

SPANISH AND EUROPEAN SUPERVISORY AUTHORITIES ISSUE FRESH WARNINGS ON THE RISKS OF INVESTING IN CRYPTO ASSETS

1. Introduction

The European Supervisory Authorities for the financial system - EBA, ESMA and EIOPA - (the “ESAs”) have issued a [Warning](#) on the risks posed by crypto assets to consumers, stressing that they are not suitable as an investment or as a means of payment or exchange for most retail investors.

With this new warning, the ESAs are once again expressing their concern about two phenomena:

- (i) the emergence of new types of crypto assets and related products and services, such as NFTs (non-fungible tokens), derivatives with crypto assets as underlying assets, life insurance policies linked to investment funds with crypto assets as underlying assets, and decentralised finance (DeFi); and
- (ii) the fact that an increasing number of consumers are acquiring such assets in the expectation of a good return, without being aware of the high risks involved.

This is not the first time the ESAs have weighed in on the issue. They previously issued the following warnings:

- [Warning to consumers on virtual currencies](#) (2013);
- [European Supervisory Authorities warn consumers of risks in buying virtual currencies](#) (2018); and
- [ESMA sees high risk for investors in non-regulated crypto assets](#) (2021).

Within Spain, the CNMV, the Bank of Spain and the Directorate General for Insurance and Pension Funds have published a [Joint Communication](#) announcing that they agree with the content of the ESAs’ warning and the assessment of the risks they identified. This time, unlike in the ESAs’ warning, no examples are given of situations where consumers need to pay particular attention to certain transactions, such as insurance transactions involving crypto assets, life insurance policies linked to investment funds with crypto assets as underlying assets, in the form of unit-linked or dedicated funds, among others. It should be noted that there is no actual ban on these products or on the use of crypto assets as underlying assets. It is more a warning to the market and, above all, to consumers, in line with what has already been pointed out by the CNMV and the Bank of Spain in their previous communications on this matter, issued in 2018 and 2021:

- [Joint communication of the CNMV and the Bank of Spain on “cryptocurrencies” and “initial coin offerings” \(ICOs\) \(2018\)](#); and
- [Joint communication of the CNMV and the Bank of Spain on the risk of cryptocurrencies as an investment \(2021\)](#).

2. Risks identified by supervisory authorities

European and Spanish supervisory authorities highlight the following risks associated with this type of product:

- (i) Sudden and extreme price fluctuations, given the speculative nature of crypto assets, make them unsuitable either as a store of value or as a means of exchange or payment.
- (ii) Misleading or even aggressive information, using marketing material that may be unclear, incomplete or inaccurate, focusing only on the potential gains and not on the high risks, and sometimes advertised through social media by influencers who receive a financial incentive in return.
- (iii) Lack of protection: Most crypto assets and the sale of related products or services are not regulated in the EU or in most EU Member States, which prevents the use of complaint or redress mechanisms available to consumers of regulated financial services.
- (iv) The complexity of products offering exposure to crypto assets which sometimes have features that can increase the magnitude of losses in the event of adverse price movements.
- (v) Fraud and malicious activities, aimed at misappropriating consumer money through the use of different techniques, such as phishing.
- (vi) Market manipulation, lack of price transparency and low liquidity, due to unregulated and unsupervised platforms that are used to determine crypto asset prices and carry out transactions.
- (vii) Cyber attacks, operational risks and security issues arising from the distributed ledger technology underpinning crypto assets, which is often a constant victim of cyber attacks.

3. The underlying problem: the lack of regulation of crypto assets

The European and Spanish supervisory authorities point out that, although these products may be elements that help to boost the sector and the supply of new financial products and services, for the time being their legal coverage is insufficient, both at an EU and national level. In this regard, it is worth noting that:

- (i) The CNMV has approved [Circular 1/2022, of 10 January, on advertising relating to investment in crypto-assets](#), which establishes guidelines for the content and format

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of advertising campaigns in this area, which must always include sufficient information on the risks of the potential investment.

- (ii) In the CNMV's Activity Plan for 2022, the regulator warns that it will pay special attention to monitoring the offerings and development of crypto assets, focusing especially on the supervision of advertising and promoting financial education and investor training.
- (iii) Following the introduction by Royal Decree-law 7/2021 of 27 April of the Second Additional Provision of Law 10/2010, of 28 April, on the prevention of money laundering and terrorist financing, the Bank of Spain has set up a [register](#) which the following will have to sign up to (i) natural and legal persons offering or providing virtual currency exchange services for fiat money and custodial wallet services in Spain; (ii) natural persons whose base, address or management of these activities is in Spain; and (iii) legal persons established in Spain that provide these services. They must have adequate measures and procedures in place to prevent money laundering and terrorist financing.

It is evident that these national regulatory developments cover a very limited part of crypto asset activity and are therefore insufficient to prevent or address all risks related to these products.

It is worth noting in this regard that the European Commission presented a [proposal for a Regulation on crypto-asset markets](#) (MiCA) in September 2020, which was voted on in the European Parliament on 14 March. This proposal for a Regulation will establish a European framework for the regulation and supervision of issuers and service providers of crypto assets, with the main objectives of protecting consumers and ensuring the integrity and stability of the financial system.

The regulation is currently before the EU co-legislators, and final approval is needed before crypto assets and related products can realise their full potential, within a regulatory framework that adequately mitigates the risks they pose to retail investors.

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The information contained in this Information Briefing is of a general nature and does not constitute legal advice. This document was prepared on 21 March 2022 and Pérez-Llorca does not assume any commitment to update or revise its contents.

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