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DISCUSSION PAPER ON INITIAL COIN OFFERINGS (ICOs)

This discussion paper focuses on Initial Coin Offerings (ICO). It includes a description of ICOs, a warning on the risks these types of operation represent, a legal analysis of ICOs with respect to the rules that fall under the remit of the AMF to enforce, and three options for future regulation of ICOs. The consultation is open from 26 October 2017 until 22 December 2017. Participants are invited to send their responses by 22 December 2017 at the very latest to the following address: directiondelacommunication@amf-france.org.

1. INTRODUCTION AND BACKGROUND INFORMATION

Initial coin offerings (ICOs) are DLT[1] fundraising operations[2] involving the issuing of tokens. These operations have recently become more popular and attracted considerable media coverage. Several ICOs have already been carried out in France, and the amounts involved continue to increase.

On a wider scale, the rapid expansion of DLTs in recent years resulted in the emergence of a blockchain industry, which comprises several kinds of operator providing financial services[3] through DLT environments. The growing influence of these technologies prompts several questions, particularly from a legal perspective.

The financial services landscape is currently contending with the emergence of these technologies, which are being developed and used both by start-ups and long-standing operators in different ways.

Given the innovative and disruptive nature of DLT in the financial services field, and the rapid growth of the blockchain industry, it seems timely to examine the phenomenon of ICOs and their practical consequences in a comprehensive manner.

In legal terms, ICOs raise many questions under positive law, especially regarding the qualification and understanding of the transactions and instruments resulting from this new paradigm, which is both economic and technological,.

This ICO discussion paper is the AMF's first step towards understanding these new challenges.

[1] Distributed ledger technology

[2] For a simpler presentation and easier understanding by the reader, it has been decided in this discussion paper to use terms such as "currency", "fund", "sums", etc. to refer to both currencies that are legal tender and cryptocurrencies, and terms such as "purchase", "price", "sale", etc. to refer to the transfer of ownership of tokens, whether this effectively results from a purchase using a currency that is legal tender or from an exchange against cryptocurrency. The AMF reminds readers, however, that the payment of sums of money is regulated in France. In accordance with article L. 111-1 of the Monetary and Financial Code, the currency of France is the Euro and, in accordance with article 1343-3 of the Civil Code, the payment, in France, of a monetary obligation, takes place in euros or (in exceptional cases) in "another currency". This discussion paper does not mean that the AMF considers cryptocurrencies that are not legal tender to be currencies that may be used for payment. The AMF would particularly like to stress that the risks of investment in a currency that is legal tender in its country of issue are not comparable with the risks of investment in a cryptocurrency that is not legal tender.

3 Applications in the areas of payments, fixed-income markets, know your customer (KYC) processes, international trade finance, data storage (cloud), etc.

1.1. ICO definitions and initial observations

ICOs involve coins (or "tokens") being issued in order to raise money from the general public. They are known as initial coin offerings since they bear similarities to traditional initial public offerings (IPOs), which involve issuing equity securities in order to raise money from the general public. However, ICOs are specific transactions that differ from IPOs particularly in terms of the nature of the rights acquired by the investor since tokens do not, in principle, have the same characteristics as equity securities.

ICOs are a new method of funding based on blockchain technology, which is generally used by fintechs or communities of developers. The operation itself is carried out via a decentralised ledger technology application shared between users. This means that, in theory, it is conducted without a financial intermediary.
Such fundraising serves to launch or develop a project that has been predefined by the ICO initiators. These projects can vary in nature, but they tend to involve complicated technology and are aimed primarily at an informed, tech-savvy audience likely to understand the investment universe in question. They can also, however, target the general public.

For those who invest in the virtual tokens issued during the ICO, the counterparty can take several forms depending on the rules governing the operation. Once the project reaches a certain stage, tokenholders tend to benefit from:

- Gains (with the meaning of the provisions of the Civil Code), be these in the form of profits or an increase in the value of their tokens, which they can look to sell if the project is successful; and/or
- Voting or governance rights in their capacity as participants in the decentralised network; and/or
- Usage rights, e.g. the right to use the network or a service offered by the issuer or the issuing community.

The ICOs and the tokens issued through such operations can therefore be different in nature and give rise to different rights or privileges.

An ICO campaign tends to unfold in three stages.

Stage 1: Announcement of the ICO

ICOs are generally announced online via publication of an executive summary, which provides an overview of the objective pursued. This summary offers a chance for the community of users to offer their reactions and feedback. Some ICOs are advertised in the media.

Stage 2: Publication of the offering

Most issuers or issuing communities publish a plan or white paper online, specifically and generally indicating:

- the nature of the project and the funds required for it to be completed;
- the members of the community or the company created;
- the type and quantity of tokens that will be held by the project promoters;
- the objectives pursued and road map;
- the types of settlement assets accepted (traditional legal tender and/or cryptocurrencies);
- the duration of the ICO campaign.

Stage 3: Sale of tokens

Tokens are issued automatically in exchange for a transfer from the investor in the requested currency. The investors thereby purchase the issued tokens, which represent an "interest" or a "value" attached to the issuer or the issuing community. Since tokens bestow no traditional financial or governance rights, they do not grant rights comparable with those usually held by shareholders.

Subsequently, depending on the success of the ICO, the tokens created and issued can be traded on secondary markets set up by online trading platforms. The tokens are designed to be fungible and transferable. The purchase of tokens during an ICO or on secondary markets entails investing in the project of the issuer or the community of users.

ICOs are becoming increasingly popular worldwide. In just a year, the amounts raised by ICOs have risen dramatically. During the fourth quarter of 2016, the figure stood at around €1 million, tens of millions of euros were raised in the first half of 2017, and in the third quarter of 2017, several ICOs raised hundreds of millions of euros.

These figures should be viewed with caution, however, because there is no reliable source. It is nevertheless estimated that around €1.5 billion was raised worldwide through ICOs between January and September 2017[4]. When taking the ICO token secondary markets into consideration, at the date of publication of this discussion paper, the total market capitalisation of these tokens was around €5 billion.

At the date of publication of this discussion paper, at least four ICOs have taken place in France, and several other proposed ICOs have been brought to the AMF's attention. The four ICOs already carried out were as follows:

- Two by existing French companies;
- One by a group of individuals that founded a French company a few weeks after the ICO;
- One by a group of French-based individuals that is expected to found a French company in the near future.

The total amount raised by these four ICOs is estimated at around €80 million. At the date of publication, the secondary market capitalisation of the associated tokens stood at approximately €350 million.

It is important to stress that ICOs are a global phenomenon. Excluding when the issuer or issuing community bans citizens of certain jurisdictions from purchasing tokens, ICOs are a cross-border method of raising funds from the general public because they are conducted on the internet. Moreover, the issuers or issuing communities do not always specify their own location. It is possible that certain ICO communities are located in several countries and should therefore, in the absence of tangible evidence to enable to situate them or define the law governing the issuing of the tokens, be considered as multinationals or even stateless entities.

The various authorities across the globe that have expressed an opinion on ICOs have warned of the risks these operations pose to investors. They have also adopted disparate approaches, which can be put into three distinct categories[5]:

[4] Approximately $1.8 billion.
[5] This summary presentation is not exhaustive and does not include all of the responses given by foreign authorities on the phenomenon of ICOs.

- Certain authorities have declared a ban on ICOs, such as the regulators in China[6] and South Korea[7], believing particularly that there have been many instances of fraud;
- Several authorities deal with ICOs on a case-by-case and constant-law basis, with various nuances:
  - the European Securities and Markets Authority (ESMA)[8], the UK's Financial Conduct Authority (FCA)[9] and the Swiss Financial Market Supervisory Authority (FINMA)[10] believe that certain ICOs should be governed by the existing legal framework for public offerings of securities or the marketing of financial instruments, while other ICOs are not governed by existing regulations, with no clarification at this stage as to the criteria for categorising different ICOs;
  - in one particular ICO[11], the United States Securities and Exchange Commission (SEC) determined that the tokens issued through this operation constituted "securities"[12] and that the ICO in question was therefore governed by US federal law[13]. The SEC specified that federal laws apply to any "security", regardless of its method of distribution;
  - In Germany, the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) has indicated that cryptocurrencies are considered to be securities under German banking law. BaFin governs entities that provide investment services relating to virtual currencies, just as it does for services relating to equities, derivatives or currency contracts. However, at the time of writing, it has not yet adopted a general stance on ICOs;
  - the Monetary Authority of Singapore (MAS)[14] has indicated that it regulates ICOs under existing law[15] in the event that the tokens are regulated products, reiterating however that it does not regulate cryptocurrencies;

- Other authorities have indicated that, at this stage, they do not regulate ICOs, and will not do so until they have an in-depth understanding of how these operations work. This is notably the case for the Australian Securities and Investments Commission (ASIC), which indicates it has a neutral approach with regard to the technology used, and the Gibraltar Financial Services Commission (FSC)[16], which intends to publish guidelines in 2018 with a view to making Gibraltar a conducive environment for ICOs.

  The Central Bank of Lithuania has also said that ICOs are not regulated, but that in some cases they should be regulated when tokens are sold to retail investors and given the high risks of them losing capital[17].

1.2. Discussion paper objectives

[6] Statement released by the People's Bank of China and six other Chinese regulators on 2 September 2017
[7] Statement released by the South Korean Financial Services Commission on 29 September 2017
[8] Statements from the ESMA, as reported by the AGEFI on 5 October 2017
[9] Statement published on 12 September 2017: https://www.fca.org.uk/news/statements/initial-coin- offerings
[10] Statement published by FINMA on 29 September 2017: https://www.finma.ch/fr/news/2017/09/20170929-mm-ico/
[11] Statement published by the SEC on 25 July 2017: https://www.sec.gov/news/press-release/2017-
[12] The SEC uses the Howey test to determine what constitutes a security that should be governed under federal law. "Securities" include "investment contracts". An "investment contract" is a financial investment in a common enterprise with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others (source: https://www.sec.gov/litigation/investreport/34-81207.pdf, page 11).
[13] As such, these digital assets their issuers must adhere to federal laws on registration, consumer protection, disclosure, security and market integrity.
[14] Statement published by the MAS on 1 August 2017: http://www.mas.gov.sg/News-and-Publications/Media-Releases/2017/MAS-clarifies-regulatory-position-on-the-offer-of- digital-tokens-in-Singapore.aspx
[15] The MAS refers to the Securities and Futures Act (Cap. 289) (SFA)
[16] Statement published by the Gibraltar Financial Services Commission on 22 September 2017 and available at: http://www.fsc.gi/news/statement-on-initial-coin-offerings-250
[17] Statements by the Central Bank of Lithuania of 10 and 11 October 2017: https://www.lb.lt/en/news/bank-of-lithuania-announces-its-position-on-virtual-currencies-and-ico

Based on these initial observations, insofar as ICOs are public offerings aimed at a vast online community, it is necessary to examine to what extent, and under what conditions, some ICOs could be governed by rules that the AMF is responsible for enforcing.

This discussion paper aims to gather opinions, comments and feedback from operators, industry professionals and potential investors on matters pertaining to ICOs.

It will examine solutions that could be introduced under current law and explore different avenues for regulating these operations in line with best market practice, in accordance with the three options described later in this discussion paper (see section 4 below).

1.3. Discussion paper deadline

Participants are invited to send their responses and feedback by **22 December 2017** at the very latest to the following address: directiondelacommunication@amf-france.org.

2. WARNING TO POTENTIAL INVESTORS

Investing in tokens or any other instrument issued as part of an ICO entails very significant, and partly unforeseeable, risks. Potential investors should pay particular attention to the following risks:

- **Lack of regulation**

  In view of current legislation and how these fundraising operations are structured, it would appear that many ICOs are unregulated in France. Consequently, investors in these schemes benefit from none of the guarantees associated with IPOs on regulated financial markets or other financial investments regulated by the AMF. Similarly, certain ICOs set up abroad and with tokens available for purchase by French investors are not regulated in their country of origin.

  Other ICOs may be subject to regulation, in France or abroad, by which they do not necessarily abide. Such offerings may be considered illegal in France or abroad.

  In any event, **it is incumbent upon the originators and/or promoters of the ICOs to check that the fundraising operations in question comply with any applicable regulations**, including those on public securities offerings and intermediaries in miscellaneous assets.

- **Risks associated with information documents**

  In the absence of any regulation, the only detailed information available to investors is usually the marketing documentation or white paper that presents the ICO in question. As things stand, this documentation is not usually subject to any legal requirement. It may contain major omissions or inaccuracies and present certain realities or forecasts only partially or in an excessively optimistic manner. For example, it may not give the names of the people who are legally responsible for the offering or the competent jurisdiction in the event of a dispute. **Under no circumstances should this documentation be compared to an information document that requires prior approval from the AMF.**

- **Risks of capital loss**

  Capital invested in ICOs is not guaranteed. Investing in tokens or any other instrument issued as part of an ICO entails a significant capital risk. Financial risks incurred by investors may not be mentioned in the information document.

- **Volatility or market risk**

  The value of tokens, just like that of cryptocurrencies in general, can be extremely volatile and subject to significant, and largely unforeseeable, fluctuations. Moreover, the market or markets on which these tokens are traded do not offer the same guarantees that are generally applicable to conventional financial markets. .

  It is also quite possible that no resale market develops for the tokens, meaning that their holders are either unable to sell them or have to sell them on unsatisfactory terms.

- **Risk of scams or money-laundering practices**

  ICO promoters or originators may not use the funds they have raised in the way they said they would initially. Some international ICOs have been frauds or scams. Moreover, some ICOs are suspected of being used to launder money, which is confirmed in a report published by the French financial intelligence unit Tracfin in 2014. This is why certain foreign regulators have chosen to ban them (see above). Note that it is up to all token issuers to make sure that their operations are not facilitating or enabling money laundering or terrorist financing.

- **Risks associated with funded projects**

  ICOs tend to fund very early stage projects, and in some cases their object is yet to be known. Their business plan may not have been analysed or verified by an independent third party. Furthermore, business plans often also contain many assumptions and financial forecasts that may prove to be optimistic, inaccurate or incorrect. Lastly, there is no guarantee that these projects will or can be completed and/or that they will not meet the success banked upon.

In addition to the independent checks and research they are advised to carry out, potential investors should:

- carefully consider and analyse each of the risks described above before taking an investment decision. The risks presented are purely indicative and do not necessarily reflect all the risks associated with buying digital tokens;

- obtain precise information about the project funded by the ICO and the person or people offering the tokens for sale (existence of a company, country of origin, organisational rules, track record, etc.);

- ask the ICO promoters or the token sellers about the scale of associated risks, including the legal liability incurred by investors;

- obtain information on the value of the tokens being offered for sale and how they can be sold on.

3. CURRENT ICO REGULATION

In light of the hugely disparate nature of ICOs, and of the tokens issued through these operations, any regulation that does currently apply to these operations can be determined only on a case-by-case basis. Most of the offerings of which the AMF is aware, however, appear not to be covered, in principle, by the rules that fall under the remit of the AMF to enforce, particularly those that govern public offer of "financial securities", equity crowdfunding, collective investments or intermediation in miscellaneous assets.

The legal status of digital tokens is difficult to ascertain[18], partly because of the diversity of the instruments issued, which may give rise to various and disparate governance or financial rights depending on how the ICO is structured[19], and partly because there is no specific legal framework for these types of instrument. Moreover, there are currently no legal precedents to help clarify the legal status of tokens.

3.1. ICOs and financial securities

Since ICOs may resemble public fundraising operations, it should be debated whether token sales could fall under regulations governing the public offer of financial securities, under which issuers are required (unless exempted) to draft a prospectus for approval by the AMF.

Under French law, "financial securities" are defined and limited as follows in article L. 211-1(II) of the Monetary and Financial Code:

"*II. – Financial securities include:*
1. Equity securities issued by joint-stock companies
2. Debt securities
3. Units or shares in undertakings for collective investment "

With regard to the ICOs that have taken place in France to the AMF's knowledge, it seems difficult to consider that those tokens can be classed as equity securities within the meaning of article L. 211-1 of the Monetary and Financial Code. This is because the issuers of the tokens are rarely companies and have no share capital as such. Even though some of the tokens issued as part of these ICOs bear some of the attributes of equity securities (bestowing voting rights or even rights to the issuer's "profits"), they do not provide access to the capital of a commercial company. This said, tokens may be legally classed as equity securities if they bestow the same economic and governance rights as those traditionally attached to shares or preference shares. The AMF acknowledges the fact that a token issuer without legal personality should not be considered an insurmountable obstacle to classing the tokens as financial securities. In practice, said entities may be considered de facto corporations.

It also needs to be established whether the tokens can be considered debt securities. Article L. 213-0-1 of the Monetary and Financial Code states that "each debt security represents a claim against the legal entity or securitisation common fund that issues it". Traditionally, a debt security is largely understood in the strict sense of a debt representing a sum of money. In this sense, none of the ICOs of which the AMF is aware resulted in the issuing of tokens comparable with debt securities or instruments designed as a loan reimbursement credit or

[18] The object of this analysis is not to qualify the legal status of ICOs or the tokens issued therein in terms of all positive law; such qualification, where required, is reserved for the competent jurisdictions. Essentially, the aim is to assess whether the ICOs and tokens issued in France, of which the AMF is aware, are likely to fall under the main rules that fall under the remit of the AMF to enforce.

[19] Tokens mainly grant their holders a right to use property or a technology or service. Some tokens also grant political and/or financial rights to their holders, although this is not necessarily the case.

entitling investors to a monetary reimbursement at the issuer's expense. Consequently, in view of current case law and the nature of the ICOs of which the AMF is aware, the tokens do not appear to qualify for the legal status of debt securities. However, this position may evolve if the notion were to prevail that the object of the "debt" may be something other than a sum of money.

As will be discussed in more detail below, in most cases the tokens cannot be classed as units or shares of collective investment undertakings as defined in article L. 211-1 of the Monetary and Financial Code, meaning that, in principle, they cannot be awarded the status of financial securities.

Consequently, the tokens issued in France of which the AMF is aware should not fall under French regulations governing the public offering of financial securities. This approach could be different in the case of ICOs giving rise to the issuing of tokens granting the same or comparable rights to those granted by financial securities (i.e. governance of financial rights).

3.2. ICOs and crowdfunding

Crowdfunding investment advisers (CIPs) and certain investment services providers (PSIs) use websites to conduct crowdfunding operations. These operations involve certain financial instruments or minibonds (i.e. securities pledged by a company in exchange for credit), give rise to investment advice, and are carried out on websites that fulfil certain regulatory criteria or are reserved for qualified investors or a restricted group of investors. As digital tokens are, in principle, neither financial instruments nor minibonds, no investment advice is provided during ICOs, the offers are not made via websites that fulfil regulatory criteria, and they are not reserved for qualified investors or a restricted group of investors. As such, it would appear that, under current law, the French crowdfunding rules should not apply to ICOs.

3.3. ICOs and collective investments

3.3.1. Undertakings for Collective Investment in Transferable Securities (UCITS)

UCITS are entities that may or may not have legal personality (in France, SICAVs do while FCPs do not), that must abide by stringent regulatory requirements, and whose sole purpose is to hold and manage a portfolio of financial instruments or deposits on behalf of a collective group of retail investors. ICOs are not typically presented as being intended to manage a portfolio of financial instruments and deposits on behalf of investors. Usually, they are pitched as a fundraising operation for an industrial or business project. Accordingly, it seems unlikely that a "community" of ICO token investors could be regarded as a UCITS.

3.3.2. Alternative investment funds (AIFs)

AIFs are non-UCITS collective investments that "raise capital from a number of investors, with a view to investing it in accordance with an investment policy defined by the AIF or its management company, for the benefit of those investors". AIFs cannot have a general business or industrial purpose. They raise capital in order to invest it according to a predefined investment policy covering the procedures for managing the assets held by the fund, with the aim of generating a collective return for investors.

ICOs, meanwhile, are typically presented as fundraising operations whose objective is to finance an industrial or business project, rather than to implement an asset management policy with the aim of generating a return for investors (even though some offerings may generate individual returns if the value of tokens increases). However, the possibility that some types of ICOs might qualify as AIFs cannot be ruled out.

3.3.3. Other collective investments

"Other collective investments" make up a specific category of investment vehicles that are neither UCITS nor AIFs. One of their peculiarities is that they are reserved for one person. In principle, however, ICOs target multiple token investors and therefore should not qualify as "other collective investments".

3.4. ICOs and intermediaries in miscellaneous assets

France's intermediaries in miscellaneous assets regimes draw on the notion of "property". Although this notion has no legal definition, it is generally agreed that property is anything that may be owned and that has economic utility allowing it to be circulated. These criteria could apply to tokens insofar as they may be obtained by investors, who acquire them from an issuer on a payment basis and may use them to receive certain services or sell them to a third party.

- **Intermediaries in miscellaneous assets within the meaning of article L. 550-1, I of the French monetary and financial code (intermediaries in miscellaneous assets 1)**

If a fundraising opportunity is offered to more than one person at the same time through an online advertisement, forums or other advertising materials, ICOs generally satisfy the first set of criteria used to qualify intermediaries in miscellaneous assets 1, i.e.: "*whoever, directly or indirectly, by means of advertising or direct marketing, regularly invites one or more clients or potential clients"*.

The second set of criteria covers the purpose of fundraising, which may be to subscribe to life annuities or to acquire title to movable or immovable property where the acquirers do not perform the management thereof themselves or where the contract offers a buyback or exchange option with revaluation of the capital invested.

ICOs might be regarded as allowing investors to acquire title to intangible movable property in the shape of tokens. An ICO might also arrange for tokens to be managed by a person other than the investor or for a token buyback facility to be put in place.

Accordingly, some ICOs could fall within the intermediaries in miscellaneous assets 1 regime if they arrange for token acquirers not to perform token management or make a token buyback facility available to acquirers.

- **Intermediaries in miscellaneous assets within the meaning of article L. 550-1, II of the French monetary and financial code (intermediaries in miscellaneous assets 2)**

An intermediary in miscellaneous assets 2 is defined as follows: "*Whoever invites one or more clients or potential clients to acquire title to one or more assets by highlighting the possibility of direct or indirect financial returns or having a similar economic effect*".

ICOs might be regarded as being offered to several potential clients and as seeking to allow investors to acquire ownership rights to intangible movable property in the form of tokens. If the ICO's white paper or advertising material highlight the possibility of financial returns on tokens, the offering might fall within the scope of the intermediaries in miscellaneous assets 2 regime.

Some ICOs might therefore fall under the scope of the intermediaries in miscellaneous assets 2 regime if they

highlight the possibility of direct or indirect financial returns.

Questions:

3.4.1. Do you agree with this analysis?

3.4.2. Can you think of any other ICO characteristics, with regard to positive law, that should be taken into consideration in the legal analysis of tokens?

4. HOW SHOULD INITIAL COIN OFFERINGS BE REGULATED GOING FORWARD?

At this point, the legal analysis indicates that while some ICOs could be covered by applicable positive-law regulations, the vast majority of current offerings could well escape AMF regulation entirely, even though they involve the solicitation of public savings and potentially very large amounts, not only in cryptocurrencies but also in euros in some cases.

Accordingly, three regulatory options are possible:

4.1. Option 1: Maintain a regulatory status quo and establish best practices

Under this solution, only ICOs covered by existing legal provisions would be regulated, i.e. probably only a tiny proportion of offerings based on the characteristics of the tokens that were analysed. Other ICOs would not be subject to any regulation in France.

This would be the most open approach to these innovative offerings, akin to the sandbox approaches taken by some other countries. However non-regulation would have drawbacks since fundraising opportunities presenting serious risk to the public and potentially involving very large amounts of money would be offered without any safeguards. Investors could also be exposed to large-scale scams or fraud in France, and about which it would be impossible to provide warning.

The lack of specific regulations for ICOs would not however prevent the AMF from establishing **best practice rules** that any ICO originator in France could voluntarily apply. These rules could reiterate the overarching principles governing public offerings, including the need to present clearly both the risks and the rewards for investors. **If no regulations are in place**, however, these recommendations **would not have binding legal force.**

The marketplace could be involved in establishing best practice rules as a way to create a label of quality for ICOs that display certain characteristics.

The AMF could work with representatives of ICO originators, consulting firms, field experts and other parties to identify a class of ICOs offering investors a certain number of guarantees.

Questions:

4.1.1. If specific regulations are not established for ICOs, would you support an approach based around a common set of market best practices?

4.1.2. Would you be in favour of having ICO originators comply with the following principles and best practices?

a. **Draft** a white paper for the offering **and provide it to** all potential token investors; update as necessary;

b. **Identify ICO participants** by naming in the white paper an individual or legal entity who is responsible for the offering and by supplying information about key members involved in the project and their roles (founder, developer, adviser, etc.);

c. **Target** a standard investor type for whom the fundraising is intended based on the risks associated with the ICO;

d. **Provide** clear, exact and non-misleading **information** in a single document, supplying balanced details about:

- ***the project and its development***: describe the project to be funded and its industrial or business purpose, if applicable; state the implementation timetable, minimum and maximum fundraising goals and the number of tokens put up for sale during the ICO; say whether the ICO is destined to evolve over time and describe the applicable procedures in the event that the offering is under- or oversubscribed. This information should be updated if there are changes to the project;

- ***what investors receive in return, with details of risks and rewards***: nature of rights received, different treatment for different investors, if applicable, valuation procedures, liquidity conditions, existence or not of a secondary market, existence of a buyback facility in the event that minimum and maximum fundraising goals are missed, **risk of losing invested capital**;

- ***economic and accounting treatment applied to funds gathered by the issuer***, indicating whether a portion of the funds collected will be used to remunerate the parties carrying out the project and specifying clearly who will benefit from any gains and in what proportion if the project succeeds, and who will bear the losses and in what proportion if the project fails;

- ***competent jurisdictions in the event of disputes;***

e. **Organise,** by putting in place human and technical resources that are secure, appropriate and proportionate to the fundraising transaction and its potential success; by drawing up rules and procedures to ensure that tokens are fairly valued, to prevent, manage and disclose conflicts of interests affecting the persons in charge of the issue, and to handle complaints and ensure that the IT systems used in the framework of the ICO are robust and secure;

f. **Act with integrity** by operating honestly, fairly and professionally, in a manner that best serves the interests of all investors;

g. **Exercise vigilance** by setting up rigorous procedures (especially Know Your Customer or KYC) to identify the source of funds raised to prevent money laundering, to assess the risks of fraud, money laundering and terrorist financing, and to report suspicions to the relevant authorities (notably Tracfin, the French financial intelligence unit);

h. **Save and store information** by setting up a system to ensure that transactions during the token pre-sale and sale phases are traceable and archived and to ensure that investors' rights in relation to their tokens are safeguarded*;*

i. **Provide** investors with **confirmation**, by means of a trade slip or equivalent proof, of receipt of funds and the nature of rights obtained;

j. During the token pre-sale and sale phase, **hold collected funds** in an escrow account by means of a smart contract or another secure arrangement to safeguard investors' rights and ensure that funds are allocated to the proper project;

k. **Use control procedures** to ensure and verify that the ICO is being conducted in accordance with the established rules;

4.1.3. What other best practices do you think should be applied to ICOs?

4.1.4. As regards the benefits offered by tokens, should the types of rights that may be associated with tokens (e.g. voting rights, financial rights, access to associated services, ownership rights, governance, and so on) be subject to guidance or restricted?

4.1.5. Should token investing be restricted to a certain investor type? What type of buyers, if any, do you believe should not be solicited by ICOs?

4.1.6. If you answered “Yes” to question 4.1.2 a., do you think the white paper should be **approved by an authority, a professional association or another key institution** in the jurisdiction where the transaction is organised?

4.1.7. If you answered yes to question 4.1.2 a., should the white paper be validated by one or more independent experts? If so, what type of experts should do this?

4.1.8. If you answered yes to question 4.1.2 a., do you think it would be useful to define a template for the white paper?

4.1.9. If you answered yes to question 4.1.2 b., which legal forms do you believe companies should be required to adopt before carrying out an ICO?

4.1.10. Should the starting value of tokens be set solely by the issuer? What rules should apply to the financial assessment of the token price?

4.1.11. During the token presale phase, would it be acceptable to allow tokens to be presold at preferential prices below the starting price set for an announced issue? If so, should a price range for the presale phase be set and announced?

4.1.12. Should the transparency of ICOs be prioritised during the presale and sale period so that potential investors can find out the funds raised during an ICO in real time?

4.1.13. ICOs may be a vehicle for **money laundering and terrorist financing practices**. What anti-money laundering and terrorist financing procedures do you believe should be introduced? What types of due diligence should token issuers perform on their partners, and particularly platforms that exchange fiat money for digital assets? Do you think that the participation of a third party, such as an authorised investment service provider, is required?

4.1.14. Should a certain type of business and accounting model be promoted for funds collected during ICOs?

4.1.15. Should funds in cryptocurrencies collected by token issuers be covered by specific rules (for example, a requirement to be placed in an escrow account evidenced by an e-wallet locked by multiple signatures)?

4.1.16. What information should the token holder receive once the fundraising has been carried out, and how often?

4.1.17. What information should be provided to token holders to notify them about the project's success or failure? Where necessary, do you think it would be useful to have information about the existence of token buyback facilities or to set rules governing the payment of gains to token-holders, for example? In a situation where the ICO is more successful than expected, should the issuer have a ceiling above which investor funds will no longer be accepted?

4.1.18. Do you think it would be useful to have a disclaimer given the unregulated nature of ICOs?

4.2. Option 2: regulate ICOs using the existing legal framework for prospectuses

The Prospectus regulatory framework applies to public offerings and all issuers must abide by these rules, even if small amounts are raised and the risks are under control. It could be argued that ICOs should be highly regulated, regardless of their form and their characteristics, just as conventional offerings are, as, in principle, nothing seems to warrant applying more flexible regulations to these highly risky public offerings.

ICOs should therefore be captured by the existing rules relating to public offerings of financial securities, as expanded for this purpose. The Prospectus regulations should be adjusted to capture ICOs, and the AMF review and approval procedures should be applied to them. This adjustment process should take place at European level[20], should expand the scope of the rules to public offerings of tokens, and possibly provide for the adjusting of application review procedures, as these regulations were devised to ensure the publication of fully comprehensive prospectuses when financial securities are issued by listed companies.

Questions:

[20] Regulation (EU) No. 2017/1129 of the European Parliament and Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, repealing Directive 2003/71/EC.

4.2.1 Are you in favour of adopting an ICO framework based on the current Prospectus regulations[24][21] or the new Prospectus regulations that will be introduced?

4.2.2 Are European Prospectus regulations desirable to regulate ICOs?

4.2.3 Is the European passport appropriate for this type of offerings?

4.2.4 If appropriate, how should these regulations be adjusted to make them suitable for the specific characteristics and risks presented by ICOs?

4.2.5 Is the Prospectus regulation, possibly adjusted, compatible with the flexibility and speed required for ICOs?

4.3. Option 3: adopt an ad hoc regulation tailored to ICOs

Option 3.A: an authorisation regime applicable to all ICOs available to the public in France

A third possibility would be to propose an ad hoc regulation tailored to ICOs, on the grounds that these offerings are so new and multi-faceted that they cannot be captured satisfactorily by existing regulations. This ad hoc regulation could be proposed on the grounds that the best practices, if introduced as per option 1 above, are not binding and thus insufficient or improperly suited to protect investors.

An ad hoc regulation would be warranted by the innovative changes introduced by these offerings to French law and by the need for guarantees that are commensurate with the risks, which are not the same as those that exist today for conventional public offerings or the marketing of miscellaneous assets.

ICOs are so varied that it would seem more sensible to opt for a **specific pre- authorisation regime** tailored to the characteristics of these offerings as observed at the time of this discussion paper, namely:

- ICOs may be presented by persons without legal personality;
- They propose fundraising for projects using blockchain technology, where "management" is performed not by a responsible person but by a community that does not constitute a legal entity;
- Projects financed by ICOs are valued only by a "scientific" community or voluntary experts, with no reliable process for valuing the tokens provided to investors;
- Tokens acquired by investors (usually in a cryptocurrency) may be highly hazardous to value; they may or may not grant rights to investors, such as usage or service rights (use of an IT platform for example), title to a future asset, voting rights, or potentially no rights at all but merely the hope that the tokens themselves will gain in value if the project succeeds and there is a secondary market for its resale.

Given these characteristics, a regulation to safeguard investor rights could be based on a marketing authorisation regime, although "approval" could not be granted to offering originators, since no organised profession is expected to be formed in this context.

The authorisation regime could be modelled on the rules arising from the miscellaneous assets intermediaries' regime, which does not regulate a profession but only marketing offerings themselves and which provides investor guarantees that essentially cover the products on offer, and rules arising from the Prospectus regime,

[21] Regulation (EU) No. 2017/1129 of the European Parliament and Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, repealing Directive 2003/71/EC.

which may be supplemented by ad hoc rules.
Offers of tokens to investors would constitute a new "intermediation in miscellaneous assets" activity, and specific guarantees to protect investors could be provided for by law and set out in detail in the AMF General Regulation. The AMF would review authorisation requests and issue a registration number or authorisation certifying that ICO originators have provided the guarantees required by law.

The ICO originator would therefore have to submit a token marketing application to the AMF, which would verify, based on the documents produced rather than a subjective appraisal, that the project's originator had provided the relevant guarantees, covering for example:

- Investor disclosures through an information document that clearly presents the project to be funded;
- Information on the originators of the offering and the project designers and the requirement, as applicable, to form a commercial company to take the project forward;
- Clear and balanced information on the risk of losing invested capital;
- A precise description of what investors receive in return (nature of rights received, valuation procedures, liquidity conditions, existence or not of a secondary market, existence or not of a buyback facility);
- Secure use of blockchain under the conditions provided by law;
- A mechanism to segregate and hold funds raised by the ICO originator;

Where applicable, professional insurance and/or a financial commitment from the issuer for the project;

- If possible, guarantees about the project's validity, potentially through expert certification or a rating system for such projects.

ICOs that had not been approved by the AMF would be banned in France and liable for penalties for lack of approval.

Questions:

4.3.1. Are you in favour of adopting new laws specifically regulating ICOs based on the miscellaneous assets intermediaries' regulations?

4.3.2. Do you think that the investor guarantees listed above are appropriate and adequate? Do you believe that any of the other guarantees presented in points 4.1.1 to 4.1.18 above are required?

Option 3.B: an optional authorisation regime

This ad hoc regulation could be designed along conventional lines by banning unauthorised offerings. The alternative would be that ICO originators could decide, on an optional basis, to request a marketing authorisation from the AMF, which would then issue its "approval", or to not submit an application to the AMF. **Non-formally authorised offerings would not be banned** but, if they are presented in France, should **contain an obligatory disclaimer** clearly stating this absence of AMF approval.

The adoption of such legislation would enable the AMF to discipline rule breaches, either because of non-compliance with approval requirements or because the offering has not been approved, assuming there is no obligatory disclaimer indicating that the offering has not been approved by the AMF.
The AMF has noted that several ICO originators that have presented their projects to the AMF have argued that an ICO regulation of this kind might attract the best projects to France, as they would want the regulator's

guarantee to set them apart from lower quality, or even fraudulent offerings. Offerings that were not approved would suffer de facto commercial consequences. This system combining a possible approval or, alternatively, a disclaimer could therefore clean up the ICO market and attract high quality projects to France.

Questions:

4.3.3. Are you in favour of adopting new laws specifically regulating ICOs that would be optional and combine a prior authorisation regime with the issuing of approval with an obligatory disclaimer for offerings that were not approved?

4.3.4. How should the disclaimer be worded?

4.3.5. Should the investor guarantees provided for by law be the same if the prior authorisation regime is optional?

Final question: Do you have any other suggestions or comments for the AMF about ICOs?

In addition to this discussion paper, the AMF invites any parties or companies considering an ICO to contact it at **fic@amf-france.org** to present their projects and discuss the content of their white paper.