

17 November 2005

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**AIDE-MÉMOIRE OF THE
18TH MEETING OF THE EUROPEAN FINANCIAL MARKETS LAWYERS GROUP,
HELD ON MONDAY, 14 NOVEMBER 2005**

1. Approval of the agenda and of the aide-mémoire of the last meeting

The aide-mémoire of the 16th meeting and the draft agenda were approved by the group. Mrs Dorothy McKinley from UBS was attending for Mr Charles Ross-Stewart and Mrs Louise Hourigan from Barclays for Mr Mark Harding. Furthermore, Mr Emilio de Lillo from SanPaolo IMI has taken over from Mr Emilio Balocco, who recently resigned from the group. Finally, Mrs Joanna Perkins from the FMLC participated as a guest to the meeting.

2. EFMLG sub-group on securitisation

The Group was informed by Stéphane Kerjean about the status of the securitisation project. Substantial work had been undertaken by the Group and the sub-group since the March meeting of the EFMLG. The mandate of the group and the questionnaire were completed before the summer and the members have then prepared the replies to the questionnaire. A table comprising the EFMLG draft replies now covers 13 jurisdictions of the “old” EU Member States. The sub-group is currently assessing the replies received and is preparing a tentative first draft of the EFMLG Report which could be submitted to the EFMLG at its next meeting end February/beginning March 2006. The Report should in principle be composed of three main chapters: (i) a review of relevant pieces of Community legislation having an impact on securitisation, (ii) an analysis of national laws of “old” EU Member States (including possibly Poland) and an assessment the existing legal obstacles which should be lifted in order to facilitate cross-border securitisations; and (iii) possible recommendations for further harmonisation of securitisation legal frameworks in Europe.

Pedro Ferreira Malaquias presented a tentative preliminary assessment of the available draft replies regarding the issues of data protection/banking secrecy and of insolvency. Some questions were raised regarding the impact of banking secrecy rules on securitisation in France and Germany. Holger Hartenfels discussed the draft replies received regarding the issues of transfer and ring-fencing of assets and also taxation. He indicated that there is some evidence that the issue of taxation raises concern in respect of the development of cross-border securitisations. He also informed the Group that the German Act on the Creation of a Refinance Register was enacted in September 2005, which i.a. is intended to facilitate securitisation transactions in Germany. It enables originators to allocate assets to a SPV for securitisation purposes without physically transferring them. The SPV's claim to the transfer of the assets is entered into a refinance register maintained with a credit institution and thereby segregated for insolvency purposes from the originator's estate. Dimitris Tsibanoulis made a presentation on the diversity of the legal frameworks on securitisation across Europe, the aspects relating to the legal status of securitisation vehicles and issues relating to the legal qualification of the acquisition of receivables by SPVs under banking laws and the rules applicable to the issuance of debt by SPVs.

Contacts have been taken by the sub-group with rating agencies and that a meeting is scheduled by the sub-group with the rating agency Standard & Poor's (S&P's) on 13 December in order to discuss (i) the S&P's European Legal Criteria 2005 as well (ii) as the views of the rating agency regarding the legal obstacles to cross-border securitisations in the EU. The Chairman congratulated the members for the resources devoted to the preparation of these replies and for the contributions received.

Follow-up:

The EFMLG Chairman urged the members who had not yet had the possibility to **provide their answers**, to do it **as soon as possible**. The Chairman also indicated that **comments** on the draft replies as well as on the draft annexes to the future EFMLG Report are expected by **15 December 2005**.

The Group agreed with the suggestion of the Chairman to prepare a letter to the Commission's DG Internal Market in order to invite the European Commission to consider an initiative aiming at remedying the fragmentation of legal frameworks on securitisation across Europe. The EFMLG recommends that this matter (including taxation issues) be put on the agenda of the Commission in the context of its financial services policy programme for 2005-2010. The letter will also mention that the EFMLG is currently preparing a report on the legal obstacles to cross-border securitisations which is expected to be completed in the second half of 2006.

3. EFMLG-sub-group on signing authorities and the enforceability of master agreements

Helen Moran debriefed the EFMLG on the current state of conclusions reached in the sub-group on signing authorities. The sub-group had its third second meeting in Brussels in October 2005.

The sub-group has prepared a draft best practice document and a revised draft template power of attorney, focusing at this stage on master agreements as such and not individual confirmations. In this context a number of core issues have been identified. Regarding the definition of scope of signing capacities, the sub-group preferred a reference to market agreements rather than a list of specific activities. Signatories should be identified by name and not by function. For the purposes of the certification procedures for signatures, the sub-group noted that these are largely governed by national law, however, in-house legal opinions may provide some comfort. Furthermore, as an example, a description of the procedural steps that are required in Italy to obtain valid powers of attorney has been prepared.

The EFMLG discussed and commented on the drafts. It was mentioned that some inspiration may be drawn from the Commission's work on a common frame of reference for European contract law, which is i.a. dealing with authorities. Generally, members of the group felt somewhat sceptical about the value of in-house legal opinions. Furthermore, it was noted that irrevocable powers of attorney may not be legally feasible in all jurisdictions. Overall, the members found it beneficial to facilitate the checking process for signing capacities by providing a best practice recommendation along the lines proposed by the subgroup.

Follow-up:

The EFMLG members are requested to provide **comments and suggestions** regarding the draft power of attorney and the draft best practice statement by **14 December 2005**. Furthermore, the EFMLG members are requested to provide a **short overview** on the procedural steps that are required in their respective jurisdiction to obtain valid powers of attorney, following the example given for Italian and German law, as attached, by **14 December 2005**.

4. Documentation of emission trading

Holger Hartenfels presented the documentation difficulties facing the OTC market in emission allowances. Problems do arise from the development and the co-existence of different types of standard documentation, reflecting the diverging interests of market players. In this context, two issues have emerged as being of central importance, first the treatment of force majeure (walk-away in case of default vs. pay-out of current market value) and second excess emission penalties (i.e. who has to bear those penalties in case of failure to deliver). In respect of the latter, it was noted that currently there is no insurance available against such failures to deliver.

The topic is related to a FMLC initiative (FMLC issue 116), which was presented by Joanna Perkins. She mentioned that in addition to the documentation issue, the question on the legal qualification of emission rights is creating another potential problem. The national implementations of the emission allowance regime by the EU Member States shows significant differences in the respective legal qualification of these emission rights, which could give rise to problems as regards the fungibility of these rights.

The group discussed the topic. It was mentioned by a member that the markets should decide for itself on the preferred documentation. Another member stated that due to the specific nature of emission rights, which will become scarcer and scarcer, the usual market mechanisms may not be suitable.

Follow-up:

The EFMLG agreed to look further into this subject. A sub-group will be formed, to which Holger Hartenfels, Emilio de Lillo and Natalia Butragueno volunteered. Further interested members are asked to indicate their interest by **14 December 2005**.

Furthermore, the possibility of a joint-project between the EFMLG and the FMLC on the issue will be explored further.

5. Rules on conflict of interests under MiFID

Emilio De Lillo presented the topic of the new regime as regards organisational requirements and conflict of interest rules under the MiFID (the slides were distributed to the group), taking into account the specifications given by the ESC working document and the draft CESR advice on level 2 measures. He stated that more specific rules and clearly defined situations would be beneficial, to facilitate a general check of activities and to create safe harbours. This view was already expressed by the Italian Banking Association.

The chairman noted that the mandate of the EFMLG is focused on legal issues of relevance to the EU financial markets and that this should be clearly distinguished from general lobbying activities. Some group members stressed that the clear definition of "conflict of interests" and the creation of materiality standard is a basically legal issue and therefore could be addressed by the EFMLG.

Follow-up:

The EFMLG agreed to address the legal issues regarding the investment services conflict of interest rules and procedures in the context of the MiFID. Emilio de Lillo, Marie-Paule Gillen and Dorothy McKinley will prepare jointly a draft letter for submission to the EFMLG. Further interested members are asked to indicate their interest by **14 December 2005**.

6. Updated draft report on netting arrangements in the new Member States

The EFMLG took note of the revised draft report on the enforceability of netting arrangements in the new Member States for discussion.

Furthermore, it was discussed how to continue the efforts to achieve an improvement of the EU legislative framework for netting, taking into account parallel activities by industry associations such as ISDA.

Follow-up:

The EFMLG members will have time to comment on the revised draft report by **14 December 2005**, after which the report will be deemed final and published on the EFMLG website.

Furthermore, the group agreed to continue to monitor the developments regarding the improvement of the EU legislative framework for netting. A letter to the Commission suggesting specific netting related legislation, for instance in the context of the review of the Collateral Directive (see below) will be further contemplated.

7. White labelling

Cornelis Blokbergen presented an in-depth overview of the issue of "white labelling" concerning the issuance of debt products by a bank, for the customers of smaller (private) banks or securities institutions (in which case the name of these products often refers to the name of purchaser). The focus is on structured products, where clarity is needed as to who manufactures a product and who is marketing it. He stated that standard market practice would be helpful as regards transparency on the entities involved and standardised wording.

The EFMLG discussed the topic. It was mentioned that the MiFID provides a partial answer to details of marketing material. It was also highlighted that the issue of reputational risk is of relevance in this context and a reference was made to the CRIMP II report.

Follow-up:

The EFMLG agreed to look further into this subject. Cornelis Blokbergen will formulate specific questions, which will be circulated to the members in due course.

Furthermore, David Bloom agreed to collect views whether the MiFID should address this topic and the EFMLG members are asked to get in touch with him if they have specific views on this.

8. Update on the draft Unidroit Convention and the Commission's legal certainty project

Klaus Löber debriefed the EFMLG on the state of affairs both as regards the Unidroit meeting of governmental experts in Rome in May 2005 and subsequent activities regarding the draft Unidroit convention on intermediated securities and on the work conducted by Commission's EU legal certainty group since June 2005.

Follow-up:

The EFMLG agreed to continue its monitoring of the two projects and intervene, if deemed necessary in view of further developments.

9. Report on the status of implementation of the Collateral Directive

A new report on the status of the implementation of the Collateral Directive was presented to the group. The report contains in a descriptive manner an elaborate explanation of the relevant provisions of the Directive and its implementation.

Follow-up:

The EFMLG members will have time to comment on the revised draft report by **14 December 2005**, after which the report will be deemed final and published on the EFMLG website.

The group agreed furthermore to continue to monitor the review process scheduled for 2006 and to intervene, if deemed necessary in view of further developments.

10. CRMPG II report 'Towards Greater Financial Stability

David Bloom presented the Counterparty Risk Management Policy Group II report to the members of the group, which brings the original 1999 recommendation forward. The new report contains recommendations and guidelines for the markets. Of particular interest to the EFMLG would be the recommendations dealing with documentation, the negotiation process, netting/close-out, cross-product and cross-affiliate netting and force majeure. Furthermore, the guidelines regarding the distribution of complex products to retail clients is of interest in the white labelling context.

Follow-up:

The EFMLG agreed to look further into this subject. David Bloom will circulate an e-mail to the EFMLG members with a suggestion of those recommendations which should be further studied by the EFMLG.

11. Other issues of relevance to the EU financial markets

11(a): ECJ: Opinion of Advocate General on Eurofoods IFSC Ltd. (Case C-341/04)

Helen Moran reported on the opinion of Advocate General Jacobs of 27 September 2005, in particular as regards a clarification provided therein as regards the concept of a debtor's 'center of main interests' (COMI) under EC Insolvency Regulation (1346/2000).

11(b): Standard Market Documentation used in the European Financial Markets

The group was informed about a meeting which took place on 7 September 2005 at the ECB between those market associations which sponsor or are affiliated with standard market documentation used in European financial markets in the areas of derivatives, foreign exchange, repurchase and securities lending transactions.

Follow-up:

The group agreed furthermore to continue to monitor this initiative.

11(c): Practical issues surrounding the Prospectus Directive

The group discussed practical issues which may have arisen as a result of the Prospectus Directive. This item was not discussed in-depth due to a lack of time. As regards specifically the application of the Prospectus Directive to asset-backed securities, it was mentioned that market practitioners had identified certain legal uncertainties (for instance, the application in case of synthetic securitisation; the legal nature and the domicile of the SPV or the availability of prospectuses). These aspects will be addressed in the context of the above EFMLG report on legal obstacles to cross-border securitisations in the EU.

11 (d): Up-date on the implementation of the STEP initiative

Stéphane Kerjean informed the EFMLG of the status of the implementation of the STEP initiative. The promoters of the STEP initiative are at present finalising the STEP convention and expect to see the first STEP-labelled programme in early 2006. The Group was also debriefed about the positive impact of the ACI-EFMLG contribution of June 2005 on the CESR draft advice regarding Clarification of Definitions concerning eligible assets for investments of UCITS. As regards the on-going consultation on the CESR revised draft advice of October and its impact on the STEP initiative, it was mentioned that Etienne Jardel, on behalf of the ACI, participated to the CESR hearing early November on this consultation and that the ACI and the European Banking Federation are currently preparing contributions on these aspects.

11 (e): Property Interest and Investment Securities

The group was informed about a letter from the FMLC dated 6 June 2005 thanking the EFMLG re its contribution to the FMLC work on property interests in indirectly held investment securities.

12. All other business

12(a): Trilateral meeting between the FMLG, FMLC and the EFMLG in Paris in June 2006

The next trilateral meeting between the FMLG, FMLC and the EFMLG will be held in Paris in June 2006.

12(b): Date and place of the next meeting

The next regular EFMLG meeting will be held in Frankfurt at the end of February or early March 2006. A proposed date will be circulated shortly to the group.