



Newsletter – Financial services

Spring 2022

The European Union's financial sanctions against Russia and Belarus following the invasion of Ukraine are astonishing in their scope but also in their content. They require complex work for the financial sector. Asset freezing measures are not just for the financial sector, although the latter must be involved in order to avoid financial flows triggering reputational risk and sanctions for lack of vigilance.

One would almost forget that the news in the financial sector also involves discussions on the future DSA and DMA rules¹, on the DORA Regulation² as well as the MiCA Regulation (on crypto asset markets). The latter must be put in perspective with (i) the above-mentioned sanctions which have clearly ruled out that this market could circumvent the sanctions and (ii) the significant US President's presidential decree on 9 March 2022.

Recent news has been largely silent on the setbacks at (i) the European Payments Initiative (to create an extended European Visa/Mastercard scheme) and (ii) the German supervisory authority (BAFIN) regarding the failed supervision of the fintech Solaris Bank.

The European legislator is still very active on sustainable finance and even tends to increase its pressure on investment sustainability after the Commission introduced an important draft Directive which aims at preventing, halting or mitigating negative impacts of companies' activities on human rights and on the environment. It imposes a duty of vigilance on European companies investing or producing abroad as well as on foreign companies selling products or services in the European Union.

It is worth noting that the French legislator released a law strengthening the protection of whistleblowers.

1. Financial Sanctions against Russia/Belarus

Since Russia invaded Ukraine, the Council of the European Union has adopted and activated packages of sanctions combining economic³ and individual⁴ sanctions targeting Russia and Belarus. The wide-ranging sectoral bans are in addition to traditional asset freezes. The latter not only targets hundreds of individuals directly or indirectly associated with the decision to invade Ukraine or are merely influential in the Russian economy and deemed close to the Russian Presidency (referred to as oligarchs) but above all a large number of entities (i) privately owned by the oligarchs or (ii) state-owned⁵.

For the financial sector, the difficulty lies in identifying the chain of ownership of entities held directly or indirectly by the specifically targeted individuals and shows the importance of the reliability and

¹ Proposed regulations on digital services (DSA – it builds new protections and safeguards for European users against content moderation practices deployed by online trading platforms and strengthens consumer protection when shopping online) and digital markets (DMA), for a regulatory framework targeted at players who have acquired almost unassailable market power.

² EU Regulation on the digital operational resilience of the financial sector.

³ The sanctions specifically cover hundreds of entities in the sectors targeted by the sanctions (not necessarily subject to the asset freeze and therefore not always identifiable through these registers), which expressly includes their subsidiaries and other controlled entities.

⁴ The sanctions also concern diplomatic measures (visas, air traffic), restrictions on economic relations with Crimea and regions not controlled by Ukraine, sanctions against media and restrictions on economic cooperation.

⁵ That is, more than 62 legal entities and 877 private individuals directly targeted as of 17 March 2022. Political statements within the EU seem to link the justification for the freezing measures to the idea of political support for Vladimir Putin, which will naturally be challenged in court given the EU Charter of human rights.



relevance of the information contained in the national registers of beneficial owners or the databases associated with such KYC process⁶.

Essentially contained in two Regulations historically adopted in 2014 following the annexation of Crimea⁷, the new sanctions have a major impact on the financial sector, at least because it is permissible to suspect any transaction directly or indirectly linked to Russia, where any error is sanctionable and the freezing of assets calls for a strict liability regime. The most important developments, which go beyond the usual framework of economic sanctions, include the following:

- the exclusion of several major Russian and Belarusian banks from the Swift messaging system without which financial flows are inconceivable in the EU and complex beyond; the restriction of the Russian central bank's access to its own assets⁸;
- an unprecedented number of economic sectors directly targeted by trade bans (steel, military, aviation, maritime, oil/gas, minerals, technology goods, luxury)⁹;
- more than 20 prohibition regimes; in the financial sector, this includes the provision of banking, investment¹⁰ or insurance services (including credit rating) to Russian/Belarusian entities¹¹, as well as the marketing of securities or the provision of securities services to Russian entities¹² or nationals or residents¹³;
- a ceiling of €100,000 on the financial flows that can be exchanged with Russian or Belarusian nationals¹⁴ and a prohibition in principle on the supply of euro-denominated bank notes;
- very restrictive sweep clauses in terms of identifying the persons concerned, such as "*as well as the natural or legal persons, entities or bodies associated with them*"¹⁵;
- increasingly broad anti-circumvention provisions as the EU was strengthening its sanctions.

Among the financial sector, these various sanctions triggered the following measures:

- A huge identification assignment covering both customer databases and transactions, under a pace that must meet the high expectations of the authorities in terms of efficiency;
- for companies in the financial sector that do not decide to cut all links with Russian/Belarusian flows, the orderly unwinding of positions and business relationships affected by the sanctions and identification of any flexibility available under the European regulations;
- the need for European groups established in Russia or Belarus to make their subsidiaries there autonomous as well as for banks the review of correspondent banking agreements.
- the need for European groups established in Russia or Belarus to make their subsidiaries in these countries autonomous and the review of correspondent banking agreements.

⁶ It becomes critical for each legal entity client to know the full shareholding chain as the asset freeze is not limited to the financial sector and also concerns shareholders who are not ultimate beneficial owners (UBOs).

⁷ Regulations n°833/2014 and n°269/2014, respectively on economic sanctions and freezing of assets; other Regulations are also amended (e.g., n°765/2006 concerning Belarus).

⁸ Which eventually puts Russia and its companies at risk of default on Russian debt repayments.

⁹ Sometimes subject to certain flexibilities (waivers).

¹⁰ Including transactions involving crypto assets.

¹¹ All the more so, when these entities are in sectors already covered by bans or are directly targeted under specific bans (money market).

¹² For example, the prohibition of the listing and servicing of shares of covered entities on EU trading platforms and the access of these entities to the services of the various entities in the securities chain (central depositories, central counterparties, etc.).

¹³ Major impact on the liabilities of funds registered in the European Economic Area.

¹⁴ This highlights the critical issue of customers with multiple nationalities as EU sanctions are excluded for EU citizens.

¹⁵ This suggests that KYC would involve knowing not only the entire family circle of clients but also their close business ties, which is beyond the scope of currently in force regulations...

2. Fight against money laundering (AML/CFT)

2.1 European developments

Financial sector institutions with cross-border activities will be sensitive to the European Banking Authority's (EBA) final draft of the Regulatory Technical Standards (RTS) creating a European database of weaknesses identified in Europe (called "EuReCa"). EuReCa will be accessible to national supervisory authorities so that they can take any useful measures to remedy deficiencies identified elsewhere in their country. A shortcoming detected in one country will trigger increased vigilance in the other countries where the institution operates.

The news in the same sector also concerns the publication - in mid-March 2022 - of the draft recast guidance on the characteristics of a risk-based approach to AML/CFT supervision and the procedure to be followed in the context of risk-based supervision¹⁶. This draft also echoes the EBA report on the "Luanda Leaks" affair, named after the revelation of documents by the ICIJ consortium of journalists on large-scale money laundering in the EU by the daughter of a former President of Angola.

Before the Court of Justice of the EU (CJEU), the opinion of the Advocate General, published on 20 January 2022, essentially rejects the arguments of Luxembourg beneficial owners (UBOs) challenging the transparency requirement. The AG considered that the Luxembourg implementation does not disproportionately affect the rights of UBOs to privacy and personal data protection. News of the Luxembourg Business Register had highlighted the existence of minor UBOs, which led to a reform aimed at improving the quality, reliability and rapid updating of the information contained in this register.

The US court case on crypto currency seizures¹⁷ is impacting the European Parliament's position on the EU Regulation which aims to regulate providers of digital assets¹⁸.

2.2 National developments

In France, the ACPR's Enforcement Committee has issued a number of decisions sanctioning anti-money laundering failure¹⁹s, one of which concerns the inadequate identification of a fintech's customers and risk mapping²⁰. The failures observed echo a strong trend in the practice of "bounce" accounts, which are frequently opened in France or abroad to escape detection of false transfer orders²¹. On this last point, the ACPR's initiative to test technologies – i.e. artificial intelligence – enabling banks to fight money laundering together is to be welcomed²².

3. Payment services

The timetable for the recasting of the 2nd Payment Services Directive (PSD3) has become clearer since it was made clear that the EBA's proposals for changes were to be expected before the end of S1 2022.

Following on from our [previous newsletters](#), the EBA published on 24 February 2022 the final version of its guidelines on exemption regimes for payment service providers. This harmonization will likely foster cross-border activities. French issuers of payment instruments relying on these exemptions shall comply with the guidelines when the ACPR will declare to apply them (by the end of 2022).

¹⁶ Applicable by the end of the year (three months after the publication of their translations).

¹⁷ Ilya Lichtenstein/Heather Morgan case (February 2022).

¹⁸ Adoption in mid-March of the report of the European Parliament on the so-called MiCA Regulation.

¹⁹ Since January 2017, more than 8 out of 10 sanction decisions are dealing with this issue, not to mention the number of investigations or no action letters.

²⁰ Decision of 1 March 2022 against the electronic money issuer W-HA (subsidiary of Orange).

²¹ See my article in the January-February 2022 issue of [law journal Banque et Droit](#).

²² ACPR press release of 9 March 2022 (the ACPR will deliver a presentation on 30 March 2022).

In this context, it is worth noting that the “mobility voucher” created by a ruling of 2 February 2022 – deriving from the Mobility Orientation Act of 24 December 2019 – does not fall within the scope of these exemptions.

A decision rendered by the French Data protection agency (CNIL) made public on 30 December 2021 against a payment institution reveals the challenging issue over the legal qualification of this type of institution as a processor or joint controller for the personal data of marketplaces’/merchants’ clients.

In the same way that the ACPR and the AMF issue lists of entities that carry out illegal activities, the ACPR has published for the first time a blacklist of French and foreign players that illegally provide payment services. Banking and insurance institutions associated with these companies should react...as should third-party payment operators (see previous news note) whose activities fall within the regulated scope.

On 15 March 2022, the ACPR recapped its expectations regarding the licensing of payment service providers (particularly with regard to the sustainability of their sources of financing) and highlighted the very significant development of these services in recent years.

The right to have access to a bank account was significantly impacted by the release in mid-March of a Decree that introduces a system of implicit refusal, through which the applicant will be entitled to reach out to the French Central Bank in order to initiate the legal process of access to basic account when the bank fails to address the customer’s application within 15 days²³.

4. Sustainable finance

Following Russia’s invasion of Ukraine, the European Commission proposed on 8 March 2022 a draft plan (which it refers to as the “REpowerEU” plan) to make Europe independent of Russian fossil fuels well before 2030, starting with gas. It includes funding for alternative/sustainable energy solutions.

As [previously announced](#), the European Commission released (2 February 2022 a Delegated Regulation supplementing those of 4 June and 6 July 2021²⁴ (respectively the Taxonomy Climate Act and Taxonomy Disclosure Act). Applicable from 1 January 2023, it addresses the challenging issue of whether the nuclear and gas sectors can be considered as virtuous activities under the European taxonomy, so that they can continue to benefit from private investment and financing²⁵.

Another Delegated Regulation on Taxonomy²⁶ finally provides details of the content and format of the information to be published by large companies on their environmentally sustainable economic activities, as well as the method to be followed to comply with the disclosure requirement. It includes specific provisions for companies in the financial sector and shall apply gradually from 1 January 2022.

Finally, the EBA released its final version of the technical implementing standards on the banking sector’s ESG risk transparency obligation (Pillar 3)²⁷.

It is also worth noting that the European Commission just released a long-awaited draft Directive²⁸, imposing a duty of vigilance on European companies that invest or produce abroad as well as foreign

²³ The measure does not create any obligation for banks to enter into a relationship but introduces their obligation to inform the French Central Bank of the reasons for refusing to open an account, following a designation by said French Central Bank under the procedure implementing the right to have access to a bank account.

²⁴ On (i) the technical review criteria for determining under which conditions an economic activity can be considered to contribute substantially to climate change mitigation or adaptation and whether that economic activity does not cause significant harm to any of the other environmental objectives and (ii) on the content and format of the information to be published by large companies in the taxonomy on their environmentally sustainable economic activities.

²⁵ Some states have already announced their intention to challenge the Regulation before the CJEU.

²⁶ Published in the Official Journal in December 2021 (Delegated Regulation (EU) 2021/2178 of 6 July 2021).

²⁷ Draft of 24 January 2022 (EBA/ITS/2022/01).

²⁸ Proposal for a Directive on corporate sustainability due diligence of 23 February 2022.

companies that sell their products or services in the European Union. This Directive, whose implementing thresholds are quite broad, aims to prevent, halt or mitigate the negative impacts of corporate activities on human rights and the environment. It goes along the same principles of existing French regulations.

In France, the French securities regulator (AMF) amended its guiding principles²⁹ to open up the possibilities of non-financial marketing on funds using derivatives such as total return swaps, subject to conditions...

5. Insurance

A Commission implementing Regulation adopted on 10 February 2022 aims at ensuring uniform conditions for the calculation of technical provisions and basic own funds of insurance undertakings.

A ruling issued by the Court of Justice of the European Union on the transparency of fees in pre-contractual information³⁰ addresses the same issues dealt with a Decree of 24 February 2022 which aims at increasing the transparency of fees in life insurance and pension plans.

The French legislated adopted on 28 February 2022 a critical law on mortgage loan insurance. The revised regulations enable policy holder to switch to another loan insurance and provide details on the conditions under which this switch can happen.

In the context of a long-awaited reform of telephone canvassing, a Decree³¹ sets out, among other things, the conditions for keeping records of sales calls to prospects.

In mid-February 2022, the French insurance regulator (ACPR) released the results of its investigation³² into the processing of redemption orders on life insurance contracts; it could be eventually followed by infringement proceedings if bad practices identified were to persist.

6. Investment services and asset management

As anticipated, the rules resulting from the revision of the Investment Services Directive (MIFID2), referred to in our [previous newsletters](#) as the “MiFID2 QuickFix”³³, came into force on 28 February 2022. They diminish certain regulatory constraints deemed problematic for investment services providers³⁴.

In addition, the European Securities and Markets Authority’s (ESMA) guidelines on suitability requirements (MiFID II) will be updated at the end of January 2022 to include (i) sustainability preferences and (ii) good and bad practices³⁵.

In mid-March, the Commission initiated the (lengthy) process of amending the rules on central securities depositories³⁶. In France, the Euroclear rules have been adjusted to take account of the new rules on market discipline³⁷.

²⁹ Position recommendation 2020-03, amended on 27 January 2022. It details information on how French collective investment schemes and foreign UCITS authorised for marketing in France can disclose they are taking into account non-financial criteria.

³⁰ CJEU of 24 February 2022: the EU Court clarified the scope of the pre-contractual information requirement (regarding charges) with respect to life insurance contracts.

³¹ Decree of 17 January 2022, adopted following the ACPR’s positions on breaches, expressed as early as 2018.

³² The survey echoes a similar survey on the monitoring of banking mobility rules.

³³ Decree of 4 February 2022.

³⁴ In particular in their dealings with professional clients. It also allows for the joint provision of execution and research services for small issuers, in order to promote the visibility of SMEs on the French market. Finally, it exempts certain bond securities from the product governance regime.

³⁵ To come into force on 2 August 2022.

³⁶ Revision of the so-called “CSDR” Regulation (n°909/2014 of 23 July 2014).

³⁷ SFTR rules (see AMF decision of 18 January 2022).

Furthermore, while the EU legislator is moving towards the adoption of the Crypto-asset Regulation, this does not prevent EU regulators from warning the public about the risks associated with these assets³⁸.

In France, the AMF updated on 2 February 2022 its policy on marketing of collective investment schemes to bring it into line with recent ESMA guidelines³⁹.

In order to give French funds a more immediate access to UK counterparties for the provision of collateral for derivatives contracts, a Decree of 28 January 2022 removed various prudential requirements imposed on non-EU counterparties. In February 2022, the Commission extended the regulatory equivalence for UK CCPs to operate in the EU until 30 June 2025.

7. Other European or national developments impacting financial services

In France, the legislator just strengthened the rules⁴⁰ covering the protection of whistleblowers deriving from its so-called “Sapin 2 law”, with a delayed entry into force on 21 September 2022.

In addition, the financial sector must take into consideration the new regulations adopted in February and March on the so-called “blocking law” of 1968⁴¹.

Finally, a Decree and a Ruling (*arrêté*) on the transposition of the European regulatory framework for crowdfunding service providers⁴² completed the French implementation of the EU regulations. Providers already active under the French regime (CIP and IFP) will continue to apply the historical rules until 10 November 2022. Beyond, the revised framework will entitle them to launch cross-border activities for crowdfunding activities up to €5 million.

For the record, it is on 1 April 2022 that the reform on financial brokerage will come into force. This will trigger the obligation for insurance, banking and payment services brokers and their respective agents to adhere to one of the seven professional associations licensed by the ACPR.

³⁸ Joint statement by ESMA, EBA and EIOPA of 15 March 2022.

³⁹ These include the display of warnings to clarify the commercial nature of the communication, the display of performance or cost changes due to currency or exchange rate fluctuations.

⁴⁰ Law n°2022-401 of 21 March 2022. It goes beyond the European rules that it aims to implement, in particular by making a subtle combination of both rules (e.g., the scope of the alert is currently broader than that of the Directive). It extends the scope of the legislative provisions that must be annexed to the internal rules of entities.

⁴¹ It prevents foreign authorities from learning of sensitive information affecting the nation's interests, including its essential economic interests, during investigations.

⁴² Decree of 1 February 2022 and Ruling (*arrêté*) of 9 March 2022 amending the AMF General Regulation.