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37TH MEETING OF THE EUROPEAN FINANCIAL MARKETS LAWYERS GROUP, 28 OCTOBER 2010

Aide-mémoire

1. Approval of the agenda

The EFMLG approved the proposed agenda.

2. Scope of legal privilege in the EU

The recent decision of the European Court of Justice in the AKZO Nobel case has clarified the extent to which companies may be able to prevent disclosure of documents during European Commission competition investigations on the basis that the documents are protected by legal professional privilege. The Chairman presented the case and members discussed it: basically, for the ECJ, in-house lawyers are not sufficiently independent to justify the application of the privilege since they know the strategy of the company and influence it, among others. The rule applies to procedures taken place under EU law only and does not prejudice the application of the legal privilege regarding procedures under national law; and the advice at stake is that connected to the company's rights of defence. EFMLG members discussed the practical measures which they can take against an eventual increased restriction of the legal privilege for in-house lawyers, among which, putting the legal function higher up in the structure of the company, not keeping it at the level of business area equal to the others, giving legal advice in a separate file with restricted circulation, using the telephone more.

The EFMLG will follow the developments in the field.

3. Policy options regarding European Contract Law

The European Commission has published a Green Paper on policy options for progress towards a European Contract Law for consumers and businesses. The EFMLG provided input already on the Daft

Common Frame of Reference (DCFR), published in 2009. Building on the DCFR, among others, the Commission is investigating the feasibility of preparing an instrument of European Contract Law. This instrument should remove the market barriers relating to diverging contract laws. An Experts Group advises the Commission. The Green Paper is about the policy options for such an instrument of European Contract Law. There was a short discussion on the different options proposed in the Green Paper. Option 2 (Commission adopting an act (Communication or Decision) to be used as a reference tool for new legislation) could be considered fine by the EFMLG but the EFMLG would prefer Option 3 (Commission recommendation on European Contract Law encouraging Member States to replace national contract laws with the recommended European instrument). Option 4 (Commission regulation setting up an optional instrument on European Contract Law, a sort of second regime optional in each Member State and common to all) could eventually also be accepted by the EFMLG, even if some EFMLG members highlighted the difficulties of this Option. Other EFMLG members saw in a European instrument the potential to influence legislation in Asia and Latin America.

A group composed of the EFMLG Chairman, Holger Hartenfels, Araceli Leyva, Moise Ba and Susan O'Malley will follow the evolution of this dossier, as necessary.

4. Commission plans regarding netting legislation

The Commission is currently considering two legislative initiatives that have substantial impact on close-out netting. Initially it was envisaged that a representative of DG-Markt would attend the meeting, but it had to be cancelled at short notice. The discussion took place on the basis of information submitted informally by the Commission. The first initiative is that the Commission envisages acting upon the suggestion to have specific EU legislation on close out netting. As the EFMLG has a clear interest in the matter, and previously issued – together with ISDA - recommendations to the Commission, it was decided to actively follow the project. It was decided that a task force is set-up on this subject and some EFMLG representatives attend the meeting the Commission organised with the view of gathering banks' views on the subject. Second, in the context of the crises management framework, the Commission considers providing authorities in the Member States to temporarily delay for a very short period the immediate operation of close-out netting clauses in order to facilitate the transfer of financial market contracts to another sound financial institution, a bridge financial institution or other public entity. This would constitute an amendment to the EU Collateral Directive's automatic recognition of close-out netting in financial collateral arrangements. This amendment would be line with recent recommendations of the Basel Committee on Banking Supervision. The EFMLG agreed also to actively follow this initiative and to send representatives to the meeting organised by the Commission in Brussels.

5. Securities Law Directive (SLD)

A group of EFMLG members met the Commission in Brussels on the 20 September 2010 regarding the proposed Securities Law Directive. The meeting was summarised: the EFMLG representation to the meeting reiterated the EFMLG views put forward in the EFMLG letter on the SLD submitted to the

Commission in the Summer of 2010, along with the criticism on potential disruptive market impact, and the Commission, while understanding the EFMLG criticism, remained in its position that the draft SLD, as foreseen, was a positive instrument. The way forward was discussed. The Commission would launch a public consultation on the basis of a text which would benefit already from the work of the Member States Expert Working Group and from other contributions received, among which those of the EFMLG (Summer letter, September Brussels meeting).

The opening of this public consultation was imminent at the moment of the meeting but had not yet taken place. Eventually, the EFMLG could consider participating in it.

6. Seminar on legal aspects of derivatives clearing in central counterparties (CCPs)

Clifford Chance and ISDA gave a 2 hour seminar on the matter covering:

1. Basic mechanics of OTC clearing (Caroline Meinertz) including differences between bilateral markets and centrally cleared ones,
2. Clearing Structures (Jeremy Walter) including different models of client clearing (principal model / agency model), legal documentation requirements, clearing house rules and role of the ISDA agreements.
3. European Regulations (Marc Benzler) comparing EMIR and Dodd-Frank including their extraterritorial effects and also covering the impact of and on Basel III.
4. Issues for reflection in particular risk issues (David Murphy) including a reflection of what is the real extent of the risk reduction of CCP clearing.

7. ABS update

Members received further update on two major projects aimed at reviving the European securitisation market: the ABS loan level data initiative and the Prime Collateralised Securities (PCS) project. Regarding the first project members were informed that project goes ahead and the Eurosystem will require loan level data regarding the use of ABS as collateral. Currently the focus is on setting up the necessary infrastructure in order to process loan level data, in particular Data Warehouses. With respect to PCS project, members were informed about the latest developments, in particular about the results of the investor surveys and about the legal issues arising in connection with this initiative. Members were invited to consider the possible involvement of the EFMLG with some legal aspects of the exercise. It was decided not to work actively on this project at the current juncture and to monitor further developments instead.

8. Work Plan for 2011

Members had a first exchange of ideas regarding the EFMLG work plan of 2011. The Chairman stressed the importance of members taking the initiative putting forward and working on topics.