

DRAFT

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**AIDE-MÉMOIRE OF THE  
26TH MEETING OF THE EUROPEAN FINANCIAL MARKETS LAWYERS GROUP,  
HELD ON MONDAY 31 MARCH 2008, ATHENS**

**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 Mr Dimitris Tsibanoulis for organising the meeting and extended these thanks to Mr Christos Gortsos (who could not unfortunately join the meeting) for hosting it. The Chairman also welcomed a delegation from SIFMA (the SIFMA delegation participated to the morning session of the meeting –see item 3 for more information).

**2. EFMLG internal matters**

**2.1. Reflections on the EFMLG**

Issue: The members expressed their satisfaction regarding the EFMLG activities and functioning and the wish to maintain the current flexibility of the EFMLG functioning (purpose between technical and strategic, level of representation, alternates). At the same time, it was agreed to enhance the EFMLG organisation with the adoption of (i) a concise Charter to be published on the EFMLG website and (ii) simple (non-public) internal rules of procedure. Concerning membership, the EFMLG considered that it would not be desirable for the group, in particular for reasons of efficiency, to have a number of members beyond 30. The EFMLG agreed therefore in Athens to keep, on the one hand, the current membership criteria (i.e. for the bank, being a member of the Euribor-Eonia panels), which ensure an objective representation of major European banks within the EFMLG and the credibility of the group and, on the other hand, to invite as members on an ad personam basis some lawyers from the most important banks in some of the new EU Member States (i.e. Member States since May 2004).

As regards the Chairmanship of the EFMLG, while the members reminded the importance for the EFMLG of being externally perceived as a market-driven group and not as an emanation of the ECB, they also considered that it was important that the ECB chairs the group in order to guarantee complete neutrality and independence and that the secretariat of the group be ensured by the ECB. The EFMLG agreed to have a Vice-Chairman appointed by the Chairman among the non-ECB members of the EFMLG in order to contribute to the external visibility of the EFMLG as a market group. To enhance the awareness of the group among the general counsels of the banks, it was agreed to invite them all for a meeting to be organised in the occasion of the 10 years' anniversary of the EFMLG (see also below 2.2.). All EFMLG members were advised to regularly give feedback to their respective General Counsels, where relevant, and to seek guidance on possible topics for the EFMLG.

Follow-up: The EFMLG secretariat will revert in due course with a tentative draft proposal for (i) a Charter and (ii) internal rules of procedures. More detailed information on the findings of the group on the future of the EFMLG is provided in the EFMLG Chairman note on the matter.

## **2.2. 10<sup>th</sup> anniversary of the EFMLG**

Issue: The EFMLG supported the proposal to publish in 2009 an EFMLG hard-copy (not electronic) book which would be devoted to "Legal issues related to the integration of European financial markets".on the occasion of the 10th anniversary of the EFMLG. An Editorial Board was set up. It will be chaired by Mr Holger Hartenfels from Deutsche Bank and will include Mr Fernando Conlledo from CECA Madrid, Mr Hubert de Vauplane from Calyon and Mrs Chiara Zilioli from the ECB with the assistance of the EFMLG secretariat. It was agreed that the financial contributions for the publication will be split among the members' institutions, and that the contributions will be written in English by EFMLG members - individually or jointly with other members-. Contributions might address either issues related to the projects already initiated by the EFMLG or other topics related to the legal integration of European financial markets.

Follow-up: The Editorial Board will meet soon and will inform the members about the follow-up to this project (including with regard to the organisation of a meeting with general counsels for the 10 years' anniversary of the group).

[N.B: Please refer to the letter sent to the EFMLG on 5 May on the matter].

## **3. EU/US financial law issues**

Issue: Mr Bertrand Huet, Managing Director, European Legal & Regulatory Counsel SIFMA Europe, and by Mr Keith Clark, International General Counsel at Morgan Stanley and Chair of the European Cross-Border Securities Working Group (SIFMA/IIF) introduced the topic with an

up-date on the activities of the EU-US Coalition on financial regulation ('the Coalition')<sup>1</sup>. EFMLG members acknowledged the importance of these policy initiatives and market developments in this area. The presentation triggered a discussion on the various options available to ensure this convergence of rules (mutual recognition, exemptive relief, standardisation of rules) and their compatibility with Community law principles. The EFMLG expressed some issues of concern with regard to the exemptive relief option (market integrity, supervision). There was also a debate on the need for a Community harmonised treatment of the access of third countries regulated institutions to the single market. Although the EFMLG expressed its availability to contribute on legal issues which might be of direct interest to the group, it was felt that, in view of (i) the current financial turmoil and (ii) the upcoming elections in the US and changes at the Commission/European Parliament level in 2009, the intensification of the EU/US convergence might not be currently perceived as the highest priority on the political level.

Follow-up: Some of the issues discussed by the EFMLG will be examined at the occasion of the Quadrilateral meeting in June 2008 (see below item 4.).

#### **4. Preparations of the Quadrilateral meeting of 12 June 2008**

Issue: In order to ensure a productive exchange of views at the Quadrilateral meeting and with a view to identifying areas for possible further joint actions, the EFMLG members agreed to suggest devoting the morning session of the Quadrilateral meeting to topics of common interest for the four groupings (or others which would be agreed by the four groupings), while the afternoon could be devoted to the 'traditional' reporting on the main activities of each of the different groupings over the past year. Against this backdrop, the EFMLG agreed to propose the three following topics for the morning session:

##### **(i) Convergence of financial sector rules between the EU and the US**

The EFMLG agreed that the first topic which could be of common interest for the various groupings is related the convergence of financial sector rules between the EU and the US since the issues at stake are of relevance on a global scale. The EFMLG noted in this respect that, among its main objectives, the Coalition's report (see item 3) prioritises several areas of regulation where, according to the market associations involved, financial services providers and their counterparties and customers would benefit from greater harmonisation. Against this backdrop, the EFMLG identified in Athens in the Coalition's report the areas of regulation which it believes may be usefully discussed at the Quadrilateral meeting. The rationale for the EFMLG selection was based on the following assumptions: (i) in some areas, common definitions should

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<sup>1</sup> It is noted that the report from the EU-US Coalition on Financial Regulation entitled 'Mutual recognition, Exemptive Relief and "Targeted" Rules' Standardisation: The Basis for Regulatory Modernisation' ('the Coalition's report') which aims at improving cross-border financial services regulation and enhancing and strengthening regulatory cooperation and understanding was released early April 2008 by the various sponsoring market associations (SIFMA, BBA, FIA, FOA, ICMA, ISDA, LIBA, etc).

be found relatively easily and in a short timeframe; (ii) the matter at issue should not require considerable amendments to existing laws and/or possible amendments may be adopted relatively quickly; and (iii) the matter at issue does not raise in principle any major political obstacles or conflicting interests between Europe and the US. In this context, the EFMLG has identified in the Coalition's report four areas of regulation which may be discussed at the Quadrilateral meeting<sup>2</sup>.

### **(ii) Netting**

Taking into account the EFMLG's proposal for European legislation regarding close-out netting arrangements (see 8.2 below), the second topic that the EFMLG would like to discuss at the Quadrilateral meeting relates to the possibility for the four market groups to ask UNIDROIT to draft an international Convention on netting.

### **(iii) Standard market documentation**

The third topic that the EFMLG would like to propose for an informal discussion is the idea of recommending the drafting of a global cross-product multi-jurisdictional Master Agreement ('EMA-type') which could contain the 'state-of-the-art' standards and be endorsed by major global market associations and which could be subject to one of various laws, including New York law, but have equivalent effect elsewhere.

Follow-up: The EFMLG will liaise with the other groupings regarding the preparation of the agenda of the Quadrilateral meeting and will suggest the above topics for discussion.

## **5. Retail structured products: follow-up**

Issue: The Chair of the retail structured products sub-group, Mr Ulrich Parche presented a synthesis of the first tentative assessment of the replies to the EFMLG questionnaire on the above topic.

Follow-up: It was agreed that the sub-group will prepare a report based on a full analysis of these replies. The members who did not yet reply are requested to provide their replies as soon as possible. The sub-group is invited to circulate its draft report in written procedure together with any possible recommendations.

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<sup>2</sup> These issues correspond respectively to the following items of the Coalition's report : item n°2: Standardisation in the classification of counterparties; item n°6 : Formulation and agreement on a common set of registration and examination requirements for those countries that operate licensing regimes or other forms of competence standards for individuals active in financial services; item n°8 : Common understanding of stabilisation practices; and item n°12:Convergence towards global standards on conflicts of interest.

## **6. Transparency requirements: the issue of disclosure obligations applicable to economic exposures**

Issue: Mr Hubert de Vauplane from Calyon introduced the topic with a presentation on the issue of the appropriate level of disclosure of economic exposures. Under the Transparency Directive, the work currently undertaken by some national authorities highlights the risk of divergent interpretation of the relevant provisions of the Transparency directive (including implementing measures) as regards the disclosure requirements applicable to certain financial instruments (such as contracts for difference).

Follow-up: The EFMLG will prepare a letter to the Commission and CESR alerting on the need for a harmonised implementation of the Transparency Directive regarding the above topic.

## **7. Efficiency of judicial systems in the area of financial services: follow-up to the 2007 EFMLG survey**

Issue: In 2007 the EFMLG answered a questionnaire on the efficiency of judicial systems for financial services claims. This survey was done to facilitate a response to ECOFIN's invitation to the ECB and the Commission in October 2006 to 'monitor and assess the relevant institutional features that hinder the efficient functioning of the financial system, and to pursue efforts aimed at improving the financial market framework conditions'. The EFMLG reviewed the proposal made in view of the discussion at the ECOFIN/EFC level meeting next September re. the above topic and approved it subject to the introduction of editorial amendments concerning the proposed recommendations.

Follow-up: An amended version of the above draft recommendations will be circulated in written procedure for the EFMLG's approval.

[N.B: The documents were circulated on 5 May to the EFMLG].

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

### **8.1. Reflections from a legal perspective on internal controls regarding OTC and exchange-traded derivatives**

The issue was postponed to the 11 June meeting in New York due to a lack of time.

[N.B: The matter will also be discussed at the Quadrilateral meeting].

### **8.2. Netting law reform/Proposed amendments to the Collateral Directive/SFD**

The sub-group on netting chaired by Mr Holger Hartenfels has prepared jointly with ISDA a letter to the Commission suggesting to remedy the current legal uncertainty at the EU level with the adoption of a directive on close-out netting arrangements. The letter was approved by the group and will be soon approved by ISDA. Although some EBF Members expressed their

interest for the EBF to participate, some others were reluctant because (i) they find it difficult to endorse the precise proposals of the EFMLG/ISDA draft documents without carrying out a deep analysis of the issue and the possible solutions beforehand (ii) and also because they consider it too early to react at this stage.

Follow-up: Once approved by ISDA, the joint EFMLG-ISDA letter will be sent to the Commission  
[N.B: The letter was sent to the Commission on 15 April 2008]

### **8.3. Forward foreign exchange transactions and MiFID**

The EFMLG secretary reported that the EFMLG letter had been received positively by the Commission. DG MARKT has drafted to the attention of Commissioner McCreevy a proposal exposing legal issues and pros and cons raised by the different possible options.

Follow-up: The EFMLG secretariat will monitor the developments at the Commission's level on this issue.

[N.B: DG MARKT published end April an answer to this question on the Commission's website (MiFID Q&A)]

### **8.4. Securitisation/Commission's White Paper on Mortgage Credit: up-date**

Following the Commission's White Paper on mortgage credit, no specific information needs to be reported except the publication of the European industry commitments re. transparency in the European securitisation markets.

## **9. Other issues - Next meetings**

- *Draft common frame of reference: principles, definition and model rules of European private law.*

The item was not discussed due to a lack of time and will be discussed on 11 June in New York.

[N.B: Please refer to the letter sent to the EFMLG on 14 May on the matter].

- *Next meetings*

The date of the Quadrilateral meeting is confirmed for 11 (evening)-12 June. The next EFMLG meetings are scheduled for **11 June 2008** (i.e. in the morning ahead of the Quadrilateral meeting) at Barclays Bank premises in New York and (tentatively) for **October 2008** (date to be confirmed). EFMLG members will be informed in more detail in due course.