Working Group Paris EUROPLACE
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ISSUANCE OF DEBT SECURITIES
ATTRACTIVENESS OF FRENCH LAW

REPORT

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PARIS EUROPLACE

French law, an attractive choice of law to govern debt securities

This report provides an overview of the attractiveness of French law as the governing law for debt securities, particularly for foreign issuers seeking an alternative to English law, following the United Kingdom's withdrawal from the European Union and in the context of the Capital Markets Union. This report is a joint initiative by Paris Europlace's Corporate Issuers' Committee (*Collège Entreprise*) and Regulatory Committee (*Comité Environnement réglementaire et juridique*), and is the result of the work carried out by representatives of professional associations, banks, issuers, public authorities, law firms and other stakeholders in the bond market[1].

French law has for many years been the governing law of a significant volume of debt securities, including for benchmark-size issues on the international market. It benefits from regular initiatives by the legislator, public authorities and market participants to strengthen its attractiveness, such as the actions launched by Christine Lagarde (then Minister of the Economy, Finance and Employment) to encourage the repatriation to Paris of numerous EMTN programmes in 2010, the reform of French law commercial paper (NEU CP and NEU MTN) in 2016[2] and the reform of bond issues in 2017[3]. French law has thus regularly adapted to provide issuers and investors with a flexible and modern framework for the issue of debt securities. The attractiveness of French law in financial matters is also demonstrated by the choice made by the International Swaps and Derivatives Association (ISDA) in 2018 to complete its range of documentation for derivatives transactions with a master agreement governed by French law[4].

The outstanding amount of debt securities governed by French law is estimated at about €4,200 billion at the end of April 2022[5]:

- €1,640 billion of French law bonds issued on standalone basis or under EMTN (Euro Medium Term Note) programmes (spread across some one hundred EMTN programmes, *i.e.* approximately 15% of the global market for programmes of this type),

[1] The composition of the working group is set out in the Appendix to this report.

[2] Decree no. 2016-707 of 30 May 2016 and Order of 30 May 2016 introducing the reform of negotiable debt securities. See also the dossier on this reform, available on the Banque de France website.

[3] Order No. 2017-970 of 10 May 2017 and Decree No. 2017-1165 of 12 July 2017 to promote the development of bond issues.

[4] Two new versions of the 2002 ISDA master agreement were published in June 2018 in the context of the United Kingdom's withdrawal from the European Union (Brexit): one governed by civil law (French law) and the other by common law (Irish law). The event is rare and deserves to be highlighted, given that, since 1985 (date of creation of ISDA), there have been only three versions of the ISDA master agreement: a 1987 version, a 1992 version and a 2002 version, all governed by common law systems. The master agreement governed by French law and its accompanying documentation (in particular regarding collateral) is therefore the ISDA's first incursion into civil law territory. From all the civil law jurisdictions available in the European Union, ISDA has chosen French law, a recognition of the modernity of French law and the reliability of the French court system when it comes to examining the most complex international commercial and financial cases.

[5] For issues admitted to trading on a market only.

- €2,080 billion of government Bonds (*Obligations Assimilables du Trésor - OAT*),
- €165 billion of *Bons du Trésor*,
- €230 billion of short-term commercial paper (NeuCP),
- €45 billion of medium-term commercial paper (NeuMTN),
- €30 billion of Euro PP[6].

These debt securities governed by French law are not only issued by French issuers but also by issuers registered in countries other than France who have chosen French law to govern their bond issues (Belgium, Luxembourg, South Africa, Spain, United Kingdom, United States, etc.) or their NEU CP (Austria, Belgium, China, Denmark, Finland, Germany, Ireland, Italy, Japan, Luxembourg, Monaco, Netherlands, Spain, Sweden, Switzerland, United Arab Emirates, United Kingdom, United States, etc.).

Following the United Kingdom's withdrawal from the European Union (Brexit), many continental issuers whose debt securities are governed by English law might want to change the governing law of their new issues to continue to benefit from the law of a country of the European Union (those who already have an EMTN programme governed by English law can opt for a dual law programme to facilitate the transition over time).

The purpose of this report is therefore to give a comprehensive overview of French law which, thanks to successive reforms, offers a modern and reliable securities law (Part 1) and numerous strengths (Part 2).

[6] Most Euro PPs are not admitted to trading on any market.

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SUMMARY OF THE STRENGTHS OF FRENCH LAW TO GOVERN DEBT SECURITIES

French law is a particularly attractive choice as the governing law for debt securities, for both French issuers and issuers registered in other countries, and for investors. It has therefore been chosen as the governing law of a significant volume of debt securities (outstanding amount of €4,200 billion at the end of April 2022), including for benchmark-size issues on the international market.

A modern and reliable securities law

- **Advantages of dematerialisation**: for over 30 years, financial securities governed by French law have not been represented by physical documents of title but are instead dematerialised, registered in a securities account or in a distributed ledger technology (blockchain). An FR ISIN code is issued almost immediately, and securities created in Euroclear France can freely circulate within Euroclear, Clearstream and any central securities depository connected to Euroclear France via the settlement platform of the European Central Bank, Target 2 Securities. Securities deposited in Euroclear France are by nature eligible for European Central Bank refinancing operations (subject to meeting the eligibility criteria defined by the ECB).
- **Option to identify bondholders**: when an issuer wishes to propose the repurchase or exchange of outstanding bonds or convene a general meeting of bondholders to seek their approval to amend of the terms and conditions of bonds, the bondholder identification process applicable to dematerialised securities governed by French law allows issuers to identify the bondholders, thereby facilitating their liability management transactions.
- **Registration in a distributed ledger technology (blockchain)**: France has continued to modernise its law, permitting the use of a distributed ledger technology (*DEEP*) to register and transfer financial securities. This allowed a foreign issuer, the European Investment Bank, to choose French law to govern its inaugural “digital” bonds issuance registered on the Ethereum public blockchain in April 2021.
- **Great flexibility to organise the relations between the issuer and the bondholders**: French law on bond issues underwent a substantial reform in 2017. On the one hand, the legal provisions relating to the *masse* have been simplified to allow collective decisions to be taken by written consultation (under the time limits and conditions specified in the terms and conditions), to have the option to amend formal and timing requirements for convening of general meetings provided for in the French Commercial Code (*Code de* commerce) and to organise contractually the methods for notifying bondholders. On the other hand, the reform enshrined a total contractual freedom for bonds with a nominal value of at least €100,000 (wholesale bonds), for which the parties may decide to continue to apply a "legal *masse*", opt for a "light *masse*" or even opt for a "purely contractual" representation regime to organise the relationship between the issuer and the bondholders.

- **Adaptability to the development of sustainable finance**: French law facilitates the issue of use of proceeds bonds (Green Bonds, Social Bonds and Sustainability Bonds) and bonds with a financial incentive to achieve sustainability targets (Sustainability-Linked Bonds), to promote the actions taken by (i) market participants in Paris, in the context of the implementation of the ambitions of the Paris Climate Agreement of December 2015 adopted at COP 21, (ii) the legislator, pioneering the promotion of transparency (declaration of non-financial performance for major French companies and non-financial reporting for key institutional investors), and (iii) the French Financial Markets Authority (*Autorité des marchés financiers*), to find the right balance between market protection and legal innovation.
- **Strengths of the NEU CP market, the commercial paper governed by French law**: NEU CP (i) gives access to a diversified source of very competitive short-term financing, flexible in terms of maturities and currencies for issuers, (ii) is documented by a documentation that is simple to implement, (iii) is based on a robust ecosystem (investors, advisors, issuing and paying agents, central securities depository, etc.), (iv) is eligible for ECB refinancing operations subject to compliance with the ECB's eligibility criteria at no additional financial cost, (v) provides a high degree of transparency and compliance, verified by the Banque de France which regularly publishes statistical information and (vi) allows very efficient settlement in central bank money.
- **Development of the Euro PP market**: a Euro PP is a medium to long-term financing between a company and a limited number of professional investors, based on *ad hoc* documentation negotiated between the borrower and the investors, usually with the participation of an arranger. The Paris Marketplace, through the Euro PP Committee, has published a Euro PP Charter and model agreements (freely accessible, in French and in English), which offer a non-binding framework of good practices to make Euro PP a go-to private placement market for the financing of mid-cap companies in Europe.

<u>The strengths of French law</u>

- **Automatic recognition of judgments of the French courts within the European Union**: judgments of French courts are automatically recognised throughout the European Union, without going through enforcement proceedings, contrary to judgments of English courts since Brexit.
- **Ability to draft the documentation in English**: French law has been adapted to allow French and foreign issuers to draft their documentation in a language commonly used in financial matters, namely English, facilitating the completion of their financing transactions, without having to wait for and incur the cost of a full translation of the documentation into French, whether it is a prospectus or the contractual documentation.
- **Attractiveness of the International Chambers of the Commercial Court of Paris and the Paris Court of Appeal**: having recourse to the International Chambers allows non-French issuers and investors to speed up and simplify proceedings in the event of litigation, through the widespread use of English (the parties, their counsel, witnesses and experts are allowed to speak in English if they are not French and to produce supporting documents in English without the need to translate them), through the recourse to

judges with solid knowledge of banking and financial litigation, both French and international, and by the speed and transparency that allow issuers and investors to have a genuine view of the entire duration of proceedings.

- **Qualities of continental and French contract law**: French law is part of a continental law system which governs most of the world's population and constitutes the law of the vast majority of the Member States of the European Union, largely because of its intrinsic qualities such as codification, which lays out reliable laws which do not require going to court to determine the content of the rule of law. French contract law also underwent an in-depth reform in 2016 based on two fundamental pillars: contractual freedom and contractual security.
- **Neutrality of the law governing the securities in a bankruptcy**: the law which governs insolvency proceedings is the law of the country of the "centre of the debtor's main interests". The French courts will have jurisdiction if the "centre of the debtor's main interests" is located in France, but if the issuer is not French and the centre of its main interests is outside of France, the law governing the debt securities will not have any impact. If a non-French company chooses to issue debt securities governed by French law, such choice has no impact on the law applicable to any insolvency proceedings.
- **Neutrality of the law governing the securities as regards tax**: the tax regime applicable to debt securities is independent from the law governing such securities. The choice of French law to govern debt securities will not in itself generate any specific tax liability. It is the tax law of the country of the issuer that will determine whether a withholding tax is applicable. For French issuers, no withholding tax is in principle due on interests paid outside of France.

PART ONE: A MODERN AND SECURE SECURITIES LAW

For both the issuer and the investors, the choice of French law as the governing law for debt securities offers a modern and reliable securities law, with the benefits of dematerialisation (1), the option for the issuer to identify its bondholders (2), the option to register the securities in a distributed ledger technology (blockchain) (3), a great flexibility to organise the relations between the issuer and the bondholders (4), its adaptability to the development of sustainable finance (Green Bonds, Social Bonds, Sustainability Bonds and Sustainability-Linked Bonds) (5), the strengths of NEU CP, the commercial paper governed by French law (6) and the development of the Euro PP market (7).

1. Advantages of dematerialisation

French law has benefited from the advantages of the dematerialisation of financial securities for over 30 years[7].

Financial securities issued on the French territory and subject to French law are not represented by physical documents of title[8]. They are dematerialised, registered in a securities account held by the issuer itself or its agent (registered securities) or by an account holder participating in Euroclear France (bearer securities), or in a distributed ledger technology (blockchain). Transfer of title to the securities results from their registration in the holder's account or in favour of the purchaser in a blockchain[9].

In principle, the securities must be registered in the name of their actual owner. However, as with the Anglo-Saxon practice, an intermediary may apply for registration in its name, in the form of a "nominee" account or several individual accounts each corresponding to one owner.

In other words, everything is digitalised and automated by standardised processes: the creation and transfer of securities take place through their registration in an account and transfer from one account to another (there is no physical certificate, contrary to the Anglo-Saxon practice). This dematerialisation avoids certain steps related to the creation and management of physical securities, including the creation, execution, authentication, endorsement, delivery, deposit, holding, transfer, exchange, modification, replacement, cancellation and destruction of notes or certificates. Under English law, these steps require the active involvement of the Fiscal Agent and Registrar and impose a time constraint, extending the settlement period. The securities no longer have physical detachable coupons,

[7] Dematerialisation was introduced in France by Law No. 81-1160 of 30 December 1981 introducing the 1982 Budget Act, implemented by a decree dated 2 May 1983 and came into force on 3 November 1984.

[8] Before 1984, these securities could be represented by a paper certificate incorporating the rights represented thereby and transfer of ownership was completed by the physical delivery of this certificate, like any other physical object. See Philippe Goutay, "*La dématérialisation des valeurs mobilières*", Bulletin Joly Sociétés April 1999, no. JBS-1999-089, p. 415.

[9] Articles L. 211-3 and L. 211-17 of the French Monetary and Financial Code.

receipts or talons[10]. Such physical coupons, receipts or talons have the same disadvantages in terms of formal requirements and timeframes as the physical securities. In general, French law relating to bonds, through dematerialisation, reinforces and facilitates the marketability and transferability of securities as well as the rights of holders. It makes it possible to avoid establishing deeds of covenant[11] and/or the introduction of third-party beneficiaries[12] in the terms and conditions of the securities (required in the case of materialised securities) to guarantee the rights of holders and to allow them to take direct action against the issuer.

Dematerialised securities also present advantages with respect to the US Tax Equity and Fiscal Responsibility Act (or TEFRA), insofar as these rules are not intended to apply to dematerialised securities. This allows Category 1 issuers within the meaning of the US Regulation S to be able to tap existing issues immediately, without having to wait 40 days; the fungibility between the new tranche and the initial tranche is immediate for the French law dematerialised securities of these issuers.

Euroclear France, the central securities depository for securities governed by French law, also acts as a codification agency. FR ISIN codes are issued almost immediately (within a maximum of one hour), allowing rapid circulation in the market.

Dematerialised securities are created by the central securities depository, Euroclear France, in an account and the transfer to the account held by the lead manager, pursuant to an accounting letter sent the day before settlement on the primary market. Banks which do not have an account with Euroclear France may ask Euroclear France to transfer the securities to their Euroclear Bank account.

Securities created in Euroclear France can freely circulate from any central securities depository connected to Euroclear France via the settlement platform of the European Central Bank, Target 2 Securities, as well as via the International Securities Central Depositories, Clearstream Banking Luxembourg and Euroclear Bank.

Finally, securities deposited with Euroclear France are by nature eligible for European Central Bank refinancing operations (subject to meeting the eligibility criteria defined by the ECB).

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[10] Decree 2005-1007 of 2 August 2005.

[11] Example of the wording of an English law "Direct Rights Creation" clause in a Deed of Covenant: "*If any Global Note representing all or part of a Tranche of Notes becomes void in accordance with its terms, each Accountholder shall have against the Issuer all rights (Direct Rights) which such Accountholder would have had in respect of the Notes if, immediately before the Determination Date in relation to that Global Note, it had been the holder of Definitive Notes of that Tranche, duly executed, authenticated and issued, in an aggregate principal amount equal to the Principal Amount of such Accountholder's Entries relating to such Global Note including (without limitation) the right to receive all payments due at any time in respect of such Definitive Notes as if such Definitive Notes had (where required by the Conditions) been duly presented and (where required by the Conditions) released on the due date in accordance with the Conditions*".

[12] Example of the wording of an English law "Third-Party Beneficiary Clause": "*The rights and obligations set forth herein are intended solely for the benefit of the Noteholders. Upon any valid transfer of a Note in accordance with the transfer requirements, the rights and obligations of the transferor of a Note pursuant to these terms shall be automatically assigned to the transferee of such Notes, with such transferee being a third party beneficiary to these Terms and Condition".*

2. Option to identify bondholders

When an issuer of bonds wishes to propose the repurchase or exchange of outstanding bonds or convene a general meeting of bondholders to obtain their approval to amend the terms and conditions of the bonds, the identification of bondholders is crucial for the success of such liability management transactions.

The bondholder identification process applicable to dematerialised securities governed by French law allows issuers to know, at a given time, the identity of their bondholders.

Initially created in France in 1987[13] with the identifiable bearer security procedure (*titre au porteur identifiable* or TPI), the identification procedure was extended to bondholders in 2014[14] and amended in 2019 and 2021[15], with the implementation of the Shareholder Rights Directive II (SRD II)[16] regime which has been extended in France to all financial instruments and therefore also to bonds.

Scope of application and developments

Article L. 228-2, IV of the French Commercial Code opens up the holder identification process to issuers of bonds or negotiable debt securities, with the exception of public law bodies, unless otherwise provided in the issuance contract and notwithstanding the silence of the articles of association.

In France, bond issuers are therefore able to identify holders of their bonds, whereas in most European Union Member States the SRD II directive has been transposed at minimum implementation level, allowing the identification of shareholders of listed companies only, thereby making French law highly attractive to issuers of debt securities compared to other European laws.

Bondholders identification process

As reforms were introduced, more information on bondholders were made available to issuers. A list of such information is set out by Article R. 228-3 of the French Commercial Code. This information is both personal (name or company name, nationality, address, etc.) and financial (number of securities held, restrictions on securities). Additional information may be addded to such data (if known by the responding person) which relates to the activity carried out by the holder or the date on which the securities were acquired. In this respect, it should

[13] *Loi sur l'épargne* no. 87-416 of 17 June 1987 and law no. 2001-420 of 15 May 2001 on new economic regulations (*NRE*).

[14] Order no. 2014-863 of 31 July 2014 on company law, adopted in accordance with article 3 of law no. 2014-1 of 2 January 2014 authorising the Government to simplify and secure business life.

[15] Law no. 2019-486 of 22 May 2019 on the growth and transformation of companies (the "Pacte" Law) transposing Directive (EU) 2017/828 of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (SRD II Directive) and Law no. 2021-1308 of 8 October 2021 setting out various provisions for alignment with European Union law in the field of transport, the environment, the economy and finance.

[16] Directive (EU) 2017/828 of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

be noted that this article of the French Commercial Code could soon be amended by the legislator to align such mandatory information with the applicable provisions of SRD II and its implementing regulation[17]. Indeed, the transposition provisions featured in the law of 8 October 2021[18] refer to a decree of the *Conseil d'Etat* (Council of State) which should be adopted in the next few months.

According to SRD II and to the law of 8 October 2021, the issuer may request the identification information from a service provider[19] or directly from financial intermediaries.

This information must be disclosed by all entities established in the European Union who provide services involving the administration or holding of shares or the holding of securities accounts in the name of their owners or other intermediaries (entities established outside France are also subject to SRD II and its implementing regulation[20]).

Regarding the time limits applicable to the bondholder identification process, Article 9(6) of the SRD II implementing regulation provides that intermediaries to which identification requests are submitted must reply no later than the working day following receipt of such requests. Specific and tight deadlines are also provided for by this implementing regulation for the transmission of requests from one intermediary to the following intermediary.

An effective identification process in France

In France, the on-demand identification process is effective. Euroclear France's Investor Insight™ service allows the processing of the issuer's requests, from the submission of the request to the collection and receipt of the responses. It covers French bonds issued since 2014 and allows the entire chain (at least, the part located in the European Union) to be traced back quickly and with excellent processing cover (for example, for shares, the Investor Insight™ service identifies between 95% and 99% of all shareholders).

[17] Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018 laying down minimum requirements implementing the provisions of Directive 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights.

[18] Law no. 2019-486 of 22 May 2019 on the growth and transformation of companies (the "Pacte" Law) transposing Directive (EU) 2017/828 of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (SRD II Directive) and Law no. 2021-1308 of 8 October 2021 setting out various provisions for alignment with European Union law in the field of transport, the environment, the economy and finance.

[19] Such as, for instance on a non-exhaustive basis, Clearstream Banking (Shareholder Identification Disclosure Request), Euroclear France (InvestorInsight™), Euronext Corporate Services (Shareholder Analysis) and Société Générale Securities Services.

[20] Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018 laying down minimum requirements implementing the provisions of Directive 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights.

3. Registration in a distributed ledger technology (blockchain)

Blockchain was first acted into law by Order no. 2016-520 of 28 April 2016 creating the "*minibons*"[21]. France continued to modernise its law with Order no. 2017-1674 of 8 December 2017 on the use of a distributed ledger technology (*DEEP*) for the representation and transfer of financial securities which, in accordance with the objective set by the French legislator, allowed the representation and transmission, by means of a distributed ledger technology, of financial securities not admitted to the operations of a central securities depository nor to a securities settlement system.

The use of blockchain as an alternative means for representing financial securities marks the singularity and modernity of French law, increasing its attractiveness. In this respect, it is remarkable that a foreign issuer, the European Investment Bank, chose French law to govern its inaugural "digital" bonds issuance in April 2021. The bonds were registered on the Ethereum public blockchain and the issuance was the first multi-dealer issuance of the kind.

Initially applicable to unlisted securities, the possibilities will be extended to listed securities by the proposed EU Pilot Regime regulation[22], which is expected to be adopted in the coming months.

The 2017 Order was completed by a decree of 24 December 2018 specifying the characteristics to be adopted by a *DEEP* used for the registration of unlisted financial securities. As it stands, the law offers the following advantages to the users of a *DEEP*:

- the registration of an unlisted security in a *DEEP* only enables its owner to carry out transactions on such security,
- the *DEEP* allows the issuer to clearly identify the owners of securities, the nature and number of securities held (Article R. 211-9-7 of the French Monetary and Financial Code),
- the *DEEP* is considered by law to be a "sustainable medium" (Article R. 228-8 of the French Monetary and Financial Code),
- the consensus rules of the *DEEP* remain unrestricted,
- the characteristics of the *DEEP* are relatively flexible in that they must, in general, only present "*guarantees, particularly in terms of authentication, at least equivalent to those presented by registration in an account*" (Article L. 211-3 of the French Monetary and Financial Code) and be designed and implemented "*in such a way as to ensure the recording and integrity of the registrations*" (R. 211-9-7 of the French Monetary and Financial Code),

[21] Articles L. 223-6 to L. 223-13 of the French Monetary and Financial Code relating to *minibons* and introduced by this order were nevertheless repealed by Order no. 2021-1735 of 22 December 2021 modernising the framework relating to equity financing.

[22] Proposal for a Regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology, procedure 2020/0267/COD.

- negotiable debt securities may be traded on a trading platform in registered form without necessarily having been previously placed on an administrative account (Article R. 211-5 of the French Monetary and Financial Code), and
- financial instruments taking the form of tokens are excluded from the regulatory framework specific to digital assets created by the *Pacte* Law of 22 May 2019.

A working group was established by the *Haut Comité Juridique de la Place financier de Paris* (HCJP - Legal High Committee for the Financial Markets of Paris) on the "registered form of digital securities registered in *DEEP*" with the aim of adapting French law even further to the digitalisation of securities and of facilitating transactions on this type of instrument.

4. Great flexibility to organise the relations between the issuer and the bondholders

French law on bond issues underwent a substantial reform in 2017 with Order no. 2017-970 of 10 May 2017, aimed at improving the development of bond issues, and its implementing Decree no. 2017-1165 of 12 July 2017.

This reform consisted, on the one hand of simplifying and modernising the legal framework for bond issues and, on the other hand, of giving issuers and market participants more flexibility to contractually organise bondholders' representation, in accordance with international best practices.

Simplification and modernisation of the legal framework for bond issues

While the purpose of this report is not to revisit the many improvements resulting from this reform, which has already been done in two reports of the Paris Europlace Bond Commission in 2017[23], it should nonetheless be noted that a certain number of improvements have rendered French law on bond issues, and in particular the legal framework for the *masse*, more flexible and better tailored to new market practices[24].

Among the main new developments which have contributed to making the French legal framework for bond issues more attractive, the following stand out:

- the creation of a new Article L. 228-46-1 in the French Commercial Code which allows the option to specify in the terms and conditions of the bonds that collective decisions

[23] See Paris Europlace - Bond Commission Report, "Order no. 2017-970 of 10 May 2017 to promote the development of bond issues" 15 July 2017, and Paris Europlace - Bond Commission Report, "Decree of 12 July 2017 for improving the development of bond issues", 25 July 2017.

[24] See Gilles Endréo, "*Ordonnance du 10 mai 2017 et décret du 12 juillet 2017 visant à favoriser le développement des émissions obligataires*" [Order of 10 May 2017 and decree of 12 July 2017 for improving the development of bond issues], October 2017; Marc-Etienne Sébire and Myriam Issad, "*La modernisation du droit des émissions obligataires et le big bang de la représentation des porteurs d'obligations*" [Modernisation of the law on bond issues and the "big bang" of bondholders representation], Bulletin Joly Bourse, no. 04, July 2017; Thierry Bonneau, "*La réforme 2017 des émission obligataires*" [The 2017 bond issues reform], JCPE, no. 23, p.9, 8 June 2017; Arnaud Reygrobellet, "*L'autre ordonnance de réforme du droit des obligations*" [The other bond law reform Order], RTDF n°2, p.103, June 2017; Jean-Marc Moulin, "*La réforme des émissions obligataires*" [The reform of bond issues], Gazette du Palais, no. 32, p.55, 26 September 2017; François Barrière, "*La réforme du régime des émissions obligataires*" [The reform of the bond issues regime], Revue des sociétés 2018, p.14, January 2018.

can be taken by written consultation of the bondholders, without the holding of a general meeting, under the time limits and conditions specified in the terms and conditions,

- the possibility to diverge from the conditions of form and notice provided for by the French Commercial Code for convening general meetings,
- or the modernisation of the methods used to notify bondholders and the possibility to provide contractually, in the terms and conditions, for other means of notification better suited to contemporary practices.

All these improvements have a twofold objective: to give greater flexibility to market participants to organise on a contractual basis the rights and terms of bondholders representation and, in doing so, to bring the French legal framework for bonds issues closer to international expectations and practices.

Contractual freedom for wholesale bonds

In the context of the 2017 reform, the inclusion of a new Article L. 213-6-3 I in the French Monetary and Financial Code enshrined for bonds with a nominal value of at least €100,000[25] (wholesale issues) the principle of total contractual freedom to define the rights of bondholders in the terms and conditions.

This is a considerable softening of the French legal framework for bond issues insofar as it is now possible, for these issues, to deviate from all or part of the legislative and regulatory provisions relating to the *masse*, the representative of the *masse* and bondholders' general meetings.

French law on bond issues is therefore particularly modern in that it gives issuers and market participants full freedom to contractually organise the rights of wholesale bondholders based on the constraints specific to each transaction.

Hence, the parties may decide to continue applying a "legal *masse*", benefiting from the flexibilities and adjustments organised by the 2017 reform, opt for a "light *masse*", *i.e.* choosing to apply the legal regime of the *masse* subject to any changes they deemed useful or necessary for the purposes of their transactions, or even opt for a "purely contractual" representation regime by totally excluding the legal regime of the *masse* and thus align fully with international practices.

On this last point, it appears that, in practice, many issuers have made the choice of a "light *masse*" for their wholesale bonds issues under French law. This can be explained by the fact that the French regime of the *masse* has certain advantages which have no equivalent in issues governed by English law or the law of the State of New York. This will in particular be the case for bonds benefiting from security interests (High Yield, Euro PP or Project Bonds) to the extent that it is possible to grant security interests to the benefit of the *masse*, where, in the absence of a *masse*, the same security interests would have to be granted in favour of each individual holder, the latter greatly complicating the safeguarding of the security interests

[25] The same applies for issues with a minimum bond subscription threshold of €100,000.

unless they are stipulated in favour of a security agent by means of a "parallel debt" mechanism where applicable.

5. Adaptability to the development of sustainable finance (Green Bonds, Social Bonds, Sustainability Bonds and Sustainability-Linked Bonds)

The attractiveness of the Paris financial marketplace and French law in the field of sustainable finance is the result of the actions taken by (i) markets participants in Paris, (ii) the legislator, pioneering the promotion of transparency, and (iii) the French Financial Markets Authority (the *Autorité des marchés financiers* or "**AMF**"), to find the right balance between market protection and legal innovation.

Involvement of market participants in Paris

The market participants of the Paris financial marketplace have mobilised at a very early stage to promote sustainable finance, particularly in the context of the implementation of the objectives of the Paris Climate Agreement of December 2015 adopted at COP 21 in Paris. To this end, strong commitments were taken during the first "Climate Finance Day" organised by Finance for Tomorrow (a branch of Paris Europlace) in 2015 ahead of COP 21[26], which has since been held annually, then during the 2019 Declaration by the Paris Financial Centre[27]. The French State, public institutions and local authorities initiated the development of the "green bond" market, in particular with the French Government Green bonds (*OAT*) which was the first green bond issue of a benchmark size carried out by a sovereign entity[28], and also with the green or sustainable bonds issued by, among others, the Ile-de-France Region, the City of Paris and the *Agence Française de Développement*, even before COP 21 was held. For its part, *Société du Grand Paris* set up the first 100% green EMTN programme. Private actors of the Paris financial marketplace have also played an active role in the development of green bonds and, today, the question of incorporating a sustainable (or green or social) feature to bond issues has become quasi-systematic in the French bond market.

Innovations by the legislator

The French legislator has promoted greater transparency in non-financial matters, which has accelerated the development of sustainable finance in the bond market, with reporting obligations throughout the entire investment chain, whether at the level of large companies participating in the real economy, or at the level of major institutional investors.

[26] Climate Finance Day - Europlace.
[27] Statement by the Centre dated 2 July 2019 - Finance for Tomorrow.
[28] Green *OAT* - AFT: the initial tranche (FR0013234333) issued in 2016 has since reached an outstanding amount which can be consulted here and was joined by a second tranche (FR0014002JM6) issued in 2020, the outstanding amount of which can be consulted here.

Declaration of non-financial performance by large French companies

Pursuant to Article L. 225-102-1 of the French Commercial Code[29], large French companies (*i.e.* whose balance sheet total or turnover and number of employees exceed the thresholds defined by decree) must publish a non-financial performance statement (or "***DPEF***") in their management report, which must include information regarding the impact in terms of climate change of the company's business and of the use of the goods and services it produces[30]. Such transparency is required not only on the fight against global warming, but also on societal commitments to promote sustainable development, the fight against food waste, the fight against food insecurity, respect for animal welfare, responsible, fair and sustainable food, employees' working conditions, the fight against discriminations, diversity and measures in favour of people with disabilities[31]. The declaration may refer to the information already included in the vigilance plan[32].

More generally, this *DPEF* must include (1) a description of the key risks related to the company's business, including, where relevant and proportionate, the risks created by its business relationships, products or services, (2) a description of the policies applied, including, where applicable, the due diligence procedures reasonably implemented to avoid, identify and mitigate the occurrence of risks and (3) the results of these policies, including key performance indicators (KPIs). If a company does not apply a policy with respect to one or

[29] And to article L. 22-10-26 of the French Commercial Code which states that the provisions of Article L. 225-102-1 are applicable to listed companies when their total balance sheet or turnover and the number of employees exceed certain thresholds defined by decree.

[30] A report "*on the manner in which the company takes into account the corporate and environmental consequences of its business"* was planned as far back as in law no. 2001-420 of 15 May 2001 on new economic regulations (NRE Law) and was then extended by several successive laws, in particular by: (A) Law no. 2010-788 of 12 July 2010 on the national commitment for the environment (Grenelle II), whose implementing decree 2012-557 of 24 April 2012 on corporate transparency requirements in relation to social and environmental issues, based on the three main themes (corporate information, environmental information and information relating to social commitments in favour of sustainable development), (B) Article 173 IV of Law No. 2015-992 of 17 August 2015 on the energy transition for green growth (Energy Transition Act) which added the "*impacts on climate change of its business and the use of the goods and services it produces*" and (C) law no. 2016-138 of 11 February 2016 on the fight against food waste (the Garot Act) in addition to the combat to prevent food waste.

[31] More specifically, Article R. 225-105 of the French Commercial Code provides that the *DPEF* includes, when relevant with regard to the main risks or policies put in place by the company, information relating to some forty categories of information organised around the following 3 topics: (1) corporate information (including employment, health and safety, training and equal treatment), (2) environmental information (relating in particular to pollution and the circular economy, the sustainable use of resources, climate change, the protection of biodiversity) and (3) information relating to society (in particular, on the impact on local and adjacent populations, the inclusion within purchasing policy of social and environmental issues).

[32] Law no. 2017-399 of 27 March 2017 on the duty of vigilance of parent companies and instructing companies (Law on the Duty of Vigilance) represents another emblematic example of the innovation capacity of the French legislator in terms of CSR, from which the European Union is currently taking inspiration. The Law on the Duty of Vigilance created the obligation, provided for in Article L. 225-102-4 of the French Commercial Code, for joint-stock companies employing, either directly or via their subsidiaries, at least 5,000 employees in France or at least 10,000 employees worldwide, to draw up a vigilance plan and to implement and publish it. This plan must include reasonable vigilance measures to identify risks and avoid serious violations of human rights and fundamental freedoms, personal health and safety and the protection of the environment. It must cover the activities of the company, the companies under its control, but also the subcontractors and suppliers with which the company has an established business relationship.

more of these risks, it must include in its *DPEF* a clear and reasoned explanation of the reasons justifying this, thereby adopting a "comply or explain" approach.

The *DPEF* must be published on the Internet and, in practice, is included in the Universal Registration Document (URD) of listed companies. It must also be audited by an independent third party.

All of these communications by market participants facilitate the structuring of sustainable financial products, including sustainable bonds, whether sustainable use of proceeds bonds (Green Bonds, Social Bonds and Sustainability Bonds) or bonds providing a financial incentive to comply with sustainability targets (Sustainability-Linked Bonds), but also bank loans whose use of proceeds is green and/or social (Green Loans, Social Loans and Sustainability Loans) or indexed on sustainable targets (Sustainability-Linked Loans).

Extra-financial reporting by key institutional investors

France was the first country to require institutional investors to include environmental and social aspects as well as climate risk in their public communications. Hence, Article 173 VI of the Energy Transition Act in 2015[33] and then Article 29 of the Energy and Climate Law in 2018[34] have been supplemented by Article L. 533-22-1 of the French Monetary and Financial Code[35], to require portfolio management companies to: (i) include information on the risks associated with climate change and biodiversity risks into their sustainability risk policy, (ii) publish their policy on the inclusion of ESG and management quality criteria in their investment strategy, the means used to contribute to the energy and ecological transition and a strategy for implementing this policy[36], and (iii) if applicable, include in their *DPEF* information on the implementation of the policies referred to in (i) and (ii) above. The aim is to communicate not only on the taking into account of ESG risks on the assets invested in and their impact on the return on investment, but also on the contribution made by these assets to environmental, social and governance issues.

This non-financial reporting applies to portfolio management companies, credit institutions and investment firms, for their portfolio management on behalf of third parties and advice on investment activities, pension funds, pension institutions, insurance companies offering insurance-based investment products and reinsurance companies.

The French legislator was a pioneer in imposing this transparency, which was then taken up and reworked at a European level in the context of implementing:

[33] Law no. 2015-992 of 17 August 2015 on the energy transition for green growth.
[34] Law no. 2019-1147 of 8 November 2018 regarding energy and climate.
[35] Article L. 533-22-1 of the French Monetary and Financial Code, *op cit*, Order no. 2011-915 of 1st August 2011 on undertakings for collective investment in securities and modernising the legal framework for asset management, the "*investment policy criteria relating to compliance with social, environmental and governance objectives*".
[36] Article L. 533-22-1 of the French Monetary and Financial Code further specifies that if the entities choose not to publish certain information, they shall justify the reasons for this, thus adopting a "comply or explain" approach leaving the market to decide whether to comply with the publication obligation, but thus obliging it to take a public position, which provides a strong incentive.

- the Sustainable Finance Action Plan or SFAP adopted by the European Commission in 2018 and whose objective is to redirect capital flows towards a more sustainable economy and therefore cover the estimated investment shortfall of around €180 billion per year; and
- the European Green Deal announced in 2019[37], which covers the European Union's objective of climate neutrality by 2050.

The principle of strengthening the declaration of non-financial performance was taken up by the draft directive (Corporate Sustainability Reporting Directive or CSRD) aimed at amending Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 (Non-Financial Reporting Directive or NFRD). The principle of non-financial reporting by institutional investors was, for its part, taken up by Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on the publication of sustainability information in the financial services sector (Sustainable Finance Disclosure Regulation or SFDR).

The stakeholders in Paris were thus able to benefit from a head start on these subjects compared to the other EU Member States, which contributed to the significant subscription to Green Bonds, Social Bonds, Sustainability Bonds and Sustainability-Linked Bonds by French institutional investors.

Supporting attitude of the AMF

Finally, the Paris financial marketplace benefits from the attention paid by the AMF[38] to the development of sustainable finance, with the publication of the Common Position Paper with the Dutch supervisory authority (*Autoriteit Financiële Markten* or AFM) in April 2019[39], which suggests strengthening at the European level the minimum level of transparency in prospectuses on the use of proceeds of green, social or sustainable bonds. The AMF also supports the current development of Sustainability-Linked Bonds, ensuring that the balance between investor protection on the one hand and legal innovation on the other is maintained. More generally, the AMF exercises its supervisory role with the objective of making practices evolve, increasing transparency and facilitating the taking into account of sustainability issues, as well as raising capital for more sustainable activities, while ensuring financial stability, the dynamism of the European and French financial centres and the protection of investors. In this context, it publishes numerous reports and recommendations (in particular, on the reporting of climate issues) enabling the improvement of practices[40], actively participates in European working groups - representing the practice of the Paris financial marketplace where appropriate - and cooperates with other regulators. The AMF's support to the stakeholders of the Paris financial marketplace is therefore provided in a manner that is as closely aligned as

[37] European Commission Communication on the European Green Deal.
[38] But also of the French Prudential Supervisory and Resolution Authority (*Autorité de contrôle prudentiel et de résolution* or ACPR), with which the AMF set up a Sustainable Climate and Finance Commission in 2019.
[39] Common position paper on the content of the green bond prospectus. This position falls within the framework of European reflections on the subject and is not binding on issuers submitting a prospectus for approval to the AMF.
[40] AMF Sustainable Finance File.

possible with the thinking of the French and European authorities and enables the development of best market practices.

6. Strengths of the NEU CP market, the commercial paper governed by French law

Within debt instruments, short-term financing instruments (commercial papers) and, in particular, the NEU CP governed by French law (Negotiable European Commercial Paper) have become an essential part of the range of corporate financing options and a key liquidity instrument for money market funds.

In November 2021, the Paris Europlace working group dedicated to short-term financings[41] published a report on the Attractiveness of the Paris marketplace for Short-Term Financings"[42], which sets out the main features of NEU CP under French law.

- NEU CP gives access to a diversified source of very competitive short-term financing, flexible in terms of maturities and currencies for issuers; a NEU CP programme is simple to set up, based on a financial documentation which may be written in French or English, subject to a minimum subscription or acquisition price of €200,000.
- NEU CP is governed by French law, a newly modernised and competitive law within the European Union.
- The NEU CP market is based on a robust ecosystem (investors, advisors, issuing and paying agents, central securities depository, etc.), which is particularly beneficial to issuers, underwriters and investors.
- NEU CP is, for investors and underwriters, eligible for ECB refinancing operations, subject to compliance with the eligibility criteria laid down by the ECB, and at no additional financial cost compared to other commercial papers.
- The NEU CP market, unlike other domestic European commercial paper markets, provides a high degree of transparency through statistical information (outstanding amounts, financial documentations of issuers) that is regularly published and updated by the Banque de France:
  - on the dedicated website of the Banque de France[43]
  - on the section of the website dedicated to statistics and studies[44]
- At the time of the market tensions observed in March-April 2020, in connection with the health crisis, the Eurosystem showed great responsiveness within a very short timeframe, by intervening in the commercial paper market, thereby enabling the quick stabilisation of the market. These purchases form part of Eurosystem's Corporate Sector Purchase Programme (or CSSP) and are disclosed on the ECB website.

[41] "Short-Term Finance" Working Group chaired by Florence Tresarrieu, Director of Treasury and Financing at Pernod Ricard and member of the Board of the AFTE.
[42] Paris Europlace working group dedicated to short-term financing, *Attractivité de la Place de Paris pour les Financements Courts*.
[43] Banque de France, *Marchés des titres négociables à court et moyen terme*.
[44] Banque de France, *Statistiques et études*.

- Brokers are accepted by participants to the primary market of NEU CP, unlike on the primary market of ECP.
- Since its inception, the NEU CP market has undergone significant reforms, the most recent of which dates to May 2016, which have each time facilitated foreign issuers' access, notably expanding the admissibility of accounting standards to local accounting standards of the countries of the European Economic Area and to accounting standards of third countries recognised by the European Commission as being equivalent to European standards.
- NEU CP is compatible with Target 2 Securities which means that payment is made in central bank money and not in commercial bank money, contrary to the English law Euro Commercial Paper (ECP). The implications are many: lower operational risk for all stakeholders (dealers, issuing and paying agents, custodian account holders, etc.), ability to use T2S auto-collateralisation services, etc.
- NEU CP benefits from a robust and highly efficient central bank money settlement system:
  - the NEU CP market allows for "same day" issues and simultaneous "same day" issues/placements; and
  - NEU CP is the only market in Europe where RFR-indexed issues (EONIA and now €STR) have been frequent for decades (before the launch of the Euro).

Euroclear France's settlement and delivery system complies with all ECB specifications and allows the almost instantaneous issuance of ISIN codes (eNEU CP application).

7. Development of the Euro PP market

The dynamism of the French debt instruments market is also demonstrated by the Euro PP Market (Euro Private Placement) which, since its launch in 2012, has enabled over 300 European mid-cap companies to raise more than €30 billion in France from institutional investors to finance their development.

A Euro PP is a medium or long-term financing between a company and a limited number of institutional investors, based on deal-specific documentation negotiated between the borrower and the investors, generally with the participation of an arranger.

This negotiation of the contractual terms is an important feature of Euro PP transactions. In most cases, the Euro PP is held until maturity by the investors ("buy and hold"), which have the requirement and ability to internally analyse and monitor credit and contractual obligations.

Euro PP allows great flexibility in terms of financing sizes and choice of format (bond or loan). Most often redeemable at maturity, with generally maturities longer than bank financing, bearing interest at fixed or floating interest rates, it may be denominated in Euros or any other currency, at the discretion of the parties.

Subject to exceptions related to the context of a particular operation, the Euro PP generally:

- ranges from about €10 million to several hundred million euros,
- aims at financing or refinancing the borrower's development, and
- maintains the borrower's leverage ratio at a reasonable level (less than approximately 4x, with variations depending on the industry).

To support the development of the market, the Euro PP Committee[45] has published a Euro PP[46] Charter, which summarises the output of the various marketplace working groups that involved representatives of the main market players (borrowers, investors, arrangers and other stakeholders), to define a non-binding framework of best practices to make the Euro PP market a go to market for the financing of companies in Europe. Drafted in its initial version in February 2014, the Euro PP Charter was updated in October 2019 to take account of changes in the market and strengthen its efficiency. To facilitate the execution of transactions, the Euro PP Charter includes a framework for a borrower presentation, a form of confidentiality agreement, a list of requested KYC documents, an ESG questionnaire, a form of indicative termsheet, a form of subscription agreement and a form of terms and conditions of the bonds (for Euro PP in bond format) and a form of loan agreement (for Euro PP in loan format).

The Euro PP Charter and model Euro PP contracts, both in bond format and in loan format, are freely accessible, in French and in English, via the Euro PP Committee website[47].

[45] The Euro PP Committee is an initiative by the Paris-IDF Chamber of Commerce and Industry, under the auspices of the Banque de France and the French Treasury (*Direction générale du Trésor*). It brings together ten professional associations: the *Association Française de la Gestion financière* (AFG), the *Association Française des Investisseurs Institutionnels* (Af2i), the *Association Française des Marchés Financiers* (AMAFI), the *Association Française des Trésoriers d'Entreprise* (AFTE), the *Fédération Bancaire Française* (FBF), the *Fédération Française de l'Assurance* (FFA), the International Capital Market Association (ICMA), METI, the *Mouvement des entreprises de France* (MEDEF) and Paris Europlace.

[46] The Euro PP Charter and the model Euro PP contracts were developed in 2014 and updated in 2019 by the Euro PP Committee, with support from the law firms CMS Francis Lefebvre, Gide Loyrette Nouel and Kramer Levin.

[47] Euro PP Committee website. CMS Francis Lefebvre also publishes a Euro PP Observatory which gives a list of Euro PPs in bond format (listed and unlisted) and in loan format which have been publicly announced, with their main characteristics.

PART TWO: THE STRENGTHS OF FRENCH LAW

In addition to securities law, the choice of French law as governing law for debt securities brings the advantages of French law in general, and in particular the automatic recognition of judgments of French courts whithin the European Union (1), the ability to draft the documentation in English (2), the attractiveness of the International Chambers of the Paris Commercial Court and the Paris Court of Appeal (3) and the qualities of French contract law and continental law (4). Bankruptcy law (5) and tax law (6) are also neutral in the choice of securities law.

1. Automatic recognition of judgments of French courts within the European Union

While the choice of English law has long been presented as a choice of a law benefiting from an effective judicial system for European issuers, the situation has changed with the United Kingdom's withdrawal from the European Union (Brexit).

Indeed, for proceedings introduced after the Brexit transition period, the regime applicable to the enforcement in the European Union of a judgment handed down in the United Kingdom in civil and commercial matters is no longer governed by the Brussels 1 *bis* Regulation, which offered automatic recognition of judgments, but should in principle be defined under an agreement between the European Union Member States and the United Kingdom. The United Kingdom had wished to sign up to the Lugano Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 21 December 2007 (the "**Lugano Convention**"): this convention specifies the conditions applicable to the enforcement of judgments handed down in the States of the European Free Trade Association (EFTA), and provides that the applicant should apply for a declaration of enforceability to (with regard to France) the *greffier en chef du Tribunal Judiciaire.* However, on 28 June 2021, the European Union indicated that it was unable to agree to invite the United Kingdom to sign up to the Lugano Convention, thereby blocking this initiative.

Therefore, judgments handed down in the United Kingdom are enforced in the European Union in accordance with the rules of ordinary law applicable to foreign judgments. In France, these rules presuppose that a party files an application for enforcement (*exequatur*) before the Court of Justice[48]. Enforcement proceedings are *inter partes* and usually last between 12

[48] Some authors suggest that the bilateral convention signed between the United Kingdom and France on the reciprocal enforcement of judgments in civil and commercial matters, together with a protocol, signed in Paris on 18 January 1934, could apply. It is expressly referred to in Articles 55 of the Brussels Convention of 27 September 1968 (as amended by Article 24 of the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland of 9 October 1978) and 69 of Regulation (EC) No 44/2001 known as "Brussels I", which list the pre-existing international conventions that these instruments replace. This Franco-British agreement of 18 January 1934 sets out the conditions under which the *res judicata* authority of "superior chamber" judgments is recognised and to which decisions handed down by

to 18 months before the court of first instance (plus the duration of the appeal proceedings, approximately 12 additional months). The defendant may raise three objections to the enforcement of the judgment relating to the fact that (i) the judgment is not compliant with French procedural public policy, (ii) the courts of the United Kingdom do not have a sufficient connection with the dispute or (iii) the judgment was obtained by fraud.

Since Brexit, rather than choosing the English courts, there is an increased benefit in granting jurisdiction to the courts of a Member State of the European Union, and to the French courts in particular, to benefit from the automatic recognition of judgments within the European Union (Regulation (EU) no. 1215/2012 of 12 December 2012 known as "Brussels 1 bis"), without going through enforcement proceedings.

2. Ability to draft the documentation in English

Although the language of the Republic is French[49], French law has long been adapted to allow the use by French and foreign issuers of a customary language in financial matters, namely English, facilitating the carrying out of their financing operations, without having to bear the delays and costs of a full translation of the documentation into French.

In that respect, Article 212-12 of the General Regulation of the French Financial Markets Authority specifies, regarding the prospectus relating to a public offer or admission to trading on a regulated market, that the languages accepted by the AMF for the drawing-up and publication of a prospectus under the Prospectus Regulation[50] are French and English. If the prospectus is drafted in English, only its summary must be translated into French, it being specified that no summary (and therefore no translation into French) is required in a certain number of cases, in particular when the securities are being offered solely to qualified investors or a limited circle of investors acting on its own behalf or when they have a nominal value per unit of at least €100,000[51].

If marketing materials are used to make an offer to the public, the information they contain must be "*sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received*"[52]. In the context of offers addressed to retail investors in France, the AMF generally considers that

the latter exclusively in civil or commercial matters, including criminal convictions on compensation for civil interests, are enforced. But these remain enforcement proceedings, even if specific rules are provided.

[49] Article 2 of the Founding Document.

[50] Article 27 of Regulation (EU) no. 2017/1129 of 14 June 2017.

[51] The scenarios in which the summary in French is not required are (i) the offer of financial securities to the public in one or more Member States of the European Union, other than France, without any admission to trading on a regulated market in France; (ii) the admission of financial securities to trading on a regulated market of one or more Member States of the European Union (other than France) without any offer to the public in France other than an offer to the public mentioned in 1) or 2) of Article L. 411-2 of the French Monetary and Financial Code or 2 or 3 of Article L. 411-2-1 of the French Monetary and Financial Code; or (iii) the admission to trading of equity securities on the compartment referred to in Article 516-5.

[52] Article 44.2 d) of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 (MIF 2 delegated regulation).

compliance with this requirement implies that the marketing materials must be drafted in French.

As regards the contractual documentation (terms and conditions of the bonds, subscription agreement, fiscal agency agreement, etc.), it can be freely drafted in English if the parties choose to[53]. Only in the context of hypothetical future legal proceedings (and only at the moment of such proceedings) could a translation into French be required (to be produced before French courts, documents drafted in a foreign language must in principle be translated into French by a sworn translator), it being specified that for proceedings before the International Chambers of the Commercial Court of Paris and the Paris Court of Appeal, the parties are allowed to produce documents in English without having to provide a translation thereof.

Finally, it should be noted that the financial documentation for the issuance of NEU CP and NEU MTN, which framework has underwent substantial simplification since the 2016 reform[54] to make negotiable debt securities' market more legible and more accessible, particularly for foreign issuers, allows issuers to draft such documentation in French or, in the case of securities subscribed for an amount of at least €200,000 and subject to the insertion of a warning, in any other customary language in financial matters[55].

3. Attractiveness of the International Chambers of the Commercial Court of Paris and the Paris Court of Appeal

The International Chambers of the Commercial Court of Paris ("**ICCP**") and the Paris Court of Appeal ("**ICCP-CA**") were created in 1995 and 2018 respectively. The stated objective of these chambers is to strengthen the attractiveness of the Paris market in a context of competition between international jurisdictions, further accentuated by Brexit[56]. Their creation was accompanied by the establishment in 2018 of two protocols relating to proceedings applicable before these chambers to allow them to adapt to the requirements of international economic and financial disputes[57].

Today, these International Chambers are fully meeting their objectives. As a matter of fact, they are increasingly involved in international economic and financial matters. On 29 June

[53] In the particular case of contracts to which a legal entity governed by French public law or a private person performing a public service assignment are parties, and which must in principle be drawn up in French pursuant to Article 5 of Law no. 94-665 of 4 August 1994 on the use of the French Language, Article L. 213-6-3 of the French Monetary and Financial Code provides that, in the case of bonds whose nominal value at issue is at least €100,000 (or which can only be acquired for an amount per investor and per transaction of at least €100,000), the terms and conditions as well as any other agreement relating to the issue of bonds, their financial service or coverage may be written in a language customary in financial matters other than French.

[54] See Part One – 6 above. Strengths of NEU CP, the commercial paper governed by French law.

[55] Article L. 211-11 of the French Monetary and Financial Code.

[56] Jean-Sébastien Bazille, "*Chambres commerciales internationales – Deux ans après leur création : bilan et perspectives dans un contexte remanié*" [International Commercial Chambers - Two years after their creation: overview and prospects in a changed context], JCP General edition, no. 25, 22 June 2020.

[57] Protocol relating to procedural rules applicable to the International Chamber of the Commercial Court of Paris (*ICCP*) and Protocol relating to procedural rules applicable to the International Chamber of the Paris Court of Appeal (*ICCP-CA*) of 7 February 2018 signed by the Paris Bar Association.

2021, disputes brought before the ICCP-CA (in their vast majority, of international commercial or post-arbitration disputes) involved 653 litigators from 69 different countries (75.5% of whom are EU nationals and 24.5% are non-European)[58]. Since Brexit, recourse thereto has been requested in financial matters: for example, for derivatives, one of the new versions published in July 2018 of the ISDA 2002 Master Agreement contains a clause granting exclusive jurisdiction to the ICCP on first hearing and the ICCP-CA on appeal to settle any dispute relating to derivatives[59].

The enthusiasm for these chambers will therefore certainly be analogous for international disputes relating to debt securities, over which ICCP and ICCP-CA have jurisdiction[60]. This type of dispute requires an international element, which is the case where the issuer and/or investor is a foreign national.

For foreign investors and/or issuers, recourse to these International Chambers presents several significant advantages aimed at speeding up, simplifying and making proceedings more accessible through the widespread use of English. The stated objective is also to have these disputes dealt with by specialist judges.

First, the judges from ICCP and ICCP-CA have solid knowledge of French and international banking and financial litigation, including litigation relating to debt securities to which French and foreign issuers and investors are exposed. As such, they come from different backgrounds having enabled them to acquire special competence in these areas: professional judges from Economic and Financial Chambers, the Ministry of Justice, members of the Paris and New York bars, English solicitors, in-house lawyers[61]. The judges sitting on the bench for these chambers and their teams (legal assistants, clerks) then master one or more foreign languages and are at least French-English bilingual[62]. Finally, if justified by the complexity of the dispute, they may request judges from other chambers of the Commercial Court or the Court of Appeal, more specialised in the dispute in question, to complete the bench. The judges are fully trained to deal with international disputes relating to debt instruments.

In accordance with the aforementioned protocols (the recourse to which must be requested by the parties)[63], English is the preferred language before these International Chambers. For example, parties, their counsel, witnesses, and experts are allowed to speak in English when

[58] Statistics of the International Chambers of the Paris Court of Appeal, June 2021.

[59] Alban Caillemer du Ferrage, "*L'accès aux chambres : compétences et contentieux - une point de vue de pratique*" [Access to the Chambers: jurisdiction and disputes - a practitioner's point of view], *Revue Lamy Droit des affaires* (no. 152) - Supplement, 1st October 2019.

[60] Articles 1.2 of the PTC and 1.4 of the BCP thus confer jurisdiction on the ICCP and the ICCP-CA to hear international disputes "*in relation to transactions in financial instruments, master agreements of the marketplace, contracts, instruments and financial products*".

[61] François Ancel, "*L'accès aux chambres : compétences et contentieux - les compétences de la CCIP-CA [CICAP]*" [Access to the Chambers: jurisdiction and disputes - jurisdiction of ICCP-CA [CICAP]], *Revue Lamy Droit des affaires* (no. 152) - Supplement, 1st October 2019.

[62] Fabienne Schaller, "*La procédure : pratique et outils – la langue et la représentation devant les chambres internationales*" [Procedure: practice and tools - language and representation before the International Chambers], *Revue Lamy droit des affaires* (no. 152) - Supplement, 1st October 2019.

[63] Alban Caillemer du Ferrage, "*L'accès aux chambres : compétences et contentieux - une point de vue de pratique*" [Access to the Chambers: jurisdiction and disputes - a practitioner's point of view], *Revue Lamy Droit des affaires* (no. 152) - Supplement, 1st October 2019.

they are foreigners[64] and to produce documents in English without having to provide a translation thereof[65]. They may also speak in another language (in this case, a translation will be offered to the parties by a translator) and produce documents in another language (a translation of the documents will then be required)[66]. Foreign issuers and investors will therefore be able to understand what is happening at the hearing and respond instantly. If the procedural documents are to be drawn up in French, the decision to be handed down will be automatically accompanied by a translation into English[67].

The protocol allows compulsory disclosure procedures for certain categories of documents[68] and the cross-examination of witnesses, similar to the discovery/disclosure and cross-examination mechanisms of common law systems. The protocol also devotes specific hearing time to the review of the costs incurred by the parties for their defence, like in Anglo-Saxon proceedings[69]. These procedures will therefore certainly be familiar to foreign issuers and investors.

These numerous advantages make it possible to simplify the procedure and render it more accessible to foreign issuers and investors.

Another advantage lies in the speed and transparency that are introduced by the protocols, which allow issuers and investors to have a genuine view of the entire duration of the procedure. The parties therefore have control of a binding procedural timetable which they set by mutual agreement and jointly with the chamber concerned. This timetable sets out binding dates for all stages of the procedure: exchange of submissions and exhibits, hearings and pleadings, publication of the judgment[70]. It should be noted that summary proceedings are also provided for, thereby enabling issuers and investors to obtain emergency decisions.

Finally, having recourse to these International Chambers to settle disputes relating to debt securities rather than foreign courts will avoid the need to file an application for enforcement of a foreign judgement in France (which is a generally lengthy and costly procedure for judgments handed down in countries that are not members of the European Union). It will also allow for the automatic recognition of judgments in the other Member States of the European Union, without having to file an application for enforcement in these States.

To grant jurisdiction to ICCP and ICCP-CA, issuers of and investors in French and foreign debt securities are advised to include a jurisdiction clause in the terms and conditions, based on

[64] Articles 2.5 of the *PTC* and 2.4 of the *PCA*.
[65] Articles 2.3 of the *PTC* and 2.2 of the *PCA*.
[66] Articles 6.3 of the *PTC* and 3.3 of the *PCA*.
[67] Articles 7 of the *PTC* and the *PTA*.
[68] Unlike discovery and disclosure procedures, the category of documents requested for production must be identified as accurately as possible.
[69] Emilie Vasseur, "*La procédure : pratiques et outils – Aspects pratiques de la procédure devant les chambres commerciales internationales*" [Procedure: practice and tools - Practical aspects of the procedure before the International Commercial Chambers], *Revue Lamy droit des affaires* (no. 152) - Supplement, 1st October 2019.
[70] François Mailhé, "*La procédure : pratiques et outils – Eléments de comparaison avec les consœurs étrangères*" [Procedure: practice and tools - Elements of comparison with foreign sisters], *Revue Lamy droit des affaires* (no. 152) - Supplement, 1st October 2019.

that featured in the French version of the 2002 ISDA Master Agreements[71]. A clause of this kind may be worded as follows:

> "*Any dispute which may arise between the parties regarding the validity, interpretation, performance or, more generally, arising out of or relating to this agreement, shall be submitted, on first hearing, to the Commercial Court of Paris (and in particular to its International Chamber), and, on appeal, to the jurisdiction of the Paris Court of Appeal (in particular its International Chamber)".*[72]

4. Qualities of continental and French contract law

French law is part of a continental law system which governs two thirds of the global population and is the law of the vast majority of the Member States of the European Union (since Brexit, only 3 out of 27 countries remain attached to common law: Cyprus, Ireland and Malta, which together have 6.5 million inhabitants out of a total of 446 million).

If continental law has spread so widely, it is largely because of its intrinsic qualities which have contributed to making Paris one of the world's leading centres for law.

Codification sets out a law which is reliable. Open to reading by all in accordance with a structured plan that can be consulted online (for example, via the Legifrance website), continental law does not require going to court to determine the content of the rule of law. According to Montesquieu, the judge must be "no more than the mouth that pronounces the words of the law" and must apply the latter as much as the will of the parties. The ease of access to continental law contributes to making it an *inexpensive* legal system that prevents conflicts.

These strengths of continental law in terms of security and economic efficiency are found in France in the field of contract law. After having been largely shaped by the case law of France's *Cour de Cassation* for nearly two centuries, contract law underwent an in-depth overhaul introduced by the law of 10 February 2016 reforming contract law, the general regime of obligations and proof of obligations, which came into force on 1st October 2016 and was ratified on 20 April 2018.

The accessibility and intelligibility of contract law has thereby been strengthened, with numerous judicial solutions being consolidated into modern French and according to a didactic outline. Consistent with the values of continental law, the philosophy of this reform

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[71] Alban Caillemer du Ferrage, "*L'accès aux chambres : compétences et contentieux - un point de vue de praticien*" [Access to the Chambers competence and disputes - a practitioner's point of view], *Revue Lamy Droit des affaires* (no. 152) - Supplement, 1st October 2019.

[72] Since the International Chambers are not strictly speaking courts, the former Presiding Judge of the Paris Court of Appeal, Ms Chantal Arens, recommends expressly referring to the International Chambers in the jurisdiction clause but putting them in brackets, after the indication of the courts (see Alban Caillemer du Ferrage, "*L'accès aux chambres: compétences et contentieux - une point de vue de pratique*"" [Access to the Chambers: jurisdiction and disputes - a practitioner's point of view], *Revue Lamy Droit des affaires* (no. 152) - Supplement, 1st October 2019).

is based on two fundamental pillars: contractual freedom, on the one hand, and contractual security, on the other.

The assertion of the principle of contractual freedom in Article 1102 of the French Civil Code must be emphasised: it is for example possible for economic players to determine the content of the contract - orally or in writing, including by electronic means - to invent new types of contracts and even to agree on proof, subject to special rules and public policy. The report to the President of the Republic relating to the law even raises "a general principle of the supplementary nature of the texts", thereby implying broad possibilities of contractual exception whenever a provision is not promulgated as public policy or when granting an exception thereto would logically be impossible (lack of consent). French contract law is marked by a concern for economic efficiency which justifies the refusal of any supervision of the value of obligations: provided that they are not illusory or derisory, it is the sole responsibility of the parties to assess their equivalence (Article 1168 of the French Civil Code). This liberalism is illustrated by the significant role conferred on unilateral will: a dissatisfied contractor may suspend the performance of its obligation by anticipating the future non-performance of the other party (Article 1220 of the French Civil Code), reducing the price paid in proportion to imperfect performance (Article 1223 of the French Civil Code) or even terminate the contract at its own risk (Article 1226 of the French Civil Code). And, drawing on practical experiences, a restated general framework for obligations (part IV) views the link between debtor and creditor as an asset, which can be the support for multiple financial transactions: transfers of receivables have been simplified and assignments of debts and contracts have been enshrined.

Contractual security is the second pillar of French contract law, which underpins this freedom of contract: it naturally leads to granting full binding force to contracts. Article 1103 of the French Civil Code therefore soberly provides the rule of "*Pacta sunt servanda*", stating that "*agreements which are lawfully formed have the force of law for those who have made them*". Following Denis Mazeaud's aphorism, in French law more than elsewhere, preference showed for the enforcement of obligations in kind means that "*what has been said is due*". Enforcement in kind is therefore guaranteed on the sole condition that the cost is not manifestly disproportionate (Article 1221). From this point of view, French law presents greater security than that which results, in some common law countries, from the application of the theory of "efficient breach of contract" which too often allows a debtor not to perform in kind by payment of simple damages. Breaking a promise given is largely combated by French law because it leads to harmful insecurity: this is the reason why the revocation of unilateral contracts (the basis of puts and calls) cannot prevent the transfer of the building or the promised securities (Article 1124 of the French Civil Code).

5. Neutrality of the law governing the securities in a bankruptcy

The question of the law governing the bankruptcy of the issuer is often a source of concern for investors who subscribe to bonds governed by French law, whereas the choice of the law governing debt securities law has no impact on the applicable bankruptcy law. Indeed, within the European Union and in accordance with European Regulation 2015/848 on insolvency proceedings, the law governing insolvency proceedings is the law of the country where the

bankruptcy proceedings are opened[73]. European regulations state, in this respect, that the jurisdiction of the courts depends on the "debtor's centre of main interests"[74]. In other words, the French courts will have jurisdiction if the "debtor's centre of main interests" is located in France[75]. If the issuer is not French and the centre of its main interests is outside of France, the law governing the debt securities will have no influence on this decision.

More specifically, to determine the location of the debtor's centre of main interests, the regulation presumes that the centre of these interests is situated in the territory of the State in which it has established its registered office[76] (except where the registered office of the issuer has been transferred to another state three months before the application to open the relevant insolvency proceedings).

This presumption regarding the location of the registered office is to be set aside when, from the perspective of third parties, the business, assets or administration of the company demonstrate an actual situation different from that which the location of the registered office is supposed to reflect[77]. Where applicable, the courts of the State in which the debtor ordinarily manages its interests will have jurisdiction [78] and not that of the State in which the debtor has its registered office.

Thus, the choice by a foreign company (*i.e.* whose centre of main interests is established abroad) to issue bonds governed by French law has no effect on the law governing the insolvency proceedings of such a company.

6. Neutrality of the law governing the securities as regards tax

For non-French issuers

France sometimes has the reputation of applying onerous taxation. However, it should first be recalled that the taxation applicable to debt securities is independent of the law governing such securities. Hence the choice of French law for governing the relationship between the various parties of the debt securities will not generate any specific tax liability. It is the tax law of the country of the issuer that will determine whether a withholding tax is applicable.

[73] Article 7, (1) of Regulation (EU) 2015/848.
[74] Article 3, (1) paragraph 1 of the Regulation op. cit.
[75] For these debtors who have their centre of main interests in France, it should be noted that French law on insolvency proceedings has been the subject of a profound revision with Order no. 2021-1193 of 15 September 2021 amending Book VI of the French Commercial Code, inspired by the economic pragmatism of the provisions of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019, with the objective of finding a balance between the interests of the creditor and those of the debtor.
[76] Article 3, (1) paragraph 2 of the Regulation op. cit.
[77] CJEU, 20 October 2011, case C-396/09, Interedil Srl.
[78] CJEU, 20 October 2011, case C-396/09, Interedil Srl; taken in accordance with the former EC Regulation no. 1346/2000 of 29 May 2000, confirmed by the current Article 3 (1) paragraph 1 of EU Regulation 2015/848.

For French issuers

For French issuers, no withholding tax is in principle due on interest paid outside of France. This exemption from withholding tax is automatically applied without any formality being required by the paying institution.

However, two specific points relating to the capacity of the investor need to be highlighted.

Firstly, interest paid outside France by a French issuer to a creditor established in a non-cooperative State or territory within the meaning of Article 238-0 A of the French General Tax Code (NCST) or paid into an account opened in a NCST are, as an exception, liable for withholding tax which may be increased to 75% in accordance with Article 125 A, III of the French General Tax Code.

However, there is a safeguard clause according to which this deduction does not apply if the issuer demonstrates that the debt transaction has a main purpose and effect other than allowing the localisation of such benefits in a NCST. In practice, the issuer must provide any element likely to demonstrate that the purpose of the debt transaction is not tax related. In this regard, it must endeavour to produce all material and quantitative elements so as to enable an objective comparison between the earnings resulting from the tax benefits derived from the payment in a NCST and that resulting from other benefits.

In any event, the tax authorities have recognised that three categories of securities automatically benefit from this safeguard clause. These are, first, securities offered in the context of an offer to the public of financial securities within the meaning of article 2 of Regulation (EU) 2017/1129 of 14 June 2017 or an equivalent offer made in a State other than a NCST. The clause also applies to securities admitted to trading on a French or foreign regulated market or multilateral trading facility, provided that such a market or system is not located in a NCST and that the operating of the market is carried out by a market firm or investment service provider, or any other similar body not located in a NCST. Finally, the clause applies to securities admitted, at the time of their issuance, to the operations of a central securities depository or clearing, delivery and payments system operator within the meaning of Article L. 561-2 of the French Monetary and Financial Code, or of one or more similar foreign depositories or operators, provided that the depositary or operator is not located in a NCST. Therefore, debt securities admitted to Euroclear France benefit from the safeguard clause and are not subject to the withholding tax referred to in Article 125 A, III of the French General Tax Code.

Secondly, the paying institution may be required to levy a flat tax where the investor is a French resident. Pursuant to Article 125 A of the French General Tax Code, the single flat-rate levy of 30% applies to interest and assimilated income received by holders who are French residents for tax purposes and do not hold their securities as part of their activity.

Appendix: Composition of the Working Group

Chairman:

- **Marc-Etienne Sébire**, *Avocat*, Partner (CMS Francis Lefebvre)

Members:

- **Clémence Berroëta**, Managing Director, DCM (Crédit Agricole CIB)
- **Stéphanie Bertin**, Head of the Financial Law Division (Crédit Agricole SA UK)
- **Stéphanie Besse**, Managing Director - Global Head DCM Corporate (Natixis)
- **Cedric Besson**, Interim Head of Primary Listing France Portugal Spain (Euronext)
- **Auriane Bijon**, *Avocat*, Counsel (Clifford Chance)
- **Arnaud de Bresson**, Managing Director (Paris Europlace)
- **Cédric Burford**, *Avocat*, Partner (Clifford Chance)
- **Henri Casadesus**, General Counsel (Morgan Stanley France)
- **Olivier Chomette**, Head of Debt Solutions - Legal Department (Natixis)
- **Veronique Collin**, *Avocat*, Partner (Squire Patton Boggs)
- **Thiebald Cremers**, General Counsel (AMAFI)
- **Audrey Dahan**, Global Manager of Securities, Legal (BNP Paribas)
- **Véronique Delaittre**, *Avocat*, Partner (Linklaters)
- **Victor Delion**, *Avocat* (CMS Francis Lefebvre)
- **Hervé Ekué**, *Avocat*, Partner (Allen & Overy)
- **Pierre Fiset**, Managing Director - Division Counsel for Western Europe & Israel (Citi)
- **Laureen Gauriot**, Senior Finance Lawyer (Orange)
- **Elsa Imbernon**, Head of Legal Practice, Debt Solutions - Legal Department (Natixis)
- **Grégoire Karila**, *Avocat*, Partner (White & Case)
- **Patricia Leclerc**, Lawyer (Citi)
- **Emmanuelle Leroy**, *Avocat* (Ashurst)
- **Alexandre Logatchev**, Debt Capital Markets lawyer (HSBC Continental Europe)
- **Soline Louvigny**, *Avocat*, Counsel (Allen & Overy)
- **Annabel Massey**, *Avocat* (Ashurst)
- **Fanny Palmieri**, Head of the ESES CSD Legal Team (Euroclear)
- **Jérome Pellet**, Head of Corporate and Public Sector Debt Capital Markets Origination - France (HSBC Continental Europe)
- **David Poirier**, Financial lawyer (Société Générale Securities Services and AFTI)
- **Florie Poisson**, *Avocat* (CMS Francis Lefebvre)
- **Michel Prada**, Chairman of the *Comité Environnement réglementaire et juridique* (Paris Europlace)
- **Richard Roger**, Head of the Issuer Services Business Division (Société Générale Securities Services)
- **Stéphanie Saint-Pé**, General Delegate (AFTI)
- **Natalia Sauszyn**, *Avocat*, Of Counsel (Jones Day)
- **Sébastien Séailles**, Group strategy (Euroclear)
- **Julien Sébastien**, *Avocat*, Partner (Allen & Overy)
- **Marc-Etienne Sébire**, *Avocat*, Partner (CMS Francis Lefebvre)
- **Florence Tresarrieu**, Director of Finance and Treasury (Pernod Ricard)
- **Manaf Triqui**, *Avocat*, Counsel (Kramer Levin)
- **Olivier Vigna**, Deputy Managing Director (Paris Europlace)

- **Hubert du Vignaux**, *Avocat*, Partner (Gide Loyrette Nouel)
- **Laurent Vincent**, *Avocat*, Partner (Gide Loyrette Nouel)
- **Christophe Yvon**, Head of *Droit des Opérations de Marché* (Société Générale)

French Financial Markets Authority (*Autorité des marchés financiers*):

- **Guillaume Clément-Larosière**, Senior Portfolio Manager (bond specialist)
- **Julien Laroche**, Head of *Pôle Banque, Assurance et Marché obligataire*, *Direction des émetteurs*

Banque de France:

- **Emmanuelle Trichet**, Head of the Negotiable Debt Securities Department

French Treasury (*Direction Générale du Trésor*):

- **Mehdi Ezzaim**, Deputy Head, *Bureau Epargne et Produits Financiers*
- **Eve Maurice**, Deputy Head, *Bureau Epargne et Produits Financiers*

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