



French Brexit-Related Legislation— A Safe Harbor for ISDA Master Agreements

IN SHORT

The Situation: In the event of a "hard Brexit," establishing a new contractual framework with EU-based clients will be a protracted and costly task for investment service providers based in London.

The Result: The French government's Ordinance of February 6, 2019, creates a "safe harbor" regime designed to facilitate replications of existing netting agreements by investment service providers by way of notification to their EU-based counterparties.

Looking Ahead: Replications, together with novations, transfers, or Part VII schemes, require attention from both sell- and buy-side market participants. Many have decided to replicate existing agreements with French counterparties under French law master agreements.

In the event of a hard Brexit, banking and investment-services firms operating in the European Union from their London head offices or branches will lose their "passports." While the loss of passporting rights will not affect existing transactions that were entered into before Brexit, undertaking new transactions with EU-based clients after Brexit may be illegal—and, potentially, a criminal offense.

Under French law, there is currently no "third-country regime" authorizing firms based in the United Kingdom to continue servicing clients from the United Kingdom. In order to comply with MiFID, banking and investment services firms based in the City will need to contract with EU-based counterparties by using an affiliate that is established in an EU Member State. This is a costly, time-consuming, and potentially risky process, should a counterparty take the opportunity to renegotiate the commercial terms of the transaction.



Under French law, there is currently no "third-country regime" authorizing firms based in the United Kingdom to continue servicing clients from the United Kingdom.



With this in mind, the French Treasury has asked the Legal High Committee for Financial Markets of Paris to design a legal framework that enables financial institutions based in London to quickly and easily replicate, with an EU-based affiliate, their existing master agreements with EU-based counterparties.

Ordinance n°2019-75 of February 6, 2019, has been published and will come into force in the event of hard Brexit. Article 3 of the Ordinance introduced a "safe harbor" for applicable derivative contracts.

"Safe Harbor" Mechanism

The "safe harbor" provisions of the Ordinance provide that a new master agreement will be deemed to be validly entered into between the EU affiliate (the "offeror") of the UK-based investment services provider and the relevant EU-based counterparty (the "offeree"), where the following conditions are met:

- The terms of the new master agreement are identical to the terms of the master agreement originally entered into with the UK entity, save for amendments required to designate French law as the governing law and the exclusive jurisdiction of the French courts, (together with such other changes necessary to ensure the legality and validity of the agreement resulting from these amendments);
- The offeror belongs to the same group as the original UK-based investment services provider;
- The offeror has an identical or superior credit quality step, as defined in the Capital Requirements Regulation, as the UK investment services provider on the date of the offer, and is authorized to enter into those transactions;
- The written offer to enter into the new master agreement is addressed to the offeree in the forms prescribed in the existing master agreement; and
- The offer must be sent to the offeree with the documentation setting out the modifications to be effected by the new master agreement, together with details of the corporate name of the offeror, its legal entity identification, and its credit quality step, as well as confirmation that the offeree will be deemed to have entered into the replica transaction with the offeror within five business days of receipt of the offer.

The safe harbor provisions will apply only to offers received during the 12-month period immediately following the Ordinance coming into force.

The safe harbor has been primarily designed for derivatives master agreements, although netting agreements (e.g., repurchase and securities lending master agreements) may also benefit from it.

Facilitating Repapering of Agreements

This new French legislation is helpful to market participants in providing for a streamlined process that facilitates continuing performance of agreements entered into between EU counterparties and financial institutions.

TWO KEY TAKEAWAYS

1. A safe harbor to replicate master agreements entered into with a UK entity of an international banking group has been published.
2. Subject to the completion of all the conditions, repapering of master agreements with a European entity of such banking group will be facilitated.



Alban Caillemer du Ferrage
Paris



Qian Hu
Paris



Nadège Debeney
Paris

YOU MIGHT BE INTERESTED IN: [Go To All Recommendations >>](#)



[Bill Preparing for a "Hard" Brexit Presented in French Parliament](#)



[New ISDA Master Agreement \(French Law\) Brings Changes for EU OTC Derivatives Market](#)

SUBSCRIBE

SUBSCRIBE TO RSS



Jones Day is a global law firm with more than 2,500 lawyers on five continents. One Firm WorldwideSM

Disclaimer: Jones Day's publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2019 Jones Day. All rights reserved. 51 Louisiana Avenue, N.W., Washington D.C. 20001-2113