

## Bill Preparing for a "Hard" Brexit Presented in French Parliament

### IN SHORT

**The Situation:** The French government has presented a new bill in order to prepare for a "Hard" Brexit scenario.

**The Result:** If the United Kingdom leaves the European Union in March 2019 without an overall deal—or with a deal but one not covering cross-border financial activity—this new bill is designed to authorize the French government to issue ordinances to extend the Finality Directive's benefit to UK-based payment and settlement systems and to address issues related to contracts continuity.

**Looking Ahead:** This bill is designed to preserve financial stability and the operations of EU 27 firms and clients from a French domestic-law perspective. It must be put in perspective with the work carried out by EU institutions, notably the Commission and European Supervisory Authorities at levels 1 and 2 of European regulation.

On October 3, 2018, the French government presented a new bill to the French Senate aimed at granting legislative authorizations to the government to issue ordinances, in preparation for the possibility of the United Kingdom's departure from the European Union without reaching an agreement addressing cross-border financial activity with the 27 countries remaining in the European Union ("EU 27"), known as a "Hard" Brexit scenario.

The bill addresses a wide range of issues and subject matters, from rights of entry and residence of UK citizens to the continuity of freight transport flows. Outlined below is a snapshot of topics dealing with issues related to financial markets.

#### Interbank Payment Systems and Settlement Systems

The bill would further extend the scope of the current safe harbor that protects the finality of transactions that participants carry out with payment and settlement systems. Presently, the scope is limited to systems within the European Economic Area ("EEA") and governed by the law of an EEA Member State. Consequently, as a result of Brexit, systems governed by English law and designated by the UK authorities under the Settlement Finality Directive (98/26/EC) will no longer benefit from the protection of French insolvency laws, and they could consequently exclude French participants.

The finality safe harbor would be extended to expressly cover third-country payment and settlement systems, including in the United Kingdom. This extension implies recognizing and safeguarding from the mandatory insolvency rules, in the context of insolvency proceedings opened with respect to a French participant to such systems, its obligations arising from its participation to the system, even if they are governed by a third-country law.

#### Legacy Contracts

The loss of passport rights for UK firms will affect their capacity to enter into new transactions, but it should not prevent their ability to perform existing obligations and to manage most life cycle events of ongoing, continued transactions.

However, some life cycle events that involve the provision of a new regulated service may raise issues and require a passport. If the original party no longer has a passport, an EU 27 regulated entity may need to intervene and render the relevant investment service to the EU counterparty.

The bill would authorize the government to issue an ordinance clarifying which life cycle events can be managed without a passport and which—through a limitative list—should be considered as implying, from a French law perspective, a new regulated service.

For those requiring a new investment service, the government is seeking to create a new legal



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regime whereby UK firms would, under certain limited circumstances and for a limited period of time, be authorized to continue to manage *all* life cycle events of legacy trades, even those they would not otherwise be authorized to manage without a passport. The new regime, known as "extinctive management" (*gestion extinctive*), will be based upon the regime applicable to banks or investment firms whose licenses are undergoing a withdrawal process for any reason, and it is designed to safeguard clients' and customers' interest.

The explanatory memorandum and the impact assessment accompanying the bill also contemplate the creation of a new legal regime allowing the transfer, in a simplified form, of existing agreements originally entered into by the UK entities of international groups to one of this group's regulated entities established in the EU 27. Simplified procedures for obtaining counterparties'/clients' deemed or express consent to such transfers are believed to be key to this regime.

### Modification of French Law to Foster Use of ISDA French Law Master Agreement

The explanatory memorandum and in the impact assessment also mention extension of the scope of the Favorable Netting Regime and the reform of the compounding of interest (*anatocisme*), which the Parliament addressed in the context of the PACTE bill (see our [June 2018 Commentary](#)). The PACTE bill—which has already been voted by the National Assembly—is expected to be enacted before the United Kingdom leaves the European Union. But there is a possibility that this will not be the case, in which case the French government is considering the possibility of having those provisions enacted by way of ordinances, in advance of the voting of the law.

### Next Steps

A special committee of the French Senate, which first met on October 10, 2018, is currently reviewing the bill. This committee issued a report on the bill on October 30, 2018, and the bill will be discussed in a public parliamentary session on November 6, 2018. The French National Assembly will then need to adopt the bill, presumably in December 2018.

The legislative authorizations contemplated by the bill are intentionally very broad, in order to allow the greatest possible flexibility if, and when, a "Hard" Brexit scenario is realized.

### THREE KEY TAKEAWAYS

1. The French Parliament is currently discussing a bill granting legislative authorizations to the French government to issue ordinances in order to prepare for "Hard" Brexit.
2. The bill addresses a wide range of issues and subject matters relevant to the banking and financial markets, including payment and settlement systems and contracts continuity.
3. The proposed measures are designed to bring further clarity and ensure financial stability for EU counterparties and market participants operating in France, in the event of "Hard" Brexit. It is likely to be followed by similar initiatives at the EU level.



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