

Deciphering crypto Part 5—the overseas story

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Corporate Crime analysis: In the final part of their series on cryptocurrencies, Will Glover and Angharad Hughes of 3 Temple Gardens consider some of the recent highlights in respect of crypto regulation in foreign jurisdictions.

Europe

Part 3 in the series examined the Fifth Money Laundering Directive (5MLD) and how it has been given effect by amendments to the Money Laundering Regulations (see News Analysis: Deciphering crypto part 3—taking aim at cryptoassets—the Fifth Money Laundering Directive of the EU and the UK AML Regulations 2019). Given the recent deadline of 10 September 2020 for implementation, other EU Member States have also given effect to the 5MLD through domestic regulation.

Germany is perhaps the most noteworthy. Its regulator BaFin announced in January 2020 that crypto operators operating anywhere in Germany, but based anywhere, would require a licence. Those wanting to acquire a licence were to notify BaFin by the end of March 2020 and need to apply by the end of November 2020.

Also of interest, French authorities decided to permit initial coin offerings (ICOs) to apply for a visa to obtain a bank account in order to solicit investment for ICOs in France. This triggers a requirement for the entity to set out its anti-money laundering (AML) compliance details and without such a visa, crypto operators will struggle to operate with a conventional bank account in France.

In Sweden the Riksbank is working on issuing an 'e-krona' which is an electronic alternative to cash. In the current coronavirus (COVID-19) climate, who knows, this may become a trend which other countries follow.

As can be seen, there are a variety of different developments and implementation models across EU nations. This demonstrates the regulatory minefield that has resulted from the creation of the 5MLD for new players to the market. While Europe is by no means the world leader, these developments demonstrate that its regulators are becoming increasingly more comfortable with the idea of new forms of digital currency.

US

Under the Bank Secrecy Act (BSA), the Financial Crimes Enforcement Network (FinCEN) regulates money service businesses (MSB). FinCEN issued guidance in 2013 that stated:

'An administrator or exchanger that (1) accepts and transmits a convertible virtual currency or (2) buys or sells convertible currency for any reason is a money transmitter under FinCEN's regulations [...].'

This therefore made virtual currency issuers/redeemers applicable to the AML regulations of FinCEN.

An MSB must conduct comprehensive risk assessments including implementing an AML program. Further guidance was issued in May 2019 in relation to their regulations involving 'Convertible Virtual Currencies' that are subjected to the BSA. The details of any such program are beyond the scope of this article but include appointing a compliance officer, ensuring there are written policies and controls in place and determination of both the identity and profile of their customers.

Another significant development in the US relates to its plans for the Cryptocurrency Act 2020 which was presented to the House of Representatives in March 2020. The bill purports:

'to clarify which Federal agencies regulate digital assets, to require those agencies to notify the public of any Federal licences, certifications, or registrations required to create or trade in such assets and for other purposes.'

The legislation is not yet in force but does signal the clear intention to regulate further the crypto landscape in the US.

A further example of the US's proactive approach to the regulation of crypto entities can be found in recent guidance issued by the Comptroller of the Currency (a branch of the Treasury that supervises national banks). It confirms the way in which US banks ought to interact with cryptoassets. It concluded that a national bank in the US may provide cryptocurrency custody services on behalf of customers, including by holding the unique cryptographic keys associated with cryptocurrency. It also re-affirmed that national banks can provide banking services to cryptocurrency businesses provided they effectively manage the risks and comply with the law. This is a huge step in bringing crypto into the mainstream. The authors believe this will bring more 'mainstream' investors into the crypto arena as it, in effect, welcomes or encourages the participation of more traditional banks in the market. The involvement of these institutions ought to lead to greater consumer confidence in the sector.

Asia

China accounts for 70% of bitcoin computer power globally making it a world leader in bitcoin mining. In January 2018 China's Leading Group of Internet Financial Risks Remediation purportedly requested local governments within China to remove preferential policies for any bitcoin mining companies (eg tax, land, etc). Now, localities must submit regular reports on bitcoin mining. ICOs have been completely banned in China since September 2017 when seven of the Chinese Central Government regulators issued the Announcement on Preventing Financial Risks from Initial Coin Offerings.

Singapore is a global hub for ICOs. In 2019, the Parliament of Singapore passed the Payment Services Act 2019 (the Act). The purpose of the Act was to safeguard against money laundering, terrorist financing and to further strengthen investor protection. The Act itself provides a regulatory licencing and operating framework for cryptocurrency agencies.

In Hong Kong, the Securities and Futures Commission in 2018 brought crypto currency fund managers and distributors under its regulatory remit.

India has had an interesting history when it comes to cryptocurrency. While the Government of India repeatedly stated that cryptocurrency was not banned in 2018, the Reserve Bank of India (RBI) issued a circular which banned regulated financial institutions from providing services to crypto businesses. This had the effect of many banks closing the accounts of crypto exchanges forcing many of them to shut down entirely. However, in March 2020, the Supreme Court of India ruled that the circular issued by RBI was unconstitutional. It is yet to be seen how this will cause the regulation of the currencies to develop in the country particularly as the Banning of Cryptocurrency and Regulating of Official Digital Currency Bill 2019 is currently lurking in the wings. This bill seeks to ban private cryptocurrencies and criminalise their use. The bill however has not yet been laid before Parliament for a vote and is therefore subject to revision.

Conclusion

As we have found throughout this series, there is a clear risk in jurisdictions which have been slow to acknowledge the rise of crypto currencies that they will become safe havens for crypto purchased with ill-gotten gains. Cryptocurrencies, perversely, are not cryptic. They are, in their purest form, assets with value. They can be, and of course are, bought and sold. Their ownership, although sometimes difficult, can be proven. They are capable of being regulated. But they ought to be regulated in a manner that does not stifle the very innovation that led to their creation; that is now the real challenge for international policy makers, domestic regimes and the global AML industry.

Will Glover is a barrister at 3 Temple Gardens. He is ranked as a leading individual for fraud (crime) in the Legal 500 2021. He has been instructed on matters relating to serious fraud, corruption and corporate offending. His recent instructions include defence work at the pre-charge stage of a Serious Fraud Office investigation, as well as trials involving the alleged mis-selling of alternative investment products and a high value counterfeit currency conspiracy.

Angharad Hughes is a barrister at 3 Temple Gardens. She came to the bar with experience in financial and complex crime, civil recovery and fraud obtained at a top-tier firm. She was recently instructed to assist a team bringing a

private prosecution on behalf of a corporate entity. She is also the founder of Griffin-LAW a pro-bono project advancing social mobility at the bar.



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