



THREE THINGS PORTUGAL NEEDS TO DO TO TAKE A SHARE OF EUROPE'S FINANCE MARKETS IN A POST-BREXIT WORLD

António de Macedo Vitorino

As we approach 29 March 2019 the race is on for banks and financial investors to prepare for a fundamental change in the way they have been doing business in Europe in the last 25 years.

The European Union (EU) gave London more than a base for expansion in the European common markets, it also gave London the conditions to establish itself as a leader in modern global financial markets. The EU unified set of rules gave London the platform to dominate Europe's unified financial markets, cementing its position among the World's top financial centres.

It is true that London has been, along with New York, one of the main financial centres in the World since the XIX century. However, XXI century global capital markets are very different from financial markets in the XIX and XX centuries.

Globalization of the financial markets requires size and Europe gave London the grandeur it had lost after the World War I. As the hub for European financial markets operations, London became an unique place in the World, a bridge between East and West.

Will all of this be lost on 29 March 2019? The answer is inevitably "no". But since Brexit was announced we have seen an erosion of London's position in the global markets. Global players are planning for Brexit. In any context, a hard or soft Brexit, financial institutions and investors are no longer considering London as the centre of European finance. Other locations emerge wanting to take that role: Paris, Frankfurt, Amsterdam and Dublin. All have an eye for a lucrative market until now dominated by London.

The tendency seems to be for banks and other financial investors to keep a significant presence in London and open other important operation centre or centres in mainland Europe and sometimes in Ireland. Internet-based systems allow for a virtual presence anywhere in Europe, so the choice will be driven by convenience, cost, tax and the incentives local governments will give to attract these investors.

The end of London's dominance seems to anticipate the loss of English law and English courts' pre-eminence in financial law matters. Unsurprisingly, it is more difficult to change from English law and English courts to French, German or Portuguese law than moving offices from London to Paris, Frankfurt or Lisbon.

The arguments for choosing English law and English courts are clear: a sound, business friendly, reliable and trusted system of law applied by courts that are commercially aware, fast and predictable. All of these arguments lauded by London based law firms play in favour of English law and English courts.

However, banks are concerned that when they move to Europe there will be no reason to choose English law, which will be a foreign legal system after Brexit and that will not be related to them or their clients. Also the laws of EU countries will continue aligned by EU directives and regulations while English will start to deviate from EU law. This means that while contractual terms can be governed by English law, the



regulatory aspects of financial instruments will be governed by EU law and local laws harmonized by EU legislation. English law will add unnecessary complexity that will only be justifiable if the advantages of the English legal system, law and courts, significantly outweigh the advantages of keeping the entire transaction under the umbrella of a single legal system.

Another point to consider is the origin of clients and investors. While the UK was part of the EU, there was no issue for a client or investor to question the choice of English law and English courts because of the advantages of the English legal system which we highlighted above and the fact that as part of a unified and integrated market, the UK offered the best of the two worlds. After Brexit, investors will question the choice of English law and English courts in favour of their own legal system. Why should a French, Spanish, German or Portuguese client or investor prefer English law, which many times will be totally foreign to the transaction, in relation to the laws of an EU country?

In the US financial markets, NY law and NY courts is the obvious choice. US investors and those gravitating around the US, such as Asian, Latin American and Middle East investors, trust the choice of NY law and NY courts. In Europe, English law and English courts will cease to perform that role in a post-Brexit world. In the last 25 years, English law imposed itself due to the business minded approach of city of London and the weight of the European markets to which investors from other latitudes adhered.

After Brexit, English law and English courts will not be as attractive to investors, who will mistrust the added complexity and the risk of local courts having to confirm English courts judgements. English law and English courts will retain an important role in international, maybe larger than the role of City of London banks and financiers, but not the same dominant role they had until today.

Paris courts and French law are emerging as the strongest challenger, but the importance of Paris in Europe's next financial hub will depend on the ability of the country to present to the finance world a well-established, predictable, creditor and business friendly set of rules, faster court decisions and no political or ideological bias. In essence, continental European countries have a system of rules that is predictable and fair, but court decisions are less predictable, less business friendly, sometimes contaminated by ideological considerations and many times slow. Recent events in France show that it will be difficult for Paris to give the same assurances as London.

If the flaws of Europe's legal and court systems remain unchanged, English law and English courts will keep a pre-eminent role in Europe's financial markets once the short-term effects of Brexit fade away and people get used to border controls and other idiosyncrasies of a divided Europe.

As a Portuguese wishing financial investors choose Lisbon to set up their European headquarters, I propose:

- First: create a business friendly and creditor friendly legal environment, with no bias against banks and financial investors;
- Second: put together a clear set of rules, predictable, less open to variations in interpretation and not dependent on general well-intended considerations that impair the application of the law in its full force; and



- Third: set up specialised finance courts that are quick in deciding, commercially aware and practical in their decision making process.

We doubt that Portugal or any other EU country will be able to do all three things, but Europe could lead the way and issue directives and regulations to create a Pan-European unified body of rules concerning commercial borrowing and lending and other financial matters and propose that countries create specialised courts dealing with finance matters to solve matters more quickly and by way of a specialised court system gain the experience needed to better decide these issues.