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## Legal News - July-August 2019

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For any information on any of the subjects covered by this letter, do not hesitate to contact us:

**Gilles Kolifrath**, Partner

T: +33 (0)1 44 09 46 44, M: +33 (0)6 75 18 84 12

E: [gkolifrath@kramerlevin.com](mailto:gkolifrath@kramerlevin.com)

Kramer Levin – 47 avenue Hoche, 75008 Paris

[www.kramerlevin.com](http://www.kramerlevin.com)

## **BANKING & FINANCE**

### **Reform of the APR's civil sanctions**

Law No. 2018-727 of July 10, 2018 provided for ordinances to reform the system of the annual percentage rate, including one for civil penalties. These were indeed diverse in the event of a defect or error in the APR: nullity of the contractual stipulation and substitution of the legal rate for the conventional rate; forfeiture of the right to interest with or without the judge's discretionary power. This diversity was a source of difficulties and ignored the rule of proportionality, as the forfeiture of the right to interest in its entirety could appear to be very severe for the banker. Ordinance No. 2019-740 of July 17, 2019 clarifies and harmonizes penalties in the event of a default or error in the APR, both for loans to individuals and for business loans, and therefore even for loans not subject to the Consumer Code. From now on, the only sanction is the forfeiture of the right to interest "in the proportion fixed by the judge, in particular with regard to the prejudice for the borrower". This reform is not accompanied by any transitional provisions, so the question of its application to current proceedings arises.

### **Retirement savings**

Article 71 of the PACTE Law of May 22, 2019 introduced a chapter on retirement savings plans into the Monetary and Financial Code. This reform was specified by Decree No. 2019-807 of July 30, 2019 on the reform of pension savings and by the decree of August 7, 2019 implementing the reform of pension savings. In particular, the decree defines the list of financial instruments eligible for retirement savings products and provides for asset allocations to be offered to investors in line with their long-term investment horizon. The decree also implements the reduced social lump-sum scheme on employers' contributions to retirement savings, provided that the savings are directed towards financing small and medium-sized enterprises. In addition, the Decree amends the methods for calculating the surrender value or transfer value of retirement savings contracts expressed in points, in order to take into account the generalisation of the possibility of a capital outflow from retirement savings products.

## CAPITAL MARKET

### Membership of clearing houses

Article L. 440-2 of the Monetary and Financial Code provides, in point 7, that certain organisations or companies, which do not belong to the categories mentioned in 1 to 6 of the same article, may join a clearing house provided that they are supervised by the French Financial Markets Authority (*Autorité des marchés financiers*) or the French Prudential Supervisory and Resolution Authority (*Autorité de contrôle prudentiel et de résolution*) or by counterpart authorities of another Member State of the European Union or party to the Agreement on the European Economic Area or of a third country appearing on a list drawn up by the Minister responsible for the economy, their membership is justified in terms of systemic risk and at least three participants in the clearing house concerned fall into the categories of credit institutions, investment firms, public bodies or controlled companies operating under State guarantee. These conditions were specified by Decree No. 2019-858 of August 20, 2019 on the conditions for the membership of organisations or companies in a clearing house. This decree, which was issued for the application of Article 84 of Law No. 2019-486 of May 22, 2019 on the growth and transformation of companies, entered into force on August 23, 2019.

The third countries referred to in Article L. 440-2, paragraph 7, are, under the terms of the Decree of August 20, 2019 designating the third countries mentioned in Article L. 440-2, paragraph 7, of the Monetary and Financial Code, Switzerland, the United States and Japan.

### Contracts for differences

At its Council meeting on March 23, 2018, (Decision (EU) 2018/796 of the European Securities and Markets Authority of May 22, 2018 temporarily restricting contracts for difference in the Union in accordance with Article 40 of Regulation (EU) No 600/2014 of the European Parliament and of the Council (amended and renewed by Decision (EU) 2018/1636 of October 23, 2018); Decision (EU) No 2019/155 of the European Securities and Markets Authority of January 23, 2019 renewing the temporary restriction on the marketing, distribution or sale of contracts for difference to retail customers), ESMA had decided on a restriction on the marketing, distribution or sale of certain CFDs to retail investors. This restriction included leverage limits including a specific limit for CFDs on crypto currencies, a prohibition on CFD suppliers encouraging the public to invest in these products and a warning on the risks associated with authorised products.

The ESMA measures have been replaced by measures taken by the competent authorities: cf. Opinion ESMA of 26 March 2019 on the product intervention measure relating to contracts

for differences proposed by the Authority for the Financial Markets of **the Netherlands**, ESMA35-43-1780 ; Opinion ESMA of 13 June 2019 on the product intervention measures relating to contracts for differences proposed by Commissione Nazionale per le Società e la Borsa of **Italy**, ESMA35-43-1971 ; Opinion ESMA of 24 June 2019 on the product intervention measures relating to contract for differences proposed by Comisión Nacional del Mercado de Valores of **Spain**, ESMA35-43-1935 ; opinion of 24 June 2019 on the product intervention measures relating to contracts for differences proposed by the Finanšu un kapitāla tirgus komisija of **Latvia**, ESMA35-43-1975 ; Opinion ESMA of 24 June 2019 on the product intervention measures relating to contracts for differences proposed by the Hellenic Capital Market Commission of **Greece**, ESMA35-43-1988 ; Opinion ESMA of 24 June 2019 on the product intervention measures relating to contracts for differences proposed by the Financial Conduct Authority of **the United Kingdom**, ESMA 35-43-1961 ; Opinion of 28 June 2019 on the product intervention measures relating to contracts for differences proposed by the Autorité des Marchés Financiers of **France**, ESMA35-43-1990 ; Opinion of 28 June 2019 on the product intervention measures relating to contracts for differences proposed by the Finansinspektionen of **Sweden**, ESMA35-43-1999 ; Opinion ESMA of 11 July 2019 on the product intervention measures relating to contracts for differences proposed by the Česká národní banka of **the Czech Republic**, ESMA35-43-1983 ; Opinion ESMA of 23 July 2019 on the product intervention measures relating to contracts for differences proposed by Finanstilsynet of **Denmark**, ESMA35-43-1985 ; Opinion ESMA of 23 July 2019 on the product intervention measures relating to contracts for differences proposed by the Financial Supervision Commission of **Bulgaria**, ESMA35-43-1980 ; Opinion ESMA of 23 July 2019 on the product intervention measures relating to contracts for differences proposed by the Hrvatska agencija za nadzor financijskih usluga of **Croatia**, ESMA35-43-2042 ; Opinion of ESMA of 30 July 2019 on the product intervention measures relating to contracts for differences proposed by the Bundesanstalt für Finanzdienstleistungsaufsicht of **Germany**, ESMA35-43-1986 ; Opinion of ESMA of 30 July 2019 on the product intervention measures relating to contracts for differences proposed by the Malta Financial Services Authority of **Malta**, ESMA35-43-1994 ; Opinion of ESMA of 30 July 2019 on the product intervention measures relating to contracts for differences proposed by the Magyar Nemzeti Bank of **Hungary**, ESMA35-43-2054 ; Opinion of ESMA of 30 July 2019 on the product intervention measures relating to contracts for differences proposed by the Komisja Nadzoru Finansowego of **Poland**, ESMA35-43-1995 ; Opinion of ESMA of 23 August 2019 on the product intervention measures relating to contracts for differences proposed by the Agencija za trg vrednostnih papirjev of **Slovenia**, ESMA35-43-2063.

On the obligations of professionals that encourage retail customers to be considered as professional customers on request in the context of CFD distribution, cf. ESMA, Public statement on the application of products intervention measures under article 40 and 42 of regulation (EU) n° 600/2014 (MIFIR) by CFD providers, 11 July 2019, ESMA35-36-1743.

## Binary options

The competent authorities of the Member States of the European Union have decided, in agreement with ESMA, to prohibit or restrict the marketing, distribution or sale of binary options to retail investors. These measures follow those taken by ESMA.

**ESMA measures:** Decision (EU) 2018/795 of the European Securities and Markets Authority of 22 May 2018 temporarily prohibiting the marketing, distribution or sale of binary options to retail customers in the Union pursuant to Article 40 of Regulation (EU) No 600/2014 of the European Parliament and of the Council (renewed and amended by Decision (EU) 2018/1466 of 21 September 2018 and Decision (EU) 2019/509 of 22 March 2019); Decision (EU) 2018/796 of the European Securities and Markets Authority temporarily restricting contracts for difference in the Union in accordance with Article 40 of Regulation (EU) No 600/2014 of the European Parliament and of the Council.

**Measures of the competent authorities:** Opinion ESMA of 26 March 2019 on the product intervention measure relating to binary options proposed by the Financial Conduct Authority of **the United Kingdom**, ESMA35-43-1723 ; Opinion ESMA of 26 March 2019 on the product intervention measure relating to contracts for differences proposed by the Authority for the Financial Markets of **the Netherlands**, ESMA35-43-1780 ; Opinion ESMA of 26 March 2019 on the product intervention measure relating to binary options proposed by the Authority for the Financial Markets of **the Netherlands**, ESMA35-43-1776 ; Opinion ESMA of 26 March 2019 on the product intervention measure relating to binary options proposed by Komisja Nadzoru Finansowego of **Poland**, ESMA35-43-1797 ; . Opinion ESMA of 3 May 2019 on the product intervention measure relating to binary options proposed by the Financial Market Authority of **Austria**, ESMA35-43-1877 ; Opinion ESMA of 14 May 2019 on the product intervention measures relating to contracts for differences proposed by the Finanssivalvonta of Finland, ESMA35-43-1914 ; Opinion ESMA of 13 June 2019 on the product intervention measure relating to binary options proposed by Commissione Nazionale per le Società e la Borsa of **Italy**, ESMA35-43-1970 ; Opinion ESMA of 13 June 2019 on the product intervention measures relating to contracts for differences proposed by Commissione Nazionale per le Società e la Borsa of Italy, ESMA35-43-1971 ; Opinion ESMA of 24 June 2019 on the product intervention measure relating to binary options proposed by the Bundesanstalt für

Finanzdienstleistungsaufsicht of **Germany**, ESMA35-43-1952 ; Opinion of 24 June 2019 on the product intervention measure relating to binary options proposed by the Finanšu un kapitāla tirgus komisija of **Latvia**, ESMA35-43-1974 ; Opinion ESMA of 24 June 2019 on the product intervention measure relating to binary options proposed by the Financial Supervision Commission of **Bulgaria**, ESMA35-43-1979 ; Opinion ESMA of 24 June 2019 on the product intervention measure relating to binary options proposed by the Finanstilsynet of **Denmark**, ESMA35-43-1984 ; Opinion ESMA of 24 June 2019 on the product intervention measure relating to binary options proposed by the Hellenic Capital Market Commission of **Greece**, ESMA35-43-1987 ; Opinion ESMA of 28 June 2019 on the product intervention measure relating to binary options proposed by the Cyprus Securities and Exchange Commission of **Cyprus**, ESMA35-43-1981 ; Opinion ESMA of 28 June 2019 on the product intervention measure relating to binary options proposed by the Autorité des Marchés Financiers of **France**, ESMA35-43-1989 ; Opinion ESMA of 28 June 2019 on the product intervention measure relating to binary options proposed by the Malta Financial Services Authority of **Malta**, ESMA35-43-1993 ; Opinion ESMA of 28 June 2019 on the product intervention measure relating to binary options proposed by the Finansinspektionen of **Sweden**, ESMA35-43-1998 ; Opinion ESMA of 23 July 2019 on the product intervention measure relating to binary options proposed by the Hrvatska agencija za nadzor financijskih usluga of **Croatia**, ESMA35-43-2043.

## ESMA SANCTIONS

### ESMA sanctions (1)

In 2018, ESMA sanctioned companies that issued recommendations and provided an investment research service on the grounds that, in the course of their activities, they issued, without having been authorised, credit ratings within the meaning of the Regulation of 16 September 2009 (ESMA, Decision of the Board of Supervisors to adopt a supervisory measure and impose a fine in respect of an infringement by Danske Bank A/S, 11 July 2018, ESMAA41-137-1145 ; Decision of the Board of Supervisors to adopt a supervisory measure and impose a fine in respect of an infringement by Svenska Handelsbanken AB, 11 July 2018, ESMAA41-137-1147 ; Decision of the Board of Supervisors to adopt a supervisory measure and impose a fine in respect of an infringement by Nordea Bank AB, 11 July 2018, ESMAA41-137-1150; Decision of the Board of Supervisors to adopt a supervisory measure and impose a fine in respect of an infringement by Swedbank AB, 11 July 2018, ESMAA41-137-1152 ; Decision of the Board of Supervisors to adopt a supervisory measure and impose a fine in respect of an infringement by Skandinaviska Enskilda Banken AB, 11 July 2018, ESMAA41-137-1153 : Rev. dr. bancaire et financier novembre-décembre 2018, com. n° 175, note Th. Bonneau). These decisions were challenged before the Board of Appeal and, following the latter's referral, ESMA maintained its decisions in 2019, except for the fines which were annulled (ESMA, Decision of the Board of Supervisors to adopt a supervisory measure in respect of an infringement by Svenska Handelsbanken AB and to repeal its decision of 11 July 2018, Decision 2019/4, ESMA41-139-1231 ; Decision of the Board of Supervisors to adopt a supervisory measure in respect of an infringement by Nordea Bank Abp and to repeal its decision of 11 July 2018, Decision 2019/7, ESMA41-139-1224; Decision of the Board of Supervisors to adopt a supervisory measure in respect of an infringement by Swedbank AB and to repeal its decision of 11 July 2018, Decision 2019/6, ESMA41-139-1230. Adde, E. Rogey, L'ESMA sanctionne la violation du monopole des agences de notation de crédit, Bull. Joly bourse November-December 2018 p 345; EIOPA, EBA and ESMA, Today the Board of Appeal publishes its decision in the Nordic banks' appeals from the decisions of the Board of Supervisors of ESMA in the "shadow ratings" cases, Press release, 13 March 2019; EIOPA, EBA and ESMA, Decision given by the Board of Appeal of the European Supervisory Authorities, Skandinaviska Enskilda Banken AB (SEB), 30 November 2018).



## ESMA sanctions (2)

ESMA sanctions are increasing. After credit rating agencies and companies that issue ratings in their investment research recommendation and service activities, it is the trade repositories that are sanctioned by ESMA for non-compliance with the applicable regulations (ESMA, Public notice, REGIS-TR S.A, 15 July 2019, ESMA41-356-39 (€56,000 fine imposed for violation of Article 81 (2) and point (b) of Section 2 of Annex 1 of the EMIR Regulation). This should not be surprising, as these professionals are, like credit rating agencies, under the supervision of ESAM.

## CONTACTS



**Gilles Kolifrath**  
Lawyer, Partner  
gkolifrath@kramerlevin.com



**Thierry Bonneau**  
Consultant  
thbonneau@kramerlevin.com



**François Poudelet**  
Lawyer, Counsel  
fpoudelet@kramerlevin.com



**Pierre Storrer**  
Lawyer, Counsel  
pstorrer@kramerlevin.com



**Wadie Sanbar**  
Lawyer, Counsel  
wsanbar@kramerlevin.com



**Linda Sharkey**  
Lawyer at the New York Bar  
lsharkey@kramerlevin.com



**Gaëlle Libouban**  
Lawyer  
glibouban@kramerlevin.com