



Newsletter – Financial services

FALL 2020

A recent leak of data from FinCEN (US Financial Intelligence Unit – FIU) highlights the ineffectiveness of the fight against money laundering/terrorist financing (AML/TF). It confirms that effectiveness cannot be reduced solely to identifying shortcomings by reporting institutions and depends on the criminal response undertaken by the authorities on the basis of the reports issued by national FIUs.

Effectiveness of AML/TF also depends on a revised EU framework for electronic identification and trust services for electronic transactions (eIDAS), which should allow the use of interoperable national digital identification solutions. This is the thrust of the European Commission's digital finance strategy for the EU, which was announced at the end of September. Several national registries are also working to introduce appropriate checks to verify that directors tied to registered companies are real persons.

The European Court of Justice (ECJ) complicated the task of some financial institutions with a ruling¹ that invalidated the data transfer regime between the EU and the US (known as the Privacy Shield) adopted by the European Commission back in 2016.

More generally, current events have been greatly impacted by the health and economic crises and the no less bleak outlook directly related to Brexit.

1. **Exit from the health crisis**

1.1 **Economic Accompanying Measures**

Beyond the adoption of a law to end the health emergency, the Amending Tax Bill² provides for measures to restart the economy³, preceded by various measures such as strengthening financing by factoring to support the cash flow of companies⁴.

The changes in the rules are accompanied by measures to control foreign investment in French listed companies (see temporary lowering of the threshold triggering the authorization regime)⁵.

1.2 **Flexibility**

The French legislator justified the postponement of the reporting obligations resulting from the European Directive on the exchange of information (DAC6) on the grounds of the health crisis. The European legislator followed the same path on the 'VAT package' applicable to e-commerce platforms.

The European Banking Authority (EBA) ended⁶ its flexible prudential treatment regime introduced by its guidance on moratoria on loan repayments applied as a result of the pandemic⁷. The increase in banks' NPL (non-performing loans) ratio is expected to keep pace with the increase in non-performing loans.

¹ 16 July 2020, Case C-311/18.

² Law n°2020-935 of 30 July 2020 organising the exit from the state of health emergency.

³ For example, Decree n°2020-995 of 6 August 2020 relating to the use of resources collected by regulated savings accounts (Livret A and LDDS), or changes to the regime of the French State-guaranteed loan (PGE).

⁴ Decree n°2020-849 of 3 July 2020 and 11 July 2020 press release.

⁵ From 25% to 10% (Decree n°2020-892 and Ruling of 22 July), to be read jointly with the EU regime, since 11 October.

⁶ 21 September 2020: it justified so by its assessment of the post-covid economic crisis exit scenario.

⁷ See our [latest newsletter](#).



In support of the delegated acts relating to the systems and procedures for managing the liquidity of investment funds of European managers, the European Securities and Markets Authority (ESMA) has issued⁸ guidance on liquidity stress testing for greater supervisory convergence. Their full acceptance by the Autorité des marchés financiers (AMF) in September 2020 coincides with a resounding case of suspensions of redemptions for French funds⁹, which could in the future encourage investors to think twice about the investments chosen¹⁰ or selected for them and the way they allocate such investments¹¹.

2. Brexit

One round of negotiations follows another¹² without any indication of the future availability of regimes for the cross-border marketing of financial services between the EU and the UK. EU authorities apparently anticipate a hard Brexit scenario: the EBA said in the end of July that, given the expiry of the transition period on 31 December 2020, financial institutions were to anticipate the loss of the European passport by having (i) applied for the necessary authorizations to continue their activity and (ii) provided adequate information to their EU clients with respect to their services after the transition period will lapse.

In France, the Government is also preparing legislation¹³ on insurance, collective investments and equity savings plans (PEAs), to secure the terms and conditions for the execution of insurance contracts entered into before 31 December 2020, and to introduce appropriate rules for informing holders of unit-funds, PEAs or insurance contracts.

While the European Commission has extended the benefit of temporary equivalence of UK clearing houses (until the end of June 2022), it intends to put in place progressive incentives for the eventual relocation of these clearing houses in the EU.

Finally, it is worth noting the publication at the end of September of the Draft Technical Standards (RTS) for the EU regime of non-EEA investment service providers¹⁴, which would be relevant in the event that the European Commission were to acknowledge equivalence of UK rules.

3. Fight against money laundering (AML/CFT)

3.1 European developments

In a recommendation dated 14 July 2020, the European Commission recommended EU member states to initiate financial support measures for companies should ensure such measures are conditioned to the verification that the companies are in no way linked or associated with the EU list of non-cooperative tax jurisdictions.

Similarly to the French experience with aim to fight against insurance fraud, an initiative lead by Dutch banks (the circle of which could open to other banks/countries) is worth mentioning: they set up a tool for detecting unusual trends in payment flows.

⁸ On 16 July 2020 (ESMA34-39-897).

⁹ Suspension on 28 August of subscriptions / redemptions of units of 3 French UCITS managed by the UK management company H2O Asset Management LLP. Insurers which had placed these UCITS in their life insurance contracts were impacted; they were similarly forced to turn down redemption requests from their policy-holders.

¹⁰ Notably the insurance companies in their selection of funds that are housed in their life insurance contracts.

¹¹ i.e., securities accounts vs. life insurance policies. On the latter, the suspension of redemptions of a single fund makes the associated insurance contract not redeemable: the risk of liquidity is directly connected to the number of funds and opening several life insurance contracts with the same underlying may prove to be riskier.

¹² No less than 9 rounds of negotiations as of today, interrupted at some point when the withdrawal agreement was challenged by the UK through a bill it pursued to adopt.

¹³ One fast track law (*ordonnance*) and two rulings (*arrêtés*).

¹⁴ Regime set forth under Article 46 of MIFIR, as amended in 2019 (cf. [winter 2019-2020 newsletter](#)).

3.2 National developments

Further to implementing the 5th AML/CFT Directive, licensing of digital asset service providers is due shortly to be enhanced¹⁵ and a draft fast track law¹⁶ is due to enlarge the scope of persons subject to the asset-freezing measures to a broader circle of private individuals / legal entities located in France.

On the latter rules (freezing of assets), one may note a decision of the French Supreme Court¹⁷ which ruled that a debtor subject to sanctions / freezing of assets cannot waive the right of his creditors to claim default interest on the principal of a payable debt made unavailable by the freezing of assets. This decision echoed a ruling issued by the European Court of Justice (ECJ) which rejected a claim for compensation of a bank whose blacklisting had been annulled by the same Court¹⁸.

While the annual “Trend & Analysis” report released in July 2020 by French Financial Unit (TRACFIN) shed useful light on the typological cases monitored in 2019. A recent press release from the National Anti-Terrorist Prosecutor's Office highlighted the dismantling of a terrorist financing network based on the purchase in France of encryption coupons whose references had been transmitted by secure messaging to jihadists, then credited on cryptocurrency exchange platforms¹⁹.

It may be recalled that the grandfather clause contained in the law creating the regime governing cryptocurrency exchange platforms will expire on 18 December 2020²⁰. Given this deadline, the AMF published on 22 September 2020 an FAQ which supplements its various instructions and provides core information on the scope of the monopoly regarding such platforms (e.g. localization of their services).

4. Digital identity

Financial institutions looking for solutions to check the clients' declared residence may eventually benefit from the service mentioned in a bill²¹ which will confirm an experimental system allowing the verification of the declared residence of persons requesting identity documents²².

The launch of ‘AliceM’, the French mobile identification solution²³, which is a facial recognition tool compatible with the French public portal of digital identities (France Connect), is apparently further delayed, notwithstanding its announced launch in the fall²⁴. Other online identification tools are however made available²⁵ and confirm the commitment of France to fight against online fraud and scams²⁶.

Finally, a Decree²⁷ has confirmed the French National Institute of Industrial Property's appointment to serve as the one-stop shop for online business formalities. The INPI is to manage e-services enabling

¹⁵ Draft fast track law (*ordonnance*) and Decree.

¹⁶ Adopted pursuant to Article 203 of the PACTE law (see our [dedicated newsletter](#)). In addition, an order (*arrêté*) on internal control is yet to be released; it is expected to include for all reporting institutions provisions that are currently contained in either Order of 3 November 2014 or the Insurance Code.

¹⁷ Great Chamber, 10 July 2020, n°18-18.542 et 18-21.814. The Decision is in relation to an Iranian Bank.

¹⁸ Decision of 6 October 2020 (C-134/19 Bank Refah Kargaran/Council).

¹⁹ The press mentioned the name of Keplerc platform (tied to a UK financial institution), which had already attracted the attention of national supervisors (ACPR/AMF) back in November 2018.

²⁰ So-called “PACTE” law. The AMF recalled so in a 27 July press release in relation to the crypto-currencies ATMs operating in France, which have not applied for the mandatory registration. The French regulator probably thought of Keplerc website; it was finally cited in September in connection with the dismantling of a terrorist financing network (press).

²¹ Bill to accelerate and simplify public action.

²² “Justifadresse” - see our [dedicated newsletter](#).

²³ [Alicem](#).

²⁴ A parliamentary report released on July 10 made a number of recommendations to move the issue forward more effectively, in anticipation of the e-ID, which is expected to be available in mid-2021.

²⁵ e.g. A Decree of 10 July 2020 now allows to send a declaration of assignment / an application for vehicle registration electronically to the Minister of the Interior, using a mobile application.

²⁶ i.e., *task force* created in July 2020.

²⁷ Decree n°2020-946 of 30 July 2020.

online business formalities, including those related to access to a regulated profession (e.g. registration of the branch passport).

5. Payment services

The Delegated Regulation for the appointment of central contact points under the Payment Services Directive (PSD2) has just been released²⁸. It reveals inconsistencies with the other Delegated Regulation on the same matter but which was adopted pursuant to the 4th AML-CFT Directive.

In its annual report released on 22 September, the French Observatory of the security of means of payment in charge of the French migration plan for strong authentication confirmed the three-month flexibility margin announced back in July for the two components of this migration plan²⁹.

The evolution of such migration plan on strong authentication for Internet payments is all the more important as it triggers other requirements for Account Servicing Payment Service Providers³⁰. The position expressed early June 2020 on the notion of ‘payment accounts’ by the Luxembourg Regulator (CSSF) is worth noting in this respect, particularly in light of a controversial position of the European Court of Justice and because such notion calls for other legal consequences (FICOBA, reporting, etc.).

A decision rendered by the French Supreme Court is worth noting as it shed light on consequences of gross negligence of a payment service user on his ability to seek reimbursement in the event of fraud³¹.

6. Insurance

In mid-August, the European Insurance and Occupational Pensions Authority (EIOPA) released draft Implementing Technical Standards (ITS) and Regulatory Technical Standards (RTS) in connection with EU Regulation on the Pan-European Personal Pension Product³².

In France, it can be noted that the French regulator (ACPR) has confirmed its compliance with the EIOPA Guidelines on outsourcing to cloud service providers (supervision, control of the provider, supervision by the competent authorities). It has also decided they would apply organizations that are not subject to the constraints of the Solvency 2 Directive.

7. Investment Services

The current health crisis has relaunched the European Commission's project to harmonize the rules governing capital markets by integrating them into a true single market by 2023³³.

The public consultation on the implementing measures of the EU Disclosure Regulation³⁴ was followed by another one aimed at standardizing – through models – the disclosure of information for financial products that promote environmental and/or social characteristics or have a sustainable objective. At its

²⁸ DR (EU) 2020/1423 of 14 March 2019, released in the OJ JO of 9 October 2020, applicable on 29 October 2020.

²⁹ The first component involves actions to enroll payment service users in strong authentication devices (secure mobile application, token, personal code, etc.), replacing the authentication method exclusively based on a password transmitted by SMS (“SMS OTP”). The second component encourages e-merchants wishing to offer payment route without strong customer authentication for reasons of fluidity to connect to the 3D-Secure v2 protocol, which justifies the use of exemptions to strong authentication provided for by EU rules (RTS). Without connection to such protocol, the migration plan relies in particular on a progressive mechanism for rejecting transactions without authentication request (soft decline), ranging from >€2,000 in the last quarter of 2020 to <€500 from April 2021.

³⁰ i.e., the obligation to set up user interfaces for the benefit of “AISPs” or “PISPs”.

³¹ Decision of 1 July 2020, n°18-21.487.

³² (EU) 2019/1238 of 20 June 2019, already mentioned in our [dedicated PACTE law newsletter](#). Perhaps the most controversial issue is the “Basic PEPP” fee cap, which is considered too low by the profession.

³³ A capital market union would allow for a more flexible regulatory framework in the event of a political (Brexit) or health (COVID-19) crisis, under the aegis of ESMA, thus improving the flow of financial flows necessary for economic recovery.

³⁴ Regulation on the publication of sustainability information in the financial services sector.

level, the French legislator, released amended rules governing the French label of Socially Responsible Investment (ISR), whose new standards will enter into force on 23 October 2020³⁵.

One may also note the failure of the Joint Committee of EU Financial Authorities to reach an agreement on the revision of certain parts of the implementing rules of the EU Regulation on Key Information Documents relating to packaged retail and insurance-based investment products³⁶.

Finally, one may also note ESMA released in the middle of the summer its recommendations for changes to the rules governing EU asset managers (revision of the AIFM Directive framework).

8. Other national developments impacting financial services

The European Commission launched³⁷ a number of projects in support of its digital finance strategy. It intends not only to harmonize national rules on digital financial services by 2024³⁸, but also to create a framework for market infrastructures based on blockchain.

In addition, while political agreement has been reached on the adoption of a Directive on representative actions in the field of the protection of the collective interests of consumers (class-actions), a bill on the same subject matter was submitted to Parliament in France in September 2020.

In the same field, one should also point out the release of a law aimed at limiting telephone canvassing³⁹. In particular, it provides for the voidability of agreements entered subsequently to telephone canvassing notwithstanding that the consumer listed himself to be freed from such type of canvassing and clarifies solicitation rules governing pre-existing contractual relationships.

The French authorities increased the level of detail and frequency of information due to the French Banking Inclusion Observatory⁴⁰, including for providers other than banks.

Finally, the AMF amended its doctrine in July with respect to the use of the term "prudent" in information governing collective schemes or asset management. The AMF became aware that this terminology may have been conflicting with the expression "prudent retirement profile" used for some individual retirement savings plans that could be subscribed through investment funds.

³⁵ Order of 8 July 2020. The changes to this standard are supposed to (i) strengthen transparency and monitoring of ESG performance and above all make the label eligible for professional funds, mandates and the real estate investment sector.

³⁶ i.e., Letter of the Joint Committee of 20 July 2020 on RTS of the PRIIPS Regulation.

³⁷ Release of 24 September 2020.

³⁸ In the form of a Regulation identified under the acronym "MiCA", which should eventually supersede in France the rules resulting from the PACTE law relating to the virtual asset providers.

³⁹ Law n°2020-901 of 24 July 2020.

⁴⁰ Rulings of 7 et 16 September 2020.