



Newsletter – Financial services

Spring 2023

High-profile bank failures in the United States (e.g. Silicon Valley Bank) were followed by market reactions in the United States and Europe (e.g. the takeover of Credit Suisse by UBS). Prior to these reactions, a 10th set of sanctions against Russia complicated the work of the European financial sector with additional anti-circumvention measures targeting trade that could involve Russia.

In addition, a criminal trial in Switzerland against former executives of Gazprombank's Swiss branch regarding the enlistment of a close friend of the President of the Russian Federation shows greater pressure on financial sector executives. This seems to evidence that executives are increasingly facing performance obligations and criminalization of their shortcomings in the fight against money laundering/terrorist financing (AML/CFT) and the implementation of international sanctions.

G7 sanctions, including the exclusion of Russian banking players from the Swift network, are in turn benefiting its Chinese rival, the Cross-Border Interbank Payment System (CIPS). This is further amplified by the circumventing choice of Brazil and China since March 2023 to trade in their own currencies.

Regulatory update with the financial sector remains sustained with our various usual sections.

1. **Financial Sanctions against Russia/Belarus**

The European authorities released a 10th set of sanctions adopted on 25 February which coincided with the first anniversary of the Russian invasion of Ukraine. It widened the circle of persons in the financial sector subject to the freezing of assets, targeting three additional banks¹ as well as the Russian sovereign wealth fund. It adds new export bans as well as new anti-circumvention measures (e.g. a ban in principle on Russian transit of goods exported elsewhere than to Russia) which could be reinforced soon with an 11th set of sanctions².

The 10th set of sanctions even impacts the governance of EU credit institutions since it bars any participation, since 27 March 2023, of Russian nationals (other than dual European nationals) or natural persons residing in Russia, within the governing bodies of the owners of *critical entities*³ (our [latest newsletter](#)), a notion that targets, for the banking sector, the EU credit institutions.

It should be noted that the effects of the Russian oil price cap system, whose European framework was set in early February⁴ and essentially came into force in early April, will certainly be put to the test in the recent context of the rise in oil prices, triggered by the production cuts decided on in early April by OPEC countries and Russia.

¹ Alfa-Bank (the largest private bank), Rosbank (one of the largest financial structures in Russia) and Tinkoff Bank (one of the three largest banks in Russia by number of active clients).

² The criminal news of the cyber section of the Paris Prosecutor's Office (18 January 2023) illustrates a situation of circumvention with the dismantling of a crypto-asset exchange platform (BITZLATO), allowing the rapid conversion of crypto-assets of the type bitcoins, ethereum, litecoins, bitcoins cash, dashes, dogecoins and tether USD into rubles.

³ The notion of critical entity is assessed in light of the regulatory framework on digital operational resilience for the financial sector adopted in mid-December 2022 (so-called "DORA" rules).

⁴ And specified at the end of February in the European Commission's guidelines on capping oil prices.



It is worth noting that the banking and insurance regulator (ACPR) has included in its 2023 supervision priorities the verification of the measures implemented by the sector to apply national and international sanctions in the context of the war in Ukraine.

2. Fight against money laundering (AML/CFT)

2.1 European developments

In March 2023, the Financial Action Task Force issued guidance on the implementation of a recommendation that it had strengthened in March 2022 (Recommendation n°24 on transparency and beneficial ownership of legal persons). The new standard requires countries to ensure that competent authorities have access to adequate, accurate and up-to-date information on beneficial owners, by adopting a multi-pronged approach (combination of different mechanisms) for the collection of information on beneficial owners. Reporting institutions must adapt this multi-pronged approach to the risks faced by the jurisdiction in which the legal entity is registered.

The evolution of these international standards naturally impacts the risk-based approach reserved for clients registered in third countries or territories deemed high risk by the European Commission. The publication in the Official Journal at the end of February 2023 of the list updated in mid-December 2022 (effective since 16 March 2023)⁵ requires that reporting institutions apply enhanced due diligence measures to their customers established in such countries/territories.

2.2 National developments

The most significant development in the area of AML/CFT came from a Decree establishing the list of national politically exposed functions⁶. This Decree remedies a shortcoming in the French rules that was pointed out by the FATF in its last assessment of France⁷, and recently pointed by the French *Cour des Comptes* in December 2022. With this Decree, France puts an end to an overly restrictive approach to the status of politically exposed person (PEP), which simply had adopted the European list without accompanying it with a risk analysis adapted to the French model. The new list uses the persons listed in a 2013 law on transparency in public life. The Decree provides for a gradual entry into force when the clients are from these new categories of PEPs. It is not certain that this more precise definition of PEPs will lighten the burden of the institutions subject to the law⁸, even if they often had difficulties identifying French PEPs and their relatives.

In the sector of institutions under the supervision of the French securities regulator (AMF), the latter indicated at the end of February to implement the recent guidelines of the European Banking Authority on the role, tasks and responsibilities of the management body with regard to AML/CFT. As a reminder, these guidelines specify that the institutions concerned must designate a member of their management board to be ultimately responsible for AML/CFT.

Finally, compliance officers will be keen to go through the March 2023 publication of a guide released by the French Anti-Corruption Agency (AFA) on the use of public information databases useful for assessing the integrity of third parties. This Guide is clearly relevant for institutions subject to the AML/CFT.

In addition, institutions subject to the AML/CFT must also be aware of the update of the French risk assessment by the dedicated committee (COLB) which noted in January 2023 that the use of complex financial arrangements, the rise of digital assets as well as transactions involving the use of cash (money

⁵ With the addition of 5 states/territories (including Gibraltar) and the removal of 3 others. Note that differences remain with the FATF black and grey lists, updated at the end of February 2023.

⁶ Ruling (*arrêté*) of 17 March 2023.

⁷ Focus on the requirement deriving from Recommendation #12.

⁸ Although the National Court of Auditors so argues.

remittance and electronic money instruments) trigger very high risks for the financial sector. This national assessment will be followed by a forthcoming update of the guidelines issued by the two French supervisors (ACPR and AMF).

In addition, a Decree of 3 February 2023 established a very specific list of payment & e-money products/services that can benefit from simplified AML/CFT vigilance.

In terms of AML/CFT sanctions, it is worth noting that a sanction issued on 15 February by the ACPR's Enforcement Committee against a credit institution adds a reminder of the obligation (i) to be vigilant when customers are the subject of judicial requisitions, (ii) to build scenarios that allow the detection of transit accounts or collecting accounts, or (iii) to set up a system for monitoring and analyzing customer transactions that takes full account of their income and estate.

3. Digital identity

At the end of March 2023, the French personal data supervisor (CNIL) published its first thematic guide dedicated to digital identity. The guide, which is aimed at the general public, is a useful reminder that the “*France Identité*” application allows any holder of a new national identity card (the CNiE) and a compatible smartphone (equipped with “contactless” or NFC capability) to generate a digital identity. This identity allows the holder to identify and authenticate himself online in a secure manner with public or private service providers linked by agreement to *FranceConnect* or the Ministry of the Interior.

4. Payment services

In anticipation of the proposed recast of the 2nd Payment Services Directive (PSD3) by mid-2023, the European Commission released its impact assessment of PSD2 in early February 2023. Beyond the question of whether PSD2 has achieved the objectives set by the European legislator, what is interesting is the list of PSD2 improvements that are suggested.

Three themes emerged from this assessment: the evolution of open banking (enlargement to open finance), the reinforcement deemed necessary on customer protection and the evolution of the scope of application and exclusion regimes. On this third theme, the Commission stressed the opportunity to merge the 2nd E-Money Directive into the future PSD3 and even to assess payment services in a more conceptual than descriptive manner. Essentially, the Commission went along the Q&As it has been involved since about 2017, with a final salvo released in January 2023. On open banking, by suggesting a single European standardization of dedicated application programming interfaces (APIs), the Commission is within the standardization trend that began at the end of November 2022 with the publication of the rulebook for the new SPAA scheme (SEPA Payment Account Access).

Without being exhaustive, the Commission also suggested a simplification of strong authentication for account access and a revision of the rules on liability in situations of unauthorized transactions. This last change is also based on the recent draft regulation on instant payments, which imposed a greater degree of vigilance on the execution of transfers and the verification of beneficiaries indicated by clients. This last change is welcome, as recent case law⁹ shows a tendency to recognize a duty of vigilance on the part of the banker in situations where the user is a victim of Authorised push payment (APP) fraud.

5. Insurance

The law of 9 March 2023 on various provisions for adapting to European Union law in the fields of the economy, health, labor, transport and agriculture (known as the DDADUE) was published in the official Journal of 10 March 2023. In the insurance sector, it ensured that inflation is taken into account in the

⁹ See notably court of appeal of Metz of 9 February 2023.

calculation of the thresholds of the so-called “Solvency II” Directive, in accordance with the recommendations of the European Commission¹⁰.

It also made it possible to make pan-European individual retirement savings products (PEPP) truly portable, already mentioned in [previous newsletters](#), fully effective and, above all, to recognize the ACPR and the AMF as the supervisory authorities for the various PEPP providers (insurers, investment services providers and management companies).

In addition, a Decree of 16 March 2023¹¹, applicable as of 1 June 2023, specified the conditions under which a consumer policyholder can cancel insurance contracts (property/casualty insurance and life insurance) within “*three clicks*”, including for contracts in progress at that date. By facilitating the change of insurer, the measure is supposed to promote competition and reduce the cost of insurance. In practical terms, the insurer must set up a “cancellation button” (from the online interface made available to policyholders), to the extent it offers the policyholder the possibility of concluding contracts electronically on the day of cancellation¹². Above all, the insurer must manage the evidence surrounding the termination and protect itself against the risk of being accused of a lack of advice on the effects of an untimely termination that could place the policyholder without coverage, particularly when such coverage is mandatory.

A second Decree, expected shortly, is due to extend this “three-clicks” cancellation to many other “everyday services”¹³. The impact study published ahead of the law apparently excluded contracts concluded in the context of financial services. It remains for the Decree to confirm this exclusion, which is not a foregone conclusion (the law gives the competent minister a great deal of latitude).

On the subject of “cyber” risks, an ACPR summary of the 2022 declaratory survey on insurance companies’ management of the security of information systems provides useful information on the good and less good practices of institutions within the insurance sector. It emphasizes the importance of systematizing risk analysis on information system security issues, particularly in light of the massive use of cloud services¹⁴. The ACPR is resolutely working to increase the sector’s resilience to cyber risk and is anticipating the work required for the DORA regulation to come into force in January 2025.

Finally, in a statement issued in mid-March 2023, the ACPR is threatening to crack down on intermediaries marketing consumer credit insurance, claiming to be acting “in an ancillary capacity” when they are in fact acting “in a principal capacity”¹⁵.

6. Sustainable finance

The aforementioned DDADUE law empowered the Government to implement the Corporate Sustainability Reporting Directive mentioned in our [latest newsletter](#).

In a statement released in mid-February, the AMF seemed to be critical of the negative effect of the European texts on the publication of sustainability information in the financial services sector (SFDR Regulation). It noted that while the Regulation requires financial actors to publish information on their

¹⁰ Mid-February 2023, the ACPR said it wished to ensure that insurance institutions improve their “Solvency 2” self-assessment of the management, audit trail and measurement of the quality of the data used in the processes for calculating prudential indicators (technical provisions, balance sheet, required solvency capital).

¹¹ Pursuant to Article 17 of the Act of 16 August 2022 (emergency measures to protect purchasing power).

¹² Legislative work suggests that the requirement would also apply to contracts negotiated face-to-face and ultimately concluded using a remote communication technique (sometimes referred to as phigital).

¹³ Since taken in application of a general provision of the Consumer Code on contracts concluded at a distance (Article 15 of the aforementioned law of 16 August 2022).

¹⁴ The ACPR specifies that the reversibility of services must be systematically provided for and the actual level of security of these services must be measured. These findings are reminiscent of very similar requirements in the banking sector, stemming from the Order of 3 November 2014 on internal control, amended in 2021.

¹⁵ According to the ACPR, this applies to intermediaries whose main activity consists of selling services or goods unrelated to the loan insurance product being marketed (boilers, solar panels, furniture, vehicles).



sustainability communication and practices, it does not impose a minimum requirement, which eventually does not allow the investor to assess the nature or extent of the manager's sustainability commitment. The AMF is therefore seeking the European Commission to amend existing Regulation to introduce minimum criteria on the environmental impact of financial products categorized as "article 8" or "article 9". This umpteenth criticism of the European legislative framework comes at a time when the European Commission itself is publishing a correction to the regulatory technical standards of the SFDR Regulation on the content and presentation of information to be published in pre-contractual documents and periodic reports relating to financial products that invest in environmentally sustainable economic activities.

At the end of March, the AMF published a study revealing that by the end of 2021, 20% of French funds representing half of the assets under management were funds categorized as "Article 8" (promoting environmental or social characteristics) or "Article 9" (claiming a sustainable investment objective), with the former accounting for more than 47% of assets under management.

7. Investment services and asset management

In the decentralized finance sector, it should be noted that the aforementioned DDADUE Act has empowered the Government to make the necessary adjustments to French legislation to implement the European regulations for DLT market infrastructures (Pilot Regime Regulation¹⁶), which has entered into effect on 23 March. Pending legislative and regulatory changes, the AMF reminded the public at the end of February 2023 that interested applicants wishing to operate a DLT market infrastructure may file an application following the recent guidelines issued by the European Securities and Markets Authority (ESMA)¹⁷.

An amendment to the AMF's General Regulation (see release of 11 February 2023) clarifies that managers of French investment funds are required to publish the net asset value of their funds in the event of a suspension of subscriptions and redemptions of their units or shares when they are able to calculate them accurately.

8. Other European or national developments impacting financial services

The aforementioned DDADUE law empowered the Government to proceed with implementation and other legislative adjustments to take into account numerous European texts, such as the MiCA Regulation (with the necessary adjustment concerning French virtual asset providers), the various texts associated with the Regulation on the digital operational resilience of the financial sector (known as "DORA")¹⁸, the Directive on the accessibility of products and services, in particular financial products and services (2019/882), or the Directive on credit purchasers and credit managers (2021/2167).

In mid-February 2023, the ACPR published the summary of a survey on banking offers for minors to better reveal the shortcomings and areas for improvement. For the institutions of the sector, this is an opportunity to focus on the contractual aspect of such offers and to properly measure the applicable requirements, whether they concern the protection of minors or the AML/CFT. This summary echoes the need to take into account the vulnerability of elderly clients in the marketing process of financial products (see the academic report published by the ACPR in February 2023).

¹⁶ EU Regulation 2022/858, already mentioned in [our previous newsletter](#).

¹⁷ The AMF indicates that two categories of securities under French law could constitute financial securities admitted to trading in a "DLT market infrastructure": on the one hand, "registered" financial securities registered in a shared electronic recording device resulting from the 2017 "blockchain" ordinance, and on the other hand, "bearer" financial securities registered in a shared electronic recording device in accordance with the conditions set forth in the Pilot Regime.

¹⁸ The European Supervisory Authorities held a discussion on 6 February 2023 on the implications of DORA, in view of the expected Regulatory Technical Standards (RTS). At the same time, the French government communicated in early April about the availability of trusted and SecNumCloud qualified cloud offerings.

