

French law paves the way for the digital assets services providers regulation

Over the last few years, digital assets did not appear to fall within scope of French law or regulation as they could not be characterised as e.g. currency, electronic money, financial instruments.

The French Government has taken the initiative to create a cutting-edge legal framework in order to regulate the provision of digital assets services in France.

1. “DIGITAL ASSETS” ARE NOW BROADLY DEFINED | 2. THE MIFID LIKE DIGITAL ASSETS SERVICES ARE SCOPED | 3. FRENCH LAW CREATES A REGULATORY STATUS FOR THE DIGITAL ASSETS SERVICES PROVIDERS A LA CARTE | 4. KEY TAKE AWAY POINTS

Over the last few years, digital assets did not appear to fall within scope of French law or regulation as they could not be characterised as currency, electronic money, financial instruments nor – on a more fundamental level – was there a clear sense of whether digital assets were merely data or some type of intangible property.

The French Parliament has taken the initiative to create a legal framework in order to regulate the provision of digital assets services. The French Parliament’s decision was notably driven by the desire to offer a more secure environment for digital assets in order to attract investors, as well as to implement mandatory changes to the French anti-money laundering regime by the 5th EU Anti-Money Laundering Directive (**5MLD**).¹

This legal structure was introduced in the law 2019-486 dated 22 May 2019 (the **Pacte Law**) which entered into force on 24 May 2019. This was supplemented by the decree 2019-1213 dated 21 November 2019 relating to digital assets services providers (**DASP**) and the decree 2019-1248 dated 28 November 2019.

The French DASP regime is now almost finalised; an order (*arrêté*) is due to be published

shortly.²

Pursuant to these legal provisions, any entity considering providing digital assets services in France is, as of 23 November 2019, required to file an application with the French *Autorité des marchés financiers* (the **AMF**) in order to become a DASP in particular if such provision of services entails solicitation activities. There is however a transition period of twelve months meaning that entities falling within the ambit of the mandatory DASP registration requirement have until end of November 2020 to register.³

1. “DIGITAL ASSETS” ARE NOW BROADLY DEFINED

The Pacte Law defines a digital asset as “*a digital representation of value that is not issued or guaranteed by a central bank or a public authority, which is not necessarily attached to a legally established currency and does not possess the legal status of a currency, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored or traded electronically*”⁴ (the **Digital Asset**).

This French definition of “digital assets” appears slightly broader than the one provided for in 5MLD.⁵

2. THE MIFID LIKE DIGITAL ASSETS SERVICES ARE SCOPED

Digital Asset services within the meaning of French law (the **Digital Assets Services**) include the following⁶ (which mirror the MiFID investment services categories):

- safekeeping for third party account of Digital Assets or access to such assets, including private cryptographic keys to be used to hold, store and transfer Digital Assets (the **Custodian Service**);
- purchasing or selling of Digital Assets against currencies having legal tender, i.e. fiat currencies (the **Service of Exchanging Digital Assets and Fiat Currency**);
- exchanging Digital Assets against other Digital Assets;
- operating a Digital Asset trading platform;
- the following services:
 - reception and transmission of orders in relation to Digital Assets for third party account;
 - portfolio management in relation to Digital Assets for third party account;
 - advice to Digital Assets subscribers;
 - underwriting of Digital Assets;
 - placing of Digital Assets on a firm commitment basis; and
 - placing of Digital Assets without a firm commitment basis.

Each of the Digital Assets Services is defined in Article D. 54-10-1 of the Code (please refer to Appendix 1 for an English translation provided for information purposes only).

3. FRENCH LAW CREATES A REGULATORY STATUS FOR THE DIGITAL ASSETS SERVICES PROVIDERS A LA CARTE

Depending on the type of Digital Asset Services an entity is contemplating, the regulatory regime will differ.

Indeed, should an entity consider providing (i) the Custodian Service, or (ii) the Service of Exchanging Digital Assets and Fiat Currency, it shall be registered with the AMF as a DASP.⁷

If instead an entity is considering providing Digital Assets Services **other than** the Custodian Service or the Service of Exchanging Digital Assets and Fiat Currency, it can elect⁸ for a DASP license, *i.e.* it is not mandatory to become licensed in order to provide such services⁹. It should however be noted that if such entity does not choose to be licensed, it will not be authorised to solicit (within the meaning of the French solicitation rules¹⁰) French investors.

Lastly, it transpires from the current drafting of the Pacte Law¹¹ that in order to become registered or licensed as a DASP, the latter must be established in France, *i.e.* a non-French entity would therefore have to establish a subsidiary (or potentially a branch) in France in order to solicit French investors for the provision of Digital Assets Services. Further, even if such non-French entity were to not solicit French clients, it could not be authorised to provide the Custodian Service and the Service of Exchanging Digital Assets and Fiat Currency (unless it sets up a French subsidiary which is registered as a DASP with the AMF).

	Mandatory registration	Optional licensing
Type of Digital Asset Services	<ul style="list-style-type: none"> • Custodian Service • Service of Exchanging Digital Assets and Fiat Currency 	<ul style="list-style-type: none"> • Service of exchanging Digital Asset for other Digital Assets • Operating a Digital Asset trading platform • Reception and transmission of orders in relation to Digital Assets for third party account • Portfolio management in relation to Digital Assets for third party account • Advice to Digital Assets subscribers • Underwriting of Digital Assets • Placing of Digital Assets on a firm commitment basis • Placing of Digital Assets without a firm commitment basis
Summary of the main regulatory requirements	<ul style="list-style-type: none"> • Suitability of the senior managers and of the shareholders • Appropriate internal control procedures and systems • Management of conflict of interest • Capital requirements or professional indemnity insurance¹² 	

No

	Mandatory registration	Optional licensing
Subject to AML requirements	Yes ¹³ and will therefore have to implement appropriate AML procedures	
Possibility to solicit French clients	Yes	Yes
Procedure	<ul style="list-style-type: none"> Filing of an application with the AMF - please note that the application will differ depending on whether the entity requests a mandatory registration or an optional licensing Upon receipt of a complete application, the AMF delivers its decision within a 6 months' time period, during which: <ul style="list-style-type: none"> the AMF informs the French banking supervisory authority (the <i>Autorité de contrôle prudentiel et de résolution</i> (the ACPR)) within 5 business days; and the ACPR has up to 3 months to issue its recommendation to the AMF. 	
Sanction in case of non-registration / non-licensing	One year of imprisonment and a fine of up to EUR15,000 ¹⁴	N/A given that the licensing is optional ¹⁵

4. KEY TAKE AWAY POINTS

1. The new DASP regulation is one of the first bespoke legal regimes created by a legislator.
2. The DASP regime provides for equivalent regulated status as applies to e.g. investment services providers or payment services providers, even though the interaction with other regulatory regimes remains open to interpretation.
3. Entities falling within the scope of the licensing regime must register with the AMF by the end of November 2020.
4. Entities currently using Digital Assets should also monitor their marketing material to ensure that they are compliant with the financial solicitation legal framework. Since the enactment of the Pacte Law, only registered **or** licensed DASP are allowed to solicit French clients¹⁶. The rationale behind such requirement is to provide entities which elect licensing with a business advantage, *i.e.* to proactively market services to French customers¹⁷. In addition, the new solicitation regime aims at ensuring that French investors are duly and correctly informed by the DASP regarding the Digital Asset Services¹⁸. As a consequence of the foregoing, an entity, which is not registered nor licensed as a DASP, may not solicit French investors.
5. Non-French entities would need to establish a subsidiary (or potentially a branch) in order to be registered or licensed as a DASP.
6. It is a truly work in progress regulation to be watched out in the upcoming months.

ENGLISH TRANSLATION OF THE DEFINITION OF THE DIGITAL ASSETS SERVICES
FOR INFORMATION PURPOSES ONLY

Article D. 54-10-1 of the Code

1° The service of safekeeping of digital assets for third party account is constituted by the controlling of, on behalf of a third party, the means of access to the digital assets registered using distributed ledger technology [(dispositif d'enregistrement électronique partagé)] and by maintaining a register of positions, opened in the name of the third party and corresponding to its rights in the said digital assets.

The safekeeping services provider thus defined shall process events affecting digital assets or associated rights under the conditions defined by the general regulations of the Autorité des marchés financiers.

When the cryptographic technique used by the distributed ledger technology (dispositif d'enregistrement électronique partagé), on which the digital assets are recorded, is asymmetric cryptography, the means of access to a digital asset shall be private cryptographic keys.

2° The service of purchasing or selling digital assets against currencies having legal tender is constituted by the entering into contracts of purchase or sale on behalf of third parties relating to digital assets in legal tender, with, where applicable, the interposition of the services provider's own account.

3° The service of exchanging digital assets against other digital assets is constituted by the entering into contracts providing for the exchange, for third party account, of digital assets for other digital assets, with, where applicable, the interposition of the services provider's own account.

4° The service of operating a digital assets trading platform is constituted by the operation of one or more digital asset trading platforms, in which multiple purchasing and selling interests expressed by third parties for digital assets against other digital assets or in legal tender, may interact in a manner that results in the entering into contracts.

5-1. The service of receiving and transmitting orders in relation to digital assets for third party account is constituted by the act of receiving and transmitting orders on digital assets on behalf of a third party.

5-2. The service of managing portfolios of digital assets for third party account is constituted by the act of managing, in a discretionary and individualised manner, portfolios including one or more digital assets within the framework of a mandate granted by a third party.

5-3. The service of advising digital assets subscribers is constituted by the provision of personalised recommendations to a third party, either at its request or at the initiative of the services provider providing the advice, concerning one or more digital assets.

5-4. The service of underwriting digital assets is constituted by the act of acquiring digital assets directly from an issuer of digital assets for the purpose of selling them.

5-5. The service of placing digital assets on a firm commitment basis is constituted by the act of seeking purchasers on behalf of an issuer of digital assets and guaranteeing a minimum amount of purchases by agreeing to acquire the unplaced digital assets;

5-6. The service of placing digital asset without a firm commitment basis is constituted by the act of seeking purchasers on behalf of an issuer of digital assets without guaranteeing an acquisition amount to the issuer.”

¹ Indeed, Directive (EU) 2018/843 dated 30 May 2018 (which shall be implemented in all EEA Member States prior to 10 January 2020) provides for a new requirement relating to custodian wallet services providers and providers engaged in exchange services between virtual currencies and fiat currencies, pursuant to which they should (i) become subject to anti-money laundering (**AML**) requirements, and (ii) be registered in EEA Member States.

² The order (*arrêté*) will amend the general regulation of the AMF to provide for (i) the licensing conditions, and (ii) the specific conditions to be fulfilled by a DASP when carrying out digital assets services. The AMF will also publish at the same time two instructions to supplement the French DASP regime.

³ Pursuant to Article 86 of the Pacte Law.

⁴ The relevant Pacte Law provisions have been implemented under Article L. 54-10-1 2° of the French monetary and financial code (the **Code**).

⁵ In the 5MLD, the virtual currencies are defined as "*the digital representation of value [...] accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically*" (emphasis added) (Article 1 §2 (d) of the 5AMLD), whereas in new Article L. 54-10-1 2° of the Code created by the Pacte Law, the digital asset is defined as "*a digital representation of value [...] accepted by natural or legal persons as a means of exchange and which can be transferred, stored or traded electronically*" (emphasis added).

⁶ Pursuant to Article L. 54-10-2 of the Code.

⁷ Pursuant to Article L. 54-10-3 of the Code.

⁸ Pursuant to Article L. 54-10-5 of the Code.

⁹ This being said, note that, in accordance with the relevant Pacte Law provisions, the French government will draft a report over the next year to evaluate the need for the optional licensing regime to become mandatory.

¹⁰ Under French law, financial solicitation is defined as any unsolicited contact, by any means, with any given individual or legal entity, for the purpose of obtaining their consent for the carrying out of regulated activities, including now all the Digital Assets Services (pursuant to Article L. 341-1 of the Code).

¹¹ See Article L. 54-10-5 of the Code.

¹² Please note that these requirements will be specified shortly once the order amending the general regulation of the AMF will be published.

¹³ Pursuant to Article L. 561-2 7 bis of the Code.

¹⁴ Pursuant to Article L. 572-23 of the Code.

¹⁵ This being said, note that any person disseminating wrong or misleading information, or using a denomination or any technique enabling people to believe that it is licensed/authorised as a DASP may be sanctioned by six months imprisonment and a fine of up to EUR7,500 (pursuant to Article L.572-26 of the Code).

¹⁶ See footnote 10 for definition.

¹⁷ As it is clearly stated in numerous French parliamentary reports (e.g. the *Sénat* Report ([link](#) - in French only), and one of the *Assemblée Nationale* report ([link](#) - in French only).

¹⁸ As it is clearly stated in numerous French parliamentary reports (e.g. the *Sénat* Report ([link](#) - in French only), and one of the *Assemblée Nationale* report ([link](#) - in French only)

Brice Henry Partner, Paris	+33 1 40 06 53 66 brice.henry@allenoverly.com
Mia Dassas Counsel, Paris	+33 1 40 06 53 64 mia.dassas@allenoverly.com
Pauline Robin Associate, Paris	+33 1 40 06 51 45 pauline.robin@allenoverly.com

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy LLP is authorised and regulated by the Solicitors Regulation Authority of England and Wales. The term partner is used to refer to a member of Allen & Overy LLP or an employee or consultant with equivalent standing and qualifications. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners is open to inspection at our registered office at One Bishops Square, London E1 6AD.

© Allen & Overy LLP 2019. This document is for general guidance only and does not constitute definitive advice.

allenoverly.com