

AMAFI POSITION PAPER

THE NECESSARY CREATION OF A HARMONIZED EU REGULATORY FRAMEWORK FOR ICOs & CRYPTO ASSETS

ICOs and crypto assets have moved from an area which should be monitored to a policy priority for international standard setters as indicated in IOSCO and FSB latest work programs. At EU level, the European Commission, among other initiatives¹, adopted in March 2018 its FinTech Action Plan calling notably for a better understanding of the risks and opportunities of the use of ICOs and an assessment of the suitability of the current EU regulatory framework. In January 2019, ESMA, in its advice to EU institutions, called for a common EU-wide approach to ensure investor protection.

In the meantime, EU member states including France have started to elaborate national legislations in order to support the development of ICOs and crypto assets. AMAFI created a specific working group in July 2018 with incumbents and new actors whose work has enabled to position the Association as a key contributor to the legislative work undertaken in France.

In that context, AMAFI is keen to contribute to current EU reflections on the elaboration of a European regulatory framework in order to help find a balance between innovation and investor protection.

In this paper, the Association aims to **(i) emphasize some of the key characteristics of the existing and upcoming French regulatory framework** in order to highlight **(ii) its priorities with regards to the elaboration of an EU framework.**

1. France regulatory framework on ICOs and crypto-assets

As of 2016, the French financial market authority (AMF) has started to receive an important number of requests from entities willing to raise funds, fiat money or payment tokens (e.g. Bitcoin) by issuing crypto-assets. The AMF's analysis stressed that most if not all of those projects planned to issue tokens which could not be qualified as "securities" according to the French legislation and therefore did not have to comply with Prospectus provisions. They were considered as utility tokens. **From this moment on, French authorities have started reflecting on the issue with the main objective to find a good balance between ensuring investor protection and contributing to the attractiveness of Paris financial center for new technology users.**

As things stand today, the existing French regulatory framework is based on the modification of the French law in December 2017 which aims **to provide companies with the possibility to register and transfer some of their securities on a distributed ledger arrangement** beside the current book entry regime. The regime is accessible for non listed securities funds shares and negotiable instruments.

This framework is expected to be completed by the outcome of current discussions on the PACTE draft bill with some provisions aiming **to create an optional regime for ICOs and secondary market activities on**

¹ EU Blockchain and Observatory Forum, [European Blockchain Partnership](#).

cyber-assets. AMAFI has largely contributed to the elaboration of the future framework at the different stages of the legislative process.

The future regime for ICOs **will provide with a specific definition of token**². The issuer can **on a voluntary basis** apply for a visa by submitting a white paper describing the characteristics and risks linked to the offer. In order to obtain that visa, the issuer should at least be **established in France, put in place safeguards in order to protect the assets received and respects anti money laundering and terrorist financing requirements** (AML/CFT).

The secondary market regime **encompasses five crypto-assets related services: (1) custody, (2) crypto/fiat exchange, (3) crypto/crypto exchange, (4) management of a trading platform, (5) other services**³. For all services, service providers may seek a licence from the AMF which means that they have to comply with prudential, conflicts of interests and IT robustness requirements. The registration is mandatory for the provision of services 1-2 and service providers offering these services have to comply with AML/CFT requirements.

2. Building up an EU framework to harmonize national practices

AMAFI anticipates that **financial markets will be more and more impacted by the development of blockchain technology in the coming years.** On the one hand, blockchain will be used to reduce transaction costs, especially clearing and settlement costs and, on the other hand, the technology is inherently linked to the emergence of the issuance of digital assets whatever their current qualifications are: security tokens, utilities tokens or even payment tokens.

The development of such technology will enable **issuers to raise funds at a lower cost and with the possibility to attract new types of funders.** Investors **will have the opportunity to invest in new types of assets** while financial intermediaries and banks will be able to offer new services to their client issuers or investors.

That being said, **there is no doubt that these developments raise new regulatory issues in term of AML/CFT, fraud, cyber investor protection or public confidence in financial market.**

Therefore, **AMAFI is very much in favour of building-up an EU framework in order to harmonize existing national legislations and to avoid regulatory competition.** Besides, with the UK, so far the main financial center, leaving the EU, we consider **financial technologies including ICOs and crypto assets have a central role to play in supporting financial market activities and in enabling the EU-27 to finance its economy in a more autonomous way.**

In light of these elements, AMAFI proposes a twofold approach based on the legal classification of crypto-assets:

❖ Security tokens

For security tokens⁴, **there is no doubt that the EU regulatory framework for financial markets**⁵ **should apply.** Nevertheless, the existing framework should be revisited and probably amended in **order to take into account situations where the risks specific to the new technology are not sufficiently addressed or**

² Article 26, PACTE draft bill : "any intangible asset which represents, in digital form, one or more rights which can be issued, registered, retained or transferred through a distributed ledger technology that would allow to identify, directly or indirectly, the owner of the asset.

³ Execution of orders, portfolio management, investment advice, underwriting on a firm commitment basis, placing on a firm commitment basis, placing without a firm commitment basis.

⁴ Where crypto-assets qualify as transferable securities or other types of MiFID financial instruments.

⁵ Including the Prospectus Directive, the Transparency Directive, MiFID II, the Market Abuse Directive, the Short Selling Regulation, the Central Securities Depositories Regulation and the Settlement Finality Directive.

where certain existing requirements may not be easily applied or may not be entirely relevant in a DLT framework. This would particularly be the case for some of Prospectus or CSDR provisions.

This approach raises the question of the different treatment of securities within EU Member States and the need for harmonisation. Indeed, the definition of transferable securities or other types of MiFID financial instruments remains subject to the discretion of each national competent authority. Some Member States, for instance France, have defined a comprehensive list while others, such as Germany, rely on a principle based approach. As a result, **AMAFI considers that a future EU regulatory framework should be based on a common definition of security tokens.**

❖ **Other crypto-assets** (*not defined as security tokens*)

Given the potential risks for consumers and the financial system, as advised by ESMA⁶, **the Association would like to stress that issuing and trading those assets should also be regulated at the EU level.** We also consider that **crypto-assets activities should at least be subject to AML/CFT rules and to the registration with a competent authority.** Other proportionate requirements, such as prevention of conflicts of interest, IT robustness, and prudential rules should also be envisaged.

The question of an optional regime (granted a visa for ICO, apply for a license for secondary market activities) should also be discussed. **AMAFI considers that it could be acceptable for a given period of time but a compulsory regime would be more secure for investor protection and market integrity.**



About AMAFI

Association française des marchés financiers (AMAFI) is the trade organisation working at national, European and international levels to represent financial market participants in France. It acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI's members operate for their own account or for clients in different segments, particularly organised and over-the-counter markets for equities, fixed-income products and derivatives, including commodities. Nearly one-third of members are subsidiaries or branches of non-French institutions.

⁶ Advice on initial coin offerings and crypto assets, ESMA-9 January 2019