

FRANCE LEADS THE WAY WITH A DEDICATED LEGAL REGIME FOR DIGITAL ASSETS AND ICOs

The French “loi Pacte”, enacted in May 2019, introduced a comprehensive new regulatory framework for digital assets in France reflecting the strong support of the French regulators and government for innovation through the creation of legal regimes for tokens in the primary (ICOs) and secondary markets (digital assets service providers).

The reform establishes an optional visa regime for initial coin offerings (“**ICOs**”). Similarly, digital assets service providers (“**DASPs**”) may apply for an optional licence. However, certain specific services on digital assets¹ require a mandatory registration with the French *Autorité des marchés financiers* (“**AMF**”). The loi Pacte also provides that certain funds may invest in digital assets and imposes specific requirements on banks for them to help the development of the French digital asset ecosystem.

A legal framework for ICOs

The loi Pacte deals with “utility tokens” only, which have been defined as intangible digital assets that may be issued, registered, stored or transferred by means of a distributed ledger technology (i.e. a blockchain). Tokens that qualify as financial instruments under MiFID II² are excluded from the definition of “utility token” and remain subject to the regime governing offers to the public of financial securities.

In-scope transactions

The new article L. 552-3 of the French *code monétaire et financier* (the “**Financial Code**”) introduced by the loi Pacte defines a token offering – or an ICO – as an offer to the public, in any form whatsoever, to subscribe to these tokens. The same article however excludes from the definition of ICO any offers of tokens to less than 150 persons acting on their own account.

Key takeaways

- The French loi Pacte introduces a comprehensive and innovative legal regime for digital assets in France.
- Utility token ICO promoters will be able to request an optional visa from the AMF for their white paper.
- Digital assets service providers may apply for an optional licence. However, some services on digital assets will require a mandatory registration with the AMF.
- Additional obligations apply to banks for them to help the digital asset market participants developing their business.
- The law allows for certain types of funds (“crypto-funds”) to invest in digital assets.

¹ “Digital assets” include utility tokens and virtual currencies as defined under European law.

² Because such tokens would have features similar to those of a financial instrument (for instance, by granting political or financial rights similar to those usually conferred upon by equity instruments).

Optional visa from the AMF

Under the optional regulatory framework set up by the law, issuers of tokens are granted the possibility to file their ICO information document (referred to in practice as a “white paper”) with the AMF in view to obtain a visa for their token offering. The AMF will grant such visa if the token offering and the issuer comply with certain requirements, notably:

- the issuer must provide investors with a document setting out all the information relevant for the public regarding the offer and the issuer. The information shall be clear, fair and not misleading. The use of French is not mandatory, and the document can be drafted in English as long as the issuer provides a summary in French;
- the issuer must be a legal person incorporated or established (though a branch) in France; and
- the issuer must put in place appropriate means to monitor and safeguard funds and assets raised pursuant to the token offering.

The AMF’s General Regulation has been updated and further specifies how the above requirements must be implemented in practice³.

Once an issuer obtains a visa for an ICO, such issuer must comply on a continuous basis with the requirements which were conditioning the visa. The AMF will be tasked with the monitoring and the supervision of the compliance of the issuer with the new regime and its information document. If the offer to the public is no longer compliant with the relevant information document, the AMF may withdraw the visa and prohibit any communication mentioning the visa. Unauthorised reference to an AMF visa is a criminal offence.

As the visa is optional, ICOs without the AMF’s visa will continue to be legal in France. However, such issuers will not be able to undertake general solicitation or carry out any other marketing step in France in relation to their ICO.

The AMF will maintain a publicly available list of ICOs that have received its visa.

Anti-money laundering requirements

The loi Pacte extends the French anti-money laundering rules to token issuers which have been granted a visa from the AMF. AML-CTF rules will apply to transactions with the investors participating to the offer. The reform therefore forces issuers that have obtained a visa to verify the origin of funds raised in the context of such ICOs.

³ See *AMF General Regulation, Book VII – Token issuers and digital asset service providers*

Digital assets service providers (DASPs)

The loi Pacte introduced a new DASP regime capturing the following digital asset related services⁴:

- the custody on behalf of third parties of digital assets or access to digital assets (as the case may be, in the form of private cryptographic keys) in view of holding, storing or transferring digital assets;
- the buying or selling of digital assets against currency having legal tender (i.e. fiat);
- the provision of digital asset/digital asset exchange services; and
- the operation of a digital asset trading platform.

The DASP regime also extends to the following six other services in relation to digital assets, which are inspired from investment services as defined under MiFID II:

- reception and transmission of orders on digital assets on behalf of third parties;
- digital asset portfolio management on behalf of third parties;
- advice to subscribers of digital assets;
- underwriting of digital assets;
- placing of digital assets on a firm commitment basis; and
- placing of digital assets without a firm commitment basis.

A forthcoming decree is expected to further define and specify the list of relevant services on digital assets.

The applicable regulatory regime will depend upon the services provided by the DASP. For the first two digital asset related services above (i.e. custody of (access to) digital assets on behalf of third parties and buying or selling digital assets against currency having legal tender (i.e. fiat)), a mandatory registration would apply (please see below for more details). The other services would only be subject to an optional licensing regime (also described below). When entering this optional regime, DASPs will be placed under the supervision of the AMF and will be bound to comply with a range of requirements as required under their licence.

The bill does not specify whether other regulated professionals such as investment firms or portfolio management companies will be authorised to perform such services in addition to the services they are already licensed to provide. Providing both services on digital assets and investment services is likely to be permitted subject to certain limitations and exceptions to maintain the consistency of the French legal framework regarding investment services.

⁴ It being noted that such services apply only when provided in relation to digital assets that do not qualify as MiFID II financial instruments.

Regulatory regime

DASPs are subject to either a mandatory registration or an optional licence depending on the type of digital asset services that are provided.

Mandatory registration

A mandatory registration will be required where the DASP intends to offer the custody of (access to) digital assets on behalf of third parties service or the service of buying or selling digital assets against currency having legal tender (i.e. fiat) referred to above.

The registration (which does not amount to the service provider being licensed but is more akin to a declaration) is required prior to any provision of the aforementioned services on digital assets. In other terms, the activity of custodian wallet provider⁵ and buyer or seller of digital assets against fiat is prohibited to any entity which has not been registered beforehand with the AMF. The registration with the AMF will allow the regulator to enforce AML/CFT rules on such service providers.

The entities currently offering such services are granted a 12-month period after the publication of the implementing texts of the law to register with the AMF.

The AMF will publish the list of registered DASPs.

Optional licence

DASPs established in France may also benefit from an optional licensing regime, which would cover all other digital asset services. Since this licence is optional, unregulated entities will still be able to keep providing such other services on the French territory without having to apply for the DASP licence. However, as with respect to the optional visa for ICOs, entities which do not hold the optional licence will not be able to undertake general solicitation or carry out any other marketing step in France in relation to the digital asset services they offer.

To obtain this optional licence from the AMF, applicants must subscribe to a professional liability insurance (or comply with capital requirements to be set forth in the AMF's General Regulation), implement resilient IT systems, establish adequate security procedures and policies to manage conflicts of interests and internal audits. Certain requirements need to be met on an ongoing basis, such as the obligation to communicate clear, accurate and not misleading information to DASP's clients, inform clients of the risks associated with digital assets, maintain a complaints handling scheme, disclose their fees policy, etc.

The loi Pacte also sets out specific requirements applicable to each of the services listed above, which is to be further specified in a forthcoming decree.

⁵ Please though note that the AMF is of the view that providers of purely technical private key storage solutions would fall outside the scope of such a requirement.

Other key provisions

New rules for banks

Incidentally, the loi Pacte amends the existing article L. 312-23 of the Financial Code to impose new obligations on credit institutions which are required to implement proportionate and non-discriminatory measures to grant efficient and unobstructed access to deposit and payment services to tokens issuers having obtained a visa and duly licensed DASPs.

A forthcoming decree will specify the conditions governing the application of such measures, and specifically the remedies available where credit institutions have declined access to deposit and payment services to a token issuer or a DASP.

Crypto-funds

The loi Pacte provides that two types of alternative investment funds (AIF) may invest in digital assets:

- professional specialised investment funds (*fonds professionnels spécialisés (FPS)*), provided that they comply with the liquidity and valuation rules applicable to them; and
- professional private equity investment funds (*fonds professionnels de capital investissement (FPCI)*), subject to a limit of 20% of their assets.

Marketing of those funds are restricted to professional investors and high net worth individuals.

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