



Legal high **C**ommittee for  
**F**inancial markets of **P**aris

## **LEGAL OPINION**

*of the Legal High Committee for  
Financial Markets of Paris (HCJP) on  
replication of market master agreements*

**6 February 2019**



The Legal High Committee for Financial Markets for Paris (HCJP) has been consulted by the French authorities in order to further develop a recommendation made in the report of the HCJP on Brexit, banking activities and investment services with respect to the implementation of a simplified mechanism to replicate market master agreements entered into by a UK entity of a banking group with a French client with an EU entity of the banking group with such same French client.

HCJP's work led to the publication of Ordinance n°2019-79 of 6 February 2019 on the preparatory measures for the United Kingdom's withdrawal from the European Union in respect of financial services together with its related report to the President of the Republic.

The relevant extracts of the Ordinance and the report to the President of the Republic have been translated and are attached hereto.



## **Extracts of the Ordinance n°2019-79 of 6 February 2019 on the preparatory measures for the United Kingdom's withdrawal from the European Union in respect of financial services**

### **Article 3**

I. - A legal person having its registered office in France or established in another member State of the European Union who has entered into a master agreement for transactions on financial instruments before the date of the withdrawal of the United Kingdom from the European Union with a United Kingdom credit institution or an investment firm is deemed to have accepted the offer to enter into a new master agreement with a credit institution or investment firm, when the following conditions are fulfilled:

1° the provisions of the new master agreement are identical to those of the master agreement entered into with the United Kingdom credit institution or investment firm, to the exception of the governing law and jurisdiction provisions, which shall designate French law and the exclusive jurisdiction of French courts, as well as any other provision necessary to ensure the performance of the new master agreement pursuant to those changes;

2° the offeror belongs to the same group of undertakings, within the meaning of Chapter 6 of Directive 2013/34/EU of European Parliament and Council of 26 June 2013, than the United Kingdom credit institution or investment firm, and benefits from a credit quality step, within the meaning of Regulation (EU) 575/2013 of European Parliament and Council of 26 June 2013, identical or superior to the one attributed to the United Kingdom credit institution or investment firm on the date of receipt of the offer, and is licensed to provide transactions on financial instruments to such legal person;

3° the offer is addressed in a written format to the legal person mentioned in the first paragraph in the form prescribed by the master agreement entered into with the United Kingdom credit institution or investment firm;

4° the offer is accompanied by a documentation evidencing the elements modified of the new master agreement, the procedure for the conclusion of the master agreement described in 5°, the corporate name of the credit institution or investment firm which is the offeror, its legal entity identifier within the meaning of Regulation (EU) 600/2014 of European Parliament and Council of 15 May 2014, and its credit quality step;

5° after the expiry of a period of five business days from the receipt of the offer along with the documentation mentioned in 4°, its recipient has entered into a contract on a transaction on financial instruments governed by the new master agreement.

II. – The provisions of I are only applicable to offers received within 12 months from the entry into force of this ordinance.



## **Extracts of the report to the President of the Republic on the Ordinance n°2019-79 of 6 February 2019 on the preparatory measures for the United Kingdom's withdrawal from the European Union in respect of financial services**

[...]

As from the withdrawal of the United Kingdom from the European Union, British institutions of the financial sector will become “third-country firms”. Institutions which benefited from it will then lose their “European passport”, i.e. the capacity to provide investment services from London to the clients in the EU. This unprecedented situation does not raise any particular legal issue for most of financial contracts. Indeed, most of the investment services must be considered as provided to the client at the time of the conclusion of the contract, thus, the loss of the passport is neither likely to affect its legality nor to expose the relevant British institutions to sanctions. However, the loss of the passport will prohibit British entities from entering into any new contract.

However, the great majority of financial contracts entered into between a client and its service provider are governed by master agreements, especially with respect to derivatives (the ISDA master agreement mentioned notably in article 1). This contractual framework is applicable to all the individual transactions that the parties enter into during their relation. It organizes the relationship between the parties, and without dealing with the transactions that may be entered into under this framework and such individual contracts will define the economic, legal and administrative parameters. Thus, each individual contract is supplemented by a stable framework already negotiated between the parties.

After a no deal Brexit, European clients wishing to keep entering into the transactions they were used to enter into with British investment services providers, will have to contact investment services providers authorized to provide services within the European Union. It is essential to provide clients of the Union with the greatest and constant liquidity of their financial transactions, which implies to preserve their capacity to enter into transactions with as many operators supervised in the Union as possible. However, a great number of British institutions already have subsidiaries in the Union - and when they do not have such subsidiaries, they are setting them up - which will enable them to maintain their business relations post-Brexit with their French clients. However, those entities were not always the usual contact persons (on the derivatives markets notably) of the French clients of those banking groups, which made it necessary to establish in a quick but orderly manner between the European subsidiaries of those groups and their French clients a new master agreement which enables the former to process in a satisfactory manner, considering legal, operational and prudential aspects, the transactions required by their clients.

The negotiation of this new master contractual relationship between the European subsidiaries of British institutions and their European clients can be done under the conditions of the general contract law. The general contract law applicable to offer and acceptance of a contract applies naturally to situations where the recipient of an offer expressly accepts it.



However, in order to ease this transfer, article 3 of this ordinance defines a subsidiary mechanism that can apply to situations in which the recipient of the offer would remain passive vis-à-vis the offer to enter into the new master agreement. It consists in considering that a master agreement will exist between the European entity, offeror, and the client recipient of the offer, as soon as the latter would have demonstrated unambiguously within a certain timeframe its intention to enter into new transactions with the European entity. This new master agreement entered into between those two entities would present the characteristic to be almost identical to the existing master agreement entered into between the client and its British mother company.

Those business relationships must be documented in accordance with regulatory requirements and it is necessary to regulate the conditions under which such a replication can be achieved, and to ensure the legal certainty of this technique. In particular, this replication must notably comply with the following conditions to benefit from the legal regime provided for by this ordinance:

1° Provisions of the new master agreement must be identical to those of the master agreement entered into with the British service provider except the applicable law clause and the jurisdiction clause which designate French law and French jurisdictions and any other clause required to guarantee the execution of the new master agreement in application of those changes;

2° The offeror belongs to the same group of companies than the British provider and has a credit quality step which is identical or superior at the date of the reception of the offer;

3° The offer is addressed in writing to the recipient in the forms of the master agreement entered into with the British provider;

4° The offer is accompanied by a necessary documentation specifying the modified elements of the new master agreement and the specific modalities of the conclusion;

5° By the end of a five business days period from the reception of the offer, the recipient has entered into a transaction governed by the new master agreement.

Provided that those cumulative conditions are fulfilled, then the new master agreement enters into force and takes effect with no further formalities.

Those exceptional provisions managing the difficulties caused by the withdrawal of the United Kingdom without agreement, the ordinance provides that this regime will only be effective for a twelve-month period from its entry into force.