

DRAFT

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**AIDE-MÉMOIRE OF THE
30TH MEETING OF THE EUROPEAN FINANCIAL MARKETS LAWYERS GROUP,
HELD ON WEDNESDAY 5 MARCH 2009, ING, AMSTERDAM**

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

The members approved the aide-mémoire of the last meeting and the draft agenda. The Chair thanked ING for hosting the meeting and welcomed Mrs Helen Cockroft from Royal Bank of Scotland as new member of the Group. As a result of the EFMLG secondment programme, the Chair also welcomed Mr Frederik Winter from Linklaters Frankfurt who joined early January the EFMLG secretariat.

2. Appointment of the EFMLG Vice-Chair

On the basis of the criteria defined in Article 4.3 of the EFMLG internal rules of procedure, the EFMLG Chair proposed to appoint Mr Hubert de Vauplane, General Counsel of Crédit Agricole Group as Vice-Chair of the EFMLG for a mandate of four years. This proposal was accepted by the EFMLG members. The new Vice-Chair replaced for the afternoon session the Chair who had to return to Frankfurt.

3. Draft Common Frame of Reference

The Chair debriefed the EFMLG on the outcome of the second meeting of the Task Force of 19 February 2009 and presented the revised draft outline of the EFMLG paper. The EFMLG took note of the revised draft outline prepared by the Task Force. The Chair reported that the Task Force members would see benefits in involving a UK solicitor for the chapter of the DCFR devoted to trusts. EFMLG members are invited to appoint a lawyer for this task¹.

¹ Mr Tom Bartos from Barclays Capital volunteered for this task.

Follow-up: Comments on the revised draft outline can be communicated to the EFMLG secretariat by 31 March. A Task Force meeting might be required before the EFMLG Milan meeting. A final draft of the EFMLG paper will be discussed on this occasion.

4. Preparations of the next meetings

4.1. Preparations of the agenda of the EFMLG meeting of Thursday 18 June and of the Quadrilateral meeting of Friday 19 June in Milan

Mrs Francesca Passamonti debriefed the Group on the preparations of the two above meetings. It was agreed that the Quadrilateral meeting could be organised according to four sessions as in 2008 in New York and that the number of interventions on the various topics should not be too high in order to allow for a proper debate on the issues addressed in the context of each of these sessions. The sessions proposed by the EFMLG members are the following: (i) legal issues arising out of the market turmoil (Lehman Brothers; netting; bankruptcy-related events); (ii) impact of the turmoil on standard market documentation; (iii) banking regulation/supervisory responses to the crisis (de Larosière Group report on financial supervision in the EU and legal issues relating to the impact of national rescue plans in the EU, financial crisis stability measures and institutional changes in the US financial sector) and (iv) EU-US regulatory convergence. Various possible other topics were also mentioned such as securitisation/risk management/segregation of risks and the issue of liability of custodians and fund managers in case of frauds such as Madoff. Mr O. Myhrman proposed to invite the PWC insolvency administrators of Lehman in the UK as well as ISDA representatives for the purpose of items (i) and (ii) above.

Follow-up: A tentative outline of the draft agenda of the Quadrilateral meeting will be discussed with the FMLC, the FMLG and the FLC in the next weeks. The EFMLG members will be then invited to volunteer for topics for the Quadrilateral meeting.

4.2. Preparations of the EFMLG event with General Counsels for the 10th anniversary of the EFMLG (scheduled for Wednesday 21 October).

The Chairman informed the members on the state of play of this event, the date - 21 October – and the venue – Frankfurt am Main - being confirmed. A few possible guest speakers were identified by the group. As regards the agenda, the Chair pointed out the importance of identifying topics which would be of immediate relevance and/or attractive for the General Counsels of the banks represented in the EFMLG. Against this backdrop, the following suggestions were made: (i) the regulatory agenda in the EU following the de Larosière Group report; (ii) the impact of the turmoil on the function of General Counsel (for instance, with regard to the increasing complexity of risk management functions or the issue of personal liability of members of the management and of the Board of Directors); (iii) the achievements of the EFMLG over the last ten years and (iv) the prospective legal issues to achieve integration of

banking markets in the EU. As regards more specifically the EFMLG, the Chairman pointed out that the main aim of the event would be to reflect critically on the past activities of the EFMLG, discuss the composition, format and procedures of the group and, more importantly, to seek support from General Counsels for an increased involvement for the future. In this context, the members also agreed that the EFMLG secretariat should prepare a booklet about the EFMLG activities which could be distributed to General Counsels and be downloaded on the EFMLG website.

Follow-up: EFMLG members are invited to indicate by the end of March their availability in contributing as speakers with regard to the above topics.

5. Review of the Financial Collateral/Settlement Finality Directive/UNIDROIT Diplomatic Conference/ Follow-up to Legal Certainty Group advice: recent developments

Mr Philipp Paech, European Commission (DG MARKT) and Secretary of the Legal Certainty Group made a presentation on the status of the preparations of EU legislation on legal certainty of securities holding and transactions². He mentioned that, following the decision of Commissioner McCreevy to prepare Community legislation in the field of barriers 13,15,9 and 3 of the Giovannini Report, a Commission inter-service steering group was set up in order to initiate in Spring 2009 a public consultation. The Legal Certainty Group will be requested to provide additional advice before the Commission formally adopts a formal legislative proposal (currently planned for December 2009) together with an impact assessment. Mr P. Paech provided an overview of the possible structure of the future draft legislation and its interaction with neighbouring Community and international texts and indicated that one of the chapters would be devoted to the conflicts of law regime. P. Paech discussed the regime which would apply to account providers and mentioned that the activity of safekeeping and administration of financial instruments for the account of clients currently considered as an ancillary service under the MiFID would become a category of investment service. Following the presentation of P. Paech, the EFMLG also exchanged views on the concept of interoperable system/arrangements under the SFD and the treatment of the right of re-use under the FCD.

Follow-up: The EFMLG will continue to actively monitor these developments.

6. Netting law reform initiatives

Mr Holger Hartenfels debriefed the EFMLG on the state of play of the joint EFMLG-ISDA initiative on netting and on the recent activities of the EFMLG Task Force on this topic. Mr Hartenfels indicated that DG MARKT is interested in this initiative but that there is no official stance of the Commission yet on this topic. Moreover, Mr Hartenfels reported that the European

² The presentation is now available on the EFMLG intranet.

Banking Federation (EBF) has set up a dedicated working group on this issue which currently assesses the EFMLG-ISDA and KBC proposals. The EBF expects to deliver its own position paper in the next weeks and indicated its interest in continuing to cooperate on this issue with the EFMLG and ISDA. Mr Hartenfels indicated that the proposal for a Convention on netting which is part of the draft tri-annual work programme of UNIDROIT was not yet endorsed by UNIDROIT. Mr Hartenfels and Mr de Vauplane observed that this initiative, in the context of the current crisis, might be interpreted as being excessively favourable to the banking industry, which might also have an impact on the attention given by the Commission to this project. Mr Tom Bartos mentioned, in relation to the recent adoption of the Banking Act in the United Kingdom, that the Government has now the power to purchase assets of insolvent banks, a measure which would have a significant impact on the banking sector due to the potential difficulty of counterparties obtaining 'clean' netting opinions. At the same time, Mr Bartos noted that, in his view, the protection of netting was significantly improved with the late amendments introduced to the law and that relevant Financial Instruments which includes deposits, debt instruments and loans would be covered (but not foreign exchange contracts). By analogy, reference was made in this context to the EFMLG discussion on the interpretation of the MiFID on the issue of its application to forward foreign exchange agreements.

7. Legal issues related to the crisis on the financial markets

As a follow-up to the discussion on this topic at the last EFMLG meeting in November 2008, Mrs Helen Moran provided an overview of the recent developments concerning the draft ISDA Close-out Amount Protocol.

Taking into account previous recommendations such as the ones formulated in the 2005 Report of the CRMPG II, the Group pointed out the difficulties arising from the application by counterparties of different master agreements (and, often, the old versions of these agreements), the various mismatches between the definitions provided by these respective master agreements as well as the need to establish bridges between them in order to facilitate cross-product and cross-entity netting. The EFMLG members also noted that the default of Lehman Brothers has provided additional evidence of the different – and in certain cases inconsistent – definitions used in the various master agreements (as regards, for instance, notification period, events of default, applicable credit events, bankruptcy/insolvency definitions).

Against this background, it was agreed that the EFMLG should take action to encourage market associations such as ISDA or ICMA to develop more harmonised definitions across the various Master Agreements, taking also into account the impact of the market turmoil on standard market documentation (for instance, the harmonisation of close-out netting clauses). For this purpose, a Task Force chaired by Mr Holger Hartenfels and composed of Mrs Helen Moran, Mrs

Susan O'Malley, Mr Michael Mortensen, Mrs Delphine Mariot-Thoreau (Calyon) and Mr Mario Fiorenzo Bona (Intesa SanPaolo) was set up.

Follow-up: A first teleconference will be organised by the EFMLG secretariat in March to define the scope of this exercise. The first meeting of this Task Force should be organised in April or May in Frankfurt.

8. Other issues of relevance to the EU financial markets (*for discussion/information*)

8.1. Legal aspects of on-going initiatives in the field of credit derivatives clearing

Mrs Delphine Mariot-Thoreau presented the recent developments in this field and in particular the Commission's and ECB's initiatives in this field. The Group agreed that, despite their policy nature, these initiatives should continue to be monitored actively due to the future impact on rulebooks and legal market documentation.

8.2. Reducing Trade Risk: Using Technology to Bind Counterparties to Deals

Mrs Helen Moran introduced the note prepared by a law firm on the above topic. Due to a lack of time, the matter could not be discussed in detail. It was agreed that the Task Force on market documentation would examine whether further EFMLG action is required and that the Task Force would report on this matter at the EFMLG meeting of June.

8.3. EMA - Draft Deposit Annex and the related Special Provisions

Mr Holger Hartenfels briefed the Group on the status of the EBF EMA draft product annex on deposit and loans and indicated that the Explanations relating to this draft annex would be made available soon³. The EBF expects that this annex might be finalised soon. Mr Hartenfels also mentioned that very positive contacts have been established on this initiative with the ACI – The Financial Markets Association.

8.4. De Larosière Group Report on financial supervision in the EU

Mr Stéphane Kerjean indicated that the de Larosière report will trigger various regulatory initiatives in the next months which might require, for some of them, a close monitoring by the EFMLG.

³ The document is available on the EFMLG intranet.