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IS PAYMENT A BLIND SPOT IN THE DEVELOPMENT OF CRYPTOCURRENCIES? A STUDY ON THE POWER TO DISCHARGE OF CRYPTOCURRENCIES IN FRENCH AND COLOMBIAN LAW[1]

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Crypto-currencies are not widely used as a means of payment in Colombia or the European Union. This observation leads us to question the compatibility of crypto-currencies with payment law, and in particular the conditions under which crypto-currencies can be admitted as having a power to discharge, from a Franco-Colombian perspective, which enables us to approach the issue through two civil law systems, albeit subject to different economic and political contexts. On analysis, French and Colombian payment law are ill-suited to crypto-currencies, admitting them only as a conventional means of payment, since they do not benefit from a universal power to discharge. Although the legislation applicable to crypto-currencies has recently been strengthened, notably with the MICA regulation in Europe, payment law still needs to be adapted to ensure that crypto-currencies are admitted as a genuine means of payment, even if this means enacting measures to protect certain users. How crypto-currencies are used will depend on the level of trust they can inspire.

Will it soon be possible to pay for one's *baguette* or *arepa* using a cryptocurrency?

1. The lukewarm reception of cryptocurrencies in the domain of payment in Europe – There has been an undeniable development of cryptocurrencies. Though, while the latter

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or virtual currencies, issued based on blockchain technology,[2] have significantly expanded, they have yet to be part of our daily lives as they have not become ordinary payment methods. That is what was revealed in a study published in December 2022 by the European Central Bank: though the Europeans use cryptocurrencies, even marginally, it is mainly for financial investment, and seldom as a means of payment.[3] That observation cannot but be surprising: virtual currencies have not become usual in the context of payment, even though the primary purpose of the blockchain was precisely to create an alternative payment system.[4] Isn't the completion of that payment system, which encounters many resistances, an ordeal[5] for the global project supported by the 'crypto' revolution? Is payment destined to remain a blind spot in the development of cryptocurrencies? Beyond that question, is this a general situation or is it specific only to Europe?

2. On the usefulness of comparing French and Colombian law – In order to try to provide an answer to some questions that have been asked, comparing two countries like France and Colombia is undoubtedly useful, and for two reasons at least. The first is that those countries have a civil-law tradition: French law and Colombian law belong to the same

2. See, in general, esp. M. Mekki, 'Les mystères de la blockchain' (2017) Recueil Dalloz, 2160; G. Canivet, 'Blockchain et régulation' (2017) N° 36 *JCP E* 1469; P. Barban and V. Magnier (eds), *Blockchain et droit des sociétés* (Dalloz 2019) esp. 'Introduction', 7, N°s 4 to 8; N. Laurent-Bonne, 'La re-féodalisation du droit par la blockchain' (2019) Dalloz IP/IT 416; H. de Vauplane, 'Les nouvelles représentations monétaires: crypto-monnaies, stablecoins, monnaies digitales des banques centrales' (2020) N° 3 Revue de Droit bancaire et financier File 15; M. Audit, 'Le droit international privé confronté à la blockchain' (2020) N° 4 Revue critique de droit international privé 669, 669-672; P. Barban (coord.), File 'Le recours à la technologie blockchain en droit des sociétés' (2021) N° 178 Actes pratiques et ingénierie sociétaire, 3 and esp. P. Barban, M. Julienne, 'Notions de base sur la *blockchain*', esp. 4-5; G. A. Noriega C., '¿Blockchain es más que criptomonedas? presente y futuro' (2022) N° 29 Apuntes contables, Facultad de contaduría pública – Universidad Externado de Colombia, 51. See also esp. on technical aspects, P. De Filippi, *Blockchain et cryptomonnaies* (2nd edn, Que sais-je?, Puf 2022).
   See also the series of conferences organised by Institut de Recherche pour un Droit attractif and the French Cour de Cassation, esp. <https://www.courdecassation.fr/agenda-evenementiel/intelligence-artificielle-et-droit-des-contrats>, the collected papers of which are published in 'Dossier: La *blockchain*: de la technologie à la technique juridique' (2019) Dalloz IP/IT 414ff and <https://www.courdecassation.fr/agenda-evenementiel/de-la-technologie-des-algorithmes-la-technique-juridique> accessed 26 February 2023.
3. *Study on the payment attitudes of consumers in the euro area* (SPACE) – 2022, December 2022, European Central Bank, Eurosystem, 56-57. <https://www.ecb.europa.eu/stats/ecb_surveys/space/html/ecb.spacereport202212~783ffdf46e.en.html#toc6> accessed 26 February 2023.
4. See G. Gensler, Chair of the US Security and Exchange Commission, Speech 'Statement on Financial Stability Oversight Council's Report on Digital Asset Financial Stability Risks and Regulation Before the Financial Stability Oversight Council Open Meeting', Oct. 3 2022, <https://www.sec.gov/news/speech/gensler-statement-fsoc-meeting-100322> accessed 26 February 2023: 'The first big crypto token, was proposed 14 years ago this month, on a cypher-punk mailing list' and calling the crypto-asset market 'teenager'. See also, mentioning the 'exaggerated ambition' of the blockchain, P. Barban and V. Magnier, 'Avant-propos' in *Blockchain et droit des sociétés* (n 2) 3, as well as 'Introduction' on Bitcoin as the 'first application' of the blockchain. Some Colombian authors make the same remark: G. A. Noriega C., '¿Blockchain es más que criptomonedas? presente y futuro' (n 2) 50-51 and 62; J. A. Padilla Sánchez, 'Blockchain y contratos inteligentes: aproximación a sus problemáticas y retos jurídicos' (2020) N° 39 Revista de Derecho Privado, 182.
5. Compare, quoted by P. Storrer, '"The collapse of FTX", une histoire ordinaire?' (2023) N° 01 Bulletin Joly Bourse, 7, D. Beau in 'Le monde des crypto actifs: l'épreuve de vérité' in Le Figaro 6 January 2023 evoking the 'ordeal' <https://www.banque-france.fr/intervention/le-monde-des-crypto-actifs-lepreuve-de-verite> accessed 4 March 2023.

legal 'family', as René David called it,[6] or to a same system of law, as we would say today.[7] More precisely, they are two legal systems belonging to the Romano-Germanic family, which is mainly characterised by the strong influence of Roman law. That circumstance makes it easier to provide an 'efficient, ie accurate and precise, comparison'.[8] The second reason is that those two countries are in two different economic and monetary contexts. While France is a member of the European Union and, as a consequence, is within an economic zone of monetary integration, Colombia is one of the emerging economies most likely to consider cryptocurrencies as a solution to some difficulties, such as the inflation of the local currency.[9] One could also add that Salvador, a Latin-American country, now admits Bitcoin as legal tender.[10] Thus, comparing French and Colombian law will allow to develop a more global approach to the legal treatment of cryptocurrencies which are a global phenomenon. Beyond that, it will make it possible to show that legislators are more interested in regulating crypto-assets generally, without taking into account the specificities of cryptocurrencies, which leaves important questions without any answer. Similarly, the analysis of French and Colombian law will evidence that, independently of technical difficulties to comprehend cryptocurrencies as real currencies, the problems linked to their characterisation are above all issues of legal policy. Lastly, this study will show that, without denying how important the legal classification of cryptocurrencies is, the practical questions raised by the latter's accelerated development should elicit similar answers on the part of our legislators.

3. The weak reception of cryptocurrencies in the domain of payment in Colombia – In Colombia, it is possible to observe that cryptocurrencies are used for investment rather than payment,[11] and some authors underline that circumstance in order to question a system of regulation based on the almost exclusive role of cryptocurrencies as a means of exchange

6. R. David, C. Jauffret-Spinosi and M. Goré, *Les grands systèmes de droit contemporain (*12th edn, Dalloz 2016) N° 16, 15-16: 'There is an infinite diversity of laws, if one considers the content of their rules; it is less so if one considers the more fundamental and stable elements thanks to which it is possible to discover the rules, interpret them and clarify their value (…). The grouping of laws into families helps presenting and understanding today's different laws by reducing them to a limited number of types (…). The notion of 'families of laws' does not correspond to a biological reality; it is used for teaching purposes, as 'only a preliminary point', to highlight the similarities and differences between different laws'.
7. B. Martinez Cardenas, 'Nueva perspectiva del sistema de derecho continental en Colombia' (2011) Ano 17 N° 2 *Revista Ius and Praxis*, 26. See R. Legeais, *Grands systèmes de droit contemporains, Approche comparative* (3rd edn, LexisNexis 2016) N° 189, 113: 'Different words and expressions are used: system, family, group of systems that may be divided into subgroups rather than families (…). Despite its wear and tear, the notion of "family" can still be used, but it is not enough to present the legal systems, and that is why we think it is necessary to use the notions of "group" and "subgroup"'.
8. M. Fromont, 'Réflexions sur l'objet et les méthodes du droit comparé' in *Liber amicorum, Mélanges en l'honneur de Camille Jauffret-Spinosi* (Dalloz 2013) 387: 'Finally, it is only possible to compare laws within European or Western legal systems. Then those laws share enough common points to allow efficient, that is, accurate and precise comparison'.
9. That is the case of Argentina or Venezuela <https://www.elconfidencial.com/mundo/2021-09-09/Bitcoin-latinoamerica-el-salvador-devaluacion_3280922/> accessed 18 May 2023.
10. infra esp. N° 63.
11. J. Ochoa Hoyos, *Guía práctica sobre el tratamiento legal de las criptomonedas en Colombia: recomendaciones y reflexiones*, Centro de Estudios Regulatorios <https://www.cerlatam.com/publicaciones/guia-practica-sobre-el-tratamiento-legal-de-las-criptomonedas-en-colombia-recomendaciones-y-reflexiones/> accessed 25 February 2023; K.J. Carvajal Aragón, N. Rivillas Arrubla and J. Diego Sánchez Posada, *Tendencia en el uso del Bitcoin como medio de pago e inversión en Colombia entre los años 2017 al 2020*, Tecnológico de Antioquia Institución universitaria, Facultad de Ciencias Administrativas y Económicas, 2021, 32 <https://dspace.tdea.edu.co/bitstream/handle/tdea/1723/18.%20TG%20II%20-%20Rivillas%2C%20Sanchez%20y%20Carvajal.pdf?sequence=1&isAllowed=y> accessed 26 February 2023.

of goods and services, though it is not the only way they can be used.[12] It would thus seem, indeed, that the reception of cryptocurrencies in the area of payment remains rather weak not only in Europe but also in other countries, like Colombia. Based on that observation, and before studying the prospects of the primary purpose of the blockchain which is to create an alternative payment system, let us first come back to the technological revolution of the blockchain and cryptocurrencies.

4. The origins and the foundations of cryptocurrencies – This technology is not very recent. The blockchain, which was invented in the 1990s, developed thanks to the support of some groups – the cypherpunks, who, as early as the end of the 1970s, wanted to ensure that technological progress in cryptography would be democratically shared and decided to support privacy and freedom of expression in the digital space, together with crypto-anarchists, who wanted to be free from State yoke.[13] From that ideological perspective, the implementation of a system of decentralised payment appeared as a logical and necessary outcome.[14] Thus, at the heart of the reasons for the emerging of the blockchain, particularly of cryptocurrencies, there was a political, libertarian project which advocated for the establishment of monetary, cross-border, autonomous systems freed from the authority of the States.[15] The initial project was based on the claim that cryptocurrencies would be outside the law and would bring about a change in society.[16] Globally, what happens is disintermediation, as the intervention of usual trustworthy third-parties is replaced with a secured technology based on cryptography.[17] The implementation of an alternative payment system was thought to be all the more pressing as the financial crisis showed the failure of the institutional system.[18] After several attempts, Bitcoin was created in 2008 by Satoshi Nakamoto, whose identity remains unknown.[19] Technically speaking, Bitcoin is based on a blockchain which works thanks to 'double-key asymmetrical cryptography', ie the method allowing to authenticate transactions thanks to the use of a private key which is personal to the user and a public key which may be circulated.[20] The system implies the intervention of miners who allow for cryptocurrencies to be issued and for transactions realised in the blockchain to be recorded: those operations are subject to the identification of a more or less long series of characters which produces a 'digital fingerprint' authenticating the operation.[21] In so doing, they are involved in securing the process. The process is different from

12. J. Ochoa Hoyos (n 11).
13. P. De Filippi (n 2) 6ff. See also on the origin of the project, N. Laurent-Bonne (n 2) 416.
14. P. De Filippi (n 2) 9-10: 'For cypherpunks as well as crypto-anarchists, the disintermediating of financial transactions was one of the foundations on which to establish a new society ideal'.
15. See also on the political and philosophical foundations of the development of the blockchain and cryptocurrencies, D. Legeais, *Blockchain* (1st January 2020) JurisClasseur Droit bancaire et financier, nº 36ff.
16. See also A. d'Ornano, 'Sur le projet Libra' (2020) Nº 1 Revue critique de droit international privé, 178 on the 'society ambitions' of Libra; M. Audit (n 2) 674.
17. P. De Filippi (n 2) 3-5 and 104ff.
18. D. Plihon, *La monnaie et ses mécanismes* (8th edn , La Découverte 2022) 4 and 50-51.
19. P. De Filippi (n 2) 14.
20. P. De Filippi (n 2) 15-19. See also M. Julienne, 'Les crypto-monnaies: régulation et usages' (2018) Nº 6 Study 19 Revue de Droit bancaire et financier, nº 1.
21. P. De Filippi (n 2) 23ff and D. Legeais (n 15) nº 8.
Data miners are the natural or legal persons checking the transactions using cryptocurrencies and are therefore a sort of system administrators, only in that sense. They confirm each transaction via a complex mathematical process consisting in solving a cryptographic algorithm. After checking, the system creates a new node with the information of the transaction and, with the creation of that node, the cryptocurrency is transferred. When they have solved algorithms, data miners receive new cryptocurrencies. That is why they are also users of the system: S. Canales Gutiérrez, *Bitcoin, la moneda descentralizada de curso voluntario, como equivalente funcional del peso colombiano* (Ibáñez 2022) 46-47.

other forms – banknote-and-coin and scriptural – of currencies in that it no longer corresponds to writing but to a digital code,[22] as well as from the famous electronic money.[23] Actually, in French law, the latter is not really a currency.[24] It is not either in Colombian law, where it is considered as an electronic method of payment, which includes for example *Paypal*[25] or, according to some authors, as a digital representation of fiduciary currency having legal tender.[26] Cryptocurrencies are therefore a completely new process which is difficult to classify.

5. Uncertainties surrounding cryptocurrencies and the blockchain – Beyond that, this technological progress, which is slow, causes ambivalent reactions. Cryptocurrencies and the blockchain fuel important fears, which are a matter of concern for the national and international legislators and regulators.[27] The increased risk of money laundering, financing crime and terrorism has been underlined many times.[28] The environmental consequences linked to transactions realised on the blockchain, because of the high quantity of energy that is necessary, have become major concerns.[29] The existence of significant implications related to data protection has also been noted.[30] The recent bankruptcy of FTX in the United

22. H. de Vauplane (n 2) nº 1.
23. On the distinction between cryptocurrencies and electronic money, esp. N. Mathey, 'La nature juridique des monnaies alternatives à l'épreuve du paiement' (2016) Nº 6 File 41 Revue de Droit Bancaire et Financier, Nº 8; D. Carreau, C. Kleiner, 'Monnaie' (June 2017) Répertoire de droit international Dalloz, nº 12.
Contra according to whom stablecoins, when they are backed by legal tender, may be called electronic money in the sense of Article L. 315-1 of the French Monetary and Financial Code, C. Pommier, V. Mamelli, A. Cazalet, 'Thème 2: Valoriser et transmettre le patrimoine dans le monde numérique, Partie I – Le patrimoine entrepreneurial, Titre 1 – L'identification des actifs numériques, Sous-titre 1 – La présentation des actifs numériques, Chapitre 1 – Le développement de la cryptoéconomie' in *Rapport du 117e Congrès des notaires de France*, 2021, Nº 2-23 <https://rapport-congresdesnotaires.fr/2021-rapport-du-117e-congres/2021-co2-p1-t2-st1-c1/#ftn0031> accessed 2 March 2023.
Even though sometimes those two expressions are used as synonyms, at least by a few Colombian administrative authorities <http://www.nuevalegislacion.com/files/susc/cdj/conc/ccirc_sf_52_17.pdf> accessed 25 February 2023.
24. Electronic money is defined in Article L. 315-1 I. of the Monetary and Financial Code as follows: 'Electronic money is a monetary value which is stored under a digital form, including a magnetic one, and represents a claim on the issuer which is issued on receipt of funds for payment purposes as defined in Article L. 133-3 and which is accepted by a natural or legal person other than the electronic money issuer.' The mechanism would not be a new currency, but rather a new way of transferring scriptural money, using digital new information and Internet technologies (on that topic, esp. D. Plihon (n 18) nº 43 as well as N. Mathey (n 23) nº 8; J. François, *Traité de droit civil*, *Christian Larroumet (ed.), Tome 4, Les obligations, Régime général* (6th edn, Economica 2022) nº 61).
25. A. Barroilhet Díez, 'Criptomonedas, economía y derecho (2019) vol. 8 Nº 1 Revista Chilena de Derecho y Tecnología, 31.
26. M. Alonso Jiménez, 'La obligación dineraria y las criptomonedas como instrumento sustitutivo de pago', Blog de Derecho de los Negocios, Universidad Externado de Colombia, Bogotá, 2018 <https://dernegocios.uexternado.edu.co/negociacion/la-obligacion-dineraria-y-las-criptomonedas-como-instrumento-sustitutivo-de-pago/> accessed 25 February 2023.
27. G. Canivet (n 2).
28. Comp. P. De Filippi (n 2). 117-18 for whom the blockchain could be a solution to money laundering; F. Fleuret, A. Lourimi and W. O'Rorke, '3 questions. Vers un droit des crypto-actifs et de la blockchain? (2021) Nº 5 *JCP E* 85.
29. esp. P. De Filippi (n 2) 25, 35 on the energy costs of Bitcoin because of mining. See also G. A. Noriega C., '¿Blockchain es más que criptomonedas?, presente y futuro' (n 2) 51.
30. A. d'Ornano (n 16) 184; M. Aglietta and O. Lakomski-Laguerre, 'VII/ Les cryptomonnaies en plein essor: les banques centrales lèvent leurs boucliers!' in *L'économie mondiale* (CEPII, La Découverte 2021) 103-17; M. Pilkington, 'De Libra 1.0 à Libra 2.0 (Diem): entre échec programmé et pertinence renouvelée pour l'économie politique' (2022) 3 vol. 132 Revue d'économie politique, 397-420, esp. 409-11. It is quite reveal- ➤

States has caused a good deal of commotion[31] and some platforms have asked for insolvency proceedings to be initiated.[32] Generally speaking, the process is a source of concern for the stability of the system given the risks it entails for its users.[33] Regulatory authorities thus regularly intervene by issuing general warnings,[34] or even deal with particular cases.[35] At the same time, however, the advantages of the blockchain for payment applications have been put forward, among which speed, reducing transaction costs, or even going beyond the diversity of national currencies.[36] One could also add that some political and economic contexts could bring about some renewed interest for cryptocurrencies, which explains why some Latin American States[37] are openly favourable to cryptocurrencies and regard them as a 'political tool for rebellion'[38] to challenge, in a way, the existing monetary order guided by global policies set by international institutions like the IMF, or at least to fight against rampant inflation which undermines trust in national currencies.[39] It is therefore in the context of a complex debate, which entails political if not ideological stances, that the leg-

ing of that issue that, in the last Colombian bill aiming to regulate cryptocurrencies and the approved version of the House of Representatives, that issue was raised: see Art. 4 (f) of Bill 139 of 2021 <http://svrpubindc.imprenta.gov.co/senado/index.xhtml> accessed 25 February 2023.

31. On that topic, P. Storrer, '"The collapse of FTX", une histoire ordinaire? (2023) N° 1 Bulletin Joly Bourse, 7, putting those concerns into perspective.
32. C. Boismain, 'Les détenteurs de crypto-monnaies sont-ils des créanciers chirographaires des plateformes d'échange? À propos de la procédure d'insolvabilité des plateformes Voyager et Celsius' (2022) N° 37 Recueil Dalloz, 1871.
33. T. Bonneau, *Régulation bancaire et financière européenne et internationale* (Bruylant 2022) n° 506.8.
34. For example, D. Beau, 'Comment assurer le bon fonctionnement de notre système de paiement?', Speech France Payments Forum, 9 November 2021 <https://acpr.banque-france.fr/intervention/comment-assurer-le-bon-fonctionnement-de-notre-systeme-de-paiement-lere-du-numerique-0> accessed 4 March 2023. See also European Banking Authority, 'Warning to consumers on virtual currencies', EBA/WRG/2013/01, 12 December 2013 <https://www.eba.europa.eu/eba-warns-consumers-on-virtual-currencies> accessed 4 March 2023, and more recently 'Crypto-assets: ESAs remind consumer about risks' <https://www.eba.europa.eu/financial-innovation-and-fintech/publications-on-financial-innovation/crypto-assets-esas-remind-consumers-about-risks> accessed 4 March 2023.
On that topic, F. Drummond, 'Loi Pacte et actifs numériques' (2019) N° 4 Bull. Joly Bourse, 60, N° 3 highlighting the differences in points of view of the MFA and the Banque de France. That is the case in Colombia, where administrative authorities, via circulars, concepts and recommendations, warn the public in general and the monitored entities of the risks of operations in cryptocurrencies: in that sense Concepto C19-49344 of the Central Bank's Management <https://www.banrep.gov.co/es/banco/junta-directiva/conceptos/c19-49344> accessed 25 February 2023.
35. For example, recently, the proceedings of the SEC against crypto-currency investment firms <https://www.lesechos.fr/finance-marches/marches-financiers/cryptos-gemini-et-genesis-poursuivis-par-la-sec-1897138>. See also the case, in Colombia, in which the Superintendence of Companies launched an investigation against Ping Nine S.A.S., a multi-level marketing company, about a massive, regular and unauthorized collection of resources from the public via the mode of money collection in negotiations in cryptocurrencies <https://www.infolaft.com/supersociedades-frena-operacion-de-multinivel-de-criptomonedas> accessed 1 March 2023.
36. D. Legeais (n 15) n° 59. See also F. Drummond (n 34) n° 2.
37. That is the case especially of Salvador where Bitcoin has been granted legal tender status or Venezuela and Argentina, where the devaluation of the Bolivar and of the Peso is important <https://es.cointelegraph.com/news/cryptocurrencies-a-shelter-against-the-inflation-suffered-by-latin-america> accessed 3 March 2023). The case of Cuba is also revealing: Liliet Díaz De Armas, 'Las criptomonedas en Cuba. Su importancia en la economía' <https://webcache.googleusercontent.com/search?q=cache:-CF00PiezuEJ:https://dspace.uclv.edu.cu/bitstream/handle/123456789/13459/Liliet%2520D%25C3%25ADaz.%2520Convenci%25C3%25B3n.pdf%3Fsequence%3D1%26isAllowed%3Dy&cd=1&hl=fr&ct=clnk&gl=co> accessed 3 March 2023.
38. In that sense <https://elpais.com/economia/2021-09-04/las-criptomonedas-la-nueva-herramienta-politica-de-los-gobiernos-rebeldes-de-america-latina.html?event_log=go> accessed 3 March 2023.
39. <https://es.cointelegraph.com/news/cryptocurrencies-a-shelter-against-the-inflation-suffered-by-latin-america> accessed 3 March 2023.

islators are trying to build a way to deal with the technological innovation of the blockchain, and the products and methods resulting from it, which are not easily integrated into our usual categories.

6. The acceptance of the blockchain in French and Colombian law – In the domain of regulation,[40] the process of the blockchain has been admitted in French and Colombian law. In French law, Act N° 2019-486 of 22 May 2019 *on the growth and transformation of companies* called the Pacte Act has consecrated the Shared Digital Recording System which consists, pursuant to Article R. 211-9-7 of the Monetary and Financial Code, in a register '*designed and implemented to ensure the recording and integrity of entries and directly or indirectly allow to identify the holders of securities, the nature and number of held securities*'.[41] Moreover, the same text has included the digital assets in the Monetary and Financial Code at Article L. 54-10-1 – a category to which cryptocurrencies belong –[42] in order to control the providers of digital-asset services defined in Articles L. 54-10-2 and following of the same code.[43] At the European level, while cryptocurrencies remain excluded from the directive on payment services, which limits the possibility to control them, they have been included into the European anti-money laundering unit.[44] Beyond that, a new regulation will soon be applicable with the *Markets in Crypto-Assets* (MiCA) Regulation dated 24 September 2020.[45] Regulation of cryptocurrencies, which is still being built, is therefore progressively strengthened, with the idea of a moderate and controlled integration of the process. In Colombia, the National Development Plan (NDP)[46] 2018-2022, adopted by Act 1955 of 2019, expressly refers, in Article 147, to the phenomenon of public digital transformation. It must be underlined that the NDP is no longer applicable because of the change of government, which has proposed a new National Development Plan, adopted in Act 2294 of 2023. However, the former NDP provided, for example, that the State entities at national

40. T. Bonneau and T. Verbiest, *Fintech et Droit, Quelle régulation pour les nouveaux entrants du secteur bancaire et financier?* (2nd edn, Revue Banque 2020) 27ff.
41. Seelastly the amendment of that text by Decree N° 2023-421 of 31 May 2023 *on the adoption of securities law to the European regulation called 'pilot regime'* and Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 *on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) N° 600/2014 and (EU) N° 909/2014 and Directive 2014/65/EU* [2022] OJ L 151/1 <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX-%3A32022R0858> accessed on 2 July 2023. Compare with Art. L. 223-12 of the Monetary and Financial Code created by Order N° 2016-520 of 28 April 2016 *on savings bonds* then abrogated by Order N° 2021-1735 of 22 December 2021 *modernising the framework of crowdfunding.*
42. F. Drummond (n 34) n° 17; D. Legeais (n 15) n° 37, as well as n° 44; H. de Vauplane (n 2) n° 2.
43. F. Drummond (n 34).
44. T. Bonneau, *Droit bancaire* (14th edn, LGDJ 2021) n° 94.
Indeed, Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 *amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU* [2018] OJ L 156/43 gives, in Article 1, the following definition of virtual currencies: 'a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and can be transferred, stored and traded electronically'.
45. Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 *on markets in crypto-assets, and amending Regulations (EU) N° 1093/2010 and (EU) N° 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937* [2023] OJ L 150/40. See on European regulation, T. Bonneau, Le 'Digital finance package', (2021) N° 1 Revue de Droit bancaire et financier, Study 1. J. Granotier, 'Finance numérique et marchés des crypto-actifs: l'Europe en pointe?' (2023) N° 2 Droit des sociétés, 2.
See developments infra n° 67 on the state of the European regulation.
46. It is the legal and formal instrument via which the Government sets its objectives allowing subsequent assessment of its management: see Art. 339 of the Political Constitution.

level would have to include into their action plans the digital transformation component. Specifically, Nº 6 of that provision provides that emerging technologies of the fourth industrial revolution must be given priority, including, in particular, Distributed Ledger Technologies (DLT), of which the blockchain is part.[47] The Minister of Information and Communication Technologies (MinTIC) also published two guide books, in 2020[48] and 2022[49], in order to stimulate the adoption and implementation of projects involving the blockchain technology for the Colombian State. Aside from that blockchain-favourable general regulation, the Colombian legislator remains silent on the question of cryptocurrencies, even though regulatory administrative authorities have issued many recommendations and releases on that topic.[50] In this context, the issue of payment seems nonetheless to have remained, in many respects, in the background, in French and in Colombian law. Payment in cryptocurrencies is not subject to specific regulation and therefore, in reality, comes under the common law of payment for a large part. That creates a grey area which is going to lead us to assess the discharging power of cryptocurrencies, and, from that perspective, the adaptability of cryptocurrencies to payment law or the necessity to adapt the latter to the former.

7. The main difficulties of a legal analysis of cryptocurrencies – A few preliminary remarks on that analysis should be made, in relation to the definition of the concepts at issue and difficulties of the matter. First, a legal study on cryptocurrencies comes up against the technical dryness of this process. The landscape of virtual currencies is extremely diverse. There are many cryptocurrencies which rely on different technical mechanisms. Then, the evolution of the technique on which those virtual currencies are based, in addition to its technical complexity, is quite fast. With the permanent development of correcting mechanisms,[51] the process seems to be undergoing constant renewal like the Lernaean Hydra and the analyst feels they are facing a Herculean ordeal. Second, whether cryptocurrencies have or may have a discharging power and therefore may become a real method of payment a priori refers to whether they have the capacity to be considered as currencies or real currencies. Deciding that issue encounters different difficulties. First, that of the characterisation as a currency, of the understanding of a concept which, in itself, is difficult to delineate. There has been a long debate, in which economists and jurists, and functional and material analyses have been opposed.[52] It reveals a paradox or even an aporia, which results from the fact that the capacity of cryptocurrencies to ensure payment would be part of their classification as currencies, but that their being classified as currencies would favour their being admitted as methods of payment.

47. Even though, on many occasions, the two words – blockchain and DLT technologies – are used as synonyms, some authors clarify their differences: <https://gobiernodigital.mintic.gov.co/692/articles-161810_pdf> accessed 1 March 2023. See also P. Sanz Bayón, 'Criptomonedas: naturaleza jurídica y regulación europea de los proveedores de servicios de cambio y custodia de monederos electrónicos' in L. F. López Roca, M. Baquero Herrera and J. A. Corredor Higuera (eds), *Los mercados financieros ante la disrupción de las nuevas tecnologías digitales* (Universidad Externado de Colombia 2021) 335, fn 6.
48. That guide is available at <https://gobiernodigital.mintic.gov.co/692/articles-161810_pdf> accessed 25 February 2023.
49. That guide is available at <https://drive.google.com/file/d/1wwiS8XSu4xLdkwhzW0w7D_7jmY7G_tpW/view> accessed 25 February 2023.
50. infra nº 20ff.
51. P. de Filippi (n 2) nº 39ff.
52. S. Boada Morales, 'La naturaleza jurídica de la cuenta bancaria' (2019) Nº 36 Revista de Derecho Privado, 177-78. See generally, infra nº 54ff.

8. Cryptocurrencies, payment and the power to discharge – The primary perspective of analysis should then consist in studying the compatibility of cryptocurrencies with payment law and, in particular, the regulation of the power to discharge in French and Colombian law. What is the power to discharge? It is the effect produced by valid payment. Pursuant to Article 1342 of the French Civil Code, payment – defined as 'the voluntary execution of a performance that is due'[53] – has, first, a discharging effect on the debtor 'in relation to the creditor' and, second, an extinctive effect except in case of personal subrogation of a third party.[54] Article 1626 of the Colombian Civil Code provides that payment is 'performance of what is owed'.[55] Apart from the voluntary character of the payment required by the French legislator, on which the Colombian legislator remains silent,[56] the discharging effect of the debtor 'in relation to the creditor' and the extinctive effect except personal subrogation of a third party[57] are similarly acknowledged in the two legal systems. Thus, the discharging power is the capacity of the performance of a service to discharge a debtor. However, in relation to cryptocurrencies, the issue of the discharging power becomes particular. It refers, by comparison or mirror-image, to that of the currency, to the capacity that this instrument has to discharge, in a general, common or universal way, the debtor from an obligation.

9. What is the discharging power of cryptocurrencies? Does this discharging power make virtual currency a currency? Is this desirable or possible? As was said, we will first consider whether the current regulation of payment gives cryptocurrencies a power to discharge. Second, more fundamentally, and from a prospective standpoint, we will study whether cryptocurrencies have the capacity to become currencies and what frame it is necessary to provide them with. That is why, to analyse the discharging power of cryptocurrencies, we will present in a first part the state of law *de lege lata* (I) and, in a second part, the characterisation and the treatment they may get *de lege ferenda* (II).

53. *French Civil Code, Code civil français, English-French-Arabic*, under the supervision of M. Séjean (LexisNexis 2020) 276.
54. Article 1342 of the French Civil Code, from *French Civil Code, Code civil français, English-French-Arabic* (n 53): 'Payment is the voluntary execution of a performance that is due. It must be made as soon as the debt becomes demandable. It releases the debtor in regard to the creditor and extinguishes the debt, except when legislation or the contract provided for subrogation into the rights of the creditor.'
55. Article 1626 of the Colombian Civil Code provides that 'El pago efectivo es la prestación de lo que se debe'.
56. On that voluntary feature, M. Julienne, *Régime général des obligations* (4th edn, LGDJ 2022) 362, nº 528. See generally, the explanations on the absence, in the Colombian Civil Code, of any reference to the voluntary nature of payment and on the advantages of that stance, unlike the requirement of voluntary character as provided for in French law: P. Natalia Robles Bacca, 'El cumplimiento de las obligaciones en el contexto de la reforma de 2016 al derecho francés de las obligaciones y su posible pertinencia para orientar futuros cambios en la materia en el ordenamiento colombiano' in A. Riaño Saad and Silvana Fortich (eds), *La reforma francesa del derecho de los contratos y de las obligaciones:¿ fuente de inspiración para una futura reforma en derecho colombiano (*Universidad Externado de Colombia 2020) 588-90.
57. In that sense, Article 1666 of the Colombian Civil Code.

I. *De lege lata*, the state of the law of payment in cryptocurrencies in France and Colombia

10. In French law, *the reform of the law of contract, the regime of obligations and the proof of obligations* performed by the Order of 10 February 2016[58] has modified the system framing the payments of obligations of sums of money,[59] which is found mainly in the Civil Code and in the Monetary and Financial Code. How are cryptocurrencies integrated into that system? Not really well. The use of cryptocurrencies is not easily inserted into the payment mechanism of monetary obligations as regulated in French law. In Colombian law, unlike in French law, there is no specific regulation of monetary obligations – studying those obligations and their regime is done based on a few general provisions of the Commercial Code, others specific to the contract for the loan of money of the Civil Code and some specific provisions in the area of international operations.[60] Here again, the use of cryptocurrencies does not easily integrate into the domain of monetary obligations. However, thanks to some forms of reasoning, and provided that the parties agree, it is possible, in the current state of the law, to perform a conventional payment in cryptocurrencies. Beyond that result – which is the same in French and Colombian law – the observation leads one to wonder about the consequences of a payment in cryptocurrencies. Let us first go back to the possibility of conventional payment in cryptocurrencies (A) before studying the consequences of such payment (B).

A. The possibility of conventional payment in cryptocurrencies

11. Overview of the regulation of payment currency in French and Colombian law – In French law, the issue of payment currency is largely determined by European Union law, in addition to the different domestic texts regulating the payment of monetary obligations. The principle that is expressed in the Treaties of the European Union and the French Monetary and Financial Code as well as the Civil Code is that one should use the euro and the methods of payment regulated by the law to pay an obligation of a sum of money in France.[61] In Colombian law, monetary sovereignty and a few rules on payment would be an obstacle to cryptocurrencies being admitted as a means to extinguish monetary obligations. Parliament, being the holder of monetary sovereignty, which is understood as 'the power of the

58. Order N° 2016-131 of 10 February 2016 'The law of contract, The general regime of obligations, and proof of obligations, The new provisions of the Code civil created by Ordonnance N° 2016-131 of 10 February 2016 and including revisions made to the text by Act N° 2018-287 of 20 April 2018' translated into English by John Cartwright, B. Fauvarque-Cosson and S. Whittaker <https://www.justice.gouv.fr/traduction-lor-donnance-du-10-fevrier-2016-langue-anglaise> accessed 26 September 2023.
59. M. Julienne (n 56) 521.
See also on the modifications introduced by the ratification statute of 20 April 2018, M. Mekki, 'La loi de ratification de l'ordonnance du 10 February 2016, Une réforme de la réforme?' (2018) Recueil Dalloz, 900, n° 36.
60. A. Gámez Rodríguez, *Obligaciones de dinero, intereses y operaciones en criptomonedas* (Temis 2020) 61.
61. Generally, on payment currency in French law, S. Benilsi, 'Paiement' (February 2019 – updated December 2019) Répertoire de droit civil Dalloz; F. Grua, updated by N. Cayrol, 'V° Paiement, Fasc. 30: Régime général des obligations, Paiement des obligations de somme d'argent, Monnaie de paiement' (2017 – updated 6 July 2022) JurisClasseur Notarial Répertoire.

State to regulate the operation of the currency',[62] is the only competent authority to establish the currency having legal tender in the country. Articles 150 and 371 of the Political Constitution confirm that solution. More specifically, Article 150(13) provides that Congress has the power to 'determine the legal currency, its convertibility and the scope of its power to discharge'.[63] Article 371 provides that the Central Bank of Colombia – *Banco de la República* – is the authority issuing and regulating the legal currency, and Act 31 of 1992 on the functioning standard of the Central Bank, provides, in Article 6, that the monetary unit and unit of account of the country is the peso, issued by that monetary authority. In addition, Article 8 of that law provides that its value is expressed in pesos, in compliance with the Board of the Central Bank, and will be the only methods of payment having legal tender and, consequently, unlimited power to discharge.[64] The rules about payment which would prevent granting cryptocurrencies a power to discharge are to be found mainly in Article 874 of the Colombian Commercial Code. Pursuant to that Act, 'except indication to the contrary, the amounts stipulated in legal transactions will be in Colombian legal currency. The national currency having power to discharge at the moment of payment will be considered as the equivalent of the agreed upon currency, when it is not in circulation when payment is made.' That provision reaffirms the thesis according to which the official currency in circulation is the only one that may be used to perform a discharging payment.[65] Does this mean that only the euro in France or the peso in Colombia, transferred to the creditor by a recognised means, may allow the discharge of a debtor who has bound himself to paying a sum of money? While the rules about payment first seem to oppose the use of cryptocurrencies to pay, it is still necessary to assess the capacity of cryptocurrencies to be used to perform discharging payments. Different questions may be raised given the delineation of the texts providing for the use of a determined payment currency or their interpretation. There are many arguments aiming to allow cryptocurrencies to slip into the corners of the payment-framing system. However, the analysis of those arguments shows that cryptocurrencies may not prevail in payments just like official currencies, but they may only work when the parties agree to use them for payment. In other words, in French and Colombian law, cryptocurrencies do not have a legal power to discharge (1) but may have a conventional one (2).

1. The denial of a legal discharging power

12. Though the denial of the legal discharging power of cryptocurrencies exists in French and Colombian law, the arguments leading to such a conclusion are not necessarily the same in those two legal systems. That is why it is first necessary to present the situation in French law (a) before studying that in Colombian law (b).

62. Corte Constitucional Colombiana, Sentencia C-021 de 1993, M.P.: Ciro Angarita Barón.
63. S. Naranjo Valencia, 'Desafíos jurídicos que implica el pacto de criptomonedas como medio de pago en la celebración de un contrato de compraventa civil. Una mirada desde el neoconstitucionalismo' (2018) Nº 50 Revista de Derecho y Economía, 110.
64. J. Mendoza Gómez, 'criptomonedas' in Y. López Castro, J. Oviedo Albán and M. F. Ávila Cristancho (eds), *Transformaciones del derecho comercial*, (Tirant lo blanch 2021) 410; E. I. León Robayo and Y. Castro López, *Derecho mercantil consuetudinario* (1st edn, Universidad del Rosario Legis 2016) 67.
65. W. Namén Vargas, 'Obligaciones pecuniarias y corrección monetaria' (1998) Nº 3 Revista de Derecho Privado, Universidad Externado de Colombia, 44-45.

a. In French law

13. Legal tender, a doctrinal definition – In French law, the first issue is that of the obstacle of legal tender. Pursuant to the principle derived from European Union law, only euro banknotes and coins have legal tender. Indeed, Article 128 of the Treaty on the Functioning of the European Union provides that '1. The European Central Bank shall have the exclusive right to authorise the issue of euro banknotes within the Union. The European Central Bank and the national central banks may issue such notes. The banknotes issued by the European Central Bank and the national central banks shall be the only such notes to have the status of legal tender within the Union'.[66] What does this rule of legal tender cover? The answer is far from obvious and has led to many debates.[67] Thierry Bonneau has defined it as 'the decision taken by a State to mention that such and such monetary media must be accepted as methods of payment'.[68] On one side, according to a restrictive and usual vision, legal tender is limited to the obligation for the creditor to accept banknotes and coins in euros.[69] The French Penal Code sanctions non-compliance with that requirement – accepting euro banknotes and coins – with a fine provided for in Article R. 642-3.[70] As far as doctrine is concerned, Rémy Libchaber has expressed the idea that legal tender allows the debtor to impose some methods of payment.[71] Jean Carbonnier has defined legal tender, which he links to the principle of the nominal value of money, as 'the law-imposed obligation for a creditor to accept a determined monetary instrument as payment for a determined quantity of monetary units'[72] but he insists on the equivalence between the units used for payment and the units owed.[73] Caroline Kleiner describes legal tender, limited to the sole material media of banknotes and coins, as 'imposing upon the creditor to accept the means of payment presented by the debtor for the amount that is on the monetary denomina-

66. Official Journal of the European Union, 26/10/2012, C326/49.
See also Art. 16 Protocol (N° 4) on the statute of the European System of Central Banks and of the European Central Bank <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT> accessed 1st March 2023. See also Art. L. 122-5 and Art. L. 141-5 of the Monetary and Financial Code; on the texts founding legal tender, C. Kleiner, *La monnaie dans les relations privées internationales*, foreword by P. Mayer (LGDJ 2010) n° 143 and H. de Vauplane, 'Un euro numérique est-il légal?' (2023) N° 149 Revue d'économie financière, 121, esp. 122ff.
67. T. Bonneau, 'The concept of legal tender in France' in R. Freitag and S. Omlor (eds), *The Euro as Legal Tender, A comparative approach to a Uniform Concept* (De Gruyter 2020) 79, generally and especially on the definition difficulties, 80-81. See also on that topic, noting the lack of uniformity of the notion of legal tender, H. de Vauplane, 'Libra, Les défis juridiques du Libra et plus généralement des crypto-monnaies' (2020) N° 1 Revue de Droit bancaire et financier, Study 2, n° 4.
Compare in German law, S. Arnold, 'The Euro in German (private) law – monetary obligations and the mutual dependence of public and private law' in R. Freitag and S. Omlor (eds), *The Euro as Legal Tender, A comparative approach to a Uniform Concept* (De Gruyter 2020) 141, esp. 143-48.
68. T. Bonneau (n 67) 79, esp. 84: 'legal tender is the decision taken by a State mentioning that such and such monetary media must be accepted as methods of payment'.
69. F. Grua, updated by N. Cayrol (n 61) n° 6, presenting the debit card as not having legal tender (ibid n° 7).
70. F. Grua updated by N. Cayrol (n 61) n° 6. See also on that text and noting that the violation of the text – 'the refusal to accept euros' – does not entail the cancellation of the debt, T. Bonneau (n 67) 79, esp. 87.
According to whom that text does not found the obligation to accept paper money but is only designed to protect the face value of coins and banknotes, T. Le Gueut, *Le paiement de l'obligation monétaire en droit privé interne*, foreword by H. Synvet (LGDJ 2016) N° 478 à 481.
See also Art. R 642-2 of the Penal Code.
71. R. Libchaber, *Recherches sur la monnaie en droit privé*, foreword by P. Mayer (LGDJ 1992) n° 89.
72. ibid.
73. J. Carbonnier, *Droit civil 2, Les biens, Les obligations* (PUF 2004) n° 688: 'Legal tender is the affirmation of that equivalence: the law grants legal tender to the monetary instrument for a value (cf a. 642-3 N.C.P.), which is its nominal, facial value (printed on the front of the coin or the banknote).'

tions'.[74] If one follows that strict meaning, the rules about legal tender are not an obstacle to using cryptocurrencies for payment.[75] For the creditor not to be able to refuse euro banknotes and coins is one thing, for him to admit something else as payment is another, which would not be incompatible with the rule of legal tender. However, on another side, another vision, which gives a broader scope to legal tender, is that the rule prohibits payments in other currencies than the euro.[76] That position is sustained by Thomas Le Gueut who, based on a re-delineation of legal tender – which should not be limited only to banknotes and coins, but should include scriptural currency –[77] considers that 'legal tender is also the attribute of a currency – for example the euro – which is the only one to be admitted by law to circulate for payment on a given territory'.[78] According to that conception, legal tender is opposed to the advent and use of cryptocurrencies.

14. Legal tender as defined in case law – One must nonetheless note that despite doctrinal debates, legal tender has recently been defined in a case. The Court of Justice of the European Union gave its understanding of the concept of legal tender[79] when it examined a text forbidding the use of banknotes and coins to pay television licence fees in its decision of 26 January 2021.[80] The Court quoted the definition of legal tender as given in Commission Recommendation 2010/191/EU of 22 March 2010 *on the scope and effects of the legal tender of euro banknotes and coins* which defines it in view of its implications – obligation to accept euro banknotes and coins at their full face value and discharging power –[81] ie considering its functions.[82] According to the Court, the notion of legal tender 'signifies, in its ordinary sense, that that method of payment cannot generally be refused in settlement of a debt denominated in the same currency unit, at its full face value, with the effect of discharging the debt'.[83] Legal tender would consequently be opposed to the refusal of some methods of payment but would not say anything about the others being accepted. In short, it is not sure that legal tender as such is an obstacle to payment in cryptocurrencies.[84] For, as the quoted texts say, legal tender seems to be limited to an attribute of some monetary media, not to be related to a quality of legal currency.

74. C. Kleiner (n 66) n° 69: '*An outdated notion, legal tender only applies to media having a denomination* (…)', and n° 143. See also T. Bonneau (n 67) 79, esp. 82 according to whom legal tender is useless for scriptural currency which is linked to paper money.
75. Compare with N. Mathey (n 23) n° 18 for whom the lack of legal tender does not entail that the currency is disqualified.
76. S. Benilsi (n 61) n° 163 debating on the meaning of legal tender. Compare with T. Bonneau (n 67) 79, esp. 82.
77. T. Le Gueut (n 70) n° 474 to 477, and n° 483ff.
78. T. Le Gueut (n 70) n° 474 to 477, and N° 489.
79. *Contra* H. de Vauplane (n 66) 121, esp. 121 for whom that decision does not provide a definition of legal tender, and 133.
80. Joined Cases C-422/19 and C-423/19.2 *Johannes Dietrich and Norbert Häring v Hessischer Rundfunk* (2021); C. Kleiner, Chronique de droit bancaire international (2021) N° 5 Revue de droit bancaire et financier, n° 1ff.
81. Court of Justice of the European Union, 26 January 2021, n 78, points 8 and 49.
82. C. Kleiner (n 80) n° 1ff, esp. n° 4.
83. Court of Justice of the European Union, 26 January 2021, n 78, point 46. Compare with the definition suggested by Advocate General Giovanni Petruzzella, (Joined Cases C422/19 and C423/19 *Johannes Dietrich* (C422/19) *Norbert Häring* (C423/19) *v Hessischer Rundfunk* [2020] Opinion of AG Pitruzzella, points 108, 116, 124 and 125) on the occasion of that case: 'the concept of legal tender in EU law, as regards banknotes and coins (…) must be understood as entailing in principle the mandatory acceptance of euro banknotes by the creditor of a payment obligation, unless the contracting parties in exercising their contractual freedom have agreed on other means of payment or unless legislation adopted by the European Union or by a Member State'.
84. See also D. Carreau, C. Kleiner (n 23) n° 16.

15. Legal tender, different from power to discharge – In reality, legal tender should be differentiated from power to discharge,[85] which would be more likely linked to the exchange rate of the currency. According to Caroline Kleiner, the power to discharge defined as 'the capacity for the debtor to be discharged from their monetary obligation through the transfer of a monetary power included into a given medium, issued in a certain unit' would be linked to the currency rather than to its legal tender.[86] Then, while it is possible that legal tender may be indifferent to the power to discharge of cryptocurrencies, that would not be the case of the legal tender of the currency, which is, for the same author, the rule that sets 'the legal unit used on a territory'.[87] Having said that, one should note that the media having legal tender have a legal effect to discharge without the creditor having to intervene.[88] From that point of view, legal tender and power to discharge are necessarily linked.[89] However, outside legal tenders, the power to discharge is still possible if the parties agree.[90] In short, granting legal tender – which is a competence of the State –[91] implies the power to discharge of the medium in question, but the absence of legal tender does not oppose any and all discharging effects.

16. The principle of using the euro – Second, payment in cryptocurrencies comes naturally into conflict with provisions framing the payment of obligations of sums of money and requiring that the euro be used. First, the Monetary and Financial Code provides in Article L. 111-1 that 'The euro is the currency in France. A euro is divided into a hundred cents'. The French Civil Code[92] provides, as to the 'Dispositions specific to obligations of sums of money' and at Article 1343-3, that 'In France payment of an obligation of a sum of money is made in euro.'[93] A strict interpretation of that text is sometimes put forward, which would exclude using another currency and would result in prohibiting any payment in cryptocurrency.[94] Beyond that, different questions are raised as to the delineation of that text and its application to virtual currencies. Some have deduced from the refusal to classify cryptocurrencies as currencies, that payment in cryptocurrencies was not subject to the constraining regime of monetary obligations.[95] Such a reasoning, which is somewhat artificial, may

85. Compare with F. Grua, updated by N. Cayrol (n 61) n° 9 for whom legal tender is an attribute of currency and legal power is for all types of goods. See also D. Carreau, 'Le système monétaire international privé (UEM et euromarchés) (Volume 274)' in *Collected Courses of the Hague Academy of International Law*, first online publication: 1998 <http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789041113009_02> accessed 2 June 2023, 309, esp. 357-58 on the classic theory linking legal tender and discharging power. *Contra* M. Julienne, 'Les crypto-monnaies: régulation et usages' (2018) N° 6 Revue de droit bancaire et financier, Study 19, n° 9 according to whom the power to discharge is '*the corollary of legal tender which cryptocurrencies lack*'.
86. C. Kleiner (n 66) n° 69. Compare with R. Libchaber (n 71) n° 461 which distinguishes exchange rate, which is decisive to identify the '*units that can be given in payment*' and legal tender, which is related to the accepted media and instruments.
87. ibid.
88. T. Bonneau (n 67) 79, esp. 85.
89. On the link between legal tender and characterisation as a currency, see infra n° 55.
90. T. Bonneau (n 67) 79, esp. 85.
91. ibid 79, esp. 83 according to whom State authorities could grant legal tender to other media, like cryptocurrencies.
92. Compare with the new Belgian Civil Code in which contract law has just been amended by Act of 28 April 2022 and which does not include any rule about currency and payment <https://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&pub_date=2022-07-01&caller=list&numac=2022032058> accessed 3 March 2023.
93. *French Civil Code, Code civil français, English-French-Arabic* (n 53) 277. On that regulation generally, T. Bonneau (n 44) n° 745; M. Julienne (n 56) n° 571, 389.
94. M. Julienne (n 85) n° 14.
95. S. Benilsi (n 61) n° 166.

be found surprising insofar as it would allow to liberalise that practice by bypassing the system of monetary obligations, while the purpose of cryptocurrencies is precisely, for their supporters and users, to play the role of a currency. Moreover, Article 1343-3 of the Civil Code applying to payment 'in France',[96] some authors have also thought about the location of payment in cryptocurrencies. If it were not located in France, then Article 1343-3 of the Civil Code would not apply.[97] Here again, such a demonstration would lead to a sort of complacency towards the ambition of the issuers and users of virtual currencies, which is hardly desirable. However, it is true that localising on a national territory some operations performed on the *blockchain* and a possible transfer of cryptocurrencies remains difficult, if not impossible. The structurally transnational character of the uses of the blockchain has been noted[98] as well as the subsequent difficulty of identifying the applicable national law due to the characteristics of the blockchain itself, which cannot be linked to a national territory because of its immaterial and decentralised nature.[99] Subject to these interpretations, which allow to apply Article 1343-3 of the Civil Code to the payments in question, the text would oppose the use of cryptocurrencies for payment. That being said, one must acknowledge that the text provides for exceptions.

17. Exceptions to using the euro – Then, the question is whether cryptocurrencies may be included into the exceptions to using the euro. Article 1343-3 of the Civil Code allows for the possibility to use 'another currency' than the euro, '*if the obligation so denominated arises from an international transaction or from a foreign judgement*'.[100] This text, which provides a basis for admitting foreign currency clauses,[101] does not allow for the possibility of paying in cryptocurrencies with certainty, for, in order to do so, cryptocurrencies should be acknowledged as foreign currencies. However, characterisation as currencies, while sometimes accepted,[102] is widely denied.[103] At least, it has not been granted in French law for the moment. It would be the same within the framework of Article L. 112-5-1 which provides that 'By way of derogation to Paragraph 1 of Article 1343-3 of the Civil Code, satisfaction may be rendered in another currency provided the obligation providing for it proceeds from a financial futures instrument or a spot currency transaction'.[104]

96. D. Carreau, C. Kleiner (n 23) nº 127 highlighting that that French legal choice is an isolated one.
97. S. Benilsi (n 61) nº 166.
98. M. Audit (n 2) 672, as well as footnotes, and 682 on payment in cryptocurrencies. See also An. d'Ornano (n 16) 180, who makes the same observation.
99. In particular M. Audit (n 2) 677-78 and 684.
100. The same text (Art. 1343-3(2) Civil Code) goes on as follows: 'The parties may agree that payment will be made in a currency if it takes place between professionals, if the use of a foreign currency is commonly accepted for the transaction in question' *(*from *French Civil Code, Code civil français, English-French-Arabic* (n 53) 277).
101. On that issue, S. Benilsi (n 61) nº 140ff.
102. N. Mathey (n 23) nº 10ff, nº 34 and nº 35 calling them 'embryonic, in the making, or imperfect'.
103. On the denial to grant them foreign currency status, M. Audit (n 2) 683; S. Benilsi (n 61) nº 166. See also, refusing to grant them currency status, esp. M. Julienne (n 85) nº 9ff; T. Bonneau, T. Verbiest (n 40) 65; C. Pommier, V. Mamelli, A. Cazalet, 'Thème 2: Valoriser et transmettre le patrimoine dans le monde numérique, Partie I – Le patrimoine entrepreneurial, Titre 1 – L'identification des actifs numériques, Sous-titre 2 – Les qualifications, Chapitre 1 – Les éléments du débat' in *Rapport du 117e Congrès des notaires de France*, 2021, Nº 2-55ff <https://rapport-congresdesnotaires.fr/2021-co2-p1-t2-st2-c1/#> accessed 4 March 2023. See also Statement of François Villeroy de Galhau, Gouvernor of the Banque de France, Beijing 1st December 2017 on Bitcoin: '(…) Bitcoin has nothing to do with a currency or even a cryptocurrency'.
104. M. Audit (n 2) 683, fn 65.

18. The system framing payment instruments – Third, the issue of the regulation of payment instruments arises. Could operators provide payment services, which until now have been reserved for banking or payment institutions?[105] Leaving fiduciary currency aside, scriptural currency needs the intervention of payment instruments to circulate.[106] In the case of cryptocurrencies, it is the purpose of the blockchain. Bitcoin would allow the circulation of cryptocurrencies 'in a decentralised and perfectly secure manner'.[107] In other words, the aim is for Bitcoin to become a currency and, in addition, to efficiently ensure the means of its circulation. *Ripple* is even directly conceived as a payment system.[108] That function, as such, raises delicate issues. That those processes comply with the *corpus* of norms regulating payment services and instruments is not obvious. It has been showed that the characterisation of payment instruments according to the European Union did not include Bitcoin because it lacks a means of transfer of a scriptural currency.[109] Does this mean however that the provision of payment instruments by the blockchain could remain without framework? That is far from sure. Once again, the disqualification of virtual currencies, as founded as it is, leads to the opening of a space of freedom the relevance of which needs to be assessed[110] and which may, if need be, entail a modification of the existing legislation.[111] Beyond that, one should note that the *Cour d'appel de Paris* and the *Autorité de Contrôle et Prudentiel et de Résolution* have subjected the companies allowing to buy cryptocurrencies with legal currencies to the regulation of payment services imposing an authorisation.[112] Moreover, the systems imposing some payment methods may already oppose the use of cryptocurrencies. Admittedly, the issue is a delicate one in relation to the texts which oppose the use of some methods of payment, which, if interpreted literally, would leave a possible space for cryptocurrencies. That is the case of Article L. 112-6 of the Monetary and Financial Code, amended by Act N° 2016-1691 of 9 December 2016 *on the transparency, fight against corruption and modernisation of economic life* which indeed prohibits payments in cash and digital payments of some debts in view of a combination of their amount and other criteria – from a perspective of fighting against money laundering and the financing of terrorism.[113] Not being cash or electronic money, cryptocurrencies may not be subject to Article L. 112-6 of the Monetary and Financial Code,[114] which should make an adaptation of the text necessary. On the contrary, there remains that, without hesitation, when the law imposes a determined payment instrument, as in Article L. 112-6-1 of the

105. T. Bonneau (n 44) n° 94.
106. R. Libchaber (n 71) n° 116ff and n° 484.
107. P. De Filippi (n 2) 4.
108. D. Legeais (n 15) n° 42; P. de Filippi (n 2) 42.
109. T. Bonneau (n 33) 1011. *Contra* N. Mathey (n 23) n° 39 and 42.
110. T. Bonneau (n 44) n° 94.
111. Compare with T. Bonneau (n 33) 1013 for whom States could accept new payment instruments by adapting existing texts to include virtual currencies, without granting those privately-created virtual currencies currency status.
112. M. Julienne (n 85) n° 10-1; T. Bonneau, T. Verbiest (n 40) 65. See also on that topic, F. Drummond, 'Bitcoin: Du service de paiement au service financier? (2014) N° 5 Bulletin Joly Bourse, 249. Compare with A. d'Ornano (n 16) 180, noting that the Libra Association was called payment service providers in Switzerland. See the release of FINMA, the Financial Market Supervisory Authority, of 11 September 2019 <https://www.finma.ch/fr/news/2019/09/20190911-mm-stable-coins/> accessed 3 March 2023– requiring Libra to obtain authorisation 'as a payment system', on the condition that the Libra Association, and not the holders of funds, 'bears all the gains and risks linked to its management of reserves'. That application for authorisation was made by Libra and then withdrawn <https://www.finma.ch/fr/news/2021/05/20210512-mm-diem/> accessed 3 March 2023.
113. S. Benilsi (n 61) n° 114.
114. *Contra* M. Julienne (n 85) n° 13.

Monetary and Financial Code, cryptocurrencies cannot be allowed. Then, from that perspective, the rule that is written in a way to provide a limited list of methods of payment is more efficient, or at least has the advantages of a secure solution.[115] Again, those are considerations which should induce the amendment of our texts which are ill-adapted to the reality that virtual currencies could form.

19. In short, the payment of monetary obligations in cryptocurrencies is not naturally welcome in French payment law. Cryptocurrencies are being tossed about between lack of admission and lack of prohibition.[116] What can be deduced from such unsuitability of payment law? *A minima*, that cryptocurrencies do not have legal discharging power.[117] The arguments that have been developed in Colombian law should be analysed to lead to the same conclusion.

b. In Colombian law

20. The administrative authorities' refusal to grant cryptocurrencies monetary status – Even if cryptocurrencies are not regulated, many administrative authorities have decided, especially via concepts,[118] to refuse to grant cryptocurrencies monetary status, by invoking, above all, the principle of monetary sovereignty and the rule of using the peso to pay monetary obligations. That is the case of the Central Bank, of the Financial Superintendence,[119] of the National Tax and Customs Department (NTCD), of the Superintendence of Companies[120] and of the Technical Council of the Public Accountancy.

The Central Bank Concept Q16-584 of 10 February 2016,[121] issued by the Board, should be highlighted. In that concept, the Bank asserted that the currency unit and unit of account in Colombia was the peso issued by the Bank of the Republic. Consequently, the Colombian peso is the only method of payment having legal tender and unlimited discharging power to extinguish obligations. Similarly, that authority noted that in Colombia, the so-called 'virtual currencies' are not admitted by the legislator and the monetary authority as being currencies. Lastly, the Central Bank underlined the lack of support of the State for that type of currency and the fact that they are outside a centralised, controlled or monitored system.

Following on that concept, that organ issued a press release on 1 April 2014 on virtual currencies, especially Bitcoin. On that occasion, the Bank insisted on the fact that the only

115. See also Art. L. 112-8 of the Monetary and Financial Code.

116. Compare with the countries forbidding Bitcoin mentioned in D. Carreau, C. Kleiner (n 23) n° 15.

117. Compare with the definition of legal power to discharge and the different degrees of discharging power highlighted by B. Courbis, 'Comment l'État confère la qualité de monétaire à un avoir? De la notion de cours à la notion de pouvoir libératoire légal' in P. Kahn (ed), *Droit et monnaie, État et espace monétaire transnational* (Litec 1988) 33, esp. 44ff. See also that analysis reproduced in T. Le Gueut (n 70) n° 491ff.

118. Generally, a 'concept' according to Colombian case law is a sort of direction, point of view or piece of advice given by the administration in response to a right to petition (Art. 13 of the Administrative Procedure and Administrative Disputes Code (APADC)) which has a pedagogical function and a function of fluid and transparent communication. Similarly, it is specified that its aim is to establish the interpretation of legal precepts to facilitate the issuance and execution of administrative tasks and to serve as a guide for citizens as to the actions expected by the administration. Thus, a 'concept' is not constraining: Corte Constitucional Colombiana, Sentencia C-542 de 2005, 24 May 2005, M.P.: H. A. Sierra Porto. Some seem to consider that as so-called 'soft law': M. Federico Bustos Romero, 'El *soft law* como fuente del derecho administrativo colombiano (2019) Vol. 22 (44) Revista Prolegómenos, 35-48.

119. The Financial Superintendence is an institution monitoring and controlling the Colombian financial system: see Decrees 2739 of 1991 and 4327 of 2005 on the general functions of that body.

120. The Superintendence of Companies is an institution which monitors and controls the different companies of the country: see Decrees 1736 of 2020 and 1380 of 2021 on the general functions of that body.

121. That concept is available at <https://www.banrep.gov.co/es/banco/junta-directiva/conceptos/q16-584> accessed 10 December 2022.

currency and account unit in Colombia was the peso (banknotes and coins) issued by the Bank of the Republic and that Bitcoin is not a currency in Colombia. Thus, there is no obligation to accept it as a method of payment.[122]

The Colombian Financial Superintendence has also had the opportunity to give its opinion on cryptocurrencies several times. For example, it issued Memoranda Nº 29 of 26 March 2014,[123] 78 of 16 November 2016[124] and 52 of 22 June 2017,[125] which were addressed to legal representatives, members of boards and external auditors of the monitored entities, to remind them that they are not allowed to keep, invest, operate or intermediate with cryptocurrencies, nor to allow that their platforms be used for operations in cryptocurrencies. For the Financial Superintendence, it is not even possible to assert that virtual currencies, such as Bitcoin, have a value pursuant to Act 964 of 2005 governing the stock market. It also insisted on the fact that, cryptocurrencies lacking an unlimited discharging power, a creditor could not be forced to accept them as payment.

The National Tax and Customs Department (NTCD) also issued many concepts to answer consultations on cryptocurrencies. Among the most important ones, one should underline Concepts 035238 and 001357 of 2018[126] where this authority reasserted that crypto-assets are not an admitted currency and that consequently they have no unlimited discharging power.

The Superintendence of Companies denies the possibility of accepting that a contribution in cryptocurrencies to a company may be considered as a cash contribution,[127] precisely because of the reluctance to consider that cryptocurrencies are currencies. One should even underline that, even though it is no longer true today,[128] that entity had shown some reluctance about the possibility to use cryptocurrencies for any type of contribution. Its position was supported by a supposed prohibition to use cryptocurrencies.[129]

Lastly, the Technical Council of the Public Accountancy also issued several concepts about the accounting treatment of cryptocurrencies, among which the last two should be underlined,[130] where it reasserted the positions of the above-mentioned authorities, to refuse to call cryptocurrencies currencies and therefore the impossibility to accept that they are legal tender.

122. That press release is available at <https://www.banrep.gov.co/es/comunicado-01-04-2014> accessed 5 December 2022.
123. That circular is available at <https://www.nuevalegislacion.com/files/susc/cdj/conc/ccirc_sf_29_14.pdf> accessed 10 January 2023.
124. That circular is available at <http://www.nuevalegislacion.com/files/susc/cdj/conc/ccirc_sf_78_16.pdf> accessed 10 January 2023.
125. That circular is available at <http://www.nuevalegislacion.com/files/susc/cdj/conc/ccirc_sf_52_17.pdf> accessed 10 January 2023.
126. Those documents are available at <https://www.dian.gov.co/normatividad/Documents/Compilacion-de-la-doctrina-tributaria-vigente-relevante-en-materia-de-criptoactivos.pdf> accessed 15 January 2023.
127. Oficio 100-237890 of 14 December 2020 <https://www.supersociedades.gov.co/documents/107391/159040/OFICIO+100-237890+DE+2020.pdf/1f62977e-47d3-e461-9cc2-484514820fea?version=1.2&t=1670899321635> accessed 15 January 2023.
128. We will come back to that aspect: infra nº 30.
129. Oficio 220-196196 of 30 September 2020 <https://www.supersociedades.gov.co/documents/107391/159040/OFICIO+220-196196+DE+2020.pdf/725c1f11-2f2e-caa4-e470-6f0fffc07d62?version=1.3&t=1670899424658> accessed 16 January 2023.
130. Concepto 2017-977 <https://cdn.actualicese.com/normatividad/2017/Conceptos/C977-17.pdf> accessed 15 January 2023; Concepto 2018-472 <https://www.ctcp.gov.co/CTCP/media/ctcp-media/documentos/DOCr-CTCP-1-8-12381.pdf> accessed 15 January 2023.

Apparently therefore, the Colombian administrative authorities, without openly acknowledging it, consider that the discharging power results from legal tender, which cryptocurrencies lack, which stance is similar to that of part of the French doctrine.[131] As to the scope of legal tender, it seems that a strict meaning is favoured:[132] the authorities insist on the impossibility to force the creditor to accept cryptocurrencies, unlike a payment in pesos where the creditor cannot refuse the banknotes and coins tendered by the debtor.

21. Cryptocurrencies are not a foreign currency – Though there is no doubt as to the reluctance to consider that cryptocurrencies are currencies, one could still wonder whether they may be foreign currencies. If they are, then they have a power to discharge, at least for some international operations,[133] pursuant to what is provided in Article 874(2) of the Colombian Commercial Code in compliance with External Resolution No. 1 of 2018.[134] Pursuant to that paragraph, 'obligations that have been denominated in foreign currencies will be covered by the stipulated currency(ies) if that is legally possible; if not, they will be paid in Colombian national currency, in compliance with the legal requirements in force at the time of payment'. The legislator therefore recognises the possibility to pay in foreign currencies provided those are operations belonging to the exchange rate regime.[135] The Central Bank has nevertheless decided against the possibility to consider Bitcoin as a currency that may be involved in exchange operations; the lack of any support from central banks from other countries may explain that denial.[136]

22. Practical issues against recognising that cryptocurrencies are currencies – Three important practical arguments are often put forward, by authors[137] as well as administrative

131. supra nº 13ff.

132. supra nº 13.

133. That type of operation is provided for in Articles 4 of Act 9 de 1991 and 2.17.1.1. of Decree 1068 of 2015. For example, importing and exporting goods and services, investing foreign capitals in the country; Colombian investments abroad.

134. When the concept was issued by the Central Bank, the exchange rate regime was governed by Resolution Externa Nº. 8 of 2000 of the Governing Council of the Central Bank.

135. J. Mendoza Gomez (n 64) 411.

136. Concepto Q16-584 of 10 February 2016 <https://www.banrep.gov.co/es/banco/junta-directiva/conceptos/q16-584> accessed 20 December 2022. See also A. Contreras P, 'Validez contractual de las transacciones realizadas en criptomonedas', 9 May 2019 <https://derinformatico.uexternado.edu.co/validez-contractual-de-las-transacciones-realizadas-con-criptomonedas/> accessed 7 December 2022.

137. A. Ayala Aristizábal, 'Naturaleza jurídica de las criptomonedas a la luz de los pronunciamientos de soft law en Colombia (2021) vol. 20 Nº 1 Revista Jurídica Piélagus; Carlos Arango-Arango, María Barrera-Rego, et alii., 'Criptomonedas', informe técnico, Banco de la República <https://www.banrep.gov.co/sites/default/files/publicaciones/archivos/documento-tecnico-criptomonedas.pdf> accessed 20 January 2023.

authorities[138] and even judicial ones,[139] to underline the drawbacks linked to using cryptocurrencies and deny they have legal discharging power.

The first is related to the financing of terrorism resulting from the anonymity of those operations. The second is about the fear of supporting money laundering which could be encouraged or at least facilitated by the use of cryptocurrencies. Lastly, there is the risk linked to the volatility proper to cryptocurrencies which would render their function as account units and stores of value, which are characteristics of legal tender, difficult.[140]

That explains, for example, Resolution 314 of 2021,[141] which consecrates the obligation, which applies to any legal and natural person who provides virtual-asset services in Colombia,[142] to inform the Information and Financial Analysis Unit (IFAU) of any transaction involving virtual assets above some amounts established in the regulation.

23. Finally, French law and Colombian law do not grant cryptocurrencies any discharging power. That denial seems to be mainly founded on legal tender. However, the notion of legal tender is not unanimous: while, for some, legal tender would prevent the creditor from refusing some payment instruments, for others, legal tender would be the attribute of a currency that would be the only one in circulation on a territory. Admittedly, legal tender is an attribute of some payment instruments, which are cash (banknotes and coins) while there are other means of payment which are not cash but still allow to circulate scriptural currency, such as bank transfers or cards. The unlimited and legal discharging power may be linked to legal tender: insofar as there are payment methods that the creditor may not refuse, those means of payment have unlimited power to discharge. Cryptocurrencies, which are not considered to be currencies, are not legal tender so that they do not have a legal and unlimited discharging power.[143] However, does this mean that they may not be a

138. Superintendence of Companies, Oficio 220-196196 of 30 September 2020 <https://www.incp.org.co/Site/publicaciones/info/archivos/Oficio-220-196196-de-2020.pdf> accessed 15 January 2023; Financial Superintendence, Circular 52 of 2017 <http://www.nuevalegislacion.com/files/susc/cdj/conc/ccirc_sf_52_17.pdf> accessed 8 December 2022.

139. See in that sense the decision of the Colombian Council of State in a nullity appeal for false statement of reasons against two circulars issued by the Financial Superintendence. One of the arguments of the party was that there was no solid proof demonstrating the risks decried by the Financial Superintendence to justify the issuance of those circulars. The Council of State decided for the Financial Superintendence and affirmed that the risks when using cryptocurrencies were real, which justified the issuance of the administrative act, reminded the monitored entities that they were not allowed to conduct operations in cryptocurrencies as the latter were not granted currency status. It also insisted on the fact that anonymity, which is characteristic of cryptocurrencies, increased the risk of terrorist financing and money laundering denounced by the Financial Superintendence, which was firm ground to repeat the prohibition for institutions under its monitoring and control to use cryptocurrencies: Consejo de Estado, Sala de lo Contencioso Administrativo, Sec. 4., Rad. 1101-03-27-000-2018-00030-00, 15 September 2022, C.P.: M. Stella Gutiérrez.

140. A. Gámez Rodríguez (n 60) 206.

141. That regulation is available at <https://www.uiaf.gov.co/sites/default/files/2022-06/documentos/archivos-anexos/Resoluci%C3%B3n_314_de_2021_AV.pdf> accessed 8 February 2023.

142. Pursuant to Art. 17 of that resolution (supra n 141), and based on the definition of the FATF <https://www.fatf-gafi.org/en/topics/virtual-assets.html> accessed 11 October 2023, a virtual asset is 'any digital representation of value that can be digitally traded, transferred or used for payment. It does not include digital representation of fiat currencies'.

143. For comparison with English law, C. Hare, '9. Cryptocurrencies and banking law: are there lessons to learn?' in D. Fox and S. Green (eds), *Cryptocurrencies in public and private law* (OUP 2019) 229, esp. nº 9.25 and footnote 151, 252: '(…) it is necessary to enquire as to whether payment by cryptocurrency would constitute absolute or conditional payment. Given that most modern payment systems result in the absolute discharge of the underlying debt, as in the case of credit cards (151), it is submitted that it is the more appropriate analogy for cryptocurrencies, rather than linking them to cheques.'

method of payment[144] and cannot be granted conventional discharging power? The answer is no: they may, in French and Colombian law.

2. The acceptance of conventional discharging power

24. In French and Colombian law, cryptocurrencies may be used as methods of payment. However, the above-mentioned reasons in each law are not exactly the same. Thus, it is necessary to study the motives that may be put forward in French law (a) and Colombian law (b).

a. In French law

25. Use of cryptocurrencies and conventional and indirect discharging power – The occasional use of 'special monetary instruments' instead of legal currency has already been highlighted by Remy Libchaber especially about phone tokens, luncheon vouchers, or credit notes.[145] The author has revealed the inherent lack of discharging power of those instruments which only work subject to some constraints – from a payment made in legal tender or in a limited circuit – and therefore their conventional-only power to discharge.[146] Given the present state of practice, the situation could be the same for cryptocurrencies. It is possible to find the characteristics of those alternative monetary instruments in the attempts to use cryptocurrencies in daily operations. Indeed, during the summer of 2022, a Parisian shopping centre communicated its acceptance of cryptocurrencies as a method of payment. Admittedly, upon looking at it more closely, it is only to buy gift cards in euros with cryptocurrencies[147] and therefore pay in euros. However, once again, a power to discharge could be attached to cryptocurrencies even if it were only indirect and necessarily conventional. Beyond that practice, which is restrictive and far from the ambitions of the issuers of cryptocurrencies, it is possible to wonder whether there is a conventional discharging power; in other words whether it is possible, more generally, for parties in a contractual relationship to accept payment in cryptocurrencies.

26. The doctrinal admission of a conventional power to discharge – This idea has not won unanimous support, but some authors accept it. That is the case of Nicolas Mathey, who admits that cryptocurrencies may be 'conventionally granted' a discharging power.[148] Other authors, without giving it a discharging power, acknowledge that it may be a conventional method of payment.[149] That analysis has been recognised in case law.

144. Compare with H. de Vauplane (n 2) nº 2 noting that a private currency, though it does not have discharging power, may be used for payment.
145. R. Libchaber (n 71) nº 111ff.
146. ibid (n 71) nº 111ff and esp. Nº 113: 'The appearance of that monetary functioning is only due to a contract which substitutes instruments for the currency'.
147. E Confrere, 'Beaugrenelle, premier centre commercial français à accepter les paiements en crypto-monnaies ce mercredi', Le Figaro, 07/06/2022 <https://www.lefigaro.fr/secteur/high-tech/un-premier-centre-commercial-francais-accepte-les-paiements-en-crypto-monnaies-20220607> accessed 2 March 2023. In the fall of 2019, a company had already offered an application that could transform Bitcoin into means of payment in some stores on the French territory: cf esp. Le Figaro and AFP, 24-25 September 2019, 'Des 2020, plus de 25 000 points de vente en France pourraient accepter les crypto-monnaie <https://www.lefigaro.fr/flash-eco/des-2020-plus-de-25-000-points-de-vente-en-france-accepteront-les-crypto-monnaies-20190924> accessed 2 March 2023.
148. N. Mathey (n 23) nº 18.
149. D. Carreau, C. Kleiner (n 23) nº 16.

27. The recognition of a 'conventional' power to discharge in case law – Giving credence to that last line of understanding, European judges have admitted that a virtual currency may be considered as a method of payment. Indeed, in a litigation about the application of European texts about taxes on added value, the Court of Justice of the European Union granted Bitcoin the quality of 'direct means of payment between the operators that accept it'.[150] Should one consider that decision with prudence, if only because it could only apply in the case in question – the tax issue in the decision issued by the Court of Justice of the European Union in 2015 –[151] and for the given virtual currency? Definitely. That being said, the admission of payment in cryptocurrencies, when contractors want it, seems to be established.[152]

b. In Colombian law

28. The role of practice in the admission of a power to discharge of cryptocurrencies – As in French law, one may wonder whether the repeated and generalised practice of using cryptocurrencies instead of legal tender should lead to the admission that they have a power to discharge, if not equal to that of legal currencies, at least in a conventional way, since the parties may consent to accept them as methods of payment.[153] Colombia is supposedly the tenth country with the most transactions in cryptocurrencies worldwide,[154] and there is an increasing number of shops which accept Bitcoin and other cryptocurrencies by way of payment.[155] Some authors have even mentioned the possibility of admitting, at a time when the lawfulness of using cryptocurrencies was being questioned, the customary character of payment in cryptocurrencies and its being destined to become the rule.[156]

29. The favourable position of the doctrine based on the recognition that cryptocurrencies are 'goods' – For an important part of the doctrine, understanding cryptocurrencies as being goods sharing important characteristics with currencies may explain their power to discharge. Indeed, those authors define a cryptocurrency as 'a digital unit created to be used as a method of payment for the provision of goods and services the nature of which is characterised by the fact that they are an electronic intangible supported by the decentralised encrypted ledger technology (Distributed Ledger Technology), or blockchain'.[157] Other stress that they are transferable, non-tangible fungible digital documents, which may

150. Case C-264/14 *Skatteverket v David Hedqvist* [2015], point 42: specifying that 'The "bitcoin" virtual currency, being a contractual means of payment (…)' and point 50. On that topic, T. Bonneau (n 33) 1009 and 1010, and T. Bonneau, 'Analyse critique de la contribution de la CJUE à l'ascension juridique du Bitcoin' in *Liber Amicorum Blanche Sousi, L'Europe bancaire, financière et monétaire,* Revue Banque, 2016, 295.
151. T. Bonneau (n 150).
152. M. Audit (n 2) 685.
153. P. Sanz Bayón (n 47) 340.
154. <https://www.semana.com/economia/inversionistas/articulo/como-le-va-actualmente-a-las-criptomonedas-en-colombia/202327/> accessed 13 March 2023.
155. <https://www.elespectador.com/economia/el-Bitcoin-es-cada-vez-mas-aceptado-en-colombia-pero-le-falta-terreno-por-ganar/> accessed 13 March 2023.
156. E I. León Robayo and Y. Castro López, 'La costumbre mercantil en aplicaciones móviles y otros avances tecnológicos contemporáneos', La costumbre mercantil, un aporte para los negocios de los empresarios en Colombia, Confecámaras, Cámara de Comercio de Bogotá, 73 <https://bibliotecadigital.ccb.org.co/bitstream/handle/11520/19941/Publicaci%C3%B3n%20La%20costumbre%20mercantil%20un%20aporte%20para%20los%20negocios%20de%20los%20empresarios.pdf?sequence=1&isAllowed=y> accessed 13 March 2023.
157. M. Alonso Jiménez, n 26.

be consumed from a legal point of view and which may have an economic and lawful value.[158] Some do not hesitate to underline that cryptocurrencies are 'movable and fungible'.[159]

Independently of differences in the authors' approaches, some highlight that cryptocurrencies have, at least from a functional point of view, the characteristics of a currency: they are fungible goods that are consumable from a legal point of view, and divisible, serving as a means of exchange, account unit and store of value.[160] The obstacle to their being granted currency status would lie in the lack of State recognition. However, other authors underline that the volatility of cryptocurrencies questions the possibility to consider them as a means of exchange. Similarly, the possibility to use it as a store of value is debatable. Bitcoin fall in value over the past years, for example, and the lack of reliable data on that phenomenon support such a conclusion. Lastly, it would be difficult to set prices in cryptocurrencies precisely because of their volatility.[161]

30. The favourable position of administrative authorities based on the recognition that cryptocurrencies are 'goods' – A few administrative authorities, like the Superintendence of Companies or the NTDC, refer to cryptocurrencies as either intangible or immaterial goods that could be valued[162] or as digital assets.[163] This is not insignificant insofar as it is precisely thanks to that characterisation that, for example, the Superintendence of Companies now admits the possibility of making a contribution to a company in cryptocurrencies.[164] Admittedly it would not be a monetary but an in-kind contribution, an issue we will come back to when we analyse the consequences of the possibility of paying in cryptocurrencies.[165] However, the fact that they may be the object of a contribution shows that there is some support for their being recognised as objects of obligations.

158. A. Gámez Rodríguez (n 60) 216. Other authors note that cryptocurrencies are movables and fungible things: J. Mendoza Gómez (n 64) 413.

159. J. Mendoza Gómez, ibid.

160. See, on the general characteristics of currency: A. Gámez Rodríguez (n 60) 5.

161. S. Vásquez Rodríguez, *El escenario normativo tras la irrupción de las criptomonedas en Colombia*, monografía de grado, Facultad de jurisprudencia, Universidad del Rosario, 60 <https://repository.urosario.edu.co/server/api/core/bitstreams/8b030383-2a3b-4cb3-a698-7860bb368a1e/content> accessed 13 February 2023.

162. See in that sense the stance of the Colombian Customs and Income Tax Office (CITO) in its answers to consultations Oficios 20436 2 August 2017 and 000314 7 March 2018 <file:///D:/criptomonedas/Compilacion-de-la-doctrina-tributaria-vigente-relevante-en-materia-de-criptoactivos.pdf> accessed 8 November 2022. In the same sense the Superintendence of Companies: see Oficio 220-196196 of 30 September 2020 <https://www.supersociedades.gov.co/documents/107391/159040/OFICIO+220-196196+DE+2020.pdf/725c1f11-2f2e-caa4-e470-6f0fffc07d62?version=1.3&t=1670899424658> accessed 16 January 2023. See A. Gámez Rodríguez (n 60) 229.

163. A. Ayala Aristizábal (n 137) who defines financial assets as a 'broad concept which includes data, information and intellectual property stored or transferred via electronic devices (…) A great number of financial assets belong to that category of digital assets, like email accounts, digital pictures, online app accounts, social media, e-commerce, and of course, electronic money like cryptocurrencies'.

164. Superintendence of Companies, Oficio 100-237890 of 14 December 2020 <https://www.supersociedades.gov.co/documents/107391/159040/OFICIO+100-237890+DE+2020.pdf/1f62977e-47d3-e461-9cc2-484514820fea?version=1.2&t=1670899321635> accessed 15 January 2023. See on the evolution of the position of the Superintendence of Companies on the topic and on the risks of contributions in crypto-assets to commercial companies: Sebastián Béndiksen and Juliana Caicedo Rozo, 'Operaciones con criptoactivos en Sociedades Comerciales y la Responsabilidad de los Administradores', Revista Foro de Derecho Mercantil, Nº 77, 2022 <https://amchamcolombia.co/wp-content/uploads/2022/10/2022-10-27-BENDIKSENLAW.-Articulo-Revista-Foro-de-Derecho-Mercantil.pdf> accessed 18 January 2023.

165. infra nº 33ff.

Among the many concepts on the subject issued by the Technical Council of the Public Accountancy in Colombia, two should be underlined. In the first,[166] that authority asserted that a cryptocurrency is a financial asset. In a more recent concept,[167] the Council came back on its position and sustained that, based on the Colombian legislation and the points of view of different authorities, as well as the International Financial Reporting Standards (IFRS), the most adequate though approximate characterisation of cryptocurrencies is that of intangible assets, despite the difficulty of including them into financial statements. The Technical Council of the Accountancy asserts that, today, there is no category of assets that is absolutely appropriate to virtual assets. That change in position complies with the fact, based on the precisions given by the Technical Council, that whoever has a financial asset has a contractual right to receive money or another financial asset from another entity, or to exchange financial assets or liabilities with another entity in potentially favourable conditions for the holder of the asset. The Technical Council of the Accountancy considers that there is no certainty that the holder of a cryptocurrency has such a contractual right.

31. The lawfulness of operations in cryptocurrencies. – Thus, insofar as there is no prohibition, in Colombian law, to use cryptocurrencies, the latter may in effect be the object of obligations as immaterial goods having a virtual existence,[168] regardless of the difficulties, for example, surrounding their tax count or even their seizability.[169] Admittedly, administrative authorities and even the Council of State deny them the monetary characterisation of currencies, but none asserts today that using cryptocurrencies is forbidden, except to conduct operations in cryptocurrencies for banks and financial institutions under the supervision of the Financial Superintendence, which precisely results from their not being accepted as currencies.[170] It is therefore possible to note that using cryptocurrencies is admitted, and, consequently, paying with them is perfectly conceivable.

32. Conclusion in French and Colombian law – One may see in it that payment in cryptocurrencies is admitted in French and Colombian law when the parties agree.[171] Accepting payment in cryptocurrencies is likely to entail a series of legal consequences. Without being exhaustive, we are going to examine a few of them.

166. Concepto 2017-977 <https://cdn.actualicese.com/normatividad/2017/Conceptos/C977-17.pdf> accessed 15 January 2023.
167. Concepto 2018-472 <https://www.ctcp.gov.co/CTCP/media/ctcp-media/documentos/DOCr-CTCP-1-8-12381.pdf> accessed 15 January 2023.
168. That is one of the reasons given by the Superintendence of Companies to admit the possibility of a contribution in crypto-assets: Oficio 100-237890 14 December 2020 <https://www.supersociedades.gov.co/documents/107391/159040/OFICIO+100-237890+DE+2020.pdf/1f62977e-47d3-e461-9cc2-484514820fea?version=1.2&t=1670899321635> accessed 15 January 2023.
169. A Gámez Rodríguez (n 60) 25ff. See also on the risk of fraud in insolvency proceedings the case in which the debtor's estate is mainly composed of crypto-assets: J. F. Sicard Arenas, 'Criptoactivos como mecanismo defraudatorio de los acreedores en el proceso de liquidación judicial. Una proposición normativa' (2023) N° 1 v. 22 Revist@ e-mercatoria, 115-50.
170. Financial Superintendence, Concepto 2017008234-001 of 23 February 2017 <https://www.superfinanciera.gov.co/jsp/10088542> accessed 15 March 2023.
171. M. Audit (n 2) 685.

B. The consequences of admitting payment in cryptocurrencies

33. Three series of questions may be raised as to the consequences of the admission of payment in cryptocurrencies. They result from the fact that two main situations may be distinguished, which at the same time raises characterisation and regime issues: the hypothesis of the obligation denominated in cryptocurrencies (1) and that of the obligation issued in legal tender but paid in cryptocurrency. One should also add the issue of the proof of payment in cryptocurrencies (3).

1. The hypothesis of the obligation denominated in cryptocurrencies

34. Issues – If cryptocurrencies are accepted as conventional methods of payment, the hypothesis of an obligation issued in cryptocurrencies must be assessed with all its implications. The stipulation of such an obligation is not without consequences especially on the characterisation of the contract where it is integrated and therefore on the regime that applies. The question, among others, is whether it is possible to foresee that the price of a sale will be paid in cryptocurrencies, and with what consequences. Let us examine those issues first in Colombian (a) and then in French (b) law.

a. In Colombian law

35. The impossibility to replace a monetary obligation by an obligation to give cryptocurrencies – If cryptocurrencies are not considered currencies, it is difficult to admit that parties may stipulate an obligation to give cryptocurrencies as they would stipulate a monetary obligation.[172] In other words, it does not seem possible today to substitute an obligation to give cryptocurrencies for a monetary obligation.

36. Characterisation of the obligation – Given that they are goods, cryptocurrencies may be the objects of obligations to give. It is an obligation to transfer the ownership of a fungible good in compliance with the above-mentioned characteristics.[173] Thus, the parties will have to determine the quality and quantity, that is, the type and quantity of cryptocurrencies that are the object of the obligation.

Similarly, the debtor having such an obligation will have to bear the risk of a potential loss of cryptocurrencies. They may not invoke, in order to claim for exemption, that they are not the holder of the cryptocurrencies meant for payment.[174]

Lastly, the characterisation of cryptocurrencies as fungible goods leads to assert, pursuant to Articles 1566 and 2223 of the Colombian Civil Code,[175] that the creditor will assume the risks of a rise or a drop in the value of cryptocurrencies. However, because of the volatility of cryptocurrencies, whether the parties wanted to conclude a commutative or random contract should be determined. The question is not insignificant. The important fluctuations of cryptocurrencies explain why some authors have raised that issue. Thus, as

172. A. Gámez Rodríguez (n 60) 237.
173. supra nº 29.
174. In that sense Articles 1729 and 1567 of the Colombian Civil Code.
175. A. Gámez Rodríguez (n 60) 233.

some Chilean authors have underlined,[176] even if the rule should be that the contract should be commutative when it is about cryptocurrencies – especially contracts with instantaneous execution – the solution would be different in the case of a contract involving sequential performance in which the parties have stipulated, for example, that the quantity of cryptocurrencies owed is subject to the value, on payment day, of a currency having legal tender or of a foreign one. Such a clause would show that the intention of the parties was to have an up-to-date value of cryptocurrencies.[177] On the contrary, if the parties have set the quantity of cryptocurrencies in a fixed and unchangeable way, then the contract would be random insofar as the party who is to receive the cryptocurrencies in exchange for a price, for example, accepts the risk that the value of the cryptocurrencies may increase or decrease.

37. Regime of the obligation – Lastly, given that cryptocurrencies do not have currency status, one should conclude, as one author has,[178] that it is useless to apply the regime of monetary obligations – and especially the principles of nominalism and valorism – to obligations relating to cryptocurrencies. They are principles linked to the monetary and exchange policy of a State aiming to answer a difficulty proper to monetary obligations – the natural destiny of their alteration between their birth and their payment. Admittedly, one could think that, precisely because of the fluctuations of the cryptocurrencies value, the application of those principles would be relevant. However, that special feature could have consequences when analysing the legal – commutative or random – nature of the contract the subject matter of which is cryptocurrencies.[179]

38. The forced execution of the obligation denominated in cryptocurrencies – Another issue, linked to the recovery of an obligation denominated in cryptocurrencies, is related to its forced execution. Given that it is impossible to know the real ownership of any and all cryptocurrencies, and the fact that only people knowing the private key to the address that contains them (public key) can use them, it will be difficult for the judge to establish whether the debtor possesses cryptocurrencies for purposes of seizure or sequestration.[180] That way, under such a hypothesis, equivalent enforcement should be sought under the terms of Article 2223 of the Colombian Civil Code. In other words, the creditor can demand the price of the cryptocurrencies owed at the time and place where the payment should have been made, and will have the possibility to ask for compensation for damage.

39. Characterisation of the sales contract – Though it is not possible today to replace an obligation to give cryptocurrencies with a monetary obligation, the question of what the consequences would be if the parties stipulate a clause in that sense may be raised. As the use of cryptocurrencies is not forbidden, there will be a re-characterisation of the contract in which one of the terms is precisely the setting of a price and the legislator provides that that price must be a sum of money. That is in particular the case of sale. Indeed, under Article 1849 of the Colombian Civil Code, sale is a contract in which one of the parties binds themselves to give something and the other binds themselves to pay for it with a sum of money. That sum of money is the price. If the parties decide that the giving of cryptocur-

176. V. Rojo Vergara and C. Vera Bauerle, *Criptomonedas como medio de pago. Una aproximación a su naturaleza jurídica*, Memoria para optar al título de licenciado, Universidad de Chile, 2020, 63ff <https://repositorio.uchile.cl/bitstream/handle/2250/177964/Criptomonedas-como-medio-de-pago-una-aproximacion-a-su-naturaleza-juridica.pdf?sequence=1&isAllowed=y> accessed 10 March 2023.
177. A. Gámez Rodríguez (n 60) 234.
178. M. Alonso Jiménez (n 26).
179. supra n° 36.
180. A. Gámez Rodríguez (n 60) 238.

rencies is the 'price', it will not be possible to assert that this is a sale. The contract will be valid, precisely because using cryptocurrencies is admitted, but it will certainly be re-characterised: cryptocurrencies being an immaterial good, the contract by which one party binds themselves to the transfer of a good to another is, pursuant to Article 1955 of the Colombian Civil Code, a swap contract. The doctrine[181] and a few administrative authorities[182] thus expressly recognise it. It is important to underline that, under above-mentioned Article 1995, the swap refers to the obligation to give cash or an ascertained property in exchange for another ascertained property. If one admits that cryptocurrencies are fungible goods,[183] the re-characterisation of the operation into an exchange is difficult. However, the Colombian doctrine criticises the restrictive nature of that provision. An important number of authors say that either it is possible to apply, by analogy, the sales standards[184] or that it is possible to give an extensive interpretation according to which the legislator itself, in the matter of exchange, refers back to sales standards which do not limit the operation to ascertained property.[185] In addition, one should underline that the price could be, on the one hand, a sum of money and, on the other, a thing. If the thing is worth more than the sum of money, it will be an exchange, but if the sum of money is worth more than the thing, it will still be a sale.[186] That way, the parties could set a part of the price under the form of a sum of money and the other part in cryptocurrencies. If the sum of money remains higher than the value of cryptocurrencies, that will still be a sale. In any way re-characterisation could raise a few issues as to the non-enforcement of the swap contract, in case some provisions of the sale are incompatible.[187] One could think, for example, taking into account the *lésion*[188]. Though it is an issue that is being debated by the doctrine,[189] case law does not exclude taking the *lésion* into consideration in a swap contract.[190]

40. Commercial sale – Nonetheless, an author has suggested that, in the domain of commercial sale, it could be possible to set the price in cryptocurrencies.[191] The commercial

181. A. Gámez Rodríguez (n 60) 252.
182. Customs and Income Tax Office – CITO – Oficio 030470 of 2019 <https://www.dian.gov.co/normatividad/Documents/Compilacion-de-la-doctrina-tributaria-vigente-relevante-en-materia-de-criptoactivos.pdf> accessed 18 January 2023.
183. However, see the debates on that issue mentioned supra n° 26ff.
184. C. Gómez Estrada, *De los principales contratos civiles* (4th edn, Temis 2008) 153.
185. ibid, 154-55; J. P. Cárdenas Mejía, *Contratos, notas de clase* (1st edn, Legis 2021) 493; J. A. Bonivento Fernández, *Los principales contratos civiles y su paralelo con los comerciales* (17th edn, Librería Ediciones Del Profesional Ltda 2008) 355.
186. In that sense Article 1850 of the Colombian Civil Code.
187. Article 1958 of the Colombian Civil Code provides for the application, in a case of exchange, of the sales standards, except in case of incompatibility.
188. Authors refer to the *lésion*, a concept of civil law, which is ruled by the Colombian Civil Code and the French Civil Code, especially in Art. 1675 of the French Civil Code (see for translation of this latter, *French Civil Code, Code civil français, English-French-Arabic*, under the supervision of M. Séjean (LexisNexis 2020). In spite of the absence of a similar concept in the common law systems, the one it comes closest to appears to be that of substantive inequality of bargain regarding the price in sales agreements.
189. J. P. Cárdenas Mejía (n 185) 49; C. Gómez Estrada (n 182) 155-56.
190. Corte constitucional colombiana, Sentencia C-222 of 5 May 1994; Corte Suprema de Justicia, Sala de Casación Civil SC948-2022, M.P.: L. A. Rico Puerta.
191. J. Mendoza Gómez (n 64) 411-12.

legislator, by providing that commercial bills[192] and debts representing a sum of money will be assimilated to a sum of money,[193] would open the debate as to the possibility to admit that whoever transfers a cryptocurrency gives an asset containing a debt representing a sum of money or transfers a sort of commercial bill.[194] However, that reasoning is not devoid of difficulties, as the author acknowledges. It would be difficult to include cryptocurrencies, understood as documents,[195] into the category of commercial bills – they are neither payment orders as such, nor promises of payment, and it is hardly possible to identify cryptocurrencies and title representing a commodity.[196] For our part, we think it is not possible today, under Colombian legislation, to understand cryptocurrencies as commercial bills. The holders of cryptocurrencies have no right to demand a sum of money, for lack of any support from the Central Bank. That way, the only manner to exchange cryptocurrencies for pesos (the only legal tender) would be to find someone ready to buy cryptocurrencies in exchange for a sum of money.

41. Classification of the loan agreement – Similarly, the fungible and consumable nature of cryptocurrencies[197] explains that it is possible to conclude, for example, a loan agreement on them. This would be a consumer loan agreement. In that case, in accordance with Article 2223 of the Colombian Civil Code, if the loan is about fungible things which are not money, there is the obligation to give back the same amount of things of the same sort and quality, taking into consideration the precisions that have just been made on the commutative or random nature of the contract.

b. In French law

42. Unlike in the German doctrine,[198] the issue does not seem to have been considered in those terms in French law yet. Similar reasonings could however be made. One can also wonder whether the obligation payable in cryptocurrencies entails re-characterisations which have sometimes significant consequences.

192. One should specify that the Colombian legislator admits, depending on the right they integrate, three types of commercial bills. Thus, Article 619 of the Colombian Civil Code provides that commercial bills cannot give rise to the right to demand payment of a sum of money (it would therefore be a commercial bill 'contenido crediticio'), or they may include social rights (it would be a commercial bill 'corporativo o participativo'). Lastly, the Colombian legislator accepts commercial bills that are representative of a commodity (that type of commercial bill is called 'de tradición').
193. See Article 905(3) of Colombian Commercial Code.
194. One should specify that, today, in Colombia, it is possible to refer to 'dematerialised' commercial bills, which explains the author's attempt at analysing the phenomenon of cryptocurrencies through the lens of commercial bills. See on the dematerialisation of 'commercial bills': J. Vicente Andrade Otaiza, *Teoría de los títulos valores* (Universidad Católica de Colombia 2018) 52-54.
195. Insofar as, at the moment the code is transferred (cryptocurrency in itself), from its holder to whoever will receive the cryptocurrencies, under the Colombian law on e-commerce – Act 527 of 1999 – that would be a document that could be identified as coming from the debtor in the sense that the transfer can only occur thanks to a password allowing to identify them, giving rise to the recognition of a signature: J. Mendoza Gómez (n 64) 415.
196. J. Mendoza Gómez, *Idem*.
197. Insofar as once the transfer of cryptocurrencies has been made the beneficiary will be the only one to have complete command of the cryptocurrencies: A. Gámez Rodríguez (n 60) 232.
198. S. Arnold, 'The Euro in German (private) law – monetary obligations and the mutual dependence of public and private law' in R. Freitag and S. Omlor (eds), *The Euro as Legal Tender, A comparative approach to a Uniform Concept* (De Gruyter 2020) 141, esp. 154-55.

43. Characterisation of the sales contract – Would the obligation issued in cryptocurrencies be compatible with characterisation as a sale?[199] Admittedly, Article 1582(1) of the French Civil Code, which provides that 'Sale is a contract whereby a person obligates himself to deliver a thing and the other to pay its price'[200] does not seem to oppose it, given the broad definition of payment.[201] The following texts however mention the concept of price.[202] Price refers to a sum of money.[203] As cryptocurrencies are not granted currency status,[204] it seems difficult to consider that they may be a price. It is also true that it has sometimes been admitted that the obligation to pay the price of the sale may be paid in nature,[205] especially when the good being the price could be assessed in monetary terms.[206] Then, in similar conditions, the capacity of cryptocurrencies to be a sales price may be conceivable. However, that possibility remains uncertain. In that respect, one should note that the draft project of contract-law reform precisely intends to expressly restrict the classification as a sales contract to a contract containing a price under the form of a sum of money in order to distinguish it from an exchange.[207] Such a writing would reinforce the idea that the stipulation of a payment in cryptocurrencies is an exchange. Moreover, the issue is not without influence on the application regime: a re-characterisation of the contract as a swap contract would entail the exclusion of some elements from the sales regime – for example, taking into account the *lésion* in a real property operation.[208]

44. Other regime issues – The characterisation of the loan agreement on cryptocurrencies has been the object of a decision of the *Tribunal de Commerce de Nanterre* in 2020 which

199. In English law, S. Green, 'It's virtually money' in D. Fox and S. Green (eds), *Cryptocurrencies in public and private law* (OUP 2019) 13, esp. n° 2.26.
200. *French Civil Code, Code civil français, English-French-Arabic*, under the supervision of M. Séjean (LexisNexis 2020) 317.
201. supra n° 8.
202. eg Art. 1583 and 1589 of the French Civil Code.
203. O. Barret, updated by P. Brun, 'V° Vente: structure' (July 2019 – update February 2023) Répertoire de droit civil Dalloz, n° 33, 38; O. Barret, updated by P. Brun, 'V° Vente: formation' (July 2019 – update February 2023) n° 400.
204. supra n° 17.
205. Draft bill on the reform of contract law. Committee chaired by Professor P. Stoffel-Munck, 9 <http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/consultation-sur-lavant-projet-de-reforme-du-droit-des-contrats-34548.html> accessed 9 March 2023.
206. O. Barret, updated by P. Brun, Dalloz, Rép. civ., V° 'Vente: formation', July 2019 (n 203), n° 401.
207. Art. 1582 (1) and (2) of the Draft bill on the reform of contract law (commented). Committee chaired by Professor P. Stoffel-Munck, July 2022, 11: 'A sale is the contract by which, in exchange for a price, the seller gives the ownership of a tangible or intangible good up to the buyer. The price consists in a sum of money. It may be completed with the provision of a good or service', and 9 <http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/consultation-sur-lavant-projet-de-reforme-du-droit-des-contrats-34548.html> accessed 2 July 2023. See also on exchange, ibid, 48.
Compare Art. 12 of the Suggestion of reform of the law of special contracts made by the Henri Capitant Association, 18: 'A sales contract is a contract by which the seller transfers the ownership or any other right in rem to the buyer who binds themselves to pay its price. The rules of the present Chapter apply as appropriate to contracts in which the buyer binds themselves to pay consideration other than price, and to the contracts in which the owner constitutes jus in rem on a good in return for payment.' <https://www.henricapitant.org/actions/offre-de-reforme-du-droit-des-contrats-speciaux/> accessed 2 July 2023.
208. Art. 1706 of the French Civil Code *French Civil Code, Code civil français, English-French-Arabic*, under the supervision of M. Séjean (LexisNexis 2020) 326: '*There is no rescission for lesion of the contract of exchange.*'
Compare supra n° 39 in Colombian law.

considered it was a consumer loan.[209] In a general way, the question of whether the contract becomes a random one could be raised[210] given the instability of cryptocurrencies and all its consequences, in particular, the exclusion of rescission for a *lésion* in case of hazard in the sale.[211] Moreover, the obligation issued in cryptocurrencies would rather badly comply with the principle of the nominal value of money as expressed in Article 1343(1) of the French Civil Code.[212] That principle, which relies on the stability over time of the value of the money that is the object of the contract, has been derived from the law of consumer loan and generalised.[213] Admittedly, it is not obvious that the obligation denominated in cryptocurrency is an obligation of a sum of money,[214] which would result in its not being subject to that principle. However, the fact that it is a good which is intended to be an exchange unit, like monetary units, if not a universal one, at least a common one, makes it necessary to think about its enforcement. Applied to the obligation issued in cryptocurrencies, the principle of the nominal value of money would place the parties in a dangerous situation. That would justify additional information or resorting to the conventional adjustments of nominalism.[215] In particular, would it not be possible to provide that the payable amount of the cryptocurrencies would be determined by reference to the value of a good, that process then referring to the technique of the *dette de valeur*?[216] Lastly, the enforcement of such an obligation seems ill-adapted. Another difficulty is that of the nullity of some operations realised during the *période supecte*, that is, after the suspension of payments of a company for which insolvency proceedings have been commenced.[217] Among other concerned laws, Article L. 632-1 of the Commercial Code provides that '4° Any payment of due debts, made by any other means than cash, commercial bills, bank transfer, assignment of a credit-claim subject to Art. L. 313-23 of the Monetary and Financial Code or any other means of payment usually admitted in business relations' is void. Here we see that payment in cryptocurrencies may be declared null for not being an ordinary method of payment if it is made in during the *période suspecte*.

209. D. Legeais, 'La qualification des opérations portant sur le Bitcoin', Observations sur la décision du tribunal de commerce de Nanterre du 26 février 2020 (2020) N° 3 Revue de droit bancaire et financier, 7; J. Moreau, 'Lorsque les juges du fond se penchent sur la nature juridique du Bitcoin et des prêts y relatifs – Tribunal de commerce de Nanterre 26 February 2020' (2020) AJ contrat, 296; M. Julienne, 'Le régime civil des actifs numériques: l'exemple du prêt de Bitcoins' (2020) N° 19 *JCP E* 1201.
210. D. Legeais, Fascicule 535: Actifs numériques et prestataires sur actifs numériques (October 2019) JurisClasseur Commercial, n° 69.
211. Art. 1681 of the Draft bill on the reform of contract law (commented). Committee chaired by Professor P. Stoffel-Munck July 2022, 45 <http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/consultation-sur-lavant-projet-de-reforme-du-droit-des-contrats-34548.html> accessed 2 July 2023. See also Art. 42 of the Suggestion of reform of the law of special contracts made by the Henri Capitant Association, 28 <https://www.henricapitant.org/actions/offre-de-reforme-du-droit-des-contrats-speciaux/> accessed 2 July 2023.
212. Art. 1343(1) of the Civil Code, from *French Civil Code, Code civil français, English-French-Arabic*, under the supervision of M. Séjean (LexisNexis 2020) 277: 'The debtor of an obligation of a sum of money is released by the payment of its face amount'.
213. S. Benilsi, 'Paiement' (February 2019 – updated December 2019) Répertoire de droit civil Dalloz, n° 122 ff. See also, M. Julienne (n 56) n° 562ff and T. Bonneau (n 67) 79, esp. 88 according to whom nominalism is linked to legal tender for the purposes of Article 1895 of the Civil Code.
214. supra n° 16.
215. On the conventional adjustments of the principal of nominalism, S. Benilsi (n 61) n° 122ff; M. Julienne (n 56) n° 562ff.
216. On the *dette de valeur*, Art. 1343-3 of the Civil Code. See M. Julienne (n 56) n° 564; J. François (n 24) n° 55ff. See also on that technique, Rémy Libchaber (n 71) Thomas Le Gueut (n 70).
217. Art. L 632-1ff of the Commercial Code.

45. Those are the first difficulties that one could think of in relation to the obligation which would be issued in cryptocurrencies. Even if accepted by the parties, that process may cause later challenges. Moreover, if one considers payment in cryptocurrencies, which would be admitted because accepted by the parties, it is necessary to also study the different case in which the obligation is denominated in a usual currency but payment is made in cryptocurrencies.

2. The obligation issued in legal tender but paid in cryptocurrencies

46. We will first study Colombian law (a) then French law (b).

a. In Colombian law

47. Between dation and novation – There may be restrictions as to the possibility to replace a monetary obligation by an obligation in cryptocurrencies, but those restrictions are not absolute. The creditor of a monetary obligation may always accept to receive cryptocurrencies instead of a sum of money, either at the time of payment, which would then lead to the characterisation of a dation in payment,[218] or before payment, by agreement with the debtor in order to conclude a novation, by which they therefore decide that the obligation of paying a sum of money is extinct and replace it with that of giving cryptocurrencies.[219] However, the Central Bank has not recognised dation in payment in the case of payment of obligations derived from an external debt on the pretext of the uncertainties linked to the account management of crypto-assets and the precise way to establish their value to include them into the property of who receives them.[220] For us that position is questionable since even though it may be difficult to set the value of crypto-assets, that does not mean that it is impossible to determine it. Then, it seems that the denial is more due to the nature of the debts considered than to the difficulty of setting the value of crypto-assets.

b. In French law

48. Dation in payment – In this second case, payment in cryptocurrencies may be admitted, assuming the creditor agrees to it, pursuant to Article 1342-4 of the Civil Code which provides that the object of the payment may not be different from the object of the obligation, of the performance owed by the debtor, except if the creditor accepts to receive something else, in which case a dation in payment is made.[221] That is what is sometimes put forward to explain conventional payment in cryptocurrencies.[222] However, the analysis relies on frail premises which once again show how ill-adapted our law is to payment in cryptocurrencies. On the one hand, to accept it, it is considered that cryptocurrencies are goods that may be received as payment, and are different from the sum of money which is payable and provided for in the obligation. More precisely, the idea being defended is that, because cryptocurrencies are not granted currency status and do not have equivalent power to discharge, payment in cryptocurrencies is a dation.[223] However, on the other hand, it has also been shown that if cryptocurrencies are subject to the dictates of the regime of mone-

218. About dation in lieu of payment: F. Navia Arroyo, 'Variaciones sobre la dación en pago', Estudios de derecho civil en memoria de Fernando Hinestrosa, t. I. (Universidad Externado de Colombia 2014) 547-78.
219. A. Gámez Rodríguez (n 60) 236-37.
220. Banco de la República, Secretaría de la Junta Directiva, 1 April 2019 <https://www.banrep.gov.co/es/banco/junta-directiva/conceptos/jds-ca-04637> accessed 13 February 2023.
221. On *dation* in lieu of payment, J. François (n 24) nº 19 and Nº 139ff.
222. D. Legeais (n 210) nº 69.
223. F. Grua, updated by N. Cayrol (n 61) nº 87.

tary obligations, the payment realised in cryptocurrencies cannot be seen as a dation in payment.[224] On that issue, it should however be possible to consider that, in the current state of the law – ie the lack of admission that cryptocurrencies are currencies, but the admission that it is a conventional method of payment – when an obligation is payable in legal tender but paid in cryptocurrencies, it is actually a dation in payment. That shows that the difficulty in characterising the special object that cryptocurrencies are leads to many difficulties of regime. Concretely speaking, here again,[225] the realisation of the dation would raise implementation difficulties linked to the determination of an equivalent.

49. Novation, optional or alternative obligation – Here too, dation in payment should be distinguished from close mechanisms, first among which novation. That technique is subject to Articles 1329 and following and, as far as we are concerned, consists in the replacement of an obligation by another,[226] that is, in the replacement of an obligation issued in legal tender by an obligation issued in cryptocurrencies. In these circumstances, the difficulties mentioned above[227] should be considered to arise. If one goes back in time a little, one should consider the hypothesis in which the obligation, though denominated in legal currency – ie payable in euros – has been conceived since the beginning as admitting a differentiated execution – here in cryptocurrencies. It has been noted that it is only the imperative or obligatory nature of a payment in foreign currencies which would go against the principle of using the euro:[228] as Thierry Bonneau said, 'the clause which allows the debtor to discharge their obligations in euros or in another currency is lawful'.[229] From that point of view, it seems possible to provide for an obligation which would be payable in euros or in cryptocurrencies. Would this process not allow precisely the use of cryptocurrencies to comply with the legal principle requiring the use of the euro?[230] Two paths seem possible then: such a case would be like an alternative obligation provided for in Articles 1307-1307-5 of the Civil Code or the optional obligation provided for in Article 1308 of the Civil Code. In the first option, while two performances are owed, the debtor's obligation is discharged thanks to the performance of only one of them; in the second, only one performance is owed but the debtor may discharge their obligation by realising another one.[231] Those are techniques that would make it possible, following different time, conditions and effects,[232] to pay in cryptocurrencies an obligation issued in euros.

224. M. Julienne, 'Les crypto-monnaies: régulation et usages' (2018) N° 6 Revue de droit bancaire et financier, Study 19, n° 14, which, according to the author, would lead to their prohibition on the ground of Article 1343-3 of the Civil Code which requires the use of the euro. On that question, supra n° 16.
225. supra n° 47.
226. M. Julienne (n 56) n° 383ff; J. François (n 24) n° 116ff, esp. n° 131ff on novation by change of subject-matter.
227. supra n° 42ff.
228. supra n° 17.
229. T. Bonneau (n 44) n° 745 and references in footnote 138: the author bases this idea on a decision of the *Cour de Cassation* of 11 July 2018, appeal N° 11-19884, confirming the annulment of a national-law loan agreement imposing on the borrower to reimburse the sums owed in Swiss francs.
230. The hypothesis – exonerating from Article 1307-1(1) of the Civil Code (M. Julienne (n 56) n° 83; J. François (n 24) n° 337) – in which the option would belong to the creditor of the alternative obligation, which may make payment in cryptocurrencies imperative on the debtor, will be left aside.
231. On the difference between those obligations and their regime, M. Julienne (n 56) n° 80-92; J. François (n 24) n° 337ff.
232. On the proximity of those processes, in particular between dation and optional obligation, M, Julienne (n 56) n° 91 and footnote 40; J. François (n 23) n° 337 and references in fn 3.

50. Leaving aside the questions raised by the payment in cryptocurrencies of an obligation denominated in legal tender and that of the characterisation of the obligation issued in legal tender, one should focus a little on the proof of payment in cryptocurrencies.

3. The proof of payment in cryptocurrencies

51. The proof of payment in cryptocurrencies – The possibility to pay in cryptocurrencies raises the issue of the proof of payment. In French law, Article 1342-8 of the Civil Code has been regulating the means of proof of payment since the 2016 reform.[233] Pursuant to that text, the proof of payment may be realised by any means, independently of the existing debate on the nature of payment, even though in practice that proof often results from the issuance of a receipt by the *accipiens*.[234] In Colombian law, the means of the proof are regulated by the General Code of Procedure. Thus, in principle, according to the rule of freedom of evidence, payment may be proven by any means,[235] except when proving the payment of an obligation deriving from a contract or a convention. In that case, the absence of document or of the beginning of a written proof will be considered by the judge as a serious indication of the non-existence of payment, unless, because of the circumstances in which the payment was made, it was impossible to get it, or the value and quality of the parties justify such an omission. Payments made *via* the classic banking system do not create any difficulty for it will always be possible to prove them thanks to a bank statement or certificate.[236] On the contrary, demonstrating a payment in cryptocurrencies could not be that easy, precisely because of the usually pseudonym nature of transactions in cryptocurrencies.[237] Admittedly, the information about transactions which has been recorded in the blockchain may theoretically be reproduced in a reliable manner allowing to establish the proof of the payment and its date. The blockchain is regularly extolled for its capacity to establish evidence, because of the unforgeable character of the information contained.[238] Indeed, the blockchain precisely allows – because of the digital fingerprint of the recorded operations showing the date and time in the chain of blocks and link to the private key of the user – to identify in a dependable manner the operations that have been realised.[239] That is the hashing function – and if need be using hashing trees or *Merkle trees* used by Bitcoin – which allows for that permanent recording in the chain of blocks and their identification,[240] while network transactions are verified via mining.[241] In reality, more than the authenticity of information and the reliability of chains of transactions,[242] it is the linking of that information to the people in question which creates difficulties. The difficulty comes in particular from the fact that the users use the network under a pseudonym, to preserve their private lives and the secret nature of their transactions.[243] Admittedly, the traceability of operations would theoretically allow to find the person who has made the transaction based on the

233. M. Julienne (n 56) nº 553, 376; J. François (n 24) nº 32-33.
234. M. Julienne (n 56) nº 214, nº 553-554; J. François (n 24) nº 31-33.
235. In that sense Article 165 of the General Procedure Code. See F. Hinestrosa, *Tratado de las obligaciones, t. I, concepto, estructura, vicisitudes* (Universidad Externado de Colombia 2002) 653-55; H. D. Velásquez Gómez, *Estudio sobre obligaciones* (Temis 2012) 1113-15.
236. J. François (n 24) nº 33.
237. A. Gámez Rodríguez (n 60) 237.
238. P. De Filippi (n 2) 47-49.
239. P. De Filippi (n 2) 52.
240. P. De Filippi (n 2) 19-22.
241. supra nº 4.
242. See also on that last point P. De Filippi (n 2) 25ff the correction, by the network, of a payment made twice.
243. P. De Filippi (n 2) 41, esp. on Bitcoin.

pseudonym data.[244] However, once again, that link needs to be established, if need be with the help of the concerned platforms. In European law, the regulation will now impose that operations realised by the providers of payment services on crypto-assets be traceable, thanks to Regulation of 31 May 2023,[245] the collected information being subject to the regime of the General Data Protection Regulation.[246] Between the parties, there are two possible solutions: the first is that the debtor requires a payment receipt from the creditor, which is an obligation of the latter;[247] the second consists in the parties identifying, in their contract, their addresses or public keys to access the blockchain. Thus, there is no pseudonym state and the debtor can prove that payment has been made from their address to that of the creditor.[248] One should note however that there are cryptocurrencies which operate with a completely anonymous and confidential system[249] and that private blockchains, in particular *consortium* ones, are based on a principle of reinforced confidentiality and are opposed to the disclosure of information outside the limited circle of their participants, which are known inside the blockchain.[250] Then, the proof of the payments realised on the blockchain does not seem to create technical difficulties, since it may always be constituted beforehand by classic means. By contrast, the issue seems to create a real ideological incompatibility, since the process relies in an essential way on the confidentiality of the operations. One may also wonder whether users will agree to conform with the usual modes of prior constitution of the proof. The admissibility of cryptocurrencies as methods of payment definitely creates significant difficulties.

52. Conclusion on the state of the law – In short, in French law as in Colombian law, while cryptocurrencies may not be currencies with full power to discharge, for lack of legal discharging power, they may be used for payment, provided the parties agree. However, their being used as a conventional method of payment creates many legal difficulties. That results from the fact that cryptocurrencies cannot be assimilated to legal tender but may not be considered as ordinary goods either.[251] From that point of view, their discharging power would in reality be intermediary. It is not possible to disregard the fact that their instigators and users wish for the mechanism to be a real means of payment. There results a strong unsuitability of our laws of payment which shows in relation to the principle of payment in cryptocurrencies, as well as in relation to its consequences. Indeed, the law of payment does not currently welcome with certainty the possibility of a conventional payment in cryptocurrencies, even though it were admitted by the Court of Justice of the European Union for the European Union. In addition, it does not provide specific protection for its users, which could rely on reinforced warning or, if need be, on the limitation of the area of intervention

244. P. De Filippi (n 2) 42.

245. Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 *on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849*, [2023] OJ L 150/1 (10).
infra nº 67 on that issue.

246. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 *on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ L 199/1, (19) and on data retention period (54).

247. See, for example, Article 877 of the Colombian Commercial Code.

248. A. Gámez Rodríguez (n 60) 238.

249. P. De Filippi (n 2) 42ff.

250. P. De Filippi (n 2) 65ff; D. Legeais (n 15) nº 11, according to whom it would not be a real blockchain.

251. M. Julienne, 'Les crypto-monnaies: régulation et usages' (2018) Nº 6 Revue de droit bancaire et financier, Study 19, nº 14 mentioning the idea that cryptocurrencies may not be 'likened to just any swap object' but noting some reluctance.

of that method of payment. Beyond substantive law, it is therefore necessary to think prospectively. What discharging power will cryptocurrencies have tomorrow? Are they intended to be classified as currencies and/or receive a new legal treatment? In that case, what legal treatment could be considered? This perspective is all the more necessary as the unsuitability of substantive law has shown that there are many projects.

II. *De lege ferenda*, what payment law for cryptocurrencies?

53. When thinking about prospective law in relation to cryptocurrencies one should come back, outside substantive-law characterisations and regimes, to the theoretical and political foundations that would determine the regulation of cryptocurrencies. That means, before studying the content of possible systems, going back to the theoretical premises of what cryptocurrencies are and, beyond that, to the main guidelines of legal policy that could direct the regulation of cryptocurrencies. We will, first, consider the theoretical and political foundations of the regulation of cryptocurrencies (A) and, second, present and assess the current projects and new regulations, that is, the prospects of the framework that cryptocurrencies are subject to (B).

A. The theoretical and political foundations of a regulation on cryptocurrencies

54. When trying to determine the theoretical motives of a regulation on cryptocurrencies, the issue of their being assimilated to currencies is one of particular interest. Could or will cryptocurrencies be characterised as currencies? It is necessary to assess their capacity to be included into the theory of currency eventually. Beyond that, the issue of the political determiners of a future regulation seems useful to decide. Does it depend on the suggested theoretical approach? Moreover, what characteristics and what limit of the considered object – cryptocurrencies – and its current regulation could direct the future choices of legal policy in that matter? Let us consider, first, the theoretical issue of characterisation as currencies (1) before suggesting the different steps of a legal policy of payment in cryptocurrencies (2).

1. The unlikely characterisation as currencies

55. Monetary sovereignty and public institution – One of the elements that are presented as constituting a currency is its inherent link to the State. That condition naturally excludes cryptocurrencies, the ambition of which is the very opposite since their promoters precisely aim to break away from the State system.[252] And, in fact, cryptocurrencies are issued by private operators without any link with States. Currency however is commonly thought to be only issued by the State. Jean Carbonnier began his definition of currency as follows: 'One should start with stating that the timeless principle of currency is a public institution, a

252. supra n° 4 on the political ambitions of the creators of the blockchain and cryptocurrencies.

sovereign State mechanism, an attribute of sovereignty'.[253] That has been the case since the Antiquity and the principle remains in our modern systems.[254] According to classic theory, currency could not apply to other elements than those granted legal tender by the State.[255] In that sense too, Caroline Kleiner develops the idea that the power attached to currency depends on a State decision, which allows to guarantee the value of the monetary unit, thus ensuring confidence in the instrument.[256] In France, monetary competence has been delegated to the European Union institutions. Indeed, the Union has exclusive competence in monetary policy matters under Article 3 of the Treaty on the Functioning of the European Union.[257] Monetary institutions – the European system of central banks in Europe – ensure the diffusion of monetary policies and therefore the regulation of the economic system.[258] Moreover, the intervention of the State, a last-resort lender, allows to keep the level of cash necessary to the functioning of the economy and the management of crises, if need be.[259] In Colombia, as has been underlined,[260] it is the Parliament[261] and the Central Bank[262] which have jurisdiction to establish which currency has legal tender in the country. Therefore, some authors have not hesitated to underline that classifying cryptocurrencies as currencies would mean losing a part of sovereignty.[263] However, for others, the intervention of the State is not a *sine qua none* condition of the existence of a currency. The State theory had long been put into perspective by some authors among whom Nussbaum who developed a sociological theory of currency.[264] Later, Rémy Libchaber defended the idea that State intervention is not a condition of currency.[265] The currency would not depend on a State competence by nature and State intervention would be the consequence of a State appropriation of the powers related to currency for the needs of its public policies.[266] Moreover, still according to this author, the State theory would falter on the reality of monetary creation which is, mainly, the work of banking institutions when they grant loans, rather than of the State.[267] Dominique Carreau has also nuanced that classic theory.[268] Recently, Nicolas Mathey, in an

253. J. Carbonnier, *Droit civil 2, Les biens, Les obligations* (PUF 2004) nº 671.
254. On the Late Roman Empire when the emperors imposed a money-issuance monopoly and built up some monetary policy, R. Szramkiewicz and O. Descamps, *Histoire du droit des affaires* (3rd edn, LGDJ 2019) nº 92-94, and esp. nº 694. See the criticism on the use of that factual historical circumstance as an argument to support the State theory, R. Libchaber (n 71) nº 68.
255. Repeating in a critical way this reasoning which leads to excluding scriptural money from the currency category, D. Carreau (n 85) 309, 346-47.
256. C. Kleiner, *La monnaie dans les relations privées internationales*, foreword by P. Mayer (LGDJ 2010) nº 70 and nº 93ff. on the *lex monetae*, a law of the State issuing the currency applicable to the considered monetary unit.
257. Compare with supra nº 2, 11.
258. D. Plihon (n 18) 85ff.
259. M. Aglietta and N. Valla, 'III. Banques et systèmes de paiement' in Michel Aglietta and N. Valla, *Macroéconomie financière (*La Découverte 2017) 97-120, esp. nº 50 on the risks of free banking, and nº 59.
260. supra nº 11.
261. In that sense Articles 150 and 371 of the Political Constitution.
262. In that sense Article 371 of the Political Constitution and Article 6 of Act 31 of 1992, on the operational standards of the Central Bank.
263. A. Gámez Rodríguez (n 60) 214.
264. D. Carreau (n 85) 309, esp. 367ff mentioning the criticism made by Mann, a supporter of the State theory. See also on those theories, H. de Vauplane, 'Un euro numérique est-il légal?', Revue d'économie financière, (2023) 1, Nº 149, 121, esp. 125-26 mentioning a third so-called institutional theory.
265. R. Libchaber (n 71) nº 57 to 76.
266. ibid nº 73, and 74.
267. ibid nº 75, though there does exist a State supervision especially with the control of interest rates on that creation of scriptural money. See also, D. Carreau (n 85) 309, 365-66.
268. D. Carreau (n 85) 388.

analysis on cryptocurrencies, has questioned the State theory of currency.[269] Some economists also criticise the assertion that the currency is only a State competence.[270] Pepita Ould Ahmed, an economist, has shown that complementary local currencies, created outside banking institutions, have emerged in periods of crisis, but also in communities advocating certain values, especially mutual assistance.[271] According to those analyses, to admit that an instrument could do without a State intervention, it should be considered that the currency – a first and foremost social institution – is based on the trust of its users. Could cryptocurrencies generate enough confidence? Nicolas Mathey has developed the idea that the trust cryptography inspires in its users may be decisive.[272] That confidence, of a new nature, would be an element inherent in the innovation that the blockchain is. As Primavera De Filippi says, 'The blockchain thus shows the change from a trust-based system to a proof-based system: as long as one trusts the underlying technology, one does not need to trust anyone'.[273] The process then makes the intervention of a third-party guarantor – the State for currency – useless. In any case, one may wonder about the motives of that possible trust, and in particular about the risk that support for cryptocurrencies mainly relies on distrust of the institutions,[274] and about its scope. How far could it go? Is it really possible to imagine confidence in the mechanism if it is not universal, or at least widely shared? This seems dubious for now[275] and the near future, especially since the recent failure of a major operator on the market will likely dent that trust[276] and the remedies offered to restore it seem to rely on the intervention of a public or private third party.[277] Then, though it is possible to admit that the link between currency and State is not always obvious, the possibility that it may be supplanted, regarding cryptocurrencies, is far from established. In reality, cryptocurrencies may be disqualified as currencies because of their incapacity – per se, that is, as an autonomous mechanism – to fulfil the functions of currencies and present their characteristics.

56. Characterisation as a currency from an economic perspective – As defined by economists, 'the currency is all the assets of the economy that individuals regularly use to buy goods and services from other individuals'.[278] The currency is usually considered to have

269. N. Mathey (n 23) n^{os} 14 to 17, also criticizing the link between currency and legal tender at n^{o} 18. On the issue of legal tender, supra n^{os} 13 to 15.

270. J.-M. Servet, V^{o} 'Monnaie' in M. Cornu, F. Orsi and J. Rochfeld, *Dictionnaire des biens communs* (1st edn, PUF 2017) 805-08. Compare with J. Couppey-Soubeyran, in collaboration with G. Arnould, *Monnaie, banques, finance* (PUF 2017) 103-04. See also about that school of thought, M. Pilkington (n 30) 406.

271. P. Ould Ahmed, V^{o} 'Monnaie locale complémentaire' in M. Cornu, F. Orsi and J. Rochfeld (Eds), *Dictionnaire des biens communs*, (1st edn, PUF 2017) 808-12. See ibid esp. 810, on the logic behind those complementary currencies (author's italics): 'The currency must allow to circulate value and not to accumulate it in the hands of a minority'.
Compare also on that topic, D. Plihon *(*n 18) n^{o} 29ff, and esp. n^{o} 32 which notes that complementary currencies are 'not real currencies'. See also M. Pilkington (n 30) 406 underlining that the issue of private currency is now focused on cryptocurrencies.

272. N. Mathey (n 23) n^{o} 29-30 studying whether that trust is enough.

273. P. De Filippi (n 2) 5.

274. N. Mathey (n 23) n^{o} 27. See supra n^{o} 5.

275. M. Aglietta and N. Valla (n 259) n^{o} 49.

276. On that question, Interview by D. Legeais and H. de Vauplane, 'Actifs numériques, Regards croisés sur les conséquences de la faillite de FTX' (2023) N^{o} 2 Revue de Droit bancaire et financier, 6 and especially the idea developed by H. de Vauplane that the loss of confidence would be about actors more than crypto-assets.

277. ibid mentioning the proof of reserves established by an audit external to the platform and the advantage of currencies issued by central banks on that point.

278. N. G. Mankiw and M. P. Taylor, *Principes de l'économie* (6th edn, Deboeck superieur 2022) 686, 723 and 1010.

three economic functions: it is at the same time an 'account unit *which allows to assess the value of heterogeneous goods*', a 'payment instrument *which allows to get any good or service*', and a 'store of value', being an asset that is kept and may be used by economic agents.[279] Some sometimes say that though cryptocurrencies or virtual currencies may correspond to the economic definition of currency, they do not fulfil its legal criteria.[280] However, it is not sure that those so-called economic conditions could be considered to be met. The role of value is central in the definition of currency,[281] but the volatility of cryptocurrencies is problematic. This volatility is all the stronger as the fluctuations of the exchange rate of cryptocurrencies cannot be corrected by political actions, as national currencies may.[282] Some have considered that using cryptocurrencies as a means of exchange would be enough to classify them as currencies.[283] According to some economic schools of thought, being an instrument of exchange may be the most fundamental function in the definition of currency.[284] However, the difficulties for cryptocurrencies to become means of payment are well known. Moreover, the other functions of currency may also be difficult to identify.[285] Cryptocurrencies have been conceived and are perceived by their users as a store of value and those assets may draw investors, despite the wide variation in their value.[286] But the idea that this volatility may also oppose their use as a store of value has been suggested.[287] The difficulty of considering that cryptocurrencies have a store-of-value function may be explained by their instability and the lack of State support. Lastly, the account unit would result from a social agreement which allows to establish a reference frame.[288] Cryptocurrencies would not be used as account units either, for the volatility that characterises them would prevent their being a reference for the setting of prices.[289]

57. Characterisation as a currency from the legal point of view – Jurists have left aside the economic definition of currency and propose their own vision of it. Admittedly, among the community of jurists itself, the definition of currency varies. But it is possible to mention a few elements. Rémy Libchaber has criticised the functional approach of currency.[290] It seems to be insufficient. The above-mentioned decision of the *Tribunal de Commerce de Nanterre* in 2020 admitted that Bitcoin had a function of currency, but did not characterise it as one.[291] The statement of the motives for the last Bill 139 of 2021, in which the Colombian Government tried to regulate services of exchange of crypto-assets, seems to have followed the same path. Indeed, it said that though those crypto-assets may fulfil the function of a

279. D. Plihon (n 18) 3-4. See also as to those functions, J. Couppey-Soubeyran, in collaboration with G. Arnould (n 270) 101.
280. D. Carreau, C. Kleiner (n 23) n° 16; T. Bonneau (n 33) 1008-09.
281. M. Aglietta and N. Valla (n 259) n° 8.
282. H. de Vauplane (n 2) n° 2.
283. A. Rodríguez Gámez (n 60) 208. See on the importance of the function of exchange of a good to be considered as a currency: S. Gutiérrez (n 21) 125, *Bitcoin, la moneda descentralizada de curso voluntario, como equivalente funcional del peso colombiano*, Ibáñez, Bogotá, 2022, 125.
284. J. Couppey-Soubeyran, in collaboration with G. Arnould (n 270) 104.
285. ibid (n 266) 117 on Bitcoin.
286. M. Aglietta and O. Lakomski-Laguerre (n 30) n° 10.
287. M. Pilkington (n 30) 403 quoting a study of 'Pfister (2020)'.
288. J. Couppey-Soubeyran, in collaboration with G. Arnould (n 270) 102.
289. S. Canales Gutiérrez (n 21) 135; A. Barroilhet Díez (n 25) 48-49. See M. Pilkington (n 30) 407.
290. R. Libchaber (n 71) n° 15; C. Kleiner (n 66) n° 6. See N. Mathey (n 23) n° 21ff developing the idea that the criterion of the discharging power is 'determining' but insufficient and must be completed with social acceptance of that currency.
291. D. Legeais (n 15) 6, esp. n° 2, 6, 7.

currency, that is not enough to consider they are one.[292] From a theoretical point of view, according to Rémy Libchaber, a currency is characterised by the existence of a value unit and a payment unit – the former allowing to assess and enter into an obligation and the latter to pay it.[293] According to the author, the two are necessary to constitute a currency and to ensure 'the functioning of a system of monetary obligations',[294] though the value unit is presented as the most fundamental element.[295] Caroline Kleiner differentiates abstract currency from concrete currency, that is, the monetary unit and the monetary power, which, concretely speaking, has a discharging power.[296] The former, an element of the monetary system, belongs to the public-law standard and refers to the capacity to evaluate;[297] the second belongs to internal or international private relations and is included into a monetary medium[298] – those elements together allowing to explain currency.[299] The author characterises monetary power as a subjective, non-fungible right having a power to extinguish debts.[300] Here again, applied to cryptocurrencies, there is no favourable outcome for those legal definitions of currency. A cryptocurrency, as has already been mentioned, may not be a standard of value which would be a reference for users. It is above all the cryptocurrencies capacity to be those value references which is problematic.[301] Moreover, as has also been demonstrated, the power of cryptocurrencies is not the same as the currency for lack of having a real universal or even generalised discharging power.[302] Assuming that cryptocurrencies serve as conventional methods of payment, it is difficult to grant them a monetary power now,[303] which is unquestionably a missing element to classify them as currencies. The characteristics of cryptocurrencies do not seem to allow a decisive characterisation. It is not certain either that cryptocurrencies meet the condition of fungibility, which, incidentally, is not attached to currency by all the authors.[304] [305] It is true that the *Tribunal de Commerce de Nanterre* granted Bitcoin the characteristic of being a fungible good in that famous decision of 2020.[306] However, cryptocurrencies are not recorded as such in the blockchain but in relation to the transactions they are the object of.[307] Beyond that, the very process of the

292. In that sense the explanatory statement of Bill 139 of 2021 <https://www.camara.gov.co/criptoactivos> accessed 25 February 2023.
293. R. Libchaber (n 71) nº 17ff.
294. ibid nº 483.
295. ibid nº 80 and nº 483 specifying (fn 1) that the value unit has a decisive role to 'compare all the products and the description of the obligations'.
296. C. Kleiner (n 66) nº 14ff.
297. ibid nº 16ff and nº 53.
298. ibid nº 54ff.
299. ibid nº 89.
300. ibid nº 66-67. Compare with the payment units being called subjective rights, R. Libchaber (n 71) nº 40ff.
301. C. Kleiner, Chronique de droit bancaire international (2021) Nº 5 Revue de droit bancaire et financier, 2, nº 8, on keeping the dollar as an account unit in the law admitting Bitcoin as legal tender. On that recognition, cf infra nº 63, 73.
302. T. Bonneau (n 33) 1011.
303. supra nº 12ff.
304. *Contra* D. Legeais (n 15) nº 6.
305. Though in Colombian law the majority doctrine does not question the fungible nature of cryptocurrencies: supra nº 26, esp. D. Guzmán, 'Aspectos legales de los NFT's en Colombia' <https://propintel.uexternado.edu.co/fr/aspectos-legales-de-los-nfts-en-colombia/> accessed 18 March 2023, which underlines that the fungible nature of cryptocurrencies would be due to the fact that they represent a specific value allowing them to be replaced by other cryptocurrencies within a blockchain as soon as they serve as a method of payment with the same value.
306. supra nº 44 (n 197).
307. P. de Filippi (n 2) 36 and 42. *Contra,* for whom cryptocurrencies remain fungible despite those circumstances, D. Legeais (n 15) nº 4; M. Julienne, 'Le régime civil des actifs numériques: l'exemple du prêt de Bitcoins' (2020) Nº 19 *JCP E* 1201, nº 7-8.

blockchain jeopardises the capacity of cryptocurrencies to be fungible, especially because a cryptocurrency could hence keep the sign of the lawfulness of a previous transaction.[308]

58. Characterisation as a currency and technical limits of cryptocurrencies – From all the above considerations, it appears that cryptocurrencies may be characterised as currencies because of their characteristics, which reveal their technical limits. If cryptocurrencies have not become important in the domain of payment, it is indeed because of their weaknesses, which oppose their becoming widely admitted currencies. Those weaknesses have been noted. The multiplicity of cryptocurrencies is obviously one of the obstacles to their advent.[309] Their incapacity to offer a stable value system is another.[310] Lastly, the multiplication of frauds linked to cryptocurrencies and other unlawful activities having happened on several platforms of the world of crypto-assets explains a level of distrust towards them.[311] Those three elements can affect trust in cryptocurrencies. Then, assuming even that the State argument be put aside, the trust necessary for them to be accepted as currencies seems quite hypothetical.[312] In addition, the rarity of Bitcoin is another source of difficulties. Its issuance in limited amount favours hoarding behaviours rather than using it as a method of payment.[313] Moreover, from a more systemic point of view, Bitcoin, issued in limited number, is not enough to provide a sufficient amount of cash.[314] Then it seems that the structure of cryptocurrencies does not provide the expected technical characteristics of a currency – for users and the needs of the system.

59. Characterisation as a currency, the special case of stablecoins – In addition to Bitcoin, there are many cryptocurrencies, which show the same deficiencies.[315] One category is different and may renew the analysis – stablecoins.[316] Those stablecoins, because they are backed by an underlying asset which may have legal tender, would have additional guarantees of stability because of their lesser volatility.[317] How could they be characterised? One should note that not all stablecoins work in the same way: while some – the fiat stablecoins – are actually backed by legal tender such as the euro or the dollar, others are linked to another type of asset which may be volatile.[318] But it is true that the development of stablecoins corresponds to a reality, though the latter is less accomplished. The Libra project[319] of

308. P. de Filippi (n 2) 42. Compare with M. Julienne, 'Les crypto-monnaies: régulation et usages' (2018) N° 6 Revue de droit bancaire et financier, Study 19, n° 9 for whom the argument must be put into perspective especially because of the methods available to interfere with traceability.
309. D. Legeais (n 15) n° 37, and n° 38ff for a presentation of the best-known cryptocurrencies.
310. supra esp. n° 55.
311. See on that topic <https://www.bloomberglinea.com/2023/03/10/cayo-el-encanto-por-las-criptomonedas-en-colombia-asi-estan-cifras-de-adopcion/> accessed 18 March 2023.
312. Indeed, according to recent studies <https://www.bloomberglinea.com/2023/03/10/cayo-el-encanto-por-las-criptomonedas-en-colombia-asi-estan-cifras-de-adopcion/> accessed 3 April 2023.
313. N. Mathey (n 23) n° 32. See also M. Aglietta and O. Lakomski-Laguerre (n 30) 103-17, esp. n° 13.
314. D. Plihon (n 18) n° 37.
315. D. Plihon (n 18) n° 38.
316. D. Plihon (n 18) n° 38ff.
317. T. Bonneau (n 33) 1007.
318. Compare with C. Pommier, V. Mamelli and A. Cazalet, 'Thème 2: Valoriser et transmettre le patrimoine dans le monde numérique, Partie I – Le patrimoine entrepreneurial, Titre 1 – L'identification des actifs numériques, Sous-titre 1 – La présentation des actifs numériques, Chapitre 1 – Le développement de la cryptoéconomie' in *Rapport du 117e Congrès des notaires de France*, 2021, N° 2-25 <https://rapport-congresdesnotaires.fr/2021-rapport-du-117e-congres/2021-co2-p1-t2-st1-c1/#ftn0031> accessed 4 March 2023, mentioning stablecoins that would not be backed by any asset but by a smart contract that could ensure the stability of their value.
319. In general on that project, M. Pilkington (n 30).

Facebook is an example of implementation of a system of stablecoins. That mechanism implied that the cryptocurrency would be backed by assets placed in a reserve composed of funds which would have been invested safely and the possibility for the holders of that cryptocurrency to be reimbursed at any moment with an exchange rate indexed on stable national currencies among which the dollar and the euro.[320] It has been abandoned. Others are being set up. In Colombia, for example, Bitso, a platform for the exchange of that sort of currency, has announced the possibility to directly exchange Colombian pesos with stablecoin USDT, a virtual currency backed by dollar, which has been widely adopted in the country. That openness would answer the increasing interest of Colombians in investing or saving in a stable cryptocurrency, especially now because inflation has reached very high levels.[321] However, technique does not avoid all the risks,[322] which has been noted by regulatory authorities, especially American ones, which call for some wariness and their regulation.[323] Economists have indeed stressed some dangers for the economic system.[324] From the point of view of the characterisation as currencies, the answer can only be uncertain, not because the tool cannot be a value unit generating trust, but because it cannot be an autonomous value unit different from real currencies.[325] Should they be classified as currencies though their characteristics are only due to their link to classic currencies? Are they even still cryptocurrencies, given their dependency on classic instruments?

60. In short, cryptocurrencies either would not be currencies or would not be autonomous ones. That being said, is the issue of their characterisation as currencies, which seems fairly out of reach for cryptocurrencies despite the different conceptions of currency, that decisive in regard to their regulation? The issue is mainly subject to autonomous choices of legal policy.

2. A legal policy for cryptocurrencies.

61. A question of legal policy – Fundamentally, the policy of cryptocurrency framing is more a question of choices of legal policy than the capacity of cryptocurrencies to be characterised as currencies.[326] It has been noted that one of the difficulties of the regulation of cryptocurrencies lies in the circumstance that their being denied currency status entails the

320. A. d'Ornano (n 16) 179. See also on that topic, C. Pommier, V. Mamelli and A. Cazalet, 'Thème 2: Valoriser et transmettre le patrimoine dans le monde numérique, Partie I – Le patrimoine entrepreneurial, Titre 1 – L'identification des actifs numériques, Sous-titre 2 – Les qualifications, Chapitre 1 – Les éléments du débat' in *Rapport du 117e Congrès des notaires de France*, 2021, N° 2-65 <https://rapport-congresdesnotaires.fr/2021-co2-p1-t2-st2-c1/#> accessed 4 March 2023.

321. See on that subject <https://www.semana.com/mejor-colombia/articulo/la-nueva-alternativa-para-que-los-colombianos-ahorren-en-dolares-digitales-como-funciona/202311/> accessed 25 February 2023.

322. T. Bonneau (n 33) 1007. Compare with H. de Vauplane (n 2) n° 3.

323. For the United States, President's Working Group on Financial Markets, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency, *Report on stablecoins*, November 2021 <https://home.treasury.gov/system/files/136/StableCoinReport_Nov1_508.pdf> accessed 4 March 2023. And quoted by G. Gensler, Chair of the US Security and Exchange Commission, Speech 'Kennedy and crypto', Sept. 8, 2022 <https://www.sec.gov/news/speech/gensler-sec-speaks-090822> accessed 4 March 2023, and by G. Gensler, Speech 'Prepared Remarks of Gary Gensler On Crypto Markets Penn Lax Capital Markets Association Annual Conference', April 4, 2022 <https://www.sec.gov/news/speech/gensler-remarks-crypto-markets-040422> accessed 4 March 2023.

324. D. Plihon (n 18) n° 39; M. Aglietta and O. Lakomski-Laguerre (n 30) n° 21.

325. Compare from the perspective of economic analysis, M. Pilkington (n 30) 407-08 showing the project of Libra being an account unit.

326. Compare with T. Bonneau (n 33) 1013.

refusal to grant cryptocurrencies the power attached to currencies as well as the possibility to escape a constraining framework.[327] Many hypotheses mentioned above have revealed this harmful paradox, which confirms the dead-end that the link between characterisation as a currency and regulation of cryptocurrencies is. It supposes – within the context of a reflection on what to do with cryptocurrencies as they may be a method of payment – considering their characterisation as a currency and their payment regime independently.[328] This also entails, as much as is possible, to assume that those mechanisms exist and to think again the existing rules or think about future rules regarding that reality, no matter their classification or not as currencies, which, though fascinating, is still a theoretical issue. Characterising cryptocurrencies as currencies should not precede regulation.

62. What legal policy for cryptocurrencies? – Upon analysis, several characteristics seem to emerge from the political and legal treatment that cryptocurrencies should receive. Some objectives would be part of the general method. First, as has been indicated, being characterised or not as currencies should not be necessary in the building of a payment regime in cryptocurrencies. It seems better that the process be understood regarding its ambitions – realising payments – without which it escapes supervision. Then harmonising, or even standardising regulations seems necessary given the impossibility to locate the process and the insecurity that the enforcement of multiple laws could entail.[329] Indeed, the difficulties of connection to national laws and the fragmentation of legislations – harming legal certainty – have been shown.[330] Lastly, the ill-adaptation of existing rules supposes that a new regime be built, which may consist in elaborating a dedicated *corpus* but could not do without an adaptation of payment substantive law.[331] In addition, other objectives would be related to the desirable content of a law of cryptocurrencies, which are linked to the historical risks and considerations many times raised by the phenomenon, especially the fight against financing terrorism and money laundering, and the necessity to protect the consumer.[332] As to the specific issue of payment, one should take into consideration the specificity of the object – which is neither an instrument that may provide universal discharging power, nor just any object –[333] to adapt the law, in particular to avoid that the practise of payment in cryptocurrencies escape any supervision.

327. Compare with F. Drummond (n 112) nº 8 on financial market law; M. Julienne, 'Le régime civil des actifs numériques: l'exemple du prêt de Bitcoins' (2020) Nº 19 *JCP E* 1201, nº 10.
328. Compare with English law, S. Green, 'It's virtually money' in D. Fox and S. Green (Eds), *Cryptocurrencies in public and private law* (OUP 2019) 13, spec nº 2.01, 2.22, 22ff, according to whom private law and private law issues should free themselves from the classic political and economic conception of currency and above all 2.48.
329. Underlining the risk of the multiplicity of applicable texts, A. d'Ornano (n 16) 181. See the criticism of France's choice of legislating alone through the Pacte Act, F. Drummond (n 112) nº 10 and 25.
330. M. Audit (n 2) 679.
331. Compare with F. Drummond (n 112) nº 9, 27 and 30, a criticism on the necessity to legislate specifically in financial law.
332. About the decision of the *Cour d'appel de Montpellier* of 21 October 2021 recognising that the user of a Lithuanian platform was a consumer, M.-E. Ancel, 'Chron. Commerce électronique – Un an de droit international privé du commerce électronique' (2022) Nº 1 Communication Commerce électronique, chron. 1, nº 9; T. Bonneau, 'Crypto-actifs, banalisation et Bruxelles 1 *bis*' (2022) Nº 1 Revue de droit bancaire et financier, 1; and C. Kleiner, Droit financier international – Chronique de Droit financier international, coord. C. Kleiner, E. Prévost (2022) Nº 2 Revue de Droit bancaire et financier, 1, nº 28-29 also mentioning a decision of the Austrian supreme court recognising that the Bitcoin borrower was a consumer.
333. supra nº 51.

63. On the necessity to monitor cryptocurrency platforms – In addition, independently of monetary characterisation, the issue of the traceability and supervision of operations relating to cryptocurrencies is fundamental. That is why in Colombia, for example, the Information and Financial Analysis Unit (IFAU) adopted Resolution N° 314 in 2021,[334] which was enforced in July 2022, whereby, following the FATF recommendations to fight against terrorism and money laundering, the obligation for the platforms of exchange of crypto-assets to inform the IFAU on the transactions realised on virtual assets was sanctioned.[335] That obligation is imposed on any legal or natural person exercising, for another, activities linked to the exchange of virtual assets and fiat currencies, exchanging, transferring or keeping virtual assets and, generally speaking, any service linked to that type of asset.[336]

64. On the necessity to take into account the adoption of Bitcoin as a currency having legal tender in Salvador and the Central African Republic – Salvador was the first country to adopt Bitcoin as legal tender, via Decree 57 of 9 June 2021,[337] which was enforced on 7 September 2021. Thus, it is provided that any economic agent should accept Bitcoin as a method of payment[338] or that it is possible to quote prices in Bitcoin[339] and to pay one's taxes using that currency.[340] The Government of the Central African Republic has regulated, in Act N° 22.004 of 22 April 2022,[341], the use of cryptocurrencies in the country and has provided that Bitcoin would be considered as a reference currency.[342] Consequently, it is provided that 'any economic agent has to accept cryptocurrencies as a method of payment when they are offered for the purchase or the sale of a good or a service'.[343] Similarly, the National Regulatory Agency of Electronic Transactions has been created to supervise and manage all the digital transactions and cryptocurrencies.[344] Independently on whether it is relevant or not to characterise cryptocurrencies as currencies, what is sure today is that at least two countries admit one of the most important cryptocurrencies – Bitcoin – as legal tender. Thus, it does not seem possible to disregard that circumstance and the impacts it could have, at least from the point of view of the characterisation of cryptocurrencies as foreign currencies.[345]

65. The phenomenon of cryptocurrencies poses many challenges. What evolutions of the control of cryptocurrencies are to be expected? Are those evolutions likely to meet the theoretical and political foundations that must guide the control of that phenomenon?

334. That resolution is available at <https://incp.org.co/wp-content/uploads/2022/01/Resolucion-314.pdf> accessed 26 February 2023.
335. Art. 4 of Resolution N° 314 of 2021.
336. Art. 1 of Resolution N° 314 of 2021.
337. Decree 57 of 9 June 2021 available at <https://cdn.inclusionfinanciera.gob.sv/wp-content/uploads/2021/06/Ley-Bitcoin.pdf> accessed 25 February 2023.
338. Art. 7 of Decree 57 of 9 June 2021.
339. Art. 3 of Decree 57 of 9 June 2021.
340. Art. 3 of Decree 57 of 9 June 2021.
341. Act N° 22.004 of 22 April 2022 <http://www.droit-afrique.com/uploads/RCA-Loi-2022-04-cryptomonnaie.pdf> accessed 25 February 2023.
342. In that sense, Art. 1 of Act N° 22.004 of 22 April 2022.
343. Art. 10 of Act N° 22.004 of 22 April 2022.
344. Art. 13ff of Act N° 22.004 of 22 April 2022.
345. In that sense, even before the recognition of Bitcoin as legal tender in Salvador and the Central African Republic, on the ground of the use of cryptocurrencies as international exchange instruments: A. Gámez Rodríguez (n 60) 215-16.

B. The future of the framing of cryptocurrencies

66. There are many new regulations and technical innovations in that matter. The control of cryptocurrencies may evolve in two different fields: the regulations of cryptocurrencies issued by private operators which is about to be reinforced (1) and the projects of creation of digital currencies which would be issued by central banks (2).

1. The projects and new regulations of cryptocurrencies issued by private operators

67. French law and Colombian law admit that the regulation of cryptocurrencies must be specific. In that sense, different projects are being elaborated or are about to be implemented. It is necessary to analyse them to determine their capacity to meet the challenges posed by cryptocurrencies. We will first examine those projects and new regulations in French and European law (a) then in Colombian law (b) before presenting recent evolutions in international law (c).

a. In European and French law

68. New European regulations – The European legislator has seized the need to regulate crypto-assets directly in the Proposal for a Regulation on Markets in Crypto-Assets (MiCA), adopted by the European Parliament and the Council on 24 September 2020.[346] That project has the merit of providing uniform rules aiming to supervise the issuance and use of crypto-assets and to offer increased protection to users.[347] Implementing a European regime would favour cross-border operations for which crypto-assets could be used.[348] That harmonising logic seems necessary,[349] even if it has been noted that crypto-asset companies are mainly outside the European Union.[350] The proposal of regulation frames different categories of crypto-assets.[351] The 'asset-referenced tokens' are subject to a regulation allowing to curb the risks they pose as to the stability of the system and to limit their volatility.[352] The issuers of those tokens must, among other obligations, get an authorisation.[353] The issuers of 'e-money tokens' – which correspond to crypto-assets backed by one currency having legal tender –[354] are regulated in the proposal. Those two categories allow to regulate the practice of stablecoins,[355] which is the most likely to be used and generalised as a method of payment. To that, it may be added that the regulation proposal imposes that a service provider of crypto-assets which offers payment services is a payment institution in the sense

346. Proposal for a Regulation of the European Parliament and of the Council *on Markets in Crypto-assets, and amending Directive (EU) 2019/1937* <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX:52020PC0593> accessed 18 March 2023. See T. Bonneau (n 33) nº 506.16, 1005-06.
347. T. Bonneau, 'Marchés des crypto-actifs, Le 'Digital finance package' (2021) Nº 1 Revue de Droit bancaire et financier, Study 1, nº 8. See Proposal for a Regulation (n 342) Art.1, 38.
348. ibid, 6 and Recital 76, 36.
349. ibid, 8-9. See supra nº 61.
350. P. Storrer (n 5) 7, nº 4.
351. T. Bonneau (n 347) nº 10.
352. Proposal for a Regulation (n 342) Recitals. 36ff, 26ff, and esp. Art. 31 and 32 of those texts on the obligation to constitute own funds and asset reserves, 67ff.
353. ibid, Article 15, 53. See on all the obligations they have, T. Bonneau (n 347) nº 15ff.
354. Proposal for a Regulation (n 342) Recital 9, 20 and Art. 3, 40 for their definition. About their regime, T. Bonneau (n 347) n 22ff.
355. On the chosen directions on that matter, Proposal for a Regulation, 342, 8ff.

of Directive EU N° 2015/2366.[356] The text was signed on 31 May 2023 by the President of the European Parliament and the President of the Council and published on 9 June 2023 in the Official Journal of the European Union.[357] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 *on markets in crypto-assets, and amending Regulations (EU) N° 1093/2010 and (EU) N° 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937* was enforced on 29 June 2023 and will be applicable, with some exceptions, on 30 December 2024.[358] As previously indicated, it establishes three main types of crypto-assets: 'e-money tokens', which are backed by one official currency, 'asset-referenced tokens' and crypto-assets other than those belonging to the first two categories.[359] It imposes on provider institutions to submit to approval procedures[360] and establishes use monitoring to ensure that those uses do not threaten the system, in particular tokens 'with a significant importance'.[361] However, it does not mention specific expectations as to payment law as such. In addition, on the same day, the above-mentioned Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023[362] *on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849*[363] was adopted and also published on 9 June 2023.[364] The definition of crypto-assets is made through reference to that which was made in Regulation 2023/1114 (MiCA) of the same day.[365] The latter imposes on payment service providers and providers realising transfers of crypto-assets an obligation to collect a certain amount of information on the purchaser and beneficiary, to ensure the traceability of operations and limit the financing of illegal activities.[366] Pursuant to its Article 40, that system aims to be applicable on 30 December 2024.

69. In French law – In France, domestic law is no longer intended to evolve autonomously given the advent of Regulation MiCA. One will note however that the recent enactment of Act N° 2023-171 of 9 March 2023 *introducing different provisions in line with European law in the fields of the economy, health, employment an agriculture*, which authorises the Government to legislate by decree to adapt the Monetary and Financial Code and other codes

356. ibid, Art. 63, 97.
357. Official Journal of the European Union 09/06/2023, L150, 40 <https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=OJ:L:2023:150:FULL> accessed 5 July 2023.
358. Regulation (EU) 2023/1114, n 44, Art. 149.
On the website of the AMF 'Marché des crypto-actifs: publication du règlement européen MICA' <https://www.amf-france.org/fr/actualites-publications/actualites/marches-de-crypto-actifs-publication-du-reglement-europeen-mica> accessed 4 July 2023.
359. Regulation (EU) 2023/1114, n 44, (18).
360. ibid, (43).
361. ibid, (102) ff.
362. supra n° 51.
363. <https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:32023R1113#d1e1276-1-1> accessed 5 July 2023.
364. Official Journal of the European Union, n 353, 1.
365. Regulation (EU) 2023/1113, n 241, (10).
366. <https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:32023R1113#d1e1276-1-1> accessed 6 July 2023.

to Regulation MiCA[367] and modifies the regime of service providers on digital assets, as regulated by the Monetary and Financial Code under Articles L. 54-10-1 and following, and especially to establish a transition regime until Regulation MiCA, is enforced.[368] Those measures are auspicious and should allow better supervision of crypto-currencies. However, they must ensure the adaptation of payment law too: the authorisation provided for in Act N° 2023-171 of 9 March 2023 seems to allow for it.

b. In Colombian law

70. The first attempts at regulation – Among the different attempts to regulate cryptocurrencies, two of them were put aside a few years ago already – Bills 020 of 2018[369] and 268 of 2019.[370] Though those two texts are no longer relevant, they are important as they expressly provided that crypto-assets were not legal tender for lack of support from the Government and the Central Bank. In addition, they acknowledged the need for regulating cryptocurrencies precisely because of the fast-growing phenomenon and the necessity to control those operations in order to mitigate the dangers linked to their being used to finance terrorism and launder money. Similarly, technological, cyber and fraud risks specific to operations in cryptocurrencies were mentioned to insist on the volatile nature of that market and consequently justify an obligation of information on platforms offering that type of services, and in favour of the consumer.[371] None of the two bills made any particular reference to payment in cryptocurrencies or to its consequences.

71. The creation of a regulatory sandbox – Similarly, it is to be noted that in May 2020 a regulatory sandbox[372] called 'La Arenera' was implemented by the Financial Superintendence and aimed to test and support new financial services or business models, exercised in real conditions and subject to framing and a particular supervision. Within that framework, many financial entities tested several business models and the risks linked to the use

367. Art. 9 of Act N° 2023-171 of 9 March 2023: 'I. – Under Article 38 of the Constitution, the Government may, within one year from the promulgation of this Act, take any measure by order in the area falling under this Act to:
1° Adapt the provision of the Monetary and Financial Code and, if need be, other codes or acts to ensure, upon enforcement of the Regulation of the European Parliament and of the Council on crypto-asset markets approved by the Council of the European Union on 5 October 2022, their consistency and compliance with that regulation;
2° Define the competences of *Autorité des Marchés Financiers* and *Autorité de Contrôle Prudentiel et de Résolution* as to the application of that regulation.
II. – A ratification bill will be introduced in Parliament within three months of the issuance of the decree mentioned at I.'

368. Art. 8 of Act N° 2023-171 of 9 March 2023.

369. The text of the bill is available at <http://leyes.senado.gov.co/proyectos/index.php/textos-radicados-senado/p-ley-2018-2019/1146-proyecto-de-ley-020-de-2018> accessed 13 February 2023.

370. The text of the bill is available at <http://leyes.senado.gov.co/proyectos/index.php/textos-radicados-senado/p-ley-2018-2019/1429-proyecto-de-ley-268-de-2019> accessed 13 February 2023.

371. Pursuant to Articles 5 and 6 of Bills 020 of 2018 and 269 of 2019, respectively, the platforms making operations in cryptocurrencies are under the obligation of informing consumers of the currencies' lack of monetary status and of the risks linked to those operations.

372. In Colombia, thanks to Decree 1732 of 2021 of the Ministry of Commerce, Industry and Tourism, the Government has authorized the creation of a sort of experimental space or environment called 'sandbox' to test innovating business models. Pursuant to Article 2.2.1.19.1.3 of the decree, the sandbox is defined as a 'sort of exploratory regulatory mechanism, allowing companies to test innovating products, services and economic models without being immediately subject to all the normal regulatory consequences of the activity in question'.

of virtual currencies under the monitoring of the Financial Superintendence.[373] Similarly, different deposit and withdrawal operations were realised with platforms of exchange of crypto-assets (exchanges) and via products of deposits of monitored entities, which demonstrated the possibility to manage risks specific to the operations involving virtual assets.

That pilot project ended in October 2022 and is still being assessed. However, that also allowed the Financial Superintendence to prepare a draft circular on the establishment of links between, on the one hand, providers of virtual asset services, and, on the other, the financial system, in order to allow the development, by the monitored entities, of operations involving virtual assets.[374] Similarly, in that draft circular, the Superintendence provides that the providers of virtual-asset services must meet some conditions to interact with banking institutions, among which, for example, an administrative system to manage the risk of money laundering, technological and operative capacities to realise the traceability of transactions in virtual assets, etc.

It is to be underlined that the monitored entities have a duty of information towards consumers so that the latter must be made aware that they are the only one to bear the risks posed by operations involving virtual assets. Another important aspect of that draft circular is that it reasserts the non-monetary nature of cryptocurrencies while noting the absence of unlimited discharging power. Similarly, it underlines that cryptocurrencies are neither foreign currencies nor financial assets. Lastly, it is provided that the entities under supervision cannot realise operations for themselves, which explains why it is impossible for them to include those operations into their statements of account.[375]

72. The latest attempt at regulating – After the two projects were put aside, another bill was presented to legislate on crypto-assets. Even though there only remained one debate for it to be definitely adopted, it was eventually also put aside, against all odds.[376] It was Draft Bill 139 of 2021, in which the word 'cryptocurrencies' was abandoned and 'crypto-assets' preferred. The latter were defined as virtual assets designed to be used as a means of exchange of goods and services, even though it was underlined that they are neither legal tender, nor a foreign currency, nor a representative title of legal tender.[377] Article 2(a) provided that crypto-assets are immaterial or fungible goods integrating the estate, that may have a value and lead to the getting of an income. In addition, it was underlined that it was not a recognised currency having legal tender. The crypto-assets nature as intangible assets was highlighted. In the same way as in the two previous projects put aside before, this project was silent on payment in cryptocurrencies and its consequences.

73. Beyond the denial that cryptocurrencies are currencies – The last bill was probably shelved because it was not one of the legislative priorities, in a context of other large-scale bills[378] but also because of the wish to enrich the existing proposal with contributions of the Bank of the Republic and the Government. Despite this shelving, the authors of the bill

373. See about the regulation and operation of that sandbox <https://www.superfinanciera.gov.co/jsp/10106586> accessed 15 November 2022.
374. See on that bill <https://img.lalr.co/cms/2022/07/15093434/ABC_proynorma17_22.pdf> accessed 13 February 2023.
375. The draft circular is available at <https://img.lalr.co/cms/2022/07/15093434/ABC_proynorma17_22.pdf> accessed 10 February 2023.
376. See on that issue <https://es.beincrypto.com/colombia-archivan-proyecto-ley-regular-exchanges/> accessed 4 August 2023.
377. Art. 2 of the bill.
378. Eg the reform of Health, see on that issue <https://es.beincrypto.com/colombia-archivan-proyecto-ley-regular-exchanges/> accessed 4 August 2023.

intend to introduce it again in the coming months, with the bill that has been withdrawn serving as a basis for the new one.[379] Thus, because of the direction of the above-mentioned attempts at regulation, it is possible to note that there is a tendency of the Colombian law to follow the positions and recommendations of the administrative authorities and in that sense deny that cryptocurrencies are currencies, and, consequently, deny they have legal discharging power. Beyond that perspective, it is possible to observe that the legislator was mainly interested in protecting the consumer. Thus, the idea is to recognise the national or international Crypto-Asset Trading Platforms (CATP) known as exchanges providing trading services of virtual assets on the Colombian territory. To be recognised, the CATPs, which would be either national or foreign, would have to be commercial companies or foreign entities belonging to the same economic group and legally linked to the CATP residing on the national territory, and would in addition have to register with the mercantile register. Similarly, the creation of a Unique Register of Crypto-Asset Trading Platforms has been planned and should be conducted by the chambers of commerce.[380] In that manner, the legislator seems to be trying to ensure that all the crypto-asset platforms will be linked to the Colombian territory which would facilitate the application of Colombian law in case of litigation. The establishment of a legal framework for those platforms may also help to solve the issue of the above-mentioned difficulties of proving payment in cryptocurrencies,[381] for, under Article 4 (h), the CATPs would have to keep a record of transactions.

In addition, those platforms would have to adopt supervising measures aiming to detect and prevent money laundering and the financing of terrorism.[382] They would also have to report to the IFAU and establish know-your-client and due diligence measures. All those requirements in the end tend to create a legal framework for the functioning of the CATPs and to ensure some security for customers, even though it is not absolute. Indeed, as was established in the last bill, the supervisory functions of the State do not imply that the latter protects against the risks inherent to the operations involving crypto-assets. Given that their value depends on supply and demand on the market based on the type of asset, each user assumes the risk of gains and losses due to the volatility and unforeseeable nature of those crypto-assets.[383]

Thus, several provisions imposed different obligations on the platforms providing crypto-asset related services, for example that of informing users that crypto-assets are not legal tender and are consequently not backed by the State.[384]

74. Uncertainty as to the relation between cryptocurrencies and foreign currencies – Another aspect on which the last bill was silent, despite its importance, was that of the possibility to consider cryptocurrencies as foreign currencies. As was underlined above,[385] the fact that at least two countries have recognised Bitcoin as an official currency should lead to a taking of position on the matter. Uncertainty is all the more important regarding Bills 268 of 2019[386] and 139 of 2021 in its original version.[387] Indeed, those two texts, upon

379. See on that topic <https://www.portafolio.co/economia/finanzas/criptomonedas-en-colombia-proyecto-se-presentara-en-julio-584966> accessed 4 August 2023.
380. Art. 4 (a) of Bill 139 of 2021.
381. supra n° 50.
382. Art. 4 (c) of Bill 139 of 2021.
383. In that sense Art. 5 (d) and (e).
384. Art. 5 (a).
385. supra n° 63.
386. In that sense Art. 2 (b).
387. In that sense Art. 2 (a).

giving a definition of crypto-assets, expressly provided that they were neither legal tender nor foreign currencies, nor representative titles of legal tender. Would the deletion of the provision which denies that cryptocurrencies are foreign currencies mean that the legislator has thought about granting them such a status? The adopted position is not insignificant regarding Article 86 of External Resolution 1 of 2018. Indeed, it would be possible to admit that the parties may stipulate an obligation in Bitcoin, which would be considered as a monetary obligation, precisely because the monetary nature of Bitcoin has been recognised by Salvador and the Central African Republic. Another issue would be to determine in which currency – Bitcoin or peso – the obligation should be paid. If it is considered to be an international operation, the obligation should be paid in Bitcoin. If it is not, the obligation should be paid in pesos. The difficulty would lie in the establishment of an exchange rate that would be representative of the market to realise the conversion. Pursuant to above-mentioned Article 86, the conclusion would be that the rate would be that of the day when the obligation was entered into, except stipulation to the contrary. However, Article 7 of Bill 028 of 2018 went into a different direction and provided that the exchange rate would be that of the day the obligation was performed, unless the parties stipulated otherwise. In addition to national projects, an international answer is being expected.

75. Independently of the differences in the direction of European, French and Colombian projects, one could note that they endeavour to regulate crypto-assets in a general way without differentiating among cryptocurrencies, which may be a drawback when cryptocurrencies have particular features that would warrant a specific approach.

c. International law projects

76. Unidroit principles – Different international bodies have studied the issue of cryptocurrencies.[388] In particular, Unidroit, in partnership with a certain number of institutions, published a working document in January 2023[389] which was subject to a public consultation. That document is designed to provide useful precisions to determine the regulation applicable to operations related to digital assets, which is a crucial issue, as has already been noted.[390] The project provides a certain number of substantial principles[391] which prevail over national laws[392] and it would encompass all sorts of transfers of digital assets,[393] including digital assets backed by other assets.[394] Above all, the project contains a conflict-of-laws mechanism which results in the national law being applicable on the matter of the ownership of digital asset when the digital asset expressly provides that the national law applies to that question, or, absent such a provision, if that national law is expressly provided for by the system or the platform on which the asset is recorded, or, in still other cases, by other

388. Interview by D. Legeais and H. de Vauplane (n 276) 6.

389. *Draft Unidroit Principles on Digital Assets and Private Law*, Unidroit 2023, Study LXXXII – PC, January 2023 <https://www.unidroit.org/work-in-progress/digital-assets-and-private-law/> and <https://www.unidroit.org/work-in-progress/digital-assets-and-private-law/digital-assets-and-private-law-public-consultation/> accessed 4 July 2023.

390. supra nº 16.

391. D. Legeais, 'Actifs numériques, En attendant MICA, voici Unidroit!' (2023) Nº 2 Revue de Droit bancaire et financier, repère 2.

392. Draft Unidroit Principles on Digital Assets and Private Law, Unidroit 2023, Study LXXXII – PC, January 2023, Principle 3, 14.

393. ibid, Principle 2, 8. On that point, J. Chacornac, 'L'émergence d'un cadre international pour les actifs digitaux', Droit bancaire et financier international (2023) Nº 208 Banque & Droit, 73, esp. 74.

394. Draft Unidroit Principles on Digital Assets and Private Law, Unidroit 2023, Study LXXXII – PC, January 2023, Principle 4, 17.

mechanisms of determination of the applicable law.[395] It is quite beneficial that that text offers a mechanism to determine the enforceable law but one may wonder about the clarity of the chosen criteria, in particular that of the foreseeability of the applicable law 'in the digital asset',[396] as what it covers is not clear at once. For that matter, an author has observed that the selected method consists in renouncing the connection that would result from the location of the thing, which may have been considered a 'failure'.[397] One may also wonder about the place of payment in cryptocurrencies in that regulation project. Admittedly, cryptocurrencies, and especially, as mentioned above, cryptocurrencies backed by other assets, are included into the field of applicable principles. However, one will note that, more than the specific objective of payment by those crypto-assets – the issue of the validity of transfers being excluded from their field of application –[398] the substantial principles are about some issues related to the ownership of assets.[399] In addition, within the framework of that project in which it participates and from the perspective of an on-going joint work, the Hague Conference on Private International Law has completed the working document of Unidroit: it stresses, among other things, the difficulties in determining the law in the considered field, because it is impossible to identify the users who act with a pseudonym and to locate the platforms, even though it states that the classic linking methods may be efficient in some situations.[400] Eventually, the project was adopted. Indeed, the Governing Board adopted the Unidroit principles as to digital assets on 10 May 2023.[401] The digital assets that may be monitored[402] – among which cryptocurrencies and currencies issued by central banks,[403] insofar however as there are private-law issues – are within the field of those principles.[404] The rule of conflict of laws that has been ratified shows, as noted previously about the working document, the rejection of the criterion of connection that would be based on the location of the asset,[405] even though the connecting criteria have been modified to additionally include that of the headquarters of the issuer.[406] That project improves the framework applicable to transactions realised in crypto-assets, but it is still too little specific as to issues of payment and may be perfected. Beyond, a main datum may change the landscape – the advent of digital currencies issued by central banks.

395. ibid, Principle 5, 21.
396. ibid, Principle 5, 21: '*(a) the domestic law of the State, excluding that State's conflict of law rules, expressly specified in the digital asset as the law applicable to such issues*.'
397. J. Chacornac (n 393) 75.
398. Draft Unidroit Principles on Digital Assets and Private Law, Unidroit 2023, Study LXXXII – PC, January 2023, Principle 3, (3) (b), and developments n° 10, 4.
399. J. Chacornac (n 393) 75, mentioning 'in the end a modest content'.
400. HCCH Proposal for joint work, HCCH-Unidroit Project on Law Applicable to Cross-Border Holdings and Transfers of Digital Assets and Tokens, Prel. Doc. N° 3C of January 2023, CGAP, March 2023, 4-5.
401. 'Adoption des principes d'Unidroit sur les actifs numériques et le droit privé lors de la 102e session du Conseil de direction' <https://www.unidroit.org/fr/adoption-des-principes-dunidroit-sur-les-actifs-numeriques-et-le-droit-prive-lors-de-la-102eme-session-du-conseil-de-direction/> accessed 5 July 2023.
402. *Adoption of Draft Unidroit Instruments (c) Principles on Digital Assets and Private Law*, Governing Council, 102nd session, 10-12 May 2023, Principle 2. On that point, J. Chacornac, 'L'émergence d'un cadre international pour les actifs digitaux' in Chronique Droit bancaire et financier international, Banque et Droit N° 208, March-April 2023, 73, esp. 74.
403. *Adoption of Draft Unidroit Instruments (c) Principles on Digital Assets and Private Law*, Governing Council, 102nd session, 10-12 May 2023, 2.8ff.
404. Compare with J. Chacornac, 'Principe 5: conflit de lois' (2023) N° 4 Revue de droit bancaire et financier, File 25, n° 23.
405. ibid n° 7.
406. ibid n° 12.

2. The project of creating digital currencies issued by central banks

77. The project – Framing cryptocurrencies is not enough when the needs that the process seems to cover are not satisfied. Different State institutions have therefore considered creating their own cryptocurrencies. Those digital currencies of central banks would serve not only for interbank settlements but also for payment between users.[407] That project has developed around the globe and in Europe.[408] The *Banque de France* and European institutions are testing that process.[409] Several issues may be raised.[410] However, that currency would be based on the idea that it is possible to fulfil the needs for the digitalisation of payment and speed of transactions which support using cryptocurrencies, with the advantage of the stability provided by the State issuer.[411] Beyond the control of cryptocurrencies, the Colombian Government is also considering creating a digital currency, the digital peso, even though this may not be a short-term project.[412] The objective seems to be facilitating payment operations and monitoring tax evasion. The digital peso would thus be included into the category of electronic money and not that of cryptocurrency.[413]

78. What future for cryptocurrencies after the digital ones issued by central banks? – The phenomenon is interesting. For the State institutions it would be a case of putting themselves beyond regulation and 'play on the field of technical innovation'.[414] That could be compared to the historical observation that the State appropriated the new methods of payment established by private initiatives after they were launched.[415] But beyond that, what could it say about future transformations? The impact of the digital currencies issued by central banks on the banking system may also give rise to questions.[416] In particular, one cannot but see the sign of inherent weaknesses of the cryptocurrency projects – which do not seem to be compensated outside a State intervention – and wonder whether the incorporation of the process by State institutions may not precisely cause their fall.

79. Conclusion on the prospective law of cryptocurrencies – Cryptocurrencies do not seem to be designed to become currencies, for lack of having the latter's characteristics. That denial of characterisation, which, paradoxically, allows cryptocurrencies to escape the constraining framework that is imposed on payments, should not however be an obstacle to the

407. M.l Aglietta and O. Lakomski-Laguerre (n 30) nº 26.
408. C. Kleiner, 'Chronique de droit bancaire international' (2021) Nº 5 Revue de droit bancaire et financier, nº 9, 2; M. Pilkington (n 30) 409. See also on that topic, H. de Vauplane (n 2) nº 4 in general and noting that the scope of different central-bank currencies could be limited to their territory.
409. <https://www.banque-france.fr/communique-de-presse/la-banque-de-france-participe-une-nouvelle-experimentation-de-monnaie-numerique-de-banque-centrale> accessed 1st April 2023. At the European level <https://www.ecb.europa.eu/paym/digital_euro/html/index.fr.html> accessed 1st April 2023; H. de Vauplane, 'Un euro numérique est-il légal?', Revue d'économie financière, 2023/1, Nº 149, 121, esp. 121.
410. H. de Vauplane (n 66) 121 and, generally, studying the possibility to found the issuance of an e-euro on the treaties and especially on their definition of the competences of the European Central Bank and examining the issues raised by granting those digital currencies currency status.
411. Compare with M. Aglietta and N. Valla (n 259) esp. nº 60-62.
412. <https://www.portafolio.co/economia/finanzas/gobierno-crearia-moneda-digital-en-colombia-segun-director-de-la-dian-569621> accessed 22 February 2023.
413. See on that difference supra nº 4.
414. M. Aglietta and O. Lakomski-Laguerre (n 30) nº 24.
415. On that observation, R. Libchaber (n 71) nº 73. On that topic, supra nº 54.
Compare with B. Courbis (n 117) 33: 'Currency is a phenomenon with an unquestionable political dimension, but it is not always imposed by the State on the economy, it results from the continuous play of the spontaneity of trade innovations and rule setting of the political power.'
416. D. Plihon (n 18) nº 39; M. Aglietta and O. Lakomski-Laguerre (n 30) nº 25, 27; M. Pilkington (n 30) nº 414.

building of a legislation on cryptocurrencies which should rely on legal policy guidelines rather than theoretical considerations. The projects, in European and Colombian law, seem to follow that approach and fundamentally provide increased framing of crypto-assets. Similarly, the mechanisms of conflict of laws seem to be being specified. Those are positive aspects. One will regret that payment law – which has been demonstrated to be ill-adapted for not clearly welcoming conventional payment in cryptocurrencies and providing specific protection to its users – is not the subject of arrangement projects yet.

80. General conclusion – Given the state of the law at least in France and Colombia, cryptocurrencies may not be a legally and universally recognised method of payment but only a conventional one, as the Court of Justice of the European Union and the regulatory administrative authorities in Colombian law admit. Upon analysis, cryptocurrencies do not seem to have a discharging power with an unlimited, general or universal scope. However, they undoubtedly have a conventional power to discharge which is superior to other goods and which could be called intermediary. In reality, they are designed or aim to fulfil some functions of a currency without being able to be called so. However, paradoxically, on the one hand, their being recognised as a conventional method of payment comes up against a law of payment that is ill-adapted,[417] while, on the other, their being denied the right to be called a currency has placed them in a less monitored position, though the clear ambition of issuers and users is to escape the States' yoke, which is not desirable. Those elements justify that cryptocurrencies be the subject of a new specific legislation which may be autonomous from their being characterised as currencies, unattainable in several respects. From many points of view, it is that stage that European and Colombian legislators are working on with, respectively, the advent of the MiCA Directive, and the probable introduction of a new bill aiming to regulate crypto-assets even though they remain silent on important issues. The question of the applicable law, which is fundamental, should be determined within the Unidroit Framework. The specific issue of the adaptation of payment law, which is essential to allow cryptocurrencies to play even a marginal role as a method of payment, seems for the moment neglected. The admission of the mechanisms should be made compatible with legal restrictions in matters of currency and methods of payment and, beyond that, should rely on clear foundations and characterisations and be included into a framework protective of users. What could be imagined as to the future of cryptocurrencies in matters of payment? Beyond the fact that they are not characterised as currencies, the process does not seem to offer the guarantees necessary to generate trust in users and to their being generalised. The initial project – offering a decentralised payment system, independent of State institutions and universal – which was first and foremost a political one, seems more or less to be fading away. The supervisory intentions of the States have had some impact on that, as well as the technical limits that are inherent in the process. Then, like the Lernaean Hydra which died from its own poison, the system of cryptocurrencies could very well, on the issue of payment, be limited by its own weaknesses: an ambition politically and technically unrealisable. There are still some unknown factors linked to the current economic and political situation which may vary depending on the territories. In particular, the admission of Bitcoin as legal tender in Salvador and the Central African Republic, as well as its being accepted in an increasing number of countries, may change the situation. Moreover, could Salvador's recent announcement of the payment of an important part of its external debt, without the help of the IMF and despite all the negative previsions due to

417. supra nº 51 and 78.

the adoption of Bitcoin as legal tender, give cryptocurrencies unforeseen help? The achievement of the project of a payment cryptocurrency remains dependent on a legislation that may welcome it, which, as the latest legislative news shows, is not simple. The outcome of the project will definitely be political[418] and global.

418. Compare with H. de Vauplane (n 66) 124: 'E-euro is first and foremost a political issue and not a technical one'.