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## **34<sup>TH</sup> MEETING OF THE EUROPEAN FINANCIAL MARKETS LAWYERS GROUP, 2 MARCH 2010**

### **Aide-mémoire**

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

The EFMLG has approved the proposed agenda and the draft aide-mémoire of the last EFMLG meeting of 20-21 October 2009. Before entering into the items of the Agenda, Fernando Conlledo reported on the programme and the logistics of the next meeting to be hosted by CECA in Granada (Spain) on 7 May 2010. The Chairman expressed his gratitude to CECA for hosting the meeting.

#### **2. Market Standard Documentation: Lessons learned from the turmoil**

Holger Hartenfels presented the latest draft of the EFMLG Report on Market Standard Documentation, as prepared by Linklaters and commented upon by members of the task force. The draft report is close to finalisation and as pointed out by the Chairman, it is essential to finalise it soon, within about a month, in order to have the desired impact, in particular ahead of the general meeting of ISDA in April 2010. Hubert De Vauplane argued that the EFMLG should make efforts so that the standard documentation changes agreed upon by the EFMLG are implemented in practice soon after the publication of the report. Members agreed that it is fundamental to involve the relevant industry associations, whose reactions were limited after the London Symposium last year. Lobbying by the Commission and the EBF is also essential, and regulators should also look at the report. Chandra Bhargavan added that, in fact, this should be a global project and the relevant Asian associations could also be involved. These considerations could also be reflected in the Executive Summary that would explicitly include the request by the EFMLG that industry associations implement the recommendations of the report.

#### **Follow-up:**

The Executive Summary will be prepared and the draft further updated. Members have 10 days to comment. It was also agreed that a mailing list of recipients of 50 to 100 people would be put together and they would receive the report both as hard and soft copy. The Chairman, together with Holger

Hartenfels will also draft a press release accompanying the publication of the report. The topic will be also on the agenda of the quadrilateral meeting in June in order to inform the partner organisations.

### **3. Report on central counterparties: report to the European Commission**

Ulrich Parche presented the draft report prepared by the ad hoc EFMLG Task Force. The draft report, which does not cover Asia, intends to provide input to the Commission beyond the relevant Commission questionnaire (not more than 1/3 of the content of the report would be covered by the questionnaire). For the Task Force, the Commission should be made aware, among others, of the difficulties that small banks are already having and will have with CCPs. Also, there is a fundamental difference when it comes to the legal nature of CCPs: some are banks (Eurex) and some are not banks (ICE). In the discussion, among others, two main questions came up: there is a big concentration of risks on CCPs and legislation should be the tool to mitigate/eliminate such risks; and the documentation so far used by CCPs is far from being uniform (while Eurex is own-rules based, ICE is master-agreement based) and such diversity might have legal risks. Given the complexity of CCP issues, the EFMLG report would become too large if it was to cover comprehensively all matters and, thus, it should circumscribe itself to focusing on a limited number of CCP questions.

#### **Follow-up:**

It was agreed that mid April 2010 would be the ideal time-frame for the finalisation of the report by the Task Force. Thereafter, the report will be sent to the European Commission, presented at the global videoconference end of May 2010 by the LEGCO Secretaries, and feature on the next quadrilateral London meeting agenda in July 2010. All EFMLG members were encouraged to submit their comments on the draft report and also to join the Task Force, in particular, Spanish and Scandinavian colleagues so as to cover most relevant jurisdictions.

### **4. Short selling, settlement failure and financial market integrity - Do we need EU wide harmonised post-trading rules?**

Following a CESR public consultation, Dimitris Tsibanoulis made a presentation on short selling including the latest regulatory reports, concerns and developments. The main point is that the impact and risks of naked short selling on securities settlement systems (SSS) has probably not been sufficiently analysed and addressed. Naked short selling may represent a threat not only to market integrity but a systemic settlement risk if not addressed properly.

#### **Follow-up:**

While the interest of the questions triggered by the presentation was acknowledged and found very topical, it was considered that short selling could not make the object of an EFMLG report, particularly since the relevant CESR consultation deadline had elapsed.

### **5. Electronic Trading - Terms and Conditions, Substantive Terms and Authority for Acceptance**

Helen Moran introduced the topic on terms and conditions relating to electronic trading that are often displayed on websites by different suppliers. It is required that, in order to trade, a dealer must click and accept such terms. The terms provide that the financial institution will be automatically bound by these

terms as soon as the end user clicks acceptance or uses the service. Such practice is problematic in different respects as it was described in detail by Helen Moran. Such concerns were shared by other members. Some considered that certain coming EU legislation, like MiFID or the prospective European Market Infrastructure legislation (EMIL) could address the issue, but everyone agreed that it is very difficult as, ultimately, this is a contractual matter and end users are technically not under consumer protection laws.

**Follow-up:**

In principle the EFMLG will not follow-up on this topic until the EMIL is mature and made public, and may be analysed by the group.

**6. Benchmarking exercise – responses to different public consultations of the Commission and CESR regarding the upcoming MiFID revision**

Moise Ba presented the point. MiFID revision is a priority of the French Banking Federation. In the MiFID revision several current debated questions were at stake: pre and post trade transparency, complex and non complex financial instruments, best execution, conduct of business. Ultimately, is MiFID a burden or an opportunity? In Moise Ba's view, MiFID is overall a success but improvements are necessary particularly regarding transparency and competition between trading venues. The MiFID revision is the adequate forum for these debates.

**Follow-up:**

Moise Ba will prepare a MiFID revision chart for the May Granada EFMLG meeting with a view to collect national responses on the points covered by the chart. While it was not agreed to set up yet a formal "MiFID revision Task Force", EFMLG members who would like to contribute to the preparation of the chart should contact Moise Ba.

**7. Public consultation on provision of ABS loan level information in the Eurosystem collateral framework**

Otto Heinz introduced the topic through a short presentation. There has been a recent public consultation on a project initiated by the Eurosystem<sup>1</sup> aiming to raise the disclosure standards of securitisation markets and set new market benchmarks. More transparent and timely information on the underlying loans and their performance, in a standardised format, would help rating agencies and investors in their due diligence and restore the weakened confidence in the securitisation markets.

During the discussion members made some comments on the initiative, pointing out how it could be fine-tuned. It was pointed out that whilst the increase of available information to market participants is important and standardisation of the available information is beneficial, the project should be approached in a pragmatic manner. One question is whether individual information is always needed, or whether in certain cases aggregate data would be sufficient. Holger Hartenfels pointed out that rating agencies, investors and collateral takers probably do not have the same information needs. It was stressed that the

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<sup>1</sup> <http://www.ecb.int/paym/cons/previous/html/abs.en.html>

data requirement should not require old data from originators as it may be difficult for them to gather such data retroactively. In general the importance of providing grandfathering period was emphasised. Tom Bartos called the EFMLG's attention to issues relating to auditing and verification of compliance and also whether the burden of such requirements could negatively impact the fulfilment of the core tasks.

**Follow-up:**

At the end it was agreed that whilst the EFMLG will not specifically pursue the project, since the ECB's public consultation deadline had elapsed, the comments made by the EFMLG at the meeting would be channelled informally by the EFMLG Secretariat internally within the Eurosystem.

**8. Prime collateralised securities: Initiative of AFME and ESF regarding the revitalisation of the securitisation markets**

Otto Heinz introduced the topic through a short presentation. The Association for Financial Markets in Europe and the European Securitisation Forum is currently working with market participants on an initiative aiming at the revitalisation of the securitisation markets. The essence of the initiative is a quality label, assigned to ABS fulfilling the designed criteria. The question to the group was submitted of whether there was a role for EFMLG to play in the matter, similar to the role played in the past with the STEP label and the ACI. Against this, it was noted that industry efforts to revive the ABS market focused rather on business issues and not on the legal framework or standards.

**Follow-up:**

After a short discussion it was decided that the EFMLG will not pursue the matter at this stage and would take a passive role, i.e. only act if specifically approached on it by the AFME or the ESF.

**9. Other issues – Next meetings**

The Chairman indicated that at the May Granada EFMLG meeting an exchange of views on the draft Securities Law Directive being prepared by the Commission may feature on the agenda given the importance of the substance matter and also in view of the fact that several EFMLG members had participated in the Legal Certainty Group. So far, the Commission has presented two discussion papers to the Member States Working Group which is helping the Commission to finalise the draft Directive. The Chairman said that, in its current status, the draft proposal might not be leading to a sufficient level of European harmonisation and might also fall short of achieving legal certainty.

Hubert De Vauplane announced that he will put some recent case law of interest for the EFMLG, among which recent English netting case law, into the website (EFMLG member space).