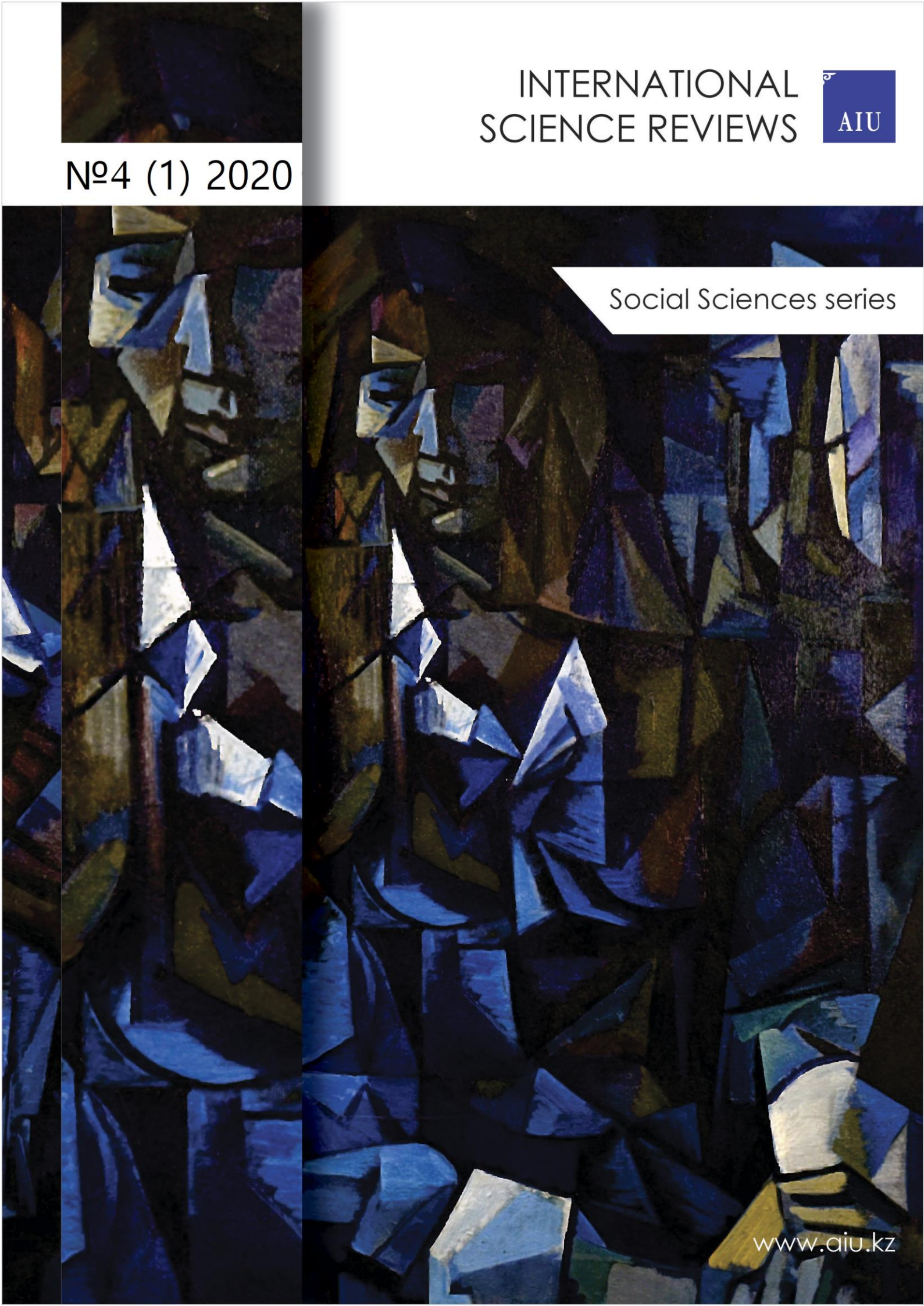

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# PECULIARITIES OF LEGAL REGULATION OF DIGITAL ASSETS IN THE RUSSIAN FEDERATION

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**Abstract**: At present in Russia and in the world there is a growing interest in the digitalization of all sectors of the economy including the fact that it is in new technologies and their accelerated implementation in life states see for themselves the opportunity to earn a competitive advantage and ensure the stability of the economy. In this regard, a number of bills aimed at regulating legal relations in the field of digital assets were developed, some of which took the form of law by 2021. In the article the authors tried to work out a unified approach to understanding the legal nature of digital assets in the Russian Federation for what the concept and essence of digital assets was revealed, the analysis of perspective directions in the legislative regulation for digital assets in Russia is carried out, the problems of regulation for digital assets in Russia are identified and the ways of their solution are proposed.

**Keywords**: digital assets, legal regulation, Russia, cryptocurrency, tokens.

## INTRODUCTION

The development of information technologies and increasing interest in the digitalization of all areas in social life has led to the emergence of such specific objects as digital assets.

Despite the great interest in this issue, there is still no unified interpretation of the term "Digital Assets" in Russia and worldwide. This is due primarily to the contradictory nature of these objects as well as the absence of this object in the physical world which makes it difficult to understand what they are actually.

In the most general sense, digital assets are everything that exists in binary format and which at the same time applies the right of ownership and right to use (Lapteva, 2019). However, this definition introduces more questions than answers. All objects in the electronic-digital environment exist in binary code, since this is the main number system used in modern information and communication technologies. If we talk about property rights we are inevitably faced with the fact that it is quite difficult to talk about ownership of objects that exist only in electronic form. Such an interpretation reflects the concept of "digital assets are any "electronic records" subject to ownership,

management or disposal" (OIEA, 2018). Partly, we can agree with this statement but this interpretation prevents the correct understanding of the essence - not all objects that exist on the Internet have economic value.

When considering such a multidimensional concept as "digital asset", we turn to the definition of what an "asset" is. The Economic Dictionary defines this concept as follows: 1. This is a set of property rights (tangible assets, cash, debt claims and etc.) owned by an individual or legal entity. It is divided into tangible (buildings, constructions, machinery and equipment, inventories, bank deposits and etc.) (Financial Dictionary, 2017) and intangible assets (intellectual product, patents, debt obligations and etc.); 2. Part of the balance sheet.

The Principles of International Financial Reporting Standards (IFRS - IAS - IFRS) also contain the following interpretation: "assets are resources controlled by the company as a result of past events, from which the company expects an economic benefit in the future"(Dictionary of Accounting, 2016).

It is the value aspect that can provide insight into what is meant by a digital asset. A digital asset is a kind of guaranteed right to claim a certain value embedded in a given digital asset(Bogdanova, 2019).

The meaning of the word "asset" is that an entity has value. What this value is expressed in is optional, the main feature is that all digital assets must have value.

Equally important is the possibility of individual identification for the asset because otherwise it is impossible to perform a transaction with such an object.

Such an approach has been established by numerous jurisprudence in foreign countries, most of them indicating the recognition of disputed digital assets as investment contracts. This is due to the fact that hybrid types of tokens, which have signs of both securities and currency, have recently appeared because they provide the owner with some preferences, such as the right to purchase other tokens, the right to receive a positive effect from the provision of services, performance of works or sale of goods.

When analyzing foreign literature on the subject, some peculiarities can be highlighted. For example, in a number of sources, the term "digital assets" in meaning and content is equal to the concept of "digital property".

The term "digital assets" (or "digital property") falls into three categories:

1. "Personal digital property";
2. "Personal digital property with monetary value";
3. "Digital business property".

D.R. Arnautov, M.G. Erokhina use the term "Digital Assets" only for cryptocurrencies (Banki.ru, 2020). We think this is not quite the right approach, as it narrows the subject of consideration unnecessarily.

The possibility for the emergence of digital assets is inextricably linked to blockchain technology and the emergence of so-called cryptocurrency based on this technology. Many other systems have subsequently emerged but blockchain is considered the progenitor.

At the moment, despite the high interest in the digital asset market, many people confuse the terms "token" and "cryptocurrency" and some consider these terms synonymous. Despite the fact that these assets have many similarities, the differences between them seem to be quite significant.

Going back to the question of what digital assets are, we need to look more closely at the issue of cryptocurrency.

So, cryptocurrency is a type of digital asset issued by entrepreneurs to finance the costs of launching venture capital businesses for platforms based on some system. They are most often issued based on blockchain. As the cryptocurrency market has proliferated, other systems have begun to emerge, a prime example being Bytball.

The approach to legal regulation of cryptocurrencies varies from country to country. In total, there are 4 approaches to defining the legal status of cryptocurrencies: property, currency, commodity, security (asset, financial instrument). The legal nature of cryptocurrencies in foreign countries will be discussed in more detail in chapter 2 of this paper. Each legislator proceeds from their personal considerations in this regard, as well as from the indicators of the market situation. At the same time, for example, in the European Union countries when adopting laws regulating the digital assets market, the directives on Combating Money Laundering and Terrorist Financing (hereinafter - AML/CFT) are mandatory to comply with. For example, the Fifth Anti-Money Laundering Directive (5AMLD) came into force on January 10, 2020 and requires cryptocurrency exchanges to undergo mandatory registration with the relevant authorities in their jurisdictions and to report suspicious transactions to supervisory authorities(AML/CFT, 2020).

Smart contracts are digital protocols for transmitting information which use mathematical algorithms to automatically execute a transaction after the set conditions are met and to fully control the process.

E.V. Somova notes that in the Russian doctrine the most famous definition of a smart contract is the definition proposed by A.I. Savelyev, in which a smart contract is an agreement of the parties, existing in the form of a program code, functioning in a distributive data registry, which ensures the self-execution of the terms in such contract upon occurrence of the predefined circumstances in it(Somova, 2019).

However, there are other versions. Thus, according to M. Kaulartz and J. Heckmann, the smart contract only fulfills the terms of the contract, while not being a written contract and does not serve to express the will (DiMatteo et al, 2019).

On the other hand, some scholars recognize that the smart contract can be a way of fulfilling obligations for the reason that the obligations arising from the smart contract are fulfilled by it independently and autonomously. At the same time, for example, in the work of E. E. Bogdanova it is noted that "smart contract can be a way to fulfill only those obligations in which the transfer of property provision takes place in the virtual world with the help of appropriate technical means"(Banki.ru, 2020). Somova E.V. considers the most reasonable to consider smart contracts in relation to the performance of obligations and recognize it as a contract with a special way of execution(Somova, 2019).

The essence of the approach to defining a smart contract as an adhesion contract comes down to the fact that only one party to the contract creates conditions that the other party must accept, otherwise the transaction will not take place. At the moment this approach is not popular because a transaction does not necessarily have to be in the format of one party creating the terms of the contract and the other party joining it. It usually happens when making smart contract terms the parties either agree on terms and the technical expert writes down those terms as a smart contract, or in the system itself the parties discuss terms of a smart contract and then apply the function of making it.

The opinion that a smart contract is a special contractual construction has become widespread enough at the moment. O.S. Grin, E.S. Grin, A.V. Solovyov consider it possible to recognize the smart contract as a standard (special) contractual construction, provided for by part 2, article 309 of the Civil Code of the RF(Grin, et al, 2019). As noted by A. Y. Akhmedov, the smart contract as a special contractual construction has some features, and the very purpose of using smart contract is the automation and objectification of individual actions for the performance of obligations (Akhmedov, 2019).

However, the question of the legal nature for a smart contract is quite extensive, for its more detailed study requires work of a different format.

The main difficulty in analyzing the legal nature of digital assets is the lack of consensus on what the concept of "digital asset" includes. Analyzing the relationship between the concepts of "digital asset" and "virtual property" Rozhkova M. refers to virtual property those intangible objects "which have economic value but are useful or can be used exclusively in virtual space"(Rozhkova, 2018). She refers to such objects as: "Gaming property", cryptocurrency, virtual tokens, domain names and virtual property in social networks.

However, there is a nuance in this approach: whether gaming property can be a digital asset.

Based on the above, we can assume that game objects are parts of a composite work - software, to which the user has certain rights with the purchase(Habr, 2018). Most often the objects in games are distributed under the terms of a license but a mixed contract is also possible. However, the legal status of virtual objects in Russia and many countries of the world is not yet clear.

At the same time for the theft of accounts in games already prosecuted in different countries, such a possibility exists even in Russia. Such actions are interpreted by the court within the framework of article 272 of the Criminal Code "Illegal access to computer information".

Thus, we can talk about a very contradictory approach to the gaming property, in our opinion, it is difficult to recognize it as a digital asset.

When considering such a phenomenon as digital assets, it becomes clear that some scientists gravitate to the use of their own conceptual apparatus to describe objects and processes. For example, V.A. Kislyy, A.Yu. Mikhailov, I.V. Dybina, V.A. Sudakova use in their works the term "crytoassets"(Dybina, et al, 2019), used to a greater extent by the

European System of Central Banks (ESCB). In this case, according to the ESCB, the term "cryptoasset" refers to any asset registered in digital form which is neither a financial claim nor a financial liability of any individual or legal entity and which is not a share in the share capital of a legal entity.

Nevertheless, a digital asset is considered a valuable asset for the user in the form of an investment and/or as a means of exchange.

In Russian law, an attempt to regulate digital assets was made in the Law "On Digital Financial Assets". This law has been discussed for quite a long time with definitions and concepts changing in the process of discussions. For example, in the Draft Law "On digital financial assets" № 419059-7 from 25.01.2018 it was proposed to consider digital financial assets as property in electronic form. Scientists criticized the Draft in this version. The essence was as follows: article 128 of the Civil Code already contained the concept of "other property", to which the courts referred digital financial assets, for lack of regulation in another order. A striking example is the ruling of the Ninth Arbitration Court of Appeal from May 15, 2018 № 09AP-16416/18 which recognized cryptocurrencies as other property for the purposes of including the contents of a debtor's cryptocurrency wallet in the bankruptcy estate.

The court pointed to the fact that due to the dispositive nature of the norms in civil law, the Civil Code of the Russian Federation does not have a closed list of objects for civil rights. The Civil Code of the Russian Federation does not contain the concept of "other property" mentioned in article 128 of the Civil Code of the Russian Federation taking into account modern economic realities and the level of development in information technology the court pointed to the admissibility of the widest possible interpretation of it.

The law defines digital financial assets as digital rights certifying one of the following rights (the list is closed):

- monetary claim;
- the possibility of exercising the rights to equity securities;
- rights to participate in the capital of a non-public joint stock company;
- the right to demand transfer of issue-grade securities which are stipulated by the decision on issue of digital financial assets (Federal Law, 2020).

At that, such wording implies a reference to article 128 of Civil Code of the Russian Federation "Objects of civil rights" which states that the objects of civil rights include things (including cash and certificated securities), other property including property rights (including non-cash funds, uncertificated securities, digital rights).

Digital rights in the Russian Federation, in accordance with paragraph 1, article 141.1 of the Civil Code, are binding and other rights, named as such in the law, the content and terms of which are determined in accordance with the rules of an information system that meets the criteria established by law. Exercise, disposal, including transfer, pledge, encumbrance of a digital right in other ways or restriction for disposal of a digital right is possible only in an information system without recourse to a third party.

Pursuant to the said law, a digital currency is an aggregate of electronic data (a digital code or designation) contained in an information system which is offered and/or may be accepted as means of payment, which is not a monetary unit of the Russian Federation, a monetary unit of a foreign state and/or an international monetary or settlement unit, and (or) as an investment and in respect of which there is no person obliged to each holder of such electronic data, except for the operator and (or) nodes of the information system, obliged only to ensure compliance with the order of release to these electronic data and the implementation in respect of them in actions to make (change) records in such information system of its rules. As noted in the RBC, under this approach the definition of digital currency in accordance with the Law "On Digital Financial Assets and Digital Currency" may fall under, for example, bonuses, as well as certificates used in e-commerce (Pryanikov, 2020).

However, the very concept of "digital financial asset" implies that this phenomenon is related to the concept of "financial asset". The definition of "financial asset" is closely related to accounting, and all the definitions that are given by academic economists, in one way or another, touch on the value aspect. For example, Adamenko A.A. gives the following definition: "financial asset is the financial resources of an economic entity which are the totality of cash and securities and are owned by the entity. It is this point that introduces a confusion such as "digital currencies" in Russia are not currencies but a set of electronic data.

I would like to emphasize that such a term as "digital financial assets" is used in the law only in Russia.

The main problem is that after the approval of this law, it became definitively unclear what exactly is meant by digital financial assets. In the draft law "On Digital Financial Assets" digital financial assets represented cryptocurrencies and tokens. Subsequently, it was decided to abandon the "technicalities" for which the law was criticized (Chernyshova, Dzyako, 2020).

Also, in our opinion, the legislator decided to emphasize that in Russia digital currencies are not means of payment, respectively, have no financial essence, so the law is called "On Digital Financial Assets, Digital Currency and on Amendments to Certain Legislative Acts of the Russian Federation".

**MATERIALS AND METHODS OF RESEARCH**

The norms of international law and legislation of foreign countries are the subject of the study, civil and information legislation of the Russian Federation, other regulations related to the characteristics of digital assets as objects of civil rights, identifying their specificity, functions and place among other objects of civil rights.

Theoretical basis of the work served as the works of M.A. Rozhkova, O.F. Zasemkina, A.V. Sazhenov, I.V. Yolokhova, M.I. Akhmetova, A.V. Krutova, A.V. Tetenova, T.E. Rozhdestvenskaya, A.G. Guznov, M.S. Sackheim, N.A. Howell and others.

The empirical basis of the study is the letters and explanations of the competent authorities on the regulation of digital assets, judicial practice database including SAS

(State Automatic System) "Justice" and ACF (Arbitration Case File) "Arbitrator". The work was prepared with the use of data from MPS (Most Popular System) "Consultant plus", MPS (Most Popular System) "Garant".

**DISCUSSION RESULTS**

1. It is worth noting that until 2014, cryptocurrencies and tokens were not subject to legislative regulation in Russia, possibly due to the low interest of citizens and businesses in their acquisition. Accordingly, with the growing interest and involvement of Russian residents in this market, attempts began to appear, if not legislative, but at least activities to clarify by the competent authorities the specifics of the application to digital assets for the current legislation. In 2014, the Bank of Russia gave explanations in the form of the Information from the Bank of Russia "On the use of "virtual currencies" in transactions" dated 27.01.2014, which referred to the danger of operations with cryptocurrencies, in particular the involvement in illegal activities, including the legalization (laundering) of proceeds from crime and terrorist financing. Head of the Investigative Committee Alexander Bastrykin promised to criminalize the use of cryptocurrencies in an interview in January 2016 including bitcoins, calling them a "soap bubble" (Interfax, 2020).

In 2016, the Federal Tax Service of Russia in its Letter № OA-18-17/1027 rightfully pointed out that the legislation of the Russian Federation does not contain a ban on transactions by Russian citizens and organizations using cryptocurrencies. The document contains the following theses:

1) The legislation of the Russian Federation does not enshrine such concepts as money surrogate, cryptocurrency, virtual currency.

2) The legislation of the Russian Federation does not prohibit Russian citizens and organizations to conduct operations with the use of cryptocurrency.

3) The use of cryptocurrencies in transactions is grounds for considering the issue of classifying such transactions as transactions (operations) aimed at legalization (laundering) of proceeds from crime and terrorist financing.

4) According to the FTS of Russia, transactions related to the purchase or sale of cryptocurrencies using currency values (foreign currency and external securities) and (or) the currency of the Russian Federation are currency transactions.

5) The existing currency control system does not provide for currency control authorities to receive information from residents and non-residents on cryptocurrency purchase and sale transactions.

Russian President Vladimir Putin instructed the Government and the Central Bank to ensure the introduction of amendments to the legislation on the use of digital technologies in the financial sector on 21.10.2017 (Poyarkov, 2017).

The Russian government, together with the Bank of Russia, had until July 1, 2018 to ensure changes in legislation that would allow the regulation of ICOs (Initial Coin Offering - public fundraising, including in cryptocurrencies, by placing tokens). Looking ahead, the specialized Federal Law "On digital financial assets and digital currencies" was adopted only in 2020.

Interestingly, the Federal Law of 02.08.2019 № 259-FZ (edited on 20.07.2020) "On attracting investments using investment platforms and on amendments to certain legislative acts of the Russian Federation", which defined utilitarian digital rights, was adopted before the Federal Law "On digital financial assets and digital currencies".

Faced with the lack of legal regulation for digital assets in Russia, the courts had to try to determine the legal nature of each individual digital asset on their own, which correlates with the US approach to determining the legal nature of an asset. In the United States, as we traced in chapters 1 and 2, the courts' assessment of the legal nature in a digital asset is most often initiated to determine whether the asset falls under the regulation of securities laws. In Russia, the courts have attempted to define digital assets in order to establish whether legal relations regarding the circulation and the digital assets themselves can be the object of judicial protection, since there was no legal prohibition on their circulation. The problem seemed global, because from the moment fiat currency is exchanged for a digital asset, a person has "nothing" that has value but has no tangible form and it is impossible to obtain proof of ownership rights.

A striking example is the aforementioned bankruptcy case of I.I. Tsarkov. The court of the first instance refused the bankruptcy trustee to include the contents of the debtor's cryptocurrency wallet in the bankruptcy estate, reasoning that the legislation does not contain the concept of "cryptocurrency" and therefore it is impossible to clearly determine which category it belongs to: "property", "asset", "information", "surrogate". The decision of the appeal court № 09AP-16416/2018 from 15.05.2018 cryptocurrency was still included in the bankruptcy estate and treated as other property in relation to article 128 of the Civil Code of the Russian Federation.

Heterogeneity of judicial practice on the issue of digital currencies and tokens also generated refusals in judicial protection in the interests of participants at the legal relations. For example, Ryazhsky district court in Decision 2-160/2017 2-160/2017~M-129/2017 M-129/2017 from April 26, 2017 denied claims for recovery of penalties, compensation for moral damages, fine, under the law on protection of consumer rights. The court pointed out that since practically in the Russian Federation there is no legal basis for the regulation of payments made in "virtual currency", in particular Bitcoin, and there is no legal regulation of online trading platforms, bitcoin exchanges, all transactions with bitcoin transfers are made by their owners at their own risk. According to the court, the presence of cryptocurrencies outside the legal field does not provide an opportunity for the plaintiff to implement legal mechanisms to impose liability on the defendant in the form of the payment of penalties, compensation for moral damage and fines provided by the Law of the Russian Federation from February 7, 1992 № 2300-1 "On protection of consumer rights".

Denying the claims for unjust enrichment in Decision № 2-4140/2018 2-505/2019 2-505/2019(2-4140/2018;)~M-3745/2018 M-3745/2018 from March 18, 2019, the Volgodonsk district court (Rostov region) pointed to the speculative nature of cryptocurrencies. As one of the arguments, the court referred to the Information of the Bank of Russia "On the use in transactions of "virtual currencies" from 27.01.2014. The status of cryptocurrencies in the Russian Federation is monetary surrogates, the issue of which is

prohibited in the entire territory of the Russian Federation according to article 27 of the Federal Law of 10.07.2002 № 86-FZ (edited from 29.07.2018) "On the Central Bank of the Russian Federation (Bank of Russia)". This decision was criticized for the lack of validity in the application as a reference of the press release of the Bank of Russia, "which was not signed by anyone and has no legislative force" (Pryanikov, 2020).

Separately, we would like to note the position of the Bank of Russia on cryptocurrencies and tokens. In 2014, the position of the Bank of Russia in the above press release was quite tough, the main idea being that the use of cryptocurrencies is a potential involvement in illegal activities including money laundering and terrorist financing.

Press release of the Bank of Russia "On the use of private "virtual currencies" (cryptocurrencies) from 04.09.2017 was already much less harsh on cryptocurrencies. The Central Bank notes that most transactions with cryptocurrencies are made outside the legal regulation of both the Russian Federation and most other states. Cryptocurrencies are not guaranteed or secured by the Bank of Russia. Transactions with cryptocurrencies carry high risks and may lead to financial losses of citizens and inability to protect the rights of consumers in financial services if they are violated.

Analyzing the judicial practice, we can note the absence of formed judicial practice, in which the tax authorities would be a party to the proceedings. This can be attributed to the fact that at the moment the tax authorities have no information that an organization or an individual is a holder of DFA (Digital Financial Assets) or DC (Digital Currency), and the holders of DFA and DC are in no hurry to declare them.

According to SAS "Justice", judicial proceedings on this issue with the participation of the tax authorities are few.

So, as an example, we can consider the Decision of the Moscow City Court from 18.04.2018 in case № 7-4313/2018.

It challenges the decision of the tax authority to terminate proceedings on the case of an administrative offence.

The prosecutor filed a protest against the Decision of the tax authority to terminate the proceedings in the case of an administrative offense, due to the absence of an administrative offense under paragraph 2, part 1, article 24.5 of the Administrative Code of the Russian Federation.

This decision is interesting exactly from the point of view of qualification of virtual currency operations by the court from the position of the Federal Law of 10.12.2003 № 173-FZ (edited on 08.12.2020) "On currency regulation and currency control".

The court rightly points to the fact that virtual currency is not currency (foreign currency and foreign securities), therefore, making payment using virtual currency is not a currency transaction in the meaning of the Federal Law № 173-FZ and does not constitute an administrative offense, liability for which is provided by part 1, article 15.25 of the Administrative Code of the Russian Federation.

It can be emphasized that this court decision is true until the entry into force of the Federal Law "On digital financial assets and digital currencies" because according to paragraph 5, article 14 of this law, residents of the Russian Federation have no right to

accept digital currency as a counterpayment for goods transferred by them, works performed by them, services provided by them or any other way that allows for digital currency payment for goods (works, services).

Let us turn to the legislative regulation of operations with digital financial assets and digital currencies. At the moment, the key law regulating digital assets and operations with them in Russia is the Federal Law from March 18, 2019 № 34-FZ "On amendments to parts one, two and article 1124 of part three of the Civil Code of the Russian Federation" which is also called the Digital Rights Law.

The first and quite important change concerned the introduction of Article 141.1 "Digital Rights" to the Civil Code, which gives this definition of digital rights, is the binding and other rights named as such in the law, the content and conditions of which are determined in accordance with the rules of an information system that meets the characteristics established by law. Execution, disposal, including transfer, pledge, encumbrance by other means or limitation of disposal using the digital right is possible only in the information system without recourse to a third party.

It should be noted that in the original wording of the draft law, a digital right was suggested to be a set of electronic data (i.e. a digital code) existing in an information system that meets the characteristics of a decentralized information system as established by law. But in this wording, it turned out that a digital right is a property right (as described in the updated article 128 of the Civil Code) but at the same time it is a digital code. During the adoption of the Law, it was decided to abandon this idea. In the last variant the definition was formulated according to the model for description of a security according to article 142 of the Civil Code of the RF (Chernyshova, Dzyako, 2020).

The adopted law refers digital rights to the objects of rights. The Presidential Council for Codification objected to this. They believed that this is not the object of rights but simply a way of their fixation, so the norms should be placed in another section of the Civil Code. The Council feared that the inclusion of digital rights as an object of law would create confusion. However, at the moment, digital rights are still among the objects of law, according to article 128 of the Civil Code.

T. E. Rozhdestvenskaya and A. G. Guznov note that the wording of the definition of digital rights contained in the Civil Code suggests that the category of digital rights should be specified in separate laws which on the one hand, should define the features of legal regulation of certain types of digital rights and on the other hand, the digital environment in which such digital rights can exist (EAEU, 2019).

At the same time, they pay special attention to the terminology, in particular the term "holder of a digital right". Paragraph 2, article 141.1 of the Civil Code states that, unless otherwise provided by law, the holder of a digital right is the person who, according to the rules of an information system, has the ability to dispose of that right. In the cases and on the grounds stipulated by law, another person is recognized as the holder of a digital right. T. E. Rozhdestvenskaya and A. G. Guznov note that such wording is necessary precisely because of the problems voiced in chapter 1 of this paper: inability to inherit and foreclose on digital assets (EAEU, 2019).

In view of these problems, the DFA Law provides that not only the person who issues the DFA or the holder of the DFA but also other persons (in cases provided by law) should have access to digital financial assets. The operator of the information system under which the DFA is issued will ensure that records on digital financial assets are made (changed) on the basis of a valid judicial act, an enforcement document (including the decision of a court bailiff), acts of other bodies and officials in carrying out their functions provided for in the legislation of the Russian Federation or on the basis of a certificate of right to inheritance issued in the manner prescribed by law, providing for the transfer in the DFA of a certain type in the order of universal succession, no later than the business day following the day on which the information system operator receives the relevant request.

In addition, the obligations of the operator of the information system FZ on DFA include informing the operator of the exchange of digital financial assets about making or changing records on DFA not later than the business day following the day of making or changing records.

Another important change introduced by the Law № 34-FZ is an attempt to legalize smart contracts. Thus, for example, paragraph 2 was added to article 309 of the Civil Code of the Russian Federation. The terms of the transaction may provide for the fulfillment by its parties for the obligations arising from it upon the occurrence of certain circumstances without the separately expressed additional will of its parties aimed at fulfilling the obligation through the use of information technologies defined by the terms of the transaction.

Paragraph 2 of article 434 has also been amended. A contract in writing may be concluded by a single document (including electronic), signed by the parties or the exchange of letters, telegrams, electronic documents or other data in accordance with the rules of the second subparagraph, paragraph 1, article 160 of this Code. The requirements of paragraph 1 of Article 160 suggests that the written form of the transaction will also be deemed to have been committed by a person in the case of a transaction in electronic or other technical means which can be reproduced on a material medium as the same content of the transaction and the requirement of a signature is considered satisfied if used any method that allows the reliable identification of the person who expressed his will. The law, other legal acts and the agreement of the parties may provide for a special method of reliably determining the person who has expressed the will.

Separately, amendments were made to article 309 of the Civil Code of the Russian Federation, the terms of the transaction may provide for the performance by its parties for obligations arising from it in the event of certain circumstances without a separately expressed additional expression of its parties' will to perform an obligation by using information technology defined by the terms of the transaction.

Thus, this Law № 34-FZ establishes the possibility of transactions in the Internet, including in the form of expression to express one's will, equating them to a written form of the transaction if its content can be reproduced on a tangible medium in its original form. However, we see that the legislator attributed smart contracts to the

condition of automatic performance for any civil contract. Thus, smart contracts have not been allocated to a separate category of contracts in Russian law.

It can also be noted that the original wording of the Law № 34-FZ contained article 141.2 "Digital money" but it had to be abandoned. From the wording proposed in the draft law, it was clear that cryptocurrency was going to be recognized as "private money", following the example of Germany but, eventually, this norm with significant reworking was included in the Law "On DFA" and the term was replaced with "Digital currency".

According to the meaning of the bill digital currency is recognized as property but not digital rights which may require amendments to the Civil Code. Circulation of cryptocurrencies in Russia is regulated by article 14 of the Law "On DFA".

"The most odious provisions which allow receiving and transferring digital currency only in inheritance, bankruptcy or enforcement proceedings are excluded from the text. At the same time, Russian residents are forbidden to accept digital currency as payment for goods, works and services, as well as to disseminate information about the possibility of digital currency payments", emphasizes D. Kirillov (Kirillov, 2016).

The need to declare (now called informing) the possession of digital currency and transactions with it remains. This is a condition for judicial protection of such transactions.

According to this Federal Law "On digital financial assets" you can buy, issue, sell, make other transactions with cryptocurrency in Russia but it is impossible to pay to Russian residents with it. There is a certain contradiction, as the very concept of cryptocurrency in the same document implies its use as means of payment.

The Federal Law "About the digital financial assets" became effective from 01.01.2021 but the law enforcement practice of this law does not exist yet.

It is noted that there are very few terms introduced by the Law on DFA. Many types of activities, first of all, mining, are left outside the terms defined by it. Whereas the DFA Law was expected to introduce a unified apparatus and conceptual legal framework for the entire cryptocurrency market as a whole, as a result it became the basis solely for the digitalization of Russian assets, the issue of digital duplicate securities under Russian law which is difficult to bring to the international market. There are no concepts that allow the application of foreign law and the resolution of conflicts in regulation which should also have been reflected in the conceptual apparatus in the first place. That said, of course, the adoption of this law is an important step to further legalize the area of business in Russia.

In particular, the actions of economic entities contribute to legalization. For example, on August 20, 2020, it became known that the first loan secured by tokens was issued in Russia. Experts' opinions are divided. On the one hand, it shows that the state recognizes cryptocurrencies and tokens but on the other hand, there are questions about the demand for this type of collateral and banks' readiness to accept it (Academic dictionary, 2010).

From the point of view of the above laws, in our opinion, it is possible. Tokens, being an object of civil rights and a digital right at the same time, can indeed be presented as collateral for an obligation. However, Yu. Brisov notes that it would be incorrect to call the tokens that act as collateral a pledge. Pledge is a separate legal entity, known as far back as Ancient Greece. They note that since the list of collaterals in the Civil Code is open, nothing prevents them from making up a new one.

However, lawyers note that this transaction is more of a promotional move for WAVES tokens than a real precedent in practice because WAVES tokens are not cryptocurrency but fall under the category of "other property" (Academic dictionary, 2010).

Pavel Lavrenkov, a member of the Commission for legal support of the digital economy of the Moscow branch of the Association of lawyers in Russia, Managing Director of the Renaissance Insurance Group Legal Department, added that it is necessary to separate digital financial assets (tokens) and digital currency which is provided by the Federal Law "On DFA". The latter includes bitcoin. Banks are unlikely to take it as collateral, as the circulation of digital currencies in the Russian Federation is prohibited (Academic dictionary, 2010).

Experts point out that the bank would simply not benefit from such pledges:

1. Cryptocurrencies are subject to high volatility, there is no obligated person and operations with cryptocurrency are actually prohibited in Russia which is a risk for the bank which cares about price stability of the token and its liquidity

2. Tokens may also be subject to exchange rate fluctuations or bankruptcy of an organization which issued a token.

However, according to article 340 of the Civil Code, if the collateral is depreciated, the bank cannot terminate the credit agreement or require additional collateral only for consumer and mortgage loans. Although if the loan is granted for entrepreneurial activity, such additional encumbrances are possible, the bank can insist on their inclusion in the loan agreement.

On the other hand, banks may be willing to assume these risks and owners of free digital assets may be interested in obtaining additional fiat funds for business development, not by selling crypto-assets, but by pledging them.

Experts note that different escrow mechanisms are possible for lending against digital assets. The automation of these actions can also be considered when the verification of the fulfillment of the conditions of pledge transfer and the transfer itself is performed by a smart contract.

Thus, the pledge of digital financial assets is quite possible, even from the point of view of the Federal Law "On DFA and DC" which came into force.

As noted earlier, the Ministry of Finance played a major role in clarifying the specifics of operations with digital assets in the Russian Federation. This was due, first of all, to the fact that cryptocurrencies are the closest to financial assets in their essence. In its explanations, the RF Ministry of Finance was forced, in the absence of legislative regulation, to give explanations based on the current legislation and its own understanding for the legal nature of DFA and cryptocurrencies.

Thus, the Ministry of Finance, unlike the Bank of Russia, did not find in the legislation of the Russian Federation a ban on transactions with cryptocurrencies by Russian citizens and organizations (Letter of the Ministry of Finance of the Russian Federation from October 3, 2016 № OA-18-17/1027).

Letter of the Ministry of Finance of the Russian Federation from October 3, 2016 № OA-18-17/1027 indicated that in accordance with the provisions of the Federal Law from 10.12.2003 № 173-FZ "On currency regulation and currency control" cryptocurrencies are not foreign currencies. The Ministry of Finance noted that the existing currency control system does not provide for receipt by the currency control authorities (Bank of Russia, Federal Tax Service of Russia, Federal Customs Service of Russia) and currency control agents (authorized banks and professional securities market participants which are not authorized banks) from residents and non-residents of information on operations to purchase and sale cryptocurrencies.

With the growth of the cryptocurrency and digital financial assets industry in Russia, taxation issues inevitably arise. It should be noted that the Ministry of Finance found itself in a difficult position because if in its letters it had indicated that transactions with cryptocurrencies and digital financial assets are not subject to taxation, it would have opened a loophole for organizations and individuals to evade taxation. It is worth noting that the Ministry of Finance in its letters explaining the positions on the taxation of these assets was guided primarily by the principle "if there is no special regulation, then taxation is on a general basis".

From the numerous letters with questions about taxation, it follows that the interest of organizations and tax authorities in clarifying the procedure of taxation for digital financial assets and digital currencies in Russia is extremely high. Now we can already be guided by the position of the competent authorities from which it follows that cryptocurrency is still taxable in Russia.

Thus, the sale of cryptocurrency is subject to income tax and personal income tax for legal entities and individuals (Letters of the Ministry of Finance of Russia № 03-03-06/1/73953 from 24.08.2020 and № 03-04-05/63704 from 20.08.2019). Letter № 03-03-06/1/40729 from June 14, 2018 stated that any income received by an organization as part of an activity aimed at generating income (commercial activity) is subject to accounting for profit taxation. However, the legal status of cryptocurrency and tokens as well as the activity of generating such assets in the Russian Federation is not defined.

However, the Ministry of Finance drew attention to the fact that under the provisions of article 271 of the Tax Code when calculating the tax base for profits tax by a taxpayer who applies the accrual method, income is recognized in the reporting (tax) period in which it occurred, regardless of the actual receipt of cash, other property (works, services) and (or) property rights (accrual method) unless otherwise provided for by paragraph 1.1, article 271 of the Tax Code. Letter of the Ministry of Finance of Russia from September 26, 2019 № 03-04-05/74126 indicates that if the benefit from transactions with such instruments can be evaluated, the income should be taxed with personal income tax in the general order. Therefore, the Ministry of Finance of Russia proposed to tax the result from transactions with bitcoins by analogy with other

property. In this case before the legislative regulation of issues related to the circulation and taxation of cryptocurrencies, in determining the tax base for income received from operations of their purchase and sale can be based on the norm of paragraph 1, subparagraph 2, item 2, article 220 of the Tax Code, that is to reduce income from sale of cryptocurrencies by the amount of actually incurred and documented expenses related to their purchase (AML/CFT, 2020).

This approach is valid only under the general taxation system when the organization pays income tax on the delta between the purchase price of the asset and the price of its sale. Under a special tax regime only one type of accounting is possible, namely when applying the simplified taxation system. It is the cash method. The cash method is characterized by the fact that income is determined by the actual receipt of funds in cash or on the current account. However, in the Letter of the Ministry of Finance from 14.11.2018, № 03-11-11/81983, it was stated that at present the concepts of mining, cryptocurrency as well as the legal status of persons conducting operations with cryptocurrency, the legislation has not been defined.

In this regard, the issue of taxation for individual entrepreneurs' income from the sale of cryptocurrency under the simplified taxation system may be considered only after the adoption of relevant legislative acts defining the concept of mining, cryptocurrency as well as the legal status of persons engaged in operations with cryptocurrency.

The Federal Law of 31.07.2020 № 259-FZ "On digital financial assets, digital currency and on amendments to certain legislative acts of the Russian Federation" does not contain the concept of mining, therefore, there are no separate provisions on its taxation. The Ministry of Finance in 2018 expressed that the issue of taxation for mining can be considered only after the creation of special regulation (Letter of the Ministry of Finance of Russia № 03-11-11/74252 from 16.10.2018).

"The logic of the provisions in chapter 25 of the Tax Code of the Russian Federation implies the taxation for all income received by the taxpayer in the course of carrying out activities, with the exception to those mentioned in article 251 of the Tax Code of the Russian Federation", - so believe the "Association of Lawyers of Russia". However, it should be noted that digital currencies have been recognized as a set of electronic data, respectively, cannot be included in the taxable base for income tax as formally they are not attributed to either goods or property rights. At the same time, article 250 "Non-operating income" contains an open list of income subject to taxation. Digital financial assets, in general, are included in the taxable income tax base because they are property rights.

In terms of taxation for digital financial assets, there is also no enforcement practice, but almost certainly taxation is assumed on a general basis. To increase investor interest in this type of digital assets, the RUIE (Russian Union of Industrialists and Entrepreneurs) proposes the following measures:

1. Exempt from VAT (20%) operations on the issue, circulation and redemption of "financial" DFA (e.g., securities, DFA loans, DFA derivatives and etc.) as well as

operations on the issue and circulation of digital rights which to some extent certify the right to demand the transfer of goods or services in transactions with DFA.

2. Income tax (20%) should be charged only when the DFA issuer (legal entities and individual entrepreneurs regardless of residency) has a positive financial result from the issue of the asset (e.g., when the total amount of income from the DFA exceeds the cost of its acquisition).

3. Not to charge income tax on non-profit organizations which receive donations for the acquisition of DFA to form "digital endowments" (funds).

4. Personal income tax (standard rate of 13%) should be levied on the sale or redemption of DFA from the difference between the price of acquisition and sale or redemption. The tax should be calculated by the tax agent (banks, exchanges and other legal entities) cumulatively on all DFA at the end of the tax period, similar to the base on circulating securities (Press release, 2017).

This seems logical from the point of view that excessive taxation can make investments in DFA extremely unprofitable and, accordingly, deprive them of their meaning.

It can be seen that without legislative regulation of the taxation for transactions with digital assets cannot do as a universal approach has not been worked out yet. On the general basis if the organization applies the simplified taxation system with the object of taxation "income-expenses" then the organization will not be able to claim expenses on purchase and sale transactions because they cannot be documented. In its Letter from 17.10.2017 № 03-11-11/67498, the Ministry of Finance explained that if expenses cannot be documented, such expenses cannot be taken into account in determining the tax base for the simplified taxation system. Accordingly, the organization will pay 15% on all income excluding expenses.

Under the "income" object, the organization will have to declare the entire amount of proceeds from the sale of digital currencies and pay 6%. Under the simplified tax system operations with cryptocurrency and DFA are not subject to VAT as it is a special tax regime.

It should also be noted that along with changes to the Tax Code, work is currently underway to amend the CAO RF and the Criminal Code RF. A draft Federal Law "On amendments to the Criminal Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation" has been posted which establishes criminal liability for evading the obligation to report to tax authorities on transactions (civil law transactions) with digital currency and on the balances of the said digital currency; it recognizes the commission of a crime involving digital currency as an aggravating circumstance.

Draft Federal Law "On amendments to the Code of Administrative Offences of the Russian Federation" establishes administrative liability for illegal organization of issuance, transactions with digital financial assets and illegal acceptance of digital currency. At the same time, for the organization of illegal circulation for digital financial assets there is a fine of up to 2 million rubles. Illegal acceptance of digital currency as a counteroffer is fined up to 1 million rubles.

The penalties for these violations of criminal legislation provides severe enough, up to imprisonment up to 8 years. President of Russian Association of Cryptoeconomics and Blockchain (RACIB) Yuri Pripachkin believes that the proposed rules do not meet the current economic relations and will not allow Russian business to fully use the potential of new financial instruments. This may cause cryptocurrency industry companies to move from Russia to the more advanced countries in this area including the CIS countries such as Belarus, Kazakhstan, Uzbekistan and Ukraine (OZON, 2021).

Thus, we can see how the main approaches to the legislative regulation of digital assets have evolved in Russia. We can see that the approaches were changing: from ignoring the weight of this phenomenon and its impact on the Russian economy, then in 2016 to consider the possibility for banning such transactions with the application of liability measures, to compromise solutions which will include the possibility of issuing DFA by Russian organizations but also prohibit the circulation of cryptocurrencies in Russia.

It may be noted that at the moment there is no law enforcement practice on the Federal Law "On DFA and DC" which has come into force.

Before the Law "On Digital Financial Assets and Digital Currencies" came into force, regulation of operations with digital assets in the Russian Federation was carried out mainly on the basis for clarifications of the Ministry of Finance which did not recognize cryptocurrency as a foreign currency but, in general, did not see in the legislation a ban on its circulation. At the same time, with its clarifications on the taxation of transactions with cryptocurrencies, the Ministry of Finance suggested the need to reflect them in the tax base for income tax and personal income tax but did not give recommendations on how to document the costs of digital currency purchases in such a case.

Courts in their activities are mainly guided by the provisions for article 128 of the Civil Code and their own opinion on the matter. This does not negate the fact that the practice is quite diverse but the trend for the recognition of cryptocurrency as other property is emerging in 2018.

The next very complicated issue of the legal regulation of digital assets is the fact that digital currency for the purposes of the Federal Law "On Insolvency (Bankruptcy)" is recognized as property. At the same time, there is no specific algorithm of actions for inventory, valuation and sale at auction for bankruptcy trustees. In this case, the legislator should not only settle the issue for the legal status of cryptocurrencies but also determine a number of procedural aspects, in particular, the procedure of foreclosure on this object in bankruptcy cases (Kornienko, Korolev, 2018).

**CONCLUSIONS**

At the moment, we can say that the system of legislative regulation of operations with digital assets is in its formative stage. The law on "Digital Financial Assets and Digital Currencies" came into force in 2021, so at this point we can say that there is special regulation of operations with digital assets in Russia.

Lawyers recognize these laws to be quite controversial, they may require changes in the near future but the positive point is the call for state regulation and judicial protection for the interests of business entities entering into legal relations regarding digital assets.

The negative factor is the inconsistency among legislators in the adoption of laws including the lack of amendments to the Tax Code of the Russian Federation, despite the fact that the law on "Digital financial assets and digital currencies" sets reporting deadlines, which can give rise to legislative uncertainty.

It is impossible not to note the growing public interest in these legislative initiatives: the bills are widely discussed by lawyers, economists, legal scholars, government and business representatives. Many provisions of these laws are controversial but the fact that the state has realized and tried to meet the need of society in the legislative regulation of transactions with digital assets. This is already a big step towards the ordering of relations in the industry.

In the course of the work, we identified the following shortcomings in the legal regulation of digital assets in the Russian Federation and proposed the following ways of solving the existing problems:

- The definition of digital currency has signs of an overly expansive interpretation.

Solution: it is necessary to legally specify what specific characteristics should meet the information system, in which there is a digital currency.

- There is no legislative consolidation of the legal nature of digital currencies, not developed a unified approach to the legal nature of digital currencies.

Solution: it is necessary in the Federal Law "On digital financial assets and digital currencies" to provide a reference definition of "digital currency" to other property under article 128 of the Civil Code.

- Nominal legislative distinction between digital financial assets and uncertificated securities.

Decision: the RF Ministry of Finance should give explanations as to the criteria for attributing the right of claim to the first and the second category.

- Insufficient elaboration of the procedure for alienating digital currencies from a person in order to exercise the rights of creditors in bankruptcy. Options for the implementation of digital currency by a bankruptcy trustee are not specified.

Solution: it is necessary to develop an algorithm of actions for bankruptcy trustees, mandatory for implementation when selling a debtor's digital currency.

- Incompleteness of taxation and accounting issues in operations with digital financial assets and digital currencies.

Solution: it is possible to take as a basis the already existing global practices of solving this problem (e.g. the Republic of Belarus) and make changes to adapt to the needs of Russian society.

With the transition from the denial of the importance in digital assets to the realization of the need for judicial protection for the interests of persons entering into legal relations over digital assets, it can be said that the state has assessed the risks associated with the legal non-regulation for these digital assets.

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## ОСОБЕННОСТИ ПРАВОВОГО РЕГУЛИРОВАНИЯ ЦИФРОВЫХ АКТИВОВ В РОССИЙСКОЙ ФЕДЕРАЦИИ

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**Аннотация:** В настоящее время в России и в мире растет интерес к цифровизации всех секторов экономики, в том числе именно в новых технологиях и их ускоренном внедрении в жизнь государства видят для себя возможность получить конкурентное преимущество и обеспечить стабильность экономики. В связи с этим был разработан ряд законопроектов, направленных на регулирование правоотношений в сфере цифровых активов, некоторые из которых будут приняты в форме законов в 2021 году. В статье авторы попытались выработать единый подход к пониманию правовой природы цифровых активов в Российской Федерации, для чего раскрыты понятие и сущность цифровых активов, проведен анализ перспективных направлений законодательного регулирования цифровых активов в России, определены проблемы регулирования цифровых активов в России и предложены пути их решения.

**Ключевые слова:** цифровые активы, правовое регулирование, Россия, криптовалюта, жетоны.

## РЕСЕЙ ФЕДЕРАЦИЯСЫНДАҒЫ ЦИФРЛЫҚ АКТИВТЕРДІ ҚҰҚЫҚТЫҚ РЕТТЕУДІҢ ЕРЕКШЕЛІКТЕРІ

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**Түйін:** Қазіргі уақытта Ресейде және әлемде экономиканың барлық салаларын цифрландыруға қызығушылық артып келеді, соның ішінде оның жаңа технологияларға енуі және оларды жеделдете енгізу бәсекеге қабілеттілікке ие болу мүмкіндігін қамтамасыз етіп, экономиканың дамуына ықпал жасайды. Осыған байланысты цифрлық активтер саласындағы құқықтық қатынастарды реттеуге бағытталған бірқатар заң жобалары әзірленді. Олардың бірқатары 2021 жылға дейін заң түрінде қабылданады. Мақалада авторлар цифрлық активтерді құқықтық реттеудің бірыңғай әдісін әзірлеуге күш салады. Сонымен қатар, цифрлық активтердің тұжырымдамасы мен Ресей Федерациясында цифрлық активтерді заңнамалық реттеудің перспективалық бағыттарына талдау жасайды. Авторлар Ресейдегі цифрлық активтерді құқықтық реттеу мәселелерінің түйінін тарқатып, оларды шешу жолдарын ұсынады.

**Кілт сөздер:** цифрлық активтер, құқықтық реттеу, Ресей, криптовалюта, жетондар.