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PACTE BILL: A FRAMEWORK FOR ICOS AND PROTECTION OF FOREIGN INVESTMENTS IN FRANCE

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The Bill on business growth and transformation, known as the “PACTE Bill” in French, aims at “eliminating barriers to business growth at every stage of business development, from business creation to business transfers, including financing”^[1], while protecting companies that conduct so-called “strategic” activities. The wide range of contemplated measures includes the creation of a clear legal regime governing initial coin offerings (“ICOs”) and the improvement and strengthening of sanctions in case of non-compliance with the rules applicable to foreign investments in France.

The PACTE Bill was adopted at first reading by the National Assembly on October 9, 2018 and will be discussed by the Senate in January 2019.

1. Legal framework governing initial coin offerings

Article 26 of the PACTE Bill is designed to regulate initial coin offerings (“ICOs”), also called initial token offerings.

The term ICO means a method of fund raising through the issuance of digital assets (“tokens”) by means of a shared electronic recording device (in particular using the blockchain technology)^[2].

This new alternative financing method, close to the “crowdfunding”^[3], the stock market listing on a regulated market (or “IPO” for “initial public offering”), and the venture capital, demonstrates growing interest amongst innovative startups^[4], which often have a hard time gathering the funds needed to start.

These “tokens” are usually classified in two major categories:

- The most popular^[5]: The “utility tokens”, offering a right to use goods or services (either current or future) proposed by the issuer;
- The “security tokens”, offering political (voting) and/or financial rights and therefore similar to financial instruments^[6];

It being specified that some “tokens” may combine characteristics of “utility tokens” and “security tokens”, which causes difficulties of legal classification.

Given the absence of a clear legal framework at the French and/or European level, a new legislation is being contemplated in order to:

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- Define specifically:
 - The token, i.e. “any intangible property representing, in digital form, one or more rights, which may be issued, registered, retained or transferred by means of a shared electronic recording device that identifies, directly or indirectly, the owner of such property”;
 - The initial coin offering, i.e. “proposing to the public, in any form whatsoever, to subscribe to these tokens”, it being specified that “The ICO open to subscription by a limited number of persons, as defined in the French Financial Markets Authority [(“FFMA”)], acting on their own behalf does not constitute an offer of tokens to the public” and that the tokens having the characteristics of a financial instrument would however remain governed by the regime applicable to public offerings of financial instruments;
- Allow issuers to request a visa (optional) from the FFMA, in order to protect the investors and reassure the public as to the seriousness of the offer being made. The issuers thereby labeled would appear in a “white list” accessible to all. The procedure for applying for the visa, the documents to be produced in support of such application (“white paper”) and the content of the document to be remitted to FFMA are expected to be detailed in the FFMA’s General Regulation, knowing that this document and the advertisements relating to the offer would need to provide and “accurate, clear and non-misleading” content and allow to “understand the risks relating to the offer”. The FFMA’s mission would then be to make sure that the contemplated offer provides the required guarantees for a public offer and, in particular, that the issuer of the tokens:
 - is incorporated as a legal entity established or registered in France;
 - sets up “any means to monitor and safeguard the assets collected as part of the offer”;
 - Create a framework for digital assets intermediaries, which will also be allowed to request a visa (optional) from the FFMA.

2. Strengthened and improved sanctions in case of non-compliance with the rules governing foreign investments in France

Article 55 of the PACTE Bill aims at strengthening and improving applicable sanctions in case of non-compliance with the rules governing foreign investments in France.

Foreign investments in France are, in principle, unrestricted but they may however be subject to the prior authorization of the French Minister of Economy, in particular whenever they are made in so-called “sensitive” business sectors: (i) public policy, public security and national defense, (ii) research, production and sale of weapons, ammunitions and explosive powders and substances[7].

Sanctions applicable in case of non-compliance with this regulation are severe and, in some cases, ill-suited. As such, a transaction carried out without prior authorization is automatically null and void, without any possibility to regularize

the situation afterwards.

Under the PACTE Bill, the sanctions would be as follows:

- in case of foreign investment carried out without prior authorization, the Ministry of Economy may order the investor to file an application for authorization, to restore the previous situation at its own expense or to modify the investment. He could also order the payment of a penalty per day of non-compliance with this order.

If the protection of "national interests" is jeopardized or likely to be jeopardized, the Ministry of Economy would also be entitled to take any of the following protective measures:

- pronouncing of suspension of the voting rights attached to the fraction of the shares, the holding of which by the investor should have been subject to prior authorization;
- prohibition or limitation of the distribution of dividends attached to the fraction of these shares;
- suspension, restriction or temporary prohibition of the free disposal of all or part of the assets related to the so-called "sensitive" activities;
- appointment of a representative responsible for ensuring the protection of national interests within the company that operates so-called "sensitive" activities.
- In case of foreign investment carried out with prior authorization with conditions/commitments, but breach of these conditions/commitments, the Minister of the Economy would be entitled to:
 - withdraw the authorization, requiring the investor to request a new authorization;
 - Enjoin (with the payment of a penalty per day of non-compliance with this injunction) the defaulting investor to:
 - comply, within a specific timeline, with the conditions/commitments set forth in the authorization;
 - meet, within a specific time-line, requirements imposed in replacement of the non-performed obligation, including the reinstatement of the situation as it was prior to non-compliance or the cessation of all or part of the so-called "sensitive" activities;

The Minister of Economy may also take the necessary protective measures, as per the terms and conditions set out above.

The decisions or injunctions made on this ground would only occur after the sending of a formal notice to express observations within a period of fifteen days, except in case of emergency, exceptional circumstances or imminent infringement to public order, public security or national defense.

These decisions would be subject to appeal.

- In case of foreign investment carried out without prior authorization, authorization obtained by fraud, breach of commitments or partial or full non-compliance with decisions and injunctions made by the Minister of Economy, the latter may, after having invited the investor to express its observations on the facts for which it is blamed within a minimum period of fifteen days, impose a financial penalty, the maximum amount of which – that will be commensurate with the seriousness of the breaches – would be the higher of the following:
 - twice the amount of the irregular investment;
 - 10% of the annual turnover, taxes excl., of the target company;
 - 5 million euros for legal entities and 1 million euro for natural persons.

Other measures are envisaged[8]:

- Extension of the list of so-called “sensitive” business sectors[9]: The production of semi-conductors, space operations, drones, artificial intelligence, cybersecurity, robotics, additive manufacturing and storage of mass data will be included within the scope of the prior authorization procedure, “in order to better protect sectors of the future”[10];
- Introduction of a procedure similar to the advance ruling procedure (rescrit) allowing to file a request with the competent authorities to enquire as to whether the contemplated investment falls within the scope of the prior authorization procedure. An order of the Minister of Economy should set forth the content of the request file.

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Notes

[1] Bruno Le Maire, Minister of Economy and Finance, and Delphine Geny-Stephann, Minister of State, attached to the Minister of Economy and Finance.

[2] For a definition of blockchain, cf. article entitled [The blockchain facing GDPR](#) authored by Laure Marolleau and published in our [November 2018 e-newsletter](#).

[3] For more information on the “crowdfunding”, cf. article entitled [Crowdfunding à la française](#), authored by Chems Idrissi and published in our January 2015 e-newsletter.

[4] Approx. 4 billion dollars have been reportedly raised in this way in 2017 (source: Impact Study of the Bill on business growth and transformation, June 2018). Cf. also Summary of replies to the public consultation on Initial Coin Offerings (ICOs) and update on the UNICORN Programme, FFMA, February 2018, and French ICOs – A New Method of Financing, FFMA, November 2018: “Although the amounts raised are still low at this stage (89 million euros for 15 issuers), ICOs represented 4% of financing in equities over the first three quarters of 2018. Moreover, although this first wave of French issuers was more concentrated in the technology sectors and sought to raise relatively low amounts (between 200,000 and 20 million euros), future projects will be more diversified in other sectors and aim to raise between one and 180 million”. “UNICORN” (“Universal Node to ICO’s Research & Network”) a research programme on digital assets offerings started by the FFMA in October 2017.

[5] French ICOs – A New Method of Financing, FFMA, November 2018: “Overall, among all the completed or future ICO projects, 89% presented utility tokens characteristics”.

[6] Article L. 211-1 of the French Financial and Monetary Code defines financial instruments as follows: “I. – Financial instruments include both financial securities and financial contracts. II. – Financial securities include: 1. Equity securities issued by joint-stock companies; 2. Debt securities; 3. Units or shares in undertakings for collective investment. III. – Financial contracts, also referred to as “financial futures”, are futures contracts that appear on a list established by decree. IV. – Bills of exchange and interest-bearing notes are not financial instruments”.

[7] For more information on the currently applicable rules, cf. article entitled [The foreign investment screening device in France is simplified... but not reduced](#), authored by Catherine Nommick and published in our [July/August 2017 e-newsletter](#).

[8] Cf. Explanatory Memorandum to the Bill on business growth and transformation and Decree no 2018-1057 dated November 29, 2018 relating to foreign investments submitted to prior authorization.

[9] The following activities are currently concerned: gambling industry (except for casinos), private security, fight against terrorism, wiretapping and mail interception, security of information systems, cryptology, national defense secrets, research into, and the manufacture and marketing of, weapons, ammunition, powder and explosive substances used for military or war purposes, or other restricted materials, companies that entered into design or supply agreements with the French Defense Ministry, integrity, security and continuity of supply in water, electricity, gas, oil or other energy sources, transport and electronic communications networks and services, facility, installation or structure that is “of vital importance”, and protection of public health.

[10] Cf. The Action Plan for Business Growth and Transformation in 10 measures, Ministry of Economy and Finance, June 2018

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