

**FINAL DRAFT**

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**33<sup>RD</sup> MEETING OF THE EUROPEAN FINANCIAL MARKETS LAWYERS GROUP,  
20-21 OCTOBER 2009**

**10<sup>TH</sup> ANNIVERSARY OF THE EFMLG**

**Aide-mémoire**

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

The EFMLG has approved the agenda and the Chairman took note of the approval in written procedure of the aide-mémoires of the ad hoc EFMLG meeting of 18 June and of the Quadrilateral meeting of 18-19 June. The Chairman of the EFMLG welcomed the various participants to the meeting and thanked in particular the General Counsels for joining the Group on the occasion of the celebration of its 10<sup>th</sup> anniversary.

The Chairman also introduced Mr Alberto Giovannini, Chief Executive Officer of Unifortune and Principal Policy Advisor of CESAME who addressed the Group by a presentation on the key aspects of capital markets integration in Europe. Mr Giovannini focused his allocution on the main factors which have driven the evolution of financial markets before the financial crisis and on what should change after the significant events of the last two years. Mr Giovannini isolated in particular three items which, in his view, require an increased awareness of the public and policy-makers: (i) the explosion of the counterparty risk in an increasingly securities-based financial system, and the need to avail of risk-absorbers; (ii) the 'boundary' issue, i.e. e. the existence of a structural mismatch between the businesses of financial institutions and the respective competences of supervisory authorities; and (iii) the tremendous deficit of information of public authorities. Mr Giovanni's presentation was followed by a discussion with the Group.

**2. Role of the EFMLG: past, present and future**

The Chairman presented the brochure prepared by the Group for the 10<sup>th</sup> anniversary of the Group which provides an overview of the main contributions of the Group to the legal integration of European financial markets. He briefly recalled the historical context of the establishment of the EFMLG in an environment characterised by the fragmentation of European financial markets, the initiatives taken by the Group to remedy the national diverging requirements (EMA, STEP, etc) and the importance of the activities of the Group in view of the positive development of the systematic consultation of the market on regulatory matters. The Chairman also pointed out that, in his view, the

EFMLG 'bottle' is half full and also half empty with plenty of work still to do. The elimination of legal barriers is a daunting task, and, in a situation of crisis, the intrusive action by Member States creates risk of further fragmentation of the single market. A lot of regulatory action is still needed and the new and enhanced supervisory framework currently under elaboration at the EU level also entails legal challenges.

Against this backdrop, the Chairman of the EFMLG invited the members and General Counsels present at the meeting to provide their views on the achievements of the Group and to provide guidance on how to further improve the organisation, the functioning and the deliveries of the group.

Mr Mark Harding (Barclays) stressed the importance of a better understanding of the various legal frameworks. Although the recent crisis requires thinking about policy issues including legal policy issues, Mr Harding pointed to the need for lawyers to deal with technical implementation issues and to strive not to be overly involved in policy matters. Mr Ulrich Parche (Unicredit) pointed out that, in his view, the networking role of the EFMLG was of key importance and precious in the context of the Group's members day-to-day activities. Moreover, Mr Parche noted that the 'neutrality' of the EFMLG was also a considerable asset of the group but that he was more sceptical on a too broad scope of the advisory role of the EFMLG. Mr Olof Myhrman (SEB) praised the chairmanship role of the ECB, recalled the importance of the EFMLG activities in the field of harmonisation of laws (such as the netting initiatives) and of standard market documentation. He suggested that existing cooperations with market associations such as ISDA could be further extended to other bodies for specific projects (for instance, ICMA). In view of the diversity of the potential legal topics to be addressed in relation to financial markets and in order to be effective, Mr Richard Gray (HSBC) stressed the need for a large group like the EFMLG, to focus on a few critical issues. Mr Hubert de Vauplane (Crédit Agricole Group, Vice-Chair of the EFMLG) underlined that the EFMLG is a unique forum composed of lawyers of European banks dealing with technical aspects relating to capital markets. This is of particular importance since markets are now subject to the laws of 27 Member States. Mr de Vauplane considered that the EFMLG constantly produced reports of a high level quality with a complete holistic view and on a voluntary basis of its members. The Group is not in competition with other groupings or market associations, neither in terms of membership nor in terms of mission and tasks. Mr Bryan Sheridan (Allied Irish Banks) also expressed his support to Mr Harding and Mr Gray's view that the EFMLG valuable input should be reserved for specific and technical issues, although he admitted that the question of boundaries between policy and legal issues is not always strictly defined. Mr Dirk Vloemans (BNP Paribas Fortis) observed that one of the strengths of the EFMLG is to be able to rely on the expertise and knowledge of the various jurisdictions that its members can bring to the benefit of the Group and to pinpoint the gaps and critical legal issues which deserve the attention of policy-makers. Mr Vloemans spotted the EFMLG Legal Symposium on standard market documentation as a typical example of how the EFMLG can be particularly effective. Mr Dimitris Tsibanoulis pointed out the crucial importance of this regular dialogue with market participants.

**Follow-up:** The EFMLG members and General Counsels expressed their full support to the continuation of the Group's activities. It was agreed that the EFMLG would take into account the

above suggestions for further improvement. It was also decided that the Group would need to re-examine the issue of the involvement of the representatives from the banking industry in the new Member States.

### **3. The impact of the turmoil on the function of General Counsel**

The first panel of the meeting was devoted to the above topic. Mr Tsibanoulis introduced the series of presentations and elaborated on the competences which are required from a legal advisor. Mr Strehovec stressed the importance of legal risk management which consists of identifying, assessing and avoiding or mitigating legal risk. Mr de Vauplane described his experience as General Counsel of Calyon<sup>1</sup> in the context of the collapse of Lehman Brothers and the organisation of the legal work by his Legal Department, distinguishing the day-to-day management of the crisis by the General Counsel from the long-term impact on the function of General Counsel and the need to develop a more preventive approach. Mr Harding pointed out that the General Counsel has been at the heart of the decision making process as advisor to the Board of Directors, as advisor to Senior Executive Management and with regard to public disclosure issues. Mr Harding noted that Boards of Directors are now sensitive to legal issues in a way which never happened before and the profile of General Counsels and senior lawyers has increased significantly with an automatic membership of relevant control committees (sometimes chairing). The role of the General Counsel has involved into a position of more independent counsellor on a broader range of issues, not necessarily of legal nature. Ms Nadine Faruque (Unicredit) noted that the General Counsel function often requires taking immediate decisions in a complex environment and with regard to institutions based in other jurisdictions, which constitutes a challenge in itself. She pointed to the important role of the Legal and compliance departments as part of the risk management strategy of the institution.

The Group discussed aspects related to the complexity of legal documentation for sophisticated financial products, the risks incurred by the involvement of lawyers in decision-making processes. The Group also examined the issue of the separation between compliance lawyers from transactional investment banking lawyers more involved in the legal documentation and the risks of not preserving the unity of legal advice, thereby duplicating efforts and of 'downgrading' the work of transactional lawyers.

### **4. Current issues in the field of standard market documentation**

Mr Holger Hartenfels (Deutsche Bank) provided an overview of the successful EFMLG initiative in the field of harmonisation of standard market documentation. Mr Hartenfels recalled that the participants to the Symposium agreed to reconvene the forum mid-2010 in order to monitor and evaluate the progress made until then in this area. Ms Susan O'Malley (HSBC) provided an overview of the answers provided by the EFMLG members to the questionnaire on the financial crisis and its organisation of a bank's legal department. Many banks have moved away from structured and

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<sup>1</sup> Mr de Vauplane is currently General Counsel of Crédit Agricole Group.

complex transactions and focus more on standardised business, which may require less or different legal support. At the same time, the EU and G20 levels initiatives aiming at rebuilding a stronger and more consistent legal framework for the future financial sector and the increased litigation experienced by banks, require increased legal support. Ms O'Malley also reported that banks experienced an increase in litigation, the peak of which is still yet to come. The survey also revealed that the insolvencies experienced during the crisis meant a severe stress test for the legal department's policies and procedures and the documentation used for business (e.g., loan documentation, custody arrangements, master agreements for derivatives and security financing transactions, procedures for failed settlements).

**Follow-up:** The EFMLG will shortly render a report on the outcome of the EFMLG Symposium of 15 September, which is expected to constitute the benchmark for the future discussion with the industry associations.

## **5. The regulatory agenda in the EU following the financial turmoil and the reform of European financial supervision**

Mr Fernando Conlledo (CECA) provided an overview of the on-going EU regulatory agenda on crisis management and resolution. Mr Conlledo reminded the main recommendations of the de Larosière report in this field, the basic features of the current EU legal framework for dealing with distressed banks and the recent recommendations by the BIS Cross-border Bank Resolution Group, the on-going discussion on deposit insurance schemes and burden sharing in a cross-border context. Mr Conlledo concluded his presentation by a description of the various policy developments to be expected in this area and he mentioned in particular the communication of the Commission on an EU Framework for Cross-Border Crisis Management in the Banking Sector (COM(2009) 561/4).

Ms Francesca Passamonti (IntesaSanpaolo) addressed the issue of colleges of supervisors, the legal basis of these new structures, their tasks, their strengths and weaknesses and possible ways for improvement.

Ms Chiara Zilioli (ECB) examined the main lessons learned from the crisis, the new proposed financial architecture for the EU and its possible direct and indirect impact for credit institutions. The new European Supervisory Authorities (ESAs) will have the power to request information, to address individual decisions to credit institutions, to address guidelines and recommendations to individual institutions and possibly direct supervisory powers over certain entities. The indirect impact relates *inter alia* to the power of ESAs to develop technical standards and to adopt decisions addressed to national authorities.

## **6. Prospective legal issues to achieve integration of wholesale banking markets**

Mr Pedro Ferreira Malaquias informed the Group of the status of the joint EFMLG-ISDA initiative on close-out netting and examined the perspectives of harmonisation of these rules both from a regulatory and contractual level. Mr Moïse Bâ (BNP Paribas) examined possible legal implications of the new Commission's initiatives regarding OTC derivatives markets (COM(2009) 563 final), also

taking into account policy developments in the US. In this context, Mr Ulrich Parche suggested that the Group should discuss legal issues raised by underlying documentation for the access to central counterparties including the conduct of business rules, governance procedures, legal protection of collateral and positions. Upon request by the Chairman, Mr. Parche accepted to chair the new Task Force. Mr Myhrman discussed the Over-Collateralization Risks in the FX and OTC derivative markets based on the recently published paper by ISDA, MFA and SIFMA and entitled 'Mitigating the Risk of Over-Collateralization'<sup>2</sup>. Collateralization has become a key method of mitigating counterparty credit risk in the derivative markets, both bilateral, privately-negotiated derivatives and exchange-traded, standardized derivatives. As developed in the paper, by this method a party may provide collateral to its counterparty or the exchange clearing house in an amount that exceeds the credit exposure between the two parties at a given point in time. This may occur intentionally, for example through the delivery of Initial Margin or Independent Amounts (in ISDA terminology) or unintentionally due to market fluctuations. Any situation in which one party has delivered collateral in excess of its obligation to the other party may represent additional risk in the event that the other party becomes insolvent. Mr Myhrman pointed out that a second part of the paper (which will be published later this year) will include potential remedies. Mr Stéphane Kerjean closed the last panel of the meeting with an up-date on the recent EU and international regulatory developments in the field of banking law and cross-border resolution of financial institutions and noted that some of these initiatives will require further attention of the EFMLG in the course of the next months.

**Follow-up:** The EFMLG will set up a Task Force chaired by Mr Parche dealing with legal issues raised by the access to central counterparties. EFMLG members are invited to express and/or confirm their interest in participating to the Task Force by **cob Friday 20 November**.

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

No specific issues were reported under this item.

#### **8. Other issues – Next meetings**

The next three meetings of the EFMLG will take place respectively:

- in **Frankfurt am Main** at the Deutsche Bank premises on 21 January 2010;
- in **Granada** on 7 May 2010 (the meeting will be hosted by CECA); and
- in **London** on 30 June - 1 July 2010 (the Quadrilateral meeting will be hosted by the Bank of England).

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<sup>2</sup> The document is available on the ISDA website and on the EFMLG intranet.