South African Institute of Race Relations NPC

Submission to the National Treasury

regarding the

DRAFT CAPITAL FLOW MANAGEMENT REGULATIONS

30 June 2026

TABLE OF CONTENTS **Page**

1. INTRODUCTION	2
2. INADEQUATE PUBLIC PARTICIPATION	2
3. THE IMPORTANCE OF BITCOIN AND OTHER CRYPTO ASSETS	5
4. THE UNCONSTITUTIONALITY OF MANY OF THE PROPOSED RULES	9
4.1 Limits on the right to trade	9
4.2 Limits on the right to privacy	11
4.3 Limits on property rights	12
4.3.1 Constraints on self-custody of crypto assets	12
4.3.2 The declaration and compulsory sale of crypto assets	13
4.3.3 Forfeiture under Regulation 4 for unauthorised exporting	15
4.3.4 Forfeiture under Regulation 24 following “attachment”	17
4.3.5 Forfeiture under Clause 25 and possible disposal	17
4.4 No adequate justification under Section 36	19
4.5 Unconstitutionality on other grounds as well	20
5. RAMIFICATIONS	21
5.1 The death of crypto-based trading in South Africa	21
5.2 Heavy-handed requirements at odds with those in Western democracies	21
5.3 Damaging controls likely to encourage a flight of skills and capital	22
5.4 An urgent need for foreign direct investment	22
5.5 The chilling effects of the Regulations	23
6. THE WAY FORWARD	25

1 Introduction

On 17 April 2026 the National Treasury ("the Treasury") invited interested persons to submit public comments on the Draft Capital Flow Management Regulations ("the Regulations") within 30 days or by 18 May 2026. It later postponed the deadline for comment to 30 June 2026.

This submission on the Regulations is made by the South African Institute of Race Relations NPC ("IRR"), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation among the peoples of South Africa.

2 inadequate public participation

Public participation in the legislative process is a vital aspect of South Africa's democracy, as the Constitutional Court has repeatedly reaffirmed in judgments spanning well over a decade. These include *Matatiele Municipality and others* v *President of the Republic of South Africa and others*, *Doctors for Life International* v *Speaker of the National Assembly and others*, *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*, and *Mogale and others* v *Speaker of the National Assembly and others.*[1]

In the *New Clicks* case in the Constitutional Court, Mr Justice Albie Sachs noted that there were many ways in which public participation could be facilitated. He added: "What matters is that...a reasonable opportunity is offered to members of the public and all interested parties to "*know about the issues* and to *have an adequate* say". This passage was quoted with approval in *Doctors for Life*, the *Land Access* case, and in the *Mogale* judgment striking down the Traditional and Khoi-San Leadership Act of 2019.[2]

2.1 No socio-economic impact report

To help the public "know about the issues", as the *New Clicks* ruling and other judgments require, the Treasury should have provided a comprehensive evaluation of the Regulations and their likely socio-economic impact. A report of this kind is also what is needed under the government's own *Guidelines for the Socio-Economic Impact Assessment System (SEIAS)*.

The *Guidelines* were developed by the Department of Planning, Monitoring and Evaluation in May 2015 and took effect in September that year. The aim of the SEIA system is to ensure that "the full costs of regulations and especially the impact on the economy" are fully understood before new rules are introduced.[3] According to the *Guidelines*, the SEIA system must be applied at various stages in the policy process. Once new rules have been proposed, "an initial assessment" must be conducted to identify different "options for addressing the problem" and make "a rough evaluation" of their respective costs and benefits. Thereafter, "appropriate

[1] [2006] ZACC 12; 2007 (1) BCLR 47 (CC); 2006 (6) SA 416 (CC); 2016] ZACC 22; [2023] ZACC 14.

[2] Section 59(1), Constitution of the Republic of South Africa, 1996; *Minister for Health and another* v *New Clicks South Africa (Pty) Ltd and others*, [2005] ZACC 14, at para. 630, emphasis supplied by the IRR; *Doctors for Life*, at para. 145; *Land Access* judgment, at para. 59; *Mogale* judgment, at para. 34.

[3] Department of Planning, Monitoring and Evaluation, "Socio-Economic Impact Assessment System (SEIAS), Revised Impact Assessment: National Health Insurance Bill," 26 June 2019 (2019 SEIAS Assessment); *SEIAS Guidelines*, p. 3, May 2015.

consultation" is needed, along with "a continual review of the impact assessment as the proposals evolve."[4]

A "final impact assessment" must then be developed that "provides a detailed evaluation of the likely effects of the [proposed law] in terms of implementation and compliance costs as well as the anticipated outcome." When new rules are published "for public comment and consultation with stakeholders," this final assessment must be attached to them. A particularly important need is to "identify when the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration."[5]

The Regulations pose risks of precisely this kind, for they are likely to deter fixed investment, encourage capital flight, limit economic growth and worsen unemployment. Yet no proper SEIA assessment has been made available to help the public develop an informed understanding of the likely ramifications of the changes they propose.

2.2 Poor compliance with the National Policy Development Framework

The Treasury is also expected to comply with the *National Policy Development Framework* ("the *Framework*"), which was approved by the Cabinet in December 2020 and is intended to help give effect to the *National Development Plan: Vision 2030*.

The *Framework* seeks to improve policy development by "ensuring meaningful participation" and "inculcating a culture of evidence-based policy making."[6] In a section dedicated to "Stakeholder Engagement in Policy Making," the *Framework* states: "Chapter 10 of the Constitution prescribes that people's needs must be responded to, and the public must be encouraged to participate in policy making. Therefore, the involvement of the public in policy making is a constitutional obligation that government institutions must respect and institutionalise."[7]

The *Framework* goes on to list some of the key requirements for proper public participation. "Consultation with stakeholders should commence as early as possible," it says. All relevant stakeholders should be identified, including "those who will benefit when problems are addressed" and "those who will bear the cost of implementation of the proposed intervention." Policy makers must also identify and counter all "barriers to active participation" and ensure that "consultation is infused in all aspects of the policy making cycle."[8]

According to the *Framework*, adequate thought must be given to "which policy solutions would best achieve the public policy objective" and "how best" the proposed policy solution can be implemented. Policy makers must "inform and engage stakeholders" on "the nature and magnitude of a policy issue," along with its likely "impacts and risks." These assessments must be "informed by the best available evidence, data, and knowledge."[9]

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[4] *SEIAS Guidelines* p. 7.
[5] *SEIAS Guidelines*, p. 11.
[6] National Policy Development Framework, 2020, p. 3.
[7] Ibid, p. 19.
[8] Ibid, pp. 19 – 20.
[9] Ibid, p. 20.

In addition, policy makers must be willing to adjust their proposals in the light of the feedback provided. "Policy makers must not impose their preconceived ideas…and pre-empt the outcome of the policy consultation process. They need to be willing to be persuaded and acknowledge the input of stakeholders with a view to creating a win-win policy outcome." They must also avoid any impression that "the consultation process is staged, managed, cosmetic, token, and a mere compliance issue." Instead, they must "strive to produce an outcome based on bargaining, negotiation, and compromise."[10]

The *Framework*, with its emphasis on negotiation and compromise in the best interests of the country, is also being ignored. Instead, what the *Framework* expressly rejects – a "tick-box" approach to consultation – is evident as regards the Regulations.

2.3 A "tick-box" approach already evident

Though the Regulations are likely to have many negative effects, the Treasury has nevertheless adopted a "tick-box" approach to public consultation. Instead of providing a comprehensive SEIA report – or "informing and engaging stakeholders" on "the nature and magnitude" of the proposed changes and their likely "impacts and risks", as the *Framework* requires – the Treasury has provided no assessment at all of likely costs and consequences.

All it said, in its gazetted notice calling for comments, is that the Regulations "seek to, amongst other things:

(a) align the exchange control framework with Organisation for Economic Co-operation and Development and Financial Action Task Force recommendations aimed at combating money laundering, terrorist financing and the proliferation of illicit financial flows;
(b) bring crypto-assets within the ambit of exchange control framework (sic) in order to address risks and ensure oversight of emerging financial instruments;
(c) clarify exemptions, permissions, and conditions; and
(d) impose administrative sanctions where there is non-compliance with the Regulations."[11]

In addition, a media statement released by the National Treasury on 20 April 2026 provides a different rationale for the Regulations. It says that "the amendments signal South Africa's readiness to modernise and adopt a 'positive bias' approach to managing cross-border capital flows through fewer transaction pre-approvals, a focus on reporting, the surveillance of high-impact and high-risk cross-border transactions, and the combating of illicit financial flows. This shift will align South Africa with international best practice, while also managing various risks using a risk-based approach and existing macroprudential tools."[12]

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[10] Ibid.

[11] National Treasury, "Draft Capital Flow Management Regulations 2026: Invitation for Public Comment," Government Gazette, No 45420, 17 April 2026..

[12] South African Government, Official Information and Services, "National Treasury invites public comment on draft Capital Flow Management Regulations, 2026," 20 April 2026. https://www.gov.za/news/media-statements/national-treasury-invites-public-comment-draft-capital-flow-management.

This statement is at odds with the what the Treasury said in its gazetted notice. It is also misleading in claiming that:

- there will be "fewer transaction pre-approvals;"
- the emphasis is to fall on "high-impact and high-risk cross border transactions;" and
- the amendments will "align South Africa with international best practice."

In addition, both the gazetted notice and the media statement brush over the fact that the Currency and Exchanges Act of 1933, under which the Regulations are to be adopted, was enacted 93 years ago – and more than six decades before the 1996 Constitution came into effect. The 1933 Act purports to authorise searches, attachments and forfeitures of the kind set out in the Regulations, but this is not nearly enough. All branches of government, including the National Treasury, must now comply with the Constitution at all times. Where regulations limit guaranteed rights – including the rights to privacy, property, and freedom of trade – such limitations must be "reasonable and justifiable," as required by Section 36 of the Constitution.

The Regulations must also comply with other relevant provisions in the Constitution. These include the doctrine against uncertainty of laws and the need for regulations to be *intra vires* (within the powers of) their principal statutes. The separation of powers between the legislative, executive and judicial branches of government must also be upheld.

The limited, contradictory and sometimes patently incorrect information provided by the Treasury in seeking public comment on the Regulations overlooks all these important points. It also fails to provide a comprehensive analysis the likely costs and consequences of the Regulations. These omissions have denied South Africans the opportunity to "know about" the issues raised by the Regulations and then to have "an adequate say" on the proposed changes. The Treasury has thus failed to promote public participation in policy development, as the Constitution requires.

This submission focuses on the proposed rules for crypto assets. However, the concerns raised in this context often apply in equal measure to other provisions in the Regulations.

3 The importance of bitcoin and other crypto assets

Since the Regulations bring crypto assets under draconian exchange and other controls, it is important to start by understanding what these assets are. It is also worth noting the valuable role that bitcoin and other crypto currencies play in protecting people against governments with policies that inhibit investment, growth, employment and prosperity.

This brief overview focuses on bitcoin, the cryptocurrency most widely known and probably still most widely used. Bitcoin's significance is best explained via a brief historical overview of the importance of money as a store of value and a medium of exchange in societies across the centuries. With few exceptions, this historical record shows that governments commonly engage in practices that erode the value of their money over time. The best way of guarding against this is to find forms of money that are difficult to create.

As IRR CEO Dr John Endres has pointed out: "Money works best as a store of value and a medium of exchange when nobody can suddenly make a lot more of it. Over millennia, various things have served as money at different times, including shells, salt, beads, silver, and eventually gold. Across cultures and over centuries, societies kept converging on forms of money that shared one particular characteristic: they were difficult to create."[13]

This characteristic is essential. If money becomes easy to produce, more of it will inevitably be created and its capacity to act as a store of value will diminish. This has happened time and again throughout history, from the clipping of coins in ancient times to modern inflation.

In the 20th century, payment methods in many countries were digitised for greater speed and convenience. However, digital information can always be copied, which meant that digital payments had to be made via trusted intermediaries – such as banks, card networks, and payment companies – that could maintain a central ledger and prevent cheating.

Dr Endres explains further: "By the late twentieth century, money had largely become digital. Most of the money we use today is not physical at all. It exists as entries in databases: numbers recorded in banking systems that track who owns what… Digital money moves quickly. Payments can happen across continents in seconds, [while] commerce scales far beyond what physical settlement ever allowed."[14]

However, when digital payments are used, it is vital to prevent double spending. To this end, banks and other trusted intermediaries maintain ledgers that record balances and verify transactions. "When you make a payment, what actually happens is that trusted intermediaries update their databases to reflect a transfer of ownership… This is not a trivial task. It is an enormous technical and operational challenge. Modern banking systems must keep vast ledgers synchronised across millions of accounts, operating continuously with extremely high reliability. Systems must be secure against fraud and cyberattack, constantly backed up, redundantly stored, and carefully updated – often while running on layers of legacy hardware and software built decades ago."[15]

For a long time, this complex system with its inherent weaknesses seemed unavoidable, notes Dr Endres. "If digital money required someone to maintain the ledger, then money in the digital world would always depend on trusted intermediaries. Which is why, for decades, economists and computer scientists assumed truly decentralised digital money was impossible."[16]

This remained the case until 2009, when bitcoin emerged. Bitcoin is a digital currency that resists both cheating and inflation. It does so, in essence, by establishing a public ledger that is not controlled by any single institution and can be verified by anyone. The bitcoin ledger is distributed across thousands of separate computers in countries around the world. Instead of one authority maintaining the record, many participants maintain copies simultaneously.

Anyone can join the network, download the ledger, and independently verify the entire transaction history. But this immediately raises a problem. If nobody is in charge, who decides which transactions are valid? And how do participants agree on a single shared history without trusting one another? Writes Dr Endres:

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[13] John Endres, "Bitcoin: The freedom money that wants to change the world," Daily Friend, 5 March 2026. https://dailyfriend.co.za/2026/03/05/bitcoin-the-freedom-money-that-wants-to-change-the-world/.
[14] Ibid.
[15] Ibid.
[16] Ibid.

> "Bitcoin's answer combines three ideas: transparency, competition, and energy. First, transactions are broadcast openly to the network. Every participant uses the ledger to check whether the sender actually possesses the funds they are trying to spend. Because the ledger is public, verification does not depend on trust. It depends on mathematics and shared rules.
>
> Second, transactions are grouped into blocks, and participants compete to add the next block to the ledger. These participants are known as miners… To add a block, miners must solve a computational puzzle that requires substantial real-world electricity and specialised hardware. The puzzle itself has no shortcut. The only way to solve it is through trial and error, performing vast numbers of calculations.
>
> The first participant to find a valid solution earns the right to add the next block of transactions and receives newly created bitcoin as a reward. Because creating a block requires real energy expenditure, rewriting history would require redoing that same work and then surpassing the combined effort of the rest of the network. As the system grows, this becomes astronomically expensive.[17]

This factor solves the problem of trust. Instead of having to trust an institution, participants trust the fact that altering the record would cost more than anyone could reasonably gain. Over time, each new block builds on the previous one, forming a chain of blocks – which we call the blockchain. Changing a past transaction requires undoing all the work done since that transaction was carried out. This history becomes increasingly secure as time passes.

Bitcoin also has rules to curb supply and prevent inflation. Explains Dr Endres: "The rules governing supply are built into the system itself. New bitcoin are issued at a predictable rate, and that issuance decreases over time according to a schedule known in advance. No participant – not miners, not developers, not governments – can arbitrarily create more."[18]

Bitcoin thus solves the problem of monetary debasement. This phenomenon is "far more universal than many people realise. Across history, and across political systems, governments expand the money supply. Sometimes gradually, sometimes catastrophically. No country is entirely immune."[19]

Preventing debasement is particularly important in extreme environments with little economic stability. Take the example of Venezuela, which used to be one of the wealthiest countries in South America. After years of monetary collapse, inflation reached extraordinary levels, wiping out savings and salaries. Opposition leader María Corina Machado has described how hyperinflation destroyed the country's financial system. She also notes that many Venezuelans turned to bitcoin to bypass currency controls and preserve value. She calls bitcoin a "lifeline" that helps citizens escape government-imposed exchange systems and safeguard their savings.

For refugees needing to leave the country, bitcoin matters enormously. When national currencies collapse, physical cash often becomes worthless both within countries and across borders. Bitcoin has allowed some Venezuelans to carry their savings digitally, something Alex

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[17] Ibid.
[18] Ibid.
[19] Ibid.

Gladstein of the Human Rights Foundation has described as an emerging form of financial survival under authoritarian conditions. Adds Dr Endres:

> "Bitcoin has also proved valuable in authoritarian countries where financial systems are used as tools of control. In such countries, human rights groups and dissidents may struggle to receive funding because bank transfers can be blocked or monitored. According to the Human Rights Foundation, activists in countries such as Belarus used bitcoin to send millions of dollars directly to striking workers after their bank accounts were frozen during protests. Similarly, bitcoin donations have supported pro-democracy movements in Nigeria's EndSARS protests. They have also buttressed opposition efforts in multiple restrictive regimes – precisely because transactions can occur outside traditional financial gatekeepers.
>
> Bitcoin also facilitates remittances. Cross-border payments remain surprisingly slow and expensive, particularly for people sending small amounts of money internationally. Traditional remittance systems can take days and charge significant fees. Bitcoin-based transfers allow individuals to send value globally without relying on correspondent banking networks. This is one of the reasons populations facing currency instability or financial isolation increasingly experiment with it.
>
> Bitcoin also helps provide portability during crises. In wartime or periods of political collapse, access to banks can disappear overnight. Accounts may be frozen, ATMs shut down, or withdrawals restricted. In such situations, wealth which is stored digitally and under the personal control of individuals remains uniquely portable. As some human rights researchers have said, it provides an 'escape hatch' from financial crises as well as repression."[20]

These examples indicate that bitcoin's greatest value is in countries where governments are becoming increasingly authoritarian – or where their laws threaten property rights and could well trigger the rapid inflation (or hyperinflation) that Venezuela and Zimbabwe have experienced since 2000. Bitcoin is also vital to poor people wanting cheap and reliable ways to make remittances within countries and, even more so, across borders. These factors help explain the growing interest in bitcoin evident in South Africa.

What the Regulations show is that the government is well aware of bitcoin's increasing use – and is determined to resist the growth of a digital currency and payment system outside its control. It is also attempting to use a short-cut method to achieve this.

The correct approach, if bitcoin is indeed to be regulated by the state, would be to enact new legislation following thorough legislative scrutiny by Parliament. Instead, Treasury is trying to secure the state's control by expanding and rewriting exchange control regulations that have been in place since 1961. It is also seeking to adopt these new rules under a primary statute that was enacted in 1933. This short-cut approach has resulted in many oddities and anomalies in the Regulations. Often, moreover, it has resulted in proposed rules that conflict with what the Constitution requires.

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[20] Ibid.

4. The unconstitutionality of many of the proposed rules

Many of the provisions in the Regulations are prima facie inconsistent with guaranteed rights in Chapter Two of the Constitution. Many are also at odds with the rule of law, "the supremacy" of which is identified as a foundational value of South Africa's democracy in Section 1(c) of the Constitution. Some clauses are inconsistent with other provisions in the Constitution. This unconstitutionality is particularly evident in the rules regarding crypto assets, which are the focus here.

4.1 Limits on the right to trade

4.1.1 Mandatory intermediaries and specified conditions

Under Regulation 3 (4), "Every person" – other than an authorised crypto asset service provider ("CASP") – who intends to "buy [or] sell crypto assets must apply" to a CASP and "furnish the information and submit the documents" the CASP may require so as to ensure compliance with all relevant conditions.

Comment: Under this wording, the obligation to buy or sell bitcoin or other crypto assets via a CASP applies to ***all*** *such assets, not only those with a value above a specified threshold. This brings all bitcoin transactions within the government's purview and paves the way for them to be brought under increasing state control.*

Under Regulation 3(1), "no person," other than a CASP, may "buy [or] sell any crypto assets …with a value in excess of a determined threshold to any person" other than another CASP.

Comment: The rule that crypto assets must be sold by one CASP to another, rather than to an individual or enterprise, applies only to bitcoin and other crypto assets valued above a certain threshold. However, this threshold can initially be set at any level. Thereafter, it can also be changed at any time, as the Treasury sees fit. Increasingly, thus, South Africans look set to lose the financial freedom – and the protection against inflation and damaging policies – that bitcoin could otherwise provide.

Regulation 3(5) tightens the net further by stating that "a person", other than a CASP, may "not…use crypto assets acquired from [a CASP] for any purpose other than the purpose stated in their (sic) application." Moreover, such a person may "not do anything to cause the use of crypto assets for any purpose other than the purpose stated in their (sic) application."

In addition, under Regulation 3(3), a CASP may "only engage in those actions" it has been "authorised to perform." It may not "buy [or] sell…any crypto asset, except for those purposes or on those conditions that the National Treasury may determine." Moreover, the Treasury, "at its discretion," may at any time prohibit a CASP from engaging in any crypto transactions at all with "any specified person, fund or foreign government." At its discretion, the Treasury may also bar any CASP from engaging in any transactions with "any crypto asset for any specified purpose, except for those purposes or on conditions that the National Treasury may determine."

Comments: Applicants to CASPs will not only have to provide an array of invasive personal details, but will also be required to state for what purpose the crypto assets are needed. They will also then have to ensure that those assets are used solely for the specified purpose. Hence, for example, if they say that they want them for investment purposes, they will not be allowed to *use them to assist relatives who might unexpectedly need their help. Nor will they be able to start using bitcoin inside South Africa to buy essentials for their own families – even if rising inflation has badly eroded the value of the rand and is pricing such items out of their reach.*

The new rules will also subject CASPs to unwarranted restrictions on their trading activities. In addition, they will create great uncertainty as to how these restrictions might change in the future. This is likely to inhibit trading and erode both business and investor confidence. If CASPs were in future to identify value in possible new activities, they would not be allowed to undertake them because these activities would fall outside the ambit of their authorised operations. Moreover, even after they have built up businesses on the basis of authorised activities, the Treasury could, at its discretion, introduce new "conditions" that hamper or prevent their continued operations.

The Regulations thus impose unwarranted and discretionary controls that go far beyond what might be needed to "combat money laundering, terrorist financing and the proliferation of illicit financial flows", as the Treasury's gazetted notice states.

There is also significant repetition in these clauses, which makes for unnecessary complexity. This repetition raises questions as to whether the slightly different wording used in different sub-regulations may in future be interpreted in different ways at different times. This increases the potential for uneven application and prima facie contradicts the doctrine against vagueness of law.

The Regulations also require individuals to declare crypto holdings above a specified threshold and puts pressure on them to sell these assets to the Treasury or CASPS (see Section 4.3.2 *below). Moreover, if the Regulations are implemented as written, crypto trading in South Africa will in practice become nearly impossible. The requirement for Treasury approval would make every significant crypto purchase or sale subject to bureaucratic delays. Writes IRR Policy Fellow, Ivo Vegter:*

> *"If you're a trader who moves in and out of positions frequently, you can forget it. The state will be looking over your shoulder and holding up your trades at every turn. For anyone involved in DeFi (decentralised finance), NFT (non-fungible token) trading, global crypto-based e-commerce, or simply sending bitcoin to family members abroad, this creates an impossible compliance burden.*
>
> *Cryptocurrency markets move in seconds. Arbitrage opportunities evaporate in milliseconds. The idea that traders must now either route large transactions through approved intermediaries – who will impose their own fees, conditions and delays – or queue up for formal National Treasury approval, would be funny if the consequences were not so serious."*[21]

These constraints are also inconsistent with Section 22 of the Constitution, which says: "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law." The Treasury may argue that its proposed new rules are sanctioned by the second sentence in Section 22. However, this contention is unconvincing. Regulations which are so invasive and draconian that they prevent

[21] Vegter, I, "The National Treasury is coming for your Bitcoins," Daily Friend, 1 May 2026. https://dailyfriend.co.za/2026/05/01/treasury-is-coming-for-your-bitcoins/.

crypto trading from happening at all do not simply affect the way in which such trading is practised. Rather, they make it impossible for people to "choose" this trade "freely", as Section 22 provides.

4.2 Limits on the right to privacy

The Regulations impose significant restrictions on the "import" or "export" of bitcoin and other cryptocurrencies. In doing so, they assume that crypto assets such as bitcoin are physical assets, similar to gold or foreign bank notes. Presumably what the Treasury is really seeking to obtain are the "keys" to bitcoin holdings, which many people prefer to keep under their own control.

4.2.1 Limits imposed under Regulation 4

Under Regulation 4(2): "Every person who is about to leave the Republic" must "declare whether…they (sic) possess or have control over any…crypto assets…intended to be removed from the Republic." They must also "produce" any such assets "in their possession or under their control" and show an enforcement officer the documents giving them permission to "remove" the crypto assets from the country.

In addition, under Regulation 4(3): "An enforcement officer may search any person or any article in that person's possession or under their control for the purpose of ascertaining whether the person possesses or has control of any…crypto assets – *(a)* if that person has denied the possession or control of any…crypto assets…; and *(b)* if the enforcement officer suspects, on reasonable grounds, that the person is in possession or control of any…crypto assets."

Moreover, under Regulation 4(5), "an enforcement officer may seize any…crypto assets…found…under the control" of the person being searched, "if the enforcement officer on reasonable grounds suspects that the…crypto assets…are to be removed" from South Africa without permission. Regulation 4(7) adds that crypto assets so seized "shall be forfeited to the state for the benefit of the National Revenue Fund," unless "the Treasury…in its discretion, directs [that they] be refunded or returned."

Also relevant here is Regulation 25(5), which states: "Any person who was the owner or in control of any crypto asset which forfeited (sic) in terms of this regulation, shall upon written demand made by National Treasury or an authorised person, furnish full particulars in writing of all and any passwords, personal identification numbers or codes which are necessary to enable National Treasury to obtain access to and control over the crypto assets and their disposal."

Comments*: These rules infringe not only privacy but also property rights. The erosion of property rights is further described in Section 4.3 below, while the risk to privacy is dealt with here.*

As Mr Vegter points out, "travellers…leaving South Africa are required not only to declare the banknotes and gold they have stashed away in their suitcases, but also to 'produce' any crypto assets 'in their possession or under their control.' He adds:

> *If you do not declare your crypto assets, and the border guards feels like you're hiding something, they are entitled to search you. In addition to the usual invasive physical search (which the regulations helpfully say must be performed by a person of the same gender as you…), they can search you for crypto.*
>
> *The only way to do that is to search your devices, as well as all the networked computers and cloud services those devices can access. And the only way to do that is*

> *to demand that you surrender your passwords and biometrics, not only to the devices you're carrying with you, but also to the platforms on which you store your crypto keys.*
>
> *To this end, the Regulations require that, upon command, you surrender 'full particulars in writing of all and any passwords, personal identification numbers or codes which are necessary to enable National Treasury to obtain access to and control over the crypto assets.'*
>
> *That these same passwords might protect your personal data, private photographs, medical information, privileged professional communication, or corporate network access is not a concern that is addressed in the Regulations."*[22]

These proposed rules are inconsistent with Section 14 of the South African Constitution. This guarantees the right to privacy, stating: "Everyone has the right to privacy, which includes the right not to have – (a) their person or home searched; (b) their property searched; (c) their possessions seized; or the privacy of their communications infringed."

Also relevant is Section 35(3)(j) of the Constitution, which deals with due process. This sub-section guarantees the right "not to be compelled to give self-incriminating evidence." Notes Mr Vegter: "These rights directly conflict with a regulatory demand for your cryptographic credentials or device access passcodes."[23]

4.2.2 Further searches under Regulation 20

The Regulations authorise other searches too. Under Regulation 20(1), "<u>The…Treasury…may order any person to furnish any information in any manner at such person's disposal which the…Treasury …deems necessary for the purposes of these Regulations</u>." In addition, "<u>any person generally or specifically appointed by the…Treasury</u> [for this purpose] <u>may enter and search any premises to inspect any books or documents belonging to, or under the control of such person</u>."

This search may be conducted (a) with the "<u>prior consent of a person so ordered</u>" or <u>"(b) without prior consent and without prior notice to a person so ordered, (i) if the entry is authorised by a warrant; or (ii) if the appointed person…believes on reasonable grounds that— *(aa)* a warrant will be issued to them if applied for, *(bb)* the delay in obtaining the warrant is likely to defeat the purpose for which entry of the premises is sought; and *(cc)* it is necessary to enter the premises for the purposes of the Regulations</u>."

<u>Comments:</u> Under these provisions, as David Ansara, CEO of the Free Market Foundation, has warned: "Government officials may enter your home or place of work, search you, seize your devices, copy your data, and attach your property. Moreover, they can do so without a warrant."

4.3 Limits on property rights

4.3.1 Constraints on self-custody of crypto assets

Constraints on self-custody stem, in particular, from Regulation 3(1). As earlier outlined, Regulation 3(1) states that: "<u>No person</u>," other than a CASP, may "b<u>uy [or] sell any crypto assets …with a value in excess of a determined threshold to any person</u>" other than another CASP.

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[22] Ibid.

[23] Ibid.

Comments: This proposed rule removes many of the intended benefits of self-custody and the untramelled use of crypto assets. In the words of Mr Vegter, "people who are serious about their crypto know that unless you own the private keys, you don't control the crypto. They insist on 'self-custody' – keeping the keys on their own computers, phones, or dedicated hardware wallets. In fact, self-custody is the principle that makes cryptocurrencies revolutionary."[24] It is also vital in safeguarding and strengthening people's property rights over their crypto assets.

As earlier explained, bitcoin was designed to eliminate the need for trusted intermediaries: banks, governments, or any other gatekeepers with the power to decide what you can and cannot do with your money. As Mr Vegter puts it:

"It was designed to enable trustless transactions, directly between owners of cryptocurrency, with no broker, bureaucrat or banker standing between you, taking a cut. The blockchain is the intermediary, governed by mathematical certainty instead of an untrustworthy third party or the whim of a government minister."[25]

By contrast, the Regulations will compel cryptocurrency owners to buy or sell crypto assets valued at more than the specified threshold through state-sanctioned intermediaries in the form of CASPs. In this way, the government will be able to control all major crypto purchases, sales and other transfers.

This greatly erodes, if not destroys, the benefits of self-custody of crypto assets. Writes Mr Vegter: "This is not just a minor inconvenience; it's a fundamental betrayal of cryptocurrency's purpose." People will have to justify to the state why they are buying or selling bitcoin. They will have to disclose the specific purpose for which they want to buy bitcoin and will be barred from using their own assets for any other purpose. The government will also have discretion to change the purposes for which bitcoin may be acquired as it sees fit."[26]

Such controls not only preclude freedom of trade, as earlier described, but also undermine core rights of ownership – particularly the rights of owners to control their assets and use or dispose of them as they see fit. Such constraints amount to indirect or regulatory expropriations both in customary international law and under most bilateral investment treaties. Such indirect expropriation ought to require the payment of just and equitable compensation – but the Regulations ignore this.

4.3.2 The declaration and compulsory sale of crypto assets

Under Regulation 8(1): "Any person in the Republic who has under their control [or] obtains possession of…any…crypto assets in an amount or with a value in excess of the determined threshold must, within 30 days…make a declaration in writing…to the National Treasury or an authorised person."

Similarly, under Regulation 8(2), any person in South Africa who "becomes entitled, as a result of any credit or any balance in any account at any bank outside the Republic, to receive payment of any amount in…crypto assets…in an amount in excess of the determined threshold must within 30 days after becoming so entitled, make a declaration in writing of the right to the National Treasury or an authorised person."

[24] Ibid.
[25] Ibid.
[26] Ibid.

In either of these situations, as set out in Regulation 8(3)(a), the Treasury or a CASP "may purchase" these above-threshold crypto assets from the persons entitled to sell them or receive payment for them. Under Regulation 8(3)(b), such persons "must sell the…crypto assets, or the right to payment of…crypto assets at the price referred to in paragraph (b) (sic)."

Comment on Regulation 8(3)(b): The reference to "the price referred to in paragraph (b)" is a mistake, for it is paragraph (c) that deals with the relevant price.

Under Regulation 8(3)(c): "The price payable for the purchase of the…crypto assets or the right to payment of…crypto assets must be paid in South African Rand." The price of the crypto assets to be sold "may not be less than the market value of…the crypto assets on the day of purchase, subject to the ruling exchange rate to the Rand…on that day." The price for "the right to receive payment of…crypto assets… must be a fair value of the right at the date of purchase," subject again to the ruling exchange rate to the Rand "on the date of purchase."

Comment on Regulation 8(3)(c): The price envisaged in either situation excludes any increase in the market value of such crypto assets since they were purchased or otherwise obtained. This could often be unfair to owners.

There are also various uncertainties in the meaning of the full wording used, as opposed to the simplified version provided here to make the underlying idea easier to understand. In addition, there is a clear conflict between Regulation 8(2) and Regulation 8(3). Regulation 8(2) says that a person may become entitled to receive payment in crypto assets "as a result of any credit or any balance at any bank outside the Republic." Regulation 8(3) implies that such credits or balances can arise solely from a "purchase". This conflict adds to uncertainty.

Also relevant is Regulation 3(6)(a), which states: "If a person has…obtained from [a CASP] any crypto assets and no longer requires all or any part of [them] for the purpose stated in their (sic) application, that person must immediately offer…those crypto assets…for sale to the National Treasury or [a CASP]." Under Clause 3(6)(b), these "crypto assets…may be repurchased in South African Rand at the price at which it (sic) was sold to that person or at another price that the National Treasury or the [CASP] may determine."

Comment on Regulation 3(6): The compulsory sale of supposedly excess crypto assets – either to the Treasury or to a CASP – is thus envisaged. Moreover, such a forced sale will take place either at the initial price at which the assets were bought – regardless of their subsequent appreciation – or at the price decided by the purchaser, whether this is the Treasury or a CASP.

Overall comments on these Regulations: A key part of bitcoin's purpose is to promote economic freedom by allowing people to buy and hold a crypto asset without having to inform an intrusive government of such purchases. Under the Regulations, however, a declaration is mandatory for any crypto assets with a value in excess of the Treasury's threshold. This could be set at any level – perhaps at R50,000 at the start – and could then be ramped either up or down.

Following the owner's declaration, the Treasury "may purchase" any crypto assets in excess of the threshold at their market value at the day of their purchase. The Regulations fail to clarify whether crypto owners will in practice be obliged to sell at this price, even though the word "must" has not been used. Comments Mr Vegter: "The Treasury or its authorised agents will *[often] decide how much the bitcoin owner is to be paid, regardless of the market value of his or her bitcoin. This is expropriation with arbitrary (or no) compensation by another name."*[27]

4.3.3 Forfeiture under Regulation 4 for unauthorised exporting

Under the Regulations, crypto assets may be "forfeited" to the state in several circumstances. Regulation 4, for example, includes this penalty for the unauthorised "exporting" of crypto assets, as earlier outlined in *Section 4.2.1*. However, the notion that crypto can be "exported" or "removed" from South Africa makes little sense. Crypto exists on a distributed ledger, identical copies of which are stored on thousands of computers located right across the world. Whatever crypto people own is reflected on all those ledgers. None of this crypto is really "in South Africa" in any meaningful sense. More accurately, it is everywhere – including in South Africa.

Regulation 4(1) ignores this reality in stating: "<u>A person may not, except with the permission of the National Treasury or an authorised person</u>," and in compliance with any conditions that may have been imposed, "<u>take, send out or remove…crypto assets…from the Republic.</u>"

In addition, under Regulation 4(2) (as earlier stated): "<u>Every person who is about to leave the Republic…must — *(a)* declare whether or not they possess or have control over any…crypto assets…intended to be removed from the Republic; *(b)* produce any…crypto assets…in their possession or under their control; and *(c)* produce to [an] enforcement officer any document evidencing an exemption or permission which the person claims to have to remove…crypto assets or control thereover from the Republic</u>."

Moreover, under Regulation 4(5), "<u>An enforcement officer may seize any…crypto assets…found in the possession or under the control of any person, if the enforcement officer on reasonable grounds suspects that the…crypto assets…are to be removed from the Republic in contravention of these Regulations</u>."

Regulation 4(7)(a) adds that "<u>crypto assets…seized</u> [following a search, as set out below] <u>shall be forfeited to the state for the benefit of the National Revenue Fund</u>." Though the Treasury, under Clause 47(b), "<u>may,…in its…discretion, direct that any…crypto assets…that have been seized be refunded or returned, in whole or in part, to the person from whom they were taken,</u>" there is no right to such a return under this sub-regulation.

Regulation 4(8) does, however, require – before crypto assets are seized under Clause 4(5) – that "<u>the Treasury must – *(a)* comply with the provisions of section 3 of the Promotion of Administrative Justice Act [PAJA], 2000; and *(b)* when taking any decision in terms of subregulation (5), consider all relevant facts and circumstances brought to the…Treasury's… attention, including any hardship which may be suffered by a person pursuant to a forfeiture in terms of sub-regulation (5)</u>."

*<u>Comment on Regulation 4(8):</u> Under this sub-regulation, various PAJA requirements – as set out below – must be fulfilled before crypto assets may be **seized** following a search. However, the Treasury is not obliged to ensure that these requirements are met before crypto assets are **forfeited** to the state under Regulation 4(7). This is primarily because of bad drafting in Regulation 4(8). This requires the Treasury to "consider all relevant facts and circumstances," including the possible "hardship" resulting from a "forfeiture in terms of subregulation (5)." This makes no sense, however, as it is Regulation 4(7) that provides for forfeiture.*

[27] Ibid.

Section 3 of the Promotion of Administrative Justice Act (PAJA) of 2000 helps ensure procedural fairness in the making of administrative decisions. It states:

> "***Procedurally fair administrative action affecting any person***
>
> 3. (1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
>
> (2) (a) A fair administrative procedure depends on the circumstances of each case. (b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)— (a) adequate notice of the nature and purpose of the proposed administrative action; (b) a reasonable opportunity to make representations; (c) a clear statement of the administrative action; (d) adequate notice of any right of review or internal appeal, where applicable; and (e) adequate notice of the right to request reasons in terms of section 5.
>
> (3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to – (a) obtain assistance and, in serious or complex cases, legal representation; (b) present and dispute information and arguments; and (c) appear in person.
>
> (4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2). (b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including – (i) the objects of the empowering provision; (ii) the nature and purpose of, and the need to take, the administrative action; (iii) the likely effect of the administrative action; (iv) the urgency of taking the administrative action or the urgency of the matter; and (v) the need to promote an efficient administration and good governance.
>
> (5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure."

<u>Overall comments</u>: *Section 3 of PAJA requires procedural fairness in the taking of administrative decisions. In practice, however, procedural fairness may not suffice to prevent substantive injustice. There is also a risk that officials charged with weighing factors such as "the need" to take the relevant action and the "urgency" of doing so may be both rushed and partisan. There is also an anomaly in Regulation 4 in that these PAJA safeguards, as earlier indicated, are supposed to be met before any* ***search*** *for crypto assets is allowed, but not before such assets are* ***forfeited*** *to the state.*

This particular weakness could be cured by more careful drafting and the re-numbering of relevant sub-regulations. However, several bigger problems cannot be resolved via small adjustments to the wording.

Among other things, the Regulations show no understanding of crypto assets. Unlike conventional assets, crypto assets exist on distributed blockchains: ledgers replicated across thousands of nodes in multiple jurisdictions simultaneously. A crypto asset is not "located" in any single country. What the owner holds is a private key, a cryptographic string that grants control over the asset on the blockchain. Whether that key is stored on a device in Johannesburg or memorised by its owner, the underlying asset remains distributed across the network. There *is therefore no coherent sense in which a South African crypto asset owner "exports" anything by the mere act of storing a key, as Regulation 4 seems to assume.*

The likely erosion of property rights is also severe. As Mr Vegter writes, "the Treasury or its agents can [seize] and forfeit your crypto assets at any time if they merely suspect you've violated exchange controls. No court order is required. You could sue to get them back, but that is costly and takes years."[28]

Moreover, though Section 3 of PAJA provides some guarantee of procedural fairness, this is not nearly enough. The forfeiture envisaged – as a penalty for a supposed "exporting" offence which cannot in fact be committed – is prima facie in conflict with the Constitution's guarantee of property rights and especially with Section 25(2). This requires the payment of "just and equitable compensation" on the taking of ownership by the state, which would amount in these circumstances to expropriation. Section 25(2) also says that "the amount" of this compensation, as well its timing and the manner of payment to be used, must "have either been agreed to by those affected or decided or approved by a court" before the state takes ownership. Regulation 4 ignores this requirement.

4.3.4 Forfeiture under Regulation 24 following "attachment"

Regulation 24 is often badly drafted, making some of its clauses difficult to understand. Its overall gist, however, is as follows.

Under Regulation 24(1), the Treasury may "attach" any crypto assets "(i) in respect of which a contravention of any provision of these Regulations has been committed," or "(iii) which the National Treasury...on reasonable grounds suspects to be involved in a contravention of...these Regulations," or "(vi) from which any person has benefited or has been enriched as a result of any actual or suspected contravention." (Attachment is possible in many other listed circumstances too, but the full list is so long and complex as to fall beyond the scope of this submission.)

Regulation 24(3) states that "the...Treasury...must return any...crypto assets or other property attached" and must do so "on a date not later than the date of expiry of the period referred to in section 9(2)*(g)* of the [1933] Act..., unless the...crypto assets or property...are forfeited under regulation 25."

Comments: The wording of Regulation 24(3) is particularly difficult to understand. What point is there in attaching a crypto asset because of its links to possible contraventions of the Regulations if the Treasury "must" return it within the specified period? In addition, if there is an obligation to return, how can such an asset be forfeited under Regulation 25, as outlined below? The period referred to in Section 9(2)(g) of the Currency and Exchanges Act of 1933 is also difficult to understand. It could be a period of 36 months from the time of the attachment, but other periods are feasible too. Moreover, though the wording of Section 9(2)(g) makes sense when read with the rest of the 1933 Act, it is unintelligible in the context of Regulation 24(3).

4.3.5 Forfeiture under Clause 25 and possible disposal

Under Regulation 25 (1), "the...Treasury... may issue an order in writing that any...crypto assets or other property" which have been attached under Regulation 24(1) "be forfeit to the State."

[28] Ibid.

Where crypto assets are in issue (rather than other property), these must be "deposited into an account at the Corporation for Public Deposits."

Under Regulation 25(2), "the…Treasury…may, if satisfied on reasonable grounds that any…crypto assets, or other property attached, do not…[satisfy the conditions in Clause 24], return the… crypto assets or property…"

Under Regulation 25(3), "Any…crypto assets or other property [attached under regulation 24(1)] …shall not be forfeited to the State unless the National Treasury or authorised person – *(a)* has complied with section 3 of the Promotion of Administrative Justice Act before taking a decision to forfeit; *(b)* has published a notice in the *Gazette* in which – (i) notice is given of any decision to forfeit to the State the…crypto assets or property specified in the notice; (ii) particulars are furnished of the manner in which the forfeited…crypto assets or property will be disposed of; and (iii) the effective date, on which the…crypto assets or property will be forfeited, is indicated." In addition to this notice in the *Gazette*, "a similar notice" must be published "on the website of the South African Reserve Bank,…for the purposes of enabling any member of the public to gain access thereto."

Under Regulation 25(4), "The…Treasury…may not dispose of any…crypto assets or other property forfeited to the State under subregulation (1), before – *(a)* the expiry of a period of 90 days from the date of publication in the *Gazette* in terms of sub-regulation (3)*(b);* or *(b)* final judgment has been given, if any proceedings have been instituted in connection with any forfeiture decision."

Comments: These clauses are generally more reasonable than those contained in Regulation 4, as earlier outlined. There, forfeiture may follow immediately upon the seizure of crypto assets that might otherwise be "exported" without the Treasury's permission. Moreover, under the badly drafted terms of Regulation 4, the requirements for "procedurally fair" administrative action in Section 3 of PAJA apply solely to the ***seizure*** *of those assets and not to any subsequent* ***forfeiture*** *– which is clearly irrational and unconstitutional.*

Under Regulation 25, by contrast, crypto assets which have been "attached" for contraventions (or reasonably suspected contraventions) "may" be returned by the Treasury if it is "reasonably satisfied" that they are not in fact linked to such contraventions. However, if the grounds for attachment have thus fallen away, then the Treasury should be ***obliged*** *to return them, not merely given the option of doing so. (Discretionary return is also at odds with the obligation to return in Regulation 24(3), as earlier described.)*

In addition, under Regulation 25, forfeiture may not take place until the Treasury has complied with PAJA, published a notice of its decision to forfeit in the Gazette *and via the Reserve Bank's website, and indicated how disposal may in time be effected. Such disposal may not take place for 90 days after the publication of the necessary notice in the* Gazette*, or until final judgment has been given in any proceedings contesting the forfeiture decision.*

However, the requirements set out in Regulation 25 are sometimes different from those envisaged in Section 9 of the 1933 Act, which requires, for example, that notice of the intended forfeiture should not only be published in the Gazette *but also sent by registered mail to the owner of the assets in issue. Prima facie, some of Regulation 25 is thus* ultra vires *the 1933 Act and cannot lawfully be adopted by the Treasury. (This problem extends beyond Regulation 25 – and requires that* ***all*** *the proposed new rules be carefully examined to ensure they are within the Treasury's regulatory powers under the 1933 statute.)*

Moreover, even if the need for procedural fairness under Section 3 PAJA has been met – and all the relevant information has been provided – the property rights of crypto asset owners will still have been severely undermined. In addition, if forfeiture and disposal are implemented for suspected contraventions that have not in fact been adequately proven, then the state's taking and disposal of the relevant crypto assets prima facie *amounts to an expropriation for which just and equitable compensation must be paid.*

Moreover, under Section 25 of the Constitution, the onus lies on the Treasury to show that any such expropriation is for "public purposes" or "in the public interest", as defined in Section 25(4) of the Constitution (which deals with land reform and equitable access to natural resources). The Treasury must also show that the amount of compensation, along with its timing and manner of payment, "have been" agreed with the owner or "decided or approved by a court" ***before*** *ownership shifts to the state. Yet Regulation 25 disregards these requirements.*

In addition, if crypto assets are taken and disposed of by the Treasury with "nil" compensation to the owner, this is prima facie *inconsistent with Section 25 of the Constitution. Nor can "nil" compensation be authorised under the Expropriation Act of 2024 (which is still to be brought into operation), as this statute permits such compensation solely in the land reform context.*

4.4 No adequate justification under Section 36

Rules which limit guaranteed rights are unconstitutional unless they can be justified under Section 36 of the Constitution. According to this section, any limits on rights must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". In making this assessment, "all relevant factors" must be taken into account. These factors include: "(a) the nature of the right," (b) the "importance of the purpose of the limitation," (c) the "nature and extent of the limitation," (d) the "relation between the limitation and its purpose" and (e) "less restrictive means to achieve the purpose."

Many of the limits on guaranteed rights contained in the Regulations fail these tests, if only because "less restrictive" means of "combating money laundering, terrorist financing and the proliferation of illicit financial flows" (as envisaged in the Treasury's gazetted notice) could readily be devised in place of the draconian clauses found in the Regulations.

To name but a few examples, it is overly restrictive to:

- prevent people inside South Africa from using crypto currencies to buy groceries at local retail stores that do not qualify as CASPs and where no capital outflows are involved;
- prohibit people from using crypto assets for lawful purposes that happen to be different from those they identified in their applications to the Treasury, particularly if these additional purposes could not have been foreseen;
- dispense with warrants for searches for crypto assets where there is no convincing evidence of significant criminal conduct needing to be curbed;
- compel people to give up their passwords to all their devices, including their banking pins and the codes to the personal information and business correspondence stored on their laptops or phones;
- empower the Treasury to take and dispose of crypto assets without adequate proof of exchange control or other offences – and without the state having to prove that the state's taking of ownership is warranted or that the necessary "just and equitable" compensation has been agreed or decided by a court, as Section 25 of the Constitution requires.

4.5 Unconstitutionality on other grounds as well

As earlier noted, in adopting new exchange control rules, it is no longer sufficient to look solely to Section 9 of the Currency and Exchanges Act of 1933. Even if the proposed Regulations were fully *intra vires* this Act – any many of the proposed rules are not – this would not suffice to make them lawful. Rather, all new exchange control regulations must also comply with all relevant provisions of the Constitution. These provisions include key clauses in the Bill of Rights, as earlier outlined. They also include the supremacy of the rule of law and the doctrine of the separation of powers.

The rule of law has many facets, including the doctrine against vagueness of laws. Under this doctrine, all laws must be certain and clear, so that people know what is permitted and what is prohibited and can adjust their conduct accordingly. This clarity is also vital in preventing the same rules being interpreted by officials in different ways at different times. Regulations which are too vague to satisfy these tests conflict with the rule of law.

Many of the proposed rules in the Regulations fail the certainty test. In many instances, their complicated, obscure – and sometimes unintelligible – clauses are likely to be interpreted by different officials in different ways at different times.

In addition, many of the lengthy and complicated rules go well beyond the much clearer provisions set out in fewer than four pages in the 1933 Act. Prima facie, many of the detailed rules in the Regulations are thus *ultra vires* the principal statute. If detailed comparison further confirms this, then these rules are invalid and unconstitutional on this basis too.

There is also considerable doubt as to whether the limited words in a 1933 statute – which was adopted in entirely different times – provide sufficient authority for new rules regarding the trading of crypto assets recorded on distributed electronic ledgers and the management of keys to those assets.

This suggests that the Treasury's real aim is to avoid enacting new legislation regarding crypto assets, which would have to be adopted by Parliament. Instead, it is seeking to bypass legislative scrutiny by adopting regulations that go far beyond what is envisaged in the Currency and Exchanges Act.

As Mr Ansara notes: "Unlike ordinary legislation, which must pass parliamentary approval, regulations can effectively be implemented overnight through the stroke of the minister's pen. This enables the government to bypass the legislative process and implement far-reaching rules by executive decree, eroding accountability between the public and elected representatives."[29]

However, it is also unconstitutional for the Treasury to usurp Parliament's law-making powers. Under the doctrine of the separation of powers, the legislature is responsible for making new laws, while the executive is confined to administering them.

Additional detail regarding implementation must often be provided by means of subordinate regulation – but such regulation cannot lawfully include substantive new laws that Parliament alone has the constitutional authority to enact.

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[29] Ansara, D., "The State Is Coming For Your Bitcoin," The Common Sense, 6 May 2026. https://www.thecommonsense.co.za/editorials/state-coming-your-bitcoin.

5 Ramifications

5.1 The death of crypto-based trading in South Africa

As Mr Vegter writes, the Regulations will "make South Africa *terra prohibita* [forbidden territory] for crypto assets and crypto-based businesses" at a time when such assets and enterprises are increasingly being embraced by other countries.[30]

Larger, well-established CASPs with a greater capacity to maintain compliance with complicated rules might be able to adapt to the Regulations. However, individuals and smaller firms will find it difficult, if not impossible, to comply. This could result in job losses at a time when unemployment in South Africa is already at crisis levels.

In addition, the Regulations will cripple, if not destroy, what Mr Ansara describes as South Africa's "vibrant ecosystem of fintech entrepreneurs and start-ups," as well as a "growing retail adoption of Bitcoin." Writes Mr Ansara:

> "Customers of Pick n Pay can now buy their groceries using bitcoin instead of rand. Meanwhile, circular bitcoin economies have emerged in towns across the Western Cape, such as Witsand, Plettenberg Bay, and the informal areas of Mossel Bay.
>
> The new regulations would undermine this burgeoning sector by forcing merchants and consumers who use bitcoin as a medium of exchange to obtain government approval for every transaction. It would make otherwise simple transactions needlessly complicated and time-consuming to process.
>
> Instead of building their businesses and adding value to others, these entrepreneurs [would have to] turn their attention to defending their vital economic interests against government overreach. If the National Treasury has its way, these innovative and productive people might be forced to shut down or take their businesses, their skills and their capital to more favourable jurisdictions."

5.2 Heavy-handed requirements at odds with those in Western democracies

The Regulations are far more heavy-handed than equivalent rules in comparable jurisdictions. As Mr Vegter points out:

> "The European Union's MiCA framework focuses on consumer protection, market integrity, and anti-money-laundering compliance. It does not restrict capital flows or require state permission for transactions. The United States treats crypto assets as 'securities', regulating exchanges and service providers, but without draconian restrictions on self-custody or global peer-to-peer transactions.
>
> In Switzerland, crypto is considered a legitimate asset class, with clear but light-touch regulations. Even in Singapore, known for its strict financial oversight, crypto is regulated as a digital payment token, not as a controlled currency."[31]

South Africa's proposed Regulations go far beyond what exchange controls might warrant. Instead, they seek to impose draconian and ever shifting constraints on crypto assets as a new asset class which the government is determined to control.

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[30] Vegter, "The National Treasury is coming for your Bitcoin," op. cit.
[31] Ibid.

5.3 Damaging controls likely to encourage a flight of skills and capital

Many of the proposed rules are likely to prove unworkable and damaging. Take for example Regulation 3, under which any individual or business other than a CASP that wants to buy bitcoin or other crypto assets must apply for permission and declare the purpose for which these assets are needed. Bitcoin obtained on this basis then cannot be used for any other purpose, no matter how legitimate and unforeseen it might be.

In addition, bitcoin no longer needed for the purpose earlier declared must "immediately be offered for sale" to the Treasury or a CASP. Moreover, it must be offered for sale either at the price at which it was bought – regardless of any subsequent gain in its value – or, under an even more damaging provision, "at another price that the Treasury or the CASP may determine."

These controls will harm many individuals and businesses not functioning as CASPs. CASPs will suffer too, however, as they will also be subject to onerous requirements from the start, along with any other restrictions the Treasury might decide, "in its discretion", to impose at any time.

CASPs will thus lack autonomy over their business models, for they will have no certainty that actions previously authorised will remain so. Nor will they be allowed to enter new markets or adopt new technologies if these fall outside their authorised scope of action.

In addition, potential penalties for CASPs – and others involved with crypto assets – will be draconian. Under Regulation 29, the contravention of any provision will be punishable on conviction by a fine of up to R1 million, a prison term of up to five years, or both. Moreover, where an offence relates to crypto assets (rather than other assets), a fine equal to "the value of" the crypto assets in question might instead be imposed if this sum is higher than R1m.

Fines of this magnitude are damaging in themselves. It is particularly concerning that they will not be confined to crimes such as the financing of terrorism. Instead, they will apply to such "offences" as a bitcoin owner declining to acquiesce in a forced sale at a minimal price set by the Treasury – or refusing to hand over banking pins or access codes to personal communications saved on laptops and other devices.

The Regulations will have a chilling effect on individual autonomy. If people buy bitcoin to fund retail purchases, they will be barred from using these crypto assets for investment purposed or to make remittances to relatives in need. This further erosion of individual freedom – coupled with a host of other damaging statutes enacted over the past 32 years – could further encourage skilled emigration. This will compound a debilitating skills shortage the government has long been struggling to overcome.

The Regulations will also damage business confidence and the investment climate. They will become yet another deterrent to the fixed investment South Africa so badly needs: most of which must come from overseas investors because the country's domestic savings rate is too low.

5.4 An urgent need for foreign direct investment

What South Africa most needs are policies that help increase its anaemic growth rate and reduce its extraordinarily high levels of unemployment. Neither of these goals can be achieved, however, without attracting much higher rates of fixed investment. As Dr Endres explains:

> "The technical name for fixed investment is gross fixed capital formation, or GFCF for short. It refers to the share of national income that goes into building productive

capacity: the factories, the machines, the ports, the roads, the energy infrastructure that makes it possible to produce goods and services, to employ people to produce them, and to move products to customers.

South Africa's gross fixed capital formation stood at 14.9% of GDP in 2023. In 2024 it fell to 14.5%. In 2025 it dropped further, to 13.7%. The government's own National Development Plan sets a target of 30%. But the last time it managed to break above 20% was in 2008,…when it was 21.6%. Fixed investment in South Africa is falling woefully short of where it needs to be, and has done so for a long time.

Investment drives everything else. An economy can tick over without it, running down existing equipment, trading goods, and managing operations set up years ago. But without new investment there is no expansion. There is no growth in productive capacity, no growth in jobs, and no growth in the tax base that funds schools, hospitals, and grants."[32]

So long as investment and growth remain at current low levels, South Africa has little prospect of reducing its current unemployment rates, which are among the worst in the world. In the first quarter of 2026, as Statistics South Africa reports, the national unemployment rate stood at 37.2%. However, "the burden was disproportionately carried by the youth, with those aged 15-24 facing the highest unemployment rate at 60.9%, followed by those aged 25-34 at 40.6%." In addition, some 45.6% of all South Africans between 15 and 34 were not in employment, education, or training (NEET).[33]

Not surprisingly, thus, as IRR opinion polls going all the way back to 2001 have revealed, South Africans consistently name unemployment as the most pressing problem facing the country. This problem ranks well ahead of crime, or concerns about corruption, water or electricity. No jobs means no income, no hope, no dignity.

Adds Dr Endres: "South Africa's fixed investment rate should not be 14%. The country has a skilled workforce, sophisticated financial markets, strong universities, and a functioning legal system. Its natural resources are abundant. The [reason]…why investment is so low is that [government] policies are driving capital away or making investment impossible."[34]

South Africa urgently needs to raise its annual rate of fixed investment from 13.7% of GDP to 25% of GDP or more. It cannot rely on its own domestic savings to achieve this, as its annual savings rate is about 16% of GDP and is thus too low. Hence, the country cannot raise its fixed investment rate to the levels needed without attracting capital from elsewhere in the world.

5.5 The chilling effects of the Regulations

The Regulations will make it still more difficult for South Africa to attract the foreign capital it urgently needs to raise its fixed investment rate. As Mr Vegter points out, "capital goes where capital is treated best."[35] Not surprisingly, it is averse to going to countries where laws are

[32] Endres, "Bitcoin: The freedom money that wants to change the world," op. cit.
[33] Maluleke, R, "Quarterly Labour Force Survey (QLFS), Q1, 2026," p. 32. https://www.statssa.gov.za/publications/P0211/Presentation%20QLFS%20Q1%202026.pdf; Statistics South Africa, "South Africa's Youth and the Labour Market in Q1 2026," pp. 1, 2. https://www.statssa.gov.za/?p=19526.
[34] Endres, "Bitcoin: The freedom money that wants to change the world," op. cit.
[35] Vegter, "The National Treasury is coming for your Bitcoin," op. cit.

damaging and exchange controls could prevent it from repatriating the returns it has made on its investments. He adds:

> "In a globally interconnected world, investment tends to go towards countries that protect private property rights, where local laws are rational, transparent, and enforceable, and where the returns on capital can be realised and expatriated.
>
> It's a counterintuitive point. Countries that make it easier to take money out are more likely to convince investors to put it in. Panama, Singapore, Mauritius, and the United Arab Emirates are global trade and financial hubs for this exact reason.
>
> As economist Chris Hart posted on X.com: 'There is only one purpose for capital controls – that is to shield bad policies. Countries with good policies have no need for capital controls.' Hart is right...
>
> Government's efforts to weaken, rather than strengthen, private property rights, its willingness to impose extractive policies such as Black Economic Empowerment (BEE), and its punitive tax regime make it a hard sell for investors. Its latest attack on cryptocurrency further weakens the investment case."[36]

What South Africa needs is to jettison its exchange control regulations, rather than extend them. Its existing exchange control regulations were introduced by the National Party government in 1961 to curb capital flight during the apartheid era. When it came to power in 1994, the African National Congress (ANC) government could have dispensed with these apartheid era rules. Instead, it retained them, saying this was needed to maintain macroeconomic stability. More than 30 years after the political transition, these "anachronistic controls persist to this day," as Mr Ansara notes.

Western democracies do not apply comprehensive exchange controls of the kind introduced in South Africa in 1961 and now to be significantly extended under the Regulations. There are no equivalent controls in the United States (US), the United Kingdom (UK) or member states within the European Union (EU). Instead, these countries have targeted financial controls aimed at countering money-laundering, inhibiting the funding of terrorism or enforcing financial sanctions against specified countries and individuals. Significant cash transactions must thus be declared, but the thresholds for reporting are relatively high: £10,000 in the UK, $10,000 in the US and €10,000 in the EU. (These sums, in rand values, range from about R160,000 to R200,000.) Moreover, these rules are tools deployed for criminal justice and national security reasons. They are not macroeconomic tools intended to keep capital corralled within these countries.

By contrast, countries with extensive exchange controls include Cuba, China, Iran, Russia, South Africa, Venezuela and Zimbabwe. South Africa ought to be seeking to distance itself from these countries by abandoning its current exchange controls, not extending them.

Since 1994, however, South Africa has merely loosened some of its limits on capital outflows. In 2010, for example, the limit on how much South Africans could send abroad was raised to R1 million a year. In March 2026, that limit was finally raised to R2 million a year. However, this increase barely compensates for consumer inflation and the declining value of the rand over the

[36] Ibid.

past 16 years. An additional R10 million can also be taken out, but only with the permission of the South African Reserve Bank.[37]

6 The way forward

The Regulations are unconstitutional and economically unwise and should simply be withdrawn.

The Treasury's tick-box approach to public consultation has already made for procedural unconstitutionality. By failing to provide a comprehensive socio-economic impact assessment of the Regulations and their likely costs and consequences, the Treasury has failed to provide the public with the information it needs to "know about the issues" and then to have an "adequate say." The Regulations are thus just as procedurally unconstitutional as the various other laws the Constitutional Court has struck down for similar failures.

Substantively, the content of the Regulations is unconstitutional too. The Treasury seems to be assuming that the Regulations need only to be consistent with Section 9 of the Currency and Exchanges Act of 1933, under which they are to be adopted. But this statute was enacted more than 90 years ago and long before the 1996 Constitution took effect. Now that the Constitution is in place and the Constitutional Court has been empowered to strike down any laws inconsistent with its terms, the Constitution cannot simply be disregarded. Instead, the Regulations must comply with what the Constitution requires.

The Regulations fail this test in many spheres. Many of its clauses unjustifiably limit guaranteed rights. Many lack the certainty required by the rule of law. Some of the proposed new rules are *ultra vires* the 1933 Act, making them invalid and unconstitutional for that reason too. Many clauses contain entirely new rules on crypto assets which – if they are to be adopted at all – need to be enacted by Parliament under the doctrine of the separation of powers.

The Regulations are also economically unwise. In particular, they are sure to deter the inflows of foreign capital urgently needed to raise the fixed investment rate from 13.7% of GDP a year to 25% at least – and ideally to the 30% of GDP the National Development Plan envisages. Unless the country can raise the fixed investment rate in this way, growth will remain anaemic, productivity will not increase, and the unemployment crisis will continue to worsen, rather than improve.

These flaws in the Regulations – and the many others identified in this submission – are too fundamental to be corrected. Instead of trying to obstruct and punish those who seek to protect themselves against high inflation and the incremental destruction of property and other rights, the Treasury – together with all parties in the Government of National Unity – should be focused on attracting investment, increasing the growth rate, expanding employment and helping all South Africans to attain the jobs and rising living standards for which so many hunger. The Regulations should thus be withdrawn.

South African Institute of Race Relations NPC **30 June 2026**

[37] Camay, A. and Ahmed, A, "Extending boundaries: Adjustments to South African exchange control limits and powers," ENSight, 13 March 2026. https://www.ensafrica.com/news/detail/11456/extending-boundaries-adjustments-to-south-afr.