



# Newsletter – Financial services

## Winter 2021-2022

*As the French Presidency of the Council of the European Union begins on 1 January 2022, the major digital legislative work will continue with the European Parliament, starting with discussions on NIS2 Directive (cybersecurity) and the MiCA Regulation (on the crypto asset markets). Also, the apprehension of large players such as GAFAMs will be tackled through the future DSA and DMA rules<sup>1</sup> and as well as through the DORA Regulation<sup>2</sup>.*

*In the payment sector, the most notable development is the green light – on 29 November – for the consortium of 30 European banks (representing the European Payments Initiative) to embark on a pan-European payments project which will create an extended European “Visa/Mastercard” scheme. Among others, it will set up a digital wallet enabling payments between individuals.*

*The ongoing regulatory developments in the area of anti-money laundering (AML/CFT) should not detract from the growing risk by networks of collectors organizing themselves to move funds associated with illegal trafficking and other undeclared activities. This is evidenced by the authorities’ dismantling last October a network that linked textile wholesalers which intended to launder cash with counterparties outside the EU.*

*Regulations related to sustainable finance are becoming increasingly important in the evolution of prudential rules for financial institutions (1<sup>st</sup> pillar of banking supervision), in addition to the transparency they owe to their investors (3<sup>rd</sup> pillar).*

### **1. Fight against money laundering (AML/CFT)**

#### **1.1 European developments**

In the wake of the revision of the FATF standards in October 2021 and the FATF’s position on *de-risking*<sup>3</sup> strategies by financial institutions, the FATF has also updated its list of countries under strategic supervision. This development could trigger an upcoming change to the corresponding European list on which financial institutions base their geographical risk approach.

Within a consultation process, the European Banking Authority (EBA) undertook last December especially its draft guidelines on remote customer onboarding solutions will be most relevant for online banking and insurance institutions. These guidelines are intended to converge practices in this area in Europe. Another consultation on guidelines for compliance officers closed on 2 November. These directly impact internal procedures of financial institutions.

On the judicial front, a decision of the Court of Justice of the European Union (ECJ) on 21 October 2021 suggests that the confiscation of cash from persons subject to a search warrant will be more complex to implement, as the authorities will not only have to establish the disproportion between the value of

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<sup>1</sup> 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.

<sup>2</sup> EU Regulation on the digital operational resilience of the financial sector.

<sup>3</sup> The European Banking Authority (EBA) quickly followed said position with an opinion, published on 5 January 2022, aimed at national supervisory authorities and the European legislator, on how best to prevent such strategies, which are not only ineffective in combating AML/CFT but also devastating in terms of financial exclusion of legitimate actors.



the property to be confiscated and the legal income of the convicted person, but will also have to ensure that any third party claiming to be the owner of the confiscated liquid assets is included in the seizure procedure.

## 1.2 National developments

In declaring their compliance with the 2021 EBA guidelines on money laundering and terrorist financing risk factors, the ACPR and the AMF<sup>4</sup> acknowledge that financial institutions will be supervised on the basis of said guidelines, which came into effect on 7 October 2021.

In December, the ACPR updated its guidelines on identification, verification of identity and knowledge of customers, which had already been subject to a 23 March 2021 recast. These guidelines take into account changes resulting from the work of the ACPR-AMF Fintech Forum on remote verification of the identity of natural and legal persons, as well as other changes resulting from the implementation of the 5<sup>th</sup> AML Directive (in particular, the obligation to report discrepancies in the registers of beneficial owners).

Lastly, it is worth noting two decisions issued by the ACPR's sanctioning committee on 14 October and 30 November against respectively, a Luxembourg bank supporting a historical market place (on AML/CFT deficiencies)<sup>5</sup> and an insurance company (for shortcomings in the implementation of freezing and prohibition measures).

## 2. Sustainable finance

The Joint Committee of European Supervisory Authorities released late October 2021 their final draft of regulatory technical standards (RTS) on sustainability reporting<sup>6</sup>. The October RTS will eventually be consolidated by the European Commission with the February 2021 RTS<sup>7</sup>, implementation date of 1 July 2022, instead of the original 1 January timeline<sup>8</sup>.

At the same time, two Commission Delegated Regulations on Taxonomy – already mentioned in our [previous newsletters](#) – were released in the Official Journal in December, triggering their application from the 2022 accounting year. The first one, dated 4 June 2021 and applicable from 1 January 2022 is very important for financial market participants constrained by the SFDR Regulation. It specifies 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 to which extent it can be said that an economic activity does not cause significant harm to any of the other environmental objectives<sup>9</sup>. The second Regulation is dated 6 July 2021. It specifies the content and format of the information to be

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<sup>4</sup> The AMF has changed (24 November 2021) its historical position n°2019-14 by referring to the EBA's guidelines, suggesting that other elements of its doctrine were impacted by said guidelines.

<sup>5</sup> The decision includes interesting developments on the scope of customers concerned by the due diligence on the business relationship by stating that buyers may be concerned by this due diligence.

<sup>6</sup> Pursuant to the Sustainable Finance Disclosure Regulation (EU) 2019/2088 (SFDR). The adopted text specifically concerns (i) the pre-contractual information applicable to products promoting social or environmental characteristics (so-called Article 8) or having a sustainable investment objective (so-called Article 9) and (ii) the periodic reports of the promoters of such products. The RTS create subsets of financial products, according to their respective environmental/social positioning. The text produces the format the communication must comply with. This communication must show to what extent the underlying investments qualify as environmentally sustainable in the sense of the EU Taxonomy Regulation. The October RTS propose that pre-contractual information on the extent of alignment with the taxonomy should be presented in the form of a graphical representation of a key performance indicator (KPI). The default KPI for calculating investment alignment will be turnover, although other indicators, based on capital expenditure (CapEx) or operational expenditure (OpEx), may also be used.

<sup>7</sup> Related to sustainability indicators of negative environmental and social impacts.

<sup>8</sup> Taxonomy Regulation (Level 1) will nevertheless apply from 1 January 2022.

<sup>9</sup> known by the acronym DNSH: it should be remembered that the market players are subject to two variations of the said DNSH principle, one of which comes under the SFDR Regulation, the other under Taxonomy Regulation.

published by companies subject to the Taxonomy Regulation<sup>10</sup> on their environmentally sustainable economic activities. Finally, negotiations are pending on a draft delegated act on taxonomy covering certain activities in the gas and nuclear sectors<sup>11</sup>.

In France, a report dated 29 September 2021 provides a definition of *impact finance*. This definition provides a credible basis for the development of the various labels for the marketing of financial products, such as the French *ISR* label, the governance of which was amended back in October.

### **3. Investment services and asset management**

On 25 November 2021, the European Commission presented a package of capital market reforms, starting with a revision of the Directive on Alternative Investment Funds Managers<sup>12</sup> and the European Long-Term Investment Fund Regulation<sup>13</sup>. Given the deadlines for its implementation, the former may not come into force until 2025.

The European Securities and Markets Authority (ESMA) released a final version of its guidelines on assessing the suitability of a service/product. The guidelines aim to clarify the due diligence required in the context of non-advised marketing (i.e. reception and transmission of orders - RTO). They mirror the existing suitability guidelines for investment advice and discretionary management.

At the end of December, the European Commission published regulatory technical standards (RTS) for the application of the new regime governing investment firms<sup>14</sup>.

In the asset management sector, the ESMA ruled on 17 December on the concept of reverse solicitation in relation to the new European regime on the cross-border distribution of collective investment schemes<sup>15</sup>. On the same day, the same Authority also commented on the postponement of the post-trade discipline measures on buy-in rules in the event of a counterparty's failure to settle its purchase order.

The content of key information documents (KID) of funds and insurance investment products is impacted by implementing legislation released last December.

**In France**, on the legislative agenda, the implementation of a Directive<sup>16</sup> will ease certain regulatory constraints deemed excessive and problematic for investment service providers, particularly in their dealings with clients classified as professionals. It also lifts the prohibition of companies to trade on securities of small issuers on which they had conducted research services. This was adopted to promote the visibility of small and medium-sized companies on the French market. It also exempts certain bond securities from the "product governance" regime<sup>17</sup>.

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<sup>10</sup> Regulation (EU) 2020/852 for the establishment of a framework to facilitate sustainable investment.

<sup>11</sup> European Commission press release of 1 January 2022.

<sup>12</sup> Revision of Directive 2011/61/EU (AIFMD), with alignment with Directive 2009/65/EC (UCITS) for certain developments. The draft first harmonizes the rules applicable to lending funds. It also clarifies the rules on delegation so that European managers (AIFM) can call on experts from third countries in a more secure manner, without turning AIFM themselves into mailbox companies. Regulatory technical standards (RTS) will specify the rules on such delegations.

<sup>13</sup> We can also mention the publication (in October) of the Delegated Regulation already mentioned in a [previous newsletter](#) on the criteria for establishing whether an activity is to be considered ancillary to the main activity (it repeals DR 2017/592).

<sup>14</sup> Regulation (EU) 2019/2033 (IFR), for their declarations for monitoring purposes. Other RTS were released early January 2022 in relation to the same IFR.

<sup>15</sup> The French implementation of which was discussed in our [previous newsletter](#).

<sup>16</sup> French fast-track law (*ordonnance*) n°2021-1652 of 15 December 2021 implementing EU Directive 2021/338, the so-called "Quick Fix", which amends Directive 2014/65/EU (the so-called "MiFID2"). The French fast-track law (*ordonnance*) enters into force on 28 February 2022.

<sup>17</sup> Only securities with a "make whole" clause. With respect to product governance, the AMF published on 19 October a summary of its findings from a series of SPOT audits on the governance of financial instruments.

Another fast-track law (*ordonnance*)<sup>18</sup> reinforces consumer rights on online sales with new constraints on the display of price reductions. Another fast-track law (*ordonnance*) released on the same day completes the implementation of the European regulatory framework on crowdfunding<sup>19</sup>, allowing existing French platforms (so-called *IFPs/CIPs*) to launch on a cross-border basis their crowdfunding finance services up to €5 million, under a different framework compared to the applicable national regime, with a transitional phase ending on 10 November 2022.

#### 4. Payment services

**In Europe**, the consultation the European Banking Authority (EBA) had initiated last fall on the reform of the waivers to strong authentication of payments (in relation to the 2<sup>nd</sup> Payment Services Directive) ended at the end of November. The outcome re-authentication will likely be extended from 90 to 180 days and new rules will likely prohibit banks from requiring earlier strong authentication in situations limited to access to payment data.

While the consultation on the EBA's draft guidance on exemption regimes for payment service providers (PSPs) ended in October, the ACPR confirmed its intent to modify its historical position of 2017 on the same, which would include some of the new EBA limitations as well as clearly state that licensed PSPs can issue payment instruments that fall within the scope of the exemption<sup>20</sup>.

The Court of Justice of the European Union (ECJ) released two important rulings respectively on (i) the right to get a refund of unauthorised transactions and (ii) prohibition of additional charges for the use of payment instruments<sup>21</sup>.

A new EU Regulation published at the end of September aims to improve cooperation and information exchange between home and host competent authorities for the supervision of PSPs operating on a cross-border basis.

Texts from the European Central Bank published at the beginning of October 2021 finally give concrete form to the consolidation project of the Eurosystem. It consists with unifying the central settlement systems for cash and securities, which is useful given asset management players often face various settlement systems in Europe that increase the costs of their operations.

**In France**, the publication of a fast-track law (*ordonnance*) dated 15 September<sup>22</sup> sets the framework for the widespread use of electronic invoicing between VAT taxpayers. This framework will undoubtedly encourage the emergence of the payment services initiation service and of Request to Pay services.

The insurance sector will be attentive to the publication last September of a release issued by the ACPR concerning medical third-party payment operators reminding of PSD2 licensing requirements.

Also in the field of payment services rules (PSD2), the ACPR declared itself compliant with the 2021 EBA guidelines, notably on major incident reporting<sup>23</sup>.

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<sup>18</sup> French fast-track law (*ordonnance*) n°221-1734 of 22 December 2021 implementing EU Directive 2019/2161. Its provisions come into force on 28 May 2022. It goes beyond the mere offering of financial products or services.

<sup>19</sup> Regulation 2020/1503 and Directive 2020/1504 (already implemented by French fast-track law (*ordonnance*) 2021-738 of 9 June 2021). In this respect, we can note the publication by ESMA on 10 November 2021 of the finalized texts of the draft regulatory technical standards (RTS) on the status of future European providers of participatory finance. The EBA is not to be outdone with the publication on 8 December of other draft RTS on the same subject, notably in relation to credit risk assessment and credit rating.

<sup>20</sup> This consultation can also be put into perspective with a case law of the Court of Cassation of 30 June 2021, which takes a position on the rules applicable to the right to reimbursement when the means of payment are covered by these derogations.

<sup>21</sup> Respectively decisions of 2 September and 2 December 2021.

<sup>22</sup> The entry into force is staggered according to company size (between 1 July 2024 and 1 January 2026).

<sup>23</sup> The ACPR's compliance goes beyond the payment sector, since a series of ACPR opinions published at the end of the autumn confirm that the regulator intends to apply other EBA guidelines, in particular on internal governance,

Finally, it is regrettable that French Central Bank issued early January 2022 a focus on fraud on cheques as it appears to be rather unaware of the significant increase of false transfer orders. It is worth noting that banks increasingly deal with situations in which their liability is involved; most recently a French real estate developer was the victim of a record fraud involving tens of millions of euros<sup>24</sup>.

Finally, French administrative authorities (DGCCRF or ACPR) revealed some of their findings of irregularities concerning bank charges or commissions wrongly levied by PSPs. As announced in our [previous newsletter](#), Act 2021-1308 of 8 October 2021 issued a framework for sanctions for violations of the European SEPA Regulation (credit transfers / direct debits).

The French Central Bank published early November 2021 a report on its interbank central bank digital money trial program (“wholesale”), which is important for the modernized development of cross-border and multi-currency payments.

## 5. Insurance

On 22 September 2021, the European Commission published its drafts for the revision of the EU insurance rules (Solvency 2<sup>25</sup>). The mandates given to the European Insurers’ Authority (EIOPA) on the consideration of sustainability risks are worth noting. They are similar to the equivalent mandates given to the EBA on the same topic. The Commission’s idea is to link the strengthening of the contribution of European insurers to the financing of the economy to virtuous ESG financing, through the reform of corporate sustainability reporting (see our [Summer 2021 newsletter](#)). Above all, the drafts incorporate the idea of better calibrated constraints, depending on the risk profile of insurance companies.

In France, a law of 8 October 2021 strengthened the capacity of supervisory authorities to monitor institutions engaged in cross-border activity. In addition, a Decree issued at the end of September sets out the conditions for the valuation of real estate assets of insurance sector institutions.

Finally, a ruling issued by the French Supreme Court (*Cour de Cassation*)<sup>26</sup> shows how critical provisions governing policy must appear in apparent characters to avoid their voidability.

## 6. Other European or national developments impacting financial services

**At the European level**, the publication in October of Implementing regulations in relation to the so-called “Benchmark Regulation” are worth noting. They relate to the designation of (i) a statutory replacement rate for certain setting of CHF LIBOR and (ii) a replacement for the benchmark Euro overnight index average.

The European legislator also released its Directive on credit managers and credit purchasers<sup>27</sup>, which is in line with the objective of reducing non-performing loans (*NPLs*).

The European Commission finally launched on 27 October the reform linked to the Basel 3 international commitments, on capital requirements of credit institutions, which is supposed to strengthen the

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criteria for assessing exceptional cases of overstepping of limits for large exposures, assessment of the suitability of members of the management body and holders of key positions, and policies on sound remuneration. Finally, the ACPR noted that the guidelines of the EBA on the governance and supervision of retail banking products remain definitively applicable since the Conseil d’Etat rejected - on 21 December - the appeal lodged by the FBF.

<sup>24</sup> See my article in the January-February 2022 issue of *Banque et Droit*, to be released.

<sup>25</sup> Amendment of Directive 2009/138/EC and proposal for a new Directive on the recovery and resolution of insurance and reinsurance undertakings, similar to the regime applicable in the banking sector.

<sup>26</sup> French Supreme Court (*Cour de cassation*), Civil Division 2, 14 October 2021, 20-11.980.

<sup>27</sup> N°2021/2167 of 24 November 2021: Member States have until 29 December 2023 to implement the Directive into national law, which is applicable on 30 December 2023. As it stands, we can note the publication on 27 October of an interesting survey carried out in France by the AMF on the granting of loans by alternative investment funds.



resilience to economic shocks and to contribute to the ecological transition. This reform is also due to address a harmonized response to the supervision of third country bank branches.

The European Banking Authority (EBA) also published on 15 September important guidelines – applicable from 1 January 2022 – dealing with acceptable and sanctionable exceptional situations on large exposure limits and possible regularization situations. Another EBA document<sup>28</sup> pointed out the unfortunate disparities in the implementation of European texts on the 3<sup>rd</sup> pillar of the Banking Union (deposit guarantees), with European depositors sometimes less protected than others.

Another release of draft Level 2 and Level 3 measures<sup>29</sup> provide important clarifications for the application of the EU Regulation on prudential requirements for investment firms.

A September 2021 EBA report highlights the challenges of supervising digital platforms, with a focus on the future rules of the DORA Regulation<sup>30</sup>.

**In France**, the French High Committee for Financial Stability (HCSF) made mandatory restrictions on the conditions for granting mortgages, which were previously expressed through mere recommendations<sup>31</sup>.

It is also worth noting the publication on 15 September of a fast-track law (*ordonnance*)<sup>32</sup> *inter alia* amending the provisions of the French Civil Code on sureties, movable privileges, pledges of receivables, pledges of tangible movables, retention of title, security trusts and real estate security interests.

In view of the economic period linked to the pandemic, France decided to extend to 31 December 2022 its temporary more restrictive foreign investment control measures.

Finally, as two decrees were released early December, the reform of brokerage activities in the banking and insurance sectors will come into force on 1 April 2022, as regards the professional associations to which brokers shall adhere to.

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<sup>28</sup> Opinion of 27 October 2021 (EBA/Op/2021/11), some of which recommendations suggest a revision of Directive 2014/49/EU of 16 April 2014 on deposit guarantee schemes.

<sup>29</sup> Regulatory Technical Standards (RTS) or EBA guidance (on internal governance or staff remuneration) related to the EU Regulation 2019/2033 (MIFIR Refit).

<sup>30</sup> This is the acronym for the European Regulation on the Digital Operational Resilience of the Financial Sector, which France is expected to push for adoption by the Council of the European Union in the first half of 2022.

<sup>31</sup> Decision dated 29 September 2021. The HCSF limits the effort rate of home loan borrowers to a maximum of 35% (including borrower's insurance), compared to 33% at present, and a maximum repayment period of 25 years, with a maximum two-year grace period, with the flexibility given to banks to waive these criteria for 20% of home loans actually granted.

<sup>32</sup> French fast-track law (*ordonnance*) n°2021-1192, supplemented by a decree of 29 December. It also enshrines the assignment of receivables and sums of money as security, defines the regime of security *in rem* for third parties and allows the creation of security *in rem* by a legal person. In essence, the new rules are applicable as of 1 January 2022.

