

A LEGAL MECHANISM FOR REGULATING THE DIGITAL ECONOMY

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Abstract: This article examines the societal affairs arising from the digital economy and how these influence the system of state regulation. The authors propose and justify a structural model of a legal mechanism to regulate the digital economy based on results of a critical analysis of Russian Federation and European Union experiences. The research indicates the need to include both centralized and decentralized elements in a mechanism for such regulation and to reconcile these elements by balancing the legislative potential of private entities and the conservative justice approaches of legislators.

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Introduction

The current digital economy involves a wealth of people united by a global communication network for advancing science and developing and exporting new technologies. The presence or absence of signs of a digital economy is the basis for classifying a national economic system as central or peripheral.

Over the past decade, leading countries have adopted strategies for developing a digital economy. Subsequently, on July 28, 2017, the government of Russia approved the program, Digital Economy of the Russian Federation. The program perceives the digital economy as an ecosystem with digital data the key factor of production in all spheres of social and economic activity. Furthermore, the program supports interaction cross-border, and between businesses, scientific and educational communities, and the state and its citizens.

The aim of the program is to implement a centralized model of regulation for the digital economy. The Ministry of Economic Development of Russia, as administrator, created a government commission to manage the program. Whereas this commission did not include representatives of fundamental science, the transition to a digital economy will mean cardinal changes in the public relations system that requires appropriate scientific support and a new regulation model. Hence, a scientific approach will assist in creating an effective legal mechanism for the regulation of the digital economy.

The concept of a legal mechanism in the field of Russian law has a one-sided legal and technical interpretation that offers a centralized model of positive law in regard to public affairs (Tikhomirov, 2008). However, the abovementioned legal institution is considered auspicious, remaining of practical importance for the European and Eurasian legal space and characterized by a territorially organized legal system. The mentioned system is based on the participant's location in the physical world and the law operating at a fixed time, material space, and within specific limits, along with the nation's enhanced ability to control the flow of information.

Data and Methodology

This study used a structural functionalism approach to identify a legal mechanism for the regulation of a digital economy and to transform it into a modern legal category. This method of legal comparison was considered the most efficient way to detect innovative legal affairs for regulating the digital sphere.

A systematic approach was used to analyze the legal means and methods of evolving a 'positive' law and define the place and role of 'soft' law institutions in the regulatory environment of the digital economy.

Theoretical modeling was chosen to create and study a suitable model of regulation for the digital sphere as it avoids potential violations of legal rights and interests in legal practice.

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The above methods were considered suitable for defining the legal mechanism, not as a linear aggregate of legal means, but as a multidimensional system of organization and interrelations of elements that preserves the basic mechanical properties and functions when implementing various forms of legal effects in the digital sphere of economic activity.

Results and Discussion

Regarding the digital economy as a subject of regulation, the research includes analyses of the digital economy using traditional indexes of infrastructure, market institutions efficiency, educational level, and macroeconomics; and innovative indexes of dynamic digital environment, technological and innovative business efficiency, and the number of qualified specialists in the high technologies area) analysis (The Global Competitiveness Report, 2010). The digital object's value is determined by demand, i.e., the number of users of the product. According to the World Economic Forum, experts forecast 80 % of the world's population will have a digital presence on the Internet by 2025 (Schwab, 2017).

The main difference of a digital economy compared to a traditional one is its unprecedented flexibility of technological production and consumption modes, with low-priced production and logistics, the emergence of new benefits of distribution models, and the growing importance of self-organization. Other changes involve the transfer of functions and business to a digital environment and almost unlimited technical potential to digitize objects, where any object exposed to digitization, gains the new name of 'content'. There are also the digital shell configurations and virtual entities' transactions. At the same time, the digital economy, according to many researchers, is not autonomous with respect to practical economic affairs (Tapscott, 1994). Digital technologies create new economic infrastructures that involve redistribution of benefits, based on supply and demand, carried out by participants of equal subjects.

Thus, the digital economy is an organized environment based on information technologies for network interaction, i.e., interconnection, distribution, and exchange between equally autonomous participants. Economic affairs bind the production and innovation and use creativity as the main technique of personal economic pursuit.

In regard to features of digital economy regulation, an erasure of boundaries in the sphere of interethnic and state regulation is considered to be the main trend in the regulation of a digital economy. The interinstitutional ways of 'better' regulation engage the principles of voluntariness, as an alternative to applying regulatory methods and intensive interaction of regulation. They have legitimate power and a balance of participants' interests as a guarantee of regulatory stability.

At the level of international regulation, legal practices are rapidly losing their legal significance and offer ground to new legal standards and recommendations, developed by international organizations. New participants of non-state entities, which are public and quasi-public organizations, that perform regulatory functions, appear regardless of the will of the states.

The entry of modern states into supranational associations naturally limits their sovereignty in the sphere of regulation. However, the voluntary ways to limit the sovereignty, as a result of restricting national legislation by a supranational law, are incomparable to the total absence of territorial boundaries in the digital sphere. The virtual world, unlike the material world with natural human interaction, is open to innovation and represents an extraterritorial communication of creative actors eager to develop, use, exchange, or transfer information about the pecuniary turnover of material world objects.

The legal and technological character of regulating a digital economy also requires consideration. Voynikaynis (2013), the author of the first Russian study into regulating digital affairs, researched the theoretical and legal experiences of the United States and Europe and concluded that, of a particular interest, a legal mechanism should not include positive law elements. At the same time, the author's notion of technologies, independently performing as social relationship regulators, appeared controversial (Voynikaynis, 2013).

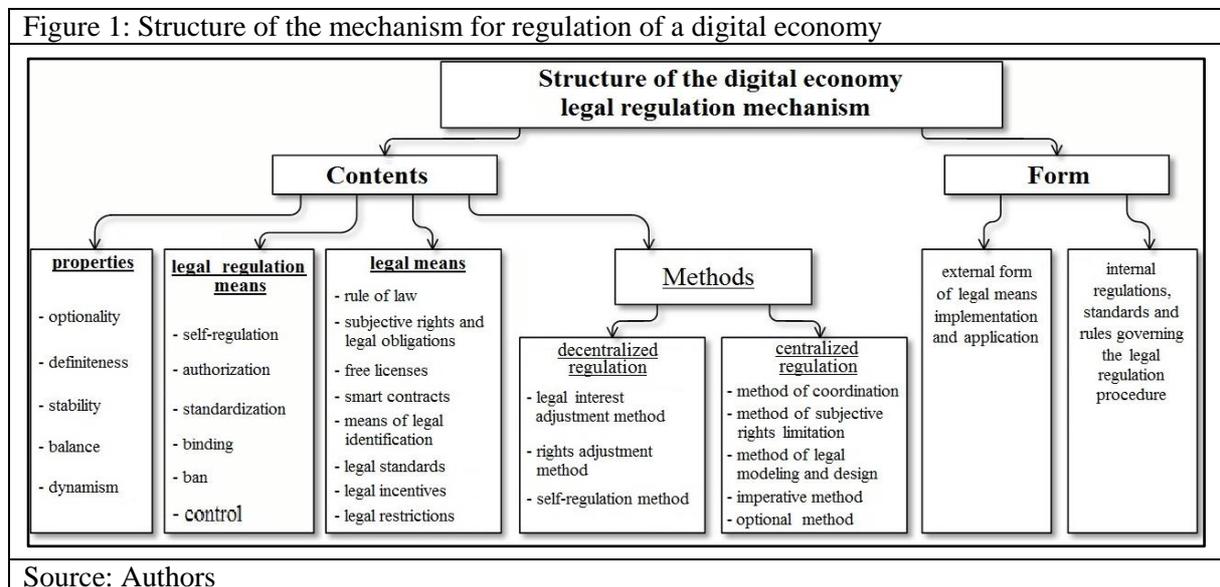
Information technology is a means of legally solving problems. For example, computer programs, or similar digital means, protect information rendered as an object of the law, by blocking or restricting access of unauthorized users. The main advantage of such methods in terms of technological

protection is their competence in preventing crime, whereas most legal means are about assigning consequences for the crime committed.

At the same time, social regulators cannot act without a subject, unlike other objective phenomena. Technologies cannot create, possess, and realize subjective rights and legal obligations, which are the main elements of the legal mechanism. Digital technologies that have developed objectively and affect public affairs require legal mediation and exposure.

Thus, the regulation of digital public affairs requires external state regulation, involving approaches of material and physical legal effect, combined with internal self-regulation of parties of digital legal affairs using flexible legal tools. Considering the current pace of information technology development and the different economic models of digital space organization, the state would need to minimize the external influence and limit the legal initiative of participants involved in virtual legal affairs. The participants mentioned above would need to ensure the interests of state security and sovereignty and the legal rights of those involved in genuine legal affairs are met.

The structure of the legal mechanism is a system of elements, organized and interrelated to ensure the basic mechanical properties and functions are preserved when implementing various forms of legal influence. It includes content, such as properties, legal regulation methods, legal means and methods, and form (Figure 1).



The regulation of digital economic relations aims to recognize the objectively determined sovereignty of a private person, expressed primarily in the possibility of owning subjective rights to intangible and material goods. The sovereignty is not to be the subject of arbitrary interference of anyone including the state.

Since the scientific and technological progress is a key factor in digital economic development, it is equally important, by means of legal forms and regulations, to stimulate the innovative activity of legal entities and implement the science for the economic development of society for profitability. Regulation would need to capture all basic principles of civil law and consider the presumption of reasonableness and conscientiousness of all participants.

The above objectives determine the properties of the legal mechanism for regulating the digital economy. The optional properties include the ability to select public affairs for legal effect, taking into account the interests of participants who independently establish regulatory standards for themselves. The optional properties also include having certainty in terms of establishing the boundaries of an individual's legal capabilities and stability with respect to existing legal prohibitions and legal behavior requirements. The properties that involve decentralism include the ability to maintain vertical and horizontal system interrelations and to establish diverse and permanent institutions and network communities that satisfy the demands of the economy. The permissive nature of regulation allows participants not only to realize their rights in a chosen way but also to form new means and methods of legal influence.

Other properties include the antimonopoly intentions and effectiveness of resolving the generally valid legal tasks and individuals' subjective rights to attainment and balancing the interests of rights holders, users, and public entities to ensure equal legal opportunities of the participants and proportioning of their subjective rights and legal obligations. Other properties also include the dynamic process of creating new legal means and forms, as opposed to a static system of current regulation.

Regarding the methods of regulation, the above properties of the legal mechanism support its multidimensional and complex character. Therefore, the methods used as a structural element of the system are divided into decentralized and centralized regulation. The first group includes a method for adjusting the lawful interests of legally equal parties involved in the network interaction. The European Union countries also use a law adjustment method that involves transferring the direct regulation of civil affairs onto intergovernmental bodies.

The application of the self-regulatory method, within the implementation of subjective rights defined by a positive law, enables the creation of a legal environment. The legal environment is based on fundamental legal principles that activate the law-creating initiative of the users to develop the fairest standards of legal conduct, giving. This gives the users maximum freedom of action for innovation, thus, increasing new products selling. However, in this article, self-regulation infers an autonomous type of regulation at a collective level rather than at an individual level. That is, patterns of legal behavior are developed by participants in a collective manner in the process of communication and legal dialogue in the digital space, within the limits established by statute. The legal behavior that is standardized in such collectives results in "conscious goal-setting on the basis of certain normative values", according to Polyakov (2004).

Since December 30, 2015, the Conception of Improving Self-Regulation Mechanisms, developed by the Russian government, has been implemented in the Russian Federation (LC RF, 2016. Article 458). However, this policy is based on the public paradigm of self-regulation, which does not correspond to the matter and content of economic affairs in the digital sphere that are aimed at reducing the public authorities' participation in managing private economic pursuits.

The centralized regulation approaches such as legal monitoring, using an imperative method, and a method of legal modeling and design, are necessary for the state to prevent cyber threats, technological disasters, and destabilization of the social system. They are also essential to ensure security on a broad scale. Modern computer technology can be effectively used to calculate a legal pattern without destructive actions in the operational world.

The method of coordination ensures a complete agreement of parties, taking into account their legal interests, and provides a common framework of legal behavior. It also creates a system that compromises mutual intersection and interrelation of interests, rather than prioritizing certain category interests. The method of subjective right limitation defines a person's limits of legal freedom and prevents the abusive practice and inappropriate treatment of regulation. The Constitution of the Russian Federation (part 3 of Article 55) defines the legislative limits of the rights and freedoms of a person or legal entity until these contradict the following: the constitutional order; morality, health, rights, and legal interests of others; and state defense and security.

Changing the objectives and methods of regulation results in a legal means of system transformation.

The normativity of economic affairs in the digital environment provides the social basis for new legal norms. In the recent decades, the emergence of norm strategies has guided innovative economic development in accordance with national priorities and goals as well as the interests and needs of the population (Shatkovskaya & Epifanova, 2016).

The social affairs involve a continuous change of private and public interests, due to information technology that introduces new objects of regulation needing adequate registration within the legal standards. Accordingly, there appears to be a great number of optional norms that establish the legal equality of the participants and the ratability of their rights and obligations.

Regulation is about actively implementing legal standards, which are considered tools for improving the quality of business regulation. It uses the best practice enshrined in international, national, and corporate standards. As a result, in the digital space, participants can successfully apply for free licenses and 'smart' contracts with proper legal identification as third-party trusted services.

In addition, alongside the emergence of new ones, traditional legal means gain a new role and significance. Thus, legal incentives now support a creative minority that guarantees the welfare of society and creates and develops new forms of free information exchange in the digital sphere. The national regulation supports legal incentives for substitution imports and implementation of export-oriented projects in the field of digital technologies.

Legal restrictions, as a means of regulating digital legal affairs, should not create obstacles and barriers to investment, awareness, turnover, and use of innovative technological products. On the contrary, these restrictions should create a good environment for global franchises and new information products and solutions (COM, 2011, 287 final. P. 4-6).

System changes in the legal mechanism due to the development of an information society result in a new type of generally permissive method of regulation or legal framework. According to this, participants of legal affairs limit their rights and transfer private activity regulations directly to the collective mechanism of government. The United States is testing a mixed type of regulation, based on a combination of imperative and optional principles, using both private law and public practice to influence the economic entities (Epifanova et al., 2017). In the Russian Federation, this type of regulation is lawfully fixed for financial market organizations and is implemented by the means of licensing and a mandatory self-regulation establishment (LC RF 2015. Article 4349). In the European Union, a type of mixed regulation is considered to be the 'best' and authorizes the competent economic pursuits of private entities, as well as imposes the legal responsibility for achieving statutory economic goals (2003 / C, 321/01). A joint state and non-state regulation is the normative fixing of legal responsibility for achieving the goals of legal impact for authorized private entities under the state structure control.

Conclusion

Today's digital economy needs a legalized influence that combines the centralized and decentralized elements of regulation. Digital technologies do not change the essence of regulation. They generate social affairs of a new type, one that depends on the virtual sphere and which makes the existing system of legality inadequate. Digital technologies transform the content and form of the legal mechanism and create lawful forms of partnership and economic cooperation, enabling entities to independently determine the rules and norms of their professional pursuits, as well as control their implementation, thus overcoming redundancy and ineffectiveness of positive regulation. Centralization as a backbone of the regulation mechanism in the Russian and the Romano-German legal systems contradicts the requirements of legal mediation of economic affairs in the digital sphere. Under the conditions of total digitalization and virtual internationalism, the current system of centralized regulation does not possess the properties necessary for a digital economy. These properties include the flexibility to create new legal affairs, a subsidiarity to distribute the regulatory power and responsibility of their implementation by public and private entities, and transnationality for ensuring permanent social interaction. The coexistence of contradictory centralized and decentralized elements in the legal mechanism is in accord providing the necessary adjustment methods are available. The effectiveness of the legal mechanism is achieved when the lawmaking potential of private entities balances the conservative approach of legislation and justice. This mechanism assumes there are different ways of solving economic problems and therefore supports a positive effect.

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