European Financial Markets Lawyers Group

10 years of EFMLG activities 1999 – 2009

An overview of the main contributions of the Group to the legal integration of European financial markets

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Introduction by the EFMLG Chairman

The historical achievement of European monetary union on January 1999 created the expectation that a single currency would quickly lead to integration of the financial markets, in particular in wholesale and investment banking and in capital markets. Once the currency barriers disappeared, however, other obstacles to market integration became evident: not least the important differences between Member States in relation to the legal and regulatory environment for financial services and in the contractual practices of market participants. At the time, only a fraction of the market operated under standard documentation, most of it subject to English law and jurisdiction. To address this issue, the European Commission set out an ambitious Financial Services Action Plan, with approximately fifty legal initiatives that would lead to harmonisation. Nonetheless, market participants felt the need to address the many other issues that impeded pan-European market integration and the EFMLG was established in 1999 to cater for this need along the lines of similar groupings of legal experts in other financial centres. Ten years on, although enormous progress has been made, there is still much to do.

The complexity of the task may be seen from the reports published on the EFMLG website. Some of these reports have had a crucial impact on legislators, such as those on financial collateral arrangements, on rights over book-entry dematerialised securities and on the difficulties posed by the Hague Convention on the law applicable to securities held by an intermediary. Other reports have addressed market documentation, such as those on force majeure, on short-term European paper and on best practices regarding corporate authority to sign. Some other fields, such as those covered by the reports on harmonisation of netting laws, legal obstacles to cross-border securitisations in Europe and practical

measures to increase judicial efficiency in financial litigation perhaps still require further EFMLG attention to convince policy-makers.

Overall, therefore, although the EFMLG 'bottle' is half full, it is also half empty, with plenty of work still to do. Perhaps, as with the labours of Hercules in Greek mythology, the EFMLG will find an Alpheus river that it can divert to clean out in a single day the Augean stables of fragmented regulation, but such a privilege is probably reserved for the gods. In the meanwhile, the EFMLG is grateful for the support that its member institutions have provided for its activities, and stands ready to continue its tasks.

Antonio Sáinz de Vicuña

EFMLG Chairman

Foreword

Despite the completion of monetary union in January 1999 and the establishment of a single market in financial matters, European regulation still remains very fragmented due to the importance of the economic, political and legal cultures in each Member State. The enormous effort made in the last 10 years in the legal harmonisation of financial markets, asset management, retail banking and insurance still remains too limited to allow these activities to be carried out in a legal and regulatory environment complying with the principles of a level playing field.

The EFMLG's role for the previous 10 years has consisted in identifying and addressing any existing national or Community regulatory barriers, allowing the single market to be completed. This Group's special feature is that unlike other international associations, it brings together in one forum representatives from the main European banks, while taking account of their national diversity. Therefore this is a unique place where lawyers with various experiences can hold exchanges on common subjects. This Group, mainly functioning on a voluntary basis, has produced many reports and hosted many Task Forces with exceptional quality and expertise.

Strengthened by this experience and given the lessons that financial market actors must draw from the banking crisis following the Lehman collapse, the EFMLG has set itself a new challenge in addition to its usual objectives: setting up a discussion forum between various financial trade associations to harmonise the standard market documentation governing financial markets operations. In a global environment, discussions can only take place in this field if the financial market actors from other continents are involved. In this respect, the EFMLG has found its place, although it is the newest institution, among other the legal groupings meeting the same objectives in London, New York or Tokyo (Financial Markets Law Committee, Financial Market Lawyers Group and Financial Law

Board respectively). Many consequences and without doubt reforms imposed on national governments and regulators as a result of the financial crisis will provide the EFMLG with the opportunity of applying its savoir-faire in analysing these proposals, while bearing in mind the cultural differences specific to Europe.

The EFMLG's strength is in fact that it brings together members with different legal origins, bringing together no doubt in a unique manner the greatest range of legal cultures.

Hubert de Vauplane

General Counsel of Crédit Agricole Group

EFMLG Vice-Chairman

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NOTICE

This publication is issued by the European Financial Markets Lawyers Group (EFMLG). All of the EFMLG members, whose names are set out in Chapter V, are experts in the field of financial markets law in the legal systems of their Member States and have a high level of practical experience. The views expressed in this publication are those of the EFMLG members and do not necessarily reflect those of their institutions.

I. Introduction

The European Financial Markets Lawyers Group (EFMLG) celebrates its tenth anniversary this year.

On the occasion of this anniversary, the EFMLG decided to prepare this brochure, which describes the Group and its main achievements over the last decade[1].

Although its objectives and tasks have not changed in substance since its inception, the EFMLG formally adopted its Charter in November 2008, which describes its mission statement, composition, main activities and history. This Charter is set out in **Chapter II** of this brochure. **Chapter III** provides an overview of the Group's main initiatives, contributions and outcomes over the last decade. Lists of its main publications and members are provided in **Chapters IV and V** respectively.

As stated in its Charter, the EFMLG is committed to providing legal support to the historic task of achieving an integrated financial market in the European Union (EU). Although much has been achieved over the last decade, in particular the implementation of the Financial Services Action Plan and various regulatory and market initiatives, the European financial markets are still hampered in many ways by the absence of a single set of legal rules and harmonised documentation practices within the EU. Entities participating in European financial markets on a pan-European level may still have to cope with the often diverging requirements of 27 different legal systems. Therefore, the EFMLG's purpose, which is to propose initiatives likely to foster the harmonisation of laws and practices relating to financial market activities across the EU Member States, continues to be of particular relevance.

1 This brochure and other EFMLG publications can be downloaded from the EFMLG's website (www.efmlg.org).

EFMLG Legal Symposium on Standard Market Documentation
Calyon, London, 15 September 2009

The lessons learned since the financial crisis[2], for example with regard to the need to strengthen, on a global level, international financial regulation of all financial entities, markets and products[3], and the on-going reforms of financial supervision in the EU[4] and the US[5], highlight the benefits which can be drawn from exchanges and

2 See in this respect the conclusions of the G20 summit in April 2009 (available at: http://www.londonsummit.gov.uk).

3 See the Roadmap agreed on 12 June 2009 by the Economic and Financial Affairs Council (ECOFIN) with a view to ensuring financial stability.

4 See in particular the Report by the High Level Expert Group on EU financial supervision chaired by Jacques de Larosière of 25 February 2009 (Available at: http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf), the Commission communication of 27 May 2009 on European financial supervision, COM (2009) 252 final and the ECOFIN conclusions of 9 June 2009 (Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/108392.pdf).

5 U.S. Treasury's White paper on proposed 'Financial Regulatory Reform', July 2009 (Available at: http://www.financialstability.gov/docs/regs/FinalReport_web.pdf).

cross-fertilisation between various legal groupings across the world. In this respect, the EFMLG pays close attention to the activities of other relevant groups such as the Financial Market Lawyers Group in New York, the Financial Law Board in Tokyo and the Financial Markets Law Committee in London – respectively sponsored by the relevant central banks. In addition, depending on the subject matter, the EFMLG intends to pursue and develop the existing cooperation with relevant banking and industry associations, e.g. the European Banking Federation (EBF), the ACI-Financial Markets Association (ACI), the International Swaps and Derivatives Association (ISDA), etc.

Organisation of the EFMLG

Since its creation in 1999, the EFMLG has been chaired by Mr Antonio Sáinz de Vicuña, General Counsel of the European Central Bank (ECB). The first Vice-Chairman of the EFMLG, Mr Hubert de Vauplane, General Counsel of Crédit Agricole Group, was appointed in March 2009.

The ECB provides the secretariat of the EFMLG. The first Secretary of the EFMLG was Mr Martin Thomas who, at the end of 1999, was succeeded by Mr Klaus Löber. In May 2007, Mr Stéphane Kerjean became Secretary of the Group.

In 2009, the EFMLG has launched a programme with international law firms initiated with the secondment of Mr Frederik Winter (Linklaters LLP) for half a year at the EFMLG secretariat.

EFMLG, 18 June 2009

II. EFMLG Charter

Mission statement

The EFMLG is committed to providing legal support to the historic task of achieving an integrated financial market in the EU, on the basis of the professional excellence of its membership, the breadth of knowledge brought together on national and European financial law, cooperative work among the legal services of the wholesale banking industry in Europe, and the support of the banking institutions which are represented in the Group.

The Group strives to examine legislative and regulatory issues and differing market practices that hinder the full development of an EU-wide single financial market, to identify major barriers, to provide advice and recommendations, and to suggest best practices, aimed at facilitating harmonisation and convergence in the EU financial markets.

Composition

The EFMLG is an international group of senior lawyers of the major commercial banking institutions of the EU, who are able to provide high quality input to the Group's activities, to identify and propose areas of work, and to contribute to the Group's activities with resources drawn from the institutions they represent. The Group's membership is limited to the credit institutions that are members of the Euribor and Eonia panels, these being representative of the credit institutions that are active on a European level. The ECB, committed to European financial integration, provides the Group with a neutral chairmanship, one member and a small secretariat. The EFMLG's views neither bind the ECB nor the credit institutions which have appointed its members.

Main activities

In order to fulfil its mission, the following are the Group's main activities:

– Identifying and prioritising areas of own-initiative collective legal work aimed at analysing legal issues or practices that hamper market integration.

– Developing constructive proposals that may help in the shaping of normative, contractual, or best practice patterns conducive to the objective of market integration.

– Preparing reports, recommendations and opinions, to be addressed to legislators, regulators, practitioners, and other market organisations, and making comments on open consultations when appropriate.

– Providing and developing a network of financial legal experts able to exchange views and experiences, building a common approach to financial integration in the EU.

– Conveying to the non-EU markets the European approach to financial markets, and observing and benefiting from the experience in and solutions given to similar issues in non-EU markets.

– Upon request, assisting other similar EU financial market groupings with legal advice.

The Group's activities are carried out through plenary meetings, specialised task forces, and regular contacts with similar legal groups outside Europe. The papers produced by the Group are posted on its website for transparency purposes.

History of the EFMLG

The EFMLG was created in 1999 at the time of the introduction of the euro, when (i) the possibility of cross-border financial transactions, using existing and new links between market infrastructures, was enhanced; (ii) a significant step towards the completion of a single financial services and wholesale banking market in the EU was made; and (iii) a single money market reflected in single market rates (the Euribor and the Eonia) was established. Similar pan-European financial market groups were created in the areas of the money market, payment systems, and market operations. Account was taken of the positive influence of similar legal groups in New York, London and Tokyo, sponsored by the relevant central banks, in the evolution of regulation and of market practices in the relevant markets.

Mr Antonio Sáinz de Vicuña,
Chair of the EFMLG

Mr Padoa-Schioppa, former Member of the Executive Board of the ECB, President of Notre Europe

III. Main EFMLG initiatives and contributions, and outcomes

This section briefly describes, chronologically, some of the EFMLG's main initiatives and contributions over the last decade. This chronological order must be qualified since, for some of these projects, the activities of or close monitoring by the EFMLG still continue. Where relevant, this section also provides information on the impact of the EFMLG's advice and recommendations and whether these have given rise to any specific follow-up by policy makers or relevant stakeholders.

1. Cross-border collateralisation in the EU and the Directive on financial collateral arrangements

In the course of 1999 and 2000, the EFMLG carried out a survey on the law relating to collateralisation in the various EU Member States, which identified a number of difficulties inherent in cross-border collateralisation in the EU. In order to contribute to the integration of cross-border financial market activity in the EU, the EFMLG drew up and circulated to the relevant European institutions in June 2000 a report entitled 'Proposal for an EU Directive on collateralisation', on the creation of a harmonised framework with regard to collateralisation in the EU. The recommendations in the EFMLG's report were largely considered positively by the European Commission when drawing up its proposal for a Directive on Financial Collateral Arrangements[6]. In 2001, the EFMLG further contributed to this project − which finally resulted in Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements[7] ('the Collateral Directive') − by publishing a statement on the Commission's proposal for a Directive on financial collateral arrangements. Subsequently, the EFMLG continued to closely follow the implementation by Member States of the Collateral Directive. Its report of March 2006 presents the findings of an EFMLG survey on the implementation of the directive, following-up on the June 2000 EFMLG report.

6 COM/2001/0168 final.

7 OJ L 168, 27.6.2002, p. 43.

2. Harmonisation of laws relating to securities held in book-entry form

In accordance with the EFMLG's belief that the absence of a harmonised legal regime governing the holding and transfer of financial instruments in the EU continues to give rise to distortions, in 2002 the Group started to investigate to what extent harmonisation of laws relating to book-entry securities could be beneficial for the further integration of the financial markets. The analysis carried out by an EFMLG working group led to the adoption in June 2003 of a report entitled 'Harmonisation of the legal framework for rights evidenced by book-entries in respect of certain financial instruments in the EU'.

In this report, the EFMLG strongly recommends legislative action to harmonise the legal regimes governing the holding and transfer of financial instruments by way of book-entries, supported by a system of statutory dematerialisation in the EU, taking full advantage of recent huge advances in computer technology.

The EFMLG believes that Community legislation is needed to allow book-entry securities to be transferred in an identical manner by way of book-entries throughout the EU, and under terms which are harmonised to the extent necessary to avoid barriers to cross-border trading in securities. The EFMLG considers that a EU directive would be an appropriate tool for the facilitation of trade in financial instruments within Europe, improving the conditions for the trading of such assets through the creation of a single market for financial instruments and harmonising the conditions for holding such financial instruments and transferring them from one Member State to another. The effects of book-entries in securities accounts would have to have certain harmonised characteristics. In particular, a high degree of harmonisation is required in respect of the following: the exact nature and extent of an investor's right as evidenced by a book-entry; the protection of investors' rights to the maximum extent possible, even in the event of insolvency of the intermediary; the full tradability of rights in securities as evidenced by book-entries, including the protection of acquirers in good faith; and ensuring the safety of systems of holdings of securities by book-entries through double-entry bookkeeping and clear rules on movements of securities in accounts. The EFMLG believes that a Community legal act should establish the conditions for transfers and cross-border movements of financial instruments, as well as legal certainty for investors when transferring their rights in respect of financial instruments, but should not fully harmonise substantive securities laws, nor affect prudential rules on participants' conduct of business in the securities markets.

The EFMLG report was one of the reference documents used by the Commission when drafting its second Communication on clearing and settlement in the EU[8] and its recommendations were taken into account in the debates of the Legal Certainty Group, i.e. the group of market experts advising the Commission on possible legislative action to remove legal barriers to cross-border clearing and settlement in the EU. The Second Advice of the Legal Certainty Group issued in 2008 largely follows the EFMLG's recommendation that a directive should be adopted in this area.

3. The Short-Term European Paper (STEP) initiative

In 2001, with a view to addressing the observed gap in financial integration, the ECB drew the attention of the ACI to the opportunity of taking collective market action to improve the situation in the short-term securities markets. In response, the ACI created the Euribor ACI STEP Task Force with the mandate of identifying measures that could enhance the development and integration of short-term securities markets (mainly commercial paper and certificates of deposit) in Europe. The basic idea of the STEP initiative was to foster the integration of the different European market segments for short-term securities through the convergence of market standards. To this end, the STEP initiative aimed to (i) identify a set of common market standards and practices capable of promoting market integration; and (ii) foster the voluntary compliance of market participants with these standards and practices by granting a STEP label to compliant issuance programmes.

The EFMLG contributed in the early stages by providing assistance to the ACI on certain legal issues. In particular, the EFMLG's 2002 report on the money market contains a legal analysis of the short-term securities most often used in the money market, namely certificates of deposit, commercial paper and medium-term notes, and details the differences in the legal, regulatory and taxation regimes, and the market documentation, that still exist in the national markets for short-term securities, with special emphasis placed on commercial paper markets. The 2002 report also discussed the treatment of money market instruments in Community legislation and the main legal barriers to the integration of the short-term money market in the EU.

8 COM/2004/0312/final.

In a second stage and on the basis of the ACI recommendations on the promotion of the integration of short-term securities markets, the EFMLG was mandated to define minimum common features for the information memorandum to be used in a STEP wholesale market. A joint ACI-EFMLG report on the information memorandum for STEP was adopted in 2004, which identifies the defining features of STEP and the possible manner in which the STEP market could function, and makes recommendations regarding the practical implementation of the proposed arrangements. The standard information memorandum proposed by the EFMLG served as the basis for the common standards agreed by the ACI and the EBF and laid down in the STEP Market Convention which was adopted in June 2006.

4. Harmonisation of force majeure clauses in market standard documentation

According to the caselaw of the European Court of Justice and in the absence of specific provisions, force majeure means non-performance 'due to abnormal and unforeseeable circumstances beyond the control of [the person invoking force majeure], whose consequences could not have been avoided despite of the exercise of all due care'[9]. As the concept of force majeure is not identical in the different areas of law, the significance of this concept must be 'determined by reference to the legal context in which it is to operate'[10].

Against this backdrop, the EFMLG undertook in 2002 the task of considering whether it would be appropriate to harmonise force majeure clauses which are incorporated, for example, into the standardised master agreements governing over-the-counter financial transactions commonly entered into within the euro markets, with a view to decreasing legal impediments to cross-border financial activity. This resulted in the EFMLG report of November 2003 entitled 'Force majeure clauses and financial markets in an EU context', which contains guidelines relating to transactions affected by force majeure events and recommendations which focus on strikes and computer breakdowns as possible force majeure events.

9 See, for instance, Case C-97/95 *Pascoal & Filhos* [1997] ECR I-04209, para. 64.

10 Case C-314/06 *Société Pipeline Méditerranée et Rhône* [2007] I-2277, para. 25.

5. Harmonisation of netting provisions in the EU

Various Community legal acts have sought to offer greater legal certainty to financial market participants as regards the enforceability of bilateral contractual set-off and netting agreements. These acts include in particular Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings[11] ('the Insolvency Regulation'), Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions[12] ('the Banks Winding-up Directive'), Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings[13] and the Collateral Directive.

The EFMLG has looked into the extent of which divergences in the regime governing netting and set-off still persist between the Member States, potentially causing distortions to cross-border financial transactions. Its 2004 report entitled 'Protection for bilateral insolvency set-off and netting agreements under EC law' identified various legal uncertainties concerning the enforceability of contractual set-off and netting agreements that result from certain provisions of the Insolvency Regulation, the Banks Winding-up Directive and the Collateral Directive. The EFMLG stressed that, to resolve those uncertainties, there was a pressing need for legislative clarification on the scope for insolvency close-out netting arrangements under Community law. The main need for such clarification is because it is deeply uncertain whether the set-off protection in Article 6 of the Insolvency Regulation encompasses close-out netting. As a result, the enforceability of close-out netting arrangements in insolvency proceedings concerning non-financial counterparties is unclear in many Member States.

Moreover, the EFMLG noted that the protection for close-out netting provisions in the Collateral Directive is not sufficient to overcome this uncertainty, since the Collateral Directive applies only to close-out netting provisions in a financial collateral arrangement or an arrangement of which a financial collateral arrangement forms part. In addition, clarification is required because the Community acquis on the enforceability of bilateral set-off and netting

11 OJ L 160, 30.6.2000, p. 1.

12 OJ L 125, 5.5.2001, p. 15.

13 OJ L 110, 20.4.2001, p. 28.

agreements is inconsistent, due to the divergent approaches taken by the Community legislator to overcoming legal uncertainties on their enforceability.

In its 2004 report, the EFMLG also stated that it would support a Community legal act on close-out netting. In the meantime, it proposed that the then forthcoming review of the Collateral Directive should be used as an opportunity to amend and expand its close-out netting provisions. As regards the EFMLG's comments concerning improving the consistency of EU legislation on netting and expanding its material scope beyond the collateral arrangements, the Commission indicated in its 2006 evaluation report on the Collateral Directive[14] that it was open to considering such comments, but not in the context of the Collateral Directive which deals primarily with financial collateral and only peripherally with netting as a method of enforcing collateral arrangements.

In view of the enlargement of the EU in 2004 and the inclusion of further jurisdictions in the single market, in October 2005 the EFMLG issued a supplementary report on the regulation of close-out netting in the new Member States.

More recently, in a letter to the European Commission sent in April 2008, the EFMLG, jointly with the ISDA, submitted a proposal for the adoption of a specific EU netting directive. Considering the paramount importance to the financial markets of the protection of netting arrangements with a view to reducing credit risk and contributing to reducing settlement and liquidity risk and, as a consequence, systemic risk, the EFMLG (and the ISDA) continue to actively monitor developments following this initiative.

6. Signing authorities

In 2006, the EFMLG looked into the matter of signing authorities in connection with standard market documentation. Its work has resulted in the emergence of a comprehensive overview of the national requirements in the EU and the identification of a number of best practice recommendations inclusive of the preparation of a draft template power of attorney. The purpose of this Best Practice Statement is to reflect practical deficiencies (defective or unclear powers of attorney issued by market participants) that have been identified and to

14 COM/2006/0833 final.

highlight the essential elements to be included in authorisations provided by financial institutions, and to propose a preferred format for such authorisations.

7. Harmonisation of legal frameworks on securitisation in the EU

In 2007, the EFMLG adopted its report on legal obstacles to cross-border securitisations in the EU. Over the last decade, both at the national and European level, securitisation markets have witnessed important legislative and regulatory developments. At the Member States level, a number of initiatives have been taken to establish a specific legal and regulatory environment to allow for the development of domestic securitisation markets across Europe. However, the securitisation landscape in the EU is nevertheless characterised by its diversity and fragmentation and a number of legal impediments affect the development of cross-border European securitisations.

Following the assessment of the national legal frameworks in the 15 'old' EU Member States (i.e. the Member States before the May 2004 enlargement) and extensive consultation with market participants, the EFMLG concluded that a certain number of principles common to all jurisdictions need to be applied to ensure a high level of transparency, efficiency and legal certainty with regard to securitisation transactions. Most of these principles were translated into EFMLG recommendations for further convergence of securitisation laws in the EU, which are set out in the report. The EFMLG suggested that these principles could be enshrined in a directive dealing with certain legal aspects of securitisation with a view to a more effective and homogeneous application of internal market principles to the European securitisation industry, including in the Member States that have not developed a specific legal framework on securitisation.

The EFMLG noted that the recommendations in its report would contribute to increasing the awareness of legislators of the need to take legislative action to promote the development of an integrated European securitisation market. Since its adoption, the EFMLG's work in this area has contributed to the EU debate on the integration of European mortgage funding markets[15].

15 See, for instance, the Commission's white paper on the integration of EU mortgage credit markets, COM/2007/0807 final.

These issues have become particularly topical as the securitisation market has received increasing attention with the financial market turmoil, including from the European legislator[16]. In line with the April 2009 G20 recommendations to extend regulation and oversight requirements to all systemically important financial institutions, instruments and markets, proposals recently issued by regulators in the field of securitisation on a global level corroborate some of the EFMLG recommendations at the EU level to the extent they 'suggest some expansion to the current ambit of regulation' in the various jurisdictions[17].

8. Judicial efficiency in respect of financial services claims

The impetus for the EFMLG's 2008 report in this area was the Economic and Financial Affairs Council (ECOFIN) which, following its meeting in Helsinki in October 2006 requested the ECB and the Commission to 'monitor and assess the relevant institutional features that hinder the effective functioning of the financial system, with a view to improving the financial market framework conditions'[18]. The courts are integral to the institutional infrastructure on which well functioning financial markets rely, for example providing legal certainty and resolving disputes. The EFMLG report highlights issues which it believes hinder the efficient and timely resolution of simple financial claims concerning for example unsecured loans and dishonoured bills. The report makes nine recommendations to improve the situation for financial institutions trying to enforce claims. The principal recommendations are that policy makers should adopt measures to reduce the time between the filing of a claim and first judgement, to introduce specialised financial market courts at appeal level and to encourage the wider use

16 See, for instance, the amendments introduced to Directive 2006/48/EC concerning capital requirements applicable to securitisation (Directive of the European Parliament and of the Council amending Directives 2006/48/EC, 2006/49/EC and 2007/64/EC as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management, as adopted in July 2009
(Available at: http://register.consilium.europa.eu/pdf/en/09/st03/st03670.en09.pdf).

17 See, for instance, Technical Committee of the IOSCO, Consultation Report, 'Unregulated financial markets and products', May 2009, para.77, p.81
(Available at: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD290.pdf).

18 ECOFIN Council conclusions of 10 October 2006.
(Available at:http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/91272.pdf).

of pan-European arbitration by international financial groups. The report's aim is to raise awareness of these issues among policy makers and to prompt legislators to take relevant measures.

9. Draft Common Frame of Reference

In December 2008, two academic groups – the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) – submitted to the Commission the final version of a joint Draft Common Frame of Reference (DCFR) which provides a set of 'model rules' covering core areas of civil law such as contract law and proprietary security rights in movable assets. Although it has not yet been decided what the future function of the DCFR will be, the DCFR is an ambitious project and this set of non-binding rules could have an important impact on the financial industry and be a source of inspiration and guidance for both European and national legislators.

Against this backdrop, the EFMLG has contributed to the European contract law project by highlighting in a position paper published in September 2009 some particular aspects of the DCFR that are relevant for the financial services industry. The EFMLG takes the view that the DCFR should be compatible with existing Community financial market regulation and with industry practices and that further important work needs to be done for the DCFR (or the future Common Frame of Reference) to comply with the legal fundamentals on which financial markets rely and the common practices usually applied in the financial services industry.

10. Harmonisation of standard market documentation

The EFMLG has been looking closely at the effects of the use of standardised of master agreements for financial transactions. In this context, it has initiated a dialogue with the leading industry organisations sponsoring standard market documentation, the purpose of which is to discuss the lessons to be learned from the recent market turmoil regarding specific provisions commonly used in financial transactions documentation, and to look at potential divergences between various master agreements.

On 15 September 2009, the EFMLG organised in London a High-Level Legal Symposium, in which various representatives from market and banking associations such as ISDA, SIFMA, ICMA, ISLA, the European Banking

Federation and the European Savings Banks Group, and from various major financial institutions, companies, legal groupings and international law firms participated. In the context of the Lehman Brothers bankruptcy and of the freezing orders of the Icelandic and UK Governments, the termination and close-out procedures as well as the master agreements supporting them were severely tested. Although the overall perception is that the close-out of financial transactions worked quite well, there is also consensus on the fact that the existing fragmentation and diversity of standard market documentation and the co-existence of different, sometimes outdated, versions caused unforeseen issues which need to be addressed. Against this backdrop, the EFMLG set up an ad hoc EFMLG Task Force which mainly focused on five aspects that all standard master agreements have in common: (i) definition of bankruptcy-related events of default; (ii) procedures for terminating master agreements by notice; (iii) operation of automatic early termination clauses; (iv) calculation of close-out amounts including valuation of securities and currency conversion; and (v) resolution of collateral and margin disputes. The EFMLG trusts that the issues already identified by the EFMLG and the recommendations for further standardisation and harmonisation which will follow will serve as a starting point. The EFMLG will monitor and evaluate the progress made in this area.

11. Other recent or current projects

As mentioned in its Charter, the EFMLG strives to examine legislative and regulatory issues and differing market practices that hinder the full development of an EU-wide single financial market, and to identify major barriers, provide advice and recommendations, and suggest best practices, aimed at facilitating harmonisation and convergence in the EU financial markets. In some instances, the EFMLG performs a catalyst role regarding initiatives developed by market associations or international bodies or draws the attention of the European legislator to the need to clarify legal uncertainties identified in Community legislation.

The EFMLG has conveyed to the Commission its concerns regarding the uneven implementation of the Markets in Financial Instruments Directive[19] (MiFID) with regard to its application to forward foreign exchange agreements. It has also pointed out the need for the EU to adopt a robust legal framework governing the holding and transfer of financial instruments as a condition of the success of an UNIDROIT international convention on intermediated securities. The EFMLG has also contributed to the launch by the EBF of its work on the introduction of deposit netting provisions in the product annex for deposits and loans in the European Master Agreement for Financial Transactions. Finally, the EFMLG contributed to the Commission's public consultation on the review of Directive 94/19/EC on Deposit-Guarantee Schemes[20].

19 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145, 30.4.2004, p. 1.

20 Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes**,** OJ L 135, 31.5.1994, p.5.

IV. Overview of EFMLG publications

2009

- Position Paper – Draft Common Frame of Reference (September 2009)
- Letter to the European Commission on the consultation on the review of Directive 94/19/EC on Deposit-Guarantee Schemes, 30 July 2009

2008

- Report: Towards improved judicial efficiency for financial services claims (August 2008)
- Joint EFMLG-ISDA letter to the European Commission: Directive 2002/47/EC on financial collateral arrangements – Proposal for an European netting directive, 14 April 2008
- Letter to the European Commission on the MiFID and forward foreign exchange agreements, 11 February 2008
- Letter to the European Commission on the interaction of the work of the Legal Certainty Group and UNIDROIT, 4 February 2008

2007

- Report: Legal obstacles to cross-border securitisations in the EU (May 2007)

2006

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