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International Bar Association
Banking & Financial Law Committee

Fintech: how is the world shaping the financial innovation industry? (2024)

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1. Fintech regulatory framework: a summary of the most relevant laws and regulations concerning fintech and financial innovation.

In France, there is no single set of regulation for fintechs. There is also no legal definition of fintechs. They are generally considered to be companies carrying innovative technologies in digital, artificial intelligence and data processing (big data) applied to the finance industry, where they play a role of accelerator of change, often disruptive.

These technologies are typically deployed in the field of payments, digital assets (cryptocurrencies, tokens, stablecoins), financing (crowdfunding platforms), management of insurance products (insurtech), assistance with risk management and compliance (regtech) and the management of financial contracts (smart contracts), where their application sometimes precedes the adaptations of the law and regulations to the new problems raised.

Fintechs and their activities will accordingly be potentially concerned by a diverse set of laws and regulations from French and EU sources, and guidelines. These essentially comprise:

- Regulation on payment services (Articles L314-1 à L314-16) and intermediaries in banking and payment services regulation (Articles L519-1 à L519-17) of the Monetary and Financial Code;
- Regulation of issue and management of electronic money (Articles L315-1 à L315-9) of the Monetary and Financial Code;
- Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020, on European crowdfunding service providers for business;
- Regulation of services providers of digital assets (Articles L54-10-1 à L54-10-5 of the Monetary and Financial Code), Decree No 2019-1213 of 21 November 2019 relating to issuers of tokens (Articles L551-1 to L552-7 of the Monetary and Financial Code) and Articles 721-1 *et seq* of the General Regulation of the Financial Markets Authority (AMF);
- Regulation on e-marketing, hawking and distance delivery of financial services (Articles L341-1 to L343-2 of the Monetary and Financial Code);

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- Regulation on providers of data communication services (Articles L549-1 to L54 of the Monetary and Financial Code);
- Regulation on intermediaries in miscellaneous assets (Articles L551-1 à L551-5 of the Monetary and Financial Code);
- Ordinance No 2017-1674 of 8 December 2017, on the use of a shared electronic recording device for the representation and transmission of financial securities;
- Delegated Regulation (EU) No 2018/389, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation or GDPR);
- Law on monetisable digital objects and gaming companies, adopted on 10 April 2024 within the context of a law on digital space and web user protection (SREN); and
- Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 (published in the Official Journal of the European Union on Friday 9 June 2023), (the MiCA regulation) which came into force on 29 June 2023. Most of its provisions will apply from 30 December 2024. From that date, a harmonised European framework will replace the existing national frameworks to govern in particular:
  - the public offering and admission to trading of tokens,
  - the provision of crypto asset services by service providers,
  - the prevention of market abuse in crypto assets.

Further regulation is being contemplated, namely:

- the Proposal for a Regulation of the European Parliament and of the Council on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014 (published in the Official Journal of the European Union on 27 December 2022, the DORA regulation came into force at the beginning of 2023 and will apply from 2025);
- the Proposal for a Regulation of the European Parliament and of the Council on information accompanying transfers of funds and certain crypto assets No 2021/0241 (COD); and
- the Proposal for a Regulation of the European Parliament and of the Council on a framework for Financial Data Access and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010, (EU) No 1095/2010 and (EU) 2022/2554.

Soft law also complements the above laws and regulations. The regulators have issued the following guidelines on this subject:

- the Prudential Control and Resolution Authority (ACPR) issued sector-specific implementing principles for digital asset service providers, as of November 2022; and
- the AMF issued Q&A on the digital asset service providers regime, updated on 3 August 2023.

As regards artificial intelligence (AI), a regulation in this regard that would further complete the contemplated EU Proposal on AI is not envisaged to be put forward in France, although the regulators are carefully scrutinising the emergence of risks associated with the use of algorithms. However, the ACPR published a white paper in June 2020 titled *Governance of artificial intelligence algorithms in the financial sector*, which provides practical guidelines on algorithms' evaluation and governance requirements. It identifies interdependent criteria to be implemented in the design and development of an AI algorithm in the financial sector and makes recommendations concerning integration of AI in processes of business lines.

2. Regulations on crypto assets: a summary of the legal framework regarding crypto assets and how they are regulated.

France was a pioneer in establishing a legal framework for crypto assets.

The first step was Ordinance No 2016-520 of 28 April 2016, regulating certain uses of blockchain technologies – notably, a shared electronic recording device for minibond and financial securities not admitted to the operations of a central securities depository.

The Law on the Growth and Transformation of the Companies (*Loi Pacte* or Pact Law) of 22 May 2019 (codified in the Monetary and Financial Code) then provided a comprehensive regulation of crypto assets. It purported, without waiting for European regulations, to offer a regulatory framework that both protects investors and is flexible to allow for changes. The regulation addresses digital assets, digital services and digital services providers.

The Pact Law divides digital assets into two subsets – utility tokens and virtual currency.

Utility tokens

This means any digital assets representing one or more rights that can be issued, recorded, stored or transferred by means of a distributed ledger technology enabling the owner of the asset to be identified, directly or indirectly, excluding those meeting the characteristics of a financial instruments and the saving bonds.

Therefore, the assets covered by this definition must be usable for non-financial purposes. In other words, the token 'must be able to be used to access goods or services. They give their holder a privileged right of digital access to the services or products offered by the issuer'. The parliamentary work that preceded the adoption of the Pact Law indicated that the token must grant 'a right of use to its holder enabling him to use the technology or services offered'.

It also means that 'security tokens', understood as a token that may represent financial securities, are excluded from the French Digital Asset regulations and are therefore subject to financial instruments regulations.

Virtual currency

This means any digital representation of value that is not issued or guaranteed by a central bank/public authority, that is not necessarily attached to legal tender and that does not have the legal status of 'money', but that is accepted by natural or legal persons as a means of exchange and that can be transferred, stored or traded electronically.

Non-fungible tokens (NFT) are not defined in French law. According to the AMF, a case-by-case approach shall be adopted in order to determine whether or not the NFT constitutes a digital asset within the meaning of Pact Law.

Pact Law also provides a specific regime for public offerings of tokens (initial coin offering or ICO) which may be defined as a fundraising operation carried out through a shared electronic recording device (DEEP or blockchain) that results in the issuance of tokens that can then be used to obtain products or services. This regime, which is designed to encourage the development of ICOs, does not apply to the issue of security tokens, but only to the issue of utility tokens. Issuers may apply for an optional visa from the AMF, which is a label of the seriousness and quality of the offer, or, subject to a warning before the realisation of the ICO indicating that the operation presents financial risks. The AMF publishes the list of ICOs that have received its visa.

The Pact Law has set up a specific regime for certain services related to investing in crypto assets and set forth a regulation applying to financial intermediaries providing those services named digital asset service providers (DASP). Such services include:

- the custody of crypto assets or access to crypto assets (via private encryption keys, for example);
- the purchase/sale of crypto assets against currencies being legal tenders (euros, US dollars, etc);
- the exchange of crypto assets for other crypto assets;
- the operation of crypto asset trading platforms;
- the reception and transmission of orders on crypto assets;
- portfolio management of crypto assets;
- advising investors in crypto assets;
- the underwriting of crypto assets; and
- the guaranteed placement and the unsecured placement of crypto assets.

A DASP must be registered with the AMF to be able to offer the following four services:

- custody of crypto assets or access to crypto assets;
- purchase/sale of crypto assets against legal tender currencies;
- exchange of crypto assets for other crypto assets; and
- operation of a crypto asset trading platform.

Registration is required for service providers that are established in France or provide services to (or even target) customers in France. Registration is based solely on the relevance of the mechanisms for combatting money laundering and the financing of terrorism, as well as on the quality and good repute of the managers. Unregistered DASPs risk being publicly blacklisted by the AMF.

DASPs wishing to market one of these nine types of services can also apply for a license from the AMF. This licence is optional. It entails more stringent obligations. Only DASPs licensed by the AMF have the right to solicit new customers in France. CFDs on crypto assets may only be marketed by a service provider licensed as an investment services provider.

Since 1 January 2024, enhanced registration is fully in force, with stricter requirements for new players wishing to provide the four digital asset services subject to compulsory registration (Law no 2023-171 of 9 March 2023 containing various provisions for adapting to EU law in the fields of the economy, health, labour, transport and agriculture (DDADUE), Article 8).

The new, enhanced registration procedure came into effect pending the introduction of European CASP (crypto assets service provider) authorisation under the MiCA (Markets in Crypto-Assets) Regulation on 30 December 2024.

3. Payment service providers and digital wallets: a summary of regulations applying to payment service providers and/or digital wallets.

The French regulation of payment service providers and wallets is derived from EU Directives 2007/64/EC and 2015/2366 on payment services.

Payment services are essentially:

- the execution of fund transfers and direct debits;
- the transmission of funds;
- services enabling the payment or withdrawal of cash; and
- the transmission of a payment account, the execution of transactions for which the payer uses a telecommunications, digital or computerised device.

Payment services are regulated.

Payment services are a subset of banking operations, which can still be provided by credit institutions, but which are open to a new category of regulated providers – 'payment institutions'. Payment institutions may also provide related services, including granting of loans under certain conditions. Payment services can also be provided by electronic money providers.

Payment institutions must be licensed by the ACPR. However, only registration as an account information service provider is required if the only payment service provided is the account information service. Furthermore, simplified payment institution licence is available for payment institutions whose payment volume is not expected to exceed a monthly average of €3m and which do not plan to provide the money transmission service.

There is an exemption from the licensing requirement for undertakings which provide 'payment services based on means of payment which are accepted for the acquisition of goods or services only on the premises of that undertaking or, under a commercial agreement with it, in a limited network of persons accepting those means of payment or for a limited range of goods or services'.

Examples include gift cards issued by commercial networks which are only accepted for payment in the stores of that network, or other types of payment cards (eg, public transport cards). The exemption is granted by the ACPR, which verifies that the conditions are met, and the arrangements ensure the security of the means of payments and consumer protection.

The service provider may start operating before filing for an exemption until the total value of executed payment transactions or electronic money outstanding within the previous 12 months exceeds €1m.

4. Special support to fintechs: a description of special programmes supporting the fintech ecosystem, fintech startups (eg, regulatory sandboxes and accelerator programmes) and regulations regarding special support.

The French fintech sector is experiencing rapid growth. It brings together approximately 950 companies totalling 50,000 jobs in October 2023.

The French regulators are particularly aware of challenges related to the rapid evolution of the financial sector, especially regarding the fintech ecosystem. The AMF, the ACPR and Banque de France have created special fintech development units with high-level experts to attend and support the development of fintechs; they have put forward a common cell, the 'Fintech Pole' (*Pôle Fintech*). The ACPR runs the FinTech Forum alongside the AMF, which brings together professionals several times a year to discuss regulatory and supervisory issues related to fintech and innovation, analyses more cross-sectoral innovations and monitors the digitalisation of French financial companies.

To closely monitor the efficacy of the legal framework for fintechs, French authorities have set up a ministerial delegation and a commission on finance, general economy and budgetary control.

On the regulatory side, to provide an adequate regulation facilitating the development of fintechs while protecting the fintech development, France has elected a 'proportionality of regulation system', offering a panel of regulated regimes adapted to the needs of fintechs ranging from licences to registrations, and including an optional visa.

In areas of joint authority of the regulators such as licensing DASPs (the mandatory registration of DASPs is carried out by the AMF, subject to the assent of the ACPR), to ensure swift and smooth review applications, the ACPR's and the AMF's departments exchange views on all aspects of an application and appoint a team of analysts from both authorities for each application.

To facilitate the fintech licensing process, the ACPR has issued a charter targeting fintechs with startup projects. It aims to present an overview of the main authorisation procedures for fintechs under the supervision of the ACPR, and provide greater visibility regarding processing time and exchanges of information. A toolkit of useful documents providing assistance in filling in the applications is available on the ACPR's website.

5. Open banking: a summary of regulations regarding open banking and direct or indirect regulations that affect open banking.

There is no single regulation on open banking. However, the practice of banks sharing data on their customers with other services providers falls under several existing regulations that affect open banking.

The second Payment Services Directive (PSD2), replacing and superseding the first PSD Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, requires banking institutions to open their information systems to third parties and created the status of agent of payment institutions (PIs) and of electronic money institutions (EMIs). It further strengthens payment security in the era of electronic payment, and provided the framework for two new payment services related to 'open banking':

- account information service providers (AISPs), who can only provide the service of collecting information on one or more payment accounts (eg, aggregating payment accounts to analyse a company's cash flow or allowing consumers to view their various bank accounts on a single platform); and
- payment initiation service providers (*prestataires de services d'initiation de paiement* – PISPs), who initiate a payment order for an account held with another provider at the user's request.

In their development of application programming interfaces (APIs), platforms must comply with the regulatory technical standards (RTS) adopted in March 2018 by Delegated Regulation (EU) No 2018/389, which are directly applicable in domestic law.

Open banking is also subject to regulations on data protection (RDPR).

In a press release dated 15 March 2022, the ACPR commented that the emergence of agents licensed by authorised PIs or EMIs that market or develop new services has led to two changes in distribution: (1) the establishment of large-scale physical retail networks alongside banking agencies (offices, booksellers, lottery agencies), which are in charge of the customer relationship, while the PI or EMI performs the service; and (2) an increasing 'platform' of the sector, with innovative players having the status of agents developing their own service offering under the supervision of the entities that mandate them.

Going further, open banking fosters specific risks (cybersecurity, consumer data protection, etc.) that are not yet adequately addressed by existing regulation. In its press release, the ACPR recalls that authorised institutions remain fully responsible for their external providers, including agents, and must have systems in place that ensure ongoing supervision and oversight.

The upcoming EU Digital Operational Resilience Regulation (DORA) will address some of these risks, under new obligations applicable to financial entities dealing with cloud service providers and new rules regarding their supervision. DORA will set conditions related to the geographical link of cloud service providers to the territory of the EU, and a prohibition on financial entities using cloud service providers that are not established in the EU. It will also strengthen the contractual obligations of cloud service providers. Published in the Official Journal of the European Union on 27 December 2022, the DORA regulation came into force at the beginning of 2023 and will apply from 2025.

Other risks will need to be considered in the forthcoming review of PSD2.

A concern has been recently expressed on the French market on the potential adverse effects of the oligopolistic structure of the cloud market, combined with the technological dependency of banks on the expertise of cloud service providers, which led to their deep interconnection with the entire financial system. Indeed, this is likely to reverse the traditional balance of power between customers and service providers.

Cloud service providers are not subject to the rules imposed on the banking sector, especially regarding the protection of sensitive information and personal data. They are a small number of companies, mainly American and Asian, to whom the regulations of the banking profession do not apply. This introduces a certain disequilibrium in the contractual relationship, but the lack of conformity of certain clauses in the outsourcing contracts exposes banks to risks of administrative sanctions and liability issues, particularly with respect to their clients.

A new legal framework is under discussion which aims at extending the open banking, introduced by PSD2, to open finance.

If open banking has enabled the development of new value-added services based on payment data, such as real-time credit risk analysis, streamlining of the identification process when entering into a relationship with third party providers, payment initiation, and aggregation of payment accounts, this new set of forthcoming regulations is now planning to go further, and is raising the issue of opening up all financial data (such as savings, insurance, investments, etc) which would enable a multiplication of value-added services.

To this end, the European Commission has proposed, in June 2023, to:

- amend and modernise the current PSD2, which will become PSD3;
- establish a Payment Services Regulation (PSR); and
- adopt a new directive for a framework for financial data access.

At this stage, the timetable for the implementation of this new legal framework remains highly uncertain.

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