

THE CHAIRMAN

10 November 2003

Contact person: Mr. K. Löber; Ext.: 7225

E-mail: [klaus.loeber@ecb.int](mailto:klaus.loeber@ecb.int)

## **12<sup>th</sup> Meeting of the European Financial Market Lawyers Group**

**30 October 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. Mrs Kerstin Neumann, Mr Olivier Mittelette and Mr Hartenfels were participating on behalf of Mr Jürgen Than, Mr Etienne Jardel and Mr Ulrich Bosch, respectively. Moreover, Mr Peter Werner from ISDA and Mr Edward Murray from Allen & Overy were attending the meeting as guests.

#### **2. Netting related issues**

##### **(a) Enforceability of insolvency close-out netting arrangements under EU legislation**

Mr Niall Lenihan presented the draft letter to the European Commission, prepared by the EFMLG sub-group on netting issues. The letter deals with the enforceability of insolvency close-out netting arrangements under the Collateral and Winding-up Directives, with a particular emphasis on the scope of application, the interpretation of Art. 25 of the view Winding-up Directive for credit institutions, the law governing netting arrangements and the limited application of netting laws.

In addition, Mrs Maria da Graça Peres from the ECB juristes-linguistes services presented the findings of a comparative survey made within existing Community legal acts on the use of the terms set-off, netting and related definitions. The principles of equal treatment and equal interpretative value of all official languages was recalled. The survey of the netting and set-off terminology used under all official

languages of the EU revealed differences in translation and concept. The EFMLG discussed the findings and held the view that the historical evolution of the legal terms relating to netting and set-off should be emphasised further. The group agreed that a section on the Insolvency Regulation should be added. Finally, the members concurred that the letter should be sent to the EFC and the relevant units of the Commission simultaneously.

Mr Peter Werner from ISDA and Mr Edward Murray from Allen & Overy, Chairman of the ISDA Collateral Law Reform Group presented the initiative of ISDA and major international law firms, aiming at providing for the most appropriate definition of set-off related provisions in the EU Insolvency Regulation. The EFMLG took note of a draft note, prepared by an ISDA working group and dealing with the interpretation of Art. 6 of the EC Insolvency Regulation. The members of the EFMLG considered the preliminary findings of the draft note and agreed that it would be of interest to have a joint approach by ISDA and the EFMLG on this matter.

Finally, Mr Olivier Mittelette, Mr Holger Hartenfels and Mr Pedro Ferreira Malaquias kindly agreed to join the EFMLG subgroup on netting issues.

Follow-up: The members have a possibility to provide **drafting comments**, if any, on the draft EFMLG letter to the Commission and on the draft ISDA note by **Friday, 21 November 2003**.

On the basis of the comments on the draft EFMLG letter and the discussion at the meeting, a revised version of the letter, including a new section on the Insolvency Regulation, will be prepared by the sub-group on netting issues and circulated to the members for approval in a written procedure at a later date.

The comments on the draft ISDA note will be communicated to ISDA. The sub-group on netting issues will liaise with ISDA to discuss on how to best co-ordinate the respective activities.

#### **(b) Netting arrangements in the acceding countries**

Mr Otto Heinz introduced the preliminary work undertaken by the ECB legal services. An Initial Report was presented with the objective of reviewing the validity and enforceability of close-out netting agreements in the acceding countries.

The members agreed that the work is indeed useful for the financial markets and that those members from institutions active in the accession countries would provide further input on practical experiences and problems encountered in the respective financial markets. It was agreed that there would be an EFMLG Report, prepared for the next EFMLG meeting in February on the basis of the Initial Report. It will be considered at a later stage whether the project can be expanded (e.g. into a legislative initiative). The

setting-up of a sub-working group was considered. The group agreed that it would further reflect to which extent a co-operation with ISDA could be envisaged in this matter.

Follow-up: The members are asked to provide their comments on the Initial Survey by **Friday, 28 November 2003**, with involvement of their local offices. On the basis of the Initial Report and the input received, a draft EFMLG Report will be prepared and circulated in due course.

In addition, members are kindly requested to indicate their interest in being involved with a sub-group. The issue will be discussed at the next meeting on the basis of the draft EFMLG Report.

### **3. EFMLG/ACI Project on Short-term Securities**

Mr Mikael Stenström presented the revised draft ACI/EFMLG Report on the Information Memorandum for Short-term European Paper (STEP) and gave an update on recent developments on the EFMLG/ACI project on STEP. The group discussed the draft Report and considered whether there were any country specific legal issues that should be raised, including certain issues related to transparency, competition aspects and liability. In addition, the legal status of the proposed draft market convention was discussed. Overall, the members of the EFMLG were positive to the work performed by the ACI/EFMLG Working Group in preparing the draft Report and agreed that it formed a good basis for further action.

Furthermore, Mr Stéphane Kerjean presented a draft Up-date of the EFMLG report of September 2002 on the legal aspects of short-term securities. The new version reflects, in particular, the recent EU regulatory developments with a direct incidence on money market instruments (adoption of the Prospectus Directive, Directive on taxation of savings income and other relevant initiatives).

Follow-up: The members have a possibility to provide **drafting comments**, if any, on the revised ACI/EFMLG Report on the Information Memorandum for Short-term European Paper and the revised EFMLG Up-date on the legal aspects of short-term securities by **Friday, 21 November 2003**.

Clean revised versions of the Report and Up-date will be circulated one week later to the EFMLG with the aim of having these two documents finalised for possible publication on the website of the EFMLG.

#### **4. General discussion on matters of relevance to the European Financial Markets**

The EFMLG members had an informal debate on current topics.

The Chairman reported on the findings of a ECB/ERC conference for accession country central banks on repurchase transactions, which stressed the need for further harmonisation of laws and documentation in that area. On the same subject, Mr Dimitris Tsibanoulis reported on recent legal developments in Greece regarding repo transactions.

Mr de Lillo raised the issue of dealings in corporate bonds and privileged access to information on corporate clients. This also arises in the context of CLO structures, by which bundles of commercial loans are securitised, such that banking secrecy rules are in tension with securities markets disclosure rules. The group considered the relevance of conflict of interests and appropriate protection mechanisms (Chinese walls).

Mr Charles Ross-Stewart raised the issue of legal risk and the need to obtain historical data for matrix purposes. Mr Klaus Löber reported on the work undertaken by an IBA subcommittee to elaborate a definition of legal risk and the related difficulties. The group agreed to further look at this aspect on the basis of a note that will be prepared by the EFMLG secretariat.

#### **5. Other matters**

##### **a) Response of the EFMLG to the EU enlargement**

The members considered how the EFMLG could respond to the EU enlargement. Various forms of representation of the acceding countries were discussed. It was also suggested to present the work of the EFMLG to lawyers from accession countries' banks in the course of 2004.

Follow-up: The issue will be rediscussed at the next meeting. Written suggestions by the members are welcome.

##### **b) Legal aspects of cross-border banking consolidation in the EU**

On the basis of an issue note, Mr Stéphane Kerjean presented selected legal issues related to cross-border banking consolidation resulting from the on-going policy debate on EU financial integration. Particular attention was paid to the recent EU company law developments (entry into force of the European Company Statute, recent caselaw of the ECJ - Überseering, Centros, Inspire- and possible implications for the financial sector). The group had a preliminary debate on the subject and agreed to consider whether a subgroup should be set-up. It was also mentioned that other groupings in the EU might already deal with this subject.

Follow-up: The members are asked to express (or confirm) whether they would be willing to participate in a subgroup dedicated to the issue of legal aspects of cross-border banking consolidation in the EU by **Friday, 21 November 2003**. Based on the reactions, the issue might be rediscussed at the next meeting. Written suggestions by the members identifying elements which might be further examined are welcome.

**c) Legal framework for book-entry transfers**

Mr Klaus Löber informed the group on the reactions on the publication of the EFMLG report on the legal framework for book-entry transfers in the European Union. The members were updated about the ongoing discussions within the Commission on a Securities Account Certainty project. The EFMLG members agreed that they would actively support the Commission's Securities Account Certainty project, as deemed necessary.

Furthermore, the EFMLG agreed to provide a positive and supportive response to the Unidroit position paper on 'Harmonised substantive rules regarding indirectly held securities', to be prepared by the EFMLG secretariat.

Follow-up: A response to the Unidroit position paper on 'Harmonised substantive rules regarding indirectly held securities' will be prepared by the EFMLG secretariat within short notice. The issue will be rediscussed at the next meeting.

**d) Collective action clauses**

The group agreed that no further activities will be undertaken in relation to this subject.

**e) EFMLG website – restricted member area**

The group was informed about the establishment of a new closed member area within the EFMLG website. The password for accessing the closed member area will be communicated to the members via separate e-mail.

**f) Date of next meeting**

The next meeting is tentatively scheduled for **18 February 2004**. The date will be confirmed to the EFMLG members in due course.