



# INCERTITUDE ET CERTITUDE: LES GFI ET LE NOUVEL ENVIRONNEMENT RÉGLEMENTAIRE



CIFA INITIAL CONTRIBUTOR

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## ÉDITORIAL

### Bilan économique de la période de confinement et perspectives

*...article de Manuel de Acevedo, Stratégie Finance SA, Membre du GSCGI*

La fin du confinement liée au Coronavirus est maintenant proche ou actée pour la grande majorité des pays du globe. Pour autant la messe est dite: l'économie mondiale est en train de dépasser le stade de la récession pour rentrer en dépression.

Ainsi, le PIB de l'Union Européenne a chuté de 3,8% au premier trimestre 2020, marqué par une situation française inédite, avec un plongeon à -5,7 % en glissement annuel. Pour avril, les indices d'activité de la zone euro, indices avancés qui donnent le pouls de l'économie réelle, que ce soit dans l'industrie ou les services, se sont effondrés à des niveaux records et bien en-deçà de ceux relevés durant la crise financière de 2008.

L'économie américaine plie mais résiste mieux. Au premier trimestre 2020, le PIB n'a ainsi reculé que de 1,2 %. L'écart de croissance États-Unis/zone euro atteint ainsi un sommet historique à l'avantage des premiers. Les indices d'activité notamment dans les services sont en baisse mais nettement plus résistants qu'en Europe (ISM à 41.8 contre 12 pour la zone euro).

Est-ce que la fin du confinement engendrera mécaniquement une reprise forte et durable, dite en V?

Nous pensons malheureusement que ce ne sera pas le cas pour deux raisons majeures:

- Premièrement, parce que la fin du confinement sera très progressive. Autrement dit, la force du rebond sera limitée.
- De nombreux secteurs d'activité continueront de souffrir fortement et durablement. A commencer, par le tourisme, l'hôtellerie, la restauration, les transports aériens, l'aéronautique, l'automobile ou encore le luxe (qui tire 60 % de sa croissance de la Chine).

Pour autant, nous pensons qu'il ne faut pas abandonner les investissements dans les marchés financiers. Ainsi, les principales bourses mondiales ont rebondi en avril, grâce aux mesures sans précédent prises par les gouvernements et les banques centrales pour soutenir l'économie mondiale. Ces mesures ont rassuré les investisseurs sur les risques de crise financière majeure.

Il ne fait cependant aucun doute que la volatilité extrême sur les marchés financiers va perdurer en fonction de l'actualité. Comme exprimé précédemment, au regard notamment des indices d'activité avancés, la dégradation de la conjoncture économique va continuer et s'accroître d'ici l'été.

La prudence et la sélection de titres imperméables à cette crise sanitaire, est donc de mise. C'est le cas notamment de l'or. Mais aussi en dehors du segment pharmaceutique, des sociétés à forte valeur ajoutée dans le secteur digital: e-commerce, cloud, paiements mobiles et réseaux sociaux, où l'on sent bien que cette crise a mis en lumière une révolution dans notre manière de consommer et de travailler. Les sociétés les plus emblématiques de ce changement, étant Amazon, Google, Microsoft et Facebook.

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## INCERTITUDE ET CERTITUDE: LES GFI ET LE NOUVEL ENVIRONNEMENT RÉGLEMENTAIRE



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### *Incertitude et Certitude: les GFI et le nouvel environnement réglementaire*

*Un monde en mutation profonde et les GFI plus que jamais indispensables pour les clients/investisseurs*

#### COVID-19 et impacts

La planète entière vit une période fort troublante et sans précédent sous tout point de vue: économique, financier et social. Notre santé personnelle et de nos proches, nos systèmes de santé, nos emplois et notre dignité subissent la vague mondiale du COVID-19. Ce virus impose à nos dirigeants et à nous-mêmes un choix impensable jusqu'à ce jour: devoir choisir entre notre santé et notre survie économique.

L'incertitude du présent et du futur s'est installée partout comme une certitude. La certitude d'être confiné, de devoir changer bien d'aspects de vie, tant à titre personnel que professionnel. Même le déconfinement qui débute lentement ces jours amène son lot d'incertitude, confirmant

ainsi "la certitude de l'incertitude". Les professionnels de la finance connaissent bien et craignent l'incertitude.

Les pompiers ont accueilli les appels 'au secours' venant de toute part. Gouvernements et banque centrales distribuent de la liquidité par centaines et milliers de milliards, tant la peur est grande que la machine de la finance se grippe et que la confiance disparaisse.

Difficile d'ignorer ce qui se passe. Nul ne peut essayer de l'éviter, car les media (TV et presse écrite) nous le rappellent en permanence et nous rapportent les conclusions de spécialistes (ou pas), dont certaines sont véritablement inquiétantes.

Quelques exemples:

MEDIA	TITRE-en	TITRE-fr
FT/25 mai	Richest nations face \$17tn government debt burden from coronavirus. <i>Fall in tax revenues set to push average debt-to-GDP ratio to 137%, warns OECD.</i>	Les pays les plus riches sont confrontés à une dette publique de 17 milliards de dollars due au coronavirus. <i>La chute des recettes fiscales devrait faire passer le ratio moyen de la dette au PIB à 137%, avertit l'OCDE.</i>
FT/10 mai	Trillion-dollar club tightens grip on fund market during crisis. <i>Market leaders such as BlackRock, Vanguard and State Street have gained control of 61% of the industry's assets.</i>	Le club des trillions de dollars resserre son emprise sur le marché des fonds en période de crise. <i>Des leaders du marché tels que BlackRock, Vanguard et State Street ont pris le contrôle de 61% des actifs du secteur.</i>
FT/7 mai	BoE warns UK set to enter worst recession for 300 years. <i>Central bank predicts 30 per cent drop in output in first half of 2020.</i>	La BoE avertit que le Royaume-Uni va entrer dans la pire récession depuis 300 ans. <i>La banque centrale prévoit une baisse de 30% de la production au premier semestre 2020.</i>
WSJ/15 avril	Coronavirus Fight Is Creating Mountains of Global Debt. <i>International Monetary Fund in report says nearly \$8 trillion in spending, loans and guarantees could pose threat after pandemic eases.</i>	La lutte contre les coronavirus crée des montagnes de dette mondiale. <i>Selon un rapport du FMI, près de 8000 milliards de dollars en dépenses, prêts et garanties pourraient constituer une menace une fois que la pandémie se sera calmée.</i>
FT/14 avril	Global economy to suffer worst blow since the 1930s, warns IMF. <i>Most countries' economies set to be at least 5% smaller, even after recovery.</i>	L'économie mondiale va subir le pire choc depuis les années 1930, prévient le FMI. <i>Les économies de la plupart des pays devraient être réduites d'au moins 5 %, même après la reprise.</i>
FT/29 mars	Can the world afford fiscal and monetary stimulus on this scale?	Le monde peut-il se permettre des mesures de relance budgétaire et monétaire de cette ampleur?

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On en déduit que l'incertitude du futur inclut un important surendettement (des États, des sociétés et des individus/familles), une forte contraction économique, un chômage en forte hausse, la déflation qui s'installe pour une longue période, et un frein au 'court-termisme' vu que des sociétés commencent déjà à refuser de donner des prévisions trimestrielles de leur activité. À côté de cela, on observe le sauvetage des institutions financières systémiques, ainsi que l'importante résurgence des colosses technologiques. Merci, COVID-19!

Au niveau global, nous avons tous salué comme absolument nécessaires les efforts de sauvetage déployés par les gouvernements et les banques centrales. Nul doute, cependant, que ces mesures plantent les graines d'une future crise, une fois que nous serons sortis de celle du COVID-19.

Alors, sommes-nous tous des "keynésiens" à présent? Réhabilitons Keynes! Il n'a pas été le défenseur brutal des dépenses déficitaires qu'on lui prête trop souvent. Au contraire, il a été un esprit brillant, surtout dans la recherche des clés du maintien de la démocratie et de la liberté économique face aux défis des autorités, tant de gauche que de droite. Quelles seraient aujourd'hui ses solutions pour un système durable, alors que les économies du monde entier s'efforcent de sortir d'un arrêt dévastateur et sans précédent? Difficile de le savoir.

Nous sommes certains, à présent, que le monde ne reviendra pas à la mondialisation telle que nous l'avions connue auparavant, soit la mondialisation qui a émergé avec l'essor de la Chine et de l'Internet après la fin de la guerre froide. En réalité, le monde ne sera plus jamais le même après le coronavirus.

Et, les pandémies ne sont plus seulement biologiques, elles sont désormais aussi géopolitiques, financières et atmosphériques.

Les États légitimes devront pourvoir aux besoins fondamentaux de la population: sécurité, ordre, bien-être économique et justice. C'est leur rôle. Mais il faut également constater que les populations mondiales ont été habituées à vivre dans un monde de dignité humaine accrue (grâce au travail) et de prospérité croissante, sauf qu'elle dépend du commerce mondial et de la circulation des personnes. Alors, le défi historique pour les décideurs, et dirigeants en général, est de gérer la crise tout en construisant l'avenir.

### Les GFI aux côtés de leurs clients dans un environnement réglementaire en mutation

Rappelons ici combien le secteur de la gestion de fortune indépendante est indispensable à toute la place financière suisse, grâce au conseil expert et professionnel que chaque gestionnaire apporte à ses clients/investisseurs. Les gestionnaires de fortune indépendants, les conseillers et les intermédiaires financiers, ont tous un rôle très important tout particulièrement durant cette crise 'COVID-19', car ils sont aux côtés de leurs clients et les aident à évaluer et possiblement atténuer l'impact de certaines catastrophes financières personnelles qui pourraient autrement se produire.

Le GFI met toujours au cœur de son activité professionnelle les intérêts de ses clients. Dans ce même esprit, il fait face à une vague massive de régulation (LSFin-LEFin), autant il est conscient que son activité, réglementée de manière appropriée et conforme, contribue à consolider la confiance et la fidélité de ses clients. Ces derniers peuvent alors potentiellement se transformer en ambassadeurs de l'approche experte et professionnelle de leurs gestionnaires de fortune indépendants.

L'environnement réglementaire de la gestion de fortune indépendante est en mutation en Suisse. Après les phases (1) sans régulation, mais guidée par la Charte du GSCGI (Groupement professionnel), (2) de surveillance LBA dès 2000, et (3) de surveillance règles-cadres en 2009 (Investisseur Qualifié), l'heure est à la surveillance dite 'prudentielle' se concrétisant par la mise en application des lois LSFin-LEFin, qui sont entrées en vigueur le 1er janvier 2020.

Le nouveau système de régulation et surveillance prudentielle a quelques caractéristiques notables:

1. **Système étatique**, l'autorisation étant délivrée par la FINMA, qui a également le pouvoir de sanction;
2. **Surveillance prudentielle** (approche fondée sur le risque) exercée par un Organe de Surveillance, soumis au contrôle de la FINMA;
3. **Affiliation à un Organe de Médiation indépendant**, dont l'autorisation est délivrée par le Département fédéral des finances (DFF);
4. **Assurance de responsabilité civile (RC) professionnelle**.

A noter que les Conseillers en placement devront désormais être inscrits à un Registre des Conseillers, ne



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seront pas surveillés, mais devront être affiliés au préalable à un Organe de Médiation et avoir souscrit une assurance RC professionnelle.

Où en est-on? Le GFI en activité (professionnelle) fin 2019, doit impérativement faire une annonce d'intention de demande d'autorisation le 30 juin 2020 au plus tard.

A noter les contours de l'activité dite 'professionnelle' qui sont les suivants (OEFin, art 19, al.1; LEFin art. 3 et 17):

*Art. 19 Exercice d'une activité à titre professionnel (art. 3 et 17 LEFin)*

*1 Les gestionnaires de fortune et les trustees exercent leur activité à titre professionnel et au sens du droit sur le blanchiment d'argent lorsque:*

- a. ils en tirent un produit brut de plus de 50 000 francs par année civile;
- b. ils établissent des relations d'affaires ne se limitant pas à une activité unique avec plus de 20 cocontractants par année civile ou entretiennent au moins 20 relations de ce type par année civile, ou
- c. ils ont un pouvoir de disposition de durée indéterminée sur des valeurs patrimoniales de tiers dont le montant dépasse 5 millions de francs à un moment donné.

En dessous de ces limites, la règle dite '*de minimis*' s'applique. Ces GFI pourront, en effet, continuer leur activité sans obligation d'autorisation FINMA et, par conséquent, de 'surveillance prudentielle'.

La FINMA a mis à disposition la plateforme EHP qui permet non seulement de faire cette annonce simplement, mais également de préparer les documents nécessaires pour présenter la demande à l'OS d'abord et à la FINMA par la suite, évitant ainsi de devoir constituer deux dossiers séparés.

Par cette annonce et subséquente confirmation de la FINMA, les GFI seront en mesure de continuer leur activité et, par le même temps, de préparer tranquillement leurs demandes (OS et FINMA), dont l'échéance ultime est le 31.12.2022.

Qu'en est-il de l'OS, du Registre des Conseillers et de l'Organe de Médiation? L'autorisation pour les deux premiers sera délivrée par la FINMA, alors que l'Organe de Médiation aura son autorisation du Département fédéral des finances (DFF). Normalement, ces autorisations sont attendues pour le 30 juin, sauf erreur. Inutile de s'attendre à une prolongation des échéances inspirée aux contraintes "covidienues". En effet, ces dates étant inscrites dans la loi,

il n'est pas envisageable qu'elles soient modifiées. On peut alors légitimement se demander si les procédures auprès du DFF et de la FINMA avancent normalement.

Au GSCGI, nous sommes confiants que les dossiers, préparés professionnellement et respectant les points essentiels édictés dans les lois, auront les meilleures chances de recevoir l'autorisation des autorités. Cela vaut tant pour l'Organe de Médiation (notre soutien à FINSOM) que pour l'Organe de Surveillance (notre soutien à l'OSIF de l'ARIF) et le Registre des Conseillers.

En outre, nous sommes persuadés que les autorités bernoises ne feront pas l'erreur de délivrer des autorisations à des constructions stratégiques improvisées, qui de plus ne respecteraient pas de façon absolue la nécessité d'indépendance et d'absence de conflits d'intérêt, ces principes étant inscrits dans la loi.

Pour conclure, nous signalons le plan-cadre d'assurance RC professionnelle du GSCGI, unique Groupement professionnel à l'offrir en Suisse, avec à la clé des avantages certains, tels qu'une couverture étendue (selon l'approche fondée sur le risque de la FINMA) des activités des GFI, Trustees et Conseillers, et un avantage financier pour le Membres du GSCGI (réduction sur la prime annuelle).

Le GSCGI offre en plus d'autres avantages à ses Membres avec importance capitale en cette période de transition vers l'ère de la surveillance prudentielle, dont les contrats-type de Gestion discrétionnaire et de Conseil financier en sont un exemple important.

Tous les GFI de la place financière suisse pourront bénéficier des nombreux avantages que le GSCGI a créés pour faciliter leur travail et réduire leurs coûts, à la condition bien entendu qu'ils viennent nous rejoindre! A titre exceptionnel, les frais administratifs d'adhésion au GSCGI ne s'appliqueront pas aux GFI assujettis à l'ARIF.

Cosima F. Barone  
pour le Conseil du GSCGI

## LES MEMBRES DU GSCGI

### Networking & la Vie de nos Collègues d'ailleurs

#### FECIF informs...



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#### FECIF Press Release / May 2020 — Excerpt ...

At its recent Board Meeting and AGM, Martin Klein, Managing Director at VOTUM, became the new Chairman of the pan-European Federation. VOTUM is one of the main trade associations for financial services professionals in Germany. Klein took over from David Charlet, following his highly successful term in the role. Charlet became the new Chairman of FECIF's Advisory Committee, a highly important position as this team drives all of the Federation's advocacy work.

*"FECIF members represent a unique and growing community," Klein stated. "Our constant exchanges and research lead us to a better understanding of the situation in the other countries of the community. We are all convinced of the importance of the European project; therefore, it must be our aim to ensure that the temporary border closures during the Corona crisis do not lead to further divisions. The future course for the post-Corona period must be set at European level. The German EU Council Presidency, starting on July 1st, will play a central role in this process."*

\* \* \*

#### FECIF NewsFlash 30/2020 — ESAs: Consultation on ESG disclosure

**Executive Summary** — The European Supervisory Authorities (ESAs) published a consultation on the proposed Regulatory Technical Standards (RTS) on content, methodologies and presentation of disclosures under the Sustainable Finance Disclosure Regulation (SFDR). The consultation runs until 1 September 2020.

**Analysis** — SFDR Articles 2a, 4(6) and (7), 8(3), 9(5), 10(2) and 11(4) empower the ESAs to deliver, through the Joint Committee (JC), draft Regulatory Technical Standards (RTS) with regard to the content, methodologies and presentation of sustainability-related disclosures. Six of these RTS must be delivered by 30 December 2020 and one must be delivered by 30 December 2021.

The European Supervisory Authorities (ESAs) welcome comments on this consultation paper setting out the proposed Regulatory Technical Standards on content, methodologies and presentation of disclosures pursuant to Article 2a1, Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation (EU) 2019/2088 (Sustainable Finance Disclosure Regulation "SFDR").

The ESAs also invite specific comments on the questions on the draft RTS as listed in Section 4, and any input on the preliminary impact assessment in Section 5.

Comments on this consultation paper should be sent using the response form, via the ESMA website under the heading 'Your input/Consultations'.

**Sources** — *The consultation document and the response form are available upon request to either FECIF or GSCGI. Further information are available [here](#).*

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#### FECIF NewsFlash 29/2020 — European Commission: Consultation on Investment protection and facilitation framework

**Executive Summary** — The European Commission has today opened a consultation on Investment protection and facilitation framework. The consultation runs until 8 September 2020.

**Analysis** — Today's (26 May) public consultation invites EU citizens and other stakeholders to express their views on the strengths or weaknesses of cross-border investing in the EU. The aim is to assess the current framework of investment protection, including both substantive rules and dispute settlement mechanisms.

In line with the Better Regulation principles, the Commission is inviting stakeholders to express their views on the identification of issues related to investment protection and facilitation cross border within the European Union and on the best way to improve the intra-EU investment environment.

In particular, taking into account different needs that the type of investors (individuals, large companies, SMEs), the duration of investments (short, medium or long term) and the field of investments may raise, the consultation is aimed at gathering feedback on strengths or weaknesses of the intra-EU system, as well as possible ideas and options to improve it.

The questions included in this public consultation do not concern investments made by EU investors in third countries.

This consultation document contains five separate sections:

- The first section contains some general questions aimed at gaining inputs on respondents' familiarity with cross-border investments and linked issues.
- The second seeks feedback from stakeholders on rules to protect intra-EU investments.
- The third invites views on enforcement of intra-EU investment protection rules, including dispute resolution mechanisms and remedies when issues related to cross-border investments arise.
- The fourth section contains some general questions to assess the overall EU investment protection framework (as presented in section two and three).

- The fifth section seeks views of stakeholders on measures to facilitate and promote cross-border investment.

The outcome of this public consultation will provide a basis for the Commission services to assess whether concrete and coherent action, by way of legislative and non-legislative measures is necessary.

**Sources** — *The Consultation Paper is available upon request to either FECIF or GSCGI. Further information are available [here](#).*

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#### FECIF NewsFlash 27/2020 — EIOPA: Risk Dashboard fourth quarter 2019

**Executive Summary** — The European Insurance and Occupational Pensions Authority (EIOPA) published its updated Risk Dashboard based on the fourth quarter 2019 Solvency II data.

**Analysis** — Despite the fact that some indicators used in this Risk Dashboard do not capture the latest market development in the context of Covid-19 outbreak, the expected deterioration of the relevant indicators reflecting all available information in a forward looking perspective has been considered in the assigned risk levels. This addresses the current situation of high uncertainty in the insurance market.

The results show that the risk exposures of the European Union insurance sector increased as the outbreak of Covid-19 strongly affected the lives of all European citizens with disruptions in all financial sectors and economic activities.

Macro and market risks indicators deteriorated in March 2020, moving from high to very high level. The macroeconomic environment has been affected strongly by the global lockdown. GDP estimate points to a strong downturn for the first quarter 2020 and latest forecasts predict a recession worldwide for 2020. Inflation forecasts have been revised downwards for the next four quarters.

Monetary policy support has been activated by all major central banks. Financial markets have been characterized by sell-off across asset classes, increased volatilities for bond and equity markets, increasing risk premia and flight to



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quality investment behaviour in March 2020. Credit risk has increased across all asset classes, in particular CDS of government bonds, financial and non-financial corporate bonds have increased sharply. Liquidity and funding risks have been raised to high level due to potential additional strains on the disposable liquidity of insurers in the medium to long-term horizon.

For Q4-2019 liquidity indicators were broadly stable, however some are expected to worsen, triggered by possible decrease in premiums and new business, potential increase in claims and illiquid level of certain assets. Profitability and solvency risks have increased to high level.

Although for Q4-2019 insurers solvency positions remained relatively stable, looking ahead profitability and solvency risks are expected to deteriorate, given the double-hit scenario negatively affecting insurers on both asset and liability side. Insurance risks also raised to high level. While broadly stable in Q4-2019, negative effects via income reduction and increase in claims are expected going forward.

Market perceptions remain at medium level albeit deteriorating. The EU insurance sector underperformed the market, both life and non-life businesses lines, and the median price-to-earnings ratio of insurance groups in the sample decreased since the last assessment. Insurers' external ratings and rating outlooks do not show sign of deterioration as of end March 2020, however credit quality is expected to deteriorate.

**Sources** — *The Report is available [here](#).*

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### FECIF NewsFlash 26/2020 — ESMA: Supervisory expectation on publication of investment funds period reports

**Executive Summary** — The European Securities and Markets Authority (ESMA), the EU securities markets regulator, today issues a **public statement** directed at Fund Managers concerning their obligations to publish yearly and half-yearly reports.

**Analysis** — The entities concerned are the following:

- UCITS management companies,
- self-managed UCITS investment companies,
- authorised AIFMs,
- non-EU AIFMs marketing AIFs pursuant to Article 42 of the AIFMD,
- EuVECA managers, and
- EuSEF managers

ESMA is aware that the confinement measures taken by Member States to prevent COVID-19 contagion present significant difficulties and challenges for Fund Managers and auditors in preparing their periodic reports for a publication within the regulatory deadlines.

While recognising the importance of periodic reports for timely and transparent disclosure, ESMA is of the view that the burdens on Fund Managers associated with the COVID-19 outbreak should be taken into account by National Competent Authorities (NCAs) in a coordinated way.

In the current situation, ESMA expects NCAs to adopt a risk-based approach and not prioritise supervisory actions against these market participants in respect of the upcoming reporting deadlines.

This public statement is without prejudice to obligations of Fund Managers stemming from national legislation and EU law.

ESMA will continue to closely monitor the situation and will take or recommend any measures necessary to mitigate the impact of COVID-19 on timely and appropriate periodic disclosure by Fund Managers in respect of the funds they manage or market.

**Sources** — *The Statement is available [here](#).*

\* \* \*

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## LES MEMBRES DU GSCGI

### Networking & la Vie de nos Collègues d'ailleurs

#### CIFA informs... Three principles of good fiscal and regulatory policy

**1. Taxes and the economy**—The ideal fiscal environment is one that has a vibrant and productive economy that generates sufficient revenue with modest tax rates that do not needlessly penalize productive behavior. Public finance experts generally agree on the following features of a tax system that produces robust amounts of taxable activity.

**a. Low marginal tax rates.** A tax operates by increasing the “price” of whatever is being taxed. This is most obvious in the case of some excise taxes – such as levies on tobacco – where governments explicitly seek to discourage certain behaviors. People will have differing opinions, of course, about the degree to which governments should try to discourage certain products, but there should be a general consensus in favor of keeping tax rates reasonable on the behaviors – work, saving, investment, risk-taking, and entrepreneurship – that make an economy more prosperous.

**b. A “consumption-base.”** Because of capital gains taxes, death taxes, wealth taxes, and double taxation of interest and dividends, many nations impose a disproportionately harsh tax burden on income that is saved and invested. This creates a bias against capital formation, which is problematical since every economic theory – including various forms of socialism – share the view that saving and investment are necessary for rising wages and higher living standards.

**c. Neutrality.** Special preferences in a tax system distort the relative “prices” of how income is earned or how income is spent. Such special tax breaks encourage taxpayers to make economically inefficient choices simply to lower their tax liabilities. Moreover, loopholes, credits, deductions, exemptions, holidays, exclusions, and other preferences reduce tax receipts, thus creating pressure for higher marginal tax rates, which magnifies the adverse economic impact.

**d. Territoriality.** This is the simple notion that governments should not tax activity outside their borders. If income is earned in Brazil, for instance, the Brazilian government should have the authority over how that income is taxed. The same should be true for all other nations.

**2. Tax cooperation and dispute settlement**—A very important consequence of a growth-oriented tax system is that there is less reason for there to be conflicts between governments with territorial taxation. Brazil taxes economic activity in Brazil and Germany taxes economic activity in Germany. There would be some issues requiring varying degrees of cooperation, to be sure, most notably transfer pricing rules for cross-border businesses. Governments also might find it advantageous to adopt agreements providing *de minimis* rules and other provisions that further simplify the administration of tax regimes.

**3. The role of cost-benefit analysis**—When considering tax policy and financial regulation, policy makers should weigh both costs and benefits. Some tax laws impose disproportionately heavy economic costs compared to projected tax collections. Indeed, organizations such as the International Monetary Fund have found that some provisions may even reduce revenue because of adverse economic effects. The same is true for some financial regulations. Know-your-customer rules and anti-money laundering regulations impose billions of dollars in compliance costs, yet there is little evidence that they have a significant impact on underlying crime rates. Moreover, there is data showing that such policies contribute to the rise of “unbanked” individuals, particularly from low-income communities.

**Daniel J. Mitchell**

Founder of Freedom and Prosperity  
Member of CIFA's Advisory Board

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## LES MEMBRES DU GSCGI

### Networking & la Vie de nos Collègues d'ailleurs

#### CIFA informs... Trois principes d'une bonne politique fiscale et réglementaire

**1. Les impôts et l'économie**—L'environnement fiscal idéal est celui d'une économie dynamique et productive qui génère des recettes suffisantes avec des taux d'imposition modestes qui ne pénalisent pas inutilement les comportements productifs. Les experts en finances publiques s'accordent généralement sur les caractéristiques suivantes d'un système fiscal qui produit des montants d'activité imposables solides.

**a. Faibles taux marginaux d'imposition.** Une taxe a pour effet d'augmenter le "prix" de ce qui est taxé. Cela est particulièrement évident dans le cas de certains droits d'accises - comme les prélèvements sur le tabac - où les gouvernements cherchent explicitement à décourager certains comportements. Les gens auront bien sûr des opinions divergentes sur la mesure dans laquelle les gouvernements devraient essayer de décourager certains produits, mais il devrait y avoir un consensus général en faveur du maintien de taux d'imposition raisonnables sur les comportements - travail, épargne, investissement, prise de risque et esprit d'entreprise - qui rendent une économie plus prospère.

**b. Taxe basée sur la "consommation."** En raison de l'impôt sur les plus-values, de l'impôt sur les décès, de l'impôt sur la fortune et de la double imposition des intérêts et des dividendes, de nombreux pays imposent une charge fiscale disproportionnée sur les revenus qui sont épargnés et investis. Cela crée un préjugé contre la formation de capital, ce qui est problématique car toutes les théories économiques - y compris les différentes formes de socialisme - partagent l'idée que l'épargne et l'investissement sont nécessaires pour faciliter l'augmentation des salaires et du niveau de vie.

**c. Neutralité.** Les préférences spéciales (exemption de certaines niches) dans un système fiscal faussent les "prix" relatifs de la façon dont les revenus sont gagnés ou dépensés. Ces avantages fiscaux spéciaux encouragent les contribuables à faire des choix économiquement inefficaces simplement pour réduire leurs obligations fiscales. De plus, les échappatoires, crédits, déductions, exemptions, congés, exclusions et autres préférences réduisent les recettes fiscales, créant ainsi une pression

en faveur de taux marginaux d'imposition plus élevés, ce qui amplifie l'impact économique négatif.

**d. Territorialité.** Il s'agit de la notion simple selon laquelle les gouvernements ne doivent pas taxer les activités en dehors de leurs frontières. Si un revenu est gagné au Brésil, par exemple, le gouvernement brésilien devrait avoir le pouvoir de décider de la manière dont ce revenu est imposé. Il devrait en être de même pour toutes les autres nations.

**2. Coopération fiscale et règlement des différends**—Une conséquence très importante d'un système fiscal axé sur la croissance est qu'il y a moins de raisons d'avoir des conflits entre les gouvernements en ce qui concerne la fiscalité territoriale. Le Brésil taxe l'activité économique au Brésil et l'Allemagne taxe l'activité économique en Allemagne. Il est certain que certaines questions nécessiteraient un degré variable de coopération, notamment les règles de prix de transfert pour les entreprises transfrontalières. Les gouvernements pourraient également trouver avantageux d'adopter des accords prévoyant des règles *de minimis* et d'autres dispositions qui ne font que faciliter l'administration des régimes fiscaux.

**3. Le rôle de l'analyse coûts-bénéfices**—Lorsqu'ils envisagent une politique fiscale et une réglementation financière, les décideurs politiques doivent peser les coûts et les bénéfices. Certaines lois fiscales imposent des coûts économiques disproportionnés par rapport aux prévisions de recouvrement de l'impôt. En effet, des organisations telles que le Fonds monétaire international ont constaté que certaines dispositions peuvent même réduire les recettes en raison d'effets économiques négatifs. Il en va de même pour certaines réglementations financières. Les règles relatives à "*Know-your-customer*" et les réglementations contre le blanchiment d'argent imposent des milliards de dollars en coûts de mise en conformité, mais il n'y a guère de preuves qu'elles aient un impact significatif sur les taux de criminalité sous-jacents. En outre, certaines données montrent que ces politiques contribuent à l'augmentation du nombre de personnes privées d'accès au système bancaire, en particulier dans les communautés à faibles revenus.

## JURISTES, FISCALISTES & JURISPRUDENCE

### FINMA: Obligation de signaler les cyberattaques selon l'art. 29 al. 2 LFINMA

...Communication FINMA sur la Surveillance, 05/2020, publié le 7 mai 2020

#### Introduction

La FINMA considère que le danger représenté par les cyberattaques sur la place financière suisse est très élevé.

Les établissements soumis à la surveillance de la FINMA sont la cible des cybercriminels qui sont mus par des intérêts pécuniaires directs mais cherchent aussi à entraver la disponibilité, la confidentialité et l'intégrité d'infrastructures technologiques d'importance critique et d'informations sensibles.

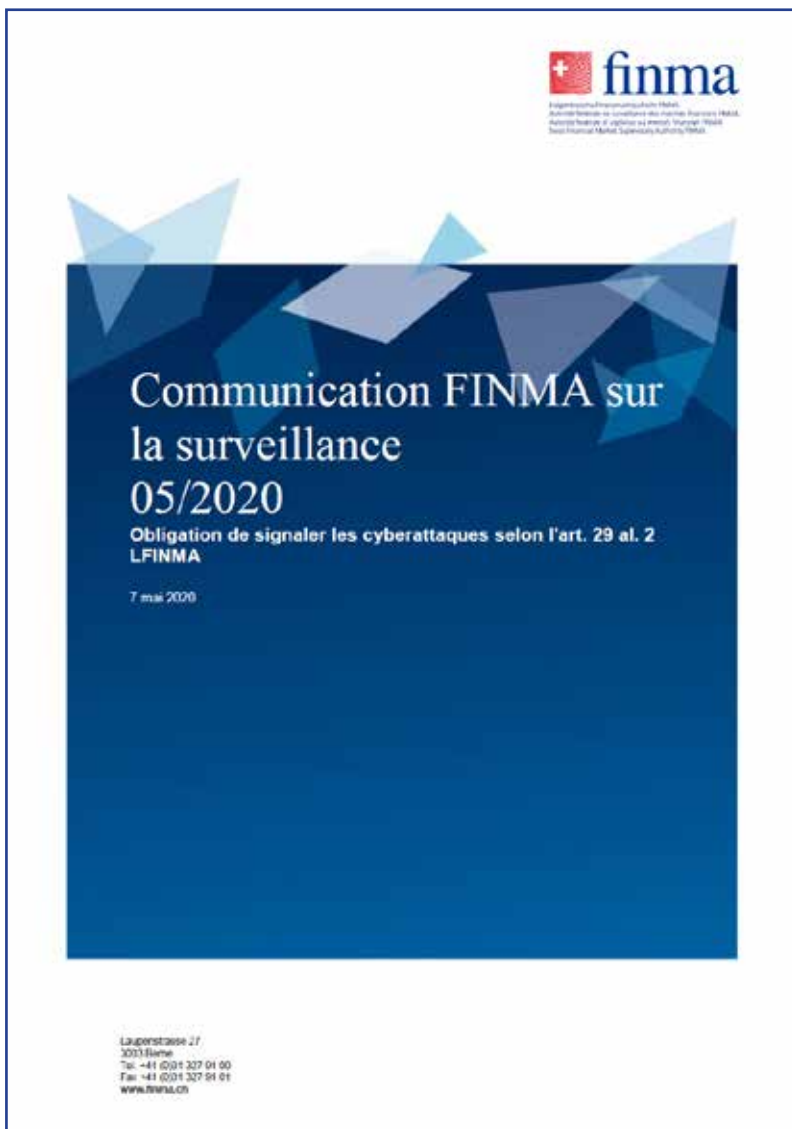
Le danger de cyberattaques est encore accentué dans les situations de crise particulières telles que l'actuelle pandémie de COVID-19.

Les cybercriminels profitent de cette phase d'incertitude, adaptent leurs stratégies d'attaques à la situation actuelle et mettent encore plus sous pression des entreprises déjà fortement mises à contribution.

La présente communication sur la surveillance vise à rappeler aux établissements soumis à la surveillance de la FINMA l'exigence légale d'annoncer **immédiatement** (dans les 24 heures) tout événement important du point de vue de la surveillance (art. 29 al. 2 LFINMA).

Cela comprend les événements importants en lien avec des cyberattaques qui ont atteint leur but, entièrement ou partiellement.

La FINMA vérifiera ultérieurement, sur la base des expériences faites avec cette obligation d'annoncer, s'il convient d'intégrer les précisions suivantes dans une circulaire.



*Télécharger le document:*

<https://www.finma.ch/fr/~media/finma/dokumente/dokumentencenter/myfinma/4dokumentation/finma-aufsichtsmittelungen/20200507-finma-aufsichtsmittelung-05-2020.pdf?la=fr>



## JURISTES, FISCALISTES & JURISPRUDENCE

### MARGIN CALLS: How can investors protect their position?

...article by Matthias Gstoechl, Simone Nadelhofer, Nicolas Ollivier—LALIVE

#### INTRODUCTION

Following the recent market shakedown amidst the Covid-19 pandemic, banks have been issuing margin calls to their counterparties.

Who is affected? Broadly speaking, two types of investors: The first category are wealthy clients who have been investing in stock markets on a leveraged basis, through so-called Lombard loans, which are secured against a portfolio of liquid assets like equities and bonds. The other category comprises counterparties who have entered into derivatives transactions or secured lending agreements with banks.

In simple terms, a margin call is the demand by the bank to increase the collateral or to reduce the credit exposure of the bank by repaying a part of the loan.

In times that are already challenging enough, the margin calls have caught many investors off-guard. Banks typically allow not more than two days to top up the collateral. This often requires affected investors to source substantial liquidity amounts to meet the bank's request, which can prove difficult in the context of a general market sell-off.

The present contribution provides a brief overview of the legal framework and main issues arising under Swiss law, including the rights and remedies available to affected parties.

#### LEGAL FRAMEWORK

**Primarily contractual provisions**—In practice, lending transactions are subject to contractual freedom. Very few statutory provisions apply. In a lending transaction, the contractual documentation ("**Transaction Documents**"), typically consist of a (framework) credit facility agreement and of a (general) pledge agreement, in each case between a bank and a client. The Transaction Documents specify, inter alia, the following parameters:

- *The maximum credit amount or credit limit.*
- *The use the borrower can make of such credit amount:* for example, a current account overdraft, a fixed term advance, a guarantee or as margin cover for OTC derivative transactions (forwards, futures, options, swaps, etc.).
- *The eligible collateral:* this will ordinarily include all borrower's present and future assets, claims and rights deposited with the bank. The bank will often require

wide discretion to determine what eligible collateral is. It will typically be defined as cash, cash-equivalent assets or other assets acceptable to the bank (often time "at its sole discretion").

The bank will not consider every type of collateral as equally eligible for lending. Indeed, the lending value or Loan-to-value ("**LTV**") for an asset against which the bank is prepared to lend is calculated based on various risk parameters. The LTV is the ratio of a loan to the value of an asset, expressed in percentage. As a rule of thumb, assets with low volatility and/or high liquidity are considered safer than more volatile and illiquid asset classes. Hence, a diversified portfolio of stocks has a higher lending value compared to a single stock, while an investment grade bond portfolio has typically a higher lending value than an equity portfolio. Assets are valued on a "mark to market" basis, with daily valuations.

The Transaction Documents will also define the conditions under which the bank is entitled to issue a margin call. This will be the case, when the total outstanding amounts including accrued interest exceed the Lending Value of the collateral.

In general, borrowers can comply with the margin call by either selling collateral, by closing open positions (in derivatives), by supplying additional assets considered eligible collateral, or by providing funds.

If a borrower fails to honour the margin call, all outstanding amounts under the Transaction Documents automatically become due and payable. Accordingly, the bank is authorized to freely liquidate all collateral and to set off the liquidation proceeds against the outstanding amounts, or to close out open positions and/or transactions.

**Obligations of the bank**—Contractual provisions typically grant banks wide discretion at virtually every step in the lifecycle of a credit transaction, including for issuing margin calls. Nonetheless, the bank remains bound by certain restrictions when issuing a margin call and liquidating collateral.

**Obligation to issue a margin call before liquidating the assets**—Under certain standard clauses found in Transaction Documents, banks are authorized, but not obliged, to issue a margin call in order to inform the borrower about such shortfall and request immediate adjustment of the overdrawn position. Such provisions

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may conflict with the contractual provisions agreed between the parties in other asset management/advisory documentation, and with Swiss law, thereby overriding the standard clauses of the Transaction Documents.

Where the bank acts as a discretionary asset manager of the client, the duty of diligence and faithful performance (Art. 398(2) CO) dictates that the bank notifies the client of all important events in relation to the management mandate. In our view, this includes an obligation for the bank to inform the client of any margin deficiency. The bank is therefore required to monitor the collateral value and take the necessary measures, i.e. issue a margin call, in case of a collateral shortfall, not only to protect its own interests, but also to limit the risk of losses to the client.

The same holds true, when the parties are bound by a general advisory agreement, under which the bank provides only investment advice to the client, based on his or her risk profile. In our opinion, where a bank advises a client in relation to his or her portfolio, it also has the obligation to follow up on the changes in collateral value, issue a margin call where necessary and advise the investor to adjust the portfolio accordingly (by either selling positions to reduce the credit exposure or posting additional collateral).

The situation may vary if the bank provides only sporadic advice to the client. The Swiss Federal Supreme Court ruled that under such agreements, the bank is, in principle, neither obliged to monitor the client's portfolio nor to warn the client unless there is an express prior agreement or practice between the parties.

Consequently, even where the bank has contractually reserved its right to issue a margin call before liquidating the assets, it may nonetheless be obliged to do so based on the applicable investment agreements. In that sense, the margin call can be even considered a protecting mechanism for a borrower.

Whenever the bank issues a margin call, it must (i) indicate the amount of collateral called and (ii) set the time limit to post it. The Geneva Court of Appeal ruled that absent these prerequisites, the bank is exposed to liability.

**Obligation to exercise its discretion with care**—A typical contractual clause may read as follows: *“the Bank may at its sole discretion, at any time and without notice to the Borrower, adjust with immediate effect the percentage figures mentioned under “Lending Value”, “Margin-Call Level” and*

*“Close-out Level” to reflect – in particular but not limited to – changes in economic, market or liquidity conditions”.*

As a matter of principle, the Swiss Federal Court and scholars question whether it is at all permissible to grant a contractual party such broad discretion. In any event, the bank must always exercise its right to adjust the contractual parameters in good faith and not be abusive.

This is particularly true when issuing a margin call. In practice, the Transaction Documents are often silent on the detailed requirements for margin calls, the level of information required to communicate to the investor, and the rules applying to liquidation of assets, in particular, for those without tradeable price. In practice, banks communicate a collateral shortfall without further explanation to the clients. An investor is thus unable to understand, react and – most importantly – challenge the bank's calculation. This is particularly difficult given the time pressure they are under.

Under its obligations to provide an accounting, a bank must communicate to the borrower the calculation details and all relevant parameters of the margin call. Otherwise, the borrower will never be able to make informed choices, especially regarding steps required to protect his or her interests.

**Obligation in connection with the liquidation of assets**—When liquidating collateral, and although the bank may privilege its own interests, it still owes a duty of care and loyalty and is obliged to act in good faith and avoid damage to the borrower, provided this is compatible with the bank's own legitimate interests.

The prevalent view among authors is that the bank is not liable to the borrower for bad timing when liquidating collateral, i.e. where its value recovers after the liquidation. However, there may be arguably situations where the bank can delay or time the execution of the relevant selling order to minimize the impact on the market price. For instance, in highly volatile markets the liquidation should be spread over successive days. Also, for large positions, the liquidation strategy should aim at minimizing the volatility risks and market impact, according to the principle of best execution.

Finally, when selecting the collateral to be liquidated, the bank must take into account the requests of the borrower, if this is compatible with the bank's legitimate interests.

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Such requests are instructions that the bank must carry out according to the best execution principle.

#### Obligations of the bank in connection with liquidation of collateral

##### —Private liquidation vs. debt collection proceedings?

Where the collateral consists of intermediated securities, a liquidation of the collateral by the bank, outside of the framework of debt collection proceedings, is only permissible if the securities are traded on a representative market.

A market is considered representative if it allows to determine an adequate price that rules out the possibility of the borrower being overcharged. The specific requirements vary depending on the method of realization. Where the bank acquires the collateral in its own name (*Selbsteintritt*), stricter requirements apply than in the case of a sale to an independent third party.

##### —Obligation to exercise its rights moderately

In line with what has been said above, the Commercial Court of Zurich held that the exercise of a right to liquidate an asset may be considered abusive if it is detrimental to the other party and if it can be avoided by an alternative, less detrimental method that could achieve the same objective (Commercial Court of Zurich HG090170 of 22 August 2011).

##### —Obligation to provide an accounting

In connection with the liquidation of collateral, the bank must provide an accounting. This is relatively straightforward for exchange-traded securities (a transaction advice and internal bank documents indicating the exact time of the trade are generally sufficient). It is however more difficult for non-traded securities or derivative instruments, or where the bank acquires the collateral in its own name (*Selbsteintritt*). Here the bank owes the borrower an accounting of the liquidation procedure and parameters to value the options/derivatives (Geneva Court of Appeal ACJC/1515/2019 of 4 October 2019).

### SELECTED ISSUES

**Material Adverse Change—clauses**—In more sophisticated situations, the relevant agreements will also include certain representations and warranties of the borrower and define certain events of default which may entitle the bank to

cancel the credit limit, declare all outstanding amounts due and payable, close-out open positions and liquidate the collateral. If any of the representations and warranties are breached, or any other close-out event or termination reasons occur, which the parties may have agreed separately, the bank may declare all loans due and liquidate the assets.

Among the events of defaults, certain credit agreements contain so-called material adverse change clauses (“MAC-clauses”): “*material adverse changes (for important reasons beyond the influence of the Bank, in particular if the Bank — at its sole discretion — considers that the Borrower’s financial status and/or earning situation has deteriorated considerably, or if the Borrower’s assets have become exposed to a major threat)*”.

The exercise of a discretionary right of determination must always be made in good faith and not be abusive. Also, the limit of Art. 27 para. 2 CC must be observed, which protects a contractual party against excessive commitment.

Especially in the case of MAC-clauses in loan agreements the bank must exercise the greatest restraint before it cuts off the borrower’s liquidity supply solely based on a material adverse effect alleged but disputed by the debtor.

**Valuation inconsistencies**—A recurring source of problems is the valuation of illiquid assets and derivative instruments, and of collateral that the bank acquires in its own name (*Selbsteintritt*).

Problems arise when the bank intends to acquire certain assets at a self-defined market value, which is not derived from the official closing prices, but in addition considers a set of non-transparent factors such as market impact, volatility and currency risk. These factors are not published on official data sources and are determined at the sole discretion of the bank.

In the same vein, in situations where the bank closes-out open derivative positions (or even where the client wishes to do so following a margin call), determining the market price of derivatives can prove a complex exercise. This is exacerbated by the fact that often the bank is at the same time lender and derivative counterparty.

Especially in bumpy markets, the bank will take different pricing assumptions (such as spreads or implied volatilities or currency exchange rates that are off-market), which may lead to distorted valuations.



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All these situations could be remedied if the parties contractually agreed in advance on a process for the liquidation of such assets and thereby largely contractualize the duty of care of the bank (e.g. number of quotes to be queried, designation of the market participants to be queried, selection of the valuation method including relevant parameters, transparency on all elements of the valuation, including any fees and commissions).

**Impact of Covid-19**—Certain banks may be tempted to invoke Covid-19 for triggering the application of MAC-clauses. To do so validly, the bank must demonstrate that the financial situation of the borrower has deteriorated due to Covid-19. A mere abstract assumption would not suffice, in particular when the borrower is a wealthy individual as opposed to a company in a sector particularly affected by the Covid-19 crisis.

By the same token, clients may invoke Covid-19 when faced with a margin call with very short notice to post collateral. In highly volatile markets and the current difficulties everyone is facing due to the various governmental measures (lockdown, clients stranded in foreign countries, etc.), the principle of good faith commands that the banks exercise their right with moderation, which is all the more a requirement when they know that clients will inevitably face a liquidity crunch or, more generally, difficulties in accessing funds to honour the margin call.

That said, the Covid-19 crisis will usually not meet the requirement to qualify as *force majeure* (see **Coronavirus: a force majeure event under Swiss law?**). Thus, it will not excuse a refusal to post collateral, at least as long as the financial infrastructure is still functional, funds can still be cleared and no measures on capital have been enacted.

### AVAILABLE REMEDIES

**Temporary restraint orders in order to allow a foreclosure of assets**—A borrower who fears that the liquidation of his or her collateral is imminent and is unjustified may apply for a temporary restraint order with the competent court in Switzerland, prohibiting the bank to liquidate the collateral. The applicant must demonstrate that he or she has a credible claim on the merits, that the announced liquidation threatens to cause a harm not easily reparable and that the measure is urgent and proportionate.

According to the case law of the Commercial Court of Zurich, the threatened liquidation of shares may constitute in certain circumstances a harm not easily reparable. This is typically the case where an asset cannot easily be replaced by the borrower (following the liquidation) or where the liquidation would cause a damage that cannot easily be quantified (typically where the valuation of such asset is not straightforward).

**Damages**—Pursuant to Art. 31 para. 4 FISA, the bank is liable to pay damages to the borrower if it violates its statutory obligation to give advance notice of liquidation, either because it sets the time limit too short, or because the notice - without justification - is not issued at all. Also, investors may in some circumstances claim damages for breach of the contractual duties to inform, to warn, or to act with due diligence, as well as for breach of best execution duty. Excessive commissions, miscalculations, misevaluation of the OTC derivatives may also give rise to damages claims.

**(No) influence of standstill on debt collection?**—On 18 March 2020, the Swiss government issued a general stay on debt collection proceedings as part of its measures to support the economy in the wake of the Covid-19 pandemic.

If the collateral comprises intermediated securities and to the extent that the agreement is silent and does not foresee a liquidation via private sale (or the same is not possible for other reasons), the stay would provide a temporary relief to borrowers.

In practice however, most banks reserve the liquidation of collateral via private realization as opposed to debt collection, so that this temporary relief would apply only in exceptional circumstances.

### KEY TAKEAWAYS & RECOMMENDATIONS

Based on the above, investors are advised to take the following steps when faced with a margin call and/or a liquidation of collateral by the bank.

**Request parameters and calculation details**—The first measure is to immediately request the bank for the calculation details of the margin call and a valuation of any derivatives positions. This will help the investor to understand and assess whether the collateral required is



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effectively due and whether the bank has abided by its obligations and exercised its rights correctly.

**If possible, honour the margin call and reserve your rights**—It may often be complicated to fully assess the situation due to the time constraints and the imminent threat of liquidation of assets. Under Swiss law, a claimant is obliged to mitigate its damage. Consequently, we advise investors wherever possible to honour the margin call, even in situations where they contest the bank's position. The investor should however highlight the relevant breaches and expressly reserve all rights to avoid any implied waiver of rights and ratification of any potential breaches committed by the bank.

**Object in writing to the margin call, the liquidation and the corresponding transactions and resulting balances**—Where honouring the margin call is not possible, clients

should swiftly object to the margin call, the subsequent liquidations and all corresponding transactions carried out on the accounts, as well as the current and former account balances. Such objection must be notified in timely fashion to the bank in writing, typically within 7 to 30 days, in accordance with the relevant contractual provisions.

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The above measures allow to assess the merits of legal action against the bank, be it in form of damages or other type of recourse. In any case, a timely reaction as soon as a margin call is received will allow an investor to protect his or her position.

## BIOGRAPHIE DES AUTEURS



### Matthias Gstoebl, Partner

Matthias Gstoebl joined LALIVE in 2017. He specialises in complex, often multi-jurisdictional, proceedings, including asset recovery, fraud and white collar crime, recognition and enforcement of foreign judgments and awards, international mutual assistance, FINMA enforcement proceedings and bank insolvency. Matthias Gstoebl's activity strongly focuses on banking and finance disputes. With first-hand experience in the financial sector, he handles complex cases requiring specialist knowledge in derivative instruments, hedge funds and other financial products. He also regularly acts for clients in contentious corporate, commercial and private client matters (primarily successions and trusts). Matthias Gstoebl is a member of the Zurich Bar Association (ZAV), the Swiss Bar Association (SAV), the International Bar Association (IBA), the Swiss Arbitration Association (ASA), the International Association of Young Lawyers (AIJA) and the International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL). Matthias Gstoebl studied law at the Universities of Vienna and Geneva (lic. iur., 1998), and completed postgraduate studies in Finance at London Business School (MSc in Finance, 2006).



### Simone Nadelhofer, Partner

Simone Nadelhofer joined LALIVE in 2009 and is a partner based in our Zurich office. She specialises in white collar crime and regulatory investigations and advises clients on crisis management, compliance and remedial action, as well as cross-border investigations by Swiss and foreign authorities. She also assists clients in international legal and administrative assistance, as well as victims of crime in tracing and freezing of assets. Simone Nadelhofer regularly acts as counsel in complex commercial and banking disputes before state courts. Simone Nadelhofer is a member of the Swiss Association of Experts in Economic Crime Investigation, the Zurich and Swiss Bar Association and the European Criminal Bar Association (ECBA). She is Regional Representative Europe of the IBA's Business Crime Committee, Chair of the Anti-corruption and the Rule of Law Committee at the Inter Pacific Bar Association (IPBA) and a member of the advisory board of the Master Economic Crime Investigations studies at the Lucerne University. Furthermore, Simone Nadelhofer acts as the external ombudsperson for tesa SE. Simone Nadelhofer holds a PhD., summa cum laude, from the University of Lucerne.



### Nicolas Ollivier, Counsel

Nicolas Ollivier joined LALIVE in 2012. He specializes in banking and finance. He regularly advises and represents clients in complex cases such as margin calls, improper execution of orders, mismanagement, fraudulent transfer orders, cross-border issues, bank bankruptcy, freezing of accounts as well as in relation to administrative and enforcement proceedings before the Swiss Financial Market Supervisory Authority (FINMA). He is a member of the Association Genevoise du Droit des Affaires, the Geneva Bar Association and of the Swiss Federation of Lawyers. Before joining LALIVE, Nicolas Ollivier worked as an associate with FBT Avocats SA, in Geneva, in the banking group (2011-2012). He previously trained with Boivin & Nussbaumer in Fribourg (2005-2007). Nicolas Ollivier graduated from the University of Fribourg with a Master of Law, majoring European Law (2004) and holds an LL.M from the University of Durham (with Distinction) (2010).

## JURISTES, FISCALISTES & JURISPRUDENCE

### Enjeux de la réforme de l'impôt anticipé pour le secteur bancaire

...article de Hristina Stoyanova — Centre de Droit Bancaire et Financier, <https://www.cdbf.ch/1128/>

Après l'adoption de **lignes directrices** concernant la modification de la **Loi fédérale sur l'impôt anticipé (LIA)**, le Conseil fédéral a ouvert le **3 avril 2020** une procédure de consultation au sujet d'une importante réforme de la LIA (cf. **Stoyanova in cdbf.ch/1089**). Celle-ci vise principalement à renforcer le marché suisse des capitaux de tiers et à améliorer la fonction de garantie de l'impôt anticipé (IA). Cette fonction est présentée comme *«la garantie d'une taxation correcte de l'impôt sur le revenu et la fortune»* (FF 2018 2384).

Selon le droit en vigueur, l'IA est perçu sur certains revenus de capitaux mobiliers suisses (**art. 4 LIA**) pour autant que le débiteur (notamment la société ou le placement collectif qui versent ces revenus) ait son siège en Suisse (**art. 9 cum art. 10 LIA**). Le taux de l'impôt s'élève à 35% de la prestation imposable (**art. 13 LIA**) et est prélevé indépendamment de l'identité de l'investisseur (étranger, suisse ou institutionnel).

L'**avant-projet** propose en particulier un passage «partiel» du principe du débiteur à celui de l'agent payeur. La notion d'agent payeur inclut en priorité les banques (**art. 9 al. 1bis AP-LIA**). Dans certaines circonstances, les émetteurs d'obligations, les gérants de fortune, ainsi que les trustees peuvent aussi être qualifiés comme tels (**Rapport explicatif**, p. 36). En l'état de la réforme, il est prévu que l'agent payeur domicilié en Suisse devra retenir (ou non) l'impôt anticipé en fonction de l'identité du bénéficiaire de la prestation imposable (**art. 4 cum art. 10 AP-LIA**). La personne de l'investisseur serait donc prise en compte dès le prélèvement, et non uniquement au moment du remboursement de l'IA.

Le passage au principe de l'agent payeur est «partiel» car le débiteur reste tenu de prélever l'impôt sur les rendements des droits de participations suisses (**art. 4 let. d AP-LIA**). L'**avant-projet** prévoit toutefois une imposition à la source, selon le principe de l'agent payeur, pour tous les placements

portant intérêts détenus par des personnes physiques domiciliées en Suisse auprès d'une banque suisse, ce qui pourrait inclure à l'avenir les titres étrangers (**art. 13 al. 1bis AP-LIA**). La fonction purement fiscale de l'IA se voit donc renforcée.

Concernant les personnes morales, les sociétés de capitaux suisses obligées de tenir une comptabilité (**art. 957 al. 1 ch. 2 CO**) pourraient bénéficier d'un nouveau cas d'exonération de l'IA (**art. 5a AP-LIA**). L'obligation de refléter les produits et les charges **de manière fiable et prudente** dans la comptabilité suffirait à garantir l'impôt. L'IA ne se justifierait donc plus.

Une exonération des personnes morales domiciliées en Suisse et des investisseurs étrangers qui investissent dans des placements suisses portant intérêt est également proposée. Cette mesure devrait renforcer le marché obligataire suisse *dans son ensemble*. Il sied de rappeler qu'après la crise, l'IA a déjà été provisoirement supprimé sur les intérêts de certains instruments dits *Too big to fail*. Les *CoCos*, les *bail-in bonds* et les *write-off bonds* (**art. 5 al. 1 let. g et i LIA**) sont exemptés de l'IA jusqu'au 31 décembre 2021. Étant donné que la réforme entrera probablement en vigueur après cette date, la question de l'imposition (ou non) de ces obligations dans l'intervalle devra être débattue.

Le traitement fiscal des placements collectifs de capitaux (PCC) constitue un axe très important de la réforme. Afin d'élargir la fonction de garantie de l'IA, les placements indirects y seront désormais soumis, ce qui couvrira les rendements d'intérêts en relation avec un PCC étranger, un PCC suisse non couvert par la LPCC ou un produit structuré.

Pour pouvoir procéder à la retenue de l'IA, l'agent payeur doit déterminer la part d'intérêt de chaque produit imposable. Contrairement au débiteur de la prestation, celui-ci ne



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## JURISTES, FISCALISTES & JURISPRUDENCE

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dispose pas de cette information dès le début. L'avant-projet prévoit donc de procéder à une comptabilisation séparée des intérêts pour distinguer les revenus soumis à l'IA de ceux qui ne le sont pas. Cette exigence n'étant actuellement pas requise, les PCC subiront des charges additionnelles. A défaut de comptabilisation séparée, l'IA pour les personnes physiques domiciliées en Suisse devra être prélevé sur la totalité du rendement, par analogie avec la réglementation des gains en capital (art. 16 al. 3 LIFD).

Une difficulté supplémentaire s'ajoute concernant les fonds de thésaurisation. L'impôt anticipé est dû, sans qu'il y ait eu des flux à destination des investisseurs, puisque la valeur des parts augmente au moment du réinvestissement. Le risque de responsabilité apparaît comme plus grand pour les agents payeurs devant procéder à une déduction d'impôt malgré l'absence de flux de fonds. Les agents payeurs pourraient donc anticiper, dans le cadre de leurs rapports de droit privé avec les clients (par ex. conditions générales), des mesures appropriées pour que l'IA puisse être remboursé correctement (cf. Rapport explicatif, p. 38).

Au regard des difficultés pratiques de mise en œuvre de la réforme, une adaptation du moment de prélèvement de l'IA est prévue. Les agents payeurs ne devront verser le nouvel impôt anticipé que trimestriellement (art. 16 let. b AP-LIA). Une telle fréquence permettra de corriger les éventuels décomptes erronés et de faire coïncider le moment du prélèvement avec celui du versement à l'AFC.

En dépit de ces adaptations, les banques suisses subiront des répercussions administratives et juridiques relativement importantes en tant que contribuables de l'IA et responsables de son recouvrement (art. 10 al. 1 let. a AP-LIA). Un risque d'exode vers les banques étrangères non soumises à l'IA pèse ainsi sur la place financière suisse. Il devrait être tempéré en raison de l'échange automatique de renseignements. Si la Suisse n'a toutefois pas conclu d'accord EAR avec le pays étranger, le risque de délocalisation pourrait être bien réel.

## BIOGRAPHIE DE L'AUTEUR



*Hristina Stoyanova* est titulaire d'un Bachelor en Droit (2015) et d'une Maîtrise en Droit des Affaires (2016) de l'Université Paris 1 Panthéon-Sorbonne. En 2015, elle a fait partie de la formation sélective du Magistère de droit des activités économiques à la même université. De septembre 2016 à février 2018, elle a effectué une Maîtrise en Droit à l'Université de Genève, avec une préférence pour les matières en Droit bancaire et financier et en Droit fiscal. Avant d'intégrer le Centre de droit bancaire et financier, Hristina Stoyanova a effectué des stages auprès d'une banque, dans deux Etudes d'avocats et à l'ONU.

## JURISTES, FISCALISTES & JURISPRUDENCE

### Swisscom, un intermédiaire financier inattendu

...article de Sébastien Pittet — Centre de Droit Bancaire et Financier, <https://www.cdbf.ch/1130/>

Le Tribunal fédéral s'est récemment prononcé sur l'interprétation de la notion de "service dans le domaine du trafic des paiements" au sens de la **LBA (2C\_488/2018 du 12 mars 2020)**. La situation factuelle peut être résumée comme suit.

Swisscom propose des *Mobile Value Added Services* ("MVAS") permettant à ses clients de payer un service en envoyant un SMS à un numéro spécifique. Dans la décision en cause, le paiement visé était le supplément de CHF 5 pour des trajets de nuit dans les transports publics zurichois.

Dans le cadre des MVAS, Swisscom permet à des tiers d'offrir leurs services à des clients, détermine le numéro auquel les clients doivent envoyer le SMS, transfère les données pertinentes entre le téléphone du client et le prestataire de services et facture les services sur le décompte mensuel du client.

Dans l'arrêt résumé ici, le Tribunal fédéral a retenu que les MVAS constituaient des "services dans le domaine du trafic des paiements" qui déclenchent l'application de la **LBA**.

#### Les MVAS sont des "services dans le domaine du trafic des paiements".

Une personne qui fournit, à titre professionnel, un service dans le domaine du trafic des paiements est qualifiée d'intermédiaire financier (**art. 2 al. 3 let. b LBA**). L'émission ou la gestion de moyens de paiement non liquides dont le cocontractant (ici: le client final) se sert pour payer un tiers (ici: les transports publics zurichois) constitue un service dans le domaine du trafic des paiements (**art. 4 al. 1 let. b OBA**).

En raison des différentes prestations fournies par Swisscom dans le cadre des MVAS, le Tribunal fédéral a considéré

que Swisscom offrait un "service dans le domaine du trafic des paiements", par opposition à un simple service de recouvrement.

Pour arriver à cette conclusion, le Tribunal fédéral s'inspire notamment du droit européen selon lequel les services proposés par un système de télécommunications doivent être considérés comme des services de paiement si l'opérateur n'agit pas uniquement en qualité d'intermédiaire pour la livraison des services concernés, mais "ajoute également de la valeur" à ces services (cf. **Directive PSD2**, considérants 15-16 et art. 3 let. 1). La Directive PSD2 évoque notamment la fourniture d'informations météorologiques ou des cours de bourse.

#### Le "service dans le domaine du trafic des paiements" doit être distingué du "système de paiement".

Les "services dans le domaine du trafic des paiements" (*Dienstleistungen für den Zahlungsverkehr*, **art. 2 al. 3 let. b LBA**) doivent être distingués des "systèmes de paiement" (*Zahlungssysteme*, **art. 2 al. 2 let. dter LBA**):

- Un *système de paiement* est une infrastructure des marchés financiers qui compense et règle des obligations de paiement (**2 let. a ch. 6 et art. 81 LIMF**). Si le fonctionnement des marchés financiers ou la protection des participants aux marchés financiers l'exigent, l'exploitant d'un système de paiement qui ne bénéficie pas d'une licence bancaire doit obtenir une autorisation de la FINMA (**art. 4 al. 2 LIMF**), ce qui déclenche l'application de la **LBA (art. 2 al. 2 let. dter LBA)**.
- En revanche, l'application de la **LBA** aux *services dans le domaine du trafic des paiements* est indépendante d'une quelconque autorisation de la FINMA (**2 al. 3 let. b LBA**).

Par conséquent, c'est à tort que Swisscom a considéré que les MVAS n'étaient pas soumis à la **LBA** en raison



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de l'absence d'obligation d'obtenir une autorisation de la FINMA.

#### Les MVAS ne sont pas des “services de recouvrement de créances”.

Swisscom a tenté de se prévaloir d'un arrêt du Tribunal fédéral **2A.62/2007** du **30 novembre 2007**, intégré ultérieurement dans les règles de la FINMA (**Circulaire FINMA 2011/1, § 59**), puis dans l'ordonnance (**art. 2 al. 2 let. a ch. 2 OBA**) selon lequel les services de recouvrement de créances ne sont pas soumis à la LBA.

Le Tribunal fédéral a considéré que Swisscom offrait plus qu'un simple service de recouvrement de créances, notamment au vu des différentes prestations fournies par Swisscom (cf. ci-dessus) et de l'existence d'un contrat entre Swisscom et le client (ce qui n'est pas le cas dans le cadre d'un service de recouvrement). Par conséquent, les MVAS ne pouvaient pas bénéficier de cette exception.

#### Observations

Il convient de souligner que Swisscom a, semble-t-il délibérément, choisi de ne pas invoquer les règles de

*minimis* de la **LBA**. Selon l'**art. 7a LBA**, l'intermédiaire financier peut renoncer au respect des obligations de diligence si la relation d'affaires porte uniquement sur des valeurs patrimoniales de faible valeur et s'il n'y a pas d'indices de blanchiment d'argent. Dans le domaine des moyens de paiement, les **art. 11 et 12 OBA-FINMA** détaillent les seuils qui permettent un allègement ou une renonciation aux obligations de diligence (cf. également le graphique très utile qui figure dans le **Rapport annuel 2015 de la FINMA**, p. 66-67). La **Directive PSD2** prévoit du reste également un régime *de minimis* en exemptant par exemple les opérations proposées par un fournisseur de services de communications électroniques pour l'achat de billets dont la valeur ne dépasse pas EUR 50 (sur une base individuelle) et EUR 300 (sur une base cumulée par mois) (**art. 3 let. 1 (ii) de la Directive PSD2**).

Cet arrêt illustre les écueils de la réglementation suisse en matière de trafic des paiements.

Tout projet impliquant la fourniture d'un service en matière de “paiement” doit ainsi faire l'objet d'une analyse dans une perspective de surveillance prudentielle et de réglementation en matière de lutte contre le blanchiment d'argent.

## BIOGRAPHIE DE L'AUTEUR



*Sébastien Pittet est titulaire d'un bachelor en droit de l'Université de Genève et d'un master bilingue (allemand) en droit des Universités de Bâle et Genève. Il effectue actuellement un bachelor bilingue (anglais) en économie et management à l'Université de Genève et travaille également comme stagiaire au sein de l'étude OBERSON ABELS SA.*

## ASSURANCE PROFESSIONNELLE

### Assurance Cadre Responsabilité Civile ... pour les Membres du GSCGI

Le GSCGI offre à ses membres une couverture cadre d'assurance exclusive, négociée avec les assureurs ZURICH et LIBERTY. Ces deux assureurs sont nos partenaires exclusifs autorisés à présenter les couvertures des risques (ci-après) aux conditions préférentielles pour les Membres du GSCGI.

Ces couvertures étendues et complètes — **Responsabilité civile professionnelle (RCPI)** couvrant également les cas de médiation; **Responsabilité des dirigeants (D&O)**; **Assurance Fraude (FR)**; **Assurance Cyber (AC)** — offrent une sécurité accrue aux Gestionnaires de fortune et Conseillers financiers dans leur activité quotidienne. L'assurance professionnelle met les professionnels à l'abri de situations inattendues



et génératrices de conséquences financières parfois dévastatrices.

Pratiquement, les Membres pourront s'adresser au Secrétariat du GSCGI, ou à la Commission Assurances, pour obtenir tous les renseignements. Un formulaire/questionnaire spécifique du GSCGI a été édité pour obtenir les offres des assureurs, il figure sur le site web du Groupement et est donc à disposition des Membres. Il devra être complété par le gestionnaire de fortune et le Conseiller financier pour demander les offres avec la preuve de sa qualité de Membre et envoyé confidentiellement au courtier Patrimigest. Le GSCGI n'a pas accès à ces informations.

### COUVERTURES D'ASSURANCES

#### Responsabilité civile professionnelle (RCPI)

Elle couvre les actes fautifs commis par la société du gérant indépendant ou l'un de ses représentants en cas d'erreur, d'omission dans le cadre de l'activité professionnelle qui entraînerait un préjudice financier d'un tiers.

##### Les fautes les plus courantes sont:

- Mauvaise exécution d'un ordre
- Oubli d'un délai
- Non respect de la stratégie convenue
- Rupture abusive d'un crédit
- Défaut de conseil
- Délit de fraude fiscale

##### Qui est assuré?

1. L'institution financière et/ou ses filiales
2. Toutes les personnes physiques agissant dans l'exercice de leur fonction dans la société (*salarié, stagiaire, dirigeant, administrateur*)

##### Quelle est la couverture? L'assureur va payer:

- Les frais de médiation
- Les frais engagés pour la défense des assurés
- Les dommages et intérêts dus au lésé après jugement et condamnation
- Les réparations résultant d'un accord amiable (*après acceptation de l'assureur*)

#### Responsabilité des dirigeants (D&O)

En tant que dirigeant de votre entreprise, vous n'êtes pas à l'abri de revendications à titre personnel même s'il s'agit d'une erreur d'un employé. En effet, un lésé peut aller chercher une responsabilité personnelle vers le directeur ou l'administrateur de la société pour obtenir réparation du préjudice sur les biens propres du dirigeant. Il peut vous être reproché une mauvaise décision ou de ne pas avoir pris une décision, d'avoir fait un choix stratégique contraire au but social, d'avoir effectué des investissements hasardeux, communication financière insuffisante ou erronée, manque de surveillance des

dirigeants ou d'une filiale. Font aussi partie les conflits du travail: licenciement abusif, discrimination, harcèlement.

**Qui est assuré?** Tous les dirigeants exécutifs et les administrateurs ainsi que leur famille directe.

##### Quelle est la couverture?

- Les frais engagés pour la défense des assurés à titre privé
- Les dommages et intérêts dus au lésé après jugement et condamnation
- Les réparations résultant d'un accord amiable (*après acceptation de l'assureur*)

#### Assurance Fraude (FR)

L'évolution technologique et économique des sociétés financières a beaucoup évolué et les risques au sein de ces entreprises aussi. Le risque de fraude devient élevé dans les services financiers surtout en fonction de l'importance croissante des équipements informatiques. L'infidélité et la malhonnêteté des employés sont aussi une source de fraude. L'usage intensif d'Internet fragilise les services en terme de risques de sabotage ou de terrorisme cybernétique. Des fraudes peuvent aussi être commises sur les marchés ou sur l'octroi des crédits.

##### Qui est assuré? L'entreprise

**Couverture d'assurance:** Une telle assurance a pour but de garantir les pertes subies par la société suite à la fraude:

1. Commise par un ou plusieurs employés y compris la fraude informatique et le transfert de fonds
2. Fraude informatique interne ou externe (*hacking*)
3. Frais de procédure et honoraires d'avocat

#### Assurance Cyber (AC)

Le risque cyber peut affecter l'activité des Gestionnaires de fortune indépendants et des Conseillers financiers. Couvertures: Cyber-RC, restauration des données et des systèmes, gestion des crises & perte d'exploitation.

## Venezuela sues Bank of England over refusal to release gold

[...] Venezuela has filed a \$1bn lawsuit against the Bank of England over its refusal to release gold stashed in its vaults, as the government of Nicolás Maduro scrambles for funds to alleviate a deepening economic and health crisis. [...]

[...] The British government, along with about 60 others worldwide, does not recognise Mr Maduro as Venezuela's legitimate leader, arguing that he rigged the last presidential election two years ago. [...]

[...] Venezuela is in the grip of a severe economic crisis. [...]

Read more: <https://www.ft.com/content/b03977ed-4f69-4e55-a3b6-77a8befdd5f3>

Source: *Financial Times* - May 21, 2020

CFB

## UK would 'finance torture' by giving gold to Venezuela, warns Guaidó

[...] Cash-strapped Maduro regime tries to seize \$1bn in bullion from Bank of England. [...]

[...] The country has been in economic freefall for years but residents in Caracas say this is the worst crisis they have ever experienced. [...]

[...] In a blow to the Maduro side, the court decided it would rule first on who was the legitimate government of Venezuela before considering whether to release the gold. A decision is expected in late June or July. The case has few legal precedents. [...]

[...] Mr Maduro has been using gold from Venezuelan reserves and from illegal mining in the Amazon to pay its longstanding ally Iran for emergency petrol shipments. [...]

[...] Eight tonnes of gold have already been airlifted to Tehran as payment for its help, Mr Guaidó said, and the Maduro government might also be using uranium as a currency. [...]

Read on: <https://www.ft.com/content/10e7e06f-cfa2-4ba6-aed1-bee2fc4d1c46>

Source: *Financial Times* - May 31, 2020

CFB

## When gold and geopolitics clash, it's rarely pretty

[...] It's remarkably common for governments around the world to park their gold at the Old Lady. Indeed it, and the New York Fed, have long been the biggest custodians of bullion in the world. Nor is it the first time that the Bank has got stuck in a political quagmire over its vaults ... the most (in)famous episode came shortly before the outbreak of the WWII, when the central bank facilitated the sale of gold looted by the Nazis after their invasion of Czechoslovakia in 1939. [...]

[...] Bullion is different to most asset classes in that it is often seen as a symbol of national strength. During the Cold War, the Bundesbank moved most of its gold to Paris, London and New York to avoid the chance of Russia invading from the east ... it was only in 2017, more than twenty five years after reunification, that 54,000 bars were transported back to German soil to vaults in Frankfurt. [...]

Read on: <http://ftalphaville.ft.com/2020/05/21/1590060495000/When-gold-and-geopolitics-clash--it-s-rarely-pretty/>

Source: *Financial Times* - May 21, 2020

CFB

## How We Broke the World

[...] Greed and globalization set us up for disaster. If recent weeks have shown us anything, it's that the world is not just flat. It's fragile. [...]

[...] And we're the ones who made it that way with our own hands. Over the past 20 years, we've been recklessly removing man-made and natural buffers, redundancies, regulations and norms that provide resilience and protection, out of an obsession with short-term efficiency and growth. We've been behaving in extreme ways — pushing against, and breaching, common-sense political, financial and planetary boundaries. [...]

[...] We've taken the world technologically from connected to interconnected to interdependent ... we've made globalization faster, deeper, cheaper and tighter than ever before. [...]

Read on: <https://www.nytimes.com/2020/05/30/opinion/sunday/coronavirus-globalization.html?action=click&module=Opinion&pgtype=Homepage>

Source: *The New York Times* - May 30, 2020

CFB

## Federal Reserve Discloses Holdings of \$1.3 Billion in Exchange-Traded Funds

[...] The Federal Reserve's first \$1.3 billion of purchases of exchange-traded funds that invest in corporate bonds show that funds that focus on buying non-investment grade debt accounted for around one sixth of the central bank's ETF purchases. The Fed owned nearly \$3 billion in ETFs as of Wednesday, according to a separate disclosure [...]

[...] The Fed said the "preponderance" of those holdings would be in funds whose primary investment objective was in the market for debts with investment-grade ratings, but officials said they would allow for some purchases of ETFs with exposure to junk bonds. [...]

[...] The decision to invest in junk debt has been controversial. Of the Fed's \$1.3 billion in ETF holdings as of May 19, around 17% were in funds that invest primarily in junk debt. [...]

[...] Fed Chairman Jerome Powell defended the decision to purchase the debt of fallen angels and other non-investment grade companies Friday during an online discussion hosted by Princeton University. [...]

Read on: <https://www.wsj.com/articles/federal-reserve-discloses-holdings-of-1-3-billion-in-exchange-traded-funds-11590782661>

Source: *The Wall Street Journal* - May 29, 2020

CFB

## US pension plans warned they will run out of money by 2028

[...] Many US public pension plans had not fully recovered from the 2007/08 financial crisis before coronavirus struck. The correction in the US stock market has increased the long-term structural problems across the entire US public pension system. [...]

[...] The crunch point of a plan running out of assets is known as the "depletion date". After this point, a US plan would move to a so-called "pay-as-you-go" arrangement where retirement benefits are paid solely from contributions by employers and employees. [...]

Read more: <https://www.ft.com/content/a96c54a1-4a7b-4e05-8257-f985cb2861f3>

Source: *Financial Times* - May 31, 2020

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## An Unlikely Hero for 1906, 1929...and Today

[...] A century ago, one banker was the lender of first resort when disasters hit. The way A.P. Giannini built Bank of America shows that hard times can breed the upstarts who fuel the next boom. [...]

[...] Born in 1870, Amadeo Peter Giannini quit school at age 15, becoming a wildly successful fruit-and-vegetable merchant. At the age of 31, three years before he went into banking, he had a net worth of about \$300,000—more than \$9 million in today's money. "I might never have gone into the banking business," he later recalled, if he hadn't gotten into a shouting match with the head of a local bank about its reluctance to make



small loans to individual borrowers. In 1904, Giannini founded a bank of his own in San Francisco, called Bank of Italy, to do just that. Giannini lent to almost everyone with a legitimate need, on one condition: They had to raise half of what they needed elsewhere. [...]

[...] As his bank expanded across California in the 1920s and eventually renamed itself Bank of America, "we had money to sell and we went direct to the people to sell it"—not "to a favored few," but "to all the people," Giannini said. [...]

[...] "Be ready to help people when they need it most," he told an interviewer in 1921. "Get set to yank them out of a hole. The 'glad hand' is all right in sunshine, but it's the helping hand in a dark day that folks remember to the end of time." This wasn't love-based lending. Giannini was maniacally focused on making his bank the biggest—first in California, then in the entire U.S. [...]

[...] Periods of prosperity often favor the incumbents, but hard times can bring forth the upstarts who will help fuel the next boom. [...]

Read on: [https://www.wsj.com/articles/an-unlikely-hero-for-1906-1929-and-today-11590764100?mod=lead\\_feature\\_below\\_a\\_pos1](https://www.wsj.com/articles/an-unlikely-hero-for-1906-1929-and-today-11590764100?mod=lead_feature_below_a_pos1)

Source: *The Wall Street Journal* - May 29, 2020

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## ANALYSES & PLACEMENTS

### How investors can mitigate a second wave meltdown

*...article by SYZ Private Bank, Membre Partenaire du GSCGI*

As governments across the globe gradually ease lockdown measures, investors are turning their focus to the shape of the economic recovery. While cautious optimism has reignited investor sentiment, markets remain in a precarious position. Further positive data signals would sustain the rebound, but a second wave of infections could send markets spiralling downward.

Constructing portfolios for the possibility of both scenarios is a delicate balancing act. However, an emphasis on quality risk assets, combined with protective hedges, can safeguard investors to the downside while maintaining exposure to market recovery.

**Cautiously constructive**—We are confident the coronavirus crisis will not lead to a sustained depression over the next 12 months. With the continued support of governments and central banks, we believe the loosening of harsh lockdown measures will allow positive economic dynamics to resume at the beginning of the summer. However, it will take several quarters for GDPs to recover from a more than 10% drop in most developed countries.

The recovery will be driven by the resumption of domestic demand and service sectors across developed economies – as human needs manifest themselves and goods and services can once again be consumed. On the other hand, it is much less clear what will happen to industrial activity, where the impact may be more sustained. This means the recovery will be uneven, with certain sectors and countries slower to bounce back.

In March, equity markets went into panic mode, pricing in a deep recession and creating a deep disconnect between the performance of the economy and the markets. Markets have now realigned to a more positive outlook for recovery, with risk assets at reasonable valuations. The danger with this is any negative news could trigger a further decline.

Equity markets are thus open to two-way risk – to the upside and to the downside.

**Quality is compulsory**—As the future of markets hangs in the balance, and with the prospect of an uneven recovery ahead, the need to be highly selective is paramount. We were quick to reduce portfolio risk at the onset of the pandemic in March – substantially decreasing equity exposure in our multi-asset portfolios. Since the end of March, when indicators started improving, we have slowly been increasing risk – focusing on high-quality assets.

In the bond market, credit spread widening is providing an attractive entry point for corporate investment grade credit – where strong balance sheets bode better than high yield in times of economic uncertainty. We upgraded the asset class to a strong preference, purchasing two new active funds. In fixed income – unlike for equities – the largest weighted issuers are not always the best performing, hence our preference for active managers.

With high dispersion in equity markets, we are sticking to high conviction calls which were already benefitting from tailwinds pre-Covid – tech, healthcare and consumer goods. Whether the current crisis causes profound structural changes or merely accelerates pre-existing trends remains to be seen. Either way, these sectors are poised to profit. For instance, a structural shift is likely to necessitate further investment in tech, while a return to normal would equally support the prior trend of increasing tech demand.

On the other hand, we are not attracted to significantly fallen value stocks, with rates set to remain at historical lows for the foreseeable future and energy demand likely to stay suppressed as climate objectives come to the fore.

**Long-term landscape**—The structural factors which have been containing inflation for the last decade – such as increasing productivity and slowing demographics – will not disappear overnight. Nevertheless, a move away from globalization and the possibility of increased trade tariffs in specific sectors could push some prices higher. In fact, we think the market is too pessimistic in this regard and inflation will likely exceed expectations in the medium term.



**Adrien Pichoud**  
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**Luc Filip**  
Head of Private Banking  
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**Fabrice Gorin**  
Senior Portfolio Manager

## ANALYSES & PLACEMENTS

### Black Gold, Black Swan: Is negative the new normal?

...article by Ron William — CFTe

Black gold's black swan price spike into negative territory has potentially triggered a "New Normal" regime over the next 3-6 months, with a significantly lower equilibrium level around the US\$10 handle. It marks yet another shockwave from the global pandemic VUCA (volatility, uncertainty, complexity and ambiguity) environment, coupled with legacy oil supply imbalances that continue to weigh.

Trend regression bands spanning from the 2008 super cycle peak level of \$147.27 previously exhibited a historical mean of \$50, tracking volatile price swings of +/- 1 standard

deviation. These statistical bands now project a new range between \$10 and sub-zero depths of -\$30. While negative pressure remains, the latest spike low at -\$40.32 is likely to hold strong for the foreseeable future, with small, but probable risk of a W-shape bottom retest.

Meantime, the upside strategic level of \$10 remains important, serving as the historic 1998 low, part of a wave IV structure of a prior impulsive cycle pattern. Further long-term resistance can also be found at \$20 and \$30, based on statistical probability distribution measures.



Over the short-term horizon, Oil's V-shape recovery is still pressured by a silent contagion contango, with futures contract deliveries across the next 4 months (June-September), favouring sub \$10, with a risk back under the zero mark, into negative territory. Immediate overhead technical price resistance holds strong at both \$25 and \$29.50 (61.8% golden ratio and Dow theory structural level). Only a sustained confirmation above the latter point would neutralise Oil's downside vulnerability and signal a resumption higher.

One of the popular methods to participate in the Wild West of the Crude oil market is via futures based synthetic products. ETFs and ETNs make speculative access to

the derivatives markets conveniently accessible for retail investors. However, the latest demand spike in Oil's exchange traded products warrants extreme caution, following the unprecedented wave of speculative "hot money" attempting to catch the proverbial falling knife. Figure 3 highlights a composite basket of 24 crude oil funds and United States Oil (USO) fund breaking multi-year ceilings, with the latter ETP giving rise to 137% of new Robinhood trading accounts, between February to the end of April, fuelled by a staggering \$1.6bn in inflows in just one week!

## ANALYSES & PLACEMENTS

### Black Gold, Black Swan: Is negative the new normal?

...article by Ron William — CFTe

Latest data shows that retail traders have dumped 30% of their pain trade in just a few days. This happened as the price of USO rose from just under \$17 post-split to its peak of over \$19 and proves again how dangerous both the markets and investor behaviour can be.

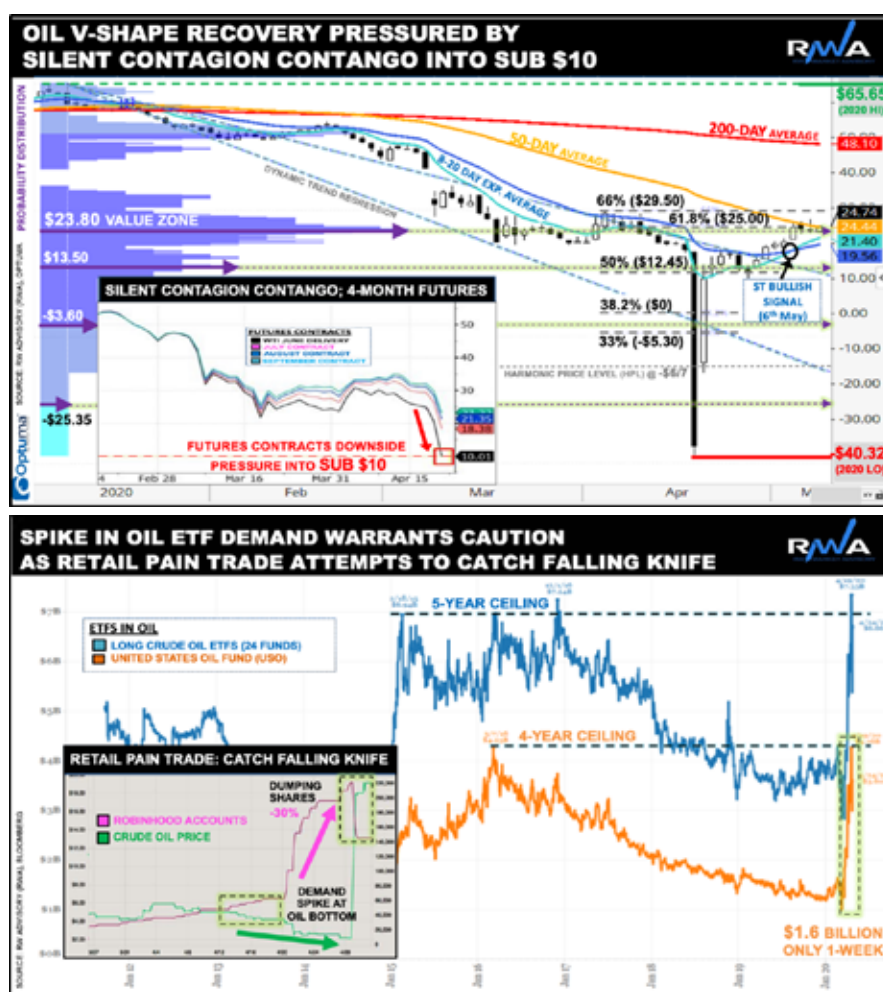
Not unlike the XIV debacle of early 2018, could this portend the implosion of derivatives-based oil ETFs?

Perhaps much worse, a perfect storm is likely brewing ahead, once oil producers take the other side of futures bought by USO and other ETPs.

What happens when a historically unprecedented percentage of shorts stand for physical delivery?

Even with a financial bailout, risks will likely remain for the industry with a technical likelihood that Oil is in a New Normal regime.

This currently signals a return to negative territory and a potential W-shape bottom.



## ABOUT THE AUTHOR



**Ron William**, CFTe, NLP, is a market strategist, educator/mentor and performance coach and a behavioral finance expert. Ron's primary work, as part of his current institutional market advisory firm (RWA), acquired global industry recognition with multiple Finalist Awards for «Best Specialist Research/CFX» and «Best Technical Analyst of the year». Previously, Ron was a senior Tactical & Market Timing Strategist at the ECU Group, a Global Macro Investment & Advisory Firm. He was part of the Multi-Asset Research & Advisory Team, headed by veteran technician Robin Griffiths; applying his signature «Roadmap» cycle model. Driven by high-integrity education, Ron serves as board member of the International Federation of Technical Analysts (IFTA); Head of the SAMT Geneva Chapter and Honorary member of ESTA. He is also a visiting professor at leading universities, active guest speaker for the CFA & CAIA, and senior teacher at colleges offering an accredited diploma in trading and investing.



## LE COIN TECHNIQUE

### Europe could outperform from mid-June into mid/late-Summer

...article by Jean-Francois Owczarczak - CEO, Management Joint Trust SA - jfo@mjt.ch



Early last month, we considered that equity markets could retrace down into late-May, before gradually resuming higher during June. Growth themes could be first starters. Cyclical ones could then start to outperform from mid-June. In retrospect, the retracement period was shorter and shallower than we had expected, and since the 3rd week of May, Equity markets have been accelerating higher into "Blue Sky", while recently Cyclical factors even started to lead. Going forward, we would still expect a slight pull-back on risk assets and cyclicity, probably into mid-June. Yet, thereafter, these trends should resume strongly higher into the Summer. Given its sector and factor profile, which is rather "Value" and "Cyclical", Europe could then outperform global markets into the Summer.



IEV - iShares Europe ETF / ACWI - iShares MSCI ACWI Index Fund  
(Weekly graph or the perspective over the next 2 to 4 quarters)



*This graph compares two ETFs from the same issuer representing Europe and Global Markets. Following sustained underperformance since Spring 2017, the ratio is entering a Low Risk position on our long-term oscillators (lower rectangles), while our medium-term ones (upper rectangle) point to at least an intermediate low towards late Q2. It could trigger a 2 to 3 months bounce into mid/late-Summer. Furthermore, in terms of targets, the downside potential is now exhausted as our I Impulsive targets to the downside have been reached (right-hand scale). The outperformance potential we can now calculate into the Summer could be between 6 and 10% (or 0.5 to 0.8 times our historical volatility measure "Delta", here at 13.52%, middle rectangle – right-hand side – added to the graphs' lowest point at -17.95%).*

IEV - iShares Europe ETF / ACWI - iShares MSCI ACWI Index Fund  
(Daily graph or the perspective over the next 2 to 3 months)



For more information on our services and methodology, please visit [www.mjtsa.com](http://www.mjtsa.com) or contact us. All opinions, news, research, analyses, prices or other information in the article above are provided as general market commentary and do not constitute any financial advice.

*Shorter term, on the Daily graph, the ratio is also approaching a possible reversal point to the upside on both our oscillator series (lower and upper rectangles), possibly between now and mid-June. Here also, the downside potential is exhausted as our I Impulsive targets to the downside have been reached (right-hand scale). Hence, some retracement of the recent rebound may still materialize over the next couple of weeks. Yet, given our exhausted targets to the downside, the remaining downside risk is rather limited. From mid/late-June, Europe should then confirm its reversal up vs Global markets and then outperform into the Summer.*

**CONCLUDING REMARKS:** Over the last two years, Europe has widely underperformed Global Markets, and the US especially (which represents 50% of the global index). Yet, as cyclical factors may start to strengthen from mid-June (Europe is more Cyclical than the US), Europe may start to

reverse up on a relative basis. It could then outperform into mid/late-Summer in first instance as generally risk assets confirm a second leg up from March. The outperformance potential over the next 2 to 3 months may be as high as 6 to 10% vs Global markets, perhaps even more vs US ones.



## LE COIN TECHNIQUE

### GOLD – Waiting for a Breakout

...article by Bruno Estier Strategic Technicals - <http://bruno.estier.net/> - [bruno.estier@bluewin.ch](mailto:bruno.estier@bluewin.ch)

The Gold daily chart gives us a short-term view of the narrowing Bollinger Bands, which took place after the sizeable advance from 1450 to 1788 from mid-March to mid-April. This narrowing of the bands resulted also from a ranging pattern in the form of a triangle, whose upper trendline is defined by the top at 1788 and by the recent spike at 1775, while the support trendline was constructed by a line passing via 1666 and 1676 in April and not broken since on a close basis. The technical analysis literature suggests that a triangle tends to break out between the 2/3 and the 3/4 of their length. 2/3 would be by the first days of June and 3/4 would be by June 15. If Gold is breaking out of its triangle, the classic target is the base of the triangle, namely \$122 from 1788-1660 applied to the break out points, i.e. on the upside near 1770 giving a 1992 target or on the downside near 1712 giving a 1590 objective.

On the upper panel, Gold in Swiss Franc is shown (orange line) but a closing new high has not been recently an early indication of a breakup. Also, the ratio of Small caps versus

Large caps (ETF SML divided by OEX – S&P100) shown (green dotted line) seems to be less useful recently, as it usually rises when Gold rises. In the past two weeks, the ratio is rising but Gold had been declining from 1775.



Therefore we need to be patient to get a signal: as Gold rebounded again on the support trendline on May 27, a rise toward 1745 is possible along a crossing up of the daily STO on the lower panel. If gold then manages to advance above 1745, then a test of the Upper B-Band (1757) is likely and later a test of 1770 should open further upside acceleration toward a breakup. However, a failure to rise above 1745, would maintain a bearish tone along with the more medium-term daily crossing down MACD toward 1712, the trend support. Below 1704, the door opens on a close basis toward 1590.

#### Graph:

Gold continuous contract CME in daily candlesticks with moving average 20 days surrounded by 2 Bollinger Bands. Further are displayed the Ichimoku Cloud which is well below current triangle formation. Narrowing Bollinger Bands may soon present a break-out potential for a new directional move. On the upper panel is represented the price of Gold in Swiss franc holding within a flat trading range for 6 weeks (orange line) and the Relative Strength of Small Caps versus Large Caps (green dotted line). On the lower panel is the momentum indicator Slow Stochastic at neutral level after hitting overbought area and the MACD, which turned down in a positive area, suggesting slowing momentum.

Source: Stockcharts.com  
Support lines  
& parameters  
are provided by  
BEST.

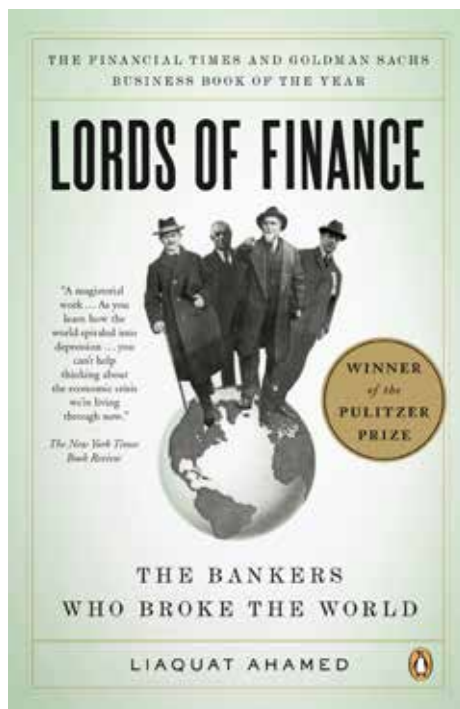


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## BOOK REVIEW

### LORDS OF FINANCE: *The Bankers Who Broke the World*

by Liaquat Ahamed



#### Flying Blind

*"We have involved ourselves in a colossal muddle, having blundered in the control of a delicate machine, the working of which we do not understand."*

So wrote the great economic iconoclast John Maynard Keynes in an essay titled *"The Great Slump of 1930,"* published in December of that year. Thirteen months had passed since the crash of 1929; the world was living, in Keynes's words, in *"the shadow of one of the greatest economic catastrophes of modern history."*

I shuddered when I read this quotation in **"Lords of Finance,"** a magisterial work by Liaquat Ahamed, a grand, sweeping narrative of immense scope and power ... the book describes a world that long ago receded from memory: the West after World War I, a time of economic fragility, of bubbles followed by busts and of a cascading series of events that led to the Great Depression. The **"delicate machine"** Keynes referred to was of course **the global economy.** By 1930, when he wrote his essay, the West was in bad shape. A combination of divisive postwar politics, a refusal to abandon economic orthodoxy and a series of policy errors by the world's four most important central banks — the Federal Reserve, the Bank of England, the German Reichsbank and the Banque de France — had

led to the near collapse of capitalist economies in the West. *"Industrial production had fallen 30 percent in the United States, 25 percent in Germany and 20 percent in Britain,"* Ahamed writes. *"Over 5 million men were looking for work in the United States, another 4.5 million in Germany and 2 million in Britain."*

In December 1930, the world was holding its breath ... Six months later, an Austrian bank collapsed, resulting in a run on the rest of Austria's banks. The central bankers responded both belatedly and tepidly, failing to stem the run and then making a new round of policy errors that compounded matters. By 1932, the United States had entered the worst year of the Great Depression — while in Germany Hitler's ascent was assured.

The central bankers of the 1920s and '30s were flying blind; Ahamed makes that quite clear.

Read more: <https://www.nytimes.com/2009/02/15/books/review/Nocera-t.html>

\* \* \*

#### Pride before the fall

Liaquat Ahamed conclusion is that the depression was not the result of mysterious forces that governments were powerless to resist. Rather, it was caused and compounded by a failure of intellectual will - a lack of understanding about how the economy operated.

The first and biggest set of errors flowed from the Paris peace conference at the end of the first world war. That saddled economies still devastated by war with an **unimaginable burden of international debt** - vast claims that festered through the next decade and beyond, poisoning international relations. Germany owed enormous sums in reparations to France and Britain, France was in hock to Britain and the US, and Britain in its turn also had huge debts to America. **These capital imbalances were a fault line in the world's financial system...**

What are the lessons for today from what followed? There are at least five: **act decisively** when the trouble starts, and to **co-operate internationally, do whatever it takes** to stem the flood tides, **keep capital flowing** across borders to wherever it is most needed, **fix the capital imbalances...**

Today's policymakers have learned from these dreadful mistakes, but they still have more to do to restore economic stability and bring down unemployment.

Read more: <https://www.theguardian.com/books/2009/may/16/lords-of-finance-liaquat-ahamed-review>

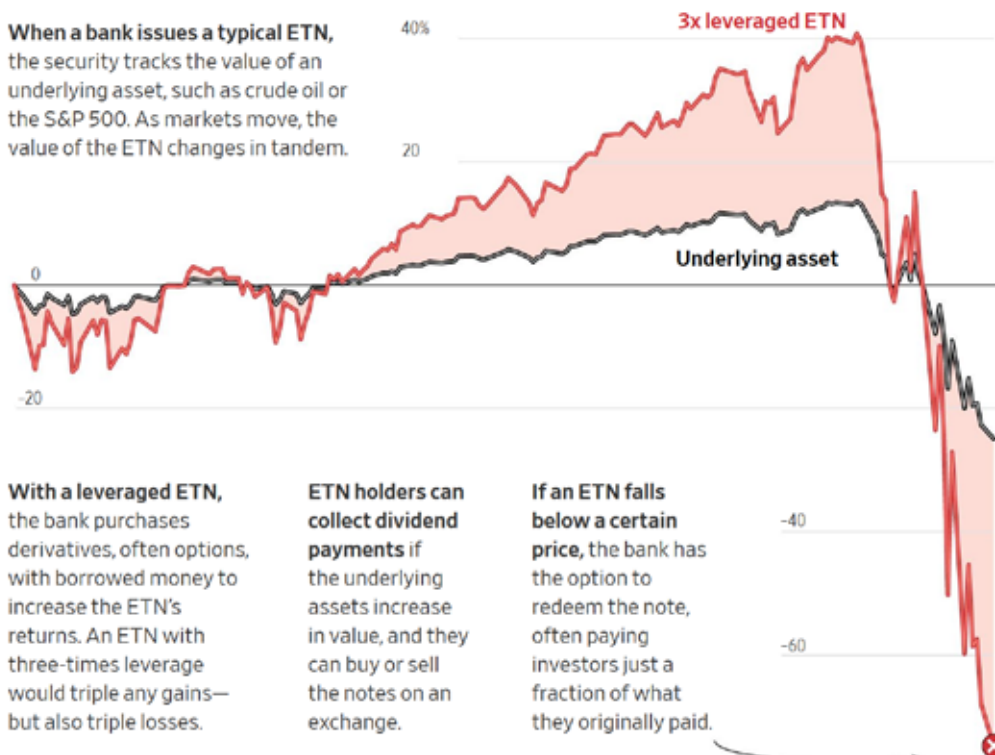
## CLIN D'OEIL À L'HISTOIRE

### 'Bankrupt in Just Two Weeks'—Individual Investors Get Burned by Collapse of Complex Securities ... *WSJ, June 1, 2020*

#### Investing on Steroids

Leveraged exchange-traded notes are complex financial instruments that use debt to amplify returns, which also increases risk.

When a bank issues a typical ETN, the security tracks the value of an underlying asset, such as crude oil or the S&P 500. As markets move, the value of the ETN changes in tandem.



Within the \$7 trillion market of structured products, banks and brokerages advertised ETNs (explained in the above graph) as offering payouts both steadier and more lucrative than plain-vanilla investments such as bonds or index-tracking funds. Most professional money managers avoided them. On the surface, ETNs don't look much different than ordinary mutual or exchange-traded funds that track a group of companies. Both products allow investors to bet on the performance of anything from the U.S. stock market to the Swiss franc to wheat. But unlike ETFs, ETNs don't own the assets they track. They are debt instruments.

Graph & article by WSJ ... [https://www.wsj.com/articles/bankrupt-in-just-two-weeks-individual-investors-get-burned-by-collapse-of-complex-securities-11591020059?mod=markets\\_lead\\_pos5](https://www.wsj.com/articles/bankrupt-in-just-two-weeks-individual-investors-get-burned-by-collapse-of-complex-securities-11591020059?mod=markets_lead_pos5)

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## LA PAROLE EST A VOUS

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*Tout ce qui est important et utile à connaître sur les investissements et leur analyse, l'environnement réglementaire, la fiscalité, la jurisprudence, etc., vous est présenté chaque mois dans le magazine mensuel 'en ligne' du GSCGI ...*

