



Newsletter – Financial services

FALL 2019

"The house is on fire and we look away!". The famous sentence of the late Jacques Chirac¹ and especially the subsequent speech, delivered 17 years ago on the occasion of a summit devoted to sustainable development, resonates today with particular acuity. Even in Europe, there is undue delay to implement the legal framework² applicable to financial actors aiming to integrate into their investment policies the social and environmental criteria that contribute to sustainable development.

The most significant discussions of the season past appear to focus on effectively combating financial circuits harmful to the financial interests of States, through the fight against money laundering, crypto-assets regulations or technological progress. Fear of the financial sector remain particularly acute on the side of the effects of Brexit, whose harmful effects authorities are trying to prevent.

Domestically, the current Government/Parliament attempts to direct the French people savings towards long-term investment with implementing measures of the recently adopted [PACTE law](#).

1. Anti-money laundering measures (AML-CFT)

At European level, the European Parliament has expressed its dissatisfaction with the too many failures noted recently and further pointed out by the Commission in four of its recent reports³.

In France, pending a review of its own policy for the full implementation of the 4th EU Directive⁴ by the asset management sector, the *Autorité des marchés financiers* (AMF) amended its General Regulation⁵ by imposing on management companies internal control in relation to AML-CFT⁶.

In addition, in the context of the implementation of a European Directive [already mentioned](#)⁷, the legislator shows an extraterritorial tone to French criminal law by authorising the prosecution of French nationals or residents who have laundered funds abroad⁸ as well as their accomplices.

¹ Former President of the French Republic, deceased on 26 September 2019.

² Various European associations requested the Commission on 19 September to postpone the entry into force of the texts on the publication of information on sustainable investments and sustainability risks (sometimes known as the Disclosure Regulation).

³ Resolution of the European Parliament (EP) of 19 September responding to the Commission's reports dated 24 July 2019. The EP even threatened to legislate by Regulation rather than Directive.

⁴ Directive n°2015/849 on the fight against money laundering.

⁵ Order of 28 August 2019. The changes were quite predictable but could be important because, as part of internal control, the AMF expects management companies to submit a report by 31 October 2019. In September, management companies were also required for the first time to fill in a questionnaire aiming at confirming that their own internal rules comply with French AML/CFT law, whereas such questionnaire is already well established for the other institutions subject to AML/CFT.

⁶ Following the Decree n°2018-284 of 18 April 2018 (more specifically Article R. 561-38-9 (b) of the Monetary and Financial Code). The AMF was required to specify the nature and scope of internal procedures, the rules for the organisation of internal control and the content of internal control reports, as well as the time limit and procedures for their transmission to the AMF. The AMF is thus aligning itself with its supervisory priorities for 2019 (see our spring 2019 [newsletter](#)).

⁷ Order n°2019-963 implementing the EU Directive 2017/1371 on the Protection of Financial Interests (PFI).

⁸ The Criminal Code is amended to remove the condition of reciprocity of offence and the subordination of prosecution to a prior complaint by the victim or an official denunciation by the State in which the acts were committed.



Furthermore, all institutions subject to AML-CFT are invited to update the risk-based approach of their internal rules to take into account the French sectoral risk analysis carried out pursuant to EU law⁹.

Taking into account past statements of the banking and insurance supervisor (ACPR), its recent press release of 17 September 2019 endorsed the recent recommendations for firmness issued by the European Banking Authority (EBA)¹⁰. No doubt the French authorities will release on time the Order implementing the 5th European Directive¹¹.

The recent financial penalty of €1 million imposed by the ACPR against a British electronic money institution¹² highlights the French authorities' determination to be tough on institutions failing to comply with French AML/CFT.

It can also be noted that France is also about to comply with European requirements for reporting the risk of tax evasion by implementing European Directive DAC 6¹³.

Finally, France still has some time to implement a Directive released during the summer¹⁴, which establishes measures to facilitate access to information of national registrars of bank/financial accounts by the competent authorities (including national financial intelligence units), for the purpose of combating serious criminal offences, including the offence of money laundering.

2. Brexit

Apart from the adoption of a Decree allowing the approval of Post-Markets systems governed by the law of a third country¹⁵, the past quarter has not seen much significant change in the European or French preparation for the occurrence of a hard Brexit.

All or at most, one can highlight the publication by the European Commission of a press release on 4 September 2019 on the issues to be anticipated in the event of a hard Brexit.

Another communication from the Commission released on 29 July is also of an interest in the context of Brexit. It deals with equivalence in the field of financial services. There is no doubt that a United Kingdom outside the European Union would claim the equivalence of its regulations in order to benefit equivalence regimes that are good for its financial industry.

3. Europe of payments

In our [previous newsletter](#), we specified that France had just initiated a migration plan aiming at the full and complete application of the strong authentication rules of the European regulations (PSD2), whereas their entry into force was scheduled for 14 September 2019¹⁶. In mid-September, the French Observatory of Means of Payment clarified the outlines of such migration plan: it plans to (i) replace the

⁹ Report released by the dedicated AML-CFT Board (COLB) in mid-September 2019.

¹⁰ Position of 24 July. One can note in particular the position taken in Luxembourg by the CSSF.

¹¹ In view of the deadlines of the PACTE law which empowered the Government, the authorities recently indicated that the Order will be released in November 2019, given an entry into force on 10 January 2020.

¹² Prepaid Financial Services Limited, procedure 2018-08. Decision rendered on 24 September 2019.

¹³ It is due to release shortly the Order implementing EU Directive n°2018/822, applicable as of 1 July 2020.

¹⁴ EU Directive 2019/1153 of 20 June 2019 laying down rules to facilitate the use of financial and other information for the prevention, investigation, detection or prosecution of certain criminal offences. The Directive must be implemented at the latest by 1 August 2021.

¹⁵ Decree n°2019-944 of 9 September 2019. In reality, this Decree is merely reiterating a Decree adopted pursuant to Ordinance n°2019-75 on measures to prepare for withdrawal from the United Kingdom, whose entry into force had been postponed to a hard Brexit. Although this Decree is currently applicable, it does not bring into force the approval orders for Post-Market systems mentioned in our [summer 2019 newsletter](#).

¹⁶ This plan is in line with the EBA's position of 21 June 2019, which acknowledged that neither payment service providers nor payment users were well prepared for the rules of strong authentication.



3Dsecure system with an 18-month phase of customer enrolment in mobile banking applications¹⁷ and at the same time (ii) upgrade e-merchants to 3D Secure 2.0 technology (which uses biometrics).

However, there is a risk that payment service providers may not be able to use this national flexibility to dissipate their liability in situations where their customers will claim they have failed applying strong authentication as early as 14 September 2019 when it was required.

In the same set of rules, the ACPR published in mid-September the list of French banks exempted from providing a backup mechanism for their customers' computer interfaces for access to their accounts (APIs). This publication is part of the technical discussions of the European forum conducted at EBA level, which updated its FAQ in July and August.

In the same month, the ACPR also provided a welcome clarification on the content and obligations associated with the payment order acquisition service.

Finally, it is worth noting an important decision of the European Court of Justice, which ruled that a merchant receiving direct debits or credit transfers associated with the European SEPA mechanism is not entitled to condition acceptance of these payment methods on localization of the payer's accounts in the merchant's country¹⁸, thus impacting on the e-merchant terms of business.

4. Europe of investment services

The European legislative framework regulating asset management is evolving with the publication in the Official Journal of the regulations relating to the cross-border distribution of collective investment undertakings¹⁹. These new rules are innovative in two respects:

- The possibility for alternative investment fund managers to launch a pre-commercialisation phase, thus allowing them to test the market without being subject to all usual constraints;
- The announced disappearance of the current practice of the required centralizing correspondents at host country level (for the benefit of retail customers), with the replacement of a required centralizing correspondent at the European level, able to take responsibility for the settlement/delivery process in the language of the retail customer.

At the national level, the ACPR and the AMF have finally decided not to amend their historic policy on the distribution of financial securities (other than collective investment schemes), which is good news for existing distribution schemes²⁰. Nor has the AMF changed the substance of its historical position on the same subject for crowdfunding platforms²¹.

During the summer, national CFD marketing regimes came into force, particularly in France, with an AMF position of 1 August 2019 that almost mirrors the temporary measures of the European Securities and Markets Authority (ESMA) on the same subject.

France is also to reform its regime for IPOs (initial public offerings)²² in order to ensure consistency between the European requirement to publish a prospectus and the simple possibility for an issuer to make an offer to the public of its financial securities.

¹⁷ These applications allow strong authentication to be satisfied via (i) the use of a secret code specific to remote transactions or (ii) biometric identification (fingerprint, facial recognition, etc.).

¹⁸ Decision rendered on 5 September 2019 (C-28/18 Deutsche Bahn AG).

¹⁹ EU Directive n°2019/1160 and EU Regulation n°2019/1156 of 20 June 2019 on the cross-border distribution of undertakings for collective investment. If the entry into force of the new core rules is postponed to 3 August 2021, some rules come into force on 2 February 2020.

²⁰ The respective positions (2012-P-02 and DOC-2012-08) have only been updated on the references to the rules from MiFID 2. This also reflects some recent case law of the AMF Enforcement Committee on the same topic.

²¹ Update of AMF Position DOC-2014-10.

²² An Order is due to be adopted shortly pursuant to Article 75 II of the [PACTE Law](#).



The AMF has confirmed that the French asset management companies are following the integration of the criteria on responsible finance²³. However, the more challenging project ahead will be the integration of the European Disclosure and Benchmark Regulations, the entry into force of which could be postponed to take into account developments that have not yet been finalised on their practical and cross-sectorial implementation²⁴.

5. Other European developments impacting financial services

As part of expected adjustments to rules²⁵ for the presentation of packaged retail or insurance-based investment products (PRIIPs), the European Commission responded²⁶ to proposals from the Joint Committee (JC) of European Supervisory Authorities²⁷ on options for presenting performance scenarios for the key information document. Among these options, the most contested by the Commission is the possibility of including past performance but also illustrative scenarios for structured products. The JC did not appear inclined to give up on launching a public consultation on these options²⁸.

6. National developments impacting financial services (including insurance)

6.1 Follow-up to the Law for the Growth and Transformation of Companies (PACTE)

In line with [our latest developments](#) on the PACTE law, the Government has implemented the pension savings reform²⁹. Subsequently, it is now necessary to distinguish between:

- two company retirement savings products³⁰; and
- an individual product succeeding the historic contracts (known as *PERP* and *Madelin*), which may be opened in the form of a securities account or an insurance contract³¹.

On a different topic and as part of the rules governing credit, an Order has been issued to reform the system of sanctions for erroneous annual percentage rates (APRs)³². While the new rules introducing a new regime of forfeiture of interest should dry up the flow of case law³³ challenging the very existence of the interest stipulation, they are not likely to limit litigation on erroneous APRs. Above all, it is regrettable that the ordinance did not retain the option offered by the enabling law to remove the mandatory reference of APRs in business credit agreements when this reference is inappropriate³⁴.

In addition, the entry into force of the rules governing token issuance (known as ICO) and those relating to virtual asset service providers (VASPs)³⁵ is to be welcomed. Even if other countries in Europe are already positioning themselves on licensing systems (e.g. the Netherlands), France's responsiveness on such a highly technical subject is encouraging, even if these national systems are not at all yet conducive to the development of these new services. It is hoped that this new set of rules will include

²³ In July, it provided a summary on the results of its audits of socially responsible investment (SRI) management systems and the integration of environmental, social and governance (ESG) criteria.

²⁴ See in particular on this point an ACPR release of September 2019 on the impact on insurance distribution.

²⁵ EU Delegated Regulation 2017/653.

²⁶ Response of the European Commission of 19 July 2019 to the ESA's proposals.

²⁷ Letter from ESA to the European Commission dated 23 May 2019.

²⁸ ESA response on 30 July 2019 to the European Commission's letter of 19 July 2019.

²⁹ Order n°2019-766 of 24 July, since supplemented by Decree n°2019-807 of 30 July and an Order of 7 August.

³⁰ "Collective" product replaces the PERCO and "Targeted" product replaces the so-called « Article 83 » contracts.

³¹ Old contracts (known as PERCO, PERP, Madelin, "Article 83", Préfon, Corem, CRH) will be closed for marketing on 1 October 2020. As of 1 October 2019, new policies were marketable and policyholders of existing policies are since then entitled to transfer their savings into the new products.

³² Order n°2019-740 of 17 July 2019 on penalties applicable in the event of failure/error of the APR.

³³ For example, a decision rendered by the French Supreme Court on 22 May 2019 (n°18-16281).

³⁴ For example, for variable rate loans.

³⁵ With a multitude of Decrees, Orders and Instructions published at the beginning of the summer (ICO) or that are to be released very shortly (VASPs).



useful clarifications on AML/CFT so that France can take due account of the new FATF standards on virtual currencies adopted in June 2019.

6.2 Whistle-blowers

While the *Sapin 2 Law*³⁶ had already led financial sector supervisors to set up internal rules to receive and process any information of whistle-blowers, the various State administrations are following the same path, as shown by a recent Decree of 24 July 2019 with respect to the administration under the supervision of the Ministry of the Economy.

7. National developments reflecting technological advancements

During the summer, the AliceM electronic identity solution [mentioned earlier](#) was challenged in court on the grounds of a violation of data protection rules³⁷. The fragility of the Decree behind this French electronic identity solution is bad news for development in France of the digital path of customer onboarding and the competitiveness of French institutions as compared to their European counterparts operating under the freedom to provide services, whose rules are more flexible than the French rules on remote identification.

On point, we can also welcome the feedback from the work of the Fintech ACPR-AMF³⁸ forum's working group, which advocates for a certain liberalisation of the French position on remote identification, in particular the introduction of a national reference system for identity verification by third parties.

³⁶ Law n°2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life.

³⁷ The argument put forward in support of this action is that the facial recognition on which this solution is based is undertaken on the basis of forced consent, which is contrary to the EU Regulation (GDPR).

³⁸ 17 September 2019 (forum bringing together public and private actors in French finance).