CNMV
COMISIÓN NACIONAL DEL MERCADO DE VALORES

Criteria in relation to ICOs

20 September 2018

This document sets out the initial criteria that CNMV is applying in relation to ICOs. Given the complexity and novelty of the phenomenon, these criteria are subject to review in the light of the experience accumulated and the debate that is currently taking place at international level and, in particular, within the European Securities and Markets Authority (ESMA).

1. Consideration of tokens as transferable securities

- Proposals will be analysed on a case-by-case basis.

- The criteria established in the CNMV Communiqué published in February 2018[1] are still valid, although with a nuance in view of the direction that the international debate on this subject is taking.

    - In the February communiqué it was stated that: *""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".*

    - However, it is considered appropriate to exclude from consideration as transferable securities those cases in which it is not reasonable to establish a correlation between the revaluation or profitability expectations of the instrument and the evolution of the underlying business or project.

The criteria included below refer to the case in which tokens issued in the ICO are considered transferable securities.

2. Need and scope of intervention of entities authorised to provide investment services

- With regard to the intervention of an authorised entity referred to in Article 35(3) of the Securities Market Act (LMV), the published content of the FinTech Q&As shall apply with respect to the minimum degree of intervention of the entity authorised to provide investment services for marketing purposes (which implies that such entity must carry out general supervision of the process and validate the information to be delivered to investors, which must be clear, impartial and not misleading, and refer to the characteristics and risks of the securities issued, as well as to the legal and economic/financial situation of the issuer in a sufficiently detailed manner to allow the investor to make an informed 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

[1] CNMV Communiqué on ICOs, dated 8 February 2018

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.

- In principle, it is not necessary, given that normally for the issuer the transaction will be merely occasional, for an entity authorised to place the securities to participate. The reserve of activity provided for in Article 144(1) of the Securities Market Act (in relation to Articles 140(e) and 140(f)) requires that the activity is carried out "on a professional or regular basis".

- Nor is it necessary, in principle, for an authorised entity to intervene in the custody of the securities since the reserve of activity provided for in Article 144(1) of the Securities Market Act (in relation to Article 141(a)) requires the activity to be carried out "on a professional or regular basis".

3. Representation of tokens and consequences of their trading on trading platforms

Article 6(1) of the Securities Market Act[2] allows the interpretation that certain securities may not be represented by book-entry form or titles (since the word 'may' is used). Therefore, the possibility of registering rights that may be considered transferable securities through DLT technology (blockchain) cannot be excluded. Bearing this in mind:

a) **If the tokens are to be traded on markets other than Spanish markets:**

- Article 6(2) of the Securities Market Act[3] only applies to Spanish trading venues. Therefore, if tokens are traded on a market other than a Spanish one, CNMV is not competent to require that they be represented by book entries.

- It will be the law (and the competent authority) of the country in which the market on which the tokens are to be traded the one that determines to what extent a specific form of representation of the securities is required for trading on an organised market and, where appropriate, the need for a central securities depository to keep the records.

b) **It does not seem possible to trade tokens on Spanish regulated markets, MTFs or OTFs since:**

- Article 6(2) of the Securities Market Act would require tokens to be represented by book-entry form.

- Article 8(3) of the Securities Market Act[4] would require that the records be kept by a central securities depository.

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[2] *"Transferable securities may be represented by book-entry form or by titles. The chosen form of representation shall be applied to all securities included in the same issue".*

[3] *"Securities admitted to trading on official secondary markets or on multilateral trading facilities shall necessarily be represented by book-entry form ". (...)*

c) **Nor does it seem possible to generate an internal market on an unregulated platform or for tokens to be traded on an exchange platform located in Spain since:**

- In the case of tokens considered transferable securities, these platforms should have the necessary authorisations to carry out their activity, including those applicable to a trading venue (as a regulated market, MTF or OTF) or as an investment firm (IF) or credit institution operating as a systematic internaliser. The trading venue should be managed by an IF or a market governing body and would generally be subject to market regulations and CNMV's supervisory scope.

- The same provisions as in letter b) above would also apply to them in respect of the need for representation by book-entry form and participation of a central securities depository.

4. Need for an information prospectus

- Since most of the transactions under consideration can be included in the provisions of Article 35(2) of the Securities Market Act (concerning situations where there is no obligation to publish a prospectus), issuers are advised to follow the criteria discussed previously in relation to Article 35(3).

- It should be borne in mind that, when preparing a prospectus for an ICO, difficulties may be encountered due to the absence of a harmonised model at European level, which, in turn, may lead to dysfunctions with other European authorities with respect to the prospectus passport approved by CNMV.

- However, when a prospectus is necessary due to the characteristics of the transaction, CNMV will take the necessary steps in an attempt to adapt and will take into account the principle of proportionality (especially when it is foreseeable that the transactions will not be large) in order to reduce the complexity and length of the document to the extent possible.

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[4] *"In the case of securities admitted to trading on official secondary markets or on multilateral trading facilities, the entity in charge of keeping the accounting records of the securities will be the designated central securities depository which will perform this function together with its participating entities".*