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CHAIRMAN:
THE RT.HON. THE LORD WOOLF

23 March 2006

Alexander Schaub
DG Internal Markets
European Commission
B-1049 Brussels
Belgium

Dear Mr Schaub

FMLC ISSUE 76 – TRANSPARENCY OBLIGATIONS DIRECTIVE

The remit of the Financial Markets Law Committee ("FMLC") is to identify issues of legal uncertainty in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed. For some time now, the FMLC has had concerns, from a legal certainty perspective, about the Transparency Obligations Directive which it believes should be considered in the current round of Transposition Workshops for this Directive.

In November 2003, the Council of the European Union revised the draft text of the Transparency Obligations Directive in response to UK submissions that were roughly parallel to concerns held by the FMLC at that time. David Wright, from your Directorate General, wrote to the European Union Committee ("EUC") of the House of Lords in 2004 (see attached Report) explaining that the UK's concerns had been addressed in the ECOFIN Council's text of 25 November 2003, in particular by replacing references to "information disclosed to the public" with "information to be made public". The FMLC is uncertain as to how these revisions were intended to address the problem, but assumes that they were thought to remove any implication of the creation of a new European private law obligation in regard to the information.

In his submission to the EUC David Wright also referred to a further concern, raised by the FMLC, about the potential for issuers to be rendered liable in a multiplicity of Member States. He explained that an amendment was proposed to introduce the application of the law of the issuer's home Member State so as to ameliorate this potential problem. However the amendment referred to by David Wright (amendment 81 of 26 November 2003) was not adopted in the Directive's final text.

After the November 2003 revisions, the FMLC published a paper (attached) focussing on what it termed "the multi-jurisdictional point", namely the concern that issuers would, in the wake of the Transparency Obligations Directive, be liable to legal actions in multiple states, under different legal systems and choices of law, for loss to investors and shareholders. The FMLC drew some comfort, in drafting this paper, from the fact that David Wright's submission to the EUC expressed the view that there was no intention to interfere with existing national regimes on liabilities, from which it inferred that the Directive was not intended to create new duties and liabilities in the Member States. However, the overriding concern resurfaced when it became apparent that the

Commission had no intention to give guidance on this point in any more public place than the report of the EUC's conclusions in the UK. Moreover, despite the fact that the Commission agreed to remove references to "information disclosed to the public" in response to UK concerns, that language still appears in Recital 1, which refers to "disclosure... [which] builds sustained investor confidence", and in Article 21(1), which requires that regulated information (including company reports) be disclosed. These references have the potential to mislead and undermine the effectiveness of the changes adopted in the November 2003 draft text.

The FMLC remains concerned to see an amelioration of the potential problems identified in its 2004 paper. Therefore, I would like to explore with you the possibility that the European Commission might articulate the view, for the benefit of Member States as a whole, that:

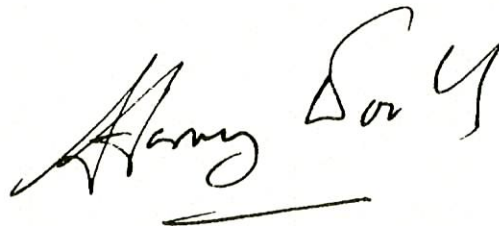
although the purpose of the Directive is to achieve better information for investors, there is no intention thereby to create a new European regime of private law liability to investors (and that should not, therefore, be the Directive's effect); and

as stated in David Wright's submission to the EUC, there is no intention to interfere with – or to *expand* – existing national liability regimes as a whole (and that should not, therefore, be the Directive's effect).

It is our understanding that the UK originally sought amendments to the Directive on the basis that there needed to be sufficient flexibility in the wording to allow for a restrictive UK implementation. However the amendments obtained do not address the FMLC's main point of concern, which is the effect of the Directive in Member States and across the European Community, where the Recitals may be interpreted as giving rise, directly or indirectly, to new liabilities to investors.

I hope that this clarifies the FMLC's concerns and I look forward to receiving any comments that you may have. If it would be helpful, the FMLC would be delighted to discuss the proposals outlined in this letter – which would ameliorate, if not resolve, the above concerns – in greater detail with representatives of DG Markt.

Yours sincerely

A handwritten signature in black ink, appearing to read "Lord Woolf", with a horizontal line underneath.

Lord Woolf

Cc Pierre Delsaux
David Wright
Florence François-Poncet