

FINAL

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**AIDE-MÉMOIRE OF THE  
24TH MEETING OF THE EUROPEAN FINANCIAL MARKETS LAWYERS GROUP,  
HELD ON MONDAY 15 OCTOBER 2007**

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

The members approved the agenda and the aide-mémoire of the last meeting. The Chairman welcomed four new members; Ms Francesca Passamonti from Intesa SanPaolo, Mrs Susan O' Malley from HSBC, Mr Adolfo Fraguas Bachiller from BBVA and Mr Bertrand Brehier from Société Générale. He also welcomed Mrs Hanneke Dorsman from ABN Amro and Mrs Maureen Bal from ING Bank (who participated on behalf of Mr Cornelis Blockbergen). The Chairman indicated that Mr Philipp Paech from the European Commission (DG MARKET) could unfortunately not participate to the meeting due to unexpected transportation difficulties.

The Chairman reported that a representative of the Spanish bank CECA expressed an interest in participating to the EFMLG. He indicated that CECA is part of the Euribor panel and that other similar groupings such as the Money Market Contact Group already comprise a representative of this institution.

**2. Implementation of the MiFID**

**2.1. Forward foreign exchange transactions: EFMLG draft legal paper**

Mrs Helen Moran introduced the topic (on behalf of Mr David Bloom, absent). The draft legal paper presented by the sub-group was approved by the EFMLG. At the same time and since the most important FX markets (and in particular the UK market) have opted for an exclusion of forward foreign exchange agreements from the scope of the MiFID, it was acknowledged that the situation created by the MiFID introduces an asymmetry which should be remedied by the Commission.

Follow-up: The sub-group will prepare a letter to the European Commission: (i) flagging the legal uncertainty created by the MiFID with regard to its applicability to forward foreign exchange agreements, (ii) briefly summarising the legal assessment performed by the EFMLG and (iii) inviting the Commission to take a stance on this matter in view of the diverging solutions adopted in the various jurisdictions and of the current prevailing market practices.

**[Addendum:** *In view of the strong concerns expressed by some members of the sub-group, it was agreed to organise a meeting to discuss further this issue. The meeting will take place on 14 December in Paris. EFMLG members who are not part of the sub-group are also invited to participate to the meeting*].

## **2.2. Classification of credit institutions as ‘eligible counterparties’ or ‘professionals’**

Mr Frank Tillian presented the issue of the classification of credit institutions as ‘eligible counterparties’ or ‘professionals’ under the MiFID and indicated that a minority of credit institutions wish to be treated as ‘professionals’. Members were invited to consider whether a EFMLG recommendation favouring a harmonised approach by credit institutions in this field at the EU level, i.e. that all credit institutions should treat themselves as eligible counterparties rather than professionals, while retaining their right for a possible change of classification. Some members believed that such approach would be beneficial in order to avoid burdensome processes. Other members felt that, although such recommendation might be desirable in theory, the situation might not always be straightforward and that specific circumstances may justify a differentiated treatment. Some other members considered that this classification primarily pertained to business considerations.

Follow-up: The EFMLG agreed to re-examine the issue in one year’s time once some experience of how the system set up under the MiFID works has been gathered and to assess whether any specific action is needed.

## **3. Structured finance/securitisation**

### **3.1. Follow-up on the EFMLG report on legal obstacles to cross-border securitisations in the EU**

Mr Holger Hartenfels reported on the meetings on 11.10.07 of the EFMLG with the FBE and the European Commission respectively. He indicated that the FBE expressed interest in the legal work performed by the EFMLG. The meeting with the Commission the same day was characterised by a wide attendance of Commission experts from various units of DG MARKT, DG ECFIN and DG SANCO. A representative of the European Securitisation Forum also participated to the meeting. Although the presentation was well received, no information was provided by the Commission as to whether it intends to take further action in this area.

Follow-up: The EFMLG will pursue the dialogue with market associations and European regulators on these aspects in view of the implementation of the recommendations contained in the EFMLG report on securitisation of May 2007.

### **3.2. Commission's impact assessment on the White Paper on Mortgage Credit: update**

Mr Stéphane Kerjean debriefed the group on the state of play of the Commission's initiatives in the field of mortgage funding. The Commission is expected to adopt its White Paper on mortgage credit in the EU on 19 December 2007.

### **3.3. Issues related to the 'sub-prime loans' episode**

The group discussed various legal aspects relating to the sub-prime loans episode. Mrs Susan O' Malley stressed the difficulties relating to the application of disclosure obligations and insider dealing/market abuse rules in the context of ABS markets.

## **4. Suitability and due diligence standards**

Mrs Dorothy McKinley introduced the topic with a brief presentation of the principles for managing the provider-distributor relationship recently adopted by several market associations with regard to retail structured products. In her view, the principles might give rise to potentially burdensome tasks for both providers and distributors that would run counter to what some European regulators are requiring in this area. She pointed out the need to clarify legal uncertainties in relation to the respective obligations of providers and financial intermediaries despite the efforts already undertaken by market authorities to improve the situation. Mr Ulrich Parche reported that unfair treatment, miss-selling and miss-advice are increasingly claimed by clients who argue that complex/structured products were sold to them without the appropriate information. Mr Parche mentioned in particular that a few German banks are reported of being sued by municipalities and public utility companies for selling complex derivatives to them without appropriate advice or providing the necessary information. As another example, he indicated that the recent Banca Italease case has highlighted the need for credit institutions to have structures and/or procedures in place to identify customers' needs, assessment of their actual capability and awareness of understanding risks related to derivatives. The EFMLG agreed to examine whether lessons can be drawn from Member States experiences and possible best practices or minimum due diligence standard recommendations adopted (as provided for counterparty risk by the Counterparty Risk Management Policy Group in July 2005) in order to enhance legal certainty throughout the industry and across Member States.

Follow-up: The EFMLG agreed to set up a sub-group chaired by Mr Ulrich Parche and composed of the following members: Mrs Francesca Passamonti, Mrs Dorothy McKinley, Mrs

Merja Viitala, Dr Klaus Poggemann, Mr Bertrand Brehier and Mr Stéphane Kerjean. The sub-group will report to the EFMLG at its next meeting.

#### **5. Legal Certainty Group/Hague Convention/Unidroit/Commission review of the Collateral Directive/Settlement Finality Directive: up-date on recent developments**

In the absence of Mr Philipp Paech from the European Commission, Mr Dimitris Tsibanoulis and Mr Pedro Ferreira Malaquias summarised the state of play of the activities of the Legal Certainty group, the preparations of its 2008 final advice and also the interaction with the developments of the draft UNIDROIT Convention on substantive rules regarding intermediated securities, for which a final diplomatic Conference is planned in September 2008. The group discussed the potential concerns raised by the respective timetables of the Legal Certainty group and of the Unidroit Convention.

Mr Holger Hartenfels recalled that the Commission currently prepares proposed amendments to the Collateral Directive and the SFD and stressed the importance for the EFMLG to continue to take a pro-active stance on these developments. The group also examined some issues related to the consultation launched by the Commission on the review of the winding-up directive for credit institutions.

Follow-up: The EFMLG agreed to prepare a letter to the Commission in order to reiterate the willingness of the group to cooperate with the Commission on the preparations of the amendments to the Collateral Directive and the SFD.

#### **6. EMA follow-up: inter-banking deposit netting**

Mr Stéphane Kerjean has introduced the topic on behalf of Mr Hubert de Vauplane (absent). It was discussed whether the summer liquidity crisis which hit the interbank market may have been mitigated, had the banks had the possibility of netting their interbank treasury deposits. Reference was made to the initiative launched by the BBA in 1996, i.e. the proposed Deposit Netting Agreement and to the work initiated by Mr Olof Myrman on the topic of inter-banking netting in 2004 (the matter was discussed in particular at the trilateral meeting in June 2004). Mr Olof Myrman recalled that the focus at that time was the limited recognition of capital relief resulting from deposit netting and that the situation might have changed with the implementation of the capital requirements directive.

The Chairman recalled that the objective of the above proposal was mainly related to the need to have good collateral. The group agreed that the EFMLG could invite the EMA Steering group to reactivate the work planned on the EMA Annexes in order to cover deposit netting.

Follow-up: Mr Holger Hartenfels and Mrs Bernadette Muscat who are members of the EMA steering group for Deutsche Bank and the ECB respectively will suggest adding the

EFMLG's proposal to the agenda of the next meeting of the EMA steering group and report back to the EFMLG at its next meeting.

#### **7. Use of rating-related trigger provisions in termination clauses**

Mr Olof Myhrman summarised the discussion held in March 2007 on the above topic as well as at the last quadrilateral meeting. He presented the state of play of the deliberations of the sub-group on this matter and in particular the concerns that these clauses increasingly required by certain governmental agencies and supra-nationals under ISDA and other master FX and OTC derivative agreements, raise, for instance in terms of liquidity risk. Before taking any formal stance on the matter, the EFMLG agreed that this issue needed to be assessed at a global level. The sub-group will examine therefore whether these clauses have triggered any best practise statements in other groupings such as the Global Documentation Steering Committee.

Follow-up: The EFMLG agreed to examine whether other groupings discussed the impact of the recourse by governmental agencies and supra-nationals to these clauses.

#### **8. Efficiency of judicial systems in the area of financial services: up-date**

Mr Marek Svoboda (ECB) presented the state of play of the EFMLG project on the efficiency of judicial systems in the area of financial services and in particular the draft summary of responses received to date from the EFMLG. The Chairman noted that the answers to the questionnaire were still missing for eight jurisdictions. He recalled the importance of the initiative in the light of the ECOFIN conclusions of October 2006.

Follow-up: EFMLG members who did not yet reply to the questionnaire for their respective jurisdictions are invited to do so by cob 15 November at the latest. Comments on the draft note should be submitted by the same date. After that deadline, the report will have to be finalised.

#### **9. Other issues of relevance to the EU financial markets**

Mrs Dorothy McKinley drew the attention of the group to on-going market initiatives such as the EU - US Coalition on Financial Regulation and the newly formed European Cross-Border Securities Working Group, in which organisations such as IIF, SIFMA, LIBA, BBA, ICMA, FOA and ISDA are involved. These initiatives aim to simplify, or eliminate, duplicative, inconsistent and/or overlapping regulations between domestic markets in order to facilitate cross-border business. Mrs McKinley referred in particular to the activities of the ECBS which met for the first time on 26 September 2007 in London. The group considered that these developments might be usefully discussed at the next Quadrilateral meeting.

## **10. Other issues – Next meetings in 2008**

The next meetings will take place on **25 January in Frankfurt am Main** (at the Dresdner Bank premises) and on **31 March 2008 in Athens**. The Quadrilateral meeting is scheduled to take place in June 2008 in New York but the precise date remains to be confirmed.

As regards the EFMLG documentation, some members expressed their preference for an electronic send out of the EFMLG documentation and an active use of the EFMLG intranet. Therefore, the EFMLG agreed that, unless there are strong objections from a substantial number of EFMLG members, the practice of paper folders and possibly also of cd-roms containing the documentation will be discontinued.