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January 3, 2013

BY E-FILING

Second Circuit Court of Appeals
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007

Subject: NML Capital, Ltd. et al v Republic of Argentina, Docket Nos. 12-105(L), 12-109(Con), 12-111(Con),12-157(Con), 12-158(Con), 12-163(Con), 12-164(Con), 12-170(Con), 12-176(Con), 12-185(Con), 12-189(Con), 12-214(Con), 12-909(Con), 12-914(Con), 12-916(Con), 12-919(Con), 12-920(Con), 12-923(Con), 12-924(Con), 12-926(Con), 12-939(Con), 12-943(Con), 12-951(Con), 12-968(Con), 12-971(Con)

We write to you to express our deep concern regarding the Amended February 23, 2012 order issued by the District Court on November 21, 2012 (the "Order"). We are concerned that the District Court has misunderstood the role of Euroclear Bank in the payment flows We are further concerned that giving effect to the Order will impair the smooth functioning of the international bond markets.

I. Introduction

Euroclear Bank SA/NV ("Euroclear Bank") is a user-owned and user-governed commercial bank and securities settlement system incorporated in Belgium. It is regulated by the National Bank of Belgium and has its registered office at 1 Boulevard du Roi Albert II, B-1210 Brussels, Belgium.

Euroclear Bank is a member of the Euroclear Group, which is the world's largest provider of domestic and cross-border settlement and related services. The Euroclear Group includes, inter alia, Euroclear Belgium, Euroclear Finland, Euroclear France, Euroclear Nederland, Euroclear Sweden, Euroclear UK & Ireland and Xtrakter Limited.

Euroclear Bank provides settlement and related securities services for cross-border transactions involving domestic and international bonds, equities, investment funds and derivatives. Its clients are major financial institutions located in more than 90 countries. Euroclear Bank holds securities and book-entry interests in securities for participating organizations and facilitates the clearance and settlement of securities transactions between Euroclear accounts and between Euroclear account holders and participants of other securities settlement systems through electronic book-entry changes in accounts of such participants or through other securities intermediaries.

Euroclear Bank has been assigned an AA+ rating by Fitch Ratings and an AA rating by Standard & Poor's. Euroclear Bank has been a highly rated firm for 10 consecutive years.

Euroclear Bank SA/NV
1 Boulevard du Roi Albert II
1210 Brussels, Belgium
RPM Brussels 0429 875 591
Tel. +32 (0)2 326 1211
www.euroclear.com

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The value of securities held for Euroclear Bank clients at the end of 2011 was a record of €10.8 trillion. The value of securities transactions settled was €328.5 trillion in 2011.

As a custodian of securities for its clients, Euroclear Bank receives income and redemption payments from paying agents appointed by issuers and then credits such amounts to its account holders. Euroclear Bank does not act on behalf of securities issuers. Its contractual obligations are solely to its clients/account holders.

Euroclear Bank has no operations in the United States. It maintains a small representative office in New York for client relationship and support purposes.

II. Our concerns

A. The Order is overly broad

The Order purports to cover "Participants" defined by the Court as "those persons and entities who act in active concert or participation with the Republic, to assist the Republic in fulfilling its payment obligations under the Exchange Bonds." The Order then goes on to list the Participants to include Euroclear Bank under "the clearing corporations and systems, depositaries, operators of clearing systems, and settlement agents for the Exchange Bonds."

This is a misunderstanding of the role of Euroclear Bank. Euroclear Bank does not act in "active concert or participation" with Argentina. It has no contractual relationship with Argentina as the issuer of the Exchange Bonds and does not act as its agent. It merely receives payments on the Exchange Bonds on behalf of its clients. Euroclear Bank should not be considered a Participant under the definition used in the Court Order and Federal Rule of Civil Procedure 65(d)(2).

B. Euroclear Bank is an "intermediary bank" under Article 4A of the UCC

The District Court in issuing the Order recognized that it could not enjoin the activity of any "intermediary bank" as defined in Article 4A of the Uniform Commercial Code (UCC).[1] The UCC defines "intermediary bank" as "a receiving bank other than the originator's bank or the beneficiary's bank."

Euroclear Bank's role is that of an intermediary bank in respect of payments on Exchange Bonds. It receives the funds from the bank of the issuer Argentina and then credits the accounts of its clients which either are the direct beneficiaries or act on behalf of the beneficiaries.

Accordingly, per the terms of the Order itself, Euroclear Bank should be exempt from its effect. However, the Order specifically identifies Euroclear Bank as a Participant covered under the Order. Thus, there is an inherent contradiction within the terms of the Order. Clearly, the District Court has not understood the role of Euroclear Bank in the payment flows between Argentina and the owners of the Exchange Bonds.

[1] N.Y.C.L.S. U.C.C. § 4-A-104

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C. The Order would have an extra-territorial effect

By the express inclusion of the European securities settlement systems as Participants in the Order, the District Court has extended its reach well beyond its jurisdiction. [2] It asserts authority over institutions and activities with little or no connection to the United States.

The Exchange Bonds for which the Order attempts to constrain the payments include a number of Euro-denominated instruments. These bonds are held entirely outside the United States and are governed by English law. The payments made on such bonds occur outside the United States.

The injunction issued by the District Court purports to enjoin payments made within the European System of Central Banks TARGET2 real-time gross cash settlement system. Giving effect of the Order will expand the authority of the US courts beyond the borders of the United States to activities carried out by governmental institutions in Europe. In the interest of comity we would expect that the Court would strive to avoid such a result.

D. The Order is in direct conflict with Belgian law

In July 2003, an interest payment on bonds issued by Nicaragua was stopped by a Belgian lower court order served on Euroclear Bank at the request of LNC Investments which claimed that such interest payment was a breach of the pari passu provision in the governing documentation for such bonds. That court order prevented Euroclear to accept or make any payments in respect of Nicaragua bonds.

On appeal, the Brussels Court of Appeal reversed the court order in March 2004 and released Euroclear Bank from the blocking measures. The Court of Appeal found that Euroclear Bank was a third party to the loan agreement between Nicaragua Republic and its lenders (including the pari passu provision) and that in such capacity, Euroclear Bank could not be forced to comply with any contractual obligation to treat debtors equally.

Following the Nicaragua case, Belgian law was amended to prevent any future Court orders similar to the July 2003 order. Article 9 of the Belgian Act of April 28, 1999 implementing the EU Settlement Finality Directive as amended by article 15 of the Law of November 19, 2004 and by subsequent legislation provides:

> Any cash settlement account maintained with the operator of a system or with a cash settlement agent, as well as any cash transfer, through a Belgian or foreign credit institution, to be credited to such cash settlement account, can not be attached, put under sequestration or otherwise blocked by any means by a participant (other than the operator or the settlement agent), a counterpart or a third party. [Euroclear Translation]

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[2] *See* Restatement (Third) of Foreign Relations Law of the United States, Section 403 (the jurisdiction of a state with respect to prescribing law with respect to matters taking place outside of its own territory is limited to: conduct that has or is intended to have substantial effect within its territory; the activities, etc., of its own nationals; and conduct that is directed against the security of the state or against a limited class of other state interests).

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According to the legislative history of Article 9 and its subsequent amendment, the purpose of this prohibition to attach or otherwise block a cash settlement account or any cash transfer to be credited to such account is to avoid any impediment to the proper functioning of payment or settlement systems and hence to safeguard the credibility and the liquidity of national and international financial markets.

Considering this objective, the prohibition contained in Article 9 of the Belgian Act of April 28, 1999 implementing the EU Settlement Finality Directive should be regarded as a rule of Belgian international public policy.

The implementation of the Order on the terms set by the District Court would likely lead to a direct violation of this rule of Belgian law to the extent it would be interpreted in such a way that Euroclear Bank would be prohibited from receiving cash payments in relation to the Exchange Bonds from its correspondents and from crediting the cash so received to its clients' cash settlement accounts.

A conflict of laws of this nature will impact the legal certainty underpinning the international bond markets and could cause a loss of confidence in the role of key market infrastructure providers. In the interest of comity, we trust that the Court would not wish to permit any action which would interrupt or impair the smooth functioning of the bond markets upon which so many governments and investors over the world rely so heavily.[3]

* * * * *

For the above reasons, we submit to the Court that the Order should not be given effect under the terms written by the District Court.

We are available to respond to any questions of the Court or to provide a formal submission if requested by the Court.

Respectfully submitted on behalf of Euroclear Bank,

Yves Poullet
Chief Executive Officer

cc: counsel of record for the above-captioned action (by email)

[3] *See, e.g.*, Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1327 n. 150 (D.C. Cir. 1980) (principles of international comity require that domestic courts not take action that may cause the violation of another nation's laws).

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