



# Newsletter – Financial services

## WINTER 2020-2021

*Over the pivotal period 2020-2021, the European Commission has embarked on a series of communications setting out the trend of its reform priorities some of which impact the financial sector (e.g., to achieve more pan-European and instantaneous payment solutions).*

*At the same time, it also launched very innovative draft regulations aiming at more control of GAFAM (DSA/DMA projects) and initiated the reform of cybersecurity by recasting the Directive establishing the common level of security of Networks and Information Systems in the Union (NIS).*

*In addition to issues directly related to the covid19 crisis, the European Union also focused on what failed. For example, the European Securities and Markets Authority (ESMA) has focused on the collapse of Wirecard as part of its assignment to oversee the transparency of financial information for listed companies and the supervision of national authorities (here the BAFIN). While such move is worth noting, it is clearly related to the Commission's reinitiating its project for a Capital Market Union.*

*Overall, all usual suspects of our newsletter are covered, especially the impacts of the full exit of the United Kingdom from the European regulatory framework and the fight against money laundering (AML-CFT).*

### 1. Exit from the health crisis

Following the extension of the state of health emergency to 1 April 2021, the French Government renewed various fast-track laws (*ordonnances*) adopted last March 2020 to limit the impact of lockdown measures on business life<sup>1</sup>. A ruling (*arrêté*) has also extended the guarantee system for loans granted to companies by financial institutions until 30 June 2021, with the possibility that their maturity will be extended to eight years. A Decree has also extended the level of the State guarantee to reinsurance transactions of certain credit insurance risks carried out by the French *Caisse Centrale de Réassurance*.

A new Decree extended until 31 December 2021 the temporary reduction from 25% to 10% of the threshold for the acquisition of voting rights that may trigger the approval mechanism for acquisition of French listed companies engaged in activities deemed to be "critical".

Given a sharp increase in debt resulting from the unprecedented demands made by public authorities to deal with the consequences of the covid crisis, a fast-track law (*ordonnance*)<sup>2</sup> was enacted to require from the French deposit guarantee fund that it deposits all of its contributions with the French Treasury, which is understandable given the economic circumstances but is questionable when the law provides that such deposit will not be remunerated.

At the European level, the European legislator reached an agreement in mid-December 2020 on the capital market stimulus package through targeted changes to capital market rules, which will eventually make ESMA a supervisory authority alike the ECB<sup>3</sup>.

<sup>1</sup> For example, on general meetings, administrative and judicial litigation, management of co-ops, etc.

<sup>2</sup> Ordinance n°2020-1496 of 2 December 2020.

<sup>3</sup> Reforms tied to Capital Markets Recovery package of July 2020 and the Commission's strategy on the treatment of non-performing loans (Communication of 16 December 2020), with the relaunch of the process to adopt a Directive on credit managers, credit buyers and recovery of collateral.



## 2. Brexit

The last-minute deal between the European Union (EU) and the United Kingdom on 24 December 2020 paved the way for a more peaceful commercial relationship between the two Unions, without major changes for British financial actors, which have lost their European passport<sup>4</sup>.

In accordance with an enabling law, the Government has drawn full consequences of the United Kingdom's new status as a non-European Economic Area country with respect to existing insurance contracts (to tackle the risk of voidability)<sup>5</sup>, British collective investment schemes<sup>6</sup>, the assets or use of tax preferred securities accounts (PEA)<sup>7</sup>, and the continued existence of British legal entities established in France<sup>8</sup>. As part of the departure from the European regulatory framework:

- the European authorities have adopted rules allowing certain UK players to continue their activities in the European Union<sup>9</sup> or, on the contrary, have raised a yellow card in connection with abusive utilization of the reverse enquiry<sup>10</sup>; and
- the French authorities (AMF or ACPR) have released the lists of UK institutions (banking or insurance) having lost their European passport, warned such institutions about their obligations to inform their French customers and finally took a position on the future of existing contracts in the context of the above-mentioned fast-track law<sup>11</sup>.

## 3. Fight against money laundering (AML/CFT)

### 3.1 European developments

In its opinion of 4 November 2020, the European Banking Authority (EBA) – the said Authority has authority for all financial institutions over AML/CFT – set out its expectations on how national authorities ought to take into account money laundering risks under the Supervisory Review and Evaluation Process<sup>12</sup>. The EBA also issued another opinion (11 December) on the interactions of AML/CFT and the Deposit Guarantee Directive: the idea is to exclude from its benefit depositors that do not comply with minimum AML/CFT standards.

Previously, the European Commission had reviewed the state of play in the EU with regard to the implementation of the 5<sup>th</sup> Directive on transparency requirements for trusts and similar legal arrangements<sup>13</sup>, which sheds light on the state of applicable law in the Member States.

The Commission removed Mongolia from the list of high-risk territories for money laundering<sup>14</sup>, indirectly confirming that other territories placed on the list back in 2020 are still in purgatory.

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<sup>4</sup> In France let alone, thousands of UK services providers had passported in in France.

<sup>5</sup> It is within this framework that fast-track law (*ordonnance*) 2020-1595 organized the supervision of existing contracts, in particular by securing existing insurance contracts under an extinctive management regime that applies to these contracts. The amendment will have implications beyond the scope of British contracts.

<sup>6</sup> UK UCITS have become third country AIFs.

<sup>7</sup> The aforementioned fast-track law (*ordonnance*) n°2020-1595 notably provided for a period of 2 years during which UK assets remain eligible for the 75% ratio and specific provisions in connection with French “tax” funds.

<sup>8</sup> Fast-track law (*ordonnance*) n°2020-1596 of 16 December 2020.

<sup>9</sup> For example, the Commission's decision on the equivalence of UK central securities depositories follows a previous decision on the temporary equivalence of various UK clearing houses.

<sup>10</sup> ESMA press release of 13 January 2021 following a more educational press release of 31 December 2020 and earlier press releases from the other two authorities (EBA 9 November and EIOPA 13 October 2020).

<sup>11</sup> ACPR press releases of 4 and 22 January 2021 on the banking and insurance sectors and AMF press releases of 18 and 28 December 2020 on respectively market activities and asset management.

<sup>12</sup> SREP.

<sup>13</sup> Report of 16 September 2020.

<sup>14</sup> Delegated Regulation of 7 December 2020.

### 3.2 National developments

In addition to the implementation of the 5<sup>th</sup> Directive, the licensing process of digital asset service providers was completed by means of a fast-track law<sup>15</sup>, while at the same time, the grandfathering clause that enabled institutions to continue existing business on digital assets without such license ended on 18 December.

Another long-awaited fast-track law<sup>16</sup> broadened the scope of persons subject to the screening of asset freezing measures to all private individuals and legal persons residents of/located in France.

A Decree on internal control on AML/CFT of the financial sector was released. It merged in a single text previously scattered provisions<sup>17</sup>, bearing in mind that the issue of internal control in AML/CFT has again come up in decisions issued by the ACPR Sanctioning Committee<sup>18</sup>.

Less important Decrees have also been published, such as the one that makes the registration of insurance intermediaries conditional on information on their shareholding of 10% or more<sup>19</sup>, another one that extends the list of public authorities enabling to access the French database of bank accounts (FICOBA)<sup>20</sup>, and finally, a last one that completed implementation of the 5<sup>th</sup> Directive for the asset management sector<sup>21</sup>.

The publication of the “Trend & Analysis” report of the French FIU (TRACFIN) in December 2020 shed light on the French specific risk analysis set forth by the dedicated Committee (COLB) and provides useful information to guide reporting entities in their own risk classification, given the risks identified for the period 2019-2020. Among such risks, the issue of cash naturally came up again and echoes two current events in connection with fiat money:

- The European Court of Justice (ECJ) confirmed that a Member State is entitled to restrict cash payments on a ground of public interest; and
- A recent law amended existing regulations in connection with the transport of cash<sup>22</sup>.

### 4. Digital identity

Deployment of the French mobile identification solution<sup>23</sup> no longer has any reason to be delayed since the French Administrative Supreme Court rejected a motion seeking to annul the Decree authorizing it<sup>24</sup>. This move is critical for the fluidity of electronic exchanges of users who can no longer absorb the multiple identifiers / passwords which do not contribute anything to such digital economy.

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<sup>15</sup> Fast-track law (*ordonnance*) n°2020-1544 of 9 December 2020. An important report of the Fintech ACPR-AMF forum released at the end of September 2020 provided a practical insight into AML-CFT expectations for the providers in question, in addition to an AMF FAQ published at the end of September.

<sup>16</sup> Fast-track law (*ordonnance*) n°2020-1342 of 4 November 2020, supplemented by a Decree of 1 February 2021, which requires financial institutions to take into account the 13 UN sanctions regimes. The monitoring of this regime is in addition to the future list of persons attached to the new (EU) Regulation n°2020/1998 of 7 December 2020 on restrictive measures in response to serious human rights violations.

<sup>17</sup> Ruling of 6 January 2021.

<sup>18</sup> Decision of 24 December 2020 et a decision rendered by the French Administrative Supreme Court of 15 October 2020 ruling on appeal from a decision rendered by the ACPR's Sanctioning Committee.

<sup>19</sup> Ruling of 15 December 2020, applicable as of 1 April 2021. The requirement directly derived from IDD.

<sup>20</sup> Ruling of 26 October 2020.

<sup>21</sup> Ruling of 10 November 2020, amending the General Regulation of the AMF, accompanied by an update of the various applicable guidelines.

<sup>22</sup> Article 13 of the law n°2020-1508 of 3 December 2020 related to the application of (EU) Regulation 2018/1672.

<sup>23</sup> [Alicem](#).

<sup>24</sup> Decision of 4 November 2020.

## 5. Payment services

As part of the monitoring of its migration plan for strong authentication for the 2<sup>nd</sup> Payment Directive (PSD2), the French Observatory for Payment Security (OSMP) has published useful documents for merchants<sup>25</sup>. In addition, in line with the requirements of the PSD2 regarding the notification of fraud situations, the European Banking Authority has launched a revised draft of its guidelines on the rules for notifying "major incidents" (applicable at the end of 2021), with the aim of fewer notifications but more useful notifications in connection with the monitoring of fraud.

## 6. Insurance

At the European level, the past period was marked by the opinion of the European Insurance and Occupational Pensions Authority (EIOPA) on the revision of the Solvency 2 Directive<sup>26</sup>. This opinion, intended for the European Commission, discusses the avenues of *inter alia* reform on insurers' own funds, European passport, proportionality, resolution and national guarantee funds.

An important report from the French insurance regulator (ACPR) of December 2020 lays the groundwork for the criteria for identifying critical functions of insurance organizations, which is an important and recurring topic in the selection of providers to whom certain functions are outsourced.

## 7. Sustainable finance

Given that some provisions of the European regulation on Sustainable Finance Disclosure<sup>27</sup> will come into force on 10 March 2021<sup>28</sup>, the French securities regulator (AMF) provided some clarity on these new obligations with national requirements on information to be provided by collective investment schemes integrating "extra-financial approaches".

## 8. Investment Services

The implementation of regulations revising the "MIFID2" rules on the prudential supervision of investment firms will take place by fast-track law no later than 26 June 2021<sup>29</sup>. Measures to adapt recent European regulations on the cross-border distribution of collective investment schemes will follow the same path, no later than 2 August 2021<sup>30</sup>.

## 9. Other European or national developments impacting financial services

At the European level, it is worth noting the publication by the Commission of draft European Regulations on contestable and fair markets in the digital sector and on a Single Market For Digital Services<sup>31</sup>, which indirectly targets the major digital players (notably GAFAM). Although it goes well beyond the framework of financial services alone, it creates a "gatekeeper" function that aims at ensuring that the core of online intermediation services<sup>32</sup> is provided in accordance with obligations that essentially aim at healthier competition.

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<sup>25</sup> 12 January 2021. These documents make it possible to identify the responsibilities related to the increase in "soft" and "hard decline" if the providers associated with the payment are behind in the evolution of their systems.

<sup>26</sup> Opinion of the EIOPA of 17 December 2020 (EIOPA-BoS-20/749).

<sup>27</sup> Regulation (EU) 2019/2088 on Sustainable Finance Disclosure (SFDR).

<sup>28</sup> Despite the postponement of the Regulatory Technical Standards announced by the Commission on 20 October.

<sup>29</sup> Habilitation Law n°2020-1508 of 3 December 2020 relating to the implementation of the "MiFID Refit" Directive.

<sup>30</sup> This applies in particular to the draft Delegated Regulations that ESMA published on 21 January 2021 on the subject matter or ESMA's guidance on related commercial communications (9 November 2020).

<sup>31</sup> Drafts of 15 December 2020, known under their English acronym DSA/DMA.

<sup>32</sup> Social networks, search engines, shared video platforms, interpersonal communication services, operating systems (OS), cloud computing or advertising services.

For example, the Commission introduced a new interoperability obligation: if a gatekeeper develops on its platform a new payment solution based on software or hardware that is only available for its own payment solution, it will have to ensure that competing providers are not excluded from the platform.

Other more directly applicable texts have also appeared, such as:

- Regulations relating to European crowdfunding providers should replace the existing French regimes applicable in France<sup>33</sup>;
- The implementing measures of the pan-European personal pension product<sup>34</sup>;
- The Directive on Class Actions<sup>35</sup>; and
- The regulatory framework for the recovery and resolution of central counterparties<sup>36</sup>.

At the level of the ECJ, a ruling<sup>37</sup> established that if European rules prohibit a lender from imposing on the borrower of a mortgage loan to drag of all his income in a bank account opened with the lender, nothing prohibits a 10 years requirement to open a bank account to which income is directed into provided that it does not cover all of the borrower's income.

In France:

- The implementation of the banking reform texts known as “CRR5” and “BRRD2”<sup>38</sup> brought French law in line with European requirements in terms of internal control, resolution and own funds of credit institutions, finance companies and investment firms;
- Aforementioned law n°2020-1508 of 3 December 2020 created a system of sanctions for unjustified geographic blocking, whose European regulations came into force on 3 December 2018<sup>39</sup>;
- A less critical Decree replaced legislative provisions on securities lending and borrowing that had been annulled by the French constitutional council, precisely because they ought to have been adopted by Decree.

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<sup>33</sup> Regulation 2020/1503 and Directive 2020/1504 of 7 October 2020.

<sup>34</sup> Delegated Regulation of 18 December 2020.

<sup>35</sup> Directive 2020/1828 of 25 November 2020 on representative actions to protect the collective interests of consumers, expected to be implemented by 25 December 2020 at the latest for full enforcement on 25 June 2023.

<sup>36</sup> Regulation EU 2021/23 of 16 December 2020.

<sup>37</sup> Decision of 15 October 2020 (C-778/18).

<sup>38</sup> Various fast-track laws, Decrees and other rulings released over the last two weeks of December 2020.

<sup>39</sup> The same law also empowers the implementation by fast-track law of Directive (EU) 2019/1153 of 20 June 2019 “laying down rules facilitating the use of financial and other information for the prevention, investigation, detection or prosecution of certain criminal offences”. As a reminder, this Directive establishes measures to facilitate access to information from national tax databases by the competent authorities (including national FIUs) for the purposes of combating serious criminal offences, including the offence of money laundering.