**A picture containing drawing

Description automatically generated**

**Inside Story – November 2021**

**Recent Reforms to Insolvency Law in Serbia**

Djuro Djuric, PhD., Associate Professor, College of Economics and Administration, Belgrade, Serbia <djuro.mdjuric@gmail.com>.

**Key words: *digital assets, virtual currency, digital token, regulation, competences, issuing, trade, pledging, Serbia*.**

**Introduction**

As from 21 June 2021, the first regulation on digital assets has entered into force in Serbia. In this way, Serbia became one of the fintech countries where a complete legal framework for digital assets is available. Moreover, it provides an attractive business environment and legal security for investors. The Law on Digital Assets (LDA) regulates the issuing of digital assets and secondary trading of digital assets in the Republic of Serbia. It also prescribes the provision of services related to digital assets, liens and fiduciary rights over digital assets, the competences of the Securities Commission and the National Bank of Serbia, as well as supervision of the implementation of the law. Furthermore, this is the first regulation introducing the fiduciary as a security instrument in the Serbian legal system. As for insolvency law, the new regulation acknowledges digital assets as enforceable assets and status of both secured and pledge creditors. The notion of digital assets comprehends virtual assets and digital tokens. Finally, the new regulation regulates the status of the digital assets if a debtor enters insolvency proceedings.

**Digital Assets as the Object of Regulation**

Digital assets have been present in Serbia for several years. Since it has undoubtedly important value and was only partially regulated by the ancillary legislation, it was necessary that the respective legislation kept up with the modern trend for global digital and electronic business. As the main reason for adopting the new LDA, the Serbian legislator stated its aim to provide for regulation of the digital assets market with the objective of its improvement and development and prevention of abuses of digital assets for criminal purposes. In addition, there is a growing tendency to enable financing through investment tokens, and to improve and develop the capital market using digital technology. Finally, there is the reason for strengthening the framework for combating abuse in the digital property market, as well as eradicating money laundering and terrorist financing.[[1]](#footnote-1)

The adoption of the new regulation ensures the improvement of the business environment and the contribution to further digitalization of services in the Serbian economy, with adequate management of the security and financial risks arising from the nature of this form of property. The provision of services and operations under this law should encourage domestic IT entrepreneurship in the field of information and communication technologies in a standardized and controlled manner and in accordance with international standards in the areas of fight against crime and prevention of money laundering.

Until recently, digital assets or the so-called virtual currency, were regulated only partially by the Law on Prevention of Money Laundering and Terrorist Financing.[[2]](#footnote-2) It is a criminal law, not a property regulation. Namely, it regulates the prevention of misuse of virtual currencies in the illegal activities of criminals and their groups. When it comes to digital property, both natural and legal persons, economic and non-economic entities, it was classified in the so-called other property rights in the sense of a pledge to settle creditors’ claims.[[3]](#footnote-3)

The provisions of the Law on Digital Assets will apply in accordance with the principles of technological neutrality, efficiency, economy and digitalisation of the procedure and transparency.

**The Object of Digital Assets**

A digital or virtual asset is a digital record of value that can be digitally bought, sold, exchanged or transferred and that can be used as a medium of exchange or for investment purposes. These assets do not include digital currency records that are legal tender and other financial assets that are regulated by other laws, except where expressly provided for by law. It can occur in the form of virtual currency and a digital token. Virtual currency is a type of digital asset that has not been issued and whose value is not guaranteed by a central bank or other public authority, which is not necessarily tied to legal tender and does not have the legal status of money or currency, but is accepted by individuals or legal entities and can be bought, sold, exchanged, transmitted and stored electronically. A digital token is a type of digital asset consisting of any intangible assets right that in digital form represents one or more other property rights, including the right of the user of the digital token to be provided with certain services.[[4]](#footnote-4)

Regarding the application of the LDA, digital assets cannot have the characteristics of a financial instrument. Otherwise, as well as where its object is traded on the secondary market or the provision of services related to such digital assets, only the provisions of the Law on Capital Markets will apply. This only does not apply to the issuance of digital assets with the characteristics of a financial instrument, to secondary trading and the provision of related services, if the digital asset does not have the characteristics of shares or is not substitutable for shares or its total value over a period of 12 months is less than the RSD equivalent to EUR 3 million at the official exchange rate, as determined by the National Bank of Serbia on the day of issue, i.e. during the primary sale.[[5]](#footnote-5)

As asset items, they may be the object of appropriate transactions or transactions. A transaction with a digital asset means the purchase, sale, acceptance or transfer of a digital asset or the exchange of a digital asset for another digital asset. Regarding the objects and forms of digital assets, the new regulations also regulate the appropriate services. Virtual currencies, as a type of digital asset, cannot be invested in a company. The contract must consist of money, into which virtual currencies can be converted or exchanged, and only paid into the company as a cash investment.[[6]](#footnote-6) However, non-monetary investments in a company may take the form of digital tokens, which are not related to the provision of services or the performance of work. In exceptional cases, non-monetary investments in a partnership and limited partnership may also be made in digital tokens relating to the provision of services or the performance of work.

**Competent Authorities**

The LDA divides competence for the supervision of transactions related to digital assets between the National Bank of Serbia and the Securities Commission, with regard to the type of digital assets. On the one hand, in situations where virtual currencies appear as a type of digital asset, the National Bank of Serbia has the authority to decide on administrative procedures, enact bylaws, supervise the performance of activities and exercise other rights and obligations of the supervisory authority. On the other hand, where digital tokens represent digital assets or where digital assets have the characteristics of financial instruments, the competence of the Securities Commission is determined for deciding on administrative procedures, passing bylaws, supervising the performance of activities and exercising other rights and obligations of the supervisory authority.

Regarding digital assets that have the characteristics of both virtual currency and digital token, the National Bank of Serbia and the Securities Commission are responsible for deciding on administrative procedures, enacting bylaws, supervising operations and exercising other rights and obligations of the supervisory authority. Also, the National Bank of Serbia is competent to prepare and give opinions on the application of laws and other regulations related to virtual currencies as a type of digital assets, except in connection with the business of legal entities and entrepreneurs in relation to digital assets. The Securities Commission is responsible for preparing and giving opinions on the application of laws and other regulations related to digital tokens as a type of digital assets, as well as digital assets with the characteristics of financial instruments. The law establishes the duty of cooperation of both institutions in the exercise of their competencies.[[7]](#footnote-7) It should be noted that the law excludes the responsibility of the Republic of Serbia, the National Bank of Serbia, the Securities Commission and other competent bodies and public authorities for the value of digital property.

**Issuing Digital Assets**

Advertising of the issued initial offer of digital assets is submitted to certain legal conditions. On the one hand, if it is the initial offer of digital assets for which a white paper has not been approved, it may not be advertised, except in accordance with the act of the supervisory body. Exceptionally, the issuer may advertise the initial offer of digital assets if:

(1) the initial offer is sent to fewer than 20 natural and/or legal persons;

(2) the total number of digital tokens issued is not more than 20;

(3) the initial offer is sent to buyers/investors who buy/invest in digital assets in the amount of at least the RSD equivalent to EUR 50,000 per buyer/investor;

(4) the total value of digital assets issued by one issuer during a period of 12 months is less than the RSD equivalent to EUR 100,000.[[8]](#footnote-8)

The publication of a white paper that is not approved in accordance with this law is nonetheless allowed, provided that during its publication and during the initial offer of digital assets to which that white paper refers, it is clearly stated that the white paper has not been approved. On the other hand, if advertising the initial offer for which a white paper has been approved the issuer is obliged to ensure that any type of advertising related to the initial offer of digital assets for which the white paper is approved is in accordance with the provisions of law. The text of the advertisement should clearly indicate that it is an advertisement and the information contained in it must not be inaccurate or misleading, and must be in accordance with the information from the white paper. The issuer is obliged to state during the advertising that the white paper has been published or that it will be published with information on where and in what way investors can get it. If the issuer discloses important information orally or in writing to one or more selected buyers/investors, such information shall be included in the white paper or in its addendum if the white paper has already been approved. The supervisory body supervises the issuer’s activities related to advertising, and all types of advertisements must be published on the issuer’s website no later than the same day as the advertisement is published.

The issuer is required to ensure that the white paper contains all information about the issuer and the initial offer that allows buyers/investors to make an informed decision regarding the purchase/investment in digital assets and understand the risks associated with the initial offer and digital assets offered. If the white paper contains incorrect, inaccurate or misleading information, i.e. important facts are omitted, the responsibility lies with the issuer and the responsible person of the issuer, i.e. the issuer’s representative. The request for approval of the publication of a white paper has to be submitted to the supervisory body by the issuer or an authorized person on behalf of the issuer. The supervisory body rejects, approves or refuses the request for the publication of the white paper by a decision. After the approval of the publication of the white paper, the issuer publishes the white paper within a reasonable time, and at the latest until the beginning of the initial offer of digital property. Payment of digital assets is made in cash, in digital assets, and/or in the services of the acquirer of those assets no later than 30 days from the day of receipt/adoption of the decision on approval of publication of white paper (e.g. the transfer of issued digital assets to persons who “mine” those digital assets).

**Secondary Trading of Digital Assets**

The activities of organizing a platform for trading in digital assets may be performed only by a provider of services related to digital assets who has a license to provide the service. The LDA exhaustively prescribes the tasks to be performed by the platform organizer, including purchases, sales and/or exchanges of digital assets and conclusion of contracts related to digital assets, the storage and disclosure of information relevant to trading, conditions for users and inclusion of digital assets on the platform, market surveillance of digital assets trading included in the digital assets trading platform and the procedure for resolving disputes between users of digital assets. The organizer of the platform is obliged to disclose the price, scope and time of execution of the transaction with the digital assets included in the trading. Data on all transactions of this type are published on an acceptable commercial basis and as much as possible in real time. OTC trading of digital assets in the Republic is allowed, and for concluding and conducting transactions through OTC trading, the contracting parties are not obliged to use the services of any service provider related to digital assets. Also the use of “smart contracts” in secondary trading of digital assets is allowed and, if the provider of services related to digital assets provides services that include them, it is obliged to obtain the consent of the user of digital assets for their use.[[9]](#footnote-9)

**Preventing Misuse of Insider Information**

The LDA prohibits the misuse of insider information. Any person who possesses insider information is prohibited from using that information directly or indirectly in the acquisition, alienation and attempted acquisition or alienation for his own account or for the account of a third party of the digital assets to which that information relates. This applies to anyone who:

(1) is a member of the management board of the issuer;

(2) has a share in the issuer’s capital;

(3) has access to information obtained by performing duties at a (professional) workplace; and

(4) through the commission of criminal acts.

As for legal entities, the prohibition applies to natural persons who participate in the decision-making on the execution of a transaction on behalf of a certain legal entity. The exchange of insider information covers any person who:

(1) discloses and makes available insider information to any other person, unless the information is disclosed and made available in the ordinary course of business, profession or duty;

(2) recommends or induces another person to acquire or dispose of the digital property to which that information relates on the basis of insider information.[[10]](#footnote-10)

However, the mere fact that a legal entity has possessed or possesses insider information does not imply that that person used that information in trading. The law refers to the internal mechanisms and procedures to prevent the misuse of insider information. Such mechanisms should ensure that no natural person who has made a decision on behalf of a legal entity to acquire or dispose of digital assets to which the information relates, or any other natural person who may have influenced to that decision, did not possess insider information, i.e. did not encourage, give a recommendation or in any other way influence the natural person who decided on behalf of the legal entity on the acquisition or alienation of digital assets to which that information refers. The issuer is obliged to inform the public without delay about the insider information that is directly related to that issuer and he is not allowed to inform the public about the information in a way that could mislead the public. The supervisory body prescribes which facts should be taken into account when making a decision on the disclosure of insider information.

**Legal Form of Service Providers**

The provider of services related to digital assets must have the legal form of a company under the Law on Companies.[[11]](#footnote-11) However, the minimum capital of a company applying for a license to provide services related to digital assets may not be less than EUR 20,000 if the company intends to provide services such as receipt, transfer and execution of orders related to the purchase and sale for the account of third parties, purchase and sale for cash and/or funds in the account and/or electronic money, exchange services, storage and administration of digital assets for the account of users and related services, in relation with the issuance, offer and sale of digital assets, with or without obligation to purchase (sponsor) obligations (agency), and keeping a register of liens on digital assets. For providing services of accepting/transferring digital assets and managing a portfolio of digital assets, a minimum capital of EUR 50,000 is required. Finally, a minimum capital of EUR 125,000 euros is set if the company intends to provide services in relation to organizing a platform for trading digital assets. Exceptionally, if a company intends to organize a platform for trading digital tokens of only one issuer, the minimum capital of that company may not be less than EUR 20,000.

As for the provider of advisory services, it is not obliged to obtain the permission of the supervisory body for the provision of these services. It is obliged to establish measures and systems for fast, fair and efficient execution of orders of users of digital assets in relation to orders of other users of digital assets or that provider of services related to digital assets and to conclude a contract with the user of digital assets which determines the rights and obligations of the contracting parties, as well as other conditions under which the provider of services related to digital assets provides services. Providers of services related to digital property are obliged to act in accordance with the law governing the protection of personal data when collecting and processing personal data.

**Pledges and Fiduciary Rights over Digital Assets**

A pledge agreement on digital property obliges the pledgor to the creditor to provide security for his claim against the pledgor or a third party by establishing the creditor’s right to pledge over the digital assets of the pledgor. It contains in particular the type and quantity of digital property that is the object of the lien, data on the claim that it secures and the manner of establishing the pledge. It may be a separate agreement or an integral part of a framework or other agreement between the creditor and the debtor and it can also be executed using a smart contract. The law provides that it may be concluded in paper or electronic form. However, the supervisory authority may prescribe additional elements that must be contained in the pledge agreement.

A lien is acquired by registration in the lien register maintained by a digital assets service provider licensed by the supervisory authority to maintain a lien register on digital property, as well as to store and administer digital assets for the user’s account and related services. The condition for entry of the pledge right on digital assets in the register of pledge right is that the digital assets which are the object of the pledge right have previously been entrusted for storage and administration to the provider of services who has a license to keep the register of pledge rights. If the pledgor has pledged digital assets over which it does not have the ownership right or if the pledge is not valid for other reasons, the entry in the register of the pledge right does not produce any legal effect. The entry of the lien in the register of the lien may be requested by the creditor or the pledgor. A creditor whose lien is entered in the register of lien may be paid off from the value of the object of the lien before other creditors, if his claim is not paid in full. A lien may secure a monetary claim in domestic or foreign currency, as well as a non-monetary claim expressed in digital assets. It secures a certain amount of the main receivable, due interest and costs of collection of receivables. Pledges can secure future as well as contingent claims.

In the case of bankruptcy proceedings against the assets of the pledgor, the provisions of the Law on Bankruptcy[[12]](#footnote-12) apply to the settlement of the value of the object of the pledge right. A pledge creditor is considered as a separate creditor who has acquired a lien in accordance with this law. By designation of an authorized person by a pledge agreement on digital assets or a special mandate, one or more pledge creditors may authorize a third party to take legal action to protect and settle the secured claim. The pledgor itself can be a debtor or a third party. It has the right to use the pledged digital assets in accordance with its usual purpose, as well as that, if it bears fruits, to collects those. The right to use the pledged digital assets may be extended or limited by the pledge agreement, which may stipulate, in relation to assets on which a pledge right has already been established or by special contractual provisions on settlement, that the pledge creditor has the right to keep the digital property for itself at the market price or at a certain price at the moment of maturity of the claim.

The LDA has introduced a new type of real security claim into Serbian legislation - fiduciary. Namely, the contract on fiduciary of digital assets obliges the fiduciary debtor (fiduciary) to the fiduciary creditor (fiduciary) to transfer the right of ownership over the digital assets to it, in order to secure the claim, and the fiduciary undertakes to receive or receive in accordance with that contract return the equivalent collateral to the fiduciary upon execution of the secured claim, i.e. simultaneously with that execution. It can be concluded for another purpose, which must then be defined by the contract on fiduciary of digital assets. Unless otherwise agreed, the fiduciary is authorized to use and dispose of the assets that is the object of the fiduciary agreement, including the right to alienate it. A debtor or a third party that provides security for someone else’s debt may appear as a fiduciary.

In the case of bankruptcy of the debtor, the fiduciary may thus have two different statuses. If the fiduciary contract is concluded for the purpose of securing the claim, it will have the status of a secured creditor. However, if the fiduciary contract is concluded for any purpose other than securing the claim, the fiduciary will have the status of an excluded creditor. The National Bank of Serbia and the Securities Commission, as supervisory bodies according to their competence, will regulate in more detail the fiduciary on digital assets and prescribe in more detail the conditions and obligatory content of the agreement on fiduciary of digital assets. The business rules of the digital asset service provider or the digital asset fiduciary contract itself may stipulate that the rules relating to the lien on the digital asset shall apply according to the fiduciary of the digital asset.

**Out-of-court Sale of Liens**

The pledge creditor may proceed with an out-of-court sale of the object of the pledge right upon the maturity of the secured claim. The certificate from the register of pledge rights on digital property authorizes the pledge creditor to conclude a contract on sale of digital property in the settlement procedure in the name and on behalf of the pledgor. The debtor can validly settle the debt at any time before the sale of the pledged digital property. Within the same period, the pledgor may settle the obligation of the debtor. Out-of-court sales of pledged items, in terms of this law, can include public sales/auctions.[[13]](#footnote-13)

**The Register**

The LDA also provides for a register of pledge rights on digital assets, which is a register kept by a provider of services related to digital assets that has the permission of the supervisory body, and in which liens on digital assets are entered. The supervisory body publishes on its website a list of all providers of services related to digital assets. Data from the register of liens on digital assets are public and available free of charge on the website of the service provider related to digital assets that maintains the register of liens on digital assets.

**Conclusion**

The LDA represents a big step forward in Serbian legislation. The new legal framework regulates the issue and secondary trade of digital assets, the provision of services related to digital assets, pledge and fiduciary rights, the competence of the authorities and the supervision of the application of regulations. This provides important legal protection for potential investors and creditors. The last decade has seen a large increase in the number of digital asset-holders and the value of such assets in both official and unofficial markets has reached a large amount. However, the new law has not regulated the issue of enforcement of claims on the debtor’s digital assets, nor was this regulated by the Law on the Execution and Securing of Claims. The great potential value of digital assets requires detailed regulation in the area of both individual enforcement on the debtor’s digital assets and in bankruptcy proceedings. Therefore, it would be important to prescribe in more detail the manner of seizure and sale of digital assets, where they are not the object of a special contract, but where their existence is certain. It should also regulate the form of legal transactions that transfer and regulate the management and disposal of digital assets and monitoring the turnover of digital assets.

1. Draft Law on Digital Assets: <www.paragraf.rs/dnevne-vesti/021220/021220-vest12.html> (14.04.2021). [↑](#footnote-ref-1)
2. Art. 15 a-c, Law on Prevention of Money Laundering and Terrorist Financing (Official Gazette of the RS Nos. 113/2017 and 91/2019). [↑](#footnote-ref-2)
3. Art. 338а, Law on Enforcement and Securities (Official Gazette of the RS Nos. 106/2015 and 106/2016) (Authentic interpretations 113 of 17 December 2017, 54 of 26 July 2019 and 9 of 4 February 2020). [↑](#footnote-ref-3)
4. Art 2 al. 1, p. 1- 2, Law on Digital Assets (Official Gazette of the RS No. 153/2020). [↑](#footnote-ref-4)
5. Ibid., Art. 7; Arts. 6-10, Law on Capital Markets (Official Gazette of the RS Nos. 31/2011, 112/2015, 108/2016, 9/2020 and 153/2020). [↑](#footnote-ref-5)
6. Ibid., Art. 14. [↑](#footnote-ref-6)
7. Ibid., Art. 10. [↑](#footnote-ref-7)
8. Ibid., Art. 17. [↑](#footnote-ref-8)
9. Ibid., Art. 31. [↑](#footnote-ref-9)
10. Ibid., Art. 40. [↑](#footnote-ref-10)
11. Art. 8, Law on Business Companies (Official Gazette of the RS Nos. 36/2011, 99/2011, 83/2014); Other Laws 5/2015, 44/2018, 95/2018 and 91/2019. [↑](#footnote-ref-11)
12. Arts. 49-50, Law on Bankruptcy (Official Gazette of the RS Nos. 104/2009 and 99/2011); Other Law 71/2012; Const. Court Decs. 83/2014, 113/2017, 44/2018 and 95/2018. [↑](#footnote-ref-12)
13. Art. 113, Law on Digital Assets (Official Gazette of the RS No. 153/2020). [↑](#footnote-ref-13)