



EUROPEAN CENTRAL BANK

## European Financial Market Lawyers Group

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### **Seventh Meeting of the European Financial Market Lawyers Group**

#### **Aide-Memoire**

##### **1. Review of legal matters consequent upon 11 September market disruptions**

Presentations were given by Mr. Bloom and Mr. Lenihan on the effects caused by the 11 September events in the financial markets. The group held the view that problems that occurred were more in the logistical than in the legal area. There appeared to be more communication problems than actual settlement problems. All markets participants acted in good faith to preserve their contracts in spite of such problems. The invocation of *force majeure* has been discussed by market participants, but was not applied by market participants. There seems to be a general agreement to the application of waiting periods before close-out rights become effective. Problems however could stem from the variety of duration of grace periods provided for in market documentation.

A further issue was policy measures taken in the aftermath of 11 September, especially as regards the freezing of assets of entities connected to terrorist activities, adopted in all Member States. A tour de table showed that in a number of Member States, a change of money laundering legislation is being considered. The change to insider dealing legislation is being discussed in France. In Germany, a discussion has been initiated on a loosening of banking secrecy rules, the setting up of a central database for customer relations, and the establishment of a special financial intelligence unit. It was also noted by the group that

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an IOSCO working group has been set up to investigate abnormal operations that have occurred in the context of the 11 September events.

## **2. Force Majeure**

### *a) Computer breakdowns*

The group discussed, on the basis of papers prepared by Mr. Tsibanoulis and the ECB, the merits of a model clause and its possible scope of application. It was felt that the creation of yet another *force majeure* clause might lead to more fragmentation in the markets. The group agreed to further work on a statement regarding common market standards in the field of computer breakdowns, with the aim of setting an interpretative criterion to existing *force majeure* clauses that may eventually be invoked as *lex mercatoria*.

#### Follow-up

The sub-group will elaborate a draft EFMLG statement proposing a market standard by 21 December 2001, which will subsequently be sent to the EFMLG members for comments in a written procedure.

### *b) Strikes*

Mr. Kerjean presented results of a questionnaire on *strikes and force majeure*. It could be seen that throughout the Member States, the distinction between internal and external strikes seems to be accepted, whereby strikes are based in constitutional law in many Member States. The group felt that there is no legal basis for community action on strikes itself, but eventually a draft statement prepared by the EFMLG might deal with strikes as one of several issues related to *force majeure*. The group held the view that a best practise recommendation might be appropriate, suggesting in particular a close-out of effected transactions if the delay exceeds a certain period. The group agreed to set up a statement with explanatory recitals.

#### Follow-up

A statement will be prepared by the ECB legal services by 21 December 2001, which will subsequently be sent to the EFMLG members for comments in a written procedure.

### *c) Termination and close-out of trades under master agreements*

A discussion paper was presented by Mr. Bloom, outlining in particular solutions found by the ISDA working group on *force majeure*, covering both *force majeure* and *illegality*. That group felt a need to have a common scope of *force majeure* across trading documentation, with an eventual modification for specific markets. Again, the EFMLG felt that its action should aim at giving guidance on best practise rather than proposing another *force majeure* termination provision, which could lead to risks where different provisions are used in related transactions.

#### Follow-up

The sub-group will prepare an EFMLG statement and it will be forwarded to the sponsors of market documentation.

#### *d) Multi-branch issue*

Postponed to the next meeting.

### **3. The role of rating agencies in the EU**

A presentation was given of a document prepared by Mr. Kerjean, explaining the work currently conducted in Basel and a potential need to adjust community legislation. Areas of interest were covering the eligibility for regular trade purposes, the process of recognition, the need for comparability of rating skills, independence, liability and the issue of unsolicited ratings. Moreover, the issue of mutual recognition is of relevance. The group held the view that at this stage further developments should be awaited before the issue should be taken up again.

#### Follow-up

No immediate follow-up needed.

### **4. a) Dematerialisation**

Mr de Vauplane reported that some answers are still outstanding as regards the dematerialisation questionnaires. The further approach to be taken in respect of this subject was discussed, whether a general harmonisation of the rules applicable to the dematerialisation of securities should be aimed at or whether only specific issues, such as the harmonisation of the date of transfer of ownership and the protection of bona fide investors . It was concluded that, on the basis of the full set of answers, a recommendation for a harmonisation of the rules applying to the dematerialisation of securities should be prepared.

#### Follow-up

The members are asked to provide the outstanding answers to the questionnaires at their earliest convenience. The sub-group will prepare then the outline of a possible EFMLG recommendation in advance of the next meeting.

### **b) Repurchase transactions**

Mr Fiset reported that the answers of two countries are still outstanding, a summary of the findings is close to being finalised. The answers received so far show that there are differences in respect of a number of aspects of repurchase transactions, which might merit a full harmonisation at the European level. However, it was acknowledged that the Collateral Directive might help for the recognition of repurchase transactions in general. Issues that would be remaining are i.e. capacity, tax and accounting.

The recharacterisation risk, however, would be removed with the adoption and implementation of the Collateral Directive. It was mentioned that uncertainties also exist for securities lending. The group decided to discuss the findings of the report once finalised in a full session.

#### Follow-up

Provision of the outstanding answers by the respective EFMLG members at their earliest convenience and finalisation of a draft summary report by the sub-group in advance of the next meeting.

### **5. a) Report on the Collateral Directive and Hague Conference**

Mr Löber gave a presentation on the state of discussion as regards both projects. The group was concerned about a possible risk stemming from a lack of concertation between the project in The Hague and the EC Draft Collateral Directive. As regards the latter, it was felt that certain issues, in particular the personal scope of application, the requirement for written form and the need to have a clear conflict of law rules might merit a further document from the EFMLG addressed to the Community legislator. With regard to the draft Hague Convention, the issue was raised as to whether the Convention would require national implementation (dualist approach) or only ratification; in the first case, the question was whether it was for the Community to implement the Convention or directly for the Member States; in the second case, the group felt that compromise wording in controversial clauses was not acceptable in this specific domain.

#### Follow-up

A sub-group, consisting of Mr. Bosch, Mr. Vloemans, Mr. De Vauplane, Mr. Garlet, Mr. Bloom, Mr Thomas and Mr. Löber will prepare a draft report or letter to the competent European authorities, highlighting points of concern from the viewpoint of the EFMLG by 14 December 2001. The draft document will be circulated to the members for comments in a written procedure.

### **b) Progress of the Financial Services' Action Plan**

Mr. Recine presented on-going projects in the context of the Financial Services' Action Plan, in particular the establishment of the Committee of the European Securities Regulators and the European Securities Committee. Moreover, the proposed directives on market abuse, prospectuses, ISD, IAS and the political agreement on company law issues were highlighted.

#### Follow-up

No immediate follow-up required.

## **6. European Contract Law**

The Chairman presented the Commission's work on the topic, which was made public in an open consultation. Mr. Thomas pointed out that the FLP would respond to that consultation.

### Follow-up

No immediate follow-up required.

## **7. Corporate Governance in relation to the financial industry in the EU**

A draft ECB report was presented by Ms. Papathanassiou. The group discussed the relevance of corporate governance and the eventual need for a community initiative to harmonise the framework applicable thereto. The group pointed out the existing divergence between state regulation and self-regulation and the potential conflict between optimising shareholder value and prudent banking business. The group noted the potential for conflicts of duties where officers of banking groups are subject to varying rules of corporate governance within the corporate group. The group agreed to further reflect on the implications of that subject and will take up the issue at the next meeting.

### Follow-up

No immediate follow-up required.

## **8. Issues of relevance to the Financial Markets**

### *a) Integration of European Money Markets*

The Chairman reported on an initiative taken by the Money Market Contact Group (a market group organised by the ECB) and the ACI to prepare a report on the lack of integration of the European money markets, in particular as regards commercial paper, certificates of deposits and medium-term notes. The Chairman asked the group whether they would be ready to assist the ECB in ascertaining the legal obstacles against a further integration of these short-term securities' markets. The group offered its support to the work conducted by the ECB and ACI.

### Follow-up

A first draft analysis of legal obstacles to integration will be forwarded to the group for written comments and final discussion at the next EFMLG meeting.

### *b) Cash changeover*

The group discussed potential problems arising from the termination of the transitional period of EMU and identified no specific legal problems on the non-cash side of the cash changeover, e.g. as regards the re-denomination of accounts, of cheques and cheque clearing houses and the re-conventioning of legacy trades and instruments.

### Follow-up

No immediate follow-up required.

## **Other issues**

### *a) Website*

Mr. Löber reported on the progress on the establishment of an EFMLG website, which will have the domain name [www.efmlg.org](http://www.efmlg.org), once finalised. Mr. Thomas volunteered to provide a tentative disclaimer note.

### *b) Projects of the FLP*

Mr Thomas informed the group about three items currently being looked at by the FLP which may interest the EFMLG: the scope and nature of the regime of market abuse due to become part of the UK financial market law on 1 December 2001; the doctrine of universal succession and the extent to which bond or other market documentation may alter its effect; and the assessment of legal risk. It was noted that the FLP project on assessment of legal risk might be discussed in the future by the EFMLG, depending on how it develops in the context of the Basle Committee discussions on 'operational risks'.

### *c) Next meeting*

The next meeting of the Group will be held on **Wednesday, 27 February 2002**.