



Newsletter – Financial services

SPRING 2020

After the worldwide contamination of financial markets by the coronavirus, the credit sector may face the risk of borrowers claiming force majeure¹ or the semi mandatory moratoriums to suspend their reimbursements. These waivers may be debated in the future before the courts...provided that the latter can handle the claims.

The decisions taken by central banks and banking supervisors (in particular the European Banking Authority) initially reassured on the short/medium-term liquidity of the credit sector. With respect to solvency of the sector, the massive debt buyback program initiated by central banks and in France with the government guarantee of 90% of outstanding credit granted to companies as of 16 March (for a total of €300 billion) could possibly enable some companies to resist the effects. This is provided that banks and the Government are able to absorb the related administrative burden with the said credit/guarantee.

In a few months' time, it cannot be ruled out that profits made by some during the stock market crisis through short selling² in the event of market tension may be challenged or at least the economic usefulness of securities lending might come under tighter scrutiny.

The other past / expected regulatory news now appears to be totally overshadowed or outdated, so that the continuity of current projects, such as the stable crypto-currency initiatives or the European Payment Initiative³, may be questioned.

1. Impacts of the outbreak

Once the health pandemic was established⁴, the markets showed signs of contamination, which was confirmed in the following days. These were immediately followed by epidermal like reactions from the authorities and alarming symptoms from the markets.

In France, the Government worked on the cure by getting Parliament to pass –in 4 days– a law⁵ allowing it to declare a health state of emergency and empowering it to adopt –through fast track laws (*ordonnances*)– economic emergency and adaptation measures against the epidemic⁶. The financial component of said measures is contained in the Amending Budget Act⁷, which directly impacts on credit to business. The French strategy aims ensuring that employment contracts are maintained (with public compensation) and self-employed so that all can continue to repay their personal credit and liabilities.

¹ It should be noted that while the Government/French State has recognised the Coronavirus as a case of force majeure for procurement contracts, such assertion cannot be valid for private contracts, i.e. this would leave the courts to decide on this. For the record, under French law and according to established case law, the conditions and consequences of the Civil Code may be the subject of agreements between the parties of a contract.

² As a reminder, a short seller sells a security by betting on its decline of value to a threshold at which he intends to buy it back. Once the expected threshold is reached, the seller becomes the holder of the security again and pockets the spread. If the short seller has taken the precaution of avoiding being unable to settle/deliver the securities, he has generally accompanied such short sale to a securities borrowing transaction.

³ Previously labelled as the “Pan-European Payment System Initiative” (PEPSI) to designate the future European framework for international payments to challenge the Visa/Mastercard and Alipay schemes. A position paper was due to be released at the end of March 2020.

⁴ On 12 March 2020 by the World Health Organization (WHO).

⁵ Emergency law n°2020-290 of 23 March 2020 aiming to deal with the covid-19 epidemic. This law reinforced the legal basis for population containment measures.

⁶ The law was adopted in record time and is supplemented by a draft organic law aimed at preventing a possible backlog of requests at the level of the Constitutional Council.

⁷ Amending Budget Act n°2020-289 of 23 March 2020, adopted even faster than the covid-19 law.



1.1 Authorities' responses to market and economic contagion

Beyond the quasi physical containment measures applied around the world⁸, the Authorities tried to prevent the collapse of:

- markets through the intervention of supervisory authorities in an attempt to curb contamination by putting strong pressure on short selling⁹ or even banning it in certain European Union countries¹⁰; plus
- the economy via an accommodative monetary and prudential policy¹¹: central bank intervention to ensure liquidity in the credit sector¹² and support for the debt market¹³.

Following these developments, the Government referred the matter to the Parliament to adopt a law empowering the former to legislate by way of fast track laws (*ordonnances*) (Article 11). The areas of empowerment are numerous (criminal, civil, corporate, administrative, social, etc.) and include 43 empowerments with a view to adopt 24 fast track laws, some of which are expected to be effective as of 26 March. Those impacting more specifically on financial services relate to:

- contract law for non-public legal entities carrying out economic activity vis-à-vis their clients and suppliers (e.g. payment deadlines and penalties);
- administrative timeline and procedures (investigations, disciplinary proceedings, approval), unless the former result from already rendered court decisions;
- adaptation, interruption, suspension or extension of mandatory period, lapse, foreclosure, statute of limitation, unenforceability, forfeiture of a right, termination of a license / an approval or cessation of a measure; and
- adaptation of the provisions relating to the organisation of the Public Investment Bank in order to strengthen its capacity to grant guarantees for the credits to be issued by the banks.

At the same time, the Parliament adopted an Amending Finance Act, whose core objective is to support businesses by providing State guarantee to:

- insurance and reinsurance operations underwritten before 31 December 2020 on credit insurance risks relating to SMEs and Mid-Size Institutions located in France; and especially

⁸ For France, via Decree n°2020-260 of 16 March 2020, applicable on 17 March and an order of 14 March (amended) for exemptions from the ban on shops and other public places.

⁹ First by the ESMA, which lowered the notification threshold for short sales (from 0.2% to 0.1% of the issued share capital) by triggering the notorious Article 28 of the Regulation on Short Selling (n°236/2012), so much criticised by the United Kingdom ahead of Brexit (cf. ECJ of 22 January 2014 C-270/12).

¹⁰ Some national authorities have implemented the ban on such sales as of 17 March. France first activated the mechanism provided for in Article 23 of the said Regulation, before triggering, like Spain and Italy, the ban under Article 20, a decision duly validated by the European Authority (ESMA).

It is worth noting that in a report released on 2 October 2019, the French National Assembly recommend that a presumption of abnormal market functioning should apply "*in cases where the extent of short selling of a financial security would exceed a certain limit (volume traded, percentage of capitalisation or free float, etc.)*".

¹¹ Release of 12 March 2020 of the European Central Bank (ECB), including the authorisation for banks:

- use the capital and liquidity buffers (including those of Pillar 2);
- to follow a less stringent approach to the composition of Pillar 2 capital.

The position of the ECB is similar to the one of the EBA which –rather awkwardly– agreed on 20 March to postpone to 2021 the stress tests planned for this year! In the insurance sector, the European Authority (EIOPA) has also taken an accommodating position.

¹² First on 12 March 2020 with the Targeted Long-Term Refinancing Operations (TLTROs).

¹³ Then on 18 March by an emergency debt buyback program of €750 billion.



- loans granted between 16 March and 31 December 2020 by credit institutions and finance companies to companies affected by the Coronavirus, up to €300 billion.

It is particularly the latter mechanism¹⁴ that will be expanded in the coming days/weeks/months, provided that companies can gather the required documents and records¹⁵ so that the loans granted can benefit from the State guarantee. **Whether you are a borrower or a lender, La Tour International is at your disposal to assist you in the implementation of this scheme.**

1.2 Implementation of continuity plans

Financial sector institutions have had to put their business continuity plans to the test. Authorities said they were monitoring the deployment of these business continuity plans, for which they are liable, subject to the above-mentioned adjustments to the law currently in force.

It can be noted that in all financial sectors, the systems seem to have functioned well (e.g. at the level of payments), including through the availability of local branches of credit institutions.

1.3 Force majeure

On 28 February 2020, the Minister of the Economy declared that for state procurement contracts, the covid-virus19 would be considered a case of force majeure for companies, thus justifying the inapplicability of penalties for late performance of contractual services. This declaration was then confirmed in the above-mentioned covid-19 law.

One may wonder whether such an assertion will transpire on the disputes that will arise in obligations between private parties. For the record, under French law¹⁶, it cannot be excluded that, in the light of case law, covid-virus19 may be recognised as a force majeure event.

Other developments in the past regulatory news seem to be fully overshadowed by the health crisis. Beware, however, that the Coronavirus will not stop money laundering: money launderers will actively (i) seek government funding and (ii) redirect their money laundering businesses into sectors that remain open for business.

¹⁴ Via the public investment bank (Bpifrance). On 21 March, the European Commission validated the French state aid, as part of its temporary framework for state aid (statement of 17 March 2020).

¹⁵ In summary and according to the information available to date, the guarantee will depend on the nature of the credit (loan or overdraft) and will amount from 70% to 90% depending on certain criteria. As the Government was anticipating a potentially large and urgent demand, it ruled that only loans granted to companies with at least 5,000 employees or with a turnover in excess of €1.5 billion will have to be decided on a case-by-case basis by order of the Minister for the Economy. For all other companies, the loans granted will benefit from the State guarantee provided that they meet the conditions of the specifications defined by Decree (of 23 March 2020), upon simple notification to Bpifrance Financement SA. Prior to the publication of the Decree, the FBF provided some details the said specifications, indicating for example that the loans could be granted for up to 3 months of turnover.

¹⁶ Article 1218 of the Civil Code: *'There is force majeure in contractual matters where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects cannot be avoided by appropriate measures, prevents the performance of his obligation by the debtor. If the impediment is temporary, performance of the obligation shall be suspended unless the resulting delay justifies termination of the contract. If the impediment is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions provided for in articles 1351 and 1351-1.'*

Article 1351: *'The impossibility of performing performance shall release the debtor from liability up to the amount due where it is due to force majeure and where it is final, unless he has agreed to take charge of it or where he has been given prior notice to do so.'*

Article 1351-1: *'Where impossibility of performance results from the loss of the due debt, the debtor who has been given formal notice shall nevertheless be discharged if he proves that the loss would have occurred in the same way if the obligation had been performed.'*



2. **Fight against money laundering (AML)**

2.1 **European developments**

As the European Banking Authority (EBA) took over responsibility for a single anti-money laundering supervisor at the beginning of the year¹⁷, it published on 5 February 2020:

- its first report on the approach of national supervisory authorities to the supervision of banks in the fight against money laundering, which is also in line with the findings expressed by the European Banking Federation in a report published on 10 March¹⁸; and
- a revised draft guidance on risk factors¹⁹ to take into account:
 - developments resulting from the 5th AML Directive²⁰ on enhanced due diligence applicable in financial relations involving high-risk jurisdictions;
 - technological developments with the emergence of the services of RegTechs; and
 - new risk factors and measures to identify beneficial owners.

One of the tasks of EBA will be to determine whether the European Union ought to adopt Regulations in lieu of Directives which are viewed as not sufficiently harmonizing²¹, given that such underlying idea is eagerly desired by representatives of the banking sector. These players are currently facing a challenge in the complex deployment of national rules in the context of their cross-border activities²².

2.2 **National developments**

The publication of the fast track law²³ implementing the above-mentioned 5th AML Directive has once again shed light to an ever-denser legal framework. As mentioned in our [previous newsletter](#), while digital asset service providers had already been made subject to AML vigilance, the most noteworthy developments are as follows:

- the end of French mistrust of remote access, with the expected development of “substantial” (instead of “qualified”) level digital identity services as defined by the European eIDAS Regulation²⁴; new identification measures are now more flexible;
- the obligation to consult the French register of beneficial owners (UBOs) in order to verify the information collected on them;
- the increase in the scope of the register of bank accounts (known under the French acronym FICOBA) to include payment accounts and safe-deposit box rental companies, and the forthcoming connection of foreign banks that are not on French territory (European passport on entry);

¹⁷ Entry into force of EU Regulation 2019/2175, mentioned in our [previous newsletter](#), which leads the EBA to take over the historically assigned role of the European Joint Committee of Supervisors (JC).

¹⁸ The report also suggests possible regulations that would allow the creation of blacklists of customers who have not complied with requests for identification of institutions subject to the law, in order to prevent money launderers from taking advantage of national disparities to recycle their dirty money.

¹⁹ For the banking and insurance sectors: JC 2019 87 (5 February 2020) amending JC guidelines n°2017/37.

²⁰ Directive n°2018/843 amending Directive n°2015/849.

²¹ Factsheet on the EBA's new role (February 2020).

²² EBF Blueprint, March 2020.

²³ n°2020-115 of 12 February 2020, supplemented by two Decrees of the same day (n°2020-118 and 119). However, the implementation is yet to be supplemented by two Decrees (on the FICOBA register and the certification of digital identity services).

²⁴ There is no doubt that the certification by the French certification authority (ANSSI) of the digital identity of the *La Poste* group (see press release of 22 January 2020) will likely encourage the emergence of this type of identification.

- the opening to the public of the register of beneficial owners (companies or trusts) with the unavoidable constitutional debates and litigation on the respect of privacy;
- the limitation to AML vigilance applicable to art sector transactions and monthly rental transactions exceeding the threshold of €10,000 and the abrogation of AML vigilance for co-op boards (*syndics de copropriété*);
- the introduction of a reporting obligation on discrepancies in the information on the beneficial owner and the adjustment to the liability waivers for individuals in charge thereof;
- an impact still to be measured on the intra-group exchange of suspicious transaction reports (STR), given the possibility for the French Intelligence Unit (TRACFIN) to object to such exchange;
- the inclusion of clerks of commercial courts and lawyers' pecuniary settlement funds (CARPA) within the perimeter of institutions subject to AML measures; and
- a subtle reformulation of the rules applicable to the gaming sector.

Based on such above implementation, the ACPR updated two guidelines governing asset management and group supervision of banking / insurance institutions²⁵.

As previously mentioned in our [previous newsletter](#), France had already implemented the European requirements for reporting the risk of tax evasion (DAC 6) by releasing a fast-track law²⁶. It cemented the requirements of such implementation through a Decree²⁷.

3. Brexit

The health crisis has halted discussions on the future relationship since some of the people in charge of negotiating were infected with the virus and countries are now turning to the urgency of the measures needed to address the health and economic consequences of the epidemic. An extension of the transitional agreement can therefore no longer be ruled out, unless the United Kingdom is satisfied with an exit without an agreement with the EU (hard Brexit scenario).

In financial services, the benefit of equivalence regimes now seems at least partly compromised as the United Kingdom wishes to regain its freedom to regulated "in a smarter manner"²⁸.

In the meantime, the European Court of Justice was keen to confirm that it retains jurisdiction over any proceedings brought by or against the United Kingdom before 31 December 2020.

It may be worth noting that on 19 March 2020, the Government initiated the accelerated procedure for the adoption of the bill containing various provisions adapting to European Union law on economic and financial matters, which includes, inter alia, a section to address the actual exit of the United Kingdom from the current Customs Union.

4. Insurance sector

While pressure from low interest rates and from the French insurance regulator (ACPR)²⁹ had recently led the life insurance industry to convince policyholders to direct all or part of their savings to unit-linked vehicles rather than euro-denominated vehicles, the ACPR took advantage of the onset of the stock

²⁵ On 16 March 2020.

²⁶ Fast track law 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 tax filings relating to cross-border activities.

²⁷ Decree n°2020-270 of 17 March 2020 setting out the information to be included in the above-mentioned tax filing.

²⁸ It should be noted that the ESMA made progress in actually building the European equivalence regime for investment services (Consultation on the draft RTS of 31 January 2020).

²⁹ e.g. through the speech delivered by the Governor of the French Central Bank Banque on 9 January 2020.

market crisis to publish a recasting of its recommendation³⁰ on the collection of know-your-customer information for the exercise of the duty to advise and the provision of a personalised life insurance recommendation service. This position also ought to be assessed in light of the vigilance expected of institutions in the sector with regard to advertising offers³¹.

The decision handed down shortly before by the ACPR's Sanctioning Committee³² against an insurance broker with a two-month ban on marketing insurance contracts evidences that the ACPR is particularly vigilant about compliance with marketing rules.

5. Europe of Payments

The EBA is about to amend guidelines for fraud reporting³³, which now seems rather anecdotal, even if the current climate is extra conducive to an increase in payment fraud.

6. Europe of Investment Services

The current health crisis will have a positive impact on the world's carbon emissions and therefore on the environment. One may fear however that recovery measures will likely ignore the challenges of sustainable finance, even though just before the crisis, the French securities regulator (AMF) had expressed its wish to prevent greenwashing by ensuring that French collective management works better towards sustainable finance³⁴.

In the context of this health crisis, plans to amend "MIFID2", "PRIIPS" and "Benchmark" regulations addressed on early 2020 now seem outdated or less pressing. European developments in the field of sustainable finance also seem less urgent nowadays³⁵.

7. Other European developments impacting financial services

The European Commission published its White Paper on Artificial Intelligence (AI) on 19 February 2020. The Commission set out different options for consultation and reiterated the need for a common European approach to AI to achieve sufficient scale and avoid fragmentation of the single market.

Lastly, the AMF has carried out a full detailed analysis of token issues (blockchain)³⁶.

8. Other national developments impacting financial services

In the credit sector, it is worth mentioning:

- the expected release in February 2020 of the French register of defaulting borrowers (known under the French acronym FICP), which reinforced its effectiveness, as already pointed out in our [previous newsletter](#); and
- a position issued by the French banking regulatory (ACPR) pointing out that brokers do not fall within the core outsourcing rules³⁷.

³⁰ 2013-R-01 of 8 January 2013, as amended on 21 February 2020 (releases of 10 & 12 March 2020).

³¹ ACPR release of 30 January 2020.

³² Case n°2019-05, rendered on 28 February 2020.

³³ Guidelines of 22 January 2020 amending Guidelines n°2018/05.

³⁴ Press Conference of 11 March 2020 in connection with funds advocating ESG criteria.

³⁵ See EBA report of January 2020 (sustainable finance – market practices).

³⁶ State of play and analysis of the application of financial regulations to security tokens (March 2020).

³⁷ Position released on 20 February 2020.