



## PRIOR PUBLIC CONSULTATION CIRCULAR ON THE ADVERTISING OF CRYPTOASSETS

5 April 2021

### How to respond to this prior consultation

The Spanish National Securities Market Commission invites you to send your comments to this document, and in particular, to the issues contained in section 6, which details the key aspects to be regulated under the future Circular on the advertising of cryptoassets.

This procedure is carried out prior to the usual public consultation to be launched by the CNMV on the specific draft text of the aforementioned Circular.

The deadline for interested parties to send their comments to this prior consultation is **16 April 2021**.

Comments may be sent to the following email address: [fintech@cnmv.es](mailto:fintech@cnmv.es)

The comments received will be published after the end of the prior public consultation period. If anyone does not wish their comments, either in full or in part, to be made public, they should expressly state so in their own reply and properly identify, where appropriate, which part they do not wish to be made public. For this purpose, generic confidentiality warnings included in emails will not be considered as an express statement that the comments submitted are not intended to be made available to the public.

#### **1. INTRODUCTION**

In order to enhance investor protection, final provision two of Spanish Royal Decree-Law 5/2021, of 12 March, on extraordinary measures to support business solvency in response to the COVID-19 pandemic has included a new Article 240 bis in Spanish Royal Legislative Decree 4/2015, of 23 October, approving the Recast Text of the Spanish Securities Market Act (SMA), to grant powers to the Spanish National Securities Market Commission (CNMV) in order to subject to administrative control the advertising of cryptoassets or other assets and instruments presented for the purpose of investment, with comparable advertising dissemination, even if they are not activities or products provided for in the SMA. The CNMV is also authorised to define by means of a Circular the objective and subjective scope, as well as the control procedures and mechanisms to be applied.

In this regard, by means of the authorisation directly granted to the CNMV under Article 240 bis of the SMA, the CNMV is going to issue a Circular that defines the

scope as well as the powers of the CNMV on the supervision and control of the advertising of cryptoassets.

## **2. PUBLIC CONSULTATION**

In order to enhance the participation of citizens in the procedure to develop legislation, the applicable regulations, and in particular, Article 133 of Spanish Law 39/2015, of 1 October, in relation to Article 26 of Spanish Law 50/1997, of 27 November, of the Government, establishes the obligation, in general, of launching a prior public consultation on the drafting of the text of legislation with the force of Law and regulation.

In this case, whereby the advertising of cryptoassets is to be regulated by the CNMV Circular, the public consultation is mandatory as it exercises the regulatory “per saltum” power. The short deadline for the submission of comments, which ends on 16 April, is due to the urgency of the regulation, the evidence of which is the reform of Article 240 bis which has been approved by means of a Royal Decree-Law.

This consultation seeks the opinion of persons particularly affected by the future regulation and of the most representative organisations with regard to:

- a) The problems that the initiative intends to resolve.
- b) The need for and advisability of its approval.
- c) The objectives of the regulation.
- d) Possible regulatory and non-regulatory alternative solutions.

## **3. PROBLEMS TO BE RESOLVED**

Cryptoassets – understood to be digital representations of value or rights, which can be transferred and stored electronically by means of Distributed Ledger Technology or otherwise, has an increasing presence in our financial systems, without the existence, as yet, of a specific, appropriate regulatory framework at European level. The supporting technologies are transforming the financial services, and are enabling important innovations.

However, to date, cryptocurrencies and cryptoassets, in general, are increasingly being offered for investment purposes, both to specialised investors and the general public.

On 9 February 2021, the CNMV and the Bank of Spain issued a joint public statement, further to another public statement issued in 2018, warning about the risks that these new types of assets pose to participants in the financial system, and in particular, to small investors. The public statement highlights the complexity, volatility and the potential illiquidity of these types of investments.

The key element that requires regulatory action is the possibility of promotional activities related to cryptoassets, when offered as an investment, not including objective information on the product and its risks. It has been observed that the advertising of these products addressed to retail clients in the past few months has

been carried out through a wide and increasing range of means and degree. Those who purchase these products need to be aware of their risks and that, in some cases, such an investment could lead to significant losses due to price fluctuations, situations of illiquidity, or of total loss due to cyber-attacks or shortcomings in custody.

#### **4. NEED AND ADVISABILITY**

The amendment of Article 240 bis of the Spanish Securities Market Act arises from the need to adequately protect investors and to ensure that they are duly informed of the characteristics and risks of the cryptoassets offered to them, a need that is evidenced by the amendment itself, which has been approved by means of a Royal Decree-Law.

#### **5. PURPOSE**

The purpose of the Draft Circular is to develop the standards, principles and rules to which the promotional activity related to cryptoassets will be subject to, and in particular, to define the objective and subjective scope, to specify the advertising activity which must be subject to prior administrative authorisation and to establish the tools and procedures which will be used to supervise the promotional activity of cryptoassets.

It is important to highlight that the aforementioned Circular will not contain any rules related to the products themselves, or on their suppliers or characteristics, which will continue being unregulated and unsupervised, but exclusively related to the requirements that the advertising activity intended for investment purposes must comply with.

#### **6. POSSIBLE REGULATORY AND NON-REGULATORY ALTERNATIVE SOLUTIONS**

The option of not developing a specific regulation on the matter and replacing it with criteria or guidelines on good practices has been ruled out, given that Article 240 bis requires the development through a Circular.

With regard to the development of the Circular, the CNMV is considering various alternatives:

##### **6.1. Scope**

In order to define the objective scope, the CNMV is assessing the possibility of such scope being the advertising activity addressed to potential investors residing in Spain which draws the attention to or offers cryptoassets. Likewise, it may be necessary to exclude from such objective some professional activities (white papers, professional investment recommendations and analyses or offers to professionals), non-fungible assets or those which are exclusively a means of payment.

With regard to the subjective scope, the CNMV is considering the inclusion of cryptoasset service providers, whose definition would be contained in the Circular, irrespective of their home State, and of advertising companies acting on behalf of these service providers.

Q1: Do you consider that the objective and subjective scopes are appropriate? What elements should be included or excluded?

## 6.2. Forms of administrative control

With regard to the forms of administrative control, the CNMV is in favour of requiring prior administrative authorisation only for mass campaigns addressed to the general public carried out through the media, physical media or certain virtual media. Another option applicable to these types of campaigns would be the establishment of a prior notification system. The remaining promotional activities would be subject to the post supervisory action of the CNMV, which may require the cessation or amendment of the advertising activity, in accordance with the terms set out in the Circular. This distinction is due to efficiency and agility reasons, while ensuring prior supervision in cases of mass advertising.

Q2: Do you consider it appropriate to request prior authorisation only for certain mass campaigns? In what cases do you consider that such distinction should be applied?

All advertising campaigns would be subject to the clarity and content objectives detailed in the Circular. Thus, the advertising must be clear, balanced, fair and not misleading. This is especially relevant in the performance information, in particular when reference is made to historical performance, and to information on costs. Likewise, it is expected that the advertising campaigns will be subject to the mandatory inclusion of warnings on the risks of investing in cryptoassets. These warnings will be adjusted and summarised in each marketing communication, as well as in extensive ancillary documentation.

Q3: For the purposes of complying with the clarity and content objectives, what elements do you consider most relevant?

Q4: With regard to the risks, what elements do you consider that the text of the mandatory warning should include? Do you agree that this text should be included on a compulsory and adjusted basis, formatted and positioned in the advertising piece? If you do not agree, please give the reasons.

Finally, the regulation will also include a regime for the CNMV to supervise the advertising, which will detail the procedures and deadlines for gathering information from the reporting parties, require the cessation or amendment and impose sanctions, where appropriate. To this end, parties must have the information and the documentation of the ongoing advertising campaigns available, and of those carried out in the last year. In view of the potential impact of the advertising campaigns, in the event of requesting cessation or amendment, the deadlines for taking action or gathering information should be established, and initially, are not expected to be more than three days. This deadline could vary according to the content or the advertising piece concerned.

Q5: Do you agree with the overall approach of action for the supervisory regime, as well as with the need to have the capacity to act with the necessary agility? What elements should be taken into account to facilitate the supervisory activity of the CNMV?

Q6: What other elements do you consider relevant for the development of the Circular on the advertising of cryptoassets?