

SEIZING AND SELLING CRYPTO ASSETS IN CIVIL AND COMMERCIAL DISPUTES: STILL NOT AN EASY ROUTE IN FRANCE

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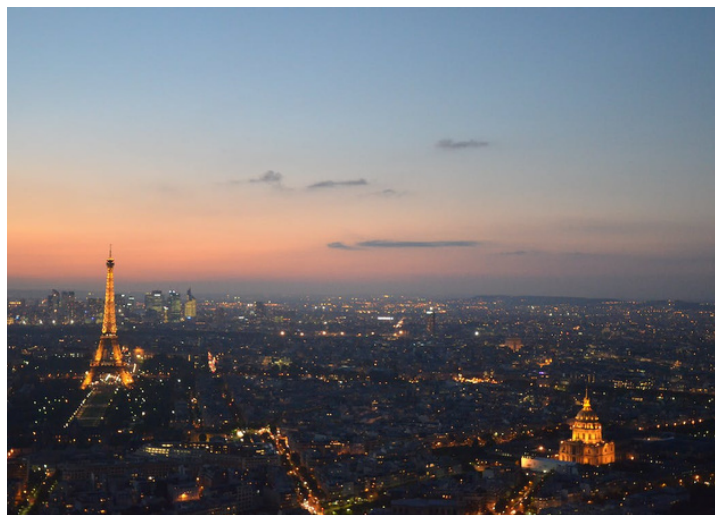
France is often considered as one of the most advanced continental European countries when it comes to regulation of crypto assets. However, civil or commercial creditors still face difficulties to enforce their rights on such assets.

By way of background, during the 'implementation phase' of the EU Markets in Crypto-Assets regulation (from entry into force in June 2023 until the date of full application in December 2024), France already has, since May 2019, a framework for crypto service providers (prestataire de services sur actifs numériques - PSAN) including an optional approval system (registering vs. authorisation) with the French Market Authority (Autorité des marchés financiers - AMF). This early regulation of crypto asset providers and France's willingness to support the tech sector have resulted in many crypto actors establishing their European head offices in Paris.

Moreover, French judges increasingly seize crypto assets in criminal cases where these assets could have helped or resulted from the commission of an offence. The AGRASC, which is the French agency for the management and recovery of offence-related seized and confiscated assets, managed €60 m. worth of crypto assets as of 31 December 2022 resulting from more than 500 seizures in 2022 in comparison to 8 seizures in 2018.

In spite of this dynamic French environment, recovery and seizure of crypto assets by civil or commercial creditors remains difficult for a number of reasons, the first one being that the current French regime is not fitted to ensure that creditors can easily locate, seize and sell crypto assets of their debtors.

While French courts consider that crypto assets create a right of ownership and are, as such, seizable assets, creditors indeed often struggle to locate their debtor's crypto assets. There is notably no such record for crypto assets as the French central register on bank accounts that a French bailiff can access on behalf of a creditor that has obtained an enforceable title or authorisation from the judge to have the list of its debtor's bank account.



Therefore, a bailiff instructed by a creditor to seize crypto assets has limited resources to locate these assets: he can run research on public sources or try to ask the tax authorities, to whom the French tax resident must declare his digital asset accounts, but these authorities have no duty to reply. The creditor can also try to compel the crypto asset service provider to disclose whether it holds crypto assets on behalf of the debtor but this is a rather complex and lengthy process.

Assuming the crypto assets have been located, there is no specific procedure under French law to seize the same. Indeed, since crypto assets - to the possible exclusion of token on monetary claim - are not a currency according to the French Monetary and Financial Code, the regime applicable to receivables on bank accounts, which is the most straightforward and quickest to implement, does not apply to crypto assets. The applicable regime is the regime for seizure of intangible rights and assets, but several of its provisions are, in fact, hardly suitable to seizure of crypto assets.

The first step of seizure of intangible assets is indeed to serve the writ of seizure upon the intermediary that created the intangible asset (i.e. the company in respect of shares; the issuer or intermediary in respect of other financial assets). However, as crypto assets come from a decentralised blockchain system, there is no actual third party upon whom the writ of seizure can be served. In practice, the bailiff will be able to serve a writ in two limited instances: if the issuer of crypto assets has legal personality or if the debtor has delegated the management of its crypto assets to a crypto asset service provider. In the other instances, the bailiff could decide to serve the writ solely upon the debtor, but this could give rise to a challenge from the latter as the first step of the seizure regime of intangible asset would not have been complied with.

The second step is to serve upon the debtor, within eight days, the writ of seizure that has been previously served upon the third intermediary party. These first steps have for effects that the debtor is prohibited from disposing from the seized asset until it is sold. However, the bailiff and/or third party have no guarantee that this will effectively be the case as the debtor is the only one having access to the crypto assets with its encrypted key.

While the seizure regime of intangible asset does not require the bailiff to immediately take away the asset from the debtor, for crypto assets, the effectiveness of the seizure will however depend on his ability to actually take the seized asset away from the debtor to avoid its dissipation pending the sale. After having served the two above notices, the bailiff will therefore need to try and get access to the encrypted key (that can be kept on an online wallet, a mobile application, with a software or hardware wallet) and escrow the seized crypto assets pending the sale.

The third step will be to organise the sale of the assets. This raises two prominent issues: obtaining the debtor's encrypted key and determining the terms and conditions of the sale. As regards the encrypted key, the vast majority of debtors will not voluntarily release their keys and the creditor will therefore need to initiate additional proceedings before the French enforcement judge so that the debtor is compelled to hand over the key under daily penalty.

As to the terms and conditions of the sale, the regime for seizure of intangible assets provides with a forced auction sale organised by the creditor's bailiff. However, some authors consider that sale at market price on the relevant platforms is also possible while, on the other hand, voluntary auctions of crypto assets are becoming more and more common.

There are therefore still debates on the way to seize and sell crypto assets in France for civil and commercial disputes. Upcoming case law should rule on a number of the above complexities but as practitioners of civil and commercial enforcement, our view is that it would make sense for France to create a seizure regime specific to crypto assets in its efforts to support and regulate the Fintech sector.



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