THE MANDATE AND ROLE OF CENTRAL BANKS IN THE FINTECH ERA: THE CASE OF THE SOUTH AFRICAN RESERVE BANK AND CENTRAL BANK DIGITAL CURRENCY

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Prepared for the Wisconsin International Law Journal's Symposium on April 12, 2024 on *Central Banking in a Time of Crisis: An International & Interdisciplinary Perspective*.

ABSTRACT

Payments have evolved extensively over the years with the emergence of various technologies from electronic money, to mobile money and, with the ever-evolving financial technologies called "fintech," payments now include crypto assets and central bank digital currency (CBDC).

This article investigates the mandate and role of the South African Reserve Bank (SARB) and the regulatory conundrum posed by CBDC. The author illustrates this conundrum by examining CBDC from a policy and regulatory perspective, identifying challenges and risks to be mitigated before CBDC can be launched in a country such as South Africa. To this end, this article briefly provides an overview of the mandate and role of the SARB within the Twin Peaks regulatory model in South Africa. Furthermore, it deals with CBDC and identifies gaps within the current legal and regulatory framework that need to be addressed if South Africa were to adopt a wholesale or retail CBDC. Finally, the author examines whether the mandate and role of the SARB is appropriate or needs to adapt in view of fintech innovations such as CBDC.

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https://doi.org/10.59015/wilj.LJUP7932

INTRODUCTION

The 2007–2008 Global Financial Crisis (GFC) is regarded as the most serious economic disturbance with losses from the crisis estimated to be more than US$15 trillion.[1] The GFC also represents the tipping point for financial regulation and led to widespread transformation and disruption of financial sectors.

How we make and receive payments, save and invest money, assess and manage risks, and raise and trade capital has changed dramatically. The form that money takes has also changed.

Money has evolved beyond coins and paper-based currencies issued by central banks. It now takes the form of cryptocurrencies, stablecoins, mobile money, e-money, and central bank digital currency (CBDC), which is a digital equivalent of legal tender issued by central banks.

The reality of financial services interacting with technology is not new. However, the GFC provided a tipping point that intensified this interaction. Lawack and Puja call the period from the GFC to date, the "age of the fintech boom."[2] Africa and Asia are predicted to lead the rest of North America, Latin America, and Europe in terms of fintech adoption.[3] This has been justified on the ground that "the lack of infrastructure in developing countries leaves room for innovation that would not find success in overbanked and heavily entrenched economies in the West."[4]

Fintech can help financial sectors become more diverse, comprehensive, efficient, and inclusive. However, fintech can also pose risks. Fintech poses risks if its application undermines favorable competition. For example, fintech could reduce service providers' ability to access and compete in the fintech ecosystem. Likewise, it could pose risks to existing protections for financial consumers if the provision of technology does not adequately protect against identity theft or other financial losses. Other risks include monetary policy transmission and financial stability.

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1 J. AMOUR ET AL., PRINCIPLES OF FINANCIAL REGULATION 1 (1st ed. 2016).

2 VIVIENNE LAWACK, FINTECH LAW AND REGULATION AN AFRICAN PERSPECTIVE 4 (2023).

3 *Id.*

4 Rébecca Menat, *Why We're so Excited About FinTech*, *in* THE FINTECH BOOK: THE FINANCIAL TECHNOLOGY HANDBOOK FOR INVESTORS, ENTREPRENEURS AND VISIONARIES 10, 10 (Susanne Chishti & Janos Barberis ed., 2016).

Emergence of fintech did not alter what constitutes financial regulation or what it should aim to achieve. The objectives of financial regulation, such as micro and systemic safeguards, consumer protection, fair competition, and market integrity, remain unchanged. Fintech alters the dynamics of achieving these goals.

So, what is fintech? Whilst there is no single definition of fintech, this article uses a definition that illustrates how fintech intersects with regulation. Keeping their book's focus on how fintech intersects with regulation in mind, Lawack and Puja advanced the following broad definition.

Fintech is:

1. the application of technology to finance,
2. with the potential to improve the financial sector's effectiveness and efficiency,
3. while also likely disrupting existing models of delivering financial services,
4. incumbent providers of financial services,
5. established practices, and
6. aspects of the regulatory regime.[5]

It is against this background that this article briefly examines the history of the South African Reserve Bank (SARB) and how it functions within the context of the Twin Peaks Regulatory Model in South Africa.

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[5] Lawack, *supra*, note 2, at 11.

I. HISTORY OF THE SARB AND SOUTH AFRICA'S TWIN PEAKS MODEL

A. HISTORY OF THE SARB

The SARB is the central bank of South Africa.[6] The need for the SARB dates back to before and immediately after the First World War (1914 to 1918).[7] During this term, all commercial banks undertook similar functions, one of which was issuing banknotes to the public.[8] At this point, no legislation regulated currency issuance and all the banks were simply obliged to convert notes held by the public into gold when tendered at their branches.[9]

After the First World War, the United Kingdom's gold price ascended above that of South Africa. As a result, a profit could be made by simply converting banknotes into gold in South Africa and, in turn, selling this same gold in London. This caused the South African commercial banks to trade at a huge loss. In 1919, the commercial banks appealed to the government to release them from their obligation to convert their banknotes into gold on demand. In that same year, the Gold Conference of October 1919 was held.[10] The Conference recommended, inter alia, a uniform banking act to replace the separate banking laws of the four provinces in force at that time, as well as the establishment of a single and non-commercial institution to assume responsibility for issuing banknotes and for taking over the gold held by commercial banks.[11] Parliament accepted this recommendation and in December 1920, the Currency and Bank Act[12] was promulgated. This Act specifically provided for the establishment of a central bank, leading the SARB to open its doors

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6 S. AFR. RSRV. BANK, https://www.resbank.co.za/ (last visited Feb. 2, 2025) [https://perma.cc/G8Y5-Y7X7].

7 *South African Reserve Bank*, S. AFR. DEV. CMTY. BANKERS, https://www.sadcbankers.org/Countries/Pages/South_Africa.aspx [https://perma.cc/W7R2-JZRK].

8 *Factors Leading to the Founding of the South African Reserve Bank*, S. AFR. RSRV. BANK (Apr. 1, 2012), https://www.resbank.co.za/en/home/publications/publication-detail-pages/fact-sheet/fact-sheet/2012/4999 [https://perma.cc/LXN9-LRPJ].

9 S. AFR. RSRV. BANK, *History*, https://www.resbank.co.za/en/home/about-us/history (last visited Feb. 2, 2025) [https://perma.cc/FN8K-9EXT].

10 *Id.*

11 S. AFR. RSRV. BANK, *supra* note 8, at 3.

12 *History*, S. AFR. RSRV. BANK, https://www.resbank.co.za/en/home/about-us/history (last visited Dec. 3, 2024) (regarding the founding of SARB) [https://perma.cc/B6KD-7EY6].

for business for the first time on June 30, 1921.[13] The Currency and Banking Act was amended from time to time and re-enacted in the form of the SARB Act of 1944.[14] The 1944 Act was repealed and substituted by the SARB Act of 1989 (hereinafter "the SARB Act").[15]

Sections 223 to 225 of the South African Constitution,[16] the SARB Act and the SARB regulations[17] present the SARB's business structure, describe the SARB's functions, and detail the actions the SARB may take to fulfill its purpose.[18] The Constitution of South Africa[19] establishes the SARB as the central bank of South Africa. Both the Constitution[20] and the SARB Act[21] provide that the primary objective of the SARB is to protect the value of currency in the interest of balanced and sustainable economic growth in the Republic.[22] Section 224(2) of the Constitution states that "[t]he South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, but there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters."[23] Section 225 states that "[t]he powers and functions of the South African Reserve Bank are those customarily exercised and performed by central banks, which powers and functions must be determined by an Act of Parliament, [the Act referred to is the SARB Act], and must be exercised or performed subject to the conditions prescribed in terms of that Act."[24]

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13 S. AFR. DEV. CMTY. BANKERS, *supra* note 7.

14 *History*, *supra* note 12.

15 South African Reserve Bank Act 90 of 1989 §§ 223, 225 (S. Afr.) [hereinafter the SARB Act]. Recently, in September 2010, the President signed into law the South African Reserve Bank Amendment 4 of 2010 ("the SARB Amendment Act"). Finance Minister, Pravin Gordhan has described the Act as "designed to enhance the governance of the Reserve Bank to uphold its public interest role." *See* South African Government Information Address by the Honourable Minister of Finance, Pravin Gordhan, Minister of Finance, Address on the South African Reserve Bank (Amendment Bill 2010 Before the National Assembly) (Aug. 10, 2010), https://www.gov.za/news/speeches/address-honourable-minister-finance-pravin-gordhan-south-african-reserve-bank-sarb [https://perma.cc/W288-N5QB]. The Act is, inter alia, specifically designed to prevent shareholders from undermining the independence of the SARB and to broaden and govern representation and disqualification of the SARB's board. *Id.*

16 S. AFR. CONST., 1996.

17 South African Reserve Bank Regulations 2010, GG 33552 (13 Sept. 2010).

18 S. AFR. CONST. §§ 223, 225 (1996).

19 *Id.*

20 *Id.*

21 SARB Act § 3 (S. Afr.).

22 *Id.*

23 S. AFR. CONST., 1996.

24 *Id.*

It is now necessary to understand the role of the SARB in the context of South Africa's Twin Peaks regulatory model.

B. SOUTH AFRICA'S TWIN PEAKS MODEL AND FINANCIAL SECTOR LAWS

1. Overview

This is a general overview of the legal and regulatory framework pertaining to the financial sector in South Africa. CBDCs will operate within this framework, but depending on their use, not all pieces of legislation will be relevant.

In 2011, South Africa's Minister of Finance at the time, Pravin J. Gordhan, began his report on a safer financial sector with the following statement: "The financial services sector is at the heart of the South African economy and touches the life of each and every citizen."[25]

The GFC highlighted the accuracy, significance, and relevance of this statement. Whilst the financial services sector is strongly regulated, the GFC also underscored the cost of a weak domestic real economy. The GFC emphasized the requirement for enhanced collaboration of the fiscal and monetary policies in the financial regulation of South Africa; it also brought to the fore the need to emphasize the management and mitigation of systemic risks.[26]

The National Treasury's decision to move to a Twin Peaks model of financial sector regulation (FSR) dates back to 2007 when it conducted a comprehensive review of South Africa's financial regulatory framework. The National Treasury expanded this scope in 2009 in light of the events and lessons learned from the 2008 GFC. The National Treasury's conclusion after completing its review was unambiguous: "South Africa did require and still requires a stable regulatory sector for financial services and financial products sold to South African consumers."[27]

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[25] Pravin J. Gordhan, *A Safer Financial Sector to Serve South Africa Better,* REPUBLIC S. AFR. NAT'L TREASURY, 1 (Feb. 23, 2011), https://www.treasury.gov.za/twinpeaks/20131211%20-%20item%202%20a%20safer%20financial%20sector%20to%20serve%20south%20africa%20better.pdf [https://perma.cc/3VT2-DQMS].

[26] Gerda Van Niekerk & C.M. Van Heerden, *Twin Peaks: The Role of the South African Central Bank in Promoting and Maintaining Financial Stability,* 80 T.H.R.H.R, 641 (2018).

[27] *See generally* Gordhan, *supra* note 25, at 59.

Such a sector promotes transparency, competitiveness, cost-effectiveness, financial inclusion, coordination, and comprehensiveness; it also educates and protects the consumer.[28]

In South Africa, the above conclusion led to the decision to transition from a fragmented sectoral model of financial regulation to a Twin Peaks model. The Twin Peaks model is comparable to the financial regulatory sector models of other nations, including Australia, the United Kingdom, Canada, and the Netherlands. Australia and the Netherlands adopted the Twin Peaks model prior to the 2008 GFC; the United Kingdom and Canada adopted the model after the 2008 GFC. South Africa is the eighth nation to adopt the Twin Peaks FSR model.

Prior to the formulation of the FSR Act, the supervisory and regulatory structure in the financial system of South Africa was multi-layered in nature. It was the responsibility of the SARB to perform banking regulation and supervision. It was the responsibility of the Financial Services Board (now known as the Financial Sector Conduct Authority (FSCA)) to regulate and supervise insurance. In addition, the Financial Services Board also oversaw fund exchangers and managers; it furthermore shared the responsibilities associated with market intermediaries with the Johannesburg Stock Exchange. The National Credit Regulator had a "consumer credit regulation mandate" and had been responsible for looking into reports and lending to the Department of Trade and Industry. Because of the silo structure, South Africa's financial regulation was complex, unintegrated, and vulnerable to regulatory arbitrage.[29]

The South African Twin Peaks model involves the regulation of the financial sector through two main regulators: the Prudential Authority and the FSCA.[30] The FSR Act and its subordinate legislation formed the foundation of South Africa's Twin Peaks model.[31] The FSR Act was signed into law on August 21, 2017 and became effective on April 1,

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[28] *Implementing a Twin Peaks Model of Financial Regulation in South Africa,* REPUBLIC S. AFR. NAT'S TREASURY, 7 (Feb. 1, 2013), https://www.treasury.gov.za/twinpeaks/20131211%20-%20item%203%20roadmap.pdf [https://perma.cc/3VT2-DQMS].

[29] *See* K. Moodley-Naidoo, *Overview of Financial Sector Regulatory Models*, *in* FINTECH LAW AND REGULATION: AN AFRICAN PERSPECTIVE, 89-110 (Vivienne Lawack ed., 2023).

[30] Van Niekerk & Van Heerden, *supra* note 26.

[31] *Understanding the FSR Act*, TWIN PEAKS NEWSL. (Fin. Servs. Bd., S. Afr.), https://www.fsca.co.za/TPNL/2/understanding.html [https://perma.cc/7S2U-BG8N].

2018.[32] Subordinate legislation promulgated includes the FSR Act Regulations.[33]

Under the FSR Act, the National Credit Regulator and the Financial Intelligence Centre (FIC) support the main Twin Peaks regulators, namely the Prudential Authority and the FSCA.[34] The FSR Act also provides for the establishment of several councils, committees, subcommittees, fora, and tribunals to support the Prudential Authority and FSCA in their respective roles, and also the Twin Peaks model as a whole.[35] Last but certainly not least, the SARB formally bears the responsibility for financial stability in South Africa under the South African Twin Peaks model.[36]

The FSR Act specifies the initial stage of the move towards a Twin Peaks system for financial regulation in South Africa by defining the regulatory architecture. The Act has undergone various drafts; the emphasis, however, has remained on refining the proposed regulatory model.[37]

The process of introducing the "Twin Peaks system of regulating the financial sector" of South Africa gained further momentum with the third draft of the FSR Bill, which was tabled in Parliament in October 2015.[38] This version was amended twice in 2016 and was later presented before the National Assembly.[39] In 2017, the President signed the FSR Bill, which turned it into the implementable law.[40]

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[32] Financial Sector Regulation Act 9 of 2017 (S. Afr.); Moodley-Naidoo, *supra* note 29, at 111.

[33] *See* Regulations in Terms of Sections 61(4), 288 and 304 of Financial Sector Regulation Act, 2017, GN 10814 of GG 41550 (Mar. 29, 2018) [hereinafter the FSR Regulations].

[34] Andrew Godwin, *Introduction to Special Issue–the Twin Peaks Model of Financial Regulation and Reform in South Africa*, 11 Law & Fin. Mkts. Rev. 151, 152 (2017), https://www.tandfonline.com/doi/full/10.1080/17521440.2017.1447777#d1e123 [https://perma.cc/TTH4-9XVP].

[35] Act 9 of 2017 (S. Afr.).

[36] *See id.* at §§ 11, 12, 26.

[37] Van Niekerk & Van Heerden, *supra* note 26, at 643.

[38] *Id.*

[39] *Id.*

[40] *Id.*

II. CENTRAL BANK DIGITAL CURRENCIES (CBDC)

A. THE MEANING OF CBDC

Whilst there is no universal definition of CBDC, it is generally regarded that a CBDC is a liability maintained by a central bank, denominated in a pre-existing unit of account, and serving effectively as both a medium of exchange and a store of value.[41] The SARB defines a CBDC as a "form of money that is denominated in fiat currency (central bank money), in an electronic form, and which is a liability on the central bank's balance sheet similar to cash and central bank deposits."[42] For purposes of this article, the following definition of a CBDC will be used:

> A CBDC is (a) a digital form of central bank money that (b) may be accessible to the general public or to a select set of licensed participants (such as commercial banks), which (c) is denominated in the national unit of account, and (d) is issued by, and is a direct liability of, the central bank of a country.[43]

The reserves or settlement account balances kept by commercial banks and certain other financial institutions at the central bank already act as a sort of digital money that is provided by central banks.[44] Given the introduction of new forms of central bank money in addition to existing ones, it is challenging to provide an accurate description of a CBDC. In fact, for the sake of analyzing what may develop, it is simpler to describe a CBDC by focusing on what it is not. "A CBDC refers to a digital representation of central bank money, which is separate from the balances held in conventional reserve or settlement accounts."[45]

The question arises as to what the legal nature of CBDC is or would be in South Africa.

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[41] Ulrich Bindseil et al., *Central Bank Digital Currency: Functional Scope, Pricing and Controls* 5 (Eur. Cent. Bank Occasional Paper Series, Paper No. 286, 2021).

[42] *Frequently Asked Questions on Central Bank Digital Currencies*, S. AFR. RSRV. BANK 1 (Sep. 8, 2021, 9:09 AM), https://www.resbank.co.za/en/home/publications/publication-detail-pages/Whats-new/Central-bank-digital-currencies-requently-asked-questions [https://perma.cc/3NAH-LM9H].

[43] Ashley Lannquist et al., *Digital Currency Governance Consortium White Paper Series* 11 (World Econ. F., 2021).

[44] Charles M. Kahn et al., *Should the Central Bank Issue E-Money?* 17 (Fed. Rsrv. Bank St. Louis, Working Paper No. 2019-003A, 2019).

[45] KLAUS LÖBER & AERDT HOUBEN, *Committee on Payments and Market Infrastructures Markets Committee* 4 (Bank for Int'l Settlements, eds., 2018).

B. THE LEGAL NATURE OF MONEY, CURRENCY, PAYMENT INSTRUMENTS, AND CBDC IN SOUTH AFRICA

A distinction must be made between money, currency, and payment instruments to analyze the legal nature of CBDC. Whilst there is no universal definition of "money," it is widely accepted that the legal concept of money is broader than the economic definition of universal medium of exchange, unit of account, and more.[46] It is also broader than currency (banknotes and coins) in many jurisdictions and includes certain types of assets or instruments that are readily convertible or redeemable into currency.[47]

Here, one needs to distinguish between "central bank money" and "commercial book money." Book money, which constitutes credit balances on accounts, can be converted into currency, subject to contractual provisions, or transferred through payment systems or instruments.[48] Book money is not currency and, in South Africa, as in many other jurisdictions, book money does not enjoy the status of legal tender.[49] Some jurisdictions have given some form of recognition to book money, for instance, as an authorized way of paying taxes or other legal obligations.[50] In other jurisdictions, electronic money is also classified as a type of money, and some assets, such as Bitcoins, may be considered under one body of law (e.g., taxes), but not under another (e.g., banking and financial law).[51] However, in South Africa, neither electronic money nor cryptocurrencies or cryptoassets are afforded the status of legal tender.[52]

Payment instruments are a third means of payment. They are neither currency nor money, but are legally used to effect payment in commercial book money or currency.[53] Payment instruments are thus

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[46] Wouter Bossu et al., *Legal Aspects of Central Bank Digital Currency: Central Bank and Monetary Law Considerations* 8 (IMF Working Paper, Paper No. 20/254, 2020).

[47] *See* Vivienne Lawack, *Aspects of Internet Payment Instruments*, 27-40 (2001) (LL.D. thesis, U. S. Afr.) (on file with author).

[48] Bossu et al., *supra* note 46, at 8.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] Vivienne Lawack, *An Exploratory Analysis of Central Bank Digital Currencies–Some Considerations*, 34 S. AFR. MERCANTILE L. J. 88, 94 (2022) (on file with author).

[53] Bossu et al., *supra* note 46.

alternative forms of payment to legal tender. Examples of payment instruments include debit transfers, credit transfers, electronic fund transfers at point of sale, electronic money, and mobile money.[54] Payment instruments, such as debit transfers, credit transfers, electronic fund transfers at point of sale, electronic money, and mobile money, are thus alternative forms of payment, but not legal tender. In South Africa, legal tender is limited to physical banknotes and coins.[55]

In 2014, the SARB issued a position paper on virtual currencies. According to the position paper:

> Only the Bank [South African Reserve Bank] is allowed to issue legal tender i.e. bank notes and coins in [the Republic of South Africa] RSA which can be legally offered in payment of an obligation and that a creditor is obliged to accept. Therefore, [decentralized virtual currencies such as cryptocurrencies] DCVCs are not legal tender in RSA and should not be used as payment for the discharge of obligation in a manner that suggests they are a perfect substitute of legal tender.[56]

Therefore, the regulatory standards applicable to legal tender do not apply to cryptoassets. Although cryptoassets share conceptual similarities with electronic money—most notably their digital form—legally, they are not the same. According to the SARB, electronic money is: "Monetary value represented by a claim on the issuer. This money is stored electronically and issued on receipt of funds, is generally accepted as a means of payment by persons other than the issuer and is redeemable for physical cash or a deposit into a bank account on demand."[57] In contrast to this definition of electronic money, cryptoassets are not issued on receipt of funds and are not guaranteed to be redeemable for physical cash or accepted by a third party.[58] Additionally, a deposit into a bank account on demand implies that the denomination deposited must be in a sovereign currency (legal tender).[59]

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[54] *Payment Instrument*, PAYALLY, https://payally.co.uk/glossary/payment-instrument/ [https://perma.cc/B92G-357N].

[55] *See* South African Reserve Bank Act 90 of 1989 § 15, 17; Currency and Exchanges Act 9 of 1933 § 2(1) (S. Afr.); Lawack, *supra* note 47, at 27–40; F.A. MANN, THE LEGAL ASPECT OF MONEY 20, 24, 365 (Oxford University Press, eds., 4th ed. 1982); Izelde Louise van Jaarsveld, *Aspects of Money Laundering in South African Law*, 43-46 (2011) (LL.D. thesis, University of South Africa) (on file with the UNISA Institutional Repository); Mark Carney, Governor, Bank of Eng., Speech to the inaugural Scottish Economics Conference: *The Future of Money*, 5 (Mar. 2, 2018).

[56] S. AFR. RSRV. BANK, POSITION PAPER ON VIRTUAL CURRENCIES 4–5 (2014).

[57] S. AFR. RSRV. BANK, POSITION PAPER ON ELECTRIC MONEY 3 (2009).

[58] *Id.*

[59] *Id*. at 8, 315.

The SARB Position Paper on Electronic Money stipulates that e-money products can only function legally either if they are provided by a bank, or if the merchant or company that offers the product enters into a partnership agreement with a bank.[60] Cryptoassets currently operate independently from the banking sector and, therefore, do not meet this requirement. Thus, it is clear that cryptoassets do not fall within the definition of electronic money. Similarly, cryptoassets do not fall within the definition of a security. According to a notice issued by the National Treasury:

> While virtual currencies [cryptocurrencies] can be bought and sold on various platforms, they are not defined as securities in terms of the Financial Markets Act, 2012 (Act No. 19 of 2012). The regulatory standards that apply to the trading of securities therefore do not apply to 'virtual currencies.' The National Treasury further contended that cryptoassets cannot be regarded as means of payment as they are not issued on receipt of funds.[61]

It follows from the above that legally, cryptoassets do not qualify as fiat currency, legal tender, electronic money, or securities. Under what asset class, therefore, do cryptocurrencies fall, and is there consensus in regard to this definition or classification? Departing from the term "virtual currencies," the SARB has adopted the term "cryptoassets."[62]

Some may argue that cryptoassets appear to be the more appropriate description given the implications the other descriptors pose. For example, cryptocurrency may be considered a misleading term as "currency" could imply a status as legal tender. However, according to the 2015 European Central Bank report, cryptocurrencies are classified as a form of virtual currency with bidirectional flow—meaning that they intersect directly with the real economy.[63] This may be contrasted with, for example, virtual currencies such as Linden Dollars and Minecraft

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[60] *Id*. at 3.

[61] NAT'L REPUBLIC S. AFR., USER ALERT: MONITORING OF VIRTUAL CURRENCIES (2014) [https://perma.cc/ND39-AUPY].

[62] Crypto Assets Regulatory Working Group, *Consultation Paper for Policy Proposals for Crypto Assets*, Intergovernmental FinTech Working Group, 9 (2018) (discussing that "Crypto assets are digital representations or tokens that are accessed, verified, transacted, and traded electronically by a community of users. Crypto assets are issued electronically by decentralized entities and have no legal tender status, and consequently are not considered as electronic money either. It therefore does not have statutory compensation arrangements. Crypto assets have the ability to be used for payments (exchange of such value) and for investment purposes by crypto asset users. Crypto assets have the ability to function as a medium of exchange and/or unit of account and/or store of value within a community of crypto asset users").

[63] EUROPEAN CENTRAL BANK, VIRTUAL CURRENCY SCHEMES- A FURTHER ANALYSIS 9 (2015).

which have their roots in online gaming worlds and are thus purely "in-game" currencies.

As far as CBDCs are concerned, to be truly equivalent to cash, South Africa's legislature will need to pass amendments to afford CBDCs the status of legal tender. However, there are some policy considerations and legal risks to consider.

C. Some Policy Considerations and Legal Risks

A few policy considerations can be identified from the literature. This section deals with some of these policy considerations, as well as legal risks in relation to CBDC.

1. Issuance, Status, and Convertibility of CBDC to Physical Currency

As stated before, a major policy consideration is the issuance of CBDC and its receipt of similar ownership restrictions and legal tender protections as physical currency. A central bank is usually the sole authorized party to issue physical cash liabilities, and a decision would need to be made as to who will issue CBDC, what type of model will be used, and how to give it the same protection.[64]

If the central bank wants to prevent CBDC from being regarded as book money, in order to be considered a CBDC, CBDC needs to be afforded the status of legal tender, as is the case with physical currency. The SARB Act, as well as the Currency and Exchanges Act would have to be amended to make provision for the above.

2. Monetary Policy Implications

Lawack argues that there will be various monetary policy implications.[65] First, the introduction of CBDC may open the possibility of a new universal public instrument by consolidating different categories of publicly issued obligations (from central bank reserves to physical cash to treasury or agency securities) into variations of a new, safe, generally interoperable CBDC instrument.

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[64] Carney, *supra* note 55.

[65] Vivienne Lawack, *Case Notes: An Exploratory Analysis of Central Bank Digital Currencies — Some Considerations*, 34 SAJHR 118, 128 (2022) (discussing monetary policy implications).

Second, it may revise the current central bank treasury coordination in the conduct of monetary policy and market operations. Third, it may expand the central bank balance sheet access. If non-bank service providers are allowed to participate, settlement participants may expand to the national payment system and mobile operators. If this is done, it will affect the daily provisioning of market liquidity as part of monetary policy, providing greater flexibility and operational tools than before. This may increase the need for the central bank to supply liquidity during turbulent times. One would have to assess this against the central bank's role as lender of last resort and balance this with the central bank's goal of achieving financial stability.

Fourth, the introduction of CBDC may lead to the establishment of new financial institutions. This may generate new markets and commercial opportunities that justify the creation of new categories of financial institutions, licenses, or designated participations. These new categories would need to be incorporated into existing monetary policy implementation frameworks. Doing so could lead to the expansion of non-bank financial institutions and businesses which would, in turn, lead CBDCs to greater inclusion in the national payment system.

Fifth, CBDC could influence depositor outflow, depending on the model of CBDC introduced. Depositor outflow refers to when depositors withdraw their funds from their bank accounts at a faster pace than new deposits are made. There is a possibility of increased person-to-person loans outside of the banking system. This could threaten the traditional commercial banking system, as banks' role as agents or intermediaries of the central bank may become less strategically important. It is also necessary to carefully consider how a greater outflow would impact the financial markets and liquidity, as well as how this impact may be countered.

Sixth, the introduction of CBDC may create new policy levers. Usually, a central bank would adjust the interest rate or vary the quantity of different forms of government and central bank liabilities. Central banks may use various tools such as the buying and selling of different kinds of securities, changing the interest rate paid on different classes of assets, and changing the amount of settlement reserves that banks are required to hold against their assets (called "capital reserves"). With CBDC, new possibilities exist, including levying positive and negative nominal interest rates directly onto retail depositor accounts; establishing a universal, publicly guaranteed payment system for both retail and wholesale depositors; and considering various forms of government guaranteed

liabilities (bonds) into subvariants of a common CBDC instrument. A central bank would need to carefully examine the potentials and limits of these levers from an economic perspective and determine how they interact within the existing monetary policy framework. A non-interest-bearing CBDC could be considered closer in spirit to central bank notes.

Seventh, the introduction of CBDC may create new opportunities or challenges for financial stability. To ensure monetary policy does not exacerbate, obscure, or destabilize private sector dynamics, experts and policymakers need to assess how CBDCs increase financial stability risks such as fraud, under regulation, and lack of supervision.

Eighth, the international dynamics of global CBDC will require harmonization of technical standards, as well as the establishment of new clearing and settlement platforms or the customization of existing cross-border platforms, such as the South African Development Community's Real-Time Gross Settlement System (formerly known as SIRESS).[66] A central bank needs to be very careful to issue a CBDC with cross-border transaction functions before the domestic CBDC is well-entrenched. Cross-border payments will likely be affected by a CBDC, namely:

- cross-border payments between consumers or firms, including correspondent banking arrangements
- intra-firm transfer of funds (e.g., between multi-nationals with multiple CBDC registered accounts in different jurisdictions)
- removing funds from the issuing jurisdiction (e.g., transferring the funds to another wallet in another jurisdiction, establishing foreign claims over balances held domestically, or convertible and/or local currency-denominated foreign instruments)

The above may have a balance of payments impact on current Exchange Control Regulations, as issued by the SARB.[67]

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[66] S. AFR. RSRV. BANK, *Regional Settlement Services*, https://www.resbank.co.za/en/home/what-we-do/payments-and-settlements/SADC-RTGS (last visited Oct. 10, 2024) [https://perma.cc/6V29-ACTE].

[67] Noriyuki Yanagawa & Hiromi Yamaoka, *Digital Innovation, Data Revolution and Central Bank Digital Currency* 15–16 (2014); Sergio Luis Náñez Alonso et al., *Reasons Fostering or Discouraging the Implementation of Central Bank-Backed Digital Currency: A Review*, 8 (2020); Michael D. Bordo & Andrew T. Levin, *Central Bank Digital Currency and The Future of Monetary Policy*, 19 (2017); Jack Meaning et al., *Broadening Narrow Money: Monetary Policy*

As is evident from the above, the monetary policy implications are immense. A detailed analysis of these implications warrants a separate discussion and falls outside of the ambit of this article.

3. Legal Risks

Legal risk can be defined as "the risk of the unexpected application of a law or regulation, usually resulting in a loss."[68] In order to mitigate against legal risk, the following can be done:

- Develop a clear classification scheme for financial institutions and derivative contract-based products that will emerge from the CBDC system.
- Ensure proper issuance and regulation of CBDC as legal tender.
- Ensure the issuance of mobile payment accounts (mMoney) and clarify the relationship to money transfers.
- Central banks can provide a means of identification and certification, passwords and other forms of security.
- Ensure interoperability, confidentiality, and integrity of information, securing the application and infrastructure, a security system assessment, licensing, and so forth.
- Ensure data privacy and protection. In this case, the central bank could develop a framework for coordinating with local law enforcement agencies and foreign legal authorities to prevent, monitor, and pursue digital financial fraud.

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with a Central Bank Digital Currency 2 (Staff Working Paper, Paper No. 724, 2018); Wouter Bossu et al., *Legal Aspects of Central Bank Digital Currency: Central Bank and Monetary Law Considerations*, 16 (2020); Michael Kumhof & Claire Noone, *Central Bank Digital Currencies-Design Principles And Balance Sheet Implications* 19 (Bank of Eng., Staff Working Paper, Paper No.725, 2018).

[68] COMMITTEE ON PAYMENT AND SETTLEMENT SYSTEMS, A GLOSSARY OF TERMS USED IN PAYMENTS AND SETTLEMENT SYSTEMS 11 (2016).

- Develop an understanding of the new risks posed as this will be crucial if a risk-based approach to Anti-Money Laundering and Countering the Financing of Terrorism are to be followed.

III. OVERVIEW OF RISKS FOR CONSUMERS OF RETAIL CBDC

CBDCs may pose different risks to, and confer benefits on, consumers. As mentioned above, unlike cryptoassets, a CBDC carries the backing of the central bank, depending on the bank's design choice. Another consideration is the fact that risks may be different for varying types of users.

A further consideration is the fact that cryptoassets are designed to disintermediate financial services, but new types of centralized entities, such as exchanges and wallet providers, offer key functions to users. In certain instances, these entities offer services such as exchanges, storage, and clearing, which require greater prudential regulation and payment system oversight.[69] The growing importance of these entities could lead them to be considered, from a financial stability perspective, as systemic financial market infrastructures. The question is now whether the risks to financial consumers of retail CBDCs are slightly different from those of cryptoassets such as cryptocurrencies and stablecoins.[70]

There are additional risks to consumers of CBDCs, which are universally accessible in a country. These consumer risks are now briefly examined.

A. CONSUMER RISKS, ANALYSIS OF LEGAL AND REGULATORY GAPS, AND RECOMMENDATIONS

Lawack highlighted four key themes of consumer protection for CBDCs: provision of information and transparency, dispute resolution, fraud prevention, and data privacy and protection. In addition to these, Lawack, Mupanghavanhu, and Olivier identified further related risks, namely: payment risks, depositor protection, and accountability. Each of these are now discussed briefly in relation to retail CBDCs.[71]

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[69] Vivienne Lawack et al., *Consumer Protection Law Aspects of Cryptoassets*, *in* FINTECH LAW AND REGULATION: AN AFRICAN PERSPECTIVE, JUTA 1, 315 (2023).

[70] *Id*. at 118; *see also* REGULATORY REQUIREMENTS AND ECONOMIC IMPACT WORKING GROUP, REGULATORY CHALLENGES AND RISKS FOR CENTRAL BANK DIGITAL CURRENCY 14 (2019).

[71] Vivienne Lawack et al., *The Protection of Consumers of Retail Central Bank Digital Currencies – Some Considerations*, 86 T.H.R.H.R 285-306 (2023); *see generally* DIGITAL CURRENCY

1. Provision of Information and Transparency

With traditional currencies, consumers can redeem the value of their deposits on a one-to-one basis, at any given time. This will be the same for retail CBDCs if CBDCs are afforded the same status of legal tender, just as physical cash is (notes and coins of certain denominations in terms of the SARB Act).[72] Where proceeds from a stablecoin are held, not in the depository account, but in financial instruments or assets (such as securities or government bonds), the value of the stablecoin is also subject to risk exposure.[73] In the case of stablecoins, the risk for consumers, from both the investor and retail buyer or seller's perspective, is that the price may be volatile. If consumers are unable to redeem the face value of such currency, they may raise deposit liability claims. There is also a possibility that the rights of the consumer may be infringed by the majority holders.[74] Furthermore, the lack of regulatory guidelines relating to the relevant governance and risk management policies of the issuers and their reserves management creates further risk exposure, which is not present with traditional bank deposits. If the SARB decides to issue a retail CBDC itself or through registered intermediaries, it must adopt prudential standards to deal with these government and risk management issues.

2. Dispute Resolution

Disputes are inevitable in business. Where they do occur, a prompt, efficient, and effective resolution of the dispute saves time and money. It is, therefore, important to not only establish good rules and regulations, but also to ensure that they are enforced by bringing to account those in violation.

In the South African financial sector, when disputes arise, they may be referred to the Ombud for Financial Service Providers (FSPs). This is an office created under section 20 of the Financial Advisory and Intermediary Services (FAIS) Act[75] for the quick, affordable, and fair

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CONSUMER PROTECTION RISK MAPPING (2021); PARMA BAINS ET AL., REGULATING THE CRYPTO ECOSYSTEM: THE CASE OF UNBACKED CRYPTO ASSETS 15–21 (2022); GLOB. BLOCKCHAIN BUS. COUNCIL, GLOBAL STANDARDS MAPPING INITIATIVE 2.0 7-8 (2021); *see generally* FIN. STABILITY BD., REGULATION, SUPERVISION AND OVERSIGHT OF CRYPTO-ASSET ACTIVITIES AND MARKETS (2022).

[72] South African Reserve Bank Act 90 of 1989 § 17 (S. Afr.).

[73] Lawack et al., *supra* note 69, at 316.

[74] *Id*. at 318.

[75] Financial Advisory and Intermediary Services Act 37 of 2002 § 20 (S. Afr.).

resolution of disputes in the sector. An Ombud Council established under the FSR Act[76] aids financial consumers in accessing the appropriate financial ombud for the resolution of disputes. It must also ensure that financial consumers have affordable, effective, independent, and fair access to alternative dispute resolution processes in the sector. The Ombud's mandate should be reviewed to ensure that consumer complaints relating to CBDCs may also be heard by the Ombud. In addition to dispute resolution through the Ombud, a Financial Services Tribunal was also established by the Act to reconsider decisions and perform other functions given through this Act or other financial sector law. The Ombud should, however, evaluate its existing rules to determine whether its ambit covers disputes pertaining to cryptoassets. If it does not, the Ombud's role should be expanded to include any complaints from consumers of retail CBDCs. In the establishment of a retail CBDC, it should be clear, from the outset, which dispute resolution mechanisms would be applicable, and consumers should be made aware of such mechanisms.

3. Security and Technology Risks and Fraud Prevention

There is a risk that poor technical design and security protocols could negatively impact the consumer.[77] Given that the average consumer may not have a detailed understanding of the systems underlying the retail CBDC, appropriate technical and audit standards would be necessary to offset or neutralize technical impediments, which can indirectly cause consumer risk. In addition, the value of increasing digital literacy in consumers cannot be overemphasized. Regulators should consider differences in digital literacy of consumers and how this may increase or decrease the risk. Regulators should also standardize ways of conducting technical audits. In addition, regulators should consider ways to increase consumer understanding through educational campaigns that seek to promote digital literacy. Finally, regulators should encourage promotion of transparency by service providers, so that the consumer can make an informed choice. These considerations could be catered for consumers through training as well as through regulation.

As with other financial products and services, CBDCs are not exempt from fraud. Fraud in the financial sector is not a new phenomenon. Examples of fraud related to cryptoassets are phishing, Ponzi schemes, rug

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[76] Financial Sector Regulation Act 9 of 2017 § 176 (S. Afr.).

[77] Lawack et al., *supra* note 69, at 319.

pull schemes, hacking, and romance scams, to name but a few. It is important that CBDCs are designed in such a way that they do not become susceptible to these fraud risks that are already prevalent in cryptoassets such as cryptocurrencies.

In South Africa, fraud is regulated by both common law and legislation. In relation to fraud in the financial sector, the following legislation is applicable: Prevention of Organized Crime Act,[78] FIC Act,[79] Protected Disclosures Act,[80] Companies Act,[81] Prevention and Combating of Corrupt Activities Act,[82] Protection of Constitutional Democracy Against Terrorist and Related Activities Act,[83] Banks Act,[84] Inspection of Financial Institutions Act,[85] Mutual Banks Act,[86] and the Cooperative Banks Act.[87] Whilst a detailed examination of these pieces of legislation falls outside the ambit of this article, it is worth noting that some of the above pieces of legislation do not deal with fraud-related activities in detail.

In all these statutes, fraud is a financial crime punishable with a prison sentence and/or a fine. The regulatory approach adopted in the Conduct of Financial Institutions (CoFi) Bill aligns with the principle-based regulatory method, rather than a rule-based model. As such, the bill does not envisage imposing criminal penalties for non-compliance. This article recommends that the CoFI Bill should include this requirement and require FSCA to monitor, supervise, and enforce compliance.

4. Privacy and Data Protection Risks

Given the highly private nature of transactional data, transparency about the information-handling practices of retail CBDC issues would be paramount to consumer trust and confidence and would ensure consumers' data is private and protected. The choices of third-party wallet providers and other application-level developers or operators may increase risk and

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78 *See* Prevention of Organized Crime Act 121 of 1998 § 68 (S. Afr.).

79 *See* Financial Intelligence Centre Act 38 of 2001 § 3 (S. Afr.).

80 *See* Protected Disclosures Act 26 of 2000 § 2 (S. Afr.).

81 *See* Companies Act 71 of 2008 § 22 (S. Afr.).

82 *See* Prevention and Combating of Corrupt Activities Act 12 of 2004 § 34 (S. Afr.).

83 *See* Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 § 4 (S. Afr.).

84 *See* Banks Act 94 of 1990 §1A (S. Afr.).

85 *See* Inspection of Financial Institutions Act 80 of 1998 (S. Afr.).

86 *See* Mutual Banks Act 124 of 1993 § 38 (S. Afr.).

87 *See* Cooperative Banks Act, 40 of 2007 § 79 (S. Afr.).

create confusion among consumers regarding accountability for the data and the consequences of data breaches.[88]

A further risk to privacy has emerged in relation to surveillance by blockchain analysis companies. These companies can match on-chain transactions with other publicly available data.[89] For this reason, if retail CBDCs are issued through authorized intermediaries or wallet providers, rather than the SARB, these service providers will have to provide a high degree of transparency and clarity on their data-handling practices and describe what protective and preventative measures they employ against external surveillance. If regulators do not require consumer transparency on these issues and there is, for example, a data breach, it could lead to a lack of consumer trust and confidence in retail CBDCs. Clear conduct standards should be drafted with clear details on the obligations and liability of intermediaries for possible data breaches and to safeguard consumers against external surveillance. Also, the Electronic Communications and Transactions Act[90] is outdated[91] and would have to be aligned with the provisions relating to data privacy in the Protection of Personal Information Act.[92] A detailed discussion on this issue falls outside of the ambit of this article.

5. Payment Risks

Different payment instruments carry different consumer risks and consumer protections. For example, money, which serves as legal tender, is one hundred percent guaranteed by the central bank.[93] However, it is not protected against loss. When deposited with a bank, it becomes part of commercial bank money and is guaranteed if the jurisdiction requires adequate capital ratios or has a depositor protection scheme to protect the consumer against the risk of error, unauthorized payments, or insolvency. Like stablecoins and cryptocurrencies, CBDC would not be a true digital equivalent of cash unless the legal and regulatory framework establish it as legal tender, and thus a liability on the central bank. In addition, even though stablecoins and CBDCs appear similar to cash they have some

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88 Lawack et al., *supra* note 69, at 319.

89 *Id.* at 318–19.

90 *See* Electronic Communications and Transactions Act 25 of 2002 (S. Afr.).

91 Lawack, *supra* note 69, at 318.

92 *Id.* at 339.

93 *See* Reserve Banks Act 90 of 1989 §17 (S. Afr.).

different functions.[94] One such example is the "push" transaction (initiated by the payer) or the "pull" transaction (initiated by the beneficiary). In the case of the push transaction, the payer needs to know the payee's details and their financial institution account number.[95] While both transactions are subject to cybersecurity risks, the push transaction is less risky since it will only be affected if there are sufficient funds available in the payer's account.[96] By contrast, in a pull transaction, the payee runs the risk that the transaction may "bounce" if there are insufficient funds available.[97] These are some payment system issues to be considered when the central bank decides how to design the retail CBDC.

6. Depositor Protection

Depending on the design choice of the CBDC (whether direct or through an intermediary), the risk of insolvency of the issuer or service provider and the deposit-taking institution where the issuer or service provider deposits its user's funds should be considered. In the author's view, the SARB may be required to expand the capital ratio requirements of the deposit-taking institution or have a deposit insurance scheme.[98] In addition, it can be argued that it would be better to have a retail CBDC that is directly issued by the SARB as a direct liability on the SARB. If intermediaries are used, regulators should carefully consider consumer risks and establish clear frameworks on how to protect depositors from insolvency.

In South Africa, the Intergovernmental Fintech Working Group recommended regulating Cryptoasset Service Providers. The Intergovernmental Fintech Working Group recommended amending the FIC Act[99] to include Cryptoassets Service Providers as accountable institutions.[100] The rationale was to make Cryptoassets Service Providers accountable institutions subject to compliance with FICA obligations and FIC supervision.[101] In the absence of a regulatory framework, their interface with all market structures was strongly discouraged. It is

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[94] Lawack, *supra* note 2, at 317.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *See* Financial Intelligence Centre Act 38 of 2001(S. Afr.).
[100] *See* Crypto Assets Regul. Working Grp., Position Paper on Crypto Assets 27–28 (2021).
[101] *Id.*

encouraging to see that these recommendations were considered, as the Minister of Finance and the legislature approved the amendments to the FICA which included Cryptoassets Service Providers as one of the accountable institutions in terms of the FICA schedule amendments passed in 2022.[102]

The Intergovernmental Fintech Working Group also urgently recommended that cryptoassets be declared financial products under the FAIS Act.[103] The Intergovernmental Fintech Working Group further recommended that financial services provided in relation to cryptoassets should fall under the FSR Act's definition of financial services and should be licensed under the CoFI Bill.[104] Upon commencement of the CoFI Bill, the FSCA will become the licensing authority for cryptoasset services and the FSCA will develop conduct standards for them.[105] It is important to note that CBDCs are not cryptoassets and, therefore, the declaration of cryptoassets as "financial products" in the FAIS Act would not apply to CBDCs.[106]

The Intergovernmental Fintech Working Group recommended that licensing requirements be established and that specific conduct standards be developed under the CoFI Bill.[107] Service providers offering custodial services and digital wallet provisioning should be placed within the appropriate licensing activity under the CoFI Bill and should meet the definition of financial services under the FSR Act.[108] The specific conduct standards to be made applicable to the provision of such activities should include any other relevant requirements. This article recommends that separate, clear conduct standards be drafted to deal with retail CBDC intermediaries, in addition to clear prudential standards.

In a drive to promote learning for financial consumers, the Intergovernmental Fintech Working Group recommended increased financial consumer education organized by FSCA and other relevant stakeholders.[109] This article submits that whether retail CBDCs would be token-based or account-based through intermediaries, the requirements for

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[102] Financial Intelligence Centre Act 38 of 2001 (S. Afr.).
[103] *See* Crypto Assets Regul. Working Grp., *supra* note 100.
[104] *Id.* at 31.
[105] *Id.* at 28.
[106] *Id.* at 8–9.
[107] *Id.* at 30.
[108] *Id.* at 31–32.
[109] *See id.* at 22.

raising awareness of retail CBDCs and improvement of financial and digital literacy would be the same as for cryptoassets.

7. Accountability

The question arises as to who should be accountable in CBDC ecosystems. In traditional bank and payment systems that rely on cash, commercial banks, as the distributors of money, provide consumer protection and guarantees.[110] Accountability in these cases can be determined by examining the contract with bank customers. Therefore, policymakers should carefully consider who the accountable party should be in the CBDC ecosystem, especially if the SARB will not be the direct issuer of retail CBDCs. The above will have an important impact on regulatory requirements and the interaction between the SARB, the FSCA, and telecommunications regulators. In view of the highlighted consumer risks, it is necessary to understand the legal or regulatory gaps in existing legislation and regulation.

The key takeaway for the SARB is that the above consumer risks would apply, in different ways, to both CBDCs and cryptoassets. Therefore, it is important to analyze the consumer risks depending on the retail CBDC design and then analyze the relevant legal and regulatory gaps.

B. Summary of Analysis of Current Legislative and Regulatory Gaps and Recommendations

Lawack, Mupanghavanhu, and Olivier provide the following summary and recommendations, drawing from their analysis of current legislative and regulatory gaps in South Africa.[111]

The above section dealt in detail with payment, depositor protection, and accountability risks that retail CBDCs consumers are exposed to. With respect to the need for the provision of information and transparency, note that because South Africa has not yet issued CBDCs, there are not yet prudential standards in place to deal with this need for information and transparency. Should the SARB issue a retail CBDC or permit registered intermediaries to do so, prudential standards would have to be issued to deal with the governance and risk management issues.

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[110] Lawack, *supra* note 69, at 318.

[111] Lawack et al., *supra* note 73, at 285.

It is inevitable that disputes may arise with respect to retail CBDCs between service providers and consumers. While the FAIS Act creates an ombud for FSPs,[112] the Ombud should evaluate existing rules to determine whether the ambit of existing rules covers disputes pertaining to cryptoassets. If the current rules do not cover such disputes, they should be expanded so the Ombud can hear complaints from consumers of retail CBDCs. The relevant recommendation, in this regard, is that in establishing a retail CBDC, it should be clear from the outset which dispute resolution mechanisms would apply, and consumers should be made aware of such mechanisms.

A few related recommendations are made to counter the security, technology, and fraud risks of using retail CBDCs, especially for the less informed and vulnerable consumers. This article recommends the following interventionist strategies from both prudential and market conduct perspectives. The first one is that the development of the appropriate technical and audit standards would be necessary to offset or neutralize technical impediments that can indirectly cause consumer risk. The second proposition emphasizes the promotion of digital literacy through educational campaigns and encourages the promotion of transparency among service providers to enable the consumer to make informed choices. A third recommendation draws lessons from the risks of fraud associated with Ponzi schemes and cryptocurrencies. In this regard, this article recommends that CBDCs be designed in such a way that they do not become susceptible to these fraud risks that are already prevalent in cryptoassets such as cryptocurrencies. Additionally, this article recommends amending the CoFI bill to include criminal sanctions for fraud.

Consumer trust and confidence are important if retail CBDCs are to be successful when they are introduced. For this reason, it is vital to ensure the privacy and data protection of consumers of CBDCs. This article recommends that clear conduct standards be drafted with clear details about the obligations and liability of intermediaries for possible data breaches. This may safeguard consumers against external surveillance. In this regard, the outdated provisions of the Electronic Communications and Transactions Act would have to be aligned with the provisions relating to data privacy in the Protection of Personal Information Act.

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[112] Financial Advisory and Intermediary Act 68 of 2008 § 20 (S. Afr.).

In order to ensure depositor protection, as is the case with customers of traditional banks, this article recommends that SARB should consider carefully if retail CBDC should be directly issued by the SARB, a move which would impose direct liability on the SARB. If intermediaries are used, SARB should carefully consider the risks for consumers and develop clear frameworks on how depositors using retail CBDCs issued by intermediaries on behalf of the SARB would be protected against insolvency. Clear conduct standards should be drafted to deal with retail CBDC intermediaries, in addition to clear prudential standards. The requirements for raising awareness of retail CBDCs and improvement of financial and digital literacy should be the same as for cryptoassets. With regard to accountability, SARB should, therefore, carefully consider who the accountable party should be in the CBDC ecosystem, especially if the SARB will not be the direct issuer of retail CBDCs.

In the author's view, South Africa has a potentially effective legal and regulatory framework established in terms of the current FSR Act, which has put in place both prudential and market-conduct standards, as well as relevant bodies to enforce the identified standards. The market-conduct standards, in particular, are aimed at minimizing and, if possible, closing the information asymmetry gap between FSPs and their consumers through improved transparency. The aim is to inculcate a culture of awareness of standards and dispute resolution mechanisms on the part of consumers. The aim also is to raise awareness among the FSPs of the need to ensure compliance with the law and encourage them to ensure good outcomes for consumers.

There are, however, some gaps even in promising legislation in the pipeline such as the CoFI Bill. The bill, for example, should have mechanisms to ensure that financial institutions have systems in place to constantly monitor service and product delivery and curb risks relating to retail CBDCs as early as possible. It was earlier highlighted that the bill should include criminal sanctions to deal with fraud risks.

With respect to the FAIS Act, the licensing requirements for bank and non-bank FSPs of cryptoassets (and possibly CBDCs) would need to be developed as an interim measure until the CoFI Bill is enacted and the FAIS Act repealed. It is normal in financial services law to debate whether the Consumer Protection Act applies to consumer protection matters in the financial services sector. However, because the FSCA regulations in the form of the CoFI Bill do not yet exist, it can be argued that, until it enters into force, the Consumer Protection Act is applicable to all issues in

market conduct in the financial sector for which there is no current regulatory framework superseding the act.

The key takeaway here is that any policy decision on a retail CBDC would necessitate a complete legal gap analysis to support the establishment of a retail CBDCs within a legally secure CBDC ecosystem and ensure the protection of financial consumers.

C. ANTICIPATED CHANGES TO LEGISLATION TO ACCOMMODATE CBDC

From a legal and regulatory perspective, when looking at the feasibility, desirability, and appropriateness of issuing a CBDC for South Africa (whether wholesale or retail), I am of the view that the appropriate place to start is to conduct a review of the current legal and regulatory framework on what is referred to as "financial sector laws" in South Africa. These are the financial sector laws as envisaged in the FSR Act 9 of 2017.

This review of the financial sector laws encapsulates that there must be an evaluation of the existing provisions in this framework against the nature and characteristics of CBDC as well as the legal and regulatory consequences of issuing a CBDC, as this may determine the extent of amendments needed to cater for the issuance and legal regulation of a CBDC, and in this case, even more so specifically for a retail CBDC. It is submitted, upon analysis of the applicable financial sector laws, that the following pieces of legislation (in alphabetical order), as amended, would need to be evaluated:

Banks Act 94 of 1990
Collective Investment Schemes Control Act 45 of 2002
Co-operative Banks Act 40 of 2007
Currency and Exchanges Act 9 of 1993
Financial Intermediary and Services Act 37 of 2002

Financial Institutions (Protection of Funds) Act 28 of 2001
Financial Intelligence Centre Act 38 of 2001
Financial Markets Act 19 of 2012
Friendly Societies Act 25 of 1956
Insurance Act 18 of 2017
Mutual Banks Act 124 of 1993
National Credit Act 34 of 2005
National Payment System Act 78 of 1998
Pension Funds Act 24 of 1956
Proposed Conduct of Financial Institutions Bill [B -2020] (second draft)
South African Reserve Bank Act 90 of 1989

IV. CONCLUDING REMARKS: THE MANDATE OF THE SARB AND CBDC

It is evident from the above that extensive work still needs to be done to enable legal certainty and to provide an adequate and appropriate legal and regulatory framework for CBDCs and, in particular, retail CBDCs in South Africa.

In considering the legal, policy, and regulatory considerations, it is evident that this does not mean that SARB or central banks elsewhere are threatened or in crisis as a result of fintech innovations such as CBDC. The mandate of SARB—price stability and financial stability—will not

change. This article highlights the various risks that regulators may need to consider and further highlights the legislative and regulatory gaps that exist and must be addressed before CBDCs may be introduced in South Africa.

It is not easy to strike a balance between promoting fintech innovations such as CBDCs and confronting the challenges posed by them. One could argue that it is sometimes impossible to simultaneously achieve the goals of promoting financial innovation, ensuring market integrity, and developing clear rules for the financial sector, and policymakers must then choose or tradeoff between these goals.

What is evident, is that regulatory coordination and cooperation would need to be strengthened if South Africa is to realize the full potential and benefits of CBDCs. Central banks, such as SARB, have a key role to play in enabling this form of regulatory coordination and cooperation.