



Newsletter – Financial services

FALL 2021

News in the European financial services sector was still predominantly marked by the implementation of the European regulatory framework for sustainable finance. In this context, former asset management executives (notably among DWS and BlackRock) critiqued both the regulatory framework on sustainable finance and the greenwashing practices of their former employers. Such criticism is a warning that finance is only sustainable if its impact is credible. The risk of a crisis of public confidence is real if sustainable finance does not imply a real responsibility.

The outcome of regulatory supervision of operational and thematic practices¹ and the sanctions issued during the summer by financial sanctioning committees emphasized the consequences of breaches on reputations and on responsibilities towards investors. Although these decisions do not yet tackle the issue of greenwashing, financial institutions should actively prepare themselves for judicial or disciplinary actions.

Beyond the above, by launching a new anti-money laundering (AML) legislative package, the European Commission (EU) initiated a new set of rules for standardization of practices in the EU. By 2024-2025, there will be a single supervision headed by a new Authority (AMLA). This is a major switch.

Other developments in various areas of the financial sectors complement the above changes.

1. Fight against money laundering (AML/CFT)

1.1 European developments

A European legislative package unveiled in the middle of the summer overhauls the fight against money laundering in Europe by making it directly applicable with two new Regulations (one of which creates a new European authority (AMLA), even if a 6th Directive completes this system on aspects requiring implementation (e.g. with a view to interconnect national registers of beneficial owners (UBO) and national bank account registers).

Beyond the foreseeable changes of this package (e.g. applying the “credit transfer” Regulation to virtual asset service providers – VASP), the real novelty will come from delegated acts (RTS), which are expected to standardize (i) the customer/UBO identification standards (while taking into account the specific risks identified at the national level), (ii) the rules applicable to players in the context of their cross-border operations and (iii) the group policy.

Although the package is due to be fully applicable around the end of 2025, its implications are significant for cross-border deployment projects and group policies. The delayed entry into force of some of important changes (e.g. on VASP) raises concerns as digital assets are now widely used in the context of terrorist financing² or cybercrime.

¹ See also the summary of regulatory expectations mentioned in the annual report of the joint ACPR/AMF unit published on 16 June 2021 or that of the AMF on good and bad practices of online subscriptions released on 6 July 2021, heralding investigations in the coming months.

² Perhaps to a lesser extent environmental crimes. See in this respect the work of the FATF (e.g.: Report of the annual meeting of 20-25 June 2021 and the two sectoral reports of June and July 2021).





1.2 National developments

In July, a fast-track law (*ordonnance*) and its implementing decrees/orders implemented a European Directive (2019/1153) to (i) improve the framework for EU cooperation between the various national financial intelligence units and (ii) enshrine the possibility for law enforcement agencies and the French financial intelligence unit to exchange financial information with Europol (in particular the information contained in French national register of bank account)³. The texts set out the practical details of these exchanges in order to ensure compliance with the guarantees provided for by the Directive.

A judicial news at the end of August marks the sanctioning of a famous American bank through the French deferred prosecution agreement in relation to the complicity of a tax fraud.

2. Sustainable finance

With the publication during the summer of the delegated texts on the integration of customers' sustainability preferences (see our [previous newsletter](#)), banking and insurance financial actors are now aware that the effective integration of such preferences shall be met by 1 August 2022.

On their end, large financial institutions (over 500 employees) will likely closely monitor a draft delegated act (RTS) of the so-called Taxonomy Regulation⁴ setting out the content of annual accounting information allowing them to evidence their degree of alignment with activities considered environmentally sustainable. All financial institutions will in any event monitor the format of this information as part of their obligations under the EU Sustainability Reporting Regulation (SFDR)⁵.

For financial actors already subject to the SFDR Regulation, the French Treasury detailed early July the expectations of the French system of non-financial transparency for investors that was modified by Decree of 27 May 2021 (mentioned in our [previous newsletter](#)).

With respect to companies not subject to above requirements of the Taxonomy Regulation, the French authorities launched in May 2021 the "Impact Platform" to ensure the "reporting" of companies' commitment to meet all or part of 47 ecological, social or governance indicators. These provide an overview of the efforts undertaken by companies for their transition to more responsible models of capitalism.

The lessons that the ACPR drew last July from non-coercive investigations into the sustainability-related disclosure efforts of insurance companies on their insurance-based investment products is likely to set the tone for future coercive supervision of institutions in the insurance sector.

Finally, in order to meet the requirements of the 2015 Paris Agreements, the EU published its "European Climate Law" at the beginning of July – a Regulation dated 30 June – which sets out the framework and timetable for measures for the irreversible and progressive reduction of greenhouse gas emissions with an intermediate target⁶. France goes along the same goal with the release of its law dated 22 August 2021 aiming at combating climate change for the same emission reduction targets⁷. The law includes a disclosure requirement applicable to all sectors listed in a Decree that has yet to be released.

³ A press release from the Ministry of Economic Affairs of 18 June 2021 shows how fruitful cooperation with this agency can be, on the occasion of a major seizure of pounds sterling going to Luxembourg.

⁴ More specifically Article 8 of Regulation (EU) 2020/852 for the establishment of a framework to facilitate sustainable investment. The publication of 6 July follows the consultation document of 7 May.

⁵ EU Sustainable Finance Disclosure Regulation 2019/2088 (SFDR).

⁶ At least 55% reduction in net emissions by 2030 compared to 1990 levels.

⁷ Which will involve the adoption of measures to avoid the kind of condemnation of the State on these failures in this area (e.g. French administrative supreme Court 1 July 2021).



3. Exit from the health crisis

While at the European level, the implementing regulations of the EU Covid digital certificate enabled its deployment, France has published another law dealing with the management of the health crisis. The latter has extended the requirement of the French health pass to a large number of physical sites⁸.

In addition, a law dated 22 August (“climate and resilience”) goes along the lines of [our previous developments](#) on the implementation of the European Recovery and Resilience Facility Regulation⁹, with, in particular, the initiation of a national environmental and social loan scheme due to be guaranteed by the State, the marketing of which will be launched from 1 January 2022.

At the same time, the French Government announced at the end of June that it would continue the access to the credit insurance scheme. In July, it made changes to its guaranteed loan scheme with the underlying question of repayment of loans already granted or their forgiveness.

4. Investment services and asset management

In the asset management sector, the most notable development is the full entry into force on 2 August 2021 of the European rules on cross-border distribution of collective investment schemes¹⁰. These rules introduce *inter alia* a harmonized European pre-marketing regime. It allows European management companies to conduct prospecting activities, aimed at assessing the appetite of EU professional clients, for alternative investment funds (AIFs) potentially marketed on a cross-border basis. For retail funds (UCITS), the new rules should put an end to the historical French practice imposing a non-French UCITS to designate a “centralizing agent”.

In the investment services sector, it is worth noting the French implementation of the EU rules governing the prudential supervision of investment firms¹¹. Investment firms are put into 4 categories, the size and activities of which will determine the scope of applicable rules as well as the supervisory authority (ECB or ACPR).

While in France the Enforcement Committee of the French securities regulator (AMF) has issued several notable sanctions in the middle of the summer, the European Securities and Markets Authority (ESMA) ruled on 13 July 2021 that it found no legitimate purpose in a market practice observed at EU level that leads brokers to remunerate financial institutions that bring them order flows, in violation with several principles set out in the MiFID rules aimed at protecting investors.

Lastly, in July, the AMF published its proposals relating to the implementation of the Capital Markets Union, as part of an EU consultation initiated by the European Commission. The AMF also drew up its initial assessment of data collected in relation to the securities financing market, under the European Regulation known by the acronym “SFTR”.

5. Payment services

As announced, on 14 July 2021, the European Central Bank launched its investigation phase of digital euro project, which aims to offset the ever-increasing decline in cash, while ensuring that households and businesses keep on getting access to central bank money.

⁸ Law n°2021-1040 of 5 August 2021 and its implementing Decrees released in July and August.

⁹ At the end of June, the European Union adopted the French recovery and resilience plan; in August it released 13% of the subsidies resulting from this plan to accelerate France’s ecological and digital transition.

¹⁰ The French implementation includes fast-track law (*ordonnance*) n°2021-1009 of 31 July 2021, 2 Decrees and a ruling (*arrêté*).

¹¹ Fast-track law (*ordonnance*) n°2021-796 du 23 June 2021 and implementing measures (Decree and Ruling).

The European Banking Authority (EBA) issued draft guidelines clarifying the scope of the exemptions from licensing for the execution of payment services¹² in order to eliminate the unequal treatment resulting from divergent interpretations by national authorities of these exemptions. It has also issued new guidelines on “major incident reporting” for payment transactions.

The aforementioned recast of the AML/CFT package includes the recast of the Regulation on information accompanying money transfers (2015/847), essentially in order to impose on virtual asset service providers (VASPs) the obligations to collect information on payers and payees¹³.

However, it does not impose the requirement applicable in the post-Brexit United Kingdom to ensure that the actual payee corresponds to the actual holder of the payment account indicated in the transfer order¹⁴. This payee confirmation feature was duly mentioned in the July annual report of a unit at the French Central bank, but the latter appears quite accommodating, as the feature is not made mandatory, even though it would drastically reduce the so-called authorization payment fraud¹⁵. These developments should be seen in the context of:

- a European recast regulation of 14 July 2021 governing cross-border payments;
- a bill which introduces a system of penalties for non-compliance with the European “SEPA” Regulation (technical/commercial requirements for credit transfers and direct debits)¹⁶.

The French authorities provide a list of documents deemed to be appropriate to justify transfers exceeding €50,000¹⁷.

A Ruling (*arrêté*) published early August 2021 also modified the mandatory terms of contractual framework for deposit account agreements and payment service agreements.

6. Insurance

A Decree published at the end of June and applicable on 1 July 2022 has expanded the list of insurance products subject to the law of 26 February 2021 on the escheatment (*déshérence*) of the “supplementary retirement savings contracts”.

A Decree of 7 June 2021 raises the minimum amount of annuities below which insurance companies can buy back “too small” insurance contracts from their policyholders.

Finally, an order dated 3 June 2021 expands the list of government services that can access the French register of life-insurance contracts (FICOVIE).

7. Digital identity

Marking the relative failure of the European rules on electronic identification (eIDAS Regulation), the European Commission issued in early June 2021 an amending draft regulation to facilitate the interoperability of European digital identities by 2023. The idea of a European digital wallet would enable the creation of a secure file where each individual could store all documents that are useful for online procedures. Conceived as an alternative to large digital platforms (e.g. GAFAM), the draft is distinct from the deployment of national digital identity cards in the EU (in France, from August 2021).

¹² Consultation of 15 July 2021.

¹³ International standards (including those at FATF level) designate it as the “Travel Rule”.

¹⁴ Which is commonly labelled in the UK as the “Confirmation of Payee” procedure.

¹⁵ Also known as the “Authorised Push Payment scam” or “APP Scam”, a term that includes but is not limited to the all too famous “president fraud”.

¹⁶ In particular, the rule governing the fees that may be charged for cross-border credit transfers and direct debits within the SEPA zone.

¹⁷ Decrees n°2021-721 & 2021-722 of 4 June 2021.

8. Other European or national developments impacting financial services

Based on the observation that the increasing digitalization of financial services has profoundly changed the customer experience, the European Commission proposed on 30 June 2021 to revise EU consumer credit rules to *inter alia* (i) include currently unregulated loans that are deemed to be risky (ex : loans under €200), (ii) amend the mandatory information requirements to ensure they are adequate for mobiles and thus avoid information overload for consumers, (iii) combat false consents (i.e., pre-ticked boxes or unsolicited credit sales) and (iv) improve the rules on assessing consumer creditworthiness.

An important decision rendered by the EU Court of Justice (on 10 June 2021) in relation to mandatory transparency owed to a borrower on the existence of foreign exchange risk is worth noting insofar as it indicates that a claim brought by a consumer for a finding of unfairness of a contractual term shall not be time-barred.

In addition, the European Banking Authority (EBA) published on 2 July 2021 its draft guidance on internal governance (applicable on 31 December 2021, thus repealing the 2017 guidance) in order to “*further harmonize the internal governance rules and mechanisms of EU institutions*”¹⁸. The same effort at greater harmonization is apparently behind joint guidance from EBA and ESMA (see publication of 26 July 2021) to recast and extend the scope of the 2017 guidance on the assessment of the suitability of members of the management body and holders of key positions.

As the date 10 November 2021 will mark the entry into force of the European Crowdfunding Service Providers Regulation (ECSPR)¹⁹, a fast-track law (*ordonnance*) dated 9 June 2021 exempted the said providers from licensing under the European “MiFID” rules, with the responsibility for another a fast-track law (*ordonnance*)²⁰ to make the necessary adjustments by the said date to grant these providers the right to operate cross-border in the EU (European passport). As a reminder, these players offer securities subscriptions (crowdequity) or interest-bearing loans (crowdlending)²¹, alike the historical players currently regulated in France (CIP and IFP).

A ruling (*arrêté*) discreetly released on 1 August 2021 lifted a historical restriction applicable to banks and investment firms concerning a cap on non-banking activities. Consequently, this historical restriction appears to be now limited to the French national finance companies (*sociétés de financement*).

In a press release dated 28 July 2021, the French prosecution office laid the foundations of a jurisprudence establishing the limits of marketing financial products via influencers/social networks.

In July, the ACPR was able to specify the exact content of the internal control report for the banking sector, whose new provisions, already mentioned in a [previous newsletter](#), came into force on 28 June 2021. It insists on the need for the sector to (i) have a structured system for IT risk management²², (ii) ensure that compliance risks are assessed when new products are approved and (iii) establish a register of outsourcing arrangements.

¹⁸ At the French level, the evolution of the rules is not neutral since the ACPR was partially in line with the historical guidelines (it had issued interpretation reservations on the presence and definition of independent members of supervisory bodies). These new guidelines are not to be confused with the 2016 EBA guidelines on governance and supervisory arrangements for retail banking products that the EU Court of Justice has just (15 July 2021) validated in a dispute initiated by the French Banking Federation. This should at least partly close a debate on the validity of so-called “soft law” acts.

¹⁹ At the European level, a letter from ESMA to the Commission dated 8 July 2021, however, cast doubt on the Regulation’s full entry into force on 10 November 2021, expressing the wish for a delay of several months.

²⁰ An enabling law should be adopted before the transposition deadline.

²¹ On 4 June, EBA proposed a draft Delegated Regulation (RTS) on information due to investors.

²² Notice of 7 July 2021.