

DRAFT

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**AIDE-MÉMOIRE OF THE
25TH MEETING OF THE EUROPEAN FINANCIAL MARKETS LAWYERS GROUP,
HELD ON FRIDAY 25 JANUARY 2008, DRESDNER KLEINWORT, FRANKFURT AM
MAIN**

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 thanked Dr Christopher Kienle/Mrs Chandra Bhargavan from Dresdner Bank for hosting the meeting and indicated that the agenda would be adjusted in view of the late arrival of the guest speaker. The Chairman informed the group of the departure of Mr David Bloom, Mrs Merja Viitala and Mr Serge Salabi. The Chairman welcomed the new members of the EFMLG, Mr Esa Raitanen from Nordea and Mr Moïse Bâ from BNP Paribas. The Chairman mentioned that Mr David Bloom would continue to remain a member of the FMLG and would participate to the next Quadrilateral meeting in New York. The Chairman also welcomed a delegation from ISDA (the ISDA delegation participated to the morning session of the meeting).

2. Proposed amendments to the Collateral Directive/SFD

As agreed at the October meeting, the Chairman mentioned that a letter was sent in November 2007 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. The EFMLG will continue to actively monitor these developments (for related issues, please also refer to items 3. and 4. of the aide-mémoire).

3. Legal Certainty Group / Unidroit / Conflicts of law

Mr Philipp Paech, Secretary of the Legal Certainty Group, European Commission, DG MARKT, presented the state of play of the activities of the Legal Certainty Group, the preparations of its final advice (due by end 2008), the issues which still need further reflection, the implications in

the context of the Commission's agenda and also the interaction with the work on the draft UNIDROIT Convention on substantive rules regarding intermediated securities, for which a final diplomatic Conference is scheduled in September 2008 in Geneva. The group discussed the potential concerns raised by the emergence of substantive differences between the draft advice of the Legal Certainty Group and the draft UNIDROIT Convention. This might give rise to conflicts in the light of the respective timetables of the Legal Certainty Group, which is expected to deliver its final advice in the second half of 2008 and of the UNIDROIT Convention. The Chairman stressed the importance for the Community not to be adversely bound by the outcome of the negotiations on UNIDROIT before a formal common EU stance on these issues, based in particular on the Legal Certainty Group advice for prospective legislation, is adopted by the Commission and the Member States. Against this backdrop, the EFMLG (together with ISDA) agreed to prepare a letter to the Commission expressing the concerns raised by these conflicting timetables and in the light of those concerns requesting the Commission and the Member States to consider to request a postponement of the aforementioned diplomatic Conference for one year.

Follow-up: The EFMLG and ISDA will prepare a joint letter to the Commission expressing the concerns related to these conflicting timetables and suggesting a postponement of the UNIDROIT diplomatic Conference.

4. Netting law reform

4.1 Follow-up to the EFMLG report of 2004 on netting/set-off

Mr Holger Hartenfels introduced the topic with a presentation of the Deutsche Bank's proposal for a directive on close-out netting arrangements. The main options currently discussed with a view to improving the EU legal framework for netting consist of (i) limited amendments to the financial collateral directive (FCD), i.e. the 'default' solution proposed by the EFMLG in its report of 2004, (ii) more extensive amendments to the FCD, introducing a new chapter on netting arrangements in the FCD (iii) a single 'over-arching' set of parallel amendments to several existing directives aimed at improving the consistency of the *acquis* (besides Article 7 FCD, the relevant provisions of the SFD, the Winding-up Directive and the Regulation on Insolvency proceedings, as evoked in the Commission's evaluation report of December 2006 following the EFMLG's analysis of rules on netting and set-off in the EU or (iv) a distinct proposal for a directive on close-out netting arrangements, as suggested by Deutsche Bank. ISDA representatives also provided an overview of the initiatives taken by their association in this field and pointed out the need to increase the efficiency of netting arrangements, for instance in the new Member States. Mr Klaus Löber mentioned that there is currently some reluctance from the Commission and of the Member States to consider immediate action in the field of netting.

In this context, the EFMLG Chairman suggested that the support of the FBE might be helpful to convey an even stronger message vis-à-vis the Commission.

Follow-up: The EFMLG (together with ISDA) will prepare a letter to the FBE urging it to support the EFMLG/ISDA recommendations for legislative action in order to improve the current legal framework for netting in the EU. Subsequently, an EFMLG submission jointly with ISDA and FBE, as the case may be, will be prepared.

4.2 Winding-up directive for credit institutions (Art. 25)

Mrs Chandra Bhargavan noted that the implementation of the EU directive on the liquidation and winding up of credit institutions and the assessment of corresponding legal opinions had revealed divergences regarding the interpretation of its Article 25 which provides that 'netting agreements shall be governed solely by the law of the contract which governs such agreements', in particular with regard to the issue of the disapplication of domestic insolvency laws and the risk of forum shopping. Mrs Katja Würtz (ECB) reported that the investigation undertaken by the Legal Committee of the ESCB on this topic had also revealed important divergences of interpretation.

Follow-up: The EFMLG agreed that the lack of legal clarity of the above provision should also be flagged in the context of the preparation of the above letter to the FBE.

Deleted: mentioned

5. Forward foreign exchange transactions and MiFID

Following a meeting held by the EFMLG sub-group in Paris on 14.12.07, Mr Hubert de Vauplane briefed the sub-group on the state of play of the discussion on the issue of the application of the MiFID to forward foreign exchange agreements. He described the preliminary findings of the sub-group and also indicated that the CESR was currently investigating the matter in the context of a question raised by the Commission.

Follow-up: The Chairman invited the members (i) to inform the EFMLG secretariat on how, in the context of the implementation of the MiFID in the Member States, the domestic law covers forward foreign exchange agreements, whether it affects both credit institutions and investment firms and what are the obligations to which these entities are subject under the national law implementing the MiFID; (ii) to indicate whether national authorities and/or market associations have taken any stance in this regard and (iii) to provide any comments that members may have regarding the draft EFMLG memo of 23 January 2008 on the issue of the application of the MiFID to forward foreign exchange agreements. Members are invited to provide their comments by Friday 1 February.

6. Retail structured products: follow-up

Mr Ulrich Parche presented the work initiated by the sub-group on retail structured products that he chairs. A meeting took place on 14 January 2008 in Munich. The sub-group discussed in particular the lack of definition of structured products in the Community legislation, the issue of whether the MiFID protects firms from civil law actions or the problems currently faced by some municipalities in Norway and Germany which are claiming that they were mis-advised by their bank for not providing a proper representation of the risks embedded in the products they were sold. Mr Ulrich Parche described the content of the questionnaire prepared by the sub-group and pointed out that the work initiated by the sub-group will take account of the on-going parallel initiatives taken at the international and Community level (for instance, the Commission's call for evidence on substitute retail investment products).

Follow-up: EFMLG members are invited to reply to the questionnaire circulated for the meeting by cob Friday 22 February 2008 and communicate the answers to the EFMLG secretariat.

7. EMA follow-up/Inter-banking deposit netting/capital adequacy rules

Mr Holger Hartenfels, who is also a member of the EMA FBE Steering group reported on the implementation of the recent EFMLG's suggestion to introduce a product annex for deposits and loans in the Master Agreement for Financial Transactions (EMA). Mr Hartenfels stressed that draft amendments were already under examination by the EMA FBE Steering group. Mrs Bernadette Muscat (ECB) indicated that the ECB also welcomed these developments.

Follow-up: The EFMLG takes note of the recent positive developments and will continue to actively monitor the activities of the EMA Steering group on these aspects.

8. Structured finance/securitisation/Commission's White Paper on Mortgage Credit: up-date

Mr Holger Hartenfels informed the members of the adoption by the Commission of its White Paper on mortgage credit in the EU last December. Although the Commission left open the debate on the different policy options available with a view to addressing the issue of different and fragmented national securitisation frameworks, for instance the adoption of a directive on certain legal aspects of securitisation, as proposed by the EFMLG, Mr Holger Hartenfels noted however that the Commission plans to continue its analysis of the nature, the causes and the magnitude of the problems identified by both the Mortgage Funding Expert Group and the EFMLG's Working Group on Securitisation.

Mr Holger Hartenfels pointed out as a positive development that the analytical work of the EFMLG had been valued by the Commission which quoted in many instances the EFMLG report on securitisation in its impact assessment. He also stressed the White Paper's suggestion to create an Expert Group on Securitisation in 2008, with a view to developing an

appropriate horizontal policy response to the complex challenges of securitisation, a proposal which is in line with the recommendations made by the EFMLG in its report.

Follow-up: The EFMLG will monitor actively the Commission's initiatives in this area and notably the possible creation by the Commission of a working group on securitisation.

9. Other issues of relevance to the EU financial markets

Use of rating-related trigger provisions in termination clauses

Mr Olof Myhrman informed the members on the deliberations of the EFMLG's sub-group regarding the use by certain Governmental agencies and supranationals of rating trigger clauses as Termination events under ISDA and other master FX and OTC derivative agreements and in particular the concerns expressed by some members regarding the increasing recourse to these types of these clauses. Although no immediate follow-up is envisaged, the EFMLG will continue to monitor any markets developments on this issue.

10. Other issues - Next meetings

The next meeting will take place **31 March 2008 in Athens at the invitation of the Greek Banking Association**. The Chairman thanked Mr Dimitris Tsibanoulis for this initiative. Members will be invited to confirm their attendance by the end of February 2008. The Quadrilateral meeting will be hosted by the FMLG and will take place in **11 and 12 June 2008 in New York**.

10th anniversary of the EFMLG

In the context of the celebration of the 10th anniversary of the EFMLG in 2009, the Chairman proposed the launch of a EFMLG collective book which would be devoted to issues related to the legal integration of European financial markets. The practical arrangements for the launch of this project will be discussed at the March meeting. Reference was also made to the possibility of involving the AEDBF (European Association of Banking and Financial Law) to this initiative.

Preparations of the Quadrilateral meeting

Some EFMLG members noted, in the context of the preparations for the Quadrilateral meeting, that the number of items on the agenda should be restricted and that more time should be devoted to the discussion on legal issues of transatlantic interest. In this regard, Mr Hubert de Vauplane mentioned the 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 aspects will be discussed at the March meeting.