

French Regulators Launch Public Consultation for Initial Coin Offerings

IN SHORT

The Situation: French investors continue to show interest in initial coin offerings.

The Result: The French Financial Market Authority has launched a public consultation to assess whether ICOs might fall within the scope of the current regulatory framework, warn about the potential risks, and consider future regulations.

Looking Ahead: Regulations for ICOs are expected after an analysis of the information gathered during the public consultation.

French regulators are confronting the challenges associated with the emergence of initial coin offerings ("ICOs") and distributed ledger technology ("DLT").

The French Financial Market Authority ("AMF") has issued a consultation paper, warning investors about the risks associated with ICOs, including the current lack of regulation, absence of guarantee of capital invested, inadequate documentation, fraud and money laundering risks, volatility risk, and the early character of the projects.

What is the Definition of an ICO?

The AMF defines an ICO as a fundraising transaction realized through a DLT resulting in the issuance of tokens. In its consultation paper, the AMF does not qualify ICOs or tokens under French law but analyzes how they might fall within the scope of the French regulatory framework. The answer lies in the characteristics of the tokens issued and in particular the likelihood that tokens could be characterized as financial instruments.

Questions Related to ICOs in France

The consultation paper asks the following questions:

Are Tokens Capital Securities? The answer seems to be "no." Generally, tokens do not give access to the share capital of the tokens' issuers. However, tokens could be characterized as capital securities where they carry corporate governance and financial rights, which are similar to those usually granted by ownership of traditional shares.

Are Tokens Debt Securities? The answer seems to be "no" as well. Indeed, no ICOs known by the AMF involved the issuance of tokens representing a claim for payment of a specific sum of money against its issuer.

Are Tokens Undertakings for Collective Investments in Transferable Securities ("UCITS") or Financial Alternative Funds ("FIA")? It is unlikely that tokens could be characterized as UCITS or FIA. Indeed, tokens are not undertakings with the sole object of collective investment in transferable securities or in other liquid financial assets of capital raised from the public and that operate on the principle of risk-spreading.

How Can ICOs and Tokens Be Regulated? To date, French law does not provide rules applying to ICOs and tokens, under the assumption that tokens are not qualified as financial instruments. Also, some ICOs launched abroad have been offered to French investors, which requires some minimum legal harmonization. Different French rules are likely to apply to ICOs depending on the characteristics of the tokens issued.

The current position of the AMF is to conduct a case-by-case analysis in order to determine whether ICOs or tokens are regulated. Until the adoption of a new legislation, the AMF has launched, in parallel with the consultation, a program named UNICORN (Universal Node to ICO's Research & Network) in order to support initiators of ICOs and deepen its expertise about ICOs.

Possible Regulations for ICOs

Under the current French legal framework, ICOs known by the AMF are not subject to current financial regulations relating to financial instruments. In its consultation paper, the AMF considers four different



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legal frameworks to regulate ICOs and is asking participants to express their views on each proposition.

The first option considers a status quo approach to the "hard law"—legally binding regulations and directives—along with the application of good practices enacted by the AMF. In this case, only ICOs that fall within the scope of the current regulatory framework will be regulated. Therefore, most ICOs will not be regulated but will be subject to the "soft law"—recommendations, opinions, communications, notices, and guidelines—provided by the AMF on a voluntary basis.

The second option considers a regulation of ICOs on the basis of amendments to the rules governing the prospectus. The AMF suggests, in this case, amending the current European framework governing the public offerings by enacting a new Prospectus Regulation. The main element of this regime will be the benefit of the European passport, but it would require a European approach.

The third option considers two approaches:

- A regulation on the basis of a new legal framework providing for a prior authorization regime for every ICO addressed to the public in France. Under such regime, each ICO will require a marketing authorization from the AMF. In contrast, the initiator of the offer will not be subject to license requirement.
- A regulation on the basis of a new legal framework providing for an optional authorization regime under which initiators of ICOs would choose whether to submit their offer for approval before the AMF. Should no prior approval be requested, specific warnings and disclaimers should be made to investors regarding the lack of any prior approval by the AMF.

The consultation (both in French and English) is open until December 22, 2017. Once the responses are analyzed, regulations for ICOs will be implemented.

THREE KEY TAKEAWAYS

1. The French Financial Market Authority is gathering information through a public consultation to help shape its policies and regulations regarding ICOs.
2. Currently, ICOs would likely not be characterized as either equity or debt securities.
3. Regulations for ICOs are likely coming, but investors and issuers should proceed with caution in the meantime.

CONTACT

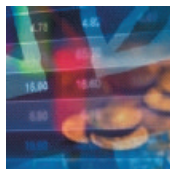


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