



# **The implications of the new Spanish Law on Securities Markets and Investment Services on the Fintech and Crypto-asset ecosystem**

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## THE IMPLICATIONS OF THE NEW SPANISH LAW ON SECURITIES MARKETS AND INVESTMENT SERVICES ON THE FINTECH AND CRYPTO-ASSET ECOSYSTEM

On 17 March 2023 Spanish Law 6/2023 of 17 March on Securities Markets and Investment Services ("LMVSI") was published in the BOE (Spanish Official Gazette). In this regard, the LMVSI has been approved with all the amendments proposed by the Plenary Session of the Senate, except for the amendments proposed to Article 5.

The LMVSI represents a major step forward for the financial sector in Spain as it has integrated a variety of European regulations, included new forms of distribution of financial instruments, and introduced the necessary adaptations for the application of the Regulation of the European Parliament and of the Council on crypto-asset markets amending Directive (EU) 2019/1937 ("MiCA Regulation").

In relation to the Fintech and crypto-asset ecosystem, the LMVSI is expected to promote the economic growth of the sector and promote greater legal certainty for all the market players involved. Thus, the following points introduced in the LMVSI are key for the Fintech and crypto-asset market:

- Inclusion of Distributed Ledger Technology ("DLT") as a valid system for the issuance, registration, transfer or custody of financial instruments, as well as the necessary rules to ensure legal certainty in the representation of tradable securities through market infrastructures based on DLT;
- Introduction of aspects related to the MiCA Regulation and the advertising of crypto-assets, as well as the supervisory and sanctioning regime of the crypto-asset market.

### 1. IMPLICATIONS OF THE USE OF DLT IN SECURITIES MARKETS

The LMVSI brings relevant developments to promote the use of DLT or other similar technologies for the issuance, registration, transfer or administration of all financial instruments, as it is set out in Article 2.1 of the LMVSI. Specifically, the admission of the use of the DLT in the Spanish financial system implies the regularisation and increase of legal certainty in relation to financial instruments based on this technology, which were not regulated in Spain.

Chapter II of the LMVSI, when regulating tradable securities, extends the application of its provisions to all tradable securities registered or represented by DLT-based systems. In particular, one of the aspects included in the LMVSI is that DLT-based systems will have to:

- Ensure the integrity and immutability of the emissions that take place within them;
- Directly and indirectly identify the holders of rights in tradable securities; and

- Determine the nature, characteristics and number of the securities.

The objective of this regulation is to allow the holders of rights in tradable securities represented by DLT-based systems to have access to all the information derived from these systems, as well as from the transactions in these securities carried out inside the DLT-based storage and trading systems.

In the same vein, Chapter II, Article 7, requires all issuers of tradable securities to prepare and issue a document containing all the information necessary to identify: (i) the entity in charge of the accounting record or whoever is in charge of the administration of the registration and recording; and (ii) the tradable securities that are included in the issuance.

In relation to the content of the document, such institutions shall include information on the operation and governance of the systems based on the DLT. In this regard, all entities are required to have copies of this document to be able to send a copy of this document to the holders of the financial instruments and to all interested parties.

Securities based on DLT will be negotiable once they have been entered in the register of the entity responsible for accounting records in favour of the issuer or the subscribers of these securities. In this case, the issuer will designate one or more entities responsible for the administration of the registration and recording of the securities in the system. These entities shall be appointed in the document described above and regulated in Article 7 of the LMVSI.

The entities designated for the accounting register in any event shall be authorised to carry out the activity of custody and administration of financial instruments on behalf of clients set out in letter a) of Article 126 of the LMVSI. In this respect, the investment services entities authorised to carry out this activity shall be authorised as brokerage firms in Spain or as credit institutions, as it is set out in Article 128 of this new law.

In relation to the above, *Security Token Offerings ("STOs")* can be carried out without a prospectus in accordance with Regulation (EU) No 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market and repealing Directive 2003/71/EC, if they comply with the requirements of the new Article 36 of the LMVSI. However, as a new feature of the LMVSI, in cases where transferable securities are represented by DLT-based systems, it will always be necessary to determine which entity is responsible for the administration of the registration and registration of securities represented by DLT, which must be included in the issue document referred to in Article 7.

Similarly, the transfer of tradable securities represented by DLT-based systems will take place through a transfer recorded in the distributed register.

It is noticeable that all these inclusions in the LMVSI are key to ensuring the proper functioning of the securities markets, as well as security for investors, who will be able to always know both (i) who is the issuer of the tradable securities and (ii) the composition of the securities. In addition, the LMVSI makes the admission of these tradable securities represented through DLT systems subject to: (i) the publication of the issue document; (ii) the existence of an intermediary between the issuer and the investor; and (iii) the existence of an accounting register.

Finally, bonds admitted to trading in a multilateral trading system established in Spain, the conditions for their issuance and the characteristics of the bonds will be set out in a certification that shall comply with the same requirements as the document of issue of the tradable securities. This certification is valid for the registration of the bonds in the registers of the TRD-based systems.

## **2. CHANGES TO THE CRYPTO-ASSET MARKET**

Having analysed the inclusion of TRD technologies in the LMVSI, it is necessary to analyse the aspects of the crypto-asset market that will be affected by this new law.

With regard to the advertising of crypto-assets, Circular 1/2022 of 10 January of the Spanish National Securities Market Commission on the advertising of crypto-assets presented as investment objects already regulated the requirements for advertising campaigns for crypto-assets that are investment objects, i.e. considered as tradable securities or any asset within the material scope regulated under the previous securities market law.

In this regard, the new legislation has extended the scope of action of the Spanish National Securities Market Commission ("CNMV") in this market. Thus, Article 247 of the LMVSI establishes that the CNMV may subject to authorisation and control the advertising of crypto-assets presented as investment objects which, as they are not considered tradable securities, could be excluded from the activities contained in this law.

Therefore, the CNMV is competent to supervise the crypto-assets included in the new MiCA Regulation. This is set out in Article 251 of the LMVSI, which designates the CNMV as the competent authority for supervising compliance with this new regulation.

However, the same Article provides that the Bank of Spain exercises the supervision, inspection and sanctioning functions in relation to the obligations laid down in the above-mentioned Regulation as regards issuers of electronic money tokens and asset-referred tokens.

Before the LMVSI, any institution which wanted to operate in this market was obliged to register in the Bank of Spain's register of providers of services for the exchange of virtual currency for fiat currency and the custody of electronic wallets. However, with this new regulation, it is possible that this registration changes, being only applicable to entities within the scope of supervision of the Bank of Spain, (i.e. issuers of electronic money tokens and asset-backed

securities) which will force all other issuers of crypto-assets to apply for registration before the CNMV.

Another relevant inclusion for this sector concerns the sanctioning regime for non-compliance with the MiCA Regulation. This new regime is included in Articles 307 and 323 of the LMVSI. Thus, serious infringements include an express reference to the articles of the proposed MiCA Regulation. This means that the new Spanish legislation refers the regime of sanctions relating to crypto-assets to the articles of a proposed regulation. Hence, the new Spanish legislation expressly refers its sanctions regime to provisions that have not been yet adopted by the European Union, which are not currently in force. For this reason, the fourteenth final Provision of the LMVSI stipulates that Articles 307 and 323 will enter into force when the MiCA Regulation enters into force.

In short, in view of the boom in the crypto-asset market in Spain, the legislator has opted to grant general supervisory and management powers to the CNMV, excluding its scope of application to entities issuing electronic money tokens and asset-linked tokens. Therefore, new entities wishing to establish themselves in Spain must submit to the control of the CNMV and comply with the requirements established in this new securities market law and in the new MiCA Regulation, which is pending.

### **3. OTHER INTERESTING DEVELOPMENTS**

In addition to the previous topics, which are key to understand the fundamental role of the LMVSI in the Spanish regulatory framework, there are other aspects of this new regulation that are very interesting for the sector and should be mentioned:

- Law 35/2003 of 4 November 2003 on Collective Investment Undertakings ("IIC Law") is amended to include as part of the definition of shares the possibility of these shares being represented in DLT-based systems. Furthermore, shares representing the capital of investment companies may also be represented in DLT-based systems. Also, as part of the obligations of the management companies of collective investment undertakings ("SGIICs") it is included that they must issue the legitimisation certificates referred to in Article 14 of the LMVSI.
- Royal Legislative Decree 1/2010, of 2 July, approving the revised text of the Capital Companies Act ("LSC") is amended. We highlight Article 23, which regulates the Articles of Association of capital companies, as an essential point. Thus, share companies are required to indicate whether their shares will be represented by means of DLT-based systems. Furthermore, Article 407 on the public deed of share companies is amended to include, where applicable, whether the obligations are represented by a DLT-based system.

In conclusion, the LMVSI is a boost for the Fintech ecosystem and the national crypto-asset market. Not only does it provide new opportunities for these market players, but it also provides these new markets with greater legal certainty, both for consumers and financial clients and for the national economy in general, which will boost investor confidence in these alternative investment methods.

Consequently, it is clear that the digitalisation of securities markets will benefit from the LMVSI, which integrates the DLT as part of our financial system. In this sense, it is likely that in the coming months new entities will start to establish themselves on the Spanish market offering innovative technological solutions related to DLT and adapted to this new regulation.

In addition, the legislator, through the LMVSI, aligns Spanish legislation with the text of the MiCA Regulation, which is pending approval, including references to it in those matters where it has been deemed necessary. In this way, the legislator has sought to ensure that once the MiCA Regulation comes into force, the Spanish securities markets will be prepared for it, providing all companies that carry out activities related to crypto-assets with a longer period of adaptation.

In summary, we can affirm that the approval of this new legislation on the securities market represents a boost for the Fintech sector and the Spanish crypto-asset market.



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