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PRAWNE REGULACJE OBIEGU PIENIĄDZA ELEKTRONICZNEGO W PRAWIE UNIJNYM

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Adnotacja. Artykuł poświęcony prawnym podejściom do definiowania pieniądza elektronicznego. Ustalono, że pieniądz elektroniczny jest odrębną formą pieniądza tradycyjnego i jest odrębną formą rozliczeń zbliżonych do bezgotówkowych. Rozważana jest treść międzynarodowych regulacji prawnych dotyczących obiegu pieniądza elektronicznego na poziomie regionalnym w prawie unijnym.
Słowa kluczowe: pieniądz elektroniczny, pieniądze, obieg pieniądza, poziom regionalny, teoria pieniądza.

LEGAL REGULATION OF DIGITAL CURRENCY UNDER EU LAW

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Abstract. This article deals with, analyze the main theoretical approaches to the definition of digital currency as a financial institution. It is established that digital currency is a separate form of traditional money and is a separate form of settlement close to non-cash. The content of international legal regulation at the regional level of circulation of digital currency under EU law is considered.

Digital currency is a new form of expression of traditional money. The peculiarity of this form lies in the physical properties of digital currency, in particular digital currency is required in digital form, which is fixed on a tangible medium (server, electronic card).
Key words: digital currency, money, money circulation, regional level, theory of money.

ПРАВОВЕ РЕГУЛЮВАННЯ ОБІГУ ЕЛЕКТРОННИХ ГРОШЕЙ ЗА ПРАВОМ ЄС

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Анотація. Статтю присвячено правовим підходам до визначення електронних грошей. З'ясовано, що електронні кошти є окремою формою традиційних грошей та окремою формою розрахунків, наближених до безготівкових. Розглянуто зміст міжнародно-правового регулювання обігу електронних грошей на регіональному рівні за правом ЄС.
Ключові слова: електронні гроші, гроші, грошовий обіг, регіональний рівень, теорія грошей.

Introduction. Digital currency is a relatively new economic and legal phenomenon. Also, digital currency as a new financial instrument appeared in the late 80's of the last century, which is a logical evolutionary stage in the development of money as the equivalent of the value of goods and services. Such a financial institution significantly speeds up the implementation of settlement operations, not limited to a particular country, and also helps to minimize the cost of their issuance.

Statement of the problem. Digital currency is a completely new way of making payments between private law entities, which is why there is no universal level of international legal regulation. Relevant regulation is carried out at the level of individual states, with the exception of regulation of digital currency at the regional level, in particular

EU law, which determines not only the procedure for mutual settlements of digital currency between entities, but also defines a number of requirements for digital currency issuers turn is also included in the concept of digital currency. This issue also requires a more precise theoretical definition of individual classification features of digital currency. Thus, the question of determining the form of settlements using digital currency remains open among theorists.

Analysis of recent research and publications. The theoretical basis of you make up scientific achievements domestic and foreign students them. Scientific developments in the field circulation of digital currency, were: A. Berentsen, M. Bernkopf, A. Wilfer, M. Woodford, A. Greenspan, N. Grishchuk, A. Genkin, C. Goodhard, A. Dowgert, M. King, A. Kissel, S. Klein, B. Cohen, G. Selgin, R. Maidannikov, A. Shamraev, B. Schmidt, L. White, B. Friedman, S. Shimon and others.

Goals of the article. The aim of the article is to identify the main problems of legal regulation of digital currency at the regional level under EU law. Also, the aim of the article is to analyze and disclose the financial and legal nature of digital currency based on the available research of scientists on this issue, as well as the existing experience of the European Union as a unique international organization with supranational law on regulating the circulation of digital currency prospects for their legal regulation.

The objectives of the article include determining the place of digital currency among other objects of civil rights, determining the methods of financial and legal regulation of digital currency under EU law; to consider the consequences of the unification of the legal regulation of digital currency by the EU directives that regulate the circulation of digital currency.

Results of the research. The problem of international legal regulation of digital currency was primarily related to the recognition of digital currency as a means of payment. Initially, for some time, there was a long discussion on this issue between scientists (Chaum, 1997: 49), then the discussion shifted to the question of form, in particular where to include digital currency in cash or non-cash form of payment. According to some scientists, digital currency should be considered non-cash money (Basel, 2004: 18); According to other scholars, digital currency should be considered a cash type of payment, because they are an electronic analogue of cash, but have the form of files recorded on media (computer hard drive, smart card), and also contain the characteristics of the bill (denomination, serial number, date of issue, name of the issuer) and is protected by cryptographic protocol and certified by the electronic signature of the issuer (D. Chaum, 1997: 41). S. Ovseyko, comparing digital currency with cash and non-cash form of money, defines the following: combines cash form with digital currency that from the point of view of information systems they are impersonal objects, and the parties to their circulation are creditors and debtors, while distinguishing the fact that cash has a material expression, and from a legal point of view are things (Ovseyko, 2010: 25). There is also a position that digital currency is a new form of money that is under development.

Our position on this issue is as follows. Digital currency should be referred to a form close to the non-cash form of payment, as their digital currency is in intangible form, and their exchange, or payments, require the presence of an digital currency operator, which in turn is characteristic of non-cash payment.

According to the approach of the European Central Bank, digital currency is a monetary value that is stored electronically on a technical device and can be widely used to make payments by an enterprise other than the issuer, without the need to use bank accounts, but which acts as a prepaid instrument bearer.

With this definition in mind, we will analyze the characteristics of digital currency and prove that digital currency is an independent object of civil rights in the form of binding rights, which are significantly different from such objects of civil rights as money.

Thus, digital currency is money previously provided to the consumer by the digital currency operator in order to fulfill the consumer's monetary obligations to third parties, which are considered by the digital currency operator without opening a consumer bank account, which the consumer has the right to dispose of only electronic means of payment.

Regarding direct legal regulation at the regional level by EU law, the 1994 report of the Council of the European Monetary Institute to identify prepaid multifunction payment cards (e-wallets) and all similar technological products was the first working group on EU payment systems the term "digital currency" is used. Thus, since 1996, the Bank for International Settlements, with the support of the Central Banks of Europe, has been conducting a continuous analysis of the development of digital currency. Relevant measures have allowed non-banking entities to issue their own e-money, but provided that such money, through licensing and other controls, are controlled by the state (Commission Recommendation № 97/489 on agreements with the use of digital currency payment instruments, in particular the relationship between the issuer and the cardholder of 30.07.1997, Directive 2000/46 of 18.09.2000 on the regulation of institutions – issuers of digital currency, etc.).

According to the European Central Bank's 1998 definition of "digital currency", digital currency is "monetary value that is stored electronically on a technical device and can be widely used to make payments by an enterprise other than the issuer, without the need to use bank accounts, but which acts as a prepaid bearer instrument".

The European Central Bank and the Bank for International Settlements have repeatedly stressed that the issuance and control of digital currency must be carried out in accordance with clear rules and conditions, as uncontrolled issuance of digital currency can adversely affect the stability of the financial system and smooth operation of payment systems.

In the context of the above provisions, the European Central Bank subsequently formulated a number of minimum requirements for the issuance and use of digital currency. In particular, such requirements are:

– the obligation for e-money issuers to be subject to prudential supervision;

– the rights and obligations of customers, sellers, issuers and operators must be clearly defined and meet the requirements of the relevant jurisdiction;

– the need to protect digital currency from counterfeiting;

– e-money schemes should be protected against abuse (eg money laundering);

– schemes for the use of digital currency are required to submit to the Central Bank of the country, and issuers of such money must provide any necessary information to ensure sound credit policy;

– compatibility of digital currency systems;

– providing digital currency issuers with guarantees and loss insurance.

Directive 2000/46 of the European Parliament and of the Council of 18 September 2000 on the taking-up and pursuit of the business of digital currency issuers and their prudential supervision defines digital currency as monetary value which is a requirement of the issuer and which: (i) is maintained on an electronic device; (ii) is issued upon receipt of cash in a value not less than the issued monetary value; (iii) is accepted as a means of payment by enterprises other than the issuer [23]. Important in this definition is the existing connection between "traditional" money and digital currency, which is embodied in a separate independent circulation. In particular, it is determined that digital currency in its equivalent must correspond to, or be at least as much as, traditional money that is exchanged, and as a result of such exchange, such money can still be used as a means of payment. That is, even after the exchange of traditional money for digital currency, the main essence of money as an equivalent is not lost.

On 27 July 2009, the Council of the European Union adopted a new directive on digital currency (2009/110).

This new directive repealed the previous Digital currency Directive (2000/46) of 2000 and amended the Money Laundering (2005/60) and Banking Consolidation (2006/48) Directives. On 30 April 2011, the provisions of the new directive became binding on EU member states.

Such a directive provides a more neutral definition of digital currency, namely Article 2, paragraph 2, defines digital currency as "monetary value presented in the form of a claim to an issuer, stored on an electronic device, including a magnetic one, and issued upon receipt for payment transactions and are accepted by a natural or legal person other than the digital currency institution".

Also, in accordance with Art. 2 directives, not only bank credit institutions have the right to issue digital currency, but also any legal entity.

The following types of institutions that can act as issuers of digital currency have been identified:

1. Credit institutions (with restrictions).

2. Specialized institutions-issuers of digital currency.

3. Post offices.

4. The European Central Bank and the national central banks, provided that they do not act as a monetary institution.

5. EU Member States or their regional and local authorities.

According to Art. 19 of the Directive, all individuals and legal entities, in addition to the above, are prohibited from issuing digital currency.

It should be noted that such a directive clearly distinguishes between credit institutions and digital currency institutions. Importantly, the right to issue digital currency had not only credit institutions, but also individual, specially created institutions.

With regard to the activities that e-money issuing companies are allowed to do, the above-mentioned directive sets less stringent conditions for the activities of e-money issuing institutions. If in accordance with the provisions of the previous directive such an institution was not entitled to carry out activities other than the issuance of digital currency, then in accordance with the new directive and other businesses than just issuing digital currency (Article 6 of the Digital currency Directive of 27.07.2009). The list of payment services has also been expanded, including permission to combine activities such as network commerce, mobile communications, etc. with the issuance of electronic funds.

Attention should also be drawn to the EU Payment Services Directive 2015/2366, as Directive 2009/110 refers to this Directive on the following issues:

– regime of prudential supervision over the activities of digital currency issuers;

– a list of payment services that can be provided by digital currency issuers (the list is given in the Annex to Directive 2007/64);

– procedures for reviewing and resolving complaints from non-litigation e-money holders.

Since November 2009, this directive has become mandatory for all EU member states. It should be noted that the concept of non-cash payments and settlements made with digital currency should not be combined, because yes, we have presented the positions of researchers who consider digital currency as a form of cash and non-cash. However, in essence, digital currency has more in common with non-cash payments, although there is one significant difference in such transactions. Non-cash payments are made with the participation of a credit and banking institution, payments with digital currency are made with the participation of a non-bank credit institution (although there may be cases when the bank is also an issuer of digital currency).

Therefore, returning to the EU Payment Services Directive, we note that the purpose of such a directive was to create uniform legal conditions for the development of the Single Euro Payments Area (SEPA). However, in the process of amending the directive, other objectives have been identified:

1) regulation of the activities of payment institutions, in particular those payment institutions that provide payment services and are not banking institutions and are not subject to regulation;

2) protecting consumers and increasing the transparency of payment transactions;

3) increase competition by opening national payment services markets to new entrants and thus improving the efficiency of payment institutions.

Thus, the regulation of e-currency in the EU is regulated by the Digital currency Directive 2009/110/EU and the EU Payment Services Directive (2015/2366).

It is also worth noting the warnings of the European Banking Supervision Service, which issued a press release in December 2013, which contained official warnings for consumers about the risks associated with the purchase, possession and operation of electronic currencies. In particular, the following risks were identified:

– lack of special regulation in the European Union that could protect consumers from financial losses associated with the closure of companies that have the relevant digital currency;

– in the case of digital currency payments, the consumer will not be entitled to a refund under European law (for example, in the case of refusal of such transactions, the money will not be refunded, as in the case of payment card transactions);

– if law enforcement agencies find that virtual currency exchanges are being used for illegal purposes (for example, measures to launder criminal proceeds), this could lead to their closure in the short term and consumers will not be able to access or return your digital currency;

– in the case of fraud involving e-wallets that store virtual currency on personal computers, laptops and mobile smartphones, their owners are not subject to appropriate protection under European law.

Thus, digital currency is a new form of expression of traditional money. The peculiarity of this form is the physical properties of digital currency, in particular, digital currency is cut in digital form, fixed on a tangible medium (server, electronic card).

Thus, we have established that in the European Union digital currency is considered, first of all, as a new means of payment, a new type of money. This necessitates banking regulation of digital currency circulation. This is due to a separate from the banking, liberal regime of regulation.

We have determined that the European Central Bank and the Bank for International Settlements have repeatedly stressed that the issuance and control of digital currency should be carried out in accordance with clear rules and conditions, as uncontrolled issuance of digital currency can adversely affect the stability of the financial system and smooth operation payment systems. The problem of the existence of digital currency as an economic and legal category is primarily due to the uncontrolled use of such an equivalent as "money" through their issuance by private entities. In fact, the lack of a legal mechanism to control the circulation and issuance of money threatens the stability of economic processes in the world. Moreover, such consequences can also be caused by the unauthorized exchange of cash for electronic currency by the state or international bodies, which does not have a clear interbank exchange rate and the technical possibility of existence is provided by individuals whose social responsibility is much lower than that of public law entities.

That is why it is fair to form the European Central Bank minimum requirements in the field of issuance and use of digital currency. Namely, such requirements are:

– the need for e-money issuers to be subject to prudential supervision;

– the rights and obligations of customers, sellers, issuers and operators must be clearly defined and meet the requirements of the relevant jurisdiction;

– the need to protect digital currency from counterfeiting;

– e-money schemes should be protected against abuse (eg money laundering);

– digital currency issuers must provide any necessary information to ensure sound credit policy;

– compatibility of digital currency systems;

– providing digital currency issuers with guarantees and loss insurance.

Thus, for the first time, European Union directives set regulatory requirements for e-money issuers, which can be conditionally classified into three main types:

1) management of the issue of electronic payment instruments and maintenance of electronic databases should relate to the activities of issuers;

2) capital adequacy requirements, in particular, own funds must be at least 1 million euros and at least 102% of the value of the issue of digital currency;

3) the obligations of issuers must be fully invested in established assets, the composition and structural ratio of which are strictly regulated by the national legislation of European countries.

Conclusion. Therefore, considering the legal regulation of the circulation and issuance of digital currency, we found that there is no universal international treaty, convention or other international legal act that would regulate digital currency. Currently, the highest level of international legal regulation of digital currency is the regional level, an example of which is the regulation of digital currency circulation in a number of European Union directives directly on digital currency and e-commerce. Therefore, a promising area of research on this issue is further comparative analysis of the regulation of domestic legislation on the circulation of digital currency with EU regional standards.

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