

DRAFT

27. 8.2008

Contact person: Mr. S. Kerjean  
Tel.: +49 69 1344 8582  
E-mail: [secretariat@efmlg.org](mailto:secretariat@efmlg.org)

**AIDE-MÉMOIRE OF THE  
27TH MEETING OF THE EUROPEAN FINANCIAL MARKETS LAWYERS GROUP,  
HELD ON WEDNESDAY 11 JUNE 2008, NEW YORK**

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

The members approved the aide-mémoire of the last meeting and the agenda. The Chairman thanked Mr Alan Kaplan, Deputy General Counsel from Barclays Bank for hosting the meeting. Regarding the kind invitation of the Financial Law Board (FLB) to host the next Quadrilateral meeting in Tokyo, the EFLMLG identified two difficulties. The first difficulty relates to the rotation scheme for the Quadrilateral meetings itself. The EFMLG members are of the view that the rotation scheme which currently involves the FMLG, the FMLC and the EFMLG should not be extended for the following reasons: (i) several of the credit institutions represented in the EFMLG have operations in Japan but not the majority of them; (ii) the identification of legal issues of direct common interest for Europe and Japan is not a priority; (iii) there are an important number of regulatory and market developments in Europe which require from the EFMLG a focus on EU matters in order to avoid a dispersion of resources. The second difficulty is that, in view of the 10<sup>th</sup> anniversary of the EFMLG and the planned organisation in 2009 of a special gathering with General Counsels from the banks represented within the EFMLG, it might be preferable that the Quadrilateral meeting takes place in Europe. Against this backdrop, it was agreed that the EFMLG could participate to meetings hosted by the FLB only on an exceptional basis, the earlier opportunity being 2010. The Chairman was asked to convey these views to the FLB representatives.

**2. EFMLG internal matters**

**2.1. Follow-up to the reflections on the future of the EFMLG: draft Charter/draft internal rules of procedure**

As agreed in Athens, the EFMLG discussed a first draft Charter and a first draft of internal rules of procedure. The matter was introduced by Mrs Chiara Zilioli (ECB) who noted that the Charter was intended to be published on the EFMLG website, while the rules of procedure would be displayed on the EFMLG intranet only. The Charter should be a concise document covering the mission of the group, its structure and activities, while the internal rules of procedure should reflect standard practices and the specific decisions taken by the EFMLG in Athens in March 2008. Mrs Zilioli mentioned during the meeting a few improvements which still needed to be incorporated in both texts in addition to minor drafting points. She noted in particular that the criteria for the appointment of the EFMLG Vice-Chair should be added to the internal rules of procedure.

Mr Hubert de Vauplane (Calyon) stressed the importance of the well-established principle of a strict separation between the ECB and the EFMLG and the need to reflect this principle in the Charter.

Mr Olof Myrhman (SEB) noted that EFMLG members do not necessarily report to the General Counsel of their respective institution and that the internal organisation of legal services and reporting lines might differ from one institution to another. Regarding the relationship of EFMLG members vis-à-vis their respective institutions, it was acknowledged that, although the participation to the EFMLG activities implies a combination of personal capacity and of support of the institution to which the EFMLG member belongs, the group itself is (and should be perceived as) collectively independent.

The group agreed to include in the EFMLG internal rules of procedure a specific article on the composition of the group which would contain the following additional elements:

- the EFMLG should not exceed 30 members;
- one Member State cannot be represented by more than three banks in order to avoid an overrepresentation of banks from the same Member State in the group;
- similarly, the same credit institution/group cannot be represented in more than three different EU Member States;
- the ECB is represented in the group by one member (in addition to the Chair and the Secretary);

Mr de Vauplane indicated that some of the EFMLG members might be appointed 'on behalf of' local institutions and suggested that this practice might be reflected in the rules relating to the composition of the group. The EFMLG Chair observed that this practice should remain the exception and that, as a rule, EFMLG members should belong to the staff of credit institutions represented in the group.

Lastly, it was agreed that, in addition to the contacts developed by the EFMLG with the FMLG, FMLC and FLB, the rules of procedure should refer to the existing regular contacts of the

EFMLG secretariat with other central banks legal departments from countries with an important financial centre.

Follow-up: The two documents were broadly endorsed by the group, subject to the introduction of the above amendments. A revised version of these documents will be circulated to the group for comments in written procedure.

## **2.2. 10<sup>th</sup> anniversary of the EFMLG: state of play of the EFMLG book project**

Issue: The chair of the EFMLG Editorial Board, Mr Holger Hartenfels (Deutsche Bank) debriefed the EFMLG members on the state of play of the EFMLG book project, namely the aspects related to the financing of the project, the contacts established with potential publishers (Springer, Hart Publishing, Oxford University Press and Nomos) and the suggestions for articles received so far. As regards the publishers, it was agreed that, if necessary, contacts may be also taken with other publishers (Elsevier or Lexis were mentioned). The group acknowledged that the number of proposed contributions for the book received was currently insufficient and that it would not be appropriate to launch a publication on this basis. It was reminded that joint contributions are possible and that alternate EFMLG members as well as lawyers from their respective credit institutions may also be involved. The decision on whether this initiative should be formally launched will be taken in the autumn at the latest in order to be able to comply with the agreed timetable and the publication of the book in June 2009. The EFMLG Chair indicated that contacts would be also taken by Mr David Bloom and Mr Martin Thomas for possible contributions to the project.

Follow-up: Members are invited to provide to Mr Hartenfels and the EFMLG secretary the topic of their proposed contribution to the EFMLG book by **4 July 2008**.

## **3. Draft common frame of reference (DCFR): principles, definition and model rules of European private law**

Issue: The EFMLG discussed in its New York meeting the pros and cons of developing a pro-active approach regarding the above project and took the pro-active approach and agreed to set up a Task Force which will be chaired by the EFMLG Chair. The Task Force will consider the preparation of an EFMLG contribution on the DCFR with regard to targeted legal issues of relevance in the context of financial markets. EFMLG members are invited to appoint Task Force members and to identify a few selected aspects which should be covered by the above contribution.

Follow-up: A first meeting of the Task Force is planned in Frankfurt am Main on **22 July 2008**.

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

Issue: This issue was presented by Mr Stéphane Kerjean and Mr Bertrand Bréhier (Société Générale – SocGen -). Mr Kerjean briefly introduced the topic with the chronology of events and an overview of the various reports which have been produced following the detection of the fraud at SocGen (and in particular the report from the French Minister of Economy, Finance and Employment to the French Prime Minister, the reports from the SocGen Special Committee and General Inspection, and from Price Waterhouse Coopers). Mr Bréhier described the main measures taken by SocGen in order to address the shortfalls which may have prevented detecting the fraud earlier and the legislative and regulatory measures currently discussed in France regarding internal controls (such as, for instance, the creation of an audit committee within each credit institution). The group discussed in this context the shareholder's actions launched in the US against SocGen and UBS following the sub-prime loans crisis. It was reported that the some of the claims were based on the alleged lack of internal controls within these institutions.

Follow-up: The EFMLG noted that the matter is also on the agenda of the Quadrilateral meeting. No follow-up is required.

#### **5. MiFID: Supervision of branches**

Issue: The EFMLG discussed the Commission's note of 18.6.2007 attached as Annex to the CESR Protocol on the supervision of branches under MiFID. The Commission acknowledges in this note that Article 32(7) of the MiFID does not satisfactorily resolve the issue of the allocation of responsibilities between home and host competent authorities for the supervision of branches and that there is a 'grey area' in the case where the client is not either in the Member State of the branch or in the Member State of the head office.

Follow-up: The EFMLG will prepare a letter to the Commission highlighting the fact that the 'case-by-case' approach suggested by the Commission in the above case does not provide sufficient legal certainty.

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

##### **(i) Efficiency of judicial systems in the area of financial services: follow-up to the 2007 EFMLG survey**

Issue: The EFMLG draft report entitled 'Towards improved judicial efficiency for financial services claims' has been revised to take into account the EFMLG members' comments mainly concerning the recommendation (no.5) on default interest. It also includes an additional recommendation (inserted as no. 9) on improving transparency of information on debtor assets

(see in this respect the Commission's Green Paper entitled 'Effective enforcement of judgments in the European Union: The transparency of debtors' assets', COM(2008) 128 final, 6.3.2008).

Follow-up: An amended version of the above draft report was circulated in written procedure for the EFMLG's final approval. Thereafter the report will be sent for editing and printing and will be published as another in the series of EFMLG reports.

#### **(ii) Transparency requirements: the issue of disclosure obligations applicable to economic exposures**

The EFMLG has set a Task Force which currently prepares a letter to the Commission and CESR alerting on the need for a harmonised treatment at the EU level of disclosure obligations applicable to economic exposures held through derivatives such as, for instance, contracts for difference, total return swaps or equity swaps.

#### **(iii) Netting law reform/Proposed amendments to the Collateral Directive/SFD**

Mr Holger Hartenfels briefed the group on the outcome of the ISDA-EFMLG joint 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 Commission believes that it is worthwhile to explore the netting issue further, and intends to do so, but is also of the view that this would go beyond the scope of the Financial Collateral Directive (FCD) and should not be addressed in the context of the on-going review of the FCD and Settlement Finality Directive. The EFMLG will continue to monitor actively this issue together with ISDA.

#### **(iv) EMA**

Mr Holger Hartenfels briefed the group on the work of the FBE EMA Working Group and steering group on the revised draft EMA Product Annex for Deposits and Loans and the related menu for the Special Provisions.

#### **(v) Forward foreign exchange transactions and MiFID**

In response to the question raised by the EFMLG regarding the applicability of the MiFID to forward foreign exchange transactions, DG MARKT published end April an answer to this question on the Commission's website (MiFID Q&A). No immediate follow-up is envisaged by the EFMLG.

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

The 29<sup>th</sup> EFMLG meeting should take place on 11 November 2008 in Frankfurt am Main (ECB premises).