



REGULATION OF CRYPTOCURRENCY IN KEY JURISDICTIONS



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Introduction

Cryptocurrencies are a recent phenomenon that has opened up immense opportunities in all fields of society and life. Mostly viewed as currency or a medium of exchange they, however, have real-life applications for both industry and society as well as presenting investment opportunities to investors- both retail and institutional. To this extent the term 'cryptocurrency' is somewhat of a misnomer and the term 'cryptoasset' better reflects their multiple attributes. In our view, at Blockchain and CryptoAsset (K) Ltd., they represent a distinct asset class in addition to their use in providing real-life solutions and applications.

The reality, however, is that with this digital innovation has come increased scrutiny and concern from both legislators and regulators. Nearly all cryptocurrencies are subject to extreme price fluctuations as well as significant risks (security breaches, market manipulation, abuse by criminal elements, exchange closures) and some Initial Coin Offerings or ICOs associated with cryptocurrencies have been little more than scams. This has increasingly led to fears among governments, central banks and regulators, globally, about the threats to the integrity of the global financial system as well as dangers to the investing public.



Most countries are still struggling to understand this nascent and fast-changing technology and most are scrambling to come up with proper regulation to manage the risks and opportunities inherent in the space. However, regulation across the different jurisdictions is anything but homogenous, contributing to both uncertainty among potential investors (particularly institutional players) and, ultimately, illiquidity and a lack of market breadth.

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Legislators and regulators are now faced with the difficult task of straddling a fine line between ensuring the stability of the global financial system and protecting the interests of investors while avoiding stifling technological innovation.

Below we provide a summary of the varying regulation of cryptocurrencies from a number of key global jurisdictions.

REGULATION OF CRYPTOASSETS IN KEY JURISDICTIONS						
<i>*The information is true as at 1 January 2020</i>						
	JURISDICTION					
	US	EU	China	UK	Switzerland	Japan
General outline	There have generally been two approaches to regulation at the state level ¹ . The sale of cryptocurrency is	The EU sees the taxonomy of cryptoassets as follows: ‘payment’ tokens, ‘investment’ tokens and ‘utility’ tokens.	Financial institutions are prohibited from engaging in bitcoin-related activities and cryptocurrencies may not be used as money. ICOs ⁴	There is no blanket prohibition or ban on cryptocurrencies and there is no bespoke financial regulatory regime for	Cryptocurrency-related activities are not prohibited and there are currently no Swiss statutes or regulations that are tailor-made for	Under Japanese law, cryptocurrency is neither treated as ‘money’ nor equated to a fiat currency. No crypto-

¹ Some states (Wyoming, Colorado, Georgia and Arizona are examples) have tried to promote the technology by passing very favourable regulations exempting cryptocurrencies from state securities laws, money transmission statutes and other state regulatory requirements. Other states (New York, California and New Mexico are examples) have either issued warnings about investing in cryptocurrencies or passed laws generally considered restrictive.

⁴ It is illegal to conduct an ICO whereby an individual or small start-up entity accepts money from investors which goes towards establishing a cryptocurrency with promises of future returns or granting of coins to the donator. It does not matter whether the ICO activity is conducted online or in a face-to-face environment or whether it is a public or a private offering.

	generally only regulated if the sale i.) constitutes the sale of a security under state or Federal law, or ii.) is considered to have constituted money transmission under state law or pursuant to FinCEN's regulations.	Both the EBA and the ESMA have pointed out that most cryptoassets ('payment' tokens and 'utility' tokens) are outside ² the scope of EU legislation and hence are not subject to provisions on consumer and investor protection and market integrity, among others. However, it is still legal ³ to purchase crypto-currencies on exchanges throughout Europe.	and cryptocurrency exchanges ⁵ are also prohibited. There is no outright ban, however, on (private) users owning cryptocurrency or making transfers of cryptocurrency.	crypto-currencies. Whether or not a given crypto-currency is subject to financial regulation depends on whether it falls within the regulatory perimeters established under FSMA ⁶ .	crypto-currencies.	currency is supported by the Japanese government or BOJ.
	US	EU	China	UK	Switzerland	Japan

² These cryptoassets are currently unregulated at EU level, except those which qualify as 'virtual currencies' under the AML/CFT framework. A virtual currency (under the AMLD5) is defined as 'a digital representation of value that is neither issued by a central bank or a public authority, nor necessarily attached to a legally established currency or fiat currency, and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of payment or exchange and can be transferred, stored or traded electronically.'

³ The crypto regulation, known as AMLD5, means that exchanges based in individual countries are required to formally register with the regulator of that country. Companies are also required to store information about how their clients have funded their purchases.

⁵ By law any of so-called token financing and trading platforms may not engage in the exchange services between any legal tender and tokens or between virtual currencies, or engage in the sale of tokens or virtual currencies for itself or as a central counterparty, or provide services such as pricing and information intermediary for tokens or virtual currencies.

⁶ The kind of instruments regulated under FSMA are known as 'specified investments'. In order to determine whether a given cryptocurrency is subject to financial regulation in the UK, it is necessary to analyse whether it matches the definition of any specified investment in the RAO.

<p>Security</p>	<p>The SEC generally has regulatory authority over the issuance or resale of any token or other digital asset that constitutes a security⁷.</p> <p>If a digital asset is determined to be a security, then the issuer must register the security with the SEC or offer it pursuant to an exemption from the registration requirements.</p> <p>For offerings made under a federal exemption from securities registration, the SEC places fewer restrictions on the sale of securities to 'accredited investors'.</p>	<p>'Investment tokens'⁸ are seen as those that have profit-rights attached to them. These are regulated under EU legislation.</p>	<p>Since crypto-currency-related services are prohibited for financial institutions, there are no licensing requirements which would permit such activities.</p>	<p>'Security tokens' which amount to a 'specified investment' as set out in FSMA⁹ are regulated tokens by the FCA.</p> <p>The issuance of tokens through an ICO that constitute (transferable) securities must meet set regulation¹⁰.</p>	<p>'Asset tokens' represent assets such as a debt or equity claim against the issuer. Asset tokens promise, for example, a share in future company earnings or future capital flows.</p> <p>FINMA will treat 'asset tokens' as securities if they represent uncertified securities¹¹ or derivatives and are standardised as well as suitable for mass-trading.</p>	<p>Although cryptocurrencies are not viewed as securities, both 'Virtual currency Exchange Services' and 'Crypto asset Custody Services' are required to register with the FSA.</p> <p>The FIEA introduced the concept of 'Electronically Recorded Transferable Rights (ERTR's)' which relate to the rights represented by proprietary value that is transferable by means of an electronic data processing system. These rights</p>
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⁷ Under US law, a security involves 'an investment contract', i.e. an investment of money in a common enterprise with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others- *the Howey Test (SEC v W.J Howey Co., 1946)*.

⁸ These are cryptoassets that are covered by EU rules by virtue of qualifying as financial instruments under the MiFiD II or as electronic money or e-money under the EMD2.

⁹ These may provide rights such as ownership, repayment of a specific sum of money or entitlement to a share in future profits. They may also be transferable securities or financial instruments under the EU's MiFiD II.

¹⁰ The regulation falls into three broad categories: i.) UK prospectus requirements; ii.) the UK restriction on financial promotions; and iii.) consumer protection and online/distance selling legislation. Typically, this regulation will not affect classic cryptocurrencies like BTC, ETH and LTC and other cryptocurrencies with substantially similar features to classic cryptocurrencies as these are regarded as unregulated exchange tokens. However, a precise determination of this may still need to be made on a case-to-case basis.

¹¹ Uncertificated securities are defined as rights which, based on a common legal basis (articles of association/ issuance conditions), are issued or established in large numbers and are, generically, identical. Under the Code of Obligations (CO), the only formal requirement is to keep a book in which details of the number and denomination of the uncertificated securities issued and of the creditors are recorded (Art. 973c para.3 CO). This can be accomplished digitally on a blockchain.

						are deemed as securities. Tokens issued in 'security token offerings' (STOs) are understood to constitute, in principle, 'collective investment scheme interests' ('CISIs') ¹² .
	US	EU	China	UK	Switzerland	Japan
Commodity/Utility	Bitcoin and Ether are considered commodities and, therefore, under the regulatory authority of the CFTC ¹³ . Futures, options, swaps and other derivative contracts that make reference to the price of a cryptoasset that constitutes a commodity are subject to CFTC regulation.	'Utility tokens' ¹⁴ are seen as those that enable access to a specified product or service. These are unregulated under EU legislation.	Bitcoin is considered a 'virtual commodity' ¹⁵ and as such treated as any other commodity able to be exchanged between individuals (excluding any institutional involvement) for an agreed value of other currency or commodity. The status of 'virtual commodity', however, is not explicitly	'Utility tokens' which can be redeemed for access to a specific product or service that is typically provided using a DLT-platform are unregulated tokens.	'Utility tokens' are tokens that are intended to provide digital access to an application or service by means of a DLT-based infrastructure. 'Utility tokens' are not currently treated as securities by FINMA provided their sole purpose is to confer digital access rights to an application or service; and the tokens can actually be used	Whilst 'utility tokens' are not a legally defined instrument in Japan, at the very least a Japanese legal opinion is required in order to confirm that the token is not a virtual currency (and thus falling under the PSA) or a security (falling

¹² CISIs are deemed to have been formed when the following three requirements are met: i.) investors (rights-holders) invest or contribute cash or other assets to a business; ii.) the cash or other assets contributed by investors are invested in the business; and iii.) investors have the right to receive dividends of profits or assets generated from investments in the business. Tokens issued under STOs would constitute ETRTs if the three requirements above are satisfied.

¹³ See full statement here. <https://www.cftc.gov/PressRoom/PressReleases/8051-19>

¹⁴ 'Utility tokens' do not constitute a general-purpose medium of exchange and can generally only be used on the token platform itself.

¹⁵ A court in China ruled in July 2019 that Bitcoin met the legal requirements to be considered virtual property because it is 'valuable, scarce and disposable'.

			extended to any other cryptocurrency under any law or regulation.		in this manner when they are issued.	under the FIEA ¹⁶).
	US	EU	China	UK	Switzerland	Japan
Currency	<p>A lawsuit alleging XRP is a security and not a currency is underway in the US¹⁷. The ruling may provide future guidance as to which cryptoassets are considered currencies and the criteria therefore.</p> <p>FinCEN doesn't consider cryptocurrencies to be legal tender but considers cryptocurrency exchanges as Money Services Businesses¹⁸ on the basis that tokens are 'other value that substitutes for currency'.</p>	<p>'Payment tokens' are seen as those that serve as a means of exchange or payment.</p> <p>Although most 'payment tokens' would be unregulated, those that fall within the definition of 'virtual currencies' under the AMLD framework become regulated cryptoassets. These would include BTC, ETH, XRP, BCH, BSV, LTC, XMR,</p>	<p>From a PRC legal and regulatory perspective, cryptocurrencies and digital tokens are not currencies issued by competent authorities and therefore may not be circulated or used as currency on relevant markets.</p>	<p>'Exchange tokens' (cryptocurrencies) like BTC, ETH and LTC which are not centrally-issued, are used as a means of exchange and give no rights or entitlements to holders are unregulated²⁰.</p>	<p>FINMA refers to 'pure cryptocurrencies' with solely a medium of exchange function as 'payment tokens'²¹ and describes them as intended to be used, now or in the future, as a means of payment for acquiring goods or services or as a means of money or value transfer. However, 'pure cryptocurrencies are not legal tender.</p>	<p>Cryptocurrencies or virtual currencies²² do not fall within the definition of 'securities' under the FIEA, and the sale of virtual currencies or tokens (including ICOs) are not specifically or directly regulated by the FIEA.</p> <p>However, certain types of virtual currencies do come under the purview of the PSA.</p>

¹⁶ Even in those cases where a company has obtained Japanese legal confirmation that its token is neither a virtual currency nor a security, there are other laws that need to be followed regarding commercial transactions (the Specified Commercial Transaction Act) and consumer protection rights (the Consumer Protection Act).

¹⁷ Read the latest filing here. <https://www.coindesk.com/amended-lawsuit-against-ripple-now-offers-theory-that-xrp-may-not-be-a-security>

¹⁸ Under the Bank Secrecy Act, FinCEN regulates MSBs. FinCEN considers a virtual currency exchange and an administrator of a centralised repository of virtual currency who has the authority to both issue and redeem the virtual currency as both MSBs.

²⁰ Exchange tokens currently fall outside the regulatory framework. This means that the transferring, buying and selling of these tokens, including the commercial operation of cryptoasset exchanges for exchange tokens, are activities not currently regulated by the FCA.

²¹ As per regulation, 'pure cryptocurrencies' are regarded as not giving rise to any claims towards an issuer or third party. They are seen as serving any one or combination of these purposes- medium of exchange, unit of account or storage of value. They are, therefore, not treated as securities.

²² A cryptocurrency which is usable as a payment method to an unspecified person and not denominated in a fiat currency falls under the definition of 'virtual currency'.

		DASH ¹⁹ .				
	US	EU	China	UK	Switzerland	Japan
Hybrid cryptocurrencies	Most jurisdictions, although acknowledging that certain cryptocurrencies will have multiple features as security, commodity, utility token and currency or some combination of these, have no specific regulation relating to the treatment of such cryptocurrencies.					
	US	EU	China	UK	Switzerland	Japan
Stablecoin	<p>U.S. SEC labeling a digital asset a 'stablecoin' does not affect its regulatory status, which instead depends on a facts-and-circumstances analysis of economic reality.</p> <p>The analysis of whether any given stablecoin is a security would likely employ the so-called 'Howey test'²³</p>	<p>Given the complexity of its structure, a stablecoin arrangement could, depending on its specific design features, fall under one of a number of different regulatory frameworks – or, potentially, none of them. The payment and customer interface functions of a stablecoin arrangement are similar to those of a traditional payment</p>	<p>Under the current regulatory environment, stablecoin issuance and usage, together with any other financial activity in relation to stablecoins in China, is sensitive and subject to close regulatory scrutiny, and will involve substantial regulatory risks and implications.</p>	<p>A 'fully-collateralised' stablecoin issued by a central issuer and pegged to an underlying reference asset through the issuer holding the relevant underlying reference asset is likely to constitute a specified investment (or, indeed, electronic money²⁵).</p> <p>It is, however, presently possible to structure a stablecoin such that it is unregulated in the UK.</p>	<p>Swiss supervisory law will focus on the economic function and purpose of a stablecoin based on its specific features (ie, substance over form)²⁶.</p> <p>The legal relationship between the stablecoin's issuer and holder will be particularly decisive for determining whether the stablecoin project will fall within the scope of the Banking Act's or the Collective Investment Schemes Act's (CISA's)</p>	<p>The FSA has taken the position that a stablecoin pegged to a legal currency does not fall into the category of 'cryptocurrency' based on the PSA (the Act)²⁷.</p> <p>If this is the case, a stablecoin other than a stablecoin secured by fiat currency could be categorised as a cryptocurrency and would, therefore, be dealt at a crypto-</p>

¹⁹ See the study report presented to the European Parliament in 2018 titled 'Cryptocurrencies and Blockchain: Legal context and implications for financial crime, money laundering and tax evasion' for further detail; or click on <https://www.europarl.europa.eu/cmsdata/150761/TAX3%20Study%20on%20cryptocurrencies%20and%20blockchain.pdf>

²³ The requirement that there be an 'expectation of profits' from the entrepreneurial or managerial 'efforts of others may provide a good basis for an argument for stablecoins not being securities under Howey. In theory, because the value of a stablecoin is intended to remain 'stable', the absence of value fluctuations should eliminate the ability for a holder to profit from stablecoin ownership, making any 'expectation of profits' unreasonable. Where a fixed redemption fiat-backed stablecoin is initially sold by the issuer at \$1 and entitles the holder to receive \$1 upon redemption, capital appreciation seems impossible, and holders are not typically entitled to distributions.

²⁵ This is the case if holders of the stablecoin have rights or entitlements in relation to the underlying reference asset.

²⁶ Therefore, a detailed case-by-case analysis will be required, based predominately on: a.) the asset class the stablecoin is pegged to; b.) the way in which fluctuations of such assets are treated by the stablecoin's issuer; and c.) the legal relationship between the stablecoin's issuer and holder (especially the characterisation of a redemption claim, if any).

²⁷ This might be because currency-denominated assets do not fall under the cryptocurrency category as regulated under the PSA.

		system, scheme or instrument. As a result, the entities responsible for providing those functions could fall under the Euro-system's oversight framework ²⁴ .			licensing requirements. In addition, due to their usual aim to be a means of payment, the Anti-money Laundering Act (AMLA) must be considered in most projects.	currency exchange regulated under the Act. In contrast, a stablecoin that is secured by fiat currency would be categorised and regulated as a fund transfer or prepaid payment instrument under the Act.
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Glossary

Key definitions

Altcoin. An altcoin is a crypto-currency that has its own blockchain, but is not Bitcoin.

Blockchain technology. A distributed database i.e the data is stored across different physical locations over a network of multiple interconnected computers or nodes. Additions to this database are initiated by one of the members (i.e the network nodes), who creates a new 'block' of data, which can contain all sorts of information. This new block is then broadcast to every participant in the network in an encrypted form (utilising cryptography) so that the transaction details are not public.

Coin. A cryptocurrency built on its own native blockchain and that acts, primarily, as a medium of exchange, a unit of account or a store of value.

Cryptoasset. An asset that is a digital currency, a virtual currency or a cryptocurrency.

²⁴ If the issuer of the coin does not grant credit and guarantees redeemability at par, and end-users have a claim on the issuer, the coin will fall within the definition of e-money under EU legislation, with both the coin and its issuer being subject to the Electronic Money Directive (EMD). If the asset management function qualifies as an investment fund and is based in the EU and/or marketed to EU investors, it will fall under the standard EU regulatory framework established by the UCITS Directive or the AIFMD. The European payment services framework under the Payment Services Directive (the "PSD") may also be relevant depending on how a particular stablecoin is used and the environment in which it operates. An example of this is where the stablecoin is used to make payments more effective and efficient or, generally, to provide or facilitate the provision of payment services within the scope of the PSD. These include, among other things, services relating to the operation of payment accounts – for example, cash deposits and withdrawals from current accounts – execution of payment transactions, card issuing, merchant acquiring, and money remittance.

Cryptocurrency. A type of virtual currency that is both decentralised and unregulated and uses blockchain (a specific form of distributed ledger) and cryptography for its operation.

Cryptography. Any of various mathematical techniques for encrypting and decrypting data in order to keep it private when transmitted or stored electronically.

Digital currency. The blanket term for all money that is intangible and only available in digital or electronic form. It is either centralised or decentralised and either regulated (for example a Central Bank Digital Coin or CBDC) or unregulated (for example virtual currency or cryptocurrency).

Distributed-Ledger Technology (DLT). A database that is consensually shared and synchronised across multiple sites, institutions and geographies and accessible to multiple people. The participant at each node of the network can access the records shared across that network and can own an identical copy of it. Any changes or additions made to the ledger are reflected and copied to all participants in a matter of seconds or minutes.

Fiat currency. Government-issued currency that is not backed by a physical commodity, such as gold or silver, but rather by the government that issued it. Its value is derived from the relationship between supply and demand and the stability of the issuing government, rather than the worth of a commodity backing it as is the case with commodity money. Most modern paper currency is fiat currency, including the U.S. dollar, the euro, and other major global currencies.

Hybrid cryptocurrency. A cryptocurrency which can serve more than one purpose (i.e. as a currency, as a security and as a commodity or utility). It may also have characteristics that change during the course of its lifecycle.

Initial Coin Offering (ICO). A fundraising mechanism in which new projects or businesses sell underlying crypto tokens or coins, normally in exchange for fiat currency or established cryptocurrency such as Bitcoin.

Payment token. A type of token that serves as a means of exchange or payment. Unlike a coin, which will be derived from its own native blockchain, a payment token will be derived from an already existing blockchain outside of itself.

Security token. A type of token that represents a claim on its issuer. It provides rights such as ownership, repayment of a specific sum of money or entitlement to a share in future profits to the buyer. (This is also known as an asset token or an investment token).

Stablecoin. A type of cryptocurrency or cryptoasset which by design seeks to maintain a stable market value by pegging its value to an underlying asset such as gold or USD. Examples include Tether (USDT), USD Coin (USDC) and Binance USD (BUSD).

Token. A programmable asset or access right(s) managed by a smart contract and an underlying distributed ledger like the blockchain. A token is accessible only by the person who has the private key for that address and can only be signed using this private key.

Utility token. A type of token which can be redeemed for access to a specific product or service that is provided on an existing blockchain platform. Examples include Chainlink (LINK), Huobi Token (HT), Ontology (ONT) and Basic Attention Token (BAT).

Virtual currency. A type of digital currency which is unregulated, issued and controlled by its developers, the founding organisation or the defined network protocol and used and accepted among the members of a specific virtual community. Virtual currency runs on distributed ledger, not necessarily blockchain. Virtual currency does not have legal tender status.

Resources

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