

THE CHAIRMAN

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

**3 June 2003**

### **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 Charles Ross-Stewart and Mr Olof Myhrman as new members of the group. Mr Christoph Kienle was participating on behalf of Mr Jürgen Than. Moreover, Mr Martin Thomas from the Bank of England's Financial Market Law Committee was attending the meeting as guest.

#### **2. Book-entry transfers and dematerialisation of securities**

The revised EFMLG report on book-entry transfers and dematerialisation of securities, as prepared by the EFMLG sub-group, was presented by Mr Hubert de Vauplane and Mr. Klaus Löber. It was pointed out that the report is coming at a very timely moment given the recent publication of the second Giovannini report on clearing and settlement in the EU.

The group discussed the content of the report chapter by chapter. There was broad agreement on the substance of the report. Specific comments were made as regards the optionality of a statutory system of dematerialisation, the scope of instruments to be covered and the requirement of segregation of accounts. Moreover, it was suggested to include a specific section outlining the recommendations. Finally, it was proposed to add a list of the members of the EFMLG.

The group agreed that the final report should be sent to the Commission DG Market, to provide support for the legal initiatives proposed in the Giovannin report. In addition, the group suggested that report should be published on the website of the EFMLG.

Follow-up: The members have a possibility to provide last **drafting comments**, if any, **by Wednesday, 18 June 2003**.

On the basis of these comments and the discussion at the meeting, the report will be finalised (at a meeting of the sub-group, if necessary) and will be submitted to the EFMLG members for approval in a written procedure.

### **3. The EFMLG's future activities and composition**

The members of the EFMLG had a general discussion on the activities and the organisation of the EFMLG, based on an issues note presented by Mr Erwin Nierop.

Members of the group emphasised that the focus should be kept on issues relating to the integration of the wholesale financial markets in the EU. It was felt that there should be a balance between proposals for legislative changes (e.g. connected to the Financial Services Action Plan) and general exchanges of views on practical issues of relevance to the financial markets. Some members expressed doubts whether the EFMLG should engage itself in replying to public consultations, considering that the deadlines for replies to such consultations are often very short and that some members may already have participated in formulating a position for other associations or institutions. However, the members acknowledged that the EFMLG is the only grouping of lawyers of its kind in Europe, which provides the EFMLG with a special technical expertise but also particular justification to conduct its activities. On balance, it was not excluded that the EFMLG could prepare opinions and contributions in response to consultations in specific appropriate cases, especially on legal technical matters.

As regards the general meetings, some members of the group expressed strong reservations against a reduction of the number of meetings. At the same time, the general meetings of the plenary should allow some time for a free exchange of views on current issues without extensively prepared documentation. In addition, the EFMLG members will be asked to suggest agenda items about one month in advance of the meetings. Further exchanges of views could take place through e-mail or brief telephone conferences.

As regards the structure of work, the relevance of using sub-groups was particularly stressed to address specific ground work and drafting exercises. The sub-groups should be open to experts nominated by the EFMLG members, to ensure the optimal case-specific knowledge in the subgroup.

Follow-up: It was concluded that the plenary group should meet about three times a year (possible each February, June and October). EFMLG members will suggest agenda items about one month in advance of the meetings. To the extent possible, one meeting a year could be hosted outside of Frankfurt. Additional telephone conferences could be held to have general discussions. Sub-groups will be actively used on a case-by-case basis, with the participation not being limited to the normal EFMLG members.

#### **4. Signing authorities for master agreements executed by EU incorporated banks**

Ms Helen Moran identified many practical problems experienced by her institution in reviewing corporate authorisations for master agreements executed with counterparties in the inter-bank market, such as an inadequate identification of the types of transactions covered (e.g., coverage for equity but not credit derivatives, sweep-up clauses referring to specified derivative products and “other similar transactions”), inadequate or ambiguous signatory powers (e.g., coverage only for head offices but not branches covered by multi-branch agreements, alternative signatory powers in the absence of a specified signatory) or restrictions on signatory powers relating to the purpose of the transactions (e.g., coverage for transactions entered into for hedging purposes only). She argued in favour of the development of guidelines to harmonise market practices in this area. Also it was unclear to what extent reliance could be placed on signatory books or commercial registries in which signing authorities are entered under the laws of various EU jurisdictions.

Different views were expressed by group members. Some members argued that it would be difficult to impose standards in this area, that problems are more pronounced with corporate rather than bank counterparties, that legal doctrines of apparent/ ostensible authority should provide comfort under the laws of EU jurisdictions, that banks never walk away from master agreements based on inadequate signing authorities and that it would be too burdensome to check to a degree of absolute certainty whether it might be possible for a counterparty to challenge the execution of a master agreement. Nonetheless, some members accepted that problems may arise, and in practice have arisen (e.g., Russia), that often only Board directors’ names are entered in commercial registries and that there is not a sufficient degree of legal confidence that master agreements have been duly executed, with too much trust being placed on the bona fides of counterparties. The group distinguished between the problem of corporate capacity and signing capacity. In particular as regards corporate capacity, it was noted that the relevant provision in the 1<sup>st</sup> Company Law Directive might be outdated for modern financial market practices.

Follow-up: The group concluded that the members would provide to the secretary a **short description of the national practices by Friday, 20 June 2003**. In this regard, Ms. Moran has prepared the attached questionnaire for the considerations of members.

Moreover, at the same time, the members are asked to express their willingness to **participate** (or nominate participants) **in a sub-group** to be chaired by Mrs Helen Moran. The sub-group will investigate whether it would be possible to give guidance on best practice and, furthermore, whether a revision of the 1<sup>st</sup> Company Law Directive might be warranted.

## **5. EFMLG/ACI project on short-term securities**

Mr Mikael Stenström briefed the group on the developments in the overall short term European paper (STEP) project, including the outcome and the follow-up work by the ACI following the ACI meeting with market participants and interested parties on 11 March 2003. There are currently three ACI working groups, one on market statistics and index, one on settlement issues and one on information memorandum. The work on the preparation and availability of a standard information memorandum for STEP is conducted by a joint ACI/EFMLG working group, including on the EFMLG side Mr David Bloom and Mr Ulrich Parche. A preliminary draft Report on Information Memorandum was submitted to the group in advance of the meeting. Mr Stenström explained that it will cover (i) the defining features of the STEP instrument; (ii) the form and content of the standard STEP information memorandum; (iii) the availability of the information memorandum at the ECB and the ESCB; and (iv) the possibility to implement STEP through a market convention. It is the intention to finalise a draft version of the new Report on Information Memorandum in the course of the summer for submission to the EFMLG and the ACI Task Force on STEP. In parallel, an up-dated adjusted version of the EFMLG Report on the legal aspects of short-term securities is being prepared. The EFMLG Sub-Group on short-term securities may be involved in the preparation of such an up-dated version before submission to the full group for adoption. Members of the group are invited to ensure that the country specific entries in the Report on short-term securities are correct and up-dated to reflect the latest legislative and market developments in their respective home jurisdictions. Following finalisation, the new Report on Information Memorandum and the up-dated version of the Report on legal aspects of short-term securities would be placed on the EFMLG website.

Follow-up: The ACI/EFMLG Report on Information Memorandum and the up-dated version of the EFMLG Report on the legal aspects of short-term securities will be sent to the members for adoption in written procedure after the summer. The members will in particular be asked to verify the correctness of the country specific information in the EFMLG Report on short-term securities. In order to facilitate the preparation of the up-dated version of the Report on short-term securities, amendments and up-dated information concerning recent national developments or other contributions can be sent to the EFMLG secretary already **by Friday, 27 June 2003**.

## **6. The EU Communication for a more coherent European contract law**

Mr Klaus Löber presented the Commission's action plan for a more coherent European contract law and its potential impact on the EU financial markets. The group expressed their views that the action plan might be geared for retail transactions rather than for the wholesale markets. Some members furthermore expressed concerns that an EFMLG response might trigger conflicts with answers that their institutions did already provide to the Commission.

Follow-up: No follow-up by the EFMLG.

## **7. Insolvency arrangements and contract enforceability**

The G-10 Consultation Report on Insolvency Arrangements and Contract Enforceability, prepared by the G-10 Contact Group on the Legal and Institutional Underpinnings of the International Financial System, was presented by Mr Mikael Stenström. It was mentioned that the report is not only dealing with insolvency issues, but also with contract enforceability, both from a legal and an economic perspective.

The members were also informed that a Symposium on the subjects covered by the Report, which is co-sponsored by the Bank for International Settlement, the Financial Stability Forum and the ECB, is planned to take place at the ECB on 30 September - 1 October 2003.

Follow-up: No follow-up by the EFMLG.

## **8. Netting and Community law**

Mr Niall Lenihan presented an issues note on the inter-play and proper interpretation of Community legislation addressing the enforceability of insolvency close-out netting arrangements contained in bilateral master agreements for financial market transactions, having particular regard to Articles 23 and 25 of the Winding-up Directive for credit institutions, Article 7 of the Collateral Directive and Article 6 of the Insolvency Regulation. The group welcomed the analysis being presented. It was noted that the interpretation of Article 25 of the Winding-up Directive is far from clear and, as a consequence, legal uncertainties might arise. The consequences are of particular relevance when looking at the enforceability of insolvency close-out netting in, e.g., the 10 Accession countries or in Greece, regarding which some preliminary information was presented. It was felt that the EFMLG should elaborate on the issue of possible interpretations and state its own point of view.

Follow-up: The group concluded that the issues note should be converted into a letter that could e.g. be sent to the European Commission and published on the EFMLG's website.

The members are asked to express their willingness to **participate** (or nominate participants) **in a sub-group by Friday, 20 June 2003**. Moreover, the members are asked to provide to the secretary any additional available **information on the enforceability of insolvency close-out netting in the accession countries**.

## **9. Collective action clauses and sovereign debt**

Mr Mark Armstrong-Cerfontaine reported on progress made to date by the sub-group, as well as recent developments re CACs. In particular, a number of new issues involving CACs did occur since the group met last. Moreover, information was provided that there seems to be no noticeable effect of CACs on the pricing of bonds.

Follow-up: The members are asked to express their willingness to **participate** (or nominate participants) **in a sub-group by Friday, 20 June 2003**.

## **10. Next meeting**

The next meeting is tentatively scheduled for the first half of October 2003. The date will be communicated to the EFMLG members in due course.