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UDC.341.23:339.732.4]:336.74:004.031.4

LEGAL REGULATION OF ELECTRONIC MONEY IN INTERNATIONAL MONETARY LAW[1]

Abstract

The subject of the analysis in this paper is the examination of the legal regulation of electronic money in international monetary law. In this context, the first part of the paper points to the influence of electronic media on the development of international monetary law, which is today most evident in the emergence of electronic money that redefines traditional money functions. The author therefore deals with the argumentative search for a potential answer to the question of whether the role of the issuer of electronic money should be found in the central bank, the government, the banking system or an international monetary legal entity such as International Monetary Fund, which operates outside the framework of the national monetary jurisdiction in view of the extraterritorial effects of using such money in the financial market. In further text, attention is paid to the advantages and disadvantages of the use of electronic money in commercial transport, the redefinition of state nominalism (lex monetae) and a different understanding of monetary aggregates. The author conclude that international monetary legislator is expected to solve the problem of discrepancy between the globalized financial market, on the one hand, and the fragmentation of the monetary system, on the other hand (which not include monetary union with centralized monetary policy) in the future period.

Key words: international monetary law, electronic money, international monetary order, IMF.

1. Introduction

Since the initial years of its creation, the monetary system is of a contractual nature, but the term contract here does not refer to the customary meaning that it has in private law, but is implied by a set of rules accepted by all state and legal mechanisms of government. Accordingly, the money is basically irreversibly variable,

[1] This paper is a result of research conducted within the project „Harmonisation of Serbian Law with EU Law (2013-2018)", carried out by Faculty of Law, University of Niš.

and hence the laws governing the monetary system of a country are not given an *ad infinitum*, but are prone to evolutionary changes.[2] The development of electronic money best illustrates this, given the change in the legal treatment of the physical substance of new payment instruments, the issuer's determination (where it may be also private law entities) and the development of specific financial standards that guarantee secrecy of data, protection of personality rights and consumer rights.

In considering the legal definition of concept of money in monetary literature, a generally accepted definition cannot be found that would successfully cover all its characteristics and appearance forms of importance for commercial turnover. In this context, it must be kept in mind that the successful legal definition of the concept of money implies knowledge of the essential elements of its definition in an economic sense (which is more consistent and leaves no room for doubt).[3] Thus, economists use a functional approach in the definition of money, which starts from the basic functions of money in the modern economy, such as: means of exchange, value measure, and standards in determining contractual obligations, assets preservation of values and units of account.Obviously, such a definition of money in a general way in the legal science must have certain reservations, since the concept of money can have different meanings depending on the context in which it is used and the specific situational frameworks. Therefore, legal science must define money within a framework in which its use produces certain legal consequences. The need for legal definition of money stems from the unsatisfactory treatment of courts in monetary disputes, or decisions that are not always adequately argued (overburdened with complex doctrines) and do not contribute to the clarification of monetary controversies, where legal difficulties also have a pronounced financial and political character.[4]If we look at monetary history at various stages of the commodity-money economy, we can undoubtedly conclude how much the influence of rights in money matter was necessary.

2. The concept of money in monetary law

Generally speaking, in considering the concept of money as a legal category in monetary law literature, there is a difference between the attitudes of the representatives of the so-called state theories of money and social theory of money. Advocates of state money theory put the role of the state at the forefront, which, as the holder of monetary sovereignty, enjoys a legal monopoly in the issuing of money. The representatives of social theory consider that the view of public opinion is crucial in

[2] Byttebier, K., *Towards a New International Monetary Order,* Economic and Financial Law & Policy – Shifting Insights & Values 1, Springer, International Publishing AG, 2017, p. 16.
[3] Proctor, C., *Mann on the Legal Aspects of Money*, Oxford University Press, 2005, pp. 9-10.
[4] Nussbaum, A., *Money in the Law*, Columbia Council for Research in Social Sciences, The Foundation Press Inc, 1939, pp. 2-3.

determining the concept of money. In defining money as a legal category, (Mann), as one of the leading theoreticians of monetary law, points out that all movable assets issued by legal authorities to which the State delegated this right, which is denominated as a means of clearing (payment) and which, under the legally prescribed conditions, serves as a means of payment.[5] Although at first glance it can act that the social theory of money is more appropriate for the observation of monetary law of the EMU and that the state theory in the circumstances of such a complex monetary union loses its meaning, such a statement requires detailed analysis. Namely, the ideology of the state money theory does not prohibit states from embarking on the process of monetary unification and the introduction of a single currency.

Also, the representatives of the so-called "Institutional Theory of Money" is the view that the concept of money is not solely determined on cash and money in circulation, but also includes a dematerialised concept of money, such as deposit requests to credit institutions that constitute special scriptural money (seen in the context of abstract money claims with realistic cover).This theoretical concept is based on two pillars: 1) an independent central bank that guarantees a stable supply of money; 2) a legal framework that supports its independence, where the organisation of legal tenders remains only a lonely concept in modern society, because cash is increasingly suppressed from the payment system.[6] This implies that the concept of the tender is limited to the official (state) standardisation of designing forms of cash and that the value of money is independent of such a technical procedure that, according to (Sainz de Vicune) as one of the leading representatives of modern international monetary law, it cannot have its own stronghold in it.[7]We can notice that the institutional theory of money is a special form of state theory, whereby the significance of the legal tender is minimised, which can therefore remain one-sided in the consideration of all the essential characteristics of money. It is clear that there is a complementary relationship between all these theories, and that no one *per se* can offer a universal definition of the legal concept of money, which is why it is missing from the monetary legal texts.

3. Characteristics of electronic money in monetary turnover

An adequate monetary legislation must be set up in order to achieve the general social interest of a particular community, so that, unlike other forms of pure civil legislative, it cannot be a trivial issue of a skilful law making (which does not have to be a problem for a good legislator). The concept of money is in its nature multi-layered, and legal science cannot ignore both its economic functions and the

[5] *Ibid*, p. 15.
[6] Lastra, M. R., *International Monetary and Financial Law*, Oxford University Press, 2015, pp. 16-18
[7] *Ibid*, 18.

psychological effects that its application brings with it in the form of different distortive effects (change in behaviour) of citizens in relation to money, its sense, purpose and significance in everyday life.At the same time, the important circumstance of modern cash flows is the fact that under monetary transfers there are increasingly less cash payments in terms of using banknotes or coins that are increasingly becoming a relic of the past, and some monetary jurisdictions decisively prohibit such payments that must be replaced using checks or card payment order to combat tax evasion (such an obligation exists in French monetary legislation for all commercial payments whose amount exceeds 5,000 francs, as well as for personal transfers among individuals whose amount exceeds 150 000 francs).[8]

The development of monetary law over the past two decades has pointed to the need to adjust the postulates of the state (institutional) and social theory of money to the requirements of the post-iinformatics society and the development of new technologies. In this sense there is a fundamental change in the approach to the legal definition of the concept of money and a currency unit, which has become particularly evident by the adoption of the first amendments to the IMF Founding Agreement and the abandonment of the gold standard (1978), what practically abolishing the link between the currency unit and the value of the real economic assets from which it is made. The occurrence of electronic money marked the beginning of the so-called " the silent revolution" in monetary legislation around the world and the gradual shift from the traditional (banking) system to the electronic payment system. The reason why the citizens accepted electronic money lies in the fact that the mentioned changes are implemented in a carefully and purposeful manner, without the need for citizens to change their economic behavior in the role of monetary users, i.e. a subjective attitude towards traditional money, which also enjoys a high degree of trust.[9]

The monetary law theorists in explaining new tendencies in terms of legal regulation of monetary relations often use an analogy which indicates "a radical transition from the Kopernikus' era (in which everything was turning around the sun, i.e. gold) according to Einstein's era of universal relativity."[10] Monetarists use this analogy very often in perceiving new tendencies in the development of international monetary law, bearing in mind that the mentioned astronomer (Kopernikus) is at the same time the creator of the ppioneering work in the field of monetary matter "*De moneta Cudenata ratione*", a catalog of the 15th century. It is interesting to point out

[8] Usher, J.A., *The Law of Money and Financial Services in the EC*, Oxford University Press, New York, 2000, pp. 4-5.

[9] Fajfar, M., *Role and Security of Paymens Systems in Electronic Age*, Remarks prepared for IMF Institute Seminar on „ Current Developmnents in Monetary and Financial Law", June 1, 2004, pp. 1-2.

[10] Giovanoli, M., *Virtual Money and Global Financial Market: Challenges for Lawyers*, Yearbook of International Finacial and Economic Law, 1996, pp. 3-24.

that, in his Utopian novel "Looking Forward" from 1888, Edward Bellamy envisioned in a certain way the formation of a society in which no cash would be used and also anticipated the abandonment of the fixed exchange rate.[11]Although in some cases the above-mentioned work is quite radical, because it also predicts the complete abolition of commercial and central banks, it is certain that the author's sense of a broad understanding of the way in which monetary relations are going on and regulated by law is more than impressive. What is not emphasised in the mentioned work is the process of globalisation of economic flows and the emergence of financial conglomerates, which, in cooperation with the development of telecommunication technologies, enabled the circulation of large amounts of money in commercial transport without significant restrictions for a relatively short time, which in turn led to the occurrence of virtual money on a globally integrated financial market.

There are more than 200 different monetary jurisdictions in the world that rely on traditional monetary rights settings developed by the creators of this branch of law such as Mann, Hannah and Nussbaum, in the part dealing with the legal concept of money, the exchange rate policy and supra-legal role of the central bank, but there is a real and logical need to adapt them to the new circumstances that are reflected in three essential fields that must be adequately regulated: physical substances of new payment means, redefinition of the currency unit and the questions of the Issuer of electronic money.In this regard, the issue of assigning the most significant legal authority to the monetary sovereignty of the *lex of monetae* and determining its title is raised. There are still no unique views on whether the role of the state, that is, the central bank (as was the case with traditional money), or the entire banking system (which would include commercial banks in this process) or an international monetary organisation such as the International Monetary Fund (IMF).[12] The assignment of the *lex monetae* to the central bank to the supreme monetary institution of national monetary law acts as a logical solution, but we have to ask ourselves if the solution is normatively efficient, since today the central banks are expected to roll over a large number of tasks, both in the field of monetary stability and in the field of general financial stability.

Namely, the central banks are expected to perform the role of the last bank resort as well as other tasks from the sphere of macro-prudential policy.[13] Therefore, the solutions of certain monetary legislations in the world allocate electronic money to commercial banks or governments (which may be associated with certain difficulties, because these tasks should be dealt with by monetary agents thoroughly). Thus, the central bank can devote itself to achieving the desired economic growth for

[11] *Ibid*.
[12] *Ibid*, p. 5.
[13] Golubović, S., Evolucija uloge Evropske centralne banke u uslovima globalne finansijske krize, *Pravni život* 3(11), 2014, pp. 589-600.

a nominal domestic gross product that is consistent with the inflationary tasks and real economic growth. [14]The IMF, as the primary subject of inter-national monetary law, must carry out global oversight of monetary policy, which increasingly receives the aforementioned "electronic expression", which implies that all the mentioned entities must participate in determinations of the e-money in order to obtain the process on the components of legality and legitimacy.

The occurrence of electronic money, in our opinion, does not substantially modify monetary prerogatives resulting from the monetary sovereignty of the state, but only adapts those to newly created economic opportunities. The contemporary concept of monetary sovereignty undoubtedly follows the conceptual continuity of the doctrinal and historical origin of classical monetary sovereignty, but it is today very dynamic, as its positive and normative components evolve continuously in the conditions of the international economic environment (which is clearly confirmed in this case).[15]

The application of the traditional monetary right to electronic money remains unsuccessful, which makes it necessary to reverse the assumptions on which it is based. Electronic money in monetary literature is usually the transfer value of contained in digital format on a computer file or microprocessor that is part of a smart card.[16] In order for electronic money to be accepted in legal transactions, it is necessary to fulfil certain requirements which, by the way, can be classified into monetary legal requirements in a wider and narrower sense. Requests in a wider sense imply that electronic money as a payment instrument is accepted within the limits of a single monetary jurisdiction; to represent a final means of payment of exempted credit and other conditions; that he can freely circulate in legal circulation; and that it is self-sustaining (which means it does not require new collection, clearing or settlement.In addition to the aforementioned conditions, there is also a request in the narrower sense regarding its judicial recognition in monetary dispute and treatment as a standard currency, since the emergence of electronic money in foreign trade *per se* in monetary law remains only a factual fact and nothing more than that.[17] Certainly, in order for this condition to be implemented in a lawful manner, it is necessary that the court possesses specialised knowledge for resolving monetary disputes, as a separate

[14] Jordan, J. L., *The New Monetary Framework*, Cato Journal, Vol. 36, 2016, pp. 367-384.
[15] Dimitrijević, M., *Monetarni Suverenitet u uslovima globalizovanih ekonomskih i finansijskih odnosa*, Zbornik radova Pravnog fakulteta u Nišu, Br. 73, 2017, pp. 659-674.
[16] Craford, B.; Sookman,B., Electronic Money: A North American Perspective, in: *International Monetary Law: Issues for the New Millenium* (ed. by Mario Giovanoli), Oxford, 2000, pp. 371-372.
[17] *Ibid*, 374.

category of administrative disputes in which the active or passive processed legitimacy of the ECB, or in which the IMF participates as an interlocutor.[18]

Adequate regulation of electronic money requires institutional changes that include both the adoption of laws dealing with consumer protection and the inclusion of various industrial branches in the electronic payment system.[19] Thus, for example, in Japan's monetary law, it particularly insists on the application of a functional approach in the development and improvement of electronic money where it is characterised as "infrastructure payment".[20]

At this point, we must emphasise that the term electronic currency should not be identified with the so-called crypto currency representing the form of digital money. It is precisely for this reason that the so- Crypto currency that are developing over the past twenty years do not enjoy monetary treatment because they are not regulated by any monetary legislation in the world. At the same time, the use of these "hidden currencies" is associated with a number of uncertainties that are reflected in the absence of control of banks that do not appear as Financial intermediaries in their use, the absence of the issuer (public or private subject of law), the difficulty of protecting the rights of personality and privacy of its users; and all uncertainties that involve the loss of value due to the destruction of software for its creation.Today, it is a matter of opinion that electronic money is issued by old private entities, and which is recognised as a court as a money can be accepted as a legal means of payment, which, of course, does not mean that the central bank loses its position, because the supervision functions are actually in this the case only increases, while at the same time relieving certain tasks related to the creation of electronic money.

4. The open questions regarding the use of electronic money in commercial transaction

When electronic money first appeared in the nineties in US monetary law, its impact on the implementation of monetary policy was the subject of a series of conferences held by the IMF and the International Monetary Law Association (MOKOMILA). Significant steps towards its recognition have been made by the European Central Bank (ECB) as the main subject of European Monetary Law.
Namely, the ECB in its 1998 report for the first time pointed to the issue of regulatory issues in the issuance and use of this form of money, emphasising that the issuers (whether private or public) must be introduced into a prudential control system and

[18] Dimitrijević, M., *O novoj nadležnosti Evropskog suda pravde u rešavanju monetarnih i fisklanih sporova*, Zbornik radova Pravnog fakulteta u Niшu, br. 70, 2016, pp. 200-215.
[19] Kanda, H., *Electronic Money in Japan*, In "International Monetary Law: Issues for the New Millenium" (ed. M. Giovanoli ed), Oxford, 2000, pp. 385-393.
[20] *Ibid*.

must be legally obliged to purchase electronic money if users want to replace it for traditional money issued by a central bank.[21]

Also, the report stated decisively that the users of the electronic currency must be introduced into a system of transparent and comprehensive legal control (so-called monetary arrangements in the narrow sense) and strictly formalised requirements of technical security. All of the above requests are less resolvable, because privacy and secrecy can be ensured by good cryptographic software, while the fight against various forms of financial crime in the form of money laundering or financing of terrorist organisations requires coordinated efforts by all national and supranational monetary agents.In this context, the European Anti-Fraud Office (OLAF)can also make a major contribution, which can develop macroeconomic dialogue and strict cooperation with EUROPOL and EUROJUST, in that plan.[22] A particular challenge regarding the use of electronic money concerns determining the identity of the user and checking the transaction. Setting up preventive control mechanisms is very important, because the electronic payment system can be the subject of a potential terrorist attack because it forms part of a critical information infrastructure on which depends the international financial system.[23]The occurrence of electronic money has *de facto* conditioned certain changes in the regulation of the international monetary order, i.e. the techniques of contracting and the structure of international monetary relations that are formalised by the conclusion of international agreements.[24]

In our opinion, the position of the central bank remains the key in the process of issuing and using electronic money, even when there are private entities in the role of the issuer for reasons of legal significance and the preservation of monetary stability as a public good. Issuers have an obligation to submit monetary statistics at their request, after which the central bank may impose certain restrictions on the position of the private issuer of electronic currency and thus determine the overall "mass" of electronic money in circulation.It is important to emphasise that there is no evidence that electronic money increases the mass of (traditional) money in circulation, and hence there is no risk of the occurrence of inflation of supply, which is one of its advantages over the use of traditional money. However, the use of electronic money increases the worry of money in circulation, because the money card is more accessible than the stock on the time accounts.[25]

[21] European Central Bank, *Annual Report*, 1998, pp.100-105.
[22] White, S.; Xanthaki, H., *OLAF at Crossroads, Action against EU Frauds*, Oxford & Hart, 2011, pp.121-131.
[23] Fajfar, *op.cit.* note 9, p.17.
[24] Gold, J., *Public International Law in the International Monetary System*, Sothwestern Law Journal 799, 1984, pp. 30-37.
[25] Bradley Craford, Barry Sookman, *op.cit.* note 16, p. 376.

Some of the open questions of using electronic money also concerns the consideration of the legal treatment of instruments that allow its use, i.e. whether there are certain non-orthodox rights on them that can only be relied upon when the instrument is present, which in case of payment through computer Internet networks is further complicated. Also, it is necessary to distinguish between monetary legal treatment of those forms of payment in small (standard) amounts and in large (non-standard) amounts, for which, as a rule, special payment systems such as CHIPS in New York and CEPS in London connecting the main financial intermediaries in the supranational monetary system.These transactions, which rely on the use of electronic money also requires the development of new financial standards, which today are especially represented by the so-called *Lamfalus* standard, created 28 years ago, which are applied in German monetary law as part of a gross settlement system in order to reduce systemic risk in clearing payments.[26] In considering the justification of the existence of electronic money should bear in mind that today's monetary aggregates mostly are derived from the reserves of commercial banks, which is why the monetary controlling role of the central bank is more important than ever before in monetary history, because in a certain sense, virtual money is actually equalised with the amount of reserves of commercial banks.[27]

5. Conclusion

The monetary legislator is expected to solve the problem of discrepancy between the globalised financial market, on the one hand, and the fragmentation of the monetary system, on the other hand (not taking into account monetary union with centralised monetary policy in which there is a high level of harmonisation of monetary regulations).This requires a detailed and critical analysis of the process of the consequences of the disintegration of international monetary law (in which we are talking about the law of the ECB and the law of the IMF, which should not be significantly different in terms of the treatment of electronic money and the recognition of its consequences for the monetary order). The monetary law theorists must in the future pay more attention to the analysis of the monetary *lex mercatoria*, to which the electronic money is influenced by it, to find optimal legal solutions that will enable the preservation of the currencies heritage and value of international monetary architecture, internal and international monetary stability, as well as the avoidance of unnecessary monetary disputes, where, as examples of good practice, solutions from the Japanese and Canadian monetary law can be used, which, regardless of the other factors in the development of monetary law discipline, in the

[26] Mario Giovanoli, *op.cit*. note 10, pp. 6-7.
[27] *Ibid*, p. 10.

segment of electronic money design, show similar legislative intent, law makingand object of protection.

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