

Informe ejecutivo (EN)

06/05/22



AUDENS

Marqués de Cubas 12, 5ºC - 28014 Madrid - C/ Elcano 14, 2º Izq., 48008 Bilbao
www.audens.es

Introduction and purposes

The purpose of this report is to determine the legal framework of the "Kubecoin" token, created by Kube Ecosystem, S.L., which is to be issued through an ICO in June 2022.

Kube Ecosystem is a decentralised platform project that would work through the Kubecoin token, based and developed in the Cardano environment. Thus, Kubecoin would constitute a token whose main purpose is to serve as an exchange medium between users of the platforms that belong to the Kube Ecosystem. In addition, this cryptocurrency would allow, among other things, to enjoy discounts, rewards and special conditions in certain establishments, as well as access to the features of a marketplace.

All conclusions and statements are subject to the better legal opinion and on the basis of existing case law and views of the Courts and the relevant Regulatory Authorities.

Kubecoin framework: security or utility token

In order to formalise an ICO and issue a specific token, there are different types of tokens depending on their characteristics. In this sense, summarising various technical issues, we can distinguish between *utility* and *security tokens*.

1. *Utility token* features

A *utility token* must have a specific use and serve to support the assets of a project, provide access to a specific platform and access to specific products or services.

In this regard, the Proposal for a Regulation on Markets in Crypto-assets¹ (hereinafter MiCA), defines a *utility token* as a type of crypto-asset which is intended to provide digital access to a good or service, available on DLT², and is only accepted by the issuer of that token in question.

Meanwhile, the CNMV and the Bank of Spain, in a joint communiqué³, define them as tokens that give the right to access a service or receive a product, notwithstanding the fact that in the context of the offer, there is often a reference to expectations of revaluation and liquidity or to the possibility of trading on specific markets.

► From the above, in order to define the *Kubecoin* token as a *utility token*, it must be established that it will only be used on the different platforms that will make up the Kube Ecosystem project.

2. *Security token* features

A *security token* represents direct securities and assets of a company and is issued in a fully regulated way, which requires compliance with money laundering, KYC and other applicable regulations, such as the “Ley de Mercado de Valores” (hereinafter LMV).

Their specificity lies in the fact that they are investment products (as equities can be) and therefore usually confer cash flow rights to investors and, in some cases, also voting rights.

In this sense, the European Securities and Market Authority (ESMA), referring to this type of token as an “investment-type” crypto-asset, defines them as a type of crypto-asset that resembles a financial

¹ Proposal for a Regulation Of The European Parliament And Of The Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937.

² DLT refers to decentralised ledger technology which is defined, in MiCA, as a type of technology that support the distributed recording of encrypted data.

³ «Comunicado conjunto de la CNMV y del Banco de España sobre “criptomonedas” y “ofertas iniciales de criptomonedas” (ICOs), de 8 de febrero de 2018».

instrument, and states that they may have some profit rights attached, like equities, equity-like instruments or non-equity instruments⁴.

The CNMV and the Bank of Spain link this type of token to those that generally grant participation in the future income or increase in the value of the issuing entity or business.

Furthermore, the US Securities and Exchange Commission (SEC) uses the Howey Test, which is used to clarify whether an investment contract is an offer of securities, to identify whether a token is considered a security. In application of the test, a security offering exists if it involves: an investment of money, in a common enterprise, with a reasonable expectation of profit derived from the efforts of others.

► In short, the Kubecoin token would be defined in the event that the token represents an aliquot part of the Kube Ecosystem's corporate structure that may result in profits for the investor, depending on the success or otherwise of the company's business.

3. *Kubecoin as security or utility token*

Taking into account the particularities of the Kube Ecosystem project and the functionalities that the issuance of the *Kubecoin* token would provide, it can be established that the token would be framed as a *utility* because its main purpose is to serve as a medium of payment on the platforms that make up the project.

Additionally, it is ruled out as a *security*, since the token does not correspond to a proportional share of the company, nor does the acquisition of the token inherently entail the power to make a profit from possible revaluations.

⁴ ESMA. (2019). Advice on Initial Coin Offerings and Crypto-Assets.

Kubecoin framework: negotiable or non-negotiable security

After determining *Kubecoin* as a *utility token*, it is necessary to classify it as a negotiable or non-negotiable security, based on its characteristics and the way in which it is going to be offered to the public in the framework of the project in which it is included.

1. Token as a negotiable security

Negotiable securities are financial instruments regulated by the LMV, defined as any property right, regardless of its name, which, due to its configuration and transmission regime, is susceptible to generalised trading in a specific financial market.

The law provides numerous examples of negotiable securities that are difficult to classify, so in this case it is advisable to refer to the definitions given by the Comisión Nacional del Mercado de Valores (hereinafter, "CNMV"), which, when an ICO is carried out, understands that two factors must be taken into account when determining whether or not a token is a negotiable security⁵:

- a. The token attributes rights or expectations of participation in the potential revaluation or profitability of the business or project in which it is framed or, in general, it presents or grants rights equivalent or similar to those of shares or bonds.
- b. The token gives the right to access specific services or to receive specific goods or products, and the token, in turn, is offered with reference, explicitly or implicitly, to any of the following:
 - i. The expectation that the purchaser or investor will make a profit from the revaluation of the token; or
 - ii. The expectation that the purchaser or investor will receive remuneration associated with the token; or
 - iii. The liquidity that the token would enjoy; or
 - iv. The possibility of trading the token on equivalent markets or purportedly similar to regulated securities markets.

In the event that the token is considered a negotiable security, Kube Ecosystem as the issuer⁶ of the securities, it must be validly constituted as a legal entity under Spanish law, and must be operating in accordance with its articles of incorporation and by-laws, or equivalent documents⁷.

⁵ «CNMV. (2018). Criterios en relación con las ICOs».

⁶ The CNMV defines "issuer" as the entity that originates and circulates securities or financial instruments (which can be traded on securities markets).

⁷ Article 33.2. LMV.

Likewise, in this area, although the law establishes that the issuance of negotiable securities is free, a fundamental obligation, with few exceptions, must be complied: the preparation of a **prospectus**⁸ which, in any case, must be approved by the CNMV.

- The prospectus is the document that would contain all the information and data about Kube Ecosystem and the "*Kubecoin*" token, so that potential investors, purchasers of the token, can get an accurate picture of Kube Ecosystem and make an informed judgement about the proposed investment.

1.1. Preparation and publication of a prospectus

The prospectus shall be easily analysable and comprehensible to the investor, enabling him to assess the financial situation of Kube Ecosystem, the prospects of profits and losses that may arise from participation in the project, as well as the rights attached to the tokens issued⁹.

1.1.1. Summary note of the prospectus

In this regard, prior to the full content of the prospectus, a so-called **summary of the prospectus** must be prepared, including the essential information to understand the characteristics and risks of *Kubecoin* and the project, in order to help investors and potential purchasers of the token to decide whether or not to invest in them.

- The summary should be accurate, unbiased and clear, without misleading content, as a coherent introduction to the prospectus, being easy to read and understand, without technical language that makes comprehension difficult.
- In addition, the summary should be in the form of a short, concise document of a maximum of seven (7) pages, A4 size, in legible font size.

The summary of the prospectus shall contain an introduction with appropriate warnings, key information about Kube Ecosystem as the issuer of the token, key information about the token itself, and key information about the ICO under which the tokens are to be issued.

1.1.2. Content of the prospectus

In particular, the prospectus shall contain at least the following information:

- a. As an introduction, a concise summary in non-technical language of the relevant and essential information described in section b. below should be provided, and the summary should also expressly state this information:
 - i. That any decision to invest in the securities should be based on the investor's consideration of the prospectus as a whole.
 - ii. That no person shall be liable to civil action on the sole basis of the summary unless the summary is misleading, inaccurate or inconsistent in relation to the other parts of the prospectus or does not provide, when read together with the rest of the prospectus, key information to assist investors in determining whether or not to invest in the securities.

⁸ Article 33.2 LMV.

⁹ Article 34 LMV, in relation with Articles 6 and 7 of Regulation (EU) 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.

- b. Throughout the document, detailed key information must be included to enable the investor to decide whether or not to invest in such securities. Key information means the following elements:
- i. A description of the essential characteristics and risks associated with the issuer and any guarantors, including assets, liabilities and financial condition.
 - ii. A brief description of the essential characteristics of and risks associated with the investment in the securities concerned, including the rights attached to the securities.
 - iii. The general terms and conditions of the offer, including the estimated charges imposed on the investor by the issuer.
 - iv. Information on the acceptance of subscription.
 - v. The reasons for the offer and the destination of the proceeds.

- ▶ In short, the referred prospectus shall include in detail all necessary information about the ICO and the Kube Ecosystem specific token.
- ▶ Notwithstanding the above, this document should not be confused with a whitepaper which, although it is a common document in ICOs and serves to describe the project itself, it cannot be likened to a prospectus despite the fact that certain issues are reproduced, mainly due to the fact that, among other issues, the prospectus is a technical document that must unequivocally inform about the existing risks and that must be supervised and approved by the CNMV.
- ▶ It should be noted that where a prospectus is necessary, the CNMV has stated that it will review the document on the basis of tailoring and proportionality in order to reduce the complexity and length of the prospectus, especially where transactions are not likely to be large.
- ▶ Nevertheless, as will be seen, having a whitepaper in addition can be a good way to increase the transparency of the ICO and the information given to investors.

1.2. Exceptions to the preparation of the prospectus

1.2.1. General

It is worth noting that the LMV indicates certain types of securities offerings that are not considered public offerings as indicated above, and therefore the preparation of such a prospectus¹⁰ is not mandatory. These types of offer are as follows:

- a. A securities offering aimed at qualified investors¹¹ only.
- b. An offer of securities addressed to fewer than 150 natural or legal persons by a Member State, excluding qualified investors.
- c. An offer of securities addressed to investors acquiring securities for a minimum amount of EUR 100,000 per investor, for each separate offer.
- d. An offer of securities with a denomination per unit of at least EUR 100,000.

¹⁰ Article 35 LMV.

¹¹ The CNMV defines a qualified investor as any entity or person who invests in the securities markets in large volumes, which allows them to obtain better trading conditions, lower fees, etc., and who, due to their institutional or professional nature, have sufficient knowledge and experience to assess the risks they assume and make their own investment decisions. It also considers banks and savings banks, insurance companies, investment fund management companies, small companies and individuals who meet certain criteria and apply to be considered as qualified investors. In short, this Firm does not consider the concept of qualified investor to be applicable to Kube Ecosystem investors.

- e. An offer of securities for a total amount in the European Union of less than EUR 8,000,000, to be calculated over a 12-month period.

Notwithstanding the above, in the event that Kube Ecosystem is considered eligible for one of the above exceptions and does not carry out a public offering as such, the LMV imposes the requirement that the offering (the ICO of Kube Ecosystem in this case) must involve an entity authorised to provide investment services for the purposes of marketing the securities issued¹², unless the platform that is the object of the ICO carries out an activity that is typical of duly authorised crowdfunding platforms.

- It is noteworthy that the regulation does not specify that the issuer (in this case the holder of the Kube Ecosystem token) must be incorporated as an investment entity or similar, but merely indicates the need for its involvement.

1.2.2. Mandatory intervention of investment firms

The legal regime of investment firms and other entities providing investment services is defined in specific regulations¹³, being their main functions, among others, to carry out one or more of the activities related to the securities market, such as the execution of orders for the purchase and sale of assets, the management of investment portfolios, intermediation between investors and companies, the provision of financial advisory services, etc.

In Spain, the following types of entities are authorised to provide investment services:

- a. Securities firms and agencies (SAs and SAs).
- b. Management companies (GSCs).
- c. Financial advisory firms (EAF).
- d. Management companies of collective investment undertakings (SGIIC).
- e. Credit institutions and foreign institutions authorised in Spanish territory.

Meanwhile, the CNMV considers that the requirement for the intervention of an entity authorised to provide investment services as set out in the previous section could be fulfilled in two different ways¹⁴:

- a. By intervening on the occasion of each subscription or acquisition of the securities or financial instruments concerned as an underwriter, intermediary or adviser, subject to the rules applicable in each case.
- b. By intervening for the purpose of validating and supervising in a general way 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), ensuring that the information provided by the issuer is clear, fair and not misleading and refers 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 enable the investor to make an informed investment decision.

¹² Article 35. LMV.

¹³ The Real Decreto 217/2008, de 15 de febrero, sobre el régimen jurídico de las empresas de servicios de inversión y de las demás entidades que prestan servicios de inversión y por el que se modifica parcialmente el Reglamento de la Ley 35/2003, de 4 de noviembre, de Instituciones de Inversión Colectiva, aprobado por el Real Decreto 1309/2005, de 4 de noviembre, would mainly be applicable.

¹⁴ CNMV (2019). Preguntas y respuestas dirigidas a empresas FinTech sobre actividades y servicios que pueden tener relación con la CNMV.

Furthermore, in these cases, the CNMV recommends that investment entities do not validate supervised ICOs unless the information provided includes prominent warnings about the novel nature of the underlying technology of cryptocurrencies and the fact that the custody of the financial instruments is not carried out by an entity authorised to provide investment services.

- ▶ Therefore, if Kube Ecosystem falls within the above exceptions, it would be mandatory for Kube Ecosystem to have the intervention of an authorised investment firm to supervise and validate the information provided in the ICO.
- ▶ It is important to note that not all firms providing investment services are authorised to perform all activities. It is therefore necessary to ensure that the firm with which you will be dealing in your case is authorised to offer the services required in this case, which would be those related to the issuance of securities.
- ▶ To do so, in order to find a valid authorised entity, it is sufficient to go to the register provided by the CNMV and select one of the entities that matches the Client's project, budget or location. This register can be consulted via the following link: <http://www.cnmv.es/Portal/Menu/Registros-Oficiales-ESI.aspx>
- ▶ In any case, it should be noted that it would be valid to use any type of entity authorised to provide investment services, as long as it provides services related to the issuance of negotiable securities.
- ▶ To do this, simply consult the list of authorised entities, select an entity and check that in the "Programa de actividades" tab, "Investment services and activities" section, it provides the "Placement of financial instruments" services indicated in section "a" of the "Instruments" column.

2. Token as a non-negotiable security

As we have already seen, the key to understanding that, when issuing *Kubecoin*, the LMV, among others, is mandatory, lies in the configuration given to the token as a negotiable security or not, depending on its characteristics.

In Spain, there is only one known precedent in which the CNMV has ruled on an ICO project, the "Cresio" project. Thus, although there is no access to the full communiqué, it is noteworthy that the CNMV considered Cresio's ICO to be a non-negotiable securities issue and, therefore, not subject to any authorisation by the CNMV or the LMV. Part of the communiqué stated the following:

"(...) With regard to the issue of tokens, the purpose of which is their use by their purchasers to access the services offered by your platform, we inform you that, provided that their nature, management and use is as described, these tokens cannot be classified as negotiable securities. Consequently, the CNMV, on the basis of the documentation provided by CRESIO and CYSAE, and the contacts maintained, understands, within the framework of its powers, that in these circumstances there are no grounds for this activity to require any kind of administrative authorisation from the CNMV. Should these circumstances change, they should be reported to the CNMV for a new assessment".

Therefore, in order not to fall under the LMV or related regulations, it is necessary to configure the Kube Ecosystem token as a non-negotiable security, understood as a token that, in short:

- a. Do not grant rights or expectations of profitability and participation in the revaluation of the project.
- b. Do not offer access to services, goods or products with the expectation that the purchaser or investor will make a profit as a result of the token's appreciation.

- c. Do not have liquidity or remuneration associated with the token.
- d. It is not a security that can be traded on secondary markets outside the issuer's platform environment.

- ▶ The fact that the token allows access to the Kubecoin platform's own services would not a priori imply that the token is considered a tradable security.
- ▶ However, attributing to tokens rights or expectations for investors to participate in a revaluation or profitability of the token or the possibility of trading the token on secondary markets could lead to the token being considered as a negotiable security and therefore subject to the LMV.

3. Kubecoin as a negotiable or non-negotiable security

According to the information provided and the technical characteristics that *Kubecoin* would present, such as acquiring certain goods or services (for example obtaining discounts in an establishment, obtaining rewards, etc.) could imply the consideration of the token as a negotiable security, since, even when operating solely on the Kube Ecosystem platform, there is the expectation that the purchaser or investor could obtain a profit as a result of the revaluation of the token.

Therefore, as it is a negotiable security, it may be necessary for Kube Ecosystem to draw up a prospectus, which must be supervised and approved by the CNMV.

However, taking into account the exemptions from prospectus preparation reflected in this report, it is understood that Kube Ecosystem would not have to prepare a prospectus as its offering of securities would be for a total amount in the European Union of less than EUR 8,000,000, calculated over 12 months from issue.

Consequently, the inclusion of Kube Ecosystem within the above-mentioned exceptions would require the support, supervision and intervention of an authorised investment services institution in order to issue Kubecoin.

Conclusions

In short, without prejudice to the recommendations already made and the regulatory analysis carried out, the following conclusions can be summarised with regard to the Kubecoin token:

- a. With regard to the consideration of the Kube Ecosystem token as a *utility* or *security token*, according to the information provided and the technical characteristics that this token would present, it is possible to understand its configuration as a **utility token**, due to its main objective of serving as a medium of exchange between users of the platforms that make up the project.
- b. As regards the classification of *Kubecoin* as a negotiable security or not, by virtue of the fact that there is a possibility that the acquirer of the token will make a profit as a result of its revaluation, even if its main purpose is to access goods and services, it should be considered a **negotiable security**.

In this case, it will not be necessary to prepare a prospectus to be supervised and approved by the CNMV, as the offer of Kube Ecosystem would be made for a total amount in the European Union of less than 8,000,000 euros, calculated over 12 months from the date of issue.

Notwithstanding the foregoing, in order to carry out the issue, the company must have the support, supervision and intervention of an authorised investment services entity.