

On the obligation of DASPs and CASPs to provide an orderly Business Cessation Plan (BCP)

1. Regulatory context

Orderly cessation requirements for Digital Asset Service Providers (DASPs) and Crypto Asset Service Providers (CASPs) are an essential component of the French and European regulatory frameworks. **In France, article 721-3 of the General Regulations of the Autorité des Marchés Financiers (RGAMF) requires DASPs offering the services listed in 1° to 5° of article L. 54-10-2 of the Monetary and Financial Code (CMF) to provide a programme of operations containing an Orderly Cessation Plan (PCA), specified in point 15.** This BCP must be included in the application for enhanced registration or authorisation, with the aim of protecting customers in the event of cessation of business.

AMF's instruction DOC-2019-23¹ further clarifies this obligation by stating that NSPs must prepare termination arrangements to *'ensure an orderly exit from the market without compromising the safety of customer funds'*. The BCP requires detailed measures to return digital assets to customers, even in the event of the entity's failure, which implies careful planning and clear communication processes.

At European level, the MiCA regulation reinforces this requirement for CASPs. **Articles 74 et seq. of MiCA impose an orderly winding up of services, with the obligation for CASPs to demonstrate their 'ability to cease their activities without causing undue economic hardship to their clients'**. These provisions apply not only to custody services, but also to the operation of trading platforms, third-party order execution, placement and crypto-crypto trading. This broad coverage is intended to protect clients in the event of an orderly termination, regardless of the type of service provided.

However, Adan notes that the practical application of this obligation raises technical and operational obstacles, which make it difficult to deliver a BCP that complies with the necessary requirements. **In particular, the management of dormant customers-those who do not respond**

¹Instruction DOC-2019-23 – 'Regime applicable to service providers of digital assets'
<https://www.amf-france.org/sites/institutionnel/files/private/2023-08/Instruction%20DOC-2019-23%20-%20Regime%20applicable%20aux%20prestataires%20de%20services%20sur%20actifs%20num%C3%A9rique.pdf>.

to solicitations or whose contact details are no longer up to date-poses major difficulties when drawing up and implementing the BCP.

Against this backdrop, Adan has taken action to analyse possible solutions for overcoming these obstacles and ensuring a structured cessation of activity. The Association's aim is to suggest ways of improving the implementation of the BCP, taking into account operational realities and regulatory constraints.

2. Challenges and limits of BCP application

While BCP is essential for the resilience of the sector and the protection of customers, its implementation raises significant challenges for PSANs and CASPs. As mentioned, players are faced with complex issues, particularly when it comes to managing **dormant customers** - inactive users who no longer respond to solicitations or whose contact details have become obsolete.

This difficulty highlights a lack of clarity in the current regulatory framework and raises questions about the ability of NSPs to fully meet their obligations while ensuring an orderly wind-down.

2.1. Issue with dormant customers

The BCP implies that the service provider communicates its situation to its customers and offers them to withdraw their funds or convert them into cash in order to receive them in their bank accounts. However, it is common for some customers not to respond to solicitations during the BCP implementation period.

These customers, known as **dormant customers**, represent a major challenge, as their bank account details or digital wallet addresses may be obsolete - which can lead to loss of funds or failed attempts to return them. What's more, if the CASP ceases trading, it cannot continue to manage these customers' assets beyond the period stipulated in the BCP. It is therefore essential to find a solution to protect the interests of these customers while respecting its operational constraints.

The current regulatory framework lacks precision as to the exact content of the BCP, leaving it up to operators to define its scope. This uncertainty can be a major obstacle, particularly when applying for authorisation. One solution often envisaged is the conclusion of agreements between CASPs, whereby an active service provider takes over the customers of another that ceases its activities. This approach seems to be encouraged in France.

However, this method has limitations in practice. On the one hand, the CASP business models may be too different for such partnerships to be easily viable. Secondly, even with a transfer of responsibility, the problem of dormant customers persists, giving rise to both regulatory and operational risks. Disagreements may also arise over the terms and conditions of asset transfers, and the risks associated with dormant customers persist despite such partnerships.

2.2. Solutions for managing dormant customer assets

To overcome the difficulties associated with the BCP and meet the legal and practical challenges posed by the management of dormant customers, several solutions can be envisaged:

2.2.1. Define a financial threshold for inactive funds considered abandoned

The DASP/CASPs could set a financial threshold below which inactive customers' funds would be considered abandoned and transferred to it to cover the processing costs associated with the cessation of activity. For example, a threshold of €20 per line of digital assets or €50 in total could be set. This would limit the administrative and operational burdens associated with managing many small balances. It is essential that this provision be expressly included in the contractual conditions so that customers are informed as soon as they sign the contract with the CASP.

2.2.2. Transferring dormant portfolios to another CASP

Another approach would be to transfer the digital assets and associated information of dormant customers (identification documents, contact details, proof of origin of funds, transaction history, etc.) to another digital asset service provider. This receiving CASP should comply with the requirements of the MiCA regulation and offer a comprehensive custody service compatible with the assets concerned.

To facilitate this process, the terms and conditions of the initial CASP could provide for the prior conversion of dormant clients' assets into widely used crypto-assets, such as Electronic Money Tokens (EMT) or Bitcoin (BTC). This conversion would simplify the subsequent management of assets by the receiving CASP by reducing the diversity of assets to be held.

2.2.3. Using the French Caisse des Dépôts et Consignations (CDC)

The option of transferring dormant portfolios to another CASP also has significant limitations: it is crucial that the receiving CASP is able to guarantee the sustainability of its activities in order to avoid a situation where this partner in turn ceases to operate, thus reintroducing the problem. In other words, at the time of contracting, it is important to select a CASP whose activity is sustainable in order to avoid a situation where the receiving provider would itself cease its activities.

However, no CASP has yet been approved under the MiCA regulation, and this situation could persist for several quarters. Furthermore, the long-term future of most private CASPs remains uncertain, making it difficult to find a truly reliable partner for the transfer of dormant portfolios.

Given these uncertainties, Caisse des Dépôts et Consignations (CDC) appears to be the most sustainable solution for ensuring continuity. As a state-owned entity with a public service remit, CDC offers stability and longevity that can reassure both customers and regulators, as it has the infrastructure and expertise to manage the digital assets of dormant customers over the long term. In addition, working with CDC would ensure that the assets of inactive customers are held securely until they come forward to reclaim them. This solution also has the merit of facilitating the regulatory compliance of the CASP when it ceases trading, by meeting the requirements of the BCP in terms of customer protection.

3. Conclusion

The BCP is a fundamental requirement for stability and security in the digital asset sector, but its application needs to be made more operational and legally secure. Adan calls on regulators to clarify the expectations of BCP, including specific solutions for dormant customers and pragmatic flexibility for PSANs/CASPs. In addition, the use of CDC to manage dormant assets could provide a sustainable solution that inspires confidence and strengthens the resilience of the industry for providers, customers and regulators.