

## France Adopts an Innovative Optional Legal Framework for Digital Assets

April 23, 2019

**After becoming one of the first countries to authorize the registration and transfer of unlisted securities using blockchain technology, France has adopted an innovative legal framework governing initial coin offerings (“ICOs”) and digital assets services providers (“DASPs”) with the aim of being at the forefront of the blockchain revolution in Europe.**

After allowing the representation and transmission of unlisted securities through the use of blockchain technology in 2017, the draft “PACTE”<sup>1</sup> bill (the “**PACTE Act**”) was adopted by the French Parliament on April 11, 2019<sup>2</sup>, constituting a new step in France’s economic transformation.

This PACTE Act contains various provisions, some of which have already been analyzed in previous client memoranda<sup>3</sup>. Below we address the legal *ad hoc* framework for digital assets provided by Articles 85 to 88 of the PACTE Act, which we believe will be of interest to any company considering getting involved in the blockchain industry in Europe. These provisions do not concern digital assets that constitute financial instruments<sup>4</sup>, as the issuance of such instruments is already governed by the regulations applicable to public offerings of financial securities, which generally require filing a prospectus and complying with various regulations such as MiFIDII.<sup>5</sup>

The provisions of the PACTE Act described below are expected to be supplemented and clarified by Government’s decrees to be published in due course and through amendments to the General Regulations of the French Financial Markets Authority (the “**AMF**”).

### An Optional Visa Regime for ICOs

Until the PACTE Act, fundraising through the issuance of “tokens” was not regulated, which caused significant legal uncertainty. Therefore, in October 2017, the AMF launched a public consultation on ICOs in order to gather the views of stakeholders on the different means of supervision and on a “digital-asset fundraising support and research program”, named UNICORN, to support and analyze these transactions. In February 2018, the AMF published a summary of the responses received<sup>6</sup>, which showed that the majority of those who participated in the consultation expressed strong support for the establishment of an appropriate legal framework for this new type of fundraising method.

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<sup>1</sup> “PACTE” is an acronym for the French words “Action Plan for Business Growth and Transformation”.

<sup>2</sup> The PACTE Act is currently under review by the French Constitutional Court. Upon validation, it will be enacted by the French President, thus becoming law, and published in the French Official Journal. The PACTE Act will come into force the day after its publication.

<sup>3</sup> Please see the Davis Polk Paris memoranda at <https://www.davispolk.com/offices/paris> including those entitled “*France’s Reform Agenda: First Year Overview*” and “*French Privatizations: practical tips for prospective bidders*”.

<sup>4</sup> Under French law, financial instruments are defined as “equity securities issued by joint stock companies, debt securities, units or shares of undertakings for collective investment”.

<sup>5</sup> Markets in Financial Instruments Directive (recast) – Directive 2014/65/EU of the European Parliament and of the Council.

<sup>6</sup> Please see the Davis Polk Paris memorandum entitled “*Publication of the French Financial Markets Authority (“AMF”) Summary of Answers Following The Public Consultation on Initial Coin Offerings (“ICO”)*”.

Taking into consideration these answers, the PACTE Act sets up an optional regime for public offerings of tokens not covered by existing specific provisions, especially those applicable to financial instruments.

The PACTE Act includes the following definition of tokens: any intangible asset representing, in digital form, one or more rights that may be issued, registered, retained or transferred through a distributed ledger technology that makes it possible to identify, directly or indirectly, the owner of such asset.

Prior to any public offering of tokens, the PACTE Act grants token issuers the right to apply for an optional visa from the AMF, thus ensuring greater protection for both investors and issuers. We note that not all token offerings constitute public token offerings, and that the new optional visa regime only applies to public offerings. For example, the solicitation of only a limited number of people may not qualify as a public offering<sup>7</sup>.

The AMF visa can only be obtained by issuers who provide sufficient guarantees: they must be legal entities established or incorporated in France, having set up the means to monitor and secure the assets collected as part of the offering in compliance with the AML/CFT and KYC rules<sup>8</sup>. Token issuers seeking a visa must also provide their subscribers with an information document containing any relevant information about the offering, the issuer, the rights attached to the tokens, the underlying project and its related risks. The information document may be drafted in English, provided that a French summary is made available. This information must be accurate, clear and not misleading and must enable investors to understand the risks related to the offering.

After the AMF has reviewed the information document, its supporting documentation and the draft promotional communications, it may grant its visa to this information document. In order to ensure complete transparency of this new regime, the AMF will publish a “white list” of approved ICOs. However, in the event that an offering no longer complies with the terms of the information document or if the issuer no longer provides appropriate guarantees, the AMF may revoke its visa and prohibit any communication to the public concerning the offering and mentioning the previously-granted visa.

The token subscribers must be notified of the results of the offering and, as the case may be, of any secondary market established for the issued tokens.

Last, the PACTE Act solves another difficulty that hindered the development of ICOs, by providing that financial institutions must establish objective, non-discriminatory and proportionate rules governing access to bank accounts for token issuers who have obtained the AMF visa. In the event a financial institution denies any such access, it will have to inform the Prudential Supervisory and Resolution Authority (the “**ACPR**”) of the reasons for such denial. This measure is most welcome because, to date, French token issuers have encountered many difficulties opening bank accounts in France. A forthcoming decree will specify the remedies and time limits applicable in any such case.

## **Two Regulatory Frameworks for Digital Assets Services**

Pursuant to the PACTE Act, digital assets include:

- tokens as defined above, except for tokens which qualify as financial instruments; and
- any digitally-registered asset (including cryptocurrencies) that is accepted as a means of exchange and that can be transferred, stored or exchanged electronically.

Digital asset services comprise the following:

1. custody of private cryptographic keys for third parties;

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<sup>7</sup> Based on the presentation of the new ICO regime published by the AMF on April 15, 2019, the solicitation of less than 150 persons should not qualify as a public offering.

<sup>8</sup> Rules on anti-money laundering, combating financing terrorism and know your customers, pursuant to article L. 561-2 of French Monetary and Financial Code.

2. trade of digital assets with fiat currencies;
3. trade of digital assets with other digital assets;
4. operation of a digital assets trading platform; and
5. (i) receipt and transmission of orders on behalf of third parties, (ii) portfolio management on behalf of third parties, (iii) investment advice to digital assets purchasers, (iv) underwriting of digital assets and (v) making guaranteed and non-guaranteed investments in digital assets.

The DASPs of the services 1 and 2 mentioned above must be registered with the AMF, which is subject to the approval of the ACPR, and the exercise of these services is prohibited to any unregistered person. The AMF will assess in particular the reputation and professional qualifications of the directors and beneficial owners of the relevant services providers and will verify that they have adequate AML/CFT procedures in place. The list of registered providers will be published by the AMF.

In addition to this registration requirement, any DASP that performs one of the services listed in points 1 to 5 above can apply for an optional visa from the AMF. To obtain this form of quality label, DASPs will have to subscribe to a professional liability insurance (or comply with the capital requirements set forth in the General Regulations of the AMF), implement adequate security procedures, an internal control system and conflict check policies and establish a resilient IT system.

Moreover, once DASPs are approved by the AMF, they must comply with a set of obligations that depend on the type of services provided. For instance, DASPs providing custody services of cryptographic keys must, *inter alia*, enter into an agreement with their clients which defines their missions and liabilities, ensure that the relevant means are in place to return the digital assets to their clients without undue delay and refrain from using the assets kept on behalf of their clients without their express approval.

The AMF will publish the list of approved DASPs and specify the services for which they are approved.

### **Additional Provision**

Finally, the PACTE Act allows two types of investment funds to invest part of their funds in digital assets: (i) professional specialized investment funds (FPSs), subject to compliance with the liquidity and valuation rules applicable to them, and (ii) professional private equity investment funds (FPCIs) subject to a limit of 20% of their assets. This provision of the PACTE Act is an additional example of France's desire to welcome ICOs widely and encourage their development.

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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