



Newsletter – Financial services

SPRING 2021

Previously, flaws in the regulatory supervision of Wirecard had been revealed. Eventually, the European financial regulator (ESMA) blamed¹...current EU regulations. At the same time, one would expect that the recent bankruptcy of Greensill Bank would embarrass the European banking supervisory system, although the European Union can take a breath since its parent company of the group is British...

In the recent period, there has been a more striking increase in cybercrime and identity theft, particularly of regulated actors², which makes digital identity ever more important. The European Banking Authority (EBA) has itself been victim of cybercrime³ : it echoes the French reform on internal control over IT risk.

The first financially significant digital art sale⁴ constitutes one of the first occasions where of the art sector is connected to digital assets. It raises issues on the risks of money laundering and financing of terrorism (AML/CFT)⁵, as evidenced by a position paper of the FINCEN in relation to the art sector⁶.

Incidentally, the French insurance supervisor (ACPR) finally launched a more robust register of insurance companies licensed in France, which it has named “REASSU”.

1. Exit from the health crisis

Beyond the continuation of public policies to support the economy⁷, the most significant development is undoubtedly the introduction of draft regulations⁸ for the creation of a “digital green certificate” that could facilitate the free and safe movement in the EU during the pandemic.

In addition to the practical importance of this latest development, there is a clear interest in the fact that this ‘health passport’ will be based on a QR code containing key information as well as a digital signature to guarantee the authenticity of the document⁹. By establishing the interoperability of the codes generated in each of the EU Member States, these rules pave the way for the deployment of EU future pan-European payment solutions.

In a seminar held by the ACPR in February 2021 in connection with the financing of “zombie” firms (defined as firms that are unprofitable but continue to be financed), one may link this expression to the prudential topic of “non-performing” loans.

2. Brexit

The Brexit remains and will remain a thorny issue on both sides of the Channel, with some developments in the pipeline or awaiting resolution, such as the Commission’s draft decision recognizing an adequate

¹ ESMA’s letter to the European Commission recommending a reform of the Transparency Directive.

² E.g.: ACPR press release of March 4, 2021 on a usurpation of a famous British bank and various scams that flourish here and there, sometimes based on the laxity of a part of the financial sector.

³ Attack making its email servers unavailable for at least three days between 7 and 9 March 2021.

⁴ Auction amounting to \$69.3M on 11 March 2021 for the artist Beeple.

⁵ See the position of working group on digital assets at the level of the ACPR-AMF Fintech forum (24 mars 2021).

⁶ Position issued on 9 March 2021.

⁷ And the expected prudence on the financial sector’s end in terms of dividend distribution (e.g. ACPR release of 18 February 2021 and the various European authorities that have already expressed themselves on this issue).

⁸ Draft regulations on the legal framework for interoperable certificates of vaccination, testing and recovery in order to facilitate the free movement of EU citizens during the pandemic.

⁹ The data in this passport can only be checked to confirm and verify the authenticity and validity of the certificates, similar to the systems that already exist in the EU to verify the authenticity of identity documents (PRADO/FADO systems).





level of personal data protection in the UK, which could pave the way for the normalization of personal data transfers to this country¹⁰.

3. Fight against money laundering (AML/CFT)

3.1 European developments

For reporting institutions with cross-border activity, the identification of beneficial owners (UBOs) becomes a headache when it involves connecting to each of the national registers (in France, there are several) to verify the identification of UBOs of companies, trusts or other similar legal arrangements established in the EU.

To meet this challenge, a European system for the interconnection of national registers was created and the 5th Directive required Member States to ensure the connection of UBO registers to a European platform¹¹. An implementing regulation¹² just formalized the technical specifications that will enable interconnection to this European platform dedicated to UBOs. It is called "BORIS"¹³.

In the end, this interoperability between national registers (like the one in place in connection with bank accounts) is becoming more and more important, given that European regulations require true mutual recognition of national systems¹⁴, which raises questions even though the interconnection is not fully functional.

However, this issue is critical, as the banking regulator regularly reminds the financial sector that it is subject to a results-based obligation¹⁵ for the identification of persons on blacklists applicable in the EU (regardless of their nationality¹⁶). One can note that the EU Regulation on the implementation of restrictive measures in response to serious human rights violations has found its first implementation with individuals or companies from notably Russia, Myanmar and China¹⁷.

Finally, the European Banking Authority (EBA) has just updated its joint guidelines for the entire financial sector on simplified and enhanced customer due diligence measures that financial institutions must take into account when assessing AML/CFT risks¹⁸. They will enter into force three months after their translation into the official languages of the EU.

3.2 National developments

While recent national developments are mainly contained in decisions handed down by the Enforcement Committee (ACPR), in particular the aforementioned decision of 24 February 2021, it is worth noting that the significant update of the guidelines on identification, verification of identity and knowledge of customers¹⁹ in connection with the specific topic of financial market transactions.

¹⁰ Draft Commission Decision pursuant to Article 45 of the European Regulation (GDPR).

¹¹ Elements of the French interconnection can be found in the recent reform on the freezing of assets.

¹² Implementation Regulation n°2021/369 of 1 March 2021 to Regulation n°2020/2244 of 17 December 2020.

¹³ Beneficial Ownership Registers Interconnection System". It is a decentralized system connecting the national central registers of UBOs and the European portal e-Justice, via the European central platform. The BORIS for companies is [accessible here](#). It does not seem to be fully developed yet and does not currently allow for automated verification via an API.

¹⁴ Regulation (EU) 2018/1805 imposing the mutual recognition of national freezing and confiscation orders, applicable since 19 December 2020 (see [Winter 2018 Newsletter](#)).

¹⁵ Lastly, the decision rendered on 24 February 2021 (Recital 47) and most obviously the decision rendered on 4 February 2020 (Recital 41).

¹⁶ Ex: Order of 1 February 2021 on the UN lists (see FATF requirements).

¹⁷ OJEU of 2 and 22 March: in application of the EU Regulation 2020/1998 on restrictive measures in response to serious violations of human rights (see our [previous newsletter](#)).

¹⁸ Guidance of 1 March 2021 (ABE/GL/2021/02) amending the Guidelines of 4 January 2018 (JC 2017 37).

¹⁹ Posted 23 March 2021, updating Guidelines originally issued on 14 December 2018.





A Ruling (*arrêté*) dated 25 February 2021 modifies the Ruling dated 6 January 2021 (see [previous newsletter](#)) which had consolidated in a single text the provisions on internal control of the banking and insurance sectors. It provides subtle clarifications on the division of the roles and responsibilities of the persons in charge of permanent and periodic controls in the banking sector in terms of AML/CFT.

Finally, in order to face the threats of financial crime and while France is currently subject to the FATF's assessment, France has developed a national action plan based on five priorities, which includes the opening to the public of the UBO register²⁰.

4. Digital identity

While EU member states will have to fully implement by 2 August 2021 the European Regulation that strengthens the security of EU citizens' identity cards and residence documents²¹, France is converting its national identity card (French ID) to digital²². The addition of a chip will enable the French ID to be actively used by the French digital identity system (Alicem). In addition to the fact that the new French ID will be valid for 10 years (instead of 15 years since 2014), the bearer will be entitled to decline that his or her fingerprints be stored on the actual French ID, which may establish a difference with the passport, whose rules do not allow such opposition.

At the same time, several Rulings (*arrêts*)²³ have given rise to the French Electronic Civil Status Register (RECE) / the associated online service, aiming to give to the digital civil status record the same authentic value as the traditional paper record, by means of an electronic signature, with a high level of security. The interest of this online service will enhance the fight against identity theft by enabling the free verification of the reliability of ID documents transmitted by a citizen, following the same route as systems operating for other administrative documents (e.g., income tax notice).

5. Investment Services and asset management

The European Union took into account the economic consequences of the pandemic by once again amending the Investment Services Directive (MiFID2)²⁴. It decided to ease constraints that often appear to be more costly than protective of investors²⁵. The implementation of these changes is due by 28 November 2021 and must be applied by 28 February 2022.

Other developments with respect to the same Directive are expected during the summer of 2021 with respect to the securities market structure (including third country issues), rules governing research, all forms of payments to advisors, product governance, loss reporting and client categorization.

A summary of the AMF's spot checks on the application of MiFID2²⁶ announced more threatening checks, given the apparent confusion of actors between the assessment of a client's capacity to incur losses and his/her tolerance to financial risk, even though these two concepts are key features of

²⁰ Action plan 2021-2022 released on 23 March 2021.

²¹ EU Regulation n°2019/1157 of 20 June 2019.

²² Decree n°2021-279 of 13 March 2021.

²³ 3 Rulings of 25 February 2021.

²⁴ Directive n°2014/65, already amended by the so-called "Refit" rules and the rules on participatory finance providers whose French implementation is pending ([Summer and Winter 2020 newsletters](#)) is further amended by Directive n°2021/338 to support the economic recovery following the pandemic (sometimes referred to as the "MiFID2 Quick fix").

²⁵ For example, there is an exemption from the "product governance" requirements where the investment service provided relates to bonds with a "make-whole" redemption clause (which ensures that in the event of early redemption, the issuer pays the investor an amount comprising (i) the net present value of the remaining coupon payments expected to be made until maturity and (ii) the principal amount of the bond to be redeemed). The relief is also very relevant in situations involving eligible counterparties or professional clients.

²⁶ AMF report published on 11 March 2021 on MiFID2 adequacy compliance.



MiFID2. Another study pointed out that there was a high proportion of complaints from individuals against Cypriot investment firms operating in France under the freedom to provide services²⁷.

In the asset management sector, the revision of the Alternative Investment Fund Managers Directive (AIFMD) is on track, given the ideas for revisions expressed by the French securities regulator (AMF) in response to a consultation lead by the European Commission that closed at the end of January 2021²⁸. The most prominent ideas addressed were (i) the responsibility for supervising an AIFM manager from one country when the said manager manages funds from another country, (ii) the content of the management delegation and (iii) the management of liquidity, all in a context where the AMF is calling for a harmonization of the rules between alternative investment funds (AIF) and UCITS.

A new market is also opening up for French AIFs, which will be able to benefit from a government guarantee to cover the risk of loss associated with their investments in equity loans granted in 2021 and 2022 to small and medium-sized companies or mid-sized companies registered in France²⁹.

6. Payment services

Although regulatory developments on roaming may seem out of place in times of pandemic, the European Commission has initiated the process of renewing the Roaming Regulation³⁰, which is a prerequisite for interoperable payment services in the EU.

In France, the migration plan for the strong authentication of the 2nd Payment Directive (PSD2), follows its course with regular monitoring by the French authorities (OSMP)³¹.

At the European level, the European Banking Authority (EBA) has published an opinion³² in which it gives national authorities until 30 April 2021 to remove obstacles attributable to banks (regarding the difficulty for authorized third-party service providers to access to accounts opened in these banks - via the API set up by the latter); failing that, to initiate any procedure necessary for these obstacles to cease.

7. Sustainable finance

The European Joint Committee of Supervisory Authorities has published its draft Delegated Regulation of the European Regulation on Sustainability Disclosure³³ for provisions applicable from 1 January 2022.

At the same time, as part of the preparation of the Delegated Regulation for the establishment of a framework to facilitate sustainable investment³⁴, the two European banking authorities (EBA and ESMA) specified on 26 February 2021 the content and presentation of information to be published (key performance indicators (KPI) and methodologies for implementation).

In France, the government is communicating on the reform of the “ISR” label (which stands for socially responsible investment) and its wish to develop what it names the “impact finance”³⁵.

²⁷ Published on 24 March 2021. It suggested that the rules on the division of competences between national supervisors (in favour of the home regulator) largely explain this situation.

²⁸ AMF position summarised on 17 March 2021.

²⁹ Decree n°2021-318 of 25 March 2021.

³⁰ Proposal of 24 February 2021 to renew and amend Regulation (EU) n°531/2012 of 13 June 2012 on roaming on public mobile communications networks within the Union.

³¹ Most recently on 18 February 2021 on the continuation of the “soft” and “hard decline” trajectory, with the former no longer to take place from 15 May 2021.

³² 18 February 2021 (EBA/Op/2021/02).

³³ Sustainable Finance Disclosure Regulation (EU) 2019/2088 (SFDR).

³⁴ Regulation (EU) 2020/8521, the so-called Taxonomy, and specifically its Article 8 on the transparency of companies in non-financial statements.

³⁵ Press releases of 25 March 2021.

8. Insurance

In a frequently asked questions³⁶, the European authorities provided useful clarifications on the interpretation of European regulations on insurance distribution³⁷, namely in relation to “product governance” or the assessment of the adequacy and appropriateness of an insurance product.

Without knowing whether the pan-European individual retirement savings product will be a success, one can note the publication of the Delegated Regulation establishing the requirements governing information documents³⁸.

In France, a law was adopted³⁹ to complete the so-called “Eckert” law⁴⁰ on the identification of dormant bank accounts and unclaimed life insurance policies. It responds to criticism from the French *Cour des Comptes* and the French regulator (ACPR), which had identified €13.3 billion in unliquidated capital from policyholders on supplementary pension contracts, particularly on compulsory membership contracts. The change will be reflected in a number of measures applicable from 2022, including an obligation to inform policyholders when they retire and the creation of a national directory (maintained by *GIP Union Retraite*). This change echoes a specific ACPR recommendation on funeral contracts, which made equivalent criticisms regarding the same subject matter of dormant insurance policies⁴¹.

The withdrawal of the United Kingdom from the EU having led to the ineligibility of UK securities to the units offered in French life insurance contracts, a Decree⁴² was adopted to ensure the continuity of contracts subscribed before 1 January 2021 in order to protect the interests of policyholders, while prohibiting these contracts from new subscriptions or new choices of arbitrage.

9. Other European or national developments impacting financial services

In our [last newsletter](#), we had pointed out an important Ruling setting a framework for internal control in AML/CFT applicable to both the banking and insurance sectors. The underlying Decree on internal control for the banking sector (Decree of 3 November 2014) has since been largely modified by another Ruling⁴³ that reshuffles all sections of internal control and also brings innovative developments on IT risk management and data aggregation. The Decree is in addition to four others of the same day on subjects specific to the banking sector and rather of a prudential nature, essentially to take into account the implementation of the so-called “CRD5” Directive.

A bill was brought to the French Senate on 3 February to reform the regulation of insurance brokers and intermediaries in banking and payment services. The change is due to make mandatory membership in professional associations⁴⁴. Incidentally, a Decree⁴⁵ was adopted to improve the control over multiple holdings of regulated savings products.

³⁶ Publication of 23 March 2021, oddly enough from the European Insurance and Occupational Pensions Authority (EIOPA) but whose responses are apparently drafted by the European Commission.

³⁷ Directive n°2016/96/EU on insurance distribution and its Delegated Regulations (2017/2358-2359).

³⁸ As well as the requirements for costs included in the cost ceiling (DR n°2021/473 released on 22 March 2021).

³⁹ Law n°2021-219 of 26 February 2021.

⁴⁰ Law n°2014-617 of 13 June 2014.

⁴¹ Recommendation n°2015-R-02 amended on 18 February 2021.

⁴² N°2021-262 of 9 March 2021.

⁴³ Dated 25 February 2021.

⁴⁴ This project had been invalidated by the Constitutional Council in the PACTE law (supported by its policy on legislative riders).

⁴⁵ Decree n°2021-277 of 12 March 2021.