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Country chapters

France

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Government attitude and definition

Over the past two years, France has been at the forefront of the blockchain revolution in the European Union ("**EU**") and the French government is currently working, together with the players in the French crypto ecosystem, to establish a favourable legal framework for initial coin offerings ("**ICOs**").

As early as April 2016, France became the first country to recognise blockchain technology in the field of cash vouchers, also called "*minibons*", a particular type of promissory note primarily used in crowd-lending transactions, by allowing issuers to register *minibons* directly into the blockchain.

In October 2017, the French Financial Market Authority (the "**AMF**") launched a unique "digital-asset fundraising support and research programme" to support and analyse ICOs, named UNICORN (for "Universal Node to ICO's Research & Network"), operating similarly to a "sandbox" programme (see **Promotion and testing**, below).

In December 2017, France adopted a specific law to become the first country to authorise the registration and transfer of unlisted securities through the use of blockchain technology.

In March 2018, Bruno le Maire, the French Minister of the Economy, declared that he wanted Paris to become the capital of ICOs, through the implementation of a very innovative optional legal framework governing ICOs (see **Sales Regulations**).

In terms of personal taxation, in April 2018, a decision by France's highest administrative court (*Conseil d'état*) resulted in the lightening of the tax burden on profits resulting from cryptocurrency transactions by applying a flat tax rate of 19% (see **Taxation**).

In June 2018, the French Strategy and Prospective General Commission ("*France Stratégie*"), under the auspices of the French Prime Minister, published a 150-page report relating to blockchain and cryptocurrencies and proposing several reforms to enable the sound development of this technology in France.

In short, the French government is working to establish a favourable legal framework, and France currently stands out as a "blockchain/crypto friendly" jurisdiction compared to some others, through its "soft touch" approach favouring innovation and entrepreneurial projects.

However, France still needs to clarify a number of practical aspects of the tax treatment of ICOs if it wishes to attract ICO issuers. Moreover, this friendly position does not mean that France considers cryptocurrencies (which are not located in France, backed by the French government or the European Central Bank) as "real money" or otherwise gives them equal standing with domestic or foreign fiat currencies. In March 2018, the French Central Bank (*Banque de France*) published a paper regarding the main issues, risks and

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perspectives raised by Bitcoin and other cryptocurrencies, in which it focuses on the reasons why "cryptocurrencies" cannot be qualified as such. As a result, the French Central Bank considered the term "cryptocurrency" to be unsuitable and that the term "crypto-asset" would be preferable instead. Following such publication, the French regulatory authorities have started using the word "crypto-asset" exclusively, delineating the fundamental difference with "real money" or "fiat currencies".

In particular, the French Central Bank explained that "crypto-assets" do not fulfil the customary roles of fiat currencies for the following reasons: (i) they are too volatile to be used as "units of account" (*unité de compte*); (ii) they are not as efficient as fiat currencies (they are difficult to use, there are high transaction fees and there is no guarantee against fraud); and (iii) they have no intrinsic value and hence cannot be used as reserve in value.

The French Central Bank also emphasised that, pursuant to the French financial and monetary code, the only currency in France is the euro and therefore "crypto-assets" may not be considered as either a means of payment or electronic money under French law. This is logical given that "crypto-assets" are not issued against a cash deposit. As a result, under French law, it is impossible to require someone to accept "crypto-assets" as payment, and "crypto-assets" do not carry a repayment guarantee at any time and at face value in the event of unauthorised payment, in each case in contrast to fiat currencies.

Cryptocurrency regulation

As discussed below (see **Sales Regulation**), as of today, there are no specific regulations governing cryptocurrencies as such, unless they fall within the existing legal framework governing securities offering and trading, according to an analysis to be made on a case-by-case basis depending on the rights and obligations conferred by each cryptocurrency. However, this will change with the adoption of the optional clearance for ICOs subject to AMF approval.

Sales regulation

As of today, there are no specific regulations governing fundraising activity based on cryptocurrencies (such as Bitcoin) and blockchain technology. In view of this, in October 2017, the AMF launched: (i) a public consultation on ICOs to gather the views of stakeholders on the different means of supervision; and (ii) a "digital-asset fundraising support and research programme" to support and analyse these transactions, named UNICORN.

As part of this exercise, the AMF carried out an initial high-level study of these transactions and their legal implications and found that while some of the ICOs identified may fall within existing legal provisions (such as the regulation applicable to intermediaries in miscellaneous assets, the public offering of financial securities, or managers of alternative investment funds), most of these issues would, currently under French law, actually fall outside of the scope of any AMF compliance regulation.

According to the AMF, this analysis must be made on a case-by-case basis depending on the rights and obligations attached to each cryptocurrency. In particular, if such rights and obligations prove to be close to those of a security, i.e. because they carry financial and/or political rights, such as dividend and/or voting rights, respectively, the AMF may qualify such cryptocurrency as a security. In such a case, the sale of such cryptocurrency would have to comply with French securities laws, including notably the obligation to publish a prospectus under certain conditions.

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Given such uncertainties for issuers, the AMF proposed three options for the supervision of future ICOs: (i) promote best practices without changing existing law; (ii) extend the scope of existing law to treat ICOs as public offerings of securities; and (iii) propose an *ad hoc* regime adapted to ICOs.

In February 2018, the AMF published a summary of the responses received following the public consultation on ICOs, pursuant to which a large majority of respondents expressed strong support for the establishment of an appropriate legal framework for this new type of fundraising method.

Accordingly, as a unique and particularly innovative approach, the AMF decided to work with the French government to introduce optional clearance for ICOs that would be open to companies incorporated in France wishing to ensure that their contemplated ICO will not be subject to the French law regime applicable to public offering of financial securities. In such a situation, solely this optional clearance would be required given that, contrary to the United States, there are requirements arising from commodities law with respect to cryptocurrencies in France.

Under this new legal framework, issuers will be free to decide whether to implement a regulated ICO, subject to AMF approval, or to proceed without the French regulator's approval. In order to obtain AMF clearance, issuers will have to comply with certain obligations which have not yet been released by the AMF but which we expect to be the following:

- provision of an information document to inform buyers of cryptocurrencies which should include, at a minimum: (1) information on the ICO and its progress; (2) the rights attached to the cryptocurrencies and the accounting treatment of the funds raised during the ICO; and (3) the identification of the legal entity responsible for the offer, its managers and founders, and their expertise;
- adopting rules making it possible to ensure the escrow of the funds raised, such as a smart contract escrow or another form of contractual escrow for cryptocurrencies or fiat currencies, respectively, that have been contributed to the issuer during the ICO; and
- setting-up of a mechanism to prevent money laundering and terrorist financing, such as customer verification requirements ("**KYC**").

In order to ensure complete transparency and publicity of this optional clearance, the AMF will make public a "white list" of approved ICOs.

The French government plans to introduce this new legal framework in the upcoming bill known as "*loi Pacte*". As a first step towards adoption by the French Parliament, this bill was presented to the French Ministers Council on June 18, 2018, and is expected to be discussed in September 2018 and ultimately passed by the end of 2018. Implementation of this new framework should occur soon after this adoption.

However, the EU may cast a shadow over such an innovative approach: on November 13, 2017, the European Securities and Markets Authority ("**ESMA**") published a warning to firms involved in ICOs on the potential qualification that cryptocurrencies could receive, pursuant to which these firms could be involved in offering "transferable securities" to the public. This qualification of "transferable securities" would trigger the application of the EU securities laws and regulations, such as the Prospectus Directive, the Markets in Financial Instruments Directive, the Alternative Investment Fund Managers Directive and the fourth Anti-Money Laundering Directive. However, to date, ESMA has not published any further information regarding the qualification of cryptocurrencies. If ESMA eventually decides to adopt a different approach, the AMF, as well as other EU regulators (including Malta, for

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instance) would necessarily have to re-examine their attitude towards cryptocurrencies to align with the EU approach.

Taxation

The accounting and tax treatment of ICO proceeds in France is unclear. To improve legal certainty, the French National Accounting Standards Authority (*Autorité des Normes Comptables* or "**ANC**") is currently working closely with the French government and the French tax administration to release specific public guidance before the end of this year.

As of today, the market accounting treatment of ICO proceeds seems to have evolved towards their registration under the category of "deferred revenues" (*produits constatés d'avance*) when looking at "utility tokens". As a result, ICO proceeds would be subject to French corporate tax, the rate of which is currently 33.33% plus surtaxes of 3.3% (to be progressively reduced to 25% plus surtaxes in 2022 as a result of the French government tax reform). Such tax is payable during the financial year immediately following the closing (i.e., between 1 and 12 months following the ICO in most cases, and up to 18–24 months for a newly incorporated ICO issuer).

Under the same interpretation, the sale of cryptocurrencies would qualify as a "sale of goods and/or services" under Directive 2006/112/EC on valued-added tax ("**VAT**"), transposed into each EU domestic law, and therefore the sale of cryptocurrencies to EU purchasers will be subject to VAT, the rate of which is currently 20% in France.

However, this treatment does not appear in our view to be relevant for cryptocurrencies which qualify or could be qualified as "security tokens", which should therefore be subject to the tax regime applicable to the sale of securities, i.e. subject to registration fees only (at a 0.1% rate) and excluded from VAT.

Therefore, we look forward to the ANC public position to obtain a clear view on the accounting and tax treatment of ICOs in France, which we expect before the end of this year.

With respect to personal taxation, despite French tax law remaining silent on the taxation of profits made on the sale of cryptocurrencies by individuals, the French tax authorities published an administrative doctrine back in July 2014, pursuant to which such profits would be subject to French income tax within the category of "industrial and commercial profits", and subject to a progressive tax rate of up to 45%, plus social contributions.

However, several taxpayers concerned with profits made on the sale of bitcoins challenged such doctrine before France's highest administrative court (*Conseil d'Etat*), which, in April 2018, eventually decided to lighten this tax burden by stating that such gains will be subject to French income tax within the category of "movable property" (governing gains made on the sale of cars, bottles of wine, etc.), and subject to a 19% tax rate plus social security contributions at a rate of 17.2%.

However, certain gains will be excluded from this tax treatment and therefore remain subject to income tax within the category of "industrial and commercial profits" or "non-commercial profits" (plus social contributions). These include:

- gains resulting from the taxpayer's participation in the creation and functioning of the Bitcoin system, i.e. gains resulting from "mining" activities; and
- gains resulting from the recurring acquisition and sale of bitcoins, thus materialising the existence of a commercial activity, i.e. gains resulting from professional trading activities.

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Although this decision concerns gains made on the sale of bitcoins, this tax treatment is, in our view, applicable to all gains made on the sale of cryptocurrencies.

Money transmission laws and anti-money laundering requirements

Currently under French law, the only anti-money laundering ("**AML**") requirement imposed with respect to cryptocurrency is that applicable to any services platform offering to convert fiat currencies into cryptocurrencies or vice versa (thereby acting as an intermediary between the purchaser and the seller), which is required to obtain approval as a payment services provider and implement customers due diligence controls, including KYC.

In May 2018, the EU Member States adopted an amendment to Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the "**AML Directive**"), to subject cryptocurrency exchange platforms and custodian wallet providers to the AML and terrorism financing obligations (in particular to KYC obligations), in line with traditional financial intermediaries.

This recent amendment will not substantially impact French law since French cryptocurrency exchange platforms are already subject to AML requirements and KYC obligations. However, the amendment to the AML Directive will extend these obligations throughout the EU, ensure the implementation of adequate safeguards and make it impossible for players to perform regulatory arbitrage on this basis within the EU.

Under French and EU law, the AML requirements primarily cover the following:

- *customer due diligence obligations*: platforms are required to verify the identity and, in certain cases, the "effective beneficiary", i.e. the actual individuals behind a legal entity, whether it is a company, a foundation or a trust, and the origin of the money used through platforms; and
- *reporting and information obligations*: if the due diligence obligations lead to suspicion about an individual or a legal entity, platforms are required to report the situation to an authority specifically in charge of gathering such reports made by cryptocurrency platforms.

In addition, the French Central Bank (*Banque de France*), in its paper published in March 2018, and together with the French Prudential Authority ("**ACPR**"), proposed the introduction of a new status for "crypto-assets services providers" (*prestataires de services en crypto-actifs*), to: (i) extend to the players offering (x) the exchange of crypto-assets for fiat currencies, and (y) the storage on behalf of private clients of cryptographic keys that can be used to hold, store or transfer crypto-assets, the application of AML requirements and KYC obligations; as well as (ii) submit them to new obligations regarding the security of transactions and the protection of their clients. It has yet to be determined whether the French government will follow the lead of the French Central Bank and the ACPR and create this new status.

Finally, while under French law, there is currently no obligation for ICO issuers to comply with any AML requirements or KYC obligations, such compliance will be required in the context of the upcoming optional clearance for ICOs. In addition, and as a matter of fact, the lack of any AML and KYC actions (which would be applied on a voluntary basis by ICO issuers) would result in important technical difficulties in the exchange of cryptocurrencies received against fiat currencies and/or the retention of such fiat currencies in an account held within the books of a French bank, which would be highly reluctant to receive them.

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Promotion and testing

In France, as discussed above, the approach adopted by the AMF is very close to a "sandbox" following the launch, in October 2017, of a public consultation relating to ICOs and the above-mentioned UNICORN programme to support and analyse these transactions (see **Sales regulation**).

As part of this consultation, the AMF organised meetings with several players of the blockchain/crypto ecosystem and received 82 contributions from digital economy players, individuals, finance professionals, market infrastructures, academics and law firms. In February 2018, as part of the UNICORN programme, the AMF announced it had advised about 15 companies during the first two months of the programme, approximately 50% of which related to blockchain-related projects, and that the total amount raised or planned to be raised by these project developers was around €350m.

Overall, the AMF demonstrated an awareness about the importance of these topics and a willingness to get in touch and learn from the ecosystem to shape an *ad hoc,* specifically adapted legal framework.

In addition, at the European level, in April 2018, more than three-quarters of European countries, including France, signed a declaration relating to the establishment of a European Blockchain Partnership, intended to act as a vehicle to foster cooperation among Member States in the exchange of technical and regulatory expertise. This declaration, and the partnership that it creates, follows the launch in February 2018 of the EU Blockchain Observatory and Forum, designed to help cultivate new blockchain opportunities in Europe. The stated goal of the partnership is to ensure that Europe continues to play a leading role in the development and roll-out of blockchain technologies.

France is therefore keen on promoting research and investment in cryptocurrency and blockchain-related projects through specific programmes and actions run by governmental authorities.

Ownership and licensing requirements

Under French law, there are very few investment funds which have invested all or even part of their funds in cryptocurrencies. This is principally explained by the fact that French law in particular, and EU law in general, is not yet well suited to enable investment funds to invest in cryptocurrencies.

Furthermore, French Undertakings for Collective Investment in Transferable Securities ("**UCITS**", otherwise known as *OPCVM* in France), which are open to distribution to retail clients, are constrained by law to invest into a specific restricted list of assets, into which cryptocurrencies do not fall. For this reason, French UCITS cannot invest in cryptocurrencies.

French Alternative Investment Funds ("**AIF**", otherwise known as *FIA* in France), which are open to professional investors only (institutional investors, large firms and investors with sufficient financial experience and competence and also retail clients under certain specific conditions) and therefore are less regulated than UCITS, are less constrained with respect to the assets in which they may invest. However, one of the conditions laid down by the French financial and monetary code is that the title to such asset must be "evidenced by a mechanism that is recognised under French law". In the present case, the fact that the title to cryptocurrency is evidenced by registration into a blockchain is not – yet – recognised under French law and therefore AIF cannot invest in cryptocurrencies. Nevertheless,

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French law has already recognised the possibility to register certain assets into a blockchain, namely for cash vouchers, i.e."*minibons*", and unlisted securities, and may evolve in the future to also recognise cryptocurrency registered into a blockchain.

The only option left for a French investment fund to invest directly in cryptocurrencies is to use a very specific French vehicle known as "other alternative investment funds" ("**Other AIF**", otherwise known as *Autres FIA* in France). This vehicle may be either regulated *ex ante* by the AMF and open to both professional and non-professional investors, or merely declared *ex post* to the AMF, in which case it is open to professional investors only. To our knowledge, this structure has been used by Tobam Asset Management, a French investment manager which, in late 2017, announced the launch of the very first French Bitcoin-focused investment fund, "approved" but not "regulated" by the AMF.

In this respect, for an Other AIF to be regulated by the AMF and therefore be open to distribution to both professional and non-professional investors, the Other AIF manager must obtain a portfolio management company licence from the AMF.

An interesting alternative to direct investment in cryptocurrency available under French law may be the use of a structure of "master" funds/"feeder" funds, pursuant to which a French investment fund would invest in a foreign investment fund which would ultimately be investing in cryptocurrencies. This raises the question of whether foreign investment funds are able to invest directly in cryptocurrencies. To our knowledge, a few countries allow the creation of crypto investment funds, including Switzerland, Luxembourg, Canada and the United States of America. However, we do not have any example of the use of such structure and the main weakness of this scenario is that it may be seen as circumventing the rules outlined above.

Finally, this French legal and regulatory framework restricting direct investment by French investment funds in cryptocurrencies may be about to change with the upcoming optional clearance for ICOs subject to AMF approval. During a parliamentary audition held in April 2018, Robert Ophèle, the Chairman of the AMF, explained that it would be appropriate for cryptocurrencies cleared by the AMF to become eligible as assets of French investment funds. However, (i) this would not benefit cryptocurrencies which have already been issued, such as bitcoins or ethers, and (ii) a recent report dated July 4, 2018, submitted by the deputy governor of the French Central Bank, Jean-Pierre Landau, states that banks and asset managers should be strongly discouraged from investing in cryptocurrencies in order to avoid any risk to financial stability.

Mining

"Mining" Bitcoin and other cryptocurrencies is permitted and unregulated under French law. However, the revenues generated by "mining" activities are submitted to a specific taxation regime (see **Taxation**).

Border restrictions and declaration

There is no specific border restriction or obligation to declare cryptocurrency holdings under French law.

Reporting requirements

Under French law, there is no reporting requirement for cryptocurrency payments made in excess of a certain value.

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Estate planning and testamentary succession

Under French law, there is no special treatment for cryptocurrencies for the purposes of estate planning and testamentary succession, and cryptocurrencies should be treated like any other assets in such situations.

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