

## Article Information

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## **Blockchain Bites: Guilty as Charged: SBF Convicted On All Counts, What is “fully decentralised”? ESMA consults on proposed MiCA regulations, Chinese Court report recognises Bitcoin as property, France levels up with NFT gaming law, Marshall Islands makes waves with new DAO law, Chainalysis and Elliptic skewer WSJ report**

*Michael Bacina, Steven Pettigrove, Tim Masters, Jake Huang, Luke Higgins, Luke Misthos and Kelly Kim of the Piper Alderman Blockchain Group bring you the latest legal, regulatory and project updates in Blockchain and Digital Law.*

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### **Guilty as Charged: SBF Convicted On All Counts**

FTX Founder Sam Bankman-Fried has been found guilty on 7 counts of fraud and conspiracy after the jury took a mere 4 hours to deliberate. SBF had taken the stand in the last week to defend his actions as in “good faith” but reports were that the government’s cross-examination of SBF was devastating.

With his lieutenants, Caroline Ellison, Gary Want, and Nishad Singh, who were all friends (and in Ms Ellison’s case a sometimes romantic partner) with SBF testifying against him, and the evidence drawing damning instances of falsehoods presented to customers, the case has been heading towards this outcome for several weeks.

After the verdict, US Attorney Damian Williams of the Southern District of New York said:

This case has always been about lying, cheating, and stealing, and we have no patience for it.

Five of the seven charges carry a maximum sentence of 20 years in prison and two of the charges carry a 5 year maximum sentence. SBF has been remanded in custody pending sentencing, so will likely spend Christmas in jail, and be sentenced in February.

In more positive news, the misappropriated assets from FTX and recovered by the trustee in bankruptcy has reached sufficient levels that there is now talk that creditors will receive potentially 90% of the USD\$7.3B in recovered assets under a proposed plan of reorganisation and the balance remaining owed to customers is likely to be recovered since the illiquid assets available for sale should be well in excess of that gap. The biggest wildcard is [whether the US Internal Revenue Service, which lodged a huge proof of claim](#), has that claim reduced dramatically (which seems likely). In the meantime many FTX customers have been [selling their claims in order to buy more crypto](#).

By M Bacina

### **What is “fully decentralised”? ESMA consults on proposed MiCA regulations**

Since it was ratified and adopted by the [European Union \(EU\) in April this year](#), one aspect of the Markets in Crypto-Asset (MiCA) regulation that has been debated has been its application to decentralised finance (DeFi) projects. Attention has focused on Recital 22 and its attempt to exclude so-called “fully decentralised” projects. The notion of what it means to be “fully decentralised” does not have a fixed definition and is a matter of debate among industry experts.

[Recital 22 of MiCA states:](#)

This Regulation should apply to natural and legal persons and certain other undertakings and to the crypto-asset services and activities performed, provided or controlled, directly or indirectly, by them, including when part of such activities or services is performed in a decentralised manner. Where crypto-asset services are provided in a **fully decentralised manner** without any intermediary, they should not fall within the scope of this Regulation.

(our emphasis)

[Critics have pointed out that it is practically impossible](#) for a project to be “fully decentralised” depending on how the term is defined, and also that decentralisation and disintermediation (which appear to be confused as the same thing in MiCA) are very different concepts.

In response, the European Security Markets Authority (ESMA) has [released a consultation paper](#) offering commentary on various issues in MiCA and proposing implementing regulations. The consultation paper acknowledges uncertainty in determining whether something is fully decentralised:

Finally, regarding DEXs, ESMA acknowledges Recital 22 of MiCA that “(...) Where crypto-asset services are provided in a **fully decentralised manner without any intermediary**” should fall outside the scope of MiCA but also notes that the exact scope of this exemption remains uncertain. ESMA considers that an assessment of each system should be made on a case-by-case basis considering the features of the system.

ESMA goes on to define “permissionless distributed ledger technology” as:

a technology that enables the operation and use of distributed ledgers in which no entity controls the distributed ledger or its use or provides core services for the use of such distributed ledger, and DLT network nodes can be set up by any persons complying with the technical requirements and the protocols.

ESMA’s approach acknowledges the fact that DeFi can operate in a manner in which a person can access a blockchain or smart contract based application as a mere user of a tool or piece of technology, rather than through forming a contractual relationship as service provider and customer.

While the question of whether a particular suite of smart contracts is decentralised will remain subject to nuanced analysis, as [Jonathan Galea points out](#), there is likely to be a need to establish decentralisation at multiple levels, which may not exist where there is an ability to unilaterally alter the underlying code base of a blockchain based application or apply fees to access activities or services.

ESMA’s approach seems somewhat at [odds with recent IOSCO recommendations](#) which asserted that DeFi is not sufficiently different to existing financial services and so should be addressed in broadly the same way. It has been reported that the US Securities and Exchange Commission had a heavy involvement in preparing the report and in IOSCO’s working groups.

However, ESMA’s attempt to grapple with this issue is welcome and acknowledges the incongruity of seeking to regulate a piece of technology as opposed to the activities of a person or corporation developing or operating that technology. It is hoped that further clarity can be provided in the final MiCA regulations or guidance specifying a number of indicative factors which would assist in carrying out an assessment of whether a DeFi application or other decentralised project is in fact “fully decentralised” or subject to oversight and control by a single entity. ESMA is due to propose implementing regulations for adoption by the European Commission before MiCA comes into force in June 2024.

*By S Pettigrove, M Bacina and L Misthos*

## Chinese Court report recognises Bitcoin as property

The Shanghai No.2 Intermediate People's Court in China [has issued a report \(Report\)](#) suggesting that digital currencies including Bitcoin have proprietary characteristics, such as scarcity, and inherent value. The Report was written by a judge at the Shanghai Court, and published on the Court's Wechat channel, a popular Chinese social media platform.

Published on 25 September, the Report emphasizes that the current ambiguity surrounding the legal and proprietary status of digital currencies has posed significant challenges where they become the subject of judicial proceedings.

The Report indicated that digital currencies such as Bitcoin possess proprietary attributes, partly due to the fact that they are unique and non-replicable. Unlike other traditional virtual currencies (the Report mentions Q coin as an example, which is an in-app payment coin issued by WeChat's mother company), digital currencies have generally-recognized scarcity. Therefore, their proprietary value cannot be ignored in day-to-day life or the financial sector.

Proposing that Bitcoin and other digital currencies should be recognized by the law as property, the Report compares and clarifies different guidance by the Chinese authorities' issued at different times:

In the 2013 *Notice on Preventing Risks in relation to Bitcoin* by China's central bank, Bitcoin is believed to be a specific type of "virtual commodity" that "cannot and should not be used as currency for circulation on the market".

However, while both the 2017 *Statement on Prevention of Financing Risks relating to Coin Offering* and the 2021 *Notice on Further Preventing and Addressing Virtual Currency Exchange Risks* by China's central bank continued to deny the currency status of digital currencies, they dropped the language referring to digital currencies as commodities. Instead, they indirectly acknowledged the financial/capital characteristics of digital currencies, by categorising public coin offering as unlicensed capital raising.

Interpreting this guidance, the Report clarifies the common view that Bitcoin, and all other digital currencies are the [subject of a blanket ban in China](#). Instead, the Report says the Chinese authorities' guidance should be understood as:

Financial and payment institutions are not permitted to conduct digital currency-related business, and no organisation or individual is allowed to publicly raise capital by offering digital currency, but the government has never prohibited peer-to-peer exchange between digital currency and fiat currency, and between different digital currencies.

In conclusion, digital currencies are not fiat currency in China, there are different views as to whether it is a commodity or capital, but it is not prohibited, and its proprietary attributes cannot generally be denied.

While this Report is not an official decision by the Shanghai court, it represents a growing consensus within China's legal and judicial system that, despite the country's overall skepticism towards digital currencies, their proprietary attributes cannot be ignored, which has clear implications for judicial proceedings and enforcement. The report may pave the way for Bitcoin and other digital currencies in China to gain a measure of legitimacy. It is also consistent with the growing trend in China to recognize and protect other digital assets, for example, a Chinese court's judgement earlier this year [recognizing non-fungible tokens \(NFTs\) as property](#).

Following this trend, it is entirely possible that there will soon be official judgments from superior Chinese courts that recognize digital currencies as personal property and which should be protected by law. By recognizing digital goods as property, China would join [a growing international consensus](#) among many jurisdictions, including [Hong Kong, which recognized crypto as property earlier this year](#).

*Written by J Huang and S Pettigrove*

## France levels up with NFT gaming law

The French National Assembly has given its resounding 'oui' to a regulatory framework for NFT based games, distinguishing them from online gambling. Officially titled the "[Loi visant à sécuriser et réguler l'espace numérique](#)" or SREN, the National Assembly voted to adopt the bill by a large majority - 360 votes in favour and only 77 votes against.



This development signals France's first foray into creating a comprehensive regulatory framework for video games that incorporate non-fungible tokens (**NFTs**) and monetisation models centred around digital assets.

The core objective of SREN is the establishment of a distinct category of video games within the purview of French law, known as "jeux à objets numériques monétisables," or "JONUM". The SREN roughly defines JONUMs or monetisable digital objects as:

game elements, which only confer on players one or more rights associated with the game, and which may be transferred, directly or indirectly, for consideration to third parties.

The SREN law authorises games with monetisable digital objects, including NFTs, for an experimental period of three years from the law's promulgation. This safe harbour will be revisited in 18 months [with the French Government expect to report on the state of the market](#) and the mechanisms that would be in place to protect players, in addition to preventing money laundering and financing terrorism

The law has brought relief to the industry participants who have harnessed the potential of NFTs to create modern iterations of collectible card games. One notable example is the French giant [Sorare](#), renowned for its fantasy football game that leverages NFTs. Article 15 of the bill has even been nicknamed the "[Sorare law](#)" in some circles.

While the JONUM regulation distinguishes NFT based games from gambling, the law reportedly mandates [strong age](#)

[protections by excluding minors from NFT based games](#) and imposing strict penalties.

The JONUM regulation now awaits approval by the French Constitutional Council. If approved, France positions itself as a trailblazer in Web3 gaming and underscores a global policy shift towards regulating and harnessing the benefits of blockchain technology and digital assets. The NFT sector continues to evolve, even amidst a crypto-asset market still in search of bullish momentum. Notably, digital payment giant [PayPal has expressed its intentions to establish an NFT marketplace](#), aiming to secure its slice of this promising sector's pie.

Recent policy developments in regions such as [Australia](#), [Hong Kong](#), and [California](#) signify a collective effort to bring transparency and regulatory clarity to the burgeoning Web3 gaming space, and given the massive size of the video gaming industry, and current centralised in-game collectible market, the move to actual ownership of game assets and how they will be regulated is one that will be watched closely. No one would want a situation where valueless centralised in-game assets continue to be unregulated, while a more valuable model of ownership is stifled by red-tape or rules.

While it remains to be seen how the sector evolves over the next three years, the French bill represents a step forward in providing the regulatory clarity necessary for innovation to flourish.

*Written by S Pettigrove, M Bacina and L Higgins*

### ***Marshall Islands makes waves with new DAO law***

The Republic of the Marshall Islands has taken another step forward in the regulation of decentralised autonomous organizations (DAOs) [by passing the "Decentralized Autonomous Organization Act of 2023"](#). The bill's primary architects are Member of Parliament David Paul, and Adam Miler, CEO & Co-Founder of MIDAO (Marshall Islands DAO). [MIDAO is a unique public private partnership between the Marshall Islands and MIDAO Directory Services](#), which acts as the DAO registrar's office and a leading player in the development of Web3 in the Marshall Islands.

The bill builds upon a 2022 law of the same name and is being touted as the "[most comprehensive law for DAOs globally](#)", according to a statement made to CoinDesk by Adam Miller, CEO and Co-Founder of MIDAO.

In 2022, the Marshall Islands became the first sovereign nation to recognise DAOs as a form of legal entity in their own right, rather than through [an existing legal entity structure or so-called DAO wrapper](#).

[Several US States have also taken steps to recognise DAOs](#) in some form including Wyoming, Utah, Tennessee and Vermont. An Australia Senate Committee [recommended in 2021 that Australia take steps to recognise DAOs](#) as a new form of legal entity.

The Marshall Island's 2022 law laid the groundwork by exempting DAOs from the need for a board of directors, allowing blockchain-based records and books (rather than paper records), and permitting almost complete anonymity for DAO members, only requiring one person to provide know-your-customer details to the registry. The latest bill purports to break new ground by allowing "Series DAO LLCs", enabling sub-DAOs with separate assets and liabilities.

The updated legislation accelerates the existing registration process, reducing it to a maximum of 30 days from the previous 30-60 days. Importantly, the proposed bill shields DAOs from being held responsible for any open-source software they create.

According to Miller, the bill also clarifies that the governance tokens of a DAO will not be treated as securities under Marshall Islands law when they lack economic rights (as distinct from the prospect of financial gain through ownership).



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Investment Highlights:

### 1. Marshall Islands Amends DAO Law: Majority of Tokens Deemed Non-Securities

In a significant legal update, the Marshall Islands has revised its DAO (Decentralized Autonomous Organization) law, designating the majority of tokens as non-securities.

9:45 PM · Oct 31, 2023

**Reply****Share****Read 1 reply**

In the evolving blockchain landscape, regulatory developments like the Marshall Islands' DAO law signify meaningful legislative momentum toward providing a legal foundation which accommodates blockchain based systems and decentralised governance. This law also contributes to much-needed regulatory clarity by allocating legal risk to the DAO rather than underlying participants (much like regular corporate structures), promoting innovation and new forms of social coordination and entrepreneurship.

*Written by S Pettigrove and L Higgins*

#### **Chainalysis and Elliptic skewer WSJ report**

In an era when blockchain technology and cryptocurrencies are increasingly intertwined with global finance and fears as to technology (including AI) are rife, it's crucial that the media accurately reports on the facts, especially in such serious matters as terrorism financing. A recent case involving The Wall Street Journal's (**WSJ**) coverage of Hamas and other militant groups' alleged cryptocurrency fundraising activities highlights the need for better understanding and clearer reporting and shows how mis-reporting can snowball and have outsized consequences.

Following the devastating and surprise terrorist attacks on Israel, on 10 October, the WSJ published an article titled [“Hamas Militants Behind Israel Attack Raised Millions in Crypto.”](#) The article, citing a report from blockchain forensics firm Elliptic, suggested that Palestinian Islamic Jihad (PIJ), a designated terrorist organisation operating in the Gaza Strip, had raised as much as USD\$93 million through cryptocurrency donations and transfers between August 2021 and June 2023.

However, this reporting mis-interpreted the reporting from Elliptic. [Elliptic quickly clarified that the USD\\$93 million figure was not necessarily connected to PIJ’s terrorist activities](#). In fact, research from another blockchain forensics firm, Chainalysis, [suggested that only \\$450,000 of the funds were sent to a known terrorism-affiliated wallet](#).

The WSJ issued a partial correction that acknowledged the revised figures, stating that PIJ and the Lebanese political party Hezbollah “may have exchanged” up to USD\$12 million in cryptocurrency since 2021, significantly lower than the USD\$93 million previously reported by the organisation. The correction also included “additional context” regarding Elliptic’s research.

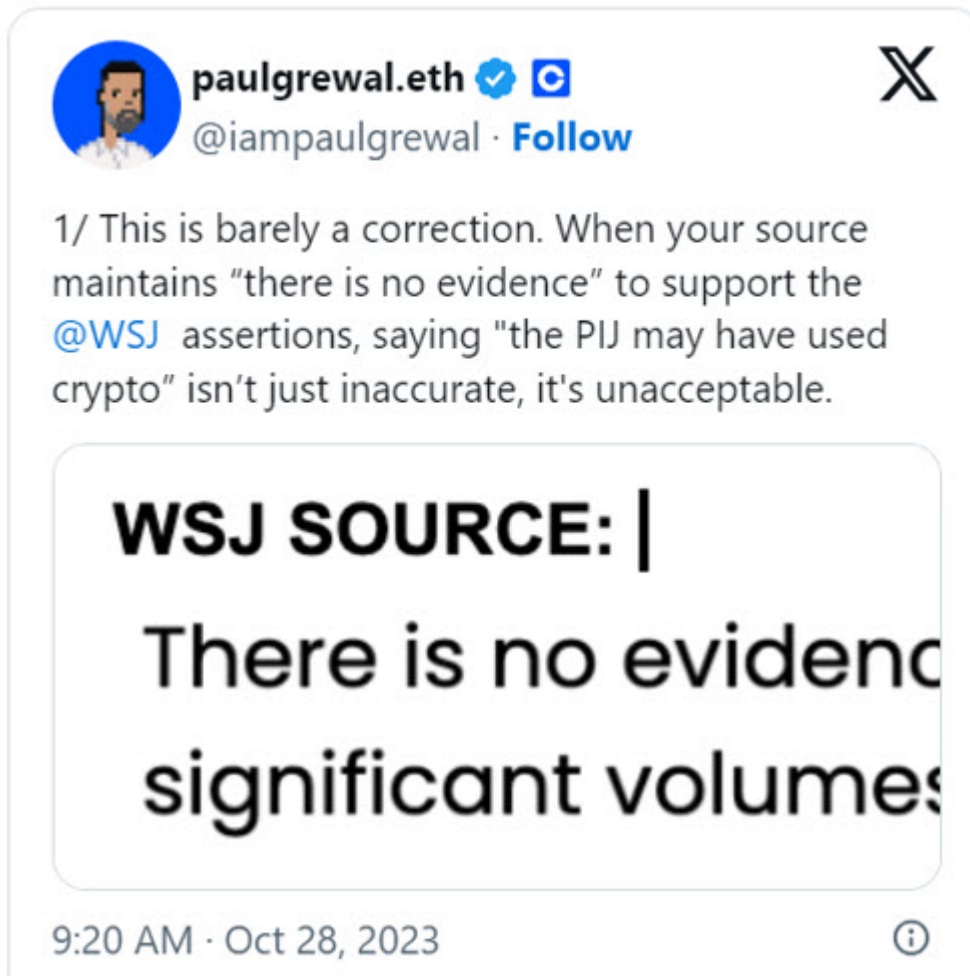
## **Corrections & Amplifications**

Palestinian Islamic Jihad and Hezbollah may have exchanged up to \$12 million in crypto since 2021, according to crypto-research firm Elliptic. An earlier version of this article incorrectly said PIJ had sent more than \$12 million in crypto to Hezbollah since 2021, citing Elliptic’s research. This article was also updated to include additional context about Elliptic’s research. The firm’s analysis of digital-currency wallets that Israeli authorities linked to PIJ found that PIJ may have used crypto to receive funds and to move funds to other terrorist groups. Elliptic said it isn’t clear if all of the transactions it identified directly involved PIJ, because some of the wallets belonged to crypto brokers that may have also served non-PIJ clients. (Corrected on Oct. 27)

Source: <https://cointelegraph.com/news/wall-street-journal-corrects-article-misciting-hamas-crypto-terrorism-funding-data>

This retraction followed a statement by Elliptic on 25 October, in which the firm called on the WSJ to correct its mistakes. Elliptic also stressed that cryptocurrency funding by Hamas remains relatively “tiny” compared to other funding sources.

However, while the correction is an important step in ensuring the accuracy of reporting, some in the cryptocurrency industry and beyond remain highly critical of the WSJ’s handling of the matter. Paul Grewal, the chief legal officer of Coinbase, noted that the WSJ’s initial framing of cryptocurrency as the primary funding source behind Hamas’ attack on Israel was not adequately addressed in the correction.



It is curious as to why the WSJ did not correct their article to the same extent it was critiqued by Elliptic, who went as far as to [say](#):

There is no evidence to support the assertion that Hamas has received significant volumes of crypto donations.

A full understanding of blockchain analysis and the context of any analysis is needed when using these insights to draw conclusions.

Elliptic has engaged with the Wall Street Journal to correct misinterpretations of the level of crypto fundraising by Hamas.

In addition, we have been in discussions with the office of Senator Warren to ensure that the relevant parties have a proper appreciation of the complexities and nuances of analysing these wallets.

Noting the discrepancy, Elliptic made the following post on X:



**Elliptic**@elliptic · **Follow**

We're pleased to see the Wall Street Journal issue some corrections to their article based on our feedback. While we would like to have seen them go further, we will continue to engage constructively.

7:19 AM · Oct 28, 2023



On 17 October 2023, Senator Elizabeth Warren and more than 100 lawmakers of the US Government [issued a letter calling for action to “meaningfully curtail illicit crypto activity”](#), citing as their only footnote the original and WSJ article. In light of Elliptic and Chainalysis’ corrections, several industry participants have taken to social media to call on Senator Warren to retract the letter:

**Elizabeth Warren** · Oct 19@SenWarren · **Follow**

Hamas raised millions via crypto in the months leading up to their attack on Israel. @RogerMarshallMD, @RepCasten and I are leading 100+ lawmakers urging the Biden admin to address crypto-financed terrorism.



reuters.com

US lawmakers urge White House crack down on Hamas use of crypto after ...

**cryptodredd**@cryptodredd2 · **Follow****cryptodredd**@cryptodredd2 · **Follow**

Absolute lies! Just \$21K came from #Crypto & even this was frozen!

Hamas themselves stated, they "no longer accept donations in #crypto as it's too easy to trace".

Your office needs to retract this & apologise for sensational lies. See below:



elliptic.co

Setting the record straight on crypto crowdfunding by Hamas

9:09 AM · Oct 27, 2023



Senator Warren’s response was to claim calls for accuracy “lobbying” and during senate hearings she was repeatedly

corrected by those giving testimony.

The correction by the WSJ highlights the importance of accurate reporting when it comes to blockchain technology, cryptocurrencies, and their potential implications for international security or money laundering. Chainalysis publishes a regular [Crypto Crime Report](#) and Elliptic recently published a report on [cross-chain crime](#).

The evolving landscape of these technologies requires careful and precise analysis to avoid unnecessary alarm and misinformed policy decisions, noting that blockchain technology is at a critical juncture of its “mainstreamification”. As blockchain and related technological innovations continue to play a more significant role in our global financial systems, it is paramount that media companies, regulators, lawmakers, and researchers work in tandem to ensure accurate and otherwise avoid misinformation.

In a world where facts and figures can shape policy and perception, precision and honest reporting is more important than ever.

*By M Bacina and L Higgins*