FRENCH THIRD-COUNTRY REGIME
Interdealer exemption
Additional details

1. AMAFI was contacted, towards the end of 2018, by a number of its members, credit institutions and investment firms, which faced certain positions expressed by counterparties based in the United Kingdom. Those counterparties were warning that they would only enter into OTC transactions on financial instruments through their EU subsidiaries, should the United Kingdom be considered as non-equivalent third country on the day of its withdrawal from the Union.

Their concern revolved around being considered as providing or carrying out an investment service or activity in France and thereby becoming subject to local regulation.

2. Those concerns seeming unfounded in a context where the French regulator's (ACPR and AMF) position was well established and where the issue was neither new and nor would change whatever the conditions of the United Kingdom's withdrawal, letters were exchanged between AMAFI on the one hand and the ACPR & AMF on the other hand (*See Annex 2*), following meetings which the French Treasury[1] attended.

The ACPR and the AMF confirmed, on 15 February 2019, to AMAFI and French participants to the interdealer market, that "*the purpose of the national regime applicable to third-country firms (…) is not to create a disruption in their own-account dealing activities with third country firms*". The regulators added that « *Article 23[2] of the draft bill on growth and business transformation (so called PACTE law) as approved by the Senate on 31 January 2019 should amend the third country regime, while retaining, by way of delegated legislation, the current regime with respect to transactions undertaken on the terms set out* [in their letter]".

3. Following the entry into force of the PACTE law, the definition of third country firms (TCFs) in Article L. 532-47 of the Monetary and Financial Code (Comofi) has been aligned with that of Article 4(57) of MiFID 2[3]. A TCF is now defined as "*a firm that would be a credit institution providing investment services or performing investment activities or an investment firm if its head office or registered office were located within the Union*".

Article L. 532-48 of the Comofi in it new version specifies that a TCF may provide investment services on French soil only through a branch established in France, whatever the type of clients might be (retail clients, professional clients or eligible counterparties). The same article provides however in its paragraph IV that "*When it is necessary for the proper functioning of financial markets,* [a decree] *may grant exemptions limited to own-account dealing as mentioned in Article L. 321-1*".

[1] Direction Générale du Trésor
[2] Art. 77 of the final version
[3] Directive 2014/65/UE of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments.

4. It is the purpose of the decree (*See Annex 1*) published in the French Official Journal on 28 June 2019 which brings into existence a new Article D. 532-40 in the Comofi. This provision authorises TCFs to carry out, without imposing the establishment of a branch in France but provided that (i) they act for their own-account and (ii) they do not provide any other investment service in France, the following transactions:

- OTC transactions on financial instruments with a French credit institution or investment firm;
- Transactions on a French trading platform.

5. This decree confirms and **replaces** the letters exchanged between AMAFI and the French regulators in February 2019.

Annex 1 – Decree n° 2019-655 of 27 June 2019 adopted pursuant to Article L. 532-48 of the Monetary and Financial Code

Target audience: the decree affects third-country firms as defined in Article L. 532-47 of the Monetary and Financial Code and members of regulated markets, multilateral trading facilities or clients of organised trading facilities mentioned in articles L. 421-1, L. 424-1 et L. 425-1.

Purpose: allow third-country firms to carry out certain transactions for their own account without imposing a physical presence.

Entry into force: Article 1 of the decree enters into force on the day after its publication in the Official Journal (…).

Notice: the decree authorises any purchase or sale of instruments between a credit institution or an investment firm and any third-country firm, traded over-the-counter and for its own account and allows a third-country firm to be a member of a French trading platform without having to establish a branch.

References: the decree is adopted pursuant to Article 77 19° of the law n°2019-486 of 22 May 2019 on growth and business transformation.

(…)

Article 1[4]

After article D. 532-39 of the Monetary and Financial Code, an article drafted as follows is added:

“Art D. 532-40 – A third-country firm within the meaning of article L. 532-47 1° of the present code is not required to establish a branch in France where, without providing any other investment service listed in Article L. 312-1 in France, it carries out transactions for its own account on financial instruments or units mentioned in article L. 229-7 of the Environmental Code while being in one of the following situations:

“1° Transactions are carried out with an entity acting for its own account which is a credit institution authorised pursuant to Article L. 511-10, an investment firm authorised pursuant to Article L. 532-1 or an institution referred to in Article L. 518-1 or article L. 531-2 1°, outside of a regulated market, a multilateral trading facility or an organised trading facility;

“2° Transactions are carried out on a regulated market, a multilateral trading facility or an organised trading facility mentioned in articles L. 421-1, L. 424-1 and L. 425-1.”

[4] Articles 2 & 3 are not relevant to the interdealer market.

Annex 2 – Letters exchanged between AMAFI and AMF / ACPR

Amafi > *Association française* des marchés financiers

LES PROFESSIONNELS DE LA BOURSE ET DE LA FINANCE

The letter was originally drafted in French.
It has been translated into English to assist non-French speakers
In case of a conflict however, the French version shall prevail.

The Chief Executive

M. Benoît de Juvigny / M. Edouard Fernandez-Bollo
Secretary General
AMF / ACPR
17, Place de la Bourse / 4, Place de Budapest
75082 Paris cedex 02 / 74436 Paris

In Paris, on 1 February 2019

Re : Interdealer market
Transactions undertaken with a counterparty based outside the EU

Dear Mr Secretary General,

The AMAFI has been contacted, over the last few weeks, by a number of its members, credit institutions and investment firms, which face positions expressed by counterparts based in the United Kingdom. Those counterparts have indeed warned that they would only enter into OTC transactions on financial instruments from their EU subsidiaries, should the United Kingdom be considered as a non-equivalent third country on the day it exits the EU.

The risk, now extremely high, of a hard Brexit is the reason most likely underpinning those positions. The non-EU counterparties are concerned that they might become subject to local rules on the basis that they may provide or carry out an investment service or activity in France.

These positions constitute a major issue from an economic standpoint. It would indeed mean that institutions and firms based in France no longer have access to a pool of counterparties – and therefore to liquidity sources – as large as today, but only to those established in the EU. Would consequently be impacted their ability to efficiently manage their balance-sheet risks. And more importantly, as a side effect, this fragmentation of the interdealer market would reduce their ability to provide their European clients with services and products at competitive prices, and, eventually, reduce their capability to support the financing needs of the European economy and the risk-hedging requirements of its actors.

More importantly, these positions seem unfounded in the context of the ACPR and AMF's existing guidance which has been, in the AMAFI's view, well and long established and where the underlying issue remains the same whatever the circumstances of the United Kingdom's exit are. For the sake of argument, interdealer market transactions with counterparties based in the United States have never caused an issue even though the situation is the same as the one which the United Kingdom could find itself in soon.

.../...

.../...

As a consequence, bearing in mind that this is a matter of interpretation of our third country regime, and given that the ACPR and the AMF, within their respective remits, are responsible for ensuring that it is properly complied with by institutions and firms under their supervision, the AMAFI respectfully requests that confirmation be provided that, where one of the counterparties is based in France, and where the three cumulative conditions set out below are fulfilled, the regulators will consider that no investment service or investment activity triggering a permission requirement in France is provided or carried out.

- Each counterparty is either a credit institution or investment firm or holds an equivalent status as far as the third country counterparty is concerned ;
- They both hold appropriate regulatory permissions to trade on own account in accordance with the rules and regulations which are applicable to them ;
- The transactions in question are OTC transactions on financial instruments entered into for the counterparties' own account.

We are of course sending the same letter to the ACPR's Secretary General.

We thank you for your careful attention and remain at your disposal to discuss this letter in more detail.

Yours sincerely,

Bertrand de Saint Mars

The letter was originally drafted in French.
It has been translated into English to assist non-French speakers
In case of a conflict however, the French version shall prevail.

In Paris, on 12 February 2019

Bertrand de Saint Mars
Directeur Général
AMAFI
13 rue Auber
75009 Paris

Re : Interdealer transactions undertaken with non-EU counterparties

Dear Mr CEO,

By letter dated 1 February 2019, you relayed concerns expressed by your members, credit institutions and investment firms, which faced reluctance from their counterparts established in the United Kingdom, to carry out over the counter transactions on financial instruments with them on the basis that, in the event of a no-deal Brexit and in the absence of an equivalence decision made by the European Commission, those third-country firms would not be able to rely on Article 46 of EU Regulation No 600/2014 (MiFIR) and would be subject to the national third-country regime.

We understand that these counterparties are concerned that they may have to seek permission in France in order to keep entering into transactions with credit institutions and investment firms based in France. If that interpretation were to be adopted, third-country counterparties would cease to trade with French entities. The latter would lose access to foreign liquidity pools which would hamper their ability to manage their balance-sheet risks and eventually harm the European market.

By way of the present letter, we would like to confirm to interdealer market participants that the purpose of the national regime applicable to third-country firms, that is those firms which, if their central administration or registered office was located within the European Union, would either qualify as credit institutions providing investment services or carrying out investment activities, or investment firms, is not to create a disruption in their own-account dealing activities with third country firms.

In particular, it is still the case that, if the only investment services or activities provided or carried out in France by a third-country firm are OTC transactions on financial instruments on own account (excluding execution of transactions on behalf of clients) with credit institutions or investment firms, so called interdealer transactions, then this third-country firm is not subject to the obligations set out in Articles L. 532-47 *et seq.* of the French financial and monetary code. As a consequence, no permission in France is required in accordance with the local law currently in force.

Article 23 of the draft bill on growth and business transformation (so called Pacte law) as approved by the Senate on 31 January 2019 should amend the third country regime, while retaining, by way of delegated legislation, the current regime with respect to transactions undertaken in the terms set out above.

We hope that we have met your expectations,

Yours sincerely

The ACPR Secretary General

Edouard Fernandez-Bollo

The AMF Secretary General

Benoît de Juvigny