

Feature

KEY POINTS

- The guidelines of the monetary authority of Singapore unequivocally state that the trading of cryptocurrency is “unsuitable” for the general public.
- The advertisement regulation in India is not issued by a financial regulator, but by a self-regulatory organisation.
- Regulatory regimes should not use consumer protection as a tool to indirectly foreclose the virtual currencies market to potentially interested and informed investors.

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Regulating cryptocurrency by policing advertisements: the approach in the UK, Singapore, India and Spain

In this article the author considers the regulatory approach of four jurisdictions to the policing of cryptocurrency advertisements.

INTRODUCTION

The past two years of the pandemic have been dubbed as the era of the retail investors, with regional financial markets across the world, especially South Asian markets, witnessing a sharp surge in retail investment participation through a host of financial instruments. The sudden shift away from traditional, risk averse investment vehicles towards investments in stocks, mutual funds and even cryptocurrency, points towards a revolution of financial markets where investors have not only a higher risk appetite, but also the willingness and ability to understand financial markets.

As a part of this revolution, Virtual Currencies (VCs)¹ have grown into prominent investment tools for retail investors across jurisdictions and are currently positioned at the forefront of financial development in many countries. While VCs are still viewed with caution and sometimes even suspicion, the level of interest they have received from young investors is hard to ignore.

In this context, the way VCs are introduced to the general public becomes critical. VC Exchange platforms and applications have emerged to take advantage of the gap between the growth and understanding of VCs, making use of extensive advertising and promotion schemes to market VC investments to the general public. These advertisements have been designed to incentivise investment in VCs, without highlighting the extreme risk and volatility involved in the investment and the

high degree of technical expertise required to undertake such risk.² It is therefore critical to regulate how VCs are advertised to the general public to protect consumers from false and misleading advertisements.

The regulation of VC advertisements reflects the global quandary on regulating advertisements in any financial product for legitimate concerns regarding consumer protection, without stifling growth of the market by curbing the dissemination of information. In fact, initially, the advertising of shares and mutual funds was heavily restricted. In the US for example, which has been the flag bearer for free market policies, the Securities Act of 1933 prohibited commercial advertisement of securities through newspapers. At the time it was argued that the high degree of uncertainty, risk and possibility of fraud associated with capital markets made such prohibition necessary. However, that approach was criticised for being a disproportionate intrusion into the public’s right to freely access information and participate in the financial market.³ Since then, investing in the stock market has become commonplace and advertising regulations now focus on balancing reasonable risk disclosures with legitimate and fair information about the product.

Many countries recognise that their existing standards on advertising are not sufficient for the unique nature of VCs and have accordingly issued guidelines on VC advertising. Since the beginning of 2022, Singapore, the UK and India have

all released their own advertising codes for VCs. These guidelines have varying degrees of restrictions on the free advertisement of VCs and resultantly, on the growth of the market itself.

REGULATORY APPROACHES IN UK, SINGAPORE AND INDIA

UK

The UK’s recent advertising guidelines err on the moderate side of regulation. In the UK, cryptocurrency advertisements are regulated in the same way as financial instruments such as stocks and mutual funds under the Financial Conduct Authority (FCA). Her Majesty’s Treasury issued a report, as per which VC advertisements will fall under the ambit of the Financial Promotion Order as promotion of a “controlled investment”.⁴ Thus, only authorised businesses will be allowed to publish advertisements regarding VCs with prior approval from the FCA, and advertisement of a misleading or unauthorised VC investment could invite criminal sanction. UK regulators will require crypto advertisements to abide by the principles of clarity and fairness, while also prominently featuring risk disclosures.

The UK has specifically defined the cryptoassets intended to be regulated by their advertisement guidelines and exclude NFTs from their ambit as they fall under a different class of “collectibles”. This distinction correctly appreciates the different financial risks and advantages associated with the two classes of Virtual Digital Assets (VDAs).⁵

Singapore

Singapore, on the other hand, has taken a far more restrictive and intrusive approach. The

Monetary Authority of Singapore (MAS) has issued guidelines, which prohibit the advertisement of VC through any public channel, including television, social media, physical billboards.⁶ Licensed crypto-service providers (CSPs) also cannot hire influencers/celebrities to promote VC investment. In Singapore, the only avenue for CSPs to advertise their services is through their own registered corporate websites and social media pages.

It is pertinent to note that the MAS Guidelines unequivocally state that the trading of cryptocurrency is “unsuitable” for the general public. This, in effect, goes beyond merely protecting the consumers from misleading advertisements and discourages public participation in the VC market altogether.

India

In India, the Advertising Standards Council of India (ASCI) has released guidelines to regulate the advertising and promotion of VDAs on exchange and trading platforms (VDA Guidelines 2022).⁷ Prior to the introduction of the VDA Guidelines, VC advertisements were self-regulated with advertisers voluntarily providing disclaimers about the risks of VC trading.

The VDA Guidelines 2022, which are effective from 1 April 2022 onwards, require every advertisement for VDA products and exchanges to carry the following disclaimer in a prominent and unmissable manner:

“Crypto products and NFTs are unregulated and can be highly risky. There may be no regulatory recourse for any loss from such transactions.”

The VDA Guidelines prohibit the use of words “currency”, “securities”, “custodian” and “depositories” (which consumers relate with regulated products) in any VC related advertisement. They also prevent all such advertisements from:

- portraying VC investment as very simple;
- downplaying its riskiness and complexity;
- guaranteeing future profits; and

- drawing comparisons with regulated asset classes.

Unlike more strict advertisement regulation in countries like Singapore, the VDA Guidelines do not prohibit social media advertisements and celebrities/prominent personalities from promoting VCs, but do impose a duty of doing due diligence before making any statement that could potentially mislead consumers. The thrust of the Guidelines is thus towards consumer protection. All restrictions and “do’s and don’t’s” mentioned aim at ensuring that the average, uninformed consumer is not misled into believing that VC investment is similar to regulated high risk investment tools such as stocks and mutual funds.

However, while the VDA Guidelines seek to achieve the same goal as other VC advertisement regulations across the world, it is important to juxtapose the framework against those adopted by other countries. It is crucial to note that the VDA Guidelines are implemented under the ASCI Code. ASCI is not a financial regulatory authority but is a self-regulatory organisation for the advertising industry in India and is registered as a non-profit company under the Indian Companies Act. This is unlike the MAS and FCA who are both financial regulators in their respective jurisdictions.

This difference in approach is emblematic of the fact that the Indian government is yet to take a call on how to treat VCs legally. Even the Indian Supreme Court stopped short of putting a precise label on the legal nature of VCs when faced with an opportunity to identify their legal character.⁸ This hesitancy bears itself out in the VDA Guidelines’ failure to define the VCs which would be subject to the Guidelines, resulting in all VCs (including NFTs) being subject to them. The VDA Guidelines are perhaps a stopgap measure till the Indian government decides how to treat VCs. Considering that the VDA Guidelines are unlikely to be the final word on VC advertisements, it is important that future regulation considers how best to achieve consumer protection through regulation without stifling financial innovation.

IMBALANCED ADVERTISING REGULATIONS: THE CREEPING EFFECT OF EXCESSIVE CONSUMER PROTECTION ON THE VC MARKET

The guidelines discussed above are geared to prevent consumer exploitation and mandate risk disclosures which emphasises the extreme volatility and risk associated with VC investment. Reports suggest that regulatory authorities in other countries are likely to follow suit in the coming months, as the wave of restrictions on crypto advertisements represent the “second phase of crypto asset regulation”, that focuses on consumer protection.⁹ This principle, however, is actualised in varying ways – and certain deviations are potentially problematic in:

- how they view consumer protection; and
- how they may affect the growth of the VC market in each jurisdiction and globally.

Consumer protection should be directed at improving the quality of information regarding VC investments, reducing the end harm to consumers and curbing fraudulent activities and cybersecurity risks.¹⁰ Keeping this in mind, the regulatory regime is justifiably risk averse, but it is questionable if the guidelines are truly effective in achieving these goals of consumer protection. While regulation has to protect the average consumer, it cannot discount the fact that there exist different classes of retail investors with differing levels of knowledge and interest in VC investments. Many young investors with a niche understanding of disruptive technologies and VC investment may prefer digital assets over traditional investments.¹¹ In that sense, excessive regulation (and prohibition, in the case of Singapore) over advertisements does little to advance goals of consumer protection and may border on unjustified paternalism over potential investors. The desirability of a paternalistic approach in VC markets is subject to debate,¹² and depends largely on whether the economic approach favours free market forces as in the US or consumer welfare as in Europe and Singapore.¹³

Notwithstanding that debate, regulation should not surreptitiously interfere with the growth of the VC market itself under the guise of consumer protection. This creeping effect is especially problematic in the case of India's VDA Guidelines 2022, which are issued by a self-regulatory body for advertisements with no specialised jurisdiction over the functioning of financial instruments and investments.

A good way to approach consumer protection could instead be to follow the Spanish National Securities Market Commission's Circular, which actualises consumer protection by necessitating the disclosure of information regarding legal and technology risks and defines the due diligence to be carried out by celebrities before promoting VC investments.¹⁴ The CNMV Circular specifically governs all cryptoassets that are means of investment, and requires all commercial communications to include the disclaimer "investment in crypto-assets is unregulated, may not be suitable for retail investors and the entire amount invested may be lost".¹⁵ The CNMV Circular emphasises that advertising of VCs must be balanced, impartial and not misleading. Importantly, Spain's CNMV Circular includes in Annex II a compendium of additional information regarding the basics of VC investment and associated technology and legal risks, which advertisers must compulsorily refer to for the benefit of their audience.

As mentioned above, a skewed view of consumer protection can have a creeping effect on the growth of the VC Market. Singapore's approach has largely been criticised as implying a negative connotation qua public participation in the VC market, thus potentially dampening the country's status as a "crypto hub".¹⁶ While India's VDA Guidelines lay down a reasonable list of requirements in terms of disclosing risks, they do little to educate consumers or paint a realistic picture of VC investments for potential investors. Considering that these Guidelines will need to be adopted by a financial regulatory framework once the government achieves clarity on how it wants to classify VCs,

India should avoid disincentivising potential and existing consumers away from the market through indirect obstacles to accessing information.

CONCLUSION: BALANCING CONSUMER PROTECTION WITHOUT HAMPERING THE GROWTH OF THE VC MARKET

It is important for regulators to recognise the impact of a misguided approach to consumer protection, and actively remedy it, in order to foster a robust and safe VC market. Balancing consumer protection with growth of a new, ostensibly high risk, financial market is both desirable and achievable, especially if one takes a leaf out of how advertising regulations of other financial products have evolved.

It may be justifiable for regulators to approach any new financial product with caution, as they have in the past. However, it is important to remember that the concept of pooling investments from strangers across the world, or buying a minuscule portion of a company, were all alien and potentially fraudulent ideas when they were first introduced. While at that time risk averse investments may have been more desirable, it was not for regulators to directly limit the public's access to newer, alternate modes of investment, such as in Singapore today. It was also not for a self-regulatory body like ASCI to guide advertising of mutual funds or stocks.

Similarly, VC investment is at a cusp where some parts of the population may be prone to incorrect information, while another segment is driving the development of the VC market. The overarching intention of the regulatory regime should be to foster legitimate information and highlight all associated risks in investment through advertisements, without using consumer protection as a tool to indirectly foreclose the VC market to potentially interested and informed investors. It is thus necessary to approach advertising with an open and balanced perspective, where regulators recognise the industry as an important source of education and awareness, without impeding investors from capitalising on their

knowledge and efforts regarding a novel financial product. ■

- 1 VC refers to cryptocurrencies and other digital and virtual tokens and coins.
- 2 See Advertising Standards Council of India, 'Press Release: ASCI frames guidelines for advertising and promotion of virtual digital assets and services' 23 February 2022.
- 3 Michael E Schoeman, 'The First Amendment and Restrictions on Advertising of Securities Under the Securities Act of 1933' (1986) 41(2) *The Business Lawyer* 377.
- 4 Her Majesty's Treasury, Cryptoasset promotions: Consultation response (proposes amendment of Financial Promotion Order), January 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1047232/Cryptoasset_Financial_Promotions_Response.pdf.
- 5 VDAs refers to cryptocurrency and digital assets such as Non Fungible Tokens.
- 6 Monetary Authority of Singapore, Guidelines on Provision of Digital Payment Token Services to the Public, Guidelines No. PS-G02, 17 January 2022 <https://www.mas.gov.sg/-/media/MAS-Media-Library/regulation/guidelines/PSO/ps-g02-guidelines-on-provision-of-digital-payment-token-services-to-the-public/Guidelines-on-Provision-of-Digital-Payment-Token-Services-to-the-Public-PS-G02.pdf>.
- 7 Advertising Standards Council of India, 'Press Release: ASCI frames guidelines for advertising and promotion of virtual digital assets and services' 23 February 2022.
- 8 *Internet and Mobile Association of India v. Reserve Bank of India*, (2020) 10 SCC 274.
- 9 'Crypto regulatory focus shifts to the next phase,' XReg Consulting, 19 January 2022, <https://www.xreg.consulting/articles/crypto-regulatory-focus-shifts-to-the-next-phase>.
- 10 World Economic Forum, Navigating Cryptocurrency Regulation: An Industry Perspective on the Insights and Tools Needed to Shape Balanced Crypto Regulation, Global Future Council of Cryptocurrencies – Community Paper (September 2021) p 9.
- 11 Tang See Kit, Crypto curbs: Industry players say ad ban not the only way to protect retail investors in Singapore (Channel

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News Asia, 20 January 2022) <https://www.channelnewsasia.com/singapore/mas-no-cryptocurrency-advertisement-marketing-protect-retail-investors-2447321>.

12 Iris H-Y Chiu, 'More paternalism in the regulation of consumer financial investments? Private sector duties and public goods analysis' (2021) 41(4) *Cambridge Legal Studies* 657.

13 Kirill Bryanov, 'Clampdown on crypto ads: A one-off or a new phase of global regulation?' (Coin Telegraph, 28 January 2022) <https://cointelegraph.com/news/clampdown-on-crypto-ads-a-one-off-or-a-new-phase-of-global-regulation>.

14 See Annex II, Spanish National Securities Market Commission, Circular on the advertising of cryptoassets presented as a means of investment, Circular 1/2022 of 10 January 2022 https://cnmv.es/DocPortal/Legislacion/Circulares/Circular_1_2022_EN.pdf.

15 Spanish National Securities Market Commission, Circular on the advertising of cryptoassets presented as a means of investment, Circular 1/2022 of 10 January 2022 https://cnmv.es/DocPortal/Legislacion/Circulares/Circular_1_2022_EN.pdf.

16 Karry Lai, 'Opinion: Blanket Ban on Ads Will Dampen Singapore's Crypto Hub

Status' (*IFLR*, 8 February 2022) <https://www.iflr.com/article/b1wnwbj5vzm4v/opinion-blanket-ban-on-ads-will-dampen-singapores-crypto-hub-status>.

Further Reading:

- Tracing and freezing cryptocurrency in Hong Kong and Singapore (2021) 9 *JIBFL* 652.
- The regulation of Bitcoin in Singapore (2014) 6 *JIBFL* 398.
- LexisPSL: Banking & Finance: Practice Note: Supranational and EU regulation of cryptoassets.

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