



## QUESTIONS & ANSWERS ON THE DIGITAL ASSET SERVICE PROVIDERS REGIME

Background regulations :

- Articles L. 54-10-1 to L. 54-10-5, D. 54-10-1, D. 54-10-2, D. 54-10-7 and D. 54-10-9, L. 561- 1 *et seq.* and R. 561-1 *et seq.* of the Monetary and Financial Code.
- Articles 721-3 to 721-6 and 722-1, 722-5, 722-7, 722-13 and 722-14 of the AMF General Regulation.

Some aspects of the questions and answers may be subject to change based on changes in legislation.

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## 1. THE NOTION OF DIGITAL ASSET

### 1.1. Does the notion of digital asset exclude other legal qualifications?

Pursuant to Article L. 54-10-1 of the Monetary and Financial Code, the qualification of digital assets is distinct from financial instruments, medium-term notes and bills of exchange.

A joint reading of Articles L. 54-10-1 and L. 315-1 of the Financial and Monetary Code shows that the qualifications of digital asset and electronic money are also mutually exclusive. The notion of digital asset effectively excludes all assets with the legal status of a currency. Therefore, an asset cannot be qualified both as a digital asset and as money. Project owners are invited to contact the Autorité de Contrôle Prudentiel et de Résolution (ACPR) to determine whether the assets they are issuing meet the conditions that qualify them as electronic money and whether their business requires an authorisation to issue electronic money, as defined in Article L. 525-3 of the Monetary and Financial Code.

However, the digital asset offering may be governed concomitantly by the provisions of the Monetary and Financial Code relating to intermediaries in miscellaneous assets, provided that the conditions set out in Article L. 551-1 of the Monetary and Financial Code are fulfilled.

## 2. FREQUENT QUESTIONS RELATING TO REGISTRATION AND LICENSE PROCEDURES

### 2.1. Can mandatory registration and optional license be combined?

Yes. They may be combined for service providers that provide the digital asset services referred to in points 1° and 2° of Article L. 54-10-2 of the Monetary and Financial Code.

Applicants who wish to provide third-party digital asset custody services or access to digital assets and/or a service for the purchase or sale of digital assets in legal tender must register in accordance with Article L. 54-10-3 of the Monetary and Financial Code. In this connection, they must comply with the provisions of Articles L. and R. 561-1 *et seq.*, L. and R. 562-1 *et seq.* and D. 54-10-2 *et seq.* of the Financial and Monetary Code.

In addition to registering, applicants may also ask the AMF for a license pursuant to Article L. 54-10-5 of the Monetary and Financial Code for the same services and for other digital asset services, if applicable. They will therefore be subject to the provisions of Articles L. 54-10-5 and D. 54-10-6 of the said code and to the relevant provisions of Title II of Book VII of the AMF General Regulation.

### 2.2. Can the DASP status be combined with the status of investment service provider (ISP), financial investment advisor (FIA), crowdfunding advisor (CIA) or crowdfunding intermediary (CI)?

Pursuant to Article 721-2, paragraph II of Article 721-6, point 9° of paragraph I of Article 721-7 and Article 721-9 of the AMF General Regulation, an ISP may also have the status of a registered and/or licensed DASP, in accordance with the rules applicable to ISPs. In particular, any ISP applying for a DASP license must have a minimum level of own funds that must be the highest amount between the minimum own funds calculated in accordance with the procedures described in Instruction DOC-2019-23 and the minimum own funds required for the investment services for which it is authorised.

Likewise, it is possible to combine the status of DASP and FIA. According to AMF Position-Recommendation DOC-2006-23, the status of FIA does not exclude the conduct of other regulated activities.

Conversely, Article L. 547-1 III of the Monetary and Financial Code prohibits the combination of the status of DASP and that of crowdfunding advisor. It excludes all activities other than the activity of financial investment advisor within the meaning of Article L. 321-1 of the same Code.

Likewise, paragraph III of Article L. 548-2 of the Financial and Monetary Code excludes the combination of DASP and crowdfunding intermediary status.

### **2.3. To what extent can the status of DASP as defined by the PACTE law be used?**

Only digital asset providers (DASP) who have effectively completed registration or obtained license can benefit from the entitlements of registration or license.

Service providers that provide the digital asset services referred to in points 1° and 2° of Article L. 54-10-2 of the Monetary and Financial Code must have completed registration before they can conduct their activity (subject to the transitional provisions provided for by the PACTE law (see Section 3, Question 1 below). Using the status of DASP to provide the services in question without first having completed registration constitutes a breach of the criminal provisions stipulated in Article L. 572-23 of the Monetary and Financial Code.

Service providers providing one or more of the digital asset services referred to in Article L. 54-10-2 of the Monetary and Financial Code may apply for an license from the AMF. Referring to such AMF license without having obtained it, disseminating inaccurate or misleading information or using a name, company name, advertising or any other process that suggests that the service provider is licensed, is in breach of the criminal provisions set forth in Article L. 572-26 of the Monetary and Financial Code.

Consequently, project owners may not communicate the fact that they have been registered as a DASP or obtained DASP license simply because they have started the procedure to obtain such registration or optional license (for example, after simply meeting with the AMF or submitting a registration and/or license application). Furthermore, they may not offer (and all the more so, mention in their disclosures) the services mentioned in points 1° and 2° of Article L. 54-10-2 of the Monetary and Financial Code if they have not first been registered (subject to Section 3 Question 1 below).

### **2.4. What information does the AMF require to assess the good repute and skills of foreign senior managers and shareholders?**

AMF Instruction DOC-2019-23 relating to the regime applicable to digital asset service providers lists the information that senior managers and shareholders have to submit for the assessment of their good repute and skills. The criminal record certificate provided must not be more than three months old.

Good repute requirements shall be deemed to have been met when the application for registration is made by a financial institution referred to in points 1° to 7° of Article L. 561-2 of the Monetary and Financial, in accordance with the last sub-paragraph of Article D. 54-10-2 of said code.

Foreign applicants must provide information (at least translated into English) that is equivalent to the list specified in the instruction. They may also submit all other information that is relevant for the purposes of this assessment.

### 3. QUESTIONS RELATING TO THE REGISTRATION PROCEDURE

#### **3.1. When will the 12-month deadline for registering with the AMF apply? Who is concerned by this deadline?**

Section X of Article 86 of No. 2019-486 of 22 May 2019 on business growth and transformation, known as the "PACTE" law (not codified) states that "*persons performing the activities defined in points 1° and 2° of Article L. 54-10-2 of the Monetary and Financial Code before the entry into force of this article shall be entitled to a period of twelve months after the publication of the implementing acts to register with the Autorité des Marchés Financiers, under the conditions defined in Article L. 54-10-3 of said code.*".

a/ For participants who began their activity before 24 May 2019

The implementing provisions are made up of (i) of Decree 2019-1213 of 21 November 2019, (ii) Decree 2019-1248 of 28 November 2019, and (iii) the Order of 5 December 2019 approving amendments to the AMF General Regulation. They were published in the Official Journal of the French Republic on 22 November 2019, 29 November 2019 and 18 December 2019 respectively.

The starting date to be taken for the 12-month period for registering with the AMF for persons engaged in the activities defined in points 1° and 2° of Article L. 54-10-2 of the French Monetary and Financial Code is 18 December 2019.

Only persons who were engaged in said activities before the date of entry into force of Article 86 of the PACTE law, i.e. before 24 May 2019, may benefit from the 12-month period for registration, i.e. until 18 December 2020.

b/ For participants who began their activity on 24 May 2019 or later

However, persons who began these activities on 24 May 2019 or later must complete registration before they begin their activity. If they fail to do so, they will be providing digital assets services illegally which may result in a criminal sanction in accordance with Article L. 572-23 of the Monetary and Financial Code. Persons in this situation are invited to contact the AMF as soon as possible.

#### **3.2. To what extent can a digital asset service be deemed to have been provided in France for the purposes of mandatory registration?**

The principle of the obligation to register for persons providing the services mentioned in points 1° and 2° of article L. 54-10-2 of the Monetary and Financial Code is set out in Article L. 54-10-3 of said code.

The AMF considers that the service providers referred to in points 1° and 2° of Article L. 54-10-2 of the Monetary and Financial Code perform an activity in France subject to the registration obligation stipulated in Article L. 54-10-3 of said code (i) when they are established in France or (ii) when they provide services to clients resident or established in France.

The service is provided to clients resident or established in France when one of the criteria below is met:

- the service provider has business premises or premises intended for the marketing of a service on digital assets in France;
- the service provider has installed one or more automatic systems that offer digital asset services in France;
- the service provider sends promotional communication, regardless of the medium used, to clients resident or established in France. This covers for example, communication via the press, radio, television, posters, banners, websites, social networks, mobile applications, road shows, participation in trade shows, invitations to events, affiliation campaigns, retargeting, the use of a response form or an invitation to download an application or to follow a training course;

- the service provider organises the distribution of its products and services through one or more distribution networks to clients resident or established in France;
- the service provider has a postal address or telephone numbers in France;
- the service provider has a .fr domain name.

The drafting of one or more pages of the website and/or all communication related to a digital asset service in French shall lead to verification of whether one or other of the above criteria is met in order to establish whether said digital asset service is provided in France.

The list of criteria above for determining whether the digital asset service is provided in France is not exhaustive.

### **3.3. Do you need to be established in France to be registered?**

No. The registration set out in Article L. 54-10-3 of the Monetary and Financial Code does not require an establishment in France, either in the form of a subsidiary or in the form of branch. Nor does it require the permanent presence of representatives of the DASP domiciled in France.

However, only DASPs established in a Member State of the European Union or in a State party to the Agreement on the European Economic Area may apply for registration or an extension of registration. DASPs should provide proof of this when they make their request for registration.

To be able to register in France, DASPs from third countries should be established either in France or in another Member State of the European Union or in a State party to the Agreement on the European Economic Area.

The registered DASP must comply with all the obligations relating to anti-money laundering and anti-terrorist financing regulations.

### **3.4. Do digital asset service providers registered in other Member States have to register with the AMF when providing digital asset services in France?**

Yes. Article 47 of the fourth directive on anti-money laundering and counter-terrorist financing,<sup>1</sup> as amended by the fifth directive of 30 May 2018,<sup>2</sup> does not create mutual recognition of the registration of DASPs providing asset custody services and the buying and selling of digital assets. When a provider of the digital asset services referred to in points 1° and 2° of Article L. 54-10-2 of the Monetary and Financial Code is (i) established in France or (ii) provides services to customers residing or established in France, it must be registered by the AMF, even if it is registered in another Member State in accordance with Article 47 of the aforementioned directive.

### **3.5. Can a foreign digital asset service provider have French clients without providing services in France ?**

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<sup>1</sup>Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council and repealing Directive 2005/60/EC of the European Parliament and of the Council and Directive 2006/70/EC of the Commission.

<sup>2</sup>Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and Directives 2009/138/EC and 2013/36/EU.

Yes. When the digital asset service provider does not directly or indirectly solicit customers residing or established in France, it may provide them services. If the service provider meets one of the criteria specified in Question 3.2 above, it must register in France.

### **3.6. To what extent can activities related to AML/CFT or the freezing of assets of the registered DASP be outsourced?**

Functions relating to AML/CFT obligations may be outsourced under the conditions mentioned in Article R. 561-38-2 of the Monetary and Financial Code. However, the DASP's reporting obligations to Tracfin may not be outsourced.

When the DASP outsources functions related to AML/CFT or the freezing of assets, relations with its service provider are governed by a written outsourcing contract that defines the terms and conditions of the outsourcing, in particular with regard to the transmission of information necessary for the due diligence and internal control performed by the DASP on its service provider. The mandatory clauses of this contract will be defined in a forthcoming decree of the Minister of Economy.

In any case, the DASP continues to be responsible for compliance with its obligations.

## **4. QUESTIONS RELATING TO THE LICENSE PROCEDURE**

### **4.1. What does the concept of "service providers established" in France mean for the purposes of the license?**

To obtain license in accordance with Article L. 54-10-5 of the Monetary and Financial Code, the service provider must be established in France.

The requirement of establishment in France may be met by creating legal entities (subsidiaries) or branches in France.

### **4.2. What are the substantial criteria that the AMF takes into account for the license of digital asset service providers?**

For the purposes of granting a license, the AMF will be particularly attentive to ensuring that applicants are not "letter-box" entities. For the license procedure, the applicant should be able to demonstrate to the AMF that:

- the effective management of the French establishment is based in France and spends a minimum amount of time sufficient for the performance of the establishment's activity in France. Management must have the knowledge and experience necessary for performing its functions as well as the decision-making powers conferred on it;
- the person or persons responsible for control functions (control of the application of AML-CTF regulations, risk management, compliance, internal control or monitoring of a trading venue) in charge of ensuring that the service provider complies with its legal and regulatory obligations devote(s) a sufficient minimum amount of time to the performance of these functions and the monitoring of the DASP's activity in France. The service provider ensures that these persons have the knowledge and experience necessary to perform their duties and a significant level of independence to enable them to prevent and manage conflicts of interest. For the application of AML/CFT regulations, the service provider shall set up an organisation comprising: (i) a person responsible for implementing the AML/CFT system referred to in I of Article L. 561-32 of the Monetary and Financial Code, (ii) a TRACFIN reporting party and correspondent referred to in Articles R. 561-23 and R. 561-24 of the Monetary and Financial Code and (iii), if necessary, a person responsible for the control functions of the AML/CFT system and the freezing of assets;



- the person or persons responsible for commercial functions or customer support also devote a sufficient minimum amount of time to the DASP's activity in France.

These three functions may be performed by a single person working full-time or by several persons working part-time or full-time, regardless of whether or not they are French nationals. To determine the number of persons and the proportion of work required to perform the activity in France, the AMF shall take primarily into account the service provider's revenue generated in France and abroad, the number of employees in France and abroad and the risk of money-laundering or terrorist financing. It may also take into account the nature and complexity of the service provider's activities.

To assess the minimum time required by director(s) or managers to perform their duties, the applicant may take the following information into account:

- the number of duties performed simultaneously by these director(s) and managers;
- the size, nature and complexity of the activities of the entity in which the director(s) and managers perform their duties;
- the geographical presence of director(s) and managers;
- the training required to perform certain duties.

### **4.3. To what extent may the activities of the licensed DASP be outsourced?**

Point 7° of Article 721-3 of the AMF General Regulation provides that the program of activity contains "the list of the services or other essential or important operating tasks entrusted, on a long-term and regular basis, by the services provider to a third party, or intended to be so, and contracts signed or contemplated with said services providers."

Services or other essential or important operating tasks are the services for which the DASP is registered or licensed, or all services provided when a defect or failure in its performance would materially impair the DASP's capacity for continuing compliance with the conditions and obligations of its license and to the obligations relating to the performance of its activities, its financial performance or the business continuity of services and activities.

Essential or important operating tasks that may be outsourced, including abroad, mainly include control and compliance functions, IT, the monitoring of trading, or sales or customer support functions under the conditions set out in Question 6. This outsourcing must not create operating risks that would diminish the quality or independence of the activities performed.

It is reminded that functions relating to AML/CFT obligations may be outsourced under the conditions mentioned in Article R. 561-38-2 of the Monetary and Financial Code. The DASP may not outsource its reporting obligations.

The DASP may outsource some or all of the duties it performs as long as the relationship with the service providers to whom critical or operating tasks are entrusted is governed by an outsourcing agreement. This agreement shall specify the following:

- the nature of the services or operating tasks entrusted, the respective responsibilities of the parties to the agreement;
- that the service provider complies with the procedures defined by the DASP regarding the organisation and implementation of the control of the services that it provides;

- that the service provider accepts that the DASP, the AMF and the ACPR can access information about the outsourced activities necessary for them to carry out their remit, including on site.

The DASP ensures that its internal control procedures and control systems include the outsourced activities. The DASP shall maintain the expertise necessary to effectively verify the outsourced services or tasks and to manage the risks linked with outsourcing, and shall control these services or tasks and manage the risks.

In any case, the DASP continues to be responsible for compliance with its obligations.

## 5. PROFESSIONAL INSURANCE AND OWN FUNDS

### 5.1. Does the applicant need to have a professional liability insurance policy and own funds to obtain license?

No. Paragraph 1° of Article L. 54-10-5 of the Monetary and Financial Code states that licensed service providers shall have at all times "*a professional liability insurance policy or own funds[...]*". Consequently, service providers who opt for insurance must comply with the provisions of Article 721-5 of the AMF General Regulation and be thus covered for the services concerned by the license. Conversely, service providers who opt for own funds are not subject to the provisions of Article 721-5 of the AMF General Regulation on professional liability insurance and shall comply with the provisions of Article 721-6 of the AMF General Regulation and the part of Instruction DOC-2019-23 on own funds requirements.

### 5.2. To what services must the guarantees of the insurance policy apply?

Pursuant to Article 721-5 of the AMF General Regulation, the professional liability insurance policy shall include sufficient and appropriate guarantees for the digital assets services for which the service provider has obtained license. It must therefore cover all the services subject to license.

The obligation to have at all times the professional liability insurance policy referred to in 1° of I of Article L. 54-10-5 of the Monetary and Financial Code does not apply to the provision of digital assets services for which the DASP does not have license.

### 5.3. What can own funds be composed of?

Articles L. 54-10-5 of the Monetary and Financial Code, 721-6 of the AMF General Regulation and the provisions of AMF Instruction 2019-23 specify that the DASP must hold own funds at all times. The AMF considers as equity the sum of equity capital, capital-related issues, reserves, retained earnings and earnings for the current year.

### 5.4. How must own funds be invested?

Pursuant to Articles L. 54-10-5 of the Monetary and Financial Code, 721-6 of the AMF General Regulation and the provisions of AMF Instruction 2019-23, the own funds corresponding to regulatory requirements must be invested "in a sound and prudent manner in liquid financial assets or assets that can be easily converted into cash at short notice, without any speculative dimension."

The AMF considers that the instruments that qualify as representative of equity are euro-denominated money market funds, cash and cash equivalents, euro-denominated 3-month term deposits and liquidities and debt securities. The eligibility of other types of instruments must be the subject of a documented analysis demonstrating the liquid and non-speculative nature of the investments. The non-exhaustive list of non-eligible assets provided for in Position-Recommendation No. 2012-19 applicable to asset management companies is also relevant for the investment needs of the DASP's regulatory equity.

## **5.5. Once it has been licensed, can a DASP opt for the professional insurance regime instead of meeting the own funds requirements, and vice versa?**

Yes. The DASP can opt for the professional insurance regime instead of meeting the own funds requirements and vice versa when it revalues the adequacy of its own funds at year-end. It must inform the AMF of the outcome of these calculations and any change of option.

However, the DASP must at all times comply with obligations relating to own funds or professional insurance. There must therefore not be a period where the DASP does not meet any of these requirements.

## **6. FIGHT AGAINST MONEY LAUNDERING AND TERRORIST FINANCING**

### **6.1. What are the requirements in terms of the fight against money laundering and the terrorist financing (AML/CFT) when examining DASP applications for registration and license?**

In accordance with Articles L. 54-10-3 and L. 54-10-5 of the Monetary and Financial Code, entities applying for registration and/or license as DASPs must implement an appropriate organisation, procedures and an internal control system that can ensure compliance with the provisions relating to AML/CFT, as well as the freezing of assets.

Instruction DOC-2019-23 relating to the regime applicable to digital asset service providers lists the documents required for this purpose. In particular, the applicant must provide the following information, which may be presented, if appropriate, in the form of a procedures manual for the service provider's personnel and written in sufficiently operational terms:

- the applicant must draw up a classification of money laundering and terrorist financing (AML/CFT) risks depending on the nature of the products or services offered, the terms and conditions of transactions proposed, the distribution channels used, the characteristics of clients, the country or region of origin and destination of the funds, in accordance with Article L. 561-4-1 of the Monetary and Financial Code. Based on this risk classification and the client information collected pursuant to Article L. 561-5-1 of the Monetary and Financial Code, the service provider draws up a risk profile (risk rating/score) of each business relationship. It will use this score to vary the level of due diligence measures taken.

- if the applicant belongs to a group as defined in Article L. 561-33 of the Monetary and Financial Code, it must also provide the risk classification established at the group level.

- the applicant must describe the organisation of its AML/CFT system, which must be suited to its risk classification, and appoint a manager of this system. The AML/CFT system must include:

1° Internal procedures, adapted to the service provider's risk classification, including client due diligence. In particular, these procedures must make sufficiently operational provisions for the relevant criteria that make it possible to distinguish between occasional clients and clients in a business relationship, the methods used in identifying and verifying the identity of clients and, where applicable, the beneficial owners, including cases where a relationship is entered into remotely (see Question 3 below), the measures of identification of transactions performed by occasional clients (see Question 4 below). The internal procedures must give details of the information collected and analysed for the purpose of knowing clients and the business relationship according to a risk-based approach, as well as the procedures for updating this information. Internal procedures must also provide for an operational description of the due diligence measures in place in the cases specified in Articles L. 561-10 and L. 561-10-1, in particular in relation to politically exposed persons (PEP). The applicant must also provide the company's AML/CFT procedures manual for staff.

2° As part of supervision of transactions, the applicant must describe the procedures for detecting atypical or suspicious transactions with regard, where applicable, to the risk profile of business relationships, based on materiality criteria and thresholds. These procedures must provide for the processing of alerts generated by means of documented analysis, leading to a duly justified decision to take no further action, an enhanced review within the meaning of Article L. 561-10-2 of the Monetary and Financial Code or a suspicious transaction report to TRACFIN. The applicant must describe the operational procedures for complying with the reporting requirements of TRACFIN, the names and curriculum vitae of the TRACFIN correspondent and reporting officer (see Articles R. 561-23 and R. 561-24 of the Monetary and Financial Code).

3° Internal control in terms of AML/CFT that meets the requirements of Article R. 561-38-8 of the Monetary and Financial Code.

4. The procedures for training personnel and providing them with AML/CFT information, as well as the resources allocated for this purpose.

- The applicant must provide a description of the system for freezing assets and prohibiting their availability or use (including an internal control system) and specify the procedures for informing the Minister for the Economy as provided for in Article L. 562-4 of the Monetary and Financial Code.

- Should the applicant plan to outsource the implementation of its obligations regarding AML/CFT or the freezing of assets, it must specify the services concerned, the name of the service provider(s) providing these services, the main characteristics of the outsourcing agreements, send a copy (or draft) of outsourcing agreements or failing which, the specifications of these services. The applicant must also explain, if applicable, the procedures and resources implemented for the control of the outsourced services.

## **6.2. Does a registered service provider subject to the provisions relating to AML/CFT have to apply the same vigilance measures for the provision of other services for which it has not applied for the optional license?**

In accordance with Article L. 561-2 of the Monetary and Financial Code service providers that provide the services mentioned in points 1° and/or 2° of Article L. 54-10-2 of the Monetary and Financial Code and licensed DASPs must comply with the AML/CFT regime.

Registered service providers must therefore apply measures relating to AML/CFT (Articles L. 561-1 *et seq.* and R. 561-1 *et seq.* of the Monetary and Financial Code) for the digital asset services for which they have been registered and those for which they have obtained license and, if necessary, adapt their procedures to the nature of the licensed service.

In any case, the AMF points out that any participant that fails to comply with these provisions shall be liable to a criminal sanction for money laundering punishable by five years in prison and a fine of €375,000 (Article 324-1 of the Criminal Code).

It is good practice for registered service providers who also provide services 3° to 5° of Article L. 54-10-2 of the Monetary and Financial Code without having applied for an AMF license to apply AML/CFT regulations to all the services that they provide, when these various services are aimed at the same clients and digital assets and on a common trading platform. Likewise, it is good practice for service providers who provide services 3° to 5° of Article L. 54-10-2 of the Monetary and Financial Code without having applied for an AMF license to apply AML/CFT regulations.

### **6.3. In cases where a relation is entered into remotely, what are the vigilance obligations to be implemented in order to verify the client's identity?**

In accordance with Article L. 561-5 of the Monetary and Financial Code, the DASP must (i) identify its clients, and if applicable, its beneficial owners and (ii) verify the identification details by means of the presentation of any written document that provides proof of identity, before entering into a business relationship with its clients or assisting them with the preparation or execution of a transaction.

Articles R. 561-5-1 and R. 561-5-2 of the Monetary and Financial Code specify the various methods that a DASP can use to verify the client's identification remotely, in particular by using "*an electronic identification issued as part of a French electronic identification scheme notified to the European Commission pursuant to Article 9 (1) of (EU) Regulation no. 910/2014 of the European Parliament and Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market, or a scheme notified by another Member State of the European Union under the same conditions and with an assurance level that corresponds at least to the substantial assurance level defined in Article 8 of said regulation*" (1°) or "*the use of an electronic means of identification presumed to be reliable within the meaning of Article L. 102 of the Post and Electronic Communications Code*" (2°).

Pursuant to Article R. 561-5-2 of the Monetary and Financial Code, when the above-mentioned verification measures cannot be implemented, the DASP shall verify the identity of its clients by applying at least two measures specified in 1° to 6° of this Article.

For example, to meet its obligations to verify the identity of the client when the business relationship is entered into remotely, the DASP may obtain a copy of an official identity document (first measure under Article R. 561-5-2 of the Monetary and Financial Code) and demand that the first payment of transactions be made from or to an account opened in the client's name with a person mentioned in 1° to 6° bis of Article L. 561-2 of the Monetary and Financial Code that is established in an EU Member State or in a State that is a party to the EEA Agreement or in a third country that imposes equivalent obligations in terms of the fight against money laundering and terrorist financing risks (second measure).

### **6.4. From what amount must the DASP identify and verify the identity of its occasional clients?**

By the terms of paragraph II of Article R. 561-10 of the Monetary and Financial Code, the DASP is required, "before carrying out a transaction or assisting in the preparation or execution of the transaction, to identify and verify the identity of the occasional client as well the beneficial owner of the client if applicable [...] when it is [...] 5° a related transaction or transactions undertaken [with a DASP], the amount of which, or, in the case of an exchange between digital assets, the higher of the values in legal tender currency, exceeds €1,000".

For the interpretation of these various concepts, please refer to the guidelines of 14 December 2018 on the identification, verification of the identity and knowledge of the client published by the ACPR on its website (occasional client, beneficial owner).

### **6.5. Which DASPs are subject to the asset freezing regime?**

Under Article L. 562-4 of the Monetary and Financial Code, DASPs that own or receive "funds or economic resources on behalf of a client" shall "immediately apply measures for freezing assets and prohibiting their availability or use, and immediately inform the Minister for the Economy". DASPs are also subject to European measures for freezing assets and prohibiting the availability of funds or economic resources for designated persons or entities.

Economic resources are defined as "assets of any kind whatsoever, whether tangible or intangible, moveable or immoveable, that are not funds but may be used to obtain funds, goods or services" which includes digital assets.

Consequently, DASPs must apply national and European asset freezing measures and the prohibition of the availability or use of digital assets and legal tender that they hold, buy or sell for legal tender, exchange for other digital assets, receive transfer or manage under mandate.

## 7. IT AUDIT

### **7.1. What are the cases in which the AMF will ask to use evaluated and certified products or request that security audits be performed?**

Articles D. 54-10-7 and D. 54-10-9 of the Monetary and Financial Code provide that the AMF may require the applicant for a license to use evaluated and certified products or perform security audits. Under Article 721-4 of the AMF General Regulation, the evaluation of products and the security audit are performed in accordance with Instruction DOC-2019-24 on the cybersecurity system of requirements.

The AMF will exercise this option when it deems it necessary for the resilience and security of the DASP's information systems, in particular to counter the following threats:

- the compromise of wallets holding the private keys of clients;
- personal data breaches;
- denial of service attacks;
- identity theft;
- inability to investigate in the event of an incident or fraudulent activity.

Without prejudice to the possibility for the AMF to apply Article 721-4 of the AMF General Regulation to all the planned digital asset services, the AMF pays particular attention to the provision of the services referred to in 1° (custody) and 5° b) (portfolio management) of Article L. 54-10-2 of the Monetary and Financial Code, which are the subject of specific provisions in the aforementioned instruction.

Other cases, such as the fact that a distributed ledger system has been designed by the applicant itself, may prompt the AMF to exercise this option. Point 3.4 of said instruction states in this respect that the AMF may require that the distributed ledger system be certified under a recognised security scheme. This possibility is especially important because the distributed ledger technology is private, is based on proprietary technology or uses code that is not available as open source.

## 8. ORGANISATION RULES AND CONDUCT OF BUSINESS RULES

### **8.1. What is a durable medium?**

Several provisions of the AMF General Regulation<sup>3</sup> provide that the DASP must send its clients certain documents on a durable medium, within the meaning of Article 314-5 of the AMF General Regulation, in particular a written agreement between the DASP and its clients.

The aforementioned article provides that a durable medium is any instrument that "enables a client to store information addressed personally to that client in a way that affords easy access for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored. "

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<sup>3</sup> Articles 721-14, 722-3, 722-4, 722-10, 722-24 and 722-25 of the AMF GR.

Media in electronic format may be considered as durable provided that the criteria used for the definition of a durable medium set out in Article 314-5 of the AMF General Regulation are met.

Durable media include in particular emails or information made available in a personal area of the service provider's website, with secure access, after the client has been notified of its availability by email or by any other means of communication.<sup>4</sup>

## 9. DIGITAL ASSET CUSTODY OR MEANS OF ACCESS TO DIGITAL ASSETS ON BEHALF OF THIRD PARTIES

### 9.1. What is meant by the expression "controlling, on behalf of third parties, the means of access to the digital assets registered in the distributed ledger system"?

Article D. 54-10-1 – 1° of the Monetary and Financial Code defines the service of custody as the act of controlling, on behalf of third parties, the means of access to the digital assets registered in the distributed ledger system and of keeping a register of positions, opened in the name of the third party, corresponding to the third party's rights to said digital assets.

This control over the means of access is exercised for example by the fact that the service provider has, by virtue of a contractual relationship with the client, one or more private digital keys associated with the public addresses of the digital assets or digital asset wallets held on behalf of clients, regardless of the type of wallet (wallet connected or not connected to the internet).

For the service to be qualified as a custody service, the following must be analysed, in particular:

- whether the custodian has the ability to move the digital assets by any means whatsoever in a distributed ledger system on behalf of the client;
- whether the custodian has a wallet opened in its name in which the private digital keys corresponding to the digital assets held by its clients are recorded;
- whether the digital assets are registered in a distributed ledger system on behalf of the custodian;
- whether the client has transferred its digital assets to the wallet opened in the custodian's name to enable the custodian to move them on its behalf.

The fact that movements on the client's account are secured by the use of the "multi-signature" process does not call the qualification of the custody service into question. The custodian is the person that has a contractual relationship with the client.

Proposing technological solutions for the storage of digital keys that remain under the sole control and responsibility of the client does not constitute a custody service.

### 9.2. What does the obligation to return the means of access to digital assets applicable to the custodian entail?

Article 722-1 6° of the AMF General Regulation provides that the custodian "shall ensure that the necessary procedures are in place to return the means of access to the digital assets [...]."

The return of the digital assets must be understood as the return of the control of the means of access to the digital assets. Consequently, the custodian's obligation to return the digital assets shall necessarily entail the loss of the custodian's ability to move the digital assets belonging to the client. This shall be done, in particular by transferring

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<sup>4</sup> See also CJEU, 25 January 2017, Bawag, C-375/15.

the client's digital assets to an external wallet designated by the client to whom the custodian will have previously disclosed the destination address.

The parties may agree that the return concerns equivalent digital assets or in legal tender.

### **9.3. What are the events non attributable to the licensed custodian that may exempt it from its obligation to return the digital assets?**

Article 722-1 6° of the AMF General Regulation provides that "except in the case of events not directly or indirectly attributable to the digital assets services provider, it shall return the control over the means of access to digital assets to the client as soon as possible. When it is impossible to return the control over the means of access of the digital assets, the digital assets custodian shall compensate its client.

Events not attributable to the digital assets custodian include, in particular, any event for which it could demonstrate that it is independent of its operations, in particular a problem inherent in the operation of the distributed ledger or in an automated computer program ("smart contract") that could be based on a distributed ledger that it does not control." In such cases, the client should be duly informed of the limited scope of the custodian's liability in the event of an incident.

The AMF considers that an event inherent in the operation of a distributed ledger or in an automated computer program that the custodian controls may not be qualified as an event not attributable to the custodian. This will be the case when the custodian controls the registered transactions or the order in which they are recorded in a distributed ledger or controls the functionalities of or access to an automated computer program.

Only the occurrence of an event that is not attributable to the custodian may exempt it from its obligation to return the digital assets. Thus, the custodian who demonstrates the existence of an "external event outside of its reasonable control, and the consequences of which would have been inevitable despite all reasonable efforts made to prevent them" is exempted from the obligation to return the digital assets.

For example, a mistake made by the client when communicating a public key for the return of the means of access to the digital assets is likely to constitute an event that is not attributable to the custodian.

## **10. PURCHASE OR SALE DIGITAL ASSETS IN LEGAL TENDER AND SERVICE OF TRADING DIGITAL ASSETS FOR OTHER DIGITAL ASSETS.**

### **10.1. Does the provision of the service of purchase or sale digital assets in legal tender also fall under the status of payment service provider?**

ACPR Position 2014-P-01 specifies that "in a transaction for the buying/selling of bitcoins for legal tender, the intermediation activity of receiving funds from the bitcoin buyer to transfer them to the bitcoin seller falls under the provision of payment services".

The provision of the service referred to in Article L. 54-10-2-2 of the Monetary and Financial Code, when it involves the receiving of funds on behalf of a third party, may be qualified as the provision of payment services reserved to payment service providers duly authorised by the ACPR. This authorisation presupposes that the ACPR has issued license as a payment institution pursuant to Article L. 522-6 of the Monetary and Financial Code. This license is not required, however, when the service provider is acting on its own account. This is because the purchase and sale of digital assets on own account are not considered payment services and are therefore not subject to the regulation applicable to these services. The AMF invites services providers to examine, prior to filing an application for registration as a digital asset provider, the financial flows generated by their activity in order to ascertain



whether or not it is necessary to obtain the ACPR's authorisation to provide the service mentioned in Article L. 54-10-2-2 of the Monetary and Financial Code and to document their application in this regard.

It is reminded that any person providing services 1° and 2° of Article L. 54-10-2 of the Monetary and Financial Code must be registered, including payment service providers and payment institutions.

**10.2. Does the digital asset trading platform referred to in Article 722-5 2° of the AMF General Regulation to which the client's orders are sent for execution have to be a trading platform licensed by the AMF?**

No. The concept of "trading platform for digital assets" must be understood in the broad sense here. It also includes platforms that have not previously received an AMF license. The status of this platform is therefore irrespective of the qualification of the activity of the service provider providing services 2° and/or 3° mentioned in Article L. 54-10-2 of the Monetary and Financial Code.

**10.3. What is meant by the "exceptional market conditions" referred to in Article 722-7 of the AMF General Regulation?**

The last sub-paragraph of Article 722-7 of the AMF General Regulation provides that the DASP providing service 2° and/or 3° referred to in Article L. 54-10-2 of the Monetary and Financial Code "may withdraw the prices and, where applicable, the quantities admitted and maximum quantities in the event of exceptional market conditions. "

The AMF considers that these market conditions are deemed to have occurred when requiring the DSPA to provide clients with prices would be contrary to a sound risk management and, in particular, when:

- the digital asset trading platform on which the digital asset is traded suspends the trading of this asset; or
- the digital asset trading platform that commits its own capital pursuant to Article 722-14 of the AMF General Regulation suspends its role as a liquidity provider on one or more of the digital assets in question; or
- there is no reliable market price for one or more of the digital assets in question.

**10.4. Can the DASP choose a single digital asset trading platform for the purposes of its best execution obligation?**

Yes. The AMF considers that a DASP who transmits orders to other entities may include only one digital asset trading platform in its execution policy when it is able to demonstrate that that such a choice enables it to consistently get the best results for their clients that are the most satisfactory compared with the results that it could reasonably expect if it used another digital asset trading platform.

## 11. OPERATION OF A DIGITAL ASSET TRADING PLATFORM

**11.1. To what extent must a digital asset trading platform obtain a license as a payment service provider?**

ACPR Position 2014-P-01 specifies that "in a transaction for the buying/selling of bitcoins in legal tender, the intermediation activity of receiving funds from the bitcoin buyer to transfer them to the bitcoin seller falls under the provision of payment services".

When a digital asset trading platform requires the advance payment of funds from its clients, which are then used to trade on the platform, a payment service provider license may be required because funds are effectively

collected on behalf of third parties. The AMF invites entrepreneurs to contact the ACPR to find out the status that is suited to their planned activities.

**11.2. Can the digital asset trading platform use the digital assets held in custody on behalf of its clients to ensure the liquidity of a digital asset?**

No. Pursuant to Article 722-14 of the AMF General Regulation, the licensed service provider operating a digital asset trading platform may commit its own capital only when it is purchase or sale digital assets to ensure liquidity on said platform and when the amount of the transactions performed by the operator is proportionate to the total market capitalisation of the digital asset concerned.

In the event that the service provider also provides the custody service, the digital assets kept on behalf of its clients shall not be considered to be the DASP's own funds and may therefore not be used to ensure liquidity on the digital asset trading platform, even when the service provider has obtained the express agreement of the client referred to in Article 722-1 5° of the AMF General Regulation.

**11.3. What law governs the operating rules of a trading platform?**

The operating rules of a digital asset trading platform operated by a DASP licensed for this service are subject to the AMF license pursuant to the application of Article 722-13 of the AMF General Regulation. For the purposes of this license, the applicable law is French law.

**12. OTHER QUESTIONS**

**12.1. Who are the persons authorised to carry out direct marketing pursuant to Article L. 341-3 of the Monetary and Financial Code?**

Pursuant to Article L. 341-3 of the Monetary and Financial Code "only the following persons may engage in the direct marketing of banking or financial services: [...] 8° Service providers licensed under the conditions provided for in Article L. 54-10-5 of the Monetary and Financial Code. "

This means that only licensed DASPs may engage in direct marketing. This possibility is thus prohibited for DASPs who are registered under Article L. 54-10-3 of the Monetary and Financial Code.