

AN OVERVIEW OF THE REGULATION OF CRYPTOCURRENCY IN SOUTH AFRICA

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Abstract

The increasing popularity of cryptocurrencies has raised many questions with regard to their regulation. Issues such as taxation and its role in criminal activities are of central importance to the way in which cryptocurrency will continue to develop and occupy space in society. In this paper, such regulatory aspects are explored, and South Africa's response is addressed. With cryptocurrency growing worldwide at increasing rates, regulators are left having to respond quickly to this aspect of financial technology and while some have banned its use outright, others have taken the stance to embrace the use of cryptocurrencies to ensure it has a space for use in the future of the financial world.

* BCom Law (finalist), University of Pretoria. ORCID iD: 0000-0002-8574-8952. I would like to thank my brother Mohamed Faez and dear friends Malcom Mangunda and Luke Schwulst for their thorough input throughout this process. Further, I would like to thank the entire PSLR team, especially Khalipha Shange and Phenyio Sekati for their relentless efforts and patience. As one of my first contributions to the field of law, I hope the reader finds this insightful and enlightening. I hereby note that all shortcomings are that of my own. I would like to dedicate this to my mother and father. In the name of Allah (SWT), the most beneficent, the most merciful.

1 Introduction

‘If you don’t stand for something, you’ll fall for anything.’- Malcolm X

The COVID-19 pandemic transformed the way in which the world utilises technology. To this end, it is interesting to note that the ancillary tools which were once used for everyday practice, so as to enhance both professional and personal life experiences, have been elevated to become necessities amid the viral outbreak. To elaborate on this train of thought, technology and digitalisation have since taken centre stage in the midst of this pandemic. As part of the increase in the use of virtual technologies, the surge of interest in financial technology (FinTech) has arguably been one of the most notable progressions over the previous year.

FinTech is not a new concept in South Africa. There are many pieces of legislation that regulate the financial services market within the ambit of South African banks and other financial service providers. Amongst others, these include the Financial Markets Act 19 of 2012,¹ the Financial Intelligence Centre Act 38 of 2001,² and the National Payment System Act 78 of 1998.³ Notwithstanding the aforementioned, at this point, cryptocurrency (as a type of FinTech), does not have any affiliation with traditional authorities such as banking institutions. In addition to this, regulatory bodies have drafted minimal legislation to assist in the regulation of cryptocurrency. Due to the growing interest in cryptocurrency, this upregulation could prove problematic.

At the point of constructing this article, cryptocurrency as a store of value is considered to be at an all-time high. It is entering mainstream markets with an addition such as Coinbase⁴ to the Nasdaq stock exchange and consumer interest is seemingly widespread amidst the backdrop of an otherwise ailing worldwide economy.⁵ South Africa has not been left behind in this worldwide phenomenon with an estimated R6.5 billion being in circulation in the South African crypto market.⁶

Interestingly, the surge in cryptocurrency can be seen as a double-edged sword mainly because the surge has advanced prosperity opportunities for both international and domestic economies. On the other hand, this surge presents many legal and regulatory questions.

1 Financial Markets Act 19 of 2012.

2 Financial Intelligence Centre Act 38 of 2001 (FICA).

3 National Payment System Act 78 of 1998.

4 Coinbase Global Incorporated is an American cryptocurrency exchange platform.

5 NH Hamukuaya ‘The Developments of Cryptocurrencies as a Payment Method in South Africa’ (2021) *Potchefstroom Electronic Law Journal* at 44.

6 Staff Writer ‘SARS is coming after these 3 tax streams’ *BusinessTech* 07 May 2021 <https://businesstech.co.za/news/banking/488741/sars-is-coming-after-these-3-tax-streams/> (accessed 10 May 2021).

This research undertakes to define and classify cryptocurrency through the exploration of international trends and the taxation of cryptocurrencies. Thereafter, recommendations as to the regulatory framework of such technologies in South Africa will be made in conclusion.

2 Defining and classifying cryptocurrency

Cryptocurrencies emanate from cryptography, digital media, and commerce respectively. The combination of digital media and commerce is not a foreign concept in modern society, with the utilisation of digital payment systems and banking applications being examples of such combinations. Cryptography, broadly defined as 'the science of secret communications', differentiates cryptocurrencies from other types of E-Commerce.⁷ In this case, cryptography affords the consumer a specific type of anonymity known as pseudonymity which essentially enables a unit the ability to be recognised through numerical sequences as opposed to exposing the consumer's physical identity.⁸

Furthermore, what can be regarded as the distinguishing factor of cryptocurrency from other types of FinTech is the premise upon which cryptocurrency is based.⁹ For clarification purposes, it is said that cryptocurrency is acquired through solving complex mathematical coding problems or puzzles.¹⁰ The individual who manages to successfully solve the mathematical puzzle (the successful miner) may then claim this unit.¹¹ A note of a transaction or 'block' is then created following each transaction associated with the said unit.¹² As a consequence, a 'blockchain' is established which is, in essence, the public transaction ledger that records each transaction.¹³ This method of recording transactions provides certainty in pseudonymous possession.¹⁴ This cryptocurrency is then afforded value depending on which category of virtual currency it falls under in terms of what it may be exchanged for.¹⁵ Each cryptocurrency also has a limit as to the amount that can be mined in totality.¹⁶ For example, by the year

7 E Reddy & V Lawack 'An Overview of the Regulatory Developments in South Africa Regarding the Use of Cryptocurrencies' (2019) 31 *South African Mercantile Law Journal* at 4.

8 Reddy & Lawack (n 7) 14.

9 Reddy & Lawack (n 7) 2.

10 Reddy & Lawack (n 7) 5.

11 Reddy & Lawack (n 7) 11.

12 As above.

13 Reddy & Lawack (n 7) 12.

14 Reddy & Lawack (n 7) 13.

15 Reddy & Lawack (n 7) 12.

16 Reddy & Lawack (n 7) 21.

2140, all Bitcoins will have been mined as it is only possible for 21 million Bitcoins to be mined.¹⁷

Cryptocurrencies are classified under the larger umbrella of FinTech and are denoted as virtual currencies.¹⁸ There are a variety of categories thereunder that relate to the centralisation, convertibility with regards to fiat currency, and the directional flow of said currency. This research primarily focuses on decentralised, bi-directional, and convertible virtual currency. This means that the cryptocurrency referred to in this research can be bought and sold in accordance with floating exchange rates.¹⁹ Furthermore, with regards to its decentralisation, such cryptocurrencies are said to be distributed, open-source, math-based peer-to-peer currency that has no central administering authority, and no central monitoring or oversight.²⁰ Such examples are that of Bitcoin, Ethereum, and Ripple. For the specific purpose of this research, it is to be noted that Bitcoin is not the only type of cryptocurrency. This is a common misconception wherein individuals consider Bitcoin as the entirety of cryptocurrency. It is merely a type of cryptocurrency much like the South African Rand or Japanese Yen is merely just a type of fiat currency. Cryptocurrencies that are not Bitcoin are referred to as altcoins.²¹

The classification of cryptocurrencies is crucial in terms of the associated regulatory measures.²² While this store of value is often referred to as 'currency', it is pertinent to note that it is not in fact a form of currency. In South Africa, the central bank, or the South African Reserve Bank (SARB) holds the sole authority to issue legal tenders.²³ Therefore, cryptocurrency is not a legal tender as one of its defining characteristics is that of its decentralisation.

While some companies such as Takealot and Pick 'n Pay have in the past allowed for cryptocurrency to be used in a contract of exchange,²⁴ it is much more common, at least in present times, for cryptocurrency to be utilised as a commodity or store of value asset.

17 Statista 'Maximum and current supply of various cryptocurrencies worldwide as of August 18, 2021' August 2021 <https://www.statista.com/statistics/802775/worldwide-cryptocurrency-maximum-supply/> (accessed 08 September 2021).

18 B Mukwehwa 'Rethinking the regulation of virtual currency in South Africa' LLM Thesis, University of Pretoria, 2019 at 4.

19 Mukwehwa (n 18) 8.

20 Mukwehwa (n 18) 10.

21 Hamukuaya (n 5) 15.

22 The Intergovernmental Fintech Working Group Position Paper on Crypto Assets (2020) at 8 (IFWG Position Paper).

23 Reddy & Lawack (n 7) 2.

24 Reddy & Lawack (n 7) 16.

The term 'crypto asset' is then coined. The Intergovernmental FinTech Working Group (IFWG)²⁵ has defined crypto assets that have been adopted by regulatory authorities as:²⁶

a digital representation of value that is not issued by a central bank, but is traded, transferred, and stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility, and applies cryptography techniques in the underlying technology.

Crypto assets may be purchased from a variety of crypto-asset service providers (CASPs), which may include either trading platforms or crypto-asset vending machines.²⁷

Finally, for a consolidated understanding of cryptocurrency, one must understand the key role players associated in a basic crypto transaction. Inventors are the initial party associated with a cryptocurrency. They are tasked with seeing the currency through the phase of its initial coin offering (ICO) which is essentially the capital raising portion of its lifespan.²⁸ Inventors may often choose to remain unknown, as in the case of Bitcoin.²⁹ The next crucial role players are the miners involved in solving the complex mathematical puzzles to essentially 'unlock' crypto assets and add them to the blockchain. A miner may either keep the coin or exchange it with a user, who is someone who attains the coin for practical use, either in the form of an investment or as a medium of exchange for goods or services.³⁰ Lastly, a wallet provider is a key role player in the world of crypto assets. Cryptocurrency may only be stored in virtual wallets, which undertakes to simplify the processes involved in transacting cryptocurrency.³¹ However, a user may act simultaneously as their own wallet provider should they possess the technical know-how.

Therefore, cryptocurrency (which is, in fact, not an official currency) is succinctly defined as a pseudonymous digital store of value that originates from the solving of complex mathematical problems and transactions thereof are recorded on a ledger referred to as the blockchain.³²

25 The government task force comprised parties from various regulatory bodies whose purpose is to put forward suggestions and positions on the regulation of cryptocurrencies in the economic landscape of South Africa.

26 IFWG Position Paper (n 22) 9.

27 Reddy & Lawack (n 7) 23.

28 Mukwehwa (n 18) 10.

29 Hamukuaya (n 5) 12.

30 Reddy & Lawack (n 7) 11.

31 IFWG Position Paper (n 22) 10.

32 A Nieman 'A Few South African Cents Worth on Bitcoin' (2015) 18(5) *Potchefstroom Electronic Law Journal* at 1986.

3 Cryptocurrency and taxation

Pseudonymity consistently poses an inconvenience to the regulation of crypto assets as it requires further administrative effort from the regulator to essentially determine the identity of the user from the numerical sequence of the asset.³³ Taxation is no different. The issue of identifying and verifying users of crypto assets has presented the South African Revenue Services (SARS) with hindrances of being able to adequately tax crypto transactions, due to the anonymities.³⁴ While there are CASPs such as Luno and VALR in South Africa which do require some sort of verification, there are still many traders who utilise platforms that do not require any form of verification.³⁵ The amount of attention afforded to the digital identities of taxpayers has significantly increased so as to ensure taxpayer compliance with taxation legislation.³⁶ It must be further noted that little to no certainty is afforded to both tax authorities and users currently in the execution of such practices. Nevertheless, efforts to tax crypto assets are achieving some success as many countries are experiencing positive feedback in response to the proposal to draft crypto taxation legislation. In the BRICS countries, for example, India and Russia have recently endeavoured to establish such legislation to develop their regulatory response to cryptocurrency, particularly in terms of taxation.³⁷

SARS has not been coy in its attempts to collect revenue from cryptocurrency. In 2018, it declared that even though cryptocurrency is not a legal tender, it may be regarded as assets of an intangible nature for tax purposes.³⁸ From this, aggressive action was taken to ensure that taxpayers knew about the fact that should such income not be declared, they may be penalised by up to 200% of the amount owed plus interest, in accordance with section 223 of the Tax Administration Act.³⁹ Interestingly enough, taxation legislation has made significant strides in incorporating cryptocurrency into its scope of application. The legislature has made concessions for cryptocurrencies in both the Value Added Tax Act 89 of 1991 (VAT

33 As above.

34 Reddy & Lawack (n 7) 22.

35 IFWG Position Paper (n 22) 16.

36 L. Sadhaseevan 'The Regulation of Cryptocurrencies in the Context of South Africa's Financial Sector' (2019) LLM Thesis, University of KwaZulu-Natal at 36.

37 J. Scheepers 'Analysis of cryptocurrency verification challenges faced by the South African Revenue Service and Tax Authorities in other BRICS countries and whether SARS' power to gather information relating to cryptocurrency transactions are on par with those of other BRICS countries' LLM Thesis, University of Cape Town, 2019 at 5.

38 Baker McKenzie 'Blockchain and Cryptocurrency in Africa' February 2019 https://www.bakermckenzie.com/-/media/files/insight/publications/2019/02/report_blockchainandcryptocurrencyreg_feb2019.pdf (accessed 10 May 2021).

39 Tax Administration Act 28 of 2011 sec 223; Staff Writer (n 6).

Act)⁴⁰ and the Income Tax Act 58 of 1962 (ITA).⁴¹ The VAT Act adds cryptocurrencies to the definition of ‘financial services’ in section 2 which enables its exemption from value-added tax.⁴² In the ITA, the addition of cryptocurrencies will be incorporated in the definition of ‘financial instrument’ and section 20A⁴³ has also been amended to include ‘the acquisition or disposal of any cryptocurrency’ which essentially enables ring-fencing of any losses accrued from acquiring or disposing of cryptocurrencies.⁴⁴

Many traders and investors often feel that due to the pseudonymity and relative timeframe in which crypto assets have been a commodity, they do not have to pay tax.⁴⁵ This is untrue and SARS has taken steps to tax crypto assets which may be classified under either income tax or capital gains tax. SARS’ budget allocation has been raised in the 2021 fiscal year by R3 billion.⁴⁶ In utilising these additional resources, SARS has made it clear that it aims to prioritise digital finances, assets, and income streams. It aims to invest heavily in technological resources so that it may be able to monitor financial transactions and identify transactions moving into and out of crypto platforms.⁴⁷

The onus lies on the taxpayer to declare any income or capital gains derived from crypto assets.⁴⁸ There are three manners in which funds are raised from cryptocurrency. These are through mining, the exchange for goods and services, and trade in/with cryptocurrencies.⁴⁹ All these streams are taxable and should be declared according to the relevant taxation legislation.⁵⁰ It is also a misconception that only upon the physical exchange of crypto assets for fiat currency can such income from crypto-assets become taxable.⁵¹ Inadvertently, even if a trader makes a trade between two types of cryptocurrencies, such as through trading Bitcoin for Ethereum, any profits derived would be taxable according to regulations put forward by SARS.⁵² Currently, SARS is working tirelessly to ensure that cryptocurrency and crypto assets are taxed in accordance with the relevant legislation. This could be a vast and fruitful stream of income for tax collectors and may impact the South African fiscus in a way unforeseen by many.

40 Value Added Tax Act 89 of 1991 (VAT Act).

41 Income Tax Act 58 of 1962 clause 2(1)(c).

42 VAT Act (n 40) sec 2.

43 Income Tax Act (n 41) sec 20A.

44 Baker McKenzie (n 38).

45 Staff Writer (n 6).

46 As above.

47 As above.

48 Staff Writer (n 6).

49 Reddy & Lawack (n 7) 22.

50 Mukwehwa (n 18) 24.

51 Staff Writer (n 6).

52 As above.

4 Risks associated with cryptocurrency

The IFWG noted a variety of risks in the establishment of a cryptocurrency monetary system in its 2020 position paper.⁵³ These risks are vast and pose some rather pertinent questions, particularly if cryptocurrency can be considered as a store of value for the future.⁵⁴ This part of the research undertakes to highlight some of the most crucial risks against the possible future use of cryptocurrency in the financial markets, with a specific focus on consumer protection, cybersecurity, and miscellaneous regulatory aspects.

4.1 Consumer protection and market conduct

Consumer protection and market conduct remain at the top of the IFWG's list in relation to the risks associated with cryptocurrency.⁵⁵ This concern deals directly with the subsequent section of regulation and will be delved into further at that point. Succinctly, the issue raised is that current international and domestic regulation is unable to keep up with the pace at which cryptocurrency is gaining popularity.⁵⁶ Tax evasion, illegal cross-border transactions, fraud, and theft in vain of the pseudonymity provided by the crypto market serve as threats to the very sanctity of South Africa's consumer protection mechanisms.⁵⁷ Consumers leave themselves vulnerable and service providers can manipulate the market freely due to the lack of established law in this regard. Information asymmetries are common within FinTech; however, this seems to be more apparent in cryptocurrency due to its pseudonymous and independent nature.⁵⁸ While decentralisation can afford power and autonomy to the average consumer, it also poses risks to such individuals in that there is no legislation to safeguard them from possible instances of fraud. South Africa established the Twin Peaks Model⁵⁹ after the 2007/2008 global financial crisis to regulate the sanctity of financial institutions. This, in tandem with the Consumer Protection Act 68 of 2008,⁶⁰ provides little insight into the possible regulation of the crypto market specifically and the prevention of the abuse of the average consumer generally. At this point, little to no movement has been made in addressing consumer protection or market conduct shortcomings. However, this is attributable to the assertion that cryptocurrency has

53 IFWG Position Paper (n 22) 15.

54 Nieman (n 32) 1982.

55 As above.

56 IFWG Position Paper (n 22) 15.

57 As above.

58 Financial Regulatory Reform Steering Committee 'Implementing a twin peaks model of financial regulation in South Africa' (2013) (FRRS Committee) at 25.

59 As above.

60 Consumer Protection Act 68 of 2008 (CPA).

been in mainstream circulation and that there has been no litigation in South Africa concerning the shortcomings of cryptocurrency.⁶¹

4.2 Cybercrimes and fraud

It has been established that there has not been any noteworthy litigation relating to cryptocurrency.⁶² Nonetheless, this does not mean that there have been no cases of cryptocurrency attracting unwanted attention from law enforcement. As previously mentioned, the intended premise of pseudonymity affords the consumer with a variety of opportunities in its provision of autonomy, but it also opens the door for abuse and manipulation.⁶³ Cybercrime is a common threat to most in today's society and crypto traders, experts or not, are no less vulnerable.

In 2014, Japanese-based Mt Gox filed for bankruptcy after it reported that Bitcoins to the value of \$473 million were stolen.⁶⁴ This is not a once-off event as various CASPs have reported instances of phishing, hacking, and malware attacks.⁶⁵ Even in South Africa, the Directorate for Priority Crime Investigations (HAWKS) is investigating the theft of Bitcoin from an estimated 27 500 South Africans, Australians, and Americans in the wake of an online Ponzi scheme.⁶⁶

As with any aspect of society, crime is a given. Nonetheless, should cybercrime with regards to crypto assets not be curtailed, this might pose a rather large point of contention in the possible progression of cryptocurrency as a legitimate monetary system.⁶⁷

4.3 Money laundering and financing of terrorism

Pseudonymity is a recurring theme in the crypto market and a premise on which this market prides itself. There are currently no regulatory requirements for identification upon purchasing cryptocurrency from CASPs.⁶⁸ This creates a conducive environment for money laundering and terrorism financing through the utilisation of illegal cross-border

61 Baker McKenzie (n 38) .

62 As above.

63 Reddy & Lawack (n 7) 21.

64 As above.

65 Reddy and Lawack (n 7) 21. Such examples include Bitcoin Savings & Trust, Bitcoin Gold, BitKRX, My Big Coin and Cryptocurrency Clipboard hijackings with a notable example being the recent routing attacks on Bitcoin. See M Apostolaki, A Zohar & L Vanbever 'Hijacking Bitcoin: Routing Attacks on Cryptocurrencies' (2017) *IEEE Symposium on Security and Privacy* at 375-376.

66 As above.

67 Sadhaseevan (n 36) 85.

68 Reddy & Lawack (n 7) 3.

flows.⁶⁹ Such transactions would be difficult to trace, particularly considering that cryptocurrency is a global commodity.⁷⁰

Money laundering involves three distinct steps.⁷¹ These steps are that of placement, wherein the 'dirty' money is introduced into the financial system; layering, wherein the money is then moved between different accounts, financial products, countries, and currencies making it difficult to trace; and integration, wherein the funds are returned to the criminal under a legal guise representing legitimate earnings.⁷² Cryptocurrency is utilised mostly in the layering step of money laundering.⁷³ As noted earlier, pseudonymity denotes the blockchain as being something inherently complicated. This increases the burden on law enforcement when it comes to tracing these funds.⁷⁴ Furthermore, cryptocurrencies are also relatively easy to transfer internationally. In essence, due to pseudonymity and the resultant complications in identifying users, cryptocurrencies are an additional (and perhaps more effective) medium through which money launderers may disguise the trail of the conversion of 'dirty' money to that of legitimate funds.

Certain CASPs have implemented identification and verification procedures even though it is not a regulatory requirement. The only regulatory requirement set out in legislation at this point that may contest the principle of pseudonymity is the obligation of CASPs to report any suspicious transactions in terms of section 29 of the Financial Intelligence Centre Act.⁷⁵

4.4 Environmental impact

Crypto mining hardware and software is costly.⁷⁶ Additionally, the cost of mining includes substantial expenditure on energy consumption.⁷⁷ Bitcoin mining alone consumes vast amounts of electricity annually and its estimated annualised electricity consumption at the beginning of 2020 was 71.07 terawatt-hours.⁷⁸ To

69 As above.

70 As above.

71 G Forgang 'Money Laundering Through Cryptocurrencies' (2019) 40 *Economic Crime Forensics Capstones* at 12.

72 Forgang (n 71) 10.

73 As above.

74 As above.

75 FICA (n 2) sec 29.

76 Reddy & Lawack (n 7) 11. The cost for a start-up mining operation (hardware and software, excluding other operational components) can amount to anywhere between R5 000 to R50 000.

77 Reddy & Lawack (n 7) 12.

78 W Daniel 'Bitcoin energy jumped 80% since the beginning of 2020, according to a new study' *Business Insider* 13 March 2021 <https://www.businessinsider.co.za/bitcoin-energy-consumption-cambridge-study-cryptocurrencies-bitcoin-mining-climate-change-2021-3#:~:text=Bitcoin's%20energy%20consumption%20has%20jumped,2020%20was%2071.07%20terawatt%2Dhours> (accessed 10 May 2021).

put this into perspective, the average American household consumes about 10.65 kilowatt-hours annually.⁷⁹ The amount of electricity used to mine Bitcoin in 2020 was thus approximately 70 billion times more compared to the electricity used by the average American household.

This evidently incurs vast financial amounts, but it also exacerbates an immense environmental burden. With the current notion that the future of fossil fuels seems to be scarce and less reliable as time goes by, a clear acknowledgement is considered with regards to the future of crypto mining and its extensive environmental requirements.⁸⁰

Furthermore, the issue of whether cryptocurrency is sustainable then comes to the fore. Little to no research has been done to conclude whether alternative or renewable sources of energy would be sufficient to mine cryptocurrency. This aspect of cryptocurrency brings about some concerns and assumptions. These include that should crypto assets not be mined sufficiently; they would eventually cease to exist in the broader scheme of society or may prove less than fruitful as a realistic alternative to fiat currency due to its inadequate supply.⁸¹

5 Regulation

The most pressing issue regarding the regulatory framework surrounding cryptocurrencies is that they are firstly a global phenomenon and secondly, that they are so complex that they take on many forms and could be classified under a variety of economic functions. Apart from the few directives elaborated on with regards to taxation and certain criminal acts, there is little regulation on cryptocurrencies. Nevertheless, cryptocurrency seems to be here to stay and as it stands there are very few regulatory measures in place, which in turn exempts the financial instrument from many consequences.⁸² For example, there is currently no explicit regulation in place addressing consumer protection.⁸³ This brings about a plethora of equity-based issues in the wake of South Africa's overall mission of equal producer-consumer bargaining power. While the Consumer Protection Act⁸⁴ may apply to transactions, in this case, complications are established due to the globalised nature of

79 US Energy Information Administration 'How much electricity does an American home use?' <https://www.eia.gov/tools/faqs/faq.php?id=97&t=3> (accessed 10 May 2021).

80 Reddy & Lawack (n 7) 12.

81 IFWG Position Paper (n 22) 21.

82 S Govender 'Officially on the Road to Crypto-Asset Regulation' 22 July 2021 <https://www.polity.org.za/article/officially-on-the-road-to-crypto-asset-regulation-2021-06-22> (accessed 12 September 2021).

83 Govender (n 82).

84 CPA (n 60) sec 1.

cryptocurrencies. Beyond mainstream CASPs like VALR and Luno, South African users may face issues in addressing grievances with less established CASPs.⁸⁵ Exacerbating this risk for South Africans, many countries have taken the stance of 'wait and see what others do' in their attempts to regulate crypto assets. Some have even taken steps to ban any interaction with cryptocurrency.⁸⁶

This section of the research is essentially the crux of the issue at hand and serves to provide clarity as to the reality of cryptocurrency possibly being a steadfast force in the South African economic landscape. In this instance, there is a two-fold analysis relating to the regulatory approach. Firstly, what has been done and secondly, what is planned and recommended to be done, while working in tandem with the aforementioned risks.

5.1 What actions have been taken to regulate cryptocurrency?

Existing financial regulatory legislation has taken little to no steps to regulate cryptocurrency. After the global financial crisis in 2008, South Africa enacted the Financial Sector Regulation Act (FSRA)⁸⁷ which essentially introduced what is called the Twin Peaks model.⁸⁸ This is the seminal financial regulatory framework in South Africa. This model established two focus areas that are deemed most appropriate to ensure economic well-being in society. These broad areas were that of the prudential regulator's objective to maintain the safety and soundness of regulated financial institutions, and the market conduct regulator's objective to safeguard the consumers of financial services and to promote confidence in the South African financial system.⁸⁹ Furthermore, this agenda was taken on in a macroprudential and micro-prudential effort to ensure overall prosperity in the financial sector. It remains to be seen whether such a model will regulate cryptocurrency. At this point, there has been no litigation with regard to cryptocurrency.⁹⁰ Beyond this, there have been a few mainstream financial service providers to offer customised cryptocurrencies (which due to the nature of cryptocurrency, is possible) which again leaves the question of the applicability of the FSRA open-ended.⁹¹

As previously analysed in this research, the relevant taxation Acts have made some strides but beyond that, less may be said. Upon the issue of cryptocurrency being classified as E-money and it possibly

85 Reddy & Lawack (n 7) 50.

86 Sadhaseevan (n 36) 79.

87 Financial Sector Regulation Act 9 of 2017 (Financial Sector Regulation Act).

88 Mukwehwa (n 18) 22.

89 FRRS Committee (n 58) 65.

90 Baker McKenzie (n 38).

91 Mukwehwa (n 18) 28.

being used as a form of payment, the National Payment System Department made it clear that in accordance with the Banks Act 90 of 1994,⁹² E-money is issued by a bank.⁹³ Therefore, cryptocurrency cannot be classified as E-money in any way.⁹⁴

The Financial Intelligence Centre Act is one of the most pertinent pieces of legislation regulating the financial sector. The Act was recently amended by the Financial Intelligence Centre Amendment Act 1 of 2017.⁹⁵ Section 29 of FICA sets out that any business or involved party that knows or suspects that the business has received or is about to receive the proceeds of unlawful activities; a transaction to which the business is a party involves proceeds of unlawful activity or property relating to the financing of terrorist activities; the business has been used or is about to be used for money-laundering purposes; or the financing of terrorism, should report such to the Financial Intelligence Centre.⁹⁶ It has been widely noted that with reference to the aforementioned provisions in mind, they may be said to apply to crypto and virtual currencies. However, this has not necessarily been enforced, neither has it even been officially noted.

Apart from taxation legislation, South Africa has seemingly adopted the 'wait and see' method. This may have drastic impacts on the future of the industry but may yet be averted by what one may hope will be done in the near future.

5.2 What is planned and recommended

In its recently published paper, the IFWG put forward a myriad of regulatory policy recommendations relating to a variety of aspects affected by crypto regulation. Many of those revolved around specific pieces of legislation. Some of the most key recommendations put forward will be noted below.

Earlier in this research, some key risks associated with cryptocurrency were alluded to. When regulation is included in the overall discussion, it is done to determine ways in which to mitigate such risks. There has been little movement achieved in realising the mitigation of said risks. The IFWG has put forward many recommendations which address the lack of security. Such recommendations primarily deal with cybercrime and the reporting of financial developments to regulatory authorities.⁹⁷ However, there are very few ironclad or secure movements in safeguarding individuals

92 Banks Act 90 of 1994 sec 17.

93 Nieman (n 32) 1984.

94 Mukwehwa (n 18) 19.

95 Financial Intelligence Centre Amendment Act 1 of 2017.

96 Mukwehwa (n 18) 20.

97 FRRS Committee (n 58) 11.

from the dangers of cryptocurrencies, let alone creating a financial environment conducive to their use. South African consumer protection law has been developed heavily and quite adequately over the last few decades but, unfortunately, no specific mention has been made of cryptocurrencies. This exemption opens room for service providers to take advantage of crypto market participants.

One of the key notes made by the IFWG concerns the inclusion of cryptocurrency as a financial service. In recommendation of its position paper, the IFWG made it a prerogative to include crypto assets in section 3(1)(a) of the Financial Sector Regulation Act 9 of 2017⁹⁸ and under licensing activities in the Conduct of Financial Institutions Bill 2020.⁹⁹ This would then bring cryptocurrencies into the ambit of this legislation and afford jurisdiction to the legislature to proceed with further legislative developments. The underlying theme of including the regulation of cryptocurrency into existing legislation has been established in South African legislation. This clearly denotes the overall intention to regulate cryptocurrencies.

The issue regarding the regulation of cryptocurrency payments is a question on the minds of many individuals.¹⁰⁰ While this is less of a priority in the grander scheme of regulating cryptocurrency (as the current focus is on crypto assets), the SARB noted in its 2018 review of the National Payment Systems Act 78 of 1998¹⁰¹ that digital currency may become a common and possibly the most common form of payment in the near future.¹⁰² This would have a ripple effect on the exclusivity of commercial banks and would be a genuine shift in the overall scope of commercial (and even civil) society. Some entities, such as Takealot and Pick 'n Pay, as previously mentioned, have allowed for the exchange of cryptocurrencies for goods in the recent past.¹⁰³ There are a significant number of intricacies that need to be addressed before cryptocurrency would be able to be seen as a mainstream form of payment. The most pertinent of which is whether it may be able to derive its own value and not merely be a form of exchange for fiat currency.

Succinctly, little to no movement has been taken to safeguard individuals from the dangers associated with cryptocurrency, as well as promote its use for a positive, innovative social impact.

98 Financial Sector Regulation Act (n 87) sec 3(1)(a).

99 Conduct of Financial Institutions Bill, 2020; IFWG Position Paper (n 10) 23.

100 Hamukuaya (n 5) 15.

101 National Payment System Act (n 4).

102 Nieman (n 32) 1993.

103 Reddy & Lawack (n 7) 16.

6 International trends

The regulation of cryptocurrency is something that countries are addressing globally. Crypto assets are a truly global commodity and, as previously mentioned, countries around the world are seeming to pull at threads in their attempts to regulate this aspect of FinTech. Some countries have taken steps to regulate crypto assets while others have merely adopted a 'wait and see' approach.¹⁰⁴ This section of the research will acknowledge some of the developments in regulation adopted by foreign countries. There is no specific rationale for the choice of these countries in terms of comparison but rather that they are countries that have taken noteworthy steps toward regulating cryptocurrency.

There are many countries internationally, such as China, Tanzania, and Thailand, which have objected to or banned any practices associated with cryptocurrency.¹⁰⁵ The reason for banning crypto assets primarily has to do with their central banks objecting to its use due to it competing with its fiat currency.¹⁰⁶ At this point, these countries deem cryptocurrency juvenile for its adoption into the mainstream economy.¹⁰⁷ Furthermore, such countries also objected because they believed such a global payment method endangers their own endeavours toward a sustainable payment method exclusive to their country and operating with the prerogative of promoting economic well-being within such a country.

Countries such as the United States and Japan have, however, been more welcoming towards the regulation of cryptocurrency. The United States Internal Revenue Services (IRS)¹⁰⁸ has taken quite aggressive steps towards classifying crypto assets as property so that they may be taxed as such.¹⁰⁹ This is quite controversial, particularly as experts in the field of property law are still experiencing rigorous debate as to whether incorporeal items can be classified as 'things'.¹¹⁰ Japan has been the first country to officially legislate the regulation of cryptocurrency with the promulgation of the Virtual Currency Act, 2017.¹¹¹ This legislation, unfortunately, allows for little reference and has been relatively uneventful.

Global legislation in relation to cryptocurrency is extremely infantile. There have been minimal developments and some countries

104 Sadhaseevan (n 36) 67.

105 Baker McKenzie (n 38); Sadhaseevan (n 36) 11.

106 As above.

107 As above.

108 The federal taxation authority in the United States of America.

109 Reddy & Lawack (n 7) 3; United States Internal Revenue Service Notice 2014-21, 2014-16 I.R.B 938.

110 G Muller et al *General Principles of South African Property Law* (2019) at 25.

111 Virtual Currency Act, 2017.

such as Nigeria have even decided not to try to regulate such aspects of FinTech.¹¹² To say the least, it does seem to be ‘every country for themselves’ which is ironic because, for a stable and equitable system to be promulgated, international cooperation is of utmost importance.

Learning from the steps taken by others, South Africa (having already expressed the intention to provide some sort of regulation for cryptocurrency) should take heed to the actions of countries like the United States of America and Japan that have taken significant steps to wholly regulate crypto assets to proactively combat any issues which may arise in the future.

7 Recommendations

The state of cryptocurrency is uncertain, underregulated, and wholly underdeveloped. It is unlikely that the ‘wait and see’ approach will prevail amidst cut-throat economic times. The issue of jurisdiction must, firstly, be addressed and as previously mentioned, steps should be taken to bring cryptocurrencies into the ambit of the FSRA.¹¹³

Financial regulators should adopt a proactive attitude towards addressing the shortcomings in the crypto market. While the IFWG poses many technical policy recommendations, it should be noted that the overall deduction of this paper is that far too little has been done to ensure a secure regulatory framework for cryptocurrency to operate in a progressive manner succeeding its initial boom. Welcoming a secure regulatory framework that embodies consumer protection, security, and the overall well-being of the South African financial landscape is needed. In this case, the primary points of departure should be in consumer protection, cybersecurity, and overall financial regulation.

8 Conclusion

This paper sought to illuminate the realities of the current state of cryptocurrency in South Africa. Upon elaborating on the developments of taxation and the regulation of cryptocurrency in South Africa, it became clear that more needs to be done to properly regulate cryptocurrencies. It is crucial for the South African legislature to be proactive in these regulatory endeavours to avert the associated risks. Consumer protection, cybersecurity, and overall financial market regulation are the points of departure for the legislature, and should this be executed in a timely and efficient

¹¹² Baker McKenzie (n 38).

¹¹³ FRRS Committee (n 58) 59.

manner, cryptocurrency may well occupy crucial space within financial technology in South Africa.