

## AML-CFT<sup>1</sup> and CRYPTO-ASSETS: HOW DO MEMBER STATES TRANSPOSE THE AML5<sup>2</sup> DIRECTIVE?

### Comparative analysis of the French and British regimes

The European directive AML5 requires that Member States subject certain activities on "virtual currencies" to a registration obligation with a view to combating money laundering and the financing of terrorism with the relevant national authorities.<sup>3</sup> This obligation is imposed on providers engaged in exchange services between virtual currencies and fiat currencies, as well as on custodian wallet providers.<sup>4</sup> In compliance with the AML5 Directive, Member States must transpose these provisions into their respective national laws by **10 January 2020 at the latest**.

The loi PACTE<sup>5</sup> of 22 May 2019 enabled France to transpose this law by including in French law new provisions applicable to a new category of assets, "digital assets" (covering "virtual currencies" within the meaning of AML5, but also "tokens" as defined in Article L. 552-2 of the French Monetary and Financial Code). On 25 October 2019, the British authority, the Financial Conduct Authority ("FCA") issued a press release<sup>6</sup> in which it clarifies the new regime applicable to "crypto-asset activities" in the field of AML/CFT.

What approaches have been adopted by the French and British legislators in transposing AML5? **Are there different interpretations of the definition of services concerned and the scope of the measures put in place?**

### Financial regulators at the heart of the AML-CFT provisions pertaining to crypto-assets

Like its French counterpart (AMF), the FCA **will be closely involved** in the supervision service providers carrying out crypto-asset activities, in accordance with their AML/CFT obligations. Regarding the FCA, this competence will concern both the examination of applications for registration of those actors concerned (such obligation involves in particular that the competence and good repute of the managers be examined), as well as their ongoing supervision with regard to compliance with AML/CFT obligations (in terms of customer due diligence, reporting and internal procedures). By comparison, in France, the AMF will be the authority to which registration applications will be submitted. However, the AMF will work in coordination with the *Autorité de contrôle prudentiel et résolution* ("ACPR"), which the AMF must consult on the registration applications it receives and which is charged of the ongoing monitoring of the compliance with AML/CFT obligations by registered actors.<sup>7</sup>

### Scope of requirements applicable and definition of services targeted

In accordance with the provisions of AML5, two types of activities are subject to registration under the provisions of French and British law: **(i)** activities for the exchange of "virtual currencies" into legal tender currencies<sup>8</sup> and **(ii)** activities for the safekeeping of private cryptographic keys on behalf of third parties for the purpose of holding, storing and transferring virtual currencies. While these activities are indeed referred to in French and British legislation, they are referred to under different terminology, meaning differences in the interpretation of the Directive are possible.

<sup>1</sup> Anti-money laundering and combating the financing of terrorism ("AML-CFT").

<sup>2</sup> Directive 2018/843 of 30 May 2018 modifying EU Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ("AML5").

<sup>3</sup> Article 2, 29) which amends Article 47 of 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 ("AML4").

<sup>4</sup> Article 1, 2) of AML5 which amends article 3 of AML4.

<sup>5</sup> Law no. 2019-486 of 22 May 2019 on the growth and transformation of companies ("Plan d'action pour la croissance et la transformation des entreprises," Loi PACTE").

<sup>6</sup> FCA, "*Cryptoassets: AML / CTF regime*", 28 October 2019.

<sup>7</sup> For service providers carrying out crypto-asset activities, which do not have to be registered based on the services provided, but which decide to seek an optional license from the AMF (see below), the AMF is in charge of the ongoing monitoring of their compliance with AML/CFT obligations.

<sup>8</sup> Article 47.1 and article 3.19 of AML5.

As regards the **definitions of the activities or services concerned, the French and British frameworks are not yet completely fixed**. While the *Loi Pacte* has indeed retained a list of services on "digital assets", taking care to define the term "digital assets" (a broader category than that of "virtual currencies" alone - see above)<sup>9</sup>, **the implementing decrees specifying the definitions of the services concerned are still awaiting publication**. The list of services detailed in the *Loi Pacte* includes in particular (i) buying or selling digital assets in legal tender<sup>10</sup> and (ii) the custody on behalf of third parties of digital assets or access to digital assets, where applicable in the form of private cryptographic keys, for the purpose of holding, storing and transferring digital assets<sup>11</sup>.

In the UK case, **HM Treasury has not yet published any formal conclusions following its April 2019 consultation**<sup>12</sup> in which it suggested several categories of "crypto-asset activities". These included (i) crypto-asset exchange provider exchanging fiat currency for a crypto-asset and vice versa, and (ii) custodian wallet providers.

As regards the definition of the term "crypto-asset" used in British regulatory language, the approach appears to be relatively similar to that adopted in France. Indeed, in its consultation document, HM Treasury **also seems to go beyond the concept of "virtual currencies"** inherited from AML5, to cover the concepts of "exchange tokens", "security tokens" and "utility tokens"<sup>13</sup>.

With regard to the definitions of services covered by the registration requirement under AML5, the point that seems potentially open to interpretation is the custody service for private cryptographic keys on behalf of third parties. The approach being considered by HM Treasury seems relatively comprehensive ("a business that looks after the customers' tokens in its IT system or server and may administer or transfer the token on behalf of the customer"). For its part, the French legislator could limit this service to controlling, on behalf of third parties, the means of access to the digital assets registered in distributed ledger system.

**These initial observations highlight that a case-by-case analysis of national legislation will likely be necessary to ensure that the services provided are covered by AML-CFT schemes.**

## A desire to go beyond the requirements set out by AML5

Under the impetus of the recommendations made by the FATF<sup>14</sup>, France and the United Kingdom wished to go further than the provisions of the AML5. While (i) France **has proposed optional approvals**, (ii) the United Kingdom is **considering extending the scope of the registration requirement** to other "crypto-asset activities" than those specifically referred to in AML5.

In terms of applicable law, **the French and British regimes will potentially present significant differences for players**.

(i) In the United Kingdom, the obligation to register with the FCA for the purposes of AML-CFT could also apply to "crypto-asset exchange providers exchanging one crypto-asset for another crypto-asset", "peer to peer providers"<sup>15</sup>; "issuers of new crypto-assets"<sup>16</sup>; and to "publication of open-source software"<sup>17</sup> activities. However, with regard to the latter, the FCA states in its October 2019<sup>18</sup> communication that it is very likely that it will eventually be rejected by the UK Treasury in the final rules.

<sup>9</sup> Article L.54-10-1 of the French Monetary and Financial Code.

<sup>10</sup> Article L.54-10-2-2° of the French Monetary and Financial Code.

<sup>11</sup> Article L.54-10-2-1° of the French Monetary and Financial Code.

<sup>12</sup> FCA, "*Cryptoassets: AML / CTF regime*", 28 October 2019.

<sup>13</sup> HM Treasury, "*Transposition of the Fifth Money Laundering Directive : consultation*", April 2019 - point 2.23 (p. 15).

<sup>14</sup> Recommendation 15 of the FATF (Financial Action Task Force), October 2018, covers a wide range of "virtual asset" service providers. In addition to crypto to fiat conversion and custody services, the FATF requires registration of crypto to crypto exchange services, as well as virtual asset "transfers", and Initial Coin Offering ("ICO") issuers.

<sup>15</sup> "A business that provides an online marketplace which facilitates the exchange of fiat currencies and cryptoassets (both fiat-to-crypto and crypto-to-crypto) between prospective buyers and sellers"; FCA, "*Cryptoassets: AML / CTF regime*", 28 October 2019.

<sup>16</sup> "A business that sells a cryptoasset, promoted or sold as a new type of cryptoasset or one that will become usable in the future, in exchange for fiat currency"; FCA, "*Cryptoassets: AML / CTF regime*", 28 October 2019.

<sup>17</sup> "A business that provides software such as an application that may be downloaded and used by a customer on their device to store or administer a token, e.g. a non-custodian wallet application that a customer can download onto a device to store the private key in relation to a token"; FCA, "*Cryptoassets: AML / CTF regime*", 28 October 2019.

<sup>18</sup> FCA, "*Crypto-assets: AML / CTF regime*", 28 October 2019.

(ii) For its part, the French framework has organised an **optional regime** based on the *Loi Pacte* that allows digital assets service providers to apply for an optional license from the AMF, which triggers the application of a series of obligations, and in particular a subjection to the AML-CFT obligations. The French system thus sets forth two types of requirements: (i) some that are mandatory (inherited from AML5) for the services of buying or selling digital assets in legal tender, and of custody on behalf of third parties; and (ii) some that are optional, for services such as the trading of digital assets for other digital assets, the operation of a trading platform for digital assets, or advice to investors in digital assets.

While the consequences in terms of applicable law could be different in the United Kingdom and in France, the regulatory approaches adopted on both sides of the Channel are similar. **They established a list of services** ("services on digital assets" in France and "crypto-asset activities" in the United Kingdom) **which then made it possible to vary the scope of the applicable regulatory obligations.**



*These differences in the interpretation of AML5 are also to be expected within other European jurisdictions. Italy<sup>19</sup> and Germany have also recently published or announced the publication of their rules on this subject. Players operating on a cross-border basis within the European Union will therefore **have to be more vigilant in order to ensure compliance with the rules applicable in the Member States in which they operate.***

*Lastly, it should be recalled that the FATF continues to be active in the regulation of activities related to crypto-assets, as demonstrated by its recent publication in June 2019<sup>20</sup> that will have to be quickly taken into account by member jurisdictions, **suggesting new regulatory movements in the short term.***

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<sup>19</sup> Legislative decree no. 125 published on 4 October 2019.

<sup>20</sup> FATF, "Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers", June 2019.

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