European Financial
Markets Lawyers Group

TOWARDS IMPROVED JUDICIAL EFFICIENCY FOR FINANCIAL SERVICES CLAIMS

31 JULY 2008

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NOTICE

This Report is published by the European Financial Markets Lawyers Group (EFMLG). All of the members of the EFMLG, whose names are set out in Annex, are experts in the field of financial markets law in the legal system of their Member State and have a high degree of practical experience. The members of the EFMLG participate in its work on a strictly personal basis. The views expressed in this paper are those of the EFMLG members and do not necessarily reflect those of their respective institutions.

Towards improved judicial efficiency for financial services claims: Report and recommendations

Table of contents

Part I Introduction & Overview

1. Introduction

The importance of legal institutions and effective enforcement for well-functioning financial systems has been debated at various high level forums and is emphasised in the literature[1]. Responding to this debate, in October 2006 and in a follow-up to its informal meeting in Helsinki, the Economic and Financial Affairs Council (ECOFIN) invited the European Central Bank (ECB) and the European Commission, 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'[2]. This was one of a number of steps agreed by ECOFIN to monitor closely developments in the capital markets, particularly for risk capital financing and innovation.

In early 2007, the ECB approached the European Financial Markets Lawyers Group (EFMLG) and asked it to prepare a report making use of its members' legal knowledge and professional expertise in this area, with the assistance, if appropriate, of their colleagues with litigation responsibilities. EFMLG is a group of senior financial lawyers from the credit institutions in the European Union that are active on the pan-European inter-bank and wholesale markets. This group of credit institutions is clearly not representative of the whole of the banking and financial services industries, but it represents those banks in the EU which are most exposed to global financial competition[3]. Its findings, therefore, should not be seen as the voice of the whole European financial services industry, but as being representative of that part of it that offers a wide variety of financial services beyond national jurisdictions, and is thus constantly concerned with globalisation, competition and innovation.

In response, the group began by conducting a fact-finding exercise based on a questionnaire designed to assess how its members rated the efficiency of the courts in their respective jurisdictions in dealing with claims filed by financial institutions and, where appropriate, how the situation could be improved. The gathering of statistical information in this area is difficult as adequate comparable data which is specific to financial services claims is simply not available. Accordingly for the preparation of this report the EFMLG members have drawn on internal information and experience of the problems arising for their financial institutions on a day-to-day basis when enforcing claims through the civil courts.

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1 See *inter alia* Freixas, X., Hartmann, P. and Mayer, C., *Handbook of European Financial Market and Institutions*, OUP, 2008 pp. 120-125; ECB, *The role of financial markets and innovation for productivity and growth in Europe*, a research paper of 4 August 2006, tabled at the informal ECOFIN meeting in Helsinki, September 2006; also Djankov, S., La Porta, R., Lopez de Silanes, F. and Shleifer, A., 'Courts: The Lex Mundi Project', *Quarterly Journal of Economics,* Vol. 118 No 2, 2003, pp 453-517.

2 2753rd Economic and Financial Affairs Council Meeting**,** Luxembourg**,** 10 October 2006: Follow-up to the informal meeting in Helsinki: Council conclusions - Press Release, p. 12.

3 See www.efmlg.org. For a list of EFMLG members see the Annex. The members of the EFMLG are selected on the basis of their personal experience from among lawyers of those credit institutions based in the EU which are most active in the European financial markets, namely the banks of the Euribor and Eonia panels.

The group has also consulted other published information about the efficiency of judicial systems. This information was obtained principally from the following sources:

- The World Bank, *Doing Business*, 2008 – a global survey on conditions for doing business in 178 countries[4];
- The European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe, *European Judicial Systems*, 2005 edition (2002 Data) and 2006 edition (2004 data);
- The European Commission *Study No JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union*, 18 February 2004, prepared by Prof. B. Hess, University of Heidelberg[5];
- The website of the European Judicial Network in commercial and civil matters, managed by the European Commission[6];
- European Commission Green Paper, *Effective enforcement of judgments in the European Union: the transparency of debtors' assets*, 6 March 2008[7].

This report has been prepared on the basis of the EFMLG members' responses to the questionnaire together with the information on judicial efficiency derived from these additional sources.

There are undoubted difficulties in compiling accurate data about court claims and judicial efficiency. It is not in all EU Member States that courts provide data on the annual number of claims filed by category (e.g. 'financial cases'). There are no commonly accepted definitions as to what constitutes a financial services claim, no mandatory rules on when a court should give judgment, and hence no agreed benchmarks for measurement. Despite these obstacles, EFMLG believes it can make a valuable contribution in this important area for creditors and investors by making targeted recommendations to decision makers. In EFMLG's view, a number of recommendations could usefully be made to ECOFIN on how the civil courts could be made more efficient and in particular more effective at protecting the rights of creditors. These recommendations are based not only on the available data, but also the members' own professional experience which, as qualitative evidence, sheds light on the other evidence. These recommendations are set out below in this report.

Although the ECB intends to present the EFMLG recommendations to ECOFIN, in view of their subject matter they should also be considered by the EU Ministers of Justice.

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4 One of the indicators used in this survey is the time taken for enforcement, expressed as the total number of calendar days needed to recoup on a bounced cheque, i.e. a simple fixed-amount claim. *Doing Business*, 2006 is also cited in places in this report.

5 The study covers those areas of judicial activity such as enforcement orders, attachments and garnishee orders that impact on cross-border activity within the EU.

6 This includes a general description of each Member State's judicial system and court procedure. http://ec.europa.eu/civiljustice/index_en.htm. The EJN was established by Council Decision 2001/470/EC of 28 May 2001.

7 COM(2008) 128 final.

EFMLG wishes to emphasise the importance of well-functioning, efficient and responsive judicial systems for the development of financial markets in the EU. It does not appear that there has previously been such a focus at this level on judicial efficiency with respect to financial services claims.

Part I.2 provides a general description of the background to the recommendations.

Part II explains the rationale and supporting evidence for each recommendation.

In this report the term 'claim' is used to mean a monetary claim, where performance is limited to the payment of a sum of money. The claimant is assumed to be a financial institution or a professional (in the regulatory sense), while the defendant may be either a business entity or an individual debtor.

2. Background

Judicial systems are clearly an important part of the institutional framework on which financial markets rely. Indeed, financial markets can only function properly if the legal foundations that support market activity are robust. That robustness is founded mainly on the efficiency of the judicial system.

Globalisation is the result of technology, deregulation and the development of international financial infrastructures that allow for global trading and settlement[8]. Millions of transactions are concluded every day on the financial markets for amounts in the trillions, almost all of them based on contracts. To a great extent these contracts are executed by electronic means, at real-time speed, increasingly internationally and multi-nationally, and on a remote basis, so participants must be able to rely on the courts to ensure due performance of these contracts, and prompt and effective remedies when there is a difference of interpretation or a default. For efficiency reasons major banks operating on a global scale centralise their cash and collateral management and their trades and investments, and from those centres they operate globally on a remote basis.

Given the complexity of financial products, the landscape has changed enormously in recent years. Until recently, financial products were relatively stable and a typology could easily be made by legislators and regulators. However, modern financial markets show an enormous degree of innovation, and new acronyms are constantly being created for use in trading rooms, price indices, by regulators and by online news

8 Some examples of trading activities: the NASDAQ OMX group of exchanges spanning five continents, www.nasdaqomx.com; the NYSE Euronext group of exchanges with six exchanges, of which five are in the EU, www.euronext.com; the MTS Group of bond exchanges spanning 16 European jurisdictions, www.mtsgroup.org; SWX-Europe, based in London but with some 100 members from nine jurisdictions, http://www.swxeurope.com/about.html; and the Turquoise trading platform with nine members from five jurisdictions, http://www.tradeturquoise.com). Examples of settlement activities include: Euroclear with settlement activities in six EU jurisdictions. www.euroclear.com; Target2, a real-time gross settlement system in euro for 21 EU Member States (so far), http://www.ecb.europa.eu/paym/t2/html/index.en.html; Clearstream, with settlement activities in two EU jurisdictions, www.clearstream.com; Link-Up Markets (a single platform encompassing seven European securities settlement systems (SSSs)), www.linkupmarkets.com; and CLS for the settlement of foreign exchange trades in 17 currencies, with offices in three continents; www.cls-group.com. In both trading and settlement, there are the global derivatives market Eurex, http://www.eurexchange.com/index.html; and the future Target2 – Securities, http://www.ecb.europa.eu/paym/t2s/html/index.en.html.

services[9]. These and the concepts they represent did not exist a few years ago and they are somewhat alien to the world of the law[10].

Credit protection is essential for the reliability of financial markets, where lenders and investors put their money at risk. The courts play a fundamental role in credit protection**.** While freedom of contract normally allows for clauses on choice of jurisdiction and these are used extensively, in other cases there will be little or no choice as to which court hears a case, as the jurisdiction may be otherwise determined by law. If the courts are not alert to the need for credit protection and if credit institutions are hindered by slow procedures from solving disputes or enforcing their claims, they will incur a cost for late credit recovery and they will not be able to pass on the full benefits of their products to their clients[11]. They will ultimately choose either not to enter into trades for which sound and prompt contract enforcement is essential but cannot be secured or, in the globalised finance market, decide to submit such trades to other jurisdictions which offer efficient judicial remedies. On a macroeconomic level, therefore, poor judicial enforcement leads to capital not being allocated efficiently in the market and to trades being done in more legally convenient foreign venues.

While the wholesale financial market has developed enormously and operates on a multi-jurisdictional basis, in preparing this paper EFMLG has formed the perception that the court systems of most EU Member States have not followed suit, but are rooted in their traditional approaches to solving disputes, with organisations and procedures that stem from a world that no longer exists.

The courts can play a significant role in helping financial markets develop and remain competitive by responding and adapting to market needs and conditions. It is not surprising that a recent survey has identified a 'fair and predictable legal environment' as the second most important criterion determining a financial centre's competitiveness[12]. Any jurisdiction that is seriously interested in a developed financial market should therefore strive to improve the conditions under which creditors or investors can enforce their claims through the courts. This is particularly so in the case of the EU, where the introduction of the euro and its worldwide success has created a multinational financial marketplace. ECOFIN is entirely correct in identifying this institutional element for the enhancement of the global competitiveness of the EU financial markets and EFMLG, at the request of the ECB, is honoured to contribute to this important task.

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9 Some examples: ABS (asset-backed securities), CDO (collateralised debt obligations), CDS (credit default swaps), CMBS (commercial mortgage-backed securities), CMO (collateralised mortgage obligations), RMBS (residential mortgage-backed securities), FRN (floating rate notes), etc. Regarding the aspects relating to securitisation, see the EFMLG report on legal obstacles to cross-border securitisations in the EU, May 2007 (available at www.efmlg.org).

10 Hedge funds, monolines, mezzanine finance, subprime, senior debt, synthetic securitisation, etc.

11 According to the Chairman of the Italian Banking Association, the higher legal costs incurred for late credit recovery in Italy represents one percentage point more in the interest rate required by Italian banks on loans to non-financial companies (source, ABI (2002) p. 21). Quoted in Commission draft working document: 'Impact assessment on directive on cross border transfer of registered office', SEC (2007) 1707, Table A19 (Case Studies), page 19.

12 *Sustaining New York's and the US' Global Financial Services Leadership*, a joint report by the Mayor of the City of New York and the US Senate, January 2007.

EFMLG RECOMMENDATIONS

1. Time taken to give judgment

In a few EU Member States it takes an average of two or more years for a court of first instance to give judgment on a typical unsecured monetary claim. The courts in most EU Member States take between 6 and 18 months to give judgment on such claims. In the United Kingdom, where the most important financial market in the EU is located, judgment at first instance is generally given within six months.

In the interests of improving the enforceability of creditor claims and consistency of enforcement across the EU, the Member States should be encouraged – while respecting judicial independence - to put the necessary resources and mechanisms in place to reduce as far as possible the delay between filing a claim and the giving of judgment at first instance. The Member States should also be encouraged, if necessary, to reform their civil procedure so as to help to reduce delay. As financial claims are normally based on documentary evidence only, proceedings could and indeed should be completed within a reasonable period.

As a rough benchmark of judicial efficiency, a creditor should not have to wait more than six months for judgment on a claim at first instance. Member States should seriously consider changing their procedures and investing in judicial resources so that the time taken to give judgment does not exceed six months. The introduction of case management procedures should be considered. Member States should also closely and regularly monitor compliance with such a benchmark. The availability of specific statistics about financial cases would also help in evaluating judicial efficiency.

2. Enforceability judgments at first instance (provisional enforcement)

Those Member States which currently do not permit provisional enforcement of judgments at first instance should consider introducing means for doing so in their civil procedure rules. Provisional enforcement is an important instrument of creditor protection.

The lodging of an appeal against a judgment which requires the appellant to make a monetary payment should not automatically stay execution; the decision to stay execution should be left to the discretion of the court and should be limited to cases where provisional enforcement would cause irreparable damage.

3. Availability of interim relief in financial disputes

The civil procedure rules of all EU jurisdictions allow some form of interim relief in urgent cases. However it is important for the legal robustness of financial markets that creditors and investors can rely on such measures, namely where there is *prima facie* evidence that a monetary debt exists, and relief should not be restricted to too narrow a range of cases.

4. Specialised courts

Financial markets and instruments are rapidly evolving, raising complex technical questions which require highly specialised judicial expertise which ordinary courts are often unable to provide. In addition, the globalisation of capital markets entails further complexity as courts increasingly have to consider foreign laws and to work with documents in foreign languages, usually English which is the language of international finance.

Those Member States that do not currently have specialised financial courts and wish to attract financial business should consider introducing such courts into their judicial systems. Such Member States should at least ensure that a chamber or division specialised in financial cases is established within their appellate or supreme courts.

Bankers associations (or other relevant representative organisations) should provide regular training on complex financial market transactions for the judiciary of such specialised courts.

5. Arbitration

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

As an alternative to judicial proceedings before specialised courts, financial institutions – particularly those with cross-border activities spanning several jurisdictions - should be offered pan-European specialised arbitration for resolving disputes concerning capital markets and inter-bank disputes. Public authorities should support the move for such arbitration.

6. Centralising the enforcement of judgments outside the court system

Most jurisdictions assign the task of enforcing judgments to the individual civil courts. However courts are generally perceived to be slow and inefficient in enforcing judgments. Enforcement may be regarded as more of a financial than a legal activity, for which judges are not necessarily well qualified. Furthermore, a single debtor may have judgments against them in different courts which do not coordinate their actions. Courts also tend to be overburdened with cases.

The introduction of alternative non-court administered schemes of enforcement by more business-oriented bodies or persons with managerial skills should be seriously considered. For example, in Sweden the enforcement of judgments entailing monetary payments is centralised in a single specialised state agency.

The introduction of a centralised database of enforceable claims should also be considered, to avoid several courts acting against a single debtor in an uncoordinated manner.

7. Transparency of debtors' assets

Cross-border debt recovery is still problematic, despite the operation of the European Judicial Network in civil and commercial matters and the possibility of recognition and enforcement of foreign judgments within the EU. Even when they are armed with an enforceable judgment, creditors find it difficult to obtain accurate and reliable information on debtors who are resident in other Member States.

It is recommended that an EU legal instrument (or instruments) should be adopted to

- Designate sources of information about debtors and their assets, and to ensure that such information is suitably publicised or accessible at EU level (subject to rules on the protection of personal data);
- Harmonise the basic elements of the procedure for disclosing debtor information across Member States.

Member States should encourage the exchange of debtor information between their national enforcement authorities.

8. Improved publicity about judgments on financial services cases

In view of the importance of legal certainty to the financial community, civil courts should be encouraged to make their judgments on financial cases more widely and easily available. In particular if there were to be specialised courts handling financial services claims, there would be a case for improving publicity about such specialised judgments. Increased availability of judgments should help to ensure the consistency of such decisions, and help speed up the resolution of such cases.

It is recommended that a centralised, publicly available database of all judgments related to financial markets given by domestic courts in the EU should be created.

9. Default interest for wholesale financial transactions

Directive 2000/35/EC on combating late payment in commercial transactions[13] should be amended to exclude wholesale financial transactions. Alternatively, the Directive should be amended to introduce a single default interest rate at EU level specifically for transactions between euro area financial markets participants - where the parties do not agree a contractual rate. The level for the rate should be set following close consultation with the market.

13 Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (OJ L 200, 8.8.2000, p. 35).

Part II Basis for the Recommendations

The following explains the rationale and supporting evidence for each of the recommendations set out in Part I. 'Responses' refers to the responses of the EFMLG members to the questionnaire.

1. Time taken to give judgment

Rationale

The reasons for considering that the time taken for judgment to be given is an area for improvement are twofold.

First, it is matter of public concern[14], including concern for the financial community which risks its money on the basis of contracts. There is a general perception – particularly among creditors or investors - that civil court proceedings for obtaining and enforcing judgments are too slow[15]. Creditors' perception of the efficiency of courts is important for attracting and retaining financial business in the global market place. In the view of EFMLG, the time it takes for a court of first instance to give judgment is most likely to affect creditor confidence in the efficiency of the courts.

Second, financial litigation tends to rely wholly or principally on documentary evidence. In contrast to other areas of law, the burden of proof in financial litigation is relatively light and the proceedings should therefore be quicker.

Responses

According to the EFMLG members' responses to the questionnaire, mostly based on their in-house experience of litigation[16], the jurisdictions covered[17] can be categorised in three groups depending on how rapidly they deal with claims. In all cases the times taken are only estimates and are not presented as scientific facts.

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14 There is a right to a fair and public hearing 'within a reasonable time' (Article 6 of the European Convention on Human Rights and Article 47 of the Charter of fundamental rights of the European Union), which also applies to market participants (e.g. investors) and to financial claims, and not only to persons accused of crimes.

15 CEPEJ Reports 2005 and 2006.

16 There are no published statistics or benchmarks for financial claims in particular; in some jurisdictions there are published statistics on all categories of commercial or civil cases dealt with by the courts, but these include cases outside the world of finance.

17 The responses did not cover all EU jurisdictions; information on non-responding jurisdictions is taken from the reports referred to above.

The first group

In jurisdictions such as Germany, Ireland, Sweden and the United Kingdom, courts of first instance are able to give judgment on a claim from within a few weeks to a few months of the date of filing the claim. For example, in the United Kingdom, where the most important financial market in the EU is located, a default judgment is reported to take an average of 21-35 days to obtain, and a summary judgment[18] (available for most civil actions) may be expected within three to six weeks of the application. Even if the case goes to trial, the first judgment may be expected within twelve months, and in fact the average is less than that.

The second group

In a larger group - the broad mean - composed of jurisdictions such as the Czech Republic, Finland, France, the Netherlands, Spain[19] and Switzerland[20], the courts are able to issue a first judgment between roughly 6 months (best case scenario) and 18 months (worst case scenario) of the date of filing a claim.

The third group

Finally, there are a few jurisdictions, like Italy and Slovenia, where the courts do not usually appear to be able to give judgment on a claim until up to 3 to 4 years after the date of filing. In Greece it is reported to take 1½ to 2½ years to give judgment on an unsecured loan - though the courts are able to order provisional enforcement on a bounced cheque within one month.

Other supporting references

These rankings broadly tally with information from other international organisations. The World Bank and the Council of Europe have surveyed judicial efficiency in some detail.

For ease of doing business in the EU, the World Bank[21] ranks the United Kingdom and Ireland 2nd and 3rd respectively, with Denmark 1st, whereas it ranks Italy 21st, Slovenia 22nd and the Czech Republic 23rd [22]. *Doing Business* takes a broad view, which includes as one of the indicators[23] for its evaluation, the time it

18 Where the claimant only needs to prove a *prima facie* case, i.e. that they have a reasonable prospect of succeeding at trial, without the merits of the claim being considered in detail.

19 Dutch court proceedings on the merits of a claim typically take between two months and two years (source: Freshfields Bruckhaus Deringer: *Litigating in Europe: the Netherlands*, 2001, p. 1).

20 The World Bank, *Doing Business*, 2008 and the CEPEJ Reports 2005 and 2006 also rank Austria, Portugal and some Central and Eastern European Member States in this middle category, so that the second group may be said to be the largest of the three.

21 World Bank, *Doing Business*, 2008. In the 2006 edition the World Bank ranked Ireland and the United Kingdom 1st and 2nd respectively, Slovenia 16th and Italy and the Czech Republic jointly 21st.

22 The Czech Republic is ranked last in EU for the length of bankruptcy proceedings - 9.2 years (source: World Bank, *Doing Business*, 2006; this is also cited in Table A13 of Commission working document on the impact assessment of the Directive on the cross-border transfer of registered office).

23 The other two indicators are the cost and the number of proceedings required to obtain settlement of a claim.

takes to enforce a simple claim such as recovery on a bounced cheque or, in the 2008 survey, payment for a sale of goods.

The Council of Europe's European Commission for the Efficiency of Justice (CEPEJ) reports that the courts of the third group of jurisdictions take the longest of all Council of Europe countries to give judgment at first instance in employee dismissal and in divorce proceedings[24]. This tends to confirm the previous information on length of proceedings in these jurisdictions.

Moreover, other academic research[25] and anecdotal evidence[26] confirms that in jurisdictions in the third group it takes much longer than in the others for creditors to obtain recovery. The World Bank *Doing Business* survey appears to corroborate this evidence as regards commercial disputes[27].

In conclusion, it is clear that in the third group of countries the time it takes from the date of filing a claim to the date of judgment is too long, judged against the European mean. These jurisdictions are failing to meet creditors' expectations regarding the length of proceedings. If six months is taken as the benchmark for the time within which courts should be able to give judgment, then there is *also* room for improvement in reducing the time it takes to give judgment in the second group of countries.

Rapidity in solving disputes has clear economic benefits. For instance, in the market for credit default swaps (CDS), if the institution acquiring the risk fails to honour its commitment in time, or if it raises questions about the scope of its commitment, a delay in obtaining a judicial remedy will entail imposing capital adequacy constraints on the risk-transferring institution which are non-recoverable in most cases. For the CDS market, judicial efficiency is of the essence.

Efficient justice is an important institutional element of market confidence in a financial centre. EFMLG has no doubt that one of the elements of the success of London and New York in attracting and retaining financial business is the efficient functioning of their courts in dealing with financial disputes[28].

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24 European Judicial Systems - CEPEJ Report Edition 2006 (2004 data); www.coe.int/t/dg1/legalcooperation/cepej/evaluation/default_en.asp.

25 *Study No JAI/A3/2002/02 on* m*aking more efficient the enforcement of judicial decisions within the European Union*, 18 February 2004, by Prof. B. Hess, University of Heidelberg.

26 For example for Italy, ABI (Italian Banking Association) (2002) p. 21: 'Empirical evidence shows credit recovery delays are much longer in Italy than in the rest of Europe: 6 years as compared to one.'

27 According to the World Bank, *Doing Business*, 2008 the total number of court days needed to enforce a commercial contract (payment claim on a sale of goods) in the EU is highest in Slovenia, followed by Italy and Greece.

28 See the example of the recent case concerning Bear Stearns High-Grade Structured Credit Fund Ltd. (Bankr. S.D.N.Y. 2007), a case arising out of the sub-prime mortgage crisis in the USA which involved a fund established by Bear Stearns in the Cayman Islands and domiciled there while holding its assets in New York. Because of the crisis, that fund entered into insolvency proceedings on 31 July 2007 before the Cayman Court of Justice. An investor sought to freeze assets in New York before the New York Bankruptcy Court on 1 August 2007; this was granted on 27 September 2007. This decision was immediately appealed by Bear Stearns to the US District Court for the Southern District of New York, which summoned a hearing on 16 January 2008; following the hearing, the appeal judgment was given on 22 May 2008 (withdrawing the New York assets from the Cayman Islands insolvency proceedings), and published on 27 May 2008. Altogether, a complex cross-border financial claim involving many investors was solved in first instance within two months, and on appeal within eight further months.

Recommendation No. 1:

In a few EU Member States, namely Greece, Italy and Slovenia, it takes an average of two or more years for a court of first instance to give judgment on a typical unsecured monetary claim. The courts in most EU Member States take between 6 and 18 months to give judgment on such claims. In the United Kingdom, where the most important financial market in the EU is located, judgment at first instance is generally given within six months.

In the interests of improving the enforceability of creditor claims and consistency of enforcement across the EU, the Member States should be encouraged – while respecting judicial independence - to put the necessary resources and mechanisms in place to reduce as far as possible the delay between filing a claim and the giving of judgment at first instance. The Member States should also be encouraged, if necessary, to reform their civil procedure so as to help to reduce delay. As financial claims are normally based on documentary evidence only, proceedings could and indeed should be completed within a reasonable period.

As a rough benchmark of judicial efficiency, a creditor should not have to wait more than six months for judgment on a claim at first instance. Member States should seriously consider changing their procedures and investing in judicial resources so that the time taken to give judgment does not exceed six months. The introduction of case management procedures should be considered. Member States should also closely and regularly monitor compliance with such a benchmark. The availability of specific statistics about financial cases would also help in evaluating judicial efficiency.

2. Enforceability of judgments at first instance (provisional enforcement)

Rationale

Once judgment is given it is important to creditors or investors that it can be rapidly enforced.

Judgment in favour of the claimant at first instance raises the legal presumption that the claim is justified. This right needs to be realised in fact. Often, following judgment at first instance, there are no further proceedings. In most jurisdictions where there are further proceedings before higher courts they take an excessive length of time and incur high costs. A policy decision to give robust legal protection to financial markets would mean that when creditors or investors have won on the substance of their case they should not incur undue delay and additional costs at the enforcement stage. In fact, given the considerable time and cost involved, it is sometimes hardly worth being a successful litigant if the judgment and the award of costs cannot be enforced within a reasonably short period.

One means of creditor protection against delayed enforcement is the institution of provisional enforcement, where the claimant has the right to apply for provisional enforcement of a ruling against a debtor even if the judgment at first instance is subject to appeal. This right should exist, particularly for the enforcement of judgment debts, unless the court stays execution at the request of the debtor on the ground that enforcement would cause irreparable damage (e.g. because it would lead to insolvency). Normally, monetary payments do not cause irreparable damage; therefore, a policy decision to foster financial markets should include facilitating the provisional enforcement of first instance judgments.

Where a subsequent judgment of a higher court amends or revokes a judgment of a lower court, this often (but not always) results in some payment that has been made under the first judgment having to be repaid. The risk of provisional enforcement being wrongly enforced can be dealt with in various ways, for example by making it dependant on the claimant lodging a temporary guarantee or security with the court. If the claimant fails on appeal, the amount of the guarantee or security would become due and payable. Alternatively, the amount of the claim provisionally enforced could be repaid at a later stage of the proceedings, should the appeal court reverse the judgment at first instance.

Responses

According to the responses to the EFMLG questionnaire, the majority of the jurisdictions surveyed have some form of provisional enforcement. A creditor can thus enforce a judgment even if it is not yet final.

In practice in a number of jurisdictions, the party seeking enforcement will wait until the deadline for lodging an appeal has passed. This is because the filing of an appeal usually stays the enforcement of the judgment[29].

However there are a few jurisdictions such as Austria, the Czech Republic, Italy and Slovenia[30] that do not recognise provisional enforcement. These jurisdictions require the judgment to be final and no longer appealable before it can be enforced.

Recommendation No. 2:

In the interests of creditor protection, Member States which do not currently permit provisional enforcement should consider introducing means for doing so in their civil procedure rules. Provisional enforcement is an important instrument of creditor protection.

The lodging of an appeal against a judgment which requires the appellant to make a monetary payment should not automatically stay execution; the decision to stay execution should be left to the discretion of the court and should be limited to cases where provisional enforcement would cause irreparable damage.

29 For example Belgium; Freshfields Bruckhaus Deringer: *Litigating in Europe: Belgium*.

30 In the case of Slovenia provisional enforcement is not available for first instance judgments.

3. Availability of interim relief in financial disputes cases

Rationale

As well as obtaining enforcement of a judgment, in urgent cases creditors need to be protected against the risk that even if obtained the judgment may be worthless if, for instance, there is a real risk that the debtor will transfer their assets to another jurisdiction between date of judgment and the date of enforcement. Interim relief measures (e.g. asset freezing orders, interim injunctions and other forms of provisional relief) could be used prior to judgment or even prior to the start of proceedings. To obtain interim relief, the applicant would have to prove that enforcement would otherwise be difficult or impossible.

Responses

The EFMLG responses and other published reports indicate that interim relief measures are available in all Member States, but they are not always effective.

For example, there are a large number of back-to-back transactions in financial wholesale markets where non-performance in one leg has consequences in subsequent legs of the transaction, in many cases giving rise to consequential damages which are non-recoverable. This requires there to be swift enforceability of the financial claim and the perception of judicial efficiency by market players.

Recommendation No. 3:

The civil procedure rules of all EU jurisdictions should include some form of interim relief in urgent cases. However, for the legal robustness of financial markets, it is important that creditors and investors are able to rely on such measures, namely where there is *prima facie* evidence of a monetary debt, and relief should not be restricted to too narrow a range of cases.

4. Specialised courts

Rationale

Financial institutions rely on the courts other than merely as creditors of simple monetary claims. The legal issues arising in the daily operation of the financial markets are often complex. Financial institutions often use complex and not always fully transparent instruments such as over-the-counter derivatives, credit default swaps and collateralised debt obligations, which may not be easily understood by non-specialist judges.

In addition, monetary union in the EU and globalisation have added an extra layer of complexity in the form of increasingly multi-jurisdictional contracts, where traditional rules on conflict of laws are important.

Globalisation has entailed increased use of standardised contractual documentation based on foreign laws, and financial market contracts are entered into in the context of a particular established market practice, custom or accepted behaviour. For instance, the over-the-counter derivatives market is frequently based on the ISDA[31] standard documentation which is subject to English or New York laws; the international repo market is largely based on the GMRA documentation, organised by ICMA[32] under English law; however, there are alternatives that have been developed to allow for the use of domestic law while still benefiting from international standardisation, such as the European Master Agreement. Furthermore, European commercial paper is to some extent based on documentation also sponsored by ICMA under English law, issuers of commercial paper and of certificates of deposit may also decide to comply with the standards contained in the STEP Market Convention[33] with regard to their respective issuance programmes; Eurobond issues are often subject to the criteria established by ICMA; the European repo market is based on the rules established by the ACI[34] or the European Repo Council (ERC)[35]. Some European wholesale payments are subject to rules established by the various European banking federations[36], and some of them to the SEPA[37] pan-European rules.

All this requires the full understanding of judges who have specialised knowledge of wholesale inter-bank markets and capital markets instruments. Specialised courts would help legal certainty by ensuring the consistency of judgments on complex financial market issues. Specialised courts would also help to speed up the resolution of such disputes between financial institutions.

There is therefore a strong case for EU jurisdictions to have additional courts that specialise in complex or high value commercial and financial cases.

Responses

The responses indicate that in the majority of jurisdictions financial or commercial claims are handled by the general civil courts.

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31 International Swaps and Derivatives Association; http://www.isda.org/.

32 International Capital Markets Association; http://www.icma-group.org/.

33 http://www.stepmarket.org/.

34 http://www.aciforex.com/.

35 The ERC, an ICMA's affiliate, regularly enacts Repo Trading Practice Guidelines and Conventions; see http://www.icma-group.org/about1/international1/repo0.html.

36 For example the European interbank compensation guidelines in cases of delayed payments agreed by the three European banking federations (banks, saving banks and cooperatives): http://www.ebf-fbe.eu/content/Default.asp?Page ID=244.

37 Single Euro Payments Area; http://www.ecb.europa.eu/paym/sepa/html/index.en.html.

The only jurisdictions that have specialised courts, or specialised divisions of courts, to deal with complex or high value commercial or financial market cases are France, Ireland, the United Kingdom and to some extent Spain (for some insolvency or other special proceedings)[38].

Some of the other jurisdictions, where such cases are handled by the general civil courts, have specialist chambers to which judges are assigned by the president of the court to deal with certain types of proceedings, for example bankruptcy or promissory notes/bills of exchange[39]. However, in many cases there are no chambers specifically designated to try financial services cases. This is the case for example in Austria, the Czech Republic and Slovenia. This also tends to be the approach of the other Central and Eastern European jurisdictions.

Some Member States have special courts for patents and trademarks or for bankruptcy, which require a high-level of technical expertise. Today's global and complex financial markets also require special courts.

Specialist courts or chambers of courts facilitate the continuous training of judges, which is recommended. The evolving nature of global financial markets, the need to understand foreign documentation and market practices, and the constant innovation in market products, requires the regular updating of judges' knowledge. The typical career of a professional judge will lead them from provincial town to provincial town, and only late in their professional life will they be posted to a financial centre with exposure to complex financial cases. If no training is given, their professional experience will not equip such judges to solve complex multinational financial disputes. Such training may be given by bankers' associations, but other alternatives are also feasible[40].

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38 Outside the EU, in New York the US District Court for the Southern District of New York specialises in financial litigation. The Swiss cantons of Zurich and Geneva also have specialised courts for financial disputes.

39 For example at the German Supreme Court none of the senates specialises exclusively in financial services law, however Senate XI tends to hear a large part of the cases arising from the financial markets.

40 For example, in the UK the Financial Markets Law Committee includes in its mandate: 'The Committee will also act as a bridge to the judiciary, a task it will carry out primarily by organising seminars to brief senior members of the judiciary on aspects of wholesale financial markets practice of which they might not otherwise be aware. Whilst the Committee will convene these seminars, it is intended that the speakers will normally be market practitioners drawn from outside the Committee's membership.' See: http://www.fmlc.org/history.html.

Recommendation No. 4:

Financial markets and instruments are rapidly evolving, raising complex technical questions which require highly specialised judicial expertise which ordinary courts are often unable to provide. In addition, the globalisation of capital markets entails further complexity as courts increasingly have to consider foreign laws and to work with documents in foreign languages, usually English which is the language of international finance.

Those Member States that do not currently have specialised financial courts and wish to attract financial business should consider introducing such courts into their judicial systems. Such Member States should at least ensure that a chamber or division specialised in financial cases is established within their appellate or supreme courts.

Bankers associations (or other relevant representative organisations) should provide regular training on complex financial market transactions for the judiciary of such specialised courts.

5. Arbitration

Rationale

Judicial proceedings in financial market cases are often protracted and therefore costly. They also suffer from shortcomings in multi-jurisdictional financial expertise. It therefore makes sense for financial institutions to be offered alternative methods of dispute resolution for their wholesale trades. Arbitration is a tried and tested method of resolving complex, technical and multinational disputes. It is particularly suited to resolving disputes involving multinational capital and financial markets and financial instruments. Its main advantages are that it is quicker – decisions may be given mostly within two to three months - and it is thus less costly in lawyers' fees than court proceedings; fees are often based on a flat fee upon registering the claim, with the rest depending on the award. Under the 1958 New York Convention, arbitral awards can also be recognised and enforced in many more countries than is the case for court judgments, especially outside the EU.

The responses indicate, however, that jurisdictions are divided with regard to the level of use of arbitration for resolving disputes between financial institutions.

In Germany and the United Kingdom, and to a lesser extent in the Czech Republic and Greece, arbitration is reported to be used frequently by financial institutions, particularly for complex or international disputes. In Spain, the four bankers' associations offer an institutional arbitration system for inter-bank disputes which has proved a highly efficient, relatively cheap and discreet means of inter-bank dispute resolution[41].

41 For disputes between banks, the arbitration system is called Diriban; for disputes between saving banks, the system is called Intercajas; for disputes between credit cooperatives, the system is called Diricoop; and for disputes between any

Since 2000, there has been a pan-European financial services arbitration initiative, supported by Community funding, named the European Centre for Financial Dispute Resolution – EuroArbitration[42]; it is based in Paris but its panel of experts is multinational and it focuses on multi-jurisdictional wholesale and capital market disputes.

In the other EU jurisdictions surveyed, arbitration for financial institutions is reported to be rare[43].

There may be several reasons for this relative lack of enthusiasm for arbitration on the part of the financial community in some jurisdictions. For instance, financial institutions may select the London or New York courts as forums for disputes in their contracts because the standard market contracts are often subject to English or New York law, as well as because of the generally recognised expertise and efficiency of these courts.

This diversity of approach reduces the likelihood of arbitration emerging as a primary method for resolving cross-border disputes between financial institutions in the EU. The possibility should therefore be explored of fostering the development of a pan-European arbitration procedure specifically for wholesale financial and capital market institutions. The competent authorities of Member States could act as catalysts or promoters for such an initiative until it reaches a critical mass of disputes where it becomes profitable.

In the absence of specialised financial markets courts, a pan-European arbitration procedure might be particularly attractive for institutions with cross-border activities spanning several jurisdictions. Such institutions could be encouraged to include in their contracts to a clause in favour of an independent pan-European arbitration procedure.

One possible model is EuroArbitration, if it were to become a general standard. But alternatives may also be considered as a basis for Europe-wide financial services arbitration, if they fulfil the condition of neutrality, avoid being seen as attached to a particular financial centre, and if they have the necessary expertise in wholesale financial services[44].

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classes of credit institutions, the system is called Serdi. These interbank arbitration procedures are recognised by the banking supervisory authority, Banco de España, in its regulations.

42 www.euroarb.org.

43 Outside the EU, in the USA the self-regulatory organisation for securities markets which merged in 2007, the Financial Industry Regulatory Authority (FINRA), has an institutional arbitration procedure for capital market disputes, http://www.finra.org/ArbitrationMediation/index.htm; in China a Financial Arbitration Court was established in 2007 in Shanghai, http://www.chinadaily.com.cn/bizchina/2007-12/19/content_6332295.htm; in 2008 the Dubai International Financial Centre set up a financial arbitration court, http://www.thaindian.com/newsportal/uncategorized/new-global-financial-arbitration-centre-opens-in-dubai_10018443.html.

44 E.g. the International Chamber of Commerce DOCDEX procedure offers dispute resolution for documentary credit (letters of credit) to international banks and other financial institutions. Applicants must sign up to the ICC rules (UCP 500) as condition of using this service (http://www.iccwbo.org/court/docdex/id4493/index.html). Other long-serving arbitration organisations, such as the London Court of International Arbitration (LCIA), do not specialise on financial services but have a broader scope.

Recommendation No. 5:

The competent authorities of the Member States should promote the use of arbitration to resolve disputes as an alternative to court proceedings in areas such as capital markets, wholesale market operations, derivatives trading and multi-jurisdictional transactions.
Financial institutions with significant cross-border activities spanning several jurisdictions should be offered a pan-European arbitration procedure to resolve disputes. Such institutions should be encouraged to include an arbitration clause in their contracts specifying the use of an independent pan-European arbitration procedure.
EuroArbitration could serve as a model for such procedure as, on the face of it, it has a pan-European character and financial expertise, although other examples might be considered.

6. Centralising the enforcement of judgments outside the court system

Rationale and responses

The responses show that in most jurisdictions enforcement is the task of the civil courts. However, courts are generally perceived to be slow and inefficient at enforcing judgments[45]. In fact, the nature of the enforcement process is more financial than legal, as it involves finding and realising the debtor's assets. Thus, there is a case for the courts to supervise the process but without being the main actors in it.

In addition, a single debtor may be subject to adverse judgments in several different courts which do not coordinate their actions, with consequent inefficiencies in enforcement.

Moreover, burdening courts with enforcement cases is to the detriment of their primary task of solving disputes and giving judgments.

Recommendation No. 6:

Alternatives to enforcement by the courts should be considered. More business-oriented, managerial enforcement would be more effective and could achieve economies of scale. For example, in Sweden the enforcement of payment orders is centralised in one State agency. The advantages of this model are that it permits process management, has a number of synergies and liberates the judiciary from non-legal tasks.

The introduction of a centralised Europe-wide database of enforceable claims should be considered, to avoid more than one court acting against the same debtor without coordination.

45 CEPEJ Report 2006.

7. Transparency of debtors' assets

Rationale

Cross-border debt recovery is still problematic within the EU, despite the improved enforceability of foreign judgments and the creation of the European Judicial Network in civil and commercial matters. Financial institutions, like other creditors, face considerable legal and administrative obstacles to enforcing judgment debts against debtors resident in other Member States. This is partly due to the difficulty of obtaining accurate and reliable information on debtors and their assets from the authorities of other Member States.

In March 2008 the Commission published a Green Paper – Effective enforcement of judgments in the European Union; the transparency of debtors' assets. This Green Paper sets out the current difficulties which creditors have in obtaining access to accurate information on the financial position of a debtor - in particular when trying to enforce claims in another Member State.

The difficulties highlighted in the Green Paper are essentially twofold: (i) cross-border debt recovery is hampered by differences between national legal systems (i.e. what information debtors are required by law to provide, where that information is held, and the sources of that information), and (ii) creditors lack knowledge about information sources and enforcement procedures in other Member States. As regards the latter there is currently no international convention on the exchange of information about debtors between the enforcement authorities of the Member States.

Generally the rules and practice on disclosure of information about debtors and the kinds of assets that are required to be disclosed differ significantly between Member States. These rules and practices need to be converged.

The Green Paper explores various options on how to improve the conditions for creditors to obtain information about debtors in other Member States.

EFMLG welcomes the ideas put forward by the Commission in the Green Paper.

Recommendation No.7:

Cross-border access by creditors to information about debtors should be improved by adopting EU legal instruments that would:

- **Require each Member State to designate the sources of information on debtors and their assets in their jurisdiction, and ensure that such information is suitably available at EU level (subject to the rules on the protection of personal data);**
- **Introduce a harmonised EU register of debtors' assets, or at least a harmonised EU procedure for disclosing debtor information.**

At the same time, the Member States should encourage the exchange of debtor information between national enforcement authorities (e.g. by memorandums of understanding, bilateral agreements etc.).

8. Improved publicity about judgments on financial services cases

Rationale:

It is questionable whether judgments relating to financial market cases are sufficiently publicised. This applies in particular to cases from courts of first instance, rather than superior court decisions. In view of the importance to the financial community of legal certainty, the 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 would be a case for improved publication of their judgments, both for cases decided at first instance and on appeal.

The classification of cases as concerning financial services would help to focus and to attract the attention of market players, and the compilation of case statistics would allow market players to assess court efficiency.

Improved availability of judgments should help to ensure the consistency of decisions. Also, the greater the certainty of judicial interpretation, the fewer the claims that are likely to be filed with the courts in future.

Recommendation No. 8:

Courts of first instance and appeal courts should be encouraged to make their judgments relating to financial market claims more widely and easily available.

Improved availability of financial case judgments should help to improve the legal certainty and consistency of jurisprudence in this area and thereby also speed up the resolution of such cases.

A centralised publicly available database of all such judgments should also be created.

9. Default interest for wholesale financial transactions

Most jurisdictions surveyed have a default interest rate provision for monetary debts fixed by law or regulation. The default rate is payable by the debtor in the event that the debtor makes late payment of a monetary claim, and it applies if there is no specific agreement between the parties on this.

Directive 2000/35/EC on combating late payment in commercial transactions[46] ("Directive") provides for a specific default interest rate in cases of late payment for all commercial transactions, whether between business undertakings (including financial institutions) or between undertakings and public authorities, unless the parties have agreed otherwise. Article 3(1)(d) of the Directive provides that in the euro area 'the level of interest for late payment ("the statutory rate"), which the debtor is obliged to pay, shall be the sum of the interest applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question ("the reference rate"), plus at least seven percentage points ("the margin"), unless otherwise specified in the contract.'

The Directive also requires the debt recovery procedure for unchallenged claims to be completed within a short period. Thus Article 5 requires an enforceable title to be obtained normally within 90 days of lodging a claim at the court or other competent authority, provided the debt or any aspects of the procedure are not disputed.

Financial institutions are not expressly excluded from the Directive. However, the application of the Directive – and especially the default rate provisions - is not wholly appropriate for the financial markets. Wholesale financial contracts (e.g. ISDA master agreements, international payment systems, interbank CHAPS payments) normally provide for a default rate that is much lower than the rate under Article 3(1)(d) of the Directive. Clearly, the Directive is mainly intended to make it easier for small and medium-sized enterprises (SMEs) to obtain payment of their commercial claims and to avoid chains of debt which may lead to insolvency. This is a concern which is less acute for large wholesale banks.

Recommendation No. 9:

Directive 2000/35/EC should be amended to exclude wholesale financial transactions. As an alternative, the Directive should be amended by introducing a single default interest rate at EU level specifically for transactions between euro area financial market participants - where the parties do not agree a contractual rate. The level of the rate should be set in close consultation with the market.

46 Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (OJ L 200, 8.8.2000, p. 35). Previously the Commission had issued Recommendation 95/198/EC of 12 May 1995 on payment periods in commercial transactions (OJ L 127, 10.6.1995 p. 19) and Communication from the Commission – Report on late payments in commercial transactions (OJ C 216, 17.7.1997 p. 10).

Annex

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