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AMF

Summary of replies to the public consultation on Initial Coin Offerings (ICOs) and update on the UNICORN Programme

On 26 October 2017 the AMF launched a public consultation on Initial Coin Offerings (ICOs) to obtain stakeholder views on how these new types of blockchain offerings might be regulated. The public consultation ended on 22 December 2017.

The consultation document included a presentation of ICOs, a warning on the risks they present, a legal analysis of ICOs with respect to the rules overseen by the AMF and the regulatory options proposed by the AMF. Respondents were invited to give their views on all of these points.

The AMF received a high number of replies (**82**) for a consultation of this type, which break down as follows: 22 from operators of the digital economy (professionals and associations), 18 from individuals, 15 from law firms, 10 from finance professionals (participating investment advisors, FIAs, chartered accountants, audit firms), 6 from academics, 5 from institutional investors, 3 from banks and their representative committees, 2 from market infrastructures and 1 from a listed company.

After a brief update on the AMF's UNICORN Programme, we provide a summary presentation of the main findings of the public consultation.

I –UNICORN Programme update

Since 26 October 2017 the AMF has started a research programme on digital assets offerings. Since the outset of the UNICORN[1] Programme work has been particularly intense. The AMF has received various types of ICO projects from many initiators (French or foreign entrepreneurs and their advisors), enabling us to improve our legal and economic expertise in these operations.

In addition to creating a dialogue with entrepreneurs and their advisors, the programme has also enabled us to educate the media and the public in a field (the digital economy) where a degree of confusion reigns: the possibility of a speculative bitcoin bubble; the types of use permitted by blockchain protocols, recent legislation (registration of unlisted financial securities and mutual fund units in a blockchain[2]) and the alternative forms of financing that ICOs can offer certain types of undertaking.

1. ICO projects presented to the AMF

Thanks to the UNICORN Programme, over the 2-month consultation period the AMF was able to meet 15 undertakings that had already completed an ICO or were intending to so. 14 of the 15 project developers that met the AMF said they wished to conduct their operations and activities in France, and 1 abroad[3]. Foreign ICOs also interested the AMF since in some cases the offers are open to French investors[4].

The AMF is currently aware of 21 ICOs that have already, or are to be, realised in France. Meetings continued after the consultation ended and a very large majority of the undertakings that intend to realise, or have already realised, an ICO have remained in contact with the AMF.

[1] Universal Node to ICO's Research & Network.
[2] Decree 2017-1674 of 8 December 2017 on the use of a shared electronic registration device to represent and transmit financial securities.
[3] In one case a project developer said that it wanted to realise its ICO in Switzerland or Luxembourg for tax reasons. The project developer did nevertheless wish to meet the AMF.
[4] Around 400 ICOs are listed at https://coinmarketcap.com/tokens/views/all/.

The undertakings we met are mainly advanced distributed ledger technology companies (6 out of 14 projects). Other undertakings are however developing in a broad range of sectors: new real estate, hotels booking, financial management using investment algorithms, on-line auctions, cloud computing, car insurance, renewable energy and regtechs. Most of these projects aim to create a market platform in their own sector with the issued token generally acting as an instrument of exchange.

In terms of the advantages of this non-traditional form of financing, the project developers we met emphasised the ease with which an international community of internet users (i.e. of token purchasers and therefore, by extension, financiers) can be contacted to supplement or replace traditional financing methods. ICO initiators often cite the need for a fast time-to-market[5] (i.e. before any other technology has time to develop and start cannibalising their own developments) since these operations can run to a tighter timetable than usual traditional fund-raising methods.

The 15 ICOs examined during the consultation period concerned either existing companies or companies currently being formed. However, 2 ICOs that completed their ICOs before the start of the consultation did not incorporate until after the ICO[6]. Of the 15 ICOs, 10 led to the incorporation of a company specifically for the ICO while 5 were by undertakings that were already organised commercial companies (1-6 years old that were expanding and seeking funds).

Of the 15 project developers we met, 12 had ICOs at the project stage, 1 was at the token pre-sale stage and 2 had already successfully concluded their ICOs. The latter 2 wished to talk to the AMF *ex-post* to check that their offerings were not subject to particular regulations of which they had been unaware and to discuss their practices.

On 19 February 2018 the total amount raised or planned to be raised by the project developers that talked to the AMF is around 350 million euro, including 66 million euro collected by 5 ended operations[7]. Average funds raised lie in the region of 25 million euro. These amounts vary significantly however, with a minimum at 700,000 euro (for the oldest ICO). An operation raised 29 million euro. The potential maximum should be in the near future circa 50 million euro (estimated by several projects to be concluded in the first half of 2018). By comparison, and to our knowledge, the most successful foreign ICO in terms of size stands at $700 million (raised).

In January and February 2018, the AMF was informed of eight new ICO projects were reported to the AMF and another four[8] have been announced by respondents via the ICO consultation.

2. Tokens issued as part of an ICO

The AMF's discussions have shown that tokens issued as part of the examined ICOs vary considerably from project to project. The law firms advising token issuers emphasised that ICOs come in a wide range of forms. Tokens can in practice present many different technical features that fall under the following broad categories:

[5] Particularly in the technology field, where the speed of a technology's time to market affects its commercial success, development and recognition by the tech and scientific community.
[6] These were the two ICOs carried out in the 4th quarter of 2016 - essentially the oldest.
[7] Corresponding to funds collected during the issuance. For these 5 ended operations, the total value of secondary markets of tokens reaches 552 million euro on 19 February 2018. Two operations are on brink of finish at the end of February, which will drive up to 7 the number of ended ICO.
[8] Including 3 initiated from France and 1 from Switzerland.

A. Utility tokens

These give the holder the right to use the technology and/or services distributed by the ICO promoter.

Utility tokens appeal to both the financiers of issuers' business plans and also clients who wish to use the services the issuers wish to develop. Some tokens are therefore intended to be used as payment methods within the project requiring financing. Similar to the distribution and marketing methods long adopted in the retail sector (e.g. loyalty cards) and the rewards offered by certain service sectors (e.g. transport) this form of financing lies somewhere between crowdfunding - since it addresses a community that is responsive to the projects of undertakings that seek on-line financing – and the “captive marketing” methods used by certain brands that lock their clients into the economic utility of their product and/or service (e.g. by selling equipment that requires the regular purchase of refills).

B. Tokens offering political or financial rights

These tokens give their holders financial or voting rights. Only a small minority of ICOs issue tokens providing this type of right. The political and/or financial rights conferred could in some cases, and depending on the applicable law, qualify these securities as financial instruments.

3. Comments on the information documents provided to token purchasers at the pre-issue stage (white papers)

The ICO issuers met by the AMF generally distinguish between two types of basic ICO documents.

Manifestos announce a protocol that could form the basis for certain types of technology projects (e.g. bitcoin, originally).

White papers have more of a commercial nature and target buyers by presenting, more or less accurately, a business plan, the features of the tokens to be issued, the planned purpose of the ICO, financial projections and how the funds raised will be applied over the more or less long term.

Some initiators also offer various types of technical information on the intended ICO in a terms & conditions document (in a separate document from the white paper).

The information documents provided on the Internet – which are not currently subject to any regulatory framework at all – at present vary enormously.

An extremely large majority of the project developers with whom the AMF held discussions has been advised by a law firm and was therefore aware of the preliminary information requirements that apply to traditional offerings (e.g. under the Prospectus Directive).

Some of them self-regulate[9] and recognise that this type of innovative project needs to comply with a basic legal framework.

The vast majority of the white papers examined by the AMF give information firstly on the way token purchasers will be treated (pre-sale and marketing stages).

Secondly, they mention the currencies or tokens that will be accepted in the ICO. ICO issuers frequently accept fiat currencies with legal tender in a State along with liquid crypto-assets (Bitcoins or Ethers).

[9] For instance, several companies announced in October 2017 having written an “ICO Chart” in order to promote good practices and to protect investors. V. not. Laurence Boisseau, "ICO en Europe : publication d'une charte de bonne conduite", Les Echos, 23 octobre 2017, p. 17.

The token issuers met by the AMF mostly apply anti-money laundering and combating the financing of terrorism rules. Some keep in particular a register of token purchasers and carry out more or less thorough checks of their non-digital identities (KYC).

These information documents also provide indicative price ranges for the planned ICOs and indeed ICO initiators do generally offer floors and ceilings for their offerings. ICOs that do not raise their floor amount would in principle be cancelled, which might provide an argument in favour of escrow accounts for funds raised during the marketing stage.

One little touched upon matter by the ICO initiators and hardly evident at all in information documents is accounting for the funds raised. Certain ICOs record the funds raised under the receipts of the issuing undertaking.

II – Respondents' opinions on the AMF's legal analysis of ICOs

Respondents' comments **generally are in line with the AMF's preliminary legal analysis** in the consultation document. Certain respondents did however raise the **possibility of other forms of regulation** (consumer law in particular) that could apply to issue or marketing of tokens.

Most respondents agreed with the AMF's view that it is **hard to apply any single legal qualification to tokens.** Many respondents emphasised token diversity and the need for a case by case approach, the law applicable to particular tokens would reflect the type of rights they confer. Several replies focused on the fundamental differences between security tokens, which are fungible with financial securities, and utility tokens that offer (sometimes future) access to a service or good whose development the token has helped finance. In this regarding, some respondents also believe that the law applicable to a token should be stated in the white paper to provide subscribers with full information on their legal rights and means of recourse.

While certain replies state that the ICO initiator should be responsible for determining the law applicable to a token, many respondents invited the AMF to clarify the criteria for assessing whether a token qualifies as a financial security by expressing a position or issuing a recommendation, as in the case of the Howey Test used by the US Securities and Exchange Commission. Some respondents also wish that ESMA publish guidelines on the criteria for qualifying a token as a financial instrument, which will then be subject to the Prospectus Directive and MiFID, to ensure the consistency at a European level.

A large majority of respondents is in favour of a specific legal framework. One reply stated that the most reputable ICO projects to date are keen to protect their subscribers. However, several replies said that current regulations are unsuited to ICOs and therefore should not be applied at this stage. Another respondent believes that at present there is no need for separate ICO regulation since positive law can regulate token sale, particularly in the case of utility tokens that are subject to consumer law. Other respondents however agreed with the AMF's analysis that only a small minority of ICOs is covered by the law as it stands at present[10].

Two respondents maintained that the AMF should be generally competent for all ICOs. Extending the AMF powers could be achieved by amending article L. 621-1 of the Monetary and Financial Code. One respondent suggested that before any ICO is launched the initiator should make a preliminary declaration to the AMF, which would enable the examination of the initiator's legal qualification of the ICO and if necessary either require legal requalification of the token or ban the ICO if it is considered to be 'contrary to public policy or likely to be found illegal'. Another respondent invited the AMF to set up an ICO watch to enable a legal framework for ICOs to be developed based on the cases observed.

[10] Regulation in the field of competence of the AMF.

Certain respondents also stated a need for a legal definition of crypto-"currency". Since some tokens may display the features of a currency, some respondents also believe that the French Criminal Code should be amended to prohibit the circulation of any unauthorised currency (article 442-4 of the Criminal Code[11]).

1. ICOs and financial instruments

A. ICOs and financial securities

Many respondents in general mentioned the difficulty of determining whether a token legally qualifies as a financial security. Some request clarification of current regulations.

Most replies on this subject agree with the AMF's analysis in the consultation document that if a token issued as part of an ICO presents features similar to those of a financial instrument, the ICO should then be subject to the relevant current regulations, in particular those governing the public offering of financial securities.

Several respondents said that qualification as a financial security must not depend primarily on the form of the security[12] or on the legal status of the issuer[13]. Based on this analysis – which puts the substance of the security above its form and is the analysis preferred by the AMF – the main focus should be on the nature of the rights embedded in the security[14]. This would mean that a negotiable security would have to be qualified as a financial security if it embeds rights similar to those usually embedded in an equity or debt security.

a) ICOs and equity securities

A majority of respondents do not believe that most tokens issued in current ICOs qualify as equity securities and some state that equity security regulations are unsuitable to the nature and features of tokens.

Certain respondents assert that if any of the standard attributes of ordinary shares are missing (e.g. voting rights, right to dividends, right to liquidation surplus) the token cannot qualify as an equity security. Some respondents therefore maintain that tokens cannot under any circumstances qualify as equity securities because:

- no token offers all the rights associated with an equity security. They do not confer any right to liquidation surplus, to submit draft resolutions to shareholder meetings or to vote at or take part in shareholder meetings; and
- token subscribers know in advance the fixed calculation of the benefits attached to the token since it appears in the smart contract - unlike equity securities that give their holders a right to share in the company's dividends, the amount of which depends on the company's economic policy and performance.

One respondent said that it would be better if tokens were officially banned from offering the right to share in the issuer's capital. This would prevent the issuer making any unilateral change to the information in the smart contract. Several respondents also pointed out that if tokens were fungible with equity securities, their issuers would have to meet quite demanding

[11] Article 442-4 of the Criminal Code states that "*the circulation of unauthorised currencies that are intended to replace coins or banknotes that are legal tender in France is subject to five years' imprisonment and a 75,000 euro fine".*
[12] The rights embedded in a security can take the form of an object (e.g. paper) or an entry in a tangible or intangible medium. In the case of financial securities, the law currently requires them to be recorded in an account that meets legal requirements, which will soon allow them to be recorded in a blockchain (see article L. 211-7 Monetary and Financial Code in the version applying at 1 July 2018 as amended by Decree 2017-1674 of 8 December 2017 on the use of a shared electronic registration device to represent and transmit financial securities).
[13] Article L. 211-2 Monetary and Financial Code gives a restrictive list of entities authorised to issue financial securities: "*Financial securities … can be issued only by the State, legal persons, mutual funds, real estate funds, professional real estate funds, specialist financing funds or securitization funds."*
[14] The analysis also considers its negotiability, i.e. whether it can be traded on the market.

requirements as to their features, i.e. those applying to start-ups that do not necessarily have either a legal personality or share capital.

While certain respondents suggest that the issue of financial securities by entities that have no legal personality or legal authorisation to do so will mean that the securities evade any form of regulation, others maintain that on the contrary the consequence should be a ban on the issue of these securities. One law professor says that, "*article L. 211-2 Monetary and Financial Code provides that financial securities can be issued only by the State, legal personalities and certain funds. Companies are prohibited from issuing them with some exceptions. Art. 1841 Civil Code prohibits companies without legal authorisation from issuing negotiable securities and provides that if they do so, any contracts made and securities or shares issued will be invalid. We do not believe that this means that a financial product issued by an entity that has no legal authorisation cannot by definition be qualified as a financial security. Instead, the issue itself should be treated as unlawful since otherwise it would be too easy to evade the law.*"

Other respondents and one law firm in particular point out that if the financial security issued is identical to others that all confer the same rights (and therefore together constitute a class), then it should be qualified as a *valeur mobilière*[15]. And the law defines in even finer detail the entities that are authorised to issue *valeurs mobilières*[16].

One respondent notes that where ICOs are launched by public limited companies, the tokens issued could be qualified as equity securities if they confer pecuniary rights, such as rights to company profits, instead of to the projects documented in the white paper. The qualification could therefore apply if the token issue dilutes the rights of the issuer's existing shareholders. Tokens could also be qualified as equity securities if the voting rights they confer concern the governance of the issuer itself and not the *ad hoc* project documented in the white paper.

Several respondents mention that in the case of ICOs by persons and entities without a legal personality, the term "*de facto* company" might apply and that subscribers of these tokens might therefore be considered partners holding shares in the company. Article 1841 Civil Code, which prohibits companies that have no legal authorisation from issuing shares to the public[17] and renders all contracts made and shares issued on this basis invalid, could then apply to ICOs by persons and entities without a legal personality.

In the consultation document the AMF stated that since tokens (which the AMF is aware) do not appear to qualify as financial securities, they should consequently not be subject to French law on the public offering of financial securities. **The replies the AMF has received essentially support this view as most respondents do not believe that tokens qualify as equity securities.**

As certain respondents have noted, qualification as an financial security remains nevertheless a possibility on those effectively rare occasions (based on our observations during the UNICORN Programme[18]) on which tokens grant political or financial rights similar to those usually carried by shares or preference shares. As a result, legal examination of tokens cannot be just a formality and the absence of certain standard share attributes (e.g. right to liquidation surplus or voting rights) cannot alone automatically rule out qualification as an equity security. Proper case by case examination of all the features of the token must therefore be a priority.

[15] Article L. 228-1(2) Commercial Code provides that "*valeurs mobilières are financial securities within the meaning of article L. 211-1 Monetary and Financial Code and confer identical rights per class*". *Valeurs mobilières* are financial securities (see article L. 211-2 Monetary and Financial Code: "*financial securities, which include valeurs mobilières within the meaning of article L. 228-1(2) Commercial Code*") but not all financial securities are *valeurs mobilières* (e.g. negotiable debt securities as defined in article L 213-1 Monetary and Financial Code that are issued on tap, i.e. one after another and are not fungible with each other).

[16] All public limited companies may in theory issue all forms of *valeur mobilière* (article L. 228-1 Commercial Code). Article 1841 Civil Code prevents other companies from doing so unless the law allows (e.g. private limited companies L. 223-1 Commercial Code). The law appears to extend the prohibition to include entities that are not companies (e.g. associations [L. 213-8 Monetary and Financial Code] and foundations [L. 213-21-1 A Monetary and Financial Code] are specially authorised by law to issue bonds).

[17] Within the meaning of article L. 411-1 Monetary and Financial Code.

[18] Talks with 15 ICO project developers during the consultation period.

b) ICOs and debt securities

A majority of respondents do not believe that qualification of debt security as per article L. 213-0-1 Monetary and Financial Code can apply if the security in question embeds a non-pecuniary debt. Those respondents argue that: (i) debt securities are a sub-class of financial securities that are themselves financial instruments, implying a pecuniary debt; (ii) the law on bonds uses three concepts (nominal value[19], interest[20], redemption[21]) all of which refer to a pecuniary debt; (iii) debt securities are based primarily on the credit/redemption concept, establishing the financial nature of the thing offered for redemption and a due date by which redemption is payable; (iv) references to capital markets, cash settlement and the notion of debt in the European definition of *valeur mobilière*[22]; (v) the law has had to specify the conditions on which contracts that unwind with physical delivery of a good are financial instruments; and (vi) to give any real meaning to the equity security/debt security dichotomy, 'debt' must be strictly understood as a pecuniary debt.

Several respondents nevertheless consider that tokens can qualify as debt securities even when they do not incorporate a pecuniary debt. They believe that tokens that incorporate a user right could be qualified as debt securities *sui generis*[23] and point out that the law does not currently require debts to be pecuniary and that until the Monetary and Financial Code and the Commercial Code produce a definition of 'debt', the very broad definition given in the Civil Code should be used. They also note that the European definition of *valeur mobilière* is very broad and that the list of examples that it contains is not restrictive. According to these respondents, the fact that a debt is not pecuniary does not prevent its incorporation into a security and some debt securities can give rise to payment in kind.

In its consultation document the AMF stated that, with regard to the ICOs of which the AMF was aware, the concept of debt security did not appear legally applicable to tokens. **The replies received essentially support this view as most respondents do not believe that tokens qualify as debt securities.**

Many respondents have however argued in detail that the absence of a pecuniary debt does not prevent qualification as a debt security. In the light of all the answers received during the consultation and the AMF's own preliminary analysis, debt security does not appear to be a concept that can be applied to the tokens of which the AMF is aware. This may change if the view that a 'debt' need not be pecuniary were to prevail.

B. ICOs and derivatives

One respondent highlights the importance of not abandoning the legal examination of tokens in terms of derivatives[24] even though the conclusion would probably be negative. Another respondent notes however a precedent (in Switzerland) relative to a token which may be qualified as a derivative. A case by case analysis of the rights conferred by the token should therefore be undertaken to determine whether it falls into any of the derivative categories listed in article D.211-1 A Monetary and Financial Code.

2. ICOs and intermediation in miscellaneous assets

Few replies dealt with the question of whether tokens legally qualify as intangible movable assets. One reply maintains that they can qualify since the law does not provide a precise definition of miscellaneous assets, which in practice includes many types of assets that do not

[19] Definition in articles L. 213-5 Monetary and Financial Code and L. 228-38 Commercial Code.
[20] Articles L. 228-65 Commercial Code and L.213-6-1 Monetary and Financial Code.
[21] Articles L. 228-72 Commercial Code and L. 228-45 Commercial Code.
[22] Article 4.1(44) of Directive 2014/65 (MIF 2).
[23] Article L. 228-36-A Commercial Code.
[24] There is no general definition of a derivative. European law simply provides a list (Directive 2014/65/EU [MiFID II] of 15 May 2014, annex 1, section C) which has been incorporated into articles L.211-1 III and D. 211-1 A Monetary and Financial Code in France.

necessarily have anything in common other than the fact they are assets (i.e. can be expressed in pecuniary terms and are transferrable) and can be the object of investment. The same respondent decries the vagueness of this class and notes that miscellaneous assets as a concept has already been the subject of a preliminary ruling on constitutionality (QPC) but criticises the ruling as being contrary to the constitutional value principle on the comprehensibility and accessibility of the law, as set out in article 34 of the Constitution and to the principle that offences and penalties must be defined in law, as set out in article 8 of the 1789 Declaration of the Rights of Man.

Another respondent believes that tokens cannot qualify as intangible movable assets because this offers only three types of right: (i) rights *in rem* and their division (rights exercised directly over the thing concerned: title, usufruct, etc.); (ii) intellectual property rights subject to special legal protection (copyright, patent, etc.); and (iii) personal rights exercised against a person (claim, debt security, non-pecuniary contractual obligation, etc.) and tokens do not generally offer any of these rights.

Going beyond whether a token qualifies as an asset, some respondents are dubious about whether an ICO constitutes intermediation in miscellaneous assets.

2 respondents note that the term 'intermediary' cannot apply to ICOs since the project developer is generally also the token issuer and therefore the investment counterparty, not an intermediary.

Many respondents emphasise that the conditions for qualification as an intermediary in miscellaneous assets is not met in the ICO context.
It is hard to see an ICO initiator acting as an intermediary in miscellaneous assets on a regular basis (criterion for qualification as an intermediary in miscellaneous assets).

“Intermediary in miscellaneous assets 1” regime[25] sets two alternative conditions: either the purchasers of the assets do not manage it themselves or the contract offers them the option of redemption or exchange and revaluation of their invested capital. In ICOs, investors rarely manage their own tokens and white papers rarely include a promise of redemption at a revalued price. One reply notes however that an ICO could very occasionally come under this regime if, for example, the issuer retained the private keys to the tokens issued, or if the tokens represented shares in financial assets or in the ownership of tangible assets managed by the issuer (asset tokenization).

“Intermediary in miscellaneous assets 2” regime[26] applies if the intermediary offers a direct financial return or an indirect return with similar economic effect. Many respondents have noted that very few white papers make any mention of either.

Looking beyond the criteria for qualification as an intermediary in miscellaneous assets, three other replies point out that certain rules on intermediation in miscellaneous assets are inappropriate:

- professional indemnity insurance and insurance for miscellaneous assets (the tokens) at first glance would seem difficult for ICO initiators, who are offering innovative services, to take out;
- opening a dedicated ICO account held with a lending institution licensed to operate in France (article 441-1 of the AMF General Regulation) is also unsuitable for ICOs, which generally keep the funds collected in an electronic portfolio; and
- inspection by the AMF prior to of all promotional communications and approaches (article L. 550-3 Monetary and Financial Code) is again incompatible with an ICO since a free on-line account in which reference data can be hosted or a dedicated project website are all ICO requirements.

[25] Regime introduced under article L.550-1(I) Monetary and Financial Code
[26] Regime introduced under article L.550-1(II) Monetary and Financial Code

Lastly, many replies agree that some types of ICO might be subject to intermediation in miscellaneous assets regulation, which would however have to be adjusted to take account of ICO peculiarities, or else a new “intermediary in miscellaneous assets 3” regime should be introduced. One respondent suggests that ICO initiators should be subject to a simplified intermediary in miscellaneous assets regime that does not require the AMF authorisation before launch of the ICO or submission of the ICO documents to the AMF. These preliminary checks would be replaced by an *ex-post* control system, whereby the AMF could request all the promotional communications to check compliance with intermediary in miscellaneous assets 1 and 2. This approach would not inhibit ICO speed but would make the initiator liable for maintaining an annual inventory of all its information documents and for setting up a company with a legal personality that could be subject to disciplinary and criminal penalties.

Respondents' observations generally comfort the AMF's analysis in the consultation document that ICOs present features comparable with miscellaneous assets offerings.

Some observations received in the consultation make the following points:

On the question of token qualification, one respondent notes that with regard to the comprehensibility of intermediary in miscellaneous assets provisions, the QPC is of relative importance only since the *Conseil d’État* has not submitted it to the Constitutional Council because "*the question raised, which is not new, is not material*"[27].

Just one respondent believes that tokens cannot be qualified as movable assets but gives no reason for this and offers no alternative qualification.

With regard to the observations that ICOs cannot meet intermediary in miscellaneous assets requirements: (i) the fact that the ICO project developer is also the token issuer is not seen as an obstacle to intermediary in miscellaneous assets qualification;
(ii) the criterion of offerings to clients "on a regular basis" appears only in intermediary in miscellaneous assets 1 and all ICOs appear to meet it since it means that the offering is made to several persons at the same time; and (iii) the technical features of ICOs (e.g. a website or internet services) are not incompatible with the intermediary in miscellaneous assets regimes.

Intermediary in miscellaneous assets 1: the AMF agrees with the replies that in practice few ICOs will be able to fulfil the conditions of this regime. However, the comment by one respondent that intermediary in miscellaneous assets 1 will apply if the ICO issuer retains the private keys for the tokens it issues does not seem well-founded, since the AMF does not believe that assets retention constitutes management.

Intermediary in miscellaneous assets 2: there are many objections that ICOs cannot provide the guarantees required under the AMF General Regulation. But provision of the guarantees is simply the consequence of legal intermediary in miscellaneous assets qualification. But the fact that it is in effect impossible to provide the guarantees must also not exclude ICOs from intermediary in miscellaneous assets 2 qualification in the legal sense.

3. ICOs and collective investments

Many respondents agree with the AMF's view that tokens that present the features of units or shares in a collective investment should be subject to existing regulations.

One reply holds that the qualification cannot apply to tokens because the funds raised through an ICO are intended to finance a particular project and the initiator cannot manage the funds on behalf of the subscribers.

Respondents' observations agree with AMF's analysis that ICOs cannot qualify as collective investments.

[27] Conseil d'État, 3 December 2014, no. 381019.

4. ICOs and crowdfunding

Several respondents declare to share AMF's analysis which considers that ICO initiators are not crowdfunding advisers (CIP) or investment services providers (PSI) as they provide no advice, do not assess, select or present the projects to be financed and do not offer investment in financial instruments.

2 respondents did however maintain that ICOs could be considered a new type of crowdfunding since both these activities allow the project developer to approach an internet community via an internet platform in order to obtain funds to finance a specific project.

Another 2 other respondents see ICOs as crowdfunding intermediaries, which falls within the scope of the Autorité de contrôle prudentiel et de résolution (ACPR).

Respondents' observations agree with AMF's analysis that neither crowdfunding advisers (CIP) nor that of investment services provider (PSI) statuses can apply to ICOs.

5. Other possible legal qualifications

Certain respondents have drawn the AMF's attention to the possibility that other regulations may apply to ICOs, including consumer law, payment services law and personal data protection law.

Consumer law[28]**:** Directive 2000/31/EC on electronic commerce of 8 June 2000, Directive 2011/83/EU on consumer rights of 25 October 2011 and the French Consumer Code on illegal clauses are all quoted as potentially applying to ICOs. Qualification of the parties as either professionals or consumers will have many consequences, e.g. the duty of professionals to provide pre-contractual information or the consumer's right to withdraw.

Payment services: 3 respondents point out that some ICOs might also be subject to these regulations but that in some cases they might be exempt from the need for approval as payment establishments or e-money establishments[29].

Personal data processing: many respondents believe that the General Data Protection Regulation[30] (GDPR) could apply if personal data is processed during an ICO. The European Regulation, which will come into force on 25 May 2018, will allow the people concerned to demand access from the initiator to their personal data and to require him/her to delete it under their right to be forgotten.

Some respondents state that the AMF currently has no legal authority over tokens that do not fall under the regulations on financial instruments or on intermediaries of miscellaneous assets. They therefore recommend that the AMF should be granted that authority, for example by amending article L.621-1 Monetary and Financial Code.

6. Other items to consider in the legal analysis

A majority of respondents emphasises the need for token classification based on the associated rights, counterparties or benefits as this would help determine the legal regime applying to each type of token. One respondent however believes that such classification is not useful since new features are likely to emerge with each new ICO.

[28] Potential application of consumer law is mentioned by around ten respondents.
[29] ACPR, Position 2017-P-01 on the concepts of "limited network of acceptors" and "limited range of goods and services", 25 October 2017.
[30] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

Replies further suggest that examination of the legal qualification of tokens should additionally take account of the following:

- the white paper, the issuer's business and financial models;
- token registration in the blockchain and whether there is a central depository;
- whether tokens are negotiable and whether there is a secondary market creating token liquidity and increasing their similarity to financial instruments or whether there is a market making contract for the secondary market between the issuer and an intermediary;
- in addition to the rights they confer, whether the tokens are speculative or not and their method of transfer/assignment;
- the nature and features of the blockchain underlying the token sale;
- the issuer's influence on the blockchain on which the tokens are issued*;*
- the likelihood of forks and hard spoons; and
- the subscriber's intention, i.e. the token is purchased for a moral purpose (donation), for profit or saving purposes (investment) or to obtain an access or user right (membership).

III - Respondents' opinions on white papers and the duties of project initiators

Respondents unanimously agree that white papers should be produced for ICOs to provide investors with information. Opinions on the format and content of the white paper vary however.

1. Minimum information that respondents agree should be provided

All respondents believe that the white paper should at least provide the following information:

- the project to which the ICO is linked and its development;
- the rights conferred by the token;
- jurisdiction in the event of dispute; and
- the economic and accounting treatment of the funds collected during the ICO.

2. Information on the projects developers

Almost all respondents believe that the white paper must name the legal person responsible for the offering, its directors and their responsibilities. One respondent even thinks that white papers should give the professional backgrounds of project developers, their previous projects and details of a criminal record they might have.

One respondent considers however that although the naming of the offeror should be strongly recommended, it should not be a requirement and that "*there is a whole range of completely decentralised projects that cannot meet this criterion*". The same respondent also believes that there will be many anonymous applications in the future, including from individuals launching an ICO. Requiring a legal person to be associated with every ICO project would therefore prevent open-source projects.

3. White paper approval by an authority, professional association or other reference institution

Almost all respondents who answer this question say that white papers should be approved by an institution. Of these respondents:

- a significant proportion does not say which institution should approve white papers;

- half of the respondents considers the AMF is the best placed to carry out these duties, some considering that approval should come from an association acting under the AMF auspices; and

- a few respondents suggest that a separate agency be created for the purpose.

One respondent declares that the AMF should approve white papers at the request of projects developers or of a minimum number of potential French investors.

Another respondent proposes that the AMF should not just approve white papers but should rank ICOs depending on their level of risk by using a set of criteria and relying where necessary on certification, especially of application code, by independent experts.

4. White paper validation by independent experts

Respondents' opinions vary considerably on whether white papers should be validated by independent experts:

- one-third considers it should not be compulsory since ICOs vary and this would slow down the process without providing any guarantee of project quality. They also note that the experts applied to by ICO initiators often find themselves with a conflict of interest;

- two-thirds of respondents believe that on the contrary validation should be compulsory. However the types of experts these respondents mention vary enormously. The most frequently suggested types of expertise are: expert audit of the computer code; audit of accounts by statutory auditors; economic examination of the sector to which the ICO applies and of the token offered; security audit (data protection officer, digital escrow account holder, provider approved by ANSSI, etc.), lawyers for documentation, validation of respect ofgood practice or project rating.

5. Sale and pre-sale transparency

A vast majority of respondents is in favour of highly transparent pre-sale processes and token sales.

Many respondents alert the AMF to the risk to investors of manipulation of the token market unless transparency rules are set and complied with by projects developers.

One respondent provides details of "three big risks" to investors:

- the purchased token might drop in value if a large number of free tokens is distributed as remuneration or to form a reserve;

- pre-sale at a preferential price (or a series of pre-sales at rising prices) before the actual sale, which if done on a big scale would create a Ponzi system by which the last buyers (of the public ICO) would be financing the first buyers without realising this; and

- whale clubs (investor groups set up to manipulate a market). Whales invest massively at the start of the ICO in order to attract media exposure and therefore investors. Whale clubs often contact the ICO team to negotiate a profitable distribution similar to a pre-ICO collection.

Another respondent identifies a fourth risk:

- the issuer collects the funds raised to the detriment of token buyers by buying in its own tokens during the ICO using the funds raised from initial sales. Repeating the process during the ICO would artificially inflate the number of tokens issued, including the proportion retained by the issuer, to the detriment of investors who will see the value of their tokens fall as a result of dilution.

In order to manage these risks of market abuse, respondents mention many transparency-related actions:

- the number and percentage of free tokens allocated to form a reserve or as remuneration should be published. Many respondents argue that the identities of the recipients should also be stated in the white paper so that potential conflicts of interest for directors and providers can be revealed;

- the number and percentage of pre-sold tokens, dates and entry terms should also be given in detail;

- the number of tokens sold during the ICO should be published according to many respondents, as should the amount raised. One respondent also suggested setting a deadline for publication of total sales, e.g. 2 weeks after the ICO;

- the number of tokens issued or to be issued should be clearly disclosed; and

- issuer buy-in of its own tokens should be either prohibited or permitted only if those tokens are then destroyed and the entire operation is transparent.

One respondent is in favour of prohibiting pre-sale. Another advises against pre-sale unless clearly justified and full details have been provided of the eligibility criteria, subscription and price.

A law firm maintains that projects developers must inform token holders of project progress after the ICO and at fixed intervals (e.g. quarterly) over the long term.

6. White paper standardisation

Respondents are very largely in favour of white paper standardisation. One believes that there should be a white paper template for each type of token: miscellaneous asset regimes 1 and 2, financial rights, voting rights, user rights, rights to share capital, right to services.

A minority of respondents is however against standardisation, one holding for example that ICOs should not be prohibited because their white papers are not standard but that this should be taken into account in their rating or that subscribers should be properly warned about it.

Another respondent adds that all white paper information should be comprehensible to investors, including to those who are not technology experts.

7. Warning about the risks arising from the unregulated nature of ICOs

Respondents unanimously agree that there should be a warning about the risks arising from the unregulated nature of ICOs, and one adds that the warning should be clearly visible before

access to the investment interface and should be written in at least French and English for internet users logging on in France.

8. Other white paper good practices mentioned by respondents

One respondent said that the white paper should give information on the blockchain on which the token is being sold. Another declared that the white paper should also have a link to the ICO source code and that since the ICO's smart contract could, despite the use of all best efforts, contain errors or vulnerabilities, the white paper should state who would bear the loss in the event of anomalies.

There was a proposal from one respondent for white papers to give:

- the minimum and maximum subscription amount (refund to investors if the minimum is not achieved and conversely closure of the offering and creation of a waiting list if the maximum is reached. The waiting list could be used to replace client files that do not pass AML/CFT tests);

- details of redemption for investors;

- the procedure for determining token value and exchange options with other crypto-"currencies";

- a list of partnerships with other platforms for the purchase and exchange of tokens (secondary market) and the features of token fungibility; and

- how token rights are protected.

One respondent says that white papers should be short and concise (15-20 pages), but may be supplemented by technical annexes.

9. Escrow of funds raised

The large majority of respondents is in favour of introducing rules of good practice for funds raised in crypto-"currencies". These could take the form of a duty to use an e-portfolio locked by many signatures (multisig wallet). Some respondents however believe this should only be a requirement if the ICO expects to raise substantial amounts or if the white paper gives only a fund floor, which if not reached will trigger refund to token purchasers. One reply notes however that it would be difficult to specify precisely which form the escrow account should take because it could change, although the most commonly used form at present appears to be the multisig wallet.

One respondent believes that even if this form of protection makes sense in a centralised and intermediated world, it could make ICOs feel undeservedly safe given that the existence of the escrow, its robustness and the absence of fraudulent collusion among signatories cannot be verified. In the light of this risk one respondent proposes that multisig wallet use should be verified by an independent body with the relevant blockchain and cyber-security skills. Another notes that the procedure for appointing the persons holding the keys to unlock funds must be carefully designed to rule out any suspicion of collusion and avoid institutional bottlenecks. 2 respondents suggest that at least one of the keys to the multisig wallet should be held by an independent third party that has the authority to run controls before funds are released. Yet another respondent suggests making keyholder identities public and that this might be a dispute resolution tool similar to arbitration, where the arbitrator holds one of the keys needed to release the funds.

Two respondents propose that the multisig wallet should be accompanied by a duty to submit the code underlying the project to public consultation via specialist sites, such as Github.

Another two respondents propose that funds should be released as the project progresses, at milestones specified in the white paper.

10. AML/CFT

The vast majority of respondents shares the AMF's view that a system for preventing money laundering and the financing of terrorism is needed. However opinions diverge on whether the ICO initiator should be responsible for ensuring compliance with these requirements. Some respondents wonder whether the current systems in use on platforms for the exchange of tokens and crypto-“currencies” into legal tender are adequate. Certain replies agree that the ICO initiator should perform simplified KYC due diligence involving at least a check of the subscriber's identity and a declaration of source of funds. Many replies say there should be a standard KYC procedure and many others that the KYC procedure should be stepped to take into account the size of the investment so that if it is large, the subscriber could be required to provide evidence of source of funds.

On the advisability of using an approved third party, respondents' opinions vary: some are in favour and suggest there should be a list of certified providers, while others maintain that the trusted third party concept is contrary to the blockchain principle. Concerning the checks ICO initiators might make of exchange platforms, many replies suggest that ICO initiators should check that their subscribers have all converted their crypto-assets on platforms recognised as compliant with the duty to control fund origin and client identity.

11. Token valuation

The majority of respondents thinks that tokens should be valued by the ICO initiator. The final price is determined by comparing supply and demand, based on information that must be high quality and that must inform investors of the reputable nature and potential of the issuer's project. Many replies say that the ICO initiator should explain the method used to value the token in the white paper. A few replies nevertheless hold that a firm of auditors or independent financial advisors might usefully supplement the ICO initiator's valuation.

12. Limitation of token subscription to one type of investor

A very large majority of replies maintains that this is not a good idea because it might dissuade initiators from carrying out their ICOs in France.

13. Post-ICO information for subscribers

The majority of replies prefers transparency and information to regulation of practices, which is considered unsuitable to project diversity. Most respondents hold that the white paper should explain the nature and frequency of the information investors will receive after the ICO. The information respondents say investors should be sent includes:

- continuous monitoring of the number of tokens in circulation, their allocation between investors and issuer reserves, the electronic addresses at which the reserves and the crypto-“currency” funds collected are held and monitoring of the amounts raised (crypto-“currency” and euro);

- offering closing date (expected/final) and outcome (success/failure);

- whether there are token redemption schemes and methods for paying profits to token holders*;*

- project progress and especially the development of the underlying technology;

- the foreseen use of funds (commercial development, recruitment, etc.);
- partnerships with exchange and secondary market platforms; and
- more generally, any financial event that might affect token value (merger, redemption, forecast dilution of tokens held by the issuer).

One respondent also points out that it might be a good idea to allow interaction between token holders and the issuer. It would allow to inform token subscriber about their powers and their representation as token subscribers within the issuer, especially if changes occur during the life of the token.

Many replies are in favour of capping the acceptance of funds. The cap must be consistent with the project and would prevent potential misappropriation.

14. Economic and accounting treatment of the funds raised

A majority of respondents calls on the competent authorities (ANC and CNCC) to clarify the accounting and fiscal treatment of funds raised through ICOs.

Many however note that given the diversity of projects and tokens, it will be hard to produce one single method and that there needs to be case by case assessment.

2 respondents do not think the chart of accounts needs alteration and that tokens can fit perfectly well into it so long as they have first been classified to determine their legal status.

15. Other suggestions on matters not touched on in the AMF consultation

Many respondents feel that the AMF consultation lacks a section on **IT security** and some respondents have also suggested that:

- it would be good practice to **rate the blockchain** used to set up the ICO;
- information should be given on blockchain **governance** and on the procedures and
- methods in place to make sales secure;
- **the tax position of ICOs should be clarified** to make France attractive for them;
- **exchange platforms need to be regulated** to prevent them operating opaquely and being open to manipulation.

IV – Regulation options preferred by respondents

The AMF's consultation document states that while some of the ICOs observed could fall under current regulations (on intermediaries in miscellaneous property, on public offerings of financial securities or on alternative investment fund managers in particular), as the law stands at present most fall outside all the regulations administered by the AMF.

The consultation document suggests three options for regulating ICOs:

- **Option 1**: promoting a good practice guide under existing law;
- **Option 2**: expanding the current law to include ICOs since they make public offerings;

- **Option 3**: proposing new legislation suited to ICOs (with one sub-option 3A [compulsory regime] and one sub-option 3B [optional regime]).

Respondents stated their preferences: some opting for just one option, others for two and yet others for a combination of options depending on ICO size. These replies have produced several conclusions:

- **Option 1** (non-compulsory rules of good practice): This option obtained a large number of votes (almost **one-third**) but was generally combined with other, more restrictive, regulation options. **Just one-tenth of respondents is in favour of good conduct rules without any compulsion whatsoever**. Many respondents indeed see good conduct rules (option 1) as providing a necessary short-term transition during which time more restrictive ICO regulations can be produced (option 3) rather than as an end in themselves or as desirable in the long term;

- **Option 2** (extended prospectus regulations) **is rejected by almost all respondents**, only 3 making it their preferred option;

- **Option 3 (new ad hoc regulations) was supported by almost two-thirds of respondents who expressed an opinion. Option 3B (optional ad hoc regulation of ICO initiators) is preferred by the vast majority of responses in favour of creating a new legislative framework.**

- Considering non-compulsory good conduct rules (option 1) and new compulsory regulations for all ICOs (option 3A), **option 3B is seen by a majority of respondents as offering a balanced solution** and a pragmatic approach to ICOs.

V – Main results of the public consultation

The **optional approval regime** is preferred by a majority of respondents. If this were the framework introduced, the initiators of ICOs targeting the French public could obtain AMF approval if they meet certain conditions and offer investors certain guarantees. Non-approved offerings would not be necessarily illegal but would have to include a warning to potential investors that they are not approved and carry risk. Token offerings made without the warning could be subject to sanction.

This framework would protect investors while attracting innovative projects of quality to France, and discouraging the fraudulent offerings that appear to be proliferating internationally.

The AMF Board has therefore decided to continue to work on the definition of a possible legal framework tailored to ICOs by specifying the appropriate information and guarantees that are necessary.

It considers that this new regime should make it possible to apprehend all the possible forms of ICOs and to provide sufficient guarantees for the investors regardless of the evolutions of this type of offers.

Besides, concerning the protection that must be given to investors, the AMF Board considers that particular attention should be given to anti money laundering and combatting the financing of terrorism, as well as the issue of investor protection on the so-called “secondary” market (purchase/sale of tokens on a market post ICO). The desirability of requiring the intervention of independent experts in ICOs and the scope of their potential duties should also be specified. Some of these matters will be considered together with the other public authorities concerned.