

# HOW CAN LAW COPE WITH INNOVATION?

---

A case study of France and its reform  
of digital assets

---

May 2019

## HOW CAN LAW COPE WITH INNOVATION?

*A case study of France and its reform of digital assets*

Reconciling law with innovation is often a challenge for legislators since, by definition, innovation departs from existing standards and frameworks. Some may therefore question the ability of the law to address innovative trends.

However, the PACTE bill<sup>1</sup> enacted in France in May 2019 includes provisions on digital assets and the token economy, which go against this common statement. Quite the contrary. This bill illustrates how regulators can innovate through law to support innovation.

### ◆ In what way is this reform innovative for the crypto economy?

The objective of the PACTE bill is to establish in France a regulatory framework for the crypto economy that is both attractive and comprehensive.

#### ATTRACTIVE

Because it strikes an original balance between

- (i) maintaining enough flexibility to support innovation,
- (ii) defining credible rules to facilitate interaction of this new economy with incumbent players (such as banks and institutional investors).

The new regime would indeed mainly provide for optional regulatory requirements, leaving it up to the market players to decide whether to opt for the regime.

#### COMPREHENSIVE

Because it addresses the entire crypto-ecosystem, based on the conviction that regulating both the primary and secondary markets of utility tokens is key in the efficiency of the future regime.

It includes regulatory provisions for (i) issuers of utility tokens, (ii) service providers on these utility tokens, (iii) investment funds likely to invest in utility tokens, and lastly (iv) credit institutions to ensure that the said issuers and service providers have access to banking services.

<sup>1</sup> Loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises.

## ◆◆ What will change for utility token issuers?

The PACTE bill aims to introduce into French law the possibility for utility token issuers to obtain a visa for their tokens' issuance.

For the purpose of this reform, utility tokens shall be understood as digital goods giving rise to one or more rights and which may be issued, registered, stored or transferred via distributed ledger technology<sup>2</sup>. The tokens, which qualify as financial instruments pursuant to MiFID II, are excluded from the scope of this regime.

This visa would be delivered by the French public authority supervising financial markets (the *Autorité des marchés financiers*, or AMF), if the offer and its issuer comply with a number of requirements, including the following:

- ◆ The issuer must provide token subscribers with a document containing all information relevant for the public and regarding the offer and the issuer. Such information, together with the information in the relevant marketing documents, shall be clear, fair and not misleading.
- ◆ The issuer must be a legal person incorporated or established in France.
- ◆ The issuer must put in place the appropriate means to monitor and safeguard the funds raised following the tokens' issuance.
- ◆ The issuer must comply with the obligations provided under French law on preventing the use of the financial system for the purposes of money laundering or terrorist financing (AML/CTF).

The General Regulation of the AMF will specify how these requirements must be implemented. These specifications should be finalised by the end of 2019, with the first visas potentially delivered by the AMF in late 2019/early 2020.

**Obtaining such a visa will be optional:** issuers may decide whether they seek the visa from the AMF. There will be no regulatory obligation compelling the issuer to do so. However, if an issuer does decide to obtain a visa, the requirements conditioning such visa become binding. The AMF would hence be granted the power to monitor and supervise compliance by said issuer with said obligations.

With this reform, the visa is intended as an incentive to facilitate issuers' approach of potential subscribers and other stakeholders. The legal framework is meant as a marketing tool for innovative players. The same approach is also used for services providers.

## ◆◆ What will change for digital asset service providers?

Pursuant to the reform, digital asset service providers ("DASP") established in France may opt into an optional regime. If they decide not to opt in, service providers established in France will still be able to run their activities without being suspected of unlawful conduct in France.

<sup>2</sup> The PACTE bill refers to "tout bien incorporel représentant, sous forme numérique, un ou plusieurs droits pouvant être émis, inscrits, conservés ou transférés au moyen d'un dispositif d'enregistrement électronique partagé permettant d'identifier, directement ou indirectement, le propriétaire dudit bien".

In the context of the PACTE bill, “digital assets” (or “*actifs numériques*” in French) mean utility tokens (as defined above) and “virtual currencies” (as defined in the 5<sup>th</sup> EU Anti-Money Laundering Directive European Directive)<sup>3</sup>.

However, if they decide to opt in, they will have to comply with all the requirements applicable under the optional regime and will be put under the authority of the AMF as licensed DASPs (just like utility token issuers).

In other words, as soon as a DASP established in France decides to opt in, all the applicable requirements pursuant to the optional regime become binding.

At this stage, digital asset related services covered by the optional regime are the following (where the services are provided in relation to digital assets that do not qualify as financial instruments under MiFID II):

- ◆ custodian wallet provider;
- ◆ digital asset/fiat exchange provider;
- ◆ digital asset/digital asset exchange provider;
- ◆ digital assets trading platform;
- ◆ execution of orders on digital assets on behalf of clients;
- ◆ digital asset portfolio management;
- ◆ investment advice on digital assets;
- ◆ underwriting of digital assets on a firm commitment basis;
- ◆ placing digital assets on a firm commitment basis; and
- ◆ placing digital assets without a firm commitment basis.

A decree will further define each of the services mentioned above. This decree is likely to be published by the end of 2019.

To seek a license from the AMF, DASPs established in France must permanently fulfil the following requirements:



Maintain a professional liability insurance coverage or own funds (the amount of which will be set in the AMF General Regulation).



Have in place adequate safety and internal control mechanisms.



Have in place a resilient IT system.



Have in place a system to manage conflicts of interest.

<sup>3</sup> European directive 2018/843.

The PACTE bill defines further requirements that must be fulfilled on an ongoing basis by licensed DASPs, such as the obligation to communicate to their clients clear, accurate and not misleading information (including in marketing communications); the obligation to disclose the fee policy; the obligation to put in place an effective policy for handling complaints; etc. The PACTE bill also lays down specific requirements for each of the services listed above. The details of the applicable requirements will be listed in the decree.

One specific exception to the optional nature of the regime is that **certain services providers** (i.e. custodian wallet providers and digital asset/fiat exchange providers) **must “register” with the AMF** and will be subject to AML/CFT requirements. In this context, registration means “declaration” and is different from licensing (which refers to the licence given by the AMF to those providers that opt-in). On this basis, the AMF will regularly publish a list of registered DASPs. **The provision of such services will be prohibited if the providers of such services are not registered with the AMF.**

This exception on the optional nature of the regime emphasises the significance of AML/CFT for France. It follows on from the implementation in France of the 5<sup>th</sup> EU Anti-Money Laundering Directive on the prevention of money laundering or terrorist financing to address the specific issues of the token economy in this field.

### ◆ **What are the other key provisions on the crypto-economy in this reform?**

Two sets of provisions must be highlighted.

First, **the PACTE bill will allow certain professional investment funds to invest in digital assets**, which was not possible until now in France. This proposal recognises that the development of this new economy may depend on the existence of appropriate investment vehicles capable of channelling the investments into it. Taking nevertheless into account the risks that this new category of assets may bear, the reform intends to rely on the skills and expertise of professional asset managers to manage these vehicles, the marketing of which shall be restricted to professional investors and high-net-worth individuals.

Second, the reform should address the difficulties that members of the crypto-ecosystem have encountered to date when dealing with banks. **The proposal intends to require from credit institutions that they set up objective, non-discriminatory and proportionate internal rules governing access to banking services for utility token issuers having obtained a visa, and licensed DASPs.** The legislator thus creates a new incentive to seek the regulatory authorisations described above.



## CONTACT US



**FRANCK GUIADER**

Innovation & FinTech  
T +33 (0)1 40 75 44 98  
franck.guiader@gide.com



**JENNIFER D'HOIR**

Innovation & FinTech  
T +33 (0)1 40 75 29 48  
jennifer.dhoir@gide.com



**MATTHIEU LUCCHESI**

Innovation & FinTech  
T +33 (0)1 40 75 96 57  
matthieu.lucchesi@gide.com



**JOHN LE GUEN**

Innovation & FinTech  
T +33 (0)1 40 75 94 70  
john.leguen@gide.com

## About Gide 255

Gide has put in place a team dedicated to offering strategic, legal and regulatory advice on all matters related to its clients' digital transformation. Headed by Franck Guiader, with Jennifer D'hoir, Matthieu Lucchesi and John Le Guen, this team of experts in the fields of regulation, innovation and strategy aims to offer "augmented" advice on changing business models and new behaviours that are deeply affected by the development of advanced technologies. The team will also offer high-end support to help advance the changing legal and regulatory framework both in France and abroad, whether ongoing or to come

Gide 255 covers in particular the growing stakes of blockchain, ICOs, artificial intelligence, automation and various aspects of data processing.

The recognised know-how of all Gide teams as regards business law, combined with the comprehensive experience of this new team on all challenges pertaining to digital transformation, together enable the firm to offer its clients a unique tool to help decision-making processes in a context that is disrupted by the advent of breakthrough technologies.

[gide.com](https://gide.com)

[gide255.com](https://gide255.com)

[@GideLawFirm](https://twitter.com/GideLawFirm)

---

You can find this article on our website in the News & Insights section: [gide.com](https://www.gide.com).

This newsletter is a free publication edited by the law firm Gide Loyrette Nouel (the "Law Firm"), and published for Gide's clients and business associates. The newsletter is strictly limited to personal use by its addressees and is intended to provide non-exhaustive, general legal information. The newsletter is not intended to be and should not be construed as providing legal advice. The addressee is solely liable for any use of the information contained herein and the Law Firm shall not be held responsible for any damages, direct, indirect or otherwise, arising from the use of the information by the addressee. In accordance with the French Data Protection Act, you may request access to, rectification of, or deletion of your personal data processed by our Communications department ([privacy@gide.com](mailto:privacy@gide.com)).

---

Algiers  
Beijing  
Brussels  
Cairo  
Casablanca  
Istanbul  
London  
New York  
Paris  
Shanghai  
Tunis  
Warsaw