THE VIRTUAL CURRENCY REGULATION REVIEW

SECOND EDITION

Editors
Michael S Sackheim and Nathan A Howell

THE LAWREVIEWS

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PREFACE

We are pleased to introduce the second edition of *The Virtual Currency Regulation Review* (the *Review*). The increased acceptance and use of virtual currencies by businesses and the exponential growth of investment opportunities for speculators marked late 2018 and early 2019. As examples, in May 2019, it was reported that several of the largest global banks were developing a digital cash equivalent of central bank-backed currencies that would be operated via blockchain technology, and that Facebook was developing its own virtual currency pegged to the US dollar to be used to make payments by people without bank accounts and for currency conversions.

The *Review* is a country-by-country analysis of developing regulatory initiatives aimed at fostering innovation, while at the same time protecting the public and mitigating systemic risk concerning trading and transacting in virtual currencies. On 28 May 2019, the International Organizations of Securities Commissions (IOSCO) published a report titled 'Issues, Risks and Regulatory Considerations Relating to Cryptoassets'. This report provided guidance on the unique issues concerning overseeing cryptoasset trading platforms that provide onboarding, clearing, settlement, custody, market making and advisory services for investors under the umbrella of a single venue. IOSCO advised global regulators of these platforms that their goals should be to ensure that investors are protected, fraud and manipulation are prevented, cryptoassets are sold in a fair way and systemic risk is reduced – the same goals that apply to securities regulation. IOSCO also advised that national regulators should share information, monitor market abuse, take enforcement actions against cryptoasset trading platforms when appropriate and ensure that these venues are resilient to cyberattacks. In the United States, the US Securities and Exchange Commission has not yet approved public offerings of virtual currency exchange-traded funds. The US Commodity Futures Trading Commission (CFTC) has approved of virtual currency futures trading on regulated exchanges and the trading of virtual currency swaps on regulated swap executed facilities. US regulators remain concerned about potential abuses and manipulative activity concerning virtual currencies, including the proliferation of fraudulent virtual currency Ponzi schemes. In May 2019, the US Financial Crimes Enforcement Network issued guidance concerning the application of bank secrecy laws relating to financial institutions with respect to identifying and reporting suspicious activities by criminals and other bad actors who exploit convertible virtual currencies (virtual currencies whose values can be substituted for fiat currencies) for illicit purposes. The CFTC also issued an alert offering potential whistle-blower rewards to members of the public who report virtual currency fraud or manipulation to the CFTC.

Fortunes have been made and lost in the trading of virtual currencies since Satoshi Nakamoto published a white paper in 2008 describing what he referred to as a system for peer-to-peer payments, using a public decentralised ledger known as a blockchain and

cryptography as a source of trust to verify transactions. That paper, released in the dark days of a growing global financial market crisis, laid the foundations for Bitcoin, which would become operational in early 2009. Satoshi has never been identified, but his white paper represented a watershed moment in the evolution of virtual currency. Bitcoin was an obscure asset in 2009, but it is far from obscure today, and there are now many other virtual currencies and related assets. In 2013, a new type of blockchain that came to be known as Ethereum was proposed. Ethereum's native virtual currency, Ether, went live in 2015 and opened up a new phase in the evolution of virtual currency. Ethereum provided a broader platform, or protocol, for the development of all sorts of other virtual currencies and related assets.

Whether virtual currencies will be widely and consistently in commercial use remains uncertain. However, the virtual currency revolution has now come far enough and has endured a sufficient number of potentially fatal events that we are confident virtual currency in some form is here to stay. Virtual currencies and the blockchain and other distributed ledger technology on which they are based are real, and are being deployed right now in many markets and for many purposes. These technologies are being put in place in the real world, and we as lawyers must now endeavour to understand what that means for our clients.

Virtual currencies are essentially borderless: they exist on global and interconnected computer systems. They are generally decentralised, meaning that the records relating to a virtual currency and transactions therein may be maintained in a number of separate jurisdictions simultaneously. The borderless nature of this technology was the core inspiration for the *Review*. As practitioners, we cannot afford to focus solely on our own jurisdictional silos. For example, a US banking lawyer advising clients on matters related to virtual currency must not only have a working understanding of US securities and derivatives regulation; he or she must also have a broad view of the regulatory treatment of virtual currency in other major commercial jurisdictions.

Global regulators have taken a range of approaches to responding to virtual currencies. Some regulators have attempted to stamp out the use of virtual currencies out of a fear that virtual currencies such as Bitcoin allow capital to flow freely and without the usual checks that are designed to prevent money laundering and the illicit use of funds. Others have attempted to write specific laws and regulations tailored to virtual currencies. Still others – the United States included – have attempted to apply legacy regulatory structures to virtual currencies. Those regulatory structures attempt what is essentially 'regulation by analogy'. For example, a virtual currency, which is not a fiat currency, may be regulated in the same manner as money, or in the same manner as a security or commodity. We make one general observation at the outset: there is no consistency across jurisdictions in their approach to regulating virtual currencies. That is, there is currently no widely accepted global regulatory standard. That is what makes a publication such as the *Review* both so interesting and so challenging to assemble.

The lack of global standards has led to a great deal of regulatory arbitrage, as virtual currency innovators shop for jurisdictions with optimally calibrated regulatory structures that provide an acceptable amount of legal certainty. While some market participants are interested in finding the jurisdiction with the lightest touch (or no touch), most legitimate actors are not attempting to flee from regulation entirely. They appreciate that regulation is necessary to allow virtual currencies to achieve their potential, but they do need regulatory systems with an appropriate balance and a high degree of clarity. The technology underlying virtual currencies is complex enough without adding layers of regulatory complexity into the mix.

It is perhaps ironic that the principal source of strength of virtual currencies – decentralisation – is the same characteristic that the regulators themselves seem to be displaying. There is no central authority over virtual currencies, either within and across jurisdictions, and each regulator takes an approach that seems appropriate to that regulator based on its own narrow view of the markets and legacy regulations. We believe optimal regulatory structures will emerge and converge over time. Ultimately, the borderless nature of these markets allows market participants to 'vote with their feet', and they will gravitate toward jurisdictions that achieve the right regulatory balance of encouraging innovation and protecting the public and the financial system. It is much easier to do this in a primarily electronic and computerised business than it would be in a bricks-and-mortar business. Computer servers are relatively easy to relocate; factories and workers are less so.

The second edition of the *Review* provides a practical analysis of recent legal and regulatory changes and developments, and of their effects, and looks forward to expected trends in the area of virtual currencies on a country-by-country basis. It is not intended to be an exhaustive guide to the regulation of virtual currencies globally or in any of the included jurisdictions. Instead, for each jurisdiction, the authors have endeavoured to provide a sufficient overview for the reader to understand the current legal and regulatory environment.

Virtual currency is the broad term that is used in the *Review* to refer to Bitcoin, Ether, tethers and other stablecoins, cryptocurrencies, altcoins, ERC20 tokens, digital, virtual and cryptoassets, and other digital and virtual tokens and coins, including coins issued in initial coin offerings. We recognise that in many instances the term virtual currency will not be appropriate, and other related terms are used throughout as needed. In the law, the words we use matter a great deal, so, where necessary, the authors of each chapter provide clarity around the terminology used in their jurisdiction and the legal meaning given to that terminology.

Based on feedback on the first edition of the *Review* from members of the legal community throughout the world, we are confident that attorneys will find the updated second edition to be an excellent resource in their own practices. We are still in the early days of the virtual currency revolution, but it does not appear to be a passing fad. The many lawyers involved in this treatise have endeavoured to provide as much useful information as practicable concerning the global regulation of virtual currencies.

The editors would like to extend special thanks to Ivet Bell (New York) and Dan Applebaum (Chicago), both Sidley Austin LLP associates, for their invaluable assistance in organising and editing the second edition of the *Review*, and particularly the United States chapter.

Michael S Sackheim and Nathan A Howell
Sidley Austin LLP
New York and Chicago
August 2019

Chapter 10

FRANCE

Hubert de Vauplane and Victor Charpiat[1]

I INTRODUCTION TO THE LEGAL AND REGULATORY FRAMEWORK

As in many countries, the first contact between cryptocurrencies and French law was through the lens of financial crime. In its 2011 annual report, Tracfin (the French financial intelligence unit tasked with fighting financial fraud, money laundering and terrorism financing) was the first French authority to mention Bitcoin.[2]

Cryptocurrencies then came under scrutiny from other regulators during the Bitcoin bubble of November and December 2013. The French Central Bank published a short report on 'the dangers linked to the development of virtual currencies'.[3] In January 2014, the Prudential Supervision and Resolution Authority (ACPR), the French banking and insurance regulatory authority, stated that entities receiving legal currency on behalf of clients in relation to the purchase or sale of cryptocurrencies were required to obtain a licence to provide payment services.[4]

In December 2016, cryptocurrency trading platforms and brokers were included in the list of entities subject to the anti-money laundering legislation.[5]

In 2016, a distinction arose between the concept of blockchain and the universe of cryptocurrencies. Experimentations using blockchain technology to simplify various technological processes were initiated. Several French banks joined the R3 consortium (which developed a private blockchain platform named Corda). The Deposits and Consignments Fund (a state-owned financial institution) launched LaBChain, a blockchain innovation lab that started working in July 2016 on a business case dedicated to the use of blockchain to manage digital identity and know-your-customer procedures.[6]

Simultaneously, the French government started working on a legal framework allowing the use of blockchain for the registration of securities. Registration on a blockchain was

1 Hubert de Vauplane is a partner and Victor Charpiat is an associate at Kramer Levin Naftalis & Frankel, LLP.

2 Tracfin, Rapport d'activité 2011.

3 Banque de France, Les dangers liés au développement des monnaies virtuelles: l'exemple du bitcoin, 5 December 2013.

4 ACPR, Position 2014-P-01, https://acpr.banque-france.fr/sites/default/files/20140101_acpr_position_bitcoin.pdf.

5 Article 2 of Ordinance No. 2016-1635 of 1 December 2016, modifying Article L. 561-2 of the Monetary and Financial Code (MFC).

6 Caisse des dépôts, LaBChain, launched by Caisse des Dépôts, reveals its first business case, 18 July 2016: https://www.caissedesdepots.fr/en/labchain-launched-caisse-des-depots-reveals-its-1rst-business-case.

first limited to short-term bonds dedicated to small and medium-sized enterprises (SMEs),[7] but was soon extended to all unlisted securities pursuant to Ordinance No. 2017-1674 of 8 December 2017.

In 2017, the renewed cryptocurrencies and initial coin offerings (ICOs) bubble led the French regulators and the government to start working on the creation of a dedicated legal framework. The French government tasked Jean-Pierre Landau, a former top executive of the Central Bank, with preparing a report on cryptocurrencies, which was published in July 2018. Three working groups were created among the French Parliament to prepare reports on ICOs, blockchains and cryptocurrencies. In addition, both the French Financial Markets Authority (AMF) and the ACPR created internal fintech teams acting as 'innovation hubs' in 2016.

In October 2017, the AMF published a discussion paper on ICOs.[8] Following an extended consultation of experts and actors of the French cryptocurrency and ICO economy, it was finally decided to create a dedicated framework for ICOs, rather than try to include them in the scope of the existing regulation of securities offerings. This legal framework was included in Act No. 2019-486 of 22 May 2019 on the growth and transformation of enterprises (the PACTE Act), which contains many measures aimed at facilitating the growth of SMEs and giving employees and stakeholders more control over corporations. Before its adoption, the PACTE Act was amended by the National Assembly and the Senate, and an ad hoc legal framework for intermediaries dealing with cryptocurrencies was added.

In the meantime, widespread lobbying was conducted by the French cryptocurrency community (with the notable help of several legislators interested in cryptocurrencies) to adapt the French tax regime. The capital gains related to cryptocurrencies were taxed at very high rates, and this became a significant problem during the 2017 bull market, as many individual investors threatened to leave France and cash out in tax-friendly jurisdictions. Consequently, Act No. 2018-1317 of 28 December 2018 (the 2019 Budget Act) created a specific tax regime that taxes capital gains at a flat rate of 30 per cent.

With the PACTE Act and the new tax regime now fully in force, the legal environment for companies dealing with cryptocurrencies, ICO issuers and individual investors has been clarified.

II SECURITIES AND INVESTMENT LAWS

i Tokenisation of securities and issuance of security tokens

More than a year before the bubble of late 2017, the French government started studying the emerging concept of blockchain technology (or distributed ledger technology).

The first appearance of the concept of blockchain in French law was in Ordinance No. 2016-520 of 28 April 2016, which created a dedicated framework for the financing of SMEs through crowd-lending platforms. The Ordinance allows for the issuance of promissory notes (known as *minibons*) through a crowd-lending platform. The registration and transfer

7 Ordinance No. 2016-520 of 28 April 2016.

8 AMF, 'The AMF publishes a discussion paper on Initial Coin Offerings and initiates its UNICORN programme', 26 October 2017: https://www.amf-france.org/en_US/Actualites/Communiques-de-presse/AMF/annee-2017?docId=workspace%3A%2F%2FSpacesStore%2F5097c770-e3f7-40bb-81ce-db2c95e7bdae&langSwitch=true.

of *minibons* can either be done in the traditional way (i.e., the issuer maintains and updates a register of all *minibons* holders) or by a shared electronic recording system (i.e., a distributed ledger).[9]

Ordinance No. 2017-1674 of 8 December 2017 took a much bigger step by extending to unlisted securities[10] the possibility to use a distributed ledger for their issuance, registration and transfer. These securities tend to be presented as security tokens, although it would be more accurate to call them 'tokenised securities'; in any case, the PACTE Act makes it clear that tokens issued pursuant to ICOs cannot be securities.[11]

Both Ordinances provided that the technical requirements (i.e., the level of security and authentication) of the shared electronic recording system would have to be specified by a decree to be passed by the government. Instead of rushing this, the government chose to consult the European Commission, which then validated the government's definition of the distributed ledger.[12] The much-awaited decree was published on 24 December 2018 (the Decree).[13]

The Decree provides that the distributed ledgers used for the registration of securities should comply with four technical conditions:[14]

a they must be 'conceived and implemented' in a manner that preserves the integrity of the information recorded;

b they must 'directly or indirectly' allow the identification of the owners of securities, and the nature and number of securities held;

c they must include a business continuity plan, which includes an external data recording system; and

d the owners of the securities registered on them must be able to access their statements of transactions.

The Decree does not specify which of the issuer or its technology provider will be responsible for complying with these technical requirements. In addition, it does not address the distinction between private and public blockchains. Although the Decree does not exclude the possibility to issue and register securities through a public blockchain (such as Ethereum), complying with some of these technical conditions could be more complicated if a public blockchain is used.

The Decree also modifies the rules applicable to the pledging of securities to allow securities registered on a distributed ledger to be effectively pledged.[15]

9 Article L. 223-12 and L. 223-13 of the MFC.

10 More precisely all securities that are not recorded in a central depositary system (Article L. 211-7 of the MFC). Units in collective investment undertakings and negotiable debt securities may also be registered on a distributed ledger (Article R. 211-5 of the MFC).

11 Article L. 552-1 of the MFC.

12 European Commission, Notification Detail, 'Decree on the use of shared electronic recording devices for the representation and transmission of financial securities', 17 July 2018: http://ec.europa.eu/growth/tools-databases/tris/en/index.cfm/search/?trisaction=search.detail&year=2018&num=367&mLang=EN.

13 Decree No. 2018-1226 of 24 December 2018.

14 Article R. 211-9-7 of the MFC.

15 Article R. 211-14-1 of the MFC.

French start-ups and large corporations have already started using the Decree to tokenise their securities. Carthagea[16] and DomRaider[17] announced that they planned to raise funds through the issuance of shares registered on a distributed ledger. In April 2019, Societe Generale issued €100 million worth of covered bonds registered on the Ethereum blockchain, as part of a pilot project in which it was also the sole subscriber of the bonds.[18] In June 2019, the share capital of a company owning a €6.5 million building located near Paris was tokenised by start-up Equisafe.[19]

However, registering securities on a blockchain is only useful insofar as various burdensome or costly processes, such as the vote at general meetings or the secondary market of unlisted securities, are made easier. While the registration of unlisted securities was greatly modernised pursuant to the Ordinance of 8 December 2017 and the Decree, the other obligations to which an issuer is subject with respect to its shareholders have remained the same, thus creating many practical problems. Various regulations (both French and European) will need to be amended to make the registration of securities on a blockchain an attractive option (see Section XI).

ii Asset managers and investment funds

In the past two years, alternative fund managers have started to create cryptocurrency investment funds. Tobam Bitcoin Fund, launched in November 2017 by French alternative asset manager Tobam, claimed to be the very first European cryptocurrency fund.[20] However, Tobam's fund was not licensed by the AMF, as cryptocurrencies, as an asset class, did not fit in any category of the regulatory framework applicable to asset managers.

Napoléon X, which raised around €10 million following an ICO in 2018, became the first French crypto start-up to obtain an asset manager licence from the AMF. The first regulated funds are expected to be launched in 2019.[21]

In addition, the PACTE Act now allows professional specialised investment funds (FPSs), which are dedicated to professional investors, to purchase assets registered in a shared electronic recording system (i.e., a blockchain).[22] The PACTE Act also allows professional private equity funds (FPCIs) to invest up to 20 per cent of their assets in digital assets.[23] FPSs and FPCIs are alternative investment funds and, therefore, may only be managed by a

16 Chaineum, 'Chaineum Acts as STO Advisor for Carthagea', 14 March 2019: https://medium.com/@Chaineum/chaineumacts-as-sto-advisor-for-carthagea-da428bdfa8e8.

17 DomRaider, 'DomRaider to launch an Equity Token Offering and sell shares registered on blockchain', 27 May 2019: https://www.domraider.com/en/equity-token-offering-shares-blockchain/.

18 Societe Generale, 'Societe Generale issued the first covered bond as a security token on a public blockchain', 23 April 2019: https://www.societegenerale.com/en/newsroom/first-covered-bond-as-a-security-token-on-a-public-blockchain.

19 Equisafe, 'Equisafe réalise la première vente d'immeuble via la technologie blockchain en Europe pour un montant de 6,5 millions d'euros', 25 June 2019: http://web.lexisnexis.fr/LexisActu/CommuniquedepresseEquisafe.pdf.

20 Tobam, 'TOBAM launches first Bitcoin mutual fund in Europe', 22 November 2017: https://www.tobam.fr/tobam-launches-first-bitcoin-mutual-fund-in-europe/.

21 Napoleon Group, 'France authorizes Napoleon AM as first regulated Asset Manager expert on crypto solutions', 8 December 2018: https://medium.com/napoleonx-ai/france-authorizes-napoleon-am-as-first-regulated-asset-manager-expert-on-crypto-solutions-1212dbd01a59.

22 Article L. 214-154 of the MFC.

23 Article L. 214-160, II of the MFC.

licensed asset manager; however, they are required to appoint a depositary (which is notably in charge of the custody of the assets owned by the fund). Licensed cryptocurrency asset managers will still need to find depositaries willing to take custody of cryptocurrencies.

Regarding cryptocurrency derivatives, the AMF took actions to increase the protection of retail investors against websites offering to bet on cryptocurrencies through derivatives (such as contracts for difference or binary options). In February 2018, the AMF issued an analysis stating that cash-settled contracts on cryptocurrencies qualified as derivatives under French law.[24] Consequently, platforms that offer cryptocurrency derivatives trading must now obtain an administrative authorisation and may not target French residents in their online marketing.

Finally, the management of individual cryptocurrency portfolios on behalf of clients is now included in the list of the digital assets services.[25] Obtaining a licence will be optional for entities providing this service and, as a general rule, they will not be subject to any regulation.

III BANKING AND MONEY TRANSMISSION

Over the past few years, French banking regulators have frequently reminded the general public that cryptocurrencies are not real money. The Central Bank and the ACPR, for example, consider that the term 'cryptocurrency' is misleading, and prefer to use the term 'cryptoassets'.[26]

Their position clearly matters because the French regulation of payment services revolves around the use of legal currency (i.e., a legal tender issued by a sovereign country). All the payment services defined by Article L. 314-1 of the MFC involve the use of funds. Pursuant to Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market (PSD 2), funds mean 'banknotes and coins, scriptural money or electronic money as defined in point (2) of Article 2 of Directive 2009/110/EC'.[27] Therefore, as a general rule, receiving and sending cryptocurrencies on behalf of third parties does not qualify as a regulated service under the payment services regulation.

However, the recent development of stablecoins (and in particular fiat-backed stablecoins) blurs the line between legal currencies and cryptocurrencies. As the European Banking Authority (EBA) stated in its advice on cryptoassets of 9 January 2019, redeemable fiat-backed stablecoins may qualify as electronic money when the token (1) is electronically stored, (2) has monetary value, (3) represents a claim on the issuer, (4) is issued on receipt of funds, (5) is issued for the purpose of making payment transactions and (6) is accepted by persons other than the issuer.[28] Consequently, some fiat-backed stablecoin issuers may be required to obtain electronic money licences to be allowed to operate in France.

Finally, the announcement of Facebook's plan to launch a cryptocurrency called Libra has been met with scepticism by the French government and the Central Bank. Bruno Le Maire, the Minister of Economy and Finance, stated that Facebook may create its own payment

24 AMF, Analysis of the legal qualification of cryptocurrency derivatives, 23 March 2018: https://www.amf-france.org/en_US/Reglementation/Dossiers-thematiques/Marches/Produits-derives/Analyse-sur-la-qualification-juridique-des-produits-d-riv-s-sur-crypto-monnaies?langSwitch=true.

25 Article L. 54-10-2, 5°, b) of the MFC.

26 Banque de France, L'émergence du bitcoin et autres crypto-actifs: enjeux, risques et perspectives, 5 March 2018.

27 Article 4(25) of the PSD 2.

28 EBA, Report with advice for the European Commission on crypto-assets, 9 January 2019, pp. 12–13.

system, but under no circumstance should it be allowed to create a sovereign currency.[29] François Villeroy de Galhau, the governor of the Central Bank, stated that Libra would in any case need the relevant licences if payment or banking services are to be provided.[30] France also announced that a taskforce dedicated to stablecoins would be created within the G7.[31]

IV ANTI-MONEY LAUNDERING

French authorities started monitoring the use of cryptocurrencies in illegal transactions as early as 2011. The 2011 annual report of Tracfin briefly described how Bitcoin could be used in money laundering schemes.[32] In June 2014, a working group led by Tracfin published a report on cryptocurrencies and issued various recommendations aimed at limiting the use of cryptocurrencies in money laundering or terrorism financing schemes.[33]

Tracfin closely monitors cryptocurrencies. Its last annual report describes how untraceable and privacy-oriented cryptocurrencies (such as Monero or Zcash) and anonymous prepaid payment cards linked to cryptocurrency wallets are increasingly used by fraudsters and money launderers.[34]

Cryptocurrencies were left out of the scope of French anti-money laundering and terrorism financing (AML/CFT) regulation until Order No. 2016-1635 of 1 December 2016, which added cryptocurrency trading platforms and brokers to the list of persons subject to AML/CFT requirements.

The European Union addressed cryptocurrency-related AML/CFT issues through Directive (EU) 2018/843 of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the Fifth Anti-Money Laundering Directive), which states that the 'Member States shall ensure that providers of exchange services between virtual currencies and fiat currencies, and custodian wallet providers, are registered.' The Fifth Anti-Money Laundering Directive defines virtual currencies as 'a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically'.

To implement the Fifth Anti-Money Laundering Directive, the PACTE Act extends the list of entities subject to AML/CFT requirements to include the following categories: (1) ICO issuers that obtained the optional approval of the AMF; (2) digital assets custodians and entities allowing the purchase or sale of digital assets against legal currency; and (3) licensed

29 Bloomberg, 'Facebook Token Runs Into Instant Political Opposition in Europe', 18 June 2019: https://www.bloomberg.com/news/articles/2019-06-18/france-calls-for-central-bank-review-of-facebook-cryptocurrency.

30 Cointelegraph, 'French Central Bank: Facebook's Libra May Need Banking License', 25 June 2019: https://cointelegraph.com/news/french-central-bank-facebooks-libra-may-need-banking-license.

31 The Block, 'France to create G7 stablecoin taskforce following Libra's announcement', 21 June 2019: https://www.theblockcrypto.com/tiny/france-to-create-g7-taskforce-on-cryptocurrency-stablecoin/.

32 Tracfin, Rapport d'activité 2011, pp. 21–23.

33 Ministry of Economy and Finance, Regulating virtual currencies – Recommendations to prevent virtual currencies from being used for fraudulent purposes and money laundering, June 2014: https://www.economie.gouv.fr/files/regulatingvirtualcurrencies.pdf.

34 Tracfin, 2017–2018 – Money Laundering and Terrorist Financing Risk – Trends and Analysis, June 2019.

digital assets services providers.[35] The PACTE Act includes the definition of virtual currencies under the Fifth Anti-Money Laundering Directive in the definition of digital assets.[36] (The definition of digital assets also includes tokens issued pursuant to ICOs.) As French banks are reluctant to open accounts for cryptocurrency-related companies because the AML/CFT regulation applicable to them is still unclear, the above-mentioned categories of entities will also benefit from preferential access to banking services (see Section X).

However, surprisingly, the PACTE Act does not extend the scope of AML/CFT requirements to cryptocurrency trading platforms, although the Fifth Anti-Money Laundering Directive requires Member States to register 'providers of exchange services between virtual currencies and fiat currencies'. In fact, crypto-to-fiat trading platforms would be subject, in any case, to Position 2014-P-01 of the ACPR, which requires them to obtain a licence to provide payment services. Licensed payment services providers are themselves subject to AML/CFT requirements.

Finally, in March 2018, the G20 finance ministers asked the Financial Action Task Force (FATF) to clarify how its standards apply to cryptoassets. In October 2018, the FATF stated that 'jurisdictions should ensure that virtual asset service providers are subject to AML/CFT regulations, for example conducting customer due diligence including ongoing monitoring, record-keeping, and reporting of suspicious transactions. They should be licensed or registered and subject to monitoring to ensure compliance.'[37] In 2019, the FATF also updated its guidance for a risk-based approach on virtual assets and virtual asset service providers. The Fifth Anti-Money Laundering Directive will probably need to be further amended to comply with these recommendations.

Cryptocurrency-related companies that are not currently included in the list of persons subject to AML/CFT requirements must still report any suspicious transaction to the public prosecutor, which will then notify Tracfin.

V REGULATION OF EXCHANGES AND OTHER DIGITAL ASSET SERVICES PROVIDERS

Before the creation by the PACTE Act of a comprehensive legal framework for digital assets services providers (DASPs), certain actors of the cryptocurrency industry were already subject to a specific regulatory status. Since January 2014, the ACPR requires that any intermediary receiving funds in relation to a purchase or sale of cryptocurrencies (e.g., a trading platform or a broker) must obtain a licence to provide payment services.[38] To our knowledge, the ACPR has not clarified what effect the adoption of the PACTE Act will have on this requirement.

DASPs are entities that provide services related to digital assets. Digital assets, as defined by the PACTE Act, include: (1) tokens, as this term is defined in the ICO legal framework (i.e., intangible digital assets incorporating rights that can be issued, registered, held and transferred on a shared electronic recording system), as long as they do not qualify as financial instruments; and (2) any digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal

35 Article L. 561-2, 7° *bis* to 7° *quater* of the MFC.

36 Article L. 54-10-1 of the MFC.

37 FATF, Regulation of virtual assets, 19 October 2018.

38 ACPR, Position 2014-P-01, 29 January 2014.

persons as a means of exchange and that can be transferred, stored and traded electronically.[39] This definition of digital assets is slightly more precise than the definition of virtual assets in the FATF Recommendations.[40] In any case, all cryptoassets and cryptocurrencies would be covered by the definition of digital assets, but certain tokens that may not be based on cryptography may also qualify as digital assets.

To establish the list of the services related to digital assets, the promoters of the PACTE Act looked to traditional investment services for inspiration. Therefore, digital assets services include the following services, as soon as they are performed in relation to digital assets:

a custody of digital assets or cryptographic private keys;
b purchase or sale of digital assets against legal currency;
c purchase or sale of digital assets against other digital assets;
d operation of a digital assets trading platform; and
e various other services related to digital assets, including receipt and transmission of orders on behalf of third parties, portfolio management, investment advice, underwriting, and placing with or without a firm commitment.[41]

These digital assets services will be further described in an implementing regulation, to be adopted during summer 2019.

Licensed entities will be subject to obligations equivalent to those of regulated investment services providers: they will have to subscribe to professional liability insurance (or comply with capital requirements), possess secure and resilient IT systems, and establish adequate policies to manage conflicts of interests. In addition, depending on the regulated services they intend to provide, licensed DASPs will have to comply with additional requirements. For example, licensed custodians will be required to establish a custody policy, ensure that they are always able to return the cryptoassets or the keys to their clients (or both) and implement segregated accounts.[42]

The AMF presents this regulatory approach based on optional licences as an incentive-based system. It emphasises non-mandatory provisions to foster professionalism and promote sound market practices while avoiding constraining frameworks that might deter innovation and diminish France's attractiveness. Licensed actors will regarded as 'white-listed' and may use their licence as a marketing tool. However, owing to anti-money laundering concerns (arising notably from the Fifth Anti-Money Laundering Directive), obtaining a registration with the AMF will be mandatory for both custodians of digital assets and providers of the service of purchase or sale of digital assets against legal currency. The requirements to obtain this registration will not be overly burdensome: registered providers must give the AMF information regarding the reputation and professional qualifications of their managers and beneficial owners, as well as implement the internal procedures required to comply with the anti-money laundering legislation. The registration will be granted by the AMF, although the prior approval of the ACPR will also be required.

39 Article L. 54-10-1 of the MFC.

40 The FATF Recommendations, p. 124: 'A virtual asset is a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes. Virtual assets do not include digital representations of fiat currencies, securities and other financial assets that are already covered elsewhere in the FATF Recommendations.'

41 Article L. 54-10-2 of the MFC.

42 Article L. 54-10-5 of the MFC.

Anti-money laundering requirements will also apply to digital assets service providers that obtained the optional licence. Although obtaining a DASP licence will mostly serve as a marketing tool, licensed entities will also be granted the following benefits:

a they will not be arbitrarily forbidden from opening a bank account and accessing basic banking services (see Section X); and

b they will be allowed to contact potential individual clients on a massive scale (through emails or cold calls) to market their services, in accordance with the 'financial or banking solicitation' regime.[43] Licensed DASPs will also be able to broadly advertise their services to the general public and use sponsorship as a marketing tool. On the other hand, the use of these marketing methods will be forbidden for unlicensed DASPs.

The licence granted by the AMF has no extraterritorial effect. As this regulatory framework is unique to France, there is no passporting regime applicable to DASPs.

The PACTE Act also requires the French government to prepare a report discussing the possibility of making the licence mandatory for all DASPs, taking into consideration the upcoming recommendations of the FATF.[44]

VI REGULATION OF MINERS

Miners of cryptocurrencies are not subject to any specific regulatory regime. The French mining industry is almost non-existent, as electricity prices have been too high to make mining profitable in the past few years.[45] However, many individuals mine cryptocurrencies as a hobby or a side job.

A parliamentary report of 30 January 2019 on virtual currencies[46] suggested that French miners be legally included in the list of 'electro-intensive industries', and thus exempted from the domestic tax on final electricity consumption (TICFE). This exemption could lower electricity costs by a third, thus making France more attractive for miners. However, the environmental impact of cryptocurrency mining has been widely criticised recently, and it seems unlikely that the government will take the risk of granting these benefits to cryptocurrency miners.

VII REGULATION OF ISSUERS

While France has struggled to attract prominent ICOs in the past few years,[47] the government and the AMF have taken multiple steps to turn France into an ICO-friendly jurisdiction.

43 Articles L. 341-1 et seq. of the MFC.

44 Article 86, X of the PACTE Act.

45 *Les Echos*, 'Blockchain : le français Bigblock Datacenter délocalise ses fermes de minage au Kazakhstan', 11 March 2019: https://www.lesechos.fr/tech-medias/hightech/blockchain-le-francais-bigblock-datacenter-delocalise-ses-fermes-de-minage-au-kazakhstan-999360.

46 National Assembly, Rapport d'information en conclusion des travaux d'une mission d'information relative aux monnaies virtuelles, 30 January 2019.

47 According to the AMF, French ICOs only raised €89 million, while the global amount raised by ICOs reached $22 billion. (AMF, French ICOs – A New Method of Financing, 14 November 2018: https://www.amf-france.org/en_US/Publications/Lettres-et-cahiers/Risques-et-tendances/Archives?docId=workspace%3A%2F%2FSpacesStore%2F27604d2f-6f2b-4877-98d4-6b1cf0a1914b&langSwitch=true).

Following a public consultation conducted by the AMF,[48] the government and the AMF chose to create an ad hoc framework for ICOs rather than promote a best practices guide or include ICOs in the scope of the existing regulation of securities offerings.

The AMF will grant its approval (or 'visa') to public offerings of tokens that comply with the requirements set out by the PACTE Act. Obtaining the AMF's approval will be optional for all ICO issuers: no ICO will be forbidden in France for lack of approval, although unapproved ICOs will be subject to marketing restrictions. The AMF expects that ICO promoters will apply for the approval, as the global reputation of the AMF would serve as proof of their trustworthiness and help them market their ICO in foreign jurisdictions, as well as allow them to freely sell their token to French investors.

Under the PACTE Act, ICOs are explicitly separated from securities offerings. No security offering will be allowed to be carried out under the form of an ICO. Issuing a token whose characteristics would make it similar to a security (i.e., a security token) would trigger the application of corporate law.

To obtain the AMF's approval, ICO issuers will have to file an information document containing various details of the offer and the issuer.[49] This document will contain financial and legal information, but also certain technical information about the tokens and the method used to secure the cryptoassets raised during the offering (e.g., multi-signature wallets, smart contracts). The information document must be accurate, not misleading and written in plain language, and it must describe the risks associated with the offer. In a way, the information document will be similar to a white paper. In addition, the issuer will be required to be located in France – if necessary through a subsidiary or a branch.[50]

The marketing materials used by the issuer will also be reviewed by the AMF.[51] This requirement was criticised by the French community as, in theory, it would prevent the issuer from communicating its contemplated offering before the end of the approval process (which may take a few months).

In June 2019, a section dedicated to ICOs was added to the General Regulation of the AMF (i.e., the code containing detailed provisions on securities offerings, capital markets, investment funds, licensed service providers, etc.).[52] The AMF also published on 6 June 2019 an instruction that further details the approval process and the content of the information document.[53]

The legal consequences of obtaining the AMF's approval will be very similar to those of obtaining the DASP licence (see Section V). The approved ICO issuers will:

a not be arbitrarily forbidden from opening a bank account and accessing basic banking services (see Section X); and

48 AMF, 'The AMF publishes a discussion paper on Initial Coin Offerings and initiates its UNICORN programme', 26 October 2017: https://www.amf-france.org/en_US/Actualites/Communiques-de-presse/AMF/annee-2017?docId=workspace%3A%2F%2FSpacesStore%2F5097c770-e3f7-40bb-81ce-db2c95e7bdae&langSwitch=true.

49 Article L. 552-4 of the MFC.

50 Article L. 552-5 of the MFC.

51 Article L. 552-5 of the MFC.

52 Article 711-1 et seq. of the Règlement général de l'AMF.

53 AMF, Instruction DOC-2019-06, Procedure for examination of the application and establishment of an information document for approval by the AMF on an initial coin offering, 6 June 2019.

b will be allowed to broadly advertise their services to the general public, through financial or banking solicitation, online advertising or sponsorship (or all three). Similarly, the use of these marketing methods will be forbidden for unapproved ICO issuers.

In addition, as explained in Section V, approved ICO issuers will be subject to AML/CFT requirements, but only in relation to transactions received from investors during the token offering.

Finally, as for the DASP licence, the approval granted by the AMF has no extraterritorial effect and cannot be passported within the European Union.

VIII CRIMINAL AND CIVIL FRAUD AND ENFORCEMENT

To our knowledge, there have been no major criminal or civil enforcement decisions related to cryptocurrencies.

Cryptocurrency-related criminal activities may be mentioned in the annual reports of Tracfin. These reports contain various descriptions of financial crime schemes involving cryptocurrencies, but do not, as a general rule, contain any information on the litigation of the case before criminal courts.[54]

IX TAX

The tax regime of cryptocurrencies and utility tokens was largely clarified following the adoption in 2018 of an ad hoc rule applicable to individual investors and the publication by the French Accounting Standards Authority (ANC) of a regulation on the accounting rules applicable to ICO issuers and investors (the ANC Regulation).[55] However, some uncertainties remain.

i Income tax treatment of individual investors

Until the adoption of the 2019 Budget Act, France was arguably one of the worst European jurisdictions for individual investors in cryptocurrencies, with a tax rate of up to 60 per cent. Cryptocurrency capital gains of individual investors are now taxed at a flat rate of 30 per cent,[56] which is still higher than in some neighbouring countries. Crypto-to-crypto transactions fall outside of the scope of the capital gains tax.[57] In practice, the taxation will be deferred until the cryptocurrencies are either sold against legal currency or used to purchase a good or service. This measure greatly simplifies tax accounting and reporting, although individual investors will still need to accurately track their transactions to be able to justify their gains.

In addition, individual taxpayers are not subject to income tax if the gains do not exceed €305 per year.

54 See, for example, Tracfin, 2017–2018 – Money Laundering and Terrorist Financing Risk – Trends and Analysis, June 2019, p. 62.

55 ANC Regulation No. 2018-07 of 10 December 2018 modifying ANC Regulation No. 2014-03 of 5 June 2014 on the national accounting code.

56 Article 150, VH *bis* of the Tax Code.

57 Article 150, VH *bis*, II, A of the Tax Code.

The 30 per cent tax rate will only apply to occasional sales of digital assets. Professional traders and miners will still be subject to the general income tax regime (i.e., a variable rate depending on their taxable income).

ii Corporate income tax – entities purchasing cryptocurrencies and ICO subscribers

Pursuant to the ANC Regulation, the accounting rules applicable to tokens issued following an ICO are also applicable to cryptocurrencies. In accordance with the Regulation, if the cryptocurrencies or tokens are held for an investment purpose, they will be recorded in a newly created account under the short-term financial instruments category, and their market value will be reassessed each year. Whether these unrealised profits or losses will be neutralised from a tax perspective is yet to be determined.

Utility tokens (tokens that are meant to be held until the services associated with them are provided or until the goods are delivered) purchased by a company will be recorded as intangible assets, and amortised or depreciated as such.

iii Corporate income tax – ICO issuers

On the issuer's side, the accounting treatment of the tokens will depend on the rights and obligations associated with the token, as follows:

a if the tokens can be assimilated (even temporarily) to a reimbursable debt, they will be recorded as 'loans and similar debts';

b if the tokens represent services to be provided or goods to be delivered in the future, they will be recorded as prepaid income; or

c otherwise, if the issuer has no implicit or explicit obligation towards the token holders, the funds collected by the issuer will be recorded as income.

In most cases, the funds collected by the issuer will eventually be recorded as income. Then, although there has been no specific regulation on this matter yet, value added tax (VAT) and income tax will have to be paid by the issuer.

iv VAT regime

In 2015, a decision of the Court of Justice of the European Union confirmed that the purchase or sale of cryptocurrencies against legal currency is exempted from VAT.[58]

With regard to utility tokens, in theory, VAT rules should be applicable, as soon as services are provided or goods are delivered in exchange for tokens. However, various technical issues have yet to be clarified (e.g., the actual value of the service provided by the token issuer is generally unknown at the time of the ICO).

X OTHER ISSUES

i Access to banking services

Access to banking services has long been one of the major struggles of French crypto-related companies. During many years, regulatory authorities only mentioned cryptocurrencies in relation to financial crime, money laundering or terrorism financing, and thus bank employees

58 Court of Justice of the European Union, 22 October 2015, C-264/14, *Skatteverket/David Hedqvist*.

are understandably wary. In addition, the ability of bank employees to open bank accounts to these companies is often limited by the bank's internal anti-money laundering policy. Many French banks prefer avoiding any exposure to activities related to cryptocurrencies to simplify their own AML/CFT reporting with their supervisory authorities.

Many start-ups report that they had their bank account frozen or closed when their bank learned that it might be used to receive funds related to cryptocurrencies. Various individuals suffered the same problem, with many retail investors reporting that their bank blocked wire transfers to bank accounts associated with cryptocurrency trading platforms such as Kraken or Coinbase.[59] As a result, many French crypto-related companies had to open bank accounts with banks located in other European countries, where the scrutiny of crypto-related activity was less strict.

In 2011, a French company that received wire transfers from European clients of MtGox (the cryptocurrency trading platform that went bankrupt in 2014) successfully argued before the Central Bank that it should benefit from the right to a bank account set forth in Article L. 312-1 of the MFC, a provision initially meant for the benefit of individuals.[60] However, the bank later managed to close the bank account by claiming that the company was operating as an unlicensed payment services provider.[61]

One of the most important provisions of the PACTE Act is the preferential access to banking services granted to three categories of entities: (1) ICO issuers that obtained the optional approval of the AMF; (2) digital asset custodians and entities allowing the purchase or sale of digital assets against legal currency; and (3) licensed digital asset services providers. Banks will have to set up objective, non-discriminatory and proportionate rules to determine whether these entities should be able to open an account in their books. Once the account is open, the entities' access to basic banking services shall not be hindered by the bank. These provisions create a strong incentive for ICO issuers and crypto-related companies to obtain an optional visa or an optional licence instead of remaining unregulated, as the right to access bank accounts will be tied to this approval or licence.

In addition, if a bank denies one of these entities the right to open an account, it shall communicate the reason for its decision to the AMF or the ACPR. Entities denied a bank account may also appeal the bank's decision.

ii General Data Protection Regulation compliance

Public blockchains seem to be at odds with certain rights guaranteed by the General Data Protection Regulation (GDPR),[62] such as the right to erasure, the right to rectification and the right to object to processing.

In September 2018, the National Commission on Informatics and Liberty (CNIL), France's data protection authority, issued an analysis on the compatibility of public and

59 *Les Echos*, 'Quand une banque interdit à son client d'investir en crypto-monnaies', 24 May 2019: https://www.lesechos.fr/finance-marches/banque-assurances/quand-une-banque-refuse-a-son-client-dinvestir-en-crypto-monnaies-1023752.

60 Court of Appeal of Paris, 26 August 2011, No. 11/15269.

61 Court of Appeal of Paris, 26 September 2013, No. 12/00161.

62 Regulation (EU) 2016/679.

permissioned blockchains with the GDPR.[63] (With regard to private blockchains, the CNIL noted that they do not raise specific issues with respect to the GDPR, as their immutability is usually not guaranteed by design.)

The CNIL stated that whenever a blockchain contains personal data, the GDPR applies. The CNIL focuses on personal data that may be uploaded to a blockchain as a way to ensure traceability of real-world documents (e.g., a diploma), but seems to acknowledge the conflict between some GDPR requirements, such as the right to erasure, and the very nature of public blockchains. In any case, the CNIL recommends not storing unencrypted personal data in a blockchain. The CNIL also announced that the challenges raised by blockchains regarding data protection would have to be addressed at EU level.

XI LOOKING AHEAD

The PACTE Act gave France a complete legal framework for ICO issuers and cryptoasset intermediaries. It is expected that the optional ICO approval and the optional DASP licence will be quite successful and encourage the development of a regulated and compliant French crypto economy.

However, many reforms still need to be made, including the following:

a With regard to tax, the tax reporting applicable to individual investors could be simplified, and shareholders should be allowed to benefit from a tax deferral when financing a company with cryptocurrencies.

b The mining industry should be supported by allowing miners to be exempted from the TICFE.

c The emerging security tokens industry urgently requires certain EU regulations and directives to be amended. The existing regulation effectively prevents the secondary market of security tokens, as securities may only be traded on a regulated trading venue, and trading on a regulated venue requires the registration of the securities with a central depositary system. In addition, the settlement of transactions on security tokens is made complicated by the current absence of a 'blockchainised' cash equivalent (i.e., the cash settlement of the transactions still needs to be conducted 'off-chain', within the legacy banking system). Various working groups have already been formed on these issues in France and at EU level.

Finally, after the European Securities and Markets Authority (ESMA) noted that the multiplication of national regimes within the European Union may create an uneven playing field and encourage regulatory arbitrage,[64] the Minister of Economy and Finance announced in April 2019 that France would support the adoption by the European Union of a legislative framework similar to the one created by the PACTE Act.[65]

63 CNIL, Blockchain and the GDPR: Solutions for a responsible use of the blockchain in the context of personal data, 6 November 2018.

64 ESMA, Advice on Initial Coin Offerings and Crypto-Assets, 9 January 2019.

65 Reuters, 'France to ask EU partners to adopt its cryptocurrency regulation', 15 April 2019: https://www.reuters.com/article/us-france-cryptocurrencies/france-to-ask-eu-partners-to-adopt-its-cryptocurrency-regulation-idUSKCN1RR1Y0.

Appendix 1

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