

Paris calling: the HCJP and the post-Brexit future

Feature



For years, AMAFI has been sending the same message: let's get capital taxation working to support productive financing. It restated this position recently at a hearing before France's Council on Mandatory Contributions (AMAFI / 17-52).

Past measures, though, have gone in the opposite direction, and France's system of taxation, especially on savings, stands out not only for sheer complexity, but also for high rates, which often exceed those in comparable countries.

For this reason, AMAFI wholeheartedly backs the stance taken by finance minister Bruno Le Maire, who said in a recent interview with Les Échos: "By overtaxing capital, we are starving companies of the funding they need to invest, innovate and create jobs".

Instructively, the CAC 40 blue chip index is populated by businesses that were founded before 1975, whereas one-third of the USA's top-40 firms are less than 40 years old.

Discussions over the next Budget Act are getting underway. A number of worthy measures are expected to be brought in, including a 30% flat tax and phased cuts in corporate income tax, while the 3% dividend tax, the wealth tax on financial investments and the intraday financial transactions tax are all to be scrapped. These measures would bring France closer into line with its neighbours.

But capital's pivotal role in business creation and growth must not be overlooked. Even if the above measures are introduced, capital will still be at a disadvantage compared with other financial investments, particularly if the dividend allowance is eliminated under a 30% flat tax. This is a great pity. If savers get no tax recognition for the risk they are shouldering, they will continue to look to other investments.

Pierre de Lauzun
Chief Executive, AMAFI

Finance relies on a sound legal system with foreseeable decision-making, embodied in the principle of legal certainty. In the past 25 years, the City of London has been able to rely on specialised committees that provide expert opinion and advice on financial issues. France is following suit thanks to the HCJP – and the timing could not be more fortuitous.

that France was pursuing plans to set up special courts to handle international disputes currently settled in London. The idea came from the Haut Comité Juridique de la Place Financière de Paris (HCJP), a high-level committee formed in 2015 to address legal issues affecting the French financial community.

The committee, which has already published several influential reports on financial regulation, has also identified a major problem likely to arise once the UK leaves the

Can Paris oust London as a key centre for international financial litigation? That's what French finance minister Bruno Le Maire hinted at in a speech to the Economic Club of New York this June. He announced

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▶ European Union: the majority of derivative and loan contracts in Europe are governed by English law, and their enforceability outside Britain could be called into question in the post-Brexit world.

So how did the HCJP come about, and what role does it play?

The sincerest form of flattery

Ironically, perhaps, the inspiration for the HCJP came directly from London. It is widely acknowledged that the UK has time-proven experience in building bridges between the legal system and financial markets. In the 1980s and 1990s the Legal Risk Review Committee (LRRRC) and the Financial Law Panel (FLP) both played an important role in improving legal certainty in British markets. Following the closure of the FLP in 2003, the Bank of England set up the Financial Markets Law Committee (FMLC) with a remit to identify issues of legal uncertainty or misunderstanding in wholesale financial markets and to propose ways of resolving them. The FMLC subsequently became an independent body.

From an operational perspective, the committee urges wholesale financial markets and their participants to see it as part of the legal infrastructure they operate in. It plays a financial intelligence role, identifying issues that can lead to substantive risks and addressing only those that are material and for which it is better placed than any other relevant body. In addition, the FMLC acts as a bridge to the judiciary by organising seminars to brief senior jurists on various aspects of wholesale financial markets.

It was the existence of a legal committee dedicated to maintaining London's competitive

edge in global finance that prompted Michel Prada, former head of the French financial regulator AMF, to look into the possibility of creating a French counterpart to the FMLC. In 2014 the idea was taken up by the AMF and the prudential supervisor, ACPR, which together established the HCJP, with the backing of the Banque de France and the Treasury. Mr Prada chaired the committee at the outset, later stepping aside for Guy Canivet, honorary first president of the Court of Cassation and a former member of the Constitutional Council.

The HCJP is based at the premises of the central bank, Banque de France, in the heart of Paris. Membership consists of a dozen of the country's top legal experts specialising in financial legislation, along with representatives from the industry regulators (AMF, ACPR), Treasury Directorate and justice ministry. Together, they form a tight-knit group of independent experts with a broad range of financial and legal expertise.

Fiercely guarded independence

From the outset, the HCJP's founders had two guiding aims in mind. First, they wanted to identify ways of making the Paris financial centre – already the eurozone's leading marketplace – more competitive by improving France's financial regulatory framework. The second aim is to assist the public authorities in negotiations on European and international legislation. Ultimately, the committee wants to strengthen legal certainty by supplying answers to judicial issues affecting all financial stakeholders, both public and private.

Unlike its UK equivalent, the HCJP does not draw on the resources of firms, banks or trade bodies for its decisions. The fact that none of its members is drawn directly from the finance industry has attracted criticism from some quarters. But the decision to adopt a tightly focused structure is intentional. The committee's founders wanted it to concentrate on legislative issues in order to shield its independence from outside interests, however legitimate their input. Nonetheless, that rule applies only to the formal approval of finalised HCJP reports on substantive legal issues. During the preparatory and research phases of the committee's analysis, its working groups are open

to external contributions, and they welcome participation by all interested parties.

In addition to its independence, part of the HCJP's appeal is that it brings industry professionals and the public authorities together to debate issues of financial law, with the shared aim of further developing the Paris financial centre. "The French authorities – especially the Treasury, AMF and ACPR – play a very active part in plenary meetings," explains Hubert de Vauplane, a member of both the HCJP and the FMLC. "This results in highly productive discussions on the best ways of promoting Paris in light of the findings of the committee's legal analyses."

In the past two years, the HCJP has held 12 plenary meetings, and its 20 or so working groups and committees have met more than 130 times to discuss a wide variety of matters ranging from regulatory methods, securities law, business financing and negative interest rates. The committee has held public consultations to highlight issues of interest to the financial community, and has been also called upon by the public authorities. In addition, it can self-refer on issues of major importance.

The committee's steady focus is on improving France's financial legislation. In July, for example, it published a report from a working group headed by law professor Alain Pietrancosta, containing proposals for clarifying and simplifying existing legislation by assessing laws once they come into force. The proposals have been taken up by two senators as part of their parliamentary work on business simplification.

More recently, however, a political event of global import has given the HCJP another focal point of activity.

Benefits of Brexit?

The outcome of the British referendum on membership of the European Union continues to create shockwaves on both sides of the English Channel. In the UK, the sector that is arguably facing the biggest headaches is financial services. One of the principal causes for concern is an increase in legal complexity for market participants seeking to ascertain which obligations apply to them. As the deadline for Brexit approaches, many areas of legal uncertainty affecting financial markets are ▶

- ▶ bound to arise, not just in Britain but in the rest of the EU and beyond.

Two months after the referendum result was announced, the FMLC set up a working group to consider areas of uncertainty relating specifically to English governing law and jurisdiction clauses in cross-border financial market transactions and reliance on these clauses in international commercial litigation. Other groups have been established to address uncertainties such as the post-Brexit status of the EU directives on bank resolution and credit institution liquidation, the scope of World Trade Organisation rules governing business with the EU, and emissions trading schemes.

In France, the HCJP's working group on Brexit initiated the project that Bruno Le Maire unveiled in New York. The committee's initial work on the impacts of the UK's departure highlighted the fact that English court rulings would no longer benefit from a European passport. According to the British Institute of International and Comparative Law (BIICL), Brexit will leave a large gap in the area of judicial cooperation. At present, a legal decision handed down in one EU member state is enforceable in any of the other 27. But once Britain departs, its rulings will not be automatically applicable. They will be subject to the standard international mechanism known as "exequatur" proceedings, whereby a ruling is not applicable in another country until and unless it has been approved by one of that country's courts. Exequatur is a lengthy and complex procedure. More importantly, it automatically generates uncertainty about future enforceability of English judgments, which may deter international plaintiffs that so far have opted for London when pursuing litigation. Of course, the British capital still has plenty of advantages, including the quality of its legal system and the suitability of English law for settling legal disputes – not to mention the English language. But, as the BIICL points out, "the uncertainty surrounding Brexit can discourage litigants if the current regime is not replaced by an effective and workable framework".

At present, the number of international finance-related cases heard each year in London is estimated at around 10,000, involving issues such as complex financial products, notably ISDA standard agreements for swaps and derivatives, as well as major loans, project finance and bank-

ing operations. But once the exequatur system comes into operation, litigants might start looking around for a more favourable litigation centre.

Already there is growing competition from other centres offering proceedings in English or under English law. Paris could be in the running to attract the lion's share of this international activity provided it makes a few adjustments. In particular, as Bruno Le Maire mentioned in New York, France intends to set up English-speaking international courts to issue rulings on complex financial contracts according to a procedure based on the British and American methods common in international finance. In early 2017 the then-justice minister Jean-Jacques Urvoas asked the HCJP to submit practical proposals for establishing these new courts. Following the formation of a new government after the presidential election in May this year, the initiative was taken up by Mr Le Maire. The newly

appointed justice minister, Nicole Belloubet, recently informed Guy Canivet that her ministry was ready and willing to support the plan. Gérard Gardella, the HCJP's Secretary General, confirms: "We have already put forward several recommendations. Now we need to prepare an action plan in order to give them concrete shape".

The HCJP has also contributed its legal expertise to two reports, due out this autumn, on the consequences that Brexit will have on contracts and the freedom to provide services. Whatever happens in the coming months and years, the committee is sure to play a key role in shaping the future success of Paris as a major global financial centre. And possibly a worthy successor to London in the field of financial litigation.

Anthony Bulger

A TALE OF TWO CITIES

➤ HAUT COMITÉ JURIDIQUE DE LA PLACE FINANCIÈRE DE PARIS (HCJP)

- Founded: 2015
- President: Guy Canivet, Honorary First President, Court of Cassation; former member, Constitutional Council
- Secretary General: Gérard Gardella
- Membership (July 2017): 13 expert members, 2 ex officio members, Treasury, ACPR, Chancellery
- **Web:** <http://hcjp.fr>

➤ FINANCIAL MARKETS LAW COMMITTEE (FMLC)

- Founded: 2013
- Chair: Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales
- Chief Executive: Joanna Perkins
- Membership (July 2017): 25 committee members, 36 patrons (including Bank of England, AFME, City Remembrancer's Office, Lloyd's, ISDA, AIG Europe, COMBAR, FIA)
- **Web:** www.fmlc.org

International

➤ **AMAFI in Washington, 28 and 29 June 2017**



Once again this year, AMAFI organised a series of meetings in Washington D.C. on behalf of the European Forum of Securities Associations (EFSA). Meetings were held with various US and international financial institutions and authorities, including the US Treasury, Congress, the Commodity Futures Trading Commission, the Securities and Exchange Commission, the International Monetary Fund and the Federal Reserve.

This year's EFSA delegation included the Association for Financial Markets in Europe (AFME), the Swedish Securities Dealers Association (SSDA), BWF, which speaks for the German brokerage industry, and AMAFI, represented by Pierre de Lauzun and Véronique Donnadieu.

With the new Republican administration in the process of being set up, this trip was an opportunity to clarify some of

the factors underpinning developments in the United States, including the possible Dodd-Frank Act review. Although Brexit was discussed, its attendant challenges are primarily viewed as European issues that will need to be handled without extraterritorial spillover.

Accordingly, considerable attention was paid to the prospect of a potential review of equivalence agreements for central counterparties and the European framework for relations with third countries. Talking partners also spontaneously flagged MiFID 2 research provisions and their extraterritorial effects as an area of concern, and participants generally reaffirmed their resolve to keep the dialogue going and maintain transatlantic cooperation.

Véronique Donnadieu

Europe

➤ MiFID 2

Algorithmic trading

After AMAFI identified a number of issues concerning MiFID 2 provisions on algorithmic trading and direct electronic access (DEA) to markets, discussions were held in late June with the AMF on implementing the new obligations. The AMF agreed with most of the analyses put forward by AMAFI and also presented its proposed algorithm and DEA notification templates.

Client relations

Back in 2007, to help its members implement MiFID 1, AMAFI published a document that identified and provided guidance on key points in contractual relations between investment firms and their clients (*AFEI / 07-47*). It was decided to repeat the exercise for MiFID 2, particularly since the new framework includes major changes that will materially affect client relations. The AMAFI Legal Committee has set up a group for this purpose. Wider consultation will be organised as required, depending on the topics addressed.

Cost disclosures

For some months, a special AMAFI group has been leading work on the client cost and expense disclosures required under MiFID 2, which raise important issues for members. A document is currently being drafted that will provide guidance on implementing the new obligations. AMAFI's analysis draws on discussions with the AMF and ESMA, and incorporates the updated version of ESMA's investor protection Q&A. Fresh discussions will be held shortly with the AMF on this basis.

European MiFID Template

Over the course of the summer, the European Working Group, which comprises a panel of European financial firms and associations, including AMAFI, finalised its template for exchanges of MiFID 2 information between manufacturers and distributors. The European MiFID Template (EMT) standardises the exchanges required under product governance obligations and those relating to client cost disclosures. AMAFI played an active part in this work, and the EMT proposals are very much in line with those in the AMAFI guide (*AMAFI / 17-53, Annex 2*). The EMT has been posted on AMAFI's website.

Market connectivity

Market operators need to upgrade their systems in order to implement MiFID 2. These developments will have various impacts on the conditions under which members transmit orders. But even though more than 250 venues are involved, in many instances the test phase – a crucial pre-requisite for such changes – will have to wait until the very last quarter. Members will be left with little time in which to manage the technical adjustment processes that will be required for every market to which they are connected.

This situation increases the likelihood of market failures if members are unable to connect or if large numbers of non-compliant orders are rejected.

Adding to this concern, it is not yet certain that the changes introduced by the venues provide all the requisite guarantees, given the data privacy obligations placed upon members. Accordingly, in mid-June, at AMAFI's initiative, several European associations alerted the European Securities and Markets Authority (ESMA) to the need for a transitional period that would provide sufficient flexibility.

ESMA replied in late August. Disregarding the identified risks, the authority said that participants had had enough time to be ready by the deadline and dismissed the data privacy concerns. Discussions are now underway with the AMF and Euronext to specify how these aspects are to be managed on the French market. Meanwhile, the question of data protection has been raised once again as part of an ISDA-led initiative involving several European associations, including AMAFI.

Pre- and post-trade transparency

On 31 August AMAFI and the French Banking Federation (FBF) submitted a joint reply to the AMF's public consultation on implementing MiFID 2 pre- and post-trade transparency obligations in France (*AMAFI / 17-58*). Since national authorities are empowered to grant transparency regime exemptions, the AMF wanted to describe the system of authorisations that it was proposing for targeted entities (trading venues and investment firms trading over the counter) and different trading phases, and to propose related amendments to its General Regulation (GR).

Europe

► ... MiFID 2

Overall, AMAFI and the FBF support the AMF's flexible and pragmatic approach, which gives participants the option of applying for all pre- and post-trade transparency exemptions proposed by MiFIR. In their reply, they welcomed the clarification on the regime for systematic internalisers and investment firms dealing OTC. They also submitted comments to the AMF on the proposed GR amendments, particularly with a view to clarifying the scope of the national exemptions regime.

Primary market

At a meeting in early July AMAFI spoke to the AMF about issues raised by the application of MiFID 2 to primary market transactions. The main concern is that products such as shares and bonds, which are key tools

in market-based financing for businesses, should not be disadvantaged by the application of requirements not designed with the primary market in mind. ESMA is expected to provide clarification on a number of these questions.

Product governance

AMAFI published the second version of its guide to implementing product governance obligations in late July (*AMAFI / 17-53*).

The update is essentially designed to capture the finalised version of ESMA's guidelines (*ESMA35-43-620*), along with European-level work conducted within the European Working Group, to which AMAFI contributed extensively (*see below*), and AMAFI's own work on infor-

mation about sales outside the target market that distributors are required to report to manufacturers. The new version, like the old one, was finalised after discussions with the AMF. An English version is available on AMAFI's website.

Suitability requirements

In July ESMA began a consultation on draft guidelines on certain aspects of the MiFID 2 suitability requirements. Once finalised, the document will update the 2012 guidelines to accommodate the MiFID 2 framework while also taking into account developments since MiFID 1, including increased use of robo-advice and input from regulators. AMAFI is in the process of reviewing the proposals contained in the consultation, which closes on 13 October.

S. Dariosecq, E. de Fournoux, F. Fleuret, C. Gonzalez, B. Julé, P. Laurent

➤ PRIIPs

In July European institutions published two documents on the PRIIPs framework. The European Commission released guidelines providing Level 1 clarification, while the European Supervisory Authorities published a Q&A to specify some of the provisions contained in the annexes of the Level 2 document, which was updated in mid-August. To incorporate the new information in these publications and the latest thinking on this topic, AMAFI is currently updating its own Q&A, first published on 2 February 2017 (*AMAFI / 17-12*).

**Pauline Laurent,
Blandine Julé**

➤ Prospectus

Acting chiefly through its Corporate Finance Committee, AMAFI is keeping a close watch on work being done to revise the Prospectus Directive. Following a legislative process that resulted in the publication in June of the new Prospectus Regulation, some of whose provisions are already applicable even if the bulk of the regulation will not come into effect until 20 July 2019, ESMA is now taking the lead on this matter. At the start of the summer, it published three consultation papers on Level 2 measures that it plans to propose to the European Commission. The consultations, which closed at the end of September, cover the format and content of the prospectus, prospectus scrutiny and approval, and the EU growth prospectus, which is a break-through innovation under the new regulation aimed

at making it easier for smaller firms to access market financing.

AMAFI submitted some mainly technical observations about ESMA's proposed implementing provisions. Generally, however, the desire to streamline the content and, by extension, the cost of prospectuses in some cases (not only for small and medium sized businesses but also, for example, for secondary issues) and the introduction of a universal registration document modelled closely on the French registration document are welcome innovations as part of the Capital Markets Union initiative (*AMAFI / 17-61*).

Sylvie Dariosecq, Chloé Gonzalez

Europe

➤ Prudential treatment of investment firms

At the end of July AMAFI sent the European Banking Authority (EBA) a position paper (*AMAFI / 17-54*) on the new prudential regime for investment firms. It was responding to a presentation by the EBA at a public hearing in July at which the authority described 58 recommendations that it was proposing to send to the European Commission. The EBA had asked participants to provide feedback before finalising the recommendations.

AMAFI voiced strong support for the EBA's amendments to the version of the regime proposed on 4 November 2016, not least because some of the changes were inspired by AMAFI's own feedback to the initial document (*AMAFI / 17-09*). AMAFI also hailed the EBA's determination to forge a broad consensus on the revised prudential regime for investment firms which, within the general framework of the Capital Requirements Regulation (CRR), is better tailored to the peculiarities of European firms. However, AMAFI stressed that the regime should apply to all EU investment firms and that a level playing field with credit institutions had to be maintained.

**Emmanuel de Fournoux,
Faustine Fleuret**

➤ Short selling

ESMA is currently consulting on certain elements of the Short Selling Regulation (SSR). In the response it submitted, AMAFI underlined the restrictive and unwarranted nature of the exemption to the obligations introduced by the SSR, which applies only to market makers on platforms to which they provide liquidity (*AMAFI / 17-59*).

AMAFI also pointed out the inconsistency of the system for reporting net short positions because its scope excludes certain financial instruments. Last but not least, AMAFI indicated its support for ESMA's proposal to set up a centralised notification and publication system for bans on short selling participants.

**Emmanuel de Fournoux,
Faustine Fleuret**

➤ Benchmarks

The AMF consulted several professional associations on a proposed policy update to reflect the effects of the Benchmarks Regulation. In addition to offering a number of drafting proposals, AMAFI stressed that while the forthcoming entry into force of the Benchmarks Regulation should certainly be taken into account, updates are equally important for MiFID 2 and PRIIPs, which also come into effect in January 2018 (*AMAFI / 17-60*).

Pauline Laurent, Blandine Julé

France

➤ Money laundering

In early July, following work by its Consultative Commission on Anti-Money Laundering and Counter Terrorist Financing (AML/CTF), which included input from AMAFI, the ACPR published Instruction No. 2017-I-11 on information about AML/CTF systems. This resulted in changes to the annual AML questionnaire that reporting institutions are required to submit to the ACPR.

Also, in mid-July, AMAFI sent the French Treasury its final comments on the draft decree amending the regulatory portion of the Monetary and Financial Code and transposing the Fourth Money Laundering Directive. It instigated discussions with the Treasury on classifying the AML/CTF risk of financial sector clients that are themselves subject to the AML/CTF framework, with a view to ensuring that firms can deploy AML/CTF resources where they are most needed.

Blandine Julé

➤ Market abuse

On 16 June AMAFI published an update of the AMAFI-FBF guide to systems for preventing market abuse (*AMAFI / 17-40*), which incorporates the new framework established by the Market Abuse Regulation (MAR). The update, led by a specially created group within the association, was the subject of discussions with the AMF. An English version is also available.

On 6 July 2017 AMAFI published an updated version of its MAR implementation Q&A (*AMAFI / 17-46*). Also available in English, the update contains new questions covering investment recommendations.

**Pauline Laurent, Chloé
Gonzalez**



New Members

Regulation Partners is a company specialising in regulatory consulting, risk management, internal audit and governance. Its senior manager is Marie-Agnès Nicolet (Chairwoman).

Square Global Limited is an investment firm whose principal activities are the reception/transmission of orders and order execution. Its senior managers are Harold Uzan (Chief Executive Officer) and Alain Atlani (Senior Manager, France and international).

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AMAFI documents quoted in this Newsletter and flagged with a reference number are on our website at

www.amafi.fr

Most of them, notably AMAFI's responses to public consultations, are freely available, but some are restricted to members only.

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