



## Questions and Answers for FinTech companies on activities and services that may be within CNMV's remit

**Last update: 20 September 2018**  
**(questions 6.2 and 6.5)**

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
1. INTRODUCTION .....	3
2. GENERAL QUESTIONS.....	5
3. CROWDFUNDING/CROWDLENDING PLATFORMS .....	6
4. AUTOMATED ADVICE AND PORTFOLIO MANAGEMENT .....	11
5. NEO-BANKS.....	15
6. CRYPTOCURRENCIES AND ICOs .....	15

This document is not intended to be prescriptive. Its purpose is to pass on to the sector and, in particular, to entities wishing to operate in the FinTech space, our criteria regarding the interpretation of the securities market rules that may apply to them.

## 1. INTRODUCTION

In December 2016, the CNMV set up a point of contact (the CNMV FinTech Portal). The aim of the Portal is to promote initiatives in the field of financial technology (or FinTech) which would offer business models that were better orientated towards the end investor while improving the efficiency and competitiveness of financial markets in Spain.

Through the FinTech Portal, the CNMV has collaborated with interested promoters and financial institutions. The CNMV has provided them regulatory information and criteria regarding the interpretation and application of any regulatory aspects of the securities market which might affect their projects.

This collaboration has given CNMV the opportunity to gain first-hand knowledge of some of the demands and needs of the FinTech sector in Spain. It also has given rise to the setting of criteria regarding certain issues which have been made available to the public through this document in a question and answer format.

The criteria set out in the following paragraphs may be reviewed in the future; as other issues requiring clarification may be raised, this question and answer document will be expanded, identifying in each case the date of update.

### Main abbreviations used:

<b>FinTech</b>	Financial technology
<b>FinTech Company</b>	Company which uses financial technology
<b>PFP(s)</b>	Crowdfunding/Crowdlending Platform(s)
<b>ESI(s): EAFI, SGC, AV and SV</b>	Investment Firm(s): Financial Advisory Firm, Portfolio Management Firm, Broker, and Broker-Dealer, respectively.
<b>MAM and PAMM</b>	Multi-Account Manager and Percentage Allocation Management Module, respectively.
<b>ICO(s)</b>	Initial Coin Offering(s)
<b>SICC and FICC</b>	Closed-Ended Collective Investment Undertaking and Closed-ended Collective Investment Fund

<b>SGIIC and SGEIC</b>	Manager of Collective Investment Schemes and Manager of Closed-Ended Collective Investment Schemes
<b>ESMA</b>	European Securities and Markets Authority
<b>ESAs</b>	European Supervisory Authorities
<b>SEPBLAC</b>	Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences
<a href="#"><u>MiFID II/MiFIR directive</u></a>	Directive 2014/65/EU, of the European Parliament and of the Council, of 15 May, 2014 on markets in financial instruments and amending Directive 2002/92/CE and Directive 2011/61/EU
<a href="#"><u>MiFID II/MiFIR regulation</u></a>	Regulation (EU) No. 600/2014, of the European Parliament and of the Council, of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No. 648/2012
<a href="#"><u>Recast text of the Securities Market Act</u></a>	Royal Legislative Decree 4/2015, of 23 October approving the Recast Text of the Securities Market Act
<a href="#"><u>Law 5/2015</u></a>	Law 5/2015, of 27 April, on the promotion of business financing
<a href="#"><u>Regulation of IIC (s)</u></a>	Royal Decree 1082/2012, of 13 July, approving the secondary regulations implementing Law 35/2003, of 4 November, on Collective Investment Schemes
<a href="#"><u>Law 22/2014 of EICC</u></a>	Law 22/2014, of 12 November, regulating venture capital schemes, other closed-ended collective investment schemes, and managers of closed-ended collective investment schemes, and amending Law 35/2003, of 4 November, on Collective Investment Schemes

## 2. GENERAL QUESTIONS

**2.1 Does being a FinTech company provide any distinction or advantage when carrying out securities market related activities?**

### **CNMV's Answer**

The principles on which the regulation of the securities market sector is based are neutral to the technology used by the various agents involved: entities, markets or investors. What really matters is whether the activity carried out by the FinTech company is deemed to fall within the scope of investment services or is subject to some type of license, such as crowdfunding platforms. In these cases, regardless of the technology it uses, it will need the relevant license to operate in the Spanish market, as well as subsequent supervision by the CNMV,

Notwithstanding the foregoing, the CNMV aims to assist FinTech companies so that they can develop their projects expeditiously in Spanish markets while ensuring the adequate investors' protection.

**2.2 If a FinTech company providing investment services or crowdfunding platform services needs a license from the CNMV, where does it apply for and how long does it take to get the license?**

### **CNMV's Answer**

FinTech companies needing a license from the CNMV should make an application to the CNMV's Department of Authorisation and Registration of Entities. This application will be solved within a maximum of three months from the time all documentation has been completed and within a maximum deadline of six months from the date the process was started. The purpose of the licensing application process is to check whether the entity and its managers meet the established legal requirements to be able to provide their clients with financial services in a due and proper manner.

The following link provides access to various documents detailing the requirements for obtaining a license as a broker-dealer, broker, portfolio management firm, financial advisory firms (EAFI), manager of collective investment schemes or crowdfunding platform:

[Standard CNMV forms](#)

If you have any question, the CNMV, through its FinTech Portal, can assist you on where to make your application.

**2.3 Are companies that act as technology providers for investment firms or other entities registered with the CNMV subject to any kind of license?**

#### **CNMV's Answer**

No. These companies are not subject to authorisation, registration and subsequent supervision by the CNMV. The companies which use their technological services and which provide the corresponding investment services with end-clients are the ones responsible to the CNMV for the use of any technology. However, if the service provided entails the outsourcing of critical or important functions of the investment firm or of any other entity registered with the CNMV, the technology provider should cooperate with the competent authority in order to facilitate their supervision.

### **3. CROWDFUNDING/CROWDLENDING PLATFORMS**

#### **3.1 Can PFPs designate non-digital agents for marketing their services?**

#### **CNMV's Answer**

No. Law 5/2015 does not expressly provide for the possibility of PFPs designating natural or legal persons to act as agents of PFPs. This lack of any express provision should be interpreted as a prohibition, given that the activity and the sector is highly regulated. This is the opposite of the situation of ESI, where Article 146 of the Recast Text of the Securities Market Act expressly provides for this possibility.

#### **3.2 Can PFPs use crowdfunding/crowdlending methods other than those provided for by Article 50 of Law 5/2015?**

#### **CNMV's Answer**

No. PFPs can only launch crowdfunding projects which are implemented through one of the options set out in Article 50.1 of Law 5/2015, i.e. through:

- a) the issue or subscription of debentures, ordinary and privileged shares, or other equity securities when their issue does not require or have an informative issue prospectus, as referred to by Articles 33 and following of the Recast Text of the Securities Market Act
- b) the issue or subscription of shares in limited liability companies
- c) a loan application, including participating loans.

PFPs may not launch crowdfunding projects implemented through other instruments such as assignments of receivables, invoice or promissory note discounting, or participation accounts. More specifically, invoice or promissory note discounting is considered as an atypical contract constituting a method of short-term financing which falls within the prohibition set out in Article 49.1 of Law 5/2015, whereby PFPs may not launch projects consisting of professional financing from third parties.

**3.3 Can other non-registered platforms finance projects through the instruments described in Article 50 of Law 5/2015?**

**CNMV's Answer**

No (without prejudice to the answer given to question 3.13). In order to carry out the activity of a PFP as described in Article 46.1 of Law 5/2015, through the provisions of Article 50 of Law 5/2015, Article 48.1 states the obligation of a license, only authorised and registered PFPs may carry out the activity described in Article 46.1.

**3.4 Can projects be financed through non-registered platforms by using instruments other than those described in Article 50 of Law 5/2015?**

**CNMV's Answer**

Yes. They may exist platforms which raise financing for investors' projects by other means without their activity falling within the authorized activity of PFPs. Therefore, these platforms do not need to apply for the authorisation and registration at the CNMV. In these cases, they cannot use the name "Plataformas de Financiación Participativa" or the abbreviation "PFP", terms reserved by the CNMV only for authorised and registered PFPs (Article 48 of Law 5/2015).

Moreover, by being unregulated platforms falling outside the CNMV's scope of supervision, their investors do not enjoy the protection measures established by Law 5/2015.

The CNMV publishes a list of entities which neither have any kind of authorisation nor are registered for any purposes with the CNMV, and which may be carrying out some type of fund-raising activity or providing services of a financial nature. An entity's inclusion on the list does not imply any judgement as to whether or not it complies with current regulations governing the activity it may be carrying out. The list is available for consultation at the following link:

[Warning issued by CNMV: List of other entities](#)

**3.5 Can a PFP launch projects that are financed through participation account agreements?**

**CNMV's Answer**

No (See Question 3.2).

**3.6 Can a non-registered platform freely raise funds for management and investment through participation account agreements if the results of the investment are determined collectively?**

### **CNMV's Answer**

No. The participation account agreement is an instrument which is designed to be used in the framework of private and personal relationships. This can be deduced from the wording of Article 239 of the Spanish Code of Commerce, which states that “*traders may take up an interest in one another's operations, contributing the amount of capital the parties may agree on, and participating in the profits and losses in whatever proportion they may determine.*”

The second paragraph of Article 1.2 of Regulation 1082/2012, approving the secondary regulations implementing Law 35/2003 on Collective Investment Schemes, makes specific reference to participation account agreements as well. It states that any persons or entities which, making use of advertising and determining investors' returns according to collective results, raise funds for management using participation account agreements or any form of co-ownership of assets and rights, will be subject to Law 35/2003.

Therefore, the use of participation accounts as a method for raising funds from the public in order to manage and invest them in the manner stated, fixing they yield for the investor based on collective results, would be expressly included within the objective scope of Law 35/2003, on Collective Investment Schemes and its implementing provisions, being an activity which requires a license of the type regulated by above-mentioned Law and can, therefore, only be carried out by a collective investment scheme.

### **3.7 Can a registered PFP have a market place on their website where investors can buy and sell investments in projects?**

### **CNMV's Answer**

Article 51 of Law 5/2015, which regulates both the main and ancillary services that a PFP may provide, does not provide for the possibility of a PFP being able to set up a virtual site in the manner of a secondary market where investors might buy and sell the debentures, shares, participations or loans previously acquired through a PFP. Furthermore, Article 52 expressly prohibits PFPs from providing financial services exclusively reserved to investment firms.

On the other hand, Article 51.2 does provide for the possibility of a PFP setting up remote communication channels to allow users, investors and promoters to contact one another before, during and after a project has been financed.

Therefore, in order to enhance the liquidity of an investment, it is allowed to post information about the existence of a market place on a PFP's website. This market place would not be a secondary market *per se*, and would merely consist of the publication of announcements from investors who wish to express their intention to sell their investment in a PFP project. Under no circumstances may the offer price appear. In the information provided by the PFP there must also be an express warning



that the PFP's role is limited to facilitating communication between investors (potential sellers) and possible users (potential buyers). The PFP must also indicate clearly that any contact between investors, and any possible execution of the sale, must be made independently from and without any intervention of the platform, and in accordance with the general rules governing the transferability of the instrument used for the financing (securities, loans, participations). Any interested parties should make direct contact with the offeror and reach a bilateral agreement. The offeror should provide potential buyers with any available information regarding the promoter, or at least assist the potential buyer where to find that information.

### **3.8 Can projects launched in a registered PFP consist of financing operations forming part of a company's regular business activities?**

#### **CNMV's Answer**

No. The financing applied for, in accordance with Article 49. 1 (c) of Law 5/2015, must be used to finance a specific project of the promoter.

### **3.9 Can projects launched in a registered PFP consist of financing a company in operation? For example, can a capital increase be carried out through a PFP?**

#### **CNMV's Answer**

Yes. While it is normal for a PFP to launch projects for the launch of a start-up or a new business model in general, the raising of financing by an already functioning company may also be considered as a project as far as it is a specific for the promoter, and it is only of a business, training or consumer nature, as stated in Article 49.1 (c) of Law 5/2015 (for example, a hotel business wishing to acquire or build a hotel, expand it, or equip it with certain sports facilities).

If the same promoter were to use a PFP on more than one occasion to obtain financing for different projects, they must meet the following requirements:

- The projects must be consecutive. No promoter can launch more than one project at once in a PFP (Article 68.1 of Law 5/2015) and each project must set a financing target and a maximum term for being able to participate in the project (Article 69.1 of Law 5/2015).
- The projects must be different and separate in every aspect.
- The projects must take into consideration the time and quantitative limits established in Articles 68 and 69 of Law 5/2015.

### **3.10 Can a PFP establish an intermediary mechanism (a trustee) to represent the investors or even make the investment?**

**CNMV's Answer**

No. Law 5/2015 is based on the relationship between the investor and the promoter being peer to peer with the PFP being the only intermediary. The PFP must be neutral and consider both promoters and investors as its clients (Article 60.1 and 2 of Law 5/2015).

Specifically, Article 49 (b) of Law 5/2015 states that crowdfunding projects must be carried out by promoters who are natural or legal persons, applying for financing on their own behalf. Similarly, Article 50 of Law 5/2015 states that the companies that are going to issue the securities or participations are the promoters while the borrowers are natural or legal persons. If an intermediary company had a manager designated by the PFP itself, that would give rise to a conflict of interests since neither their independence from the PFP nor their defence of investors' interests could be guaranteed.

**3.11 Can the PFP continue to provide services to the promoters once the financing has been obtained (for example, legal advice, marketing advice, or business plans)?**

**CNMV's Answer**

Yes, albeit to a limited extent.

Article 55 of Law 5/2015 states that a PFP must have as its sole corporate purpose the performance of the activities they are intended for (main services and ancillary services) according to the provisions of that Law and, if also authorised, the activities of a hybrid payment entity.

The ancillary services that a PFP is allowed to carry out are set out in Article 51.2. These include advising promoters regarding the launching of the project, including the areas of information technology, marketing, advertising and design, project analysis, and risk level determination, or the provision of the parts of the contract models required for participating in the projects (legal advice).

Since the corporate purpose is exclusive, ancillary services other than those listed in Article 51.2 may not be provided. Neither may services be provided for projects other than those for which the financing has been requested.

Law 5/2015 says nothing in respect of when the provision of these ancillary services must cease, so they may continue to be provided after the promoter has obtained the financing.

**3.12 Can a registered PFP launch projects for promoters from outside the European Union?**

**CNMV's Answer**

No. Article 67.1 of Law 5/2015 states that: *"A legal person promoter must be*

*legitimately incorporated in Spain or in another Member State of the European Union. In the case of a natural person, their tax residence must be in Spain or in another Member State of the European Union”.*

Therefore, projects of promoters from outside the European Union may not be included in any PFP authorised and registered with the CNMV.

### **3.13 Can a non-registered platform launch projects for promoters outside the European Union?**

#### **CNMV's Answer**

Yes. In the case of a non-registered platform, projects of promoters from outside the European Union may be launched. However, such a platform cannot use the name “Plataformas de Financiación Participativa” or the acronym “PFP”, which are only reserved for CNMV authorised and registered PFPs (Article 48 of Law 5/2015).

Moreover, by being unregulated platforms falling outside the CNMV's scope of supervision, their investors do not enjoy the protection measures established by Law 5/2015.

The CNMV publishes a list of entities which neither have any kind of authorisation nor are registered for any purposes with the CNMV, and which may be carrying out some type of fund-raising activity or providing services of a financial nature. The list is available for consultation at the following link:

[Warning issued by CNMV: List of other entities](#)

## **4. AUTOMATED ADVICE AND PORTFOLIO MANAGEMENT**

### **4.1 Is authorisation and registration with the CNMV necessary to carry out automated advice and automated portfolio management activities?**

#### **CNMV's Answer**

The performance by a FinTech company of automated advice and/or automated portfolio management means the performance of one or a number of the investment services reserved to investment firms which hold the appropriate license granted by the CNMV, and to credit institutions and managers of collective investment schemes authorised to provide investment services, provided that the advisory activity refers to specific instruments and is carried out in a manner that takes into account the personal circumstances of the investor.

Depending on the business model of the company carrying out automated advice and/or automated portfolio management activities, one or several investment services are provided.

In the most straightforward case, the company only advises on matters of investment (Article 140 (g) of the Recast Text of the Securities Market Act). This business model means that the company will only recommend portfolios of financial instruments for its client and it will be the client who pays for the service. Subsequently the client may set up the recommended portfolio through the relevant investment firms. Investment advice may be provided by broker-dealers (SV), brokers (AV), portfolio management firms (SGC), and financial advisory firms (EAFI) (Article 143 of the Recast Text of the Securities Market Act), as well as credit institutions and managers of collective investment schemes (SGIIC) authorised to provide such investment services (Article 145 of the Recast Text of the Securities Market Act). Of the above mentioned types of entities, the EAFI is the simplest and, in principle, the one that has fewer requirements when applying for a license with the CNMV.

If the company also sets up an investment portfolio on behalf of its clients, this company would be providing the investment service known as discretionary and individualised investment portfolio management on behalf of its clients (Article 140 (d) of the Recast Text of the Securities Market Act). Discretionary portfolio management services may be provided by broker-dealers, brokers, and portfolio management firms (Article 143 of the Recast Text of the Securities Market Act), as well as credit institutions and managers of collective investment schemes authorised to provide such investment services, as in the previous case.

To carrying on the activity of discretionary portfolio management, the portfolio management firm is the simplest of the above mentioned types of entities and, in principle, the one that has fewer requirements governing its setting up.

The fact that the advice or portfolio management is automated does not alter in any way the need for the investment service to be provided in accordance with applicable rules of conduct and, in particular, in compliance with the need for clients to take a suitability test.

#### **4.2 Does a FinTech company engaged in the management of PAM/MAM accounts need to be authorised, registered and supervised by the CNMV?**

##### **CNMV's Answer**

Yes. MAM (Multi-Account Manager) and PAMM (Percentage Allocation Management Module) accounts are trading accounts managed by third parties, normally experienced traders, rather than being managed by the investors themselves. This means that whoever manages these accounts, it opens and closes positions on behalf of the investor. In exchange for these services, the manager normally receives a percentage of the money earned by the operations in which they have participated. The difference between the two types of accounts is that MAM allows the manager to assign different weightings to the investment of each client and assign different leverages to their accounts. In the case of PAMM accounts, this percentage is determined in turn by the percentage of the investment that each client represents in the account as a whole.

MAM/PAMM accounts mean that, once the investor chooses who he wishes to follow

and mandates the manager to execute the sale and purchase orders of the various financial instruments, investment decisions are made without the need for the investor to intervene. The document ESMA/2012/382 “MIFID Questions and Answers” of 22 June 2012 considers that the use of automated trading systems falls within the scope of investment portfolio management. The same document recognises exceptions to the above when there is specific authorisation from the client to execute each transaction, or when the client determines the criteria under which the system sends the various orders to the market.

Given that MAM/PAMM accounts are considered as automated trading systems to which the aforementioned exceptions do not normally apply, the CNMV understands that this service must be offered to investors under a discretionary portfolio management agreement (Article 140 (d) of the Recast Text of the Securities Market Act). Also, before signing the agreement, the suitability of the investor should be assessed by the entity authorised to provide this investment service, and all other rules of conduct applicable to the provision of the service must be complied with.

Therefore, for a FinTech company to be able to manage MAM/PAMM accounts, it would need to set up as a broker-dealer, broker, or portfolio management firm (Article 143 of the Recast Text of the Securities Market Act) or as a credit institution or a manager of collective investment schemes able to provide such an investment service.

Of the above mentioned types of entities, the portfolio management firm is the simplest and the one that has fewer requirements when applying for a license with the CNMV.

#### **4.3 Does a FinTech company whose business is based on marketing the investment strategies of other investors (social trading) need to be authorised, registered and supervised by the CNMV?**

##### **CNMV’s Answer**

Yes. This company’s business model consists on setting up an online platform where it offers various investment strategies of other investors or of other successful managers that may be imitated or replicated by clients wishing to establish their investment strategies for the creation of their own portfolios.

The document ESMA/2012/382 “MIFID Questions and Answers” of 22 June 2012 considers that the use of automated trading systems falls within the scope of investment portfolio management. The same document recognises exceptions to the above when there is specific authorisation from the client to execute each transaction, or when the client determines the criteria under which the system sends the various orders to the market.

Social trading platforms are considered as automated trading systems to which the aforementioned exceptions do not normally apply.

The CNMV understands that this service must be offered to investors under a

discretionary portfolio management agreement (Article 140 (d) of the Recast Text of the Securities Market Act). Also, before signing the agreement, the suitability of the investor should be assessed by the entity authorised to provide this investment service, and all other rules of conduct applicable to the provision of the service must be complied with.

Therefore, for a FinTech company to be able to carry out the activity known as social trading, it would need to be set up as a broker-dealer, broker, or portfolio management firm (Article 143 of the Recast Text of the Securities Market Act) or as a credit institution or a manager of collective investment schemes able to provide such an investment service.

Of the above mentioned types of entities, the portfolio management firm is the simplest and the one that has fewer requirements when applying for a license with the CNMV.

#### **4.4 When is the sale of software to retail investors considered to be an investment service and therefore has to be performed by a CNMV authorised, registered and supervised company?**

##### **CNMV's Answer**

The direct marketing of an algorithm/software to retail investors does not require CNMV authorisation or registration. However, it is necessary to bear in mind that the parametrisation of the algorithm by the clients themselves would require clients not only to have a certain level of technical training but also sufficient financial knowhow to be able to use the algorithm prudently and personalise the results adequately according to their risk profile. Therefore the indiscriminate sale of this type of software to all types of investors, especially retail investors, is not advisable.

However, if the company marketing the algorithm/software also parametrises it based on information provided by the client, the activity would be considered as the provision of investment advice (Article 140 (g) of the Recast Text of the Securities Market Act) and its performance would be subject to prior CNMV licensing. If the retail investor also wished to put into practice the algorithmic trading strategy provided by the marketed software, the investor would have to go to an authorised investment firm for them to execute the trading.

Investment advice may be provided by broker-dealers, brokers portfolio management firms and financial advisory firms (EAFI) (Article 143 of the Recast Text of the Securities Market Act), as well as credit institutions and managers of collective investment schemes authorised to provide such an investment service. Of the above mentioned types of entities, the EAFI is the simplest and the one that has fewer requirements when applying for a license with the CNMV.

## 5. NEO-BANKS

5.1 Can a FinTech company market products of more than one entity authorised, registered and supervised by the CNMV, or of more than one credit institution authorised, registered and supervised by the Bank of Spain?

### CNMV's Answer

If the FinTech company markets products considered to be financial instruments, its activity will be subject to the provisions of the Spanish Securities Market Act.

In this case, the company must have authorisation to carry out marketing activities, or be appointed as an agent of an authorised entity, in accordance with Article 144.1 of the Securities Market Act, which states that *“only entities authorised to provide such services, either themselves or through agents regulated under Article 146, may professionally market investment services and provide client acquisition services”*.

With regard to the possibility of a FinTech company being an online agent or digital agent of an authorised entity, Article 146.2 states that investment firms may designate agents, although the agents of an ESI must act exclusively for one ESI or for a number in the same group. Thus, the same company may not be an agent for more than one investment firm and, therefore, may not market investment services in financial instruments provided by more than one ESI in an aggregated manner.

If a company wishes to market financial products of more than one ESI or credit institution authorised to provide investment services, that company must have authorisation as a broker-dealer, broker, credit institution or manager of collective investment schemes authorised to provide investment services. Of the above mentioned types of entities, the broker is the simplest and the one that has fewer requirements when applying for a license with the CNMV.

## 6. CRYPTOCURRENCIES AND ICOs

In addition, it is recommended to consult [CNMV's Criteria in relation to ICOs \(20 September 2018\)](#)

6.1 What opinion does the CNMV have regarding investment in cryptocurrencies?

### CNMV's Answer

The CNMV has published a joint warning with the Bank of Spain regarding the risks of investing in cryptocurrencies and initial cryptocurrency offerings. The warning is available for consultation at the following link:

[Joint press statement by CNMV and Banco de España on “cryptocurrencies” and “initial](#)

[coin offerings” \(ICOs\)](#)

The ESAs have also published a joint warning, available via the following link:  
[ESMA, EBA and EIOPA warn consumers on the risks of Virtual Currencies](#)

## 6.2 What are CNMV's criteria for initial coin offerings (ICOs)? (20 September 2018)

### CNMV's reply

CNMV has published its [criteria on cryptocurrencies and ICOs in a Communiqué addressed to professionals in the financial sector](#).

This document is supplemented by [CNMV's Criteria in relation to ICOs](#) published on 20 September.

## 6.3 Is it possible to set up a CNMV registered fund which invests directly in cryptocurrencies?

### CNMV's Answer

This type of funds would have legal space under Law 22/2014 which regulates not only venture capital firms but also closed-ended collective investment schemes and their managers.

Investment could be made through a closed-ended collective investment scheme (EICC) in which, in accordance with Article 2.1 of Law 22/2014, the divestment policies of its participants or partners must meet the following requirements:

- divestment must take place simultaneously with respect to all investors or participants
- investors or participants will be remunerated according to the rights corresponding to each one, in accordance with the terms established in the articles of association or regulations for each class of shares or participations.

To set up this type of entity, which may take the form of funds (FICC) or undertakings (SICC), involves meeting a large number of requirements and conditions, among which is the restriction on the marketing of shares or participations of this type of entities to professional investors (as defined in articles 205 and 206 of the Recast Text of the Securities Market Act).

As well as being registered with the CNMV (Article 8 of Law 22/2014), FICCs must be managed either by a manager of a closed-ended collective investment scheme (SGEIC), or by a manager of a collective investment scheme (SGIIC) which is authorised to manage this type of funds, or by an international SGIIC with a European passport to operate in Spain able to manage a closed-ended investment fund. No minimum equity is established for setting up an FICC (Article 38.2 of Law 22/2014).

An SGEIC must have a minimum initial share capital, fully paid up, of €125,000. There



is also the possibility of using a self-managed SICC as defined in Articles 45 and following of Law 22/2014, which, in accordance with Article 48.1, requires a minimum initial share capital, fully paid up, of €300,000.

It should be noted that, according to the provisions of Article 85 of Law 22/2014, FICCs and SICCs are not subject to supervision by the CNMV (with the exception of self-managed SICCs).

However, in spite of the theory being provided for by this instrument, investment by FICCs and SICCs in cryptocurrencies poses a number of practical issues with regard to how to comply with regulations covering asset valuation, liquidity management, and assurance of safeguarding. Regarding asset valuation, the procedure to be used for valuing cryptocurrencies would need to be determined, bearing in mind their volatility and the fragmentation and lack of regulation of the underlying cryptocurrency market. With regard to liquidity, a way of managing liquidity and controlling liquidity risk would have to be found, in order to ensure that any obligations in respect to leverage that may have been incurred can be met. It is also necessary to analyse how the safeguarding of this type of assets is to be assured; for example, how is the software to be validated, how will passwords be safeguarded, or how is the risk of cyber-attack to be managed?

In particular, with regard to the practical difficulty of safeguarding assets, and given that movements of virtual currencies can in some cases be made anonymously and without clients being properly identified, the obligations of disclosure for the prevention of money laundering also need to be taken into account. It would be advisable to contact SEPLAC (the Spanish AML authority), to know whether an FICC needs to meet any of the obligations on disclosure called for by Law 10/2010, on the Prevention of Money-Laundering and the Financing of Terrorism.

The CNMV is watching the phenomenon of the increase in investment in virtual currencies with concern due to the possible risks that such investment may entail in terms of protecting investors, especially retail investors, and the stability and integrity of the markets. We recommend you consult the actions (including warnings) of the CNMV, ESMA and the ESAs:

On 14/11/2017, [ESMA warned of the risks of what are known as ICOs \(initial coin offerings\)](#)

On 15/01/2018, [the CNMV released a statement from the SEC with its Chairman's views on cryptocurrencies \(initial coin offerings or ICOs\)](#)

On 8/2/2018, [the CNMV \(together with the Bank of Spain\) issued a statement regarding cryptocurrencies and initial coin offerings \(ICOs\) and the CNMV offered its views on cryptocurrencies and ICOs to financial sector professionals.](#)

On 12/2/2018, [the ESAs \(ESMA, EBA and EIOPA\) published a warning to investors regarding the risk of acquiring virtual currencies.](#)

Both the CNMV and ESMA continue to analyse the whole global phenomenon of ICOs

and virtual currencies, their implications, and how they fit in with EC legislation.

#### 6.4 What are the requirements for establishing a trading platform (exchange) for cryptocurrencies or other cryptoassets?

##### CNMV's reply

Currently there is no specific regulation on the so called trading platforms for cryptocurrencies or other cryptoassets or their activity.

However, CNMV considers that, as a minimum, these types of platforms should be subject to rules related to custody, registration, management of conflicts of interest between clients and transparency on fees (in addition to anti-money laundering regulations)<sup>1</sup>. Therefore, CNMV recommends that these platforms voluntarily apply the principles of securities market regulations relating to the aforementioned matters in order to ensure the proper functioning of their activity.

The foregoing, however, only refers to cases in which the platform's activity focuses on cryptocurrencies or other cryptoassets that are not considered financial instruments. Insofar as the assets with respect to which these platforms carry on brokerage or trading activities should be considered financial instruments (in accordance with Article 2 of the consolidated text of the Securities Market Act), securities market regulations should be applied to them. One of the consequences would be that in such a case authorisations should have been granted to these platforms in order to carry on their activity, including where appropriate, authorisation as trading venue (such as a regulated market, a multilateral trading system or an organised trading facility) or as an investment firm (IF) or credit institution that operates as a systematic internaliser. The management of the trading venue should be carried out by an IF or a market operator and would be subject in general to market regulations and CNMV's supervisory scope.

<sup>1</sup> The fifth revision of the European Anti-Money Laundering Directive, which will enter into force in 2020, specifically extends its scope to virtual currency exchange service providers to fiat currency exchange service providers – exchanges – and to e-wallet custodial service providers.

#### 6.5 What is the nature and scope of action of the authorised entity to provide the investment services referred to in Article 35(3) of the consolidated text of the Securities Market Act in certain offers intended for the general public using any form of advertising exempted from prospectus requirements? (20 September)

##### CNMV's reply

CNMV considers that this requirement for action by the authorised entity can be met in two ways:

- action by an entity authorised to provide investment services on the occasion of each subscription or acquisition of the securities or financial instruments in question as a placement agent, broker or adviser, subject to the rules applicable in each case,
- or through the action of an entity authorised to provide investment services, generally validating and supervising the offer, in particular, the

information provided to investors and the placement or marketing procedure used (without the need for intervention by an authorised entity on the occasion of each subscription or acquisition). With regard to the validation of information, the authorised entity must ensure that such information is clear, impartial and not misleading and that it refers to the characteristics and risks of the securities issued, as well as the company's legal, economic and financial situation, in a sufficiently detailed manner to allow the investor to make a well-founded investment decision.

It is also considered appropriate that the authorised entity should not proceed to validate the information to be provided to investors unless it includes prominent warnings about the novel nature of registration technology and the fact that custody of the instruments is not carried out by an entity authorised to provide investment services.