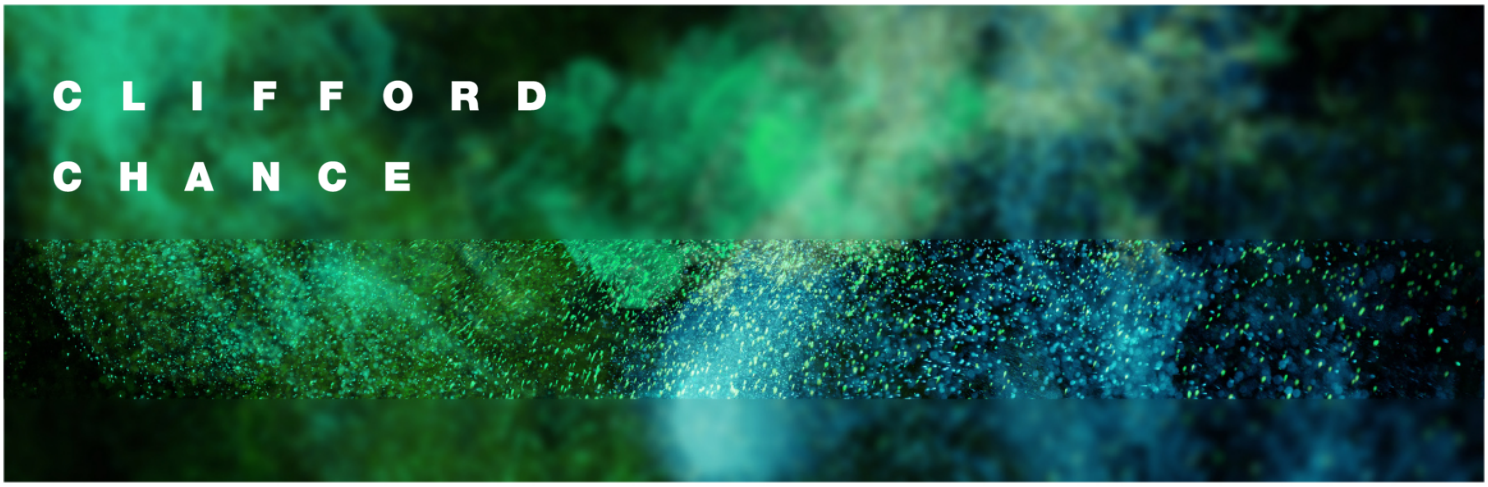

FINTECH: THE EVOLVING FRENCH REGULATORY LANDSCAPE

As part of the EU Digital Finance Package, the European Commission published a proposal for the Markets in Cryptoassets (MiCA) on 24 September 2020. The European Parliament adopted an amended version of the proposal on 14 March 2022. MiCA aims at establishing a dedicated and harmonised regulatory framework for the offering of cryptoassets and related provision of services upon them. The existing digital assets regulatory framework in force in France will be replaced by MiCA.

Key issues

- French digital assets framework
- MiCA Proposal
- CBDCs
- NFTs
- Metaverse
- EU pilot regime
- DeFI

The existing French regulatory framework: quick reminder and update

The French "loi Pacte", enacted in May 2019, introduced a comprehensive new regulatory framework for digital assets in France, reflecting the strong support from the French regulators and government for innovation through the creation of dedicated legal regimes for initial coin offerings (ICOs) and certain services in relation to digital assets (digital asset service providers – "**PSAN**").

The "loi Pacte" (see below) introduced the concept of digital assets, defined as follows:

- tokens, which are defined as an intangible asset representing, under a digital form, one or more rights that can be issued, written, stored or transferred through a shared digital registration mechanism enabling the identification, directly or indirectly, of the owner of said tokens[1]; or
- cryptocurrencies, which are defined as any digital representation of a value which is not issued or guaranteed by a central bank or a public authority, but which is not necessarily related to a money of legal tender and which does not have the legal status of money, but which is, however, accepted by natural or legal persons as a means of exchange and which can be digitally transferred, stored or exchanged.[2]

[1] Article 54-10-1, 1° of the French *Code monétaire et financier*.
[2] Article 54-10-1, 2° of the French *Code monétaire et financier*.

Under such new framework, a PSAN shall register with the AMF where it intends to provide one of the following digital asset services in France:

- 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;
- buying or selling of digital assets against currency having legal tender (i.e. fiat);
- exchanging digital assets against digital assets; and
- the operation of a digital asset trading platform.[3]

The question of when a digital asset service is provided in France has been subject to clarifications from the AMF (as to which, please see below).

It is also worth noting that the service providers who seek to register are required to put in place and implement anti-money laundering and counter-terrorist financing ("**AML-CTF**") procedures only with respect to the custody and the buying or selling against fiat services mentioned above.

Please see our previous briefing published in 2019 to learn more about the French regulatory framework created by the "loi Pacte" (here).[4]

Since the publication of our previous briefing, additional regulatory measures have been adopted to implement the provisions of the "loi Pacte", in particular decree n°2019-1213 of 21 November 2019 in relation to PSANs, decree n°2021-387 of 2 April 2021 on the fight against the anonymity of virtual assets and strengthening the national system for combating money laundering and terrorist financing, and Title II of Book VII of AMF General Regulation (Digital Asset Services Providers).

Guidance regarding the location of digital asset services

The AMF[5] clarified that a digital asset service is considered as being provided in France, thus triggering, as applicable, PSAN registration requirements:

- when it is provided by a digital asset service provider having facilities in France; or
- when it is provided at the initiative of the digital asset service provider to customers residing or established in France.

It further specified that the digital asset service provider shall be deemed as providing a service in France when at least one of the following criteria is met:

- the service provider has commercial premises or a place dedicated to the marketing of digital asset services in France;
- the service provider has installed one or more automatic machines offering digital asset services in France;
- the service provider addresses a promotional communication, regardless of the medium, to customers residing or established in France;

Focus on crypto funds in France

The "loi Pacte" introduced new provisions relating to French crypto funds. Two types of alternative investment funds (AIF) may invest in digital assets in France:

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

Marketing of these funds is restricted to professional investors and high net worth individuals.

However, in practice, it seems that the French market suffers from a lack of depositaries willing to take on the role of a digital assets custodian.

[3] Article L. 54-10-2 of the French *Code monétaire et financier*.
[4] Note that such briefing does not include further amendments to the "loi Pacte" or further implementing regulatory measures.
[5] Article 721-1-1 of the AMF General Regulation.

- the service provider organises the distribution of its products and services through one or several distribution system(s) to customers residing or established in France;
- the service provider has a postal address or a telephone number in France; or
- the service provider has a ".fr" extension to the name domain for its website.

The AMF has also published a Q&A on the PSAN regime (AMF Position DOC-2020-07 – available in English here). Among other things, the Q&A clarifies certain key terms such as the concept of "service provider established" in France for the purpose of the optional licence, which should be understood as a legal entity having legal personality (a subsidiary) or a branch in France.

Digital asset services and other regulated services

One of the key issues that Fintechs face in France relates to the delineation between digital asset services and other regulated services that are subject to standalone sectoral regulations (in other words investment, banking, payment and e-money services). The borders might appear blurred in some cases which require a legal and regulatory characterisation work exercise. On this front, it is worth noting that MiCA (as we discuss in further detail below) requires from cryptoasset issuers to justify why the cryptoasset is not to be considered a financial instrument, e-money, a deposit or a structured deposit.

From a French law perspective, the ACPR published a position on Bitcoin transactions in France as early as 2014[6] in which it indicated that, in the context of a transaction to buy/sell Bitcoins for fiat currency that is legal tender, the intermediation activity of receiving funds from the Bitcoin buyer and transferring them to the Bitcoin seller may characterise the provision of payment services. The ACPR therefore concluded in its position that entities willing to carry out this activity on a regular basis in France must be authorised as a payment service provider (i.e. credit institution, e-money institution, payment institution) or enter into partnership with a PSP as its payment agent.

Regarding investment services, the AMF also concluded in its "*Analysis of the legal qualification of cryptocurrency derivatives*"[7] published in March 2018 that a cash-settled derivative whose underlying is a cryptocurrency can be considered as a financial contract and that, consequently, the regulations

[6] ACPR, *Position on Bitcoin transactions in France* (2014-P-01), 29 January 2014 (please click here to access the position (in French only)).
[7] AMF, *Analysis of the legal qualification of cryptocurrency derivatives*, March 2018 (please click here to access the analysis, in English).

applicable to the marketing of financial instruments in France apply to cryptocurrency derivatives.

Both positions still stand today.

White lists published by the AMF

The AMF publishes "white lists" of approved ICOs (please click here to see the list) and registered PSANs (please click here to see the list). However, as of today, no digital asset service provider has been licensed by the AMF under the optional regime.

The European future: an overview of MiCA

MiCA is the European Commission's attempt to create a Europe-wide taxonomy of cryptoassets and establish a regulatory framework for the issuance and provision of services related to cryptoassets that are not currently regulated as financial instruments.

As part of the EU Digital Finance Package, MiCA has been published along with a proposal for a regulation on a pilot regime for market infrastructures based on distributed ledger technology (DLT – please see the paragraph below in relation to the EU pilot regime) and a proposal for an EU regulatory framework on digital operational resilience (DORA).

The MiCA proposal published by the Commission has been voted by the EU Parliament's Economic and Monetary Affairs ("**ECON**") Committee of the European Parliament on 14 March 2022. The ban on cryptoassets relying on the Proof of Work (PoW) validation method was narrowly avoided during the vote by the Committee following an amendment tabled by the Green Group to ban cryptos based on such validation method which is very energy intensive. The issue was crucial as otherwise the future of Bitcoin and the most widely used cryptoassets would have been conducted outside of the European Union.

The ECON Committee has published a report containing its negotiating position on the EU Commission's proposal. The report, dated 17 March 2022, sets out various amendments to the proposal. The developments below are based on the Proposal as amended by the Parliament (which can be accessed here). This briefing will be updated as the legislative process currently pending comes to an end.

In view of the trilogue negotiations which are due to commence shortly, the EU Council has helpfully published a note settling out the text of MiCA in a three-column table form, comparing the negotiating positions taken by the European Commission, the Council and the European Parliament (please click here to access the table).

It is expected that MiCA should enter into force by the end of 2022. As it is an EU regulation, it will directly be effective in EU Member States without further formalities (in particular, without the need for any local "transposition" contrary to EU directives).

Insight: Proof of Work vs Proof of Stake

Proof of Work (PoW) is defined by the European Parliament in its amendments to MiCA's initial proposal as "a consensus mechanism that requires all miners that are participants to the DLT to solve complex mathematical puzzles to validate a new transaction, adding a block to the chain and permanently and irreversibly recording a new transaction". The Proof of Work method is very energy intensive as it requires computers with massive computing power and therefore uses a lot of electricity.

This validation technique is opposed to **Proof of Stake** (PoS) which requires users to stake their own cryptocurrencies to win the right to validate blocks. Validators are chosen at random to create blocks and are responsible for checking and confirming blocks they do not create. Unlike Proof of Work, validators do not need to use significant amounts of computational power as they are selected at random and they are not competing. Validators are rewarded both for proposing new blocks and attesting to ones they have seen. If they attest to malicious blocks, they lose their stake.

Major amendments of the Parliament to the initial proposal of the European Commission

- The Parliament has included an article requiring the EU Commission to develop, by 1 January 2025, a legislative proposal to include any

cryptoasset mining activities that contribute substantially to climate change under the EU taxonomy; and

- the European Parliament has granted ESMA with the supervisory responsibility over the issuance of asset-referenced tokens and EBA the responsibility over e-money tokens.

Please note that the developments below are based on the MiCA proposal as amended by the European Parliament.

Scope of MiCA

MiCA applies both to (i) persons that are engaged in the issuance or offering of cryptoassets for the purpose of trading and (ii) to persons that provide services related to the trading of cryptoassets in the European Union.

MiCA defines the "cryptoasset" concept very broadly as "a digital representation of a value or a right that uses cryptography for security and is in the form of a coin or a token or any other digital medium which may be transferred and stored electronically, using distributed ledger technology or similar technology".

However, MiCA excludes cryptoassets that are already regulated as financial instruments, e-money (except where they qualify as e-money tokens under MiCA), deposits, structured deposits and securitisations.

MiCA sets out three different types of cryptoasset and three consequential regimes depending on the type of cryptoasset:

- asset-referenced tokens;
- e-money tokens; and
- cryptoassets other than asset-referenced tokens and e-money tokens (referred to below as ""regular" cryptoassets"),

which are briefly compared in the table below.

	"Regular" cryptoassets	Asset-referenced tokens	E-money tokens
Definition	Cryptoassets other than e-money tokens and asset-referenced tokens.	A type of cryptoasset that is not an e-money token and that purports to maintain a stable value by referring to any other value or right or a combination thereof, including one or more official currencies.	A type of cryptoasset the main purpose of which is to be used as a means of payment, and which purports to maintain a stable value by maintaining a portfolio which ensures that the token maintains the value of a fiat currency that is legal tender; e-money tokens which maintain the value of a fiat currency of the Union shall be deemed to be e-money as defined in Article 2(2) of Directive 2009/110/EC.
Status and location of the issuer	Legal entity established in the EU, natural person having its residence in the EU, entity established or having a seat in the EU and subject to the rights and obligations of the EU, or a decentralised autonomous organisation.[8]	Legal entity established in the EU.	Legal entity established in the EU.
Licence	Issuer must have received authorisation from the competent authority.[9]	Issuer must be authorised either as asset-referenced token issuer under MiCA or as credit institution. Where authorised as credit institution, issuer shall notify its supervisory authority of the intention to issue an asset-referenced token no later than three months prior to the intended date of initial issuance.[10]	Issuer must be authorised as a credit institution or an e-money institution, or must be on the list of national entities that are exempted under CRD (including, notably, the *Caisse des dépôts* in France; KfW in Germany; CDP in Italy; BGK in Poland; ICO in Spain[11]).[12] In addition, the ECB shall decide whether to authorise e-money tokens and shall adopt a decision within three months.[13]
Initial requirements upon the issuer	Three requirements[14] • have AML-CTF measures in place;	No additional initial requirements.	Requirements applicable to e-money institutions

[8] Such statutes have been added by the European Parliament, as the Commission proposal was only referring to a legal entity.
[9] The requirement of authorisation has been added by the European Parliament.
[10] This prior notification regime has been added by the European Parliament.
[11] Article 5(2) of the CRD.
[12] The latest status has been added by the European Parliament.
[13] Such requirement of authorisation by the ECB has also been added by the European Parliament.
[14] These requirements have been added by the European Parliament.

	"Regular" cryptoassets	Asset-referenced tokens	E-money tokens
	• no parent undertaking or subsidiary in a third-country that is listed as a high-risk third country or as a non-cooperative jurisdiction for tax purposes; • no 0% corporate tax rate, or no taxes on company profits.		generally (titles II and III of the e-money directive).
White paper	Publication of a white paper meeting all relevant disclosure requirements notified to the relevant competent authority (no approval). Possibility for the issuer to ask competent authorities for prior approval of the white paper, in which case that prior approval will be valid throughout the Union.[15]	Publication of a white paper meeting all relevant disclosure requirements and approved by the relevant competent authority. When an applicant issuer is authorised under MiCA, its white paper is deemed to be approved.	Publication of a white paper meeting all relevant disclosure requirements notified to the relevant competent authority (no approval).
Exemptions to licensing and the white paper requirements	Seven exemptions among which, in particular: • where the cryptoassets are offered for free; • where the cryptoassets are automatically created through mining as a reward for the maintenance of the DLT or the validation of transactions; • where, over a period of 12 months, the total consideration of an offer to the public of cryptoassets in the Union does not exceed EUR 1,000,000, or the equivalent amount in another currency or in cryptoassets; • where the offer to the public of the cryptoassets is solely addressed to qualified investors and the cryptoassets can only be held by such qualified investors; • where the cryptoassets have a specified	Only two exemptions: • where the average outstanding amount of asset-referenced tokens does not exceed EUR 5,000,000 over a period of 12 months; and • where the offer to the public is solely addressed to qualified investors and the asset-referenced tokens can only be held by such qualified investors.	Only two exemptions: • where e-money tokens are marketed, distributed and held by qualified investors and can only be held by qualified investors; and • if the average outstanding amount of e-money tokens does not exceed EUR 5,000,000 over a period of 12 months.

[15] Such possibility has been added by the European Parliament.

	"Regular" cryptoassets	Asset-referenced tokens	E-money tokens
	purpose of use and can only be used for purchases of a specific store or network of stores, cannot be transferred between holders, and do not have a wider general purpose of use.[16]		
Ongoing obligations	Limited ongoing obligations, including in relation to conduct of business, conflicts of interest and the obligation to maintain all of their systems and security access protocols to appropriate Union standards, acting in the best interests of the holders.	Extensive ongoing obligations (including around conduct of business, complaint handling procedure, conflicts of interest, governance arrangements, own funds requirements, obligation relating to reserve assets, and orderly wind-down).	Ongoing obligations, being those of e-money institutions.
Reporting obligations to ESMA (added by the European Parliament)	N/A	Yes[17]	N/A
Regulatory capital	N/A	The highest of EUR 350,000, 2% of the average amount of the reserve assets, or a quarter of the fixed overheads of the preceding year, to be reviewed annually.[18]	Same as for e-money institutions.
Reserve assets	N/A	Reserve assets must be segregated and held in an account opened in the books of, as applicable, a credit institution (for fiat currencies and financial instruments), of a cryptoasset service provider (for cryptoassets) or of an investment firm providing the ancillary service of safekeeping and administration of financial instruments.[19] Reserve assets can be invested but only in highly liquid financial instruments with minimal market, concentration and credit risk.	N/A

[16] This exemption has been added by the European Parliament.
[17] The reporting obligations to ESMA have been added by the European Parliament.
[18] The quarter of the fixed overheads of the preceding year has been added by the European Parliament.
[19] The possibility for the reserve assets to be held in an account opened in the books of an investment firm has been added by the European Parliament.

	"Regular" cryptoassets	Asset-referenced tokens	E-money tokens
Claims on issuer / redemption right	N/A	Each unit of asset-referenced token shall be pledged at par value with an official currency unit of a Member State. Holders must have redemption rights at all times on the reserve assets. Upon request by the holder, the issuer shall redeem, at any moment and at market value, the monetary value of the asset-referenced tokens.[20]	Holders of e-money tokens are entitled to a claim for redemption at any moment, and at par value, of the monetary value of the e-money token held.
Payment of interest on tokens	N/A	Prohibited	Prohibited
Change in control	N/A	Yes: specific regime is set out by MiCA.	Yes: application of the e-money directive regime.
Significant issuances	N/A	Additional obligations are applicable to issuers of asset-referenced tokens that are classified as significant by the EBA.[21]	Additional obligations are applicable to issuers of e-money tokens that are classified as significant by the EBA.[22]

[20] The initial proposal from the Commission did not require the issuers to grant to the holders of asset-referenced tokens any direct claim or redemption rights on the issuer or on the reserve assets.
[21] The European Parliament has notably added a specific regime that is applicable to significant asset-referenced tokens that are being widely used for payments in the EU (quasi e-money tokens).
[22] The European Parliament has added the requirement that the classification by the EBA is subject to prior consultation of the ECB (and the relevant central banks of Member States whose currency is not the euro).

Regulating cryptoasset service providers

- MiCA also sets out a new regime that will be applicable to anyone seeking to provide cryptoasset services in the EU.
- The candidate must be a legal entity having a registered office in the EU. It must apply for authorisation with ESMA and shall be authorised by the relevant competent authority.
- An authorisation as a cryptoasset service provider shall be valid for the entire Union and shall allow cryptoassets service providers to provide services throughout the Union through the passporting regime.
- ***The European Parliament has added an article into MiCA initial proposal regarding the provision of cryptoasset services at the own exclusive initiative of the client (article 56a***) (i.e. reverse solicitation).
- MiCA does not provide for a separate third country regime. This means that persons located in a non-EU jurisdiction and wishing to actively promote and/or advertise their services to clients in the EU will have to obtain full authorisation. Otherwise they could rely on reverse solicitation as indicated above.
- A register of all cryptoasset service providers will be held by ESMA.
- Cryptoasset service providers are subject to general requirements that include conduct of business rules, prudential requirements, organisational requirements, rules relating to safekeeping of clients' cryptoassets and funds, complaint-handling requirements, as well as the management of conflicts of interest and outsourcing.
- ***Following amendments made by the European Parliament, cryptoasset service providers shall also have systems in place to prevent and detect money laundering and terrorism financing. They shall also implement know-your-customer policies. ESMA shall set up a public register of non-compliant cryptoasset service providers and update it on a regular basis.***
- MiCA sets out requirements that are specific to each cryptoasset service.
- Rules are also provided in relation to the acquisition or disposal of a qualifying holding in an entity that is a cryptoasset service provider.

Market abuse regime

As a new type of asset class, cryptoassets that do not qualify as financial instruments under MiFID II fall outside the scope of the market abuse regulation (MAR). However, MiCA sets out new market abuse rules for cryptoasset markets to guarantee market integrity. These rules apply to cryptoassets that are admitted to trading on a trading platform for cryptoassets operated by an authorised cryptoasset service provider. They notably include requirements relating to the disclosure of inside information, the prohibition of insider dealing, the prohibition of unlawful disclosure of inside information and the prohibition of market manipulation.

MiCA future regime vs French existing regime

MiCA will replace existing national frameworks applicable to cryptoassets. In the meantime, however, it is interesting to put into perspective the differences between the two regimes. These are set out in the Annex (MiCA future regime vs French existing regime).

MiCA includes a grandfathering clause for cryptoassets issued before its entry into force, with the exception of asset-referenced tokens and e-money tokens. There will also be a transitional period allowing cryptoasset service providers to continue providing their services for 18 months or until they obtain the new MiCA licence. This is relevant for French PSANs who could benefit from this transitional period and a simplified procedure to transition from the current French regime to the new rules under MiCA.

Exclusions from MiCA: CBDCs and NFTs

CBDCs

MiCA does not apply to central bank digital currencies (CBDCs) issued by the ECB and national central banks of the Member States when acting in their capacity as monetary authority. Recital 7 of MiCA specifies that cryptoassets issued by central banks acting in their monetary authority capacity should not be subject to MiCA, and nor should services related to cryptoassets that are provided by such central banks.

The Banque de France recently successfully completed the last experiment of its programme for interbank settlements in CBDC, launched in March 2020. The Banque de France will now proceed with its CBDC experimentation programme, which second tranche will be mainly dedicated to cross-border transactions (click here to read more). Considering the fact that the European monetary system is based on the complementarity of private money with public money, the ECB has launched an investigation into the possible issuance of a digital euro alongside cash, to ensure that public money can maintain its fundamental role in the digital age (click here to read more).

NFTs

A non-fungible token ("**NFT**") is a unique cryptoasset that represents rights to an underlying "tokenised", often digital asset, which is created and transferred using DLT. This contrasts with many existing cryptoassets, including cryptocurrencies like Bitcoin, which are fungible or interchangeable.

The scope of the purchaser's usage rights with respect to an NFT is determined by the conditions or licence terms attached to the applicable NFT.

In light of the very broad definition of a "cryptoasset" that is set out by MiCA (please see above), it could be considered that NFTs are in the scope of application of MiCA, even though NFTs have emerged after the drafting of such definition.

However, MiCA explicitly states that the obligation of drafting, notifying to the competent authority and publishing the cryptoasset white paper shall not apply where the cryptoassets are unique and not fungible with other cryptoassets.[23] Such exemption would probably apply to NFTs. It is worth noting that this is the sole reference to cryptoassets that are unique and not fungible in MiCA.

[23] Article 4(2)(c) of MiCA.

Some clarification could be brought by clearly excluding NFTs from MiCA's scope of application, not only with respect to the obligations in relation to the cryptoasset white paper, but also from the entire scope of application of MiCA.

EU pilot regime

On 24 September 2020, as part of the Digital Finance package, the European Commission published a proposal for a pilot regime (the "**Pilot Regime**") for market infrastructures based on DLT. The Pilot Regime regulation[24] has been published on 2 June 2022 and shall generally apply from 23 March 2023.[25] The Pilot Regime aims to help the development of the European infrastructure for the trading, clearing and settlement of tokenised securities using DLT by providing a regulatory sandbox in which it will be possible to disapply European legislation such as MiFID II and the CSDR. The European Commission hopes that the Pilot Regime experiments will allow a market consensus to emerge as to what a permanent EU regulatory regime for the use of DLT in capital markets should look like, and help market infrastructures (*i.e.* the central securities depositories and multilateral trading facilities) develop DLT platforms that can handle both trade and post-trade activities.

For Paris Europlace, the Pilot Regime is a part of a general move towards the emergence of fully digital end-to-end solutions which will gain market acceptance without any technological or legal "big bang" that could threaten financial stability and cause systemic risk.[26] The Legal High Committee for Financial Markets of Paris (HCJP) has also been supportive of the Pilot Regime, proposing various changes to French law in order to ensure that there is no conflict between French law and the Pilot Regime which might prevent French actors from participating or French law being used as the governing law of experiments.[27]

Legal challenges raised by the Metaverse

There is no universally accepted definition for the term "Metaverse" and, for many, it is simply a generic term used to refer to a future of the internet (the so-called "Web 3.0") which is emerging. Generally, such term designates the use of virtual reality (VR), augmented reality (AR), and avatars, connected by a network. Companies can distribute digital goods in the Metaverse, either by selling identical goods to many users, or by selling rights of ownership on unique goods. Sales of virtual goods are being made using cryptocurrencies and other digital assets.

While the real scope of the Metaverse and its implication in the lives of users have still to be determined, new situations and new challenges will appear tomorrow, as already experienced by Nike, Hermès and Meta.

Nike recently issued a claim against online reseller StockX LLC for launching NFTs that used its trademark and portrayed the similarities with official Nike products.[28] Nike alleges that the NFT collection constitutes trademark

[24] Regulation (EU) 2022/858 of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology (available by clicking here).
[25] Except for specific provisions listed by article 19 of the Pilot Regime regulation.
[26] Paris Europlace, *Digital finance for the European economy*, 25 March 2022 (available by clicking here).
[27] HCJP, *Les titres financiers digitaux "Security Tokens"*, 27 November 2020 (please click here to access the report in French only).
[28] You can read more about it by clicking here (article from Fortune).

infringement and trademark dilution. In May 2022, Nike filed an amended complaint to include counterfeiting on the ground that it had recently bought counterfeit shoes through StockX despite the platform's claims that its NFTs are part of a process to guarantee its shoes' authenticity.[29] Similarly, Hermès is suing the NFT creator Mason Rothschild, who designed the MetaBirkins NFTs for trademark infringement.[30] Meta has faced complaints from users who claimed to be sexually harassed on Horizon World (Meta's Metaverse). To react to such behaviour, Meta has rolled out "Personal Boundary", a function that prevents avatars from invading other avatar's personal space.[31]

This raises new legal issues. For instance, can the avatar, which is the virtual incarnation of each user in the Metaverse, be seen as an extension of the legal personality of the user who created it, or will it be recognised as having its own virtual responsibility? Should positive law be applied to the Metaverse, or should the legislator be proactive and enact laws regulating the Metaverse? Such questions, and others, such as the regulation of financial services offered by regulated entities in the Metaverse are still to be explored.

Some law firms have already entered the Metaverse. For instance, a French law firm is acting on the Lemverse platform, while other American law firms have chosen Decentraland. A Canadian law firm has even bought premises in the Upland Metaverse. Such firms propose to their clients to access their virtual premises: could this be the future of legal services?

We can also note that HSBC is launching a new fund, called the Metaverse Discretionary Strategy Portfolio, aimed at high net worth private banking clients in Asia.[32] The portfolio will invest in virtual-world/metaverse products.

And what about DeFi?

The OECD recently published a report entitled "Why Decentralised Finance (DeFi) Matters and the Policy Implications".[33]

Decentralised Finance (or DeFi) seeks to provide traditional financial services involving cryptoassets (i.e. mimicking the centralised finance market (CeFi) in an open, decentralised, permissionless way). DeFi applications allow for the provisions of financial products and services built as decentralised applications on the blockchain, such applications being mostly based on the Ethereum protocol.

Collateralised lending is currently the fastest growing DeFi product. DeFi lending activities try to mirror market-based lending (securities lending, repos) rather than traditional consumer/retail bank lending.

On the one hand, DeFi applications would allow some benefits to financial market participants: increase in speed of execution, decrease of transaction costs, more equitable participation of users in markets, promote innovation in financial services as well as financial inclusion.

On the other hand, DeFi gives rise to important risks and challenges, notably in relation to the lack of regulatory safeguards, and in particular AML-CTF,

[29] You can read more about it by clicking here (article from Reuters).
[30] You can read more about it by clicking here (article from Bloomberg Law).
[31] You can read more about it by clicking here (article from BBC news).
[32] You can read more about it by clicking here (article from Fortune).
[33] OECD, *Why Decentralised Finance (DeFI) Matters and the Policy Implications*, 19 January 2022 (available by clicking here).

market integrity and prudential and investor protection rules. Further, the possibility to engage in almost unlimited leveraged trading of cryptoassets is another important risk induced by DeFi.

According to the OECD Report published in January 2022, such challenges can be overcome at the cross-border level and avoid regulatory arbitrage by greater international policy collaboration and discussion.

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Annex

MiCA future regime vs French existing regime

Please note that the comparison table below is based on the MiCA proposal as amended by the European Parliament.

	French Regime	MiCA Regime	Comments
Definitions			
Definition	Defines digital assets by distinguishing (utility) tokens from cryptocurrencies.	Defines cryptoassets and provides three separate definitions: asset-referenced tokens, e-money tokens and a catch-all category of other cryptoassets (referred to below as ""regular" cryptoassets").	The MiCA definition of cryptoasset is very broad and includes several types of assets. The French definition of digital asset is more explicit.
Exclusions	Financial instruments under MiFID II are excluded.	The following are excluded from MICA's scope: • financial instruments under MiFID II; • e-money (except where qualifying as e-money tokens under MiCA); • deposits; • structure deposits; and • securitisations.	MiCA makes the effort to exclude instruments that are already regulated by other EU sectoral legislations so as to have a clear articulation between the EU texts. The French regime explicitly excludes financial instruments only.
Regime			
1. Offer of cryptoassets to the public			
General principles	Optional visa from the AMF. Issuers of tokens are granted the option 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 offering. ICOs which do not hold the optional visa are not invalid, but they will not be capable of being marketed or being the subject of financial promotion in France.	**"Regular" cryptoassets:** the issuer must be authorised and must publish a white paper (priorly notified to the competent authority – possibility to apply for a prior approval (i.e. not a mere notification)). **Asset-referenced tokens**: the issuer must be authorised (as asset-referenced token issuer under MiCA or as credit institution) and must publish a white paper that is approved by the home state authority. **E-money tokens**: the issuer must be authorised as credit institution or e-money institution, or must be on the list of national entities that are exempted under CRD	MiCA's requirements apply to both the offering of cryptoassets to the public and their listing on a cryptoasset trading platform. The French regime only considers the offering of digital assets. The French regime is optional and does not distinguish between the various categories of digital assets, whereas MiCA provides for different regimes depending on the cryptoasset class involved.

	French Regime	MiCA Regime	Comments
		(such as the *Caisse des dépôts* in France). In addition, the ECB shall decide whether to authorise e-money tokens and shall adopt a decision within three months. The issuer must publish a white paper (priorly notified to the competent authority).	
Ongoing obligations	No specific ongoing obligations, but the issuer must comply on a continuous basis with the requirements which were conditions of the visa.	**For issuers of "regular" cryptoassets**: limited ongoing obligations (please see above). **For issuers of asset-referenced tokens**: extensive ongoing obligations (please see above). **For issuers of e-money tokens**: issuers must comply with all requirements applicable to e-money institutions (please see above).	The French regime does not impose any specific ongoing obligations on the issuer once the visa is obtained. MiCA provides for separate ongoing obligations which must be complied with by the issuer depending on the cryptoasset class involved.
2. Providers of services on cryptoassets			
Services covered	• 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 fiat currencies; • the provision of digital asset/digital asset exchange services; • the operation of a digital asset trading platform; • other services involved: reception	• the custody and administration of cryptoassets on behalf of third parties; • the operation of a trading platform for cryptoassets; • the exchange of cryptoassets for fiat currency that is legal tender; • the exchange of cryptoassets for other cryptoassets; • the reception and transmission of orders for cryptoassets on behalf of third parties; • the execution of orders for cryptoassets on	The services on cryptoassets covered by the French regime and the MiCA regime are not exactly the same.

	French Regime	MiCA Regime	Comments
	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; placing of digital assets without a firm commitment basis.	behalf of third parties; • placing of cryptoassets; • providing advice on cryptoassets; • the transfer of cryptoassets; • the exchange of cryptoassets for financial instruments; • providing portfolio management on cryptoassets; • the provision of a portfolio management service.[34]	
Regime			
Authorisation/Registration	**Mandatory registration:** For the first four services listed above: mandatory prior registration with the AMF. **Optional licence**: For the other services: optional licensing regime. 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.	Mandatory authorisation with respect to all services.	MiCA requires cryptoasset service providers to be authorised, without making a distinction based on the service involved. The French regime only requires registration for the provision of some digital asset services only.
Passporting rights	No	Yes: either through the right of establishment (including through a branch) or through the freedom to provide services.	The French regime being specific to France, it is only domestic in scope. MiCA, as for other sectoral EU legislation, provides for an EU-wide passport.

[34] The last four services have been added by the European Parliament.

	French Regime	MiCA Regime	Comments
General requirements applicable to all digital asset services	**Mandatory registration**: requirement upon the persons who effectively manage the service provider; the natural persons who hold more than 25% of the capital or voting rights or who exercise a power of control, compliance with AML-CTF rules when providing four types of services (please refer to above). **Optional licence**: Applicants must subscribe a professional liability insurance, implement resilient IT systems, and establish adequate security procedures and policies to manage conflicts of interest and internal audits.	General requirements relate to conduct of business, prudential safeguards, organisational requirements, safeguarding of both cryptoassets and funds, complaint handling procedure, management of conflicts of interest and outsourcing.[35]	The general requirements set out by MiCA are more stringent than the general requirements set out by the French regime. Pursuant to MiCA, AML-CTF requirements would be applicable to every cryptoasset service provider, whereas the French regime requires compliance with the AML-CTF rules only with respect to services triggering mandatory registration requirements.
Specific requirements applicable to each of the services listed	Yes	Yes	Both regimes set out specific requirements per service provided.
Market abuse regime / acquisition regime	No	MiCA establishes market abuse rules for cryptoasset markets and provides rules governing the acquisitions of capital or voting rights in issuers of asset-referenced tokens and cryptoasset service providers.	MiCA is the only one to provide a market abuse regime, as well as rules governing the acquisition of issuers of asset-referenced tokens and cryptoasset service providers.

[35] The European Parliament has also included requirements in relation to AML/CTF.