

NEW REGULATION OF DIGITAL ASSETS FOR FUTURE BUSINESS – CASE OF SERBIA

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ABSTRACT

In the past several years Serbia and surrounding countries became attractive environment for crypto currency hubs. Enterprises dealing with digital assets, which are present, dispose already over a 1 billion USD. Firstly, Serbian legislator adopted several regulations on this issue for the purpose of preventing money laundering, organised crime and terrorism. However, very soon it became necessary to create a legal framework for business, finance and attracting foreign investments. Serbia was among the early birds who adopted relatively complete regulation on digital assets in 2021. The purpose of this paper is to bring this very actual topic to the attention of the academic and broader public. The authors will analyse the legal framework in force and the use of digital assets in practice. New legislation represents one big step towards the modern business. Never the less there are some more actions to be done to include digital assets completely into the legal life in Serbia.

KEYWORDS: digital assets, regulation, future business, Serbia.

INTRODUCTION

Created with the purpose to avoid strict rules and to allow free trade and exchange, cryptocurrencies and other digital assets set an important challenge for legislators around the world. The very nature of cryptocurrencies imposes a need for specific legal definition, and the way of their treatment. Among early birds, Serbian legislation recognized the importance of regulating cryptocurrencies. In December 2020, following the recommendations of the Financial Action Task Force (Financial Action Task Force, 2021, p. 45), National Assembly of Serbia adopted the Law on Digital Assets (Law on Digital Assets, 2020) which sets a legal framework for cryptocurrencies and allowed further development of this relatively new and specific market value. The EU Fifth Directive on the Prevention of Money Laundering and Terrorist Financing (EU Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, 2015) was also taken into account. Since its entry into force in June 2021, the first assessment estimated that approximately 200.000 persons in Serbia own some type of digital assets (Politika, 2021). Some of the biggest cryptocurrency projects, such as Polygon, Celsius, Ethereum developer platform and Tenderly are based in Serbian capital of Belgrade and at least 92 million USD was raised by crypto startups in the region in 2021. In July 2021, the National Bank of Serbia adopted amendments and supplements to the Instructions for the Implementation of the

Decision on the Conditions and Manner of Performing International Payment Transactions. New regulation itself represents only a legal framework, but the interpretation of legal issues regarding identification and realization of cryptocurrencies in practice is yet to be provided by the judicial practice. Given the fact that cryptocurrencies very often face the risk of significant price fluctuation the lawmaker clearly considers digital assets to represent a significant challenge for both stakeholders, owners and their creditors. In the civil law theory, digital assets are still not considered as a particular property object. General division of civil law recognizes as object of property rights real estate, movable property and property rights (Stanković & Orlić, 2014). However, digital assets cannot be included in none of these and has to be regarded as specific category. Besides, other property rights regulations in force have to take this new category into account and harmonize the legal framework accordingly.

METHODOLOGY

The research in this paper focuses on normative approach to the national legislation in force and its comparative analysis with the respective rules in the EU and requirements set by international organisations. Since it is relatively new topic, there are only few comparative examples. Many countries still do not regulate digital assets or do not recognize it as personal property or even forbid its use in business operations. For judicial practice, it is completely new and pretty unknown area, which requires knowledge and professional experience for adequate decisions and protection of interested parties.

Firstly, digital assets will be analysed as personal property according to the legislation in force. It will be followed by discussion on the content of the property rights. Further, the use of digital assets in business operations will be considered. Bearing in mind its value, the use of digital assets for claim settlement will be taken into account. Finally, considering its usually dislocated storage, cross border issues relating digital assets will be analysed.

1. DIGITAL ASSETS AS PERSONAL PROPERTY

Since digital assets represent a legal novelty, it is necessary to analyze the legal nature of digital assets in Serbian law. In some countries, digital assets are considered as a type of personal property (Inacio, 2018, p. 12-13), but in others they are not recognized as such (Lyadnova et al., 2018, p. 5). The EU Council formally approved the Proposal of the Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 (MiCA). Now EU Parliament has to adopt the proposal which prescribes a transitional period of 18 months after entry into force (Proposal for a EU Regulation on Markets in Crypto-assets, 2020/0265). Digital assets are defined as identifiable, non-monetary and without physical substance (International Financial Reporting Standards Foundation, 2022, p. 4). They are also characterized as authenticated by cryptography, based on a distributed transaction ledger, decentralized and ruled by consensus (OPUS Business Advisory Group, 2021, p. 3). In order to be identifiable, digital assets have to be detachable and created on the basis of contract or other legal rights transferable/non-transferable and detachable/non-detachable from entity or other rights.

Serbian law regulates digital or virtual assets as the digital value record that can be digitally bought, sold, exchanged or transferred, and that can be used as a medium of exchange or for investment purposes (Art. 2. Para. 1. p. 1. Law on Digital Assets, 2020). This does not include digital currency records that are legal instruments of payment and other financial assets regulated by other laws. This implies that Law on Digital Assets recognizes digital assets the legal position of personal property, since it possesses two important features of property, its value and its *iustus titulus*, the same as prescribed for sale of goods in the Law on Contract and Torts (Art. 454. Law on Contracts and Torts, 1979).

Since they are by their nature intangible, digital assets have to be stored on secure digital location called wallet. This may be a software wallet, hardware wallet, hot wallet and cold wallet (OPUS Business Advisory Group, 2021, p. 6). Their digital storing allows the assets to be at disposition of its owner. Digital assets are usually decentralized, until they become a whole by operation of the holder. Any registration by public or licensed private providers of services secures their flow control and protection. In addition, digital assets have their address as a unique identifier of a virtual place that contains data on each specific digital asset. Because of their specific nature, digital assets may have the form of virtual currency (serb. *virtuelna valuta*) and digital token (serb. *digitalni token*). On the one side, virtual currency is considered as a type of digital assets that has not been issued and whose value is not guaranteed by the central bank (National Bank of Serbia) or other public authority (Art. 2. Para. 1. p. 2. Law on Digital Assets, 2020). That is why in Serbia the legislator does not recognize them as a legal instrument of payment and they have no legal status of money or currency. This statement was confirmed by the National Bank of Serbia in 2022 (NBS, Statement on Digital Assets, 2021). Serbian legislation recognizes digital token as a type of digital assets that represent any intangible property right and that may represent one or more other property rights in digital form, including the right of the user of the digital token to be provided with certain services (Art. 2. Para. 1. p. 3. Law on Digital Assets, 2020).

Any acquisition of digital assets by participating in the provision of computer certification of transactions in information systems related to certain digital assets (mining of digital assets) is allowed. The digital assets acquired in this manner may be freely disposed of by their owner. The owner may also use the services of digital asset service providers, in which case the owner is considered as a user of digital asset transaction in the OTC market. An over-the-counter (OTC) market is a decentralized market in which market participants trade stocks, commodities, currencies, or other instruments directly between two parties and without a central exchange or broker. Over-the-counter markets do not have physical locations; instead, trading is conducted electronically (Corporate Finance Institute, Capital Markets, 2022). Digital assets may also have the characteristics of a financial instrument. In this case, all operations on issuing, secondary trading of digital assets and providing related services have to be conducted in accordance with the Law on Capital Market (Art. 7. Para. 1. Law on Digital Assets, 2020).

The new legal framework in Serbia also regulates the stable digital assets. These are special digital assets issued for the purpose of minimizing changes of their value. Their value is bounded to the value of legal instruments of payment or one or more property rights with small value changes, such as the official RSD (NBS, Official middle RSD exchange rate, 2023) exchange rate or foreign exchange rate currency that is relatively stable. Digital assets

are stored in a digital wallet. The wallet may be located in software storage (such as cloud) and hardware storage (external).

1.1.OBJECT OF THE PROPERTY RIGHTS

The Law on Digital Assets differentiates between the holder and the user of digital assets. A user may be a natural person, entrepreneur or legal person that uses or has used any service related to digital assets or has contacted a provider of services related to digital assets for the use of that service (Art. 1. Para. 1. p. 35. Law on Digital Assets, 2020). A holder comprises of both user of digital assets and a person who has acquired digital assets (Art. 1. Para. 1. p. 36. Law on Digital Assets, 2020) as personal property. It may be any person regardless of the business relationship established with the digital asset service provider or transactions made through that provider. Holder of any digital assets has all property rights provided by the Serbian laws. As mentioned above, the holder is authorized to buy, sell, exchange, transmit and store electronically his/her/its digital assets.

The legislator set an obligation for providers of services related to virtual currencies to submit to the National Bank of Serbia all data on legal persons and entrepreneurs who are users of virtual currencies. Holders of virtual currencies based in Serbia, both legal persons and entrepreneurs, who have not used licensed providers' services related to virtual currencies are required to submit reports to the National Bank of Serbia, and are responsible for the accuracy and completeness of these data. The National Bank of Serbia keeps electronic data records on holders of virtual currencies (Art. 85. Para. 4. Law on Digital Assets, 2020). Any information obtained while providing services related to digital assets and to their user, including user's identity, and on transactions with digital asset service provider must be kept as a business secret. The only exempted information is the one made publicly available.

Company, as a legal person, may be the holder of digital assets provided that it respects certain restrictions. Namely, virtual currencies cannot be invested as a monetary investment in the capital of a company. However, they can be converted in cash and paid into a company as a cash investment. Digital tokens may be invested as a non-monetary investment in a company but cannot be related to the provision of services or the work performance. This restriction for digital tokens does not apply to a partnership and limited partnership (Art. 14. Para. 3. Law on Digital Assets, 2020). The list of digital tokens that may be invested is determined by the Securities Commission. In the business books, a company has to record its digital assets as intangible, i.e. a resource controlled as a result of past events and from which the economic income is expected in the future, or as inventories kept for the purpose of sale in regular business or material used in production process or providing of services.

1.2.DIGITAL ASSETS IN BUSINESS OPERATIONS

The holder/owner is authorized to buy, sell, exchange, transmit and store electronically its digital assets. Although not specifically regulated, it is possible that this property may also be subject of a lease agreement. More importantly, Law on Digital Assets regulates the pledging of digital assets. Any acceptance of digital assets in exchange for

goods sold and/or services provided in retail trade may be done exclusively through a licensed provider of services related to digital assets. The provider may accept from the consumer the appropriate value of digital assets corresponding to the price of goods sold and/or services provided to that consumer and place it with the appropriate amount of legal instrument of payment on the trader's account. However, direct acceptance and/or transfer of digital assets from the consumer to the trader is prohibited (Art. 97. Para. 3. Law on Digital Assets, 2020).

Following the Comments of the International Financial Reporting Standards Interpretation Committee (IFRIC) and provisions of the Law on Digital Assets, the Serbian Ministry of Finance issued the Explanation regarding accounting recognition, valuation, and manner of recording digital assets in the business books of taxpayers, which recognizes digital assets as intangible assets and inventories (Art. 7. Para. 1. Law on Digital Assets, 2020).

As personal property, digital assets may also have the characteristics of a financial instrument. In this case, all operations on issuing, secondary trading of digital assets and providing related services have to be conducted in accordance with the Law on Capital Market, determined by the National Bank of Serbia on the day of issuance (Art. 7. Para. 2. p. 3. Law on Digital Assets, 2020). However, capital market regulation does not apply, if digital assets do not have the characteristics of shares or not exchangeable for shares and their total value issued by one issuer during a period of 12 months does not exceed the amount of EUR 3,000,000 in RSD equivalent (Securities Commission of the Republic of Serbia, 2022). As a financial instrument, digital assets may be subject of special financial security agreement and may be held as intangible assets or inventories. When digital assets as financial instruments are issued, a special document called “white paper” is published, which contains information on the issuer of digital assets, digital assets and risks associated with digital assets, allowing investors to make an informed investment decision.

Digital tokens are recognized as especially important form of alternative financing of young and innovative companies (startups). On 27th May 2022 the Securities Commission of the Republic of Serbia approved the publication of the first white paper to one company. Its initial offer was 35,250 tokens, with the nominal value of 1,000 RSD and the total value of the initial offer of 35,250,000 RSD (1 € = 117,33 RSD). By approving this white paper, Serbia gets the first digital token called after its issuer *Finspot factoring token* (*FIN* for short). This will enables investors to make an informed investment decision and assess the risks associated with investing in digital assets (Ministry of Finance of the Republic of Serbia, Opinion regarding accounting recognition, valuation and manner of recording digital assets in the business books of taxpayers, 2022).

Every person who owns digital assets may use them as security for its or someone else's debt. This means that the owner may appear both as debtor and as guarantor. The legal basis for the pledge on the digital assets is the pledge agreement. The pledgor is obligated to provide to the creditor or pledgee collateral for its claim on the pledgor or a third party by establishing the creditor's right of pledge on pledgor's digital assets (Art. 98. Para. 1. Law on Digital Assets, 2020). Pledge agreement may be concluded in paper, electronic form or on a permanent data carrier that enables storage and reproduction of original data in unaltered form. A pledge agreement may also be executed using a smart contract.

The new legislation introduced fiduciary agreement as a complete novelty in Serbian civil law. In the same way as pledging, fiduciary of digital assets is based on agreement. It bounds the fiduciary debtor to transfer the ownership of digital assets to the fiduciary creditor for the purpose of securing a claim, and the fiduciary creditor is bound to return the received or equivalent collateral to the fiduciary debtor upon settlement of the secured claim or at the same time (Art. 121. Para. 1. Law on Digital Assets, 2020).

1.3.DIGITAL ASSETS AS THE OBJECT OF A CLAIM SETTLEMENT

Following the principle of legality and uniform legal treatment, the Law on Digital Assets prescribes the general duty for all companies in Serbia in capacity of an enforcement debtor to cooperate with the competent authorities in enforcement proceedings and to provide all information necessary for enforcement settlements on digital assets, including the means by which digital assets are accessed - cryptographic keys (Art. 14. Para. 6. Law on Digital Assets, 2020). If the owner of digital assets is a natural person or entrepreneur, only civil enforcement proceeding is applicable. The proceedings initiated at the request of the creditor are conducted by the public enforcement agent. If the owner of digital assets is a legal person, claim settlement procedure depends on its financial situation (Jovanović & Đurić, 2021, p. 46-55). In case of individual claim settlement where the value of debtor's assets covers the amount of the claim, only civil enforcement proceeding will be carried out. If an insolvency ground is determined, all enforcements on its assets will be conducted in bankruptcy proceedings. Every civil enforcement proceeding for the purpose of claim settlement may be conducted by the public enforcement agent over the digital assets.

Both public enforcement agent and bankruptcy administrator may meet some obstacles in payment collection. A company debtor is bound to cooperate with the competent authorities in enforcement proceedings and provide all information necessary for enforcement settlements on digital assets. This includes the keys by which digital assets are accessed.

However, in bankruptcy after opening of the proceedings, the only person authorised to administrate the assets, including digital assets of insolvency debtor (bankruptcy estate) is the bankruptcy administrator appointed by the court. It also manages the business of and represents the insolvent debtor. If successful in apprehending the digital assets of the insolvency debtor, the bankruptcy administrator strives to achieve the highest possible value to ensure the most favourable collective settlement of bankruptcy creditors (Droege Gagnier & Marlière, 2019, p. 29).

The outcome of bankruptcy proceedings and thus the future of insolvent debtor depends on decision of its creditors. In order to settle their claims, creditors consider the financial aspect of the debtor's assets. If debtor's assets including value of the digital assets secure continuation and sustainable business, creditors may vote for its reorganisation.

The valuation of digital currencies is different for digital currency and digital token and depending on whether these are recorded as intangible assets or as inventories. On the one hand, the valuation of digital currencies as intangible assets includes initial and subsequent valuation. Initial valuation involves measuring according to the purchase price. It includes the purchase price and directly attributable transaction costs. Two approaches can be used in the subsequent valuation of digital currencies: the cost model and the revaluation

model. The cost model involves subsequent measurement at cost less depreciation and impairment losses. Due to their specific nature, digital currencies have virtually unlimited time of use. However, if such a limitation exists, depreciation should include the residual value. The revaluation model is only applicable when the fair value of digital currencies can be determined in an active market. If the quoted price does not exist on the market, it would be necessary to apply the cost model. On the other hand, the valuation of digital currencies as inventories is performed by measuring at a lower value between the purchase value and the net realizable value, while increases in value over the initial purchase value are not recorded.

Based on the valuation report, the bankruptcy administrator decides on suitable method of sale of digital assets in insolvency estate. The general rule on sale of assets in enforcement and bankruptcy proceedings prescribes public auction, public collection of offers and a direct agreement as sale methods. However, these sale methods are more suitable for sale of real estate or movables. For digital assets, sale on commodities market (Shawver, 2021, p. 2047) and securities market for financial instruments appears as more suitable. However, the choice of the sale method should be considered and decided in every specific case. Depending on the type of digital assets, the sale may be organized on exchange platforms and over the counter or peer-to-peer sale.

The moment of the sale of digital assets in bankruptcy proceedings is one of the most important both for enforcement and bankruptcy proceedings. In case of drop-off in trading (“crypto winter” or “chilling”) (Greifeld & Hajric, 2022), enforcement agent/bankruptcy administrator may not comply with the first objective of proceedings - to ensure the most favourable collective settlement of creditor/s by achieving the highest possible value for the debtor’s assets. Therefore, the sale of debtor’s digital assets also depends on capacities and experience of the enforcement agent/bankruptcy administrator (De Macedo & Coelho, 2021, p. 17).

2. CROSS-BORDER ASPECTS OF DIGITAL ASSETS

The payment collection proceedings including the total assets of the debtor located in Serbia or abroad follows the principle of universality of proceedings. In the case of insolvency, the bankruptcy estate comprises all assets of the bankruptcy debtor in Serbia and abroad on the day of opening of bankruptcy and all assets acquired by the bankruptcy debtor during the bankruptcy. With regard to digital assets, their location depends on the manner of storing. For digital assets wallet stored on hardware, it does not represent an issue. Identification of hardware allows further conduct of bankruptcy or enforcement proceedings. However, the location of online wallet is difficult to determine. This issue has been discussed in professional circles. Some opinions refer to the company managing online wallets (INSOL International Special Report, 2019, p. 36). Since it might be located anywhere in the world, the biggest challenge for the enforcement agent/bankruptcy administrator is yet to arise. This is particularly the case if the legislation of the country where the company managing online wallet is located does not recognize digital assets as a legal category or does not have bilateral agreement on legal cooperation with Serbia.

In enforcement or bankruptcy proceedings, Serbian courts apply the law of the country where these have been initiated (*lex fori*). Serbian law exclusively applies to assets subject to excluding rights or secured assets located in the territory of Serbia (Knežević &

Pavić, 2017, p. 108). The court in the territory of which the seat and/or the permanent business unit of the bankruptcy debtor is located conducts the procedure of recognition of the foreign proceedings and cooperation with foreign courts and other competent authorities. If the debtor does not have the seat or permanent business unit in Serbia, the court in the territory of which a substantial part of the assets of the bankruptcy debtor is located has the territorial jurisdiction. In case the bankruptcy proceedings have already been conducted in the Republic of Serbia, the court conducting the bankruptcy proceedings shall have the territorial jurisdiction for deciding on recognition and cooperation with foreign courts and other competent authorities. The foreign collection proceedings may be recognized in Serbia under conditions stipulated by the applicable laws.

CONCLUSIONS

Although a relatively new legal institute, digital assets undoubtedly became a part and form of the personal property in Serbian civil law. By its nature intangible, but fungible, digital assets require specific manner of storing in electronic wallets on software storage accessible by keyword or on hardware storage. One of the main features providing the digital assets with legal qualification of a property right is their value. According to the assessments, the value of digital assets in the world reaches dozens billions of USD. That is the reason why such assets may and have to be the pledge for settlement of claims towards their owners. By regulating digital assets, acquiring, sale and other transactions relating to digital assets, Serbian legislator also set the legal framework for protection of creditors. After first digital token issuance has been approved, first white paper was published, which allowed investing in the digital assets. This is an important step for future business of companies and especially for start-ups businesses. As any type of personal property, digital assets may be apprehended from their owners along with other assets and sold in enforcement or bankruptcy proceedings. For the time being, bankruptcy proceedings in Serbia can only be carried out against legal persons. Therefore, creditors of natural persons and entrepreneurs have to rely on civil enforcement proceedings. The purpose of sale of assets is the settlement of creditors' claims by achieving the most favourable value of debtor's assets. However, the value of digital assets often faces the important risk of significant changes in price. Bearing this in mind, treatment of digital assets in payment collection proceedings requires big professional education and experience. First challenge that any legal officer faces is to determine the existence of digital assets in the debtor's property with or without its cooperation. For this purpose, the relevant information may be requested from the National Bank of Serbia, public bodies and licensed providers of services related to digital assets. Once the digital assets are found and apprehended, they have to be cashed accordingly in a due time framework. Before the sale, the value of digital assets has to be carefully assessed. Establishing the valuation report also requires an experienced expert. Even then, the period between the apprehension and the sale of digital assets remains the most delicate part of any proceedings. Hence, this is the second important challenge for legal officer such as enforcement agent or bankruptcy administrator. It also imposes a new approach to the sale methods regulation. Since the decision on destiny of insolvent company relies on creditors, they may decide about the future of the insolvent debtor by voting for its liquidation or its reorganisation. In both cases, the financial aspect of

its assets remains the most decisive factor. If digital and other assets secure sustainable business, insolvency debtor has his second chance in the reorganisation proceedings. The new regulation on digital assets in Serbia represents only the initial framework that requires further development by adopting by-laws and other regulation. In particular, regulation on professional education of judges, enforcement agents, bankruptcy administrators and licensed providers of services related to digital assets and licensed valuation experts should be adopted and implemented. Judicial practice on digital assets is yet to be expected.

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