European Financial
Markets Lawyers Group

- CHAIRMAN -

To the EFMLG members

10 March 2008

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Dear colleagues,

Subject: Follow up to ECOFIN October 2006: recommendations on improving judicial efficiency for financial services claims

In 2007 you answered for us a questionnaire on the efficiency of judicial systems for financial services claims**.** As you know, this survey is part of our work to respond 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 efficiency of the courts is clearly an important part of that institutional back–drop for any well functioning and developing financial market.

The EFMLG can make a valuable contribution to this process by informing on members' own professional experience with the court system and, on the basis of that evidence and other data, make recommendations to decision makers on how courts could be made more efficient and in particular more effective at protecting the rights of creditors.

On the basis of your responses and other sources of information, we have therefore prepared a short paper (see enclosure) which sets out a number of recommendations and explains their rationale.

It is intended to present these recommendations to ECOFIN (or EFC) in September 2008. In this manner, we intend to highlight the significance of well functioning, efficient and responsive judicial systems for the development of financial markets in the EU. To our knowledge this has not been done before at this level.

In summary, the most important recommendations are the following.

1. Duration to judgment

There is a considerable body of evidence that in certain EU member states (Italy, Slovenia, Greece) it takes several years for a first instance court to make judgment on an unsecured monetary claim. The courts in the majority of EU member states take between 6-18 months to issue judgments on such claims.

In the interests of improving the enforceability of creditor claims and the consistency of enforcement across the EU the concerned member states should be encouraged to put the necessary resources and mechanisms in place to reduce as much as possible the delay at first instance between filing of a claim and the issue of a judgment. These jurisdictions should also be encouraged, if necessary to reform their civil procedure in a way that would help to reduce that delay.

As a rough benchmark of efficiency, a creditor should not have to wait more than 6 months for a judgment on his claim. Member states should seriously consider whether to make changes in their law so that the duration to judgement does not go beyond a reasonable period, for example 6 months.

2. Enforceability of first instance judgment - executory judgments

The member states which currently do not permit executory judgments should consider introducing this into their civil procedure rules. The executory judgment is an important instrument of creditor protection.

Furthermore, the fact of an appeal being lodged against a judgment should not automatically stay execution, but this should be left to the discretion of the judge. Monetary claim judgments and interim injunctions should also be immediately enforceable.

3. Specialised courts

Financial markets and instruments are rapidly evolving and raise complex, technical questions which require highly specialised expertise, which ordinary courts are often unable to provide. In addition, globalisation of capital markets entails further complexity as increasingly courts have to consider foreign laws.

The member states which currently do not have specialised commercial and financial courts should consider introducing such courts into their judicial systems.

Alternatively, such member states should ensure that their appellate courts have a specialised chamber or division of the court to deal with complex or high value commercial and financial cases.

4. Arbitration

The potential of arbitration to efficiently resolve disputes between financial institutions concerning banking and capital markets is not being fully exploited.

In the absence of specialised courts, financial institutions – particularly those with cross border activity spanning several jurisdictions - should be offered a pan-European arbitration procedure to resolve capital markets and inter-bank disputes as an alternative to judicial proceedings. Such institutions should be encouraged to amend their contractual documentation by specifying an arbitration clause in favour of an independent pan European arbitration procedure.

5. Default interest

An appropriate default interest rate should be set in legislation or regulation, as a means of discouraging the debtor from unduly delaying payment of the adjudicated claim.

The possibility should be explored of a single converged default rate for the Euro area countries. The rate should be based on the official ECB rate plus certain basis points sufficient to dissuade the debtor from protracting the proceedings as a means of delaying payment.

6. Effectiveness of interim relief

The civil procedure rules of all EU jurisdictions include some form of interim relief in urgent cases. It is however equally important for creditors that these measures are used effectively and reasonably in practice. For instance,

- The courts should be able to make decisions on interim relief upon very short notice – as these are by definition urgent cases;
- The courts should not subject applications to unreasonable or particularly burdensome conditions;
- Generally, interim relief should be widely available in commercial litigation and should not be restricted to too narrow a range of cases.

7. Simplified or accelerated procedures

The threshold for the small claims procedure should be periodically re-assessed upwards (for example in line with domestic GDP), particularly in the new member states where they may be too low. In this way simplified procedures could apply to a wider number of cases.

The introduction of a compulsory arbitration procedure with simplified evidentiary rules and limitations on the right of appeal should also be considered for certain types of cases or cases where the value of the claim does not exceed a set monetary threshold**.**

8. Centralising enforcement outside the courts

The responses to the questionnaire show that most jurisdictions assign the civil courts with the task of enforcement. However civil courts are generally perceived to be slow and inefficient in enforcing judgments. Moreover, enforcement may be regarded as more of an economic than a legal activity for which judges are not necessarily well suited. Courts also tend to be over–burdened with case load.

The introduction of alternative non-court administered schemes of enforcement should be seriously considered. For example, as in Sweden, the enforcement of payment orders is centralised with one state agency.

9. Improved publicity of judgments

In view of the importance of legal certainty to the financial community, civil courts should be encouraged to make their judgments more widely and easily available. Particularly if there were to be more specialised courts handling financial services claims, there is a case for improved publication of such specialised judgments. Increased availability of judgments should help to ensure the consistency of such jurisprudence. It should also help to speed up the resolution of such cases.

It should be considered to create a centralised, publicly available database of all financial market related judgments from domestic courts (appeal or higher) in the EU.

You are invited to consider whether these recommendations could be presented to ECOFIN along the above lines. As this topic will be discussed at the next meeting in Athens on 31 March, comments are invited by noon Tuesday 25 March at the latest.

With best regards,

[*signed.*]

Antonio Sáinz de Vicuña

- Encl.