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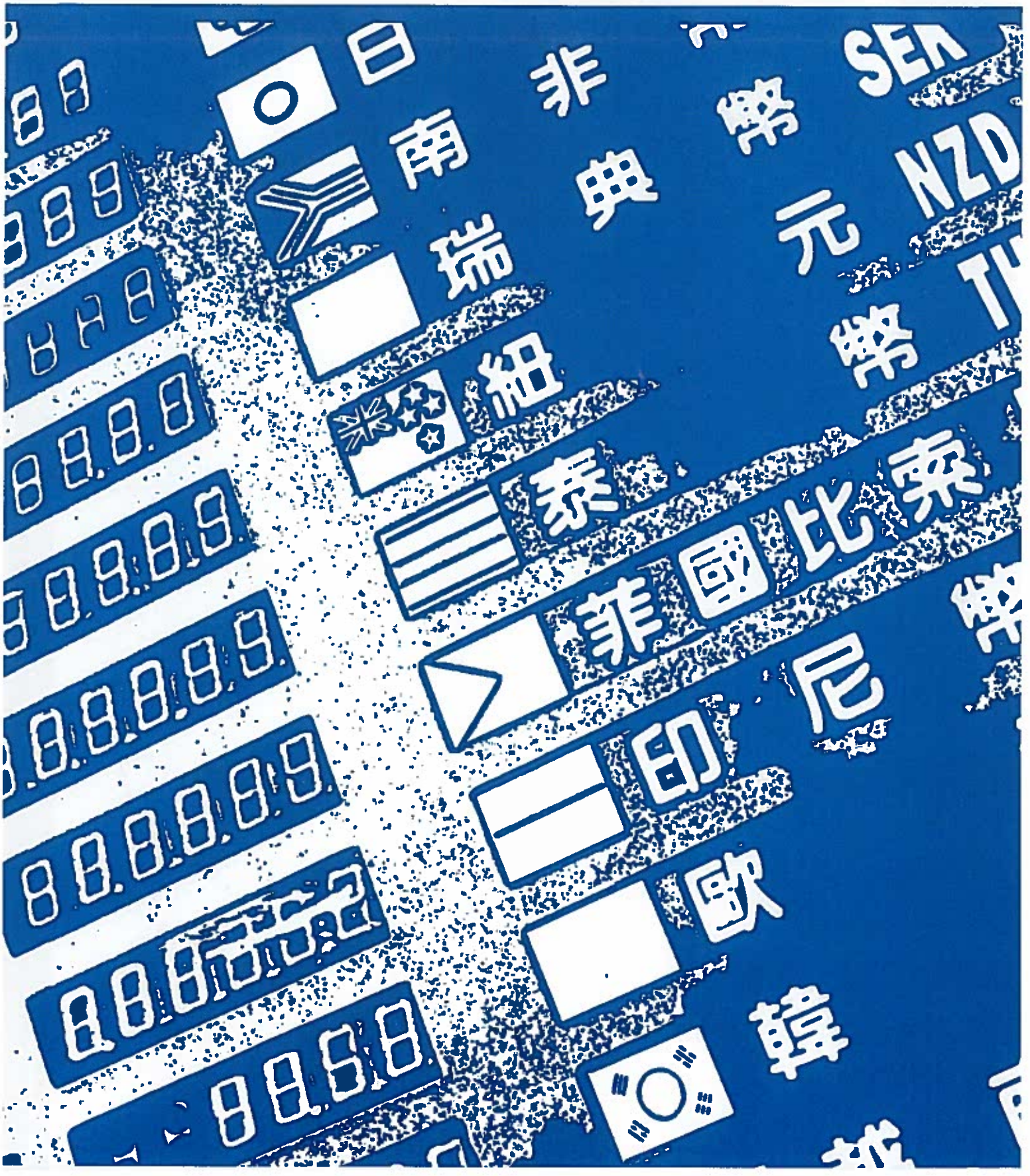

after the merger would indicate an increased likelihood of the Issuer not paying principal and interest on time, which would affect the value of the Notes and also provide an incentive for a noteholder to call an event of default. These and other factors would have to be discussed among the Issuer and counsels to decide on a proper course of action.

Another option to consider, in light of the risks of a noteholder calling an event of default, would be to obtain consent from the required number of Noteholders to waive the possible event of default. This approach, however, has several drawbacks. First, finding all the noteholders and actually obtaining consent could be difficult. Also, informing noteholders of possible events of default could risk alarming investors or causing them to ask more questions and create more uncertainty and stress for the Issuer, which seems too burdensome in a situation where the Issuer genuinely believes that there is no event of default.

Conclusion

In cases such as our hypothetical one, counsels in the various jurisdictions must come together to advise the Issuer on the prudent course of action. These cases show the necessity for cooperation among international counsels, and the challenges posed by advisory matters involving the laws of multiple jurisdictions.

Notes

1 This language is excerpted from an event of default provision in an offering document of a Euro Medium Term Note programme for a Korean issuer, drafted by Allen & Overy.

2 This language is excerpted from an event of default provision in an offering document of a Euro Medium Term Note programme for a Korean issuer, drafted by Allen & Overy.

A double jeopardy ruling shakes up the French legal regime against market abuse practices

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After the Penalties' Commission[1] of France's Autorité des Marchés Financiers (AMF), the government agency with regulatory authority over the financial markets in France, handed down its decision of 27 November 2009, dismissing all the charges in the European Aeronautic Defence and Space Company NV (*EADS*) matter,[2] the then Chairman of the AMF, Jean-Pierre Jouyet, declared that 'for the AMF, there will be the time before EADS and the time after EADS'.[3]

The *EADS* case: double prosecution at its worst

The *EADS* matter is the insider trading saga that came to light in 2006, as the AMF, followed shortly thereafter by the criminal prosecutor, investigated nearly all of the individual members of the executive committee at EADS, the European aircraft industry conglomerate (now called Airbus Group), and Airbus, its main subsidiary, as well as the two main non-governmental shareholders of EADS (Daimler AG and Lagardère SCA). The charges were that the individual defendants had massively traded in EADS stock when exercising their stock options between November 2005 and March 2006, and that the corporate defendants had traded even larger volumes of shares as they both withdrew 7.5 per cent each of the capital stock in early April 2006: that is, they all traded at a time when they allegedly knew of the critical difficulties that were or would be hampering the two main industrial aircraft programmes at Airbus, namely, those of the A350 and A380 which, when disclosed in stages later that same year, caused sharp drops in EADS's stock price (eg, a 26 per cent fall on 14 June 2006); also, EADS recorded a resounding loss at year end in 2006, in sharp contradiction with the financial guidance that had been

circulated to the market at the end of March of that year. However, the AMF Penalties' Commission found that the information identified in the charges was either inaccurate or failed to qualify as privileged and, therefore, dismissed all the charges.

When making that statement after the defendants' unexpected release from the AMF charges in 2009, Jouyet presumably had in mind the few adjustments that needed be made to the AMF procedures to restore the credibility and efficiency of the agency as a law enforcement institution. For that sake, a 2010 regulation[4] required that the AMF investigators share their preliminary findings with defendants prior to issuing their final investigation report, with a view to avoiding situations where a protracted and costly investigation could be annihilated at trial by the Penalties' Commission as it had been in the EADS case. Also, and more importantly, a 2010 law[5] now entitles the Chairman of the AMF to appeal in the civil courts against decisions of the AMF Penalties' Commission: up to then, only the defendants had been admitted as appellants, so that when the defendants did not appeal against the AMF decision as, in the *EADS* case, when the charges against them had all been dismissed, the decision became final. Accordingly, the November 2009 ruling by the Penalties' Commission in the EADS case is a final decision.

It is unclear whether Jouyet also realised at the time the current, much further-reaching implications of that same 2009 decision, now conveyed by the ruling that the Conseil Constitutionnel issued on 18 March 2015. Indeed, French laws and regulations on market abuse have been very recently shaken to pieces by this long-awaited, yet unexpected, ruling by the Conseil Constitutionnel, the highest French court on constitutional issues: in response to the application filed by most of the defendants indicted in the *EADS* case, it scrapped specific sections of its Monetary and Financial Code (the 'CMF') that allowed for double prosecution by the AMF on the one hand and by the judiciary in criminal proceedings on the other.

Indeed, in *EADS*, even after the 2009 decision by the Penalties' Commission, the prosecution continued its investigation, which had been running in parallel to the proceedings with the AMF, and the investigating judges (the *juges d'instruction*) indicted seven individuals and the same two corporate defendants, and remanded them for trial in the criminal courts (*tribunal correctionnel*). The proceedings were allowed to resume in the criminal courts in spite of the final ruling by the AMF that had found them not guilty, because the French legal system on market abuse allows for two concurrent sanctioning regimes to coexist separately, quasi independently from one another: insider dealing is treated as a regulatory breach (*manquement d'initié*) to be investigated, prosecuted and adjudicated upon by the AMF;[6] it also is a criminal offence (*délit d'initié*), to be investigated and prosecuted under French criminal procedure rules and adjudicated upon by the French criminal courts.[7]

The administrative or regulatory breach carries financial penalties of up to ten times the profit derived from the violation, or a cap that may now reach €100m;[8] the criminal offence may lead to financial penalties of €1.5m[9] or the same cap of ten times the unlawful gain collected, plus a two-year prison sentence. In practice, financial penalties inflicted in criminal courts are in most cases the same quantum as those ordered by the Penalties' Commission,[10] and the former are allowed to offset the amount of the fine ordered by the AMF against the quantum of the penalties they would award:[11] accordingly, in most cases, even if found guilty in the criminal courts, the defendant will not be fined more than he or she was by the AMF. Nevertheless, being exposed to criminal prosecution on top of the proceedings sustained before the AMF creates additional hardship for the defendant, who has to sit through a new range of expensive, nerve-wracking and time-consuming procedures, confront the collateral damage associated with a criminal trial; and, incur again, financial penalties, plus a damage award to civil plaintiffs (as, unlike in the proceedings before the AMF, civil plaintiffs are entitled to sue for damages in the criminal courts) and, more importantly, a prison sentence.[12] This was particularly straining in the EADS case, where the AMF had dismissed all charges.[13] Therefore, the exposure to a double set of proceedings for the same charges is understandably perceived as a manifest breach of the double jeopardy rule, known in civil law jurisdictions as '*non bis in idem*', even more so in *EADS*, where the defendants were able to secure a not guilty ruling by the AMF.

Non bis in idem in the French courts until the March 2015 decision by the Conseil Constitutionnel

The *non bis in idem* rule is an established principle of French criminal law, under Section 6 of the French Criminal Code, which lists the circumstances that prevent the prosecution from pressing charges against a defendant and bringing him to trial, among which is '*la chose jugée*'; that is, '*res judicata*', meaning a final decision given on the same matter.

However, the French criminal courts adamantly deny *res judicata* authority to the decisions of the Penalties' Commission because these are administrative by nature and not criminal proceedings and, accordingly, may not be found binding for the criminal judiciary.

At the outset, the Commission des Opérations de Bourse (COB), the earliest predecessor of the AMF, was, for the enforcement of market abuse laws and regulations, in charge only of investigations, and was first granted the authority to adjudicate over market abuse charges and order financial penalties by a law of 2 August 1989. Solicited by certain lawmakers who had challenged the validity of the draft bill, by reason of the risk that defendants incur double punishment through the combination of financial penalties ordered by the COB plus criminal penalties, the Conseil Constitutionnel ruled on 28 July 1989 that the double jeopardy rule did not apply to the cumulation of criminal penalties and administrative penalties. At the same time, the Conseil Constitutionnel acknowledged that a separate constitutional rule, which only allowed for sanctions that were 'strictly and manifestly necessary',[14] applied to both criminal penalties and penalties that, although not issued by the criminal judiciary, could nevertheless be equally characterised as a punishment. It therefore ruled that, for sanctions to remain 'proportionate', the COB and the criminal courts should ensure that, cumulatively, the administrative and the criminal sanctions should not go beyond the statutory cap (which, at the time, was ten million francs, or ten times the benefit derived from the offence).

In short, in order to preserve the French regulatory system, which vested administrative regulators with the authority to issue penalty orders, the Conseil Constitutionnel allowed double prosecution and, subject to an overall single statutory cap, double sanctions as well.

The French courts have since consistently denied every attempt made at stopping criminal charges being pursued for market abuse matters after their being adjudicated upon by the COB or the AMF. Defendants had in these cases invoked European treaties that France had signed and ratified, which incorporated the *non bis in idem* rule, namely, Article 4 of Protocol No 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'),[15] and Article 50 of the Charter of Fundamental Rights of the European Union.[16]

However, French courts repeatedly relied on a reservation that had been expressed by France under Protocol No 7 of the ECHR, which restricted the scope of the rule to criminal offences.[17] Illustratively, in several decisions, the criminal section of the Cour de Cassation simply relied on the French reservation to Protocol No 7, without even mentioning the EU Charter of Fundamental Rights.[18] As defendants argued that the French reservation was invalid because it failed to comply with specific terms of the Convention, French courts replied that they had no authority to treat a French reservation to a signed international treaty as invalid (which implied that only the Conseil Constitutionnel was entitled to invalidate a French statute).[19]

Alternatively, the courts also denied the defence based on the *non bis in idem* rule solely on the basis of Article 50 of the EU Charter of Fundamental Rights which, through an erroneous interpretation of the 2003 EU Market Abuse Directive,[20] they read as being limited to criminal proceedings.[21] Specifically, the French courts read the 2003 Directive as encouraging Member States to enact 'administrative measures' in view of 'administrative sanctions' by ensuring 'that these measures are effective, proportionate and dissuasive', without creating any restriction derived from the existence of parallel criminal sanctions, as the Directive recommended administrative sanctions 'without prejudice to the right of Member States to impose criminal penalties'.[22]

Accordingly, the position of the French judiciary remained that, as long as sanctions incurred cumulatively before the AMF and in criminal proceedings were in quantum 'effective and dissuasive' but also 'proportionate' – that is, so long as they did not pass the applicable single statutory cap – the *non bis in idem* rule would not apply to the combination of criminal and

administrative penalties.[23]

However, although the Conseil Constitutionnel carefully avoided any reference in its March 2015 decision to the aforementioned European statutes, increased pressure from legal authors and from the latest decisions of the European Court of Justice (ECJ) in Luxemburg and the European Court of Human Rights (ECtHR) in Strasburg manifestly contributed to the reversal recently conceded by the French justices of the Conseil Constitutionnel.

Recent developments in European law on *non bis in idem*

Two tests apply under the *non bis in idem* rule: first, focusing on the word '*bis*', the nature of the proceedings (must these be both criminal proceedings, or may administrative proceedings qualify as criminal for the purposes of the double jeopardy rule?); and, secondly, the identity of the charges brought in both such proceedings and the underlying facts (meaning: the proper reading of the word '*idem*'). On both issues, recent case law from the ECJ and the ECtHR has made decisive progress towards the admission of the *non bis in idem* rule in market abuse cases.

The ECtHR in the *Engel* decision[24] in 1976 was first to determine the test whereby regulatory proceedings could be treated as tantamount to criminal proceedings for the purposes of the *non bis in idem* rule. *Engel* established a three-criteria test, made of: the legal classification of the offence under national law, the nature of the offence, and the degree of severity of the penalty incurred, meaning not the penalty actually inflicted but 'the maximum potential penalty for which the relevant law provides'.[25] In the more recent *Grande Stevens* decision rendered in March 2014,[26] a decision that proved critical in contributing to the reversal just obtained in the Conseil Constitutionnel, the ECtHR specified that these criteria were alternative and not cumulative,[27] and found that the Italian financial markets regulator, Commissione Nazionale per le Società e la Borsa (CONSOB), should be held as issuing penalties that 'were criminal in nature';[28] furthermore, the ECtHR in that same matter reiterated that, in its past decisions, proceedings by certain French regulatory agencies had also been found to belong to the sphere of criminal law (and mentioned in particular the AMF).[29]

The ECJ, on its side, applied to that same issue the rule established by the ECtHR, even when quoting from the aforementioned 2003 Directive, noting that Member States were invited under the Directive to impose appropriate administrative sanctions, but that 'none the less, in the light of the nature of the infringements at issue and the degree of severity of the sanctions that may be imposed, such sanctions may, for the purposes of the application of the ECHR, be qualified as criminal sanctions'.[30] The ECJ, understandably, had been referring to the rules issued by the ECtHR because the EU Charter of Fundamental Rights specifies (in Article 52.3) that rights enacted under the Charter shall have the same 'meaning and scope… as those laid down by the said Convention [for the Protection of Human Rights: the ECHR]'.

Importantly, too, in *Grande Stevens*, the ECtHR addressed the issue of the Italian reservation to Protocol No 7 of the Convention (the ECHR), which it stated 'was similar to those made by other States' (mentioning Germany, France and Portugal)[31] and found it invalid as it failed to comply with certain requirements spelled out in the Convention (in Article 57) for such reservations.[32]

Turning to the second test to be satisfied in order to apply the *non bis in idem* rule, meaning the identity of the charges and the underlying facts as between both proceedings, the ECtHR held in *Zolotukhin* that the double jeopardy rule 'must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same'.[33]

Grande Stevens noticeably cleared the path for the upcoming changes in French law, not just by addressing the Italian and, accordingly, also the French reservation to Protocol No 7 of the ECHR, which had served as the main defence erected by the French courts, but because *Grande Stevens* dealt with an insider trading matter, and the closest on the agenda of the French courts for double jeopardy arguments were insider trading cases, namely *EADS* and *Pechiney*. Indeed, in *Pechiney*, feeling the pressure from the international legal environment, the Paris Tribunal Correctionnel (incidentally, these were the same judges who dealt a few days later with the application by the *EADS* defendants to the Conseil Constitutionnel) denied the objection grounded on the *non bis in idem* rule, but stated that 'in this context, it is likely that the French legal regime for

sanctioning market abuses shall be forced into adjustments in order to coordinate the criminal and administrative sanctions in the financial sector and comply with the [ECtHR] jurisprudence.'[34]

Moreover, even after *Grande Stevens*, the ECtHR handed down several more decisions in late 2014 and early 2015 which, although not in the field of market abuse, repeated the same rule and used the same language, thereby adding to the pressure on the French courts.[35]

The 18 March 2015 decision by the Conseil Constitutionnel

In a major breakthrough decision,[36] the Conseil Constitutionnel has scrapped certain specific parts of its legislation on market abuse practices, leaving it until 1 September 2016 for the French Parliament to come up with the corresponding legislative changes[37] (but releasing immediately in the interim defendants such as the applicants in the *EADS* case, meaning defendants who after having first been prosecuted or convicted in either AMF or criminal proceedings would incur further prosecution under the other type of proceedings).[38]

Specifically, until 18 March 2015, double prosecution was allowed but double punishment was restricted to a single statutory cap for pecuniary sanctions from the AMF and the criminal judiciary cumulatively; from now on, double prosecution will have to stop. However, double prosecution will only cease in respect of proceedings covering the same defendants and the same facts: the definition of '*idem*' in this ruling by the Conseil Constitutionnel is accordingly narrower than as admitted by the ECtHR, which extends the double jeopardy rule to proceedings dealing with 'identical facts or facts which are substantially the same'.[39]

Moreover, the scope of the expected changes to the current statute is limited to insider trading only, and insider trading only by investors that are not regulated by the AMF. Indeed, in order to enhance their chances with the Conseil Constitutionnel, the applicants in the *EADS* case had to show that criminal proceedings duplicated the proceedings conducted by the AMF, and therefore that both followed the same statutory purpose. For that reason, they purposefully narrowed their argument to insider trading only, not all market abuse practices, and have also sought to distinguish, in the statute dealing with the enforcement of insider trading rules by the AMF, the provisions covering third-party investors from those dealing with market operators and institutions regulated by the AMF.[40]

Accordingly, for the time being there will be no change made to market abuse legislation affecting insider dealing by AMF-regulated professionals, or to statutes governing other market abuse practices, such as price manipulation, circulating misleading financial information or the failure to disclose appropriate financial information. Also, double prosecution will still affect other areas in France in which the Government may impose financial sanctions separately from the judiciary, such as tax, anti-trust, banking law, consumer law, and so on.[41]

However, exactly which legislative changes should be expected in France for sanctioning insider trading remains uncertain. Some authors advocate returning the AMF to its initial purpose, meaning investigating possible financial market offences, stripping it of its sanctioning authority and consolidating all such enforcement activity into a newly created financial market tribunal.[42] This would be in line with the recent creation in France of a special prosecutor for financial matters, and the expected enlargement of the Paris criminal courts through the organisation of a 32rd section of the Tribunal correctionnel dedicated to financial matters.

Alternatively, the AMF could retain its sanctioning authority, but there would be a clear allocation of roles between the AMF and the criminal courts. This resembles an earlier French legislative proposal, whereby the AMF would have been required to transfer the case to the prosecutor whenever it appeared that the facts supported a criminal indictment, without being entitled to impose its own penalties for that same case.[43] This is also the solution currently adopted by fifteen EU Member States, including, noticeably, the United Kingdom, where, reportedly, the Financial Conduct Authority acts in close cooperation with the prosecutor and refrains from issuing penalty orders when the case is turned over to the judiciary.

This would also satisfy the recommendations expressed in the 2014 EU Market Abuse Directive[44] and the 2014 EU Market Abuse Regulation,[45] with administrative sanctions being covered by the Regulation, and the Directive suggesting (in Article 3.1) that 'insider dealing… constitute criminal offences at least in serious cases and when committed intentionally'; indeed, the wording of the

Conseil Constitutionnel decision now clearly forbids jurisdictional overlaps between the AMF and the criminal courts, as does the 2014 Directive, which provides (in 'Whereas' clause 23) that 'Member States should ensure that the imposition of criminal sanctions for offences in accordance with this Directive and of administrative sanctions in accordance with the Regulation (EU) No 596/2014 does not lead to a breach of the principle of *ne bis in idem*'.

Notes

1 The Commission des Sanctions, a panel made up of judges and professionals in the financial sector that decides market abuse cases on behalf of the AMF.
2 Commission des Sanctions de l'AMF, 27 November 2009, *Revue Trimestrielle de Droit Commercial* 2010, No 2, chron. p. 395, with comments by Rontchevsky; *Bulletin Joly Bourse*, 15 December 2009, No 6, p. 451, with comments by Daigre; *Droit des Sociétés* 2010, No 4, p. 22, with comments by Mortier.
3 Jean-Pierre Jouyet quoted in '*Il y aura pour l'AMF, un avant EADS et un après*' – *Le Figaro* (18 December 2009).
4 As per *arrêté* of 8 December 2010, AMF investigators now send a *lettre circonstanciée* to the persons under investigation, affording them time to respond before finalising their report.
5 Law No 2010–1249 of 22 October 2010, amending section L. 621–30 of the French Monetary and Financial Code (CMF).
6 Section L. 621–15 of the CMF.
7 Section L. 465–1 of the CMF.
8 In the version of the statute applicable in 2006, at the time of the facts invoked against the defendants in the *EADS* case, the cap for penalties for the administrative breach was set at €1.5m.
9 The cap for the financial penalties inflicted by the criminal courts is multiplied by five when the defendant is a corporate entity as opposed to a natural person, under the combination of Section L. 465–3 of the CMF and Section 131-38 of the French Criminal Code.
10 Dezeuze, 'Abus de marché: de la coexistence à la coordination des procédures répressives administrative et pénale?', *Revue de Droit Bancaire et Financier*, March-April 2013, 82, p. 85.
11 Section L. 621–16 of the CMF.
12 Although prison sentences are seldom inflicted in insider trading matters by the criminal courts, unless for suspended sentences.
13 *EADS* is the only case to date where criminal proceedings continued although the defendants were found not guilty of an administrative breach by the AMF.
14 Article 8 of the Declaration of Human Rights of 1789.
15 Article 4.1 of Protocol No 7 provides that: 'No one shall be liable to be tried and punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State'.
16 Article 50 of the EU Charter of Fundamental Rights provides that: 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'.
17 'The Government of the French Republic declares that only those offences which under French law fall within the jurisdiction of the French criminal courts may be regarded as offences within the meaning of Articles 2 to 4 of this Protocol'.
18 Ruling of 2 April 2008, *Bulletin Joly Bourse* 2008, 301, with comments by Lasserre-Capdeville; ruling of 28 January 2009, *Droit des Sociétés* 2009, comm 83, with comments by Salomon; ruling of 1 March 2000, *Bull Crim* No 98.
19 Paris Court of Appeals, 28 March 2012, cited in the decision by the Cour de Cassation of 22 January 2014 which upheld that same appellate decision (see n 21).
20 Directive 2003/6/EC of the European Parliament of 28 January 2003.
21 Ruling by the Cour de Cassation, criminal section of 22 January 2014, *Revue de Droit Bancaire et Financier* March-April 2014, 80, with comments by Pailler; *Bulletin Joly Bourse* 2014, 203, with comments by Chacornac.
22 See Article 14.1 of the 2003 EU Market Abuse Directive. However, when commenting upon this Directive, the French courts purposely failed to mention the 'Whereas' Clause 44 of the same Directive, which states that 'this Directive respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union'. Later French court judgments ran comparable arguments on the basis of the new 2014 Market Abuse Directive (Directive 2014/57/EU of 16 April 2014), although also failing to mention the same *non bis in idem* rule incorporated into two 'Whereas' clauses (23 and 27) of that Directive (TGI Paris, 26 September 2014, in the *Péchiney* case: see n 34 below).
23 Cour de Cassation, 8 July 2010, rejecting four applications to the Conseil Constitutionnel that were based on the *non bis in idem* rule, *Revue de Droit Bancaire et Financier*, November-December 2010 Refère, No 6, with comments by Le Nabasque; *Revue des Sociétés*, 2011, 371, with comments by Paclot.
24 *Engel and Others v the Netherlands*, 8 June 1976.
25 *Sergey Zolotukhin v Russia*, ECtHR, 10 February 2009, paragraphs 53 and 56.
26 *Grande Stevens v Italy*, ECtHR, 4 March 2014.
27 *Grande Stevens*, paragraph 94.
28 *Grande Stevens*, paragraph 99.
29 *Grande Stevens*, paragraph 100.
30 *Spector Photo Group NV*, Case 45/08, ECJ, 23 December 2009, paragraph 42.
31 *Grande Stevens*, paragraph 204.
32 *Grande Stevens*, paragraph 208. The ECtHR had also found invalid the reservation made by Austria in its earlier decision in *Gradinger v Austria*, 23 October 1995.
33 *Sergey Zolotukhin v Russia*, ECtHR, 10 February 2009, paragraph 82.
34 TGI Paris, 26 September 2014, *Bulletin Joly Bourse*, March 2015, 103, with comments by Chacornac: unlike in *EADS*, the defendants in *Pechiney* did not apply with the Conseil Constitutionnel; as a result, their double jeopardy argument was denied, and they were fined and given suspended prison sentences by the Tribunal, despite having already been fined by the AMF.
35 *Lucky Dev v Sweden*, ECtHR, 27 November 2014; and *Rinas v Finland*, ECtHR, 27 January 2015.
36 Conseil Constitutionnel, decision No 2014-453/454 QPC and 2015-462/QPC of 18 March 2015.
37 Paragraph 35 of the decision (see n 36).
38 Paragraph 36 of the decision (see n 36).
39 *Sergey Zolotukhin v Russia*, ECtHR, 10 February 2009, paragraph 82.
40 This is because, when the AMF is enforcing market abuse law over professionals that are regulated by it, the AMF is acting as a regulator with a disciplinary function, which is a different purpose than when it is imposing fines upon a third-party investor, in which case, just like a criminal prosecutor pursuing market abuse charges, the AMF is acting for the preservation of the integrity of the markets at large.
41 For that sake, the statutory changes expected in France from the March 2015 decision by the Conseil Constitutionnel are much narrower than advocated by the ECtHR: as a reminder, in *Grande Stevens*, the court ruled over a case of double prosecution affecting an earlier decision by

CONSOB in Italy, and also mentioned (in paragraph 100) earlier ECtHR decisions affecting the AGCM (antitrust authority) in Italy, the Budget Court in France and the French antitrust authority, Conseil de la Concurrence.

42 Schmidt and Le Fur, 'Pour Un Tribunal Des Marchés Financiers', *Bulletin Joly Bourse*, 2015, 24.

43 Article 10 of the Draft Bill submitted to Parliament on 7 February 2001.

44 Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (the Market Abuse Directive).

45 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (the Market Abuse Regulation).

Disclosure requirements for convertible and exchangeable debt securities: recent developments in the French market

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Commission Delegated Regulation (EU) No 759/2013 of 30 April 2013 amended Commission Regulation (EC) No 809/2004 (the 'Prospectus Regulation') as regards the disclosure requirements for convertible and exchangeable debt securities. The rationale of this regulation is that additional disclosure should be required in cases where the shares to be delivered upon exchange and/or conversion of debt securities are not, or not yet, admitted to trading on a regulated market.

Specifically, the amendment requires that securities notes relating to convertible or exchangeable debt securities that give rights to shares that are not already traded on a regulated market must include a working capital statement and a statement of capitalisation and indebtedness of the issuer. The European Securities and Markets Authority (ESMA) consequently updated in January 2014 its Questions and Answers – Prospectuses.[1]

The Autorité de Marchés Financiers (the 'Securities Regulator') subsequently issued on 21 February 2014 a table setting forth the information required for securities notes relating to equity-linked debt securities, depending upon whether underlying shares are new or already admitted to trading on a regulated market. Specifically, any securities note for bonds that are convertible into and/or exchangeable for shares that are new in whole or in part (whether the nominal value of such bonds is below or above €100,000) must include a working capital statement and a statement of capitalisation and indebtedness of the issuer of the underlying shares as of a date no earlier than 90 days prior to the date of the securities note.

The Securities Regulator also considers such additional information to be required where shares are to be delivered upon redemption of the bonds unless the underlying shares are already listed existing shares at the time of the debt issuance. As an example, the issuances by Alcatel in June 2014 of two tranches of bonds listed on the regulated market of Euronext in Paris and convertible into and/or exchangeable for new or existing shares, due respectively on 30 January 2019 and 30 January 2020 and amounting to €688m and €460m, were done in compliance with the additional disclosure requirements. Another example is the issuance in February 2014 by Suez Environnement of €350m worth of bonds convertible into and/or exchangeable for new or existing shares due on 27 February 2020 with a zero coupon.

In its updated Questions and Answers of January 2014, ESMA addressed the question