

## The development of ICOs in France: just an illusion?

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While France has recently deployed significant efforts to become the chosen home for initial coins offerings (ICOs), one may still wonder about the actual role this new tool, using the Blockchain technology, will play to address corporate financing issues.

The upcoming introduction into French law (with the so-called “*Loi PACTE*”) of a special regime for initial coins offerings, including the principle of an optional visa delivered by the French Financial markets regulator (“*Autorité des marchés financiers*” or AMF), is a considerable step forward, but this approach also reflects the desire to restrict the use of this new technique.

Despite the fact that the new regime is designed to encourage ICOs, it will not apply to the issuance of security tokens, but exclusively to the issuance of utility tokens, to which attach various non-financial rights (e.g. access to online services marketed by the issuer, or preferential conditions on the goods or services sold by the issuer, etc.).

This restrictive approach is all the more paradoxical as the French Ordinance No. 2017-1674 dated 8 December 2017 now makes it possible to use Blockchain technology to register or transfer financial securities by granting probative value to the use of shared electronic recording devices. This reform is key as it now allows full recognition of security tokens by the French legal system.

With this reform, it is therefore fully feasible to issue security tokens provided that such issuance is carried out in accordance with the rules of French company law. This issuance may be made solely in Euros for tokens qualifying as equity securities, but it could be made in crypto currency for tokens qualifying as debt securities, even if these are redeemable or convertible into shares (as long as the issuance contract provides how the conversion in Euro should be handled).

Alas, by excluding financial securities from the future regime of initial coins offerings, the legislator is perhaps depriving France of a historic opportunity to be one of the first countries, if not the first, to offer a secure regime for ICOs involving instruments that constitute the vast majority of financing raised by companies.

In this respect, like financial securities, utility tokens may present some form of capital loss for investors, for instance in the event of the insolvency of the issuer or if the latter refuses to perform the agreed service. Furthermore, if the service provided by the issuer to the bearer through the utility token is treated as a taxable transaction, the cost of such financing for the issuer will ultimately be higher than that of a “classic” financing through equity or debt securities.

For practitioners and business professionals, ICOs will not be able to develop effectively in France if their scope of application remains limited and if the legislation related to the offering of securities to the public is not adjusted in the short run. The application of these rules in their current form will indeed oblige issuers of financial tokens to establish a prospectus, subject to AMF's approval; it can be reasonably anticipated without too much hesitation that this obligation, added to the intrinsic complexity of carrying out an ICO compared to a traditional issuance of securities, will be deterrent for potential issuers.

If we really want to promote the development of ICOs in France, we can only expect for (i) the extension of the regime covering public token offerings to financial tokens, and (ii) a better balance to be found between the constraints weighing on issuers and the legitimate protection of the investor public, in particular by implementing specific arrangements for ICOs to allow prospectus' exemption, for example based upon the quality of the subscribers (reserved for qualified investors), or the number of investors eligible to subscribe to the ICO (a similar approach is proposed by *Loi PACTE* to determine the public nature of a token offering).

Failing this, the relative attractiveness France that seems to currently offer for potential candidates carrying out an ICO may rapidly fade away, as the virtual and disintermediated nature of these new financing tools creates an increased competition between national legislations.

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