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CNMV considerations on cryptocurrencies and ICOs addressed to market professionals

Offering or marketing of cryptocurrencies

CNMV has identified and detailed below various means by which bitcoins or cryptocurrencies are marketed or acquired (the list should not be considered closed; constant innovation in products and channels means that further forms of exposure to bitcoins or other cryptocurrencies may arise):

- **“Direct” marketing.** There are several possibilities, the most frequent being the acquisition through platforms operating on the Internet and through the so-called cryptocurrency “ATMs”. In both instances it might be the case, indeed often so, that the investor does not actually directly own the cryptocurrencies, but rather only has rights vis-à-vis the unsupervised platform or intermediary. That may expose purchasers to the risk of insolvency of the intermediary and to the risk of the intermediary not complying with the basic principles of proper record-keeping, diligent custody and recording of assets, and the proper management of conflicts of interest.

Additionally, with regard to this means of acquiring virtual currencies, the risk of money laundering should be taken especially into account, without prejudice to the fact that providers of services involving the exchange of this type of virtual currency for fiat money and providers of key custody services (virtual purses) may also be subject to money-laundering regulations.

- **Through CFDs.** Another means of marketing or acquiring cryptocurrencies are contracts for differences (CFDs).

In this connection, market professionals should bear in mind that this type of contract usually entails a high risk (see [CNMV warning](#) and [ESMA statement](#)).

Moreover, the entity offering these products should be authorised by CNMV to provide investment services and to meet, on offering such services, all reporting obligations and other applicable rules of conduct.

- **Through futures, options and other derivatives.** An example of this are the bitcoin futures on several US markets authorised by the Commodity Futures Trading Commission (CFTC). It should be borne in mind that the active marketing of these types of products under a public offering (Art. 35 of the consolidated text of the Securities Market Law, TRLMV by its Spanish abbreviation) by market professionals among unqualified (retail) investors might require a prospectus approved by CNMV or by another European Union authority that has been subject to passporting arrangements.

- **Through specific investment funds or other collective investment vehicles that invest in cryptocurrencies.** These types of vehicles or investment funds should be approved or registered by CNMV. So far, no such fund with these characteristics has been registered by CNMV and the funds that could legally, were they authorised, invest in cryptocurrencies can generally not be sold to retail investors.
- **Through acquiring structured bonds whose underlying asset is a cryptocurrency** (Exchange Traded Products or ETPs, and Exchange Traded Notes or ETNs). The marketing under a public offering regime of this type of security requires the approval by the supervisors of an explanatory prospectus that has also been subject to the above-mentioned passporting arrangements.

ICOs

The criteria set out below, which seek to offer initial guidance about the consequences of so-called “Initial Coin Offerings” (ICOs)¹ from the regulatory standpoint, are subject to potential coordinated approaches or regulatory developments at the national, European or international level. CNMV, like all other European and international supervisors, is aware of the difficulty that fitting the instruments issued in these operations in the current legislation may entail, and of the possible unsuitability of the regulatory framework for some new business and digital collaboration models. The difficulty of applying the rules in a digital and essentially transnational context, moreover, makes an international cooperation effort necessary.

In any event, CNMV is sensitive to the potential benefits that technological development and innovation may bring to financial services and it will have particular regard to the principle of proportionality (numerous ICOs are of a small or medium-sized volume) on exercising its supervisory functions.

Without prejudice to the foregoing, CNMV considers that a good number of the operations structured as ICOs should be treated as issues or public offerings of transferable securities. Among other reasons, this is based on the broad concept of transferable security as contained in Art. 2.1 of the TRLMV.²

The following factors are deemed important for assessing whether transferable securities are being offered through an ICO:

- That tokens assign rights or expectations of a share in the potential rise in the value or profitability of businesses or projects or, in general, that they constitute or assign rights equivalent or similar to those proper to shares, bonds or other financial instruments included in Art. 2 of the TRLMV.

¹ See the joint statement by CNMV and Banco de España on this same date.

² Any patrimonial right, regardless of its name, which, because of its own legal configuration and system of transfer, is susceptible of being traded in a generalised and impersonal way on a financial market.

- In the event of tokens that entitle access to services or to receiving goods or products, that they are offered referring explicitly or implicitly to the expectation that the purchaser or investor will obtain a profit as a result of its rise in value or of some remuneration associated with the instrument or mentioning its liquidity or tradability on equivalent or allegedly similar markets to the securities markets subject to regulation.

In the case of ICOs which, on the basis of criteria such as those mentioned above, qualify as transferable securities or financial instruments, it should be recalled that the related national or European rules will be applicable to them, essentially those contained in, relating to or arising from MiFID II, the Prospectus Directive and the Alternative Investment Fund Managers Directive.

It should be noted, in particular, that in the event of ICOs not considered to be public offerings (because they are either aimed at fewer than 150 investors, set a minimum investment of €100,000 or involve a total amount below €5 million)³ the provisions of Art. 35.3 of the TRLMV would be applicable: if the placement is made using whatsoever form of advertising,⁴ an entity authorised to provide investment services should intervene in relation to the marketing.⁵

Lastly, it should be pointed out that, irrespective of the place of issuance of the tokens, if the issue complies with the aforementioned criteria (and may, therefore, qualify as a transferable securities issue), its active marketing in Spain (an indication of which may, for instance, be the availability of websites in Spanish offering the tokens) would also be subject to the aforementioned rules.

³ Art. 35.2 of the TRLMV.

⁴ The promotion of the offer through websites or social media shall be deemed to be advertising.

⁵ This obligation shall not be applicable to duly authorised crowdfunding platform activity.