



EUROPEAN CENTRAL BANK

DIRECTORATE GENERAL LEGAL SERVICES

EFMLG member
Company
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Dear colleagues,

European Financial Markets Lawyers Group

Aide-memoire of the meeting of 27 September 2000 and preparatory work for the 5th meeting

1. Aide-memoire

In the light of the experience of the past meetings, and in order to steer the group's work forward as efficiently as possible, we decided after the last meeting to immediately circulate action points. In addition to these action points, and taking into account that the general nature of our discussions favours more an aide memoire than exhaustive minutes of each meeting, please find below a summary and additional points in relation to each issue, which try to sum up the discussions and line out the way forward in relation of each issue.

I would also like to take this opportunity to recall the general point made at the last meeting that the work of the EFMLG benefits its members as much as the ECB, and we very much appreciate the continuing efforts made by its members. Only if you as members contribute from the perspective of the European financial market places in which you have expertise, a true picture of the developments towards a single European financial market can be gained. The documents subsequently created by the EFMLG shall serve as added value to these developments.

2. Meetings in 2001

In order to allow to complete in an orderly fashion the follow-up work that was agreed at the last meeting in September, it is proposed to hold the next meeting of EFMLG in the first half of March. We have singled out two dates that would be possible (the main constraint being the availability of the larger meeting rooms at the ECB). If any members have a preference between **Wednesday, 7 March** or **Thursday, 8 March**, could they please let us know by 10 January, by giving information to Ms Zachres, secretary to Klaus Löber (kerstin.zachres@ecb.int)? We will let you know which date is chosen immediately after.

In addition, please be aware that it is planned to host two further meetings in the year 2001, which are tentatively scheduled for June and October 2001, respectively.

3. Dematerialisation

At our last meeting in September 2000, we considered dematerialisation and seemed to conclude that:

- the barriers to harmonisation of the EU internal market and relating to securities consist as much in the differences between regulatory regimes as in the differences between the legal systems;
- the EFMLG's work on the "legal concepts of debt" has usefully shown that a number of these differences relate to different rules about the form in which and the terms under which debt may be issued;
- the huge advances in computer technology and the desire for a barrier-free internal market seem to support the idea of dematerialisation as the best form for the issuance of debt securities; and
- Community legislation would be needed to allow for a debt issued in dematerialised form in identical manner throughout the European Union and under terms harmonised to a sufficient extent that their differences do no longer constitute any barriers to cross-border securities trading.

It was therefore decided that the EFMLG would examine the possibilities for the removal of the barriers to dematerialisation in the EU internal market by investigating the possible outline and the eventual form of Community legislation. Hubert de Vauplane kindly agreed to act as rapporteur for this project, and EFMLG members were encouraged to send in any material that might be relevant to a consideration of how to best formulate the proposal.

A subgroup, convened by Hubert de Vauplane and consisting of Klaus Löber and Martin Thomas, supported by Frederic Nizard and Eric Malinvaud from BNP Paribas, did meet in December to discuss further the issue and to elaborate on the extent that information will be further needed from the members of the group. A questionnaire resulting from that exercise is to be finalised shortly and will be sent out for discussion and approval at the next meeting.

4. Legal definitions of ‘repurchase transactions’

At the last meeting, the EFMLG agreed to investigate whether the existing variances in the legal definitions of repurchase transactions are posing a problem to the smooth conduct of repurchase transactions throughout the European Union and whether a harmonised definition could prove beneficial to the financial markets.

A first *tour de table* has shown that the existing definitions in community legislation or in standard market documentation such as the GMRA 2000 or the EMA are not identical, which might create a level of uncertainty. That is even more relevant as, on the operational side, trade becomes more and more standardised.

The absence of a common legal definition is emphasised by the fact that in certain countries, there are even different types of repos on a domestic scale. Also, in this context, issues such as divergences for capital adequacy purposes, for the purpose of the annual account statement and finally for reserve requirements might have a bearing. Moreover, it might be warranted to urge for a clear separation between cash driven transactions and securities driven transactions (such as securities lending).

The investigation seems to be timely as is also evident through a couple of other developments, which may be mentioned here in order to put the project into context:

- The reversed transactions regime of the Eurosystem, which entered into force in January 1999, recognises, on the one hand, that the use of investment securities as collateral for short term financing in the inter-bank market is now accepted throughout the euro area and, on the other hand, that there remains a fairly wide range of legal features within the scope of that instrument;
- the prevalence of multi-national standard legal agreements has been given a certain level of publicity recently, since the EMA has been launched as a market cross-border alternative to the recently reworked TBMA/ISMA GMRA 2000; and
- the Commission’s proposed draft collateral directive recognises that, whilst “pledges” and “title transfer” might have the same economic intent, their legal nature differs.

Jean-Michel Bossin and Pierre Fiset of Societé Générale are taking this project forward, and a questionnaire will be developed to be sent out for discussion and approval at the next meeting.

5. Force majeure

At the last meeting, it was agreed that a limited further analysis in this area could be useful before any final conclusions were drawn. Ulrich Bosch kindly agreed to take this forward, and to consider whether the questionnaire developed by the EFMLG in 1999 needs to be supplemented with a few additional questions, so that a more complete picture could be obtained. In particular, the main three points of attention that could be identified at that time (strike, communication breakdown and act of state) might merit further attention.

Bearing this in mind, the eventual need for an initiative has to be evaluated. In this context, the experience of the ECB in the context of the TARGET system (computer breakdowns) could prove helpful. However, a further separation in respect of the various financial sectors might be needed.

6. Proposal for a collateral directive

Almost all members have by now kindly commented on the draft country chapters that were submitted to them before the September meeting.

After having received also the missing comments, the ECB Legal Services will work on the answers received to ensure consistency from a presentational point of view and to adjust the comparative tables in accordance with the changes made to the respective country surveys. The revised country surveys and the comparative tables will be sent to the members of the EFMLG for final agreement before the next meeting in order to allow a submission to the Commission as background information for the Commission's work in this area immediately thereafter.

The members are also invited to study the revised draft proposal of the European Commission for a directive on collateral, a copy of which is attached to this aide-memoire. You will find that the draft proposal contains provisions on all issues identified as being potentially problematic by the EFMLG, to which the EFMLG's proposal for an EU directive was instrumental as having been one of the documents that were attached to the final conclusions of the Forum Group on Collateral in July 2000. However, it is to be noted that the draft EC directive contains a limitation in the scope of application as regards the entities concerned.

It is also hoped that the full set of country surveys will be useful both to EFMLG members and the public at large as an overview of the national differences in respect of collateral techniques in the EU.

The high importance of the EFMLG's work in that area can be underlined by the still intensifying work on law reform by various institutions such as the European Commission, The Hague Conference on Private International Law and UNCITRAL. Although the number of supportive initiatives is increasing (IBA, ISDA, etc.), there is still a lack of comprehensive comparative information.

7. Wise Men Initiative

After the lively discussion on the issue of the Wise Men Initiative at the last meeting, which focused on the regulatory aspects of the European financial markets (in particular on the approach taken by FESCO and the possible powers given to the regulators as well as to a self-regulation by the markets) it showed that there is no harmonious general understanding of what is meant with self-regulation, both as regards rule making and the enforcement of rules.

The members are encouraged to study the "Initial report of the Committee of Wise Men on the regulation of European securities markets" that can be downloaded from the EU website (http://www.europa.eu.int/comm/internal_market/en/finances/banks/report.pdf) and provide to the group any further information they deem relevant in that context.

8. Website

We are still working towards the development of a website linked to the ECB website and hope that it will be operational in the first half of 2001.

9. EFMLG membership

It is with deep regret that we have to inform you of the death of Mr Franco Riolo. We wish to express our gratitude for the support given by him to the EFMLG.

There are also various alterations to the membership of the group to be recorded:

- Laurie Adams has moved from Citibank to ABN Amro and has left the EFMLG accordingly, he will be replaced by Ian Jameson;
- Reinhold Kraxner has left Bank Austria and has resigned from the EFMLG; and
- Diederick van Wassenauer of ING Group has joined the EFMLG.

We are currently considering to invite a few other new members, in order to ensure that the group overall allows to cover all EU jurisdictions and remains broadly aligned to the composition of the panel of banks reporting for EURIBOR and EONIA and that the group is able to give the ECB a full range of the relevant expertise.

10. Christmas and New Year

Finally, I wish you all a merry Christmas and happy New Year to all members of the group. My colleagues and I look forward to another year of successful co-operation in 2001.

With best regards,

[signed]

Antonio Sáinz de Vicuña

General Counsel

Encl.