Amafi
Association française des marchés financiers

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Double trouble:
France to adopt a new system for punishing market abuse

Feature

Until recently, anyone committing market abuse in France could be punished by the market regulator and then pursued through the courts. No longer. Recent legal rulings have upheld the principle that double jeopardy infringes both the French constitution and human rights legislation. A new system will be adopted by mid-2016 to determine which set of laws – civil or criminal – will apply to each case of wrongdoing. Much head-scratching lies ahead!

In France, a person accused of market abuse – which covers insider trading, false information and price manipulation – was punishable by the country's securities regulator, Autorité des Marchés Financiers (AMF), and could then also be subject to criminal prosecution for the same offence. Italy followed the same doctrine – and it was there that game-changing forces were set in motion.

Editorial

Over the past few years, AMAFI has been updating its surveys on taxation (see News p 7). They show that relative to neighbouring countries, France has an approach that discourages business investment. This is particularly true of equity, which apart from being indispensable is crucial to getting start-ups off the ground. The differential between France and other nations is not as great as it was in 2012 but has by no means disappeared.

The wealthiest households are certainly bearing the heaviest burden, but fair tax treatment is a façade that masks other issues. The fact is that by dissuading those with the greatest savings capacity from investing in business, our companies have no choice but to tap international savings instead. The capital raised in the USA by Criteo and BlaBlaCar bears witness to our entrepreneurs' success and France's dynamic business culture. But why did the relatively small sums involved have to be sought in America rather than closer to home?

Let's not be naïve. Access to capital is a major consideration in the location of a number of decision-making centres. French savings should therefore play an active role in the globalisation of companies that will be tomorrow's world-beaters. As the French president explained a year ago, we really do have to put our savings to work in financing business. It is high time for action.

Pierre de Lauzun
Chief Executive, AMAFI

Feature

On 3 March 2014 the European Court of Human Rights (ECHR) dropped a bombshell. In the matter of *Grande Stevens v. Italy*, it handed down a decision concerning *non* (or *ne*) *bis in idem,* or double jeopardy, the principle that a person cannot be prosecuted twice for the same offence. The decision applied to a case in Italy where Francesco Grande Stevens, a lawyer who had been sanctioned by the Italian stock market regulator for his part in an affair involving Fiat, was also facing criminal prosecution on the same charges. Grande Stevens appealed to the ECHR, which ruled that a person who has already received administrative sanctions is immune from subsequent criminal prosecution for the same misconduct. In short, no double jeopardy.

The onus in the *Grande Stevens* case was on Italy, but the ruling concerns all 47 member states of the Council of Europe (even though it is not binding on any of them at this stage). The ECHR's ruling was thus the writing on the wall for France, which has long used the same two-tier system of administrative and criminal sanctions. Back in 1989, to toughen the country's stockmarket regulation, parliament decided to permit the AMF's forerunner, the COB, to impose administrative penalties in addition to the existing legal sanctions. At that time the Constitutional Council, which has the final say on whether French law complies with the country's constitution, was quizzed about the issue of dual-track prosecution. It responded with the landmark decision that the procedure was permissible provided the total fine did not exceed the maximum sanction provided for under criminal law and securities regulation.

For years this situation was challenged repeatedly by defendants and their counsel on the grounds that it constituted double jeopardy, outlawed by both the European Charter and the European Convention on Human Rights. The thrust of the argument was that in common-law countries such as the UK, a defendant found guilty or convicted of an offence could enter a plea – known, ironically, by the French term *autrefois* – not to be retried on the same count. But each time these challenges fell on deaf ears.

All change

The ECHR's ruling changed everything. It meant that double-sanction systems violated the EU's human rights convention. It also prompted defendants already sanctioned by the AMF in France and awaiting trial on criminal charges to challenge the constitutional validity of a dual prosecution, insofar as it would breach the *ne bis in idem* principle. The finance and justice ministers, together with the AMF, immediately set about finding ways to bring the system into line with the ruling.

The courts, however, were not bound at this point by ECHR's ruling. In September 2014, for instance, the Paris criminal court refused to drop a prosecution against Pechiney, a major French aluminium conglomerate that had already been fined by the AMF, because French law still applied. It was in this uncertain environment that a ground-breaking case involving EADS, the former Airbus Group, came before the courts. The affair had begun in 2006, when both the AMF and the public prosecutor launched investigations into insider trading allegations. (Interestingly, the German regulator, BaFin, and the prosecutor's office did the same, but quickly withdrew.) After a lengthy probe, the AMF's Sanctions Committee cleared all the defendants. But the criminal investigation forged ahead and the same defendants were indicted for trial, which opened on 3 October 2014.

This time, counsel for the defence opted for a novel tactic. It did not ask the court to throw out the case, arguing instead that the matter should be referred to the Constitutional Council on the grounds of *ne bis in idem*. On 18 March 2015 the Council ruled that the dual-sanction regime was inapplicable to insider trading, not because multiple proceedings and penalties are banned by French law but because they must result from two separate bodies of rules, with sanctions of a different nature and objective. The Council considered that the nature and objective of the rules defining and sanctioning insider trading as a criminal offence, on the one hand, and professional misconduct on other hand, were almost identical for non-professionals. In consequence, double prosecution and punishment for this type of offence and this type of defendant breached the fundamental principles enshrined in France's 1789 Declaration of Human Rights. As a result, ongoing criminal cases in which non-professional defendants had already been investigated by the AMF – even where no sanctions had been imposed (the EADS case, among others) – were halted immediately. In the meantime, no criminal prosecution can be brought in a case where the AMF Enforcement Committee has already initiated proceedings for the same facts. The same rule applies in reverse in the event that a regulatory proceeding is underway. The Council also abrogated the legislation on which the system was founded, effective 1 September 2016.

No soft touch

That the Constitutional Council has set a lengthy 18-month deadline for compliance with the new ruling is a sign that the issue is highly complex, not least because the double-trial principle applies to other professions such as law and medicine. One concern regarding the financial industry has been that the double jeopardy ban might result in lighter punishments for market misconduct, due to a trade-off between legal and administrative sanctions.

Feature

But, according to legal experts, such fears are ungrounded. In fact, the revamped Market Abuse Directive introduces even stricter rules. Member states that do not yet provide for criminal penalties in the most egregious cases of abuse are now required to do so.

In the United States, where defendants can be subject to parallel civil and administrative proceedings for the same facts, the situation is uncontroversial. Following an investigation for market abuse, the Securities and Exchange Commission may authorise a civil suit in a federal court or administrative enforcement action. In some cases, it can pursue both. Moreover, the SEC's powers have been expanded by the 2010 Dodd Frank Act. The question of double jeopardy was settled to a greater of lesser extent in a 1998 Supreme Court decision stating that the imposition of civil and criminal penalties did not automatically violate the double jeopardy clause.

In the UK, the issue of double jeopardy does not arise. The market supervisor, the Financial Conduct Authority, has the power under statute to take action under either criminal or civil law, depending on the seriousness of the case. Richard Sims, a partner at the international law firm Simmons & Simmons, says the FCA pursues "a more streamlined enforcement approach".

Here in France, the sanctioning system will be reorganised in order to establish a procedure for determining whether a case should be routed to the AMF or the public prosecutor.

Head-scratching complexity

In June the AMF issued a set of proposals for the new routing system, which is fiendishly complex from a legal perspective. Basically, the idea is that the choice of jurisdiction in market abuse cases should be based on fundamental differences between criminal and administrative law. According to the AMF, criminal law should apply in circumstances where the aim is to punish intentional wrongdoing that impinges on "the fundamental values of society", whereas administrative law should prevail where the purpose of regulation is to ensure the orderly functioning of markets. In other words, the criminal option should be reserved for the most serious and highly symbolic cases that entail a prison sentence.

That split is similar to the current situation where market abuse is only rarely prosecuted under criminal law, which is reserved for emblematic cases such as Altran and Vivendi – the two biggest financial scandals in France during the pre-crisis bubble years – and EADS more recently. Going forward, the only difference is that offenders will be subject to just one type of sanction instead of both. The problem will be to determine for certain when a case involves intentional wrongdoing. The AMF proposes to set objective criteria for gauging the seriousness of a case, based on the profits earned or losses avoided through the infraction. Criminal penalties would also apply to anyone committing a repeat offence and acting in concert. These recommendations seem to chime with other opinions. A leading group of legal experts, the Club des Juristes, concurred with the AMF's proposals but disagreed that the gravity of an offense should be assessed on the amount of money earned or saved. In a report published at the same time as the AMF document, it said that although misconduct can certainly involve large monetary amounts, there may be no manifest intent to defraud. Conversely, a culpable offence can be committed for a much smaller gain. Evidently, this issue still needs to be clarified.

Once the choice between criminal and administrative law has been made, the proceedings can go ahead. One important question, however, is how victims will be compensated if a penalty is imposed. At present they have to seek redress through the criminal courts because the AMF Enforcement Committee is entitled to sanction but not indemnify. Under the new system, if the AMF has imposed a sanction, then victims will no longer be able to petition the criminal court but will have to assert their claim through civil proceedings. This will be easier to do in future, however, because a law passed in 2014 allows the AMF to forward cases to the civil court.

AMAFI's deputy chief executive, Bertrand de Saint Mars, expressed satisfaction that the AMF and the Club des Juristes concur on the need to align the interests of professionals and non-professionals, who alone stand to benefit from the Constitutional Council's decision. "There is obviously a need for consistent treatment of the same type of dispute, namely market abuse. Now the ECHR has imposed a solution. And even though the ruling is not binding on France for the time being, it is only a matter of time".

The AMF's blueprint is very likely to be adopted, but the issue is both sensitive and complex. The finance ministry will certainly be at loggerheads with the justice ministry because it intends to keep the upper hand in dealing with market abuse. The legislature may benchmark its reforms on the systems adopted by other European countries, which also have to comply with European human rights law and EU legislation. Whatever the outcome, one thing is certain: double jeopardy is here to stay.

Anthony Bulger and Olivia Dufour

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International

IOSCO annual conference and ICSA meeting, London, 15-19 June 2015

This year the International Organisation of Securities Commissions (IOSCO) held its 40th Annual Conference in London, hosted by the Financial Conduct Authority (FCA).
In parallel with the public hearings, the International Council of Securities Associations (ICSA) organised meetings between the financial industry and regulators, together with IOSCO standing committee chairs. The industry was represented by an ICSA delegation that included AMAFI.
On the menu were bond market liquidity, capital market financing for SMEs and mid-tier firms, penalties and credible deterrence, and the resilience of market infrastructures such as clearing houses.
ICSA took advantage of the event to call an exceptional meeting aimed mainly at formal approval of its reorganisation process, identifying its strategic direction and setting out its work programme for the coming months.

Véronique Donnadieu

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Europe

MiFID 2

Assessing staff knowledge and skills

As part of MiFID 2, ESMA has to establish guidelines on financial institutions' obligations to assess the knowledge and skills of their staff. It launched a consultation on a draft proposal at the end of April, aimed at more standardised European practice in this area.
AMAFI wants to stick with the existing AMF certification system (*AMAFI / 15-39*), which in many respects is already ahead of the game. It has emphasised two points in particular. First, requirements for staff providing information to clients should not be decoupled from those applicable to staff advising them, and each institution should adapt its training to the staff concerned instead; secondly, mandatory supervision for any individual that does not have appropriate experience or qualifications should in principle be aligned with current practice. But AMAFI also suggests a six-month trial period to maintain consistency with the current requirement for certification within six months of taking up a post.

Stéphanie Hubert, Julien Perrier

Transposition work under way

In close collaboration with the AMF, the French Treasury has kicked off industry meetings with a view to transposing MiFID 2. The first was held in mid-September, and tackled trading platforms, algorithmic trading and communications providers; the next, in mid-October, will look at investor protection; another in early November will focus on commodity markets.
A formal consultation process is set for early 2016. Apart from avoiding gold plating, the authorities are keen to tidy up the parts of the Monetary and Financial Code that now overlap with MiFID. The objective is to arrive at definitive legislation in June; the directive requires transposition by all Member States before 3 July 2016.
AMAFI is heavily committed to these efforts as well as to continuing discussions within its committees and working groups on the implementation of the directive and its associated regulations. At the beginning of October it will circulate a Q&A document on the various issues MiFID could raise, although many details will be unclear until the publication of the definitive level 2 legislation.

Emmanuel de Fournoux, Sylvie Dariosecq et Victor Maurin

The "better regulation" initiative

On 19 May the Commission published a package of reforms called "Better regulation for better results – An EU agenda", together with guidelines aimed at improving the European legislative process as a whole. The initiative seeks more transparency in decision-making, especially in discussions between the European Council, Commission and Parliament. It is also designed to raise the quality of new legislation via better impact assessments and to encourage the review of existing legislation in the light of its political objectives.

AMAFI can only applaud these ambitions but is keenly aware that the package does not guarantee a better decision-making process. On the one hand, many of the measures concern existing procedures that seem to work satisfactorily already. On the other, burgeoning consultations and impact assessments could lengthen the legislative process without improving its quality, and it is far from obvious how European institutions will cope with the resulting information and costs. The real impact of stakeholder input is also unclear.

Unfortunately, there has been no clarification of the rights of the European Council and Parliament with respect to level 2 legislation. As outstanding questions in MiFID 2 show, this is now a burning issue.

Given that the current process does not guarantee the quality of the standards that emerge from it, AMAFI advocates a mechanism by which comments from consultations can be taken on board in a transparent manner.

Véronique Donnadieu

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Europe

Central securities depositories

At the end of July, ESMA asked market participants about rules on buy-in procedures for OTC transactions. The consultation took account of criticism of previous ESMA proposals from numerous European stakeholders, including AMAFI.

In the situation where a securities seller fails to deliver within four days after the normal delivery date, the mandatory buy-in mechanism finds a replacement counterparty to deliver to the buyer instead. It is essential to the quality of the settlement and delivery process. It has to be efficient and workable in practice, however, which is why market participants are the only realistic candidates for this role. Not central securities depositories, as ESMA initially thought (*AMAFI / 15-40*).

Emmanuel de Fournoux, Victor Maurin

EMIR

At the beginning of August, the Commission launched a consultation on revising EMIR rules concerning OTC derivatives, central counterparties and trade repositories. The move has come before two of the regulation's main provisions, mandatory clearing and margin requirements for non-netted derivatives, have even come into effect.

AMAFI has reiterated its concern that clearing houses enjoy preferential access to central bank liquidity (*AMAFI / 15-41*). It has also pointed out that given the operational difficulties involved, frontloading (i.e. the clearing of trades executed between the authorisation date for the clearing house for the product category concerned and the effective date of the clearing obligation) should be abandoned.

It is also important to ensure that colleges of supervisors operate in a more effective and uniform way.

Emmanuel de Fournoux, Victor Maurin

News

Taxation

Taxation of savings – AMAFI barometer 2015

For the past few years, AMAFI has been regularly updating a tax barometer to assess France's attractiveness in terms of business finance. The 2015 update highlights the current situation and compares France with its main economic and financial partners (*AMAFI / 15-45).*

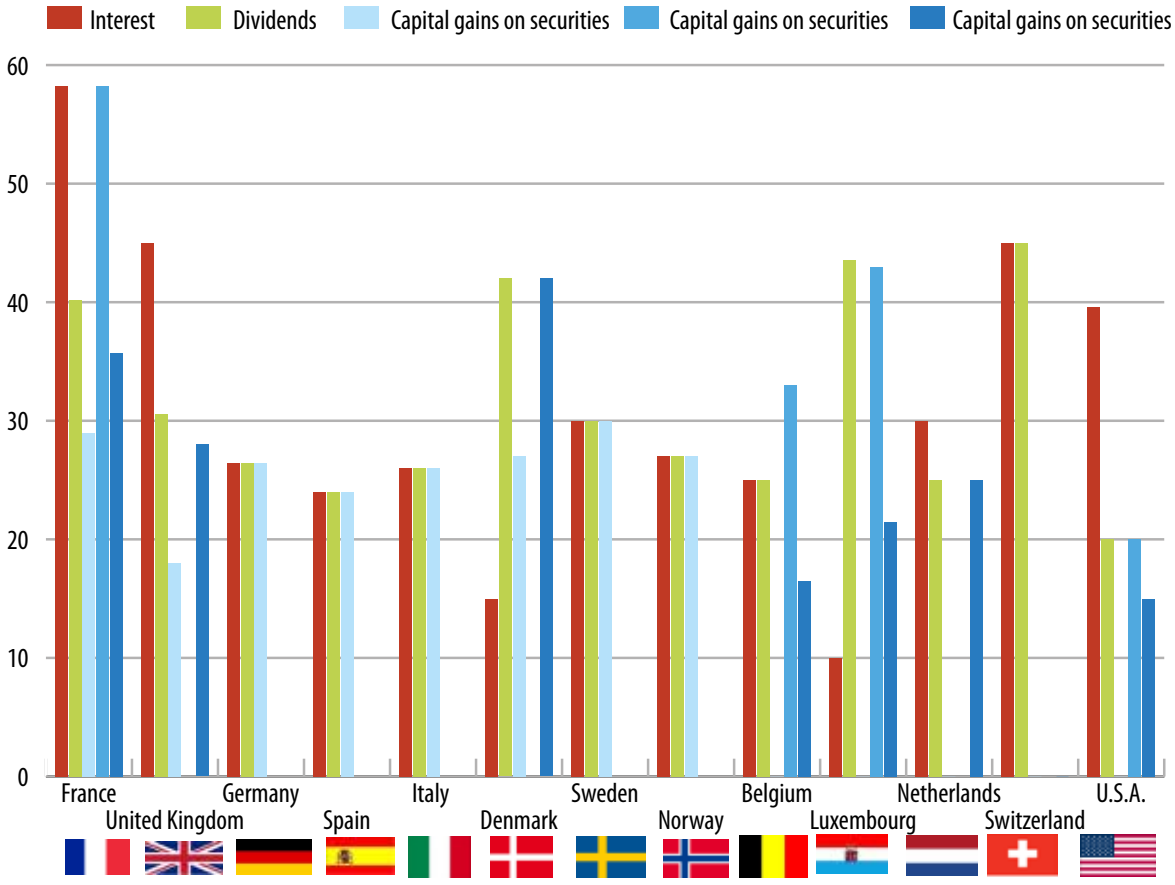
The main conclusion in this latest edition is that aside from the sheer complexity of its taxes on savings, France taxes residents that invest in their own economy far more heavily than its neighbours do. Even in northern Europe, where taxes are notoriously high, the overall rate on savings (income or capital gains) tops out at 27% in Norway and 30% in Sweden. In France it is close to 40% on dividends and almost 60% on some capital gains and on interest in excess of €2,000 per year.

Against this backdrop, and with the government pondering its budget choices, AMAFI has been urging swift changes to the taxation of savings in France to ensure the continuing financing of the economy. International comparisons are a good guide to the sorts of changes needed.

Discussion has focused on the German example, as the French authorities have often highlighted the need for more similar or even identical tax rules between the two countries. Germany is also towards the top end of the international tax burden table, although behind France. But there are notable differences. While interest, dividends and capital gains are in principle subject to the income tax regime in both countries, capital gains and dividends benefit from a 40% rebate in Germany. And German investors can opt for a fixed 25% levy at source, something not available in France.

Eric Vacher

Savings taxation comparisons
Marginal tax rates (2015)



Source : AMAFI / 15-38

Amafi Highlights

New Members

Investimo, a credit institution that offers order reception and transmission services, proprietary trading, underwriting and guaranteed and non-guaranteed investment. Its senior managers are Hubert Rodarie (CEO) and Pierre-Louis Carron (Deputy CEO).

La Française Bank, Paris branch, a credit institution whose business is order reception and transmission services, order execution, proprietary trading, investment advice, underwriting and guaranteed and non-guaranteed investment. Its senior managers are Franck Meyer (member of the Management Board) and Arnaud Sarfati (CEO).

Opera Trading Capital, an investment firm specialising in proprietary trading. Its senior managers are François Demon (CEO), Stéphane Liot (Deputy CEO) and Xavier Coste (Deputy CEO).

Amafi Staff

Having joined AMAFI as Compliance Director more than seven years ago, **Stéphanie Hubert** has covered a large number of issues important to the profession. At the beginning of September she moved to Axa Investment Managers as Compliance Manager. Legal affairs and compliance project manager **Julien Perrier**, who started his career at AMAFI in 2012, joined HSBC as a Compliance Officer in mid-September.
AMAFI wishes them success in their new jobs.

Stéphanie Hubert's replacement is **Pauline Laurent**, who started at the beginning of October. Pauline is well known to many members as she started her career at AMAFI in 2005 and has never really stayed far from it. A Compliance Officer at Exane in 2007, she subsequently worked at Crédit Agricole Cheuvreux and Natixis. She has participated in many of the Association's compliance-related initiatives and returns at a critical time, with new MiFID and Market Abuse rules needing to be implemented.

Bertrand de Saint Mars

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Most of them, notably AMAFI's responses to public consultations, are freely available, but some are restricted to members only.

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