



**AMF POSITION - RECOMMENDATION  
DOC-2020-07**



## 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 721-1-1, 721-3 to 721-6 and 722-1, 722-4, 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 asset 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 an electronic currency. Project owners are invited to contact the Autorité de Contrôle Prudentiel et de Résolution (ACPR) to determine whether the assets they are issuing or distributing meet the conditions that qualify them as electronic money and whether their business requires a license to issue electronic money, as defined in Article L. 525-1 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.

As a general rule, providers who may be considered as providing digital asset services must ensure that the assets on which their services are rendered constitute digital assets within the meaning of Article L. 54-10-1 of the Monetary and Financial Code.

In this respect, the fungibility of the asset is not a qualifying element under the terms of this provision. Law No. 2019-486 of May 22, 2019, on the Growth and Transformation of Companies (the “PACTE law”) was adopted by the legislator with the aim of regulating assets that have a financial use, that are easily interchangeable or whose value in relation to another asset can be determined by comparison with an existing market or an equivalent asset. Therefore crypto-assets that are unique and not fungible with other crypto-assets, including digital art and collectibles or that represent services or physical assets, should not qualify as digital assets within the meaning of Article L. 54-10-1 of the Monetary and Financial Code. The value of such unique and non-fungible crypto-assets is attributable to each crypto-asset’s unique characteristics and the utility it gives to the token holder. If it's true that unique and non-fungible crypto-assets could be traded on markets and accumulated speculatively, they are not easily interchangeable and the relative value of such a crypto-asset to another, each being unique, cannot be determined by comparison with an existing market or equivalent asset. Besides, the mere assignment of a unique identifier to a crypto-asset is not in itself sufficient to classify it as unique and non-fungible.

Companies wishing to offer to their customers services based on non-fungible assets are invited to carry out an in-depth legal analysis to determine whether they should be qualified as digital assets.

## 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° to 4° of Article L. 54-10-2 of the Monetary and Financial Code.

Applicants who wish to provide on behalf of a third party a digital asset custody service or access to digital assets, a service for the purchase or sale of digital assets in legal tender, the trading of digital assets for other digital assets or a service of operation of a digital asset trading platform must register in accordance with Article L. 54-10-3 of the Monetary and Financial Code. For this purpose, they must comply with the provisions of Articles L. 561-1 *et seq.* and R. 561-1 *et seq.*, L. 562-1 *et seq.* and R. 562-1 *et seq.* and L. 54-10-1 *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

AMF position - recommendation - DOC-2020-07 – Questions-answers on the digital asset service providers regime 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.

Registration and optional license do not confer the same rights, and in particular, the ability to advertise is limited for a registered digital asset service provider ("DASP") (see answer to question 12.2).

## **2.2. Can the status of registered or licensed DASP be combined with the status of investment service provider (ISP), portfolio management company, financial investment advisor (FIA), crowdfunding advisor (CIA), crowdfunding intermediary (CI) or licensed crowdfunding service providers for business?**

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 DASP in accordance with the rules applicable to ISPs and mainly with the Order of September 5, 2007 on the other activities of investment firms, as amended by the Order of December 23, 2020. 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 licensed.

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 in compliance with the conditions set forth in the above-mentioned Position-Recommendation. In this respect, in order to provide the service of advice to subscribers of digital assets, a FIA may decide to be licensed as a DASP or, since license for this service is optional, to provide this service without being licensed. When this service is rendered without license, pursuant to AMF Position-Recommendation DOC-2006-23, advice to subscribers of digital assets constitutes "*other asset management advisory activities*" that may be provided by the FIA. It is therefore required to comply with all the rules of good conduct defined in Article L. 541-8-1 of the Monetary and Financial Code and set out in the AMF General Regulation mentioned in AMF Position-Recommendation DOC-2006-23.

Conversely, the combination of the statuses of DASP and of crowdfunding advisor is prohibited according to Article L. 547-1 III of the Monetary and Financial Code, which excludes any activities other than the activities mentioned in I and II of this Article, mainly 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.

As an extension of its asset management activity, an asset management company may carry out an ancillary activity involving digital assets, within the limits of the services it is otherwise authorized to provide relating to financial instruments. The conditions for carrying out this activity are set out in AMF Position-Recommendation DOC-2012-19 entitled "Programme of operations guide for asset management companies and self-managed collective investments".

Finally, the combination of DASP and crowdfunding service provider status is permitted under the conditions set forth in Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937.

### **2.3. To what extent can a portfolio management company buy, sell or exchange digital assets as part of its collective investment activity?**

The cases in which a portfolio management company may, as part of its collective investment activity, buy, sell or exchange digital assets are specified in AMF Position-Recommendation DOC 2012-19 "Programme of operations guide for asset management companies and self-managed collective investments".

### **2.4. To what extent can the status of registered/licensed DASP be used? What clarification(s) are required in connection with this status?**

Only DASP that have effectively completed registration or obtained license can benefit from the entitlements of registration or license.

Article 8 of Law no. 2023-171 of March 9, 2023 on various provisions for adaptation to European Union law in the fields of the economy, health, labor, transport and agriculture (the "DDADUE law") imposes new obligations from January 1, 2024 on service providers who submit a registration file on or after July 1, 2023 (included) (hereinafter referred to as "reinforced registration"), and maintains registration under current provisions for service providers who submit a complete file before June 30, 2023 (hereinafter referred to as "simple registration").

Service providers that provide the digital asset services referred to in points 1° to 4° of Article L. 54-10-2 of the Monetary and Financial Code must have completed registration before conducting their activity. Using the status of DASP to provide the services in question without first having completed registration constitutes a breach of the criminal provisions set forth 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 a 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.

In a general way, a person who is not registered or authorized to provide one or more services on digital assets must not use a name, a corporate name, issue commercial communications or use any other process suggesting that it is DASP or likely to create any confusion in this respect in accordance with articles L. 54-10-4 and L. 572-26 of the Monetary and Financial Code, and L. 121-2 of the Consumer Code.

Consequently, project owners may not communicate the fact that they have obtained any validation from the AMF or that they have been registered as a DASP or obtained DASP license simply because they have contacted the the AMF services or have started the procedure to obtain such registration or optional license (for example, after simply meeting with the AMF services 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° to 4° 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).

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<sup>1</sup> Law No. 2019-486 of May 22, 2019 for the Business Growth and Transformation.

## **2.5. What do the concepts of good repute and competence of senior managers and significant shareholders of the capital, voting rights or control of the providers cover?**

Article L. 54-10-3 of the Monetary and Financial Code provides that, prior to commencing their activity, DASPs wishing to provide the services mentioned in 1° to 4° of Article L. 54-10-2 of the Monetary and Financial Code must register with the AMF. In this respect, the AMF checks whether the persons who manage the company and the natural persons who either directly or indirectly hold more than 25% of the capital or voting rights of the service provider, or exercise, by any other means, a power of control over the service provider within the meaning of 3° and 4° of I of Article L. 233-3 of the French Commercial Code<sup>2</sup> (hereinafter, the "holders of control over the service provider") *"are of sufficiently good repute and competent to perform their duties"*.

Article L. 54-10-5 of the Monetary and Financial Code also provides that, in order to obtain the optional license or provide the services mentioned in 5° of Article L. 54-10-2 of the Monetary and Financial Code, the DASPs must prove the good repute and competence of their effective managers and holders of capital or significant voting rights.

In this respect, the complexity of a DASP activity requires, in principle, that it be effectively managed by at least two persons. By way of derogation, a DASP may be effectively managed by a single person when, in view of the skills and availability of this single manager and the simplicity of the DASP's business model, it can be demonstrated that efficient, sound and prudent management of the DASP would be possible with a single effective manager.

In order to ensure consistency with the treatment of similar entities subject to their supervision, the AMF and the ACPR have adopted a similar approach for the assessment of senior managers and holders of control over the service provider to that set out in the joint ESMA and EBA guidelines on the assessment of the suitability of the management body members and key positions holders<sup>3</sup>. These guidelines primarily provide that:

- (i) the assessment of the knowledge, skills and experience of senior managers should take into account the role and functions of the position as well as the required capabilities, education, training and practice, practical and professional experience gained in previous positions and the skills acquired and demonstrated through professional conduct. Senior managers must have acquired sufficient practical experience. Particular attention should be paid to the nature of the position held and its level of authority, the length of service, the nature and complexity of the business in which the position was held, including its organizational structure, the extent of the member's skills and decision-making authority and responsibilities, the technical knowledge acquired in the position and the number of subordinates;
- (ii) senior managers must demonstrate that they are able to devote sufficient time to the performance of their duties;
- (iii) all areas of knowledge required for the performance of a DASP activities must be covered by sufficient expertise among its senior managers. In other words, the skills of the senior managers can be assessed collectively<sup>4</sup>;
- (iv) the good repute, honesty and integrity of the senior managers and holders of control over the service provider are considered to be present when there are no objective and demonstrable reasons to suggest otherwise. Good repute implies compliance with applicable laws and regulations. Good repute also requires taking into account facts that may have a negative impact on the public's and market participants' perception of the company. In this respect, the AMF may have to base its decision on judicial or administrative decisions, but also, in particular, on the existence of a complaint or legal proceedings in progress that could call into question the good repute or integrity of the person<sup>5</sup>.

## **2.6. 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 DASP lists the information that senior managers and shareholders have to submit for the assessment of their good repute and skills.

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 the said code.

The requirements relating to good repute and skills are deemed to have been met when registration is requested by providers of the services mentioned in 1° and 2° of Article L. 54-10-2 of the Monetary and Financial Code, registered or licensed in another Member State of the European Union or party to the Agreement on the European Economic Area, in accordance with the 6<sup>th</sup> paragraph of Article L. 54-10-3 of the same Code.

However the presumption of good repute and skills does not apply to shareholders and senior managers of service providers not covered by the above paragraph.

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

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<sup>2</sup> Article L. 54-10-3, 2° of the Monetary and Financial Code: *"Natural persons who either directly or indirectly hold more than 25% of the capital or voting rights of the service provider, or who exercise, by any other means, a power of control over the service provider within the meaning of 3° and 4° of the first paragraph of Article L. 233-3 of the Commercial Code, guarantee the sound and prudent management of the service provider and are of good repute and have the necessary competence."*

<sup>3</sup> Joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body, ESMA35-36-2319 or EBA/GL/2021/06, July 2nd, 2021

<sup>4</sup> As such, if, due to the departure of a senior manager, the collective competence was lost, it would have to be regained by the DASP by finding a manager filling the same competence gap.

<sup>5</sup> CE, 16 février 2005, Société Global Financial Services, n°25833



### 3. QUESTIONS RELATING TO THE REGISTRATION PROCEDURE

#### **3.1. What transitory provisions apply in relation to the reinforced registration of DASP?**

Providers of the services mentioned in 1° to 4° of article L. 54-10-2 of the Monetary and Financial Code must be registered in accordance with article L. 54-10-3 of the same code before they can operate in France.

In application of the DDADUE law, the AMF services will examine DASP applications as being subject to simple registration, provided that the application files are considered complete by June 30, 2023 (included) at the latest. All other applications will be processed under the reinforced registration regime.

Those who have not completed their registration file by July 1, 2023 will therefore have to comply with the provisions of the reinforced registration.

The completeness of the file is analyzed not only in terms of the exhaustiveness of the documents provided, but also in terms of the quality and degree of precision of the information supplied. When a DASP subject to simple registration declares a change of situation to the AMF under the conditions set out in article D. 54-10-5 of the Monetary and Financial Code, it remains governed by the provisions applicable prior to January 1, 2024.

#### **3.2. What about changes of status or applications for registration extension on or after July 1, 2023, concerning a DASP already registered under the simple registration regime?**

When a DASP subject to registration declares to the AMF a change relating to the persons mentioned in 1° and 2° of article L. 54-10-3 of the Monetary and Financial Code or any event likely to call into question the assessment previously made of their good repute in accordance with article D. 54-10-5 of the Monetary and Financial Code, it remains governed by the provisions applicable to simple registration.

However, when a DASP subject to simple registration applies to extend its registration to a new service, it is subject to the provisions of reinforced registration for all services provided, including those for which it was previously registered under the provisions applicable prior to January 1, 2024. Therefore, if the service provider previously provided the digital asset custody service or extends its activities to the service of custody of digital assets, the provisions of 6° of article L. 54-10-3 of the same code will also apply to this service.

#### **3.3. What provisions apply to DASP authorized before January 1, 2024?**

Amendments to the AMFGR or AMF doctrine relating to the approval of DASP that come into force on or after January 1, 2024 are applicable to all DASP approved on or after that date. DASP approved by the AMF before January 1, 2024 comply with the provisions of the Monetary and Financial Code, the AMFGR and the AMF doctrine in force at the time of their approval by the AMF, and bring themselves into line with the new requirements applicable when they come into force.

#### **3.4. What are the meanings of the concepts of promotional communication and distribution system mentioned in the list of criteria of Article 721-1-1 of the AMF General Regulation which determine whether a service on digital asset is provided in France?**

The promotional communications mentioned in Article 721-1-1 of the AMF General Regulation for the purpose of determining whether a service on digital asset is provided to a customer residing or established in France are, in particular, communications via the press, radio, or television, via social networks (including through influencers, or, more generally, social network users, acting on behalf of the provider), direct mail (mailing and emailing), on a proprietary website or of a third party, posters of any kind, banner, the provision of mobile applications, participation in road shows and trade fairs, any invitation to an event, affiliation campaigns, retargeting, invitation to fill out a

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response form or to download an application or to follow a training course, etc.

The drafting of one or more pages of the website and/or any communication related to a digital asset service in France shall lead to the verification of whether one or other of the criteria provided for in Article 721-1-1 of the AMF General Regulation is met in order to characterize the provision in France of the said digital asset service.

The promotional communication mentioned in Article 721-1-1 of the AMF General Regulation is deemed to be addressed by the DASP when it is addressed by the provider itself or by a third party on his behalf at its express request or with its approval, even if this approval is only implied (for instance, through the publication of links included on third parties' websites which direct to the provider's platform).

The distribution system referred to in Article 721-1-1 of the AMF General Regulation for the purpose of determining whether a service on digital assets is considered to be provided in France means a network set up by the service provider with the purpose of organizing a promotion or commercialization by means of a branch, a subsidiary or a third party (including by means of partnerships, agreements or franchises).

In addition, the AMF points out that the list of criteria provided for in Article 721-1-1 of the AMF General Regulation to determine whether the service on digital assets is provided in France is not exhaustive.

### **3.5. 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, as well as the extension of registration for new services, does not require a mandatory establishment in France, either in the form of a subsidiary or in the form of branch, as long as the DASP is established in a Member State of the European Union or in a State party to the Agreement on the European Economic Area. DASP should provide proof of the existence of the establishment when they make their request for registration.

To be able to register in France, Digital Service Asset Providers 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 through the establishment. DASP will need to provide evidence of the existence of this facility when applying for registration.

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

### **3.6. Do DASP 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, as amended by the fifth directive of 30 May 2018, does not create mutual recognition of the registration of DASPs providing asset custody services and the buying and selling of digital assets. When a DASP referred to in points 1° to 4° 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 or matriculated in another Member State in accordance with Article 47 of the aforementioned directive.

### **3.7. Can a foreign DASP have French clients without providing services in France?**

Yes. When the DASP does not directly or indirectly solicit customers residing or established in France and the service is not provided in France within the meaning of Article 721-1-1 of the AMF General Regulation, it may provide them digital asset services that will not be deemed to be provided in France. On the other hand, as soon as the service provider meets one of the criteria specified in article 721-1-1 of the AMF General Regulation, it must register in France.

However, where a third-country company, including through an entity operating on its behalf or having close links with that third-country undertaking or any other person operating on behalf of that entity, solicits customers or potential customers in the Union, regardless of the means of communication used for solicitation, promotion or advertising in the Union, this service is not deemed to be a service provided at the exclusive initiative of the customer. This is the case regardless of any contractual clause stating otherwise.

### **3.8. To what extent can activities related to anti-money laundering and combating financing of terrorism obligations (AML/CFT) or the assets freeze of the registered DASP be outsourced?**

In accordance with Article L. 561-2, 7 bis, of the Monetary and Financial Code, DASP referred to in 1° to 4° of Article L. 54-10-2 of the Monetary and Financial Code are subject to the anti-money laundering and anti-terrorist financing obligations set forth in Chapter I of Title VI of Book V of the Monetary and Financial Code. In addition, DASP are subject to the assets freeze obligations set forth in Chapter II of Title VI of Book V of the same code.

As part of the implementation of these procedures, article R. 561-38-2<sup>6</sup> of the same code authorizes DASP to entrust an external service provider with the performance, in their name and on their behalf, of all or part of the activities relating to their obligations.

The functions relating to anti-money laundering and combating the financing of terrorism obligations may be outsourced under the conditions mentioned in Article R. 561-38-2 of the Monetary and Financial Code.

In particular, the use of a transactional analysis tool (TAT) requires a case-by-case analysis and falls under the provisions of Article R. 561-38-2 if the DASP relies primarily on the conclusions of this tool to fulfil its AML/CFT obligations, in particular to carry out an enhanced review provided for in Article L. 561-10-2 or to determine the risk profile of a business relationship. On the other hand, the reporting obligations of the DASP to Tracfin cannot be outsourced, subject to the provisions of Article R. 561-28 of the Monetary and Financial Code, which allow, under certain conditions, to entrust another entity of the same group with the realization of suspicious transaction reports. The person so authorized must perform his or her duties in France.

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<sup>6</sup> To which article R. 562-1 of the Monetary and Financial Code refers with regard to the assets freeze.

The article specifies the conditions under which this outsourcing may be implemented:

- (1) DASP, regardless of the outsourcing of AML/CFT procedures, remain fully responsible for compliance with their obligations;
- (2) when the DASP outsources functions related to AML/CFT or to assets freeze, the relationship with its service provider is governed by an outsourcing contract concluded in writing and defining the terms and conditions of outsourcing, in particular with regard to the transmission of information necessary for vigilance and the internal control exercised by the DASP over its service provider. The mandatory clauses of this contract are defined in Article 10 of the Order of January 6, 2021 relating to the system and internal control in the fight against money laundering and terrorist financing and the assets freeze and the prohibition on making funds or economic resources available or using them.

In any case, the DASP remains responsible for compliance with its obligations.

### **3.9. What does Order No.2020-1544 of December 9, 2020 provide for the verification of compliance with anti-money laundering and combating financing of terrorism obligations?**

Generally speaking, for functions other than activities related to the fight against money laundering and the financing of terrorism (the "AML/CFT"), a DASP may resort to outsourcing as long as this is based on objective reasons, properly documented and does not have the effect of completely emptying the entity providing the digital asset services of its substance.

Article L. 54-10-3 of the Monetary and Financial Code, as amended by Order No. 2020-1544 of December 9, 2020 strengthening the framework for combating money laundering and terrorist financing applicable to digital assets, provides for an extension of the registration requirement to providers of the services mentioned in 3° and 4° of Article L. 54-10-2 of the said Code, without prior verification that they have put in place an organization, procedures and an internal control system likely to comply with the AML/CFT and assets freeze obligations. There is therefore no prior check of their AML/CFT and assets freeze systems in order to obtain registration for these persons.

On the other hand, for the services mentioned in 1° and 2° of Article L. 54-10-2, 4° of Article L. 54-10-3 of the Monetary and Financial Code provides for an *a priori* check to ensure that *"that the service providers are able to comply with their obligations in terms of the fight against money laundering and terrorist financing, the assets freeze and the prohibition on making assets available by setting up an organization and procedures to ensure compliance with the obligations set forth in Articles L. 561-4-1 to L. 561-5-1, L. 561-10-2 and L. 561-15 and by the regulations adopted for their application, as well as Chapter II of Title VI of this Book and European regulations on restrictive measures adopted pursuant to Articles 75 or 215 of the Treaty on the Functioning of the European Union"*.

Thus, under the terms of these provisions, the elements relating to risk classification, identification, identity verification and knowledge of the client, enhanced examinations, suspicious transaction reports and assets freeze are verified more specifically. Therefore, internal control, staff training, document retention or outsourcing procedures, as well as additional vigilance measures (filtering of politically exposed persons, etc.) are excluded from this *a priori* verification.

The AMF points out that in any event, providers registered in accordance with Article L. 54-10-3 of the Monetary and Financial Code, regardless of the services registered, remain subject<sup>7</sup> in their entirety to the obligations set forth in Chapters I and II of Title VI of Book V of the Monetary and Financial Code relating to AML/CFT and assets freeze. The supervisory authority will ensure that those subject to the law comply with their obligations by means of documentary checks and, if necessary, on-site checks which may lead to a sanction.

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<sup>7</sup> Article L. 561-2, 7° bis of the Monetary and Financial Code.

### Summary of the obligations relating to services subject to registration

In summary, the table below summarizes the obligations applicable to digital asset-based services subject to registration:

Service concerned?	Service subject to the registration obligation?	Verification of the good repute/competence of the senior managers and shareholders?	Prior verification of the AML/CFT and assets freeze systems for registration purposes?	Post-registration control of the AML/CFT and assets freeze obligations?
Custody of digital assets	yes	yes*/**	yes	yes
Buying or selling digital assets in legal tender	yes	yes*/**	yes	yes
Exchanging digital assets for other digital assets	yes	yes*	no	yes
Operation of a digital assets trading platform	yes	yes*	no	yes

\* Except for the organizations referred to in 1° to 7° of Article L. 561-2 of the Monetary and Financial Code for which the requirements regarding good repute are deemed to be met.

\*\* Except for providers registered or licensed in another Member State of the European Union or party to the Agreement on the European Economic Area for which the requirements regarding good repute and competence are deemed to be met.

#### **3.10. What if the status of a DASP changes after registration?**

Article L. 54-10-3 of the Monetary and Financial Code requires that any change affecting the compliance of the DASP exercising one or more of the services mentioned in 1° to 4° of Article L. 54-10-2 of the Monetary and Financial Code with the obligations provided for in the same article be reported to the AMF. This concerns in particular any change in the senior managers or holders of control over the service provider, the occurrence of any event that may affect the honourability or competence of the senior managers or holders of control over the service provider, any change in the structure of the DASP (in particular a merger, demerger or partial contribution of assets) and, more generally, any event that would result in the DASP failing to comply with the undertakings made or the conditions set at the time of registration.

In the event of an extension of its activity to new services on digital assets subject to mandatory registration, a new application for registration must be submitted by the DASP pursuant to Articles L. 54-10-3 and D. 54-10-2 of the Monetary and Financial Code before it begins to provide these new services.

As mentioned above, when a DASP subject to simple registration applies to extend its registration to a new service, it is subject to the provisions of reinforced registration for all services, including those for which it was previously registered under the provisions applicable prior to January 1, 2024. Thus, when a provider of digital asset services extends its activities to another service, the provisions of article L. 54-10-3 6° of the same code become applicable to all its services.

to perform a control of the DASP, its senior managers and holders of control over the service provider at the time of the facts.

#### 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 a legal entity with legal personality (subsidiary) or a branch in France.

##### 4.2. What are the substantial criteria that the AMF takes into account for the license of DASP?

For the purposes of granting a license, the AMF is particularly attentive to ensuring that applicants are not “letter-box” entities. For the license procedure, the applicant shall 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/CFT and assets freeze 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 and assets freeze regulations, the service provider shall set up an organisation comprising: (i) a person responsible for implementing the AML/CFT and assets freeze systems 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 assets freeze ; all located in France;
- the person or persons responsible for commercial functions or customer support also devote a sufficient minimum amount of time to the DASP activity in France.

These 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 senior 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 senior managers;
- the size, nature and complexity of the activities of the entity in which the director(s) and senior managers perform their duties;

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- the geographical presence of director(s) and senior managers; and
- the training required to perform certain duties.

The communication supports proposed by DASPs are written in a clear, accurate and understandable way for French clients so that the latter can make informed decisions.

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

Point 8° 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 digital asset services for which the DASP is registered or licensed, or all services provided when a defect or failure in its performance is likely to materially impair the DASP's capacity to comply 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, as well as Articles 9 and 10 of the Order of January 6, 2021 on the system and internal controls to combat money laundering and the financing of terrorism, assets freeze and the prohibition on making funds or economic resources available or using them. The DASP may not outsource its reporting obligations subject to the provisions of Article R. 561-28 of the Monetary and Financial Code (see Question 3.6 above).

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 to information relating to outsourced activities necessary for them to carry out their remit.

The DASP ensures that its internal control procedures and control systems include the outsourced activities. The DASP shall maintain the expertise necessary in order 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 remains responsible for compliance with its obligations.



## 5. PROFESSIONAL INSURANCE AND OWN FUNDS

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

Article L. 54-10-5, I, 1° 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 thus be 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 relating to 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 Instruction DOC-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 Instruction DOC-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 listed or high credit quality 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 permanently 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.

### **5.6. What are the minimum guarantees that the AMF takes into account in its assessment if the provider chooses to contract professional insurance?**

Article 721-5 II of the AMF General Regulation provides that *“the professional liability insurance contract shall include sufficient guarantees adapted to the digital asset services for which the provider is licensed. The amount of coverage may not be less than €400,000 per claim and €800,000 per insurance year.”*.

Without prejudice to the freedom of the parties to the insurance contract to negotiate the contractual guarantees, the AMF expects at least that these guarantees sufficiently cover the activities of the DASP. Indeed, the AMF is careful to ensure that the insurance contract is not emptied of its substance by insufficient or inappropriate guarantees.

In its assessment, the AMF takes into account the level of deductibles, overly broad exclusions and excessive waiting periods and considers in particular whether all or some of the following are covered by the policy: (i) loss and theft of documents ; (ii) misrepresentation and false statements ; (iii) acts, errors or omissions resulting from a breach of legal and regulatory obligations, the duty to act honestly, fairly and professionally towards clients and confidentiality obligations ; and (iv) business interruption as a result of an external attack on the provider's computer networks.

## 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 assets freeze.

Instruction DOC-2019-23 relating to the regime applicable to DASP 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.
- 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), or in cases 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. 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).

- the applicant must provide a description of the system for assets freeze 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.

### 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, 7° bis of the Monetary and Financial Code service providers that provide the services mentioned in points 1° to 4° of Article L. 54-10-2 of the Monetary and Financial Code and licensed DASPs referred to in article L. 54-10-2, 5° 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.

It is good practice for registered service providers who also provide service 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 service 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.

In accordance with Article L. 562-4 of the Monetary and Financial Code, those subject to AML/CFT regulations as well as any other legal entity constituted or established under national law or carrying out an operation on the national territory, in the context of its activity, are required to implement assets freeze measures and prohibitions on making funds available. As a result, DASPs are required, independently of their registration, to implement assets freeze and non-disposal measures.

### **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 “*a) To a means of electronic identification certified or attested by the National Agency for the Security of Information Systems that complies with either the substantial or high level of guarantee set by Article 8 of Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market, or (b) A means of electronic identification issued under a scheme notified to the European Commission by a Member State of the European Union under the conditions provided for in paragraph 1 of Article 9 of that Regulation and whose level of guarantee corresponds to either the substantial or high level set by Article 8 of that Regulation*” (1° of the article R. 561-5-1 of the Monetary and Financial Code) 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° of the said article).

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 State party to the European Economic Area Agreement or in a third country that imposes equivalent obligations in terms of the fight against money laundering and terrorist financing risks (second measure in accordance with article R. 561-5-2 of the Monetary and Financial Code).

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

Following the publication of Decree No. 2021-387 of April 2, 2021, as of May 1, 2021, DASP are required, “before carrying out a transaction or assisting in its preparation or execution, to identify and verify the identity of their occasional customer and, where applicable, the latter’s beneficial owner [...] when it concerns [...] 5° a transaction carried out with a person mentioned in 7° bis and 7° quater of Article L. 561-2 or a subscription with a person mentioned in 7° ter of the same article”.

For the interpretation of these various concepts, please refer to the guidelines of 14 December 2018 (updated) 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 assets freeze regime?**

Under Article L. 562-4, 2° of the Monetary and Financial Code, DASPs as part of their activities shall immediately apply measures for assets freeze and prohibiting their availability or use set out in the Monetary and Financial Code, and immediately inform the Minister for the Economy. DASPs are also subject to European measures for assets freeze and prohibiting the availability of funds or economic resources for designated persons or entities.

In accordance with article L. 562-1, 3° of the Monetary and Financial Code, 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 assets freeze 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 of the said assets.

### **7. CYBERSECURITY 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.

When examining applications, the AMF requires a security audit, the details of which are described in instruction DOC-2019-24.

## 8. ORGANISATION RULES AND CONDUCT OF BUSINESS RULES

### 8.1. What is a durable medium?

Several provisions of the AMF General Regulation provide that the DASP must send its clients certain documents (including the convention concluded between the DASP and the client) on a durable medium, within the meaning of Article 314-5 of the AMF General Regulation.

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”*.

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 includes 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>8</sup>. The provider must be able to identify with certainty the version of the documents that was communicated to the clients.

## 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 DLT 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 [hotwallet] or not connected to the internet [coldwallet]).

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 DLT on behalf of the client;
- whether the custodian has a wallet in which the private digital keys corresponding to the digital assets held by its clients are recorded;
- whether the client’s digital assets are registered in a DLT under a public address that belongs to the custodian;
- whether the client has transferred its digital assets to the wallet opened under a public address that belongs in the custodian's name to enable the custodian to move them on behalf of its client.

In this respect, the service provider’s access to a client’s wallet through the use of an Application Programming

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<sup>8</sup> See also CJEU, 25 January 2017, Bawag, C-375/15.

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Interface ("API") may, depending on the rights granted to the service provider by the API, qualify as the service of custody on behalf of third parties or other digital asset services.

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.

In the situation where a custodian uses a sub-custodian, Article 722-2 of the AMF General Regulation provides that *"the responsibility of the custodian of the digital assets towards its client is not affected by the fact that it uses a sub-custodian"*. The custodian should also be understood as the person in a contractual relationship with the client. In this context, the custodian shall comply, in its relationship with the sub-custodian, the provisions relating to outsourcing (see above Question 4.3).

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

Nor does it constitute a custody service for a token issuer, in the context of a public offering of tokens within the meaning of Article L. 552-3 of the Monetary and Financial Code, to put in place any means to track and safeguard the assets collected within the meaning of Article L. 552-5 of the Monetary and Financial Code. The same applies if, after the closing of the public offering of tokens, the issuer maintains a system for tracking and safeguarding digital assets without providing, on a principal and professional basis, a service for tracking and safeguarding digital assets on behalf of third parties and is not remunerated for this.

## **9.2. What does the separation and return of the means of access to digital assets obligations applicable to the custodian entail?**

In accordance with the provisions of Article 722-1 of the AMF General Regulation, the DASP ensures that the digital assets of its clients are separated in the DLT from its own digital assets. This separation implies, at least, a segregation in the DLT between the digital assets of all clients, on the one hand, and the digital assets held on its own behalf by the licensed provider, on the other hand. It also implies the impossibility to use the digital assets of clients and the rights attached to them without their express agreement. Beyond that, it is good practice for licensed providers to segregate digital assets for each client of the service.

Article 722-1, 6° of the AMF General Regulation provides that the licensed 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 licensed custodian's obligation to return the digital assets shall necessarily entail for him, once this restitution is implemented, to no longer be able to transfer or move the digital assets belonging to the client. This may imply for the service provider, to transfer the client's digital assets to an external wallet previously designated by the client.

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 that are not attributable, directly or indirectly, to the digital asset service provider, it shall return control of the means of access to the digital assets to the clients without any delay. In the event that control of means of access cannot be returned, the digital asset custodian shall compensate its client. Events that are not attributable to the digital assets custodian include any event that the custodian is able to demonstrate is beyond its operational control, including an inherent problem with the distributed ledger system or a smart contract that may be based on a distributed ledger system which is beyond its control."* In such cases, the client should be duly informed of the limited extent of the custodian's liability in the event of an incident.

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The AMF considers that an event involving an inherent problem of a DLT or an automated computing program on which the custodian has control does not qualify as an event not attributable to the custodian. This will be the case when the custodian has control over the registered transactions or over the order in which they are registered within a DLT or control over the functionality of an automated computing program or its access.

Only the occurrence of an event not attributable to the custodian may relieve it from its obligation to return. Thus, a custodian that is able to demonstrate the existence of an external event beyond its reasonable control and which the consequences would have been unavoidable despite all reasonable efforts to avoid them, may be relieved from its obligation to return the assets.

For instance, an error made by the customer when communicating her public key for the needs of returning the means of access to digital assets is likely to constitute an event 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 services, as those referred to in 2° to 4° of Article L. 54-10-2 of the Monetary and Financial Code, when it involves the collection of funds on behalf of a third party, may be qualified as the provision of payment services within the meaning of Article L. 314-1 of Monetary and Financial Code. Provide payment services as regular profession presupposes that the ACPR has issued license as a payment service provider (PSP) (credit institution, electronic money institution or payment institution). It is also possible for a DASP to be mandated as an agent/distributor by a payment service provider on the basis of Article L. 523-1 of the Monetary and Financial Code. This PSP remains responsible for the payment services provided and registers the agents it mandates with the ACPR. This license is not required, however, when the DASP collects funds owed to it. This is because the purchase and sale of digital assets do not lead to the collection of funds on behalf of third parties by the DASP, which is the direct beneficiary of the funds received in the context of these transactions. This activity does not therefore constitute the provision of payment services. The AMF invites services providers to examine, prior to filing an application for registration or license as a DASP, the financial flows generated by their activity in order to ensure whether or not it is necessary to obtain the ACPR's license to provide the service mentioned in Article L. 54-10- 2, 2° to 4° of the Monetary and Financial Code and to document their application in this regard.

It is reminded that any person providing to clients digital asset services referred to in 1°, 2°, 3° and 4° of Article L. 54- 10- 2 of the Monetary and Financial Code must be registered, including, without this limitation being exhaustive, payment service providers, agents of payment service providers (this status being based on a request from the payment service provider - principal), payment institutions or electronic money issuers.

### 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 registered or 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 or registration. The status (registered, licensed, or unregistered and unlicensed) of this platform has therefore no impact on 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 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 DASP to provide clients with prices is 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 funds 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 that transmits orders to other entities may include only one digital asset trading platform in its execution policy when it is able to demonstrate 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 or a registered agent may be required because funds are effectively collected on behalf of third parties. The AMF invites project holders to contact the ACPR in order to find out of payment services provider the status that is mandatory 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 funds only when it is purchasing or selling 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 Article 722-13 of the AMF General Regulation. In the context of this approval, to the extent that all or part of the envisaged clientele would be in France, in order to ensure their familiarity with the applicable law, the AMF may require that the law governing the operating rules be French law.

## **12. PROMOTIONAL COMMUNICATION AND CLIENT RELATIONS RELATED TO DIGITAL ASSETS**

The following answers apply to DASPs (registered or licensed) or persons acting on their behalf, in connection with service offerings involving digital assets when the DASP's clients reside or are established in France. In the case of licensed DASPs, they apply without prejudice to the specific rules that apply to them.

When a DASP provides its services to a client base composed, at least in part, of consumers within the meaning of the preliminary article of the Consumer Code<sup>9</sup>, it ensures compliance with the requirements set out in the provisions of this Code. In this area, the AMF cooperates with the Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (DGCCRF), the authority in charge of monitoring compliance with the provisions of the Consumer Code.

### **12.1. Does a promotional communication related to digital asset services have to contain specific information?**

The DASP ensures that its promotional communication is accurate and fair and does not constitute a misleading commercial practice within the meaning of Article L. 121-2 of the Consumer Code. In this respect, the information given to the client on digital assets must not create confusion with another good or service such as financial instruments or banking services. Furthermore, the presentation of the offer must not mislead the consumer on the nature of the good or service. Specific attention must be paid on this point by actors with a regulated status in order to distinguish the various offers with distinct clients paths.

**Recommendations:**

When the client base is composed, at least in part, of consumers it is recommended that the DASP communicate the following to clients or potential clients in any promotional communication:

- a warning about the volatility and potentially inappropriate nature of digital assets for retail clients and the risk of capital loss;
- if returns are mentioned, a warning that past returns are not a reliable indicator of future returns; and
- specific risk disclosures appropriate in light of the nature and complexity of the digital assets and services involved.

The compliance by the DASP with these recommendations cannot be considered as demonstrating, on its own, the absence of unfair or deceptive commercial practices within the meaning of Articles L. 121-1 et seq. of the Consumer Code.

The DASP remains responsible for its promotional communications when it uses third parties for these purposes. It will ensure that such persons comply with the above requirements.

**12.2. Which DASPs are permitted to advertise directly or indirectly for the purpose of obtaining an individual's consent to provide a digital asset service?**

Article L. 222-16-1 of the Consumer Code states that "*any direct or indirect advertising broadcast by electronic means with the aim of inviting a person, by means of a response or contact form, to request or provide additional information, or to establish a relationship with the advertiser, with a view to obtaining the advertiser's agreement to carry out a transaction relating to: [...] a) The provision of services on digital assets within the meaning of Article L. 54-10-2 of the same code, with the exception of those for the provision of which the advertiser is approved under the conditions provided for in Article L. 54-10-5 of said code;*"

On the other hand, only DASPs licensed in accordance with article L. 54-10-5 of the Monetary and Financial Code may proceed with the electronic dissemination of any direct or indirect advertising with the aim of inviting a person, by means of a response or contact form, to request or provide additional information, or to establish a relationship with the advertiser, with a view to obtain its agreement to carry out a transaction relating to the provision of services on digital assets for which they are licensed.

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<sup>9</sup> It is "*any natural person who acts for purposes that do not fall within the scope of his commercial, industrial, craft, liberal or agricultural activity*".

### **12.3. What are the requirements for sponsorship?**

The AMF reminds that sponsorship or patronage operations related to services on digital assets are prohibited when their purpose or effect is direct or indirect advertising in favour of services on digital assets, except for those for which the sponsor or patron is a licensed DASP.

Indeed, according to article L. 222-16-2 of the Consumer Code: *"Any sponsorship or patronage operation is prohibited when its purpose or effect is direct or indirect advertising in favour of: [...] 2° Services on digital assets within the meaning of article L. 54-10-2 of the same code, with the exception of those for the provision of which the sponsor or patron is licensed under the conditions provided for in Article L. 54-10-5 of the said code; [...] Any failure to comply with the provisions of this article is punishable by an administrative fine of up to €100,000 (...)"*.

When a non licensed DASP exercises activities other than services on digital assets, it must ensure that the advertising effect of the sponsorship operation is identifiable by the public as being aimed solely at these other activities, and not aimed at services on digital assets, not aimed at investment services referred to in Article L. 222-16-2 of the Consumer Code.

### **12.4. What complaints handling system should be put in place?**

For registered DASPs, when a DASP has a client base composed, at least in part, of consumers, pursuant to the provisions of article L. 616-1 of the Consumer Code, the service provider communicates the contact details of the competent mediator(s) to the client when the contract is entered into and, again, when a dispute arises and is not settled in the context of a complaint lodged directly with its services.

In addition, exchanges between the DASP and the client residing in France within the framework of the processing of complaints mentioned in article 721-11 of the AMF General Regulation are carried out in French or, with the client's agreement, in a language that is customary in the sphere of finance or easily understandable by the client.

The AMF reminds that pursuant to article 721-11 of the AMF General Regulation, the licensed DASP establishes, implements and maintains a policy for the management of complaints sent by its clients with a view to their rapid processing. In this respect, AMF Instruction DOC-2012-07 "Complaints handling" applies to licensed DASPs.

**Recommendation:**

For registered DASPs, the AMF recommends the implementation of a complaints handling system in accordance with AMF Instruction DOC-2012-07 "Complaints Handling" for registered DASPs.

## 13. OTHER QUESTIONS

### 13.1. 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, within the limits of the specific provisions governing them: [...] 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 that are registered under Article L. 54-10-3 of the Monetary and Financial Code.

### 13.2. When a provider offers a service that allows customers to participate in so-called "staking" or "cryptolending" activities, is this activity susceptible of constituting a digital asset service?

"Staking" activity may consist in the fact for digital assets holders of locking up their digital assets, in exchange for consideration, within a wallet (or other medium) for the purpose of supporting a distributed ledger technology using a « proof of stake » mechanism or equivalent validation mechanism.

"Cryptolending" may consist in the fact for a service provider to make digital assets available to another person or entity who agrees to return them to the provider at the end of a specified period of a time.

Depending on the type of services offered by the provider in connection with these two activities, they may constitute a digital asset service within the meaning of Article L. 54-10-2 of the Monetary and Financial Code and/or a payment service within the meaning of Article L. 314-1 of the Monetary and Financial Code, and would entail for the service provider to obtain a registration or licensing, as the case may be.

Consequently, participants who wish to offer their clients services that allow them to participate in either of these activities are invited to conduct a legal analysis in order to determine whether one (or both) of the two aforementioned regimes are applicable to their activity.