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Digital Currency and Novelties in the Criminal Code of the Russian Federation: Topical Issues

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Abstract
Introduction: the article analyzes the concept and legal nature of digital currency and certainnoveltiesrelated to digital currency, which were put forward in the last few years so as to be introduced in the Criminal Code of the Russian Federation. *Aims:* to study and summarize legislative initiatives related to digital currency; to define the concept and essence of digital currency; to establish its place in the civil rights system; to analyze the possibility of recognizing digital currency as an object and (or) a means of committing crimes. *Methods:* historical, comparative-legal, empirical methods of description and interpretation; theoretical methods of formal and dialectical logic; legal-dogmatic method, and interpretation of legal norms. *Results:* having analyzed the development of Russian legislation regulating the legal status of new digital objects of economic relations we see that the features that make up the general concept of digital currency do not allow us to determine the range of objects that fit this legislative definition; moreover, these features do not allow us to define digital currency as an object of civil rights and identify which operations and transactions with it are legal. Due to the above, it is impossible to establish criminal liability for committing acts involving digital currency. *Conclusions:* we have revealed certain tendencies toward legalization of digital currency on the one hand, and prevention of its use for payment for goods and services, including the imposition of criminal-legal prohibitions, on the other hand. The concept of digital currency needs to be revised: its definition should not contain a reference to the operator and the nodes of the information system. The most correct solution seems to be the introduction of the concept of cryptocurrency to denote a decentralized means of expressing value; as for digital currency, it should be understood as centralized funds, for example the digital ruble. Digital currency must be recognized as an object of civil rights, being classified as other property. This will help to minimize the difficulties in recognizing it as a subject or means of crime and introduce socially determined prohibitions into the criminal law.
Keywords: digital currency; digital rights; cryptocurrency; amendments to the Criminal Code of the Russian Federation; novelties in the Criminal Code of the Russian Federation; crimes against property; crimes in the field of economic activity; theft.

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Introduction

In 2008, an article on bitcoin was published on the Internet. Its author was a certain Satoshi Nakamo to [28]. He wrote about electronic coins that were based on the blockchain technology. The term “cryptocurrency” itself became established and came into use after the publication of the article *Crypto Currency* in 2011 [30]. Over time, this new digital object became increasingly popular and was widely used to conclude transactions and conduct related operations. At the same time, progress in the field of digitalization is always relative, since it also has some negative implications [25].

For example, in 2017, one of the first criminal cases was initiated in the United States on the fact of fraud, the circumstances of which testified to the fact that Maksim Zaslavskiy launched an advertising campaign for RE coin tokens as the world’s first cryptocurrency backed by real estate, and the diamond token as backed by diamonds, which was not true [32]. As a result, the businessman collected about three million dollars from the deceived citizens. Another ex-

ample is the American case of Nicholas Truglia, who in 2018 stole an amount of cryptocurrency worth about a million US dollars, using a fairly simple scheme –SIM swapping [31]. The number of crimes where cryptocurrency was somehow involved is growing not only in foreign countries, but also in Russia [4].

Research methods

The article uses a historical method that allows us to study some stages of formation and development of cryptocurrency and digital currency; comparative legal method that helps to compare the concept of digital currency contained in the FATF recommendations and in the legislation of the Russian Federation, to identify similarities and differences we also use empirical methods of description and interpretation, which allow us to consider the legislative idea in terms of the concept and legal status of digital currency in the Russian Federation. The use of theoretical methods of formal and dialectical logic allows us to identify trends in the development of criminal law norms in connection with the normative design and consolidation of new digital objects. The legal-dogmatic method contributes to the development of the concepts of cryptocurrency and digital currency.

Discussion

The legal status of new means of expression and preservation of value until recently was not regulated in any way by the current legislation of the Russian Federation; this fact gave rise to numerous difficulties both in private law relations, for example, in connection with the inclusion of such in the inheritance or bankruptcy estate under bankruptcy, and in public law relations, for example, when recognizing them as the subject or means of crime [10].

In addition, based on the results of the analysis of judicial practice in criminal cases, we can conclude that law enforcement agencies have not developed a unified approach to the designation of the object under consideration. Thus, in one of the court decisions it is indicated that "A.A. Gavrilov committed an attempt at fraud, that is, an attempt to steal someone else's property by deception on a particularly large scale, asking the victim to transfer him 50,000US dollars, which is equivalent to at least 2,954,275 rubles, as well as to make a financial transaction in the form of converting the required amount of money into the bitcoin cryptocurrency" [18]. In another case, the court found that Sh. and O. entered into a preliminary criminal conspiracy to steal someone else's property, namely BTC-e codes (an abbreviation without official decryption), via the Internet [3]. According to another court decision, A.S. Perfil'ev committed legalization (laundering) of funds by performing financial transactions with the funds obtained as a result of illegal sale of narcotic drugs, the funds were then converted into the form of virtual assets, after which – in non-cash form with subsequent transfer to cash [19].

Experts in the field of law and information technology also define the nature and essence of cryptocurrency in different ways: as a legitimation mark [23], money surrogate [29], electronic money [1], currency value [7], law of obligations [11], other property [6], etc. All this indicates the need to establish the legal status of new digital objects of economic relations and determines the trend toward their normative consolidation, which most clearly began to be traced in 2019.

One of the first steps of the legislator in this direction was to define the category of digital rights in Article 141.1 of the Civil Code of the Russian Federation [13], and then classify them as objects of civil rights in accordance with Article 128 of the RF Civil Code [2]. To secure utilitarian digital rights, the federal law "On crowdfunding" was adopted, which regulated their legal status [14]. In 2020, Federal Law 259-FZ "On digital financial assets, digital currency and on amendments to certain legislative acts of the Russian Federation" (hereinafter referred to as the federal law "On digital assets") was adopted [15], which defined the concepts of digital financial assets and digital currency.

An interesting fact is that the explanatory note to the federal law "On digital assets" points out the need to consolidate the legal status of cryptocurrency, which was eventually transformed into a digital currency at the legislative level [17]. In the course of our study, we shall consider whether this approach is successful or not; but for now, having determined the place of digital currency among other new digital objects of economic relations, we shall focus on those government initiatives that were proposed as amendments to the RF Criminal Code and that are somehow related to digital currency.

Almost immediately after the adoption of the federal law "On digital assets", the Ministry of Finance of the Russian Federation, on the instruction of the Government of the Russian Federation, presented a draft law "On amendments to the Criminal Code of the Russian Federation and Article 151 of the Criminal Procedure Code of the Russian Federation" [12]. The document proposed that Article 187.1 of the RF Criminal Code establish criminal liability for organizing illegal

trafficking in digital rights, Article 187.2 of the RF Criminal Code – for organizing illegal trafficking in digital currency, Article 187.3 of the RF Criminal Code – for illegal acceptance of digital rights and digital currency as a counter-provision in the implementation of trading activities, activities for the performance of works and (or) the provision of services. Despite the fact that the amendments were never adopted, the vector of the legislative movement was already directed toward the prohibition of any operations with digital currency, with some exceptions. Therefore, it is not surprising that the legislator's further attempts to regulate relations arising over new digital objects were of a similar nature.

At the time of writing this article, the State Duma of the Russian Federation adopted the draft law "On amendments to parts one and two of the Tax Code of the Russian Federation" in the first reading [21]. In this document, it is proposed to supplement Article 23 with Paragraph 35, which provides for the obligation of certain categories of persons to report on obtaining the right to dispose, including through third parties, of digital currency, to submit reports on transactions (civil transactions) with digital currency and on the balances of digital currency.

At the same time, in order to make this regulation as mandatory as possible, the Ministry of Finance of the Russian Federation proposed a draft law "On amendments to the Criminal Code of the Russian Federation and Article 5 of the Criminal Procedure Code of the Russian Federation" (hereinafter referred to as the draft law "On amendments to the RF Criminal Code") with the addition of Article 199.5 to Chapter 22 of the RF Criminal Code [20]. However, according to the conclusion of the RF Ministry of Economic Development, the developer of the project did not present convincing arguments in favor of the need to recognize the offense in question as a crime, so it cannot be supported [5]. Having analyzed the wording of this conclusion, we can treat it with doubt, since the main problem in this case is not so much the lack of arguments, as in general the possibility of introducing criminal liability in cases where digital currency is the subject or means of crime.

The facts presented above in a certain sense determine the further scenario of development of events, in which similar projects of criminal-legal norms will appear, which are doomed to failure in advance with the greatest degree of probability. And since Article 199.5 of the RF Criminal Code is currently the latest proposal on the part of the state, one way or another related to digital currency, then it seems appropriate to show the real reasons for the lack of the possibility of introducing criminal liability for the acts under consideration without determining the legal status of such a digital object unambiguously.

According to the novelty, it was proposed to criminalize malicious evasion of the obligation (provided for by the legislation of the Russian Federation on taxes and fees) to submit to the tax authorities a report on transactions (civil transactions) with digital currency and on the balances of digital currency by failing to submit such a report or including deliberately false information in the report, if the amount of transactions on the receipt or write-off of digital currency for a period of three consecutive years exceeds a large amount. Part 2 provided for the qualifying attribute: "the same act, which exceeds a particularly large amount, or if it was committed by a group of persons by prior agreement or by an organized group", and the notes to the Article explained what is meant by malicious evasion and large amount. At the same time, the most severe punishment was up to two years of imprisonment, with or without the right to hold certain positions or engage in certain activities for a period of up to three years.

Next, it would be logical to consider the legal status of digital currency. Since 2003, our country has been a member of the FATF (Financial Action Task Force on Money Laundering), a group that develops financial measures to combat money laundering, which in its 2014 report on virtual currencies established the concept of digital currency. Thus, the latter is understood as adigital representation of either virtual currency (non-fiat currency) or e-money (fiat currency) [33]. It turns out that, according to FATF recommendations, digital currency is a fairly broad concept, since it includes both a means of expressing value that does not have the status of legal tender and is not an officially valid and legal means of payment in settlements with creditors, and digital means of expressing fiat currency used for electronic currency transfer and having the status of legal tender. Thus, in order to avoid confusion regarding the distinction between virtual currency, digital currency and e-money, the FATF did not recommend using the term "digital currency" to regulate new digital objects in the legislation of the countries that are members of this intergovernmental organization [8].

Although such prescriptions are of a consultative nature for FATF member states, it seems that countries should adhere to this understanding of new digital objects. At the stage of regulatory consolidation of cryptocurrency in the Russian Federation, the legislator did not follow

the path of its eponymous definition [9] or recognition as a virtual currency according to FATF recommendations; instead, a more ambiguous way was chosen: law defined cryptocurrency too broadly – as a digital currency. We should point out that the problems in understanding the legal status of digital currency do not end there.

First, as noted above, the federal law "On digital assets" attempted to define the term "digital currency" as a set of electronic data. For example, for the purposes of anti-corruption, anti-laundering legislation, enforcement proceedings, digital currency is already recognized as property [27], and it is proposed to do the same in accordance with the amendments to the RF Tax Code. However, it is interesting that the objects of civil rights listed in Article 128 of the RF Civil Code do not include digital currency, although both tax legislation and the RF Civil Code understand property similarly. On the other hand, the recognition of digital currencies as an object of taxation confirms the recognition of their turnover by the legislator. There is a certain conflict concerning the desire to receive taxes and simultaneous reluctance to consider digital currency as an object of civil law. Here we see an inconsistency: for certain purposes, digital currency is recognized as property; but globally, it is not recognized as such. It seems that criminal prosecution for failure to report on transactions with digital currency would be extremely questionable, given the precarious legal status of such a means of expression and preservation of value.

Second, according to Part 3 of Article 1 of the above-mentioned law, a digital currency is a set of digital codes that can be accepted as a means of payment. However, already in accordance with Part 5 of Article 14 of the federal law "On digital assets", the subjects of civil legal relations listed there are not entitled to accept digital currency as a counter-provision, that is, as payment for goods, works, services. Paradoxically, it is still unclear whethera digital currency is a means of payment or not. If it is not, the acceptance of digital currency as a result of a civil transaction will be recognized as illegal and the person will also be required to report this offense to the tax authorities. Thus, in order to propose the introduction of criminal liability for evading the obligation to provide a report on transactions with digital currency, it is necessary to determine the scope of its permissible and unacceptable use.

Third, the concept of digital currency provides for a feature, according to which, in relation to each of its holders, the operator and (or) nodes of the information system are required to ensure compliance with the procedure for issuing this electronic data and perform actions to make records in such an information system (change them). But this feature is not typical of any known decentralized cryptocurrency that exists in distributed registries [26]. The fact is that in the vast majority of cases, cryptocurrencies do not have any operators, and an information network node is understood as part of a computer network or a device connected to other nodes of this network. This can be either a computer, or a special switch, router, or hub [22]. It is not entirely clear what obligations such a node can have to the owners of the digital currency. In this regard, it is not possible to determine the range of objects that would fall under the concept of digital currency, and it is impossible to establish a tax regime and introduce criminal liability in accordance with Article 199.5 of the RF Criminal Code without such clarification. From the standpoint of criminal sociology, we cannot justify the introduction of criminal liability as well, since there are no social grounds for the emergence of a criminal-legal prohibition [16].

Key takeaways

Thus, it is impractical to introduce criminal liability for the acts, in which digital currency is a subject or a means, until digital currency is firmly established among the objects of civil rights, until the range of civil law transactions and operations that can be concluded and carried out in relation to it is clarified, and until it is determined exactly what is meant by digital currency. The above also applies to the elements of crime already provided for in the RF Criminal Code, for example, when recognizing a digital currency as an object of theft, it is initially necessary to give answers to questions, in particular, about the location of such a digital object in accordance with Article 128 of the RF Civil Code [24].

It is of interest to consider the draft law "On amendments to the Criminal Code of the Russian Federation" which proposed to supplement Article 63 of the RF Criminal Code with such an aggravating circumstance as the commission of a crime using digital currency. But it is not clear how justified this is, because it turns out that it should be on a par with other aggravating circumstances, for example, the commission of a crime with the use of weapons, military supplies, explosives. And how it is different from other means of preserving and accumulating value, the use of which is not recognized as an aggravating circumstance?

Conclusions

Thus, based on the results of the study, we can formulate the following conclusions and proposals:

1. Having considered the proposed amendments to the RF Criminal Code, we can assert that today the state seeks to settle issues related to digital currency in a way that is far from liberal. It is possible that in the foreseeable future there will be new proposals to supplement the RF Criminal Code with such norms in which digital currency will appear in one way or another, but until the legal status of this digital object is determined, the introduction of criminal liability for the relevant acts is not possible.

2.In connection with the fact that the Russian Federation could introduce another digital object of economic relations – the digital ruble, which, unlike traditional cryptocurrencies, has its official issuer in the person of the state, representatives of the banking sector suggest that the legislator understands digital currencies as national digital currencies, rather than common cryptocurrencies that are received by miners. It seems that this position cannot be supported for a number of reasons.

First, A.G. Aksakov, an author of the law "On digital assets", has repeatedly explained in the media that digital currencies should be understood as cryptocurrencies. At the same time, no reservation was made as to whether such a digital object is the result of government emission.

Second, the Council under the President of the Russian Federation for the Codification and Improvement of Civil Legislation in its expert opinion No. 199/op-1/2020 of July 20, 2020 on the draft federal law "On digital assets" also tends to support the fact that digital currency is intended to act as a legal form of cryptocurrencies.

Third, the explanatory note to the law "On digital assets" does not refer to any currencies, the process of issuing which is related only to the activities of the state. Thus, the obvious conclusion is that, at its core, a digital currency cannot be reduced exclusively to state-owned cryptocurrencies.

3. The concept and legal status of a digital currency do not allow us to consider as such a decentralized cryptocurrency that does not have any specific issuer. Most likely, such a cryptocurrency was understood by the legislator as a digital currency. Transactions carried out with it are anonymous, only the owner and the acquirer participate in them, so no operators or nodes can have obligations to the owner of this digital object. In this regard, it seems logical to exclude the reference to the operator and the nodes of the information system from the definition.

4. The most appropriate, though resource-intensive, solution to the problem is to adopt an independent term "cryptocurrency". It should be defined as a decentralized means of expressing value, created using cryptographic methods and based on distributed registry technology. Under this approach, digital currency will need to be understood as a centralized means of expressing value, an example of which could be the digital ruble.

5. Taking into account these changes, digital currency (in the context of a decentralized cryptocurrency) should be recognized as an object of civil law in accordance with Article 128 of the RF Civil Code and considered as other property. This, first, will minimize the difficulties in recognizing digital currency as an object or means of criminal encroachment, since the concept of property in criminal law is interpreted in accordance with civil law, and second, only after that will it be possible to talk about amending the RF Criminal Code by supplementing it with new elements of crimes related to digital currency. At the same time, the appearance of criminal-legal norms should be socially conditioned.

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