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This volume, titled “**Advancing Financial Regulation and Supervision**” focuses on the ongoing evolution of financial regulation and supervision as authorities respond to geopolitical developments, technological innovation, and the pursuit of more effective and proportionate oversight. The articles are organized to cover key themes such as cross-border supervision and geopolitical risk, the regulation of emerging technologies and payments, and the advancement of smarter, outcomes-based supervisory practice, reflecting the comprehensive approach needed to support well-functioning, resilient, and inclusive financial markets.



2.1
Academic Article

**Devolving Innovation Regulation to
Gatekeepers: Proportionality,
Co-regulation or Regulatory
Abdication in the UK's Regulation
of Crypto Asset Offers**

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Author's Bio



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She has published extensively in the areas of corporate governance and financial regulation, fintech and crypto regulation, and the law and policy for business and finance generally. She is a Research Member of the European Corporate Governance Institute, and in 2020, a Senior Scholar at the European Central Bank's Legal Research Programme.

Abstract

This article examines the UK Financial Conduct Authority's regulatory innovation in introducing a proportionate fund-raising regulation for crypto asset offers. The attempt at proportionality is reflected in the refrain from adopting mandatory registration and disclosure techniques like in securities regulation, but to co-opt crypto asset trading exchanges as gatekeepers to perform verification roles in order to underpin investor confidence in the market. The article examines the nature of these gatekeeping roles and frames them within the theoretical framework of co-regulation, in order to critically examine if the FCA would achieve its objectives: offering a form of cost-effective investor protection that can be trusted. The article argues that questions arise as to the aptness of the crypto asset trading exchange being enrolled as a gatekeeper, as the scope of verification can be expansive, and matters such as the veracity of disclosed code can better be audited by professional code auditors. The article argues for a proportionate reframing of exchanges' gatekeeper role as well as for the co-option of other suitable gatekeepers. Effective co-regulation ultimately depends on the identification of appropriate gatekeepers that are well-placed in terms of proximity and expertise, in order to underpin investor confidence.

Devolving Innovation Regulation to Gatekeepers: Proportionality, Co-Regulation or Regulatory Abdication in the UK's Regulation of Crypto Asset Offers

Introduction

Crypto asset offers are a form of fundraising for developmental blockchain-based business projects. Developers raise funds by the issuance of digital tokens programmed with smart contracts, subject to further development by code programming, for deployment in a permissionless blockchain environment. Crypto asset offers are often made when developers wish to produce a competing permissionless blockchain, such as becoming an alternative to the incumbent Ethereum blockchain or its main competitors such as Solana, Binance Chain, Algorand, Cardano, Polygon, Polkadot etc. Developers could also fundraise in this manner when they wish to develop an application to run on any of these permissionless blockchains.

Digitally programmed tokens could be issued for public fund-raising in order to finance the development of the project, which includes further code development of digital tokens, in order to realise their functionality as well as to attract network effects to the projects. As the projects are often decentralised and thrive on creating a shared community or commons, network effects are important for a project's future viability. In this manner, we have seen crypto asset offers made by developers for new blockchains, such as Solana in 2020 and for applications to be deployed on existing blockchains, such as a gaming application on Ethereum or a 'decentralised finance' application which facilitates holders of crypto assets to make yields on their assets by financialising them.¹ Token-holders both financially support the project as well as provide a critical mass for the network effects needed for such projects.

When crypto asset offers or otherwise known as 'initial coin offerings'² burst onto the scene in late 2016, regulators worldwide were rightly challenged with reckoning with them as an innovation as well as with the limitations of traditional securities regulatory regimes designed to regulate corporate fund-raising.³ Many securities regulators recognised the fund-raising nature of these endeavours, as tokens are not merely utility-conferring digital goods. Thus, the need for investor protection arises in an otherwise self-regulatory market that could be rife with mis-selling and scams,⁴ besides simply the high risk of investing in developmental projects that may fail.⁵ However, regulators do not often have a track record of responding with regulatory innovation to market innovation.⁶

After protracted observations of watching each other in regulatory divergence and competition,⁷ leading regulators finally made a move. The EU introduced its pioneering Markets for Crypto Assets Regulation (MiCAR) in 2023.⁸ There is significant academic literature critically examining the Regulation in respect of crypto asset offers, in terms of its somewhat derivative nature of traditional securities regulation⁹ while being pared down, and therefore

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- 1 *Professor of Corporate Law and Financial Regulation, UCL.
OICU-IOSCO, 'Final Report with Policy Recommendations for Decentralized Finance (DeFi)' (Dec 2023), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD754.pdf>; ESMA TRV Risk Analysis, 'Decentralised Finance in the EU: Developments and risks' (Oct 2023), https://www.esma.europa.eu/sites/default/files/2023-10/ESMA50-2085271018-3349_TRV_Article_Decimalised_Finance_in_the_EU_Developments_and_Risks.pdf.
 - 2 N Essaghoorian, 'Initial Coin Offerings: Emerging Technology's Fundraising Innovation' (2019) 66 UCLA Law Review 294; Dimitri Boreiko, *Understanding Initial Coin Offerings: A New Era of Decentralized Finance* (Cheltenham: Edward Elgar 2024).
 - 3 There is an abundance of academic literature in the US and EU on whether tokens were securities, P Hacker and C Thomale, 'Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law' (2018) European Company and Financial Law Review 645; P Maume and M Fromberger, 'Regulation of Initial Coin Offerings: Reconciling U.S. and E.U. Securities Laws' (2019) 19 Chicago Journal of International Law 548; TL Hazen, 'Tulips, Oranges, Worms, and Coins – Virtual, Digital, or Crypto Currency and the Securities Laws' (2019) 20 North Carolina Journal of Law and Technology 493; U Rodrigues, 'Semi-Public Offerings? Pushing the Boundaries of Securities Law' (2018), ssrn.com/abstract=3242205; MT Henderson and M Raskin, 'A Regulatory Classification of Digital Assets: Towards an Operational Howey Test for Cryptocurrencies, ICOs, and Other Digital Assets' (2019), ssrn.com/abstract=3269295; SEC, 'Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO' (25 July 2017), www.sec.gov/litigation/investreport/34-81207.pdf.
 - 4 See <https://www.visualcapitalist.com/cp/ranked-dead-crypto-coins-by-year/> for 'dead' crypto coins including both business failures and scams.
 - 5 M Fromberger and L Haffke, 'ICO Market Report 2018/2019' (2020), ssrn.com/abstract=3512125.
 - 6 This more proactive position is urged by Cristie Ford, *Innovation-Framing Regulation* (Cambridge: CUP 2013).
 - 7 IH-Y Chiu, 'Decrypting the Trends of International Regulatory Competition in Crypto-finance' (2020) European Journal of Comparative Law and Governance 1-40.
 - 8 Regulation 2023/1114.
 - 9 P Maume, 'The Regulation on Markets in Crypto-Assets (MiCAR): Landmark Codification, or First Step of Many, or Both?' (2023) 20 European Company and Financial Law Review 243-275; M Lehmann, 'MiCAR – Gold Standard or Regulatory Poison for the Crypto Industry?' (EBI Working Paper 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4692743.

giving rise to areas of uncertainty in terms of standards and compliance expectations.¹⁰ To date there are no reports of new headline crypto asset offers made in the EU adopting the MiCAR regime, and it can be questioned whether it has struck the right balance in appealing to business innovators/issuers and to investors.

The UK has followed on the heels of the EU's approach of tailor-making a regulatory regime for crypto assets broadly, including crypto asset offers, stablecoins and crypto asset intermediaries.¹¹ Its approach to regulating crypto asset offers differs from the EU and there is potential in such an approach, relying more heavily on market-based governance, to offer a more responsive and flexible regulatory environment for crypto asset issuers. The cost of making crypto asset offers within such a regulatory framework could also be more proportionate. This article focuses on this regime, discussing the co-regulatory approach adopted by the Financial Conduct Authority (FCA), considering whether this is a form of regulatory innovation that is well thought out. Hence this article is not a comparative discussion with the MiCAR. It critically examines not only the regulation of crypto asset offers as a novel form of fund-raising but also within the lens of co-regulation as an overarching framework. The FCA's delegation to, and partnership with, key gatekeepers in this landscape provides the framework for studying the specific regulation of crypto asset offers that could be made to the public in the UK.

Section B introduces the UK's regulatory regime in terms of the FCA's designation of crypto asset trading exchanges or platforms as key gatekeepers of crypto asset offers. Section C then situates the substantive discussion within the framing of the concept of co-regulation. In examining how crypto asset offers are to be regulated, market actors are devolved with substantive signalling, steering functions and bear responsibility for doing so. Furthermore, market actors' roles involve secondary rule-making that would be accountable to the meta-level regulatory framework. Section C critically examines whether the FCA's co-regulatory design for crypto trading exchanges as gatekeepers is well-thought and what the achievements and shortcomings are. Section D offers suggestions that the unique nature of crypto assets entail considerations for refining the co-regulatory design. In particular, the network of gatekeepers needs to be expanded, and greater clarity can be provided in terms of risk-sharing amongst them. This can also ultimately lead to a more proportionate regulatory compliance regime for crypto asset issuers and assuage investor protection in novel but effective ways. This Section also provides brief concluding remarks.

10 H Marjosola and M Salo-Lathi, 'Offer and Admission to Trading of Crypto Assets Other than ARTs and EMTs' in M Haentjaens, L Gullifer and I Kokorin (eds), *Markets in Crypto Assets Regulation: Law and Technology* (Oxford: Hart 2025), ch5.

11 The Financial Services and Markets Act 2000 (Cryptoassets) Regulations 2026.

01

Regulating Crypto Asset Offers: Trading Exchanges as Gatekeeper

The UK's regulation¹² of crypto asset offers take a somewhat different approach from MiCAR. It co-opts the crypto asset trading exchange as a gatekeeper in two capacities, in relation to supplying investor protection at the pre-sale stage, and in relation to the continuing needs for price formation to benefit investors and maintain efficient markets, in the post-admission stage. Arguably these two roles have been performed by public regulatory standards, and to an extent market intermediaries, in relation to securities offers. They would however be significantly delegated to crypto asset trading exchanges in a unique model of co-regulation as framed in Section C. This Section explains what the gatekeeping roles and obligations are for crypto asset trading exchanges, who would themselves be a new species of authorized financial intermediary under the UK's new rules.¹³

First we turn to crypto asset trading exchanges' gatekeeper role for investor protection at the pre-sale stage. The paradigm for regulating fund-raising, such as in securities regulation, is that investor protection is best served by investors being able to make an informed decision on the investment opportunity. To that end mandatory disclosure is required of the issuer in order to provide an optimal set of material information, and investors would benefit from regulatory standardization in that such information is not merely selective and would be comparable.¹⁴ The ex ante nature of mandatory disclosure fosters market confidence and efficient allocation, and is therefore superior to an ex post system of anti-fraud enforcement.¹⁵ The UK's design for crypto asset trading exchanges' gatekeeper role is that they play a part in determining the content of mandatory disclosure, in addition to a minimum level provided by regulatory standards for a public offer of crypto assets. They also offer an extent of merit vetting but not to the point of guaranteeing the performance of the crypto asset or viability of the issuer.

The institution of mandatory disclosure as a fundamental regulatory design for crypto asset offers is not surprising. Mandatory disclosure via a prospectus that contains comprehensive material information relevant to an investor coming to an informed decision, is a key underpinning in securities regulation. Mandatory disclosure is aimed to combat information asymmetry between investors and issuers which can result in mis-selling. However, crypto asset offers raise certain differences in context distinguishing them from securities offers. Crypto asset fund-raising is 'pre-development' in nature, as tokens are usually offered when a business idea is still to be technologically developed. Such business ideas are often premised upon a form of shared or platform economy which can only be built out *ex post*. This is a novel point in time for business fundraising as securities fundraising usually takes place at a point of relative maturity of the company. Even venture capitalists funding start-up companies are

12 *ibid*; FCA, *Regulating Cryptoassets: Admissions & Disclosures and Market Abuse Regime for Cryptoassets* (Policy Statement, June 2026), <https://www.fca.org.uk/publication/policy/ps26-9.pdf>.

13 Sect 40, The Financial Services and Markets Act (Cryptoassets) Regulations 2026, inserting s9N, 9S, 9T, 9W, 9Y and 9Z6 to the Financial Services and Markets (Regulated Activities) Order.

14 JC Coffee, 'Market Failure and the Economic Case for a Mandatory Disclosure System' (1984) 70 Virginia Law Rev 717.

15 JA Franco, 'Why Anti-Fraud Provisions are not Enough: The Significance of Opportunism, Candor and Signalling in the Economic Case for Mandatory Securities Disclosure' (2002) Columbia Business Law Review 223.

facing an already-incorporated company with perhaps some initial operations.¹⁶ Crypto asset offers necessarily take place with no or little track record for investors to observe, given the need to develop the project or platform. The informational environment for investors may be unprecedentedly thin. This is not necessarily an issue of information asymmetry typical in corporate fundraising paradigms, i.e. that issuers often hold more information than is accessible to investors. This is an environment of information anemia as both issuers and investors are wading into a speculative venture with much information yet to discover.

In this manner, it is arguable that pre-sale mandatory disclosure, which is the gold standard for securities offers, is not exactly a good fit for crypto asset offers, where issuers and investors are both discovering information through token development. The UK's approach does not rely excessively on *ex ante* mandatory disclosure as the key regulatory tool for investor protection. Crypto asset offers can only be made in the UK under a public offer regime, or as exempt from the public offer regime if conditional upon admission to an authorized trading platform, or as an otherwise exempt offer.¹⁷ Hence, one key avenue of fund-raising for crypto asset issuers is to seek admission to trading and therefore obtain an exemption from the default public offer regulation which resembles the MiCAR's. The crypto asset trading platform is the intermediary that bears the obligation to vet the crypto asset issuer in order to decide whether to admit to trading, and is obligated to carry out due diligence in order to avoid material harm to investors.¹⁸

It is expected that admission to trading would be the main means of crypto asset issuers coming to market as investors would likely only be attracted to an offer of crypto assets that are traded on a secondary market. UK regulators seem to have adopted a 'theoretical' maintenance of regulatory parity with the MiCAR, retaining a default public offer regulatory design based on *ex ante* mandatory disclosure that is very similar to the EU's in terms of disclosure items. This is perhaps for the purposes of hedging against regulatory competition. It is however arguable that the trading platform admission exemption would be substantively significant for issuers evaluating the options of market access, if they do not wish merely to market to qualified investors which would avail them of an exemption from public offer regulation.

The crypto asset trading exchange is designated as a key gatekeeper, by allowing or denying issuers to be admitted to a secondary market, therefore affecting whether they could come to market for fund-raising. This role is designed with investor protection in mind, a subject therefore for regulatory compliance and not just as private relations with investors. Regulators' expectations for the role of crypto asset trading platforms are not unwarranted since they have engaged to an extent with the 'Initial Exchange Offering' (IEO) model prior to the introduction of regulation. In a self-regulatory landscape, some initial coin offerings were made as IEOs rather than directly to investors, as a mechanism for reputational bonding that is appealing to investors. The initial coin offering hype did bring in lemons as well as innovators to market, and in order to sustain market confidence, some offerings were completely administered and distributed by a crypto asset exchange. It is envisaged that exchanges conduct an extent of vetting in order to protect their own reputation, and issuers benefit from the exchange's leverage of their user base and marketing visibility. However, while IEOs were voluntary, the UK's

16 B Zider, 'How Venture Capital Works' (Harvard Business Review, 1998), at hbr.org/1998/11/how-venture-capital-works on the relative rarity of venture capital funds investing in start-up and very young stages of companies. Furthermore, even investment in young companies is premised on some track record, like the company's patent applications, see D Engel and M Keilbach, 'Firm-level Implications of Early Stage Venture Capital Investment — An Empirical Investigation' (2007) 14 Journal of Empirical Finance 150.

17 Reg 10, and Schedule 1, The Financial Services and Markets Act (Cryptoassets) Regulations 2026.

18 FCA, *Regulating Cryptoassets: Admissions & Disclosures and Market Abuse Regime for Cryptoassets* (June 2026), , para 2.29-2.38.

regulatory design would enrol authorised crypto asset exchanges into this role of gatekeeping. Arguably, crypto asset trading exchanges can decide to avoid taking on this role and limit their access to qualified investors. In this manner, they can list tokens without vetting them as required by the FCA, as these can be marketed exclusively to qualified investors being an exempt category. However, besides not attracting the retail market and affecting business growth, the unwillingness to undertake verification for admissions of crypto assets can be perceived negatively. In this manner, the regulatory design does not make it easy for crypto asset trading exchanges to be both successful and able to avoid the delegated governance of gatekeeping crypto asset issuers.

Crypto asset trading platforms are expected to conduct due diligence on crypto asset offers in order to admit or otherwise to trading.¹⁹ This process is intended to result in a form of verification of issuers' disclosures, in order to avoid detriment to investors.²⁰ Crypto asset issuers intending to be admitted to trading are expected to produce disclosures that exchanges require, but it is likely that the minimum mandatory disclosure specified in regulation would apply. Similar to the EU, the UK provides mandatory disclosure items that are broadly-framed, such as the characteristics of the crypto asset to be offered, the governance mechanisms of the platform for its deployment, the underlying technology and protocols, conflicts of interest and risk information.²¹ These are not exhaustive as a general materiality standard underpins the disclosure obligation.²² A 2-page non-technical summary is also mandated for disclosure.²³ Furthermore, the disclosure document must identify the responsible persons for the disclosure, whether the issuer, third party or the person seeking admission to trading, so that investors clearly know where to seek recourse.²⁴ Crypto asset issuers are also encouraged to make forward-looking statements of a financial or intentional nature. This caters for the developmental nature of crypto assets as statements of plans, developmental milestones or intentions can be framed as forward-looking disclosure, and issuers can be incentivized to disclose these appropriately without undue fear of legal risk from ex post litigation.²⁵

Crypto asset trading platforms can add to the minimum mandatory disclosure, in order to be able to flexibly provide for the salient information needed on the part of investors. This provides more scope for exchanges to compete towards investor protection, and incorporate other information that may matter in a pre-developmental context. Empirical research insights show that information about token retention by project developers is an important tenet of investor protection for crypto asset sales. The retention of tokens by founder-developers is often seen in a positive light by investors, as founder-developers would have skin in the game and signal commitment and confidence in their development project.²⁶ Commentators find that token retention bears a positive relationship to

19 Ibid, paras 2.34-2.36.

20 Ibid.

21 Ibid, paras 2.58, 2.66 Regulation 13, The Financial Services and Markets Act 2000 (Cryptoassets) Regulations 2026.

22 FCA (June 2026), para 2.43, 2.49.

23 Ibid, 2.73.

24 Ibid, paras 2.98, 2.107.

25 Discussed shortly, and see Ibid, para 2.108-2.118.

26 S Adhami, G Giudici and S Martinazzi, 'Why Do Businesses Go Crypto? An Empirical Analysis of Initial Coin Offerings' (2018) 100 *Journal of Economics and Business* 64, but contrary findings see L Ante, P Sandner and I Fiedler, 'Blockchain-Based ICOs: Pure Hype or the Dawn of a New Era of Startup Financing?' (2018) 11 *Journal of Risk and Financial Management* 80; R Amsden and D Schweizer, 'Are Blockchain Crowdsales the New "Gold Rush"? Success Determinants of Initial Coin Offerings' (2019), at papers.ssrn.com/sol3/papers.cfm?abstract_id=3163849.

funding success and project completion.²⁷ Howell et al's²⁸ and Blaseg's²⁹ empirical research also finds that token retention subject to lock-ups as well as a vesting schedule are important. Lock-ups refer to periods of prohibition from disposal of tokens by founder-developers. A vesting schedule refers to an incentive mechanism where tokens may be reserved in a pool and vested in founder-developers in stages. The vesting schedule provides an incentive mechanism for performance on the part of founder-developers while also 'locking up' the pool during the period of development. However, token retention can be designed in a number of ways and these affect investors' agency risk. For example, if tokens are retained but can be sold off quickly in a secondary market, the impression of 'skin in the game' would be only skin-deep. Furthermore, there are also governance hazards with founder-developers' retention of large volumes of tokens, as they would be able to exercise disproportionate power over the governance of the project and may disincentivise investment by other investors. Trading exchanges can consider whether token retention levels and policies should be disclosed, and to what extent.

Other information that trading exchanges could consider relevant would be whether pre-sales to qualified investors should be discussed, and what the 'tokenomics' policies are for the developmental project, such as in relation to token supply. Presales are arguably important to the development team in terms of securing financial backing ahead of the crowd sale. The existence of professional financial backing is also a favourable signal for the developmental project, as Adhami et al find that presales are attractive to crypto asset investors for reasons of positive signaling.³⁰ Stastny³¹ also finds that presales to professional investors result in less underpricing in the tokens listed on secondary markets than if such a presale had not been carried out. However, crucial information such as discounts at pre-sales and how this may have benefited the first investors should be disclosed, as the early buyers often make a significant gain in the secondary market after the listing of the crypto assets.³²

Token supply is also an important issue as uncapped token supply policies means that project developers can make subsequent rounds of fund-raising and potentially dilute the value of tokens held by initial subscribers.³³

Crypto asset exchanges' discretion to impose other disclosures would be guided by the materiality standard. It is questioned if exchanges may be unincentivized to add to minimum mandatory disclosure as expanding these requirements add to their due diligence burdens to verify disclosure documents. However, the imposition of the materiality standard may mean that they are delegated with the requirement to ascertain what other salient information is needed by investors on an offer-by-offer basis, and simply defaulting to the minimum specified information would be insufficient.

27 T Davydiuk, D Gupta and S Rosen, 'De-crypto-ing Signals in Initial Coin Offerings: Evidence of Rational Token Retention' (2020), at papers.ssrn.com/sol3/papers.cfm?abstract_id=3286835.

28 S Howell, M Neissner and D Yermack, 'Initial Coin Offerings: Financing Growth with Cryptocurrency Token Sales' (2019), at ssrn.com/abstract_id=3201259; C Fisch, 'Initial Coin Offerings (ICOs) to Finance New Ventures' (2019) 34 *Journal of Business Venturing* 1.

29 D Blesag, 'Dynamics of Voluntary Disclosure in the Unregulated Market for Initial Coin Offerings' (2018), www.researchgate.net/profile/Daniel_Blesag/publication/326849740_Dynamics_of_voluntary_disclosure_in_the_unregulated_market_for_initial_coin_offerings/links/5b696802a6fdcc87df6d6a39/Dynamics-of-voluntary-disclosure-in-the-unregulated-market-for-Initial-Coin-Offerings.pdf.

30 (2018).

31 P Stastny, 'Underpricing in ICOs' (2018), at ssrn.com/abstract=3206323.

32 OECD, *Initial Coin Offerings for SME Financing* (2019), at www.oecd.org/finance/ICOs-for-SME-Financing.pdf, 15–16.

33 WA Kaal and M Dell'Erba, 'Initial Coin Offerings: Emerging Practices, Risk Factors, and Red Flags' in F Möslin and S Omlor (eds), *Fintech Handbuch* (CH Beck, 2019), at papers.ssrn.com/sol3/papers.cfm?abstract_id=3067615.

It is important to examine the nature of the obligation to verify and whether this introduces potential exchange liability to investors. Exchange liability would be the *ex post* component of gatekeeper responsibility in relation to the *ex ante* obligation to conduct verification. It is arguable that the FCA's enumerations are not entirely clear and this will be critically discussed in section C below.

First, it is arguable that the FCA does not set out an absolute verification obligation. The FCA's expectation is that a crypto asset exchange should undertake its own due diligence for the purposes of verification of disclosures. It is uncertain to what extent this would be similar to underwriters' roles in initial public offers, in terms of line-by-line reviews, which can be demanding in terms of resources and effort. The purpose of verification is to prevent material harm or detriment to investors, so it can be surmised that such verification would likely involve due diligence in relation to potential harm causing signals. These could be arguably found in relation to a number of different items in minimum mandatory disclosure, and if an exchange stipulates additional disclosure for admission, arguably the exchange would have to verify against those additional disclosure.

If potential adverse signals may be found in relation to the developer team's integrity, such as adverse records in relation to criminal convictions or professional disciplinary actions, the due diligence needed would be similar to that needed for ascertaining fitness and propriety for the FCA's individual authorization regime for working in the financial services industry.³⁴ Fitness and propriety diligence has been found to be relatively resource-consuming.³⁵

There also seems an expectation that crypto asset exchanges would verify matters in relation to the nature of the crypto assets, underlying protocols and technological functions. These require the vetting of the smart contract code for crypto assets, and it may not be sufficient for crypto asset issuers to merely disclose code and make it open source. Indeed, one study has found that code interrogation, although useful in discovering bugs and inconsistencies in many self-regulatory crypto asset offers, can be a resource-demanding exercise.³⁶

One must ask if crypto asset exchanges are on the hook to investors if negligent verification is alleged after the failure of an issuer? The FCA's initial proposals for exchanges to report their due diligence findings to investors have been withdrawn, seeming to indicate that there is no explicitly constructed statutory duty to investors. However, the FCA requires that exchanges should only admit to trading where they are satisfied that issuers' disclosures are in their view not untrue or misleading, whether or not exchanges are able to perform complete verification. This may suggest that it remains open for investors to allege that exchanges have failed, perhaps a common law duty of care, to discharge their verification to the standard stated.³⁷

Nevertheless, in view of the provision of a responsible disclosure in the disclosure document to crypto asset investors,³⁸ it is arguable that investors should first seek recourse against the responsible discloser for primary liability where disclosure defects cause loss. However, could exchanges be susceptible to secondary liability for negligence in verification? Crypto asset exchanges' liability, if any, would be secondary, or gatekeeper liability, and

34 FCA Handbook FIT 2.

35 Eleanore Hickman and Alan Brener, 'The Senior Managers and Certification Regime in UK Practice and Global Context' (2025) 26 *Journal of Banking Regulation* 326.

36 S Cohny, D Hoffman, J Sklaroff and D Wishnick, 'Coin-operated Capitalism' (2019) 119 *Columbia Law Review* 591.

37 FCA (June 2026), paras 2.36-2.38.

38 Regulation 12, The Financial Services and Markets Act 2000 (Cryptoassets) Regulations 2026.

it is important to bear in mind both the appropriateness/fairness as well as proportionality of gatekeeper liability that may cause disincentives to their carrying out of their gatekeeper functions.³⁹

Even with the publication of the FCA's final policy statement on exchanges' obligations, the legal risk for exchanges is not clarified. Arguably, it is not appropriate for the FCA to pre-empt possible civil litigation against exchanges, even for secondary liability, as investors' seeking of private remedies is an essential tenet of investor protection. Although UK legislation⁴⁰ explicitly states that the person named as responsible for mandatory disclosure is liable to pay compensation where disclosure liability entails, it is uncertain if this means an exclusive identification of the liable person so that no one else could be liable. Exchange liability, even in respect of secondary liability, is not foreclosed as it is up to the court in dispute resolution to determine if there is a breach of statutory duty on the part of the gatekeeper and to what extent this is causative of loss. Where an action is not taken by an individual investor who could avail of the action for breach of statutory duty,⁴¹ courts are arguably also not prevented from finding a common law duty of care between the gatekeeper and investor.⁴² Exchanges' legal risk may however be circumscribed by the negligence standard, where claimants have to prove that the exchange cannot reasonably be satisfied that issuers' disclosures are true and not misleading.

Where forward-looking statements are concerned, the responsible discloser for crypto assets offers benefits from a higher threshold of liability for mis-disclosure, i.e. the dishonesty or reckless standard.⁴³ In this manner, would crypto asset exchanges benefit from a higher threshold for secondary liability as well? It would be first questioned if they are required to verify forward-looking statements, being speculative in themselves and more susceptible to being opinions which may not be objectively verified. The FCA also does not list forward-looking statements within the example list articulated for verification.⁴⁴ If, on the other hand, exchanges are expected to conduct verification anyway, it is arguable that such verification liability should be subject to the same threshold for disclosure liability. In this manner the legal risk for such verification would be proportionately reduced, especially if forward-looking statements comprise a large proportion of investor-facing disclosure due to the pre-developmental nature of such fund-raising.

Next, crypto asset exchanges also act as gatekeepers to maintain the post-admission information efficiency environment of crypto assets in order to facilitate price formation and prevent insider dealing. The UK regulatory regime envisages that issuers, offerors of crypto assets and crypto asset trading exchanges would be responsible to update inside information to the market, using wide channels for information publication and dissemination in order to prevent market abuse.⁴⁵ Furthermore, these same persons have the obligation to draw up and maintain a current list of 'insiders', i.e. a list of persons regarded as having access to price sensitive information regarding

39 Assaf Hamdani, 'Gatekeeper Liability' (2003) 77 Southern California Law Review 53.

40 Reg 14, The Financial Services and Markets Act 2000 (Cryptoassets) Regulations 2026.

41 Section 138D, Financial Services and Markets Act 2000.

42 Although that would be much more challenging given the requirements of proximity under *Caparo Industries plc v Dickman* [1990] UKHL 2.

43 FCA (June 2026), paras 2.108-2.118.

44 See FCA's earlier consultation paper, *Admissions & Disclosures and Market Abuse Regime for Cryptoassets* (Dec 2025), para 2.52, <https://www.fca.org.uk/publications/consultation-papers/cp25-41-regulating-cryptoassets-admissions-disclosures-market-abuse-regime-cryptoassets>.

45 FCA (June 2026), paras 3.15-3.22.

crypto assets, because of their position or connection to the issuer, offeror or the crypto asset trading exchange.⁴⁶ This position is not dissimilar to the EU's. This regime does not impose periodic ongoing disclosure on crypto asset issuers like under securities regulation but imposes ad hoc disclosure of price sensitive information as a form of ongoing disclosure.

In this manner, crypto asset trading exchanges are not merely gatekeepers to facilitate or compel *ad hoc* disclosure but are themselves subject to the disclosure obligation where relevant, i.e. where the exchange or its personnel may be named within the insider list. This may also be a means of mitigating the conflicts of interest where exchanges admit their own issued token. Their insider status would compel the timely disclosure of price sensitive information to prevent other investors from being taken advantage of on the market.

Different from the verification role of exchanges for admission to trading, which is similar to underwriters for securities offers, the role of crypto asset trading exchanges for ongoing informational transparency and efficiency is one of co-compliance with the issuer or offeror of crypto assets. This is supported by regulatory requirements for them instituting systems and controls for surveillance and monitoring purposes, including onchain monitoring, not only to detect suspicious behaviour but arguably for the purposes of compliance with anti-market abuse measures which include ad hoc ongoing disclosure of price sensitive information.⁴⁷ In view of the potential regulatory liability for the failure to disclose inside information in a timely manner where legitimate delay is not available,⁴⁸ crypto asset trading exchanges could be in line for primary liability where the delay of material new information takes place, even if the issuer or offeror is expected to be the ones to release such information. Nevertheless, the FCA clarifies that an insider on a list is only obliged to disclose what the insider has access to, and whether exchanges are in a privileged position regarding issuers' inside information would very much depend on factual closeness to issuers, such as in relation to business connections.⁴⁹

In sum, the FCA's regulatory design involves the crypto asset trading exchange as being a co-provider of investor protection, as well as co-complier along with the issuer (where there is one) in the post-admission stage. These expectations are of an intense nature although the exchange is not the primary fundraiser, especially where new issues of crypto assets are concerned. The expectations for secondary market transparency may be designed based on the need to ensure that already-existing crypto assets without a clear issuer, such as Bitcoin, that are admitted by a crypto asset trading exchange would be supported by ongoing transparency based on the responsibility of the admitting exchange which benefits from this trading business. However, this scope of primary liability may be excessive where new issues of crypto assets with an identifiable developer/issuer are concerned.

We next turn to the high-level framing of co-regulation, especially in financial services regulation, in order to situate the FCA's reforms regarding crypto asset trading exchanges as gatekeepers. The next Section critically questions the nature and expectations of co-regulation before turning to proposals in Section D.

46 Ibid, paras 3.59-3.63.

47 Ibid, paras 3.42-3.50.

48 Ibid, para 3.22.

49 Ibid, para 3.22.

A Paradigm for Examining Gatekeeper Fit

The FCA's regulatory design for crypto asset trading exchanges as gatekeepers is arguably a form of co-regulation, broadly defined. Co-regulation can be regarded as an umbrella term⁵⁰ where non-state governance capacity is 'enrolled' or co-opted,⁵¹ in relation to public interest objectives the regulator is seeking to achieve, such as investor protection. Such co-option can cynically be regarded as a manifestation of regulators' neo-liberal or light touch tendencies,⁵² but can also be regarded as an inevitable development due to the limitation of regulatory resources.⁵³ Where the polycentric landscape of actors is usefully leveraged upon by policy makers in order to supply or influence governance actions in efficient and comprehensive ways,⁵⁴ co-regulation is achieved, in sometimes optimal ways.

It is arguable that where governance actors have expertise or information that facilitates easier monitoring than a public regulatory authority, a delegated form of governance can be more proximate and effective. This is subject to the private sector actors' incentives, which may require managing in terms of being bonded to or regulated by the regulator.⁵⁵ This can especially be the case where regulatory supervision involves assessing novel forms of technology that regulators do not yet have equivalent expertise.⁵⁶ For this reason, crypto asset trading exchanges can be viewed as having an appropriate form of expertise to verify crypto asset offers as they offer an intermediary service that engages with on-chain activity, accessing and being versed in navigating permissionless blockchains. However, it is queried if this is a correct perception of expertise and ease of monitoring.

Black argues that co-regulatory governance can involve experts in relation to assurance, accreditation, compliance, calculability and rating, as well as standard-setting, such as for markets.⁵⁷ These are different types of expertise positions. In the FCA's co-regulatory design, it is queried if a crypto asset trading exchange is overburdened with expertise expectations. Verification may involve (a) assuring in relation to technological veracity; (b) facilitating compliance with investor protection, such as in determining the interpretation of what amounts of material investor

50 T Prosser, 'Self-regulation, Co-regulation and the Audio-Visual Media Services Directive' (2008) 31 J Consum Policy 99–113.

51 'Enrolling' is a term used by Black to depict the leveraging upon of governance capacity of a variety of potential governance actors including non-state actors, see J Black, 'Mapping the Contours of Contemporary Financial Services Regulation' (2002) 2 Journal of Corporate Law Studies 253.

52 J-C Le Coze, 'The Unfolding Regulator-Regulatee Relationship' in J-C Le Coze and B Journé (eds), *The Regulator-Regulatee Relationship in High-Hazard Industry Sectors* (Springer 2024), ch1.

53 Such as risk-based regulation, see J Black, 'The Emergence of Risk-Based Regulation and the New Public Risk Management in the United Kingdom' (2005) Public Law; H Rothstein, O Borraz, M Huber, 'Risk and the Limits Of Governance: Exploring Varied Patterns of Risk-Based Governance across Europe' (2013) 7 Regulation and Governance 215.

54 J Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' world' (2001) 54 Current Legal Problems 103; PrH. Lindøe, 'The Tripartite System: A Key in Polycentric Risk Governance: Lessons from Norwegian Offshore Industry' in J C Le Coze and B Journé (eds), *The Regulator-Regulatee Relationship in High-Hazard Industry Sectors* (Springer 2024), Ch5.

55 Black (2003).

56 C Marsden, 'Internet Co-regulation and Constitutionalism?' in Christopher Marsden, *Internet Co-regulation* (Cambridge: CUP 2011), ch2.

57 J Black, 'The Role of Third Parties in Regulatory Systems: Examples from Financial Services Regulation' in J C Le Coze and B Journé (eds), *The Regulator-Regulatee Relationship in High-Hazard Industry Sectors* (Springer 2024), ch3.

harm; (c) standard-setting for markets, in terms of determining what material information is necessary beyond minimum mandatory disclosure. If exchanges develop scoring systems for verifiability, this may also evolve into a rating and signalling system. In other words, exchanges are subject to a 'bundled' set of co-regulatory expectations and need to supply various forms of expertise. The FCA's 'bundled' expression of exchanges' gatekeeping responsibility is actually a number of different gatekeeping services when viewed against the more granular taxonomy offered in Black's article. It is questioned if the sum of these gatekeeping services is overly demanding.

For crypto assets already in existence, and since the UK's framework does not provide for a grandfathering regime for existing crypto assets, it is arguable that exchanges that wish to admit a crypto asset to trading, regardless of whether they secure the initial issuer's cooperation to make disclosure, should take on the responsibility of both disclosure and verification. The 'bundled' expectations in verification means that the cost of such verification may be significant, whether exchanges undertake their own performance or outsource such verification. For already existing crypto assets, exchanges would need up-to-date information regarding the functionalities, governance and tokenomics of the crypto asset in question, and may need to consult wide ranging resources on the technological, financial and business risks relating to the network for which the crypto asset is deployed. The admission decision, which is a business decision based on exchanges' likely revenues from the crypto asset's secondary market trading volume, would need to be balanced against the cost of producing such disclosure to the 'verified' standard. This may also mean that exchanges are unlikely to admit anything but the most popularly traded crypto assets in view of their possibly broader information footprint and the recoverability of verification cost from future trading revenue. If crypto asset trading exchanges converge upon offering only a limited set of popular tokens, then market diversity may be affected and the liquidity of other tokens would not be improved by the FCA's regulatory design, which entails consequent effects for exchanges' incentives.

For newly issued crypto assets, which the market should serve in order to support innovation and productivity in this area, it is arguable that the FCA's regulatory design would impose strenuous burdens or costs upon crypto asset trading exchanges. This could adversely affect this fund-raising avenue option for issuers. Exchanges' verification roles can be challenging in view of the limited fit with their expertise, as explained below, and this is exacerbated by the bundled nature of the verification responsibilities.

It is arguable that some types of information, such as conflicts of interest information for the issuer, may not be hard to verify. Conflicts of interest verification can be more factual and descriptive in nature, and entails a compliance-based type of verification. However, it is queried if checking that a crypto asset is compatible with the protocol blockchain it purports to be designed for, or its technological properties, or tokenomics, may require coding expertise. Does the verification expertise required of exchanges mean coding expertise to verify and perhaps test disclosed code?⁵⁸ In this respect there are dedicated code auditing companies that may be better placed than exchanges,⁵⁹ and would there be a good reason for regulators to demand that they internalize this outsourcing cost? Furthermore, verifying the nature and rights of tokens or governance mechanisms is likely also a code-based verification exercise. This means that much of the verification needed is technologically-based, and it can be questioned if this expectation is a good fit with exchanges' perceived governance capacity.

58 FCA (Dec 2025), para 2.52 but see industry feedback in paras 2.47-2.48. This issue is not explicitly clarified in FCA (June 2026).

59 Such as Consensus Diligence, Certik, Hacken etc.

Furthermore, verification in relation to risks may deal with: technological risks such as bugs in code; business risk, in terms of the promise and market potential of the developmental project; or financial risk, in relation to the crypto asset which such as market sentiment analyses. The expectation for exchanges to verify risk disclosures can be expansive. It is arguable that voluntary market actors such as ICO rating services have been performing this role, albeit not without criticism.⁶⁰ Do exchanges have this governance capacity or is it reasonable for them to internalize this cost, even if they may outsource such verification, say, to an ICO rating service provider?

Based on the concerns above, it is questioned if enrolling crypto asset exchanges to take on an umbrella of verification roles in the 'bundled' manner discussed, would deliver on one key rationale for co-regulation, which is that governance can be more cost-effectively provided and flexibly designed for market actors.⁶¹ The cost-effectiveness of market access for crypto asset issuers was important to the FCA's regulatory thinking, hence avoiding highly prescriptive mandatory disclosure standards. However, if devolving disclosure standard-setting and verification to exchanges is not likely to be cost-effective after all, the proportionality of the regulatory design for gatekeeping needs to be revisited. Arguably, there is already a pattern of regulatory design that shifts cost away from small or start-up issuers seeking to raise funds, to the platforms or markets that host their fund-raising. The regulation of online equity crowdfunding in the UK⁶² is an example. Nevertheless, the cost shifting strategy away from issuers to platforms or market operators would need to be consistent with their incentives, expertise or proximity to information so that there is efficient leverage upon their capacity and resources. Where regulators impose on market operators obligations that are not a natural fit with their business models or operations, market operators would likely raise the barriers to entry for fundraisers.

This article argues that the FCA may be incorrect in assuming that crypto asset exchanges possess the bundled range of expertise required for disclosure standard-setting, compliance verification, technological/code verification and business risk assessment. Out of the four above aspects, exchanges may be best placed to administer standard-setting for disclosure as part and parcel of formulating admission policies, as well as compliance verification. This is because exchanges can leverage upon their own compliance and control capacities, and extend to vetting issuers. It may be the case that the exchange has to expend significant resources to comply with technological/code vetting, which this article argues would form the bulk of crypto asset offer disclosures, as well as business risk vetting, which is in the province of corporate finance consulting or research analysis (undertaken by investment banks in the conventional securities fund-raising sphere).

If third party outsourcing is used by exchanges to fulfil the verification roles, the costs incurred by exchanges are likely to be passed on as increased cost for both issuers and investors. Furthermore, the exchange may not be able to fully be responsible for the areas of third-party verification that it lacks expertise in, such as code auditing or business rating. It is open to question whether the exchange is best placed to coordinate all these needs of verification under its umbrella. Code auditors or ICO rating services do not affiliate themselves with exchanges as

60 T Bourveau, ET De George, A Ellahie, D Macciocchi, 'The Role of Disclosure and Information Intermediaries in an Unregulated Capital Market: Evidence from Initial Coin Offerings' (2022) 60 J. Account. Res.129-167. <https://doi.org/10.1111/1475-679X.12404>; D Florysiak and A Schandlbauer, 'Experts or Charlatans? ICO Analysts and White Paper Informativeness' (2022) 139 Journal of Banking and Finance 106476.

61 Prosser (2008).

62 There is no disclosure standardisation for investment-based equity crowdfunding but crowdfunding platforms have to undertake investor appropriateness tests and create frictions to entry for first-time investors with adequate warnings and cooling off times, see FCA, 'Strengthening our Financial Promotion Rules for High-Risk Investments and Firms Approving Financial Promotions' (2022), <https://www.fca.org.uk/publication/policy/ps22-10.pdf>.

a matter of current practice, so specialized contracting is likely needed for exchanges to buy into their expertise. Furthermore, an exchange that potentially bears the responsibility for 'bundled' compliance and is susceptible to liability for negligent verification would need to enter into fine details of private contracting with third parties in order to manage its own legal risk. It is arguable that investor protection could become a costly affair for market participants, and a reputational hazard generally for the market.

This gives rise to the question whether the regulatory design would disincentivize exchanges from admitting new crypto asset offers, focusing them only on admitting existing crypto assets. Arguably this would not support a pro-innovation objective where new forms of productivity and economic activity may potentially be generated by new crypto asset issues that fundraise for new projects.

Given the demands of compliance with the bundled verification required, it is also possible that crypto asset exchanges could take an approach of performing this role in a minimalist or superficial manner in order to minimise cost while providing a veneer of gatekeeping. Exchanges could take proceduralised approaches to due diligence and establish lists for box-ticking. Such performance by exchanges of verification would undermine substantive usefulness to investors, making the delegated governance paradigm questionable in its effectiveness for securing an optimal level of investor protection and confidence. However, as the FCA has ultimately demanded that exchanges perform verification to the standard of being satisfied that issuers' disclosures are true and not misleading, it is arguable that the risk of minimal and cosmetic verification can be mitigated. However, as long as investors do not suffer unexpected losses and turn to scrutinise exchanges' roles, how exchanges discharge their verification roles may remain opaque. In this respect, exchanges' meaningful compliance with the verification role may depend on how intensely they perceive the FCA to engage in supervising their roles and holding them to accountability.

The ambiguity regarding exchanges' liability to investors can also support exchanges in quietly maintaining an expectations gap in relation to their verification role.⁶³ Commentators have pointed out that gatekeeper liability is key to affecting how intensely gatekeepers perform their functions in signalling substantive veracity for the market.⁶⁴ The FCA's regulatory design has been arguably reluctant to clarify gatekeeper liability, as there is emphasis on identifying *ex ante* responsible disclosing persons so that liability is consensually taken upon. Furthermore, the FCA's earlier proposal to ask exchanges to report their due diligence findings to investors, which could result in a relationship of accountability and proximity to investors, has been dropped. Although it cannot be foreclosed that courts could find either breaches of statutory duty by exchanges in discharging their verification roles to individual claimants, or a breach of a common law duty of care if a relationship of proximity is indeed found between the gatekeeper and investor which is breached and is causative of loss, neither point is clarified in the FCA's policy statement. Hence this article argues that exchanges as gatekeepers are certainly not strictly liable for mis-disclosures unless named as responsible in disclosure documents. At best, a negligence-based liability regime may apply for verification failures. However, where a forward-looking statement is concerned, it is uncertain if such liability may apply at all as the standard for liability for primary disclosers is based on dishonesty or recklessness. Unless there is a clear case of exchanges clearly abetting such mis-disclosure, it may be challenging to establish exchanges' liability.

63 Akin to that for corporate compliance gatekeepers, see A Eckstein and R Shapira, 'Compliance Gatekeepers' (2024) 41 Yale Journal on Regulation 469.

64 S Roychowdhury & S Srinivasan, 'The Role of Gatekeepers in Capital Markets' (2019) 57 Journal of Accounting Research 295; J Johnson, 'Secondary Liability for Securities Fraud: Gatekeepers In State Court' (2011) 36 Delaware Journal of Corporate Law 464.

However, it can be argued that exchanges' primary disclosure obligations for inside information can act as a compliance reinforcer for its verification role at the admission stage. Exchanges' liability for ongoing disclosure of inside information to the market is arguably framed as a strict responsibility. This regime of strict liability may entail a behavioural orientation towards information diligence, creating positive spillovers for the efforts needed for admission verification. However, it can equally be argued that the strict responsibility for inside information disclosure is a responsibility to disseminate, which is a different expectation from verification of information at hand. The dissemination duty does not include independent or objective verification, and is premised upon promptness. In this manner, exchanges' ongoing monitoring could be complemented by big data and artificial intelligence capacities to scrape for relevant off chain and on chain information in order to provide dissemination. This is not the same as carrying out verification, which usually entails expending efforts to be independently or objectively satisfied as to the extent of veracity.

In essence, the gatekeeping expectations for crypto asset trading exchanges are bundled in a 'convenient' form of regulatory delegation, which can be a 'bad' form of co-regulation. The gatekeeper is 'enrolled' due to its convenient location as an essential intermediary for crypto asset fund-raising, but based on a mis-perceived sense of regulatory expertise or capacity. In this way the regulatory design induces a false sense of proportionality in representing its enrollment of market-based governance. The framing of co-regulation enables us to critically consider the appropriateness of delegated governance, in terms of the nature of fit for delegated governance which then circumscribes what can be optimally delegated. The next Section turns to argue that the FCA's regulatory design can be adjusted to retain the co-regulation ethos of enrolling gatekeepers, but in a manner that is more limited but focused. This can also pave the way for designing appropriate accountability on the part of market actors who have been delegated governance as gatekeepers.

03

Proposals for Limited but Focused Gatekeepers – Refining a Broad Co-regulatory Blueprint

This Section argues that it is not unwarranted for the FCA to look for a co-regulatory regime, relying on the governance capacity of market-based actors. They may have incentives aligned with investor protection while keeping the cost of regulatory standardisation and compliance low for both regulators and issuers. The crypto asset trading exchange is not necessarily the optimal gatekeeper for all investors' information needs, as it may not be well-placed to carry out the bundled verification the FCA expects, and may implement such gatekeeping in a manner that would only perpetuate an expectations gap.

Where the exchange is seeking to admit a crypto asset to trading on its own volition, it is a discloser and subject to primary disclosure liability. Where it is in the position of operating a marketplace for an issuer, especially for new issues of crypto assets, it is not necessarily in a position of information parity with the issuer, or more relevantly, in a position of equivalent information expertise due to the overwhelmingly technological nature of information relating to crypto assets. The factual information relating to crypto assets relating to functionalities, rights, governance, security, tokenomics and compatibility with protocol blockchains, are all likely to be code-based. The forward-looking information would also largely be code-based, but may also be business-based in terms of projected

network effects or market share, or finance-based, in terms of revenue or cost.

It is suggested that investors' key information needs lie in technological verification. Non-technologically savvy investors would need the bridging of the gap between technical representations of information, such as in code, and lay but intelligent understanding. The Section proposes that the FCA could require crypto asset offers, whether existing assets or new assets, to be accompanied by an independent third-party code audit, whose audit report is to be made publicly available. Code auditors are a new gatekeeper industry, arising to provide services for a range of needs including companies commissioning code products and investors in blockchain-based opportunities etc. They include Consensys Diligence,⁶⁵ Certik,⁶⁶ Hacken,⁶⁷ Hashlock⁶⁸ etc. There are a number of possible co-regulatory designs co-opting code auditors as gatekeepers.

First, the issuer or other person seeking to admit crypto assets to an exchange can be responsible for the cost of code audit, and a competitive market may provide for reasonable cost options. In such an issuer-pays model, old problems such as conflicts of interest on the part of the gatekeeper can arise.⁶⁹ However, lessons drawn from regulatory history can apply. There is the option of letting the market work to ascertain market failure if any. If market failure occurs, a regulatory option can be brought in for code auditors, drawing analogies with regulating credit rating agencies, or ESG rating agencies. The public regulation of auditors is also a relevant lesson, which although accelerated after the Enron debacle,⁷⁰ has consistently faced pushback from the accounting industry.⁷¹ In principle, however, regulated gatekeepers can be faced with regulatory accountability and liability, consistent with Black's exhortation that co-opted gatekeepers into regulatory governance should either be supported by direct regulatory accountability or accountability to their users.⁷² Other than regulatory accountability and liability, regulation can also clarify the civil liability that gatekeepers owe to those who rely on them. Ambiguity in gatekeeper liability is often justified in order to prevent overdeterrence but lessons from gatekeeper failures such as the auditing industry have shown that this can culminate in a form of 'veneer' gatekeeping which ultimately offers insufficient investor protection.

Second, to mitigate the conflicts of interest problem and to boost gatekeeping veracity, one can consider Lynch's proposal⁷³ for the regulator to manage the verification work assigned to gatekeepers. This ensures that code auditors are under no uncertain impressions that they serve the public interest in providing fair and accurate signals for investor confidence. The regulator would assign code auditors for each crypto asset offer, to be paid out of a

65 <https://diligence.security/>.

66 <https://www.certik.com/>.

67 <https://hacken.io/audits/>.

68 <https://hashlock.com>.

69 J Payne, 'The Role of Gatekeepers' in N Moloney et al (eds), *The Oxford Handbook of Financial Regulation* (Oxford:OUP 2015), ch9; IH-Y Chiu, 'Regulatory Governance of Credit Rating Agencies in the EU: The Perils of Pursuing the Holy Grail of Rating Accuracy' (2013) *European Journal of Risk and Regulation* 199 and citations therein.

70 resulting in the Sarbanes-Oxley Act and creation of the Public Company Accounting Oversight Board in the US.

71 Such as the resistance of the auditing industry to the implementation of audit reforms in the UK after the collapse of listed company Carillion, although championed by independent reviews, see <https://www.gov.uk/government/collections/audit-and-corporate-governance-reform>.

72 Black (2003).

73 TE Lynch, "Deeply And Persistently Conflicted: Credit Rating Agencies In The Current Regulatory Environment" (2009) 59 *Case Western Reserve Law Review* 227.

fund maintained by the regulator from industry subscription. Crypto asset trading exchanges and intermediaries can be made to subscribe to such a fund in order to support crypto asset financialisation. Code auditors would not have a contractual or business relationship directly with issuers, and can be made subject to accountability to regulators as well as civil liability to their users.

Such a limited but focused form of gatekeeping, through code auditing, may provide more salient information for investors, based on the unique technological nature of crypto assets. This is aligned with code auditors' expertise and incentives to promote their reputations in an emerging competitive market. Although this is not an all-encompassing form of verification, it may be neither proportionate nor practicable to try to achieve an equivalent form of comprehensive review that resembles what underwriters do for securities offers. In this manner, investors are also educated as to the unique nature of the risks in this form of investment, while the investor protection supplied may arguably be salient and cost effective from both issuers' and regulators' points of view.

Malta has instituted a system of regulated code auditors, known as 'systems auditors' to report on blockchain-based organisations that wish to register as an 'Innovative Technological Arrangement' (ITA) to obtain legitimacy for its organisational form.⁷⁴ The ITA Act creates a new body of gatekeepers, the systems auditors, to verify the technical functionalities of the software and code for the ITA's smart contracts. In implementing the Act,⁷⁵ Malta has developed eligibility criteria based on IT qualifications for systems auditors. It has also developed two assurance levels providing type 1 and type 2 reports. A type 1 report relates to whether the description of the innovative arrangement is fairly represented, while a type 2 report deals with operational effectiveness as well. Transposing this to the context of code auditing for crypto assets, a type 1 assurance may relate to whether the disclosed code is fairly represented while a type 2 report would test for the code's operations and functionality. Although the author was unable to access the Maltese systems auditor register,⁷⁶ it remains to be seen if Malta's early mover regime could offer regulatory innovation lessons elsewhere.

This article does not oppose the FCA's designation of crypto asset exchanges as gatekeepers too, but the regulator should consider what best fits with their business models, incentives and operational capacities. As argued above, crypto asset exchanges could perform compliance verification for issues of crypto asset offers, and standard-setting for admission is part and parcel of their business models. Furthermore, they are well-placed to administer ongoing dissemination of price-sensitive information, although their primary responsibility for disclosure may need to be refined according to whether they are proximately located to the source of relevant inside information.

Where gatekeepers are appropriately designated, regulators should keep them accountable through a suitable accountability design. This can be by way of soft law, i.e. by a code of best practice, or by hard law, in the form of regulatory standards, which can be principles-based or a mixture of principles and rules. For code auditors, the emerging competitiveness of the industry provides a context for market-based discipline, as firms desire to build up their reputations. For crypto asset exchanges, although the market is competitive, the market is also dominated by some large, multi-business-line exchanges such as Binance, Coinbase etc. Regulators would already subject them to authorisation and regulation for their activities, and arguably, their relevant gatekeeping roles should also be regulated by hard law.

74 S8, Innovative Technology Arrangements and Services Act, <https://legislation.mt/eli/cap/592/eng/pdf>.

75 <https://mdia.gov.mt/services/system-auditors/>.

76 https://portal.data.gov.mt/en_GB/data-service/list-of-system-auditors.

A spectrum of soft or hard public governance of gatekeepers can be adopted depending on their market positions, the nature of market failures and the needs for aligning them with public regulatory objectives. Proxy advisers as corporate governance intermediaries for capital markets are mostly governed by soft law,⁷⁷ although securities benchmarks are regulated by principles-based hard regulation.⁷⁸ Auditors are governed by professional standards,⁷⁹ while credit rating⁸⁰ and ESG rating agencies⁸¹ are governed by hard regulation. Lessons from the spectrum of co-regulatory governance adopted with different gatekeepers can offer lessons learnt.

The FCA's co-regulatory design for crypto asset exchanges subjects them to compliance but how intensely this will be supervised or enforced remains to be seen. In light of the ambiguity of civil liability, it is queried if the FCA has sufficiently considered how gatekeepers are themselves to be governed. The 'new governance' of polycentric and co-regulatory designs ultimately need to be supported by dynamic and responsive regulatory accountability.⁸² This article not only argues for a better co-regulatory design but also for its ultimate accountability.

04

Conclusion

This article examines the UK Financial Conduct Authority's regulatory innovation endeavors in introducing a proportionate fund-raising regulation for crypto asset offers. The attempt at proportionality is reflected in the refrain from adopting mandatory registration and disclosure techniques like in securities regulation, but to co-opt crypto asset trading exchanges as gatekeepers to perform verification roles in order to underpin investor confidence in the market. This article examines the nature of the gatekeeping roles and frames these within the theoretical framework of co-regulation, in order to critically examine if the FCA would achieve its objectives: offering a form of cost-effective investor protection that can be trusted. This article argues that questions arise as to the aptness of the crypto asset trading exchange being enrolled as a gatekeeper for the purposes of verification as required by the FCA. A suggestion is offered for a more limited but focused co-option of code auditors, but is not opposed to enrolling crypto asset exchanges in appropriate positions of gatekeeping. They must however be underpinned by well-designed accountability regimes.

77 The UK The Proxy Advisors (Shareholders' Rights) Regulations 2019.

78 UK Benchmarks Regulation, onshoring Regulation 2016/1011, but poised to move to regulation only for systemically important benchmarks, likely leaving other benchmarks to be potentially self-regulatory or subject to soft law.

79 Enforced by the Financial Reporting Council, UK.

80 EU Regulation 1060/2009, onshored The Credit Rating Agencies Regulations 2010.

81 EU Regulation 2024/3005, and The Financial Services and Markets Act 2000 (Regulated Activities) (ESG Ratings) Order 2025.

82 J Black, 'Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis' (2012) 75 Modern Law Review 1037.

