



# Newsletter – Financial services

## SUMMER 2021

*The past period has shown numerous releases of draft implementing measures supporting sustainable finance, which is a major issue for the (financial) sector. The reversal by a famous American car manufacturer in its acceptance of bitcoins as payment for its car sales shows the extent that sustainable finance has become important for all corporates, especially those whose activity is thought to be the most harmful to the environment (e.g. oil industry).*

*Digital identity clearly remains a major concern with the increase in cybercrime. The risks of money laundering and financing of terrorism (LCB-FT) are also increasingly topical.*

*While the Wirecard and Greensill supervision flaws already mentioned in our [spring newsletter](#) continue to make the news, other events evidence attempts to destabilize financial markets, such as an apparent attack on the listed issuer Atos after a mysterious investor claimed to the French securities regulator (AMF) that it reached a 5% share in the said issuer; strangely, the AMF's defense is that it is merely a passive central register...*

*Finally, it is surprising that in an April 2021 release, the French banking regulator (ACPR) has pointed out that fintechs that are not banks were barred from marketing themselves as “neobanks” (an expression that goes beyond the sphere of banks) especially after having published back in June 2020 a study dedicated to...“neobanks” that included fintechs that do not qualify as banks.*

### 1. **Exit from the health crisis**

At the European Union (EU) level, an agreement was reached on the conditions for the interoperability of the Covid digital certificate (once called “green digital certificate”) that is due to ease the “end” of the health crisis. It is based on two Regulations applicable from 1 July 2021<sup>1</sup>, for an initial period of 12 months. Read jointly with recommendations of the European Commission, the aim is to resume free movement for individuals who can prove (i) to have received a vaccine (recognized by the World Health Organization) or (ii) to have tested negative to Covid or to have recovered less than 6 months ago.

The EU has also put in place regulations aimed at supporting the EU economy<sup>2</sup>, notably by granting significant European subsidies<sup>3</sup>. While the financial sector is not directly benefiting from such subsidies, the EU plan constitutes not only (i) an indication of the sectors benefiting from aid but also (ii) a practical application of the principle according to which investments must not cause significant harm to environmental objectives (DNSH) within the meaning of the EU Regulation on taxonomy<sup>4</sup>.

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<sup>1</sup> Political agreement of 20 May 2021: one Regulation for EU citizens; another for other non-EU citizens, whose certificates will be accepted on a reciprocal basis.

<sup>2</sup> EU Regulation 2021/241 of 12 February 2021 establishing a Recovery and Resilience Facility Regulation, which supplements the financial assistance provided under Regulation (EU) 2020/672 of 19 May 2020 establishing a European instrument to provide temporary support for the mitigation of unemployment risks in emergency situations (SURE) caused by the spread of COVID-19.

<sup>3</sup> Public spending is not very relevant to the financial sector. It is in line with two of the main European requirements of a public expenditure allocated to at least 37% climate objectives and 20% to the digital transition. The French implementing plan was sent to the European Commission on 29 April.

<sup>4</sup> See section on sustainable finance (European Commission Technical Guidelines of 12 February 2021).



In France, the health crisis exit plan is accompanied by a law<sup>5</sup> and minor adjustments to the state-guaranteed loan scheme (known under the French acronym “PGE”).

## **2. Fight against money laundering (AML/CFT)**

### **2.1 European developments**

In its role of directing, coordinating and supervising the financial sector with AML/CFT, the European Banking Authority (EBA) has published draft regulatory technical standards (RTS)<sup>6</sup> creating a database of AML/CFT deficiencies identified by national supervisory authorities on financial sector firms. In the long term, all financial sector companies should be aware that deficiencies identified through inspections lead by regulators of a country may trigger their reporting to an EBA database, the data of which may eventually be used by other national regulators against said companies.

This database can also be used to issue opinions by national authorities or the EBA, such as the EBA's opinion on the specific risks of money laundering and terrorist financing affecting the European Union's financial sector<sup>7</sup>. This advice is critical to risk classification and mapping. It is also particularly useful as it takes a position on the practice of de-risking that is often wrongly supported by AML/CFT.

While the Financial Action Task Force (FATF) addresses supervisory authorities with its guidance on risk-based supervision<sup>8</sup>, this guidance is very useful to financial sector institutions in their anticipation of inspections carried out by supervisors (and ultimately potential sanctions in the event institutions are not prepared to be challenged).

### **2.2 National developments**

A Decision issued by the ACPR's Sanctioning Committee against an insurance company<sup>9</sup> echoes the above-mentioned EBA opinion on risk-based approach. The insurance company had *inter alia* challenged flaws of its own risk-based approach, arguing it had full discretion in implementing its AML/CFT risk-based approach. The Sanctioning Committee rejected the argument that the supervisor had to provide factual substance to alleged flaws of the risk-based approach.

In furtherance of the implementation of the 5<sup>th</sup> AML/CFT Directive, a Decree<sup>10</sup> (i) clarified that anonymous electronic money is prohibited for the purchase of virtual assets and (ii) imposes an obligation on virtual asset service providers (VASPs) to identify their customers prior to any transaction. It also clarifies the competence of supervisory authorities to implement EU asset freezing / anti-money laundering measures. It finally modifies requirements associated with electronic identification services<sup>11</sup>.

Finally, as part of the attractiveness of the French financial center in the sector of crypto assets, it is worth noting the publication at the end of March 2021 of an important study by a forum led by the French Authorities on (i) the access of virtual asset service providers (VASPs) to bank accounts and (ii) the resulting bank transfers resulting from the conversion services provided by VASPs.

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<sup>5</sup> Law n°2021-689 of 31 May 2021 relating to the management of the end of a health crisis. It puts an end to various exceptional regimes while giving a residual faculty to take preventive measures.

<sup>6</sup> Draft of 6 May 2021 (EBA/CP/2021/19).

<sup>7</sup> EBA opinion of 3 March 2021 (EBA/Op/2021/04).

<sup>8</sup> Risk-based supervision, March 2021.

<sup>9</sup> Decision of the Enforcement Committee of 29 April 2021 (n°2020-03). Another decision sanctioned a bank for AML/CFT breaches related to its marketing of a current account product backed by an international payment card (Decision of 7 May 2021, n°2020-05).

<sup>10</sup> Decree n°2021-387 of 2 April 2021. Another Decree (n°2021-446) limits the AML/CFT requirements of VASPs to the service of (i) custody and (ii) purchase and sale of virtual assets against fiat currency.

<sup>11</sup> Order (*Arrêté*) of 28 March 2021 on the certification of conformity. It is the latter that institutions using such services should request from the service providers to whom they outsource biometric identification of their own customers.

### 3. Digital identity

We can note at EU level the publication on 21 April 2021 of a European Commission draft Regulation to regulate artificial intelligence and through it biometric identification.

The development of digital identity goes beyond innovative solutions for individuals. This is, for example, the trend set by two Decrees<sup>12</sup> which abolish the obligation for companies to prove their identity (i.e., provide their registration certificate) in support of their applications with the public administration. The Government drew the logical consequences of the availability of this information via the programming interfaces (APIs) set up by the said administration to have access to the same information. The issue of digital identity nevertheless remains a major concern, with recurring identity theft observed in the financial sector<sup>13</sup>.

The issue of digital identity is in any event becoming increasingly important, particularly in the health sector, as patients undergo administrative filings or more and more seek medical assistance on a remote basis. It is in this context that a fast-track law (*ordonnance*) was released<sup>14</sup> which *inter alia* enables to use, in conjunction with the French social security card (*carte vitale*) or the health professionals' card, new electronic means of identification using tools other than a physical card.

At the same time, the French "FranceConnect" access portal – the gateway to more than 900 service providers including financial institutions – is evolving with its service "FranceConnect+", which has to deal with "substantial" and "high" thresholds within the meaning of the EU Regulation on electronic identity (eIDAS), which opens wider the door to financial actors in the private sector, whose remote identification implies at least the "substantial" level, for the purposes of AML/CFT.

### 4. Sustainable finance

Since the EU Sustainability Reporting Regulation (SFDR) came into force on 10 March 2021<sup>15</sup>, the financial sector as a whole – banking, insurance and asset management – became compelled to amend its policies to integrate sustainability risks into its investment decision-making processes, notwithstanding the French requirement to take them into account pursuant to French historical obligations<sup>16</sup>. As a matter of fact, the latter have just been amended<sup>17</sup>, which makes compliance even more a challenge. The entry into force of the European rules<sup>18</sup> also includes legal documentation and marketing communications<sup>19</sup>, with an obvious constraint for the insurance sector, whose insurance contracts (*multi-supports*) must reconcile information on the durability of their underlying investments.

While the draft Regulatory Technical Standards (RTS) of the SFDR Regulation referred to in our [last newsletter](#) specify how financial actors should ensure the alignment of financial products with European measurement instruments (Taxonomy), the European Commission has published new draft

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<sup>12</sup> Decrees n°2021-631 and 632 of 21 May 2021 (applicable from 23 November 2021). Identification (including of UBOs) is now easily accessible via <https://annuaire-entreprises.data.gouv.fr>.

<sup>13</sup> Release of the French Banking/insurance regulator (ACPR) of 28 April 2021 on usurpations of European financial institutions.

<sup>14</sup> Announced in our [Summer 2020 newsletter](#). Fast-track law (*ordonnance*) n°2021-581 of 12 May 2021 on the electronic identification of users of digital health services and health insurance beneficiaries. The entry into force depends on a Decree and an Order (*arrêté*) which must specify the interoperability and security reference systems.

<sup>15</sup> Sustainable Finance Disclosure Regulation (EU) 2019/2088 (SFDR). The granularity of the information depends on implementing rules in the making, including a 2nd draft delegated regulation published on 15 March 2021. The ACPR communicated at the beginning of April 2021 for the institutions under its supervision.

<sup>16</sup> Resulting from Article 173 of Law n°2015-992 on the energy transition for green growth.

<sup>17</sup> Article D.533-16-1 of the Monetary and Financial Code is amended by a Decree of 27 May 2021.

<sup>18</sup> In an April 2021 publication, the ACPR considers that the SFDR RTS should be applied in advance!

<sup>19</sup> This is also the context for ESMA's guidance of 27 May (ESMA34-45-1244) on marketing communications related to the cross-border distribution of investment funds.

delegated regulations applicable from 1 January 2022 to implement the Taxonomy Regulation<sup>20</sup>. They are due to ensure that all assets of a financial institution are 'taxonomically' aligned:

- On 21 April 2021<sup>21</sup> to detail the activities that contribute most to climate change mitigation and adaptation (the first two environmental objectives); and
- On 7 May 2021<sup>22</sup> to detail the content and format of the information to be disclosed, pursuant to Article 8 of the Taxonomy Regulation.

Finally, in order to ensure that financial actors are able to disclose sustainability information to their end-investors, the European Commission has published a proposal for a Directive applicable from 1 January 2023 which aims at ensuring that the companies that make up the former's investments provide them with the information they need to meet their reporting obligations under the SFDR.

## **5. Investment services and asset management**

In its above-mentioned publication of 21 April 2021, the Commission recalls that delegated regulations on investment services will evolve<sup>23</sup> to require from October 2022 (i) the targeted institutions to obtain information on their customers' sustainability preferences (impact on suitability) and (ii) the consideration of sustainability factors in product design (governance of investment and insurance products).

## **6. Payment services**

A summary dated 16 April 2021 from the French authorities (OSMP) in charge of the migration plan for the 2<sup>nd</sup> Payment Directive (PSD2) clarifies the conditions for the implementation of strong authentication for online card commerce, by tying the various use cases<sup>24</sup> to their resulting authentication obligations. The document is particularly useful in monitoring the legal documentation between e-merchants and payment processors.

On the application of PSD2 rules, the French Central Bank threatened to initiate proceedings if the industry were not to improve its practices in terms of refunding unauthorised payments<sup>25</sup>.

While the payments industry has gone through all the stages of the above-mentioned migration plan, it is now increasingly facing with the handling of BigTechs, which are interfering in the historical relationship between the financial industry and fintech/insurance companies<sup>26</sup>. This growing interaction is well described in an opinion of the French Competition Authority<sup>27</sup> which is useful in the emergence of European projects or texts on the sector<sup>28</sup>.

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<sup>20</sup> Regulation (EU) 2020/852 for the establishment of a framework to facilitate sustainable investment.

<sup>21</sup> The European Commission refers to it as the "Climate Delegated Act": it addresses only the first two of the six environmental objectives set by the Taxonomy Regulation.

<sup>22</sup> The European Commission refers to it as the "Disclosure Delegated Act".

<sup>23</sup> DR (EU) 2017/565 on organizational requirements / operating conditions for investment firms.

<sup>24</sup> "One-click" or "deferred" payments, "recurring transactions", "reservations", with obligations depending on the qualifications of the payment scenarios (CIT, MIT, MOTO, one-leg, etc.).

<sup>25</sup> Joint press release with the French banking regulator (ACPR) of 26 April 2021, echoing a consumer association survey published in October 2020.

<sup>26</sup> Which are as much complementary as they are competing. For example, on the implementation of the digitalization of business invoices, given the deadlines as of 1 January 2023 (see CNPS press release of 25 April 2021). More broadly, there is still the question of "open finance" through the development of access by fintechs/insurance companies to the financial data of bank/insurer customers (which goes beyond the sole framework of "payment accounts").

<sup>27</sup> Opinion n°21-A-05 of 29 April 2021.

<sup>28</sup> Pursuant to acronyms EPI, IP, RTP, Diem, OIT, CBDC (see Banque de France press release of 29 April 2021). The French authorities are closely monitoring these developments (see CNPS press release of 20 May 2021).

## 7. Insurance

The insurance sector will find interest in the publication of a fast-track law (*ordonnance*)<sup>29</sup> which should eventually enhance the emergence of insurance solutions that encourage respectful behaviour by car/truck drivers.

An opinion issued by the French Central Bank sets out a framework for an enhancement of the legibility of health insurance contracts<sup>30</sup>.

## 8. Brexit

In addition to the entry into force of the EU-UK Trade and Cooperation Agreement on 1 May 2021, an interesting sanction decision was released by the AMF on 30 April. It *inter alia* addresses the issue of "reverse solicitation", which has become a very important issue in the context of Brexit.

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

In the delimitation of general good rules (*règles d'intérêt général*), there is no doubt that those governing the marketing of financial products to vulnerable elderly people are among them. In this context, after an educational phase in 2020, the French authorities (ACPR and AMF) have specified their expectations in a summary report dated April 2021. This topic is critical for the KYC of financial institutions.

As cybercrime events continue to make the news, the public administration has undertaken to educate with a "guide to prevention against scams" which could usefully be shared by companies as part of their employee awareness campaigns on the fight against fraud. At the same time, the ACPR intends that companies in the financial sector follow a common categorisation of IT incidents of all kinds (including cyber security)<sup>31</sup>.

Our [spring newsletter](#) had addressed the critical reform of internal control for the banking sector (applicable from 28 June 2021). The extent of changes was eventually detailed in an April 2021 release from the French regulator. In the same newsletter, we also mentioned a draft law aimed at reforming the insurance and banking/payment brokerage sector by making mandatory membership to professional associations<sup>32</sup>. While this bill now became law<sup>33</sup>, its entry into force is deferred until 1 April 2022. One of its core changes is that it makes the new French requirement a general good rule for institutions operating in France under the European passport. It also gives the latter the possibility to benefit from the ombudsman service offered by the professional associations.

Two Orders (*arrêtés*) of 29 March and 12 May 2021 amended the AMF General Regulation on issues relating to (i) regulatory reporting by management companies and the AML/CFT and (ii) the territorial scope of the monopoly of virtual asset service providers.

Finally, the expected reform of French guarantee laws (*droit des sûretés*) will not be amended anytime soon, as the deadline enabling the Government to amend existing laws has now lapsed<sup>34</sup>.

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<sup>29</sup> Fast-track law (*ordonnance*) n°2021-442 of 14 April 2021 on access to vehicle data. Access to this data for the most serious accidents should not only reduce the management burden of the insurance sector but also make it easier to establish whether an accident is directly related to speeding or not. In the future, this question of access to data is also essential for the emergence of autonomous cars (cf. another fast-track law dealing with the regime of criminal liability "in the event of the circulation of a vehicle with delegated driving" was also released).

<sup>30</sup> Release of the French Consultative Committee of the Financial Sector (CCSF) of 20 May 2021.

<sup>31</sup> ACPR Release of 6 April 2021.

<sup>32</sup> The so-called "PACTE" law had attempted to change the law, but its legal provisions had been invalidated by the Constitutional Council.

<sup>33</sup> Law n°2021-402 of 8 April 2021.

<sup>34</sup> The overrun is linked to a late awareness by the Government of the threat of downgrading the rank of salary advance claims in the Ministry of Justice's draft fast-track law (*ordonnance*).