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HOW “DIGITAL” IS THE NEW SERBIAN LAW ON DIGITAL ASSETS?

***Abstract:** The paper focuses on the legislative changes from 2021 that the Law on Digital Assets introduced into the legal system of the Republic of Serbia and contextualizes the amendments from the perspective of existing practice. Introductory part evaluates the issue of whether blockchain technology can secure trust and safety in the transactions that are executed via Internet by parties from all over the world, as well as reasons that created the regulatory framework for values that are transferred over distributed ledger technologies infrastructures. Main part of the paper examines in detail the legislative solutions within the Law on Digital Assets as well as key exceptions and terms and their impact on the local economy. The section is followed by an overview of the draft legislation in EU in the field as well as how it may impact Serbian economy as a third country. Aside from concluding remarks on legislative changes domestically, the paper outlines potential upcoming challenges related to blockchain and instruments that may require a different approach in regulation.*

Key words: digital assets, ICO, White Paper, tokens, blockchain.

1. INTRODUCTION

Understanding the ideas behind the decentralized technology solutions and how they fit into the wider legislative scheme of a particular country is important for the wider context of adopted regulatory framework. This paper will, in its introductory part, focus on formative impact of trust protocols in the era of Internet and how a need for systems that are not controlled by a central entity emerged at the time of the global economic crisis. The central part of the paper focuses on legislative efforts of states to keep up with the trend, as well as efforts of the Serbian government in enacting legislation tackling the issue of digital assets, providing insight into the adopted rules and exceptions as well as some comparative overviews. Final part examines the effects of the new law and how it can

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potentially impact further participation of the state in the processes that revolve around blockchain powered solutions and also tackles the upcoming mechanisms that are pending but would require a more nuanced and creative approach in regulatory activity.

Namely, in the beginning of the 1980's, problem of security and trust that related to transactions among individuals who did not know each other but were conducting their business over Internet necessitated a solution. The fact that Internet allowed for instant communication and business operations among such parties across the globe, provided for one of two possibilities: either parties trust that other side will fulfill its end of the bargain, or the transaction is conducted through an intermediary that charges for the service under commercial terms. None of the two options held a proper, neutral guarantee that the contract would in the end be fulfilled.¹

With the increase in importance of Internet in general (and the society and business operations in particular) an idea emerged: exchange trust in transactions with an independent and trustworthy party. Along this line of thought, cryptographer Nick Szabo completed a short manifesto in the late 1990's titled *The God Protocol* stating:

Imagine the ideal protocol. It would have the most trustworthy third party imaginable – a deity who is on everybody's side. All the parties would send their inputs to God. God would reliably determine the results and return the outputs. God being the ultimate in confessional discretion, no party would learn anything more about the other parties' inputs than they could learn from their own inputs and the output.²

If one was to decode the word “God” used by Szabo, the search for the ideal solution of the problem of trust thereby would suggest that the source of the solution should be in technology, rather than people. Solution mapping journey took almost a decade from the publishing of the *God Protocol*, and in 2008, a first Bitcoin White Paper was published.

Coinciding with the global economic crisis, in October 2008, an individual under the pseudonym Satoshi Nakamoto published *Bitcoin: A Peer-to-Peer Electronic Cash System*.³ Timing of the paper, alongside the fact

1 For a more extensive debate around “cybersecurity” in 1980's see: Radu, R., 2019, *Negotiating Internet Governance*, Oxford, Oxford University Press, pp. 58–60.

2 Szabo, N., 1997, *The God Protocol*, (<https://nakamotoinstitute.org/the-god-protocols/>, 6. 4. 2022).

3 Nakamoto, S., 2008, *Bitcoin: A Peer-to-Peer Electronic Cash System*, (<https://bitcoin.org/bitcoin.pdf>, 6. 4. 2022); there is a series of controversies around the actual origin of the first White Paper and its author. Some sources have suggested the Australian academic Craig S. Wright. “His” paper titled *Bitcoin: A Peer-to-Peer Elec-*

that global trust in financial systems and ability of states to control and regulate the market properly was deteriorating at rapid speed, offered a glimmer of “decentralized” hope. The technology that was offered allowed for secured transactions, relying on technology, without an intermediary and without a central institution that controls the financial system. The gist of the problem, as defined by Nakamoto’s seminal paper was:

*Commerce on the Internet has come to rely almost exclusively on financial institutions serving as trusted third parties to process electronic payments. While the system works well enough for most transactions, it still suffers from the inherent weaknesses of the trust-based model [...] as no mechanism exists to make payments over a communications channel without a trusted party.*⁴

As an alternative to the traditional way of handling transactions, Nakamoto created a decentralized currency that operates without a central financial institution as an intermediary, or participation of a centralized authority. Instead of relying on the existing financial system – Bitcoin is offered as value that can cover for payments directly between participants in the transaction, excluding intermediaries that are at the core of the traditional financial structures – utilizing blockchain technology that records and automatically performs all transactions.

Authors Wright and De Filippi define blockchains as: “[...] decentralized databases, maintained by a distributed network of computers. They blend together a variety of different technologies – including peer-to-peer networks, public-private key cryptography, and consensus mechanism – to create a novel type of database.”⁵ What is more, the technology as such is not a novel invention, but a “concatenation of existing mechanisms” that encompasses not only tech side of things but economic incentive models.⁶ This, however, was not of interest for the states and legislators around the world in early 2010’s having in mind the sheer volume of transactions that was conducted through utilization of cryptocurrency and blockchain. With the drastic shift in volume of transactions within the decentralized system, governments started showing interest for participating in the game and having a “say” in the process.

tronic Cash System from August 2008 is also digitally available, (<https://ssrn.com/abstract=3440802>, 6. 4. 2022).

4 *Ibid.*

5 Wright, A., Filippi, P. de, 2018, *Blockchain and the Law: The Rule of Code*, Cambridge, Massachusetts, Harvard University Press, p. 13.

6 Ante, L., 2020, A Place next to Satoshi: Foundations of Blockchain and Cryptocurrency Research in Business and Economics, *Scientometrics*, 124, pp. 1305–1306, (<https://link.springer.com/content/pdf/10.1007/s11192-020-03492-8.pdf>, 7. 4. 2022).

2. LEGISLATIVE ACTION AND DIGITAL ASSETS

The need to regulate the new reality that Internet shaped was recognized in scholarly research long before states caught up with the need to do so. The constraints of how we act come not only from the law and legislative regulation but also from the domain of social norms that permeate our understanding of human interaction, the market and limitations it poses, as well as architecture of reality around us. “To understand a regulation then, we must understand the sum of these four constraints operating together. Any one alone cannot represent the elect of the four together” – this is how Lawrence Lessing addresses the issue of regulation in his seminal address from 1998, concluding among other things that these constraints necessitate a different understanding in cyberspace:

Cyberspace is different. For even if we assume that the same laws apply to cyberspace as to real space, and even if we assume that the constraints of norms and the market carried over as well, even so, there remains a critical difference between the two spaces. For while in real space it is hard to hide that you are a kid, in cyberspace, hiding who you are, or more precisely, hiding features about who you are is the simplest thing in the world. The default in cyberspace is anonymity. And because it is so easy to hide who one is, it is practically impossible for the laws, and norms, to apply in cyberspace. For these laws to apply, one has to know that it is a kid one is dealing with. But the architecture of the space simply doesn't provide this information.⁷

The reality of cyberspace and how its architecture is essentially different, requiring a new approach to how to regulate – which for legislators is always a stretch in modernism. The differentiation is also related to the territoriality of the laws and their application to a piece of land. The legitimacy of regulation that is based on geographic boundaries negatively impedes upon the feasibility of the laws if one is to look at the global computer-based communication that cuts through territorial borders. In words of Johnson and Post:

Territorially based lawmakers and law-enforcers find this new environment deeply threatening. But established territorial authorities may yet learn to defer to the self-regulatory efforts of Cyberspace participants who care most deeply about this new digital trade in ideas, information, and services. Separated from doctrine tied to territorial jurisdictions, new rules will emerge to govern a wide range of new phenomena that have no clear parallel in the nonvirtual world. These new rules will play the role of law by defining legal personhood and property, re-

7 Lessing, L., 1998, *Laws of Cyberspace – A Lecture*, Taiwan Net Conference, Taipei, p. 6, (https://cyber.harvard.edu/works/lessig/laws_cyberspace.pdf, 25. 5. 2022).

*solving disputes, and crystallizing a collective conversation about online participants’ core values.*⁸

The need to understand the changes that were happening in the 1990s and the response mechanisms of legislators to keep up with the changes resulted in short-sited regulatory attempts that were either focused on banning digital assets, including cryptocurrencies, or went so far as to predict that new digital assets will simply vanish under the market pressure. Despite the disinterest, the Internet in the late 1990’s has become a mainstream of western culture and not a day would pass by without traditional media outlets reporting on some “Internet” news. With rise in situations and businesses that were conducting their transactions online, the need to catchup with events in the digital sphere was increasing.⁹

Despite some initial hopes of government officials that cryptocurrencies would disappear from the social scene, and keen disinterest of the central banks to participate in the process, it came to the point in which an unregulated financial market with hyper-volume transactions per minute is not only legislator’s biggest nightmare but a part of local reality. Therefore, the exchange of crypto currencies and utilization of the blockchain technology on a large spectrum – permeating everything from finance to art – led to a situation where states could not keep the role of silent observers anymore.

In this scenario, states firstly started with application of existing anti-money laundering legislation, financial markets rules and taxation in a way that these regulations should directly affect cryptocurrencies and services related to their exchange. The second wave was to regulate on a more specific level and initiate enactment and defining legislation that tackles an entire new category of assets – digital assets.

2.1. GENERAL OVERVIEW OF THE SERBIAN LAW ON DIGITAL ASSETS

Turning to the core topic of the commentary and following the general trend of necessity to regulate cryptocurrencies and other forms of values recorded in digital space, the Republic of Serbia enacted the Law on Digital Assets that entered into force on December 29, 2020 and is applicable from June 30, 2021.¹⁰

8 Johnson, D.R., Post, D., 1996, Law and Borders – The Rise of Law in Cyberspace, *Stanford Law Review*, Vol. 48, pp. 1367–1368.

9 Group of Authors, 1999, Developments in the Law: The Law of Cyberspace, *Harvard Law Review*, Vol. 112, No. 7, pp 1577–1579.

10 Law on Digital Assets, *Official Gazette of the Republic of Serbia*, No. 153/20 (hereinafter: “Law”).

On a general scope, the Law promotes the principle of technological neutrality, meaning that it applies to all digital assets and all services related to digital assets, regardless of the technology on which these digital assets or provision of the services are based. Regulatory scope of this legislation encompasses: defining digital assets, issuance of digital assets and secondary trading, provision of services related to digital assets, lien and fiduciary right to digital assets, consumers' protection, and determining the competencies of the National Bank of Serbia and the Securities Commission for the supervision of the application of the Law.

Moreover, the Law prohibits financial institutions under the supervision of the National Bank of Serbia to acquire or hold digital assets and instruments connected to digital assets or keep them as stakes/contributions in kind. The prohibition for these institutions also extends to provision or usage of services related to digital assets. The only exception that is regulated under Article 13 relates to keeping of cryptographic keys. The Law prescribes the rules of conduct on the market for digital assets, prohibiting manipulations and abusive behavior of the market participants, akin to the regulation of the financial markets. Acting contrary to the prescribed limitations is sanctioned as a criminal act under national law.

2.1.1. Fundamental Terminology of the Law

Majority of legislators around the world that decided to regulate virtual/digital assets adopted the colloquial terminology that was pioneered by programmers who developed the technology. Typical examples of such terminology are “smart contract” and “white paper”.

The Law provides the following definition in Article 2: smart contract is a computer program or protocol, based on technology of distributed data bases or similar technologies, that in part or in total automatically executes, controls and registers legally relevant event and activity in accordance with a concluded contract, with the contract being concluded electronically through the program or protocol.

Using the term “smart contract” can lead to confusion and potential equalization with the contract in the general legal sense of the term used in everyday commerce. As the contract in general and its formation rests on the will of the parties to be bound by it, it is necessary to point out that smart contract is not a contract in legal terms. Smart contract is a (program) code that enables automation in performance of the contract. Contract, legally speaking, is concluded in the manner defined by the law, by a mutual will of the parties – and this meeting of the minds between the parties is then “translated” into the code that performs the contract when certain specified conditions are met. These conditions are recorded on the

blockchain or some other Distributed Ledger Technology (hereinafter: DLT) platform and would enable automatic performance when the conditions in the code are fulfilled.¹¹ Once the meeting of the minds between the parties is introduced into the form of the smart contract, it cannot be avoided by any of the contractual parties, in the same manner that neither of the parties can stop the performance once conditions are fulfilled. The possibility for a smart contract to be regarded as a contract in the legal sense of the word is also discussed in concluding remarks, tackling the issue of further development and application of blockchain technology and artificial intelligence (hereinafter: AI).

Another programmer-specific term that was adopted is the “White Paper”, defined as a document in which the entity that issues digital assets lists all the data and information relevant for the properties of the digital assets issued and offered to potential investors. The White Paper is executed for the purposes of announcing digital assets, having in mind that issuance of digital assets mimic to an extent the issuance of financial instruments, but in a more informal and simple manner. In this regard, the white paper would resemble the securities’ prospect that is prepared when securities are issued on the market.

Mining for crypto currencies is another term that the Law defines, and it arises in the context of activity of crypto currency users and allows for participation in provision of services of computer confirmation of transactions in IT systems that relate to a particular digital asset. The Law also stipulates that its rules do not apply to individuals acquiring assets through mining.

2.1.2. Types of Digital Assets

According to the Law on Digital Assets, digital asset is a property on which a particular person has a title on property, but the property is digitally registered (in a digital database, which can be DLT or any other technology that can serve this purpose), has a specific value, can be digitally bought, sold, exchanged, or transferred, for the purpose of barter or investment.¹² The law divides it into two types of digital assets: virtual currency and digital token.

11 Natarajan, H., Krause, S., Gradstein., H., 2017, Distributed Ledger Technology and Blockchain, *World Bank FinTech Note No. 1*, pp. 1–2, (<https://openknowledge.worldbank.org/handle/10986/29053>, 6. 4. 2022); Distributed Ledger Technology refers to the technological infrastructure and protocols that allows simultaneous access, validation, and record updating in an immutable manner across a network that’s spread across multiple entities or locations, commonly referred to as blockchain technology.

12 Art. 2 of the Law.

The Law follows the current position of the National Bank of Serbia *i.e.* cryptocurrency (defined by the Law as the virtual currency) is not a mean of payment, provided that the digital currencies of central banks (*e.g.* the expected digital euro) are not digital assets, nor does this law apply to them.¹³ In addition to virtual currencies, the Law states that digital tokens are “intangible property rights that in digital form represent one or more other property rights, which may include the right of digital token users to be provided with certain services”.¹⁴

Depending on the economic function and entitlement that digital asset provides to the asset holder, in practice (and in line with some existing legislation in Europe¹⁵) digital assets are generally divided into following groups:

- Payment token – a widely used synonym for cryptocurrency.
- Utility token – is used to provide the asset holder with access to particular goods or services that can be requested from either the entity that issued the token or a specified third party.
- Asset / Security token – represents assets such as a debt or equity claim on the issuer or tokens which enable physical assets to be traded on the blockchain. Issuance of security tokens fails under security regulations.
- Hybrid token – is a token that contains a combination of at least two of the features of other token groups.

It is worth noting that the Law does not define specific types of digital tokens but leaves room for these to form in everyday application and commerce, depending on the type of right that a token contains.

2.1.3. Procedure for Issuing Digital Assets in Serbia

Initial Coin Offering (hereinafter: ICO) is a key term in the procedure for issuance of digital assets. The term has been derived from actual practice and is reminiscent of IPO – Initial Public Offering – denoting the institute of public offer of shares (as prescribed by law, and under formal rules of offering). ICO is also a public offer, but for digital assets, that is

13 National Bank of Serbia Press Release Statement on Crypto Currencies from 27. 6. 2018 (<https://www.nbs.rs/sr/scripts/showcontent/index.html?id=12975&konverzija=no>, 7. 4. 2022).

14 Art. 2 of the Law.

15 FINMA Guidelines for Enquires Regarding the Regulatory Framework for Initial Coin Offerings (ICOs), (https://www.finma.ch/~media/finma/dokumente/dokumentencenter/myfinma/1bewilligung/fintech/wegleitung-ico.pdf?sc_lang=en&hash=-C9899ACF22747D56C800C6C41A7E28AB, 7. 4. 2022).

used as the basis for the issuers to submit their tokens to sale (tokens being usually registered on the blockchain).

The Law provides the offers to be made pursuant to the rules contained within, with issuers of digital assets being both domestic and foreign individuals, entrepreneurs, or other legal entities.¹⁶ The prescribed procedure seems like a fairly straight-forward one – at least having in mind the applicable legislation and by-laws; however up until this paper was submitted for publishing, no procedure for issuance of digital assets under the Law had been completed. One of key factors for considering the simplicity of the process is the absence of any procedure for obtaining the permit to issue digital assets, with issuers being obliged only to obtain the permit for a publication of the White Paper, pursuant to the public offer rules in place.

Accordingly, issuing digital assets is allowed even without a drafting of the White Paper, but the advertising of ICO would be announced in a restrictive manner pursuant to the rules explained in the following paragraph.¹⁷ From the perspective of the issuer and the investor in digital assets, it is to be expected that the ICO will be accompanied by a White Paper, so that investor purchasing the tokens can have an overview of all the rights and obligations stemming from the purchase.

The competence to oversee the digital assets is divided between the National Bank of Serbia and the Securities Commission, as per Article 10 of the Law.¹⁸ If a virtual currency is issued, the competent authority is the National Bank of Serbia. In a case of issuance of digital tokens, the competence is entrusted to the Securities Commission. Digital assets, which encompass both the characteristics of virtual currency and a digital token, are subject to both institutions’ competence. Furthermore, when digital assets have the characteristics of a financial instrument, the law governing the capital markets is applicable, with the following exceptions directly regulated by the Law on Digital Assets:

- if digital assets do not have the characteristics of shares;
- if digital assets are not exchangeable for shares; and
- if the total value of digital assets issued by one issuer during a period of 12 months does not exceed the amount of EUR 3,000,000 in dinar equivalent at median exchange rate of the dinar against the euro determined by the National Bank of Serbia on the day of issue, *i.e.* during primary offering.¹⁹

16 Section II, Arts. 16–29 of the Law.

17 Art. 17 of the Law.

18 Art. 10 of the Law.

19 Art. 7 of the Law.

In case the publication of the White Paper has been approved by the competent authority for the initial offer of digital assets, the issuer of digital assets is obliged to:

- start registration and payment of digital assets in a period of no later than 30 days from the approval of publication of the White Paper. Issued digital assets can be purchased by payment in cash, in digital assets, and/or in the services of the acquirer of those assets (e.g. transfer of issued digital assets to persons who are “mining” for those digital assets). If the initial offer is successfully completed (and this is a criterion that the issuer should delineate in the White Paper), the issuer has the obligation to immediately notify the supervisory authority;²⁰
- publish a report on the outcome of that initial offer on its website no later than 3 working days after the end of the initial offer. The legislator leaves the form and content of this notification to be regulated by by-laws.²¹

Issuance and advertising of the initial offer of digital assets for which no White Paper has been written or the request for approval of advertising a White Paper has been rejected – the Law stipulates that the publication of such White Paper is allowed, provided that during its publication and during the initial offer of digital assets to which the White Paper relates clearly states that it has not been approved. Publication in the sense of the applicable provisions means posting on the website of the issuer of digital assets.

However, Article 17 of the Law provides exceptions to the rule above, according to which the issuer may advertise the initial offer of digital asset for which a White Paper has not been approved in the following cases:

- the initial offer was sent to less than 20 natural and/or legal persons;
- the total number of digital tokens issued does not exceed 20;
- the initial offer is sent to buyers/investors who buy/invest in digital assets in the amount of at least 50,000 euros in dinar equivalent at median exchange rate of the dinar against the euro determined by the National Bank of Serbia on the day of purchase/investment, per buyer/investor;
- the total value of digital assets issued by one issuer for the period of 12 months is less than 100,000 euros in dinar equivalent at me-

20 Art. 28 of the Law.

21 Art. 29 of the Law.

dian exchange rate of the dinar against the euro determined by the National Bank of Serbia.

2.1.4. Services Related to Digital Assets

Provision of services related to digital assets, the Law defines as 1) receipt, transfer and execution of orders related to the purchase and sale of digital assets on behalf of third parties; 2) services of purchase and sale of digital assets for cash and/or non-cash and/or electronic money; 3) digital asset exchange services for other digital assets; 4) storage and administration of digital assets on behalf of users of digital assets and related services; 5) services related to the issuance, offer and sale of digital assets, with the obligation to purchase it (sponsorship) or without that obligation (the agency); 6) keeping a register of liens on the digital assets; 7) digital assets acceptance/transfer services; 8) digital asset portfolio management, 9) organization of a digital asset trading platform (hereinafter: “Services”).²²

The Service Provider may be a company established in accordance with the Law on Companies which obtained a license from the supervisory authority. Which supervisory authority will be competent for issuance of a license depends on the type of the Service, *i.e.* whether the Services are related to virtual currencies (competence of the National Bank of Serbia) or if the Services are related to digital tokens (competence of the Securities Commission). In the event of hybrid digital assets, both authorities will be regarded as competent. Also, depending on the type of Services that are rendered, the Law prescribes the founding capital in the range between 20,000 and 125,000 euros.²³

Service Providers whose activity is connected to digital assets are obliged to apply the rules that regulate anti-money laundering and prohibition of financing terrorism, aside from having an obligation to register all transactions that were conducted with the assistance of the Service Provider and keep the records for 10 years.²⁴ Aside from this, the Law obliges the Service Providers whose services are connected to crypto currencies to notify the National Bank of Serbia of all the transactions conducted by companies and entrepreneurs, as well as provide data on those persons.²⁵ The same obligation exists for holders of crypto currencies – companies and entrepreneurs with a registered seat in Serbia – as they are obliged to notify the National Bank on the currencies they have, despite not conducting transactions through a Service Provider.

22 Art. 3 of the Law.

23 Art. 54 of the Law.

24 Art. 84 of the Law.

25 Art. 85 of the Law.

3. EU REGULATORY ACTIVITY ON DIGITAL ASSETS

On 14 March 2022, European Parliament's Committee on Economics and Monetary Affairs adopted a draft report on Markets in Crypto Assets (hereinafter: MiCA) which streamlines a set of rules that regulates digital assets and activities of crypto assets service providers and consumers' protections.²⁶

Issuer of crypto-assets means a legal person who offers to the public any type of crypto-assets or seeks the admission of such crypto-assets to a trading platform for crypto-assets.

The MiCA, defines crypto-assets as: a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology. The MiCA outlines three types of crypto assets:

- a. asset – referenced token – a type of crypto-asset that purports to maintain a stable value by referring to the value of several fiat currencies that are legal tender, one or several commodities or one or several crypto assets or a combination of such assets;
- b. e-money token – a type of crypto-asset the main purpose of which is to be used as a means of exchange and that purports to maintain a stable value by referring to the value of a fiat currency that is legal tender and
- c. utility token – a type of crypto-asset which is intended to provide digital access to a good or service, available on DLT, and is only accepted by the issuer of that token.²⁷

However, the MiCA does not apply to crypto-assets that qualify as:²⁸

- a. financial instruments as defined in Article 4(1), point (15), of Directive 2014/65/EU;

26 Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on Information Accompanying Transfers of Funds and Certain Crypto-Assets (Recast) (COM(2021)0422 – C9–0341/2021 – 2021/0241(COD)), (https://www.europarl.europa.eu/doceo/document/CJ12-PR-704888_EN.pdf, 6. 4. 2022); see also: Bočánek, M., 2021, First Draft of Crypto-Asset Regulation with the European Union and Potential Implementation, *Financial Law Review*, 22, pp. 2–5, (https://www.google.com/url?sa=t&trct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewiDw62W_oj3Ah-WsqaQKHYSvDN8QFnoECAQQAQ&url=https%3A%2F%2Fwww.ejournals.eu%2Fpliki%2Fart%2F19444%2F&usg=AOvVaw1cUV_-hESu6_AYG212qeJr, 9. 4. 2022).

27 Art. 3 of MiCA.

28 Art. 2 of MiCA.

- b. electronic money as defined in Article 2, point (2), of Directive 2009/110/EC, except where they qualify as electronic money tokens under this Regulation;
- c. deposits as defined in Article 2(1), point (3), of Directive 2014/49/EU of the European Parliament and of the Council²⁹;
- d. structured deposits as defined in Article 4(1), point (43), of Directive 2014/65/EU;
- e. securitisation as defined in Article 2, point (1), of Regulation (EU) 2017/2402 of the European Parliament and of the Council³⁰.

This is the reason why some authors consider that MiCA tokens and non-MiCA crypto assets should be distinguished for theoretical and practical purposes.³¹

The rules explicitly regulate that issuers of asset-referenced tokens shall be incorporated in the form of a legal entity established in the EU (Art. 15) and also indicates that no asset-referenced tokens can be offered to the public in the EU or admitted to trading on a trading platform for crypto-assets if the issuer is not authorized in the EU and it does not publish a crypto-asset white paper approved by its competent authority.³²

Furthermore, Article 43 describes that no e-money tokens shall be offered to the public in the EU or admitted to trading on a crypto-asset trading platform unless the issuer is authorized as a credit institution or as an “electronic money institution” within the meaning of Article 2(1) of Directive 2009/110/EC. Article 43 also states that “e-money tokens” are deemed electronic money for the purpose of Directive 2009/110/EC.

The MiCA also provides that in order to ensure transparency of service provided in relation to crypto assets, establishing the registry of service providers in the field that will register the information on subject that are authorized to provide these services in the EU.³³ This is to be organized

29 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, *OJ L 173*, 12. 6. 2014, p. 149.

30 Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012, *OJ L 347*, 28. 12. 2017, p. 35.

31 Szwajdler, P., 2021, Considerations on the Construction of Future Financial Regulations in the Field of Initial Coin Offering, *European Business Organization Law Review*, p. 7 (<https://link.springer.com/content/pdf/10.1007/s40804-021-00225-z.pdf>, 5. 6. 2022).

32 Art. 15 of MiCA.

33 Art. 57 of MiCA.

by the European Securities and Market Authorities, with the idea that the registry will also keep records of White Papers on crypto assets that the issuers are submitting for confirmation to relevant authorities.

Bearing in mind the restrictions related to issuing of e-money tokens and asset-referenced tokens which are subject to above rules, the MiCA defines the additional restrictions to the issuers that are established in a third country *i.e.* such issuers should notify their crypto-asset White Paper, and, where applicable, their marketing communication, to the competent authority of the Member State where the crypto-assets are intended to be offered or where the admission to trading on a trading platform for crypto-assets is sought in the first place.³⁴

One can note the difference between the approach of the EU and the Serbian legislator having in mind that the Serbian law allowed for issuance of tokens to both domestic and foreign legal entities, entrepreneurs, and individuals without any limitations with respect to the type of token issued.

Another notable difference is that the Serbian law regulates the exception that allows for tokens that have characteristics of financial instruments to be issued pursuant to the Law on Digital Assets, while MiCA redirects to application of the rules that regulate financial markets and instruments.

4. UNREGULATED HORIZONS LURKING AROUND THE CORNER

The fact that many ideas from 1980's are finally becoming a reality through technologies such as blockchain, doors are being opened to numerous challenges that legislators, including the Serbian parliament, would need to face in the near future. One of the stories from the past, and an idea metaphor – that is soon going to be lurking around the corner and await regulation – is the story of Personless Inc. as penned by Meier Dan-Cohen³⁵, a company that was successful in its business operation and whose founders reinvested large amounts of profit in its development only for the company to once decide to buy its own shares. Purchase of shares followed by a full automatization of its work (which was followed by firing of all the workers) turned the company into not only an ownerless corporation but a fully automated one. Next step in management was for

34 Art. 3 of MiCA.

35 Dan-Cohen, M., 1986, *Rights, Persons and Organizations: A Legal Theory for Bureaucratic Society*, Berkeley, Los Angeles, University of California Press, pp. 37–44.

the company to become fully computerized: all the key decision-making functions, and all the decision-making processes, were ably programmed and delegated to the computers.

While this story, specifically in 1980's, has been a guess for what may come, the existing blockchain technology, coupled with smart contracts and application of AI is now making this idea a reality through Decentralized Autonomous Organization (hereinafter: DAO). As defined by Wright and De Filippi:

Decentralized autonomous organizations are a specific kind of decentralized organization that are both autonomous (in the sense that, after they have been deployed on the blockchain, they no longer need nor heed their creators) and self-sufficient (in the sense that they can accumulate capital, such as digital currencies or physical assets). Decentralized autonomous organizations can charge users for the services they provide, in order to pay others for the resources they need. As long as they receive sufficient funds to operate on their own, they can thus subsist independently of any third party. If a decentralized organization is truly autonomous, no one (including its original creator) can control it after it has been deployed on the blockchain.³⁶

While many authors do not consider that blockchain and connected technologies are exponential developments in industry, but rather an incremental one³⁷ – that has been developing over decades of steady growth and expansion – it would be interesting to see how legislators will “catch-up” with the developments.

If one is to consider that legal entities are fictions that are vested with legal personality by laws enacted by men, and can be entitled to acquire rights and obligations, it would be reasonable to expect that DAO should follow the same pattern and be required to be regarded as legal persons.

If we take into consideration how legislators reacted when the cryptocurrencies market exploded in volume, it would be safe to conclude that DAO will become a subject of regulation once it starts threatening the system currently in place or starts generating value that states simply cannot ignore to take cut off.

However, unlike the approach that is utilized for regulating digital assets – where legislators used existing legal institutions and adapting rules of property law, financial market regulation and payment transactions, approach to regulating DAO will have to be more innovative and complex.

36 Wright, A., Filippi, P. de, 2015, *Decentralized Blockchain Technology and the Rise of Lex Cryptographia*, p. 17 (<https://ssrn.com/abstract=2580664>, 25. 5. 2022).

37 Franco, P., 2014, *Understanding Bitcoin: Cryptography, Engineering and Economics*, Wiley Finance Series, pp. 15–17.

This stems from the fact that DAO has a potential to become an entirely new type of legal subject that is unlike anything that currently exists. Unlike legal entities whose decisions are enacted and implemented by individuals, DAO can function in full autonomous capacity.

This means that by virtue of applicable technologies and AI, DAO will be in a position to fully and independently enter into legal relationships with other DAOs or other subjects (legal persons and individuals). As a self-standing subject, DAO will be able to enact decisions and execute smart contracts with help of AI, making these contracts legally binding. Namely, smart contract that is currently concluded by legal subjects is always presupposed on the notion of the will of the parties – represented by individuals – to enter a contract that is then turned into a code: smart contract. The smart contract that DAO will be entering into will exist without participation of people but only appear as a code and will indeed be a contract in the legal sense of the word.

This opens a number of questions that are touching upon all existing principles of law that will have to be resolved not only by adaptation but creation of new regulations and legal rules. Inevitably, the questions of DAO directly related to liability for smart contracts, AI and connected issues of ethics that are extremely sensitive in that field. This however is just the tip of the iceberg, and the legal profession will have to tackle the new challenges with a keen new approach and a revolutionary creative response mechanism fit for a new century.

5. CONCLUSION

New legislation finally regulated issues pertaining to digital assets that were functioning and operational even before the Law was enacted, but the processes were conducted without supervision of the state. The regulatory change increased Government's potential to control, supervise and to theoretically curb any abuse or misconduct, as well as fraudulent activity, key success being the change is Serbia's position to adequately tax the processes that were under the radar up until that point. The level of monitoring and control was ensured through introduction of licensed Service Providers in the sphere of digital assets.

The utilitarian aspect of the Law for SMEs as well as small investors who can directly fund their investment activities is regulating the ICO procedure. This way, the Law enabled the option of crowdsourcing, setting limits and boundaries for the issuers. The issuance of digital assets can therefore enable investing into a particular project that the issuer has

decided to finance through an ICO, which in turn allows individuals and small investors to directly and without an intermediary or a broker purchase digital assets (even if the asset has characteristics of a financial instrument). Moreover, this enables the investors to acquire other rights that the particular digital asset holds – such as participation in the profits of the project, option to acquire certain IP rights or entitlement to a service that can be requested from the issuer of the token, or another entity designated by the issuer.

Looking at the potential benefits for the economy, one should bear in mind and consider effect of EU regulatory shifts in the field. To start with, unlike the Law that allows issuance of digital assets in Serbia notwithstanding the seat of the issuer, MiCA provides that issuance of assets – referenced tokens in EU can only be done by companies registered in one of the Member States, while assets issued outside of EU require White Paper verification by the competent authority of the EU country in which the offer will be made. Another notable difference is that the Serbian law regulates the exception that allows for tokens that have characteristics of financial instruments to be issued pursuant to the Law on Digital Assets, while MiCA redirects to application of the rules that regulate financial markets and instruments. The model will certainly pose a restriction for digital assets issued in Serbia, as the access to EU market in this regard will be limited. On the other hand, despite approaching one year from the enactment of the Law, it seems that its processes are still not activated fully in the local economy. Namely, the first White Paper was approved in May 2022, and the first ICO fully conducted in Serbia as prescribed by the Law, while still no license for provision of services related to digital assets were issued. In parallel, and aside from the taxation options that were introduced, technology behind the digital assets is advancing and providing new solutions that the current Law, despite being only one year old, does not recognize. Some attention should be given to the NFTs that in their essence are more akin to intellectual property and the transfer that follows, than digital assets as defined by the Law. However, the reality is that legislators around the world are battling to keep the pace of technological advancements and to regulate it properly – which one can only hope will not result in frequent legislative adaptations – bringing uncertainty for the state entities and government bodies that are usually slow to adjust to new technology and accompanying legislation.

From an objective standpoint, the enacted Law is far from revolutionary, specifically as it introduced a number of already existing and tested models. The rules that the Law provides for conduct and activity of Service Providers are to an extent similar to existing rules for issuing permits

for subjects operating on the financial market. The rules on pledge on digital assets largely resemble the rules that regulate pledge over movable property – which are mostly unfit for application in this regard. Regulation on the process of issuing tokens, however, is a practical upside of the system at hand and we are hoping for an opportunity for local SMEs to fund different projects locally.

One can hope that despite the rapid changes in technology, legislator will understand that chasing new rules and regulating over and over will not necessarily be a fruitful outcome or the most efficient approach. Technology advancements and changes to society that former bring should be carefully adapted and fitted into existing solutions with full awareness of the scope, principles, and purpose of the rules currently in place.

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KOLIKO JE NOVI ZAKON O DIGITALNOJ IMOVINI SRBIJE ZAPRAVO „DIGITALAN“?

Željka Motika

APSTRAKT

Predmetni rad izdvaja u fokus izmene iz 2021. godine koje je uveo Zakon o digitalnoj imovini u pravni sistem Republike Srbije i kontekstualizuje promene iz perspektive već postojeće prakse. U uvodnom delu razmatra se pitanje da li blokčejn tehnologija može da obezbedi poverenje i sigurnost u transakcijama koje se odvijaju putem interneta, između učesnika iz svih delova sveta. Razmatraju se razlozi koji su doveli do stvaranja regulatornog okvira koji se odnosi na vrednosti koje se prenose putem DLT-a. U centralnom delu fokus je na prikazu osnovnih premisa Zakona o digitalnoj imovini, rešenja i ključnih izuzetaka, kao i definicija pojmova i šta oni znače za lokalnu privredu. Date su osnovne informacije o vrstama digitalne imovine, načinu i postupku izdavanja digitalne imovine, kao i rešenja koja su primenjena na subjekte koji pružaju usluge povezane sa digitalnom imovinom. Pregled izmena legislative EU u predmetnoj materiji prati niz zaključnih razmatranja o uticaju regulisanja materije koja je predmet ovog zakona na privredu i razvoj Srbije kroz prizmu novih tehnologija. Deo razmatranja se odnosi na osobine tehnologije i na analizu dometa regulatornog okvira u odnosu na dalji razvoj tehnologije, kao i da li regulativa koja se sada donosi od strane zakonodavca ima dovoljnu širinu da može da obuhvati i promene koje se očekuju, odnosno da li je postojeći regulatorni pristup adekvatan da uredi promene koje tek dolaze.

Ključne reči: digitalna imovina, ICO, beli papir, tokeni, blokčejn.

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