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**Regulating the Digital (Currency) Revolution: Unravelling the Technological Challenge Faced by Charities**

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**I Introduction**

In today’s technologically astute society, new payment methods are being utilised, at an ever-increasing rate, as individuals and groups seek to avoid the often restrictive and archaic practices of the formal financial sector. Digital currencies such as bitcoin, which this chapter will primarily focus on,[[1]](#footnote-1) represent the latest and most evolved way to store and exchange value. Their appeal lies in the fact they allow users to pseudonymously[[2]](#footnote-2) transfer money across borders at near instantaneous speed, with little or no cost, and very low barriers to entry. However, whilst new technology is being adopted in a wide range of other areas, the charity sector seems either unable or unwilling to keep up with the pace of technological change and spot genuine opportunities for innovation. Digital currencies offer charities the chance to revolutionise the way they conduct their financial affairs. However, as with all payment methods, there are risks and challenges associated with their use.

Whilst the technology that underpins digital currencies provides new opportunities for the charity sector, which will be discussed fully below, it also brings about some not-so-new legal challenges which impede the adoption of digital currencies by charities. The opportunities afforded by bitcoin have been relatively well covered in the literature,[[3]](#footnote-3) though only a few focus on their appeal to charities.[[4]](#footnote-4) However, analysis of the risks associated with the use of digital currencies are thin in the general literature, tending to focus specifically on anti-money-laundering efforts.[[5]](#footnote-5) Only a few sources have considered the risks digital currencies pose for charities,[[6]](#footnote-6) and none has considered the debate in charity law as to whether the current legal framework (or lack thereof) unnecessarily hinders charities’ ability to harness the potential benefits afforded to their activities by the adoption of digital currencies.

In light of the above, this chapter adds to the literature by seeking to unravel the legal challenges faced by charities in attempting to keep pace with the digital revolution, and in particular, adopt digital currencies. Part II of the chapter will consider the emerging technological opportunities that digital currencies present to charities. Part III will then outline law’s role in regulating emerging technology, so as to provide a lens for the rest of the chapter. In light of the lens, Part IV of the chapter will critically analyse five intersecting and overlapping themes, drawn from the discussion in Part III, which highlight the legal challenges that need to be addressed for charities to consider digital currencies a more viable technology to utilise. These themes are: regulatory competence and consistency, regulatory appetite, effectiveness, proportionality, and incidental impact. Finally, by way of concluding remarks, Part V will consider what this tells us about the ability of charities to adopt digital currencies.

Digital currencies offer a new efficient way of conducting our financial affairs. As a result, they have the potential to benefit charities financially. They are a quick, affordable and borderless way of transferring funds, and potentially bring to charities a range of new donors. However, adoption is not simple; at present they are synonymous with criminal activity and are largely unregulated, and so the chapter will address how the law can assist in making digital currencies more appealing to charities. First, it will argue that the limited competence of international actors prevents the effective coordination of a counter-financial crime digital currency strategy. Second, it will contend that there is a lack of regulatory appetite to implement a digital currency strategy and that this makes charities more averse to adoption. Third, it will argue that some of the measures introduced to tackle digital currency abuse are not fit for purpose. Fourth, it will note that proportionality issues impede the uptake the digital currencies, in comparison to other payment methods. Fifth, it will explain that there may be some incidental impacts of utilising digital currencies that reduce a charity’s appetite to engage with them. Finally, the chapter will argue that the legal issues we see here are not new, and the fact that we have yet to solve them in traditional contexts makes it less likely we will solve them in relation to digital currencies. Whilst these challenges persist, digital currencies will fail to be attractive to any more than a few opportunistic risk-taking charities, of which there are few.

**II Digital Currencies as an Emerging Technological Opportunity for Charities**

Before moving into the central part of the chapter, which critiques why law (or the lack thereof) inhibits the uptake of digital currencies by charities, it must be established how and why digital currencies, and the technology behind them, present an opportunity for the charity sector. Digital currencies offer a two-fold opportunity for charities: first, they open up a new fundraising stream; and second, they provide a new mechanism for charities to move funds.

In relation to the first opportunity, finance is the lifeblood of charities; their very existence depends on being able to collect funds to finance their activities. In the UK alone, it is estimated that charitable income is around £77.4 billion per year.[[7]](#footnote-7) Despite initial reports to the contrary,[[8]](#footnote-8) there is little evidence to suggest that challenging economic events in the last decade, such as the global financial crisis and Brexit, have had any impact on donor appetite to give.[[9]](#footnote-9) However, in the longer term, the likely UK withdrawal from the EU will result in a loss of £258 million of EU funding for UK charities.[[10]](#footnote-10) Significantly, the more challenging issue for the sector is the fact that individuals are changing their financial habits. Debit card payments have recently overtaken cash as the most prevalent payment type.[[11]](#footnote-11) Indeed, this is reflected in the fact that 70 per cent of UK charities have reported a decrease in cash donations in the last three years.[[12]](#footnote-12) It is clear, then, that charities need to look for alternative funding streams and consider how new, emerging payment mechanisms may plug the gaps left in their funding by decreasing cash donations. The need for such thinking is underlined by the fact that newer payment mechanisms are particularly prevalent amongst younger generations,[[13]](#footnote-13) meaning that cash donations are only likely to further decrease.

Digital currencies, such as bitcoin, are one potential avenue which can be considered to plug the funding gap. Given that the technology is still developing, and that there are some significant developments for digital currencies in the short-term future, it is important to consider both their current and future fundraising potential. At present, digital currency donors are most likely to be individuals who have either made a profit through mining[[14]](#footnote-14) digital currencies and/or who have experienced an increase in value in their digital assets over the course of the time they have held them. These individuals then donate a percentage of their returns. Less prevalently, donors may be individuals who have bought digital currencies at a similar or lower value to what they are now worth and have decided for whatever reason to donate all or part of their digital currency holding to charity. It is clear, then, that the current state of play leads to donations, but given the relatively low usage compared to other payment methods, that donations from digital currencies cannot yet be considered a significant fundraising stream. However, looking to the future, new developments around digital currencies, in particular the entry into the market of established companies and financial service providers[[15]](#footnote-15) offers the potential for substantial growth in uptake relative to other payment methods, resulting in digital currencies becoming a credible and consistent stream of funding for charities. It is this potential, alongside some other benefits outlined below, that makes it worth charities’ time and resources to investigate and consider adopting digital currencies as a funding stream.

Alongside the above outlined potential financial benefit, there are also certain technological features of accepting payment in digital currencies, which may be appealing to charities and donors alike. One of the key features of digital currencies is the pseudonymity they afford. This has the potential to attract more donations to a charity that accepts digital currencies as a donation method. The reasons for this are that first, it facilitates the giving of funds in a way where the donor is not reliant on any other individual or institution to assist in the masking of their identity. This is likely to be appealing to altruistic donors who give for giving’s sake, and not to boost their own image. Second, and linked to the first, a wider group of donors may be inclined to donate in this way where they wish to give but with the guarantee they will not receive follow-up emails and messages. Alongside this, there is also a level of transparency with digital currencies that is unparalleled, namely that the blockchain enables individuals to follow their transaction and see where it ultimately ends up. This could be a huge marketing tool for charities, offering them the potential to promote their transparency by encouraging donors to follow their donations through the blockchain. Significantly, given this is all facilitated by the underlying technology, it is an advantage that requires little on the part of charities, other than deciding to accept digital currency donations. Speed is another key feature of digital currencies that may attract charitable usage of digital currencies.[[16]](#footnote-16) The decentralised system harnesses users’ computer power to process and confirm transactions.[[17]](#footnote-17) When coupled with the ability to scan a charity’s QR code, giving becomes speedy, with little effort required from the donor. This perhaps most closely replicates, in the current cashless society, the low effort of donating cash in collection buckets. Finally, many digital currency wallets[[18]](#footnote-18) can be set up so that they instantly transfer any currency received into the charity’s chosen fiat currency. This may appeal to charities, as it enables them to accept digital currencies, therefore attracting a range of new donors whilst maintaining their funds (once received) in a more stable local currency.

The second significant opportunity identified above relates to the transferring of funds. Digital currencies offer the opportunity for charities to quickly transfer funds, both nationally and internationally,[[19]](#footnote-19) at a relatively low cost.[[20]](#footnote-20) However, whilst at face value digital currencies appear to be a cheap way for charities to transfer money, the costs involved may in fact be misleading where the intention following the transferring of digital currency is to revert it back to fiat currency. Usually, a small fee is charged on digital currency transactions to incentivise bitcoin network miners to include the transaction within their block and thus confirm the transaction in a prompt manner.[[21]](#footnote-21) In terms of the transfer, given the price volatility of digital currencies, it is unlikely that a charity would hold value in digital currencies. It would therefore usually need to purchase digital currencies before the transaction and sell them as soon as it is complete. However, unlike international transfers by traditional mechanisms, where funds are transferred and changed once from ‘originating state currency’ (eg, British Pound) to ‘receiving state currency’ (eg, Euro), where digital currencies are utilised for the transfer, funds are changed from ‘originating state currency’ (eg, British Pound) to ‘intermediary digital currency’ (eg, bitcoin) and subsequently changed into ‘receiving state currency’ (eg, Euro). This means the charity is likely to lose money due to exchange rates on two occasions, rather than simply once under traditional methods of transfer. Obviously, if the money could be transferred and then spent in digital currency form, it would be comparable to other methods of transfer. However, digital currencies still lack widescale adoption, and so for funds to be used in a practical way it is necessary to change them into the relevant fiat currency. Whilst this presents an additional cost, another is removed, as the use of digital currencies removes the need to pay intermediary fees to correspondent banks because the process all occurs on one platform.[[22]](#footnote-22) So, it is clear then that whilst transferring funds utilising digital currencies may provide some savings, this is currently limited until they become more widely accepted as a payment method, removing the need for funds to be transferred back to fiat currency. As things stand, cost should not be the sole driver of utilising digital currencies to transfer funds. Looking towards the future, should digital currencies be made more appealing through appropriate laws being introduced, charities would potentially be able to conduct all their financial affairs through them, and in turn avoid the issue of banks de-risking and withdrawing their banking facility, in line with their anti-money laundering obligations, on the basis that the charities operate in risky areas of the world.

This section has highlighted that digital currencies can provide benefits to charities both in terms of fundraising and also in terms of the transfer of funds. The instability of digital currencies as a place to store funds and the lack of widescale adoption have been highlighted as factors which impede the benefits outlined above. The rest of the chapter will focus on the (re)emerging legal challenges that need addressing if charities are ever truly going to be able to reap the benefits of digital currencies.

**III Regulation of (Emerging) Technology as a Research Lens**

Since bitcoin came to prominence, legal academics have increasingly become concerned about the opportunities and risks that digital currencies present in terms of regulation.[[23]](#footnote-23) Despite this, few jurisdictions have developed, and even fewer have implemented, any financial crime regulation of the area.[[24]](#footnote-24) In the United Kingdom, there is evidence to suggest that criminal abuse of digital currencies is recognised, but little in terms of actual regulatory action resulting from this.[[25]](#footnote-25) However, in the short to medium term, this is likely to change in order for the United Kingdom to comply with its obligations as a Financial Action Task Force (FATF) member,[[26]](#footnote-26) and in line with its current EU membership.[[27]](#footnote-27) It is notable that even to get to this point, progress has been slow, and that the mechanisms proposed do not solve the whole issue or consider appropriately the impacts on other sectors. Therefore, it is relevant to consider how the law has responded over time to other technological challenges. Consideration of the wider ‘regulation of (emerging) technology’ literature establishes themes that will assist in unravelling the legal challenges presented by digital currencies to charities.

It should be no surprise that regulators and various stakeholders in the UK are struggling to realise the promising benefits and manage the disruptive impacts of digital currencies, given this is the case internationally for a host of different emerging technologies.[[28]](#footnote-28) The slowness in developing appropriate responses can be somewhat explained by the fact that ‘it is widely accepted that regulating emerging technology is a challenge due to uncertainty and limited knowledge in the management and assessment of new risks’.[[29]](#footnote-29) Indeed, the struggle for regulators in terms of assessing the ‘uncertainty’ and ‘risk’ of new technologies has been long recognised.[[30]](#footnote-30) Owing to this, it is almost impossible for law to not be ‘too narrow … or too broad’ in terms of defining the issue, given it has to envisage all future implications and changes.[[31]](#footnote-31) It is worth noting, at this stage, that whilst emerging technology presents a host of difficult questions for regulators to deal with, these are often old legal issues reinvigorated by a new technology.[[32]](#footnote-32) Part of the reason these can take so long to develop a response to is that the law is unsatisfactorily developed in terms of dealing with crime typologies in their traditional form—never mind their technologically adapted state. Crucially, without taking time and care, the responses of regulators can both ‘stifle innovation and amplify risk’.[[33]](#footnote-33) Whilst, the ‘pacing problem’[[34]](#footnote-34) and the ‘Collingridge dilemma’[[35]](#footnote-35) are two ways this issue has been framed, Brownsword’s concept of ‘regulatory connection’[[36]](#footnote-36) has emerged as the predominant way to analyse law’s (in)capability to adapt to technological advances. For the law to effectively deal with the development of new payment methods, beyond digital currencies, it is imperative that all aspects of law remain technology-neutral and connected.[[37]](#footnote-37) To that end, it is not uncommon for law ‘designed for the technological landscape of the past’ to require reconnection;[[38]](#footnote-38) we will see this below, particularly when considering the law surrounding Gift Aid.

Given the power of law to either encourage or stifle innovation,[[39]](#footnote-39) consideration must be given as to whether to intervene, and if so, to what extent.[[40]](#footnote-40) There are competing interests when it comes to regulating new technology; on the one hand it is imperative that regulations do not discriminate against as-yet-unknown opportunities, whilst on the other hand it is important that the possibility of innovation does not preclude regulators’ willingness to create a strong enough regulatory framework that is capable of countering the risks that the emerging technology presents.[[41]](#footnote-41) Indeed, it is the purpose of regulation to ‘enable innovation, while at the same time protecting society from unintended consequences’.[[42]](#footnote-42) The literature tends to be biased towards the promotion of innovation, but this is because most inventions are in the health and bioscience sectors, where criminal abuse is less prevalent.[[43]](#footnote-43) However, it is not uncommon for other literature to focus more on technology’s potential for criminal abuse, and therefore focus more on regulation and less on innovation.[[44]](#footnote-44) Digital currencies, particularly in the present context, require a greater consideration of allowing sufficient room for growth whilst balancing this against the need to regulate against the potential for criminal abuse.

In terms of the law’s response to digital currencies, it is clear from the foregoing discussion that there is not an easy path to follow. Indeed, ‘innovation is a complex, multifactorial phenomenon, and developing regulatory responses to it is challenging’.[[45]](#footnote-45) An immediate thought may be to develop new regulatory frameworks.[[46]](#footnote-46) However, in reflecting on past regulatory responses to emerging technology, it is evident that existing regulation will most likely simply require some adaption to be applicable to the new medium.[[47]](#footnote-47) This dichotomy will be reflected throughout the rest of the chapter, and to a large extent the answer in this context will depend on whether the challenges presented are genuinely new or whether they represent the re-emergence of traditional challenges in a new form. Where the challenge is a (re)emerging one in a new form, it is likely that it is regulatory adaption that is needed. It would be useful going forwards if regulation remains technology-neutral, as this aids adaption to new technology.[[48]](#footnote-48) It is important to note, however, that this rule can be set aside where there is a moral objection to the technology that necessitates technology-specific regulation.[[49]](#footnote-49) It may be the case, where the issue is a less socially significant one, that self-regulation and guidance are favoured.[[50]](#footnote-50) Alongside all of this, it is relevant to consider how existing bodies ‘such as law reform agencies or proposed specialised institutions might help law makers and regulators[as well as charities]’,[[51]](#footnote-51) in this endeavour. Whatever route is taken, it is clear that ‘negotiating the mix of hope, hype, fear and quotidian use’ of new technologies will not be easy.[[52]](#footnote-52)

Finally, it is suggested that if the regulation of (emerging) technology is to be a useful lens for analysing the legal challenges faced by charities in adopting digital currencies, then it must ‘yield insights that could not be gained by looking at the problem of regulation either more broadly (for instance regulatory theory) or more narrowly (in a particular technological or regulatory context)’.[[53]](#footnote-53) To that end, the insights in this section on emerging technology regulation will be used to critically analyse the role law can play in promoting the usage of digital currencies by charities and reducing the risks their usage presents.

**IV Unravelling the Legal Challenges Posed by Digital Currencies to Charities**

This section will explore five interrelating themes identified from discussion in the previous section to highlight the legal challenges to more widespread adoption of digital currencies by charities. As noted in the introduction, the five thematic headings for analysis are: regulatory competence and consistency, regulatory appetite, effectiveness, proportionality, and incidental impact. It is worthy of note that whilst digital currencies are a new technological opportunity for charities to maximise, the below challenges to their adoption are not so new. Often the challenges are ones that charities have long faced in relation to other developments, to which no answer has been found. These challenges should also be considered in light of the resource and expertise limits within charities.

***A Regulatory Competence and Consistency Challenge***

On an international level the responsibility for dealing with the threat that digital currencies cause has fallen on the FATF,[[54]](#footnote-54) by virtue of their role as the international standard setter for ‘combatting money laundering, terrorist financing, and the financing of proliferation, and other related threats to the integrity of the international financial system.’[[55]](#footnote-55) United Nations (UN) instruments purely criminalise financial crime, and make provisions relating to cooperation between states. They do not consider how to tackle the abuse of specific payment methods, and so are not relevant to this discussion.[[56]](#footnote-56)

FATF’s limited competence is a significant challenge when it comes to addressing the crime risks of digital currencies. FATF’s competence is derived from its membership,[[57]](#footnote-57) and furthermore, their Recommendations are non-binding and the principles which they promote are open to interpretation by states as to how to implement them into domestic law.[[58]](#footnote-58) Countries have diverse legal, administrative and operational frameworks, and as such a one-size-fits-all approach would not work.[[59]](#footnote-59) To this end, the FATF Recommendations are best described as ‘mandates for action by a country, if that country wants to be viewed by the international community as meeting international standards’.[[60]](#footnote-60) Such instruments are common practice on the international stage,[[61]](#footnote-61) and are chosen over other forms due to the advantages they offer in relation to speed of adoption and because they are perceived as being useful for technical matters which may need repeated revision.[[62]](#footnote-62) However, it does mean that states may choose not to comply, and also may struggle to interpret the proposals and thus either fail to implement them or implement them ineffectively.

In an effort to avoid these outcomes, the FATF does have a system of assessment of its members’ compliance with the Recommendations.[[63]](#footnote-63) It has been stated that such a system of reported assessments should be enough to ensure compliance,[[64]](#footnote-64) and that, in addition, the political and peer pressure arising from the process can be used to induce others to change their practices.[[65]](#footnote-65) On the whole, the assessment process is considered very successful in achieving its aims.[[66]](#footnote-66) However, issues can be overlooked when they are not perceived as integral parts of the FATF framework, and persistent failure, across multiple jurisdictions, to implement a Recommendation can be ignored for a long period of time.[[67]](#footnote-67) The end result of FATF’s lack of competence is that their Recommendations may not be implemented, and even where they are implemented this is likely to be very different across jurisdictions. This creates uncertainty, but also most importantly for this chapter a significant burden for charities to understand the differences in digital currency laws in all jurisdictions in which they operate. Further, it does little to reduce the criminal stigma attached to digital currency usage and fails to prevent the volatile price changes. This is likely to serve as a barrier to charity engagement with digital currencies.

In Europe, the issue is somewhat alleviated by the European Union, which undertakes to implement the FATF Recommendations through its Money Laundering Directives, thus ensuring compliance and the harmonisation of laws across its member states. However, as international charities are most likely to be active in countries outside the European Union, this is perhaps only a small comfort. G20 member nations have also reaffirmed their commitment to implementing FATF Recommendations, and in particular implementing their digital currency measures into national law.[[68]](#footnote-68) The United Kingdom’s intended withdrawal from the EU could result in the UK introducing its own separate digital currency laws in the future, which would add to the uncertainty and inconsistency for UK-based charities.

***B Regulatory Appetite Challenge***

The second challenge, which is alluded to throughout this chapter, is the lack of regulatory appetite to introduce regulation aimed at curbing abuse of digital currencies and at promoting their positive uses. Indeed, throughout the world progress towards regulating digital currencies has been slow. Bitcoin, the world’s first and most prominent digital currency, was released over a decade ago, and started to gain wider attention around five years ago. Yet, international actors are only now bringing in countermeasures. The FATF, despite researching their risks,[[69]](#footnote-69) have only recently agreed to introduce standards aimed at regulating and supervising virtual asset financial activities.[[70]](#footnote-70) The same is also true of the EU, which is only now introducing measures through its Fifth Money Laundering Directive.[[71]](#footnote-71) Somewhat naturally, the UK has currently not implemented any regulation on digital currencies, and will now transpose the Fifth Money Laundering Directive into national law. However, there is a long way still to go; the Fifth Money Laundering Directive is only the first iteration of regulation of digital currencies, and furthermore it is only implemented in the 28 member states. Other countries need to make their own efforts to implement the FATF guidelines. This is an international issue given that digital currencies are borderless; for regulation to be truly effective, a number of countries need to be regulating against its abuse. The international effort to curb crime linked to the use of digital currencies is only as strong as the response of the weakest state. Until such a point that the appetite to fight abuse of digital currencies increases both nationally and globally, then they will remain susceptible to abuse and unappealing to charities, despite the opportunities they offer.

***C Effectiveness Challenge***

The effectiveness of anti-money laundering laws when applied to digital currencies is also a significant issue. If these laws are ineffective, then they will fail to curb the crime threats that digital currencies present. This in turn will make charities less likely to engage with them due to the threat of reputation damage from being associated with a currency used for illegitimate purposes. Further, the currency is likely to remain volatile with low uptake unless it is regulated effectively, again dissuading charities from utilising it.

The first challenge is evidencing that bitcoins have been used for illegitimate purposes, but this is incredibly difficult.[[72]](#footnote-72) However, bitcoin is not untraceable; as has been noted previously, it is pseudonymous. Utilising the publicly accessible blockchain, any transaction can be linked back to a wallet. The difficulty lies in linking a wallet to an individual. This can become even more challenging when an individual operates numerous wallets, or where they have set up a wallet with fake details.[[73]](#footnote-73) Advanced money-laundering techniques such as ‘smurfing’ can further complicate this.[[74]](#footnote-74) Increasingly, ‘dark wallets’ are being used by dark web criminals to further conceal their identity. These wallets encrypt and mix users’ payments to make money flows untraceable. Looking to the future, the challenge may get still harder, as criminals look to utilise privacy-focused digital currencies such as Monero, Zcash and Dash, which mask identifying information.[[75]](#footnote-75)

The second area where the law’s effectiveness can be challenged is in relation to confiscating the proceeds of crime. If law enforcement agencies cannot gain control of digital currency, then the law fails to bite. There are a few factors that hinder law enforcement agencies successfully controlling criminal assets held in digital currencies. First, digital currencies have no central bank that law enforcement officials can ask to freeze funds. Second, funds move quickly, so without a body to freeze them they can be almost impossible to locate. Third, the funds may be located outside the reach of the investigating jurisdiction, or across multiple jurisdictions. Fourth, and perhaps most significantly, even when law enforcement officials do find the funds, they are reliant either on the criminal complying by providing them with their private key or on the criminal having been careless by making a note of the private key somewhere. Without this, officials cannot confiscate the funds. Crucially, there is no reason for a criminal to hand over their private bitcoin key voluntarily.[[76]](#footnote-76) In light of this, digital currencies are considered a key strategic threat[[77]](#footnote-77) and ‘technically challenging’ to confiscate.[[78]](#footnote-78)

Critically, given the lack of regulatory action in the UK, discussed above in this piece, law enforcement agencies are left to interpret how the Proceeds of Crime Act, Part VII applies to digital currencies. This is a significant burden, given that they have received little or no training and so are almost doomed to fail. Nothing in this section suggests that UK regulation of digital currencies is going to successfully tackle their susceptibility to abuse any time soon, and therefore they will remain too risky for the majority of charities to consider engaging with, irrespective of the opportunities their usage may present. Indeed, charities these days are often global brands and therefore need to protect their reputations.[[79]](#footnote-79) Given that in recent times, a range of charities have been severely impacted by the damage that scandals they are associated with cause to their brand,[[80]](#footnote-80) it is perhaps unsurprising that they are averse to utilising digital currencies when digital technologies are almost synonymous with a range of crimes.

***D Proportionality Challenges***

In seeking to regulate digital currencies to serve the dual aim of promoting further innovation whilst also preventing criminal abuse, proportionality issues have arisen. The first of these relates to the regulatory approach that should be adopted. Whilst some countries have sought to ban digital currencies, others favour regulating their usage. Predominantly, however, world-wide digital currencies remain unregulated. The second proportionality issue relates to how Gift Aid law is, or more appropriately is not, applied to digital currencies in comparison to other payment methods.

***i Approach to Regulation***

As identified at the outset of this chapter, the first issue that needs to be addressed when regulators are looking at new technologies is whether they require fresh intervention or whether measures that are already in place adequately cover them.[[81]](#footnote-81) At present, there appears to be widespread agreement that regulation is needed.[[82]](#footnote-82) However, in the UK, like many other jurisdictions, progress towards implementing regulatory measures has been slow.[[83]](#footnote-83) Where regulation has been implemented, there have been two contrasting approaches. The first (more controversial) approach has been to ban the use of digital currencies. The second (more proportionate but resource-intensive) approach has been to allow the use of digital currencies, but to create a framework for tackling their abuse, normally through targeting the proceeds of crime measures. As will be outlined below, both are tried and tested, but neither is perfect. Largely, this is indicative of the challenge outlined above of needing to balance preventing abuse with leaving enough freedom for them to flourish. Such a balancing act seems almost impossible, and in some cases undesirable.

Some countries have sought, to varying extents, to ban the use of digital currencies, most notably China,[[84]](#footnote-84) Vietnam,[[85]](#footnote-85) and India.[[86]](#footnote-86) Whilst banning digital currencies might serve the purpose of removing their crime threat, it also removes the potential benefits they offer. It is questionable whether this is a proportionate response to their risk, particularly where they offer such potential for positive use in the charity sector. In any event, it is also debatable how successful this strategy would be. A ban is likely to succeed in deterring the average law-abiding citizen from utilising digital currencies, and it may have some merit in terms of protecting consumers. However, it is unlikely to deter a seasoned criminal from utilising them, especially where it is not an international blanket ban adopted by all. Perhaps a good indicator of the lack of proportionality of this approach is the fact that Russia is now moving from the ban it adopted for several years to a more open approach that acknowledges the positive uses of digital currencies.[[87]](#footnote-87)

The approach more widely adopted, or which will be more widely adopted, is to permit the use of digital currencies but to attempt to regulate them appropriately. This is achieved primarily through the implementation of anti-money laundering measures. This approach has been led by and advocated for by the FATF. However, it is still far from successful. Whilst countries such as Australia have implemented some safeguards, on the whole countries are still trying to assess how their anti-money laundering mechanisms may be tailored to the digital currency threat. The EU’s Fifth Money Laundering Directive will implement several mechanisms to curb digital currency abuse across EU member states.[[88]](#footnote-88) Notably, the Directive sets out measures that will regulate certain digital currency businesses (wallet providers and exchange services) in a similar way to that in which banks are regulated, eg by following customer due diligence measures, transaction monitoring and record-keeping, and reporting suspicious activity.[[89]](#footnote-89)

What is clear is that no common approach has yet been developed. The work of the FATF and the EU may see countries converge in their approach. However, until this happens, we are left in a situation where there is uncertainty for charities who are looking to engage with digital currencies. It is difficult for them to know what mechanisms countries are imposing, and more significantly, law in the area is still developing, so they would need to stay abreast of developments. At present, the possible benefits do not seem to justify such an undertaking.

***ii Gift Aid Approach***

The proportionality issue in relation to Gift Aid is whether its application (or lack thereof) to digital currencies is a fair outcome in comparison to how it is applied to other payment methods. Gift Aid gives relief for some gifts of money to charity by individuals.[[90]](#footnote-90) It provides an extra 25p for every £1 donated, as charities can reclaim the basic rate of tax on the gift.[[91]](#footnote-91) This is obviously a significant benefit to charities and one that they seek to take advantage of.

There are a few challenges that stand in the way of a digital currency donation being eligible for Gift Aid. First and foremost, there is a requirement that the donation take the form of ‘a sum of money’.[[92]](#footnote-92) This is a contentious issue, and in relation to bitcoin we have seen arguments both for and against. Bjerg argues that digital currencies are money, suggesting we need to change our perceptions of what constitutes money rather than simply saying bitcoin does not meet our expectations.[[93]](#footnote-93) The Bank of England advocates following economic theory when assessing whether digital currencies constitute money, by considering to what extent they act as a store of value, a medium of exchange, and a unit of account.[[94]](#footnote-94) They suggest that at present digital currencies ‘act’ as money only to a limited extent and only for relatively few people.[[95]](#footnote-95) Significantly, this formulation stops short of saying that they are money. In clear contrast to these two, Yermack suggests that digital currencies largely fail to satisfy the economic theory approach and behave ‘more like a speculative investment than a currency’.[[96]](#footnote-96) Undoubtedly, this is true as things stand; the price is too volatile to be used as an effective store of value, and digital currencies are accepted in too few places to be a useful medium of exchange to all bar a few tech-savvy individuals using it in a specific context. It is entirely possible, though, that these issues could be fixed, and therefore digital currencies could be classed as money.

Case law lends some weight to the fact that bitcoin and digital currencies could be considered to be money, as the Court of Justice for the European Union found it to be VAT-exempt on the basis of a ‘currency exception’ in Article 135(1)(e) of the VAT Directive.[[97]](#footnote-97) In the US, case law has been inconsistent in deciding whether bitcoin amounts to money, with some decisions suggesting that it does not[[98]](#footnote-98) and others suggesting that it does.[[99]](#footnote-99) What is clear is that it is not an easy distinction to make.

Given the uncertainty, and the fact that there at least seems to be an acceptance that digital currencies can be used as money, in limited circumstances at present, then we should be looking to apply Gift Aid to them. The main barrier to this is the pseudonymity associated with digital currencies and how charities would identify individuals to be able to reclaim their tax on the gift. Again, this is not insurmountable, as a separate declaration would work. The issue would be whether the typical bitcoin donor wishes to disclose their identity regardless of the additional funds the charity would receive. However, until such a time that digital currencies are treated equally to other payment methods for the purposes of Gift Aid, it is unlikely that charities are going to want to advocate usage of digital currencies to their wider donor base, as it would result in them not receiving Gift Aid on any donations received by this medium. At present, if accepting digital currency donations, they may satisfy themselves that these are gifts they would not have received otherwise.

***E Incidental Impact Challenge***

The removal of a charity’s financial services by a bank, owing to de-risking in line with their anti-money laundering obligations, has been a longstanding issue for the sector.[[100]](#footnote-100) Significantly, whilst digital currencies may one day provide a solution to this phenomenon if they gain broad appeal and change how we conduct our financial affairs, at present they may give cause for banks to de-risk. In particular, the challenge at present is that de-risking tends to occur in response to perceived regulatory risk, not in response to an assessment of actual risk of illicit activity. The result of this is that banks may choose to remove financial services provided to charities where they are utilising digital currencies. This will be particularly true where the other challenges raised throughout this chapter are not successfully addressed by regulation, meaning that digital currencies become synonymous with crime and particularly the dark web. At present, charities are reliant on banks to provide their financial services. Without banks, charities cannot make the international transactions that are necessary for some of them to function, whether that be directly, or by putting funds into other payment methods.[[101]](#footnote-101)

If it does turn out to be the case that banks will de-risk and remove the financial services they offer to charities on the basis that the usage of digital currencies obscures both the trail of financial flows and the purposes for which they were sent, then this will be a significant barrier to the adoption of digital currencies by charities. Put simply, they cannot afford to reap the currently limited benefits of digital currencies at the expense of losing access to their main financial accounts. At present, we have no indication that this would be the case. However, given digital currencies’ crime links and their less-than-transparent nature, banks will more than likely feel that these present too much of a risk for banks to engage with. The difficulty is that there is no easy solution to this challenge. The issue is broader than banks simply being risk-averse. It is a political issue stemming from the need to implement a strong anti-money-laundering framework that holds banks accountable where there are breaches. It seems somewhat unlikely that a bank would be willing to expose itself to the risks of charities transferring funds through digital currencies when there are other methods charities could utilise that are more well understood and have better oversight.

**V Concluding Remarks—A Digital Future for Charities?**

At present, it is clear that digital currencies present an opportunity, as evidenced by the growing number of charities engaging with them. However, whilst adoption is growing, it is fair to say that the numbers can still be considered as limited at present. If digital currencies are going to move beyond having potential and into providing actual demonstrable benefits for charities, then it is clear that the plethora of challenges, identified through the five thematic headings in the chapter, need to be addressed.

The first challenge the chapter identified was that bodies at an international level have limits to their competence in this area, which results in them simply making recommendations to member states. The result of this is an incoherent approach to regulating digital currencies, varying from country to country. This is a significant challenge, particularly for international charities who by virtue of their global reach would be required to have a working knowledge of the laws relating to digital currencies (or lack thereof) in each jurisdiction in which they operate. Second, the chapter identified the challenge of regulatory appetite. Progress towards regulating digital currencies has been slow across much of the world and in the UK, the consequence of which is that regulation remains on the horizon rather than being active. Until such a time that there is a broader appetite to regulate digital currencies across many jurisdictions, digital currencies’ appeal to charities will be limited due to the negative stigma of crime associated with them and their extreme fluctuations in value. The third challenge, that of effectiveness, links to the second; even where jurisdictions implement measures designed to curb criminal abuse of digital currencies, these are inappropriate for the task at hand and so may never remove some of the negatives which dissuade charities from using digital currencies. The fourth identified challenge was proportionality issues around the regulatory approach taken to digital currencies and with regard to the application of Gift Aid. Different regulatory approaches create uncertainty, and where countries ban the use of digital currencies this is unlikely to preclude usage by criminals but will certainly preclude usage by legitimate actors. In relation to the Gift Aid issue, given that the situation in relation to digital currencies and their eligibility for Gift Aid is ambiguous to say the least, charities will not want to promote its usage above other payment methods as this will result in less income. So, until there is a solution to the Gift Aid issue charities will only want digital currencies to be a supplementary gifting mechanism, attracting new donors who may not have donated were it not for the digital currency option. The fifth challenge highlighted was that the use of digital currencies by charities may lead to banks de-risking and withdrawing banking services from charities owing to the crime risk associated with their usage. Given that digital currencies are in their infancy, and appear unsuitable as both a store of value and as a regular means of exchange owing to a lack of widespread acceptance, charities are still reliant on traditional banking services and therefore cannot afford to lose these for the relatively limited benefits provided by digital currencies, as outlined above.

Finally, it should be remembered that the issues presented are regulatory challenges that are magnified by the particular context of charities, in that they are risk-averse and have limited resources. Whilst the opportunities presented to charities by digital currencies are new, the challenges presented to their adoption are longstanding state-level issues that have lacked adequate solutions. As a result, addressing the challenges to digital currency adoption by charities is a substantial regulatory issue that appears to have no quick fix. The consequence is that these challenges, when combined, are a significant barrier to digital currency usage by charities, for all bar a few larger and/or opportunistic entities.

It is important to remember that law has a role in promoting innovation and innovative uses of technology, as well as its more traditional use in curbing abuse. Whilst law is somewhat naturally reactive rather than proactive, it is imperative that in both these roles it is faster in its development if it is going to assist in the promotion of new technologies. Further, those involved in developing digital currency legislation are unlikely to be considering its impact in relation to the charity sector, and this needs to change. It is therefore important that the sector is receptive to new technologies and willing to engage with regulators so that their views and goals can be reflected in future legislation. If law can be quicker to respond to new technologies, and the charity sector more engaged in the digital revolution, then they will be in a position to maximise future opportunities. Indeed, if digital currencies can grow and shed the negative perceptions held of them, they will offer charities the benefits outlined at the outset of this chapter with limited risk. On top of this, they may also offer a new way for charities to conduct their financial affairs, without the need for the formal financial system. This may prevent the situation whereby a bank de-risks and removes financial services from a charity on the basis that it operates in an area of the world perceived as risky. Significantly, this chapter has revealed that the challenges to charitable adoption of digital currencies are likely to be insuperable until we have suitable regulation. Digital currencies have great potential, making it worthwhile for the regulatory environment to overcome the challenges identified here. Unless this occurs, the charity sector may be left behind by the digital revolution, which is changing how we go about our everyday lives, not just how we manage and utilise our finances.

1. The chapter focuses on bitcoin because it was the world’s first cryptocurrency and is still the largest digital currency in operation. [↑](#footnote-ref-1)
2. ‘Pseudonymity’ is used rather than ‘anonymity’ to describe the secrecy of identifying information in relation to the majority of digital currencies. Whilst anonymity would imply that an individual cannot be identified, this is not wholly true of digital currencies transactions. They can be linked back to a wallet’s alphanumeric identifier by tracking the transaction on the publicly available blockchain which underpins all digital currency transactions. [↑](#footnote-ref-2)
3. See, for example: Antoine Bouveret and Vikram Haksar, ‘What Are Cryptocurrencies? A Potential New Form of Money Offers Benefits While Posing Risks’ (2018) 55(2) *Finance & Development* 26. [↑](#footnote-ref-3)
4. Charities Aid Foundation, ‘Giving a Bit(coin): Cryptocurrency and Philanthropy’ (Giving Thought discussion paper no 3, May 2015) www.cafonline.org/docs/default-source/about-us-publications/givingabitcoin-cryptocurrency-philanthropy-may2015.pdf?sfvrsn=5; and John Plummer, ‘Blockchain: What Charities Really Need to Know’ (*Third Sector*, 1 June 2018) www.thirdsector.co.uk/blockchain-charities-really-need-know/digital/article/1466334. [↑](#footnote-ref-4)
5. See, for examples: Robert A Stokes, ‘Virtual Money Laundering: The Case of Bitcoin and the Linden Dollar’ (2012) 21(3) *Information & Communications Technology Law* 221; and David S Brown, ‘Cryptocurrency and Criminality: The Bitcoin Opportunity’ (2016) 89(4) *Police Journal* 327. [↑](#footnote-ref-5)
6. Philip Hackney and Brian Mittendorf, ‘Charities take digital money now—and the risks that go with it’ (*The Conversation*, 3 October 2018) http://theconversation.com/charities-take-digital-money-now-and-the-risks-that-go-with-it-103983; WeTrust Editorial Team, ‘What Charities Need to Understand Before Accepting Crypto’ (*WeTrust*, 27 June 2018) https://blog.wetrust.io/what-charities-need-to-understand-before-accepting-crypto-53edb3f74907; and Charities Aid Foundation, ‘Giving a Bit(coin)’ (2015) (n 4). [↑](#footnote-ref-6)
7. Charity Commission for England and Wales, ‘Recent Charity Register Statistics: Charity Commission’, www.gov.uk/government/publications/charity-register-statistics/recent-charity-regiter-statistics-charity-commission. [↑](#footnote-ref-7)
8. Alastair Jamieson, ‘Charity Donations Hit by Financial Crisis’ *The Telegraph* (London, 8 November 2008) www.telegraph.co.uk/finance/financialcrisis/3405594/Charity-donations-hit-by-financial-crisis.html. [↑](#footnote-ref-8)
9. Charities Aid Foundation, *CAF UK Giving 2018: An Overview of Charitable Giving in the UK* (Report) (March 2018) 18, www.cafonline.org/docs/default-source/about-us-publications/caf-uk-giving-2018-report.pdf. [↑](#footnote-ref-9)
10. Daniel Ferrell-Schweppenstedde, ‘UK Charities Will lose £258m of EU Money After Brexit. Where’s the Plan?’ *The Guardian* (London, 7 December 2017) www.theguardian.com/voluntary-sector-network/2017/dec/07/charities-lose-at-least-258m-after-brexit-no-government-strategy. [↑](#footnote-ref-10)
11. UK Finance, *UK Payment Markets Summary* (Report) (UK Finance, 2018) 3, www.ukfinance.org.uk/system/files/Summary-UK-Payment-Markets-2018.pdf. [↑](#footnote-ref-11)
12. Institute of Fundraising, *Cash and Digital Payments in the New Economy: Call for Evidence Response by the Institute of Fundraising* (Report) (Institute of Fundraising, June 2018) 1, www.institute-of-fundraising.org.uk/library/hm-treasury-call-for-evidence-on-cash-and-digital-payments-in/cash-and-digital-payments-response.pdf. [↑](#footnote-ref-12)
13. ibid, 2. [↑](#footnote-ref-13)
14. Mining is the process of utilising computer power to solve mathematical problems on the digital currency network, in return some of that digital currency. For a good explanation of the mining process, see: Jacob Aron, ‘Future of Money: Virtual Cash Gets Real’ (*New Scientist*, 1 June 2011) www.newscientist.com/article/mg21028155-600-future-of-money-virtual-cash-gets-real/. [↑](#footnote-ref-14)
15. Kurt Wilberding, ‘Facebook’s Libra Cryptocurrency: How It Stacks Up to Bitcoin and Paypal’ *The Wall Street Journal* (New York, 28 June 2019) www.wsj.com/articles/facebooks-libra-cryptocurrency-how-it-stacks-up-to-bitcoin-and-paypal-11561714204. [↑](#footnote-ref-15)
16. Edward Southall and Mark Taylor, ‘Bitcoins’ (2013) 19(6) *Computer and Telecommunications Law Review* 177, 178. [↑](#footnote-ref-16)
17. For more on how quickly bitcoin transactions are confirmed, see: Blockchain, ‘Median Confirmation Time’ www.blockchain.com/charts/median-confirmation-time. [↑](#footnote-ref-17)
18. A digital currency wallet is a software programme that enables users to send and received digital currency and monitor their balance. It does so by storing the private and public keys. [↑](#footnote-ref-18)
19. Jonathan Turpin, ‘Bitcoin: The Economic Case for a Global, Virtual Currency Operating in an Unexplored Legal Framework’ (2014) 21(1) *Indiana Journal of Global Legal Studies* 335. [↑](#footnote-ref-19)
20. Southall and Taylor, ‘Bitcoins’ (2013) (n 16) 178. [↑](#footnote-ref-20)
21. Usually, this fee will be between $0.2 and $1.5, irrespective of the size of the transfer. For more, see: Bitcoin Fees, ‘Bitcoin Transaction Fees’, https://bitcoinfees.info. Whilst no fee is required, paying a small fee results in a significantly faster confirmation time, meaning transfers are faster. The higher the fee, the faster the confirmation. If no fee is paid, the speed advantage of digital currencies is diminished. [↑](#footnote-ref-21)
22. Deloitte, *Impacts of the Blockchain on Fund Distribution* (Report) (Deloitte, 2018) 16, www2.deloitte.com/content/dam/Deloitte/lu/Documents/technology/lu\_impact-blockchain-fund-distribution.pdf. [↑](#footnote-ref-22)
23. See for example: Stokes, ‘Virtual Money Laundering’ (2012) (n 5); Primavera de Filippi, ‘Bitcoin: A Regulatory Nightmare to a Libertarian Dream’ (2014) 3(2) *Internet Policy Review* 43; and Peter Seele, ‘Let Us Not Forget: Crypto Means Secret. Cryptocurrencies as Enabler of Unethical and Illegal Business and the Question of Regulation’ (2018) 3(1) *Humanistic Management Journal* 133. [↑](#footnote-ref-23)
24. The Law Library of Congress, Global Legal Research Center, *Regulation of Cryptocurrency Around the World* (Law Library of Congress, June 2018) www.loc.gov/law/help/cryptocurrency/cryptocurrency-world-survey.pdf. [↑](#footnote-ref-24)
25. See, for example: HM Treasury, ‘Digital Currencies: Response to the Call for Information’ (Report) (HM Treasury, March 2015) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/414040/digital\_currencies\_response\_to\_call\_for\_information\_final\_changes.pdf; HM Treasury, Financial Conduct Authority, and Bank of England, ‘Cryptoassets Taskforce: final report’ (Report) (HM Treasury et al, October 2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/752070/cryptoassets\_taskforce\_final\_report\_final\_web.pdf; and Financial Conduct Authority, ‘Guidance on Cryptoassets’ (Consultation Paper CP19/3) (Financial Conduct Authority, January 2019) www.fca.org.uk/publication/consultation/cp19-03.pdf. [↑](#footnote-ref-25)
26. Since issuing their ‘Guidance for a risk-based approach to virtual currencies’ in 2015, the FATF has kept a close eye on digital currencies and updated this guidance. For more, see: FATF, ‘Guidance for a risk-based approach: Virtual assets and virtual asset service providers’ (Report) (FATF, 2019) www.fatf-gafi.org/media/fatf/documents/recommendations/RBA-VA-VASPs.pdf. In October 2018, FATF Recommendation 15 and its glossary were updated to clarify which businesses and activities the FATF requirements apply to within this field. In advance of their October 2019 plenary meeting, the FATF are now revising their methodology to assess how countries comply with this new requirement and note that they will be keeping a close watch on members over the next 12 months. For more, see: FATF, ‘Outcomes FATF Plenary, 16–21 June 2019’ (FATF, June 2019) www.fatf-gafi.org/publications/fatfgeneral/documents/outcomes-plenary-june-2019.html. [↑](#footnote-ref-26)
27. At present, despite the uncertainty surrounding Brexit, the UK will be implementing the 5th EU Anti-Money Laundering Directive on or before 20th January 2020. For more, see: HM Treasury, ‘Transposition of the Fifth Money Laundering Directive: Consultation’ (Consultation Paper) (April 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/795670/20190415\_Consultation\_on\_the\_Transposition\_of\_5MLD\_\_web.pdf. This will require the UK to regulate the digital currency sector in line with the EU Directive. [↑](#footnote-ref-27)
28. Government Office for Science, ‘Innovation: Managing Risk, Not Avoiding It’ (Annual Report) (Government Office for Science, 2014) www.oxfordmartin.ox.ac.uk/downloads/reports/14-1190b-innovation-managing-risk-evidence.pdf; and Lyria Bennett Moses, ‘Agents of Change: How the Law “Copes” with Technological Change’ (2011) 20(4) *Griffith Law Review* 765. [↑](#footnote-ref-28)
29. Maria Weimer and Luisa Marin, ‘The Role of Law in Managing the Tension between Risk and Innovation: Introduction to the Special Issue on Regulating New and Emerging Technologies’ (2016) 7(3) *European Journal of Risk Regulation* 469, 469. [↑](#footnote-ref-29)
30. See, as examples: Graeme Laurie, Shawn HE Harmon and Fabiana Arzuaga, ‘Foresighting Futures: Law, New Technologies and the Challenges of Regulating for Uncertainty’ (2012) 4(1) *Law, Innovation and Technology* 1; Marjolein BA van Asselt and Ortwin Renn, ‘Risk Governance’ (2011) 14 *Journal of Risk Research* 431; and Ulrich Beck, *Risk Society: Towards a New Modernity* (London, SAGE Publications, 1992). [↑](#footnote-ref-30)
31. Mate Daniel Szabo and Beatrix Vissy, ‘Regulating the Future? Law, Ethics, and Emerging Technologies’ (2011) 9(3) *Journal of Information, Communication & Ethics in Society* 180, 183. [↑](#footnote-ref-31)
32. Ellen Stokes and Diana M Bowman, ‘Looking Back to the Future of Regulating New Technologies: The Cases of Nanotechnologies and Synthetic Biology’ (2012) 3 *European Journal of Risk Regulation* 235, 235. [↑](#footnote-ref-32)
33. Government Office for Science ‘Innovation: Managing Risk, Not Avoiding It’ (2014) (n 28). [↑](#footnote-ref-33)
34. The ‘pacing problem’ describes the inability of law to keep up with technological development. For more, see: Gary E Marchant, Braden R Allenby and Joseph R Herkert, *The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight*, 7th edn (Springer, 2011). [↑](#footnote-ref-34)
35. The ‘Collingridge dilemma’ essentially entails that efforts to influence the future development of technology face a two-fold issue: first, a knowledge challenge, in that technology cannot be fully understood until it is developed and used; second, an influence problem, in that once a technology is widely used, it is difficult to influence its development and usage. For more, see: David Collingridge, *The Social Control of Technology* (Pinter, 1980). [↑](#footnote-ref-35)
36. For more, see: Roger Brownsword and Morag Goodwin, *Law and Technologies of the Twenty-First Century: Text and Materials* (Cambridge, Cambridge University Press, 2012) ch 6. [↑](#footnote-ref-36)
37. Stefan Carnmel, Andreas Lbsch and Alfred Nordmann, ‘A “Scanning Probe Agency” as an Institution of Permanent Vigilance’ in Morag Goodwin, Bert-Jaap Koops and Ronald Leenes, *Dimensions of Technology Regulation* (Wolf, 2010) 125. [↑](#footnote-ref-37)
38. Brownsword and Goodwin, *Law and Technologies of the Twenty-First Century* (2012) (n 36)*.* [↑](#footnote-ref-38)
39. Bert-Jaap Koops, ‘Should ICT Regulation be Technology-Neutral?’ in Bert-Jaap Koops et al, *Starting Points for ICT Regulation: Deconstructing Prevalent Policy One-Liners* (Asser Press, 2006) 77. [↑](#footnote-ref-39)
40. Stokes and Bowman, ‘Looking Back to the Future of Regulating New Technologies’ (2012) (n 32) 235. [↑](#footnote-ref-40)
41. Wolfgang van den Daele, ‘Access to New Technology: In Defense of the Liberal Regime of Innovation’ in Bert-Jaap Koops et al, *Starting Points for ICT Regulation: Deconstructing Prevalent Policy One-Liners* (Asser Press, 2006) 85. [↑](#footnote-ref-41)
42. Ulrich Beck, *Risk Society: Towards a New Modernity* (SAGE Publications, 1992). [↑](#footnote-ref-42)
43. Stokes and Bowman (2012) (n 32) 237–8. [↑](#footnote-ref-43)
44. For example, see: Matthew Robert Shillito, ‘Untangling the “Dark Web”: An Emerging Technological Challenge for the Criminal Law’ (2019) 74(2) *Information & Communications Technology* *Law* 186. [↑](#footnote-ref-44)
45. Christie Ford, ‘Innovation as a Challenge to Regulation’ (*The Regulatory Review*, 12 March 2018) www.theregreview.org/2018/03/12/ford-innovation-regulation/. [↑](#footnote-ref-45)
46. Stokes and Bowman (2012) (n 32) 235. [↑](#footnote-ref-46)
47. ibid. [↑](#footnote-ref-47)
48. Carnmel, Lbsch and Nordmann, ‘A “Scanning Probe Agency”’ (2010) (n 37) 125. [↑](#footnote-ref-48)
49. For good discussion of the benefits and risks of technology-specific regulation, see: Chris Reed, ‘Taking Sides on Technology Neutrality’ (2007) 4(3) *SCRIPT-ed* 263, 283–284. [↑](#footnote-ref-49)
50. Stokes and Bowman (2012) (n 32) 235. [↑](#footnote-ref-50)
51. Carnmel, Lbsch and Nordmann, (2010) (n 37) 125. [↑](#footnote-ref-51)
52. Olympia Bekou and Thérèse Murphy, ‘Editorial’ (2010) 10(4) *Human Rights Law Review* 597, 597. [↑](#footnote-ref-52)
53. Lyria Bennett Moses, ‘How to Think about Law, Regulation and Technology: Problems with ‘Technology’ as a Regulatory Target’ (2015) 5(1) *Law, Innovation and Technology* 1, 14. [↑](#footnote-ref-53)
54. The FATF’s focus on digital currencies was first identified in 2010. For more, see: Financial Action Task Force, ‘Money Laundering Using New Payment Methods’ (Report) (October 2010) https://www.fatf-gafi.org/media/fatf/documents/reports/ML%20using%20New%20Payment%20Methods.pdf. [↑](#footnote-ref-54)
55. Financial Action Task Force, ‘International Standards on Combatting Money Laundering and the Financing of Terrorism & Proliferation, The FATF Recommendations’ (Report) (February 2012, updated June 2019) 6, www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf. [↑](#footnote-ref-55)
56. Financial Action Task Force, ‘FATF Recommendations Support United Nations Instruments’, www.fatf-gafi.org/publications/fatfgeneral/documents/unscs-nov-13.html. [↑](#footnote-ref-56)
57. At present, there are over 180 countries which implement the FATF Recommendations. Whilst there are only 39 full FATF members, the rest are associate members by virtue of their membership of one of 9 FATF-Style Regional Body. For more, see: FATF, ‘FATF Members and Observers’, [www.fatf-gafi.org/about/membersandobservers/](http://www.fatf-gafi.org/about/membersandobservers/). [↑](#footnote-ref-57)
58. Matthew Robert Shillito, ‘Countering Terrorist Financing via Non-Profit Organisations: Assessing Why Few States Comply with the International Recommendations’ (2015) 6(3) *Nonprofit Policy Forum* 325, 333. [↑](#footnote-ref-58)
59. ibid. [↑](#footnote-ref-59)
60. Paul Allan Schott, *Reference Guide to Anti-Money Laundering and Combatting the Financing of Terrorism* (2nd edn, World Bank/IMF, 2006) III-9. [↑](#footnote-ref-60)
61. Douglas M Johnston, *Consent and Commitment in the World Community: The Classification and Analysis of International Instruments*, 1st edn (Brill, 1999). [↑](#footnote-ref-61)
62. Dinah Shelton, ‘Normative Hierarchy in International Law’ (2006) *The American Journal of International Law* 291, 322. [↑](#footnote-ref-62)
63. For more on the assessment process, see: Matthew Robert Shillito, ‘Countering Terrorist Financing via Non-Profit Organisations: Assessing Why Few States Comply with the International Recommendations’ (2015) (n 58). [↑](#footnote-ref-63)
64. CM Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 *International and Comparative Law Quarterly* 850, 862–863. [↑](#footnote-ref-64)
65. Dinah Shelton, ‘Normative Hierarchy in International Law’ (2006) (n 62) 319. [↑](#footnote-ref-65)
66. Financial Action Task Force, *Annual Report 2010–2011* (Report) (2011) 5, www.fatf-gafi.org/media/fatf/documents/reports/FORMATTED%20ANNUAL%20REPORT%20FOR%20PRINTING.pdf. [↑](#footnote-ref-66)
67. Matthew Robert Shillito, ‘Countering Terrorist Financing via Non-Profit Organisations: Assessing Why Few States Comply with the International Recommendations’ (2015) (n 58). [↑](#footnote-ref-67)
68. Japan Ministry of Finance, ‘Communique: G20 Finance Ministers and Central Bank Governors Meeting’ (Fukuoka, June 2019) www.mof.go.jp/english/international\_policy/convention/g20/communique.htm. [↑](#footnote-ref-68)
69. See for instance: FATF, ‘Virtual Currencies—Key definitions and Potential AML/CFT Risks’ (Report) (June 2014) www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf; and FATF, ‘Guidance for a Risk-Based Approach to Virtual Currencies’ (Report) (June 2015) www.fatf-gafi.org/media/fatf/documents/reports/Guidance-RBA-Virtual-Currencies.pdf. [↑](#footnote-ref-69)
70. U.S. Department of the Treasury, ‘U.S. Concludes Successful Term as President of the Financial Action Task Force’ (21 June 2019) https://home.treasury.gov/news/press-releases/sm714. [↑](#footnote-ref-70)
71. Directive (EU) 2018/842. [↑](#footnote-ref-71)
72. Philip Larratt, Paul Taylor, David S. Wall, Syed Naqvi, Matthew Shillito, Rob Stokes, ‘Innovation and the Application of Knowledge for More Effective Policing’ (Report) (13 July 2017) http://n8prp.org.uk/wp-content/uploads/2017/08/N8-Cryptocurrency-Report.pdf 22 July 2019. [↑](#footnote-ref-72)
73. Financial Action Task Force, *Guidance for a Risk-Based Approach to Virtual Currencies* (Report) (June 2015) 11–13, www.fatf-gafi.org/media/fatf/documents/reports/Guidance-RBA-Virtual-Currencies.pdf. [↑](#footnote-ref-73)
74. ‘Smurfing’ is the process of breaking down large cash deposits into a number of smaller deposits in an attempt to evade detection. (See: Előd Takáts, ‘A Theory of “Crying Wolf’’: The Economics of Money Laundering Enforcement’ (2007) International Monetary Fund Working Paper 07/81, www.imf.org/external/pubs/ft/wp/2007/wp0781.pdf. [↑](#footnote-ref-74)
75. European Parliament, *Virtual Currencies and Terrorist Financing: Assessing the Risks and Evaluating Responses* (May 2018) PE 604.970, 32. [↑](#footnote-ref-75)
76. Matthew Robert Shillito, (n 44) 201. [↑](#footnote-ref-76)
77. HM Government, *Serious and Organised Crime Strategy* (Report) (November 2018) Cm 9718, 14, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/752850/SOC-2018-web.pdf. [↑](#footnote-ref-77)
78. European Parliament, *Virtual Currencies and Terrorist Financing: Assessing the Risks and Evaluating Responses* (May 2018) PE 604.970, 57. [↑](#footnote-ref-78)
79. For more on charities as brands, see: Philippa Hankinson, ‘Brand Orientation in the Charity Sector: A Framework for Discussion and Research’ (2001) 6 (3) *International Journal of Nonprofit and Voluntary Sector Marketing* 231. [↑](#footnote-ref-79)
80. For examples, see: Charity Law & Policy Unit, ‘Charity Governance: Looking Backwards to Move Forwards’ (20 February 2019) www.liverpool.ac.uk/law/research/charity-law-and-policy/charity-governance/. [↑](#footnote-ref-80)
81. Stokes and Bowman (2012) (n 32) 235. [↑](#footnote-ref-81)
82. Financial Action Task Force, ‘Public Statement—Mitigating Risks from Virtual Assets’ (February 2019) www.fatf-gafi.org/publications/fatfrecommendations/documents/regulation-virtual-assets-interpretive-note.html. [↑](#footnote-ref-82)
83. The government has consulted on digital currencies, and responded to the findings, however as yet there is no tangible outcome of this process. See: HM Treasury, ‘Digital Currencies: Call for Information’ (3 November 2014) www.gov.uk/government/consultations/digital-currencies-call-for-information/digital-currencies-call-for-information. [↑](#footnote-ref-83)
84. It is fair to suggest that China has adopted risk-averse approach to regulating digital currencies. All financial institutions and third-party payment providers are banned from accepting, using and selling digital currencies, while all websites that facilitate digital currency trading have been blocked. For more, see: Sidney Leng, ‘Beijing bans bitcoin, but when did it all go wrong for cryptocurrencies in China?’ *South China Morning Post* (5 February 2018) www.scmp.com/news/china/economy/article/2132119/beijing-bans-bitcoin-when-did-it-all-go-wrong-cryptocurrencies. [↑](#footnote-ref-84)
85. Vietnam’s central bank has banned the use of digital currencies as a means of payment. For more, see: Daniel Palmer, ‘Vietnam’s Central Bank Announces Ban on Bitcoin Payments’ *Coindesk* (31 October 2017) www.coindesk.com/vietnams-central-bank-announces-ban-on-bitcoin-payments. [↑](#footnote-ref-85)
86. India has banned the use of digital currencies; however, it is still considering a central bank offered digital currency. It is also considering large fines and prison sentences of up to ten years for anyone caught using digital currencies. For more, see: John Biggs, ‘Indian Panel Proposes Fines and Jail Time for Cryptocurrency Use’ *Coindesk* (23 June 2019) www.coindesk.com/indian-panel-proposes-ban-and-jail-time-for-cryptocurrency-use. [↑](#footnote-ref-86)
87. Maxim Pervunin and Tatiana Sangadzhieva, ‘Russia’ (2018) 1 *The Virtual Currency Regulation Review* 243. [↑](#footnote-ref-87)
88. Directive (EU) 2018/842. [↑](#footnote-ref-88)
89. Whilst many digital currency exchanges throughout Europe already implement these measures, such a move will harmonise responses and discourage bad actors from acting in the digital currency sphere. [↑](#footnote-ref-89)
90. Income Tax Act 2007, s 413(1). [↑](#footnote-ref-90)
91. ibid, s 414. [↑](#footnote-ref-91)
92. ibid, s 416(2). [↑](#footnote-ref-92)
93. Ole Bjerg, ‘How is Bitcoin Money?’ (2016) 33(1) *Theory, Culture & Society* 53. [↑](#footnote-ref-93)
94. Robleh Ali, John Barrdear, Roger Clews and James Southgate, ‘The Economics of Digital Currencies’ *Q3 Quarterly Bulletin* (2014) www.bankofengland.co.uk/-/media/boe/files/digital-currencies/the-economics-of-digital-currencies. [↑](#footnote-ref-94)
95. ibid. [↑](#footnote-ref-95)
96. David Yermack, ‘Is Bitcoin a Real Currency? An Economic Appraisal’ (NBER Working Paper No. 19747) (December 2013, revised April 2014) www.nber.org/papers/w19747. [↑](#footnote-ref-96)
97. Skatteverket v David Hedqvist, Case C-264/14. [↑](#footnote-ref-97)
98. See for instance: State v Espinoza No F14-2923 (Fl Cir Ct July 22, 2016). [↑](#footnote-ref-98)
99. See: United States v Faiella 39 F Supp 3d 544, 545 (SDNY 2014) and EC v Shavers 2013 WL 4028182 (ED Tex Aug 6, 2013). [↑](#footnote-ref-99)
100. FATF, ‘FATF clarifies risk-based approach: case-by-case, not wholesale de-risking’ (23 October 2014) www.fatf-gafi.org/documents/news/rba-and-de-risking.html; and Charity & Security Network, ‘Financial Access and De-Risking: Impact on Nonprofit Organisations’ (June 2015) www.somaliangoconsortium.org%2Fdocs%2Fkey%2F17%2F2015%2F1439110614.docx&usg=AFQjCNHERqxmYmyBNMhY7yYGqmYPsjx4nw&sig2=8octf\_Yzb60FIot0i\_IS0A. [↑](#footnote-ref-100)
101. ibid. [↑](#footnote-ref-101)