



EUROPEAN CENTRAL BANK

European Financial Market Lawyers Group

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Eighth Meeting of the European Financial Market Lawyers Group

Aide-Memoire

1. Approval of the Agenda and of the Aide-Memoire of the last meeting

The members of the group approved both documents. The Chairman welcomed Mr. Daunizeau (Credit Agricole) as a new member and Mr. Kienle, attending this meeting for Mr. Than (Dresdner Bank). The Chairman expressed his thanks to Mr. Thomas, who was attending the Group for the last time in his capacity as a member of the Financial Law Panel secretariat.

2. Short-term securities

The group took note of the project to conduct a survey on various legal aspects of the short-term securities markets in Europe being initiated by the ECB Money Market Contact Group. The Secretary of the Money Market Contact Group, Mr. Roberto Schiavi, explained that the ACI- has established a task

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force of market participants in order to investigate possible initiatives for further integration of the short-term securities markets in the euro area. The task force intends to specify its findings in an ACI white paper. The EFMLG expressed its support for the project and agreed on elaborating an EFMLG report on the legal aspects of the short-term securities markets.

A suggested working draft prepared by the ECB legal services was introduced by Mr. Stenström and praised by the group. It was noted that the draft has profited from input given by the ECB Working Group of Financial Law Experts (consisting of representatives of the National Central Banks of the European Union).

Members of the EFMLG expressed the view that, by focusing only on the euro area, relevant experiences and important segments of the European markets would be left out. The group therefore agreed to expand its investigation to all 15 Member States, especially in view of possible future EU legislation, which would apply to all Member States of the European Union. In addition, it was noted that, whereas certificates of deposit and commercial paper have clear characteristics, the borderline between medium-term notes and other forms of bonds is less clear. Reference was also made to the ECB report on Money Markets of July 2001, especially the points on fragmentation, lack of integration of trading and settlement and legal barriers.

The group then discussed the content of the draft report and it was agreed that Members would provide factual input on the Annexes by mid-March, taking care to differentiate between law and practice. To facilitate such input, an amended draft version of the report, specifying the areas to be covered by the annexes, will be circulated to members of the EFMLG for their written comments. It was also mentioned that the figures given in the main part of the Report might no longer be up to date. It was also felt helpful to include a comparative part referring to the US markets.

Finally, the Group discussed briefly the question by what means harmonisation could be achieved, either by way of legislation or by harmonisation of market practises. In the latter context, the IPMA rules were mentioned. The Group also considered to suggest both short-term solutions (such as harmonisation of market practises) and long-term solutions (such as substantive EU law reform for securities).

A sub-group was established, composed of Mr. Nizard, Mr. Parche, Mr. Vloemans, Mr. Bloom, Ms. Alonso Jimenez, Ms. Genestrone, Mr. Tillian, to be co-ordinated by Mr. Stenström of the ECB. The sub-group intends to hold a first meeting in the week beginning on 18 March (tentatively scheduled to take place at the ECB on Thursday 21 March) with the aim to prepare a revised draft report by June/July 2002.

Follow-up

The sub-group will further elaborate on the draft report, by having meetings of the sub-group to the extent deemed necessary.

3. Repurchase transactions

Mr. Fiset introduced the topic. The survey on repos is now complete with the exception of input from Ireland. Moreover, a draft memorandum outlining the legal concern has been prepared.

It was highlighted that the Collateral Directive will not provide a satisfactory solution to all aspects identified, in particular now that the originally proposed definition of repos has been dropped from its proposed text. The group discussed the means by which further harmonisation could be reached. In this context, an EC Regulation or an amendment to existing EC Directives was considered. Specific attention was paid to the issues of tax and accounting, which are seen as being most crucial to achieve an integrated market for repos in the euro area.

On the basis of the draft memorandum, the EFMLG discussed the possible content of an EFMLG statement, by focusing on the definition of repos, the re-characterisation risk, the scope of transactions to be covered, the parties to the agreement and the accounting treatment. In respect of the latter issue, the group noted that the existing Community definitions are not fully consistent. Moreover, the Annual Accounts Directive is only applicable to credit institution, not to other entities. Further aspects covered were the scope of eligible securities, the need for a delivery, formalities and tax issues. In respect of tax treatment, a full tax neutrality was being seen as desirable. The group noted that formalities should to a large extent be abolished by the Collateral Directive, to the extent that a personal scope of application would cover all entities of relevance.

Follow-up

Mr. Fiset, in co-operation with Mr. Löber, will elaborate a draft EFMLG statement to be circulated to the Group in a written procedure.

4. Hague Convention on Indirectly Held Securities

Mr. Löber presented the discussions that took place in January in The Hague and gave an overview on open issues in the latest version of the draft Convention.

The group saw a need for further clarity on some issues, in particular: the definition of the scope of securities to be covered, the compatibility of the draft's PRIMA formulation with that found in existing EU legislation and national implementing legislation; the transitional rules and the possibility they create of an avoidance of validly established collateral arrangements due to a retroactivity of the Convention. The Group took note that there is a possibility to provide the Secretariat of the Hague Conference with comments on the current draft by 11 March and agreed to ask for clarification on these issues.

Follow-up

A draft statement will be prepared by the ECB legal services to be circulated to the Members for comments in a written procedure.

5. Issues of relevance to the Financial Markets

- EU developments

Mr. Recine gave an overview on recent EU developments in the field of market abuse, prospectus and the Lamfalussy procedures. Moreover, the Commission's intention to revive the Take-over Directive was discussed.

- Force majeure - Computer breakdowns

Mr. Kerjean and Mr. Tsibanoulus introduced the topic and presented the guidance paper and the interpretative criteria set up by the sub-group dealing with the issue. The group approved the approach to set up the basic criteria to be considered when drafting *force majeure* clauses relating to computer breakdowns. It was felt that the paper should make it clear that it intended to stop short of suggesting actual drafting for model clauses.

Follow-up

The Members of the EFMLG are invited to provide comments on the documents by 15 March, after which the documents will be made publicly available for comments and observations, by *inter alia* being sent to the relevant market organisations and being published on the EFMLG website (when is ready). After such period of wider consultation the group would publish the paper in final form as an EFMLG Recommendation.

- Force majeure - Strikes

The topic was introduced by Mr. Kerjean and the draft EFMLG statement was presented.

Follow-up

The Members of the EFMLG are invited to provide comments on the documents by 15 March, after which the documents will be made publicly available for comments and observations, by *inter alia* being sent to the relevant market organisations and being published on the EFMLG website (when is ready).

After such period of wider consultation the group would publish the paper in final form as an EFMLG Recommendation.

- *Force majeure - Market Documentation*

Mr. Bloom introduced the draft statement. It was discussed whether *force majeure* should be left to the interpretation under the law governing the contract. It was noted that the EMA contains a definition of the elements of *force majeure*, however, an adjustment of that wording might be needed. The EFMLG members discussed whether an abstract definition, a reference to the governing law, concrete examples or a combination of those elements might be preferable. Another issue, which was seen as meriting further attention, was the question of appropriate waiting periods. Finally, it needs to be considered which point in time would be the relevant one to determine whether a transaction is effected by a *force majeure* event.

Follow-up

The Members of the EFMLG are invited to provide comments on the documents by 15 March, after which the documents will be made publicly available for comments and observations, by *inter alia* being sent to the relevant market organisations and being published on the EFMLG website (when is ready). After such period of wider consultation the group would publish the paper in final form as an EFMLG Recommendation. A similar follow-up being planned for each of the the three force majeure papers, the Group will consider whether to present the issue in its final form in a joint paper.

6. Other Issues

Mr. Löber reported on the status of the EFMLG website, which is still in the process of being constructed. The group urged the ECB's computer services to make good progress, the website being the key not only to disseminating the group's work in a transparent fashion, but also to the collaboration necessary to produce that work.

The next meeting of the EFMLG was tentatively set for 29 May 2002. However, due to restrictions in the availability of rooms, it is now set for Tuesday, 28 May 2002.