



# Assessing Regulatory Risk with Evolving Global Regulations in the Cryptocurrency Arena

While the recent crypto winter appeared to be a setback for digital assets markets, it was not by any means a death knell for this developing space. The headline cases and failures of the past year were largely due to mismanagement, poor governance and/or fraudulent practices and should not be viewed as indicative of cryptocurrency's fundamental viability.



Organisations evaluating this space must recognise that the challenges in cryptocurrency are nuanced. Rapid innovation continues to outpace regulations specific to the digital assets space and existing financial regulatory controls are not always or clearly applicable. Ongoing misnomers and uncertainty have led to the resounding question of how can the financial sector create operational frameworks that instil trust in cryptocurrency traders?

Crypto assets are digital or virtual tokens that use cryptography for security. They are verified by network nodes through cryptography and recorded in a distributed public database called a blockchain, a transfer of value on an immutable public ledger with no centralised governing authority. A common myth is that this pseudo-anonymity offered by cryptocurrencies makes it easier for bad actors to circumvent anti-money laundering (“AML”) controls or engage in other forms of financial crime and terrorist financing. While this is only a myth, and the majority of cryptocurrency platforms have AML and Know Your Customer (“KYC”) mechanisms in place, more education is needed to break down misconceptions and support healthy growth in digital assets markets.

Governments have begun to address these challenges by introducing cryptocurrency legislation, including licencing frameworks for crypto asset service providers (“CASPs”) or virtual asset service providers (“VASPs”)—companies that provide services related to cryptocurrencies. (The South African financial regulator’s distinction between the two is unclear, but they are essentially the same.)

However, with different countries imposing a wide array of varying compliance rules and regulations, establishing and tracking compliance across jurisdictions is a challenging prospect. This reality adds another layer of risk and complexity for organisations looking to engage with the industry.

### Changes in crypto legislation

Total crypto spot trading volume in January 2023 was \$1.88 trillion. While this was a downturn from prior years, it signals there is still momentum in adoption of cryptocurrencies by businesses and individuals, decentralised finance, and the expanding interest in NFTs (“non-fungible tokens”). This has accelerated the need for local and national changes to the regulations and frameworks for crypto assets.

#### South Africa

The Financial Sector Conduct Authority has declared all crypto assets financial products (under the Financial Advisory and Intermediary Services Act 37 of 2002). The Act (Financial Advisory and Intermediary Services Act 37 of 2002) defines a crypto asset (which is also declared a financial product) as a non-central bank-issued tradeable digital unit of value that uses cryptographic and distributed ledger technologies. Effective 19 December 2022, CASPs are now accountable institutions under the Financial Centre Intelligence Act 38 of 2001 (“FIC Act”). This means that they are now under FIC supervision and have several obligations. These include registration with the FIC and compliance with the FIC Act and the FIC’s definition of a crypto asset which “refers to a digital representation of perceived value that can be traded or transferred electronically within a community of Internet users who consider it a medium of exchange, unit of account or store of value and use it for payment or investment purposes (PCC 57).”

#### European Union

In the European Union (“EU”), the Anti-Money Laundering Directive (“AML”) called for, among other measures, stronger ultimate beneficial owner identification standards and a legal definition of virtual currencies and the addition of VASPs providers to existing AMLD programmes. The Markets in Crypto-Assets Act (“MiCA”

Act), a landmark regulatory framework in the EU, entered into force in June 2023. The MiCA Act aims to provide greater clarity and uniformity for EU crypto businesses and to protect investors. The MiCA Act also imposed restrictions on who can issue and provide services related to crypto assets in the EU and what those services may include.

#### United States

To date, US regulators have largely relied on regulation by enforcement in the digital assets space, relying on existing laws rather than establishing new laws specifically designed for cryptocurrency. US authorities have also classified a wide range of tokens as securities, implying that such tokens must be regulated under existing securities regulations. Still, the different uses of different cryptocurrencies have made it difficult for regulators to fit them into an existing asset class, particularly as the US Securities and Exchange Commission and the Commodity Futures Trading Commission have different views on classifying cryptocurrencies.

#### UK

In the UK, The Royal United Services Institute released a guide that provides a forward-thinking approach to conducting virtual asset risk assessment. The guide includes some counterintelligence flavours by addressing and identifying crypto-related warning signs for accountable institutions and risk mitigation strategies. Additionally, as of 8 October 2023, the Financial Conduct Authority (“FCA”) requires firms to be authorised or registered to promote crypto assets to retail consumers in the UK. In addition, firms are required to have their marketing approved by an authorised firm. The FCA has also made moves to ensure that crypto asset businesses in the UK will be required to collect, verify and share information about crypto asset transfers, known as the “Travel Rule”. Considering that UK losses to crypto fraud increased by around 30%-40% over the past year, one can only hope that these changes in legislation will assist in reducing rampant crypto fraud going forward.

#### Asia Pacific

While the broader Asia Pacific region is considered an emerging hub for crypto activities, certain countries, including China, have enforced severe crypto regulations, including bans on initial coin offerings and crypto exchanges. In Singapore, the Securities and Futures Commission stated that there are potential legal and regulatory consequences for making false claims in licence applications, operating as an unlicensed entity, and not complying with virtual asset trading platform regulations when applying for a licence.

## Global

The International Organisation of Securities Commission (“IOSCO”), the international securities watchdog unveiled “the first” global approach to regulating crypto assets and digital markets. This came following calls for a unified approach to replace the cascade of differing regulatory approaches to crypto assets. It can be a concern that many countries utilise different legislative definitions, which can disjoint efforts to maintain a consolidated legislative front line. These policy recommendations from the IOSCO were finalised on 16 November 2023 and elaborate the regulatory expectations, either through application of existing rules or development of new rules, depending on the jurisdiction, to address the key areas of harm observed in these markets. The Crypto and Digital Asset Recommendations set a clear and robust international regulatory baseline to ensure that CASPs meet the standards of business conduct that apply in traditional financial markets.

### The potential of central bank digital currency

The promise of a potential central bank digital currency (“CBDC”), led by the South African Reserve Bank, leaves a trail of unanswered regulatory questions and challenges. It remains to be seen how a CBDC could create long-term value for a country still largely dependent on physical currency. This is especially true in light of the BRICS (Brazil, Russia, India, China, South Africa, Egypt, Ethiopia, Iran and the United Arab Emirates) countries’ desire to create a common currency, although some question the feasibility of such a currency due to the different economic policies and structures of these countries.

Another important indication of the potential of CBDCs in South Africa is that the Reserve Bank has stated that “there is no hard and fast rule regarding the technology used to implement a CBDC.”

## Risk and risk assessment for crypto assets

A nuanced approach to risk management is essential: over-regulation can stifle business, while inadequate governance can lead to further mistrust in digital assets and make it easier for criminals to exploit otherwise viable markets. Understanding the sources of risk that surround crypto assets is critical to building a practical risk management framework.

In addition, it’s vital to assess AML and KYC controls and onboarding procedures when dealing with VASPs and counterparties.

### Conclusion

The rapid growth and adoption of crypto technologies, propelled by the promise of financial innovation and empowerment, hasn’t been without its share of challenges and uncertainties.

While the path forward for CBDCs in South Africa and other nations remains uncertain, they offer the potential for a more sovereign economic landscape, albeit with a labyrinth of complex challenges and questions about their role in the crypto ecosystem. Meticulous risk assessment remains crucial: financial institutions (VASPs) and regulators must collaborate to forge effective measures for mitigating risks so that their activities may continue in a regulated environment.

The underlying technology holds immense promise for enhancing efficiency and fostering innovation across industries. The future of crypto assets and virtual currencies will continue to unfold, and the key to success lies in adapting to change while upholding the principles of security, transparency and ethical conduct. All stakeholders must remain vigilant in this uncharted terrain, be open to collaboration and stay committed to shaping a sustainable and trustworthy crypto ecosystem for the benefit of all.

#### AMIT DAYAL

Managing Director  
Financial Crime Compliance  
[amit.dayal@fticonsulting.com](mailto:amit.dayal@fticonsulting.com)

#### CHRISTIAN ENGELBRECHT

Consultant  
Financial Crime Compliance  
[christian.engelbrecht@fticonsulting.com](mailto:christian.engelbrecht@fticonsulting.com)

#### STEVE MCNEW

Senior Managing Director  
Technology  
[steve.mcnew@fticonsulting.com](mailto:steve.mcnew@fticonsulting.com)

The views expressed herein are those of the author(s) and not necessarily the views of FTI Consulting, Inc., its management, its subsidiaries, its affiliates, or its other professionals. FTI Consulting, Inc., including its subsidiaries and affiliates, is a consulting firm and is not a certified public accounting firm or a law firm.

FTI Consulting is an independent global business advisory firm dedicated to helping organisations manage change, mitigate risk and resolve disputes: financial, legal, operational, political & regulatory, reputational and transactional. FTI Consulting professionals, located in all major business centres throughout the world, work closely with clients to anticipate, illuminate and overcome complex business challenges and opportunities. © 2024 FTI Consulting, Inc. All rights reserved. [fticonsulting.com](https://fticonsulting.com)