



Newsletter – Financial services

WINTER 2019-2020

While recent news in France largely revolved around the debate on pension reform and the strikes that go with it, technical discussions in connection with financial services during the last quarter of 2019 in France and in Europe were dense and have notably focused on State sovereignty issues and specifically that of the European Union, through private initiatives like stable coins or the PEPSI project¹.

The most significant discussions in the financial sector revolved around (i) electronic identity (through KYC and facial recognition) and (ii) the evolution of finance in the light of climate change issues². On electronic identity, some are calling for an economic sacrifice in the name of freedoms, alike what happened on the protection of personal data (GDPR).

Finally, the Brexit finally seems to have found its epilogue.

1. **Brexit**

Brexit appears to be on target after the UK Parliament voted the EU/UK withdrawal agreement on 17 October 2019³, which suggests that the United Kingdom will leave the EU as early as 31 January 2020, with the continuation of EU rules until at least 31 December 2020.

Prior to these significant developments, work continued in Europe and France to ensure that a regulatory framework is in place to allow post-trade (clearing) operations to continue in the EU even in the event of Brexit without a withdrawal agreement. This work included the adoption of homologation rulings⁴ for clearing houses and central securities depositories in the United Kingdom, noting the lapse of previously adopted texts. The EU has taken the same step⁵ but for a smaller number of entities, which raises questions about the status of some of the above entities.

2. **Anti-money laundering measures (AML-CFT)**

2.1 **Cross-cutting regulatory developments**

At the European level, the European Joint Committee issued guidelines to improve European cooperation between supervisory authorities in their supervision of the cross-border activities of financial institutions⁶. These guidelines apparently echo the failings of European cooperation that were highlighted by the revelation of the Danske Bank affair. Above all, they require institutions with cross-border business in at least three countries to have specific AML/CFT governance dedicated to such business. Such guidelines are also part of the evolving framework of the European passport.

¹ An acronym which stands for the “Pan-European Payment System Initiative”. This project aims at creating a European framework for international payments upon the model of existing major American (Visa/Mastercard) or Chinese (Alipay) networks.

² The recent publication of the European Commission’s Green Deal is an illustration. Another illustration of such trend can be found in the Ordinance of 9 October 2019 on the modification of the greenhouse gas emission allowance trading scheme, which also reflects the evolution of finance in Europe.

³ Published on 12 November in the Official Journal; Article 126 provides that the transitional period shall end on 31 December 2020.

⁴ Rulings of 30 October 2019.

⁵ ESMA release on 23 December 2019.

⁶ JC 2019 81, published on 16 December, applicable as of 10 January 2020.



In France, the French securities regulator (*Autorité des Marchés Financiers* or AMF) finally issued its guidelines for the asset management industry⁷. Not surprisingly, it expressly referred to some of the developments of the European Joint Committee's guidelines on risk factors, in particular on risk classification requirements in relation to the products, countries and clients concerned.

In addition, the French Banking Regulator (*Autorité de contrôle prudentiel et de résolution* or ACPR) and the AMF released on respectively 16 and 30 December 2019 the sector risk analysis of the activities undertaken by the entities under their supervision. It followed the same methodology than that of the French AML/CFT guidance council (COLB)⁸. Previously, the ACPR had also released specific analysis in connection with (i) intra-group vigilance and (ii) money remittance activities⁹.

Beyond the mere circle of financial institutions, statutory auditors were notified applicable new professional standards of practice¹⁰, now in compliance with the 4th Directive.

More broadly, The French Financial Intelligent Unit (Tracfin) has released its annual report "trends and risk analysis". The report focuses on sectors of the economy that are used by organised crime (such as the gambling sector) and notes that luxury real estate is often used by foreign politically exposed persons. It also deals with the fight against tax fraud (e.g. VAT fraud) and the fight against terrorist financing, noting a significant increase in suspicious transaction reports.

Financial institutions will necessarily be interested in a series of decisions rendered by the French Supreme Court (*Cour de Cassation*) on 11 September 2019. They shed very important light on the fight against money laundering and tax fraud, including the starting point of its statute of limitations as well as the bases for calculating the applicable proportional fine. There is no doubt that these new developments should benefit a bank which was heavily sanctioned at the beginning of 2019.

Finally, as France is due to release very shortly regulations implementing the 5th European Directive¹¹, it has already complied with the European requirements for cross-border tax arrangements, known as DAC 6¹². It has also just substantially amended its list of non-cooperative states and territories (known under the French acronym ETNC)¹³, with inevitable consequences for financial flows to and from the new territories or those that have just been removed from the French list.

2.2 Developments linked to the digitalisation of access to financial services

At European¹⁴ and global level¹⁵, there is growing interest for digitalisation given it is an enabler to cross-border deployment and provides fluidity of financial services. It is also indicative of regulatory changes in line with technological developments.

⁷ 3 positions and 2 positions-recommendations (n°2019-14 to 2019-18), two of which (on the risk and risk factor approach) are more innovative compared to the guidelines previously in force. It thus complies with the 4th Directive (n°2015/849), pending the 5th Directive (n°2018/843).

⁸ This involves cross-referencing threats on the one hand and vulnerabilities on the other, for a risk rating at three levels (low, moderate or high exposure).

⁹ Analysis dated September 2019, published on 2 October 2019. In this sector and on the rules on freezing assets, one can note that a bank lost its appeal before the *Conseil d'Etat* against a decision of the ACPR Sanctioning Committee.

¹⁰ NEP 9605 issued on 3 November 2019.

¹¹ With no less than 5 regulations expected (one Ordinance, one Decree and three Rulings).

¹² Ordinance n°2019-1068 implementing EU Directive n°2018/822 (applicable as of 1 July 2020), which must be supplemented by a Decree setting out the information contained in the declaration relating to cross-border devices.

¹³ Ruling of 6 January 2020, including the introduction of the British Virgin Islands.

¹⁴ Report to the European Commission of an expert group of 13 December 2019 issuing 30 recommendations for the removal of barriers to financial innovation.

¹⁵ FATF Draft Guidance on Digital Identity, released for consultation on 29 November 2019. It is interesting to note through this project that remote identification may no longer be systematically associated with enhanced vigilance.



In France, authorities responsible for supervising financial institutions¹⁶ have confirmed that they are willing to amend the regulatory framework to take account of the findings of the ACPR-AMF fintech forum¹⁷ aiming at facilitating remote identification, including through:

- a Ruling (*arrêté*)¹⁸ on the certification of identity verification services;
- a Decree¹⁹ abolishing the obligation to verify domicile prior to opening a bank account;
- all in the context of position paper of the French data protection authority (CNIL) on the real issues at stake in the use of facial recognition²⁰.

2.3 Status of Virtual Asset Service Providers (VASPs)

The entry into force of the French regulatory framework governing VASPs²¹ comes at just the right time given that they have become subject to AML/CFT on 10 January 2020 pursuant to the 5th Directive²².

At the European level and beyond the mere AML/CFT issue, the European Commission has launched²³ a public consultation on the EU framework for markets in crypto-assets. In this consultation, the EC is drawing the classical distinction between payment tokens, investment tokens and utility tokens. This consultation is linked to initiatives, mainly from the private sector, aimed at creating new payment products, such as the "PEPSI" initiative²⁴ or stable coins projects²⁵.

3. Europe of payments

In our [previous newsletter](#), we indicated that the French Observatory for Means of Payment had detailed the contours of the French migration plan aiming at the full and complete application of the new EU strong authentication rules (DSP2) by the end of March 2021, instead of the 14 September 2019 set in EU regulations. Since then, the same Observatory has curiously noted that the European deadline of 31 December 2020 set by the European Banking Authority (EBA) in an opinion of 16 October 2019 was in line with the French migration plan²⁶.

In any case, we can expect the disappearance of 3D Secure SMS as of 1 January 2021 and during 2020 a series of campaigns to raise awareness of end customers to the new EU strong authentication rules as well as means of payment combining biometrics with more traditional authentication factors (e.g., possession or knowledge).

¹⁶ Notably the ACPR, at its own annual conference on 4 December 2019.

¹⁷ 17 September 2019 (on KYC for private individuals) and 24 December 2019 (on KYC legal entities).

¹⁸ Ruling expected to be released very soon.

¹⁹ Decree expected to be released very soon. This Decree was part of the demands of the banking profession through the Fintech ACPR-AMF forum on remote KYC.

²⁰ Baseline of 15 November 2019. It is interesting that since this publication, a member of the Government revealed the existence of a project, on an experimental basis, of real-time facial recognition.

²¹ With a multitude of Decrees, Rulings and Instructions issued between the end of November 2019 and 19 December 2019. In our [last newsletter](#), we had announced the entry into force of the French rules on Initial Coin Offerings (ICOs). The entry into force of the rules governing VASPs followed shortly afterwards, setting 19 December 2020 as the starting point for the 1 year period until which they will need to apply for the required or optional licensing applicable in France (grandfather clause).

²² Mentioned as providers of "exchange between virtual and legal currencies" and "custody portfolios" services.

²³ 19 December 2019.

²⁴ Which stands for « *Pan-European Payment System Initiative* ».

²⁵ A sub-category of cryptographic assets whose value is intended to be pegged to another asset or a basket of underlying assets. It is precisely on this asset that Facebook is trying to develop its "Calibra" and that central banks (e.g. French Central Bank) intend to work on the emergence of the "e-euro".

²⁶ It also ties in with the migration plan of the ACPR and the Banque de France on the setting up by payment service providers of the interfaces for access to payment accounts.





4. Europe of investment services

It is worth highlighting the release of two expected European regulations²⁷ since the scope of the market players and products at stake is quite broad and will impact the entire financial sector. Such regulations are the end outcome of the European Commission's 2018 action plan for sustainable finance²⁸. The consequences of the first of the two regulations will be perceptible not only vis-à-vis end clients but also in the operational framework of information exchanges between those who structure the financial products and their distributors, even in the event said products are off scope of the regulation. As authorised by the Disclosure Regulation, France went beyond the EU core requirements by adding information obligations to the said market players²⁹.

During Q4 2019, the Joint Committee of Financial Supervisory Authorities also took a position on the application of the PRIIPS Regulation³⁰ to the bond market and the need to amend the same Regulation on the content of the key information document.

During the same period³¹, the AMF has updated its guidance on the practical implementation (i) of MiFID2 rules³² and (ii) rules governing UCITS, AIFs and money market funds.

5. Europe of insurance

In the insurance sector, the European legislator revised the Solvency 2 Directive³³ thereby drawing the consequences of the new role of the European Banking Authority (EBA) in preventing the use of the financial system for money laundering or terrorist financing.

In France, the ACPR has updated 7 recommendations³⁴ to essentially reflect the new rules on the distribution of insurance products applicable as of 1 October 2018. In response to recent event that revealed malpractice, the ACPR issued two news releases:

- On 12 November 2019: as a result of ACPR's monitoring of insurers' undertakings against cyber risks, which were found to be out of the control of insurers or their distributors, particularly with respect to implied warranties; and
- On 9 October and 26 November 2019: reacting to the opinion of the French Financial Sector Consultative Committee (known in France as the CCSF) on telephone solicitation in the insurance

²⁷ The "Disclosure" and "Climate Indices" Regulations were referred to in our [last newsletter](#): EU regulations of 27 November 2019 n°2019/2088 on the publication of sustainability information in the financial services sector and n°2019/2089 on the "Climate Transition" and "Paris Accord" benchmark indices and the publication of sustainability information for the benchmark indices. The entry into force of the Disclosure Regulation is set for 10 March 2021, which takes into account the incorporation of delegated regulations yet to be released in the official journal.

²⁸ It should be noted, however, that these Regulations must also be read in conjunction with the "Taxonomy" Regulation, on the establishment of a framework to promote sustainable investments given that there are indications that the latter's entry into force is due to be postponed to 2022. The issue of these postponements of entry into force is rather not easily understandable with other publications, in particular those of the EBA, which has called on credit institutions to act without further delay in sustainable finance.

²⁹ In its recently published Energy and Climate Change Act Law n°2019-1147 of 8 November 2019, whose entry into force is due to match that of the EU Regulation.

³⁰ Retail investment products.

³¹ The AMF and its Enforcement Committee also brought light to interesting and worth mentioning deferred prosecution agreements and decisions of sanctions. The AMF was later on more didactic with its December 2019 report on on-site inspections of management companies' cyber security systems.

³² Various positions-recommendations related to professional ethics, in particular an overhaul of existing positions-recommendations including n°2019-12 which specifies some of the professional obligations of investment services providers and portfolio management companies in their relations vis-à-vis their non-professional clients.

³³ EU Directive 2019/2177 of 18 December 2019.

³⁴ All exclusively related to the insurance sector, with the exception of the one concerning the processing of claims (change made on 19 December 2019).





sector³⁵, the ACPR audited an insurance broker outside France who had outsourced a call center in Morocco, which must have been previously subject to criticism from a few dissatisfied insurance policyholders³⁶.

Lastly, one may raise the ACPR Enforcement Committee's decision of 25 November 2019 against a European insurer operating under the freedom to provide services. It illustrates that the ACPR not only can but in effect does exercise its ability to issue sanctions, even against financial institutions that are not established in France.

6. Other European developments impacting financial services

As announced in our [previous newsletter](#), France has reformed its system in relation to the public offering rules³⁷ in order to ensure consistency between the European requirement to publish a prospectus and the mere possibility for an issuer to offer its financial securities to the public³⁸. In addition to the said consistency work, the law is amended to raise the threshold (to €8 million) above which the issuance of equity offers must arise through an investment service provider.

In addition, following our [previous developments](#) on the protection of whistleblowers, European law is reshuffling the cards with its own rules³⁹.

The EU is also strengthening its consumer protection rules with a Directive⁴⁰ which, although not specifically aimed at financial services, concerns in particular marketplaces dedicated to financial services and banks active in the trendy "cashback" service.

Finally, the conditions for exercising the European passport may change in the near future⁴¹.

7. Other national developments impacting financial services

Within the framework of the law for the growth and transformation of companies (PACTE) mentioned in our [previous newsletters](#), two Decrees impact on the investment framework of French life insurance contracts⁴². Such Decrees complement the regulatory framework to include within insurance contracts unit-linked assets backed by ESG labels (Environmental, Social and Governance).

In the credit sector, credit institutions were compelled to adjust in 2019 to technical developments relating to access to the French Central Bank Credit Default Database (known under the French acronym FICP); a Ruling to be shortly released⁴³ is due to enhance the effectiveness of the said database, in particular by (i) authorising its consultation with a view to proposing offers of specific banking services prior to the allocation of payment means and (ii) introducing a solution for notarisation of proof of consultation where such consultation is mandatory.

³⁵ Notice of 19 November 2019. The same CCSF issued other opinions over the same period, such as on (i) the legibility of contracts in the context of supplementary health insurance or (ii) financial inclusion.

³⁶ This only confirms that outsourcing schemes always ought to be treated seriously and that offshore outsourcing does not necessarily preclude on-site audits by the French regulator.

³⁷ Ordinance of 21 October 2019, supplemented by two Decrees and a Ruling.

³⁸ It draws the consequences of a European regulation already applicable since 21 July 2019 which governed public offerings that French law had so far excluded from the scope of constraints. Henceforth, a public offer is now defined only to determine whether a prospectus is required (or not).

³⁹ EU Directive 2019/1937 of 23 October 2019 to be implemented by 17 December 2021.

⁴⁰ EU Directive 2019/2161 of 27 November 2019 whose implementation is expected by 28 November 2021.

⁴¹ For the banking sector (cf. draft amendments to the rules proposed by the EBA on 13 November 2019).

⁴² A Decree of 14 November 2019 and another of 23 December 2019, respectively with respect to the distribution of private equity in life insurance and the implementation of "Eurocroissance" life insurance contracts.

⁴³ The Decree to be published also responds to operational needs that have arisen during the implementation of the procedure, such as the situation of an institution that is in the process of having its license withdrawn.

