

## CNMV Circular 1/2022, of 10 January, on the advertising of crypto-assets presented as a means of investment

On 17 January 2022, the Spanish Official Gazette (*Boletín Oficial del Estado*) published Circular 1/2022, of 10 January, of the Spanish Securities Market Commission (*Comisión Nacional del Mercado de Valores*, "CNMV") on the advertising of crypto-assets presented as a means of investment (the "Circular"). The Circular mainly sets out the requirements, principles and criteria applicable to advertising crypto-assets as an investment. We highlight the following about the Circular:

- It does not regulate crypto-assets or their issuance, providers or characteristics, but exclusively advertising activities aimed at offering them as an investment.
- It defines the concepts of "crypto-asset" and "crypto-asset services" for the first time in Spain and provides an open list of such services as an example.
- It regulates the content and format of advertising campaigns, which must include clear, balanced, impartial and non-misleading content, as well as information on the risks and certain warnings.
- It expressly excludes from its scope of application the advertising of crypto-assets that the Securities Market Law<sup>1</sup> considers financial instruments—which have their own regulation—, that are similar to the current concept of utility tokens under the MiCA proposal<sup>2</sup> or that are non-fungible tokens, amongst others.
- It applies not only to the advertiser, but also to anyone involved in the creation and dissemination of cryptocurrency advertising, such as communication agencies or the media, influencers, exchange platforms and social media platforms.
- It introduces a prior notification system for mass advertising campaigns (in principle, those aimed at 100,000 people or more) and gives the CNMV the power to veto campaigns if it considers that such campaigns do not comply with the Circular.
- It establishes documentary and record-keeping obligations, empowering the CNMV to require that parties subject to the Circular provide specific information and documentation regarding their advertising activities and to request that such activities terminate or be rectified, regardless of whether or not they are part of mass advertising campaigns.

► The Circular is available [here](#).

<sup>1</sup> Consolidated text of the Securities Market Law, approved by Royal Legislative Decree 4/2015 of 23 October.

<sup>2</sup> Proposal for a Regulation on Markets in Crypto-assets, and amending Directive (EU) 2019/1937.

## 1. OVERVIEW

### 1.1 INTRODUCTION

The Circular is issued based on the powers Royal-Decree Law 5/2021<sup>3</sup> conferred on the CNMV, which added article 240 *bis* to the Securities Market Law, allowing the CNMV to (i) submit to authorisation or other means of administrative control, the advertising of crypto-assets or other assets and instruments offered as an investment item, even if they are not subject to the Securities Market Law; and (ii) develop through a circular the scope and specific control mechanisms to which advertising of crypto-assets will be subject, amongst other issues.

The main objective of the Circular is to **develop the rules, principles and criteria applicable to advertising that depicts crypto-assets as an investment opportunity**, provided they are not financial instruments, utility tokens or non-fungible tokens (NFTs). It does not regulate crypto-assets themselves, nor their issuance, providers or characteristics, as these matters are reserved for MiCA.

Other than the communications and considerations issued to date<sup>4</sup>, the Circular is the CNMV's first regulation on crypto-assets. The CNMV intends to comprehensively regulate crypto-asset advertising to be essentially clear, balanced, impartial and not misleading, and which prominently displays the associated risks, especially as crypto-assets currently **pose a challenge in terms of protecting investors** as they are not regulated.

### 1.2 THE CIRCULAR'S OBJECTIVE AND SUBJECTIVE SCOPE

#### 1.2.1 Objective scope

The Circular covers **crypto-asset advertising for investment purposes**, and "advertising activity" means all advertising aimed at investors or potential investors in Spain that, implicitly or explicitly, offers or draws attention to crypto-assets as a means of investment. The Circular presumes on the other hand that **crypto-assets are offered or attention is drawn to them as a means of investment** when their acquisition is promoted or any reference is made to their current or future performance, price or value in a way that implies that they entail an investment prospect, even if they may potentially be used as a means of exchange.

Thus, although the Circular previously **defines "advertising activity" by reference to the definition of the term "advertising" in article 2 of the General Advertising Law**<sup>5</sup>, the fact is that strictly speaking it establishes additional (or not exactly coincidental) terms to those of the legal concept. Moreover, it also uses and defines separately other concepts which, in reality, totally or partially overlap (such as

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<sup>3</sup> Royal Decree-Law 5/2021 of 12 March on extraordinary measures to support business solvency in response to the COVID-19 pandemic.

<sup>4</sup> See, in particular (i) the [joint press statement](#) by the CNMV and the Bank of Spain (*Banco de España*) on cryptocurrencies and initial coin offerings (ICOs) of 8 February 2018, (ii) the [CNMV's considerations](#) on cryptocurrencies and ICOs addressed to market professionals of 8 February 2018, (iii) the [CNMV's criteria](#) in relation to ICOs of 20 September 2018, and (iv) the CNMV's statement on fundraising transactions through ICOs of 26 March 2019 (available [here](#)).

<sup>5</sup> Law 34/1988 of 11 November on general advertising.

"commercial communication", "advertising piece" or "advertising message"), as well as concepts which have been widely further elaborated by case law or advertising self-regulation (such as "advertising campaign"), whose regulatory definition may generate certain difficulties in the correct determination of the advertising message actually conveyed, a legal analysis which must always take into account the context of the communication and its overall view, and which therefore requires **a case-by-case analysis**.

The Circular considers that an advertising activity **is aimed at investors in Spain** when it is carried out by physical means in Spain (through the media, including Spanish websites or domains) or when it is provided in Spanish or in other official languages of Spain, unless, in the latter case, measures are included to prove that the services or products are not accessible to investors in Spain.

**The Circular excludes advertising of crypto-assets from its scope of application** when such crypto-assets:

- (A) Have the nature of financial instruments included in the annex to the Securities Market Law — since they are already specifically regulated, in particular by CNMV Circular 2/2020 of 28 October on advertising investment products and services, which inspired this Circular—.
- (B) Are not suitable as a means of investment.
- (C) Are utility tokens under MiCA, that is, those that give digital access to a good or service and which only their issuer or a limited number of commercial providers with which the issuer has a contractual relationship accept, provided that they are offered with no indication or expectation of appreciation in value or gains.
- (D) Are non-fungible tokens (NFTs), that is, unique crypto-assets that are not fungible with other crypto-assets such that they are not massively offered as a mere object of investment, but rather as collectible assets, works with intellectual property or assets intended only for use in games or competitions, in such a way —the Circular adds— that they are not massively offered as "mere" means of investment.

Additionally, the Circular expressly excludes the following from its objective scope of application (i) "white papers" published in the context of an issuance of crypto-assets, (ii) certain corporate advertising campaigns that contain generic information, (iii) presentations addressed only to analysts or institutional investors to gauge their interest in an issuance, (iv) publications on crypto-assets issued by financial analysts or independent reviewers/commentators that are not sponsored or endorsed, and (v) advertising of technical seminars, courses and conferences on crypto-assets so long as they do not encourage investment in crypto-assets and they are not offered free of charge or for a symbolic price.

### 1.2.2 Subjective scope

The Circular applies to **(i) crypto-asset services providers when they engage in crypto-assets advertising activities; (ii) advertising service providers, including influencers; and (iii) any natural or legal person that acting on their own initiative or on behalf of a third party carries out crypto-asset advertising activities**.

The nationality or domicile of the natural or legal person, or the place from which the advertising activity is carried out, are irrelevant, provided that such activity falls within the objective scope of the Circular insofar as it is aimed at **investors or potential investors in Spain**.

The Circular establishes also a pioneering definition in Spain for the term “**crypto-asset services**”, which refers to professional or business activities relating to crypto-assets, such as (i) trading crypto-assets on platforms; (ii) the purchase, sale or swap of crypto-assets; (iii) advice on investment in crypto-assets; (iv) management of crypto-asset portfolios; (v) any form of remuneration arising from crypto-assets; and (vi) any other services or activities for the distribution of crypto-assets.

Regarding the concept of “**advertising service providers**”, the Circular describes it as a third party that performs a process, service or activity for another obligated party, or connected thereto, in the area of advertising under an advertising contract, as regulated in the General Advertising Law, a contract for the provision of services or an outsourcing agreement. It adds that in any event influencers —i.e. persons who are viewed as having influence or being **experts in social media platforms or in the media itself** who, through referral programmes, offers or commissions of any kind, disseminate promoted advertisements of crypto-assets— shall be included in this concept.

## 2. CONTROL OF ADVERTISING

Advertising campaigns should consider the **nature and complexity of the product being advertised**, the characteristics of the media used and the target audience.

Advertised messages should include **clear, balanced, impartial and non-misleading content, as well as prominent information on the risks of the crypto-asset and certain warning messages**, in particular the following one: “*Investment in crypto-assets is unregulated, may not be suitable for retail investors and the entire amount invested may be lost*”. **If the marketing communication has additional information**, a link or indication of the location of such information shall be included with the following text: “*It is important to read and understand the risks of this investment, which are explained in detail in this site*”.

To this end, **Annex I** of the Circular contains the general principles and criteria that advertising must comply with, while **Annex II** specifies the information on the nature and risks to be provided to potential crypto-asset investors, with a particular emphasis on high-risk investment products, technology-specific risks and legal risks.

## 3. SUPERVISION OF ADVERTISING ACTIVITIES

### 3.1.1 Prior communication of certain advertising activities

**Mass advertising campaigns aimed at investors in Spain must be communicated in advance to the CNMV** using the form available on its website and attaching the documentation and information the Circular requires. Once a period of ten business days has elapsed since the notification, the obligated party can start the mass advertising campaign, unless the CNMV expressly objects within that period. However, the lack of response from the CNMV during this period does not necessarily mean that the this

organism considers that the campaign complies with all the rules contained in the Circular, and it may raise rectifications or other objections at a later stage.

For the purposes of the Circular, **“mass advertising campaigns” are defined as advertising campaigns through any advertising media that are aimed at more than 100,000 people.** However, the Circular empowers the CNMV’s Board to increase this threshold following a specific and properly reasoned analysis, based on the experience gathered once the Circular has been applied in practice.

In addition, **the CNMV may require parties subject to the Circular to notify in advance all their advertising campaigns,** based on their potential impact on the target audience, even if they are not mass advertising campaigns.

### 3.1.2 Request to terminate or rectify the activity

The Circular empowers the CNMV to inform obligated parties of any non-compliance it detects in their advertising activities and **to require that the advertising activity terminate or be rectified.**

In addition, the Circular grants the CNMV the power to require obligated parties to provide **specific information on advertising activities,** whether mass advertising or not, in order to assess compliance with the requirements in the Circular, for which purpose **obligated parties must keep a register** with information and documentation on all advertising campaigns carried out in the past two years. It is important to note that the new record-keeping duties include the obligation to identify advertising service providers and the advertising contracts or agreements entered into, therefore it will be particularly relevant to properly work on these contracts.

## 4. PENALTIES

Royal Decree-Law 5/2021 amended article 292 of the Securities Market Law to expressly include within the category of **serious infringements (*infracciones graves*) advertising that is contrary to article 240 bis of the Securities Market Law or its implementing regulations,** which includes the Circular.

Therefore, failure to comply with the Circular is a **serious infringement and could give rise to the penalties described in article 303 of the Securities Market Law.**

## 5. ENTRY INTO FORCE

**The Circular will enter into force on 17 February 2022,** one month after it was published in the Spanish Official Gazette.

## 6. CONTACT LAWYERS



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