

FINAL DRAFT

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35TH MEETING OF THE EUROPEAN FINANCIAL MARKETS LAWYERS GROUP, 7 MAY 2010

Aide-mémoire

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

The EFMLG approved the proposed agenda and the draft aide-mémoire of the last EFMLG meeting of 2 March 2010. The Chairman informed that Chiara Zilioli had been promoted to another business area of the ECB, and resigned as EFMLG member. In addition the Chairman expressed on behalf of the group his gratitude and appreciation to Holger Hartenfels and Fernando Conlledo for kindly organising the 34th and 35th EFMLG meeting respectively.

2. Cross-border banking resolution issues

The Chairman introduced the topic, recalling that it is in the global and EU agenda since the crisis, especially following the Lehman and Icelandic bankruptcies, which showed the weaknesses of the present system as there were different unconnected bankruptcy procedures in different countries and the creditors in different jurisdictions lacked group and intra-group information, lacked locus standi outside their jurisdiction, cooperation between courts were inexistent, and joint approaches were not possible. With this background, recent G20 meetings stressed the need to address cross-border insolvency procedures globally and, prompted by this, the BIS published its report on cross-border bank resolution in March 2010. The Chairman recalled recommendations 8 and 9 of this report, on which the group as a market body should now focus. Striking the correct balance between regulatory measures aimed at minimising general damages and individual termination and close-out rights is still at the centre of the attention. Some members cautioned about the possible drawbacks of regulation oriented proposals: if regulators interfere with the transfer of claims, the calculation by a credit institution of its overall exposure to a given counterparty becomes uncertain. Similarly, if not all claims of an entity are transferred at the same time, but there is a delay, this delay can again cause uncertainty. The result of this uncertainty is the need to increase capital. It was also stressed that global solutions, striking the right balance must be

found between micro and macro approaches, were needed in view of the global dimension of the market. It was finally noted that ISDA is also dealing with the issue. It was agreed to put this topic forward during the upcoming quadrilateral meeting.

3. Report on central counterparties (CCPs): contribution to the European Commission's consultation.

The activity of the EFMLG Task Force on CCPs was introduced. As there were quite different views within the Task Force about the possible content of an EFMLG report, instead of a report, an EFMLG letter will be sent to the Commission. The following elements will be addressed in the letter:

- To properly address liquidity risks, but also to cater for their deposit-taking and lending tasks, CCPs should ideally be banks. This would mean that they would be subject solvency, liquidity requirements and supervision, and have access to central bank liquidity, which would make such systemic-relevant institutions more solid;
- At the moment a key problem is inadequate legislation; mandatory clearing through CCPs is a fundamental issue for transparency, statistics, and harmonisation purposes.
- It should be clarified if only financial sector derivatives, or other derivatives are included;
- The EFMLG input should only focus on legal and regulatory issues.

The next steps of the preparation of the EFMLG letter were discussed.

4. The work programme for the Commission for 2010

The work programme for the Commission for 2010 was introduced. Members discussed which pieces of legislation – that the EFMLG does not yet deal with – could be of interest for the group to assess and possibly give input on. The topics that were singled out as being of particular interest for EFMLG were the following:

- Communication on the European contract law - Method towards the adoption of the Common Framework Reference;
- New comprehensive legal framework for data protection (in financial services);
- Legislative initiative on short selling / Credit Default Swaps;
- Revision of the Market Abuse Directive.

In addition, the definition of 'investment advice' was discussed: this definition may be currently too wide and even unclear, which gives rise to legal uncertainty. This issue will be addressed in a letter to the Commission and possibly will be included it in any eventual MIFID related EFMLG input.

5. Securities Law Directive (SLD)

Based on the second Discussion Paper of the Commission for the Member States Working Group advising on the SLD, the Chairman introduced his first assessment, pointing out that as it stands in the Discussion Paper, the projected SLD will not achieve a level of legal harmonisation which would allow a real EU-wide primary and secondary securities markets. In addition to numerous references to national

law provisions, there are also several contradictions within the draft. Some members pointed out that national banking federations and the EBF were asked to comment on the drafts. The Chairman will prepare a draft letter to the Commission on the subject, which will be circulated for comments before submission to the Commission.

6. MiFID revision: Benchmarking exercise; 3 CESR Consultations

The various recent consultation papers of the Commission were reviewed and briefly discussed. It was specifically mentioned that issues related to 'dark pools' and 'inducements' can be of particular interest for EFMLG members. The group decided not to contribute at this stage to those consultations.

7. Preparation for the upcoming Quadrilateral meeting

The Group discussed the planned agenda of the upcoming Quadrilateral meeting. It was agreed to put forward the following sub-topics with the following speakers on behalf of the EFMLG:

For Agenda Topic 1:

An update of the emerging new European Supervisory Architecture (Antonio Sáinz de Vicuña)
Securities Law Directive, European Market Infrastructure Regulation (Pedro Malaquias)

For Agenda Topic 2:

Cross-border banking resolution banking resolution issues (Fernando Conlledo and Niall Lenihan)

For Agenda Topic 3:

EFMLG Initiative on Standard Market Documentation (Holger Hartenfels).

In addition, there will be a meeting with representatives of the different market associations beforehand, discussing the follow up the EFMLG report on standard market documentation. Susan O'Malley of HSBC kindly offer to host this meeting in London, subject to confirmation.

8. Publication of the EFMLG Report on Market Standard Documentation

There was an update on the reactions of the market associations on the report. In this context it was discussed already under agenda point 7 that there will be a follow-up meeting with those associations. The importance of EFMLG members informing local business contacts about the report was also highlighted.

9. Follow-up on the Eurosystem's ABS loan level data project

As a follow-up to the discussion of the previous EFMLG meeting on the Eurosystem's ABS loan level data project, members were updated about the main findings of the public consultation, and also about the planned next steps envisaged by the Eurosystem.

10. Legal consequences of an EU sovereign debt default and G20/IMF proposals on financial services tax

Tom Bartos introduced the subject matter. There was a discussion about the disruptions of the sovereign bond market, partially caused by abnormally high volumes of naked short selling, The distinction between

euro area member states and non-euro area member states and also between external and internal indebtedness was highlighted. It was pointed out that in the EU, medium term financial assistance is only foreseen for non euro area Member States. It was also explained that Article 124 of the Treaty only deals with the prohibition of taking over the obligations of a Member State by other Member States or by the EU, but lending as such is not prohibited. There was also a short discussion on the issue of to what extent the adoption of an IMF programme constitutes a restructuring event in case of CDS contracts, as contractually defined, with an overall sentiment based on past experience of this not being the case. The pro-cyclical role of the rating agencies on sovereign bonds was also touched upon.

Tom Bartos presented the current status of the discussions on financial services tax. The different options on the table were reviewed, including the choice between pre- and post funded approaches, and possibly transaction-based taxes. Some members raised the issue of to what extent there is overlap with other plans relating to bank resolution funds or with deposit guarantee schemes.