The Rise of e-Money and Virtual Currencies
Re-discovering the meaning of money from a legal perspective
June 2018
The Rise of e-Money and Virtual Currencies – Re-discovering the meaning of money from a legal perspective

Table of contents

Introduction 3
Defining money 4
A brief history 4
Money as more than currency 4
Does money have to be legal tender? 5
Money, sovereignty and a legal framework 6
But what about when the government fails? 7
e-Money 8
Claims on the issuer, e-Money 8
Bank deposits and fiat currency 8
Can e-Money be ‘money’? 9
Understanding money as a debt 9
Debt, damages and breach of duty 10
e-Money in context 10
Regulatory treatment of e-Money 11
Virtual currencies 13
New and old challenges to the meaning of money 13
What are virtual currencies? 13
Currency or commodity? 13
Private money 14
Central bank digital currencies – coming back full circle 15
Key contacts 16
Where we work 17
Introduction

Cryptography, digital coins, tokens, blockchain – whether you are a student trying to figure out how to save the salary from your first job, a cafe accepting payments in Bitcoin, or a seasoned venture capitalist looking out for an exciting deal, you are likely to be affected by virtual currencies. Worldwide, regulators are in the process of defining these terms; economists are trying to understand their place in society; and bankers are figuring out their implications to the conventional monetary system.

Virtual currencies are simultaneously exciting and inscrutable, because they challenge our existing concepts regarding money, payments, and the State’s role in the monetary system. The suffix of ‘currency’ attached to ‘crypto’, ‘virtual’ or ‘digital’ is in most descriptive of its function as money. But, what precisely is the true nature of money? What makes money, ‘money’? It is not an easy concept to define or understand, and the advent of virtual currencies gives us yet another lens through which to look at the meaning of money.

Money has different definitions depending on whom you speak to. An economist may look at the functions that money performs. For the lawyer, money becomes relevant in the context of relationships:

– Between the State and its people; and
– Between persons who owe obligations to one another.

The paper is divided into three sections. In the first section, we conclude that defining money is often tangential to addressing some other question or regulatory predicament. To put it differently, the norm is to take the meaning of money for granted. For example, the Courts have defined money in a case where it had to decide whether a coin with numismatic value was stolen or used to make payment. Similarly, through our analysis of e-Money, it becomes evident that the regulatory treatment of e-Money also differs widely – some authorities treat e-Money on par with cash, others find that e-Money is akin to bank deposits. In some cases, e-Money is also confused with electronic payment systems. This highlights yet another conundrum – whether e-Money ought to be treated as a type of money, or a service on money.

In the final section, we come to virtual currencies. It is Money ought not to be confused with their payment systems.

Virtual currencies give us yet another lens through which to look at the meaning of money. Virtual currencies appear to have more in common with commodity money of ancient history than the monies from our recent past. In place of cattle and seeds, we have Bitcoin and Eth. Central banks too, are experimenting with developing their own central bank digital currencies, i.e., a digital form of money. In the course of carrying out this legal analysis of money, we conclude that defining money is often tangential to addressing some other question or regulatory predicament. That being established to be the relative situations of banker and customer, the banker is not an agent or factor, but he is a debtor.11

Money as more than currency

Money does not necessarily mean only physical currency alone, i.e., banknotes and coins. The Bank of England notes that there are three “types” of money – currency, bank deposits and central bank reserves. All three are money, “as is each represents an IOU from one sector of the economy to the other”. Therefore, from an economist’s perspective, physical currency is only one type of money and it makes up the smallest percentage of the money in the economy.

“Money can take many forms, and the rise of virtual currencies is just one example of this.”

The Rise of e-Money and Virtual Currencies – Re-discovering the meaning of money from a legal perspective

Defining Money

A brief history

One of the most common (economic) definitions of money is based on the functions it performs:

– As a unit of account – to measure, value or price goods/services;
– As a medium of exchange – i.e., to buy and sell;
– As a store of value – an asset that can be retained for later use.

Going by this definition, many things can be money – not just banknotes and coins. For example, historians have noted that cigarettes functioned like money in prison of war camps during the Second World War. Before banks issued currencies, other objects functioned as money including – feathers, cowrie shells, gold, silver etc.

Historically, money lets people move beyond the constraints of barter trade. While there is debate on how this money came to be created, it is accepted that money used to be something that had intrinsic value as a commodity. In its paper on virtual currencies, the European Central Bank (‘ECB’) notes that cattle, seeds, and later precious metals such as gold and silver coins functioned as money.

Finally, the first ‘paper money’ could be exchanged for underlying commodities. In the convertible currency system, the banknote was merely a claim on the issuing bank’s gold and silver reserves and portfolio of bills.

However, present day fiat money is not backed by commodities or convertible for anything, other than itself. Instead, fiat money depends on trust that it will continue to be valuable and hence exchanged for goods and services. More simply put, fiat money is a special type of IOU that is accepted by everyone in a society. If the issuer of fiat money fails in its monetary policy, we end up with cases of hyperinflation (Germany after the First World War, and more recently, Venezuela) where people no longer trust the fiat money and go back to systems of barter or seek out alternative currencies such as Bitcoin. Therefore, trust is a crucial element of a fiat money system.

The Osborne Clarke Payments team

Project Coordinator

Chia Ling Koh
Director, OC Queen Street LLC
FinTech Who’s Who Legal

1 The project coordinator would like to thank Ma’s Claire Merchant for editing in helping to prepare this paper, together with the accompanying comparative table on the front end of the paper. Acknowledgements

2 OC Queen Street is a Singapore Law Practice with limited liability (Company Registration: 201613315M) (‘LLC’). The LLC is an independently owned and managed Singapore Law Practice and is also a member of Osborne Clarke’s international legal partnership.


7 See note 2 at para 6.08, fn. 7.

8 See note 4 at p. 1.

9 Charles Proctor, Mann on the Legal Aspect of Money (OUP, 6th ed, 2005), para. 1.45-1.48.

10 Foley v Hill (1848) 2 HL Cas 28.

11 See note 9 at para 7.04, fn. 2.

The Rise of e-Money and Virtual Currencies – Re-discovering the meaning of money from a legal perspective

Money as more than currency

Money does not necessarily mean only physical currency alone, i.e., banknotes and coins. The Bank of England notes that there are three “types” of money – currency, bank deposits and central bank reserves. All three are money, “as each represents an IOU from one sector of the economy to the other”. Therefore, from an economist’s perspective, physical currency is only one type of money and it makes up the smallest percentage of the money in the economy.

But, some legal definitions held that money could only exist in the form of cattle, i.e., physical form. It then followed that the “money” held in bank deposits was merely a personal obligation between the debtor bank and creditor customer.

The Rise of Lords in Foley v Hill considered the nature of the relationship between a customer and banker.10

‘The money placed in the custody of a banker is to all intents and purposes the money of the banker, to do with it as he pleases. He is guilty of no breach of trust in employing it; he is not answerable to the customer if he puts it into jeopardy, if he engages in a hazardous speculation, he is not bound to keep it or deal with it as the property of the customer, but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the customer, when demanded, a sum equivalent to that paid into his hands. [ ] That being established to be the relative situations of banker and customer, the banker is not an agent or factor, but he is a debtor.’

Emphasis added.

However, arguments have been advanced that in the context of modern financial markets, the legal definition of money cannot be dependent on the creation of a physical token issued by or under the authority of the State. Moreover, physical money, e.g., a banknote, is more than just mere cattle – it also embodies claim against the central bank. Proctor proposes that the concept of payment must be more important than the definition of money11. In any case, a legal definition of money also has to take into account its function as a means of payment.

The Rise of e-Money and Virtual Currencies – Re-discovering the meaning of money from a legal perspective
Defining money

Money is merely a form of contractual claim, whether against the central bank, in the form of banknotes issued or deposits accepted by such an institution, or against a credit institution, in the form of deposits accepted by it. As a corollary, it is argued that ‘payment’ merely refers to the transfer of such a claim.

Does money have to be ‘legal tender’?

A common understanding of flat currency, (i.e., physical bank notes and coins), is that it functions as legal tender in the jurisdiction where it was issued. Though this archaic term is used in various statutes that declare a nation’s currency as its legal tender, the term itself is not defined. It is therefore necessary to understand the meaning of ‘legal tender’, and the implications of such a declaration on flat currency.

The concept of legal tender is especially relevant as it is often used to define/distinguish virtual currencies such as Bitcoin from fiat currencies. For instance, the Financial Action Task Force (‘FATF’) defines virtual currency, fiat currency and e-Money in the following way: 14

Virtual currency is a digital representation of value that can be digitally traded and functions as (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but does not have legal tender status anywhere in Scotland or in the rest of the United Kingdom, and the economy in Scotland (as well as Northern Ireland) manages to function without this protection. 15 In so far as acceptability of the banknotes (with or without legal tender status) is concerned, it is a matter of agreement between the parties.

In light of the case, it may well be pertinent to define fiat money without any reference to the technical concept of legal tender. Further, if the legal definition of fiat money were to move beyond the notion of fiat currency, i.e., cash, the concept of legal tender need not necessarily form a part of the definition.

14 For instance, the Bank of England, the Reserve Bank of New Zealand and the Bank of Canada define ‘fiat currency’ as “money”.
16 Does money have to be “legal tender”? A matter of agreement between the parties. In such cases, commercial considerations (in the absence of agreement) will dictate the mode of payment.
17 ‘Björn Segendorf and Anna Wilbe, “Does money have to be legal tender?” (accessed 23 March 2019), at p 32.
18 The three banks are Bank of England, Clydesdale Bank and Royal Bank of Scotland.
19 The Lockean view of money is that it came about as man’s solution to move beyond the wastefulness of the barter system, where excess produce would ‘perish uselessly’ in one’s hands. Money therefore came about as a ‘tasting thing that men might keep without spoiling, and that by mutual consent men would take in exchange for the truly useful, but perishable supports of life’. 20 In this theory, money was created by societies as a response to the limitations of barter.

Perhaps more important in defining and identifying money (whether in the form of fiat currency or otherwise) is the ‘formal and mandatory backing of a domestic legal system or currency’. Monetary sovereignty is one of the attributes of the modern State and the issuance of money is in itself an exercise of sovereignty by the State. Ultimately, it is the State that has a monopoly over fiat money (including the physical fiat currency). It is the exercise of sovereignty in issuing fiat currency that distinguishes flat currency from other means of payment such as e-Money and virtual currencies.

Money, sovereignty and a legal framework

Therefore, the lawyer’s definition of money would have to deal with the evolution and development of the monetary system in the modern State. Does fiat money, by definition, have to be issued by a government?

The three banks are Bank of England, Clydesdale Bank and Royal Bank of Scotland.

18 The Rise of e-Money and Virtual Currencies – Rediscovering the meaning of money from a legal perspective

19 For instance, the Bank of England, the Reserve Bank of New Zealand and the Bank of Canada define ‘fiat currency’ as “money”.
21 ‘Banks of England, Clydesdale Bank and Royal Bank of Scotland. 22 See note 6, para. 15.
26 ‘Banks of England, Clydesdale Bank and Royal Bank of Scotland. 27 For any commodity to have acted as a unit of value, store of value and medium of exchange, it has to be recognised as such by a “stakeholder”28 such as chiefs or clan leaders in the early Anglo-Saxon kingdoms. The analysis begins by asking why the subsistence farmer would see value in a shell or piece of metal, independent of the same being recognised as “money”.

The rise of e-money and virtual currencies – rediscovering the meaning of money from a legal perspective

The rise of e-money and virtual currencies – rediscovering the meaning of money from a legal perspective

The rise of e-money and virtual currencies – rediscovering the meaning of money from a legal perspective

The rise of e-money and virtual currencies – rediscovering the meaning of money from a legal perspective

The rise of e-money and virtual currencies – rediscovering the meaning of money from a legal perspective

The rise of e-money and virtual currencies – rediscovering the meaning of money from a legal perspective

The rise of e-money and virtual currencies – rediscovering the meaning of money from a legal perspective

The rise of e-money and virtual currencies – rediscovering the meaning of money from a legal perspective

The rise of e-money and virtual currencies – rediscovering the meaning of money from a legal perspective

The rise of e-money and virtual currencies – rediscovering the meaning of money from a legal perspective

The rise of e-money and virtual currencies – rediscovering the meaning of money from a legal perspective

The rise of e-money and virtual currencies – rediscovering the meaning of money from a legal perspective

The rise of e-money and virtual currencies – rediscovering the meaning of money from a legal perspective

102
It is the stakeholder who, as the leader of a group of people, has the “unique capacity to create currency.” The stakeholder here is a “common creditor” to the entire group of people, as he would be owed taxes, dues, rent etc. The stakeholder can declare a token as proof of having received goods easily and later, accept it in payment of taxes owed to him. This token, usually coins, could be exchanged from person to person in this collective and it would help the final holder meet a tax obligation to the stakeholder. For the stakeholder, he allowed him to “spend now and tax later.” Therefore, it is the stakeholder who had the power to denote a unit of account. Hence, under the “stakeholder theory of money,” money owes its creation to a legal framework of sorts, where a leader/governing body has the power to denote a unit of account and enforce its usage by accepting it as taxes subsequently. This remains the position today, where each state accepts its national currency in satisfaction of tax liabilities.

An early example of the State’s power to denote a unit of account is The Case of Mat Monies. This dispute in this case arose as a result of Elizabeth I’s debasement of commodity money (silver coins) that circulated in Ireland in 1601. Silver coins in circulation were demonetized and new coins with lesser silver content were circulated, with the original silver coins to be exchanged for the debased coins, i.e. the “mat monies”. A question arose whether a payment under a contract could be made with the new debased coins, though the contract was entered into prior to the Queen’s proclamation. The Privy Council concluded that tender of the debased money was good and it was “the sovereign’s prerogative to fix the intrinsic fineness of the coinage, and to assign, it a legal valuation in terms of money of account.” This case “helped to distinguish the value of money in payment transactions from its intrinsic metallic value”, and marked an important step towards the present day fiat money.37

But what about when the government fails? We had made brief reference earlier to cases of monetary systems collapsing or where commodities such as cigarettes functioned as currency during war. In this context, it is necessary to refer to what is known as the ‘Societary theory of money’:

“It is the usage of commercial life or the confidence of the people which has the power to create or recognize ‘money’. In other words, it is the attitude of society—rather than the State itself—which is relevant in identifying money.”38

This once again goes back to the functionality of money, which is divorced from the legal framework underpinning it. The Societary theory is perhaps of greater relevance today when lawmakers around the world are faced with the question of whether “virtual currencies” are money.

Defining money

See note 28

Claims on the issuer: e-Money, bank deposits and fiat currency

At the most basic level, fiat currency is in itself a claim on the issuer, namely the central bank or a State. It is a debt that can only be satisfied with itself. On the other hand, bank deposits and e-Money are contractual claims against the bank and the issuer respectively, though the nature of these claims are quite different. Each is a right to be exercised against private (regulated) bodies.34

The European Commission’s Directive on e-Money primarily defines it as a means of payment: 35

“Electronic money” means electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions […] and which is accepted by a natural or legal person other than the electronic money issuer”.36

As the definition notes, it is also necessary that e-Money is accepted by persons other than the issuer, for it to function, as a means of payment and be “money”. Therefore, several regulators distinguish e-Money from single use cards such as cards used for transport, loyalty cards issued by vendors etc. In addition to EU jurisdictions, Indonesia, Philippines and Malaysia also define e-Money as a value that is accepted by someone other than the issuer. 37

However, the nature of the claims against the bank (in respect of bank deposits) and the e-Money issuer is very different. A bank deposit involves the creation of a debtor-creditor relationship, akin to the “IOU” that the central bank owes to the holder of fiat currency. As the Court in Fox v BEI38 explained, the bank contracts with the customer to repay a sum equivalent to that paid by the customer, when demanded, and hence a debtor-creditor relationship is formed.

An e-Money issuer, on the other hand, is selling “e-Money” in exchange for fiat money. While redeemability might be a requirement under some regulations, the e-Money issuer is not a debtor. For instance, the EC’s Directive on e-Money requires that a Money be redeemable, but clarifies that “redemability does not imply that the funds received in exchange for electronic money should be regarded as deposits or other repayable funds” 39

The relationship between the customer and the e-Money issuer is governed by a sale and purchase agreement where fiat money is exchanged for a product/service, namely, “e-Money”.40 Hence, the e-Money holder’s claim against the issuer is in the nature of damages for breach under the terms of the sale agreement, rather than a debt.

This difference is reflected in the regulatory treatment of bank deposits and e-Money. Money jurisdictions require that e-Money issuers ring fence 100% of the outstanding value to ensure that the “customer’s money” is fully protected and always available for redemption. Conversely, banks are allowed to maintain fractional reserves and customers are protected by deposit insurance schemes.41

Can e-Money be “Money”?

In defining and regulating e-Money, lawmakers often compare its attributes to cash or bank deposits. It is an “electronic alternative to cash”42 as functions as a cash substitute to the unbanked. Instead of hoarding cash, one can convert cash to e-Money and transact in e-Money.43 Like cash, e-Money does not earn interest and it is not a deposit. E-Money also shares similarities to bank deposits. It is a claim on a private organisation and involves a transfer of “ownership” over the fiat money. The customer relinquishes the right to the fiat currency and can only claim an equivalent amount of the fiat currency. Another similarity between bank deposits and e-Money is that they are each claims pegged to a fiat currency. Several jurisdictions require that e-Money is issued only in exchange for the fiat money of the State.44 Further, in some jurisdictions, e-Money is allowed to earn interest and supported by deposit insurance. In the section above, we saw that bank deposits are treated as money by the economist and that there is a case for the lawyer to do so as well. In part, this was based on the definition in Moss v Rancocas45 which defines money as a means of payment. By transacting in the bank’s debt from one customer to another, bank deposits can function as a means of payment, and is therefore “money”. In the same vein, some argue that there is a strong argument to treat e-Money as “money” as well.46

See note 9 at page 2.35
36 An Airline Passenger’s proposed definition of e-Money: “Definitions of e-money can be found in the accompanying table comparing the treatment of money across jurisdictions.” See note 37
37 See note 36
38 See note 15. para 18 of the preamble
40 Examples can be found in the accompanying table comparing the treatment of money across jurisdictions.
42 See note 33
43 See note 34
44 E.g. Netherlands
45 See note 35
46 See note 36
e-Money

But a solely functional definition of money as a means of payment does not (fully) address the way in which the law treats “Money”.

**Understanding money as a debt**

In the previous section, we saw how money was created by “stakeholders” and later, the sovereign and the State. A corollary of this is the law’s recognition of the unit of account created by the sovereign as “money.”

For some economists, money has always been inextricably linked with debt. Under this “credit theory of money,” money is always a token of debt:

> “The coin, the paper certificates, the banknotes and the credit on the books of the bank, are all identical in their nature, whatever the difference of form or of intrinsic value.”

but the traditional view of money as an instrument that can satisfy a debt, and conversely debt as an obligation that can only be expressed in terms of money.

Here, “money is credit” and physical currency is merely a token by which credit can be transferred or, a debt obligation satisfied. Hence, any “thing” (whether physical or a record in a bank’s ledger) that has the effect of transferring credit will be money. Under this theory, “credit is far older than cash,” and ancient systems of credit and transferring existed before coins. Alfred-Mitchell Innes cites the example of “tallys” made from wooden sticks that recorded credit.48

It is important to note that the law has not tried very hard to define money, and has perhaps never needed to do so. For the jurist, money is often a secondary concept to other primary questions of law. The definition and nature of money are often dealt with tangentially to issues of a “technical legal nature”, such as resolving disputes between parties, or determining the difference between sole and barter.49 Therefore, one of the first instances of the law’s acknowledgement of the nature of money emerges from the common law remedy of debt.

The writ of debt (debtor in default) was commonly used to enforce liquidated claims and were denominated in money terms. This was developed with the law’s understanding of money as being something that is distinct from other fungible chattels. In contrast, the writ of detinue (detain) was used to enforce claims for fungible chattels such as grain, animals etc. Therefore, money, even in the form of coins made of precious metals, was treated differently from fungible chattels that did not denote money.50

As Christine Dietz notes, “the very definition of what could be sold is determined by working out the legal operation of money.”51 The writ of debt in the Middle Ages shows the law’s recognition of money as an instrument that can satisfy a debt, and conversely debt as an obligation that can only be expressed in terms of money.

**Debt, damages and breach of duty**

An outcome of the separation of actions for debt and detinue is also an understanding that money retains its nominal value in an action for debt. Even if a coin has been debased and the intrinsic value of the coin reduced by the State, in an action for debt, the plaintiff can only recover the monetary value pleaded, and cannot ask for, undebased coins that has higher intrinsic value. On the other hand, when pleading detinue, the plaintiff’s action is based on the defendant’s failure to deliver the chattels promised. The defendant had the option of paying damages instead of delivering the chattels, and the court would then attempt to quantify these damages in monetary terms.

It also follows that in an action for debt, there is no underlying breach that needs to be demonstrated. As David Fox puts it, “the gist of the action [for debt] was not to make good the losses that resulted from a breach of duty.”52 As long as the defendant does not pay the amount pleaded, the plaintiff had no further recourse (even if the intrinsic value of the coins had been debased in the meantime).

**E-money in context**

This condensed explanation of common law’s development of the law of obligations shows the law’s preoccupation with regulating relationships rather than an abstract concept of “money”. Nonetheless, how do we apply this historical understanding of money and debts to e-Money?

As noted earlier, e-Money does not represent a claim in debt against the issuer. We had proposed that e-Money represents a claim in damages against the issuer, arising out of a sale and purchase agreement for “e-Money” in exchange for “money”. Thus, a demand between debt and damages is set out in Chitty on Contracts.

“A debt is a definite sum of money fixed by the agreement of the parties as payable by one party in return for the performance of a specified obligation by the other party or upon the occurrence of some specified event or condition; damages may be claimed from a party who has broken his contractual obligation in some way other than failure to pay such a debt.”53

We are yet to come across cases that have hard to deal with any breach or default by an e-Money issuer, which would also give jurors an opportunity to grapple with a legal definition of money. This may well be the result of the fact that e-Money is often used for small transactions as a substitute for cash payments. E-Money is also distinct from bank deposits because e-Money is not purchased with the intention to redeem at a later stage while bank deposits act as a store of value with the intention that the debt will be satisfied at some stage, i.e., the money “withdrawn”. But, there are some who see no difference between the functioning of bank deposits and e-Money, and argue that issuers of e-Money on-stored value products should be treated on par with bank deposits by regulators.54 It has also been described as a “debt instrument … embodied in an electronic instrument, whose circulation effects full and final payment”, and which can be compared to travelers’ cheques.55 A point of further investigation are the legal differences in transferring a debt claim (bank deposit) and a damages claim (e-Money). For instance, can e-Money be garnished by the Court in an execution proceeding?

There is also a case to be made that e-Money has more in common with cash than bank deposits, as it functions as a token of credit. Instead of physically handing over notes and coins, e-Money holders pass on “e-Money” units in satisfaction of debt. This is also reflected in the practical day-to-day usage of e-Money as a payment instrument rather than a deposit instrument. The EU’s Directive on e-Money does not regulate e-Money as a “deposit-taking activity” for precisely this reason.

“The issuance of electronic money does not constitute a deposit-taking activity […], in view of its specific characteristic as an electronic surrogate for coins and banknotes, which is to be used for making payments, usually of limited amount and not as a means of saving.”56

This is not the case everywhere, though. In Kenya, e-Money can be used to open a mobile banking account which by customers can earn interest and have access to credit57. Physical cash cannot be deposited into the mobile bank account, and the only way to withdraw money from this account is in the form of e-Money.

---

51 Bretton Woods, edited by David Fox and Wolfgang Ernst, Oxford University Press (2016), at p. 213.
53 For example, Benjamin Gere and Mahamad Kamil, *Reimagining E-Money: Its Conceptual Unity with other Retail Payment Systems* in *International Monetary Fund, Current Developments on Monetary and Financial Law (vol 3)* (International Monetary Fund, 2005), at pp. 649 – 707.
54 See note 51.
55 See note 13, para 13 of the preamble.
56 See, for example, Benjamin Gere and Mahamad Kamil, *Reimagining E-Money: Its Conceptual Unity with other Retail Payment Systems* in *International Monetary Fund, Current Developments on Monetary and Financial Law (vol 3)* (International Monetary Fund, 2005), at pp. 649 – 707.
There are regulatory and policy arguments for treating e-Money on par with bank deposits, for instance to extend savings services to the unbanked. African nations such as Ghana\(^{60}\) and Tanzania\(^{61}\) are implementing a policy to "distribute" the interest earned by the e-Money issuer to its customers. Interestingly, Australia, which regulates e-Money as a "purchased payment facility", treats it as a deposit taking activity. The media release introducing regulations for "purchased payment facilities" describes it in the following manner: \(^{62}\)

"The stored value backing a purchased payment facility represents a promise by the holder to repay in full. Where the customer is entitled, under the terms of the facility, to demand repayment in Australian currency of part or all of the balance of the stored value, the facility is akin to a deposit [...]." 

To give effect to these arrangements, a Regulation has been enacted under the Banking Act 1959 which defines the holder of the stored value in relation to a purchased payment facility to be "carrying on banking business." Despite treating e-Money on par with bank deposits, as well as regulating under a banking license, conditions of the license may nevertheless require that the e-Money issuer not pay any interest to the customer. \(^{63}\) Having said all this, e-Money users in Australia (as well as other advanced economies) does not appear very prevalent. \(^{64}\)

Ultimately, it appears that regulatory treatment of e-Money is driven by the needs of each nation, whether it is the extension of "branchless banking" through e-Money services or protecting the existing monetary and banking system by regulating e-Money very strictly. We again encounter the fact that whether it is to be treated as a form of money that can be held and invested (and e-Money) is peripheral to some other problem.

Confusing e-Money and payment systems

There are also a few regulators who end up regulating e-Money under the umbrella of "online payment systems" or "non-cash payments" alongside debit cards and online banking. This arises out of a confusion on the nature of e-Money – whether it is to be treated as a form of money that can replace cash and bank deposits, or whether it is merely a service on existing money. \(^{65}\) It is also reflected in the FATT's definition of e-Money that we set out earlier. \(^{66}\) On the one hand, e-Money is a "digital representation of fiat currency" but it is also a "digital transfer mechanism for fiat currency". For instance, Malaysia regulates it as a retail payment system under its Payment Systems (Designated Payment Instruments) Order 2003 and defines e-Money as a "payment instrument". Taiwan appears to regulate e-Money alongside intermediaries who transfer payments electronically. China too, regulates e-Money as a category of online payments or "third party electronic payments". \(^{67}\)

The regulatory overlap between payment systems and e-Money seems to arise due to reasons unique to each jurisdiction:

- In countries where existing banking and payments systems are very robust (e.g., Australia), e-Money is not very prevalent and does not attract regulatory attention separately. Such countries focus on developing more robust payment systems. For instance, Australia is in the process of rolling out its "New Payments Platform" to improve near real time settlements and faster clearing between financial institutions. \(^{68}\)
- e-Money is often looked at from the perspective of the medium or technology used to access e-Money – e.g., "mobile money" in Kenya, "online payments" in China. e-Money is often synonymous with "fintech". \(^{69}\)
- There is an overlap where e-Money issuers also provide financial intermediary services by which an application allows access to bank deposits.

Comment

It is our opinion that a Money is not a payment system, and should not be defined or regulated as such. Electronic payment systems (such as mobile banking, internet banking, as well as e-wallets) do not require regulation to ensure integrity of the payments and the robustness of the technology. For example, Singapore recently released a consultation paper on proposed 'user protection guidelines for e-payments',\(^{70}\) However, the regulation of e-Money has very different legal and regulatory objective that should not be confused with the means in which payments are made or the systems used.
Virtual currencies

New and old challenges to the meaning of money

If e-Money helps to answer the question, “What is that makes money? Money?”75 virtual currencies challenge our existing legal definition(s) of money. Virtual currencies are often described as “money” or a “currency” yet, in fact, there is no such term as a legal category. Some lawmakers have previously said that virtual currencies are not:

– Fiat currency
– A claim on any issuer (in fact, there is no issuer) or the liability of anyone
– Backed by any authority – whether the State or a “stakeholder”
– Legal tender
– In fixed currency

For the economist, virtual currencies open up the debate about the role of the State in a monetary system. We are back to where we began in this paper – with a token – digital or physical, tangible or intangible – “Money”?76

What are virtual currencies

The term “virtual currency” is often used interchangeably with “digital currencies”, “cryptocurrencies” and even, “electronic currency.” Regardless of the term used, they are distinguished from e-Money.

For the lawyer and regulator, perhaps the biggest challenge is that virtual currencies cannot be distinguished from other types of payments. For several virtual currencies, there is “no identifiable scheme operator” akin to financial intermediaries for fiat currency.77 Virtual currencies are in line with the Society for the Study of Money theory of money,78 where society denotes what is money without the need for a central stakeholder.

For the economist, virtual currencies open up the debate about the role of the State in a monetary system. The term “virtual currency” is often used interchangeably with “digital currencies”, “cryptocurrencies” and even, “electronic currency.” Regardless of the term used, they are distinguished from e-Money.

For the lawyer and regulator, perhaps the biggest challenge is that virtual currencies cannot be distinguished from other types of payments. For several virtual currencies, there is “no identifiable scheme operator” akin to financial intermediaries for fiat currency.77 Virtual currencies are in line with the Society for the Study of Money theory of money,78 where society denotes what is money without the need for a central stakeholder.

For the economist, virtual currencies open up the debate about the role of the State in a monetary system. The term “virtual currency” is often used interchangeably with “digital currencies”, “cryptocurrencies” and even, “electronic currency.” Regardless of the term used, they are distinguished from e-Money.

For the lawyer and regulator, perhaps the biggest challenge is that virtual currencies cannot be distinguished from other types of payments. For several virtual currencies, there is “no identifiable scheme operator” akin to financial intermediaries for fiat currency.77 Virtual currencies are in line with the Society for the Study of Money theory of money,78 where society denotes what is money without the need for a central stakeholder.

For the economist, virtual currencies open up the debate about the role of the State in a monetary system. The term “virtual currency” is often used interchangeably with “digital currencies”, “cryptocurrencies” and even, “electronic currency.” Regardless of the term used, they are distinguished from e-Money.

For the lawyer and regulator, perhaps the biggest challenge is that virtual currencies cannot be distinguished from other types of payments. For several virtual currencies, there is “no identifiable scheme operator” akin to financial intermediaries for fiat currency.77 Virtual currencies are in line with the Society for the Study of Money theory of money,78 where society denotes what is money without the need for a central stakeholder.

For the economist, virtual currencies open up the debate about the role of the State in a monetary system. The term “virtual currency” is often used interchangeably with “digital currencies”, “cryptocurrencies” and even, “electronic currency.” Regardless of the term used, they are distinguished from e-Money.

For the lawyer and regulator, perhaps the biggest challenge is that virtual currencies cannot be distinguished from other types of payments. For several virtual currencies, there is “no identifiable scheme operator” akin to financial intermediaries for fiat currency.77 Virtual currencies are in line with the Society for the Study of Money theory of money,78 where society denotes what is money without the need for a central stakeholder.

For the economist, virtual currencies open up the debate about the role of the State in a monetary system. The term “virtual currency” is often used interchangeably with “digital currencies”, “cryptocurrencies” and even, “electronic currency.” Regardless of the term used, they are distinguished from e-Money.

For the lawyer and regulator, perhaps the biggest challenge is that virtual currencies cannot be distinguished from other types of payments. For several virtual currencies, there is “no identifiable scheme operator” akin to financial intermediaries for fiat currency.77 Virtual currencies are in line with the Society for the Study of Money theory of money,78 where society denotes what is money without the need for a central stakeholder.

For the economist, virtual currencies open up the debate about the role of the State in a monetary system. The term “virtual currency” is often used interchangeably with “digital currencies”, “cryptocurrencies” and even, “electronic currency.” Regardless of the term used, they are distinguished from e-Money.

For the lawyer and regulator, perhaps the biggest challenge is that virtual currencies cannot be distinguished from other types of payments. For several virtual currencies, there is “no identifiable scheme operator” akin to financial intermediaries for fiat currency.77 Virtual currencies are in line with the Society for the Study of Money theory of money,78 where society denotes what is money without the need for a central stakeholder.

For the economist, virtual currencies open up the debate about the role of the State in a monetary system. The term “virtual currency” is often used interchangeably with “digital currencies”, “cryptocurrencies” and even, “electronic currency.” Regardless of the term used, they are distinguished from e-Money.76

For the lawyer and regulator, perhaps the biggest challenge is that virtual currencies cannot be distinguished from other types of payments. For several virtual currencies, there is “no identifiable scheme operator” akin to financial intermediaries for fiat currency.77 Virtual currencies are in line with the Society for the Study of Money theory of money,78 where society denotes what is money without the need for a central stakeholder.

For the economist, virtual currencies open up the debate about the role of the State in a monetary system. The term “virtual currency” is often used interchangeably with “digital currencies”, “cryptocurrencies” and even, “electronic currency.” Regardless of the term used, they are distinguished from e-Money.

For the lawyer and regulator, perhaps the biggest challenge is that virtual currencies cannot be distinguished from other types of payments. For several virtual currencies, there is “no identifiable scheme operator” akin to financial intermediaries for fiat currency.77 Virtual currencies are in line with the Society for the Study of Money theory of money,78 where society denotes what is money without the need for a central stakeholder.
The Rise of e-Money and Virtual Currencies – Re-discovering the meaning of money from a legal perspective

Virtual currencies

Central bank digital currencies – coming back full circle

The Bitcoin boom has made central banks ask whether they should also be providing a “central bank digital currency.” In its report on the subject, the BIS considers four aspects that would need to be addressed:

– The issuer (central bank or other);
– The form (electronic or physical);
– The accessibility (universal or limited); and
– The transfer mechanism (centralised or decentralised).

By its very name, we understand that a central bank digital currency would have the central bank as its issuer, and that it would be electronic digital as opposed to physical notes and coins. One kind of central bank digital currency already exists in the form of commercial banks’ deposits with the central bank, which is not paper money, but intangible deposits. This is available to commercial banks and financial institutions. For others however, the only way to hold a claim against the central bank is by way of banknotes and coins.

A central bank digital currency that aims to imitate cash (and virtual currencies) will have to allow for decentralised peer to peer transfer of currency. Unlike cash, a central bank digital currency would not have to be physically handed over to effect payment. But, unlike virtual currencies, it would amount to a claim against the central bank and should be accepted in satisfaction of tax liabilities. The Deputy Governor of Sweden’s Riksbank considered the possibility of an “e-krona” to act as a complement to cash. Central banks would also have to consider whether the central bank digital currency will earn interest like a bank deposit or retain its similarity to cash in that respect as well.

Ultimately, it appears that central banks are excited by the technology of virtual currencies as a payments system that can be adapted for fiat money. Whether it is the decentralised nature of distributed ledgers or the use of blockchain to maintain historical records, it is not just the central banks that are interested in deploying these technologies. Virtual currencies have also given rise to a new and innovative method of raising funds by way of Initial Coin Offerings. Whether virtual currencies are going to break down our definitions of money is yet to be seen.

[OC to insert latest country profiles]

Key contacts

Chia Ling Koh
Director, Singapore
T: +65 6350 4282
E: chialing.koh@osborneclarke.com

Chin Kiat Ong
Associate, Singapore
T: +65 6350 4392
E: chinkiat.ong@osborneclarke.com

Paul Anning
Partner, UK
T: +44 207 105 7446
E: paul.anning@osborneclarke.com

Kate Johnson
Partner, UK
T: +44 207 105 7230
E: kate.johnson@osborneclarke.com

[90] This is the term of choice for the European Central Bank. The Bank of International Settlements term it “central bank cryptocurrencies.”
The Rise of e-Money and Virtual Currencies – Re-discovering the meaning of money from a legal perspective

Where we work

750+ talented lawyers

working with

250+ expert partners

in

25 international locations

advising across

8 core sectors

with

1 client-centric approach

Our locations around the world

Europe
Belgium: Brussels
France: Paris
Germany: Berlin, Cologne, Hamburg, Munich
Italy: Brescia, Busto Arsizio, Milan, Padua, Rome
The Netherlands: Amsterdam
Spain: Barcelona, Madrid, Zaragoza
UK: Bristol, London, Reading

USA
New York, San Francisco, Silicon Valley

Asia
China: Shanghai
Hong Kong
India: Bangalore*, Mumbai*
Singapore

Osborne Clarke is the business name for an international legal practice and its associated businesses.
Full details here: osborneclarke.com/definitions

*Relationship firm