UNIVERSITY OF CAPE TOWN

DEPARTMENT OF COMMERCIAL LAW

How should virtual currencies be regulated in South Africa to prevent their use for Money Laundering.

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Word Count:	20 139
Submission Date:	**15th** of November 2022

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM (General Specialisation) degree in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM (General Specialisation) dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

CONTENTS PAGE

CHAPTER 1 INTRODUCTION

I. AIM

The objective of this dissertation is to determine whether the current regulatory environment is sufficiently equipped to prevent Virtual Currencies (VC) from being used to launder illicit gained funds into the South African financial system.

II. THESIS

The aim of this mini-dissertation will be to demonstrate the money laundering risks which VC pose and will set out that while VC remaining unregulated in South Africa it poses a number of risks to the South African financial system. The dissertation will evaluate whether the current regulatory environment is sufficiently equipped to deal with the operation of VC, and if not, whether specific legislation needs to be brought into existence to deal therewith. This mini-dissertation will set out different ways in which the South African legislature can go about dealing with VCs by drawing inference from other jurisdictions as well as intergovernmental organisations.

III. BACKGROUND

The current South African legal framework dealing with the problems of money laundering was designed for fiat money and did not take into account the possibility of VCs being created, which is able to act as a global currency. This has become evident with the South African Reserve Bank Act recognising electronic money as a legal tender but stipulating that VC is not recognised as a legal tender.[1] In dealing with the operation of VC within the South African financial system the legislature has the choice to ban the use of VC in it's entirety, or even partially, alternatively the legislature can opt to allow VC to operate freely without any restrictions.

Over the past ten years there have been a number of innovations that have disrupted the financial sector. These innovations have been made possible by technological advances which have infiltrated, and continue to infiltrate, the banking and financial sector globally, these advances are changing customer expectations. These innovations can be understood as having

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[1] For information regarding the recognition of VC as a legal tender, see IFWG Crypro Assets Regulatory Working Group *Frequently asked questions about crypto assets* available at- http://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Crypto%20assets%20FAQs_Final.pdf (accessed 30/09/2021).

brought together finance and technology in what has become known as the 'Fin-tech revolution'.[2]

These Fin-tech advances may one day change our understanding of what we know money to be and before the Fin-tech revolution brings about such major changes it may be best to anticipate what can be expected. At this point such changes may seem far-off, but in the short time of the 20th century the world saw significant and rapid changes to the world's monetary system.

To understand the direction in which money seems to be going, it is important to understand the history of money and how over time the concept of money has developed, particularly during the twentieth century. The first change made to money, which changed the way business was done internationally, was the introduction of the Gold Standard, which was in operation from 1900 up until 1933.[3] It was during the gold standard era that countries were required to hold in reserve gold to back up their domestic currency in circulation.[4] In the event that the country wanted to increase the amount of currency in circulation, they would first have to increase the amount of gold held in reserve.[5] Despite this system seeming flawless, a number of problems arose during the gold standard era. Some of these problems were caused by the trade in gold increasing, resulting in certain countries holding excessive gold in reserve, much more than the amount of currency which they had in circulation.[6] The opposite was also taking place in less-developed countries with countries having less gold in reserve than currency in circulation. In turn this forced a different monetary policy to be brought into existence.

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[2] Johan Coetzee 'Risk Aversion and the adoption of Fintech by South African Banks' (2019) *African Journal of Business and Economic Research* Vol. 14 Issue 4, 133-153 at 137.

[3] For more information on the gold standard, see IE Centre for Governance and Change *Cryptocurrencies and the Future of Money* (2019) available at-https://docs.ie.edu/cgc/research/cryptocurrencies/CGC-Cryptocurrencies-and-the-Future-of-Money-Full-Report.pdf(accessed 05/10/2021).

[4] Richard N Cooper ' The Gold Standard: Historical Facts and Future Prospects' (1982) Volume, 1 *Brooking Papers on Economic Activity* 1-56 at 4.

[5] IE Centre for Governance and Change *Cryptocurrencies and the Future of Money* (2019) available at-https://docs.ie.edu/cgc/research/cryptocurrencies/CGC-Cryptocurrencies-and-the-Future-of-Money-Full-Report.pdf(accessed 05/10/2021).

[6] IE Centre for Governance and Change *Cryptocurrencies and the Future of Money* (2019) available at-https://docs.ie.edu/cgc/research/cryptocurrencies/CGC-Cryptocurrencies-and-the-Future-of-Money-Full-Report.pdf(accessed 05/10/2021).

It was as a result of the downfall of the gold standard era that a new monetary policy was introduced in 1934. This monetary policy was later referred to as the Bretton Woods era. It was during this period that the United States (US) adopted a flexible exchange rate for a year in order to increase the competitiveness of US products in the world economy.[7] It was as a result hereof that Britain and the United States proposed entering into a tripartite agreement with the aim of managing the exchange rate between them.[8] The tripartite agreement was eventually ratified at Bretton Woods in 1944, which changed the worlds monetary policy into what became known as a gold-dollar policy with the US dollar pegged to the price of gold and the rest of the worlds domestic currencies pegged to the US dollar, making the US dollar the global reserve currency.[9]

The Bretton Woods era however came to an end in the 1970s, introducing Fiat Currencies. The introduction of Fiat Currencies resulted in countries now having their own domestic currency which they themselves now regulate and distribute. The adoption of Fiat Currencies by countries also had no fixed value in terms of an objective standard moving the world's monetary system even further away from the gold standard.[10] The value of fiat currencies is determined by the collective trust in that particular currency and the continued existence and stability of the entity issuing it.[11] What this did was to give more power to a centralized institution as they were now allowed to adjust the supply of money through interest rates and their capital reserve requirements, it however seems as if the concept of money is about to change again, from fiat currencies to the acceptance of VCs as a means of payment globally.

The next significant change to the world's monetary policy came as a result of Fin-tech which has increased the use of VC significantly. The term VC has been defined by the Financial Action Task Force (FATF),[12] as being a digital representation of value that can be digital-

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[7] Isaac O C Igwe 'History of the International Economy: The Bretton Woods System and its impact on the economic development of developing countries' (2018) 4(2) *Athens Journal of Law* 105 at 113-14.

[8] Filippo Cesarano ' Monetary Theory and Bretton Woods' (2006) *Cambridge University Press* at 167-168.

[9] Filippo Cesarano ' Monetary Theory and Bretton Woods' (2006) *Cambridge University Press* at 167-168.

[10] Chia Ling Koh 'The rise of E-Money and Virtual Currencies' (2018) *Osborne Clarke* 1-17 at 4.

[11] For more information on Fiat currency, see IE Centre for Governance and Change *Cryptocurrencies and the Future of Money* (2019) available at-https://docs.ie.edu/cgc/research/cryptocurrencies/CGC-Cryptocurrencies-and-the-Future-of-Money-Full-Report.pdf(accessed 05/10/2021).

[12] For information on the FATF and who they are, see FATF *Who we are* available at-https://www.fatf-gafi.org/about/ (accessed 06/10/2021).

ly traded and is able to function as a medium of exchange and/or a unit of account and/or a store value, but which does not have legal tender status.[13] It is clear from this definition that VCs are able to perform a number of functions similar to those of money, yet they don't have legal tender status. The manner in, and speed with which VCs have infiltrated the financial sector stems from the advances made in the field of technology that have forced the financial sector to keep pace or run the risk of being in outdated with the demands of clients.

The most popular VC, despite not being the first VC in existence is Bitcoin and the reason for this is the Fin-tech revolution,[14] which has undoubtedly changed customer demands and expectations and has been the cause of a number of advances made in the financial services sector that have had a ripple effect on the way business is done by making it more dependent on technology, but also by influencing what consumers now expect from their financial services providers.[15]

The infiltration of VC such as Bitcoin into the South African financial sector has been identified by the South African Reserve Bank (SARB), who have noted certain issues such as VC providing a platform for Money Laundering and Terrorist Financing, and also provides a new risk to consumers; which could become susceptible to misuse, potentially disrupting the Financial system.[16] Furthermore the SARB has requested users to approach VC with extreme caution and despite this the government has failed to bring into existence legislation to regulate VC. In addition hereto a Crypto Asset Working Group has also been created with the

[13] Financial Action Task Force *Virtual Currencies Key definitions and potential AML/CFT Risks* (2014) available at-https://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf (accessed 26/07/2021).

[14] The term Fintech has been defined by Deloitte as being a computer program or other modern technology used by business that provides automated and improved financial services to consumers, see Deloitte *Fintech | On the brink of further disruptions* (2020) available at-https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/financial-services/deloitte-nl-fsi-fintech-report-1.pdf (accessed 22/07/2021).

[15] Price Waterhouse Coopers *Customers in the spotlight: How Fintech is reshaping banking* available at-https://www.pwc.com/gx/en/industries/financial-services/publications/fintech-is-reshaping-banking.html(accessed 15/07/2021).

[16] South African Reserve Bank-National Payment System Department *Position Paper on Virtual Currencies* (2014) available at-https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-surveillance/general-public/Virtual%20Currencies%20Position%20Paper%20%20Final_02of2014.pdf (accessed 30/09/2021).

purpose of making recommendations on the use of VC and to ultimately bring VC into the South African legislative framework.[17]

The first issue identified with VC is that they are able to act as a universal currency despite only existing digitally.[18] The problem with the existence of a universal currency is that it poses a problem because a service provider hoping to provide this service in South Africa would need to comply with the laws governing domestic and cross-border transactions, and needs to have measures in place which circumvent money laundering.[19] The issue here is not that there doesn't exist a regulatory framework which aims to combat Money Laundering or Terrorist Financing in South Africa but rather that there is no specific legislation inaugurated in order to give effect hereto. The second issue with VC like Bitcoin is that VC are able to act as a payment instruments enabling users to buy goods and services at any shop willing to accept VCs as a means of payment, again to perform this function VCs are required to adhere to the laws governing payment instruments, whilst also ensuring that the payment system has anti-money laundering and terrorist financing measures in place.[20] Despite being unregulated and not complying with key pieces of South African legislation, a well-known South African retailer by the name of Pick n Pay experimented with the use of VC as a payment instrument by accepting Bitcoin as payment during a test run at it's Head Office in Cape Town in 2017.[21]

These rapid developments in the financial system needs to be investigated as they threaten the integrity of the South African financial sector. The focus of this mini-dissertation will be to highlight how VCs are susceptible to abuse by individuals who have identified them as being unregulated, making the use thereof attractive for individuals who have criminal objectives or ideologies. As a result this mini-dissertation will look into the money laundering risks

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[17] Crypto Asset Regulatory Working Group *Consultation paper on policy proposals for crypt-assets* available at-http://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paper%20on%20crypto%20assets_Final.pdf (accessed 29/07/2021).

[18] Ricordo Goncalves *What the South African Reserve Bank thinks of Bitcoin*, (2016) available at-https://www.news24.com/MyNews24/what-the-south-african-reserve-bank-thinks-of-bitcoin-20160425 (accessed 17/09/2021).

[19] Act 38 of 2001

[20] Darryn Pollock *The future of payments is here: How can crypto play it's part?* available at-https://www.-forbes.com/sites/darrynpollock/2018/11/20/the-future-of-payments-is-here-how-can-crypto-play-its-part/?sh=26fd84632dc3(accessed 17/09/2021).

[21] Duncan Mcleod Pick n Pay in store trial of Bitcoin payment (2017) available at-https://techcentral.co.za/bitcoin-now-accepted-pick-n-pay/77019/(accessed on 17/09/2021).

which VC pose to the South African financial system and to determine whether a completely new regulatory framework is required to deal therewith, or whether the current regulatory framework is sufficiently equipped to deal therewith.

IV. STRUCTURE

Chapter 1 sets out the dissertations aim and thesis as well as the background to the research question, and outlines the structure of dissertation.

Chapter 2 examines the concept of VCs as a means of payment and investment as compared with fiat money.

Chapter 3 discusses how the current South African legal framework regulates fiat currencies and sets out how VC are able to operate outside of the regulatory parameters applicable to fiat currencies.This Chapter will lay the foundation for the argument for separate legislation to deal with VC.

Chapter 4 undertakes a comparative study on the regulation of VCs in other jurisdictions such as the USA the UK to try and gain a broader understanding of how other jurisdictions have gone about tackling the risk which VC pose. This chapter will also discuss the views of intergovernmental organisations like the FATF.

Chapter 5 will propose an approach to be adopted by the South African Legislature to regulation of virtual currencies as means of payment. The approach will be cast in relative broad terms, drawing on the results of the consideration of the comparative jurisdictions and the views of the international organisations' and banks' views on the way to deal with this problem whilst also setting out the regulatory developments South Africa has made on VC.

Chapter 6, will conclude by setting out how the operation of VCs poses a risk to the South African financial and banking sectors while remaining unregulated. It will as a result be recommended that specific legislation be introduced to combat the money laundering risks which VC pose.

CHAPTER 2 INTRODUCTION TO VC

I. INTRODUCTION

In order to determine whether the South African regulatory framework is sufficiently equipped to combat the use of VC to launder money, it is necessary to know how these currencies may be used to launder money and for this it is best to start with what VC are, and how they may be used as a means of payment generally.

A good starting point is the Financial Action Task Force's (FATF) definition of VC, which is that VC is 'a digital representation of value that can be digitally traded and that is also capable of functioning as a medium of exchange, a unit of account and as a means to store money, but despite all this does not have legal tender status'.[22] As the FATF has pointed out,VC are not issued or guaranteed by any jurisdiction which is why it is not afforded legal tender status and are therefore able to perform all their 'payment' functions only by agreement amongst users.[23] The FATF definition was adopted by the SARB in its 2014 position paper on VC and should be kept in mind at all times.[24] In order to delve even further into VC as a concept, the Union Bank of Switzerland (UBS) has defined VCs as being 'digitally traded scripts which attempt to replicate the government-backed currencies we use today'.[25]

In additional to being able to act as a legal tender by being capable of functioning as a medium of exchange amongst users on the network. It also needs to be kept in mind that VC are able to act as an investment by providing users thereof with a positive return. It is believed that a number of different VC has to date made a number of millionaires.

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[22] For more information on the FATF definition of VC see, FATF *Virtual currencies: Key Definitions and Potential risks AML/CFT Risks* (2014) available at-https://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf (accessed 11/10/2021).

[23] FATF *Virtual currencies: Key Definitions and Potential risks AML/CFT Risks (2014)* available at-https://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf (accessed 11/10/2021).

[24] The South African Reserve Bank National Payment System Department *Position Paper on Virtual Currencies* Position Paper Number: 02/2014 available at-https://www.resbank.co.za/en/home/publications/Papers/position-papers (accessed 12/07/2021).

[25] Sandeep Gantori et al *Cryptocurrencies* (2017) Union Bank of Switzerland at available at-https://www.ubs.com/content/dam/WealthManagementAmericas/cio-impact/cryptocurrencies.pdf (accessed 13/07/2021).

II. UNTANGLING THE COMPONENTS OF VIRTUAL CURRENCIES AS A MEANS OF PAYMENT.

VC is able to act as a means of payment in that it is able to initiate payment as well as act as a settlement amongst users on the network. The way in which VC go about doing this is by enabling holders thereof with the ability to transfer value to another person.[26] The reason for this transfer can be for one of two reasons, to simply transfer value or to alternatively exchange the VC for something else, whether it be a physical item or even a service. It needs however be noted that VC differ considerably from actual money as it is much more volatile, is not as widely accepted and is not issued by an accountable centralized authority.[27]

To understand the true potential of VCs like Bitcoin, it is important to understand the difference between a centralized and a decentralized currency as this is the key feature that makes VCs like Bitcoin so successful but at the same time so harmful to the integrity of the financial system. A centralized currency refers to a currency which is controlled by a centralized body and an example hereof would be the South African Rand (ZAR) being controlled by the SARB.[28] The SARB'S control of the currency allows it to manage the value of the rand by implementing its monetary and fiscal policy.[29]

By contrast decentralized currencies are those not managed or controlled by a centralized authority. In practice, what this means is that a centralized authority like the SARB has no control over VCs like Bitcoin and their operation within South Africa or anywhere else for that matter. So the value stability of the VC is determined by the intrinsic value of the networks and the level of trust which participants have therein.[30] The value of the individual

[26] Wilko Bolt, Maarten RC Van Oordt 'On the value of Virtual Currencies'(2020) Vol 52, No 4, *Journal of Money, Credit and Banking* 835-862 at 836.

[27] Wilko Bolt, Maarten RC Van Oordt 'On the value of Virtual Currencies'(2020) Vol 52, No 4, *Journal of Money, Credit and Banking* 835-862 at 840.

[28] South African Reserve Bank *Monetary Policy* available at-https://www.resbank.co.za/en/home/what-we-do/monetary-policy (accessed 13/07/2021).

[29] The South African Fiscal Policy refers to the policies and measures which the government puts in place to help boost the economy with the hope of boosting the strength of their economy and to ultimately eradicate poverty see, The International Monetary Fund *Fiscal Policy: Taking and Giving Away* available at-https://www.imf.org/external/pubs/ft/fandd/basics/fiscpol.htm (accessed 13/07/2021).

[30] Jeff Currie 'Crypto is its own class of asset'(2021) Issue 98, *Global Macro Research* 1-41 at 12.

coin in operation is determined by the value and growth of the network, which means that the coin carries no value outside of the network.[31]

In order for a decentralised currency to operate it needs to have measures in place which will sustain it and will allow it to function. In the case of VCs what seems to make it function is the existence of a peer-to-peer system with Bitcoin considered the purest form of a peer to peer version of electronic cash. What this allows for is payments to be made from one party to another, without the use of a third party intermediary facilitating the transaction. Which is important as the absence of a third party intermiary provides the basis for the regulatory dilemma, as intermarries are the ones who act as an enforcement authority within the financial sector.

Over the past 10 years VC have become increasingly more popular, and it is largely due to the innovations brought forward by the Fin-tech revolution. A number of institutions are revolting the idea of VC as they fear their role within the financial sector may become redundant. There are however a number of authors in favour of VC as they are of the opinion that the current banking system better suits the interests of established Financial Institutions as it allows them to continue to play the intermiary, which in itself is quite lucrative.[32] It is the Fin-tech revolution that has changed the way business is being done in the financial sector.[33]

The decentralized nature of VC requires it to operate a consensus algorithm, while making use of miners as an external resource in order to validate transactions.[34] The role of miners can however differ depending on the systems used being a proof of work or a proof of stake system, which I will be discussing in further detail, but it is easy to see which system Bitcoin falls into. The first form is the 'Proof of Work' system which compiles pieces of data, whereby participants who in this case can be referred to as miners afford their computer processing

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[31] Jeff Currie ‘Crypto is its own class of asset’(2021) Issue 98, *Global Macro Research* 1-41 at 12.

[32] Deloitte *Digital Transactional Banking Opportunities & Challenges* available at-https://www2.deloitte.com/content/dam/Deloitte/sg/Documents/financial-services/sea-fsi-digital-transaction-banking-noexp.pdf (accessed 13/07/2021).

[33]Douglas Arner, Ross Buckley, Kuzi Charumba, Artem Serges and Dirk Zetzsche ‘ Governing Fintech 4.0” Biotech Platform Finance, and Sustainable Development’(2022) *Fordhm Journal of Corporate & Finance Law* 1-67 at 4.

[34] Price Waters Cooper *Blockchain, a catalyst for new approaches in insurance* available at-https://www.pwc.ch/en/publications/2017/Xlos_Etude_Blockchain_UK_2017_Web.pdf (accessed 14/08/2021).

power to help complete transactions and as a result will be rewarded, either in tokens or Bitcoin for their participation in completing the transaction, the reward will either be tokens or Bitcoin.[35] The second system is referred to as the 'Proof of Stake' system that requires of users to buy into a particular VC, and the amount or value of the particular VC which they purchased will be the cap to the value of transactions they can mine.[36]

A key component of the network is Blockchain technology, which has at times, been described as being revolutionary in that its capabilities and function suits the libertarian movement as it takes the power and gives it to the individuals that make up society.[37] The way in which Blockchain has been described is as consisting of a number of smaller blocks, which acts as a ledger, keeping count of where Bitcoins are sent and who owns them at any particular point in time.[38] A Blockchain is a continuous document made up of smaller blocks keeping record of all transactions and dates back to the first ever block called the genesis block. The key function of the Blockchain is that there needs to be one constant version thereof to ensure consensus amongst users about the whereabout of VC. It is clear that the Blockchain is a powerhouse tool that is capable of changing a number of industries such as financial services, remittances and trade finance.[39]

The Blockchain technology has been described as a Distributed Ledger Technology (DLT) which keeps record of transactions by linking blocks together. The blocks are stored on the distributed network of computers which are made available by users.[40] The consensus based system that allows VCs like Bitcoin to operate without a centralized authority is the

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35 Reuters Graphics *Blockchain Explained* available at-http://graphics.reuters.com/TECHNOLOGY-BLOCKCHAIN/010070P11GN/index.html (accessed 14/08/2021).

36 Reuters Graphics *Blockchain Explained* available at-http://graphics.reuters.com/TECHNOLOGY-BLOCKCHAIN/010070P11GN/index.html (accessed 14/08/2021).

37 Apolline Blandin, Gina Pieters, Yue Wa, Thomas Eisermann, Anton Dek, Sean Taylor, Dumaris Njoki '3rd Global Cryptoasset Benchmark Study' (2020), *Cambridge Centre for Alternative Finance* 11-13 at 41.

38 Apolline Blandin et al '3rd Global Cryptoasset Benchmark Study' op cit note 34 at 41.

39 Gordon Meyers, Martin Holtmann, Matthew Saal, Marina Niforos *Blockchain: Opportunities for private enterprise in emerging markets* (2019) available at-https://documents1.worldbank.org/curated/pt/260121548673898731/pdf/134063-WP-121278-2nd-edition-IFC-EMCompass-Blockchain-Report-PUBLIC.pdf (accessed 02/10/2021).

40 Berhard Reinsberg 'Fully-automated liberalism? Blockchain technology and international cooperation in an anarchic world' (2021)13 *International Theory* 287-313 at 290.

Blockchain which is maintained by users who also assist in keeping the ledger up to date.[41] The benefit hereof is that anyone is able to download the software and assist in maintaining the network.[42]

While Blockchain technology's potential is clear, the technology itself has not been analysed and criticised enough for it to become a key component of the financial system. Many countries like South Africa have adopted a 'trial-and-error' approach to the use of VCs and as a result are encountering a number of issues with regard to the technology as they go along. The technology behind Blockchain can be understood as being 'a shared, replicated, append only database whereby access is shared among participants, but validation is performed by users'.[43] The definition of Blockchain in the future may change depending on how widely accepted the idea becomes and how it is able to integrate into other sectors.

A Blockchain can be described as being a digital ledger on which transactions are recorded, however one must not forget that there are two versions of Blockchains available, which can either be a private Blockchain or a public Blockchain. A Public Blockchain is far more popular than the private Blockchain, due to it having the ability to maintain a general consensus of transactions itself.[44] When using a Public Blockchain all participants are able to access and conclude cross border transactions without the assistance of a centralized authority.[45] On the other hand a Private Blockchain differs from that of a Public Blockchain as it limits and regulates all participant's participating thereon. A Private Blockchain can be set up in a way which allows only selected individuals or entities from operating thereon and prohibits external parties gaining access thereto.[46]

The Blockchain technology has also introduced additional functions which can assist everyday citizens in their day to day living, for example identity management system, which if

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[41] World Economic Forum *Navigating Cryptocurrency Regulation: An industry perspective on the insights and tools needed to shape balanced crypto regulation* (2021) available at-https://www3.weforum.org/docs/WEF_-Navigating_Cryptocurrency_Regulation_2021.pdf (accessed 11/10/2021).

[42] Berhard Reinsberg 'Fully automated liberalism' op cit note 37 at 290.

[43] Reed Smith Blockchain Technology Team (2016), 28.

[44] Reed Smith Blockchain Technology Team (2016), 28.

[45] Reed Smith Blockchain Technology Team (2016), 28.

[46] Reed Smith Blockchain Technology Team (2016), 28.

adopted would result in the use of the Blockchain for identification and verification purposes.[47] If the identity management system had to be adopted it would act as a system separate to VC on the Blockchain, which would be used to verify individuals' identities.[48] Clearly illustrating how the ledger system could in turn be used to store travel documents, social security numbers, tax identification numbers and even driver's license, thus eliminating the need to travel with physical documentation. Although the likelihood of having something like this seeming highly unlikely due to there being a number of complexities involved, such as having to comply with legislation in a number of jurisdictions.

The mining of Bitcoin is also an important component as it assists in maintaining the Blockchain, which on it's own has been recognised as an independent business with huge growth potential, but for those wishing to partake in the process by affording their computer processing power, the business has also been described as being lucrative.[49] The Blockchain technology was formulated with the idea of having more miners partaking in the process, making it harder for anyone to infiltrate or monopolise the network.[50]

The Mining of Bitcoin's can occur in one of two ways, either by solo mining or through mining pools. The difference between the two is that solo miners use their individual computing processing power to help facilitate transactions, who will in turn receive all profits deriving from that particular transaction.[51] Whereas Mining Pools amounts to a more collective approach whereby a number of miners use their collective mining power to mine for coins by affording their computer processing power to help facilitate transactions, what this means is that the more computer processing power is available the more powerful that mining pool would be, therefore increasing that mining pools chances of concluding transactions.[52] The

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47 Price Waters Cooper *What is a digital identity* available at-https://www.pwc.com/it/it/publications/assets/docs/blockchain-and-digital-identity.pdf (accessed 15/07/2021).

48 Price Waters Cooper *What is a digital identity* available at-https://www.pwc.com/it/it/publications/assets/docs/blockchain-and-digital-identity.pdf (accessed 15/08/2021).

49 Goldman Sachs *Blockchain: The new technology of Trust* available at-https://www.goldmansachs.com/insights/pages/blockchain/(accessed 10/08/2021).

50 Emmanuelle Ganne 'Blockchain's Practical and Legal Implications for Global Trade and Global Trade Law' (2021) *Cambridge University Press* 128-159 at 130.

51 Hari Krishnan, Sui Sakeh, Venkata Tej Vaibhav ' Cryptocurrency Mining- Transition to Cloud' (2015) *International Journal of Advanced Computer Science and Application,* Vol 6 No 9, 115-124 at 116.

52 Hari Krishnan et al 'Cryptocurrency Mining Transition to Cloud' op cit note 49 at 116.

downside to being in a mining pool is that the profits thereof are split amongst all users who made available their computer processing power to help solve the transaction, the splitting of profits are done according to the respective agreement within that mining pool.

In order to create a secure platform for users of the Bitcoin community to conclude transactions on and store their funds, as well as a way in which to identify one another. The system makes use of both public and private addresses, which contracting parties hoping to transact using VC require in order to conclude a transaction.[53] The numbers which make up these addresses are random which makes duplication highly unlikely. It is however possible for users to form a coalition account, better known as one account with more than one individual linked thereto, who are all able to spend the funds held therein.[54]

A users public key can be found in their wallet and can be communicated to any party by either scanning the QR code found in the wallet or by simply sending the payment address, which is a string of seemingly random numbers and letters and is identifiable by always being 65 bytes in size.[55]A private key is a bit more complicated and comes into operation when a user hopes to spend or gain access to his VC or Bitcoin held in his wallet, thus acting as a safety measure which coincides with the functioning of the public-key, which allows parties to identify one another.[56] A key point to ponder on, which may interest a number of corporate institutions would be the creation of a vanity address, which can be understood as being a personalised address which contains characteristics with which that institution can easily be identified with, similar to a personalised number plate or a corporate bank account, and allows for that institution to be identified easily by consumers with whom they are transacting, making for a more secure transaction process.[57]

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[53] Luno *What are Private Keys* available at-https://www.luno.com/learn/en/article/what-are-bitcoin-private-keys (accessed the 20/08/2021).

[54] Luno *What are Private Keys* available at-https://www.luno.com/learn/en/article/what-are-bitcoin-private-keys (accessed the 20/08/2021).

[55] David Lee Kuo Chaen *Handbook of Digital Currency* 1 ed (2015) 16-19.

[56] Luno *What are Private Keys* available at-https://www.luno.com/learn/en/article/what-are-bitcoin-private-keys (accessed the 20/07/2021).

[57] Sudhir Khatwani *Vanitygen : What's a Bitcoin Vanity Address & How to make one* available at-https://themoneymongers.com/bitcoin-vanity-address-vanitygen/(accessed 18/07/2021).

Another key components of VC is the use of the Wallet which affords users with access to VC which they have purchased acting as a storage facility, which depending on the type of wallet used can only be accessed with a private key. It is important to note that exchanging information in a secure manner within the financial sector has become a high priority as of late with data privacy and data protection laws recently having been brought into existence.[58] The VC wallet acts as the gatekeeper into any user's personal information. In order for a user to purchase and hold VC he would need to choose a wallet which best suits his/her needs, luckily there are a number of wallets with different features to choose from with a clear distinction between 'hot' and 'cold' wallets. A hot wallet in its simplest form is a wallet which is connected to the internet, whereas a cold wallet can be understood as a wallet that is stored offline.[59]

The first type of hot wallet available to users is a 'desktop wallet,' which is a wallet downloaded and stored on a PC or a laptop and is only accessible from a specific computer.[60] If the user chooses to make use of a one 'access point' feature , which in itself is incredibly secure, however possess the risk of that user losing all their VC if that PC or laptop was to be stolen or lost. According to the Business Insider it is believed that over 140 million dollars worth of VC is inaccessible at this moment in time, this again shows the problem with having this type of wallet.[61] The second type of hot wallet is the 'online' wallet, which operates similar to that of a digital cloud or a cellphone banking application enabling any user thereof access to their funds from a computing device wherever they may be.

The use of an online wallet is quite lucrative for users to buy into as it allows users to access their funds from wherever and at any time they wish, provided that they have access to a computer with a stable internet connection. The downside of this wallet cannot be ignored as the cloud or application which contains all the private keys of the users operating thereon is

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[58] Ian Jacobsberg Lutifiyyah Ahmed *South Africa Data Protection Regulations Expected to Take Effect in 2019* available at-https://www.hldataprotection.com/2019/04/articles/international-eu-privacy/south-africa-data-protection-regulations-expected-to-take-effect-in-2019/(accessed 10/07/2021).

[59] World Economic Forum *Cryptocurrencies: A guide to getting started* available at-http://www3.weforum.org/docs/WEF_Getting_Started_Cryptocurrency_2021.pdf (accessed 19/07/2021).

[60] World Economic Forum *Cryptocurrencies: A guide to getting started* available at-http://www3.weforum.org/docs/WEF_Getting_Started_Cryptocurrency_2021.pdf (accessed 19/07/2021).

[61] Ben Winck *There's roughly $140 billion of inaccessible bitcoin in the world right now. Here's what could happen to it* available at-https://www.businessinsider.co.za/bitcoin-price-btc-inaccessible-cryptocurrency-digital-currency-wallet-security-blockchain-2021-1?r=US&IR=T (accessed 24/07/2021).

controlled by a third party therefore making it more vulnerable to hackers and cyber attacks.[62] Lastly the third type of wallet available to users is a 'hardware' wallet' better known as a cold wallet, which stores the users private key on a hardware device like a USB. Although transactions in principle have to be concluded online, the information required to complete the transaction is stored offline. Another form of a 'hardware wallet' is a paper wallet which is merely a physical printout of public and private keys which in any event needs to be used together with a hot wallet to conclude a transaction.[63]

III. THE VARIOUS CAPABILITIES OF VC.

The excitement around Bitcoin is not all for nothing, and what caught the attention of the users is the decentralized nature of VC meaning that VC are not controlled by any centralized authority but instead requires of miners to facilitate transactions, while at the same time making for minimal transactional and legal costs. The market which will be effected the most by VCs is cross border transactions, which is where the biggest risk for money laundering exists. It is important to first understand that VC like Bitcoin can act both as an investment and as a payment instrument. In practice, this would work the same as calling your broker at the JSE and instructing him/her to purchase Steinhoff shares and being able to transact therewith. The value of the item being purchased would be deducted from the value of the shares, however instead of purchasing Steinhoff shares at the JSE you would be purchasing VCs like Bitcoin to conclude these transactions. Although this analogy may seem far-fetched, the use of Bitcoin as a legal tender was however trialled in South Africa by Pick n Pay.[64]

In the last quarter of 2017, Pick n Pay attempted something which has never been thought possible in a developing economy like South Africa or even Africa. For a limited time consumers were able to use Bitcoin to purchase their groceries. The checkout point scanned the QR code, better known as the public key of the customer, allowing both parties to identify

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[62] Luno *What is the difference between a hot and cold wallet?* available at-https://www.luno.com/learn/en/article/what-is-the-difference-between-a-hot-and-cold-wallet (accessed 23/07/2021).

[63]Ameer Rosic *Cryptocurrency Wallet Guide: A Step-By-Step Tutorial* available at-https://blockgeeks.com/guides/cryptocurrency-wallet-guide/(accessed the 14/07/2021).

[64] Duncan Mcleod *Pick n Pay in in-store trial of bitcoin payments* available at-https://techcentral.co.za/bitcoin-now-accepted-pick-n-pay/77019/(accessed the 25/07/2021).

one another and for the consumer to use their VC to pay for their groceries.[65] Although this was just a trial run, the Pick n Pay CEO pointed out that it was very unlikely that this trial run was going to continue in the near future as the industry and regulatory authorities had first to manage the risks associated with VC.[66] Although this was just a trial run, it showed that how an initial investment could be used as a payment mechanism.

It was not long after the trial period of VC as a means of payment at Pick n Pay that the retailer decided to accept VC as a means of payment in South Africa. The South African retailer now accepts VC as a means of payment at 39 of it's stores. The payments are conducted through the Bitcoin Lighting Network, which is believed to be suitable for high volumes of transactions but at a low transactional cost.[67] It is believed that in addition to the 39 stores the South African retailer is interested in making this a nationwide adoption.

In addition to the Pick n Pay trial period, it needs to be noted that the South African gambling market has also been in favour of VC being used as a means of payment. The South African online gambling market accepts VC as a means of payment, which would allow the user access to various gambling platforms, which includes slot machines, roulette tables and card games.[68] The user is then also afforded the ability to cash out with his winnings and can receive his winnings. This in-itself is not a regulated environment but in addition thereto it needs to be noted that the gambling environment is a sector which poses a large money laundering risk.

Bitcoin, along with other VC must be understood first as being an investment, which is what created the hype around it. In 2010 anyone could go about purchasing Bitcoin for under one Dollar.[69] The price of Bitcoin has increased significantly and today is hovering around

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[65] Duncan Mcleod *Pick n Pay in in-store trial of bitcoin payments* available at-https://techcentral.co.za/bitcoin-now-accepted-pick-n-pay/77019/(accessed the 25/07/2021).

[66] Duncan Mcleod *Pick n Pay in in-store trial of bitcoin payments* available at-https://techcentral.co.za/bitcoin-now-accepted-pick-n-pay/77019/(accessed the 25/07/2021).

[67] Terence Zimwara South African Retailer Pick n Pay now accepts payment in Bitcoin at 39 outlets available at-https://news.bitcoin.com/south-africa-retailer-pick-n-pay-now-accepts-payment-in-bitcoin-at-39-outlets/(accessed 09/11/2022).

[68] Business Insider Africa *How cryptocurrency is changing South Africa's online gambling scene* available at-https://africa.businessinsider.com/local/markets/how-cryptocurrency-is-changing-south-africas-online-gambling-scene/pfy3jng (accessed 09/11/2022).

[69] Buy Bitcoin Worldwide *Bitcoin price History Chart* available at https://www.buybitcoinworldwide.com/price/ (accessed the 16/09/2021).

$47 000.00 a coin.[70] The constant increase in prices of Bitcoin is unmatched and any financial advisor would advise you that a return of that much from any other investment over the period of nine years is nearly impossible, making a number of instant millionaires. This has however, occurred in the VC space, clearly showing how the demand for Bitcoin has increased in just eleven-years. The increase in Bitcoin's price comes down to the fact that many countries are now open to the idea of VC, which also means VCs are now able to transact in a bigger market. As a result of the legislative advancements, such as the creation of the Intergovernmental Fintech Working Group (IFWG), users have started to trust the idea of VC.

The speculations around Bitcoin has become so accurate that Bitcoin has started to trade futures, which creates the impression users are starting to believe that Bitcoin is here to stay. A future contracts can be understood as being 'an agreement to buy or sell a particular commodity or financial instrument at a predetermined price at a specified time in the future'.[71]

Practically speaking a future contract could work in favour of the buyer if at the said date the value of the commodity or financial instrument is higher than the price agreed to, meaning that the buyer would be at an advantage as he would still buy in at the agreed price. In the event that on the said date the price of the commodity is lower than the price previously agreed on the seller would be at an advantage as the said commodity will still have to be sold at the agreed price. Bitcoin within a number of jurisdictions has been considered a commodity, which was confirmed by the Commodities Futures Trading Commission (CFTC) in the United States.[72] The CFTC stated that Bitcoin would be treated as a commodity for regulatory purposes and according to the CME Group, Bitcoin futures are already in operation.[73]

These rapid developments clearly illustrates how Bitcoin as an investment seems to be here to stay, which despite its price volatility and many experts labelling Bitcoin as a bubble waiting to burst, has become significantly more popular and could one day be trusted. Being able

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[70] Luno *Bitcoin Price* available at-https://www.luno.com/en/price/BTC (accessed 20/07/2021).

[71] Kirithiga S, Naresh G, Mahalakshmi S, Thiyagurgan S 'An assessment of the causal relationship and price dissemination of commodity spot and future contracts' (2020) *South Asian Journal of Management* 103-122 at 109.

[72] Commodities Future Trading Commission *An Introduction to Virtual Currency* available at-https://www.cftc.-gov/sites/default/files/idc/groups/public/%40customerprotection/documents/file/oceo_aivc0218.pdf (accessed 21/07/2021).

[73] CME Group *Bitcoin Futures and options* available at-https://www.cmegroup.com/markets/cryptocurrencies/bitcoin/bitcoin.html (accessed 21/07/2021).

to trust VCs like will only occur when confidence in the currency increases which will most likely only occur when the network becomes more popular and includes a number of stake-holders, making VC more stable.

The second capability of VCs are that they are able to act as a payment system like what was done by Pick n Pay when accepting Bitcoin as payment.[74] A payment instrument can be described as a paper based, electronic means or other mediums of exchange which can be used to facilitate the transfer of funds.[75] A problem with VCs as a payment system is that is not concluded in real time and takes approximately ten minutes to be verified and reflect, which poses a problems if VCs were ever to become more widely accepted as a means of payment.

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[74] Duncan Mcleod *Pick n Pay in in-store trial of bitcoin payments* available at-https://techcentral.co.za/bitcoin-now-accepted-pick-n-pay/77019/(accessed the 25/06/2021).

[75] Bank of International Settlements *A glossary of terms used in payments and settlement systems* available at-https://www.bis.org/cpmi/glossary_030301.pdf (accessed 21/07/2021).

CHAPTER 3 SOUTH AFRICAN ANTI-MONEY LAUNDERING LEGAL FRAMEWORK AND THE REGULATION OF VIRTUAL CURRENCIES

I. INTRODUCTION

The operation of VC can be described as being able to act as an investment and a medium of exchange and despite this does not comply with the legislation governing investments as well as legal tenders. VCs can be used to act as an investment for consumers wishing to receive a positive return and also acts as the gate key onto the network, although users are also able to acquire VC by mining, or even selling goods or services and to receive VC as a payment. As a means of payment VC use is limited due to VC not being recognised as a legal tender, which means they can only be used at retailers who are willing to accept VC as a means of payment.

In dealing with VC, such as Bitcoin, it Is important that they are not confined to a specific jurisdiction and as a result can be used to transact across borders, making it particularly susceptible to money laundering. This is because a value can easily be transferred across borders from one country to another and converted to a fiat currency or even used to purchase goods. It is because of this that VC is particularly susceptible to money laundering.

There are some key issues which are required to be raised if VCs are to be allowed to be used as a means of payment in South Africa and ultimately recognised as a legal tender in South Africa; such as establishing whether VC users are utilising their savings or surplus money to enter into the VC market. Which is important because, if it can be established that users are only using their surplus funds to purchase VC, this would support the argument that this type of investment would only be available to the elite of society, which completely disregards the social and economic transformation which advancements in technology and finance are supposed to have on the marginalised.

There is no doubt that technology has the potential to improve productivity as well as spark economic growth.[76] In the same breath technology can also be the cause of inequality, and increasing poverty. This is because the advancements in technology only seem to be benefit-

[76] United Nations ESCAP *Inequality in Asia and the Pacific in the era of the 2030 Agenda for sustainable development* (2018), Chapter 4 available at- https://www.unescap.org/publications/inequality-asia-and-pacific-era-2030-agenda-sustainable-development (accessed 19/10/2021).

ting first world countries as they are able to keep up with the latest technological advancements and use this to their advantage. Meanwhile third world countries and those countries which are developing slower are lagging further behind as they aren't able to take advantage hereof.[77] As a result the introduction of the Fin-Tech revolution with all it's innovations will only increase the gap between the rich and the poor, an argument brought up amongst many academics.[78] The aforementioned argument contradicts the argument that banking can help improve the social and economic conditions of rural areas by facilitating the movement of money in a faster and cheaper manner, a prime example hereof would be in Africa where remittance services thrive as it allow for the flow of money into rural areas, the same cant be said about VCs which seem to have a more elite status associated therewith.

With all the grey areas existing around the existence of VC and it's operation, which in particular poses a money laundering risk to the South African financial system, the importance of regulating the use of VC in South Africa becomes more clear. Over the last 10 years there have been a number of encounters which has caught the attention of the authorities. A prime example hereof is the kidnapping of a Cape Town businessman by the name of Liyaqat Parker was kidnapped and held in captivity for over two months and his captors demanded a ransom payment of 50 Bitcoins for his release which at the time was equivalent to R4 300 000 (four million three hundred thousand rands).[79] In a completely separate incident a 13 year old South African boy had been kidnapped in Mpumalanga and while in captivity his captors demanded a ransom payment of 15 Bitcoins which at the time was valued at $120 000 (one-hundred and twenty-thousand dollars).[80] In another incident, which is completely unrelated to the above mentioned incidents, a businessman from Gqeberha by the name of Willie Breedt had promised investors that he would pay their money out after investors had raised an

[77] United Nations ESCAP *Inequality in Asia and the Pacific in the era of the 2030 Agenda for sustainable development* (2018), Chapter 4 available at- https://www.unescap.org/publications/inequality-asia-and-pacific-era-2030-agenda-sustainable-development (accessed 19/10/2021).

[78] CNBC *Bill Gates says technology could accentuate the gap between the rich and poor* available at-https://www.cnbc.com/2017/11/14/bill-gates-defends-the-rise-of-the-robots.html(accessed 19/10/2021).

[79] Christina Pitt & Caryn Dolley *Kidnapped Cape Town business man released* available at-https://www.news24.com/SouthAfrica/News/kidnapped-cape-town-businessman-released-20180918 (accessed 12/07/2021).

[80] Stephanie Busuri *The 13-year old South African boy kidnapped for a Bitcoin ransom has been returned* available at-https://edition.cnn.com/2018/05/24/africa/south-africa-bitcoin-ransom-boy-found/index.html (accessed 12/07/2021).

amount of R277 million (two hundred and seventy seven million rand) with him to invest in VCs. In the case of Willie Breedt the investors were later informed that he had scammed them and had run away with their hard-earned money, which undoubtedly equates to crimes of theft and fraud.[81] These investors were left with no other option but to approach the Eastern Cape High Court for assistance. The court ordered that some of the bank accounts owned by Willie Breedt be frozen in an attempt to recover some of the stolen funds.[82]

In light of the above incidents, it is clear that there is enough reason for laws to be amended or inaugurated to regulate the operation of VCs in South Africa. As it is clear that VC users are able to enter the financial market without having to comply with 'Know Your Customer' (KYC) requirements, which in turn allow users to transact anonymously and with minimal detection.[83] This poses a problem for authorities who would hope to prevent criminals from benefitting from their illegal activities.

II. RECOGNISING VC AS A LEGAL TENDER

Although recognising VC as a legal tender and bringing VC into the formal financial sector will do little to prevent the use of VC to launder money. It would however bring the operation of VC within the formal financial system as it is the ability to transact outside of the formal financial sector that is a cause of concern. The purpose behind recognising VC as a legal tender stems from VC being able to transact within the South African financial system unregulated, although VC are not widely accepted. Therefore recognising VC as a legal tender, would bring the operation of VC within the scope of the South African regulatory authorities. Recognising VC as a legal tender would only be the first step, and further action would have to be taken by the legislature in order to allow the SARB to exercise a degree of control there-over to prevent the misuse of VC within the South African financial system.

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[81] Buks Viljoen *SA Accounts of alleged Bitcoin scammer frozen* available at-https://www.news24.com/news24/SouthAfrica/News/sa-bank-accounts-of-alleged-bitcoin-scammer-frozen-20200620?isapp=true (accessed 19/07/2021).

[82] Buks Viljoen *SA Accounts of alleged Bitcoin scammer frozen* available at-https://www.news24.com/news24/SouthAfrica/News/sa-bank-accounts-of-alleged-bitcoin-scammer-frozen-20200620?isapp=true (accessed 19/04/2021).

[83] WNS *Rogue Trade: The AML & KYC challenge in monitoring Virtual Currencies* available at-https://www.wns.com/insights/whitepapers/whitepaperdetail/596/rogue-trade--the-aml-and-kyc-challenge-in-monitoring-virtual-currencies (accessed 19/10/2021).

Although VCs have been identified as posing a number of risks, the South African legislative arm has failed to inaugurate legislation that will be able to regulate VCs, or to bring VCs into the current regulatory framework. Despite this, VCs are already operating within South Africa. The only development made to date was by the South African Reserve Bank (SARB) which published a position paper on VCs. In addition to the position paper a working group has been formed to look into the operation of VCs within in the South African financial system and to try and establish what the best way to deal with them would be.[84]Although the SARB is said to have expressed an opinion on VCs and has together with a number of other government departments formed the working group, there still exists a need to have the functioning of VCs within South Africa regulated.

In order to protect the integrity of the South African financial sector. What this means is that VC would either have to be brought into the existing regulatory parameters that exist in South Africa, which would most likely result in the ban of the operation of most VC in South Africa, requiring of the legislature to introduce a completely new legal framework to regulate VC specifically. In order to bring VCs into the existing legal framework as a recognised payment system, the first amendment which is required to be made in order to allow for the operation of VC as a legal tender within the South African borders is for the definition of a legal tender to be broadened as set out in S 17 of the South African Reserve Banks Act.[85] The current definition of a legal tender recognises that a legal tender is a tender issued by the SARB itself, and includes a note by the bank, or that of an outstanding note from another bank for which that bank has assumed liability, then lastly an agreement entered into for the commencement of this Act, shall also suffice as a legal tender. [86]

It needs to be kept in mind that the South African Reserve Bank is the only body in South Africa which can issue or be the cause for the issuing of banknotes and coins in the Republic of South Africa.[87] In addition thereto the SARB also has the responsibility to ensure that the bank does not issue or cause to be issued any banknote of a denomination in a form or of a

[84] Intergovernmental FinTech Working Group *Consultation paper on policy proposals for crypto-assets* (2019).

[85] Act 90 of 1989.

[86] S17 of Act 90 of 1982.

[87] S14(1) of Act 90 of 1982.

material which has not been approved by the Department of Finance.[88] It seems as if S14 as whole would be a problem for VC operating as a legal tender in South Africa, firstly because it has not been issued by the SARB and secondly because the operation of VC in it's digital form has not been approved by the Department of Finance.

The SARB, in its 2009 position paper, went as far as to say that Electronic Money, better known as E-Money, 'would also be accepted as a legal tender and would represent a claim on the issuer although the value thereof is stored electronically and is only issued on receipt of funds'.[89] It is clear that E-Money would be accepted as a means of payment by persons other than the issuer thereof and allows that individual to lay claim to physical cash or to deposit those funds into a bank account of their choice. The SARB, went on to say that E-Money included payments conducted over a mobile phone, the internet or funds which are stored on a certain prepaid instrument.[90] It must however be highlighted that despite VCs not being recognised as a legal tender, its functionality needs to be weighed up against that of E-Money.

In determining whether VCs can constitute E-Money, a key question to answer would be to ask whether VCs afford their users with the same capabilities and benefits as E-Money, despite them lacking legal tender status. In order to do so E-Money is required to be outlined and defined, whereby requirements of what exactly constitutes E-Money can be identified and compared to the functionality of VC. According to the SARB, E-Money can be identified as having four essential components: the first is that it must represent a monetary claim on the issuer, then secondly it must be able to be stored electronically, thirdly E-Money is required to act as a means of payment and then lastly E-Money should be redeemable for physical cash or deposit into a bank account from the issuer on demand.[91] These four listed requirements of E-Money must be compared with the functionality of VCs.

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[88] S14(2) of Act 90 of 1982.

[89] South African Reserve Bank National Payment System Department *Position paper on Electronic Money* 2009, available at-https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-surveillance/general-public/PP2009_01.pdf (accessed on the 22/07/2021).

[90] South African Reserve Bank National Payment System Department *Position paper on Electronic Money* 2009, available at-https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-surveillance/general-public/PP2009_01.pdf (accessed on the 22/07/2021).

[91] South African Reserve Bank National Payment System department *Position paper on Electronic Money* available at-https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-surveillance/general-public/PP2009_01.pdf (accessed on the 22/07/2021).

The first requirement is that E-Money is required to 'represent a monetary value that in turn represents a claim on the issuer' which has two elements thereto and each will be considered independently in order to determine whether VC's meet both these elements. With regard to the first element, that the VC would be required to represent a monetary value, it seems relatively clear that this element is satisfied, which is illustrated by Bitcoins as one type of VC. A Bitcoin has a monetary value albeit one that fluctuates. Although an argument that can be put forward here is that VCs differs considerably from E-Money due to their volatility, most fiat currencies value is volatile and can be impacted by a number of factors. It is however clear that VCs like Bitcoin undoubtedly holds a monetary value to the holder thereof. [92]

The second requirement is that E-Money must be stored electronically.[93] This requirement is met by VC because although VC and E-Money differ considerably due to E-Money predominantly being stored on a cellphone device and being accessible through the use of a specified pin, whereas VC are stored using digital Wallets which come in various forms.[94]. Similar to that of E-Money a VC wallet is only accessible by a specific user, who is able to gain access thereto using his private key similar to that of an E-Wallet pin.[95]

The third requirement, is that E-Money must generally be accepted as a means of payment.[96] VCs are however not widely accepted as a means of payment as E-Money is. It can however be argued that VCs are still able to function as a means of payment in South Africa at retailers who are willing to accept VC. A prime example of how VC are able to act as a means of payment was demonstrated during the Pick n Pay trial period during which

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[92] MacKenzie Sigalos *Bitcoins wild price moves stem from its design you'll need strong nerves to trade it* available at-https://www.cnbc.com/2021/05/19/why-is-bitcoin-so-volatile.html (accessed on the 23/07/2021).

[93] South African Reserve Bank National Payment System department *Position paper on Electronic Money* available at-https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-surveillance/general-public/PP2009_01.pdf (accessed on the 22/07/2021).

[94] The various forms of VC wallets have been discussed in depth in chapter 2.

[95] Luno *What is the difference between a hot and cold wallet?* available at-https://www.luno.com/learn/en/article/what-is-the-difference-between-a-hot-and-cold-wallet (accessed 23/07/2021).

[96] South African Reserve Bank National Payment System department *Position paper on Electronic Money* available at-https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-surveillance/general-public/PP2009_01.pdf (accessed on the 22/07/2021).

consumers were able to purchase their groceries using Bitcoins.[97] In addition consumers are also able to purchase goods on Bidorbuy, Bukhara and VapeClub using their Bitcoins.[98]

Then the fourth and last requirement is that E-Money must be redeemable for physical cash or a deposit into a bank account of the user's choice.[99] This requirement is also complied with as consumers are easily able to exchange their cryptocurrencies for physical cash at their closest cryptocurrency ATM, in South Africa.[100] VC users are also able to transact with one another with payment pursuant to such transactions being able to be received by a transacting party, into that party's digital wallet.

In addition to the argument made above that VC does not meet all the requirements of E-Money as VC is not widely accepted as a means of payment.VC also fails to comply with the laws governing E-Money as the SARB 2009 position paper sets out that only SA registered banks are able to issue E-Money. Then as a result of VC not being traceable back to any South African bank or Accountable Institution would mean VC does not meet this requirement, as a matter of fact most VC are decentralized which means that no accountable institution has distributed it or even exercises control thereof.[101]

The recognition of Accountable Institutions in SA has been done with the sole purpose of promoting compliance and ensuring accountability. The role of the AI is to go about implementing internal rules and developing a risk management and compliance program which ensures that all relevant stakeholders comply with the various parts of FICA.[102] The Act goes further to state that the AI has the responsibility to conduct training and monitoring. In terms

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[97] Duncan Mcleod *Pick n Pay in store trial of Bitcoin payment* available at-https://techcentral.co.za/bitcoin-now-accepted-pick-n-pay/77019/(accessed on the 23/07/2021).

[98] Luno *Where to spend Bitcoin in South Africa* available at-https://www.luno.com/blog/en/post/south-africa-pay-with-bitcoin (accessed 20/10/2021).

[99] South African Reserve Bank National Payment System department *Position paper on Electronic Money* available at-https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-surveillance/general-public/PP2009_01.pdf (accessed on the 22/07/2021).

[100] A cryptocurrency ATM can be found in Johannesburg, Zeenat Vallie *SA's first cryptocurrency ATM comes to Joburg* available at-https://www.iol.co.za/business-report/economy/sas-first-cryptocurrency-atm-comes-to-joburg-14982296 (accessed on the 23/07/2021).

[101] South African Reserve Bank National Payment System department *Position paper on Electronic Money* available at-https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-surveillance/general-public/PP2009_01.pdf (accessed on the 22/07/2021).

[102] S42 of Act 38 of 2001.

of FICA all AI as set out in Schedule 1 of FICA need to ensure that they comply with the Act.[103] The operation of VC as a payment instrument as well as an investment falls within the ambit of carrying on business of a bank, providing money remittances services or being able to act as a financial instrument trader as set out in the act.[104]

Therefor to account for the proper regulation of VC, the operation thereof needs to be weighed up against the existing legal framework which regulates fiat currencies and E-Money, with a key focus being on the legislation which aims to combat money laundering and terrorist financing. The aim here would be to determine whether the existing legal framework is sufficiently equipped to deal with VC, or whether a completely new legal framework needs to be brought into existence to regulate VCs while taking into account the risks associated therewith, something which has already been identified by the international community.

III. APPLICATION OF FICA TO VC.

The aim of the Financial Intelligence Centre Act (FICA) is to put in place control measures which aims to facilitate the detection and investigation of money laundering, the Act also assists in identifying unlawful proceeds and lastly assists in the implementation of financial sanctions in accordance with the resolutions adopted by the Security Council of the United Nations (UNSC).[105]

The FICA does this by adopting the risk based approach in dealing with risks as well as introducing three basic principles of money laundering detection and investigation.[106] The first of which being that intermarries are required to get to know their clients as well as understand with whom their clients are doing business with.[107] The importance of getting to know ones client or in the case of a company, who the beneficial owner is, stems from criminals often using fake identities and shell companies in order to further their unlawful interests.

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[103] Act 38 0f 2001

[104] The Financial Intelligence Centre Act 38 of 2001.

[105] S3(1) of Act 38 of 2001.

[106] Financial Intelligence Centre '*Guidance Note 7 on the implementation on various aspects of the Financial Intelligence Centre Act of 2001*' available at- https://www.fic.gov.za/Documents/171002_FIC Guidance Note 07.pdf (accessed 03/11/2022)

[107] Financial Intelligence Centre *Guidance for accountable institutions on client identification and verification and related matters* available at-www.fic.gov.za/Documents/130328%20GUIDANCE%20NOTE%203A.pdf (accessed 21/10/2021).

The second principle of money laundering detection which the act introduces is the 'preservation of paper trails', which means that transactions through the financial system must be preserved. Then the last principle of money laundering which FICA introduces is that the suspicion of money laundering transactions must be brought to the attention of investigating authorities.[108]

The introduction of FICA is inline with the agenda of the global community who has in the last decade prioritised the combating of financial crime, as they have finally come to realise that financial crimes are often a secondary crime associated with a number of serious high profile primary crimes. This is evident with the implementation of legislation which aims to combat money laundering and the financing of terrorist-related activities. A prime examples of the seriousness of financial crimes can be seen with HSBC bank being fined by the United States government for having inadequate money-laundering controls in place, allowing it to be used to launder drug money into Mexico by one of the most dangerous cartels in the world.[109]

The seriousness of having inadequate anti-money laundering and terrorist financing measures in place has also been prioritised by the SARB. In 2022 the SARB fined Nedbank a staggering R35 million for failing to comply with FICA.[110] According to reports the fine was imposed by the SARB due to Nedbank failing to comply with: its risk management and compliance programme obligations, its record keeping obligations, its cash threshold obligations, its anti-money laundering and terrorist financing governance obligations and lastly that Nedbank had failed to produce evidence to prove that senior management approval was obtained when additional due diligence measures were to be implemented.[111] In addition hereto the

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[108] Financial Intelligence Centre *Guidance for accountable institutions on client identification and verification and related matters* available at-www.fic.gov.za/Documents/130328%20GUIDANCE%20NOTE%203A.pdf (accessed 21/10/2021).

[109] Reuters *HSBC draws line under Mexican cartel case after five-years on Probabtion* available at-https://www.reuters.com/article/us-hsbc-usa-idUSKBN1E50YA (accessed 02/08/2021).

[110] Reuters *Brief South African Reserve Bank imposes Administrative sanctions on Nedbank Ltd* available at-https://www.reuters.com/article/brief-south-african-reserve-bank-imposes-idINFWN2ZO66X (accessed 27/08/2022).

[111] Rorisang Kgosana *Nedbank fined millions by Reserve Bank. Here's Why* Available at- https://www.thesouthafrican.com/news/nedbank-fined-millions-by-reserve-bank-heres-why-latest-south-africa-latest-13-august-2022/ (accessed 27/02/2022).

China Construction Bank in 2018 was fined R75 million by the SARB for having inadequate anti-money laundering and terrorist financing measures in place.[112] It was identified by the SARB that the bank had failed to have in place: record keeping requirements, adequate processes and working methods in order to detect and report property associated with terrorist and related activities, suspicious and unusual transaction reporting measures as required by FICA and that lastly that the bank had failed to comply with the cash threshold requirements as set out in FICA.[113]

Therefore despite these crimes seeming a bit far-fetched due to the complexities involved in committing them for an ordinary citizen, they still need to be accounted for due to the criminals involved being well-equipped and well educated. It would be a fair assumption to make that no country would want to find themselves in a position whereby they had failed to adequately prepare for a crime which they knew had the possibility of occurring, and which the international community has on a number of occasions warned them about through international bodies like the FATF and the Wolfsburg Group.

The FICA is undoubtedly one of the most important pieces of legislation that Accountable Institutions (AI) are required to comply with. The preamble of FICA clearly sets out that the aim thereof is to combat money laundering activities as well as the financing of terrorism and related activities and does so by imposing duties on certain individuals and institutions.[114] It is however clear that the legislation that applies to AI does not regulate VCs, and having this gap in the application of our legislation goes against exactly what the legislation aims to combat, which is to prevent the South African financial system from falling victim to money laundering and terrorist financing undoubtedly poses a risk to the South African financial system, showing the need for urgent legislative intervention. It is important to note that despite VC not falling into the ambit of FICA it's operation even if it were to be regulated by FICA, would have difficulty meeting the requirements imposed by the Act as will be illustrated below.

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[112] Kabelo Khumalo *China Construction Bank fined R75 million by the SA Reserve Bank* available at- https://www.thesouthafrican.com/news/nedbank-fined-millions-by-reserve-bank-heres-why-latest-south-africa-latest-13-august-2022/ (accessed 27/08/2022).

[113] The South African Government South African Reserve Bank imposes administrative sanction on China Construction Bank available at-https://www.gov.za/speeches/south-african-reserve-bank-imposes-administrative-sanctions-china-construction-bank-2-feb (accessed 27-08-2022).

[114] Act 38 of 2001.

In support of the argument made above the first section of FICA worth noting is S 21 which VCs fail to comply with, that imposes a duty on all AI to identity clients before entering into a single transaction or going about establishing a business relationship with them.[115] VCs clearly bypass S 21 by enabling users to download wallets in whichever format they wish, and thereafter enabling them to transfer fiat currency into that wallet using their domestic bank account whereby they are able to convert their fiat currency into a VC of their choice using a crypto exchange such as Coinbase or Luno. The process for the purchasing of VC may differ from wallet to wallet but the underlying requirement is that the user has to transfer funds from their domestic account to their wallet to gain access to VC, with the exception of miners who acquire VC through mining. Although it can be assumed that South African banks have gone about identifying and vetting their clients before onboarding them, thus complying with S 21. This is however not the only way to go about purchasing VC and the risk exists for funds which has an illegal origin to be laundered using VC.

It must however be noted that despite South African banks having stringent controls in place to ensure compliance with S 21, the possibility still exists for users to purchase VCs using a bank from a non-equivalent jurisdiction or to receive payment of VC from a non-equivalent jurisdiction which is a cause of concern to the South African financial system. When a user in South Africa chooses to transact with a user from a non-equivalent jurisdiction that would mean that the user has chosen to transact from a jurisdiction which has been identified by the international community as having inadequate anti-money laundering measures in place.[116] Once those funds are now reflecting in that users wallet, that user would now be able to transfer those funds to anyone in South Africa, which could now be integrated into the South African financial system. There also exists the possibility that the user could himself travel to South Africa to spend those funds.What this does is to allow these illicit gained funds to be integrated into the South African financial system.

Another applicable section from FICA which VC would have difficulty complying with, and which is worth discussing is the duty imposed on all financial institutions to keep records

[115] S21 of Act 38 of 2001.

[116] For those jurisdictions identified as high risk see FATF *Topic: High-risk and other monitored jurisdictions* available at-https://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/?hf=10&b=0&s=desc(fatf_releasedate)(accessed 01/08/2021).

of business relationships and transactions concluded with clients.[117] What this does is to allow the AI to create a profile for clients and to determine whether future transactions can be expected from that client. The purpose of creating a profile for clients is to enable AI the ability to determine whether transactions are in line with that institutions knowledge of that client. In terms of S 22, AI's must be forward-thinking and in doing so need to obtain from clients or prospective clients certain information in accordance with what is set out in S 21 to S 21H.[118] What this would mean that the clients identity must be verified and kept on hand, and in the case of a business relationship addition information must be obtained and retained. The type of information which the AI is required to keep on hand is the intended business relationship, any business correspondence and lastly the details of the parties to all transactions involving their clients.

The importance of S 22 stems from it allowing AI's and their staff, who can be held liable for failing to get to know their client, to better understand their clients. Therefore allowing that AI to identify when transactions conducted by clients are inconsistent with the profile which they created for that client. What this does is to assist AI in identifying illicit gained funds and illegal activity. Gathering this information assists the AI in protecting its reputation by determining when the client's activity is inconsistent with that institutions knowledge of that client, ensuring that the AI does not become an instrument to financial crime.

In my opinion one of the most important sections of FICA is S 21A, which allows AI to make independent inferences about their clients and to evaluate the risk which they may pose to the institutions reputation and the financial industry as a whole. In the same breathe also gives effect to the Wolfsburg 'Know Your Client' (KYC) guidelines which requires of financial institutions to identify and verify the identity of their customers. In terms of S 21 AI are required to get to know their client enabling that AI to identify Politically Exposed Persons (PEPS) or individuals who have been placed on UNSC watchlist.[119] It is important for AI to

[117] S22 of Act 38 of 2001.

[118] S22 of Act 38 of 2001.

[119] A Politically Exposed Persons (PEPS) is someone who is someone who has been entrusted with a prominent public function and who poses a higher risk for potential involvement in bribery and corruption. Financial Intelligence Centre *Frequently Asked Questions* available at-https://www.fic.gov.za/Pages/FAQ.aspx?p=3 (accessed 21/10/2021).

identify PEPS when onboarding clients as they have the ability to create adverse media publications which may have the effect of dampening the reputation of the institution.

It seems as if S 21A in its entirety is not adhered to by VC since transactions are merely solved and settled by Miners who only provide their computer processing power to help settle the hash key attached to the transaction and allow the transaction to be concluded, while on the other hand all the two contracting parties require is one another's public keys. While facilitating the transaction on the Blockchain the miners have no knowledge about the transactions which they are facilitating, nor do they have knowledge of the underlying agreement between the two parties who have agreed to send one another funds, thus failing to comply with S 21A.[120] It is also important to note that the transactions which are concluded using VC could pose financial crime risks, which the miners have no knowledge about, which can easily result in the contracting parties getting away with a crime which an AI could easily have detected and prevented. As a result it becomes important to note that perhaps the legislature should make it mandatory for all VC users to go about purchasing VC through digital currency exchanges like Luno who before onboarding clients go about verifying that clients credentials, and to make this the only way to go about purchasing VCs.

The retention of records is also another important crime prevention measure as it enables AI and crime prevention authorities to recreate the sequence of transactions in the event that suspicious activities is identified, thus allowing prosecution to take place. With the Blockchain protocol it seems as if VC satisfies this requirement. What the Blockchain does is to record all transactions concluded and stores them in smaller Blocks, all of which are available to the public and investigating authorities to inspect. What this means is that transactions can at a later stage be reconstructed, making it possible to prosecute users of VC. At face value it would be easy to assume that the requirement in terms of S 22A, which requires records to be retained for a period of five years has been satisfied.[121] In reality this is not adhered to and the problem arises with the type of information which the Blockchain retains not satisfying the requirements of S 22 of FICA. This is because in terms of S 22 AI must also retain

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[120] S21 A Act 38 of 2001.

[121] S21A of Act 38 of 2001.

customer due diligence records.[122] Which is where VC and the Blockchain protocol again falls short. Which can be supported by VC non-compliance with S 22 discussed previously which requires of AI to verify clients identities as well as S21A which deals with understanding and obtaining information on the business relationship between transacting parties.[123]

The importance of bringing VC into the existing regulatory parameters stems from the risk which it poses. There have been a number of articles written which have gone about discussing the issue of VC being able to bypass international sanctions. The first article discusses how North Korea, who is said to have increased their focus on crypto-currencies exchanges and related sites, have used VC to bypass international sanctions.[124] As a result hackers have managed to breach the Bitcoin news website and collected Bitcoin ransom payments from the victims of the malware.[125] Which clearly shows why persons having an ulterior motive would choose to make use of VC, such as Bitcoin. These features make VC attractive for terrorist financing and for those wishing to launder money.

It is also believed that North Korea has their own army of hackers, who expand their interest from military espionage to financial theft, and although there is no concrete evidence in support hereof it is also believed that the North Korean army of hackers are making use of a tactic referred to as 'spearfishing' which involves targeting personal email account of employees of digital exchanges. Once the hacker has obtained the employees passwords they are able to gain access to the virtual funds. Hereafter the hackers are able to steal Bitcoin's or withdraw the cryptocurrencies in South Korean won or even the United States Dollar.[126] The

[122] S22 of Act 38 of 2001.

[123] S21A of Act 38 of 2001.

[124] Sam Kim *North Korean hackers hijack computers to mine cryptocurrencies* available at-https://www.fin24.com/Tech/Cyber-Security/north-korean-hackers-hijack-computers-to-mine-cryptocurrencies-20180102 (accessed 02/08/2021).

[125] Michelle Nicholas, Raphael Satter *United Nations experts point finger at North Korea for $281 million cyber theft,KuCoin likely victim* available at-https://www.reuters.com/article/us-northkorea-sanctions-cyber-idUSKBN2AA00Q (accessed 02/08/2021).

[126] Sam Kim *North Korean hackers hijack computers to mine cryptocurrencies* available at-https://www.fin24.com/Tech/Cyber-Security/north-korean-hackers-hijack-computers-to-mine-cryptocurrencies-20180102. (accessed 02/08/2021).

latest figures published sets out that North Korea has to date stolen 1.3 Billion dollars worth of cryptocurrency.[127]

The second country which Bitcoin is believed to be helping circumvent international sanctions is Iran as there has been sanctions imposed against Iran by the United States for its nuclear programme, these sanctions include international embargoes and trade bans against Iran.[128] It is believed that these economic sanctions are easily circumvented with the use of Bitcoin, as they are largely accepted in Iran.[129] The Financial Crimes Enforcement Network (FinCEN) published an advisory labelled advisory on the Iranian regime's Illicit and Malign Activities and Attempts to Exploit the Financial System, and highlights how Iran is abusing the international financial system using VCs and what risks this pose.[130]

In terms of S 28, AI are obliged to report all cash transaction above a prescribed amount, which in South Africa is R24.999.99. It needs to be noted that this amount has since been reevaluated and is now sitting at an amount of R49 999.99 (forty-nine thousand nine hundred and ninety-nine rand and ninety-nine cents).[131] In terms of S 28, AI are required to report to the FIC the prescribed particulars concerning a transaction concluded with a client which exceeds the amount mentioned above, within 24 hours of such transaction being concluded or becoming aware thereof.[132] The reporting obligation in terms of S 28 comes into effect as soon as the individual concerned becomes aware thereof, even in the event that the employee of the AI only becomes aware thereof at a later stage. Practically speaking the reporting obligation must be fulfilled within two days of becoming aware thereof. What this hopes to achieve is to act as a proactive mechanism which monitors and forces individuals to report

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127 CNBC *North Korean hackers charged in massive cryptocurrency theft scheme* available at-https://www.cnbc.com/2021/02/17/north-korean-hackers-charged-in-massive-cryptocurrency-theft-scheme.html (accessed 02/08/2021).

128 Sky News *The Iran nuclear deal explained* available at-https://news.sky.com/story/what-is-the-iran-nuclear-deal-11362807 (accessed 03/08/2021).

129 Jamie Redman *Bitcoin helps people circumvent economic sanctions in Iran* available at-https://news.bitcoin.com/bitcoin-circumvent-economic-sanctions-iran/(accessed 03/08/2021).

130 FinCEN *Advisory* available at-https://www.fincen.gov/sites/default/files/advisory/2018-10-11/Iran%20Advisory%20FINAL%20508.pdf (accessed 03/08/2021).

131 Financial Intelligence Centre Act '*Media release-Revision of the cash transaction reporting threshold in terms of the Financial Intelligence Centre Act*' available at-https://www.fic.gov.za/Documents/Media Release - CTR Regulations.pdf (accessed 03/11/2022).

132 S28 of Act 38 of 2001.

cash transactions which may be subject to money laundering activities, forcing the FIC to investigate funds which exceed the prescribed threshold.[133]

An important starting point to bring the operation of VCs within the regulatory parameters of FICA would be to look at the term 'cash' according to S 1 of FICA, which is defined as coin and paper money which within the South African borders performs the function of a legal tender, which can be circulated and is customarily used and accepted as a medium of exchange.[134] It would be fair to assume that VC bypass this requirement as its not tangible as which is set out in the definition of cash in section 1 of FICA.

It must however be noted that Bitcoin like many other VCs seems to meet the second part of the definition of cash since it's able to act as a medium of exchange within SA. It was previously discussed that VC like Bitcoin is able to act as a payment instrument by facilitating transactions, which then means that because the definition of cash is not inclusive of virtual money that the transfer of VC from one party to another does not need to comply with the requirements of S 28 or any other section of FICA. Despite this problem many South African citizens are already able to convert South African Rands to VC and transact amongst one another above the prescribed threshold, but are afforded limited protection in terms of the law.

The underlying issue then is that Bitcoin like most VCs does not regulate the payments which it facilitates. In fact, all that is required for miners to facilitate transactions between the two parties is for that miners to afford their computer processing power to help solve the hash-key and upload these records onto the Blockchain. A key question and a current grey area within the law seems to be whether a transaction using Bitcoin over the threshold amount as set out in S 28 would have to be reported, and on who this responsibility is placed. The answer thereto is not simple because the blockchain uses no human intelligence nor is there any duties or obligations imposed on Bitcoin miners, clearly setting out a need for regulatory intervention.

The second issue with Bitcoin meeting the requirements of S 28 and the definition of cash in S 1 of FICA, is that according to S 1 which is the section which deals with definitions is

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[133] Financial Intelligence Centre *Guidance Note 5C on cash threshold reporting to the FIC in terms of S28 of FICA* available at-https://www.fic.gov.za/Documents/221020 GN5C_ final (004).pdf (accessed 02/11/2022).

[134] S1 of Act 38 of 2001.

that the term cash is normally defined as coins or paper money which symbolises a legal tender and acts as a medium of exchange within the Republic.[135] The definition provided falls short of including VC which despite this is able to act as a medium of exchange. It cannot be denied that VC and its operation is strikingly similar to that of electronic money but it is only electronic money which is recognised as a legal tender. Which has undoubtedly created a grey area which requires a stance to be taken as to whether VC will be accepted within the Republic as 'cash' and if so how will s 28 be enforced.

One of the most important sections of FICA is s 30, which regulates the convergence of cash to and from the Republic.[136] What this section does is to regulate anyone who wishes to move, or who intends to move funds into or out of the Republic by requiring them on demand to report the prescribed particulars concerning that particular convergence of cash to an individual identified by the Minister.[137]

Discussing S 30 is important as it governs the movement of funds to and from the Republic of South Africa, which effects our economy and in turn the value of our currency in relation to other currencies. The manner in which this effects the South African economy stems from the purchasing power afforded to VC which have been bought using South African rands ends up being used in another jurisdiction, in turn empowering that economy. Another well known payment system that weakens the South African economy is the movement of remittances out of South Africa which is believed to be helping other jurisdictions, as these funds end up being used for a greater good in countries receiving these funds, as it helps to fight poverty, enhance human and economic development by providing finances which can be used for education, healthcare, housing and small businesses and farming.[138] Although money that is leaving the economy weakens the economy the movement of remittances have been identified as assisting the fight against poverty, a problem which we as a continent are faced with. It would however be an accurate assumption to make that before Bitcoin as an investment or payment instrument finds its way to a remote poverty ridden jurisdiction, it would be likely

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135 S1 of Act 38 of 2001.

136 S30 of Act 38 of 2001.

137 S30 of Act 38 of 2001.

138 Gumisai Mutume *Workers' remittances: a boon to development* available at-https://www.un.org/africarenewal/magazine/october-2005/workers'-remittances-boon-development (accessed 16/09/2021).

that poverty would have already been eradicated, giving the impression that the use of VC is for the elite, as opposed to remittance services, which is often used by immigrants and asylum seekers to send money back to their home country.

What this means is that Bitcoin allows for the movement of funds across borders in a manner which does not exactly promote for the fair distribution of wealth and instead of helping eradicate poverty it weakens the country from which the fiat currency originates. Now to go back and discuss S 30, the issue with Bitcoin is that when the information of a particular transaction needs to be reported to an individual identified by the Minister as required in terms of S 30, on whom will this duty be conferred. Although transactions are recorded on the Blockchain this section also seems to create a duty which miners cannot be expected to fulfil, whereby they would be required to make available the information made mention of in S 21 and S 21A, giving effect to the Wolfsburg Group recommendations dealing with AI having to get to know who they are dealing with.

A section which somewhat relates to S 28 of FICA is S 28A of FICA, which requires of an AI to identify any property which it may have in its possession which may be associated with terrorist activities and, or financial sanctions pursuant to the Resolution of the United Nations Security Council (UNSC).[139] A key question would then be to ask on whom will this duty fall if the VC protocol is decentralised which functions without the need of a centralised body like the SARB.

The next section is pretty similar to the previous section and therefore the same arguments to a large extent can be brought forward as S 31 of FICA discusses the electronic transfer of money into and out of the Republic,[140] which stipulates that when an AI electronically transfers funds to or from the Republic in excess of the prescribed amount, that AI is required in writing within the prescribed time to report this transfer to the FIC.[141] This requirement becomes problematic since Bitcoin is a decentralized currency that has no centralized authority exercising control here-over. What this means is that the reporting obligation created by S 31 does not fall onto anyone, despite all Bitcoin users being able to electronically transfer funds

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139 S28A of Act 38 of 2001.

140 S31 of Act 38 of 2001.

141 S31 of Act 38 of 2001.

from one party to another across borders and in excess of the prescribed amount. This is undoubtedly a grey area within our law since Bitcoin does not impose a duty on having to comply with S 31 onto its users nor does it impose this duty onto the miners who in reality aren't required to do anything but merely provide their computer processing power to help facilitate transactions. Therefore it is of the utmost importance that a stance on the existence of digital currencies within the South African borders is taken.

Another issue identified with VC and its non-compliance with FICA is its non-adherence with S 32. The provisions of S 32 sets out that the FIC may on request require an AI, reporting institution or any other person to furnish more information relating to transactional activity and supporting documents in terms of S 28, S 29 and S 31.[142] In reality Bitcoin and other VC fail to meet the requirements of S 32 as there is no centralised authority to whom this request can be made. Ensuring compliance with S 32 is still however applicable due to the fact that although Bitcoin is founded on the Blockchain protocol, that when the need arises allows the public or any investigative authority to access the records at any time. It still lacks individual accountability by an institution representing all VCs to the FIC in the event that information regarding transactional activity and supporting documents is requested.

Lastly in terms of S 34 of FICA, the FIC is afforded the power to intervene where the centre is of the opinion that the funds involved in a particular transaction had derived from unlawful activities or is property which is connected to an offence relating to the financing of terrorist and related activities.[143] The centre is also able to intervene if they are of the opinion that the property concerned derives from an individual or entity who has been identified by the UNSC as having sanctions imposed against them, which includes the freezing of their assets and imposing travel bans on them.[144] In the event that FIC identifies proceeds which require an intervention from their side, what would their cause of action be with VC like Bitcoin which is a decentralized currency? In the event that this occurs it would be required that the centre gain control of these funds and store them at a central location in its virtual form,

[142] Act 38 of 2001.

[143] S34 of Act 38 of 2001.

[144] S34 of Act 38 of 2001.

which would not be possible since the SARB or the FIC has not provided their stance on how exactly this would be executed.

One way to rectify a transaction which has at a later stage been identified as being associated with a non-equivalent jurisdiction would be to reverse or cancel the transaction. According to the Bitcoin support website, it is not possible to reverse or cancel a Bitcoin transaction.[145] Which brings about the second issue with Bitcoin and its compatibility with S 34, as it would be virtually impossible for the FIC to gain control of any Bitcoin's which they have identified as having an unlawful origin or being held by an individual who has been identified by the UNSC as having sanctions imposed against them. According to an article written by the Guardian, the only way to gain control of someone's Bitcoin is by gaining access to the servers which run the system or to somehow gain access to the Bitcoin users private key, the latter would have to be obtained unlawfully by violating that users right to privacy.[146]

This was done to Sean Everett when he was notified that his cell phone number was being migrated and shortly thereafter via email received an email confirming that his Bitcoin wallet had been hacked and his Bitcoin's stolen. The manner in which the hacker did this was by obtaining Sean Everett's two verification keys, which would be his cellphone number and his email address.[147] The difficulty in seizing Bitcoin's have been recognised by the government of the United Kingdom. Who in the 'N8 Policy Research Partnership' proposed that the UK Home Office who oversees the country law enforcement agencies consider classifying Bitcoin as a form of cash so that the police will be able to seize and gain control thereof more easily for investigative purposes, whilst also making it easier to apply cash seizure legislation.[148]

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145 Blockchain.comSupport *Can my transaction be cancelled or reversed* available at-https://support.blockchain.com/hc/en-us/articles/211162263-Can-my-transaction-be-canceled-or-reversed-(accessed 03/08/2021).

146 Adam Gabbatt, Dmonic Rushe *Silk Road shutdown: how can the FBI seize Bitcoins* available at-https://www.theguardian.com/technology/2013/oct/02/bitcoin-silk-road-how-to-seize (accessed 03/08/2021).

147 Jen Wieczner *Hacking Coinbase: The Great Bitcoin Bank Robbery* available at-http://fortune.com/2017/08/22/bitcoin-coinbase-hack/(accessed 23/08/2021).

148 Stan Higgins *UK Police wants change the law to make bitcoin seizure easier* available at-http://www.coindesk.com/uk-police-want-change-law-make-bitcoin-seizures-easier/(accessed 03/08/2021).

IV. ENFORCEMENT CHALLENGES WITH VC WITHIN THE CURRENT REGULATORY FRAMEWORK

The next piece of legislation which becomes worth discussing is the Prevention of Organised Crime Act 121 of 1998 (POCA), which like the name may suggest is aimed at combating organised crime and much like FICA addresses key issues like money laundering and terrorist financing. The purpose of POCA as set out in it's preamble is to combat organised crime, money laundering and criminal gang activities whilst imposing a reporting obligation on AI to report unlawful activities.[149]

The way in which POCA does this is by setting out which actions the state can take to prevent crime from becoming a profitable activity. In addition hereto it also needs to be mentioned that FICA amends POCA as well, just to illustrate how the two acts work hand in hand towards a common goal. The way in which FICA amends POCA is by repealing S 7 of POCA and replacing it with S 7A, which is implemented through Schedule 4, and what this does is to provide a complete defence for those individuals and institutions charged with committing offences in terms of S 2(1)(a) or (b), S 4, S 5 and S 6 of FICA.[150]

The first issue with VCs and its non-compliance with POCA is that VCs don't meet the definition of property as set out in S 1 of POCA, posing a problem for enforcement.[151] According to S 1 of POCA the definition of property is set out, which is important because it sets out against what the various orders, which the act makes mentioned of, can be enforced against.[152] The definition of property in the Act refers to money, immovable property, movable property, corporeal/incorporated as well as claims and securities.[153] The POCA does not go about defining the term money much like FICA.

The definition of cash in FICA is defined as paper or coin money in the Republic or another country which is used as a legal tender or circulates as a medium of exchange.[154] In attempt-

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[149] S1 of Act 121 of 1998.

[150] Schedule 4 of Act 28 of 2001.

[151] S1 of Act 121 of 1998.

[152] S1 of Act 121 of 1998.

[153] S1 of Act 121 of 1998.

[154] S1 of Act 38 of 2001.

ing to regulate the use of VC in South Africa a key step to take would be to include Bitcoin and other VCs as being property in terms of POCA or as cash in terms of FICA; doing this would allow the act to have authority to act. Despite this technicality, which first needs to be addressed, it is still important to highlight the difficulty for POCA in dealing with VC.

Furthermore POCA sets out that any person who retains any property derived directly or indirectly from a pattern of racketeering activities and who uses or invests directly or indirectly any such property in the accumulation of any interest, or the establishment, operation or activities of any enterprise would be guilty of an offence.[155] A question to ask is that although it has been established that VCs are not recognised as a legal tender or cash, would it still be possible to convert funds which has an unlawful origin to VC and allow these funds to gain interest.[156] The answer thereto is yes as VCs are able to act as a medium of exchange as well as an investment.[157]

A prime example of how VC can be used to launder illicit gained funds took place in Latin America when a suspected human trafficker by the name of Ignacio Santoyo, who had been linked to crimes of prostitution and racketeering across Latin America used VCs like Bitcoin to launder the proceeds of her unlawful operation.[158] Therefore in evaluating the potential risks which VC pose to the integrity of the South African financial system it becomes worth discussing how the operation of VC prevents the proper execution of Confiscation Orders, Restraining Orders, the Realisation of Property, Preservation Orders, The Forfeiture of Property and lastly the proper use of the Criminal Asset Recovery Account as set out in POCA.[159] Allowing the state to recover funds which have been acquired illegally and which has an unlawful origin.

[155] S2 of Act 121 of 1998.

[156] Eva Entenmann *Terrorist Financing and Virtual Currencies: Different Sides of the Same Bitcoin?* available at-https://icct.nl/publication/terrorist-financing-and-virtual-currencies-different-sides-of-the-same-bitcoin/(accessed 08/08/2021).

[157] World development Report 'Do digital Technologies Facilitate Illicit Financial Flows' (2016) Max Planck Institute for Foreign and International Criminal Law 1 27.

[158] Diego Ore *Latin American crime cartels turn to cryptocurrencies for money laundering* available at-https://www.reuters.com/article/mexico-bitcoin-insight-idUSKBN28I1KD (accessed on the 09/08/2021).

[159] Act 121 of 1998.

The first preventative measure used by the prosecuting authority to deprive criminals from enjoying the proceeds of their crimes is Confiscation Orders. Which is an order used by the government to deny criminals from accessing their assets, in an attempt to disrupt or deter criminality activity, in turn seizing the criminals property. The use of the Confiscation Order reassures the public that crime does not pay. The Confiscation Order is imposed through S 18 of POCA, which provides that once an accused has been convicted of an offence, on the application of the prosecutor concerned an enquiry may be held into any benefit which that accused/defendant may have derived from that offence or any other offence committed and convicted within the same trial, as well as any other criminal activity which is found to be substantially related to the primary offence.[160] In terms of S 19, the value of the Confiscation Order will be determined by the value of the accused proceeds derived from unlawful activities, which shall be inclusive of the sum of the value of the property, services, advantages, benefits and rewards received as a result of unlawful activities.[161] In turn what this requires of the accused is to pay over to the state an amount which the state believes the accused may have benefited as a result of the said unlawful activities.

In practise a Confiscation Order would be of little or no use to the state in the event that a criminal was to receive payment for any unlawful activity he has committed using VC, or has opted to convert his unlawful gains to VC as the state would not have a legal leg to stand on to confiscate these VC. The reason for the prosecutions hands being tied here is because firstly there is no centralised body which can be instructed to cancel the transaction or gain access to the users digital account holding the VC which in turn would allow them to confiscate the said funds, although the state may be able to claim the suspected illicit funds from the holder of the account however the state would be prevented from doing this. The reason why the state would be prevented from doing this due to VCs not falling within the definition of property as set out in S 1 of POCA. There have also to date been no progressive guidelines provided on how the state would go about gaining control of the accused VCs without violating that individuals' right to privacy, which in practise would require of the state to hack into the server or to go about obtaining the users private key in a manner similar to which was done to Sean Everett.

[160] S1 of Act 121 of 1998.

[161] S19 of Act 121 of 1998.

The second preventative measure used by the government in an attempt to deprive criminals from the proceeds of their crimes is an Restraining Order, which is an order obtained by the state from the court which prohibits a person from carrying out a particular action, which may include preventing a person from contacting a specific person or approaching a specific individual.[162] When the court enforces a restraining order it also has the discretion to add any conditions or clauses that they may deem necessary. It is possible to impose a restraining order against realisable property which would prevent that realisable property from being disposed of or even removed contrary to the restraining order.[163] The restraining order also empowers any police official in line with the restraining order to seize such property if they are of the opinion that such property will be disposed of or even removed[164]. In the event that property is seized by the police official in light of the police official being of the opinion that this property will be disposed of, this property will then fall into the hands of the Curator Boni's to manage, whose responsibility it will become to ensure that the said property is properly managed.[165]

The execution of these preventative measures seems possible when dealing with tangible assets or even bank accounts which if the need arises can be frozen, however what remains unknown is how a Restraining Order will be executed in the event that the accused has chosen to convert his illicit gained funds to a VC like Bitcoin. The first issue as previously discussed is that it would not be legally possible to gain control of an individual's Bitcoin account without violating that individual's right to privacy. The second issue is that it is also not possible when dealing with a fugitive to cancel or reverse any transactions conducted on the Blockchain network.[166] The third issue is the fact that the term property as referred to in the Act does not make provision for VC as which was previously discussed, which would mean that law enforcement officers or prosecutors would have no recourse against perpetrators in this regard.

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162 S26 of Act 121 of 1998.

163 S27 of Act 121 of 1998.

164 S27 of Act 121 of 1998.

165 S27 of Act 121 of 1998.

166 Blockchain.com Support *Can my transaction be cancelled or reversed* available at-https://support-.blockchain.com/hc/en-us/articles/211162263-Can-my-transaction-be-canceled-or-reversed(accessed 10/08/2021).

The third preventative measure authorities use to deprive criminals from benefiting from the proceeds of their criminal activity is to Realise the said property. Which can be better understood as a process whereby any property which has been identified as having been unlawfully obtained will then be realised, in other words sold. The proceeds derived from realising this property will be used to compensate anybody who may have suffered damages or who have sustained any injuries as a result of the property or offence relating to the criminal activity.[167] The purpose of the realisation order is to prevent criminals from benefiting from any criminal activity and to provide some sort of reconciliation for those who have been affected by the said criminal activity. This needs to be looked at in line with the objectives of the proper functioning of the Criminal Justice System, which can be understood as ensuring that justice is delivered where a wrong has been committed and to ensure public order, while also ensuring the innocent is protected.

Attempting to uphold the Criminal Justice System seems impossible to achieve when criminals are converting their illegally gained proceeds to VC. In reality it would not be possible to realise any property which has been acquired as a result of criminal activity and has subsequently been converted to VC, which prevents VC from being used to reconcile any harm caused by the related criminal activity.[168] Although the state would be able to realise other property owned by the perpetrator in an attempt to reconcile victims it would be difficult to realise proceeds which has already been converted to VC, as can be seen in the case of the Cajee brothers.[169] It is believed that in the case of the Cajee brothers the state is still struggling to compensate investors or even locate their funds. [170]

The fourth preventative measure governments make use of to deprive criminals from benefiting from the proceeds of their crimes is by making use of Preservation Orders.[171] Which is an order which aims to maintain the condition or status of something, making it illegal for

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[167] S30 of Act 121 of 1998.

[168] S38 of Act 121 of 1998.

[169] Ciaran Ryan *R77M rescue plan for Africrypt could see Cajee brothers avoid criminal prosecution* available at-https://www.moneyweb.co.za/moneyweb-crypto/r77m-rescue-plan-for-africrypt-could-see-cajee-brothers-avoid-criminal-prosecution/(accessed 15/11/2021).

[170] Phillip De Wet *Africrypt: They owe us money, say family of SA kids accused of gigantic bitcoin heist* available at-https://www.businessinsider.co.za/behind-the-africrypt-bitcoin-exit-scam-allegedly-run-by-south-african-brothers-ameer-cajee-and-raees-cajee-2021-6 (accessed 09/08/2021).

[171] Albert Kruger *Organised Crime and Proceeds of Crime Law in South Africa* (2008) 99.

anyone to alter or destroy that property. The State would apply for a Preservation Order when the state wishes to protect or preserve any property pending the finalisation of the case before the court, meaning the preservation order is the first step to the state ultimately obtaining a forfeiture order against the said property.[172] An example hereof can be found in the case of the *National Director of Public Prosecution v Braun,*[173] in which the state applied for a preservation order and ultimately a forfeiture order against property owned by the Respondents as it believed the Respondent had engaged in unlawful sexual acts with children under the age of 16 on the property.[174]

It is clear that of all of the preventative measures discussed this far, this seems to be the most effective for the handling of illicit gained VCs, which when enforced would prevent an individual from spending or transferring their VCs, which the state has identified as having illicit origins. In reality enforcing a Preservation Order against the holder of VCs is a bit difficult and the problem lies with the state gaining physical control of these funds. One way the state could go about gaining control of illicit VCs would be to create their own wallet and to have the VC transferred thereto, pending the investigation into the origins of those funds.

The fifth preventative measure which governments make use of to deprive criminals from the proceeds of their crimes is a Forfeiture Order. Which applies when it is established that the defendant had unlawfully accrued any property. In terms of the Forfeiture Order would require of the perpetrator to surrender all property which he had accrued unlawfully to the state.[175] The operation of the Forfeiture Order is governed by S 48 of POCA, which provides that a Forfeiture Order will be enforced by seizing, in other words giving the state control of the said property.[176]

The way in which the State handles proceeds which they have identified as having an unlawful origin is by placing these funds into a Criminal Asset Recovery Account (CARA).[177]

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172 S43 of Act 121 of 1998.

173 *NDPP V Braun and Another* 2007 (1) SACR 326 (C).

174 *NDPP V Braun and Another* 2007 (1) SACR 326 (C).

175 S48 of Act 121 of 1998.

176 S48 of Act 121 of 1998.

177 S63 of Act 121 of 1998.

This account contains funds which have been obtained after executing a Confiscation or Forfeiture Order, which includes the balances of all money derived from the execution of foreign execution orders which is provided for in the International Co-Operation in Criminal Matters Act.[178]

The first issue with transferring VC into the CARA is that the term money as discussed before is not inclusive of VC. In turn meaning is that when a CARA is opened, a criminal who has opted to convert his illicit proceeds to VC, that this cant be confiscated and form part of the CARA. To address this issue the state is required to amend the existing legislation to be inclusive of all VC and should stipulate exactly how the government plans on gaining control thereof. It would be advisable for the state to open up their own state-owned VC wallet which they can transfer all VCs into, which they suspect to have an unlawful origin. Another solution would be to convert these VCs which is suspected to have an unlawful origin to a fiat currency making it compatible with the CARA and other orders set out in POCA.

[178] S64 of Act 121 of 1998.

CHAPTER 4 VC REGULATORY MODELS

I. INTRODUCTION

It has been established that VC are not regulated in South Africa and that there exists a needs to have VC regulated, a problem with which a number of jurisdictions are faced with. VC is not regulated and there exists a specific need to regulate VC due to the money laundering risk which VC pose to the financial sector. Therefore by identifying how other countries have gone about dealing with VC could benefit the South African financial system.

The jurisdictions identified for this comparative study will include the **United States of America (US)** and the **United Kingdom (UK),** and the focal point of this comparative study will be to identify how these jurisdictions have gone about dealing with the operation of VCs within their respective jurisdictions and financial systems, with the key focus on the measures each country has put in place to prevent the laundering of illicit gained funds. The reason for selecting these jurisdictions stem from these jurisdictions position within the international community and having been described as being innovative and fast moving. In addition here-to a brief discussion will be held on the views of the FATF on VC and the reason here-for stems from the FATF success over the years, despite it only being in operation and existing for 20 years. The success of the FATF is largely due to the FATF being able to create and find solutions to the global drug trade by recommending global standards for member states to implement in an attempt to combat money laundering, terrorist financing and other forms of commercial crime.

II. THE US REGULATORY RESPONSE TO VC.

The existence and operation of VC has attracted the attention of the Financial Crimes Enforcement Network (FINCEN) which acts as a regulatory body within the US. The FINCEN is of the view that reporting requirements, due diligence and record keeping measures should be put in place to regulate VC users. The FINCEN acts similar to the FIC in South Africa.[179] Despite these rules proposed by FINCEN there still exists no uniform approach adopted by

[179] Federal Register *requirements for certain transactions involving convertible virtual currency or digital assets* available at-https://www.federalregister.gov/documents/2020/12/23/2020-28437/requirements-for-certain-transactions-involving-convertible-virtual-currency-or-digital-assets (accessed 27/10/2021).

the US which ensures VCs are not being used to launder illicit gained funds, instead states have gone about dealing with VC in their own ways.

The state of New York has opted to jump the gun by bringing into existence a Bit-Licensing process which imposes licensing and regulatory requirements on VC and which will be monitored by the New York State Department of Financial Services.[180] Under these requirements companies who wish to apply for a Bit-license would have to pay an amount of $5000 (five-thousand dollars); hire independent auditors to look into their finances and lastly to hire cyber security processors to prevent users VC from being stolen. It will then become the responsibility of the company who have purchased the licence to conduct due diligence on company executives and investors.[181]

In the state of Massachusetts the District court in the case of *Commodity Futures Trading Commission v My Big Coin Inc* found that the VC which *My Big Coin Inc* had distributed, known as 'My Big Coin' constituted a commodity and that *My Big Coin Inc* had failed to comply with the Commodities Exchange Act.[182] The Commodity Futures Trading Commission (CFTC) put forward that *My Big Coin Inc* had been running a fraudulent VC scheme in that they enticed customers by making untrue and misleading statements.[183]

While still in the US, but completely different from the view of Massachusetts, the state of California, who in my view has been the most progressive when dealing with the regulation of VC has opted to adopt a similar approach to that of New York. In 2015 the Assembly Bill 1326 was proposed, which if it had been enacted would have brought into effect the Digital Currency Business Enrolment Program, requiring of VC distributors to apply for the issuing of a license from a commissioner.[184] This proposal was rejected by a number of users, especially the Electronic Frontier Foundation (EFF), who can be described as an advocate for

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[180] New York Department of Financial Services *Virtual Currency Business* available at-https://www.dfs.ny.gov/apps_and_licensing/virtual_currency_businesses (accessed 28/10/2021).

[181] Dilendorf Law Firm *Obtaining New York Bitlicense* available at-https://dilendorf.com/blockchain-crypto/obtaining-new-york-bitlicense.html(accessed 28/10/2021).

[182] *Commodity Futures Trading Commission v My Big Coin Pay Inc* (2018) United States District Court District Court of Massachusetts.

[183] *Commodity Futures Trading Commission v My Big Coin Pay Inc* (2018) United States District Court District Court of Massachusetts.

[184] California Legislative Information *AB-1326 Digital Currency* available at-https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1326 (09/01/2022).

digital innovation within the US.[185] The reasons for opposing the bill was that the EFF was of the view that the bill was premature, the EFF also considered the definition of VC business as set out in the bill as being vague and lastly that VC are being dealt with differently by each state which is confusing to users.[186] Despite the uproar against the regulation of VC within the state of California, the governor of California Gavin Newsom signed a bill into law which would in-turn afford the regulator with the tools and power to regulate VC.[187]

It is clear that the US is not anti-VC, and welcomes the idea of VC operating within its financial system. The US has however recognised that VC poses some danger towards the integrity of the US financial system and has as a result taken steps to bring the operation of VC within its regulatory perimeters, an approach which South Africa should also adopt.

III. THE UNITED KINGDOMS REGULATORY RESPONSE TO VC.

In the UK, VCs remain partially unregulated, however there has been an attempt by the UK Regulatory authority to try and get the regulatory environment around VCs under control. The UK has gone about launching a task-force in an attempt to maintain its status as a world leader in financial technology.[188] The task-force has admitted that VCs or crypto-assets fall outside, or are likely to fall outside the current regulatory environment and as a result would not be subject to the same consumer protection or safeguards, applicable to other financial services and payment systems in the UK.[189]

The UK has identified VCs as being a problem and has identified the operation thereof as posing a money laundering risk in particular, and has brought into existence a number of changes to deal with the money laundering risks which VC pose. The UK hopes to implement and bring into existence the fifth Anti-Money Laundering Directive which brings custodian

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185 Electronic Frontier Foundation *About EFF* available at-https://www.eff.org/about(accessed 10/01/2022).

186 Electronic Frontier Foundation *Stop AB1326-California's Bitcoin license* available at-https://www.eff.org/about (accessed 09/01/2022).

187 Nasdaq *California Governor Signs Law Bringing state "New Tools" to regulate crypto* available at-https://www.nasdaq.com/articles/california-governor-signs-law-bringing-state-new-tools-to-regulate-crypto-2020-09-29 (accessed 10/01/2022).

188 HM Treasury *UK Regulatory approach to Crypto assets and stable coins: consultation and call for evidence* available at-https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/950206/HM_Treasury_Cryptoasset_and_Stablecoin_consultation.pdf (accessed 19/08/2021).

189 HM Treasury op cite note 179.

wallet providers and crypto-assets exchange providers into the ambit of the current legislative framework with the aim of preventing the laundering of money or the financing of terrorism.[190] Despite the UK regulatory authorities identifying the risk posed by VC, there is still no specific legislation which deals with the operation of VC.

The Financial Conduct Authority (FCA), who acts as the UK regulatory authority has set out that most firms and individuals who offer, promote, or sell financial services or products in the UK would have to be registered and authorized by the FCA.[191] In a statement released in 2021, the FCA warned consumers of the risk of investing in digital currencies which has at times been described as advertising high returns. The FCA has also required of dealers in cryptocurrencies to register as a prerequisite to dealing in such currencies going forward.[192] The FCA has gone further to state that if consumers wish to invest in crypto-assets that they should be prepared to loose all their money and that if they still wish to invest in VC that they would not be afforded access to the Financial Ombudsman Service nor the Financial Services Compensation scheme.[193]

The FCA has made a lot of progress in requiring of crypto-asset firms to register with it by the 10th of January 2021 and this could assist it in tackling money laundering and terrorist financing. The rationale behind this would be to enable the FCA to keep a proper account into who owns VC within the UK and to further investigate how they went about obtaining this VC, and what they intent on doing with it. If firms fail to register with the FCA they could then be held liable.[194]

The UK has slowly started to regulate the VC market and it is easy to see that the UK has not fully accepted VC into their financial system but has opted to adopt a trial and error ap-

[190] HM Treasury op cite note 179.

[191] Financial Conduct Authority *Digital Currency Market* available at-https://www.fca.org.uk/news/warnings/digital-currency-market (accessed 19/08/2021).

[192] Financial Conduct Authority *FCA warns consumers of the risks of investments advertising high returns based on crypto-assets* available at-https://www.fca.org.uk/news/news-stories/fca-warns-consumers-risks-investments-advertising-high-returns-based-cryptoassets (accessed 19/08/2021).

[193] Financial Conduct Authority *FCA warns consumers of the risks of investments advertising high returns based on crypto-assets* available at-https://www.fca.org.uk/news/news-stories/fca-warns-consumers-risks-investments-advertising-high-returns-based-cryptoassets (accessed 20/03/2021).

[194] Financial Conduct Authority *Cryptoassets* available at-https://www.fca.org.uk/consumers/cryptoassets (accessed 19/08/2021).

proach when dealing with VC. The Chancellor of the Exchequer launched a Cryptocurrency Task Force which consists of the HM Treasury, The FCA and the Bank of England who have all come together to uphold the UK status as being the most innovative financial economy.

In addition hereto the European Union has introduced the Markets in Cryptoassets Directive (MiCA), which will bring the operation of VC like Bitcoin and Ether into a regulatory environment in an attempt to regulate the crypto wild west. The introduction of MiCA will aim to protect consumers by requiring of Crypto Asset Service Providers (CASP) to ensure that strict requirements are complied with to ensure that clients digital wallets are protected, and also introduces a degree of liability for CASP's in certain instances.[195] The MiCA will also introduce a licensing requirement and will also will require of actors within the crypto environment to declare their environment and climate footprint.[196]

IV. THE VIEWS OF THE FATF ON VC AND MONEY LAUNDERING

The Financial Action Task Force (FATF) is an intergovernmental body that helps develop and promote policies which aims to protect the global financial system from being used to launder money, finance terrorism, as well as the financing of weapons of mass destruction.[197] According to the FATF, VCs have many legitimate uses which, include being able to improve payment efficiency and reducing transaction costs for transfers, especially across borders.[198]

The FATF has identified Bitcoin as the VC that affords users with these benefits, simply because it prevents users from having to pay exchange fees therefore making lower transactional costs than traditional payment instruments. One of the key benefits which the FATF has identified with VC is its ability to facilitate international remittances as it affords those who don't have access to the financial system with new financial products and services which was previously not available to them, at a lower cost.[199] Affording users with these benefits has to

[195] European Council, Council of the European Union *Digital finance: agreement reached on European crypto assets regulation (MICA)* available at-https://www.consilium.europa.eu/en/press/press-releases/2022/06/30/digital-finance-agreement-reached-on-european-crypto-assets-regulation-mica/ (accessed 09/08/2022).

[196] European Council, Council of the European Union *Digital finance: agreement reached on European crypto assets regulation (MICA)* available at-https://www.consilium.europa.eu/en/press/press-releases/2022/06/30/digital-finance-agreement-reached-on-european-crypto-assets-regulation-mica/ (accessed 09/08/2022).

[197] The FATF *What we do available at-*https://www.fatf-gati.org/about/whatwedo/(accessed 04/11/2021).

[198] Financial Action Task Force *Virtual Currencies, Key definitions and Potential AML/CFT Risks* (2014) 8-9.

[199] Financial Action Task Force *Virtual Currencies, Key definitions and Potential AML/CFT Risks* (2014) 8-9.

comply with key pieces of legislation to ensure that users utilise these services and products for the right purpose and in this regard service providers need to put measures in place to ensure that mitigates these risks.

In order to make a fair judgement of something it is important that both the benefits and the potential risks associated therewith is considered. In this case the existence and operation of VC is being analysed and although the benefits thereof have been identified the potential risks associated therewith were set out by the FATF. Only once this has been done can regulation be brought into effect which addresses VC in its entirety and the way it operates.

The FATF has identified VC as posing risks as they are susceptible to money laundering and terrorist financing.[200] The FATF has gone further to state that the space of Virtual Assets can be described as being the wild west of the finance industry.[201] Despite this, cryptocurrencies have been described as not posing a risk to financial stability but should nevertheless still be monitored closely.[202]

The first money laundering risk identified by the FATF with VCs stems from the increased anonymity that VC users are afforded as opposed to other conventional transactional methods. The increased degree of anonymity associated with VCs stem from VCs being traded on the internet and transactions being concluded on non-face-to-face customer relationships.[203] Furthermore VCs also afford their users with the ability to transact anonymously and the environment within which this trading takes place has inadequate measures in place to identify transacting parties. These risk was identified by the FATF as being a problem as this fails to comply with the FATF Recommendations, especially those recommendations which require of institutions to understand who they are dealing with as VCs don’t go about identifying or verifying it’s users by requiring them to upload historical transactional records.[204]

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[200] FATF *Virtual Currencies, Key definitions and Potential AML/CFT Risks* (2014) 9-10.

[201] FATF *Virtual Assets* available at-https://www.fatf-gafi.org/publications/virtualassets/documents/virtual-assets.html?hf=10&b=0&s=desc(fatf_releasedate) (accessed 28/08/2021).

[202] FATF *Virtual Assets* available at-https://www.fatf-gafi.org/publications/virtualassets/documents/virtual-assets.html?hf=10&b=0&s=desc(fatf_releasedate) (accessed 28/08/2021).

[203] FATF *Virtual Currencies, Key definitions and Potential AML/CFT Risks* (2014) 10.

[204] FATF *Virtual Currencies, Key definitions and Potential AML/CFT Risks* (2014) 10.

The second risk associated with VCs stems from its cross-border capabilities, as VCs are easily accessible through the internet and can be used to facilitate cross border transactions and fund transfers.[205] This feature needs to be considered with the rapid pace at which decentralised VCs seem to be evolving, and the role which miners play in facilitating transactions.[206] The FATF has stated that all the components of a decentralised VC needs to be evaluated as it allows transactions to be concluded involving funds from jurisdictions who have inadequate anti-money laundering and terror financing controls in place.[207]

The FATF in its report to the G20 Finance Ministers and Central Bank Governors discussed a number of issues, one of the key issues being discussed is the way forward onVC. In this discussion it was advised that member states must ensure that they exercise a sufficient level oversight on VC and cryptocurrencies activities taking place within their respective jurisdictions.[208] Which means that member states are afforded the discretion to decide themselves how to deal herewith, but what remains is that member states are to ensure that they exercise oversight of the VCs within their jurisdictions, to ensure that their financial system does not fall victim to users who have unlawful intentions, how they go about doing this is up to member states to decide.

The FATF in its publication in October 2018, made the point that 'virtual assets and related financial services have the potential to spur financial innovation and efficiency that, in turn, can have the effect of increasing financial inclusion, but at the same time opens the door for criminal activities'.[209] The FATF in its attempt to better equip jurisdictions to deal with VC has broadened its glossary of VC to include virtual assets and virtual assets services providers, which can be used as guidelines by member states in enforcing anti-money laundering and terror financing protocols against VC that covers customer due diligence, record keeping obligations and the reporting of suspicions activities.[210]

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205 FATF *Virtual Currencies, Key definitions and Potential AML/CFT Risks* (2014) 10.

206 FATF *Virtual Currencies, Key definitions and Potential AML/CFT Risks* (2014) 10.

207 FATF *Virtual Currencies, Key definitions and Potential AML/CFT Risks* (2014) 10.

208 FATF *FATF Report to the G20 Finance Ministers and Central Bank Governors* (2018) 2.

209 FATF *Regulation of Virtual Currencies* available at-http://www.fatf-gafi.org//publications/fatfrecommendations/documents/regulation-virtual-assets.html (accessed 29/08/2021).

210 FATF *Regulation of Virtual Currencies* available at-http://www.fatf-gafi.org//publications/fatfrecommendations/documents/regulation-virtual-assets.html (accessed 29/08/2021).

In 2019, the FATF published guidelines on how virtual assets and virtual assets service providers should be regulated.[211] In attempting to put this report into perspective it must be noted that the FATF has taken quite a big step forward as the FATF believes that VC are here to stay and is said to become an integral part of the financial system. The practical effect of this guideline is in effect to regulate Virtual Assets (VA) and Virtual Assets Service Providers (VASP) by requiring member states to impose registration and licensing requirements and enforcing recommendations 10-21 on them.[212]

V. CONCLUSION

It is clear, as seen with the US and the UK that there is no uniform approach to dealing with VC. The options that are available include the outright ban of VCs which a number of jurisdictions have opted to do, some of which without looking into the benefits thereof and ways to circumvent the risks which they pose. A complete ban of VC would not benefit a developing economy like South Africa which could benefit from using VCs, but must also ensure that they approach them with caution.

At the opposite end of the spectrum there exists the option of allowing VC the operation as has been done in the USA and the UK has done, but to putting measures in place to prevent VC from being used to launder illicitly gained funds. It is clear that from the measures put in place by the US and the UK and the recommendations put forward by the FATF that it would be best to have a centralised authority dealing in VCs who would in turn be identified as being an AI on whom all reporting obligations fall onto.

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[211] FATF *Guidance for a Risk-Based Approach: Virtual Assets and Virtual Asset Service Providers* (2019) available at-https://www.fatf-gafi.org/media/fatf/documents/recommendations/RBA-VA-VASPs.pdf (accessed 29/08/2021).

[212] FATF *Guidance for a Risk-Based Approach: Virtual Assets and Virtual Asset Service Providers* (2019) available at-https://www.fatf-gafi.org/media/fatf/documents/recommendations/RBA-VA-VASPs.pdf (accessed 28/08/2021).

CHAPTER 5 THE SOUTH AFRICAN REGULATORY RESPONSE AND RECOMMENDATIONS GOING FORWARD

I. INTRODUCTION

This chapter will consider the South African Government's regulatory response, to date on VCs with a particular focus on them being used to launder money and while doing so will set out recommendations, based on the approaches to the problem being followed at international level and with-in the comparative jurisdictions identified previously, as to what the best way to go about dealing with VC.

The operation and the existence of VC seem to be operating in the realm of uncertainty with no regulatory stance being taken thereon, a problem with which a number of jurisdictions are currently faced with.[213] These advances made in the field of technology that have undoubtedly influenced the financial sector needs to be accounted for before these countries financial systems becomes susceptible to misuse and abuse.[214] As a result it becomes extremely important to determine how well the South African regulatory authorities have done in keeping the operation of VCs at bay. In addition hereto recommendations will be made, which the regulatory authorities should consider in order to protect the SA financial system from being abused.

II. THE SOUTH AFRICAN GOVERNMENT'S REGULATORY RESPONSE

The South African Government has not yet produced a regulatory response to this problem, despite VC posing a money laundering risk to the South African financial system. The South African position on VC is unique, as there has been no regulatory stance taken on the legality on the operation of VC in South Africa, however the SARB, the Financial Services Board (FSB), SARS and the FIC have all come together and issued a warning to all South Africans to be aware of the risks associated with VC.[215] The position paper titled Position Paper on VC (SARB Position paper) sets out clearly that users of VC are more likely to become victims of

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[213] World Economic Forum *Whats next for Bitcoin and crypto? The trends to watch in 2022* available at-https://www.weforum.org/agenda/2022/01/cryptocurrencies-2022-bitcoin-predictions/ (accessed 11/01/2022).

[214] World Economic Forum *Whats next for Bitcoin and crypto? The trends to watch in 2022* available at-https://www.weforum.org/agenda/2022/01/cryptocurrencies-2022-bitcoin-predictions/ (accessed 11/01/2022).

[215] The South African Reserve Bank *Position paper on Virtual Currencies* available at-https://www.golegal.co.za/wp-content/uploads/2018/01/Virtual-Currencies-Position-Paper-Final_02of2014.pdf (accessed 23/08/2021).

fraud and criminal behaviour. Despite this warning the operation of VC has not been banned in South Africa and has remained unregulated. According to the South African regulators, regulating VCs is problematic due to VCs being concluded end to end by the users themselves and not requiring the help of a third party intermiary.[216]

It is therefore clear that no regulatory framework has been implemented with VCs and this stems from the fact that the SARB does not think that VC can really pose a significant risk to the South African financial system, price stability or the national payment system due to its market cap.[217] The SARB has however in 2019 developed a keen interest in VC with the previous Minister of Finance mentioning that a new working group would be brought into existence to provide some meaningful insight about the world of VC and provide a regulatory response thereto, which will include providing recommendations on how to combat the money laundering risk, which VC pose.[218]

III. IFWG AND ITS RECOMMENDATIONS ON THE WAY FORWARD

In 2019, a VC working group was formed and was ultimately named the Intergovernmental FinTech Working Group (IFWG).[219] The IFWG was formed by bringing together the National Treasury (NT), The SARB, The Financial Sector Conduct Authority (FSCA), SARS and the FIC. The IFWG has since produced a consultation paper which sets out that South Africa has two options when dealing with VCs, which are either to apply the existing legal framework to VCs, which would likely ban over 80% of the current VCs in existence, or, alternatively to develop a completely new legal framework to regulate specifically VCs in South Africa.[220]

In the consultation paper, the IFWG admitted that the existing legal framework is not stringent enough to deal with VC and it has suggested that specific legislation be brought into ex-

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[216] Ibid.

[217] Ibid.

[218] Admire Moyo *Move to regulate crypto-currency gains pace in SA* available at-https://www.itweb.co.za/content/4r1lyMRb6GmMpmda (accessed 23/08/2021).

[219] Intergovernmental FinTech Working Group ‘Consultation paper on policy proposals for crypto-assets’ (2019) 20.

[220] Intergovernmental FinTech Working Group ‘Consultation paper on policy proposals for crypto-assets’ (2019) 20.

istence that will take into account the recent amendments made to the FATF Recommendations.[221] The IFWG has suggested that a rating system be implemented, which was initially formulated by Lanksy which rates VC on a scale from zero to five and in light hereof suggests measures to be implemented for every level.[222] The way in which this rating system would work is that a zero rating would mean that the VC should be allowed to operate freely within the South African financial system and on the opposite end of the spectrum a rating of five would mean a full or partial ban be imposed on these VCs.[223] The IFWG has however amended this rating system formulated by Lansky and suggested amending it further to include another category between three and four, which should be labelled as VCs which should be subject to limited regulation, allowing for specific requirements to be imposed on providers of certain crypto asset providers without having these requirements applied generically.[224]

This approach suggested by the Working Group would mean that FICA would be amended to account for the recognition of Crypto Asset Service Providers as a Accountable Institutions (AI), who would be obliged to comply with AML requirements set out in FICA.[225] Which means that no new legislation will be brought into effect but rather that the existing regulatory framework will be amended to account for the operation of VC. In turn what this would mean is the creation of a centralized authority who would be accountable for ensuring that the provisions of FICA is complied with.

In June of 2020, the then Minister of Finance, Tito Mboweni made a speech in which he highlighted a number of issues but to take from his speech that which is appropriate to the issue at hand, indicated that there would be legislative amendments to the FICA in order to align the South African legislative framework with that of the current international standards

[221] Ibid at 22.

[222] Ibid at 22.

[223] Ibid at 22.

[224] Ibid at 22.

[225] Ibid at 33.

of FATF as well as recent legislative amendments.[226] These amendments are said to effect both financial and non-financial businesses and includes Crypto Asset Service Providers.

In addition, the FSCA has published a number of press releases on VC that clearly sets out that VC are not regulated by the FSCA and that investors run the risk of loosing their money.[227] In 2021, the FCSA published a further press release, which sets out that it had received a number of complaints from a number of crypto-asset investors who advised that they had lost their savings through investing in crypto related investments and in response thereto the FCSA has set out the position that Crypto related investments are not regulated by the FSCA or any other body in SA and as result users are afforded little to no protection.[228]

In an attempt to bring the VC space into the regulatory parameters there have been discussions held by a number of renowned individuals. The most recent being the deputy governor of the SARB, who in July of 2022 had set out that VC is not a currency but that it is rather a Financial Asset and with that being said it has become the investors interest which has become a priority.[229] It as a result hereof that VC being listed as Financial Asset that it is now brought within the ambit of the FICA. In addition with bringing the operation of VC into the ambit of FICA, the SARB has also identified the need for Crypto Assets who despite requiring to be registered by the end of 2023 will also require a specific regulatory framework governing their operation.

It as a result of the stance taken by the SARB that the FSCA has issued a general notice. In terms of this notice Crypto Assets are declared a financial product. This came into effect on

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226 Staff Writer *South Africa takes steps to regulate Bitcoin and other cryptocurrencies* available at-https://businesstech.co.za/news/banking/416033/south-africa-takes-steps-to-regulate-bitcoin-and-other-cryptocurrencies/ (accessed 26/08/2021).

227 FSCA *Crypto Health Warning* available at-https://www.fsca.co.za/News%20Documents/FSCA%20Press%20Release%20%20Crypto%20health%20warning%2004%20February%202021.pdf (accessed 11/01/2022).

228 Financial Service Conduct Authority *Crypto Health Warning* available at-https://www.fscamymoney.co.za/Press%20ReleasesFSCA%20Press%20Release%20%20Crypto%20health%20warning%2004%20February%202021.pdf#search=cryptoassets (accessed 26/08/2021).

229 BusinessTech *New laws coming for cryptocurrency in South Africa* available at- https://businesstech.co.za/news/banking/605900/new-laws-coming-for-cryptocurrency-in-south-africa/ (accessed 09/11/2022).

the 19th of October 2022, this came after the FSCA realised that the operation of many Crypto-Assets operating similar to that of traditional financial products.[230]

There has been an attempt by the South African Legislature to deal with VC and have the operation thereof brought within the current regulatory environment and it seems the like the operation of VC is here to stay, and if that is the case to put into place measures that ensures a safe and efficient financial system. Which provides more reason for measures to be put in place to prevent VC from being used to launder money as well as to ensure investors are afforded a certain degree of protection.

IV. RECOMMENDATIONS ON VC TO PREVENT THEIR USE FOR MONEY LAUNDERING

It cannot be denied that a stance needs to be taken on VC and an urgent one. The need for urgent regulatory intervention stems from there being a need for clarity on VCs that, it seems, only the Legislature can provide. VCs are operating with-in the realm of uncertainty, as there still remains no regulatory stance on how to prevent the use thereof for money laundering purposes. There also exists the need for users to be afforded some degree of protection as can be seen by the events which have already unfolded, during which investors were afforded little to no protection.[231]

The pending legislative changes by the Legislature to recognise Crypto Asset Service Providers (CASP) as AI as listed under schedule 1 of FICA would undoubtedly eliminate a large number of money laundering risks which VC pose. If when implemented would mean that VCs which are recognised with the CASP would have to comply with the provisions of FICA, which would mean that VC would now be brought within the reach of the regulatory authorities. The CASP's will now act as a centralized body that would be responsible for regulating the use of VC amongst users. If this is brought into effect, compliance with FICA would not be a problem as the CASP would have to mitigate the money laundering risk

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[230] Declaration of Crypto Asset as a Financial Product under the Financial Advisory and Intermiary Services Act in GG 47339 GG 1350 of 19 October 2022.

[231] Gialietta Talevi *Durban brothers vanish amid R51bn cryptocurrency scam* available at-https://www.timeslive.co.za/news/south-africa/2021-06-24-durban-brothers-vanish-amid-r51bn-cryptocurrency-scam/(accessed 02/11/2021).

which VC pose by 'getting to know their clients', monitoring transactions, and most importantly investigating the movement of VCs into and out of the country.

It may seem as if all risks which VC pose can be eliminated through the recognition of CASP's as an AI, however this is not the case. The first problem would be the VC that have already been integrated into the South African financial system and has already bypassed the legislation which is yet to come into operation, which aims to combat money laundering. A solution to this risk would be for the SARB to create a central database whereby VCs users and wallet holders would have to declare how much VC they have in their possession and to also declare how they went about acquiring this. This will enable the regulators to keep an accurate record of VC holders, provided that users are willingly disclosing how much VCs they own and to determine how they went about obtaining them. This will also enable the regulator to investigate those individuals who are not disclosing how much VCs they own and the reason for this.

It would be in the interest of the South African financial system for it to be made compulsory for those who wish to purchase VC to do so through accredited CASP's. As this would enable the regulator to keep an accurate account of VC users and to also hold the CASP accountable for any illicit activities. Which would immediately remove the anonymous nature with which VC users are allowed to operate, which is one of the main concerns identified with VC.

The use of VC also gives rise to jurisdictional issues because it is not confined to any specific jurisdiction making it difficult to monitor and control. By requesting of users to declare their VC and making it compulsory for VC users to purchase VC from a CASP, the regulator could keep an accurate account of VC holders within the South African borders and financial system, which is one of the biggest concerns with VCs. It is only once an accurate account of VC holders is maintained that the provisions of FICA can be given effect to and systems put in place to prevent money laundering.

The current regulatory framework that aims to combat money laundering like FICA and POCA, is ineffective in relation to VCs because VC are not confined to any jurisdiction and as a result they can easily be used to send funds across borders without any detection. It is therefore of the utmost important that measures are put in place that can confidently monitor the movement of VCs into and out of South Africa and that can positively identify the source of the funds which were used to purchase VC. It is also importance for measures to be put in place that only allows SA VCs holders to receive VC from equivalent jurisdictions. This is problematic as non-equivalent jurisdictions have been identified by the international community as having inadequate money laundering controls in place and as a result poses a risk to the integrity of the financial system globally. These countries include the Democratic Republic of Korea as well as Iran.

CHAPTER 6 CONCLUSION

The VC market is ever expanding with a market cap sitting at well over a trillion dollars. This market cap needs to be looked at in light of the fact that VC only became popular in the last 10 years. Therefore the growth rate needs to be taken into consideration along with the potential growth VC is most likely to experience, which becomes something worth prioritising. In addition it cannot be denied that times have changed and has undoubtedly become more digital and reliant on technology. This can be seen with the existence of electric cars and what has been described as the Fin-Tech revolution. Therefore the likelihood of VC becoming something worth noting and regulating seems ever more likely.

The common issue encountered with VC as an investment as well as a payment system is that VC poses significant tax evasion and money laundering risks, while affording holders thereof with little to no protection. The focus of this dissertation was to prove that VC pose a significant ML risk and while doing this it was established that the current regulatory framework aimed at combating ML in South Africa would not be effective towards regulating VC, despite it being suggested that CASP's be brought into existence to be held accountable for the VC market. It cannot be denied that despite this VCs would still pose a significant problem especially for enforcement purposes in the event funds were to be recovered or even a transaction cancelled.

As a result, the best solution would be for regulation be brought into effect which goes about regulating VC specifically, as opposed to bringing VC into the current regulatory framework. This regulatory framework should deal with VC as a payment system as well as an investment and should provide guidelines on tax as well as consumer protection and should also have measures in place over and above the current regulatory framework which combats money laundering. It is also important before these measures are put in place that all users are verified and that regulators have an accurate account of VC within the South African borders and financial system.

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