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38TH MEETING OF THE EUROPEAN FINANCIAL MARKETS LAWYERS GROUP, 22 MARCH 2011

Aide-mémoire

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

The Chairman gave a week for members to provide comments, if any, on the aide-mémoire of the last meeting.

2. Close-out netting legislation of the EU Commission

Rogier Wezenbeek from the Commission joined the meeting and gave the EFMLG an update on the latest state of affairs. He confirmed that whilst the political focus may have shifted towards the issue of suspension of close-out netting in the context of crises management, EU legislation on close-out netting is still being actively considered, albeit with some delays. The meeting envisaged with the Member States' Working Group on 12 April will be of great importance. Public consultation is expected for early May, with a legislative proposal in September. Currently not only a directive but also a regulation is conceivable.

Representatives from ISDA Ed Murray and Peter Werner have introduced the views of ISDA, expressing strong support for the project. They also pointed out that the project is likely to be a lot more simple than the amendment of the FCD. It was also pointed that there would probably be no need to amend the insolvency regulation and only article 25 of the Winding up Directive needs to be deleted in case there is a separate EU legal instrument on netting.

Holger Hartenfels, heading the EFMLG task force also stressed that the EFMLG intends to actively help the Commission with this important project.

In the subsequent discussion it was agreed that preferably the personal and the product scope of the legal act should be wide, but not necessarily as wide so as to hinder the political acceptability of the instrument among Member States. Regulation is also preferred to a directive for the sake of clarity.

Finally there was also discussion on the global dimension of the subject, and the need to co-ordinate globally, e.g. with the US, was emphasized. Attention was also brought to the subject of jurisdictions outside the EU and the US, in particular Russia and China and to the beneficial role EU legislation could play there if adopted in time. The UNIDROIT project on close-out netting was also mentioned, although it was concluded in the past this approach did not effectively brought about the global harmonisation that was hoped for.

Follow-up:

The Commission agreed to share the update of the Discussion paper for the 2nd meeting of the close-out netting member states working group of 26 January 2011 with the EFMLG once it is ready. Furthermore, both the EFMLG and ISDA expressed their continued full support for the project, most imminently in the context of the public consultation being considered.

3. Two recent English High Court judgements with special relevance to financial markets

Helen Moran briefed the group about two decisions of the English High Court that are relevant to the interpretation of the ISDA master agreement. On 21 December 2010, in *Lomas v JFB Firth Rixson, Inc*, the English High Court ruled on an application for directions by the Joint Administrators of Lehman Brothers International (Europe) (LBIE) as to the true construction and effect of Section 2(a)(iii) of the 1992 and 2002 ISDA Master Agreements. Section 2(a)(iii) provides, amongst other things, that the obligation of each party to make the payments specified in each confirmation is subject to the condition precedent that no Event of Default or Potential Event of Default with respect to the other party has occurred and is continuing. On 7 May 2010 in *Gray & Ors v G-T-P Group Ltd (Re. F2G Realisations Limited (in Liquidation))* the High Court issued an important judgement. This case is of interest because it is the first English case to consider the meaning of 'control' under the Financial Collateral Arrangements (No. 2) Regulations 2003 (the 'Regulations'). The particular floating charge was held to be void against the liquidator due to lack of registration and the Regulations could not be relied upon due to the interpretation of 'control' for the purpose of the Regulations. There are references in the Judgment to 'real legal control' as opposed to simply 'administrative control'.

In conjunction with the above briefing, Ed Murray has described ISDA's activities as regards the above-mentioned cases, including ISDA's views on the subject matter of the judgements.

4. Presentation on the reform of the saving banks (Cajas) in Spain

Araceli Leyva gave a short presentation to the EFMLG on the significant reforms the system of savings banks in Spain is expected to undergo in the near future, including recent legislation on these institutions and their expected public offering.

In the subsequent discussion members had the chance to ask questions about the presentation.

5. Crises management framework

Hubert de Vauplane introduced the subject. In its Communication of 20 October 2010, the Commission announced its plans for an EU framework for crisis management in the financial sector, together with a timetable for action to implement the ideas set out in that document. The EU Commission had sought the views of the market already on the technical details of a possible EU framework for the management of failing credit institutions and an appropriate class of investment firms. The Commission intends to adopt a legislative proposal on bank recovery and resolution in June 2011. EFMLG members discussed the input they provided in the consultation, and exchanged views on the problematic points.

One issue mentioned was the compatibility of the proposed framework with the 6th Company law directive as regards creditors consent in case of reorganisation. Another issue related to the geographical scope, how EU legislation can deal with global entities. Furthermore level playing field is also an issue as many banks outside the EU and the US are not affected by such rules. Confidentiality concerns were also mentioned as reorganisation plans contain strategic information and as such very sensitive. Especially it is a concern how confidentiality could be preserved outside the EU. Pricing of assets could be hindered if counterparty to whom contracts are transferred is uncertain. A point was also made re the transfer triggering credit events.

Follow-up:

It was agreed that despite the fact that the Commission's public consultation has already closed, it would be useful if the EFMLG directly communicate its views on the matter to the Commission. Hubert de Vauplane kindly agreed to prepare the letter, reflecting the concerns raised by members during the discussion.

6. Extraterritorial effects of the Dodd-Frank Act, in particular Title VII

Mike Prokop described the uncertainties regarding the scope of the Dodd Frank Act, and its extraterritorial effects, in particular Title VII, which deals with the registration of swap dealers and major swap participants. This can have a significant impact on the business of European banks. The US Commodity Trading Futures Commission provided rather unclear guidance and SIFMA, SocGen, IIB and Davis Polk & Wardwell (on behalf of Barclays, BNP, Deutsche Bank, Royal Bank of Canada, RBS, SocGen and UBS) submitted their position to the CFTC, SEC and FED. Members discussed the issues involved, and shared the concerns put forward in the introduction.

Follow-up:

It was agreed that the Chairman sends a letter to the CFTC, SEC and FED on behalf of the EFMLG in support of the efforts of the above mentioned parties to clarify the extraterritorial impact of Dodd Frank.

7. Tour de table of EFMLG responses regarding MIFID 2 and PRIP consultations

Bertrand Bréhier led the discussion on two already concluded public consultations of the EU Commission, the first on MIFID 2 and a second, related consultation is on legislative steps for Packaged Retail Investment Products. As regards MIFID, key points discussed included questions related to market structures, automated trading, pre- and post-trade transparency, investor protection and provision of investment services, and regulatory framework and supervisory practices.

Follow-up:

It was agreed to wait for the Commission to summarise the findings of the public consultation, and then the EFMLG could react to it in a letter to the Commission.

8. Establishing a specialized financial tribunal for complex financial products in The Hague

Representatives of the World Legal Forum Foundation, Prof. Jeffrey Golden and Ms. Camilla Perera, described the project to establish a Panel of Recognized International Market Experts in Finance (PRIME Finance), an international tribunal specialized in resolving cases arising from the most sophisticated financial instruments.

Members had the opportunity to provide comments and to ask questions. Whilst there was general support for the idea to have a specialised tribunal for complex financial products, the suggestion was made to explore the possibilities of setting it up under the auspices of an existing arbitration court, so as to make it “institutional” rather than ad hoc.

Follow-up:

It was agreed that the EFMLG would monitor the developments of this project.

9. Discussion on the work of the EFMLG

The Chairman initiated an informal discussion about ways to develop further the work of the group. The ideas that were raised by members included the following:

- With more advance preparation before meeting it is easier to focus on concrete EFLMG follow-up actions
- Posting key court decisions (e.g. re derivatives) on the EFMLG website
- Identifying for certain members special areas to monitor for the benefit of the EFMLG
- More time for tour de table for benchmarking regarding public consultations
- Creation of an EFMLG email address

Follow-up:

Besides following up on the ideas above, members agreed to communicate any further ideas to improve the work of the group.

10. Quadrilateral meeting (*for discussion/information*)

The topics to be proposed by the EFMLG for the Quadrilateral meeting were discussed. The following items were mentioned:

- Close-out netting legislation of the EU Commission
- Extraterritorial effects of the Dodd-Frank Act
- Crises management framework
- Issues relating to the application of FATCA

Follow-up:

It was also agreed to organise an EFMLG conference call following the quadrilateral meeting dedicated to debrief members who could not attend the meeting.

11. Other issues – (*for discussion/information*)