

Mr Giovanni Sabatini

Chairman of the Executive Committee of the European Banking Federation

General Director of the Italian Banking Association

Mr Wim Mijs

Chief Executive of the European Banking Federation

31 August 2017

Dear Sirs,

On behalf of the European Financial Market Lawyers' Group (EFMLG), we are turning to you about the pressing need for action in order to address the long-term viability of the European Master Agreement (EMA). The EMA has an important role to play in the financial legal infrastructure of the EU and the euro area, especially for cross-border transactions. The clear potential of this master agreement, however, has not been realised yet as there has been no sufficient support to the EMA on an ongoing basis.

The advantages of the EMA and its current deficiencies are well-known. In particular, we see that the agreement itself would need continuous updating to reflect market developments. Furthermore, the legal opinions on the EMA in different jurisdictions would need to be updated regularly. In the absence of such updates, market counterparties have understandable concerns about the use of the EMA. In general, the governance of the EMA should be ensured and there should be a clear strategy about how to develop the agreement and its market acceptance.

Especially in the light of Brexit it is essential to address the long term viability of the EMA. The current market standard documentation in Europe for derivatives (ISDA) and for repos/securities lending (GMRA/GMSLA) is governed by English law with the jurisdiction of English courts. A key consideration is that English law will not be the law of an EU jurisdiction any longer. Also, the jurisdiction of English courts, i.e. courts outside the EU, is an issue of concern. In contrast, the EMA, whilst with standard content across the EU, is an agreement in local language, governed by different EU Member State laws with jurisdiction of the courts of that EU Member State. Given that it covers both derivatives and repo, it enables cross-product netting, unlike other master agreements. This situation represents a crucial window of opportunity for the EMA that should be seized.

The EFMLG understands that this exercise would require a concerted effort of the private and public sector. It is of fundamental importance that the EBF remains in the lead of this project as the sponsor of the EMA with the support of the local banking federations. An active engagement of the EBF, driving and coordinating the different efforts is absolutely essential for the success of the EMA. Central banks in the Eurosystem and the EU that actively use the EMA could also play a role, similarly to banks in the market.

On our side, the EFMLG is willing to actively support the EMA. We have recently established a task force to get engaged with the issue. In addition, several EFMLG members would be interested in participating in the EBF working group on the EMA. Please refer the list attached to this letter in that regard.

As to the concrete steps and actions ahead, we see four key areas needing immediate action. Later, other fields could be also addressed (e.g. the transaction specific confirmations, market infrastructures).

1. Update of the agreements

It is of utmost importance that the EMA documentation is updated to reflect the latest market and legislative development, as it is done in the case of other master agreements. This should happen as one of the first steps as the updating of legal opinions could then already consider the latest version of the EMA.

In our view, there are some areas where action is more urgent (in the short-run), deriving mostly from legislative changes at EU level. For example this could include the update of the EMIR Annex¹ following the last update in 2013: the Clearing Annex could be amended (to enable transfer/switch of EMA based transactions), and amendments to reflect margin requirements (Margin Maintenance Annex - Article 14 EMIR).

We see that the main responsibility in updating the agreements is with the EBF. It is particularly important that this exercise is done in a centralised manner. On the other hand, close cooperation with other actors, particularly with the local banking associations is indispensable.

On our side, we are ready to contribute to the work with our members participating in any EBF working group for the purposes of updating the agreement. One may consider liaising with law firms as well.

2. Update of the legal opinions

As referred to above, it is also of utmost importance that the legal opinions are updated on a yearly basis. Without such regular updates of legal opinions, the long-term viability of the EMA is not ensured.

We understand that according to current set-up, the update of the legal opinions is driven by the local banking associations with local banks and firms (contrary to the update of the EMA

¹ See at <http://www.ebf-fbe.eu/european-master-agreement-ema>.

documentation which is centralised at the EBF). The EBF may want to consider reverting to the original approach whereby the updating of legal opinions was decided centrally at the EBF. In this context it could also be considered to enter into a contract with one law firm to take care of the updates in the different relevant jurisdictions, which could represent efficiency gains.

At any case, for the purposes of supporting the update of legal opinions, the EFMLG suggests examining how interested stakeholders in the local market – interested in being able to rely on the legal opinions - could pool resources to finance the updates. Most EFMLG members would be interested in joining such efforts in their local market.

3. Replacing local master agreements with the EMA

There are several jurisdictions in the EU and the euro area where local master agreements are still being used. These local master agreements are sponsored by the national banking associations. In order to channel more resources to the EMA, to increase its use, and to reduce fragmentation in the European markets, it should be considered to what extent such local master agreements could be replaced by the EMA. For this purpose the EMA (with local law, local jurisdiction and local language) could be more actively promoted, by making parties in the national market more familiar and comfortable with it.

A first step in this process could be to replace, with the EMA, those local master agreements in different EU jurisdictions that are used with subsidiaries of EU headquartered companies in jurisdictions outside the EU (e.g. Asia, Americas) and which would have needed local legal opinions. This would immediately reduce the number of legal opinions and the related costs.

This matter can be communicated primarily to the local banking association (by the EFMLG in conjunction with the local member of the banking association). We believe that the local banking associations could play a very important role, as they are aware of the needs of local counterparties and have participated actively in the creation, modification and update of the local master agreements.

4. Governance, strategy and promotion of the EMA

With a view to ensure the long-term viability of the EMA, it is of fundamental importance that the governance of the EMA is catered for. The main responsibility in this regard belongs to the EBF, but also other stakeholders (national banking federations, central banks, market players) play an important role. The EFMLG would be interested in participating in forming and operating such a governance arrangement.

In the same vein the strategy for the revival of the EMA should also be carefully calibrated. The financial products covered, the intended users of the agreement, the type of transactions, the markets to be covered all form part of the strategy that should be considered when developing the EMA. Again, the EFMLG would be ready to actively contribute to developing such strategy.

In fact for a European financial law association, like the EFMLG, it would be a particularly fitting role to be more active with such an EU cross border product such as the EMA. More concretely, the EFMLG can also help promoting the EMA. It can dedicate separate meetings (or dedicated seminars) to it. EMA-related matters could be frequently highlighted in the EFMLG Newsletter which is circulated to market participants on a regular basis.

We would welcome feedback from the EBF regarding the above matters, including more concrete information about what is being planned to address the above issues. In the same vein the EFMLG is interested in getting feedback from the EBF how it could best assist the effort. For this purpose we would welcome having a representative of the EBF at the next meeting of the EFMLG in order to discuss the project.

Yours truly,

A handwritten signature in blue ink, appearing to read 'Otto Heinz', with a stylized flourish extending to the right.

Otto Heinz

EFMLG Chairman