

Towards the legal colonisation of cryptocurrencies

The financial crisis of 2008 brought distrust of banking and an alternative. Bitcoin was [born](#) with the aim of creating an alternative monetary system that can operate without central banks. It is designed to operate outside the law with pretensions of a legality. It describes itself as infallible, but it is not immutable. Like a virus, it admits variants. In a first stage, it is institutionalised. Through mining farms, custodians and contracting houses, it becomes a business concentrated in the hands of a few. But the system reacts and, relying on Ethereum applications, it combines with smart contracts to create decentralised finance in which it becomes increasingly difficult to identify those in charge. According to this design, crypto-assets are products that are the subject of a decentralised registry via Blockchain or similar technology. They arise under the protection of free will and entrepreneurial freedom. They are traded as profitable and safe investments without warning of their risks. It is increasingly common to see advertisements offering «Invest in Bitcoins to protect your savings». The truth is that crypto-assets have risks that make them unsuitable for savers. However, the regulation that protects the customers of financial institutions does not cover crypto-assets. Beyond tax and anti-money laundering rules, there is no legal regime for cryptocurrencies. As a notable exception, Switzerland has legislation that characterises cryptoassets as a new form of representation of movable wealth and regulates their distribution and trading. In the European Union, there is a proposal for a regulation on crypto-asset markets (MiCA). When this regulation enters into force, the issuing of cryptoassets will be subject to transparency duties similar to those that exist for financial instruments.

In the absence of substantive law, cryptoassets have been traded without restrictions. The first reactions came from Bigtech. With their peculiar Lex Mercatoria, they vetoed crypto-asset advertisements on social networks for not complying with their terms of use. Restrictions that are now beginning to modulate. For some months now, both [Facebook](#) and [Google](#) have been more open to advertising cryptoassets. In the United Kingdom, Advertising Standards Authority (ASA), has [vetoed](#) certain advertisements for cryptoassets. In their qualified opinion, consumers' credulity and inexperience about these volatile and complex products cannot be exploited.

In the absence of a specific legal framework, the financial authorities have limited themselves to warning against the risk of investing in crypto-assets in order to make it clear that they are not financial instruments subject to their supervision. In this way they have tried to avoid their own liability. What is not so common is that a financial supervisor regulates advertising of a product that does not fall within its remit. Only the Monetary Authority of Singapore (MAS) has dared to issue [guidelines](#) prohibiting the public promotion of cryptoassets in the media and social networks. These guidelines seek to avoid

trivialising the risk of investing in these products, such as opening Bitcoin ATMs on the street.

Spain is a pioneer in the control of crypto-asset advertising by the financial authorities. In 2021, the Securities Market Act was amended to empower the National Securities Market Commission (CNMV) to control the advertising of cryptoassets presented as an investment object, even though they are not financial instruments that are the natural object of the Securities Market Act. Using this authorisation, the CNMV has just issued a [circular](#) setting out the principles and criteria for this type of advertising. Instead of extending the financial advertising control regime to crypto-assets, the CNMV has opted for autonomous regulation. It begins by defining its scope. The new regime applies to all advertising to investors in Spain that offers or draws attention to cryptoassets, including, sensibly, non-fungible cryptoassets (NFTs) offered to the public as an investment object. It is a regime that must be complied with by any person advertising cryptoassets, including influencers who get paid for such advertisements on social media. A [tweet](#) by former soccer player Andrés Iniesta about cryptocurrencies would be subject to control by the CNMV.

After setting out its scope, the circular sets out principles and criteria common to the advertising of financial instruments and adds some criteria specific to the advertising of crypto-assets. As with advertising of financial instruments, advertising of crypto-assets must be «clear, balanced, impartial and not misleading». Information on costs and returns must be «accurate, sufficient and up-to-date», avoiding biased information on past performance. It should also avoid creating disproportionate expectations. The novelty lies in new high-risk and technology risk warnings. Crypto-assets are products with legal risks arising from their uncertain nature. Although they are sold as currency, «there is no legal obligation to accept them». The CNMV considers that the technology of distributed registries lacks maturity and «there may be significant flaws in their operation and security». These statements contrast with the infallible nature of Bitcoin. But it is important to distinguish between the mathematical protocol that is infallible and the system of services involving miners, programmers, custodians, intermediaries and other actors subject to the failures and weaknesses of human beings. It is this constellation of operators that can lead to «system failures», or rather, to malpractice that harms investors. It is not the algorithmic and cryptographic technology that can fail but the human system put in place to provide monetary and financial services with that technology.

The CNMV is the body in charge of supervising that crypto-asset advertising complies with these principles and criteria. Crypto-asset advertising does not require prior authorisation. It is sufficient to keep a record of advertising campaigns for the last two years at the disposal of the supervisor, who may require the cessation or modification of advertising that does not comply with the regulated regime. As a special rule, the CNMV requires prior notification for mass campaigns targeting more than 100,000 people through the media, including social networks. This is not a prior authorisation but a mere communication that must be made ten days prior to the execution of the campaign. Once this period has passed, the campaign can begin, unless the CNMV indicates otherwise.

In contrast to what happens with the advertising of financial instruments, in which the entity can resort to the prior report of the Advertising Self-regulation System to prove that it acted diligently, in the advertising of crypto-assets there is no such recourse. It is a regime lacking this safe harbour. Moreover, advertising in breach of the regulations constitutes a

serious infringement (art. 292.4 Securities Market Act) punishable by a fine of 300,000 euros.

With this circular, the CNMV ventures to regulate the advertising of crypto-assets without having a legal framework for the product whose advertising it must control. In this way, the CNMV is playing on foreign ground. It is trying to act as a referee outside the stadium and without having a regulation on this type of betting. It is an adventure with an uncertain outcome that poses risks for the supervisor. From now on, the CNMV will be liable with its assets for the damage caused as a result of the lack of control over the advertising of this type of product or for excesses in its control.