FRANCE

Investment rules of the world

About

At DLA Piper, we have one of the largest finance and projects teams in the world with more than 600 dedicated lawyers and an established local law firm network. We share knowledge and skills in debt instruments, debt securities, funds, derivatives and portfolios, as well as energy, infrastructure and other projects, across Europe, the Middle East, Africa, Asia Pacific and the Americas.

When and wherever we work for you on finance and investment deals and projects, you can rely on our international platform; we are backed by the network and resources of one the largest and most-connected business law firms in the world.

We enjoy being part of your team, bringing experience across sectors, borders and financial products, supporting you on first-of-a-kind deals, in new markets and to grow.

With global perspective, we can help you to realize your financial strategy in whichever markets you do business.

Investment Rules of the World

With input from across our global network, this guide covers key legal topics for different financial activities and projects and gives you an overview of the points you may consider when initially looking at financing or investing in particular jurisdictions. Please contact us if you would like to discuss any legal issues or solutions for your business. We also welcome your feedback about this guide via investmentrules@dlapiper.com.

France

Last modified 04 December 2019

Capital markets and structured investments

Issuing and investing in debt securities

Are there any restrictions on issuing debt securities?

There are restrictions on offering and selling debt securities under both French and EU law.

Unless certain exclusions or exemptions apply, it is unlawful to offer debt securities to the public in France or to request that they are admitted to trading on a regulated market operating in France unless an approved prospectus has been submitted for approval to the French regulator (*Autorité des Marchés Financiers*) and made available to the public.

The *Autorité des Marchés Financiers* has provided guidelines and instructions for the issuance of debts securities and the distribution of marketing materials to the public.

Last modified 4 Dec 2019

What are common issuing methods and types of debt securities?

The most common methods of issuing debt securities in France are on a standalone basis or under a program. The program method is for an ongoing series of issues governed by a set of legal documentation while standalone issuance is for one particular issuance of debt securities.

Many different types of debt securities are offered in France. Some common forms include:

- debt securities characterized by the type of interest or payment such as fixed-rate securities, floating-rate securities, variable-rate securities, zero-coupon securities;
- guaranteed securities, subordinated securities, perpetual debt securities (ie debt securities that have no specified redemption date);
- asset-backed securities;
- derivative securities such as securities linked to the value of one or more reference asset – including shares, commodities, interest rate, currency rate or index, and credit-linked notes;
- hybrid securities (ie securities with both debt and equity features);
- equity-linked securities such as convertible bonds (ie debt securities convertible into the equity of the issuer);
- exchangeable bonds (ie debt securities convertible into the equity of a third party);
- depositary receipts (ie security issued by a depositary conferring on the holders beneficial ownership of certain underlying assets held by the depositary for the holders); and

- warrants (ie securities giving the holders the option to purchase the equity of the issuer or a related company).

Last modified 4 Dec 2019

What are the differences between offering debt securities to institutional / professional or other investors?

The Prospectus Directive does not make a distinction between professional and other investors for the purposes of its disclosure requirements but does include different disclosure regimes by reference to the minimum denomination of a single security.

If the denomination of the securities is equal to or above €100,000 (or the equivalent in another currency), the 'wholesale' rules apply. If the denomination is under €100,000, the 'retail' rules apply. Additional disclosure requirements apply for retail securities.

Last modified 4 Dec 2019

When is it necessary to prepare a prospectus?

Under the Prospectus Directive, unless an exemption applies, it is necessary to publish a prospectus where there is an offer of securities to the public or an application for the securities to be admitted to trading on a regulated market.

The obligation to publish a prospectus does not apply to offers made to the public if it is made solely to qualified investors, addressed to fewer than 150 persons (other than qualified investors) per European Economic Area state or where the minimum denomination per unit is at least EUR100,000.

The definition of 'qualified investor', following the implementation under French law of Directive 2010/73/EU has been aligned with the definition provided under the Markets in Financial Instruments Directive. Pursuant to article D. 411-1 of the French Monetary and Financial Code, in order to be a qualified investor, a person needs to be either a professional client or an eligible counterparty.

If the offer is deemed not to be made to the public, a prospectus may still be required if an application is made for the securities to be admitted to trading on a regulated market.

Last modified 4 Dec 2019

What are the main exchanges available?

Market operator NYSE Euronext manages the Euronext Paris regulated markets in France.

Last modified 4 Dec 2019

Is there a private placement market?

France has an active private placement market. The documentation is generally standardized (such as the Euro PP standard).

Last modified 4 Dec 2019

Are there any other notable risks or issues around issuing or investing in debt securities?

Issuing debt securities

Issuers are required to provide comprehensive information in relation to their financial situation and activities as well as to provide risk factors to bring the attention of investors. Issuers are accountable and liable for misleading or inaccurate information provided in their prospectus or information memorandum.

Investing in debt securities

Specific risks factors related to the securities and the ability of the issuer to repay the securities are generally provided for under the prospectus or the information memorandum. Typically, an investor may lose all his investment in case of insolvency or inability of the issuer to fulfil his payment obligations.

Last modified 4 Dec 2019

Establishing and investing in debt / hedge funds

Are there any restrictions on establishing a fund?

Depending on the characteristics of the fund (offered to professional or nonprofessional investors), alternative investment funds (AIFs) must be authorized by or notified to the Financial Markets Authority (*Autorité des Marchés Financiers*) (AMF).

Last modified 4 Dec 2019

What are common fund structures?

Several fund structures are listed by the Monetary and Financial Code (*Code monétaire et financier*):

- retail investment funds;
- funds of alternative funds;
- private equity funds;
- employee investment undertakings;
- real estate collective investment undertakings (OPCI);
- real estate investment companies (SCPI);
- forestry investment companies (SEF);
- closed-ended investment companies (SICAF);
- professional investment funds (FPS which take the form of (i) mutual fund (*fonds commun de placement*) or (ii) *société en commandite simple* (*SLP*));
- professional private equity funds;
- professional real estate collective investment undertakings; and
- financing entities, which includes securitisation entities and specialised financing entities (organismes de financement spécialisés).

These funds generally take the form of investment companies with variable capital or mutual fund (fonds commun de placement) with no legal personality.

Others fund structures (Autres FIA) are not listed by the Monetary and Financial Code (Code monétaire et financier) and fall within the scope of AIF by meeting the criteria of the definition referred to in Article 3 of the AIFM Directive.

Last modified 4 Dec 2019

What are the differences between offering fund securities to professional / institutional or other investors?

Retail funds

Retail funds, including Undertakings for Collective Investment in Transferrable Securities (UCITS), are subject to substantial regulatory oversight and restrictions, including obligations with regard to independent custodian/depositary arrangements for assets, investment and borrowing powers specifications, concentration requirements and other matters.

Institutional/professional funds

Professional funds can only be marketed to professional clients as defined in the MiFID.

Professional funds that are offered in France are subject to the Alternative Investment Fund Managers Directive regime in relation to authorization of the manager/fund, marketing arrangements, reporting, depositary arrangements for assets and governance etc.

Last modified 4 Dec 2019

Are there any other notable risks or issues around establishing and investing in funds?

Establishing funds

Managing investments is a regulated activity under French law and therefore subject to authorization. Certain investment vehicles which do not fall within any of the categories of alternative investment fund (AIF) under the Monetary and Financial Code (*Code monétaire et financier*) may nevertheless be subject to regulatory obligations if they fall within the definition of AIF as defined in the Alternative Investment Fund Managers Directive.

Last modified 4 Dec 2019

Managing and marketing debt / hedge funds

Are there any restrictions on marketing a fund?

French selling restrictions

Generally in France, offering securities or interests in alternative investment funds (AIFs) is covered under the Monetary and Financial Code (Code monétaire et financier) and the General Regulation of the AMF, which implement in French law the Undertakings for Collective Investment in Transferable Securities Directive and the Alternative Investment Fund Managers Directive.

Undertakings for Collective Investments in Transferable Securities (UCITS)

UCITS, including those established in France, have an EU passport which enables fund promoters to create a single product for marketing in all EU member states and on the completion of the appropriate notification procedure, a UCITS established in one member state can be sold in any other.

A UCITS intending to market in another member state must complete and submit to its home regulator a notification including certain specified information, including copies of key investor documents. The home regulator then completes a notification file which is sent in a regulator-to-regulator transmission, following which the UCITS can be sold in the other member state.

Alternative Investment Funds (AIFs)

An alternative investment fund manager (AIFM) may only market an AIF to EU investors if it is authorized by a relevant EU regulator – registration with one EU regulator opens access, subject to certain further limited conditions, to marketing to professional investors across the EU under a EU passport or if it complies with national private placement regimes (where available).

Reverse solicitation and the definition of 'marketing'

The act of marketing AIFs consists in presenting the products on French territory by different means (advertising, direct marketing, advice, etc) with a view to encouraging an investor to subscribe to or purchase such AIFs. If units or shares of AIFs are marketed as defined above, those units or shares are considered as being marketed in France and the manager of the AIF must comply with the legal and regulatory framework applicable to the marketing of AIFs (eg Financial Markets Authority (*Autorité des Marchés Financiers*) (AMF) authorization or EU passport).

The AMF expressly considered in its AIF marketing guidelines that the purchase, sale or subscription of units or shares of an AIF in response to a client's unsolicited request to purchase a specifically designated AIF, provided that the client is authorized to do so, would not be considered as an act of marketing in France (Reverse Solicitation). Any entity wishing to rely on the Reverse Solicitation exception should document all of its communications with potential investors.

Last modified 4 Dec 2019

Are there any restrictions on managing a fund?

Managing a fund is a regulated activity. Any entity managing funds must be authorized by the AMF before commencing its activities.

Last modified 4 Dec 2019

Entering into derivatives contracts

Are there any restrictions on entering into derivatives contracts?

The European Market Infrastructure Regulation applies to all derivative transactions and requires transactions to be reported to trade repositories, for relevant transactions (certain classes of overt-the-counter (OTC) derivatives above certain thresholds) between dealers to be cleared, or when derivatives are not centrally cleared, subject to risk mitigation techniques such as initial margin and variation margin requirements.

Local authorities may only enter into derivatives contracts for hedging purposes and subject to the fulfilment of other specific conditions.

In addition, the French regulators have provided instructions to be complied with in respect of the marketing and the transparency obligation applicable to banks and investment services providers offering complex derivatives products. Unless an exemption applies, investment services on financial contracts (i.e. derivatives contracts) require a license in France (or a passport) to provide the relevant investment service.

Last modified 4 Dec 2019

What are common types of derivatives?

Derivatives may be traded over-the-counter or on an organized exchange.

All of the main types of derivative contracts are widely used in France:

- forwards;
- futures;
- swaps (such as interest rate or currency swaps); and
- options (call options and put options).

The value of the derivative contracts is based on the value of the underlying assets. The main classes of underlying assets seen in France are:

- equity;
- fixed income instruments;
- commodities;
- emission allowances;
- indexes;
- foreign currency; and

- credit events.

Last modified 4 Dec 2019

Are there any other notable risks or issues around entering into derivatives contracts?

Since the global financial crisis in 2007 to 2008, many regulations have been enacted with the intention of monitoring and/or regulating derivatives markets. The European Commission has sought in particular, to:

- enhance transparency by requiring the provision of comprehensive information on over-the-counter derivative positions;
- reduce counterparty risk by increasing the use of central counterparty clearing, limiting the scope of title transfer, by generally prohibiting such type of collateral in case the counterparty to the financial counterparty is a non professional client (e.g. retail);
- improve the management of operational risk by increasing the standardization of derivatives contracts;
- provide rules for the collection and posting of initial and variation margins;
- improve banking secrecy (e.g. for redit derivatives); and
- provide rules on miscelling/good conduct.

Last modified 4 Dec 2019

Debt finance

Lending and borrowing

Are there any restrictions on lending and borrowing?

Lending

If the lending activity is performed on a regular basis, the lender must be authorized.

Borrowing

Borrowing is generally not regulated. However, depending on the circumstances, borrowers should insure that lenders are duly licensed.

Last modified 4 Dec 2019

What are common lending structures?

There is no mandatory lending structure in France; lending can be structured in a number of different ways to include a variety of features depending on the commercial needs of the parties.

A loan can either be provided on a bilateral basis (a single lender providing the entire facility) or syndicated basis (multiple lenders each providing parts of the overall facility).

Loans will be structured to achieve specific objectives, eg term loans, working capital loans, equity bridge facilities or project facilities.

Loan durations

The duration of a loan can also vary between:

- a term loan, provided for an agreed period of time but with a short availability period;
- a revolving loan, provided for an agreed period of time with an availability period that extends nearer to maturity of the loan and which may be redrawn if repaid;

- an overdraft, provided on a short-term basis to solve short-term cash flow issues; or
- a standby or bridging loan, intended to be used in exceptional circumstances when other forms of finance are unavailable and often attracting a higher margin.

Loan security

A loan can either be secured, unsecured or guaranteed.

Loan commitment

A loan can also be:

- committed, meaning that the lender is obliged to provide the loan if certain conditions are fulfilled; or
- uncommitted, meaning that the lender has discretion whether or not to provide the loan.

Loan repayment

A loan can be repayable on demand, on an amortizing basis (in instalments over the life of the loan) or in full on the maturity date.

Last modified 4 Dec 2019

What are the differences between lending to institutional / professional or other borrowers?

The main differences concern lending to consumers. This type of lending is governed by the Consumer Code (*Code de la consommation*) and lenders are subject to additional obligations regarding in particular:

- advertisement of consumer credit transactions;
- pre-contractual and contractual information obligations are reinforced; and
- evaluation of the consumer's solvency.

Last modified 4 Dec 2019

Do the laws recognize the principles of agency and trusts?

Agent

COMMON AGENCY RULES (*MANDAT*)

Security interests have traditionally been granted under French law in favor of a security agent, acting in the name and on behalf of the beneficiaries. Such regime raises, however, several difficulties in practice (eg in case of court proceedings).

SPECIFIC PROVISIONS OF THE FRENCH CIVIL CODE (*CODE CIVIL*)

As a result of the imperfection of the common agency rules (*mandat*), the French lawmaker created a specific set of rules for the security agent (providing that any security may be constituted, registered, maintained and enforced on behalf of its beneficiaries by an agent appointed in the agreement under which the secured obligations arise) (Art. 2488-6 and seq. of the French Civil Code). Albeit the legal regime of the security agent has been clarified pursuant to the *ordonnance* n°2017-748 dated 4 May 2017, it is still not widely used in practice since the market and the legal practitioners need to get used to it.

Trust in a context of security taking/similar mechanism

PARALLEL DEBT MECHANISM

Security interests can be granted under French law in favor of a security agent to the extent only such security agent has been appointed pursuant to 2488-6 and seq. of the French Civil Code (cf. above paragraph).

Otherwise, in practice, and to the extent valid under the law governing the loan agreement, the loan agreement may provide for a 'parallel debt' obligation due by the borrower to the security trustee, which can be secured by a French security granted in favor of the security trustee. This 'parallel debt' mechanism may, however, not be used in respect of security that is exclusively granted in favor of a lender (eg a Dailly assignment, pledge over tools and equipment or pledge over inventory).

FRENCH LAW TRUSTS (*FIDUCIE-SÛRETÉ*)

Under French law, it is possible to transfer the ownership of assets to a trustee (*fiduciaire*) in order to guarantee obligations owed to third parties. The trustee (*fiduciaire*) shall (i) hold such assets segregated from its own assets and (ii) following the occurrence of an enforcement event, transfer the ownership of such assets in accordance with the beneficiaries' instructions. It is, however, uncommon to use such a security structure in France.

Last modified 4 Dec 2019

Are there any other notable risks or issues around lending?

Generally

Lenders are required to inform any borrower (professional or consumer) of the percentage rate of charge (taux effectif global) of the loan.

Since the ordonnance n°2019-740 dated 17 July 2019, if a lender fails to provide the percentage rate of charge (taux effectif global), such lender may not be entitled to receive the contractual interest rate of the loan, up to a proportion to be determined by a judge, depending on the damage actually suffered by the borrower.

Specific types of lending

Consumer and mortgage credit rules aim to prevent irresponsible lending to consumers and impose a number of requirements on lenders including the need to, among other things:

- conduct affordability tests before lending; and
- provide standard information about the credit to enable borrowers to compare products (eg annual percentage rate of charge).

Last modified 4 Dec 2019

Are there any other notable risks or issues around borrowing?

Borrowers should be aware of the potential implications of the EU's Bank Recovery and Resolution Directive (BRRD), which outlines certain measures for dealing with failing financial institutions.

The BRRD applies to financial institutions incorporated in the European Economic Area (EEA), but does not apply to EEA branches of non-EEA incorporated entities.

Article 55 of the BRRD gives authorities the power to 'bail in' obligations of failed EEA financial institutions and also postpone the enforcement of early termination rights against the affected institution. 'Bail in' describes a variety of write-down and conversion powers, such as the power to convert certain liabilities into shares or cancel debt instruments. In the case of French or other EEA law contracts, such powers override what the contracts says. In the case of non-EEA law contracts, there are requirements to incorporate such provisions into the contract.

In certain circumstances, the agent must be licenced as creditor or payment institution (or duly passported in France for such activities) or as loan broker ("intermédiaire en opérations de banque") and registered as such with the French dedicated authority (ORIAS).

Last modified 4 Dec 2019

Giving and taking guarantees and security

Are there any restrictions on giving and taking guarantees and security?

Capacity

It is important to check the constitutional documents of a company giving a guarantee or security and relevant provisions of French law applicable to it in order to check:

- whether such a transaction is within its corporate objects (*objet social*);
- who are the persons entitled to bind the company towards third parties (ie the legal representatives of the company);
- whether any corporate approval is required prior to the execution of the relevant security document by its legal representatives (In international transactions, even if not expressly requested by the articles of association of the company, it is market practice to request that resolutions be taken by a corporate body of the company so as to confirm that the transaction is useful to the implementation of its corporate object (*utile à la réalisation de son objet social*) and in its corporate interest. Compliance with corporate interest is a matter of fact and requires a careful review, in particular regarding any upstream or cross-stream guarantee or security provided by a subsidiary to its parent or sister company.); and
- the security document constitutes a regulated convention (*conventions réglementées*), as defined under French law and, as the case may be, the articles of association of the company. (Depending on the legal form of the company, French law provides for specific procedures to be complied with in the case of agreements entered into between, for example, the company and any of its shareholders holding more than 10% of its share capital. Specific advice should be sought on a case-by-case basis.)

Execution by same authorized representative

Pursuant to article 1161 of the French Civil Code (*Code civil*), where the same physical person acts as authorized representative of one or several other physical persons party to the same agreement, this may lead to the nullity of the said agreement, unless expressly approved or ratified by the represented physical persons. The scope of this provision has been clarified pursuant to a law n°2018-287 dated 20 April 2018 and no longer encompass the representations of companies.

Insolvency

HARDENING PERIOD (*PÉRIODE SUSPECTE*)

Under French law, security interests granted to secure previously existing debts are null and void if they are granted during the hardening period (*période suspecte*) (ie the period from the date the pledgor became insolvent up to the date of the opening judgement, the duration of such period being up to 18 months prior to the date of the opening judgement).

DISPROPORTIONATE SECURITY INTERESTS

In the event of insolvency proceedings being opened against a company, if guarantees and security interests granted in favor of a creditor are disproportionate to the loan granted or credit extended to the company, the security interests of such creditor may be challenged and such guarantees and security interests may be nulled or reduced by a French judge.

Financial assistance

It is unlawful for any *société anonyme* and *société par actions simplifiée* to advance funds, grant loans or provide a security or a guarantee for the purpose of enabling a third party to acquire or subscribe its shares. However, the financial assistance rules do not apply to:

- operations carried out by credit institutions and finance companies in the normal course of their business;
- operations carried out for the purpose of the acquisition or subscription by employees of shares of the company, of one of its subsidiaries or of a company coming within the scope of a group savings plan (*plan d'épargne de groupe*) as provided by article L.3344-1 of the French Employment Code (*Code du Travail*); and
- any security or guarantee provided for any part of the debt which is not used to acquire or refinance the acquisition or subscription of shares.

Last modified 4 Dec 2019

What are common types of guarantees and security?

Common forms of guarantees

Guarantees can take a number of forms, the more common ones being:

- a corporate guarantee (*cautionnement*), which is an undertaking taken by a guarantor towards a beneficiary to pay a debtor's debt in case of non-payment by the latter (such guarantee is ancillary to the principal obligation – the obligations of the guarantor are closely linked to the obligations of the main debtor);
- an autonomous guarantee (*garantie autonome*), which is an undertaking taken by a guarantor, in light of a third party's obligation, to pay a sum of money to a beneficiary on first demand or upon the terms and conditions agreed between the parties (it is a non-ancillary separate and distinct obligation – the guarantor may not raise any exception pertaining to the obligation of the debtor and, unless otherwise agreed between the parties, such guarantee does not follow the guaranteed obligation); and
- a letter of intent (*lettre d'intention, lettre de confort or lettre de patronage*), which is an undertaking to do or not to do, so as to support a debtor in the performance of its obligation towards the creditor (its purpose is to ensure that the debtor will be in a position to satisfy its obligations – otherwise, the issuer of the letter will have to indemnify the creditor for any damages incurred because of such failure).

Common forms of security

There are three basic types of security interest that can be created under French law and that are suitable for securing different types of assets:

- a pledge over non-tangible property (*nantissement*) (such as financial securities accounts (*nantissement de comptes de titres financiers*), receivables, bank account and intellectual property rights);
- a pledge over tangible property (*gage*) (such as stock or equipment); and
- a mortgage (*hypothèque*) over real estate, vessels or aircrafts.

Under French law, as a matter of principle, there is no assignment for security purposes, except:

- the so-called 'Dailly assignment' of receivables; and
- the French trust for security purposes '*fiducie-sûreté*' (which is only used in practice under exceptional circumstances).

It is not possible to grant security over all of the assets of a company, such as an English law debenture. The closest security would be to grant a pledge over business (*nantissement de fonds de commerce*), which covers the logo, commercial name, commercial leasehold, customers, some fixed assets (equipment, machinery and tools) and intellectual property rights.

Last modified 4 Dec 2019

Are there any other notable risks or issues around giving and taking guarantees and security?

Giving or taking guarantees

The main points that should be checked are as follows.

SPECIFIC RULES APPLICABLE TO GUARANTEES GRANTED BY COMPANIES

The French Commercial Code provides for rules applicable to certain guarantees granted by companies. For instance, it is not possible for some companies to guarantee the obligations of managers and shareholders and/or directors. Specific advice should be sought depending on the form of company.

HANDWRITTEN WORDING TO BE INSERTED IN A CORPORATE GUARANTEE (*CAUTIONNEMENT*)

In a guarantee granted by a private deed, it is required that the guarantor write by hand the amount of the secured obligations in words and figures.

SPECIFIC RULES APPLICABLE TO CORPORATE GUARANTEE (*CAUTIONNEMENT*) GRANTED BY INDIVIDUALS

The French Consumer Code (*Code de la consommation*) provides for specific rules applicable to corporate guarantees granted by individuals. In particular, The guarantors' undertaking shall be proportionate to its revenues and assets at the time when the guarantee is granted, except if the guarantor's assets are sufficient to satisfy its obligations when the guarantee is called.

Giving or taking security

RESTRICTIONS AS TO THE SECURED CREDITORS AND OBLIGATIONS

Security may only be granted in favor of the person to whom the secured debt is owed.

Certain kind of security interests may only be granted in favor of certain creditors to secure certain claims. For instance, a Dailly assignment may only be granted in favor of a credit institution or a financing company to secure a loan that it has granted to the assignor in the course of its business.

PRIVATE DEED OR NOTARIAL DEED

There are no notarization requirements for security documents under French law, except for:

- mortgage over real estate – the mortgage deed (*acte d'affectation hypothécaire*) has to be drawn up by a notary;
- pledge over business (*nantissement de fonds de commerce*), which can be either drawn up by a notary or entered into as a private deed provided that it is registered (ie stamped and filed at nominal costs) with the tax authorities; and
- pledge over shares issues by a *société civile*, which has to be notarized and accepted by the company or notified by bailiff (*huissier*) to the company whose share are being pledged.

COMPULSORY PROVISIONS

Some security documents (such as aircraft mortgages, mortgages over ships and Dailly assignments) must contain compulsory provisions. In the absence of such provisions, the security shall be declared null and void.

PERFECTION REQUIREMENTS

Once granted, some security interests need to be properly perfected in order to be enforceable against third parties. Perfection formalities can range from having the secured asset delivered to the security holder, registration of the security and notice being given to third parties.

In France, there is no general security register in which all security interests granted over assets located in France shall be registered. However, specific security interests have to be registered with the commercial register having territorial jurisdiction or, as the case may be, specific registers.

Depending upon the type of security, there may be applicable time limits for registration. In the case of non-registration within such time limits, the security interest will be unenforceable against third parties. The security interest takes priority according to the date of its registration. The registration shall remain effective for a specific period of time, but may be renewed before expiry of such period of time.

LANGUAGE

Security documents can be drafted in foreign languages, except when:

- drawn up by a French notary;
- registered with a French authority; or
- mandatory provisions drafted in French are required (eg a 'Dailly' assignment).

Last modified 4 Dec 2019

Financial regulation

Law and regulation

What are the main laws and regulations that apply to entities that are involved in finance and investments generally?

Generally

Civil Code (Code civil), in particular Book III, Title III (Contracts), IV (Obligations' regime) & Title X (Loan), and Book IV (Security & Guarantee)

Monetary and Financial Code (*Code monétaire et financier*)
Regulation of the French authorities (AMF, ACPR, Banque de France)

Consumer credit

Consumer Code (*Code de la consommation*), in particular Chapter IV (Consumer Credit)

Mortgages

Civil Code (*Code civil*), in particular article 2393 and seq.

Corporations

Commercial Code (*Code de commerce*), in particular Book II (Companies and other groups)

Funds and platforms

Monetary and Financial Code (*Code monétaire et financier*)

AMF General Regulations (*Réglement Général de l'AMF*)

Other key market legislation

Commercial Code (*Code de commerce*), in particular Book VI (Insolvency Proceedings)

Last modified 4 Dec 2019

Regulatory authorization

Who are the regulators?

There are two main regulators:

- the Prudential Supervisory and Resolution Authority (*Autorité de contrôle prudentiel et de résolution*) (ACPR), which supervises regulated entities acting in the banking, payments, investment and insurance industries (eg credit institutions, payment institutions, electronic money institutions, investment companies, digital assets service providers (DASPs), insurance firms, etc.); and
- the Financial Markets Authority (*Autorité des Marchés Financiers*) (AMF), which supervises and authorises participants and products in financial markets including, without purporting to be exhaustive:
    - financial markets and market infrastructures;

- listed companies;
- financial intermediaries authorized to provide investment services and financial investment advice (credit institutions authorized to provide investment services, investment firms, alternative investment fund managers (AIFMs), financial investment advisors);
- alternative investment funds (AIFs);
- undertakings for collective investments in transferable securities (UCITS); and
- DASPs.

Last modified 4 Dec 2019

What are the authorization requirements and process?

Depending on the type of regulated entity (credit institution, investment firm, alternative investment fund manager (AIFM), an entity must apply to the Prudential and Resolution Supervisory Authority (*Autorité de contrôle prudentiel et de résolution*) (ACPR) or the Financial Markets Authority (*Autorité des Marchés Financiers*) (AMF) for authorization.

The regulators assess whether the application meets the required conditions such as:

- suitability of the legal form for the proposed activity;
- minimum capital requirements;
- program of operations, technical and financial resources, organization;
- identity and status of capital contributors, and where applicable, of their guarantors, and the size of their holding;
- location of the central administration and registered office;
- the activity must be effectively run by at least two people, whose knowledge, experience and fitness must be demonstrated, both individually and collectively, as well as their availability; and
- members of the governing body, persons who are in charge of effective management and persons responsible for governance procedures must meet, without purporting to be exhaustive, availability, worthiness, knowledge, skills and experience requirements, assessed both individually and collectively.

Last modified 4 Dec 2019

What are the main ongoing compliance requirements?

Authorized entities must, without purporting to be exhaustive, comply with all required conditions listed above and also with the legal and regulatory rules applicable to their activities.

Last modified 4 Dec 2019

What are the penalties for failure to be authorized?

A person undertaking a regulated activity without being authorized or exempted, commits a criminal offence and is liable to imprisonment and a fine.

Last modified 4 Dec 2019

Regulated activities

What finance and investment activities require authorization?

Save for certain exemptions provided for in the Monetary and Financial Code (*Code monétaire et financier*), any person who/which provides finance or investment services, on a regular basis, is required to be authorized by either the Prudential and Resolution Supervisory Authority (*Autorité de contrôle prudentiel et de résolution*) (ACPR) or the Financial Markets Authority (*Autorité des Marchés Financiers*) (AMF).

In particular, the following financing and investment activities require authorization from the regulators or a registration:

- banking services (including, without purporting to be exhaustive, receipt of repayable funds from the public and credit);
- payments services;
- issuance and management of electronic money;
- investment services;
- crowdfunding; and
- management or marketing of alternative investment funds (AIFs).

Banking services are subject to the banking monopoly, which especially applies to the paragraphs on giving and taking guarantees and securities below. In this respect, when transferring a loan and related security, it should be considered whether the transferor was or is duly licensed to provide a credit and whether the transferee is duly licensed (or passported) to act as a transferee.

Last modified 4 Dec 2019

Are there any possible exemptions?

Certain exemptions are available depending on the entity providing the regulated activities (such as certain public entities, etc.).

Certain exemptions are available depending of the type of activity contemplated (such as intercompany lending, loans granted by non-profit associations, etc.).

Last modified 4 Dec 2019

Do any exchange controls or other restrictions on payments apply?

Manual money changers obtain an authorisation from the Prudential Supervisory and Resolution Authority (Autorité de contrôle prudentiel et de résolution) (ACPR). Pursuant to EU and French regulations, any person which carries to a Member State of the European Union or from a Member State of the European Union more than EUR10,000 of cash shall declare that sum to the custom authorities.

Other restrictions apply related to payments and foreign investments (and divestments).

Last modified 4 Dec 2019

What are the rules around financial promotions?

The main rules regarding financial promotions are as follows.

Banking and financial solicitation (*démarchage bancaire et financier*)

Banking or financial solicitation (*démarchage bancaire et financier*) is strictly regulated under French law: any unsolicited contact, by whatever means, with an individual or legal entity in order to obtain its agreement to enter into a transaction for financial instruments constitutes banking or financial solicitation (*démarchage bancaire et financier*) (Solicitation).

The Monetary and Financial Code (*Code monétaire et financier*) (CMF) provides a list of entities authorized to perform Solicitation, among which are, without purporting to be exhaustive, credit institutions, electronic money institutions, payment institutions, insurance firms, investment firms and their agents, financial investment advisers, etc.. Any entity carrying out Solicitation must comply with the specific regime provided in the CMF relating to information obligations, right of withdrawal, registration requirements etc.

Several exemptions to this regime are available. One of them is when the targeted persons are French 'qualified investors': a qualified investor is an individual or a legal entity possessing the expertise and resources required to apprehend the risks inherent in transactions in financial instruments (eg banks, financial institutions or large corporates).

Solicitation is prohibited for certain products, such as, without purporting to be exhaustive, products whose maximum risk is not known or that exceed the amount of the initial subscription made by the investor, or products unauthorized for marketing.

Information, advertisements and marketing material addressed to clients

Any information, advertisement or marketing material addressed to investment firms' clients must be clearly identified as advertising, be accurate, clear and not misleading. In addition, the material must mention the existence of a prospectus and the key investor information document. The Financial Markets Authority (*Autorité des Marchés Financiers*) (AMF) may request the marketing material contents to be modified or sent to it prior to the publication. In accordance with the Markets in Financial Instruments Directive, investment firms acting in France must also provide their clients or potential clients with information that enables them to have a reasonable understanding of the nature of the investment service and the specific type of financial instrument proposed, as well as the risks associated therewith, thus enabling them to make their investment decisions in full knowledge of the facts.

The rules detailed above are not exhaustive and do not cover for instance certain specific French law provisions that may apply depending on the characteristics of the activities carried out in France (eg consumer protection rules, contract or solicitation made by electronic means, financial instruments distribution rules, rules applicable to the marketing of structured or complex financial instruments, etc.).

Last modified 4 Dec 2019

Entity establishment

What types of legal entity are generally used to undertake financial or investment activity?

The most common types of legal entities are used to undertake financial or investment activity, such as public limited company (*société anonyme*) or simplified joint-stock company (*société par actions simplifiées*), both of which are body corporates with separate legal personality and limit the liability of their members.

Last modified 4 Dec 2019

Is it possible to conduct lending or investment business through a branch or establishment?

It is possible to conduct lending or investment business through a branch of an authorised European regulated entity or from an authorised European regulated entity without any physical presence in France through the so-called 'European passport'.

Overseas companies having a French branch may conduct lending business in France subject to an authorization granted by the Prudential and Resolution Supervisory Authority (*Autorité de contrôle prudentiel et de résolution*) (ACPR) and compliance with specific prudential and regulatory requirements.

Last modified 4 Dec 2019

FinTech

FinTech products and uses

What are the most common technology products and FinTech applications used or being developed in the finance and investment marketplace?

Peer-to-peer funding platforms and marketplace lending

There is no strict definition for marketplace lending given the wide variety of entrants and financing techniques involved. The principal characteristics of new marketplace lenders, however, would include:

- operating from or through a non-bank lending platform established as a specialist corporate or special purpose vehicle (SPV) based structure;
- applying technology to leverage and optimize the lending platform and user experience; and
- connecting borrowers and lenders through the platform rather than applying funding arising from a wider deposit-based relationship.

Marketplace lending is available to address most forms of traditional bank funding products. Recently products have included:

- virtual credit cards;
- consumer loans;
- student lending products;
- small and medium-sized enterprises (SME) lending; and
- residential property and commercial property mortgage lending.

It is likely that the volume of lending in these product areas as well as further and additional product areas will significantly increase over the coming years, as financing becomes more readily available to support the marketplace lending sector.

HOW ARE MARKETPLACE LENDING PLATFORMS FUNDING THEMSELVES?

Marketplace lending includes peer-to-peer (P2P) type structures often operated through an electronic platform provider as well as crowdfunding and also direct-to-retail financing mechanisms. The increase in demand for credit through these marketplace platforms has also been appealing to larger pools of available capital, such as private equity and venture capital funds as well as institutional sponsors. Funding platforms will now often be backed by institutional finance in addition to, or rather than, individual investors on a traditional P2P basis.

Blockchain, smart contracts and cryptocurrencies

WHAT IS BLOCKCHAIN?

Blockchain provides a new approach to holding and authenticating data. It is a database operating through distributed ledger technology in which data is recorded on computers, by way of a P2P mechanism, based on pre-agreed consensus algorithms in the applicable participating network. It is a form of database where data is stored in the chain in either fixed structures called 'blocks' or algorithm functions called 'hashes'.

Each block includes unique features such as its unique block reference number, the time the block was created and a link back to the previous block. Each block is reviewed by a number of nodes and the block is only added to the database if the node reaches consensus that the block only contains valid transactions. Content includes digital assets and instructions which reflect the transactions and parties to those transactions. The ability to track previous blocks in the chain makes it possible to identify transactions back to the first ever transaction completed, enabling parties to verify and establish the authenticity of the assets in the latest block. This makes blockchain exceptionally accurate and secure.

Specialist users on the system apply advanced computing software to identify time stamped blocks, verify the accuracy of the block using sophisticated algorithms and add the verified block to the chain. As the number of participants increases, the replication of the data over a wider base makes it harder for any person to alter the data in the chain. Any attempted addition or modification to the information on a block needs to be approved by all users in the network and verification of any block can only happen through a 'proof of work' process. This process requires vast amounts of computing power, making it practically impossible to insert fake transactions into a block.

As a result, the data is identified and authenticated in near real-time, providing a permanent and incorruptible database sufficiently robust to operate as a store of value (eg in the case of cryptocurrencies such as bitcoin) or providing an indisputable record for example relating to securities transfer.

Blockchain is a decentralized system, created and maintained by users of the network rather than being dependent on any central or third party intermediary. It may be public and open ('permissionless' or 'unpermissioned') or structured within a private group ('permissioned').

Permissionless blockchains include bitcoin and ethereum, in which anyone can set up a node that once authorized, can validate, observe and submit transactions. The identities of the participants are not known (other than the unique and random identities known as an 'address'). Permissioned ledgers restrict participation in the network and only the specific participants are given access and are known within the network. The network is private, and only organizations that have been authorized can participate and view transactions.

WHAT ARE SMART CONTRACTS AND DECENTRALIZED AUTONOMOUS ORGANIZATIONS (DAOS)?

Developments in blockchain are also providing an ability to transfer and rely on instructions verified within the electronic system in the form of so called 'smart contracts'. These contracts have been converted into code and are then executed and enforced by the blockchain network on the occurrence of an event. This reduces the need for intermediaries to collect, store and act on communicated information.

Smart contracts are essentially pre-written computer codes which are stored and replicated on distributed ledger platforms such as blockchain. Execution takes place over the network, eliminating the need for intermediary parties to confirm the transaction, leading to self-executing contractual provisions. These contracts can be as simple as moving a balance from one account to another or advanced more-complex interactions with the outside world using so called 'Oracles'. With Oracles, the contract code consults with a service outside of the blockchain network to make a decision. This may entail receiving a confirmation that an event has occurred, such as payment, which automatically executes a further step in the contract, such as the transfer of an asset, which might be in digital form or by delivering instructions to a person or warehouse to release the asset for delivery.

DAOs are essentially online, digital entities that operate through the implementation of pre-coded rules. These entities often need minimal to zero input into their operation and they are used to execute smart contracts, recording activity on the blockchain. DAOs can be particularly challenging to regulate depending on their software engine, the nature of transactions they are completing or other unique features. Questions of ownership and responsibility for resulting acts of DAOs can also be brought to question if any technical issues arise with their operation.

WHAT IS A CRYPTOCURRENCY?

The European Banking Authority definition of a cryptocurrency is that it is a digital representation of value that is neither issued by a central bank or public authority nor necessarily attached to a fiat currency, but is issued by natural or legal persons as a means of exchange and can be transferred, shared or traded electronically. The best-known cryptocurrency is bitcoin (itself based on the bitcoin platform) although many other cryptocurrencies now exist. For example, the most widely-known alternatives to bitcoin include ether based on the ethereum platform and litecoin (these cryptocurrencies are now actively traded with a large developing infrastructure for holding, pricing and exchanging currency).

Initial coin offerings and token-based products

WHAT IS AN INITIAL COIN OFFERING (ICO)?

ICOs are a form of digital currency or token using blockchain technology. ICOs are often a means by which funds are raised for a new blockchain or cryptocurrency venture (the market for ICOs is currently booming). ICOs come in a wide variety of forms and may be used for a wide range of purposes. Some forms of ICOs may be directed at customers or suppliers as a form of loyalty program or a form of access or purchasing power (preferential or otherwise) in respect of assets of the issuer's business. Other forms may be more focused on raising initial funding. It is essential to examine the legal and regulatory basis for any ICO as an unauthorized offering of securities is illegal and may result in criminal sanctions. Legal analysis of the underlying token will determine if it should be treated as a specified investment or form of regulated security or is more appropriately a form of asset that is not itself subject to the regulatory regime.

Typical attributes provided by tokens will include:

- access to the assets or features of a particular project;
- the ability to earn rewards for various forms of participation on the platform; and
- prospective return on the investment.

Key aspects to consider will include the:

- availability and limitations on the total amount of the tokens;
- decision-making process in relation to the rules or ability to change the rules of the scheme;
- nature of the project to which the tokens relate;
- technical milestones applicable to the project;
- basis and security of underlying technology;
- amount of coin or token that is reserved or available to the issuer and its sponsors and the basis of existing rights;
- quality and experience of management; and
- compliance with law and all regulatory requirements.

The nature of the business and the purpose and structure of the token offering will typically be set out in a white paper available to potential purchasers.

On 22 May 2019, France has adopted an innovative legal framework (law and decree) governing initial coin offerings (ICOs), digital assets and digital assets services providers (DASPs). The entry into force of this legislation is however subject to specific rules to be published by the French financial market authority (AMF). The definition of digital assets is very broad and not limited to ICO Tokens and virtual currencies. DASPs providing the service of digital asset custody or purchase/sale of digital assets in exchange for legal tender are subject to mandatory registration with the AMF. Additionally, all DASPs may apply for an optional license.

Public offering of tokens is subject to specific rules including an optional registration (visa) with the AMF requiring the issue of a white paper made available to investors detailing, without purporting to be exhaustive, the token issuer's project, the intended use of the funds and digital assets collected, the rights and obligations attached to the tokens, etc. The AMF publishes on its website a white list of ICOs benefiting from its visa as well as a “black list” of ICOs and DASPs not complying with the regulation.

Artificial intelligence and robo advisory systems

Automated financial advice tools, also known as 'robo advisors' are software tools driven by artificial intelligence (AI) that provide a variety of investment advice services from portfolio selection to personal finance planning. The systems are generally operated on a platform /personal dashboard basis; a user can input a set of personalized data to be processed by the AI algorithms which produce optimized outcomes around specified parameters. Although generally of application in the asset management sector, AI and automated advice tools also impact in the banking and private wealth advisor sectors; the implications include decreased human involvement, although recent trends have included a growth in popularity of hybrid structures which combine AI and human inputs.

Data analysis and cloud computing

Cloud computing enables delivery of IT services through internet-based tools and applications, rather than direct connection to a physical server. Cloud-based storage makes it possible to save masses of data to remote servers, accessible through the internet rather than by way of a physical connection. With the vast data processing and storage capabilities offered by cloud computing technology and virtually no infrastructure barriers to entry, there are a number of applications in building and running FinTech businesses and the technology has had a significant impact in recent years.

Payment initiation service and account information service

The European Directive on payment services introduced two new types of payment services providers: payment initiation service is a service to initiate a payment order at the request of a bank account holder with respect to this account, held at another payment service provider, and account information service is an online service to provide consolidated information on one or more payment accounts held with either another payment service provider or with more than one payment service provider.

Last modified 21 Sep 2017

Are there any restrictions, specific laws, regulations or procedures that apply to FinTech products?

General financial regulatory regime

The Prudential and Resolution Supervisory Authority (*Autorité de contrôle prudentiel et de résolution* or ACPR) and the Financial Markets Authority (*Autorité des Marchés Financiers* or AMF) are the supervising entities and regulators of firms providing banking and financial products and services.

GENERAL

A person must not carry on a regulated activity in France unless authorized or exempted. A banking or financial activity requires regulatory authorization when it is identified as a regulated activity, carried on by way of business on a regular basis in France and it does not fall within any of the available exemptions. Where FinTech products and/or applications involve banking or financial activity which requires regulatory authorization, the firms providing such products and/or applications must be authorized by the ACPR or the AMF.

ACPR'S FINTECH INNOVATION UNIT

The FinTech Innovation Unit is the ACPR team dedicated to FinTech and to innovative project initiators. The unit provides an interface between project initiators and the relevant ACPR departments, as well as the Bank of France (for projects regarding payment services) and the AMF (for projects regarding investment services). The ACPR considers that an innovative financial project consists of the creation of a company ('startup style') with a strong level of innovation and acting in one or several financial fields under ACPR's supervision.

AMF'S FINTECH, INNOVATION AND COMPETITIVENESS DIVISION

The AMF's FinTech, Innovation and Competitiveness Division assists stakeholders in analysing innovations in the investment services industry, identifying competitiveness and regulation challenges and, where applicable, evaluating the need to modify European regulations or the AMF policy. The ambition of the AMF is to develop an ecosystem that promotes FinTechs in order to make the Paris financial centre more attractive to foreign participants and facilitate the development and support of FinTechs.

Electronic payments platforms and regulation of peer-to-peer lenders

ELECTRONIC PAYMENT PLATFORMS

Electronic payment platforms' activities are generally considered as regulated payment services activities requiring a payment institution authorization with the ACPR. Electronic payments platforms may also be authorized as lightly-supervised payment institutions if they do not exceed the threshold of an average volume of monthly payment transactions of EUR3 million. Depending on their features, such platforms may also trigger other qualifications and regulatory regimes, and notably, enter into the scope of the new "Pacte" law (dated 22 May 2019) – digital assets framework,

PEER-TO-PEER LENDERS

A person carries out a regulated banking activity if they provide lending or facilitate lending and borrowing between individuals or between individuals and businesses, in particular through an electronic platform, by way of business on a regular basis. Such regulated activity can be carried out if the person is authorized as a credit institution or financing company, or, if the person is registered as a crowdfunding intermediary.

CROWDFUNDING INTERMEDIARIES

Any person or entity proposing, through a website, to fund projects in the form of a loan with or without interest must be registered in the Banking, Insurance and Financial Intermediaries Register (ORIAS), as a crowdfunding intermediary. Crowdfunding intermediaries are subject to organizational and business conduct rules (in particular information obligations).

Regulation of payment services

Where a person provides payment services as a regular occupation or business activity in France, it will require authorization by the ACPR to become an authorized payment institution. Failure to obtain the required authorization is a criminal offence.

In order to become authorized by the ACPR, a payment services business will need to meet certain criteria, including in relation to its business plan, initial capital, processes and procedures in place for safeguarding relevant funds, sensitive payment data and money laundering and other financial crime controls.

PSD 2 regulation, as implemented into French law, has broaden the scope of payment service, which now extended to payment initiation and aggregation of payments.

Money laundering regulations

The Monetary and Financial Code (CMF), which will implement the European Union's Fifth Money Laundering Directive by 10 January 2020, contains the legal provisions governing anti-money laundering and terrorism financing. The ACPR and AMF are responsible for supervising the compliance of regulated banking and financial entities with anti-money laundering requirements.

The CMF expressly includes platforms facilitating the trade of virtual currencies under the scope of the anti-money laundering legal and regulatory framework.

Last modified 21 Sep 2017

What type of funding arrangements and incentives are available to FinTech businesses?

Early stage

SEED INVESTMENT

Initial investment in FinTech businesses may be provided by family and friends of the founders and other high-net-worth individuals (often known as business angels) in return for an equity stake. Such seed investment is often used to fund the establishment and early growth of the business before larger investment is available. The investing individuals may also provide know-how and expertise to assist in the company's development. The seed investors would typically not require the same controls over the business as, for example, venture capital providers.

CROWDFUNDING

The crowdfunding sector may be appropriate for a FinTech business in the early stages. It involves members of the public investing in a business by pooling their resources through an intermediary platform.

There are two main types of crowdfunding: equity and reward-based.

- Equity crowdfunding involves company shares being given in exchange for investment in the business.
- Reward-based crowdfunding provides investors with a tangible benefit, such as early access to a platform or application that the business is developing.

Crowdfunding offers a large number of private investors an opportunity to make small-scale investments in early-stage businesses to which they may otherwise not have had access.

Venture capital and debt

Venture capital funding is a type of equity investment usually targeted at early stage FinTech companies with an established business and some trading history. Venture capital provides a viable alternative to traditional lending given that the business is unlikely to have the tangible asset base or long track record needed to attract traditional debt funding from financial institutions.

Corporate venture capital (CVC) is a type of venture capital and involves an equity investment by a corporate fund. The benefit of having a CVC as an investor for a FinTech startup is that the fund is able to share its knowledge and expertise of the FinTech sector with the company and act as an advisor.

Senior bank debt

Once a FinTech company is established and has a track record, bank debt becomes a more viable source of funding, either on a secured or unsecured basis depending on the creditworthiness and asset base of the business. In contrast to capital markets funding which is often covenant-lite, bank funding will generally involve the imposition of financial covenants and controls that will apply over the life of the facility. Bank finance may be particularly important for working capital, overdraft, accounts management and general liquidity purposes.

Last modified 21 Sep 2017

Portfolio sales

Loan transfers and portfolio sales

What are common ways of buying and selling loans?

A loan can be sold on an individual basis or packaged up with other loans and sold as a portfolio pursuant to overarching terms.

The most common ways of selling loans are as follows.

Transfer of contract (*cession de contrat*)

A cession de contrat is a full legal transfer of the party's rights and obligations. It is a tripartite arrangement between the transferor (*cédant*), the assigned party (*cédé*) and the transferee (*cessionnaire*). To the extent the assigned party (*cédé*) has given its consent, the transferor (*cédant*) is released from its obligations for the future.

Assignment of rights (*cession de créance*)

A cession de *créance* is available to the extent the facility has been fully drawn. Subject to any contractual restrictions, a *cession de créance* can be done without the consent of the debtor.

Sub-participation

A sub-participation is a transfer of the economic interest in a loan without changing the legal relationship between the existing parties. Sub-participations involve the buyer taking on double credit risk, both on the seller as well as the borrower.

Last modified 21 Sep 2017

What are the main considerations when transferring a loan and related security?

The main considerations in connection with a transfer of loan include:

- **consent/notification** – whether a transfer requires the consent or notification of any other parties;
- **lender eligibility** – whether there are any restrictions around the type of entity to which the loan can be transferred;
- **undrawn commitments** – whether there are any continuing obligations for further funding or other material obligations on the part of the lender that may fall on the transferee or reduce claims made by the transferee;
- **confidentiality and banking secrecy** – whether the seller of the loan is allowed to disclose information relating to the loan to a potential purchaser; and
- **data protection** – whether there is any personal data or other restricted information in the loan that should not be disclosed to a potential purchaser.

Last modified 21 Sep 2017

Projects

Financing / investing in energy / infrastructure

To what extent are energy and infrastructure assets publicly or privately owned?

Generally

From a general point of view, infrastructure and energy infrastructure assets in France are mostly owned by the state or the relevant public entity.

Energy

The gas and electricity industries in France have been partially privatized (EDF-GDF).

Onshore wind farms, offshore wind farms and photovoltaic plants are owned by the private companies in charge of the projects, not by public entities.

The energy sector is regulated by an independent administrative authority entitled *Commission de Régulation de l'Energie* (CRE).

Telecoms infrastructure

The telecommunications networks (fixed and mobile) in France are privately owned by a number of service providers (Orange, Bouygues, SFR and Free).

The telecom sector is regulated by an independent administrative authority entitled *Autorité de Régulation des Communications Electroniques et des Postes* (ARCEP).

Transport infrastructure

RAIL

Railway infrastructure is owned by SNCF Réseau, a public entity managing the railway infrastructure.

The railway sector is regulated by an independent administrative authority entitled *Autorité de Régulation des Activités Ferrovières et Routières* (ARAFER).

HIGHWAYS

Highways are owned by the state and concessions have been granted to private companies.

The highways sector is regulated by the ARAFER.

AVIATION

Airports are owned by public entities (State or local public entities), who have generally granted a concession. Concessionaires were initially state-owned entities, but French law now provides for a progressive opening of the share capital of the concessionaires to the private sector.

The aviation sector is regulated by the *Direction Générale de l'Aviation Civile* (DGAC).

Other infrastructure

SOCIAL INFRASTRUCTURE (SCHOOLS, HOSPITALS, EMERGENCY SERVICES CENTERS/PRISONS)

These assets are owned by the relevant public entities in France. Generally, a contractor is in charge of the construction or the maintenance of these assets pursuant to a public-private partnership.

Last modified 21 Sep 2017

Are there special rules for investing in energy and infrastructure?

There is no specific regime governing or restricting investment in energy or infrastructure projects in France, subject to:

- antitrust clearance;
- prior authorization of the Minister of the Economy in case of foreign investments in activities in relation to materials, products or performance of services, including activities in relation to the safety and well-functioning of the installations and equipment, essentials to the guarantee of the country's interest on public policy, public security or national defense (eg supplying electricity, gas or public health); and
- any planning or environmental authorizations (building permits, classified installations for the protection of environment (ICPE) etc) or licenses to be applied for and/or any relevant land rights arrangements (long-term lease, easement etc) to be concluded by the SPV.

Last modified 21 Sep 2017

What is the applicable procurement process?

Generally

The key principles of the public procurement are that:

- contracts procured by the public sector are awarded fairly, transparently and without discrimination on the grounds of nationality; and
- all potential bidders are treated equally.

Different forms of public procurement exist, depending on:

- the type of administrative contract (*marché public or délégation de service public ou concession*);
- the nature of the project (eg PPP or renewable energy project); and
- the procurement threshold.

Legal framework of the public procurement in France

Public procurement for PPP in France is mostly based on the following European directives:

- Directive n°2014/23/UE regarding concession agreements (implemented in France by ordinance n°2016-65 and decree n°2016-86); and
- Directive n°2014/24/UE regarding Public Procurement contracts (implemented in France by ordinance n°2015-899 and decrees n° 2016-360 and n°2016-361).

Public procurement for renewable energy in France is mostly based on the following texts:

- Directive n°2009/28; and
- Law n°2015-992 and its implementing decrees issued or to be issued.

Publicity of the public procurement

This legislation is complex and depends on:

- whether it is a public procurement contract or a concession; and
- some thresholds applicable to this type of procurement and contract.

Form of public procurement

For greenfield projects (ie when the asset has not been commissioned yet), the public procurement is complex.

For public procurement contracts:

- below a certain threshold there is an adapted bidding process (*marché à procédure adaptée*) in which the public entity determines freely the modalities of the procedure; or
- above a certain threshold there is formalised procedure (*procédure formalisée*) in which the public entity shall run one of the following procedures:
  - tender process (*appel d'offres*), which may be opened (ie any bidder may apply) or restricted (ie a few bidders may apply);
  - competitive procedure with negotiation (*procédure concurrentielle avec négociation*) in which the public entity may negotiate the conditions of the public procurement contracts with one or several bidders, after receipt of the initial offer;
  - negotiated procedure with prior call of competition (*procédure négociée avec mise en concurrence préalable*) in which the public entity may negotiate the conditions of the public procurement contracts with one or several bidders, before receipt of the initial offer; or
  - competitive dialogue (*dialogue compétitif*) in which the public entity cannot set out the technical, financial or legal means for the project.

For concession agreements:

- the public entity freely organizes the procurement procedure;
- the minimal procedural guarantees (*garanties procedurales minimales*) shall be complied with by the public entity for any concession agreements; and
- in addition to the common rules set out for the concession agreements, sectoral rules (for example in relation to hydroelectric, highway or ski lift concession) and specific rules depending on the amount of the concession agreement or its purposes shall apply.

For renewable energy (for example), in the offshore wind, onshore wind and photovoltaic sectors, a tender process shall be complied with for projects exceeding a certain threshold.

For a brownfield investment (ie when the asset has already been commissioned), contractual mechanisms inserted in the public contract (or in the relevant finance documents) control the shareholding structure of the special purpose vehicle (SPV).

Financing in the context of a public procurement

On a publicly procured contract, the public sector may have prescribed requirements on the funding arrangements. In any case, size and costs of the debt financing play an important role in the decision of the awarding public entity.

Last modified 21 Sep 2017

What are the most common forms of funding / investing in energy and infrastructure?

The principal forms of private sector funding/investment in energy and infrastructure in France (including in relation to public-private partnerships) are:

Funding

Common forms of funding in energy and infrastructure include:

- loans made on a project-finance basis (to a special purpose project company) without any recourse against the shareholders of the special purpose vehicle (SPV) (these loans are generally a bridge loan for the construction and VAT, and at the commissioning, a refinancing loan in order to reduce the financing costs (as the asset has been delivered));
- projects bonds in the context of a refinancing;
- mezzanine debt provided by funds to the holding company of the SPV; and
- asset financing (which is particularly relevant in the rail, aviation and maritime sector).

The European Investment Bank is very active in telecom and infrastructure from a general point of view, while export credit agencies are more focused on assets (such as aircraft or ships).

Distressed funds may also acquire some debt participation through one of the mechanisms described in Loan transfers and portfolio sales.. In addition, French law has recently authorized certain kind of funds to lend directly to borrowers (professional private equity fund (FPCI), private equity funds (FPS and SLP), financing entities, which includes securitisation entities and specialised financing entities (OFS and SFS).

Investing

Common forms of investing in energy and infrastructure include:

- equity participation in the SPV, shares, convertible bonds etc; and
- shareholders loans (subordinated to the rights of the lenders in the context of a project financing).

It is specified that a private entity and a public entity may own some companies operating an asset in certain areas, called *sociétés d'économie mixte*.

Last modified 21 Sep 2017

Restructuring

Enforcement and sanctions

When can there be regulatory investigations?

When the Prudential and Resolution Supervisory Authority (*Autorité de contrôle prudentiel et de résolution*) (ACPR) or the Financial Markets Authority (*Autorité des Marchés Financiers*) (AMF) considers that an authorized firm or regulated individual may have breached the ongoing compliance requirements, it will launch a formal investigation. This may result in regulatory sanctions.

Last modified 21 Sep 2017

What regulatory penalties may apply?

When a rule breach has taken place, the Prudential and Resolution Supervisory Authority (*Autorité de contrôle prudentiel et de résolution*) (ACPR) or the Financial Markets Authority (*Autorité des Marchés Financiers*) (AMF) may impose a penalty (up to EUR100 million or to 10% of net annual turnover for legal persons, and EUR 5 million or tenfold the amount of the benefit derived from the breach for natural persons for the ACPR, and up to EUR 100 million or to 10 times any profit earned for professional under AMF supervision or up to EUR 300,000 or to or 5 times any profit earned for individual acting under the authority or on behalf of a professional, for the AMF) or censure, or withdraw regulated status (on a temporary or definitive basis) against the firm and/or regulated individuals. Regulators may also require inter alia the compulsory resignation of the regulated entities directors. The regulator will publicize these penalties.

The ECB has competence to pronounce sanctions as well against French entities subject to its direct supervision.

Last modified 21 Sep 2017

What criminal penalties may apply?

Following formal judicial proceedings, French courts have powers to impose criminal penalties in certain cases, including:

- insider dealing and misleading statements and practices;
- breaches of the Money Laundering Regulations;
- conducting regulated activities when not authorized; or

- any other breach of applicable rule such as prudential, good conduct rules, etc.

Last modified 21 Sep 2017

Tax

Tax issues

Are stamp, registration, transfer or other similar taxes applicable?

Are there stamp, registration, transfer or other similar taxes payable on the advance, transfer or assignment of a loan?

No stamp, registration, transfer or other similar taxes are payable on the advance, transfer or assignment of a loan, unless the parties voluntarily register the agreement in relation to the loan before the French tax authorities. In this case, the registration fee amounts to €125.

Are there stamp, registration, transfer or other similar taxes payable on the taking, transfer or assignment of a mortgage, debenture or other security?

The constitution of a conventional mortgage (*hypothèque conventionelle*) over real estate must be entered into by notarial deed and executed in front of a French public notary. It gives rise to (i) notary fees and (ii) land registration tax (*taxe de publicité foncière*) at a global rate of 0.71498% calculated on the amount guaranteed by the mortgage plus a real estate contribution (*contribution de sécurité immobilière*) at a rate of 0.05% calculated on the amount guaranteed.

The assignment of the beneficiary right under a conventional mortgage (*subrogation d'hypothèque*) gives rise to (i) notary fees and (ii) a real estate contribution (*contribution de sécurité immobilière*) at a rate of 0.05% calculated on the amount of the assigned mortgage.

Under French law, the question as to whether the taking or the transfer of a security interest must be registered is dependent on the type of security. Certain security interests (eg a pledge over ongoing business assets or share pledge with respect to shares in civil companies) must be registered in a special registry kept by the clerk of the commercial court (*Tribunal de commerce*) and are subject to registration fees. In any case, the parties may voluntarily register the agreement in relation to the taking or the transfer/assignment of security before the French tax authorities. In this case, the registration fee amounts to €125.

Are there stamp, registration, transfer or other similar taxes payable on the issue, transfer or assignment of a debt security (eg a bond)?

No stamp, registration, transfer or other similar taxes are payable on the issue, transfer or assignment of a debt security (eg a bond), unless the parties voluntarily register the agreement in relation to the debt security before the French tax authorities. In this case, the registration fee amounts to €125.

Last modified 21 Sep 2017

Do tax authorities take priority on enforcement?

On the enforcement of security, do tax authorities take priority over secured lenders or secured debt security holders (eg secured bond holders)?

The French Public Treasury has a general privilege to ensure the collection of the main taxes (eg corporation tax and value added tax).

Determining the ranking between the French Public Treasury and secured lenders or secured debt security holders is a complex issue. Indeed, rules regarding priority on enforcement vary depending on the type of security, the creditor and the situation of the debtor (insolvent or not insolvent).

In insolvency cases, for example, French insolvency law provides for a set waterfall of payments for unsecured assets (sale of assets or business within the frame of safeguard, receivership, or liquidation proceedings) that is as follows:

- the employees' super priority (wages and paid holidays due to employees for the last 60 days preceding the opening of the insolvency proceedings);
- court expenses and legal professional fees;
- new money facilities granted during conciliation proceedings;
- claims arising after the opening of the insolvency proceedings to the benefit of the proceedings (including taxes arising after the opening of the proceedings);
- claims secured by real property or by a security interest including a right of retention or pledge on professional machinery and equipment (including any tax claim that have been converted into a security on real estate or machinery);
- other privileged or secured pre-judgment claims; and
- other pre-opening unsecured claims.

The secured lenders take priority over other creditors on any sale of collateral over which their security has been taken (it has to be noted that tax claims can be converted into security before the opening of the proceedings and therefore the tax authorities could be treated as a secured creditor).

In conclusion, the position of the tax authorities compared to secured lenders and secured debt security holders in the context of insolvency proceedings depends on the nature of the tax claim and whether or not the tax claim has been converted into security with collateral before the opening of the insolvency proceedings.

Last modified 21 Sep 2017

Is withholding tax on interest payments applicable?

Is there withholding tax on interest payments under a loan?

As a general rule, no withholding tax is levied on French source interest payments, except in cases where:

- interest is paid to a beneficiary or to an account, located in a non-cooperative state or territory (NCST); or
- the interest payment is not deductible for the debtor by virtue of the application of the French rules which in some cases may limit the deduction of interest to the maximum legal interest rate provided for by Article 39.1.3° of the French tax code. In these cases, the non-deductible interest is reclassified as a deemed dividend subject to dividend withholding tax.

If so:
What is the rate of withholding?

Interest paid under a loan by a French entity to a beneficiary located in a NCST or to an account located in a NCST may be subject to withholding tax at a rate of 75%, unless the recipient is able to prove that the payments do not have a tax avoidance motive.

The standard withholding tax rate on dividends is currently 30% (to be progressively reduced down to 25% in 2022). This rate applies to deemed dividends (see above). The rate may be reduced or the withholding tax eliminated under an applicable double tax treaty.

What are the key exemptions?

There is generally no withholding tax on interest, except for the specific circumstances described above.

Would the same analysis apply to interest payments under a debt security (eg a bond)?

Yes.

Last modified 21 Sep 2017

Are foreign lenders and debt security holders subject to tax on interest payments?

Will the lender be taxed on interest payments under a loan in the jurisdiction of the borrower (other than by way of the application of withholding taxes (if any)), assuming the lender is not otherwise resident in that jurisdiction for tax purposes (eg by virtue of incorporation, residence or local branch)?

No.

Would the same analysis apply to interest payments under a debt security (eg a bond)?

Yes.

Last modified 21 Sep 2017

Key contacts

Erwan Lacheteau
Partner
DLA Piper
erwan.lacheteau@dlapiper.com
T: +33 6 86 48 82 81

Disclaimer

DLA Piper is a global law firm operating through various separate and distinct legal entities. Further details of these entities can be found at www.dlapiper.com.

This publication is intended as a general overview and discussion of the subjects dealt with, and does not create a lawyer-client relationship. It is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. DLA Piper will accept no responsibility for any actions taken or not taken on the basis of this publication.

This may qualify as 'Lawyer Advertising' requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.