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## **Speech by Robert Ophèle, President of the AMF, to the 'Virtual Currencies' fact-finding mission set up by the National Assembly Finance Committee Chairman: Eric Woerth, Rapporteur: Pierre Person - 5 April 2018**

Check against delivery

First of all, thank you, Mr Chairman, for having taken the initiative of undertaking this fact-finding mission and for hearing the AMF in this context.

Beyond the turbulence triggered by bitcoin and despite the reassuring inference that the value of all crypto-assets identified on specialist platforms – of which there are around 1,700 – represents less than 50% of the capitalisation of Apple alone<sup>(1)</sup>.

The world of crypto-assets has been driven by the "success" of bitcoin (whose capitalization however only exceeded \$10bn in October 2016 then \$100bn in October 2017, and currently represents only about 15% of the market capitalization of Apple). The number of initiatives has grown enormously: the website Coinmarketcap lists nearly 1,000 "coins" (for a capitalization fluctuating daily between \$250bn and \$350bn, of which 75% for the three main ones: Bitcoin, Ethereum, and Ripple) and nearly 700 "tokens" (for a capitalization of \$35bn of which only 35% for the top 3).

, it is clear to all concerned that the digitalisation of assets based on distributed ledger and advanced cryptology techniques is a phenomenon that will grow, and extensively call the operating framework of our economies into question. The role of currency, of banking intermediation and financial markets, investor protection, and ultimately the financing of

our economies must all be revisited in the light of the disruption that crypto-assets and the associated technologies might cause.

This is of course a subject of reflection for the AMF, as it is for the other authorities of the financial sphere in France and more generally in Europe and the rest of the world; I am pleased that the Finance Committee of the National Assembly is addressing this issue through your fact-finding mission as well as via the one set up jointly with the Law and Economic Affairs Committees, on "the question of the use of blockchains and other ledger certification technologies".

The AMF has been alerted to this phenomenon via multiple channels:

- first, through the marketing to the general public of cryptocurrencies and cryptocurrency derivatives (binary options and Contracts for Difference (CFD), often via misleading advertising and often via ghost platforms, which turn out to be pure scams<sup>(2)</sup>.  
By way of illustration, the AMF's Epargne Info service platform received more than 100 crypto-asset claims in February, reporting €1.1m in losses.  
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- then by asset management companies wishing to offer funds invested in crypto-assets;
- finally, by entrepreneurs wanting to raise funds via the issuance of tokens and who come to us to ask how to carry out their transactions in compliance with regulations.

At the same time,

- an ecosystem has developed in Paris among IT engineers, "fintech" sector entrepreneurs, and specialist law firms, which has raised many new legal issues;
- the crypto-asset world has attracted ever-growing interest among the general public despite the extreme volatility of their prices and their particularly risky nature;
- following a period of issuing alerts on the danger these assets may involve, the authorities began to reflect on a supervisory framework, or even a binding regulation. The AMF has been most active on both fronts, making numerous appearances in the media, including on social networks, in a bid to warn the public about the danger of crypto-assets, but also via a public consultation on the preferred supervisory framework for token offerings on the primary market, i.e. Initial Coin Offerings or ICOs; this consultation was highly successful and we have provided a report on it. What I intend to put forward this afternoon is largely inspired by its findings<sup>(3)</sup>.

First of all, and prior to determining their possible regulation, one has to grasp the reasons for this enthusiasm for crypto-assets.

For sure, there may be those behind the crypto-asset phenomenon who willfully wish to ensure that it is difficult to trace their financing of criminal activities, or those who want it to embody a libertarian globalist ideal<sup>(4)</sup>.

The bitcoin genesis block on 3 January 2009 included the following brief line of text embedded into the data "The Times 03/Jan/2009 Chancellor on brink of second bailout for banks".

free from all State constraints, all this relayed by the attraction of possible spectacular capital gains. However, this phenomenon also reflects the willingness to:

- lower the cost of certain financial transactions (transfers, public offers of securities, etc.),
- speed up the execution time for these transactions,
- tap a global market,
- finance projects at a very early stage of their implementation,
- finance the development of a service or product by its potential future users without dilution of the share capital of the company behind the project,
- strengthen the security of transactions by imparting a highly secure traceable record, since this is inherent to the distributed ledger technology (DLT) and advanced cryptology,
- create Amazon-type retail service environments (the case of Ethereum for example, which houses most ICOs),
- eventually appropriate the seigniorage income enjoyed by currency issuers; central banks are now studying the possible issuance of public cryptocurrencies more seriously <sup>(5)</sup>.

CPMI-BIS "Central Bank Digital Currency" report of March 2018 and also Raskin and Yermack "Digital currencies, decentralized ledgers, and the future of central banking" 2016 NBER w22238.

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All this leads us to think that the development of crypto-assets is a deep-set trend, that should not be fought, but rather be accompanied, via supervision that allows it to grow in a more secure framework than is the case today.

This is the approach that the AMF has taken and we have four priorities. As a markets authority, we consider it necessary to ensure:

- appropriate product information,
- transparency of issuers and investors,
- a price formation mechanism that is transparent and ensures market integrity,
- a secure market chain both from a legal standpoint (proof of the holding of an asset), and from an operational standpoint (mechanisms must be strong enough to withstand cyber-risks for example).

This must be deployed in both primary and secondary markets and the appropriate conclusions should be drawn across the entire financial landscape.

1. First preliminary question: should tokens be considered as transferable securities and their offer to the public fall under the Prospectus Regulation?

The Prospectus Regulation oversees and governs the issuance of "transferable securities" in the European Union. In its current version, it has been transposed into French law by replacing the term "transferable securities" with "financial securities". Therefore, if tokens were to constitute "financial securities" within the meaning of French law, their offer to the public would generate an obligation for the issuer – save where an exemption is granted- to issue a prospectus approved by the AMF.

I hold our detailed analysis at your full disposal, and at this stage will go no further than to indicate that we think that this is only rarely the case, since tokens do not generally fall into any of the categories of the applicable law that defines financial securities (Article L. 211-1 of the Monetary and Financial Code), namely: equity securities issued by joint-stock companies, debt securities, units or shares on undertakings for collective investment. Naturally, should a token give rise to rights that would assimilate it to one of these three categories, it would be subject to the existing associated regulation.

This interim conclusion, in the light of the many cases<sup>(6)</sup>.

**At the date of the hearing, 37 ICO projects has been presented to the AMF on a voluntary basis.**

we have observed, has several consequences. To begin with, since it is impossible, except in special circumstances, to obtain the qualification of financial securities, it does not appear possible in positive law to require issuers of tokens to submit a prospectus to the AMF with

a view to approval. Secondly, and as it is not possible to qualify tokens as financial securities, Article 1841 of the Civil Code, which lays down a principle prohibiting the offer of financial securities or shares to the public unless specifically authorised by law, does not apply.<sup>(2)</sup> Under Article L. 211-41 of the Monetary and Financial Code, "All equivalent instruments or rights pertaining to a financial investment in an entity that are issued on the basis of foreign legislation shall be treated in the same way as the financial securities referred to in Article L. 211-1." As a result, marketing in France of tokens issued on the basis of foreign rights entails the same consequences for issuers of such instruments as those applicable to issuers of financial securities issued on the basis of French law (whether or not a prospectus is required for example).

However, the new Prospectus Regulation (note that we are no longer talking about a directive but a regulation), which will come into full effect as of 21 July 2019, leads us to revisit this issue, because the definition of "financial securities" in Article L. 211-1 of Monetary and Financial Code will no longer be relevant. The regulation will apply to public offers of "transferable securities" within the meaning of MiFID 2 (Markets in Financial Instruments Directive 2). Yet, this definition is broader than that of "financial securities" in the current Monetary and Financial Code. Indeed, "transferable securities" are defined in European law as "classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as....".

In view of the entry into force of this European Regulation, the question therefore arises as to whether tokens may constitute "a class of securities which are negotiable on the capital market", in which case they should be qualified as "transferable securities", whose offer to the public falls under the Prospectus Regulation.

The answer to this question mainly lies within the field of competence of the European Securities and Markets Authority (ESMA) and the competent courts. Without pre-empting the outcome of reflections that are currently underway, it appears that one of the central questions, to which the final answer has yet to be found, is to determine whether the term "security" excludes the possibility of incorporating a right that does not intrinsically represent a financial right. In other words, can it be considered that a right (other than a financial right) that would be incorporated in an instrumentum could become a "security" for the simple reason that it carries hope of gain on the day of its resale?

The question is open. Is this desirable? I do not think so and this is not in keeping with the responses received from the public consultation.

This solution would admittedly make it possible to take into account the fact that ICOs can potentially involve very large amounts and can carry similarly high risks. Therefore, nothing

seems to justify a priori that flexible regulation would be applicable to these public offers; while at the same time the heavier Prospectus Regulation applies to issues of more limited size (even if the AMF is considering raising the exemption threshold to EUR €8m) and for material risks that are however generally better controlled (biotechs for example).

This would also have the advantage of bringing tokens fully into the scope of MiFiD and thus making them subject to the secondary market transaction rules.

This solution, however, does have several disadvantages:

- Tokens intended to serve solely as a payment instrument would not be targeted because they lie explicitly outside of the definition of transferable securities. Indeed, the Court of Justice of the European Union (CJEU) qualified bitcoin in a Hedqvist decision of 22 October 2015 as "a means of contractual payment", "virtual currency that cannot be viewed as a current account or a deposit, a payment or a transfer. Moreover, unlike a debt, cheques and other negotiable instruments.... the 'bitcoin' virtual currency is a direct means of payment between the operators that accept it." However, given the continuum observed between the various crypto-asset offers, it would not seem wise to segment rigidly between a token that is intended to be a mere payment instrument and another to which a value of use is attached.
- Although ESMA could propose the drawing up of a prospectus specifically for crypto-assets, one might wonder whether it is timely to insist upon imposing the prospectus regulation. These offerings made outside the usual frameworks would be treated within an ill-adapted process and, moreover, would not necessarily provide the appropriate guarantees in view of the risks involved (the prospectus guarantees quality information only).

Such regulation would give a negative signal on behalf of the Paris marketplace and the European Union, both of which are, on the contrary, in favour of fintech development. Speed and flexibility are perceived as ICOs' strengths: ill-adapted regulation would most likely drive them away ("good projects" included).

2. Second preliminary question: Should tokens be considered as "miscellaneous assets"?

The AMF (and ESMA) consider that crypto-asset derivatives, irrespective of the legal regime of these assets, fall under financial regulation because the notion of the derivative outweighs the status of the underlying asset. Binary options and some CFDs on crypto-assets are thus targeted directly by the advertising bans in force in France and, now, by the temporary marketing bans by ESMA on a European scale and which may be conveyed without a time

limit by the national authorities.

While the derivatives market can be apprehended, we have seen that the issue of tokens by a French resident, and to the best of our knowledge in the vast majority of cases, is today not subject to any financial regulation; in certain cases, however, the issuer or the intermediary that markets the tokens may be subject to two different "intermediation in miscellaneous assets" statuses:

- 'Intermediary in miscellaneous assets 1" regime' (ex-ante control of marketing communication by the AMF and monitoring of the entity) if it is proposed that investors "acquire the rights to movable or immovable property where the contract offers a buy-back or exchange option with revaluation of the capital invested";
- 'Intermediary in miscellaneous assets 2" regime' (ex-ante control of marketing communication by the AMF) if such investments "highlight the possibility of direct or indirect financial returns or a similar economic effect".

The AMF has initiated repressive actions against platforms under the 'Intermediary in miscellaneous assets 2" regime' and keeps a blacklist of sites that do not respect this regulation. However, the AMF considers that its current powers are too limited. It is the AMF's wish to extend them to cover miscellaneous assets, and by so doing, to allow the request by court order, of the blocking of access to websites, which unlawfully offer such investments ( binary options, CFDs etc).

However, such an approach, adapted to the fight against scams, has two disadvantages:

- it cannot cover all crypto-asset offers,
- it is purely national and difficult to export at European level, and even more so on a global scale.

3. At this stage, the AMF recommends a flexible approach that is based on the following two pillars.

Firstly, an optional label/approval that would be meted out by the AMF on issues when a certain number of conditions are met, and in particular:

- Issuers and identified subscribers:
  - an issuer must be an identified legal entity (company or association) and at least registered in a country that is not on the EU "blacklist";
  - subscribers must be more clearly identified than just by their computer's IP address or

their personal key, and the issuer or its agent must be able to be complete customer due diligence (KYC).

— Relevant information on the asset issued and the project financed:

- an indicative taxonomy distinguishing tokens intended to be mere means of payment from those giving rise to user rights with a defined categorisation regarding these rights; tokens giving rise to financial rights are of course to be treated within the existing framework for public offers of financial securities (prospectus, key regulatory information document (KIID/ DIRS), etc.);
- a white paper describing in detail the rights acquired, the prospective business plan, the technology used (possibly with an opinion on the latter from an independent expert, for example approved by the French Network and Information Security Agency (ANSSI).

— A transparent and secure issuance procedure with:

- a fixed issue price or one for which the method of determination is fixed ex ante,
- an issue duration fixed ex ante,
- an issue size fixed ex ante (possibly a range), including the treatment of oversubscription,
- comprehensive information on the role of the issuer and its related parties involved in the issue: reserved tokens, tokens already acquired, tokens created in the context of "mining",
- subscriptions held in escrow until the closing of the ICO.

Ultimately, the information document carrying the AMF label accompanying an ICO would be more appropriate than a traditional prospectus and would provide additional guarantees against the specific risks of these transactions. Its optional nature would make it possible to develop the more serious projects in France.

The second pillar would be an efficiently-organised secondary market for tokens whose tradability is an important feature:

- This involves a specific status for platforms carrying out crypto-asset transactions. To this end, the emphasis must be placed on the similarities with investment firms and their securities trading platforms in order to provide investors with security, far beyond any similarities with electronic money institutions or payment institutions. Currently, the secondary market for crypto-assets is extremely opaque and all the more conducive to market abuse, as its volatility (incl. intraday) is extremely high. If we wish to offer a more secure environment, we must apply MiFID-II inspired provisions and carry out transactions on regulated and supervised MTF-type platforms (non-discretionary market

rules) or via OTFs (with a degree of discretion) or systematic internalisers, all with the associated transparency (pre-trade and post-trade).

- There should also be a legal framework for the holding and transfer of ownership of crypto-assets. Blockchain technology is not recognised at present as being able to generate a ledger attesting the ownership of an asset; this is why a French ordinance was passed last year to enable the representation and the transmission of certain financial securities (and crypto-assets are not covered by this ordinance) by means of a shared electronic recording system. Naturally, it is also necessary to extend the system with the usual post-trade mechanisms for financial transactions: DVP (Delivery versus Payment) with the possibility of maintaining the issuer's ledger in real-time, as provided by blockchain technology.

4. Once satisfactory supervision has been established, the market for crypto-assets could be opened to collective investment schemes and, in so doing, to a wider group of investors

At present, therefore, French regulations could be considered as most restrictive. At this stage, the AMF has not allowed regulated funds in France (in a specific case a professional specialised investment fund) to invest in crypto-assets on the grounds that the ownership of crypto-assets was not currently established in French law<sup>(8)</sup>.

1° of Article L 214-154 of the Monetary and Financial Code..

Under an incentive approach, we could consider deploying the following set-up in future, once the prerequisites mentioned have been implemented:

- in the case of an approval/label, authorisation to advertise crypto-assets and eligibility for AIFM-type professional specialised investment funds, retail private equity investment funds (FCPR) and retail venture funds (FCPI);
- in the case of an approval/label and tradeability with a relevant price mechanism, eligibility for retail Alternative Investment Funds (retail investment funds open to non-professional investors) and via these to unit-linked insurance contracts; eligibility for UCITS assets (within the limit of the "junk" ratio of 10%).

In conclusion, I would nevertheless like to stress the two following points:

- First, it is urgent to legislate, but to legislate in a spirit of openness since we are facing a phenomenon of which we have yet to take full measure;

— Second, the need to develop a national and an international approach, in parallel; while crypto-assets are inherently cross-border and call for a coordinated approach between countries – this is the underlying logic of the recent Franco-German initiative – it would be counterproductive to wait for the outcome of international work (Financial Stability Board (FSB), Financial Action Task Force (FATF), International Organization of Securities Commissions (IOSCO), ESMA, etc.). Outcomes that are difficult to predict, given the time it may take to reach a consensus.

[1] The world of crypto-assets has been driven by the "success" of bitcoin (whose capitalization however only exceeded \$10bn in October 2016 then \$100bn in October 2017, and currently represents only about 15% of the market capitalization of Apple). The number of initiatives has grown enormously: the website Coinmarketcap lists nearly 1,000 "coins" (for a capitalization fluctuating daily between \$250bn and \$350bn, of which 75% for the three main ones: Bitcoin, Ethereum, and Ripple) and nearly 700 "tokens" (for a capitalization of \$35bn of which only 35% for the top 3).

[2] By way of illustration, the AMF's Epargne Info service platform received more than 100 crypto-asset claims in February, reporting €1.1m in losses.

[3] <http://www.amf-france.org/Actualites/Communiqués-de-presse/AMF/annee-2018?docId=workspace%3A%2F%2FSpacesStore%2F57711a6c-4494-4215-993b-716870ffb182>

[4] The bitcoin genesis block on 3 January 2009 included the following brief line of text embedded into the data "The Times 03/Jan/2009 Chancellor on brink of second bailout for banks".

[5] CPMI-BIS "Central Bank Digital Currency" report of March 2018 and also Raskin and Yermack "Digital currencies, decentralized ledgers, and the future of central banking" 2016 NBER w22238.

[6] At the date of the hearing, 37 ICO projects has been presented to the AMF on a voluntary basis.

[7] Under Article L. 211-41 of the Monetary and Financial Code, "All equivalent instruments or rights pertaining to a financial investment in an entity that are issued on the basis of foreign legislation shall be treated in the same way as the financial securities referred to in Article L. 211-1." As a result, marketing in France of tokens issued on the basis of foreign rights entails the same consequences for issuers of such instruments as those applicable to issuers of financial securities issued on the basis of French law (whether or not a prospectus is required for example).

[8] 1° of Article L 214-154 of the Monetary and Financial Code.

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