

Loi PACTE: French Regulator Implements an Innovative Legal Framework for ICOs

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On May 22, 2019, a new legislation entitled *Plan d'Action pour la Croissance et la Transformation des Entreprises*, also known as the *Loi Pacte* (the “**Pacte Law**”), was enacted in France. It aims to foster entrepreneurship and innovation, facilitating the growth of businesses and creating jobs. As we reported [at the time](#), the Pacte Law encompasses a very broad range of measures covering many aspects of company life.

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This update describes the main provisions of the Pacte Law that directly relate to Initial Coin Offerings (“**ICOs**”) and that set a new precedent in Europe with the introduction of a visa regime for ICOs. As briefly reported in our [Blockchain 2018 Year-in-Review](#), the new visa regime for fundraising through the issuance of virtual utility tokens is not mandatory but optional and meant to be attractive to startup companies looking for investors through ICOs. The Pacte Law broadly establishes the framework of the new regime and empowers the French regulator *Autorité des Marchés Financiers* (“**AMF**”) to take action to implement the new regime. For this purpose, the AMF has updated its general regulation on June 5, 2019¹ and published on June 6, 2019 an administrative instruction² describing in more detail the steps to be taken to be granted such a visa.

SCOPE

The new optional visa regime for ICOs aims to provide investors with better information and protection. Until now, except for ICOs of tokens qualifying as financial instruments pursuant to an existing regulatory framework, ICOs did not require prior authorization and were not susceptible to interdiction. The AMF had no oversight powers, nor could it take action to support ICOs that were transparent in their communication and in their operating model.

The creation of the new regime is the consequence of a public consultation process led by the AMF in 2017 that reached the conclusion that industry players needed a tailored

¹ Articles 711-1 to 715-2 of the [AMF General Regulation](#) (not yet available in English)

² [Instruction AMF; DOC-2019-06](#) (in English) Procedure for examination of the application and establishment of an information document for approval by the AMF of an Initial Coin Offering

regime for ICOs that did not fall under any existing legal framework applicable to offerings, such as the European Union Prospectus Regulation. The Pacte Law innovates by setting up the basis for a new regime for the offering of utility tokens. This new French regime has been established as an additional option for companies with qualifying tokens, in recognition of the cross-border nature of coin offerings and for the purpose of reinforcing the attractiveness of Paris as a leading place of business.

DEFINITIONS

Tokens. The Pacte Law defines tokens as 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 an asset. The new legal framework only covers utility tokens, and the AMF must ultimately decide whether tokens issued in an ICO are such utility tokens that fall within the voluntary regime or whether such tokens instead qualify as securities.³

ICOs. The Pacte Law defines an ICO as any proposal to the public to subscribe for utility tokens. In other words, a token offering open for subscription only to a limited number of persons will not qualify as an ICO. The AMF's General Regulation further specifies the relevant criteria, and the administrative instruction makes it clear that the AMF will not grant visas to ICOs limiting the offer to less than 150 persons (acting for their own account).

CONDITIONS

A visa may be granted for a specific ICO only under strict conditions and for a limited period of time (a maximum of six months):

- The token issuer must be established as a legal entity in France (either by incorporation in France or by registration of a branch in France);
- An information document (see description below) must be provided along with the notification of the offering;

³ The issuance of tokens that qualify as securities is already regulated by the law on offering of securities, such as the European Union Prospectus Regulation. Securities are a category of financial instruments strictly comprising equity securities issued by *sociétés anonymes* or *sociétés par actions simplifiées*, debt securities and units or shares in collective investment schemes. As such, the definition of security is more limited under French law than under US law.

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- The token issuer must set up a system for monitoring and safeguarding the assets raised during the offering;
 - The token issuer must notify the AMF of any material change to the offering made between the granting of the visa and the closing of the offering (“material” being defined as susceptible of having a significant influence on the investment decision); and
 - The token issuer must comply with anti-money laundering and anti-terrorism financing rules.

AMF’S ADMINISTRATIVE INSTRUCTIONS ON OFFERING DOCUMENTATION

The administrative instruction published by the AMF gives concrete steps to be taken for the information document to be compliant with the criteria for the granting of a visa. It also provides templates that could serve as checklists for the application.

- A mandatory disclaimer shall warn that an ICO entails risks of a partial or complete loss of the investment;
- Another warning notice shall describe the scope of the AMF approval;
- A mandatory declaration of the person responsible for the information document shall state that the provided information is accurate;
- The procedures for collection and management of the funds and digital assets raised via the ICO shall be published, containing mandatory information about the use of funds during the ICO, the right to convert digital assets collected into fiat currency or other digital assets, and other related matters;
- Non-exclusive examples are given of the types of asset monitoring and safeguarding system(s) that shall be in place (including the possibility of escrow arrangements, a multi-signature system and/or a smart contract that may be based on a distributed ledger technology); and
- The issuer must make the outcome of the offering publicly available within two business days following the closing of the offering. The required news release shall contain certain mandatory information,⁴ including the amount of funds and digital assets collected during the offering period, the total number of tokens of the same

⁴ AMF Regulation, Article 714-1

type issued, the token allocation structure by category of holder, and, where applicable, the amount of the funds and digital assets collected during the offering period and already used by the issuer.

The AMF will review the information document provided to the public, along with other requested documents, in order to assess the quality of the information provided and shall give notice of its approval or disapproval within 20 business days following the acknowledgement of receipt of the application (or, if applicable, 20 business days following its receipt of additional information requested by it). Where the AMF refuses to approve an application, it is required to provide justification for its decision.

NEW POWERS OF THE AMF

The Pacte Law grants the AMF powers to oversee the ICOs that have received its visa, as well as sanction powers. If the conditions for the granting of the visa are no longer met, the AMF will no longer permit the issuer to mention the fact that a visa has been granted for its ICO. The AMF may initiate legal proceedings to block access to websites of token issuers that publish false or misleading information regarding the granting of a visa. The AMF may also publish a black list.

ADVANTAGES OF THE VISA

Token issuers that are granted a visa are more readily able to establish a bank account since, under the Pacte Law, a French credit institution must open a bank account for an authorized issuer or provide justification for its refusal to do so. This is a major improvement in the development of ICOs, as financial institutions will have to establish objective, non-discriminatory and proportionate rules for the granting of a bank account. Refusing to open a bank account for an authorized token issuer will have to be justified by the financial institution, which will need to report the reason for the denial to the Prudential Supervisory and Resolution Authority. A decree from the French government will specify the remedies for breaches of the new regime and the time limits applicable to the opening of a bank account for a token issuer that has been granted a visa.

The visa will provide qualifying ICOs with a label that is expected to encourage investments. The AMF will publish a list (“white list”) of ICOs that have received a visa, giving the licensed ICOs improved visibility. However, the AMF makes it clear that the approval does not imply that the AMF has approved the appropriateness of the issuer’s project or authenticated the financial, accounting and technical information presented

in the information document – it only implies that the issue complies with the AMF’s visa regime.

The request for a visa is optional, but issuers who have not requested and received the AMF visa will not be able to use general solicitation in their offering process.

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