

New French Brexit-Related Ordinance

7 March 2019

On 7th February 2019, ordinance no. 2019-75 relating to the preparatory measures in connection with the United-Kingdom's withdrawal from the European Union in respect of financial services (the **Ordinance**) was published.

The Ordinance provides for specific measures that will be applicable as from the withdrawal from the European Union without an agreement entered into pursuant to Article 50 of the Treaty of the European Union (i.e. **Hard Brexit**), with respect to the following:

- a) guaranteeing the continued access of French entities to UK payment and inter-bank settlement systems;
- b) providing for insurance contracts entered into prior to Brexit to be performed (but that such contracts cannot be renewed without triggering a licensing requirement);
- c) in the context of the publication by the International Swaps and Derivatives Association, Inc. (**ISDA**) of the ISDA 2002 Master Agreement (French law), adjustments to French law on two specific points: (i) compounding of default interest due for a period of less than one year for derivative instruments and (ii) the scope of the products eligible for close-out netting under French law;
- d) providing for a dedicated solution, subject to a number of conditions, for master agreements entered into between an EU counterparty and a UK credit institution or UK investment firm to be replicated between the former and an EU credit institution or EU investment firm of the same group as the UK original counterparty;
- e) introducing rules in relation to investment ratios for collective portfolio management purposes;
- f) designating the French *Autorité des marchés financiers*, the French financial market regulator, as the relevant competent authority in relation to securitisation issues; and
- g) clarification of the powers of the *Autorité de contrôle prudentiel et de résolution*, the French banking regulator, vis-à-vis UK entities that have entered into contracts on the basis of the European passport.

Overview of the guidance regarding insurance contracts

The Ordinance provides that:

- insurance contracts entered into by UK insurance companies cannot be renewed or provide for the payment of new premiums, in the event of a Hard Brexit; and
- should UK insurance companies not comply with such conditions, the insurance contracts shall be deemed to be null and void, noting nevertheless that such invalidity shall not be enforceable against insured parties, subscribers and beneficiaries.

Therefore, the Ordinance:

- clarifies the regime applicable to existing insurance contracts in the event of a Hard Brexit;
- secures the rights of insured parties, subscribers and beneficiaries; and
- creates a strong incentive to transfer the existing contracts issued by a UK company to another EU insurance company.

Overview of the changes relating to derivatives

Article 1 of the Ordinance amends French law on two points which were flagged as instrumental by the *Haut Comité Juridique de la Place financière de Paris*¹ (the **HCJP**) in the context of the publication of the ISDA 2002 Master Agreement (French law) by ISDA:

- i) Article 1343-2 of the French *code civil* is amended to provide an exception from the provisions of this Article which allow the compounding of interest only if such interest is due for a period greater than one year. This exception (which allows for compounding of interest for a period of less than one year) applies to interest due under an agreement or a master agreement referred to in Article L. 211-36-1 of the French *code monétaire et financier*;
- ii) the scope of the netting regime governed by Article L. 211-36 of the French *code monétaire et financier* is extended to emission allowance units referred to in Article L. 229-7 of the French *code de l'environnement*, spot foreign exchange transactions or transactions for the sale, purchase or delivery of gold, silver, platinum, palladium or other precious metals.

Article 3 of the Ordinance creates a specific legal framework applicable for a limited period of time (twelve months following the entry into force of this Ordinance) for master agreements entered into between an EU counterparty and a UK credit institution or UK investment firm to be replicated between the former and an EU credit institution or EU investment firm of the same group of the UK original counterparty. This regime is designed to ensure that EU counterparties who previously entered into derivative instruments with, among others, counterparties in the UK would still be able to enter into derivative instruments with the newly created EU licensed entity within the group of these counterparties located in the UK. The aim is therefore, as the Report to the President relating to the Ordinance explains, to ensure that sufficient liquidity remains available to EU counterparties.

The negotiation of a new master agreement to govern derivative instruments can last between 3 to 6 months. This new legal framework therefore creates a simplified replication framework which allows a licensed EU investment firm to replicate the existing master agreement. An EU entity which was a party to a master agreement for financial instruments transactions entered into before the date of the United Kingdom's exit from the European Union with an investment firm or a credit institution governed by English law, shall be deemed to have accepted the offer relating to a new master agreement made by an EU investment firm or EU credit institution as long as five conditions are fulfilled.

Amongst the five conditions, we draw your attention in particular to the following three conditions:

- i) the clauses of the replicated master agreement must be identical to those of the original master agreement concluded with the investment services provider governed by English law, except for the clause designating the applicable law and the jurisdiction clause, which must designate French law and the exclusive jurisdiction of the Paris Commercial Court and the Paris Court of Appeal, and any other clause relevant to ensure the performance of the new master agreement pursuant to these amendments. This condition linked to the "identical clauses" of the replicated master agreement is important to note since this replication framework cannot be used when it not only entails a change to French law and to the jurisdiction clause but also other changes in the master agreement unrelated to the change to French law and to the exclusive jurisdiction of the Paris Commercial Court and the Paris Court of Appeal;
- ii) the offeror must be part of the same corporate group and have a credit quality step within the meaning of CRR which is identical to or higher than the credit quality step assigned to the UK investment services provider on the date of the receipt of the offer. This means that the offer to replicate has to come from the EU investment firm or EU credit institution (and the offer cannot be made from the EU counterparty); and
- iii) at the end of a 5 business day period from the receipt of the offer, the EU recipient must have entered into a contract relating to a transaction governed by the new master agreement.

The other two conditions relate to the form of the offer (in particular the need that it be made in the forms of the original master agreement and accompanied by documentation showing the amended elements of the replicated master agreement).

¹ The HCJP is a working group comprising representatives of the French authorities (*Autorité de contrôle prudentiel et de résolution / Autorité des marchés financiers*, the French Treasury and scholars, academics, lawyers and judges)

Overview of the guidance regarding other regulated activities

The Ordinance does not provide for any requirements or measures regarding the provision of regulated activities (such as banking activities, payment services, e-money services, or investment services) currently carried out in France by UK licensed entities.

As a consequence, there are no clear legal grounds that would allow UK licensed financial entities to be legally authorised to continue, or to offer to provide new financial services, in case of a Hard Brexit.

It should however be noted that the HCJP has issued reports in September and October 2018, which provide guidance on these topics, i.e. on the legal consequences of Brexit for French stakeholders and investors. While these reports are not legally binding before a court, they express the majority view of the legal community and are used by the French government and the authorities as such.

In these reports, the HCJP is of the view that the performance of a contract with respect to regulated services that was entered into prior to Brexit should not be affected by a Hard Brexit. The rationale being, for the members of the HCJP, that the core characteristic of the services is located in the UK and that no regulated services are provided in France. This analysis was clearly stated with respect to financing arrangements where no changes to the supporting agreements are made post Brexit. The HCJP also applied that analysis for banking and payment services.

This interpretation of the HCJP is an application of the principle of contractual continuity, which relates to existing transactions, and refers to the ability to perform contractual obligations agreed under existing transactions. Please note that the views of the HCJP on the application of the principle of continuity of contracts are not expressly confirmed or denied by the Ordinance.

Finally, the French national competent authorities² issued a joint letter dated 1st February 2019 (and released on 15 February 2019) regarding the interdealer market and transactions undertaken with a counterparty based outside the European Union. The French national competent authorities consider that non-EEA banks and investment firms can enter into derivatives transactions for their own account with French banks and investment firms without being subject to any licensing requirements in France.

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If you would like to discuss the issues raised in this paper in more detail, please contact any of the experts above or your usual Allen & Overy contact

² The *Autorité des marchés financiers* and the *Autorité de contrôle prudentiel et de résolution*.

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Ordinance No. 2019-75 of 6 February 2019 relating to the preparatory measures in connection with the United-Kingdom's withdrawal from the European Union in respect of financial services

NOR: ECOT1901015R

ELI: <https://www.legifrance.gouv.fr/eli/ordonnance/2019/2/6/ECOT1901015R/jo/texte>

Alias: <https://www.legifrance.gouv.fr/eli/ordonnance/2019/2/6/2019-75/jo/texte>

The President of the Republic,

On the report of the Prime Minister and the Minister for the Economy,

Having regard to the Constitution, in particular Article 38 thereof;

Having regard to the Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012;

Having regard to the Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012;

Having regard to the Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisations and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012;

Having regard to the Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998, as amended, on settlement finality in payment and securities settlement systems;

Having regard to the Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC;

Having regard to the insurance code;

Having regard to the civil code;

Having regard to the environmental code;

Having regard to the monetary and financial code;

Having regard to the Law No. 2019-30 of 19 January 2019 empowering the Government to take by order measures to prepare for the United Kingdom's withdrawal from the European Union, in particular Article 2, paragraph 4 (I) thereof;

Having regard to the opinion of the advisory committee on financial legislation and regulation dated 17th January 2019;

Having taking notice of the Council of State (*Conseil d'Etat*) (finance section);

Having taking notice of the Council of ministers,

Orders:

Article 1

The monetary and financial code is thus amended:

1° In 1° of I of Article L. 211-36, after the words: “on financial instrument”, are inserted the words: “or on units referred to in Article L. 229-7 of the environmental code, on foreign exchange transactions or on transactions for the sale, purchase or delivery of gold, silver, platinum, palladium or other precious metals”;

2° Article L. 211-40 is supplemented by a subparagraph worded as follows:

“Article 1343-2 of the civil code does not prevent the capitalisation of interest that are due pursuant to an agreement or master agreement referred to in Article L. 211-36-1 from being provided for by them.”;

3° In Article L. 330-1:

a) In the second subparagraph of I, after the words: “systems benefiting from Articles L. 330-1 and L. 330-2”, are inserted the words: “governed by French law”;

b) After this second subparagraph, six subparagraphs are inserted, as follows:

“Constitutes a system:

“1° Any system designated as a system and notified to the European securities markets authority by the Member State which legislation is applicable, in accordance with Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems;

“2° Any system governed by the law of a third country intended to settle foreign exchange transactions in payment versus payment mechanism and in central bank money, in which a person governed by French law referred to in II is a direct participant, where said system, approved by order of the minister of economic affairs, after consulting the *Banque de France*, presents a systemic risk and a level of regulatory and operational security equivalent to those governed by French law;

“3° Any system governed by the law of a third country acting principally in central bank money and intended to execute payments or to settle and deliver financial instruments, in which a person governed by French law referred to in II is a direct participant, where said system, approved by order of the minister for economic affairs, after consulting the *Banque de France*, presents a systemic risk and a level of regulatory and operational security equivalent to those governed by French law;

“4° A clearing house recognised by the European securities and markets authority, to which a person governed by French law referred to in II is a direct participant, when this system, approved by order of the minister of economic affairs, after consulting the *Banque de France*, presents a systemic risk.

“The systems referred to in 2°, 3° and 4° shall comply with the conditions of their approval at any time. Any modification of the conditions of this approval must be subject to a declaration to the minister of economic affairs. An order of the minister of economic affairs defines the terms of said declaration and the consequences it may give rise to.”;

c) In the thirteenth subparagraph of II, the words: “European Economic Area” are replaced, at their first occurrence, by the words: “referred to in 1° or 2° or 3° or 4° of I” and are deleted the words: “provided that such law is one of a Member State to the European Economic Area”;

4° In IV of Article L. 330-2, after the words: “located in a Member State to the European Economic Area”, are inserted the words: “or in the State whose law governs the said system referred to in Article L. 330-1, 2° or 3° or 4° of the I”;

5° In the first subparagraph of IV of Article L. 612-1, after the first sentence, is inserted the following sentence:

“This power of sanction is exercised over said persons and for acts within the scope of its control at the date of commission of the breach or offence.”;

6° In III of Article L. 612-2, after the words: “or free establishment”, are inserted the words: “or performing obligations arising from contracts concluded under any of these schemes,”;

7° After 18° of II of Article L. 621-9, a 19° is inserted, worded as follows:

“19° The persons referred to in subparagraphs 4 and 5 of Article 29 of Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation.”;

8° In Article L. 621-15:

a) In a) and b) of II and in a) and b) of III, the reference: “18°” is replaced by the reference: “19°”;

b) After the c) of III, a d) is inserted, worded as follows:

“(d) For the persons referred to in subparagraphs 4 and 5 of Article 29 of Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisations, the sanctions provided for in points c) to h) of Article 32(2) of said Regulation.”;

9° Is inserted after Article L. 621-20-6, an Article L. 621-20-7, worded as follows:

“Art. L. 621-20-7. – The *Autorité des marchés financiers* is the competent authority within the meaning of Articles 29(4) and (5) of Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisations.”

Article 2

Chapter I of Title I of Book III of the insurance code is amended, as follow:

1° Is inserted after Article L. 310-2-2-2, an Article L. 310-2-3, worded as follows:

“Art. L. 310-2-3. - I. – When a foreign company regularly established in a third country has concluded a contract pursuant to 2° of I of Article L. 310-2 and is no longer in one of the situations provided for in I of the same Article, the contract may not give rise to a renewal or any direct insurance operations involving the issue of premiums.

“II. – Are null and void contracts renewed or covered by direct insurance operations involving the issue of premiums by a company referred to in I. However, such invalidity shall not be enforceable against insured parties, subscribers and beneficiaries of the contracts.

“III. – Companies no longer in one of the situations provided for in I of Article L. 310-2 inform their insured parties and subscribers in accordance with the procedures specified by regulation.”;

2° In the first subparagraph of Article L. 310-27, are inserted after the words: “and L. 310-6” the words: “or in the provisions of I of Article L. 310-2-3”.

Article 3

I. - A legal person having its registered office in France or established in another Member State of the European Union, which is a party to a master agreement governing transactions on financial instruments entered into before the date of withdrawal of the United Kingdom from the European Union with a credit institution or an investment firm governed by UK law, shall be deemed to have accepted the offer of a new master agreement by a credit institution or an investment firm, where the following conditions are met:

1° The clauses of the new master agreement are identical to those of the master agreement entered into with the credit institution or the investment firm governed by UK law, with the exception of the clauses designating the applicable law and the competent court, which designate French law and the exclusive jurisdiction of French courts, and any other clause necessary to guarantee the performance of the new master agreement pursuant to these amendments;

2° The tenderer belongs to the same group of companies, within the meaning of Chapter 6 of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013, as the credit institution or the investment firm under UK law and has a credit quality step, within the meaning of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013, which is identical to or greater than that assigned to the credit institution or the investment firm under UK law on the date of receipt of the offer, and is authorised to provide transactions on financial instruments to the legal person;

3° The offer is made in writing to the legal person referred to in the first subparagraph in the form prescribed by the master agreement entered into with the credit institution or investment firm governed by UK law;

4° The offer is accompanied by documentation showing the amended elements of the new master agreement, the terms of conclusion defined in 5°, the corporate name of the credit institution or the investment firm making the offer, its legal entity identifier within the meaning of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014, and its credit quality step;

5° At the end of a period of five working days from the receipt of the offer accompanied by the documentation referred to in 4°, its recipient has entered into a contract relating to a transaction governed by the new framework agreement.

II. – The provisions of I are only applicable to offers received during the twelve months following the entry into force of this Ordinance.

Article 4

I. – For the application of the registered office requirement provided for in 4° of I of Article L. 221-31 of the monetary and financial code, securities subscribed or acquired before 30 March 2019 for which the issuer has its registered office in the United Kingdom remain eligible for a period set by an order of the minister of economic affairs and which cannot exceed three years.

II. – Units or shares subscribed or acquired before 30 March 2019 of UCITS established in the United Kingdom, which are eligible under the seventh subparagraph of Article L. 221-31 of the same code, on the date of publication of this Ordinance, retain their eligibility under the conditions of said subparagraph for a period defined by order of the minister of economic affairs and which cannot exceed three years.

III. – For the application of the registered office requirement provided for in subparagraph 5 of Article L. 221-32-2 of the same code, securities subscribed or acquired before 30 March 2019 for which the issuer has its registered office in the United Kingdom remain eligible for a period set by Order of the Minister for the Economy and which cannot exceed three years.

IV. – Equity securities or securities giving access to capital subscribed or acquired before 30 March 2019, which are admitted to trading on a market referred to in I of Article L. 214-28 of the same code, located in the United Kingdom and are issued by companies whose market capitalisation is below EUR 150 million, remain eligible for the investment quota provided for in that same I under the conditions provided for in III of the same Article for a period set by order of the minister of economic affairs and which cannot exceed three years.

V. – Securities subscribed or acquired before 30 March 2019 from a company which complies with the conditions laid down in Article L. 214-30, I, and Article L. 214-31, I, of the same Code on the date of publication of this Ordinance, and whose registered office is located in the United Kingdom and in which a mutual fund for innovation or a local investment fund is invested on that same date, remain eligible for the 70% investment quotas referred to in Article I of these same Articles. The current account advances referred to in the same Articles L. 214-30 and L. 214-31 are also subject to the provisions of this subparagraph.

Article 5

I. – The provisions of Articles 3 and 4 are applicable to the Wallis and Futuna Islands, French Polynesia and New Caledonia.

II. – The monetary and financial code is thus amended:

1° In Article L. 742-1:

- a) The I is supplemented by a subparagraph worded as follows:

“Article L. 211-40 is applicable in its wording resulting from Ordinance No. 2019-75 of 6 February 2019.”;

- a) In II, is inserted after the words: “II. - the following reference: “1.” and is added a 2, worded as follows:

- b) “2. For the application of Article L. 211-40, the references to the civil code are replaced by the references to locally applicable provisions having the same purpose.”;

2° In Article L. 752-1:

- a) The I is supplemented by a subparagraph worded as follows:

“Article L. 211-40 is applicable in its wording resulting from Ordinance No. 2019-75 of 6 February 2019.”;

- b) In 3 of the II, are replaced the words: “in Article L. 211-35” by the words: “in Articles L. 211-35 and L. 211-40”;

3° The I of Article L. 762-1 is supplemented by a subparagraph worded as follows:

“Article L. 211-40 is applicable in its wording resulting from Ordinance No. 2019-75 of 6 February 2019”;

4° In Articles L. 743-9 and L. 753-9:

- a) The second and third lines of the table in the second subparagraph of the I are replaced by a line worded as follows:

“

L. 330-1 and L. 330-2	Pursuant to Ordinance No. 2019-75 of 6 February 2019
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”;

- b) The 4° of the II is worded as follows:

“4° For the purposes of Article L. 330-1, subparagraph 1° of the I is not applicable.”;

5° In Article L. 763-9:

- a) The second and third lines of the table in the second subparagraph of I are replaced by a line worded as follows:

“

L. 330-1 and L. 330-2	Pursuant to Ordinance No. 2019-75 of 6 February 2019
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”;

- b) The 3° of II is worded as follows:

“3° For the purposes of Article L. 330-1, the 1° of the I is not applicable.”;

6° In Articles L. 746-2, L. 756-2 and L. 766-2:

- a) In the second subparagraph of paragraph I, are replaced the words: “of Ordinance No. 2016-1635 of 1 December 2016.” by the words: “of Ordinance No. 2019-75 of 6 February 2019”;

- b) In the third subparagraph of paragraph I, are replaced the words: “of Law No 2018-700 of 3 August 2018 ratifying Ordinance No 2017-1252 of 9 August 2017 transposing Directive 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market.” by the words: “of Ordinance No. 2019-75 of 6 February 2019.”;

7° In Articles L. 746-5, L. 756-5 and L. 766-5:

- a) In the first subparagraph of I, is inserted after the reference: “L. 621-20-3,” the reference: “L. 621-20-7,”;

b) Is inserted after the first subparagraph of the I, a subparagraph, worded as follows:

“Articles L. 621-9, L. 621-15 and L. 621-20-7 are applicable in their wording resulting from Ordinance No 2019-75 of 6 February 2019.”;

a) In the fourth subparagraph of the I, are deleted the references to: “L. 621-9” and “L. 621-15”.

Article 6

Articles 1 to 4 enter into force from the date of withdrawal of the United Kingdom from the European Union without an agreement entered into in accordance with Article 50 of the Treaty on European Union.

Article 7

The Prime Minister and the minister of economic affairs are, each, responsible of the application of this Ordinance, which will be published in the *Journal Officiel de la République française*.

On 6th February 2019.

Emmanuel Macron

By the President of the Republic:

The Prime Minister,

Edouard Philippe

The Minister of Economy and Finance

Bruno Le Maire

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