

In late June, Pierre de Lauzun left his position as AMAFI Chief Executive, a position he had held since 2002. Over the years, and especially since the onset of the financial crisis, Pierre was our spokesperson, representing AMAFI in dealings with our talking partners, at home of course, but also increasingly within Europe and at international level. At a time when the very legitimacy of our industry was being questioned, it was vital to remind people that while some excesses and problems certainly needed to be corrected, markets perform a critical economic function by connecting project contributors with finance providers.

Both personally and on behalf of the Board, I want to thank Pierre for his efforts, which have gone a long way to building the credibility that our organisation enjoys today. I am happy to report, though, that Pierre is not leaving us altogether: he has joined the Board and will continue to chair the International Council of Securities Associations until next June.

Bertrand de Saint Mars is now in charge of leading our association as Chief Executive. He will build on the work we have already done, whether that means informing and driving the public debate on the role of financial markets, leading the industry's contribution to new regulations, or helping members implement these rules. Bertrand will also act on the Board's wishes by boosting our European presence, which is the task assigned to our newly created European Action Committee.

**Stéphane Giordano**  
AMAFI Chairman

## Contract continuity: Finance braces itself for Brexit

### Feature



**With Brexit looming, contract continuity is becoming a critical issue as participants ponder what will happen to in-force banking, insurance and management contracts when the UK heads for the door. Post-Brexit relations between British and EU firms are another matter of huge concern. France is offering some answers to these explosive questions.**

**W**e like to say that Brussels regulates everything down to the shape of bananas. It's certainly true that over recent decades Europe has churned out a huge volume of

rules in many areas, but perhaps especially in finance, where directives, regulations and level 3 measures (which ensure common and uniform implementation of regulatory standards) set sophisticated rules dealing in the finest levels of detail. Yet there is something that all the millions of pages of European rules never foresaw and still less got ready for: the departure of a member state. There is not a single line or word on this point. No one ever thought it would happen. The situation ▶

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► takes an even more complicated turn given that London is home to the bulk of Europe's financial activity. One instant effect of Brexit will be to strip UK firms of the authorisations or "passports" that they use to do business in the European Union (EU), leaving any UK contracting party at risk of breaking the law by continuing to operate. UK authorities, including the Bank of England and the Financial Conduct Authority, have issued stark warnings about the question of contract continuity. Although EU representatives have dismissed these concerns, the fate of financial contracts on day one of Brexit is a critical issue. What is going to become of the hundreds of thousands of insurance, banking, investment and management contracts in force when Britain leaves? Will they instantly cease to exist or can they be continued?

In January 2018, the Haut Comité Juridique de la Place Financière de Paris (HCJP), a high-level committee formed to address legal issues affecting the French financial community, began examining the legal risks associated with Brexit. It created four working groups, covering banking, insurance, management and investment services respectively. "We had lots of participants, including academics, lawyers as well as representatives from financial regulators and the Treasury. We plainly saw the benefits of getting financial legal specialists together in the same place for a technical and objective discussion of these major issues", says Gérard Gardella, the committee's secretary general. Established back in 2014, the HCJP has already penned numerous reports,

some of which have translated into operational reforms. The committee has proven highly effective precisely because of its ability to bring together top legal experts alongside public policymakers to come up with ways of objectively improving the regulations on market-wide issues in a manner dictated by the legal common good rather than individual interests. Within six months, the four working groups – cut to three once the overlap between banking and investment services issues was recognised – had put out their conclusions. A briefing document published on 6 July recapped the recommendations pending the release of the full reports in September.

The reports' intricate recommendations illustrate the sheer complexity of the question surrounding what happens to contracts in force when Brexit occurs. There are just about as many possible scenarios as there are contract types. As Frederick Lacroix, a partner at Clifford Chance, explains: "The wide variety of contract types is what complicates matters. You've got everything from contracts for successive or immediate execution to fixed-term and open-ended contracts, not to mention the master agreements used in the derivatives industry." In short, though, the main risk is that firms could find themselves acting unlawfully if they get their analysis wrong in terms of their situation at Brexit.

Still, the authors of the report are clear about one thing: loss of authorisation for UK firms will not cause contracts that they have signed to become void, with all jurisdictions obeying the general rule that a contract's validity is based on the date when the agreement was signed. Put another way, the fact that a previously authorised firm loses its authorisation a few months or years later does not mean its contracts are torn up. Which is good news, because there had been fears that thousands of contracts might suddenly be terminated, putting parties back to where they were before signing. Imagine the nightmare that this would create for long-term contracts involving huge sums and complex transactions.

So contracts are not facing a big bang. But that doesn't mean that Brexit is not going to cause problems. Regulators in the UK have been voicing continuity concerns for some time. In its June 2018 Financial Stability Report, the Bank of England flagged the continuity of trillions of pounds worth of existing derivative contracts as an area requiring action by authorities on both sides of the Channel. It pointed out that the UK government had "committed to legislate, if necessary, to put in place a temporary permissions regime to enable EU-based financial companies to continue to provide financial services to UK end-users", but expressed concerns that Europe had not yet done the same. The UK Financial Conduct Authority, meanwhile, has spoken of "cliff-edge" risks ►

- ▶ relating to continuity in insurance contracts and derivatives, suggesting that 10 million UK policyholders and 38 million policyholders in the European Economic Area could be affected.

Be that as it may, the HCJP has said based on its analysis that the loss of a European passport will have little effect on investment services contracts in force between a French client and a UK entity that loses its European passport. In most cases, contracts will run out without fuss. However, the same cannot be said for market transactions involving instruments such as derivatives, securities lending and repos. In these types of deals, financial institutions and their counterparties, which may or may not be financial institutions themselves, sign master agreements drawn up by industry associations and governing the parties' general obligations. The parties then conduct transactions on the basis of that master agreement. If they do not alter the basic elements of the agreement, there is no problem. But if the UK firm decides to change a key obligation, such as the nominal or notional amount, say, or the maturity date, difficulties may arise because this will require an authorisation that no longer exists. To remove the legal uncertainty, the HCJP recommends making a list of amendments that constitute the key obligations of the parties. The committee also suggests drawing up European legislation to make it easier to transfer business from London to new entities in the EU as well as simplified formal procedures for drawing up new master

agreements. This mechanism could be used to replicate the master agreements signed between UK financial institutions and EU parties, for the benefit of EU-based entities.

Another key question is the organisation of relations between European and UK firms post-Brexit. Once the UK leaves the EU, it will become a "third" country, forcing British businesses to choose between a range of solutions, from activating mutual recognition mechanisms to applying for authorisations and transferring business to subsidiaries. The shift in status creates many unknowns for British companies and the UK economy as a whole. Will jobs be lost as firms relocate to the continent? The financial services industry, in particular, has plans to move thousands of people, with Paris emerging as a popular destination. Another grey area is business investment: with the UK exiting the EU, will firms adopt a "wait and see" stance on their investment projects? The list of imponderables goes on.

For their part, European authorities are worried about forum shopping, where UK firms attempt to identify and exploit differences in the way that EU countries apply European legislation, in hopes of spotting jurisdictions where it is easier for them to set up structures that make up for the loss of the European passport. With this in mind, the report recommends quickly holding talks to promote more harmon-

isation of European legislation to keep key functions in the EU and limit the scope for regulatory arbitrage between EU27 countries.

When news of Brexit first broke, financial institutions went through a period of denial, trying their best to ignore the issue in hopes that the UK would backtrack on its decision. Then they had to face the truth, acknowledge that the unthinkable was happening and organise themselves to deal with the situation. Since that time, they have been working hand in hand with regulators to overhaul their business plans. The trick is that they are used to relying on legislation that tells them more or less exactly what to do. But now they have no guidance, so they have to come up with their own solutions. "I don't think it's going to be a disaster", says one project leader at a Paris-based firm, who claims the issue takes up about 90% of his time. "But it's creating huge amounts of stress, lots of people are involved and it's extremely expensive because we are having to totally revise our business models. Even after Brexit, I think there will still be plenty of adjustments to make."

With the UK's departure looming larger than ever on the horizon, the only certainty is uncertainty. As the deadline draws nearer, and with no-one – not least the British – quite sure what is actually going to happen, the French financial community is continuing to work hard to create some clarity and address the pressing question of contract continuity in a post-Brexit world.

**George Fowler**

## Europe

### ↗ European Action Committee

Less than seven months before the UK leaves the EU, marking a change that will redraw Europe's financial landscape, it is important that AMAFI can engage with European institutions in a manner commensurate with the challenges faced by its members and the wider Paris financial community. This was the reasoning behind the decision to set up a European Action Committee.

The Eurofi Forum held in Vienna in early September afforded the first opportunity to act on this resolve. AMAFI, represented by Stéphane Giordano and Arnaud Eard, together with members of the new committee, held talks with a number of important figures on the fringes of the public meetings. These figures included Martin Merlin, Director of the European Commission's Directorate-General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA), MEPs Pervenche Berès and Jakob von Weizsäcker, who sit on the European Parliament's Committee on Economic and Monetary Affairs, as well as Zsófia Haraszti and Henrietta Olasz, Financial Services Representatives for Hungary. Discussions centred on four key issues for AMAFI, namely the review of the European Supervisory Authorities (*AMAFI / 18-43*), financing for small, medium and mid-market businesses (*AMAFI / 18-44*), the review of the prudential framework for investment firms (*AMAFI / 18-45*) and Brexit (*AMAFI / 18-46*).

Amid persistent uncertainty over how Brexit is going to unfold, and with elections and new appointments ahead for the European institutions, the coming weeks will be devoted to establishing a detailed work programme, aimed in particular at stepping up contact with member states' permanent representations.

**Arnaud Eard**

### ↗ Sustainable finance

AMAFI replied to two consultations organised by the European Commission as part of its sustainable finance initiative.

The first dealt with proposed amendments to the articles of the Commission's MiFID 2 Delegated Regulation 2017/565 on suitability requirements, aimed at requiring investment services providers to recognise clients' environmental, social and governance preferences. AMAFI stressed the need to clarify the timetable for entry into effect of the new measures and to ensure that this requirement was not a performance obligation, particularly in relation to professional clients (*AMAFI / 18-29*).

The second consultation covered a proposed change to the Benchmarks Regulation (BMR) on low carbon or positive carbon impact benchmarks. AMAFI highlighted elements that it felt were important to take into account when determining these benchmarks and the specific obligations applicable to them (*AMAFI / 18-41*).

**Pauline Laurent,  
Blandine Julé**

### ↗ PRIIPs

At the start of July, AMAFI and the DDV, the German association that represents manufacturers of structured products, met with European Commission representatives to follow up on a letter that they sent to the Commission on 4 May 2018 concerning the main problems encountered since the Packaged Retail Investment and Insurance Products (PRIIPs) Regulation came into effect (*cf. AMAFI Newsletter No. 34*). The meeting provided the two associations with an opportunity to spell out the impact of these issues and put forward possible solutions.

In mid-July, the European Supervisory Authorities (ESAs) published an updated set of Q&A on this question (JC 2017 49). The update incorporated specific questions on PRIIPs with a recommended holding period (RHP) of less than one year, which had been raised by AMAFI and the DDV, and corroborated the approach that AMAFI had been recommending to members. In other areas, however, the clarification provided by the ESAs actually raised new questions that are currently being analysed. To reflect this, AMAFI is delaying publication of its own updated PRIIPs Q&A (*AMAFI / 17-71*), which was supposed to come out this autumn.

**Pauline Laurent,  
Blandine Julé**

## Europe

### ➤ MiFID 2

#### Costs and charges

In early July, AMAFI released updated guidance on implementing cost and charges disclosure obligations (*AMAFI / 18-30*). The primary aim was to reflect Q&As published by ESMA on the notion of ongoing relationships and on using PRIIPs KIDs to provide information on costs and charges required under MiFID 2. The new version of the Guide, which was discussed with AMF representatives, is also available in English.

#### Product governance

To reflect the release of ESMA guidelines in French as well as amendments to the AMF General Regulation, on 23 July AMAFI issued an updated version of its guidance on implementing product governance obligations (*AMAFI / 18-34*). Like previous versions, the guide is also available in English.

A new version of the European MiFID Template (EMT) is currently being finalised by the European Working Group (EWG), a panel of financial participants in which AMAFI is extremely active and which brings together representatives from across the continent, including industry associations and corporations. The latest version of the template, like the last one, will be posted on AMAFI's website. Consistent with requests by AMAFI, the new version includes only amendments that are considered to be necessary, particularly as regards the section dealing with product cost disclosures.

#### MiFIDVision – AMAFI study

As part of work led by the MiFIDVision platform (*cf. Financial Newsletter No. 34*), AMAFI carried out a study on the coverage of French stocks by investment research firms between end-2005 and end-2017 (*AMAFI / 18-52*).

Unsurprisingly, the findings point to a high correlation between market capitalisation and the number of analysts covering the firm. On average, firms with a market capitalisation of between €10 million and €150 million are covered by fewer than one analyst, while almost ten analysts cover firms with capitalisation of between €1 billion and €5 billion. Overall, coverage of firms with a capitalisation of less than €1 billion decreased between 2005 and 2017, with the average coverage rate for stocks with a market capitalisation of between €150 million and €1 billion falling from five to 3.5 analysts. Only the €10 million-€150 million cap category bucked the trend, as the arrival of new investment research firms in France over the 2007 – 2012 period offset the loss of long-standing providers, paving the way for increased coverage.

The study also highlighted the fact that research on small, medium and mid caps is essentially performed by local firms and highly concentrated. Another key finding was that changes in coverage for a given population of stocks is linked much more closely to “plastic” factors, such as the closure or creation of investment research firms, than to the number of stocks followed by firms, especially in the case of small caps. These findings are cause for concern in the MiFID 2 environment, illustrating the weak foundations underpinning coverage at a time when new research firms cannot always be guaranteed to emerge to compensate for the closure of existing providers. The withdrawal of a big player would increase attrition risk still further. At the end of the day, what is at stake is the market's ability to provide small, medium and mid-market firms with financing at reasonable cost.

**S. Dariosecq, E. de Fournoux, B. Julé, P. Laurent, M. Ounjema**

## France

### ➤ PACTE legislation

France's National Assembly has begun reviewing the Action Plan for Business Growth and Transformation (PACTE) Bill, initially in a special commission, and, over the last few days, as this newsletter went to press, in public hearings. Jean-Noël Barrot, the member of the National Assembly who is acting as rapporteur for provisions relating specifically to business financing and the attractiveness of the Paris financial centre, interviewed Stéphane Giordano and Bertrand de Saint Mars as part of this process.

The proposed legislation contains many important provisions supported by AMAFI. Accordingly, this discussion offered an opportunity to talk about cyber-assets and also to reiterate some of AMAFI's main concerns.

**Bertrand de Saint Mars**

### ➤ Liquidity contracts

In early July, the AMF published Decision No. 2018-01 establishing a new accepted market practice for liquidity contracts in equity securities after ESMA issued a negative opinion on the initial draft decision. The result of close collaboration with the authority over many months, the new decision addresses some aspects of ESMA's opinion. Crucially, though, and as requested by AMAFI, the framework still maintains sufficient freedom over a two-year period, which will be used to collect data to refine the framework by beefing up or relaxing restrictions.

**Bertrand de Saint Mars, Sylvie Dariosecq**

AMAFI is now concentrating its work on two main areas. First is to update the AMAFI standard liquidity contract, which is expected to be published very soon. The second area concerns implementation of Decision No. 2018-01, which will entail working with the AMF to clarify aspects of the decision while drawing up a non-exhaustive typology of situations that justify non-compliance with specific restrictions. The typology will play an important role by ensuring that the use of exemptions established by the AMF is not hindered in practice because the requisite documentation is too unwieldy to produce.

### ➤ Secondary market in cyber-assets

In recent months, the AMAFI has been actively participating in discussions on issues surrounding cyber-assets. In addition to engaging with the AMF on initial coin offerings (*cf. Financial Newsletter No. 34*), the association has been talking with the Treasury about subjects such as issuing and transferring minibonds and other unlisted securities via blockchain, creating a regime for token offerings, and setting up a secondary market for tokens.

Since the new PACTE legislation is supposed to include measures to address the secondary market question, the French Treasury asked AMAFI at the start of the summer to come up with some proposals. Discussions, which wrapped up in early September, were conducted by a group comprising members of the association alongside specialists in the new cyber-asset markets. The group put forward a number of proposals to regulate participants in the secondary market for these digital assets (*AMAFI / 18-47*). These included introducing a single cyber-asset company authorisation, which would entail compliance with general requirements relating to IT resilience for example and/or expertise in cyber-assets, as well as with specific requirements based on whether the firm plans to operate a cyber-asset trading platform or provide custody of cyber-assets for third parties.

AMAFI will continue exploring this subject, while keeping track of developments arising in connection with the PACTE legislation, since the National Assembly is proposing to amend this portion of the bill fairly substantially.

**Emmanuel de Fournoux**

## Amafi Staff

The end of the summer has brought some changes to AMAFI's team of full-time staff, with three departures, two new faces and one appointment.

**Véronique Donnadieu**, Director of European and International Affairs, left AMAFI in late July to join ASPIM, the professional association that represents real estate investment companies, as Chief Executive. Her position has been taken over by **Arnaud Eard**. Arnaud, who holds an MA in international political economy from the University of Sheffield, worked for six years in Brussels, first at the European Commission's Anti-Fraud Office, and later at public affairs consultancy FleishmanHillard.

**Sicile Rouillé**, Management Assistant, left AMAFI in early August.

**Faustine Fleuret**, Adviser, Market Activities, left AMAFI at the start of September. She is moving to join ConsenSys, a company specialising in blockchain technol-

ogy, as Finance and Regulatory Strategy Associate. **Mehdi Ounjema**, who holds a Masters in Applied Economics from Paris I Panthéon-Sorbonne University, is now providing support to Emmanuel de Fournoux, Director, Market Activities.

**Blandine Julé**, who joined AMAFI in October 2016 as Compliance Adviser, has been appointed Compliance Projects Officer – Head of Financial Security. In addition to being involved in issues addressed by her unit, particularly in terms of product marketing, Blandine will now be specifically responsible for questions relating to AML/CTF and anti-corruption.

Personally, and on behalf of my entire team, I would like to wish those who are leaving us – Sicile after 15 years, Véronique after 11 and Faustine after 2 – every success in their continued careers. We will miss them greatly.

**Bertrand de Saint Mars**

## New Members

**Goldman Sachs International**, Paris branch, whose main business is order reception/transmission for third parties in fixed income, currency and commodity products. Laurent Lellouche is its senior manager.

**Lazard Frères Banque**, a credit institution that conducts all of Lazard's banking activities in France, from standard banking services (which include receiving funds from the public, credit transactions and provision of payment instruments) to investment services other than discretionary portfolio management for third parties, which is handled by Lazard Frères Gestion, and multilateral trading facility operation. Its senior managers are Chairman Matthieu Bucaille, CEO Christian Benezit and Executive Director François Funck-Brentano.

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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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