Questions and Answers intended for FinTech companies on activities and services that may be related to the CNMV

Last update: 12 March 2019

(questions 3.1, 3.14 and 3.15)

TABLE OF CONTENTS

This document is not regulatory. Its purpose is to transmit to the sector and, in particular, to entities wishing to operate in the FinTech field, interpretation criteria for the proper implementation 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) in order to offer business models that are 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 with regulatory information and criteria regarding the interpretation and application of any regulatory aspects of the securities market which may affect their projects.

This collaboration has given the 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:

FinTech	Financial technology
FinTech Company	Company which uses financial technology
PFP(s)	Crowdfunding/Crowdlending Platform(s)
ESI(s): EAFI, SGC, AV and SV	Investment Firm(s): Financial Advisory Firm, Portfolio Management Firm, Broker, and Broker-Dealer, respectively.
MAM and PAMM	Multi-Account Manager and Percentage Allocation Management Module, respectively.
ICO(s)	*Initial Coin Offering(s)*
SICC and FICC	Closed-ended Collective Investment Undertaking and Closed-ended Collective Investment Fund
SGIIC and SGEIC	Manager of Collective Investment Schemes and Manager of Closed-ended Collective Investment Schemes
ESMA	*European Securities and Markets Authority*

ESAs	*European Supervisory Authorities*
SEPBLAC	Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences
MiFID II/MiFIR directive	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/EC and Directive 2011/61/EU
MiFID II/ MiFIR regulation	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
Recast text of the Spanish Securities Market Act	Spanish Royal Legislative Decree 4/2015, of 23 October, approving the Recast Text of the Spanish Securities Market Act
Spanish Law 5/2015	Spanish Law 5/2015, of 27 April, on the promotion of business financing
Spanish Regulation on CISs	Spanish Royal Decree 1082/2012, of 13 July, approving the implementing regulation for Spanish Law 35/2003, of 4 November, on Collective Investment Schemes
Spanish Law 22/2014 on EICCs	Spanish 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 Spanish 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 or subsequent supervision by the CNMV. The companies which use their technological services and which provide the relevant investment services to end-clients shall be liable to the CNMV for the use of any technology. However, if the service provided entails the outsourcing of critical or important operational functions of the investment firm or of any other entity registered with the CNMV, the technology provider shall cooperate with the competent authority in order to facilitate their supervision.

3. CROWDFUNDING/CROWDLENDING PLATFORMS

3.1 Potential third-party actions in relation to the PFPs activity (12 March 2019)

a) Can PFPs use third-parties to attract investors?

CNMV's Answer

Spanish Law 5/2015 does not exempt PFPs from using third-parties to attract investors nor does it impose any requirements on them, as occurs in the case of investment firms (where investors may only be attracted via third-parties acting as agents for the relevant investment firm, in accordance with Articles 146 and 147 of the Spanish Securities Market Act, and the relevant implementing provisions).

Accordingly, PFPs may use third-parties to attract potential investors but solely to enable these to subsequently contact the promoters through the PFP (via the latter's website). In other words, this is permitted insofar as the third-parties merely provide information on the existence and features of the platform, and promote the interest and the use thereof by potential investors. Any third-party activities other than these would be contrary to the legal requirements stipulated for investment services and the actual legal concept of PFPs[1].

In short,

- the activity of the third-parties must be restricted to that mentioned above (informing and promoting the use of the PFP), without accepting the provision by the latter of any type of service that is similar to an investment service (reception and transmission of orders, project presentations or any type of advice on potential investments via the platform, etc.), nor any type of activity related to securities and cash flows that may arise from investments made by the investors attracted;

[1] Spanish Law 5/2015, on the Promotion of Corporate Financing, in its Article 48, exempts PFPs from the activity provided for in Article 46(1), i.e., putting "into *contact on a professional basis, through websites or other electronic means, a group of natural or legal persons that offer funding in exchange for monetary income, known as investors, with natural or legal persons that apply for funding in their own name to finance a crowdfunding project, known as promoters*". Under this provision, the legal concept – and this is important in order to distinguish this scope from that of the provision of investment services – is that the contact between the investor and the relevant project must be made via the PFP.

- and all types of contacts, communications and relationships with investors attracted by the third party once they have contacted with the PFP must be made directly through the PFP and not via the third party, whose activity must be restricted to the attraction thereof, and promoting the use of the PFP.

In any case, the principles laid down in Article 60 of Spanish Law 5/2015 are fully applicable to the use of this procedure by PFPs, in particular the principles of diligence and acting in the best interests of their clients, which implies that the relevant PFP must supervise the actions of these types of collaborators and shall be liable for their actions.

The specific case of investor attraction through aggregation and comparison websites is discussed in question 3.14.

b) Can PFPs use third parties to identify or attract potential projects?

CNMV's Answer

The answer to this question is yes, in the sense that the use of PFPs by third parties to identify and attract potential projects is accepted:

- Firstly, because the approach laid down in Spanish Law 5/2015 is less restrictive in terms of the services that can be provided by a PFP to project promoters. Thus, Article 51 of Spanish Law 5/2015 states that an ancillary service (not restricted to PFPs) is the provision of "*advice to promoters in relation to the launching of the project on the platform, including the provision of services and advice in the areas of information technology, marketing, advertising and design*".

- Secondly, because these types of services, as occurs in the case of investor attraction, would unlikely conflict with the scope of the activity restriction for investment services.

In any case, the fact that a PFP uses third parties to identify and attract projects would not affect its legal obligations and liabilities, inter alia, the assessment thereof with due diligence.

3.2 Can PFPs use crowdfunding/crowdlending methods other than those provided for by Article 50 of Spanish 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 Spanish Law 5/2015, (see Article 49(d)), 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 Spanish 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 Spanish 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 Spanish 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 Spanish Law 5/2015, through the provisions of Article 50 of Spanish Law 5/2015, an activity reserve is provided for in Article 48(1) whereby 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 Spanish Law 5/2015?

CNMV's Answer

Yes. There may be 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 Spanish 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 Spanish Law 5/2015.

The CNMV publishes a list of entities which have no type 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*".

Furthermore, the second paragraph of Article 1(2) of Spanish Regulation 1082/2012, approving the secondary regulations implementing Spanish Law 35/2003 on Collective Investment Schemes, makes specific reference to participation account agreements. 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 Spanish 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 Spanish Law 35/2003, on Collective Investment Schemes and its implementing provisions, being an activity which requires a license of the type regulated by the above-mentioned Law and, therefore, may 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 Spanish 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 Spanish 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 Spanish 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 Spanish 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 Spanish 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 Spanish 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 Spanish Law 5/2015).

Specifically, Article 49(b) of Spanish 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 Spanish 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 Spanish 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 standard contracts required to participate 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.

Spanish 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 Spanish 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 Spanish 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 Spanish Law 5/2015.

The CNMV publishes a list of entities which have no type 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

3.14 Are websites focused on the aggregation and comparison of investment projects from various PFPs accepted? (12 March 2019)

CNMV's Answer

Yes, although in order to carry out the aggregation and comparison activity of the investment projects from the various PFPs it is essential for it to be considered as a mere advertising activity in accordance with the provisions of Article 64 of Spanish Law 5/2015, of 27 April, on the promotion of business financing.

In any case, it is the responsibility of PFPs that use aggregators as an advertising channel to ensure that the crowdfunding information provided therein complies with the rules and requirements laid down in Articles 64 and concordant precepts (in particular, Article 60) of Spanish Law 5/2015, which are mentioned below. The failure to comply with these rules and requirements could be considered as one of the breaches defined in Article 92 of Spanish Law 5/2015 (in particular, the one referred to in Article 92(2)(b) of said law).

For clarification purposes, this question exclusively refers to a PFP and PFP projects authorised in accordance with the provisions of Spanish Law 5/2015. As this law defines the activity of PFPs as a restricted activity, and currently, there is no European framework in this regard, it is not possible for similar entities from other countries to actively offer the service of "putting in contact" by electronic means (thus preventing them from carrying out any type of advertising activity in Spain).

Principles that the launching of projects through aggregators must comply with.

The launching by a PFP must comply with the provisions of Article 64(2) and (3) of Spanish Law 5/2015. Specifically, the launching must comply with the following aspects:

a) The selection of the projects and PFPs whose projects shall be included in the aggregator must be based on objective and non-discriminatory criteria. In the event of not including all the PFP projects, it must be possible to give a reasoned explanation for the selection criteria.

b) The principle of neutrality with regard to the order in which the projects appear on the aggregator. In this regard, for example, any systems, including rotation mechanisms, which indicate the place and manner of launching on the basis of objective and random criteria (size, type of company or sector, date of registration of the project on the aggregator, etc.) and that do not give priority to the so-called PFP or projects identified in a discretionary manner, are considered acceptable.

c) The principle of transparency which implies that the information contained in the aggregator on the rights and obligations of the investors must be clear, timely, sufficient, accessible, objective and not misleading.

Method of remuneration for aggregators

To be consistent with the principle of neutrality, and for the avoidance of doubt with regard to the exclusive advertising nature of its activity, the remuneration system for aggregators should not be linked to the effective fund-raising by investors for crowdfunding projects through the aggregator.

For example, the following remuneration schemes are considered acceptable:

- per click with regard to the project or visit to the PFP's website from the aggregator's website.

- per the period of time the project is on the aggregator's website or on the PFP's website from the aggregator's website.

- a regular fixed amount or an amount related to the number or the value of the projects.

Functioning of the aggregator (in particular, lack of advice)

The aggregator's activities must be limited to disseminating project information and acting as an access channel to their relevant PFP. The aggregator's website must highlight the exclusively informative nature of the activity carried out.

The aggregators may include search engines and selection of projects which makes the use thereof attractive for potential investors insofar as, to activate the search function, no information that directly or indirectly identifies the personal circumstances of the potential client is requested (the scope of the prohibition includes when the client does not expressly provide the personal data but such data can be deduced, for example, if a certain strategy is chosen from among various investment strategies and the risk tolerance, which is a personal circumstance, can be deduced from the strategy chosen).

To this end, the following shall be considered as personal circumstances:

- the financial situation of the potential investor (source and level of regular income, assets, etc.).
- The investment objectives of the potential investor (risk profile, purpose of its potential investment, etc.).
- The expertise and investment experience of the potential investor (level of training, occupation, volume of financial instrument transactions, etc.).

However, it is considered acceptable for the search engine to request information such as the minimum and maximum amount of the potential investment, the desired time horizon for the potential investment or the generic class of the desired product.

The results of the search should offer, where possible, a selection of products that is sufficiently broad, so that it cannot be considered as a specific investment recommendation.

PFP's control of the launching of its projects via aggregators

In the agreement concluded with the aggregator, the PFP should reserve the power to review that the information on its projects provided by the aggregators is completely and objectively consistent with the content thereof, and in general, all the rules and requirements under Spanish Law 5/2015 mentioned above are complied with.

Likewise, the PFP should reserve the power to terminate the relationship with the

aggregator in the event that the latter does not carry out its activities in accordance with such rules and requirements.

Advertising PFP-aggregator agreement

PFPs should conclude written agreements with the aggregators that, as a minimum, adequately reflect what has been mentioned in the preceding paragraphs.

Other guidelines that should be followed by PFPs in relation to aggregators

Notwithstanding the foregoing, the following are considered good practices:

- That the PFP adequately identifies the aggregator's owners (natural or legal persons) and its directors or senior managers.

- That the PFP ensures that the owners who are natural persons and the directors and senior managers are individuals with a sound business or professional standing, and that the directors and senior managers also have the appropriate knowledge and experience to carry out the activity.

- That the PFP requires the aggregator to take out professional liability insurance policy.

3.15 Can a PFP include on its website information and links to other PFPs and projects of other PFPs? (12 March 2019)

CNMV's Answer

Yes. The requirement of exclusive corporate purpose stipulated in Article 55 of Spanish Law 5/2015 should be considered compatible with this, even with an aggregation and comparison activity for investment projects of other PFPs, insofar as such activity is mere advertising, and it complies with the guidelines mentioned above in question 3.14. This is an activity that is restricted to the sphere of PFPs and is consistent with the purpose of PFPs stipulated in Article 46(1) of Spanish Law 5/2015[2].

For clarification purposes, the inclusion of information on other financial products or on entities that provide investment services or links to such entities is not considered to be compatible, however, with said requirement of exclusive corporate purpose.

[2] "PFPs are authorised crowdfunding/crowdlending platforms whose activity consists of putting into contact on a professional basis, through websites or other electronic means, a group of natural or legal persons that offer funding in exchange for monetary income, known as investors, with natural or legal persons that apply for funding in their own name to finance a crowdfunding project, known as promoters".

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 Spanish 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 Spanish 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 Spanish 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 Spanish 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 Spanish Securities Market Act). In addition, before signing the contract, the suitability of the investor must be assessed by the entity authorised to provide this investment service and all other rules of conduct applicable to the provision of the investment 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 Spanish 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 of 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 Spanish 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 Spanish 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 the CNMV's 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 expertise 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 Spanish 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 Spanish 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

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)?

CNMV's Answer

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 Spanish 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 Spanish 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; and

- 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 only to professional investors (as defined in Articles 205 and 206 of the Recast Text of the Spanish Securities Market Act).

As well as being registered with the CNMV (Article 8 of Spanish 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 Spanish 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 Spanish 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 Spanish 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 laid down in Spanish 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 November 2017, ESMA warned of the risks of what are known as ICOs (initial coin offerings) .

On 15 January 2018, the CNMV released a statement from the SEC with its Chairman's views on cryptocurrencies (initial coin offerings or ICOs).

On 8 February 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 February 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 Answer

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)[3]. 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 Spanish 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

[3] 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.

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.

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 Spanish Securities Market Act in certain offers intended for the general public using any form of advertising exempted from prospectus requirements?

CNMV's Answer

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.