Initial Coin Offerings as Securities Offerings: 
A Comparison of Legal Approaches in the United States and France

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**Acronyms**

**ACPR:** Autorité de Contrôle Prudentiel et de Résolution

**AMF:** Autorité des Marchés Financiers

**B2B:** Business to business

**BTC:** Bitcoin

**C. com.:** Code de commerce

**C. mon. fin.:** Code monétaire et financier

**CA:** Cour d’appel

**CF:** Crowdfunding

**CFTC:** Commodity and Futures Trading Commission

**Cour Cass.:** Cour de Cassation

**DLT:** Distributed ledger

**EBA:** European Banking Authority

**ESMA:** European Securities and Markets Authority

**ETH:** Ethereum

**EU:** European Union
**ICO**: Initial Coin Offering

**IPO**: Initial Public Offering

**PNF**: Parquet National Financier

**Régl. gén. AMF**: Règlement général de l’Autorité des marchés financiers

**SEC**: Securities and Exchange Commission

**TGI**: Tribunal de Grande Instance

**TI**: Tribunal d’instance
Chapter 1 – Introduction

Everything in contribution with the stimulation and the protection
of investment, an essential condition of every economic activity,
can be linked to financial law.¹

Historically, financial markets were self-regulated.² Each stock exchange had its own
set of rules to maintain a certain degree of consistency among intermediaries and to
protect investors.³ However, after the Great Depression of 1929, the United States
adopted new laws to protect investors from unscrupulous companies and traders who
sold stocks without any real relevant information and tried to speculate⁴ on financial
markets.

² J. Knight, Grandes tendances de la régulation des marchés financiers, LPA 1994, n° 71, p. 12 (in French).
³ ibid.
⁴ Investopedia, sub verbo “Speculation”: “the act of conducting a financial transaction that has
substantial risk of losing value but also holds the expectation of a significant gain or other major value”,
Online: https://perma.cc/5E7G-2HYY
Thus, the US *Securities Act* was enacted in 1933 to regulate primary stock markets and the *Securities Exchange Act* was enacted in 1934 to create the Securities and Exchange Commission (SEC).

Before the enactment of these acts, the United States had a very liberal policy that didn’t have and safety nets. According to Elisabeth Keller, “the economic crisis of the 1920s and ‘30s led to intensive efforts by the federal government to regulate business, ending years of a *laissez-faire* policy”.

Those acts saw the light of day because after the market crash of 1929, and because President Franklin Roosevelt wanted the government to take an active role in the financial system.

The *Securities Exchange Act* required public companies to register with the SEC in order to issue securities. This registration process required companies to provide specific information...
information on the nature of the security that was going to be issued. The aim of this disclosure obligation was to give information to investors and allow them to take an enlightened decision.

In France, the self-regulation of financial markets largely prevailed until the late 1980s. This lack of governmental regulation was made up for by strict control of the financial markets by professional associations and peers. Before the law of January 22, 1988, rules regarding financial markets, public offerings and the exchange of securities were added to the general regulation of the Company of Foreign Exchange Brokers (Compagnie des Agents de Change). Nevertheless, financial markets in France still enjoy large prerogatives to make their own rules with respect to the trading of securities. In a report to the French Ministry of Justice, some authors argued that the complexity of certain products can only be comprehended by financial markets experts, that jurists and lawmakers could not understand all the aspects, such as technical regulations, and that the system of self-regulation should be maintained.

[References]


11 Marie-Anne Frison-Roche (law professor), Véronique Magnier (law professor), Edouard de Soultrait (lawyer), Pascal Etain (law professor), Marie Stéphane Payet (law professor)
Over the last years, however, a number of laws have been enacted in order to protect investors. In France, most rules have come through the European Union in the form of Directives and Regulations. In Europe, the Passport System allows companies to operate within the European Union once they have established themselves in one of the Member States.\(^1\) Therefore, Member States must cooperate with EU law.

Those remarks on the technicality of financial instruments can also be applied to cryptocurrencies and crypto assets. Still today, only a few people can fully understand the implications of cryptocurrencies and crypto assets.\(^2\) These new technologies remained unregulated for a long period of time because many lawmakers did not fully understand the technology, or its implications. A specific regulation has slowly emerged in the United States as well as in Europe, but remains insufficient to provide


\(^2\) A currency that is based on cryptography (a mathematical method to secure information)
efficient protection to investors, without hindering the development of the
technologies.

In order to protect the general investor, there is an urgent need to better understand,
from a technical perspective, how cryptocurrencies work.

Securities laws generally ensure that the public has access to a standard set of unbiased
information about the security they are purchasing, so that investors can make
informed investment decisions. Nevertheless, securities laws have not averted all
financial market crises.⁴ A recent example is the subprime crisis of 2008 where the
regulation that was in place let financial and insurance institutions create a financial
bubble by loaning to individuals who wanted to buy real estate without checking if the
operation was viable, then creating financial products based on those loans and then
insuring those financial products.

Today, there is a growing interest in cryptocurrencies and related new technologies as
they represent an increasing share of transactions. Those products rely on the

to-Distribute Narrative” (2020) 35.2 B.F.L.R. 279; Ilene Grabel, Global Financial Governance and
Development Finance in the Wake of the 2008 Financial Crisis, Feminist Economics 2013, vol. 19, n° 3,
32-54; Stephen Bell, Historical Institutionalism and New Dimensions of Agency Bankers, Institutions and
the 2008 Financial Crisis, Political Studies, 2017, vol. 65(3) 724-739
blockchain technology, which is a form of decentralized database, or a distributed ledger. Seeing that the blockchain technology was attracting capital, many companies wanted to take advantage of the system. Initial Coin Offerings (ICOs), which are based on the blockchain technology, let companies raise funds for little cost but also raise issues with existing securities laws. At first blush, many ICOs were considered analogous to initial public offerings (IPOs) under securities laws, with virtual “coins” serving as a functional equivalent of traditional securities. However, as will be argued in this thesis, some virtual coins cannot— and should not— be considered the same as securities for the purpose of regulating ICOs. Many jurists do not yet understand these new technologies and their implications for securities regulation, as well as regulation under other areas of law. Therefore, there is a great need to educate lawyers and lawmakers about the various types of coin offerings, and which ones should and should not be treated as securities for the purpose of applying securities law.

This thesis canvasses how the United States, France, and the European Union have approached the issue of whether ICOs should be considered securities offerings for the

15 Blockchain is a decentralized peer-to-peer database composed of a chain of blocks which contains information. A distributed ledger is a decentralized database used by several users; Cf. Chapter 2 for a detailed explanation of the technology; Investopedia, What is the Blockchain, Online: https://perma.cc/V6GD-K2EF

16 Cf. Chapter 3 infra for further explanations on different types of ICOs
purpose of applying securities law. It analyzes the existing legal frameworks in the United States and France as well as prospective laws and regulations that are currently being discussed by the United States Congress and the French Parliament. In both countries, legislators have refrained from legislating on the subject, which has contributed to legal uncertainty. Nevertheless, some laws were passed fairly early on in order to stop the proliferation of ICOs. At this stage, however, prospective legislation is being proposed to replace existing, prohibitive laws, which would create conditions that are more conducive to ICOs.

The rest of this thesis is structured as follows. Chapter 2 defines the blockchain technology and its uses. This chapter provides the technical background necessary to discuss ICOs and their regulation. Chapter 3 defines ICOs and distinguishes between different type of token or coin offerings. Chapter 4 analyzes the existing legal framework applicable to ICOs in the United States and France. Chapter 5 analyzes the prospective laws in the United States and France which would regulate ICOs. This chapter evaluates the whether the proposed laws are adequate to regulate ICOs robustly. Chapter 6 concludes the thesis by considering possible improvements to the proposed laws, which would enhance the regulation of ICOs.
Chapter 2 – The Blockchain Technology

This chapter provides the technical background necessary to support the subsequent legal analysis of ICOs and their regulation in chapters 4 and 5. The subsections in this chapter define the Blockchain technology, describe its uses, analyze the difference between cryptocurrencies, tokens and crypto securities, and evaluate their similarities and differences with conventional securities.

A – Definition of the blockchain technology

The US Federal Reserve Board defines blockchain as follows:

[Blockchain is] some combination of components including peer-to-peer networking, distributed data storage, and cryptography that, among other things, can potentially change the way in which storage, record-keeping, and transfer of a digital asset is done.\(^{17}\)

All cryptocurrencies work on the blockchain technology. This technology is based on a decentralized database, meaning that no person or entity exerts control over the database. Instead, the database relies on the collective computing power of miners around the world. Every crypto asset has a source code which determines the ways miners contribute to the blockchain. The source code of the program is often available on GitHub, which is a platform where developers can work together, unless the technology is closed sourced. However, some blockchains are private, meaning that the source code is inaccessible to the public.

Miners are users who share their computing power in order to control and write transactions on the blockchain database. Every transaction is processed by miners. For example, when person X wants to send a crypto asset to person Y, the transaction is sent to the network in the form of an algorithm to execute. Those algorithms are calculated by miners and the result is then written in the blockchain. When enough

18 Investopedia, *Blockchain Explained*, Online: https://perma.cc/W6X6-ZHVW

19 Mining in this context refers to the verification process of a transaction on a blockchain done by miners, who are in often rewarded with crypto assets for their efforts.

20 GitHub, Online: https://perma.cc/3JVY-42KK

21 A set of operatory rules that serves the purpose of resolving a problem
transactions have been written an individual block is created, as depicted in Figure 1, below.

*Figure 1: Representation of a Blockchain*

To reward them for their efforts, miners receive a reward in the form of coins or tokens after each block is written onto the chain. 22 The coins or tokens can be exchanged, giving them some value.

The blockchain database is freely accessible to anyone who wants to consult it. All transactions are visible, allowing one to see who sent what to whom. But this does not mean that every transaction is transparent.; the blockchain contains only the electronic addresses that were part of the transaction. If you do not know the person’s electronic address, there is no way to know the identity of the parties.

22 A crypto asset that gives access to an application on the blockchain
B – Uses of the blockchain technology

The blockchain technology can serve many purposes. When it first became known through the popularization of Bitcoin, it was designed solely to be used as a decentralized database for cryptocurrency transactions. Its purpose was to defy the banking system and show the world that it was possible to devise a currency system separate from governments. It was supposed to be anonymous, secure, quick, and easy to use. It was created by two individuals who go by the names Satoshi Nakamoto and Martti Malmi. Nakamoto published a whitepaper on Bitcoin on October 31, 2008, however, his true identify remains unknown. His whitepaper elaborates on the vision behind the development of Bitcoin and the blockchain:

A purely peer-to-peer version of electronic cash would allow online payments to be sent directly from one party to another without going through a financial institution. Digital signatures provide part of the solution, but the main benefits are lost if a trusted third party is still required to prevent double-spending. We propose a solution to the double-spending problem using a peer-to-peer network. The network timestamps transactions by hashing them into an ongoing chain of hash-based proof-of-work,

\[23\] An independent cryptocurrency that works on the Bitcoin blockchain. It can also refer to the blockchain

\[24\] Bitcoin.org, FAQ, What is Bitcoin, Online: [https://perma.cc/2TAB-FXGA](https://perma.cc/2TAB-FXGA)

forming a record that cannot be changed without redoing the proof-of-work. The longest chain not only serves as proof of the sequence of events witnessed, but proof that it came from the largest pool of CPU power. As long as a majority of CPU power is controlled by nodes that are not cooperating to attack the network, they'll generate the longest chain and outpace attackers. The network itself requires minimal structure. Messages are broadcast on a best effort basis, and nodes can leave and rejoin the network at will, accepting the longest proof-of-work chain as proof of what happened while they were gone.

The blockchain concept can be used for various purposes and new applications are being found every day. Below are some examples of uses for the blockchain:

- **Financial Services**: ING, Société Générale, and ABN Amro have implemented a commodities’ trading platform that relies on blockchain.

- **Identity Verification**: IBM is using blockchain as way of verifying credentials.

- **Supply Chain Traceability**: Treum has a solution to trace “the entire lineage” of a product. This tool lets companies to “share verifiable claims with their consumers to improve confidence and authenticity in their products”, “provide

26 ING Newsroom, *Easy Trading Connect on the verge of digitalizing an age-old sector*, February 23, 2017, Online: [https://perma.cc/6D8R-9B8Y](https://perma.cc/6D8R-9B8Y)

27 IBM, *IBM Verify Credentials: transforming digital identity into decentralized identity*, Online: [https://perma.cc/7EAT-47EG](https://perma.cc/7EAT-47EG)

28 Treum, Online: [https://perma.cc/WA53-CYCC](https://perma.cc/WA53-CYCC)
companies the ability to track the entire lineage of their products and their underlying ingredients from source-to-sale” and “provide customers the ability to tokenize non-fungible assets and allow them to be held, purchased, exchanged and traded at anytime, anywhere”.

- Data Storage: Sia is a decentralized data storage service based on the blockchain technology.29

These examples give an indication of the various uses of the blockchain technology. According to Oracle, the blockchain technology will play an important role in the future of Business to Business (B2B) transactions, because it is “flexible, secure, and rational”.30 More broadly, there is a developing consensus that blockchain and similar technologies will have an increasing impact in the world.

At this juncture it is crucial that lawmakers step in and provide suitable regulation for these new technological innovations in order to guarantee the security of this new technology. Regulation is important to ensure that application of the new technology can be successful without harming the average user or technological progress. Robust regulation will necessarily consider different stakeholder and their respective

29 Sia, Online: https://perma.cc/M2XZ-MJ5Q

30 Oracle, 4 raisons d’utiliser la Blockchain, July 17, 2019, Online: https://perma.cc/PM7F-R6SL (French).
interests. As this thesis will argue, some securities laws that have been applied to ICOs are ill-suited in this respect.

C – Main characteristics of cryptocurrencies and tokens

Created in 2008 with the Bitcoin technology, cryptocurrencies have gained widespread public attention over the past several years. However, prior to their popularity, this technology was already being studied by banks and financial institutions.31

Today, the daily volume of transactions conducted with Bitcoin is worth about US$1 billion.32 In comparison, Visa’s total transaction volume for the fourth quarter of 2017 was US$2 trillion.33 Although cryptocurrencies have a long way to go in order to overtake existing, popular payment methods like Visa, their adoption rate is growing


32 Estimated USD Transaction Value, Blockchain.com, Online: https://perma.cc/RY58-LKXY

33 Visa’s payment volume hit $2 trillion in Q4, Jaime Toplin, 5 February 2018, Business Insider, Online: https://perma.cc/H5E4-KX3K
exponentially, and they may be poised to surpass existing payment solutions in the near future.\footnote{34}

According to the European Parliament, the term “\textit{cryptocurrencies}” should be used in a broad sense, as distinguished from the terms “\textit{tokens}” or “\textit{crypto securities}”.\footnote{35} The European Parliament defines a cryptocurrency as:

\begin{quote}
\begin{itemize}
\item[(i)] a digital representation of value that (i) is intended to constitute a peer-to-peer (“P2P”) alternative to government-issued legal tender,
\item[(ii)] is used as a general-purpose medium of exchange (independent of any central bank),
\item[(iii)] is secured by a mechanism known as cryptography
\item[(iv)] can be converted into legal tender and vice versa.\footnote{36}
\end{itemize}
\end{quote}

A token, even if it is still based on the blockchain technology, is a crypto asset that gives access to an application or a product on the blockchain or represents shares\footnote{37} or

\footnotesize{\begin{flushright}
\parbox{\linewidth}{\footnotesize
\textit{\textsuperscript{34} Bitcoin Transaction Volume Tops PayPal, Creeps Up on Visa, Jonnie Emsley, 26 August 2018, Cryptoslate, Online: https://perma.cc/PCB6-NK32}\\
\textit{\textsuperscript{35} European Parliament, TAX3 Committee, Prof. Dr. Robby Houbben, Alexander Snyers, Cryptocurrencies and blockchain, Legal context and implications for financial crime, money laundering and tax evasion, July 2018, Online: https://perma.cc/HX7S-BFEW}\\
\textit{\textsuperscript{36} Ibid.}\\
\textit{\textsuperscript{37} An ownership in a company, Investopedia, sub verbo “Shares”, Online: https://perma.cc/58H5-2TUE}}}
\end{flushright}
bonds\textsuperscript{38}. Cryptocurrencies have value on their own based on the trust of their users. Tokens, however, are necessarily backed by an underlying asset or an underlying use that determines their value.

The European Parliament also distinguishes cryptocurrencies from crypto securities\textsuperscript{39}. The latter are genuine securities that use the blockchain technology for registration, transfer, and issuing purposes.\textsuperscript{40} Therefore, before proceeding to an analysis of ICOs, it is necessary to define securities in their general and traditional sense. This will facilitate a close analysis of ICOs versus securities, revealing the similarities and differences of the two concepts from a legal perspective. As will be argued in this thesis, while ICOs are very similar to traditional securities offerings in some respects, there are some varieties of ICOs which are fundamentally different.

\textsuperscript{38} A loan given to a company by an investor, Investopedia, \textit{sub verbo} “Bond”, Online: https://perma.cc/W4L7-BE27

\textsuperscript{39} European Parliament, TAX3 Committee, Prof. Dr. Robby Houbben, Alexander Snyers, \textit{Cryptocurrencies and blockchain, Legal context and implications for financial crime, money laundering and tax evasion}, July 2018, p.23 at para 2.2.3, Online: https://perma.cc/HX7S-BFEW

\textsuperscript{40} \textit{Ibid.}
D – Securities: definitions in the US and in France

a – The concept of securities in the United States

A security is a financial instrument that represents an ownership position in a publicly traded company (e.g. stock), a creditor relationship with governmental body or corporation (e.g. bond), or rights to ownership as represented by an option.\(^{41}\) It is a fungible, negotiable financial instrument that represents financial value. The company or entity that issues the security is known as the issuer\(^{42}\).

Securities are typically divided into debts and equities. A debt security represents money that is borrowed and must be repaid, with terms that define the amount borrowed, interest rate and maturity/renewal date\(^{43}\). Debt securities include, for instance, government and corporate bonds, certificates of deposit, preferred stock, and collateralized securities. Equities represent an ownership interest held by investors in a corporation\(^{44}\). Equity securities are usually referred to as shares or


\(^{42}\) Investopedia, *sub verbo* “Issuer”, Online: [https://perma.cc/XZ3S-F6QP](https://perma.cc/XZ3S-F6QP)

\(^{43}\) Investopedia, *sub verbo* “Debt Security”, Online: [https://perma.cc/6ZCL-3QHR](https://perma.cc/6ZCL-3QHR)

\(^{44}\) Ibid.
stocks. Unlike holders of debt securities, which only receive interest and the repayment of the principal, holders of equity securities are able to profit from capital gains and may also receive distributions of profits through dividends.

The Securities Act of 1933 defines “security” as:

any note, stock, treasury, stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, […]” [Emphasis added].

This definition can potentially include ICOs since the term “investment contract” is very broad. As we will see infra, case law has interpreted the term investment contract as “an investment of money in a common enterprise with the expectation of profits; solely from the efforts of others”. In the seminal case of SEC v. W.J. Howey Co. (1946), the US Supreme Court ruled that a contract was a security even though it concerned a company that sold groves to the public. The SEC considered the contract in question

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45 Investopedia, sub verbo “Equity”, Online: https://perma.cc/S9A8-8K7C

46 US Congress, Securities Act of 1933, May 27, 1933

47 US Congress, Securities Act of 1933, Sec. 2. [77b] (a), p.1, May 27, 1933 [emphasis added]

to be an investment contract because the investors did not own a specific part of the land used to cultivate the fruits and instead, they relied solely on the efforts of the offeror.49

When something is considered a security under securities laws, various steps must be followed when selling that security to the public. These steps are largely geared toward protecting the investing public by providing them with the information necessary to assess the security they are purchasing. One of the most important requirements is the requirement that securities offerings be accompanied by a prospectus.

A prospectus is a legal document issued by companies that are offering securities for sale to the public50. It contains a description of the offering; history of the business; description of management; price; date; selling discounts; use of proceeds; description of the underwriting; financial information; risks to buyers; legal opinion regarding the formation of the company; and the SEC disclaimer51.

49 Cf. infra, Chapter 3, A, b

50 15 USC § 77b (a) (10), “The term prospectus means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security”

51 15 USC § 77j; Investopedia, sub verbo “Prospectus”, Online: https://perma.cc/EPY6-FIX5
The role of the prospectus is to make investors aware of the risks of an investment. Without this information, they would essentially have to make investments sight unseen. This disclosure also protects the company from claims that it did not fully disclose enough information about itself or the securities in question.

Many companies using the Blockchain technology are startups that do not have many financial resources. To raise money, some of these companies issued coins or tokens to the public with the promise of a finished product or service. This practice quickly became problematic because it triggered securities law requirements in the United States. In testimony on ICOs from February 2018, the SEC confirmed that its mission is:

- to protect investors, maintain fair, orderly and efficient markets and facilitate capital formation” and that “those who invest their hard-earned money in opportunities that fall within the scope of the federal securities laws deserve the full protections afforded under those laws. This ever-present need comes into focus when enthusiasm for obtaining a

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52 Crypto Intelligence Trading System (CITS), Whitepaper, 19 June 2020, Online: https://perma.cc/D98C-AN9S; GrounderCoin, Whitepaper, Online: https://perma.cc/YCM7-7FRM

profitable piece of a new technology ‘before it’s too late’ is strong and broad. Fraudsters and other bad actors prey on this enthusiasm.\textsuperscript{54}

Therefore, the SEC clearly considers that the scope of its mandate to protect the public includes ICOs.

\textbf{b – The French approach to securities}

In France, according to the article L211-1 of the C. mon. fin., financial instruments are composed of stocks and other tradable financial instruments that give or can give access, directly or indirectly, to the capital or the voting rights; debt titles; shares or stocks of collective investment schemes; futures; and all other equivalent foreign financial instruments.\textsuperscript{55} This definition is further analyzed \textit{infra} in chapter 4 regarding the registration rules in France.

The role of the Autorité des Marchés Financiers (AMF) is to oversee financial markets in France. It fulfills this role, in large part, through its power to grant a visa to prospectuses. A visa gives the issuing company authorization to sell its securities to the

\begin{flushleft}
\textsuperscript{54} SEC, Jay Clayton, \textit{Testimony on “Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission"}, February 6, 2018
\end{flushleft}

\begin{flushleft}
\textsuperscript{55} Article L211-1, C. mon. fin., France (in French)
\end{flushleft}
public. Similar to the US requirements, the French prospectus must contain information about the company and; the financial operation; as well as financial statements. The AMF verifies that the information contained in the prospectus is accurate and, if so, grants a permission (visa).

In 2019, French lawmakers enacted a law directed at ICOs in particular. The Plan d’action pour la croissance et la transformation des entreprises (PACTE) law, which is further discussed infra, provides that companies planning ICOs may obtain an AMF visa for their prospectuses. However, the new law does not create a requirement for companies to obtain this visa for an ICO, as it is only a possibility given to the issuer.

56 However, there are certain cases where issuers are exempt from this visa. Those exemptions are not discussed in this thesis, except to the extent that they directly ICOs.

57 AMF, Guide d’élaboration des prospectus et information à fournir en cas d’offre au public ou d’admission de titres financiers, June 17, p. 29, 2020, Online: https://perma.cc/VPSR-9CGU (in French)

58 AMF, ICO: à quoi sert le visa de l’AMF, Online: https://perma.cc/BH67-W4WV


60 Cf. Chapter 3 for more details.
Chapter 3 – Initial Coin Offerings

As described in chapter 1 the primary purpose of securities law is to protect investors. The underlying idea is that investors have reliable information before buying any security in order to accurately assess the risks and benefits. When companies around the globe issued the first ICOs, they did not consider the coins or tokens offered to be securities as defined by securities law. Therefore, the offering companies did not follow securities law requirements.

Purchasers of the coins or tokens were sometimes given information and sometimes not. Among the companies that provided information about the ICO, some gave information which was misleading. This led many countries, such as the United Kingdom and France to legislate on the subject to better control and regulate ICOs. For example, Jason Tashea examined the effect of laws enacted to regulate cryptocurrencies or ICOs in various countries and states. Tashea reported that the creation of BitLicense in New York, for example, had a negative effect on the industry.

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62 Jason Tashea, Blockchain Based Initial Coin Offerings Are the Rage, but the Legal Terrain is Uncertain, 104 A.B.A J. 56 (2018)
since it was too strict\textsuperscript{63}. Some countries adopted a more flexible approach, to foster ICOs within their jurisdiction. The most notable of example is which is called a ‘regulatory sandbox’, a setting which lets companies test new ideas under the supervision of the regulatory authority.\textsuperscript{64}

Other authors have analyzed whether Bitcoin should be considered as a security for the purpose of securities laws\textsuperscript{65}. For example, Ruoke Yang, determines criteria according to which Bitcoins should be regarded as securities under the \textit{Securities Act} of 1933 and the \textit{Securities Exchange Act} of 1934\textsuperscript{66}. He approaches the analysis through

\textsuperscript{63} Ibid. p.8


the lens of the Howey test\(^67\), in which an investment contract should involve an investment of money, a common enterprise, and an expectation of profits to derive solely from the efforts of others.\(^68\)

Before proceeding further in the analysis, a few definitions are in order. The following subsection define the concept of an Initial Coin Offering, describe the different types of Initial Coin Offerings, and show some of the issues that Initial Coin Offerings raise with regard to securities laws. The growth of the ICOs around the world is also highlighted.

A – Definition of Initial Coin Offerings

According to Investopedia:

an Initial Coin Offering (ICO) is the cryptocurrency industry’s equivalent to an Initial Public Offering (IPO). ICOs act as a way to raise funds, where a company looking to raise money to create a new coin, app, or service launches an ICO. Interested investors can buy into the offering and receive a new cryptocurrency token issued by the company.

\(^{67}\) SEC v. W. J. Howey Co., 328 U.S. 293 (1946), Online: [https://perma.cc/U8U2-VPLM; Cf. infra p.43 for further explanations]

This token may have some utility in using the product or service the company is offering, or it may just represent a stake in the company or project.\(^6^9\)

It is relevant to compare the definition of ICOs with that of a conventional initial public offering (IPO) under securities law:

an Initial Public Offering (IPO) refers to the process of offering shares of a private corporation to the public in a new stock issuance. Public share issuance allows a company to raise capital from public investors.\(^7^0\)

As these two definitions illustrate, there is a very strong resemblance between ICOs and IPOs. ICOs and IPOs share many common features, as they are both created to raise funds. Nevertheless, the similarities should not be overstated or used to define ICOs as IPOs in all cases. As discussed below, there are some varieties of ICOs where the coins or tokens do not meet any of the requirements to be considered a security under existing securities law.

\(^6^9\) Investopedia, *sub verbo* “Initial Coin Offering (ICO)”, Online: [https://perma.cc/GRLS-DX5A](https://perma.cc/GRLS-DX5A); CMS, *Initial Coin Offerings, New Means of fundraising*, p. 3 at para 9, “ICOs are means for companies to collect money. Instead of writing long business plans and conducting endless pitches, companies can simply create their own cryptocurrency, gather a community behind their project, do some marketing, and write a white paper”

\(^7^0\) Investopedia, *sub verbo* “Initial Public Offering (IPO)”, Online: [https://perma.cc/EWG6-DWZ7](https://perma.cc/EWG6-DWZ7)
B - Different Types of Initial Coin Offerings

As discussed above, in Chapter 2, coins and tokens have many uses and thus not every ICO has the same purpose. The distinctions play an important role when it comes to a legal analysis of how to characterize a coin or token. The legal framework specific to crypto assets is not very well developed. Therefore, at this point in time, the United States and France are using existing legal concepts and extending these by analogy, where appropriate, to coins and tokens to fill in the regulatory gap.

There are three main types of coins or tokens that can be offered through an ICO. These are currency tokens; utility tokens; and, investment tokens. Depending on the type of coin/token, it may or may not qualify as a security under existing securities laws. To understand the issue of legal characterization, it is important to understand the three main types of coins/tokens.

a – Currency Tokens

Currency tokens (or coins) were the first crypto assets to go into used on the blockchain. As mentioned in Nakamoto’s whitepaper, their purpose was to replace traditional currency, creating an independent form of currency that did not rely on
governments\textsuperscript{71}. This type of token is of tangential interest for the purpose of this thesis, as there are very few ICOs that offer currency tokens.

Furthermore, it is important to note that the SEC does not view cryptocurrencies as securities.\textsuperscript{72} The SEC has stated that cryptocurrencies do not rely on the efforts of a third party and, thus, cannot be considered a security under existing laws.\textsuperscript{73} Nevertheless, the SEC’s statement seems to imply that if a cryptocurrency needs the efforts of a third party to gain value, it may be qualified as a security. Practically speaking, the likelihood of a cryptocurrency being considered as a security according to the criteria set by the SEC is low, since cryptocurrencies are decentralized by design. This decentralization allows the code to work on its own rather than having it rely on the efforts of a third party.

\textsuperscript{71} Satoshi Nakamoto, \textit{Bitcoin: A Peer-to-Peer Electronic Cash System}, October 31, 2008, Online: \url{https://perma.cc/LF4C-X85A}

\textsuperscript{72} William Hinman, \textit{Digital Asset Transactions: When Howey met Gary (Plastic)}, SEC, June 14, 2018, Online: \url{https://perma.cc/NW6X-ZPFX}

\textsuperscript{73} Cf. the paragraph on the Howey Test \textit{infra} to have a better understanding on the conditions required for an offer to be considered as a security
b – Utility Tokens

Utility tokens are the most common type of virtual coin or token. The purpose of those tokens is to give access to a certain product or service. Merriam-Webster defines utility tokens as:

a digital token of cryptocurrency that is issued in order to fund development of the cryptocurrency and that can be later used to purchase a good or service offered by the issuer of the cryptocurrency.  

This type of token cannot be considered security for the purposes of securities laws because it is not supposed to be an investment. Rather, ICOs offering utility tokens are comparable to crowdfunding. Nevertheless, those tokens can still be speculative considering that the price of the token can vary depending on the success of the project.

As discussed further below, it is argued that utility tokens should not be considered as securities because they do not pass the Howey Test for what constitutes an investment contract under US securities law. For a contract to be considered as an investment contract there needs to be an investment of money in a common enterprise with the

74 Merriam-Webster, sub verbo “Utility Token”, Online: https://perma.cc/8AUS-KQ6K

75 Joern H. Block, L. Hornuf, et al., The entrepreneurial finance markets of the future: a comparison of crowdfunding and initial coin offerings, Small Business Economics (2020)
expectation of profits solely from the efforts of others. Utility tokens do not meet a plan reading of this definition. However, this does not imply that utility tokens should be entirely unregulated either. This type of token still entails certain risks for potential purchasers, which may warrant regulation under laws other than securities laws.

**c – Investment Tokens**

Investment tokens (also referred to as security tokens) are tokens that are analogous to investment products. The main objective of an investment token is to make a profit and distribute it among its holders. This type of token is likely to be considered a security under securities laws because it functions in a manner similar to other investment contracts. The main difference is that it relies on effort exerted through mining the blockchain, rather than conventional methods. For example, the DAO token was characterized as a security in the United States since its main objective was to make profits for distribution among token holders.

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76 SEC v. Howey Co., May 27, 1946, US; Cf. Chapter 4, A, b for more details

C – The Growth of ICOs

According to a report done by GreySpark Partners in 2018,\(^{78}\) 50% of ICOs fail to raise money. The study covered more than 1,900 ICOs and reported that only 743 of them were able to raise more than US$1 Million\(^ {79}\). However, some ICOs are successful. According to the strategy\& report of June 2018 done by PWC,\(^ {80}\) US$13.7 billion dollars have been raised through ICOs for 2018\(^ {81}\). The countries that attract most ICOs are the United States, Cayman Islands, British Virgin Islands, and Singapore\(^ {82}\). In Europe, only the United Kingdom attracts enough ICOs to be considered impactful\(^ {83}\).

The PWC report underlines the fact that regulatory schemes around the world are not homogenous, and thus, countries who offer “clear and firm” regulatory requirements

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\(^{78}\) GreySpark Partners, William Benattar, Meri Paterson, *Charting the growth of cryptocurrencies*, September 2018: Online: [https://perma.cc/EZ3L-4QH7](https://perma.cc/EZ3L-4QH7)

\(^{79}\) Ibid. p. 28

\(^{80}\) PWC, strategy\&, *Initial Coin Offerings, A strategic perspective*, June 2018, Online: [https://perma.cc/DVV3-2N2F](https://perma.cc/DVV3-2N2F)

\(^{81}\) Ibid. p. 2

\(^{82}\) Ibid. p. 4

\(^{83}\) Ibid. p. 4
are succeeding in attracting more ICOs. The report states that the United States is the “leading ICO destination, reinforced by clear and firm regulatory requirements”.\footnote{Ibid. p. 4}

The next chapter discusses how the United States and France have tackled the issues raised by ICOs. While the United States has been able to adapt its legal framework easily to respond to the challenges, so far France has been less effective in doing so.
Chapter 4 – Existing Legal Framework

In response to the global growth of ICOs, Marco Dell’Erba (2018) describes how some regulators were able to find regulatory solutions within existing legal frameworks, some acted to simply ban ICOs, and others have yet not taken any action. According to Dell’Erba, the main difficulty in regulating ICOs is their cross-border nature. Due to the “‘non-jurisdictional’ or ‘extra-jurisdictional’ nature” of ICOs, regulators situated in discrete, geographical jurisdictions are poorly placed to tackle the issue, which requires coordinated action among regulators. He goes on to argue that so far there has also been a lack of cooperation between private actors (including ICO issuers) and regulators. Only France has officially consulted private actors before regulating on ICOs. Dell’Erba argues that letting private actors participate in the process of


86 Ibid. p.23 at para 2

87 Ibid. p.25 at para 2
regulation could imply that regulators would achieve a better understanding of the technology, which will ultimately improve the quality of the regulation\textsuperscript{88}.

Dell’Erba suggests that self-regulation of ICOs – similar to that of IPOs before the Securities Act of 1933, and until relatively recently in France – may be the most effective regulatory solution\textsuperscript{89}. A well-functioning market is beneficial to every actor within it\textsuperscript{90}. Self-regulation may be a good way to regulate ICOs, at this point, because actors have a much better understanding of the technology and the risks than do regulators\textsuperscript{91}. However, Dell’Erba cautions that there is presently a lack of coordination between securities regulators and self-regulatory initiatives, which may prove problematic\textsuperscript{92}.

In the case of the United States and France, after several years of inaction, both countries have now taken steps to regulate crypto assets in general, and more specifically ICOs.

\textsuperscript{88} Ibid.

\textsuperscript{89} Ibid. p.27

\textsuperscript{90} Ibid. p.26

\textsuperscript{91} Ibid.

\textsuperscript{92} Ibid. p.25 at para 2
A – Current regulation of ICOs in the United States

Securities law in the United States is both statute- and case-based. The Securities Act of 1933 defines investment contracts as securities. This conception has been interpreted by the US Supreme Court to include new types of securities, including ICOs. The SEC – the US securities regulator – has interpreted the term security so as to include crypto assets. In addition to these federal authorities, some states have acted within their jurisdiction to regulate crypto assets. However, the starting point of a securities law analysis of ICOs is the registration and exemptions rules contained in the Securities Act of 1933.

As discussed below, the United States is considering ICO regulation hesitantly. The United States has not yet enacted a federal statute to regulate ICOs, in large part because existing legal concepts have been extended to encompass coins/tokens which therefore fall under regular securities laws. As vividly described in a comment by Nate Crosser, the American jurisprudence on digital assets is presently underdeveloped “due to the rapid development and adoption of blockchain technology—creating an intellectual gold rush with agencies, attorneys, and techies all shouting their position (on securities law, particularly) into the wind”.

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93 Nate Crosser, Initial Coin Offerings as Investment Contracts: Are Blockchain Utility Tokens Securities?, 67 Kan. L. Rev. 379, December 2018
According to the SEC, the *Securities Act* of 1933 has two main objectives: to inform investors about the products they buy; and to sanction fraud, deceit, and misrepresentation.\(^{94}\) In pursuit of these twin objectives, one of the main rules of securities law is the registration rule\(^{95}\). This rule requires companies that offer securities to the public to provide information to the SEC in order to correctly inform investors. When a company files for registration it has to give the following information: description of the company’s properties and businesses; description of the security to be offered for sale; information about the management of the company; and financial statements certified by independent accountants\(^{96}\).

The filing process can therefore be very costly for a company, which often must hire lawyers to prepare the required information since the legal rules can be fairly complex. The SEC’s website recommends that companies hire a specialized lawyer: “*if you have questions concerning the meaning or application of a particular law or rule, please consult with an attorney who specializes in securities law*.\(^{97}\)

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\(^{94}\) SEC, Fast Answers, Registration Under the Securities Act of 1933, Online: [https://perma.cc/YDB8-3C54](https://perma.cc/YDB8-3C54)

\(^{95}\) 15 U.S. Code § 77eee

\(^{96}\) Investor.gov, *Registration Under the Securities Act of 1933*, Online: [https://perma.cc/T8VK-AT6B](https://perma.cc/T8VK-AT6B)

\(^{97}\) *Ibid.*
This cost can be a deterrent for small companies that need to raise capital. Initially, one of the main advantages of ICOs was that they were not costly. If a company needs to register to offer coins, however, this advantages quickly disappear. There is still a considerable advantage of ICOs, technically speaking, as it is easier to issue coins and to manage issued coins compared to traditional methods used to raise capital. 

There are many exemptions contained in the Securities Act of 1933 which allow a company to issue securities without fulfilling the usual prospectus requirements. For example, there is an exemption for United States Government securities and treasuries and or life insurance. As will be discussed in chapter 5 the proposed Token Taxonomy Act would create a new exemption for ICOs, subject to certain criteria.

b - SEC v. W.J. Howey Co.

SEC v. W.J. Howey Co. was a significant US Supreme Court case, which established the seminal test for determining whether a transaction can qualify as an investment.

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99 15 U.S. Code § 77c

100 Ibid. (a) (2)


contract under securities law. This test is commonly referred to as the “Common Enterprise Test” or the “Howey Test”. This test is accordingly the starting point for a securities law analysis of ICOs in the United States context.

The Howey Company owned large tracts of citrus acreage and offered half of the groves to the public “to help [...] finance additional development”. Units of the citrus grove development were offered with a service contract entailing cultivating, marketing, and remitting the net proceeds to the investor. Potential customers were told it was not feasible to invest unless these service contracts were made, they allowed customers to use other service providers, but strongly encouraged the use of Howey as the service provider. In the result, 85% of the units sold were in service contracts with Howey. The units were not separately fenced and the only indication of ownership was through small marks and bookkeeping. The purchaser had no right to enter the premises to market the crop, and no right to the specific fruit grown on

103 15 U.S. Code § 77b (a) (1)


105 Ibid. p.4

106 Ibid. p.3

107 Ibid. p.3

108 Ibid p.3
their unit of land\textsuperscript{109}. The company was only accountable for allocating the net profits made at the time of picking to unit holders\textsuperscript{110}.

The issue that was raised in this case is whether the contracts that Howey was selling constituted “\textit{investment contracts}” within the meaning of the \textit{Securities Act} of 1933\textsuperscript{111}. An affirmative answer brings into operation registration requirements, unless an exception applies. In their decision, the US Supreme Court ruled that an investment contract for the purpose of the Act meant a contract, transaction, or scheme, whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party\textsuperscript{112}. In this case the transactions in question clearly involved investment contracts. The Howey company was offering more than just a fee simple interest in land; it was offering an opportunity to contribute money in order to share the profits of their enterprise\textsuperscript{113}.

The Howey company offered the contracts to individuals who had no means, skills, or desire to cultivate and harvest the land purchased, and therefore the service contract

\textsuperscript{109} Ibid. p.4

\textsuperscript{110} Ibid. p.4

\textsuperscript{111} Ibid. p.5

\textsuperscript{112} Ibid. p.6-7

\textsuperscript{113} Ibid. p.7
was essential in order for investors to achieve their aim of profits. The transfer of rights in land was purely incidental. Therefore, the US Supreme Court found that all the elements of a profit-seeking business venture were present.

The Howey Test or the Common Enterprise Test can therefore be summarized as follows: an “investment contract” is characterized in the presence of an investment of money in a common enterprise with the expectation of profits, which are derived solely from the efforts of others.

With this concise definition of investment contract for the purposes of US securities law in hand, this thesis now considers how it might be applied to ICOs. As ICOs share many features with traditional IPOs, it is clear that the Common Enterprise Test can potentially bring ICOs within the ambit of securities law. Jason Tashea (2018) argues that since ICOs can be compared to IPOs, the main question resides in whether the underlying token or coin is a security. According to Tashea, this question can be answered by reference to the SEC v. Howey case. Tashea distinguishes between three types of ICOs: sales of security tokens, sales of utility tokens, and sales which involve a

\[\text{\textsuperscript{114} Ibid. p.8}\]

\[\text{\textsuperscript{115} Ibid. p.8}\]
mix of security and utility tokens. For the first one, registration rules should apply, for the second one it should not, and for the last one, Tashea argues that it depends on the way the token works. If the token meets the Howey test, then registration rules should apply, if not there is no security involved.

Julianna Debler (2018) takes the opposite stance and argues that most ICOs should be considered as offerings of securities. According to Debler, ICOs should be considered securities offerings because they entail a “horizontal commonality of the investment”: a pooling of assets from multiple investors that share the profits and risks. She argues that utility tokens cannot be exempted from securities law since there is a liquid secondary market: “the participants will be deemed to have an ‘expectation of profits’ even if the underlying cryptocurrency has substantial existing utility at the time of the offering.”

116 Jason Tashea, Blockchain Based Initial Coin Offerings Are All the Rage, but the Legal Terrain is Uncertain, 104 A.B.A J. (2018)
117 Ibid. p. 5
119 Ibid. p.14 at para 4
120 Ibid. p.16
Additionally, according to Shlomit Azgad-Tromer (2018), the Howey test only applies if the investor is attracted to the investment for the purpose of financial returns only.\textsuperscript{121} The author distinguishes between retail investors, on one side, and sophisticated investors, on the other side. Under the assumption that both types of agents operate on different markets, he argues that if only retail markets are subject to mandatory disclosure, a specific market for sophisticated investors would emerge. On this market disclosure would be based on the will of the promoter.\textsuperscript{122} The advantage of this parallel market is that it would be subjected to anti-fraud rules but there would be no registration obligation, allowing a better flow of capital \textit{“without jeopardizing the protection of retail investors”}\textsuperscript{123}. This method would let companies and investors chose the market they want to operate in.

c – The DAO Report

The Decentralized Autonomous Organization (DAO) Report is a report written by the SEC regarding the German company Slock.it UG, which raised money through an

\footnotesize
\begin{itemize}
  \item \textsuperscript{122} Ibid.
  \item \textsuperscript{123} Ibid. p.50
\end{itemize}
ICO\textsuperscript{124}. The company published a white paper disclosing information about the offering\textsuperscript{125}. The idea was that DAO was supposed to be a decentralized organization: investors would send money, and users would decide together the means of governance\textsuperscript{126}.

DAO was launched in April 2016 and raised more than US$150 Million\textsuperscript{127}. In June 2016, before the project was finished, the DAO network was targeted by hackers who were able to steal US$ 50 Million (or 3.6 million ETH)\textsuperscript{128}. This hack considerably slowed down the project, as digital currency exchanges de-listed the DAO token\textsuperscript{129}.


\textsuperscript{125} DAO Community & Friends, \textit{A next-generation decentralized organization that coordinates the resources of a community (human and capital) to sustainably deliver value for members}, GitHub, Online: https://perma.cc/TQE2-W6WE

\textsuperscript{126} Ibid.

\textsuperscript{127} Gertrude Chavez-Dreyfuss, \textit{Virtual company may raise $200 million, largest in crowdfunding}, Reuters, May 17, 2016, Online: https://perma.cc/GA9F-UFHR

\textsuperscript{128} David Siegel, \textit{Understanding The DAO Attack}, CoinDesk, June 25, 2016, Online: https://perma.cc/3YKZ-7NBG

\textsuperscript{129} Samuel Falkon, \textit{The Story of the DAO – Its History and Consequences}, The Startup, Medium, Online: https://perma.cc/4AKW-L2ER
This incident attracted the attention of the SEC. In July 2017, it published a report in which ICOs were directly targeted:

the investigation raised questions regarding the application of the U.S. federal securities law to the offer and sale of DAO Tokens, including the threshold question whether DAO Tokens are securities.\textsuperscript{130}

In its report, the SEC reminds market actors that the principles of securities law apply to “virtual organizations or capital raising entities making use of distributed ledger technology”\textsuperscript{131}. Due to the role of case law in interpreting statutory rules, most notably the Howey case, securities law in the United States is not static and can adapt itself to new forms of investment. This kind of approach allows the SEC to better control investment contracts even though proper regulations have not been enacted. The definition of an investment contract set forth by the SEC in the above-mentioned case (SEC v. Howey) indicates that the underlying economic situation should be taken into account, regardless of the name of the contract\textsuperscript{132}. This definition is derived from \textit{SEC v. Howey}\textsuperscript{133} and it indicates that the analysis should take into account the underlying


\textsuperscript{131} Ibid. p.11

\textsuperscript{132} Ibid. p.11

\textsuperscript{133} \textit{SEC v. W. J. Howey Co.}, 328 U.S. 293 (1946), Online: \url{https://perma.cc/U8U2-VPLM}
economic realities, not just the form or name of the contract in question. The SEC’s approach can be applied to any new and unknown contract, in order to assess whether it falls into the category of investment contracts.

In the Slock.it case the SEC considered that the investors invested money (bought the tokens) and expected to make profits. The SEC stated that profits “include dividends, other periodic payments, or the increased value of the investment.” The delicate aspect of the case consisted in assessing whether the profits were entirely derived from the managerial efforts of others. On this point the SEC cited to the SEC v. Glenn W. Turner Enter. Inc. (1972) case in which it had to determine if the managerial efforts were significant.

To market the DAO token, Slock.it published a white paper, maintained a website, and actively answered questions in the online forum. This contributed to an expectation in the minds of the investors, who believed DAO had a high chance of being a success.


135 Ibid.


This demonstrated that Slock.it was making special efforts to make the platform work. The SEC found that "through their conduct and marketing materials, Slock.it and its co-founders led investors to believe that they could be relied on to provide the significant managerial efforts required to make The DAO a success".\footnote{Ibid. p.12 at para. 3}

The SEC went on to discuss several features that led it to the conclusion that the investment scheme was an investment contract. First, investors did not have much choice in the decision-making process when the DAO was first launched and they relied on the expertise of Slock.it.\footnote{Ibid. p.13 at para. 1} Importantly, when the hack occurred, Slock.it intervened to protect the platform\footnote{Ibid. p.9}. Additionally, token holders had limited voting rights since investors could only vote yes or abstain from voting\footnote{Ibid. p.7 footnote 24}. This led the SEC to conclude that the platform needed extensive managerial efforts from Slock.it even though the investors, too, exerted some effort. The SEC pointed out that token holders were not acting as a group and that Slock.it retained central control over the platform – this was paradoxical, since the goal of the project was to make a decentralized platform\footnote{Ibid. p.8}. 

\begin{itemize}
    \item \footnote{Ibid. p.12 at para. 3}
    \item \footnote{Ibid. p.13 at para. 1}
    \item \footnote{Ibid. p.9}
    \item \footnote{Ibid. p.7 footnote 24}
    \item \footnote{Ibid. p.8}
\end{itemize}
In the end, the SEC concluded that the DAO was a security under the *Securities Act* of 1933 and the *Securities Exchange Act* of 1934. Therefore, Slock.it was required to register the DAO as a security. This case study clearly demonstrates the flexibility of US securities law definitions such as “*investment contract*”, which can be adapted to new technologies.

This flexibility is needed in areas such as finance, where innovations are common, and entrepreneurs are always devising new schemes to make money. This flexibility constitutes a strength of the US approach to securities regulation. In practical terms, some ICOs might be considered as securities while others might not, depending on the conclusions drawn from the Howey test. This flexibility fosters the growth of ICOs.

Julianna Debler (2018) concludes that with the DAO report, token promoters will not be able to avoid the application of the Howey test because it will be impossible to rely on the participation of investors to exempt itself from the last part of the Howey test (efforts of a third party). This argument is actually not a general one since in the DAO case, the SEC was able to characterize the DAO as a security because investors had

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143 Ibid. p.17-18

144 Ibid. p.17

little say on investment projects. Slock.it, the issuer, maintained a major role in the process. Therefore, the distinction between utility tokens and security tokens is significant, because in a utility token the investor is buying a service that it intends to use as in a security token the objective is to profit. Consequently, ICOs should be analyzed on a case-by-case basis to determine if they trigger registration requirements under securities law.

Nate Crosser (2018) takes a different stance and argues that the courts should analyze each ICO before deciding whether it is offering a security or not. Specifically, courts should consider “access and use rights, license rights, labor contribution compensation, non-money computing power contributions, re-sale rights, franchise rights, many varieties of voting rights, ownership interests in the entity, equity interests in the application, profit sharing, loss liability, sharing of assets, claims in bankruptcy, debt obligations, control of source code, vesting requirements, and convertibility”. Crosser notes that investors in securities expect a direct profit from the product whereas purchasers of utility tokens may be guided by an intent to use the product.


147 Ibid.

148 Ibid. p.35
In the latter case, securities law arguably should not apply. In conclusion, the author highlights the fact that harsh regulation can drive innovation and promoters away.\textsuperscript{149}

For comparison purposes, in the case of Munchee Inc.,\textsuperscript{150} the SEC characterized a utility token as a security “\textit{because MUN purchasers expected their profits to arise from continued DAPP development, cultivation of Munchee’s ecosystem (incentive structure), and Munchee’s promoters playing a major role in the application for at least several years per their product roadmap}”\textsuperscript{151}. For the SEC, even though the token was advertised as a utility token, the conduct of Munchee indicated that the token was framed as an investment opportunity. As suggested by Crosser, the relevant criteria is the intention of the purchaser. Once again, it appears that the SEC is using the Howey test extensively to analyze each ICO on a case-by-case basis.

\textbf{d – BitLicense}

In parallel to the actions of the federal SEC, some US States have tried to control the use of the Blockchain technology within their jurisdictions. The BitLicense offers a prime example. BitLicense is a regulation enacted by the New York State that requires

\textsuperscript{149} \textit{Ibid.}

\textsuperscript{150} SEC, Munchee Inc., Securities Act of 1933, Release No. 10445, December 11, 2017

virtual currency businesses to register themselves with the Superintendent of Banking in New York State and obtain a license called “BitLicense”.\textsuperscript{152} Prior to the enactment of this law, businesses in New York only needed to comply with federal regulations, such as SEC rulings on cryptocurrencies and initial coin offerings,\textsuperscript{153} and only register themselves when issuing tokens which could be considered securities. This BitLicense imposes further requirements on business operating within New York State if they engage in virtual currency business activities.

In the New York legislation, \textit{“virtual currency business activity”} is defined as:

the conduct of one of the following types of activities involving New York or a New York Resident:

(1) Receiving Virtual Currency for Transmission or Transmitting Virtual Currency, except where the transaction is undertaken for non-financial purposes and does not involve the transfer of more than a nominal amount of Virtual Currency;

(2) Storing, holding, or maintaining custody or control of Virtual Currency on behalf of others;

(3) Buying and selling Virtual Currency as a customer business;

\textsuperscript{152} New York State Department of Financial Services, New York Codes, Rules and Regulations, Title 23. Department of Financial Services, Chapter I. Regulation of the Superintendent of Financial Services, Part 200. Virtual Currencies (2014)

\textsuperscript{153} SEC, Chairman Jay Clayton, \textit{Statement on Cryptocurrencies and Initial Coin Offerings}, U.S. Securities and Exchange Commission, December 11, 2017, Online: \url{https://perma.cc/W82T-5WQK}
Performing exchange services as a customer business; or
Controlling, administering, or issuing a Virtual Currency.

The development and dissemination of software in and itself does not constitute Virtual Currency Business Activity. [Emphasis added]¹⁵⁴

While the New York State legislation is mainly focused on exchange and investment platforms who process transactions in New York or on behalf of a New York Resident, subsection (5) expressly concerns ICOs. This encompasses all major financial transactions done with the blockchain technology and appreciably adds to the regulatory requirements imposed on market actors. To apply for a BitLicense, a virtual currency business must pay a US$ 5,000 fee, provide the name of the applicant, their affiliates, their organization chart, managers’ names, contact information, personal history, qualifications, a background report done by an independent institution, a set of fingerprints and photographs, a current financial statement, a description of the business and the proposed service, banking arrangements, written policies and procedures, an affidavit with all pending actions or threats, insurances policies, and the methodology that would be used to determine the value of virtual currency¹⁵⁵.

¹⁵⁴ New York State Department of Financial Services, New York Codes, Rules and Regulations, Title 23. Department of Financial Services, Chapter I. Regulation of the Superintendent of Financial Services, Part 200. Virtual Currencies, p. 6

¹⁵⁵ Ibid. p.8
Prior to the New York legislation, many businesses operated without state-based constraints, and did not expect new, onerous regulatory requirements.

The problem with those conditions is that many businesses are startups which do not have many legal or financial resources which would enable them to easily comply with all the regulatory requirements. The CEO of Coinsetter\(^{156}\), Jaron Lukasiewicz, had to spend US$ 50,000 in legal fees just to apply for the BitLicense\(^{157}\). Bitstamp, another virtual currency business had to spend US$ 100,000 for this application.\(^{158}\) Prior to this law, businesses could start a virtual currency activity with limited financial resources since the technology was open source and free. Now, startups under the scope of the regulation have to apply and pay all legal fees attached to the application without even the assurance of getting their currency business registered. Furthermore, a virtual currency business has to apply for Bitlicense registration for each service it proposes. Currently, many exchange platforms or investment businesses often offer more than one service on the blockchain technology such as fiat to virtual currency exchange, initial coin offerings, futures, swaps, margin trade, wallet services, etc. Each of these

\(^{156}\) Crunchybase, Coinsetter, Online: https://perma.cc/NNP3-7P2D

\(^{157}\) Yessi Bello Perez, The Real Cost of Applying for a New York BitLicence, CoinDesk, August 13, 2015

\(^{158}\) Daniel Roberts, Behind the « exodus » of bitcoin startups from New York, Fortune, August 14, 2015
services would need to be registered under the Bitlicense if the business falls within the scope of the New York legislation.

One of the biggest exchanges in the world, Kraken, prior to the enactment of the BitLicense regulation, offered provisional wallet services, margin trading, trading, and fiat to virtual currency exchange.\(^{159}\) Under the New York law, those services required the business to theoretically apply for four BitLicenses and pay US$ 20,000 in fees alone. Instead of registering, however, Kraken left New York and pursued its activities from a different State with more lenient regulation\(^{160}\).

Section 200.6 of the New York regulation also states that once an application is received and the business complies with the provisions of Part 200, the Superintendent has to examine the financial situation, experience, and the character of the applicant within a 90 days period that can be expanded on a discretionary basis.\(^{161}\) The law is problematic because it does not provide certainty as to how long the Superintendent may take to complete their review, nor does it provide clear criteria for what must be

\(^{159}\)Kraken – Buy, Sell and Margin Trade Bitcoin (BTC) and Ethereum (ETH), Online: [https://perma.cc/QK43-J7ZJ](https://perma.cc/QK43-J7ZJ)

\(^{160}\)Kraken, Farewell, New York, August 9, 2015, Online: [https://perma.cc/GC2Z-FDUH](https://perma.cc/GC2Z-FDUH)

\(^{161}\)New York State Department of Financial Services, New York Codes, Rules and Regulations, Title 23. Department of Financial Services, Chapter I. Regulation of the Superintendent of Financial Services, Part 200. Virtual Currencies, p. 13
shown in order to pass the Superintendent’s review and obtain a BitLicense. To a certain extent, the approval or denial of application may seem discretionary, meaning the Superintendent has wide powers with respect to the issuance of BitLicenses.

This led to an affected business owner to file a lawsuit against the New York Department of Financial Services in the Supreme Court of New York.\textsuperscript{162} Theo Chino, a virtual currency business owner, contested the application of Title 23, Chapter 1, Part 200 of the New York Codes, Rules, and Regulations for violation of the US separation-of-powers doctrine\textsuperscript{163}. However, on December 21, 2017, the court rejected his arguments and dismissed the case\textsuperscript{164}. In the decision, the court noted that Chino did not complete the BitLicense application and abandoned the process when more information was required by the Department of Financial Services. Thus, there were no government actions subject to review. The court noted that the Chino challenged


\textsuperscript{163} Bitcoin Foundation, \textit{BitLicense can still be stopped if we use this opportunity}, April 10, 2017, Online: https://perma.cc/MNW6-XBHY

the legislation itself, but the court did not discuss it further. Following this decision, the applicant filed an appeal on February 3, 2018.165

The fact that only 18 businesses were able to obtain BitLicenses shows that the requirements are quite strict and gives credit to the idea that there is a certain degree of discretionary decision making166. The Chino decision is blameworthy because the applicant suffered damage from the enforcement of the regulation in the form of financial loss167. It is submitted by Chino that further investigation should have been taken to analyze if the law in itself was harmful to businesses as they were not expecting a legislation this harsh168.

Based on the wording of the Part 200, the Superintendent arguably has too much power to decide whether or not a business should obtain a BitLicense. For comparison purposes, in France a similar license exists for virtual currency businesses which engage

165 Article 78 against NYDFS, Online: https://perma.cc/T6MS-DANJ

166 Jessica Klein, New York Just Granted Its 18th BitLicense, Breakermag, March 28, 2019, Online: https://perma.cc/U35Q-TWZK


168 Article 78 against NYDFS, Online: https://perma.cc/T6MS-DANJ
in fiat to virtual currency exchange\textsuperscript{169}. The decision to give the license is taken by the ACPR (Autorité de Controle Prudentiel et de Résolution) under the supervision of the Banque de France.\textsuperscript{170} The licensing regime relies on laws regarding the Directive on payment services in the internal market. Moreover, the conditions which must be met in order to obtain the license are set clearly either by law or by ministerial decrees\textsuperscript{171}. The specificity of the law and the oversight provided by the Banque de France allows business owners to understand the criteria and hence to adapt their behavior. This transparency also ensures that decisions are not arbitrary.\textsuperscript{172} Furthermore, it is worth noting that registration as a payment service provider in France gives the registering business access to the whole European market, whereas the BitLicense only concerns the State of New York.

Issues with the regulation are not confined to the application process for a BitLicense. After a BitLicense is granted to a virtual currency business, section 200.7 mandates that each company have a compliance officer(s) and make internal compliance policies that

\textsuperscript{169} Articles L521-1 to L526-40, C. mon. fin., France (in French)


\textsuperscript{172} Articles L. 522-6 and following, C. mon. fin., France (in French)
would prevent fraud, money laundering, hacks and protect privacy. Section 200.8 lets the Superintendent determine a discretionary minimum capital requirement “to ensure financial integrity.” Section 200.9 requires a surety bond or trust account in US dollars for consumer protection. Section 200.11 lets the superintendent decide if the licensee can change control or sell-out, while section 200.15 imposes an anti-money laundering program.

One is left with the impression that this regulation was passed very quickly, after some issues first appeared with virtual currency trading and certain platforms, such as Mt. Gox. The conditions imposed on virtual currency businesses do not take into account the reality of this business sector. As a new technology, blockchain was mostly attracting young entrepreneurs who were trying to innovate with few resources.

173 New York State Department of Financial Services, New York Codes, Rules and Regulations, Title 23. Department of Financial Services, Chapter I. Regulation of the Superintendent of Financial Services, Part 200. Virtual Currencies, section 200.7

174 Ibid. section 200.8

175 Ibid. section 200.9

176 Ibid. section 200.11

177 Ibid. section 200.15

178 Mt. Gox, Online: https://perma.cc/T9Y3-ZU77
Requirements, such as minimum capital requirements, bond or trust accounts, and compliance officers are onerous for new, start-up companies and can deter them to enter the market. Such requirements can only be met by mature businesses which can finance both the costly application process and all further conditions imposed by the BitLicense.

When the idea of a BitLicense was first announced in 2014 the former Superintendent, Benjamin M. Lawsky, said he wanted to ensure the new law would not deter innovation.\textsuperscript{179} However, after approximately four years, it is clear that BitLicense has introduced onerous regulation and hampered innovation. David Adler, an American lawyer specialized in European corporate and investment banking, notes that:

\begin{quote}
as cryptocurrencies have grown to be increasingly popular, calls to amend or repeal the BitLicense have increased. At a recent roundtable between legislators and cryptocurrency advocates, some lawmakers seemed open to the idea of introducing a bill to amend or abolish the BitLicense. Attendees at the meeting pointed to the high costs of compliance for small startups, as well as the fear that even those who are seeking to use blockchain technology for a broader purpose other than as a currency or tokens may fall afoul of the
\end{quote}

\textsuperscript{179} Cf. \textit{supra}
BitLicense regulatory framework, and lawmakers seemed sympathetic to their concerns.\(^{180}\)

During the roundtable David Adler referenced, the crowd remained silent when they were asked is there “anyone in the crowd that does not think the BitLicense needs to be reformed?”\(^{181}\) In addition, many business owners asked that lawmakers lessen the regulatory burden imposed by the BitLicense\(^ {182}\). Several business owners also asked that a distinction should be drawn between different virtual currencies\(^ {183}\). This point of view is understandable since the blockchain can be used for many purposes (e.g. smart contracts, identity management, etc.) and targeted regulation could potentially reduce the regulatory burden. However, in the context of the BitLicense, the argument seems to be less relevant, to the extent that the definition provided in the law defines its scope.

The definition given to “virtual currency business activity” explicitly excludes non-financial activities, and businesses using the blockchain technology to offer non-

\(^{180}\) David Adler, The BitLicense: Regulatory Overreach or Prudent Response?, Fordham Journal of Corporate & Financial Law, March 26, 2018, Online: https://perma.cc/63AD-YN5C

\(^{181}\) Stan Higgins, New York Lawmakers Open to Revisiting the BitLicense, CoinDesk, February 23, 2018, Online: https://perma.cc/9JAJ-JU33

\(^{182}\) Ibid.

\(^{183}\) Ibid.
financial services are not required to register themselves\textsuperscript{184}. Interestingly, most advocate a separation among virtual currencies, ICOs and tokens from other blockchain technologies were representatives from banks, government and startup executives. The fact that the law was not clearly understood by these individuals and institutions is problematic and suggests that the law itself was not well written. This underscores the importance of lawmakers taking into account the user of the law, particularly in an area as fast-evolving and technically challenging as blockchain and writing accessible and easy to understand laws should be one of the lawmaker’s priorities.

When compared to the SEC’s DAO decision, the BitLicense is not well suited for ICOs as it imposes onerous requirements for every kind of offering. The advantage of the DAO decision was that the qualification depended on the context and the SEC considered the offering on a case-by-case basis. If the tokens that were being offered met the Howey test, then they would be considered securities. If the token only gave access to a service, it would not be considered a security and securities regulation would not apply.

\textsuperscript{184} New York State Department of Financial Services, New York Codes, Rules and Regulations, Title 23. Department of Financial Services, Chapter I. Regulation of the Superintendent of Financial Services, Part 200. Virtual Currencies, p. 6
B – The regulation of ICOs in France (and the European Union more generally)

This part canvasses the approach taken by the European Union on the matter of regulating ICOs. The blockchain technology interested European financial and banking authorities from a fairly early date, with the European Central Bank publishing a report on the subject in 2016. The following year the European Securities and Markets Authority studied the technology and published a report on ICOs.

As discussed below, the European legal framework does not yet fully accommodate ICOs. That is why member states, like France, have acted to legislate on the subject, in order to protect investors and financial markets. In France the Autorité des Marchés Financiers (AMF) published a synthesis to make investors aware of the risks underlying ICOs. Those risks woke up the French government who enacted the PACTE law to create a legal framework to govern ICOs. However, before studying the legal framework on ICOs, it is necessary to discuss the securities law registration rules that apply in France. It will be argued that the French legal framework is not as flexible as US securities law, and for this reason it was necessary to enact a new law to better regulate ICOs, which led to the PACTE law of 2019.
In April 2016, the European Central Bank published a report on distributed ledger technologies in securities post-trading.\(^\text{185}\) In the abstract of the report, the European Central Bank highlights the increasing role of new database technologies:

> over the last decade, information technology has contributed significantly to the evolution of financial markets, without, however, revolutionizing the way in which financial institutions interact with one another. This may be about to change, as some market players are now predicting that new database technologies, such as blockchain and other distributed ledger technologies (DLTs), could be the source of an imminent revolution.\(^\text{186}\)

This report does not focus on whether ICOs have to be registered or not, but rather on the use of the blockchain technology to distribute real securities. Even though this question is not directly related to the main issue addressed in this thesis, it is relevant to the extent that it proves the interest of European institutions in this new technology and their will to find a relevant regulation. In its conclusion, the European Central Bank affirms that distributed ledger technology has a much potential, but the technology is


\(^{186}\) ibid p.2 at para 1
not yet mature, and the legal framework is not adapted to the new technology.\textsuperscript{187} This is illustrated by the fact that Member states, like France, are adopting the technology at a slow pace. ICOs have the opportunity to change the landscape of public offerings since it is much easier to complete an ICO than a traditional IPO.

As discussed below, this ease of use largely stems from the lack of an effective legal framework governing ICOs. This can be problematic because it can create inequalities between companies. Companies which issue IPOs will have to comply with securities law and follow the usual registration process, while other that opt to raise funds through an ICO can avoid many regulatory requirements. In the latter case there are risks for investors, who will not have the same access to information or the benefit of the regulatory checks and balances that are required through the IPO process.

\textbf{b – European Securities and Markets Authority Report on Distributed Ledger Technology Applied to Securities Markets}\

On February 7, 2017, the European Securities and Markets Authority (ESMA) published a report on distributed ledger technology (DLT) applied to securities markets.\textsuperscript{188} The report states that “ESMA wants to understand both the benefits and the risks that DLT

\textsuperscript{187} Ibid. p.32 at para 2

\textsuperscript{188} European Securities and Markets Authority, \textit{The distributed Ledger Technology Applied to Securities Markets}, Report, February 7, 2017
may introduce to securities markets, and how it maps to existing EU regulation”\textsuperscript{189}. This is further evidence that financial and banking authorities in the European Union are thinking about the subject very deeply and that they are aware of the risks underlying the technology. The report underlines that this technology could be beneficial to securities markets in many ways.

First of all, ESMA argues that DLT could create “more efficient post-trade processes”\textsuperscript{190}. Since DLT offers a decentralized database, it allows financial markets to keep records while offering safekeeping functions. The DLT is synchronized between its users, so if the record is lost on the servers of one user, it can be retrieved from the database shared by other users. The records are also tamper-proof since every user has the same records.

Secondly, DLT can enhance “reporting and data management capabilities”\textsuperscript{191}. ESMA believes that DLT can let companies record their reports on the decentralized database so that market participants can access them easily\textsuperscript{192}. It also believes that Know your

\begin{itemize}
\item \textsuperscript{189} Ibid p.2 at para 1
\item \textsuperscript{190} Ibid. p. 5
\item \textsuperscript{191} Ibid. p. 6
\item \textsuperscript{192} Ibid. p. 5 at para 8
\end{itemize}
Customer (KYC) and Anti-Money Laundering processes can benefit from the technology\textsuperscript{193}.

Finally, ESMA highlights that DLT can reduce costs. Using one decentralized database would significantly reduce costs for market participants. ESMA believes that in the medium to long term it would suppress the need for \textit{“clearing, settlement, custody, registrar and notary services”}\textsuperscript{194}

However, ESMA reminds supporters and developers of the technology that they should be aware of, and comply with, the existing European legal framework\textsuperscript{195} as it \textit{“provides important safeguards for the well-functioning of financial markets”}\textsuperscript{196}. It is clear that there are many benefits of using the blockchain technology or DLT for financial market purposes but the need to protect investors should be the main priority for authorities.

The European Union is aware of the risks entailed by this new technology and is exerting effort to develop an appropriate legal framework by studying the subject and analyzing the markets that are using this technology. In addition, after this initial

\textsuperscript{193} Ibid. p.11 at para 35

\textsuperscript{194} Ibid. p. 7

\textsuperscript{195} However, we will see \textit{infra} that this legal framework is not compatible with ICOs as there are no rules governing them today in the European Union; each member state is legislating on its own.

\textsuperscript{196} Ibid. p.2 at para 5
report, the ESMA published another report in 2019 focusing on ICOs in which the authority tries to understand this new way of raising money and considering how it can co-exist with the existing legal framework. This report is studied in the following paragraphs.

c – European Securities and Markets Authority’s report on Initial Coin Offerings and Crypto-Assets

On January 9, 2019, the ESMA published advice on Initial Coin Offerings and Crypto-Assets.\(^{197}\) This advice comes after “ESMA identified Initial Coin Offerings (ICOs) and crypto-assets as an issue requiring consideration through its Standing Committee on Financial Innovation” back in 2017\(^{198}\).

The report notes that one of the major issues with ICOs is that investors need to understand precisely what they are buying as well as the risks attached to the

\(^{197}\) European Securities and Markets Authority, *Initial Coin Offerings and Crypto-Assets, Advice, January 9, 2019*

\(^{198}\) ibid. p.6 at para 13
product. The report highlights that there is currently a high risk of failure regarding businesses behind ICOs, causing investors to lose their capital.

Along with other authorities, ESMA argues that:

another issue has to do with the uncertainty that currently prevails around the legal treatment of crypto-assets and the way in which the existing EU regulatory framework may apply to them. This uncertainty creates risks to investor protection and does not allow for the development of a sustainable ecosystem.

It should be noted, that presently, crypto assets are not clearly characterized as securities under European securities law. Rather, there is uncertainty as to their characterization, which can be harmful to investors. Nevertheless, as discussed below, the existing European legal framework can potentially be interpreted as including crypto assets. ESMA states that that companies using ICOs are at the early stage of their development. Many of these businesses do not have a functioning business

199 Ibid. p.14 at para 46

200 EY, ICOs the Class of 2017 – one year later, October 2018

201 E.g. European Central Bank

202 European Securities and Markets Authority, Initial Coin Offerings and Crypto-Assets, Advice, January 9, 2019, p.14 at para 48

203 Ibid. p.39 at para 179
model and they are at the stage of selling ideas. These are issues which should be tackled quickly, as the volume of ICOs is growing rapidly.

The above-mentioned ESMA advice of January 2019 therefore states:

> there have also been widespread reports and concerns around fraudulent ICOs, whereby crypto-assets either do not exist or issuer/developers disappear after the ICO. These could represent up to 80% of ICOs according to some sources\(^\text{204}\).

Without a unified legal framework in the European Union these risks are exacerbated. The current approach within the EU is to let each member state legislate with respect to this issue, but this creates a lack of homogeneity among member states. This is problematic because exchange platforms are allowed to operate throughout the European Union once they receive accreditation from any one member state. Companies could therefore start their ICOs in a country where securities law have not been adapted to accommodate this new technology and promote the ICO in other member states. In other words, the regulatory requirements at the European level correspond to the regulation in force in the member state with the weakest regulation. In this context, the European Union should swiftly legislate on the issue, all the more so as the European passport system for exchange platforms is already in force. Without

\(^{204}\) ibid. p.49 at para 49
this legal framework, European investors will be at risk since ICOs based in member states with lax regulation.

The next subsection discusses how France has addressed the lack of legal framework in the European Union with respect to ICOs. As some ICO investors lose money due to irregularities in the crypto scene, there is a strong need to consider new regulation to prevent and combat fraudulent token offerings.

**d – ICOs and Securities Law in France**

In France, the definition of a security is provided by the ordinance of January 8, 2009.\(^{205}\) Securities are considered either “financial securities” or “financial contracts”\(^ {206}\). Financial securities include shares, debt instruments, mutual funds, and financial futures. As for financial contracts, they include forward contracts, option contracts, exchange contracts, and credit derivatives\(^ {207}\). Instruments included in these lists qualify as securities and must therefore comply with the rules applicable to securities offerings.

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\(^{205}\) Ordonnance n° 2009-15 du 8 janvier 2009 relative aux instruments financiers, January 8, 2009, France (in French)

\(^{206}\) Article L211-1, C. mon. fin., France (in French)

\(^{207}\) Article D211-1 A, C. mon. fin., France (in French)
Just as the United States, securities that are offered to the public in France are subject to a registration process. This process entails submitted a prospectus to the Autorité des Marchés Financiers to obtain a visa\textsuperscript{208}. This process changed over time because the European Union acknowledged the need for a specific regulation. As described in chapter 1, France must enact laws that accord with European law, and thus, most of its rules relating to securities come from the European Union. Member states like France must respect this uniformity through European law since all European financial marketplaces are interconnected. Therefore, having uneven laws across the European Union would tend to destabilize markets in member states.

The definition of securities offerings in the Code monétaire et financier\textsuperscript{209} directly stems from the European Regulation of June 14, 2017.\textsuperscript{210} The latter is a regulation that “\textit{lays down requirements for the drawing up, approval and distribution of the} \ldots"


\textsuperscript{209} Article L411-1, C. mon. fin., France (in French)

prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State”.211

According to this regulation:

‘securities’ means transferable securities as defined in point (44) of Article 4(1) of Directive 2014/65/EU with the exception of money market instruments as defined in point (17) of Article 4(1) of Directive 2014/65/EU, having a maturity of less than 12 months.212

Point (44) of Article 4(1) of Directive 2014/65/EU clarifies this definition:

‘transferable securities’ means those classes of securities which are negotiable on the capital market, with the exception of instruments of payments, such as:

(a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities and depositary receipts in respect of shares;
(b) bonds or other forms of securities debt, including depositary receipts in respect of such securities;
(c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures213.

211 Ibid. article 1
212 Ibid. article 2 (a)
The regulation then continues to define other type of securities:

‘equity securities’ means shares and other transferable securities equivalent to shares in companies, as well as any other type of transferable securities giving right to acquire any of the aforementioned securities as a consequence of their being converted or the rights conferred by them being exercised, provided that securities of the latter type are issued by the issuer of the underlying shares or by an entity belonging to the group of the said issuer.\textsuperscript{214}

It also defines the offer of securities to the public:

‘offer of securities to the public’ means a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe for those securities. This definition also applies to the placing of securities through financial intermediaries.\textsuperscript{215}

As with the US Securities Act of 1933, the definition given by the European Union is very broad and can be applied to new technologies as long as the instrument is transferrable and negotiable.


\textsuperscript{215} Ibid. Article 2 (d)
In 2018, Maume and Fromberger came to the conclusion that European Law can be considered similar to the SEC’s approach to the subject as “most of the ‘investment tokens’ would be considered as ‘transferable securities’ pursuant to Art. 4(1)(44) of MiFiD 2”\textsuperscript{216} since most tokens are transferrable and negotiable.

However, ICOs are not considered public offerings in France, even though European Law is open to that interpretation. This is due to the way the Directive and the Regulation has been transposed in national law. Those rules have been transposed in the C. mon. fin. by the ordinance n° 2016-250 of April 28, 2018\textsuperscript{217} and the ordinance n° 2019-1067 of October 21, 2019.\textsuperscript{218}

The first rule modified article L211-1 of the C. mon. fin. to define financial instruments accordingly to the European law. It defines financial instruments as financial securities and financial contracts. Financial securities are defined as capital securities issued by

\textsuperscript{216} Philipp Maume, Mathias Fromberger, Initial Coin Offerings: Are Tokens Securities under EU Law?, September 7, 2018, University of Oxford, Online: https://perma.cc/9WKP-N792

\textsuperscript{217} Ordonnance n° 2016-520 du 28 avril 2016 relative aux bons de caisse, April 28, 2016, France (in French)

\textsuperscript{218} Ordonnance n° 2019-1067 du 21 octobre 2019 modifiant les dispositions relatives aux offres au public de titres, October 21, 2019, France (in French)
stock companies, debt securities, or shares or stocks from collective placement organizations\textsuperscript{219}. Financial contracts are defined as forward contracts.

The second rule modified article L411-1 of the same code in order to transpose the European Regulation. Article L411-1 of the C. mon. fin. now forbids any person from making public offerings (according to the definition of the European Regulation of June 14, 2017, as seen above) without a specific authorization by the AMF.

Reading those two articles jointly, it appears that ICOs that can enter the scope of the C. mon. fin. as tokens can be considered as a security according to the European law. This would bring the French law in line with the US law, which considers some ICOs to be public offerings if the tokens offered to the public meet the definition of security.

Article L411-2 lists some exemptions to article L411-1 and allows, under some circumstances, public offerings without any special authorization. More specifically, article L 411-2 states that public offerings do not require an authorization if one of the following conditions holds: the offering is not listed as part of a regulated market or a multilateral trading facility; the offering is inferior to an amount determined by decree; the offering is proposed by the intermediary of an investment service provider or a crowdfunding advisor. According to the decree of October 28, 2019 the maximum

\textsuperscript{219} Article L211-1, C. mon. fin., France (in French)
amount mentioned in article L411-2 is equal to 8 million euros. Therefore, it appears that an ICO that respects these conditions is exempt from article L411-1 and does not have to register. This approach would have simplified things as the Autorité des Marchés Financiers would have control to supervise ICOs. However, European Law have not been transposed very well into French law and this interpretation is effectively prevented by the definition given to securities by articles L211-1 and L211-2 of the C. mon. fin. To understand this result it is necessary to analyze the terms used in those articles.

As seen above, article L211-1 characterizes securities as either capital securities or financial contracts. Capital securities refer to stocks (or shares) or debt securities. Article L211-2 adds that capital securities, which are composed of transferable securities as defined by article L228-1 of the Code de commerce, can only be issued by the State, a legal entity, a common investment fund, a real estate investment fund, or a common securitization fund. This narrows the scope of what can be considered a capital security. Article L228-1 of the Code de commerce defines transferable securities as capital securities that offer identical rights by category. This means that to be

220 Article 10, Décret n° 2019-1097 du 28 octobre 2019 modifiant les dispositions relatives aux offres au public de titres, October 28, 2019, France (in French)

considered as a security, rights need to be attached to the financial product. Most companies either offer a share of its capital or offer its debts. Therefore, ICOs do not meet this definition since the coins do not offer any direct rights to the company that issues them.

To better understand the limitations of the definition of security under French law, we can return to the DAO case discussed above. Recall that in the DAO case the SEC determined that the DAO token offered political and financial rights to its holders. Users could vote on decisions proposed by other users and received distributions of dividends. Nevertheless, the DAO token never offered any rights to the company that issued them. It also never offered any of its debts. Instead, all rights were attached to the algorithm that made the platform function. The token provided access to this platform. The SEC considered the DAO token a security, yet it would not be possible to reach the same conclusion under French law since securities are limited by the article L211-1. This demonstrates that US securities law can be interpreted more broadly to integrate new technologies like ICOs. French law, as it presently exists, cannot be interpreted to integrate ICOs. This can be problematic from an investor protection standpoint, as ICOs are beginning to raise more and more capital in France, as in other countries.

Furthermore, it is open to question whether a security token offering can be considered as securities under French law. Taking DAO tokens as an example, these could be considered utility tokens because they allow users to use an investment platform but do not give any rights in the issuing company.

Hypothetically, it is possible that a company could use a blockchain technology to distribute shares instead of tokens. If that were to happen, the Autorité des Marchés Financiers would have to determine if that offering would be considered an offering of securities, and thus trigger registration requirements under securities law. In light of the definition of security given above, it is likely that shares issued through a blockchain would be considered securities: the token would only be the means of distribution while real shares or debt securities would underlie the token. At this stage, however, this analysis is hypothetical. We will have to wait and see how the AMF will rule in future cases.

The next subsection considers a new French law enacted in 2019.223 The law illustrates the government’s interest in the ICO technology and its concerns regarding the

223 Loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises (Loi PACTE : Plan d’action pour la croissance et la transformation des entreprises), May 22, 2019, France (in French)
compliance with legal constraints. However, we contend that this new law does not go far enough to protect the public in the regulation of ICOs.

On October 26, 2017, the AMF initiated a public consultation on ICOs in order to better understand the opinion of stakeholders. In total, 82 actors participated in the French public consultation (22 from the economic sector, 18 from the general public, 15 from law firms, 10 from finance professionals, 3 from banks, 2 from market businesses, and 1 from a listed company). This consultation ended on December 22, 2017 and the AMF published a report which summarizes the responses.

This consultation is discussed by Marco Dell’Erba in his article. He states that the main difficulty in regulating ICOs is their cross-border nature, “or even ‘non-jurisdictional’ or ‘extra-jurisdictional’ nature”, since regulators are not able to take

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224 AMF, Synthèse des réponses à la consultation publique portant sur les Initial Coin Offerings (ICO) et pout d’étape sur le programme ‘UNICORN’, February 22, 2018 (in French)

225 Ibid.

coordinated action to regulate across borders\textsuperscript{227}. In the same line of thought, the author also regrets the lack of cooperation between the actors and regulators\textsuperscript{228}. He highlights that only France has publicly consulted private actors before regulating on ICOs and that this process could be beneficial if carried out in other countries. He indeed argues that the participation of public actors in the regulation process can potentially lead to a better understanding of the technology by regulators\textsuperscript{229}.

This synthesis also gives a brief information about the UNICORN program the AMF initiated (2017)\textsuperscript{230}. This program let the AMF meet businesses that prepared an ICO or intended to do so. The AMF was able to analyze 21 different ICOs in the span of this consultation\textsuperscript{231}. The UNICORN program revealed that businesses that were using ICOs were doing so in order to facilitate raise funds internationally. Businesses emphasized that this method let them raise funds faster than traditional methods. Specifically,

\textsuperscript{227} Ibid. p.23

\textsuperscript{228} Ibid. p.23

\textsuperscript{229} Ibid.

\textsuperscript{230} AMF, \textit{L’AMF lance une consultation sur les Initial Coin Offerings et initie son programme UNICORN}, October 26, 2017 (in French)

\textsuperscript{231} AMF, \textit{Synthèse des réponses à la consultation publique portant sur les Initial Coin Offerings (ICO) et pout d’étape sur le programme ‘UNICORN’}, February 22, 2018, p.2 (in French)
those businesses raised 350 million euros as of February 2018, and that the average amount raised was around 25 million euros\textsuperscript{232}.

Some of those ICOs offered utility tokens, while others offered security tokens. For utility tokens, the AMF draws the analogy with crowdfunding and captive marketing methods. Crowdfunding lets the company raise funds for a product or a service before its public launch, investors are then rewarded with the finished product at the end. Captive marketing methods allow investors to buy a product or service first, and based on the support of those investors, the company then sells its underlying products or services.\textsuperscript{233} For security tokens, the AMF makes the comparison with shares or stocks which offer political or financial rights\textsuperscript{234}. The report shows that only a few ICOs were offering that kind of token\textsuperscript{235}. It emphasizes on the fact that those tokens can be qualified as financial instruments depending on the applicable law.

Even though there was no specific legal framework for ICO prospectuses at the time of the consultation, the report showed that a very large majority of businesses were

\textsuperscript{232} Ibid.

\textsuperscript{233} E.g. Nespresso who sells a coffee machine and also coffee capsules

\textsuperscript{234} AMF, Synthèse des réponses à la consultation publique portant sur les Initial Coin Offerings (ICO) et pout d’étape sur le programme ‘UNICORN’, p.5 (in French)

\textsuperscript{235} Ibid. p.7
assisted by law firms, and thus, the information disclosure was more or less adequate with the Prospectus Directive of the European Union.236

The respondents and the AMF agree that the major difficulty consists in providing a universal legal characterization of tokens – an issue also dealt with in this thesis. The majority of the respondents in the French consultation wanted a clear legal framework to regulate tokens. As discussed above, without this legal framework, businesses and investors, are prone to major risks, such as bankruptcy, loss of capital, money laundering, etc.

To solve this issue, several paths of reform have been considered by the respondents to the French consultations: some respondents consider that a specific legislation on is necessary; some suggest that the AMF should have exclusive authority to regulate ICOs; some favor a preliminary declaration to the AMF prior to an ICO in order to determine whether it constitutes a security offering; and finally, some respondents

encourage the creation of a watch cell\textsuperscript{237} for ICOs to better understand them and regulate them\textsuperscript{238}.

There was a general consensus among respondents that the characterization of tokens as securities should take into consideration the nature of the token and no other factors such as the identity of the issuer, or the form of the offering\textsuperscript{239}. It is argued that if one attribute is missing from the traditional definition of a stock (\textit{e.g.} voting rights, dividends, liquidation bonus, etc.), the token should not be considered as a security, and thus it would not be subject to the legal regulation applicable to securities\textsuperscript{240}.

\textsuperscript{237} AMF, \textit{Synthèse des réponses à la consultation publique portant sur les Initial Coin Offerings (ICO) et pout d'étape sur le programme ‘UNICORN’, February 22, 2018} p.5 (in French); The definition of a watch cell is not given by the document, however the respondent indicates that this watch cell would let the AMF to adapt its regulation in consideration of the reality on the ground more or less like a regulatory sandbox

\textsuperscript{238} Ibid. p.5

\textsuperscript{239} Ibid. p.6

\textsuperscript{240} Ibid. p.7
One of the respondents, a law professor, is more skeptical: he argues that article L211-2 of the C. mon. fin. only authorizes the issuing of financial instruments for the State, a moral person, or some funds:

We should not conclude, according to us, that a financial product, issued by an unauthorized entity escapes, by definition, from the qualification of financial title. It would be better, to consider this illegal, without that, it would be too easy to bypass the law.

It is clear that the legal uncertainty regarding ICOs was top of mind for all stakeholders involved in the consultation. Following this consultation, the French government took steps to create a legal framework for ICOs by enacting the PACTE law, which is discussed in the next subsection.

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241 The document does not give his identity

242 Article L211-2, C. mon. fin., France (in French)

243 AMF, Synthèse des réponses à la consultation publique portant sur les Initial Coin Offerings (ICO) et pout d’étape sur le programme ‘UNICORN’, February 22, 2018, p.7 (in French)
f – PACTE Law on ICOs

On May 22, 2019, French lawmakers enacted the PACTE law\textsuperscript{244} which directly deals with ICOs. Since 2017, the French government studied the technology and the AMF warned investors about the risks of ICOs\textsuperscript{245}. The AMF memos advised investors to be very careful before investing in crypto assets since there were no protections similar to those for IPOs\textsuperscript{246}.

The PACTE law is a major step in the French legal framework towards a better regulation of ICOs. This thesis argues, however, that the approach adopted by the French government is too lenient since it does not establish clear obligations for issuers. As discussed below, even though the law addresses the issues raised by ICOs, it does not provide sufficient protection to investors.

\textsuperscript{244} Loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises (Loi PACTE : Plan d’action pour la croissance et la transformation des entreprises), May 22, 2019, France (in French)

\textsuperscript{245} AMF, L’AMF lance une consultation sur les Initial Coin Offerings et initie son programme UNICORN, October 26, 2017, Online: https://perma.cc/AX6H-V423 (in French)

\textsuperscript{246} AMF, Que faut-il savoir avant de participer à une Initial Coin Offering (ICO) ?, June 6, 2019, Online: https://perma.cc/JB35-2JYS (in French); AMF, The AMF publishes an analysis on the trends of Initial Coin Offerings (ICOs), November 14, 2018, Online: https://perma.cc/STZU-3HUN
The PACTE law is the first law in France to legally define coins, tokens and ICOs and it creates a chapter X in the title V of the book V for Initial Coin Offerings in the C. mon. fin. Tokens (or coins) are defined as an intangible asset representing in one or more rights in digital form which can be issued, registered, conserved, or transferred with a shared digital recording system giving the ability to identify, directly or indirectly, the owner of the intangible asset\(^{247}\). ICOs are defined as a public offering of tokens (or coins) which lets the public subscribe to those tokens (or coins)\(^{248}\). It is specified that the offering which is limited to a limited number of people does not constitute a public offering of tokens\(^{249}\).

The PACTE law further provides that ICOs may obtain visas from the AMF if the offering can be qualified as an ICO according to the definitions provided above\(^{250}\). However, this visa is optional, not mandatory, and it is intended to give the investor more trust.

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\(^{247}\) Article L552-2, C. mon. fin., France (in French)

\(^{248}\) Article L552-3, C. mon. fin., France (in French)

\(^{249}\) Ibid.

\(^{250}\) Article L552-4, C. mon. fin., France (in French)
in the offer. To complement this law, a decree has been enacted to let digital assets service providers obtain visas from the AMF\textsuperscript{251}.

In an article published in 2019, Thibault de Ravel d’Esclapon, Nicolas Rontchevsky, and Michel Storck\textsuperscript{252} argue that, even though the AMF visa is optional, it can be a positive factor in terms of encouraging ICOs because it will increase investor confidence. The public has been made aware of the risks regarding these new kinds of offerings by the AMF\textsuperscript{253}, and individual ICOs need to positively distinguish themselves from others to attract more investors. This visa process can be an important means of marketing the ICO as it will increase the investors’ confidence in the underlying tokens.

This visa process for ICOs is based on an informational document that is submitted to the AMF, just as for prospectuses with IPOs. The law states that the objective of this document is to give all useful information to the public regarding the offer and the

\textsuperscript{251} Décret n° 2019-1213 du 21 novembre 2019 relatif aux prestataires de services sur actifs numériques, November 21, 2019, France (in French)

\textsuperscript{252} Thibault de Ravel d’Esclapon, Nicolas Rontchevsky, Michel Storck, Loi PACTE : innovations et modifications en matière de droit financier, RTD Com. 2019 p.713 (in French)

\textsuperscript{253} AMF, Que faut-il savoir avant de participer à une Initial Coin Offering (ICO) ?, June 6, 2019, Online: https://perma.cc/JB35-2JYS (in French); AMF, The AMF publishes an analysis on the trends of Initial Coin Offerings (ICOs), November 14, 2018, Online: https://perma.cc/STZU-3HUN
offeror.\textsuperscript{254} In order to implement the PACTE law, the AMF has modified its regulation.\textsuperscript{255} The general regulation of the AMF now specifies that the following information should be included in the informational document filed to obtain a visa for an ICO: a detailed description of the project; the reasons underlying the offer; the ways the collected funds will be used; a detailed description of the rights and obligations that come with the token or coin; the modalities of exercise of those rights and obligations; a detailed description of the characteristics of the offer; the technical modalities of the offer; a detailed description of the means put in place to keep track and save the funds and digital assets; a detailed description of the offeror; a presentation of the main participants in the conception and realization of the project; the risks underlying the offeror, the offer, and the project\textsuperscript{256}.

To better inform investors, the regulation also requires an end note on all informational documents that should describe risks related to ICOs. Since June 2019, the following information must appear in the end note:

The investment in an initial coin offering as defined in the article L552-3 of the Code monétaire et financier has risks of partial or total loss of investment. No guaranties are given on the liquidity of the tokens, the existence of secondary markets, or the value of

\begin{flushleft}
\textsuperscript{254} Article L552-4, C. mon. fin., France (in French)
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\textsuperscript{255} Article L712-2, Régl. gén. AMF, France (in French)
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\textsuperscript{256} Ibid.
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the tokens. Tokens do not qualify as financial instruments in the terms of the article L211-1 of the Code monétaire et financier and do not give any right other than what is described in the informational document. Furthermore, the legal framework applicable to initial coin offerings and the legal framework applicable to taxation of tokens are not well defined in some jurisdictions. The visa given by the AMF only concerns the offer contained in the informational document. The AMF will not control the conformity of the project when the offerings is closed. Subsequent communications will not be supervised.257

When France enacted this law, it acknowledged the need for a specific regulation regarding ICOs not only to protect investors but also to increase France’s attractiveness. The AMF event stated that: “We will be the first ones in the world to have an ad hoc regulation on ICOs” and that there is a need to attract the best projects in France.258 As ambitious as those statements were, the PACTE law leaves a lot to be desired because it does not provide strict rules to govern ICOs. The only clear conclusion one can draw from the PACTE law is that ICOs are still not characterized as securities in France.


258 Delphine Cuny, Levées de fonds en crypto : la France sera « la 1re au monde » à avoir une réglementation sur les ICO, June 01, 2018, La Tribune, Online: https://perma.cc/9DM5-FHAS (in French)
Nevertheless, once a company applies for a visa for its ICO, it must follow a given set of rules. After the application has been submitted, the AMF examines the informational document. This process must be completed within 20 days, commencing when the AMF receives a complete application\textsuperscript{259}.

Once a visa is issued, the AMF publishes the informational document in parallel with the issuer\textsuperscript{260}. This issuer has to publish a press release to inform potential investors about the result of the application process\textsuperscript{261}. The law states that the visa cannot exceed 6 months\textsuperscript{262}. This 6-month period corresponds to the period during which the AMF has the power to supervise the offer\textsuperscript{263}. If a modification or a new fact that could impact the visa decision occurs, then the issuer has to submit another application to get the approval of the AMF\textsuperscript{264}.

\begin{flushleft}
\textsuperscript{259} AMF, Procédure d’instruction et établissement d’un document d’information devant être déposé auprès de l’AMF en vue de l’obtention d’un visa sur une offre au public de jetons, Instruction AMF, DOC-2019-06, p.7 at para 1
\textsuperscript{260} Ibid. p.7 at para 8
\textsuperscript{261} Ibid. p.7 at para 13
\textsuperscript{262} Article L712-10, Régl. gén. AMF, France (in French)
\textsuperscript{263} Article L712-11, Régl. gén. AMF, France (in French)
\textsuperscript{264} Ibid.
\end{flushleft}
The AMF has the ability to sanction companies that have obtained a visa in violation of
the conditions set forth in the informational document²⁶⁵. If the AMF determines that
the company is not respecting the terms of the visa, it questions the company and can
decide to withdraw the visa if it considers the issuer’s response unsatisfactory²⁶⁶.
However, this withdrawal has no real impact on the ICO itself, which is paradoxical.
Since the visa process is optional, and ICOs are not yet considered as securities, the
withdrawal of the visa does not stop the offer which can subsist without the visa. The
only meaningful impact is that the law gives the power to the AMF to publish publicly
the reasons of the withdrawal which could deter the public from investing in that
ICO²⁶⁷.

Comparing the approaches of the United States and France, it is clear that the United
States was able to use its existing legal framework to tackle issues raised by ICOs, while
France had to enact a new law to begin regulating on the matter. As discussed in
chapter 1, the United States is the first destination for ICOs because it has “clear and

²⁶⁵ Article L715-1, Régl. gén. AMF, France (in French)
²⁶⁶ Ibid.
²⁶⁷ Article L715-2, Régl. gén. AMF, France (in French)
firm regulatory requirements”. Clear and firm regulations is an absolute requirement in the financial sector since it reduces uncertainty and allows companies and investors to form accurate anticipations.

Before the enactment of the PACTE law in France, 40 ICO projects were submitted to the AMF (in 2017 and the first trimester of 2018). After the enactment of the law, the AMF delivered its first visa in December 2019 (six months after the enactment of the PACTE law) to French-ICO.com. After that, the AMF only delivered another visa in May 2020 (one year after the enactment of the PACTE law) to WPO, and in October 2020 to iExec Blockchain Tech.

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268 PWC, strategy&, Initial Coin Offerings, A strategic perspective, June 2018

269 Delphine Cuny, Levées de fonds en crypto : la France sera « la 1re au monde » à avoir une réglementation sur les ICO, June 01, 2018, La Tribune, Online: https://perma.cc/B8FE-76EJ (in French)


271 AMF, Visa n° ICO.20-189, May 12, 2020

272 AMF, Visa n° ICO.20-508, October 13, 2020
In terms of performance, the PACTE law regulation has not been well received by companies that want to issue tokens. The attorney\textsuperscript{273} that helped French-ICO emphasized that the most challenging aspect of the law is to respect both the conditions required by the AMF and those listed by the PACTE law.\textsuperscript{274} For the most part, these related to KYC requirements. Even though similar requirements exist in the United States, it is interesting to note that companies still choose the United States, rather than other countries, to start their projects.

\textsuperscript{273} Maître Margaux Frisque

Chapter 5 – Prospective Legal Framework

At present, only the United States is working actively to upgrade its existing legal framework to better suit ICOs. While in France, there have not been any new developments since the PACTE law.

A – Paths for future regulation in the United States

After the SEC decided to characterize some tokens as securities, some US House representatives\textsuperscript{275} wanted to amend the Securities Act of 1933 and the Securities Exchange Act of 1934 to integrate ICOs expressly. The SEC has taken another approach and proposed amendments that would use existing regulations.

\(\text{a – Token Taxonomy Act}\)

The ICO Taxonomy Act is a bill that was introduced in the US Congress in December 20, 2018, in order to:

- amend the Securities Act of 1933 and the Securities Exchange Act of 1934 to exclude digital tokens from the definition of a security, to direct the Securities and Exchange Commission to enact certain regulatory changes regarding digital units secured through public key cryptography, to adjust taxation of virtual currencies held in

\textsuperscript{275}Warren Davidson, Darren Soto, Josh Gottheimer, Ted Budd, Tulsi Gabbard, Scott Perry
individual retirement accounts, to create a tax exemption for exchanges of one virtual currency for another, to create a de minimis exemption from taxation for gains realized from the sale or exchange of virtual currency for other than cash, and for other purposes.\footnote{US Congress, H.R. 7356 (115th): Token Taxonomy Act, December 20, 2018}

This initial bill was not enacted when it was first proposed but it contained interesting propositions to better regulate ICOs. The bill was reintroduced on April 9, 2019 with some modifications.\footnote{US Congress, H.R. 2144 (116th): Token Taxonomy Act, April 9, 2019, Online: \url{https://perma.cc/D67G-2QYG}} This version includes clearer definitions. If enacted, this bill would create a new exemption for digital units in the \textit{Securities Act} of 1933:

\begin{quote}
\textbf{(c) EXEMPTIONS. –} Section 4(a) of the Securities Act of 1933 (15 U.SC. 77d(a)) is amended by adding at the end the following:

\par\textbf{(8) Transactions involving the offer, promotion, or sale of a digital unit if-}

\par(A) the person offering, promoting, or selling the digital unit has a reasonable and good faith belief that such digital unit is a digital token; and

\par(B) within ninety days following a written notification from the Commission to such person that such digital unit has been determined by the Commission to be a security, posts public notice of such notification and takes reasonable efforts to cease all sales and return
\end{quote}
all proceeds from any sales of such digital unit, excluding funds reasonably spent on the development of technology associated with the digital unit\textsuperscript{278}.

Congressman Warren Davidson, who introduced the bill, highlights fact that the text was introduced to provide “\textit{regulatory certainty for businesses, entrepreneurs, and regulators in the U.S.’s blockchain economy}”\textsuperscript{279}.

As mentioned above, legal certainty is a crucial aspect on a financial market, as it allows actors to form anticipations. All actors want to their investments to be secure and legal uncertainty undermines the security necessary to attract businesses.

Warren Davidson underlines the that “\textit{this need for regulatory certainty is motivating market players to leave the U.S. for the certainty provided elsewhere. China, meanwhile, has endorsed blockchain technology as essential to its digital economy and emphasizes the importance of regulation to a healthy future}”\textsuperscript{280}.

Nevertheless, as explained above, this act does not help much for security tokens. The act clearly says that if the SEC determines the ICO to be a security then the issuer must

\textsuperscript{278} Ibid. p.4, Online: \url{https://perma.cc/D67G-2QYG}


\textsuperscript{280} Ibid.
cease the offer. In fact, it creates more uncertainty than before. With the Howey test, issuers knew what to expect from the Commission and could simply refer to the test to determine whether the offer could be considered a security. If this act is enacted, then most issuers will not take the necessary steps to see if the offer can be considered as a security before issuing tokens or coins.

Like in France, this act acknowledges the urgent need to regulate ICOs. However, the text does not set clear requirements for issuers to respect. With the PACTE law, France expected to attract more ICOs but as seen Chapter 4, the law did not trigger the expected effect, and only 3 companies applied for the AMF’s visa281.

With this act, the Howey test is not done *a priori* but *a posteriori*, after the ICOs has been offered. At this stage, the public has already invested money in the token.

It is understandable that countries want to avoid hindering the development of this new technology through weighty regulation. However, a lenient regulation implies increased financial risks for investors and creates inequalities between companies that attract funds by IPOs and companies that can attract funds by ICOs. To ensure legal certainty and legal security, actors on a given market should be subject to identical regulation, in order to avoid disparities which could ultimately generate market distortions and harm investors?

281 Cf. p.96
As we will see in the following section, the SEC also proposed amendments which aim at simplifying the existing legal framework.

b – Amendments proposed by the SEC

On March 4, 2020, the SEC proposed new amendments to simplify exemptions regarding securities. In a press release published at the same date, the SEC stated that those amendments:

would harmonize, simplify, and improve the exempt offering framework to promote capital formation and expand investment opportunities while preserving and enhancing important investor protections.

The SEC’s Chairman, Jay Clayton argues that:

the complexity of the current framework is confusing for many involved in the process, particularly for those smaller companies whose limited resources spend on navigating our overly complex rules are diverted from direct investments in


283 SEC, SEC Proposes Rule Changes to Harmonize, Simplify and Improve the Exempt Offering Framework, March 4, 2020
the companies’ growth. These proposals are intended to create a more rational framework that better allows entrepreneurs to access capital while preserving and enhancing important investor protections.\textsuperscript{284}

The current legal framework requires companies who want to raise capital to register themselves unless there is an exemption applicable to the specific situation. Today, several possibilities are available to make security offerings without registering as a public company.

The first possibility is to apply using Regulation A\textsuperscript{+}\textsuperscript{285} that lets small businesses to raise funds if the offer does not exceed USD 50 million $. The second possibility consists in applying under the Regulation CF\textsuperscript{286} which allows small businesses to raise funds using crowdfunding if the offer does not exceed USD 1 million $.

The proposed amendments would raise those limits to USD 70 million $ for Regulation A, and to USD 5 million $ for Regulation CF. In the report published by GreySpark

\textsuperscript{284} Ibid.

\textsuperscript{285} Secs. 230.251 to 230.263, 15 U.S.C. 77c, 77s.

\textsuperscript{286} Secs. 227.100 to 227.503, 15 U.S.C. 77d, 77d-1, 77s, 77z-3, 78c, 78o, 78q, 78w, 78mm
Partners in 2018, the amount of the median raised funds by ICOs between 2014 and 2018 was evaluated at USD 5 million $287.

With this proposal, many ICOs would benefit from Regulation CF that offers numerous advantages over a classic IPO, one of them being that there is no need to become a fully public company.

When we compare those amendments to the PACTE law and the Token Taxonomy Act, we can see that it is a better compromise between legal certainty, investor protection, and attracting new businesses.

While still keeping a control over the offer, the SEC would let companies to raise funds more easily since the criteria required are less strict.

It should also be noted that with this kind of requirements, there is no need for attorneys to learn new regulations as they are already familiar with the above-mentioned regulation.

Globally, using this method would bring the cost to make an ICO minimal while still preserving the interests of the investors.

287 GreySpark Partners, William Benattar, Meri Paterson, Charting the growth of cryptocurrencies, September 2018
B – The lack of perspective for further regulation regarding ICOs in France

After the PACTE law, France did not make any new moves to better regulate ICOs. As mentioned above, only three visas have been given by the AMF, since the enactment of the PACTE law, and the law didn’t exert the power of attraction that was expected by the regulator.

It is unfortunate that French lawmakers do not consider the interests of the blockchain community as a priority, since an increasing number of companies are turning towards this new technology. The United States and other countries have grasped the economic implications of this new technology and are trying to take steps more quickly to accommodate digital businesses.

We will see in the years to come how that turns out for France and if it will succeed to attract more ICOs.
Chapter 6 – Conclusion

This thesis has analyzed the legal framework in the United States and France and shed light on the approaches taken by different governmental agencies. This analysis led us to the conclusion that we cannot clearly say when an ICO is considered as a security.

Chapter 1 discussed the different origins of securities law in the United States and France and highlighted that the two countries offer differing levels of flexibility for Initial Coin Offerings.

In the second Chapter, the Blockchain technology was defined, its uses were discussed and the definition of securities was discussed under United States and French law. This chapter highlighted how the United States uses the term “investment contract” to encompass new investment products, while France has a more restrictive approach as the law is restrictive.

Chapter 3 defined Initial Coin Offerings and examined different kinds of Initial Coin Offerings (currency tokens, utility tokens, investment tokens). It also underlined the
fact that ICOs were gaining traction and that “countries who offer ‘clear and firm’ regulatory requirements are succeeding in attracting more ICOs”\textsuperscript{288}.

In Chapter 4, the thesis analyzed the existing legal framework in the United States, the European Union and France. For example, Dell’Erba underlined the fact that ICOs are “extra-jurisdictional in nature” and that there is a need for better coordination between regulators.\textsuperscript{289} He also argued that there is a need for a better understanding of the technology by regulators”.\textsuperscript{290} This thesis also shares this idea since ICOs can target investors all around the world. In France, this cooperation can come from the European Union since it has a major role on financial institutions. As for the United States, things may be more complicated since the country is not a part of a cooperative union.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{288} PWC, strategy&, Initial Coin Offerings, A strategic perspective, June 2018, p.4 Online: \url{https://perma.cc/DVV3-2N2F}
\item \textsuperscript{290} Ibid.
\end{enumerate}
\end{footnotesize}
In the United States, we have seen that the SEC used the Howey test\textsuperscript{291} to control ICOs.\textsuperscript{292} On this matter, authors were not on the same page as some suggested that the nature of the ICO has to be taken into account,\textsuperscript{293} whereas others suggested that most ICOs should be considered as offerings of securities.\textsuperscript{294} Others, have suggested that the test only applies if the investor is attracted in the investment for the purpose of financial returns only.\textsuperscript{295} In Chapter 4, we have also studied the case of the BitLicense that was put in place in the State of New York\textsuperscript{296}. We have seen that harsh regulations could discourage innovation, investors, entrepreneurs and users.

\begin{flushleft}
\footnotesize
\textsuperscript{291} SEC v. W. J. Howey Co., 328 U.S. 293 (1946)
\textsuperscript{293} Jason Tashea, Blockchain Based Initial Coin Offerings Are All the Rage, but the Legal Terrain is Uncertain, 104 A.B.A J. (2018) ;
\textsuperscript{296} New York State Department of Financial Services, New York Codes, Rules and Regulations, Title 23. Department of Financial Services, Chapter I. Regulation of the Superintendent of Financial Services, Part 200. Virtual Currencies (2014)
\end{flushleft}
In the European Union, we have seen that different regulators were extremely interested in the technology as they published many detailed papers on the subject.\textsuperscript{297} European regulators share the idea that there are many benefits in using the blockchain technology or distributed ledger technology for financial markets.\textsuperscript{298}

In France, we have seen that the financial regulation comes directly from the European Union, however, French regulators have enacted the PACTE law in order to create a legal framework to ICOs since it was not done by European law. This law allowed people who wanted to use ICOs to attract investors to opt in for a visa from the AMF. This visa certified that the ICO was respected the requirements put in place by the AMF and protected investors from abusive ICOs. Nevertheless, this visa program is optional and only 3 companies have obtained this visa.


\textsuperscript{298} European Securities and Markets Authority, \textit{The distributed Ledger Technology Applied to Securities Markets}, Report, February 7, 2017
Finally, Chapter 5 discussed the steps that the United States has taken in order to enact laws regarding ICOs.\(^{299}\) If enacted, this proposed law would let the SEC decide if the ICO is a security offering which does not change much from the legal framework that is actually in place. Whereas, in France, regulators have not taken any steps further in order to better control ICOs.

The exercise to regulate the finance sector is not an easy one since investors and businesses now have the possibility more than ever to move themselves in another country if the rules are too harsh. This was illustrated with the BitLicense that was put in place in the New York State, which caused businesses to move to other states with lighter regulations.

As seen in the reports detailed in the Chapter 1, there is a growing interest in ICOs, and the volume of funds raised is growing exponentially. The challenge for lawmakers today is to create a legal framework that would not only protect investors but also attract more and more businesses.

With the information that we have today, this thesis has argued that the SEC’s approach is the best one suited for ICOs as it uses the existing legal framework known by attorneys and businesses and does not create any surprises. The amendments

proposed to raise limits in Regulation A and Regulation CF is a sign that the SEC wants to see more and more ICOs while still encouraging responsible offerings.

With PACTE law, France did not encourage responsible offerings as it is still possible today to make ICOs without the visa of the AMF which creates inequality between businesses.
Appendix I: Definitions

**Algorithm**: a set of operatory rules that serves the purpose of resolving a problem

**Bitcoin**: an independent cryptocurrency that works on the Bitcoin blockchain. It can also refer to the blockchain

**Blockchain**: a decentralized peer-to-peer database composed of a chain of blocks which contains information

**Coin**: a fungible, divisible, acceptable, portable, and durable cryptocurrency

**Commodity Token**: a crypto asset that can be traded but which doesn’t represent a value on its own

**Commodity**: an object that can be sold, bought or traded

**Cryptocurrency**: a currency that is based on cryptography

**Cryptography**: a mathematical method to secure information

**Crypto-Mining**: the verification process of transaction on a blockchain done by miners who are often rewarded with crypto assets

**Currency**: a medium of value exchange

**Digital Currency**: a currency that is available in electronic form, can be based on fiat currencies
**Distributed Ledger**: a decentralized data base used by several users

**Ethereum**: an independent cryptocurrency that works on the Ethereum blockchain. It can also refer to the blockchain

**Fiat currency**: a currency that is backed by a government

**Investment**: the action to make profit

**Issuer**: a person that has the authorization to sell securities

**Peer-to-Peer**: a computer network who receives and distributes information between users. Each user is a client and a server

**Security Token**: a crypto asset which can be traded, and which gives or can give an ownership position of a company or an ownership position on a debt

**Security**: a financial instrument that can be traded and which gives or can give an ownership position of a company or an ownership position on a debt

**Smart Contract**: an electronic contract that executes itself automatically on the blockchain based on conditions set beforehand

**Token**: a crypto asset that gives access to an application on the blockchain

**Utility Token**: a crypto asset which gives access to a service or a product

**Virtual Currency**: a digital currency that can be backed by private entities
Appendix II: Bibliography

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