

Cryptocurrency and Asset Recovery in South Africa

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It is well established that the use of cryptocurrency poses significant legal and regulatory challenges with regards to asset recovery. South Africa is no exception, as is evidenced by the recent scams involving Mirror Trading International and Africrypt.

Cryptocurrencies are by nature designed to preclude regulatory control. Ownership is anonymous, transactions are irreversible, and cryptocurrency can easily be transferred abroad- all that is required is access to the internet. Jurisdictions around the world, including South Africa, have recognized the inherent difficulty in asset recovery involving cryptocurrency.

In South Africa, there is no regulatory body which regulates cryptocurrency. In a press release dated 4 February 2021, the Financial Sector Conduct Authority (“FSCA”) aptly surmised what this means for consumers by stating that, “...if something goes wrong, you’re unlikely to get your money back and will have no recourse against anyone.”

Various measures have been proposed to regulate cryptocurrency. In November 2020, the FSCA released a Draft Regulation wherein it was proposed that cryptocurrency should be treated as if it were a financial product which falls within the purview of the Financial Advisory and Intermediary Services Act 37 of 2002 (“FAIS Act”). In June 2021, the Intergovernmental Fintech Working Group (“IFWG”), a joint initiative of the National Treasury, the FSCA, the South African Reserve Bank (“SARB”), the South African Revenue Service (“SARS”) and the Financial Intelligence Centre (“FIC”) published a position paper wherein various recommendations aimed at the phased-in regulation of cryptocurrency in South Africa were proposed. Given that the position paper is supported by the members of



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the IFWG, most notably by National Treasury the recommendations by the IFWG will likely influence future regulation of cryptocurrency.

In relation to cryptocurrency and asset recovery, the following relevant recommendations ought to be taken into account:

- Crypto asset service providers should be included in the definition of an “accountable institution” under the Financial Intelligence Centre Act 38 of 2001 (“**FIC Act**”). This means that obligations in the FIC Act which are designed to prevent and detect, *inter alia*, money laundering, such as customer verification and detection, due diligence, the reporting of suspicious and usual transactions, will be mandatorily required. This will not only aid in early detection and prevention of money laundering, but will provide a means by which consumers are more easily identified, aiding in tracing efforts. This is also consistent with international reforms. On 20 July 2021, the European Commission proposed that the EU’s anti-money laundering and counter terrorism rules should be applicable to the crypto sector which will serve to prevent and detect, *inter alia*, money laundering and enable the traceability of cryptocurrency related transfers. In addition, Singapore legislated the Payment Services Act 2 of 2019, which enforces fraud prevention requirements on licensed cryptocurrency exchanges.
- Advocacy in relation to digital financial literacy should be increased, through singular and collaborative efforts between national and international stakeholders. Increased awareness and education will likely increase early notification to law enforcement, which is vital to successful asset recovery. Moreover, learning from international best practices will allow South Africa to ensure that it is continually monitoring and developing successful asset recovery methods. Such an approach is endorsed by Acting U.S. Attorney for the Northern District of California, Stephanie Hinds, who stated the following in relation to the Department of Justice’s successful seizure of cryptocurrency which was paid as a ransom

payment to a group known as DarkSide, “*We will also continue developing advanced methods to improve our ability to track and recover digital ransom payments.*”

- Crypto assets should be included as a “financial product” under the FSCA.
- Measures aimed at the supervision and regulation of the cross-border flows of crypto assets should be introduced. This will greatly assist in tracing cryptocurrencies which are transferred abroad. Currently the SARB has no oversight over cross-border flows of cryptocurrency.

While the proposed legislative changes aimed at phasing in the regulation of cryptocurrency in South Africa is undoubtedly a step in the right direction, it remains to be seen whether it goes far enough to cater for the recovery of cryptocurrency in appropriate circumstances.

South Africa law enforcement activities have in recent years been curtailed by capacity constraints and skill shortages. We submit that critical to legislative efforts is inclusion of greater collaboration between public and private enforcement initiatives in order to build capacity and share critical data aimed at tracing, freezing and repatriating funds. This will increase the efficacy in the recovery of cryptocurrency through the gathering evidence and early reporting, which is vital to successfully recovering cryptocurrency.

On the positive side, South Africa has some of the most progressive legislative tools available to deal with asset recovery and combating corruption. These include, *inter alia*:

- The Prevention of Organised Crime Act 121 of 1998 (“**POCA**”) which caters for both civil and criminal forfeiture of property;
- The recent decision handed down by the Supreme Court of Appeal in the case of *Bobroff and Another v The National Director of Public Prosecutions* which confirms that our Courts have jurisdiction over property situated abroad which constitutes proceeds of unlawful activities;
- The Prevention and Combating of Corrupt Activities Act 12 of 2004 which expressly affords

our Courts extraterritorial jurisdiction in respect of corruption and related offences; and

- The FIC Act, which contains provisions aimed at the prevention and early detection of money laundering.

Accordingly, since it is arguable that both public and private enforcement initiatives are equipped with the tools to recover cryptocurrency, South African authorities should ensure that legislative efforts geared towards strengthening our ability to effectively trace cryptocurrency are developed.

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