

# Cryptocurrency in Russian law: Surrogates, “Other Assets” and Digital Currency

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## **Abstract**

For the last five years there has been a global boom of interest in cryptocurrencies, followed by the fall of their rates; at the same time, there was a wave of enthusiasm regarding the public offering of tokens (ICO) and disillusionment in them (due partly to the active counteraction by American and other influential regulators). Disputes on doctrine moved from suggestions of a new object of property rights to prohibitive initiatives. As these eventful years have shown, the global financial system is sufficiently stable to digest even such a decentralized phenomenon as cryptocurrency. In my opinion, it is now time to recall the tribulations of former discussions and draw a conclusion concerning their interim (one hopes) normative results.

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## **Keywords**

cryptocurrencies, money, digital currencies, virtual currencies, virtual assets, financial surrogates

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## **Prerequisites for Regulation in Russia**

From the very beginning it must be stipulated that the present article shall examine cryptocurrencies in their “classical” meaning — units of payment, possessing an exclusively settlement function and not authenticating any additional rights of demand toward the emitter. Recent years have seen the emergence of numerous forms of cryptocurrencies of various kinds: stablecoins, national cryptocurrencies, etc. The present article deals only with “classical” cryptocurrencies such as the widespread Bitcoin and Ethereum.

Initially, discussions concerning the legal regime for cryptocurrencies in Russia centered around the private and public law aspects. Within the sphere of private law, there were questions about the legal nature of cryptocurrencies: the character of rights to cryptocurrency, its place in the system of property rights, the qualification of cryptocurrency transactions and their validity, as well as possible means of legal protection of rights to cryptocurrency. Alongside this discussion (partially on the basis of arguments emerging in it) amendments were introduced into the Civil Code in 2019, including a clause on “digital rights”<sup>1</sup>.

The polemics around public law concerned, first and foremost, observance of the anti money-laundering recommendations of the Financial Action Task Force (FATF) concerning cryptocurrencies (including the procedure and criteria for monitoring transactions involving cryptocurrencies), the correlation between cryptocurrencies and financial surrogates, permitted and proscribed operations with cryptocurrencies and potential sanctions regarding their performance. Prospectively, this discussion should result in the regulation of cryptocurrencies with a separate law “On digital financial assets”<sup>2</sup>.

These questions are interlinked but were discussed within the context of various branches of the law by various public bodies and such discussions bore different results. For this reason, the present article shall examine both groups of questions consecutively: firstly, the private law issues, then — questions of “convergence” *inter alia* the legal qualification of transactions with surrogates, and then the purely public law issues.

## **1. Cryptocurrency in Private Law. Qualification of Cryptocurrencies**

### **1.1. Qualification of “Intangible Goods” in Russian Law**

In the field of private law, lawyers faced the impossibility of qualifying cryptocurrencies as an object of property rights. The point at issue is that

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<sup>1</sup> Federal Law dated 18.03.2019 № 34-FZ “Amending parts 1—2, second clause of Article 1124 of the Civil Code of the Russian Federation.”

<sup>2</sup> Draft Law № 419059-7 “On digital financial assets.” Available at: URL: <https://sozd.duma.gov.ru/bill/419059-7> (accessed: 12.07.2020). There was a subsequent suggestion to extrapolate regulation of cryptocurrencies into a separate law “On digital currency.” This initiative is under discussion.

right for cryptocurrency has an obvious absolute character. Rights of that kind are typical for exclusive rights, personal non-property rights and property rights, and are not typical of contractual rights. Exclusive rights and personal non-property rights do not coincide with the economic content of cryptocurrency. It would appear reasonable to extend the regime of property rights to cryptocurrency — however the possibility of property rights to intangible objects does not correspond to the Continental legal doctrine that only acknowledges material objects of property (*rem*, things). The concept of the materiality of an object of property rights is reflected in German law<sup>3</sup>, and later in the doctrines of many European countries, including Russia. [Scriabin S.V., 2004: 34]. This evoked recurrent difficulties with new objects of absolute rights: intellectual property, or, in recent history, uncertificated securities or electric power. Difficulties arose and continue to exist in qualifying virtual objects — for example, virtual gold and items gold and in online games, domain names, etc<sup>4</sup>.

Moneys in cash, having a material form in Roman law and the subsequent Continental legal doctrine, have always been accepted as moveable generic divisible and unusable goods. Certain problems arose in qualifying cashless (bank) money: unlike cash money, such moneys are not deemed to be objects of property rights, they are determined as objects of contractual rights (of contract between bank and account holder) [Lunts L.A., 2004 (1927): 20]. This point of view was supported by doctrine and despite objections [Efimova L.G., 2001: 204–234], was established in the formulations of the Civil Code. *Inter alia* Article 128, determining the objects of title, divides cash money belonging to an owner on grounds of property rights to cashless money to which one has property rights of demand: ““Objects of civil rights” mean things, including, *inter alia*, money in cash and paper securities, other assets, for instance money in a cashless form, paperless securities...”)<sup>5</sup>. An identical regime concerning cashless money was established in Germany, France, Great Britain [Sazhenov A.V., 2018b: 115].

The regulation of so-called “electronic money” (e-money) did not influence the qualification of cashless money in that “electronic money” only

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<sup>3</sup> Materiality of things is established in §90 Bürgerliches Gesetzbuch. In Russian legislation there is no such requirement, but it is common in legal doctrine.

<sup>4</sup> Rozhkova M.A. On property rights to non-material objects in the system of absolute rights. 2020. Available at: URL: <https://zakon.ru/rozhkova-ma/blogs> (accessed: 30.05.2020)

<sup>5</sup> Art. 128 of the Civil Code.

fixes a certain balance of the rights of the participants in the payment system, but does not constitute a separate element of property rights. As the law “On the national payment system” stated, electronic money are one and the same financial monetary means that are moved within the framework of the form of cashless settlements accepted by the participants<sup>6</sup>. Thus, Russian legislation attributes “electronic money” to contractual rights, that may be directed towards not just banks, but also other participants in the system of cashless settlement.

## 1.2. Cryptocurrency as an Object of Rights *Sui Generis*

Thus, in the existing system of objects of civil rights, money is regarded as either material object (cash money) or as the right of demand to banks or other participants of the financial system (cashless money, “electronic money”). However, cryptocurrency in pure form does not fit in with either of these concepts. As I have already said, the nature of rights to cryptocurrency clearly tends toward the absolute, rather than the relative. Scholars have repeatedly tried to explain relative (contractual) nature of rights to cryptocurrency<sup>7</sup>. However, the attempt to find an obligated party within the blockchain only lead to further discrepancies. For example, some scholars endow the holders of cryptocurrency with rights of demand against the owners of blockchain nodes — you might as well say that when you buy a car, you are endowed with the rights of demand regarding all petrol stations.

In my view, cryptocurrency is an absolute right of a particular kind (*sui generis*). This position is sufficiently widely held [Tolkachev A.Yu., Zhu-zhzhlov M.B., 2018: 114–116]; [Efimova L.G., 2019: 17–25]. Yet acknowledgement of the absolute nature of rights to cryptocurrency require a direct indication in law by virtue of the principle of *numerus clausus* — the list of absolute rights must be exhaustive and established in the law. Therefore, the regulation of rights to cryptocurrency as an absolute right, needs the establishment of the new object of civil rights — similar to that of uncertified securities. Of course, the introduction of such substantial amendments to legislation requires lengthy discussion — due to this, no decision satisfying

<sup>6</sup> Art. 3 of Federal Law dated 27.06.2011 № 161-FZ “On the national payment system”.

<sup>7</sup> Uspensky M. Legitimate bitcoin. Available at: URL: [https://zakon.ru/blog/2017/12/13/legitimnyj\\_bitcoin](https://zakon.ru/blog/2017/12/13/legitimnyj_bitcoin) (accessed: 30.05.2020). See also: [Novoselova L.O. 2017: 11].

all parties has been formed to date. Lacking a concrete civil law regulation, in practice Russian courts find various reasons to evade not just qualifying cryptocurrency, but also to evade protecting rights to it.

Thus in 2017 a court in the Tyumen district<sup>8</sup> did not support the seller of bitcoins in a dispute versus an internet exchange: the court ruled that the interest of the claimant is not subject to court support since the subject of the transaction did not conform to the determination of electronic monetary means, is not a foreign currency and is not named in the Civil Code. As a result, the court decided that "all operations with the transfer of bitcoins are conducted by their holders at their own risk" and dismissed the case.

Such a qualifications can be explained only by the court's reluctance to rule on the matter in substance. The list of objects of rights established in Article 128 of the Civil Code is not closed; the lack of some object in it does not mean that rights to that object are not subject to judicial protection. The principle of *numerus clausus* does not allow the court to determine a new object of civil rights, but the formulation of Article 128 leaves a loophole: the court can relate to cryptocurrency as a "assets", not specifying its legal nature. This has become the mainstream policy in qualifying cryptocurrency among Russian courts for the next few years.

### 1.3. Cryptocurrency as an Asset

The collective category of "assets" in Russian law, although often limited to property [Sukhanov E.A., 2017: 44], comprises a wide list of rights, including both property rights and contractual rights. The category of assets is applied to different types of "masses": the bankruptcy estate ("the entire assets of the debtor"<sup>9</sup>), mass of the succession ("things, other assets, including property rights and obligations"<sup>10</sup>), marital assets of spouses ("assets acquired by spouses during marriage"<sup>11</sup>) et al. Disclosing the enterprise as an asset complex, the legislator includes ("blocks of land, buildings. constructions, equipment, fittings, raw materials, products, rights of demand, debts"<sup>12</sup>).

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<sup>8</sup> Ruling of the Ryazhsky regional court, Ryazan district, 26.04.2017 on case № 2-160/2017 (M-129/2017).

<sup>9</sup> Art. 131 of Federal Law of 26.10.2002 № 127-FZ "On insolvency (bankruptcy)"

<sup>10</sup> Art. 1112 of Civil Code.

<sup>11</sup> Art. 34 of Family Code.

<sup>12</sup> Art. 132 of Civil Code.

I repeat that the qualification of any substance as “asset” does not elucidate its legal nature, as “asset” is a collective concept. Therefore, qualifying cryptocurrency as “asset” does not help to establish its legal nature but does allow legally commercialize it. Strictly speaking, this is already sufficient for the protection of rights to cryptocurrency in contractual and tort disputes (by virtue of the principle of general rights protection established by Article 1064 of Civil Code) [Fedorov D.V., 2018: 54].

In this respect, the “Tsarkov Case” is indicative, in which the court examined the question of inclusion of cryptocurrency of a bankrupt (Tsarkov I.I.) into his assets for distribution. As I have mentioned above, the law clearly indicates the inclusion of such a mass — “the entire assets of the debtor” — with the exception of licenses and objects excluded by law (cryptocurrency is not that kind). Therefore, pursuant to the direct order of the law, the insolvency administrator is obligated to include the cryptocurrency to the assets for distribution.

The below court supported the bankrupt, having established that Tsarkov is under no obligation to transfer bitcoins. However the Appeals Court cancelled that decision and granted the claim of the insolvency administrator<sup>13</sup>. This decision was based on the following grounds:

In general, norms of Civil Code are discretionary, and therefore the list of objects of civil rights in Article 128 of Civil Code is non-exhaustive<sup>14</sup>;

Although Civil Code does not disclose the concept of “other assets”, allowing for contemporary realities and levels of technology this concept may be interpreted with maximum scope, *inter alia*, by including cryptocurrency in the composition of property;

Under the Law “On insolvency (bankruptcy)”, any property of the bankrupt that is of economic value to creditors, may not be excluded from distribution;

The debtor’s ownership of cryptocurrency may be proven by scrutinizing web pages and also by the circumstance that the debtor has access to his wallet.

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<sup>13</sup> Resolution of Arbitration court of Appeal № 9 dated 15.05.2018 on case № A40-124668/2017.

<sup>14</sup> One may argue with the court about this: is the principle of disparity established by art. 1 CC (“citizens...are free to establish their rights and obligations on the basis of the contract...”) applicable to the list of objects of civil rights?

Consequently, despite the fact that courts in the “Tsarkov Case” did not consider comprehensively the legal nature of cryptocurrency, a conceptually correct approach was formulated: cryptocurrency may be an object of property rights even without a stipulation of such in the law.

#### **1.4. Do Cryptocurrency Relations Belong to the Field of Law?**

Determination of the nature of the right to cryptocurrency is complicated by the technological specifics of the blockchain. The ability of the participant to enter information into the block — *inter alia*, to perform all cryptocurrency transactions — is determined by access to a specific address. Such access, irrespective of its form (login and password, certificate of electronic signature, etc.) is certain information held by the participant of the blockchain. Without this information, i.e. without access, it is impossible to perform actions within the blockchain. As neither the court nor the creditor can obtain the information required for access, it becomes impossible to encroach on the cryptocurrency without the consent of its owner. The same limitation complicates legal defence: it is impossible to enforce the fulfilment of a contract with transfer of cryptocurrency.

This raises the question of the nature of relations of cryptocurrency ownership. As doctrine says, in absolute legal relations — including property relations — the owner is confronted by an indefinite circle of obligated subjects. Can it be said that the participants of a blockchain are obligated to the “owner” of cryptocurrency — as after all, they are physically unable to hinder its “owner”? If the answer is “no, they are not obligated”, the possibility of a very absolute right to cryptocurrency can be questioned. If it is accepted that “ownership means a factual relationship to an object that has no limits apart from coercion by third parties wishing to encroach on that object” [Sklovsky K.I., Kostko V.S., 2018: 131], ownership of cryptocurrency cannot be acknowledged as ownership: as enforced encroachment on cryptocurrency is impossible. In such a situation, we shall have to speak about relations within the blockchain not as a legal relations but of factual relations of some form — possibly a new type of social relations regarding which law is inapplicable [Savelyev A.I., 2016: 54]. This corresponds with the position of some German specialists in civil law who regard cryptocurrency transactions not as a legal relationship, but a certain “real act” [Fedorov D.V., 2018: 30].



It is possible to dispute this viewpoint. Encroachment on an object can occur in ways other than physical enforcement — it may be accomplished as a result of a faulty expression of will by the owner (deceit, threats, etc.) There are objects of property law the ownership of which also does not presume the possibilities of encroachment by third parties (for example, spacecrafts<sup>15</sup>). There are also objects of absolute rights *sui generis* (for example, the intellectual property), infringement of which has its own specifics.

The described particularities of blockchain technology also do not enable owners to defend their rights. For example, it is technically impossible to enforce a demand for it in either judicial or extrajudicial order<sup>16</sup>. Does such a limitation affect the substance of an obligation involving cryptocurrency?

In fact, the right to protection was considered an intrinsic element of an obligation for a long time; this viewpoint has changed only in contemporary literature under the influence of the theory of protective legal relations [Mertvishchev A.V., 2012: 12], pursuant to which even moral obligations, lacking protection, are considered as judicial relations. Contrary to moral obligations, obligations relating to cryptocurrency are not denied judicial protection in whole; such protection is simply hampered by the pseudonymity of abundant blockchains and the impossibility of performing a transaction without the consent of the debtor (these two factors should be distinguished from one another).

Nevertheless, cryptocurrencies are not a unique occurrence of an object of obligation that affects the application of means of judicial protection. Thus, it's impossible to force performance concerning personal obligations of the debtor (for example, an obligation to perform a musical composi-

<sup>15</sup> Regarding spacecraft, the doctrine acknowledges the regime on real estate even though this is not affirmed by legislation. Reference to spacecraft as objects were made in currently invalid laws “On pledge” (p.1 Art. 35) and “On state registration of real estate and transactions with it” (Art. 4). The law “On state registration of rights to spacecrafts” has been under discussion for several years but has not been submitted to the State Duma at this time.

<sup>16</sup> A.I. Savelyev [Saveliev A.I., 2018: 36—52] states that as the inapplicability of vindication claims against cryptocurrency does not allow considering rights to it as strictly absolute. It would appear that the error in this reasoning lies in that not all absolute rights are protected by a vindication claim. Moreover, it is inarguable that absolute and property right represent, as A.A. Ivanov puts it, “shades of grey” (A.A. Ivanov. Many shades of grey; absolute and relative rights (digital practice and a little bit of theory. Available at: URL: [https://zakon.ru/blog/2018/08/31/mnogo\\_ottenkov\\_serogo\\_absolyutnye\\_i\\_otnositelnye\\_pravacifrovaya\\_praktika\\_i\\_nemnogo\\_teorii](https://zakon.ru/blog/2018/08/31/mnogo_ottenkov_serogo_absolyutnye_i_otnositelnye_pravacifrovaya_praktika_i_nemnogo_teorii) (accessed: 30.05.2020). These “shades” are determined, *inter alia*, in the application of proprietary-legal means of protection.



tion) [Gromov A.A., 2018: 10—15]. In Russian law it is not possible to force company stockholders to vote in a specific way, even if such an obligation is established by a shareholders agreement. In such and other cases the object of an obligation influences the possibility of the application of one or another means of judicial protection but does not abolish the obligation at whole. In the matter of cryptocurrency, interests that cannot be protected through enforcement of the performance of a contract, may be protected by payment of compensation for losses in monetary form. Protection from theft of cryptocurrencies shall be either of tort nature (a claim for inflicting damage to property), or of a conditional nature (*indebitatus assumpsit*) [Savelyev A.I., 2017: 149]; [Sazhenov A.V., 2018b: 117–118].

### 1.5. Judicial Protection of Rights to Cryptocurrency

In practice, difficulties in protection of rights to cryptocurrency arise most often due to their pseudonymity, and not the impossibility of performance against the will of the debtor. One of the first cases to be examined regarding protection for a transaction with cryptocurrencies was examined by the Arbitration Court of the Khabarovsk Territory in 2016<sup>17</sup>. With no adequate comprehension of the technical side of the matter, the court demanded that the claimant provide evidence regarding the transfer of cryptocurrencies to Russian jurisdiction, and without receiving that, dismissed the claim. In the opinion of the court, the lack of evidence regarding the appearance of cryptocurrency in Russian jurisdiction meant the impossibility of its use in a transaction, the performance of which the claimant attempted to prove, — a transaction aimed at the exchange of real estate for cryptocurrency.

In the “Totem” case the court also demanded evidence regarding the transfer of cryptocurrency to the claimants from the respondent<sup>18</sup>. The claimants asserted that they sent him 600 thousand roubles to acquire “Totem” cryptocurrency, after which he refused to respond to them. The respondent asserted that he had opened accounts for the claimants on the “Totem” website, as was agreed, and transferred cryptocurrency to these accounts. The below court ruled in favour of the claimants, but the court

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<sup>17</sup> See: court acts on cases № A73-7423/2015 and № A73-6112/2015. Subsequently, the matter went as far as the Supreme Court, and at all levels the decision of the regional court was upheld

<sup>18</sup> Decision, Leninsky regional court, city of Ulyanovsk, 13.04.2018 on case № 1444/2018; appeal ruling of the Ulyanovsk regional court, 31.07.2018 on case № 33-3142/2018.

of appeal reversed that ruling. In fact, the dispute was reduced to the issue whether it was feasible to accept the balance of an anonymous internet wallet as affirmation of the transfer of cryptocurrency and which party has the burden of proof on. The appeals level placed the burden of proof on the claimants, and the respondent won the case.

In a similar case in the Tyumen Region, the question also hinged on the confirmation of a transfer of cryptocurrencies between the parties<sup>19</sup>. According to the materials of the case, the claimant transferred means to the credit card of the respondent, expecting a consideration (cryptocurrency). However, this did not occur, and he filed a *indebitatus assumpsit* claim. As evidence, the respondent provided the results of a notarial examination of the account on the platform of private exchange of cryptocurrencies, but the court did not deem this to be sufficient proof of the exchange of cryptocurrency. As a result, the transferred amount was deemed to be unjust enrichment by the respondent.

In the cited decisions, the courts did not question the validity of transactions with an object not named in the Civil Code and did not question the provision of judicial protection to actions occurring in the blockchain. In all three cases the decisive role was played by the pseudonymity of addresses in the blockchain, which prohibits proving the fact of the ownership of cryptocurrency by a concrete entity. The actual decisions of courts in such cases depend on whom the court encumbers with the burden of proving the transfer (or failure to do so) of cryptocurrency. If, for instance, a cryptocurrency contract states the addresses of wallets and rules of transfer, the parties' rights will more than likely be protected in case of court action.

I would note that although quite a number of court decisions have been made in the sphere of civil disputes connected with cryptocurrency, in my opinion one may not speak of the formulation of a consecutive court practice. Many decisions in such cases contain practically no rational reasonings. For example, in the "Cripton" case, the Moscow City Arbitration Court traditionally dismissed the claim by virtue of the unproven fact of unjustified enrichment. However, at the appellate level the court unexpectedly and comprehensively augmented the arguments of the below level court, *inter alia*: "Legislation of the Russian Federation does not contain such a method

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<sup>19</sup> Decision. Zavodoukovsky regional court, Tyumen district, 11.10.2017 on case № 2-776/2017 (M-723/2017). The decision was appealed in the Tyumen regional court, the appeal ruling 24.01.2018 dismissed the appeal (case № 33-245/2018).

of protecting rights as obligation to return cryptocurrency... The indicated method of protection of rights is not established in article 12 of the Civil Code of the Russian Federation, and is thus not a lawful means of protecting rights and may not be applied, that is in the given concrete case the claimant is denied the right to judicial protection of its violated rights"<sup>20</sup>.

## **2. Attempt to Introduce Cryptocurrency into the Civil Code**

### **2.1. "Digital Currency" in the First Draft of Amendments to the Civil Code**

From 2018, acting against the background of ongoing theoretical disputes, the legislator began to make efforts to regulate cryptocurrency. A draft law "On the introduction of amendments to parts one, two and four of the Civil Code of the Russian Federation" was presented to the State Duma<sup>21</sup>, presuming augmentation of the Code with the categories "digital rights" and "digital money", in fact meaning the token and cryptocurrency.

The draft law proposed introducing a new type of property rights into the Civil Code — "digital rights". In substance, these rights signify a "digital code" that "validates the right" and exist "within the information system, answering to... the signs of a decentralized information system." A mandatory condition for the existence of digital rights is the ability to "provide an entity possessing a unique access to this digital code...the possibility of becoming acquainted with the description of the relevant object... at any time." The holder of a digital right is acknowledged to be "an entity possessing unique access to...the digital code...facilitating the execution of actions relating to disposal of digital rights".

This ambiguous determination, to put it simply, positions "digital rights" as access to a specific address in the blockchain. In turn, "objects of rights" may be tied to this address. If the user has access, he also has the right: if access disappears — digital right disappears with it. Such an approach is an

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<sup>20</sup> Resolution of Arbitration court of Appeal № 9 dated 4 February 2020 on case № A40-164942/19.

<sup>21</sup> Draft law № 424632-7 On introduction of amendments to the first and second parts of Article 112 third part of the Civil Code of the Russian Federation (on digital rights). Available at: URL: <http://sozd.duma.gov.ru/bill/424632-7> (accessed: 12.07.2020)

original resolution to the problem of protection of rights to digital assets: no access to digital assets means no rights to them.

As the digital rights envisaged by the draft law extended to any crypto asset, including blockchain tokens, a separate article — “Digital currency” — was envisaged to determine cryptocurrency as a more limited phenomenon. This currency was connected to the digital code that existed reciprocally with digital rights within the distributed system but, unlike them 1) it did “not authenticate rights to any object of civil rights” and 2) was used “for execution of payments”. It was indicated separately that digital currency could be used as a means of payment “in the instances and under the conditions established by law” — In this instance, the norms of digital rights were to apply by analogy. Inevitably, the question arose regarding the capacity of digital currency in other situations — as property, as digital rights or as an object limited in turnover?

Clearly, digital currencies were described from the contrary: just as money can be described as a bearer security which does not authenticate any deriving rights (historically, this is similar to the characterization of the first banknotes), digital moneys were described as digital rights, not as granting any rights. Such a determination, expressed with a certain paradoxical elegance, has several shortcomings. Firstly, the very fact of determinations proceeding from the contrary often show that that the author was unable to grasp the substance of one or another phenomenon<sup>22</sup>. Secondly, it enables ascribing any tokens without the presumption of an understandable right of demand to cryptocurrency — for example, tokens granting the right to receive cryptocurrency at a future date are also cryptocurrency receipt if used for indefinite activity in “execution of payments”. At the same time, characterization of digital currency does not include, for instance, secured cryptocurrencies insofar as they endow their holders with certain rights (although somewhat conditional ones).

## **2.2. “Digital Rights”. Final Edition of the Law Omitting Cryptocurrencies**

I shall not dwell on the numerous shortcomings of the interim version of the draft law but proceed directly to the approved version. It excluded

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<sup>22</sup> One cannot but recall Plato’s characterization of Man as a two-legged creature without feathers, which was brilliantly countered by Diogenes’ observation regarding a plucked rooster [Diogenes Laertes, 1986: 226].

norms concerning “digital money” as in various other provisions. The article on “digital rights” was retained, but in an amended form. In the approved version digital rights are described as “named in this capacity in the law as obligatory and other rights, the content and conditions of performing which are determined in accordance of the rules of the information system that conforms to signs established by law.” At the same time “the holder of a digital right is recognized as an entity that, in accordance with the rules of the information system, has the ability to dispose of that right”<sup>23</sup>.

Clearly, the formulation has altered by comparison with the first version. After lengthy fruitless debates regarding the “digital code”, “digital designation” and other technological definitions, the legislator chose to transfer to the closed list of digital rights that should be established in special laws. Two references regarding future legislation in one sentence (“named in this capacity by the law... conforming to signs established by the law”) point to the indecision of the legislator that divested itself of the responsibility for specific signs of digital rights and demands thereto. To the erroneous benefit of misunderstood technological neutrality, the distributed register also disappeared; all that remained was the initial concept of “digital rights — denotes access”, removing partially certain questions regarding protection of digital rights.

Amendments were also made to the approved draft law in Article 128 concerning objects of rights. The new formulation “Assets, including proprietary rights (including cashless monetary means, undocumented securities, digital rights) allows the conclusion that digital rights are related to property rights in the composition of assets, but do not extend to objects. In such case, digital rights may also authenticate obligatory, corporate and even exclusive rights, depending on what shall be established by special legislation.

The final version of the draft law also failed to disclose the nature of rights to crypto assets (digital rights): are they absolute or relative? Is it possible to distinguish the right to crypto asset (access) from the right arising from a crypto asset (right of demand), or the rights to crypto asset is not a new object of civil rights but merely a form of their attachment to rights of demand from a crypto asset?<sup>24</sup> Therefore the questions raised in p. 2.2–2.3 of the

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<sup>23</sup> Art 141.1 of Civil Code.

<sup>24</sup> See: Expert opinion regarding the draft of federal law №424632-7 “On the introduction of amendments in the first, second and third parts of the Civil Code of the Russian Federation. Approved at the meeting of the Council for Codification and Perfection of Civil Legislation under the President of the RF 17.01.2019, №183-1/2019. P. 3.

present article remain unresolved, and the substance of rights to cryptocurrency (as well as the legal nature of digital rights) has not been established by legislation.

With the exclusion of norms concerning “digital currency” from the draft it was announced that cryptocurrency shall be determined in a separate draft law “On digital financial assets” providing a more specific regulation of separate types of crypto assets and rules for their turnover. However, the legal regime of cryptocurrency, passed as a relay stick from the developers of the Civil Code, became an obstacle for the working group, and its activity became stuck at this point. Apart from the civil-legal qualification of cryptocurrency, difficulties arose with permission to use cryptocurrency as a method of payment in the absence of understandable mechanisms to counter money laundering and financing of terrorism (AML/CFT). The Central Bank finally proposed the complete exclusion of cryptocurrency from legislation; but FATF, in developing financial methods for countering money laundering, reacted to this proposal immediately by demanding the reinstatement of cryptocurrency in legislation<sup>25</sup>.

In May 2020 the Committee of the State Duma on the Financial Market was presented with a new draft law — “On digital currency and the introduction of amendments into certain legislative acts of the Russian Federation”, accompanied by amendments to the Code of Administrative Offences (CoAO) and the Criminal Code (CC). Consultations on this draft law are in progress.

### **3. Money, Monetary Surrogates and Cryptocurrencies**

#### **3.1. Money and Monetary Obligations**

The unique nature of money is determined by its role as a general equivalent of value. Money measures the value of all other things, just as responsibility for violation of civil-legal obligations. This characteristic arises for both economic and political reasons — the state grants certain things the force of a means of payment, calling them money; related obligations become monetary ones. These days money is issued by the state itself, although historically there were many forms of money emitted by private entities and

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<sup>25</sup> Aksakov: adoption of the law on digital financial assets is “suspended” due to the demands of the FATF, 21.05.2019. Available at: URL: <https://tass.ru/ekonomika/6452798> (accessed: 12.07.2020)

recognized by the state — for example, bank receipts in the epoch of free banking [Dowd K., 2002: 7].

There are several theories on which signs distinguish money from other things, at which moment money acquires value, and can non-governmental units (private money) be perceived as money [Gleeson S., 2018: 29], yet I do not wish to address this problem in depth in the present article and will employ the terminology established by legislation.

Pursuant to Art. 140 of the Civil Code and the law "On currency regulation and currency control"<sup>26</sup>, the money category includes cash and cashless monetary means. Money may be both in Russian roubles (the legal tender of the Russian Federation), and in foreign currency. The use of foreign currency as a method of settlement on the territory of the Russian Federation is permissible only on the basis of law. Foreign currency is emitted by foreign states or their groups (including international units of account); regional and private money, just as monetary signs of unacknowledged states<sup>27</sup> are not regarded as foreign currency. Accordingly, cryptocurrency does not relate either to money, or to means of payment.

The substance of the category of lawful means of payment appears in private law relations. Under obligations envisaging the transfer of money (i.e. under monetary obligations) the creditor is obligated to accept a lawful means of payment as settlement. Thus a lawful means of payment, as distinct from other payment means, may settle any monetary obligation without a supplementary expression of will by the creditor, and specifically the use of a lawful means of payment renders a financial obligation to be a monetary one. Similarly, irrespective of the substance of the obligation, it is the lawful means of payment that serve as an instrument for calculation of losses, subject to compensation in the event of failure to fulfil the obligation. A lawful means of payment is also a financial collection of lawful and contractual interests as well as forfeit in any circumstances<sup>28</sup>.

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<sup>26</sup> Federal Law "On currency regulation and currency control" dated 10.12.2003 № 173-FZ.

<sup>27</sup> List of signs of foreign currency recognized by the Russian Federation, formally established by the All-Russian Classifier of Currencies (OK (MK (ISO 4217) 003-97) 014-2000. Affirmed by the Resolution of the Gosstandart of Russia 25.12.2000 № 405-st.

<sup>28</sup> S. 9 of Information letter of the Chair of the Higher Arbitration Court of the Russian Federation of 04.11.2002 № 70 "On the application of articles 140 and 317 of the Civil Code of the Russian Federation by arbitration courts."



The parties to a contract have the right to exercise their own discretion (p. 4 of Art. 421 of Civil Code). However, the use of foreign currency as a means of settlement is permissible only on the basis of law. If the condition regarding means of payment violates this prohibition, the court may declare it void, but this does not mean invalidation of the contract as a whole (Art. 180 of Civil Code); the amount to be paid is subject to conversion into roubles on the due day of payment; it is calculated in accordance with the official exchange rate, unless another rate is established by law or the contract (Art. 317).

What happens if an obligation is expressed not in roubles, but in cryptocurrency or regional or private money? There may be various viewpoints on this issue depending on the interpretation of the correspondence of the norms of public law with the Civil Code: *inter alia* depending on how to evaluate the active prohibition on the turnover of monetary surrogates.

### **3.2. Cryptocurrencies — Monetary Surrogates?**

The prohibition on emitting monetary surrogates was inherited by Russian legislation from the Soviet Union, and that — from the Russian Empire. This prohibition appeared in legislation for the first time in 1870, when the 1845 Code of Criminal and Correctional Sentences was augmented by Art. 1150, prohibiting private entities to “emit nameless monetary signs in the form of stamps, receipts, labels and other signs, or obligations promising the bearer a definite sum of money, goods or other objects”. The appearance of this norm was caused by the widespread distribution of private money, which competed with state issue [Nersesov N.O., 2000 (1889): 238–241].

The next arising of the surrogate problem was in the 1920s, when against the background of post-war destruction various forms of cooperative money came into broad circulation. As a result, the turnover of surrogates was proscribed; acts of that time qualified surrogates as “securities which by the nature of their convertibility could acquire the significance of monetary signs” — *inter alia*, certain bearer documents regarding distribution of goods [Lunts L.A., 2004 (1927): 67–68].

Current legislation limits the emitting of monetary surrogates by the Constitution and the law “On the Central Bank of the Russian Federation.” Article 75 of the Constitution prohibits “the introduction or emitting” of

“other money” on the territory of the Russian Federation except the Russian rouble. Article 27 of the Federal Law “On the Central Bank of the Russian Federation” proscribes the introduction of “other monetary units” and “monetary surrogates.” Formally, not one of these norms prohibits the turnover of monetary surrogates and provides no definitions of them [Sazhenov A.V., 2018a: 57–60]: in fact this means that the definition of one or another unit of payment as a monetary surrogate is left to the mercy of the Central Bank [Bashkatov M.L., 2018: 81]. Despite the prohibition in force since 1994, the latter has never concretized it<sup>29</sup> — even in response to the issue of regional currencies in the 1990s (Ural francs, Khakass roubles et al). Nevertheless, I shall not interpret this norm religiously as a direct prohibition on the use of monetary surrogates in turnover.

In the absence of a definition of a monetary surrogate, it is not unreasonable to ask: into what groups does public law, in the form of the Constitution and the law “On the Central Bank” divide means of payment that are in turnover: apart from “money” and “monetary surrogates”, is there some other, third group of means of payment?

If one is to adhere to the strict dichotomy “everything that is not money (roubles and foreign currency) is a monetary surrogate”, then cryptocurrencies must be relegated invariably to the latter. In this instance the prohibition must be interpreted as the exclusion of monetary surrogates from turnover by the norms of public law, and Art. 189 of the Civil Code regarding a void transaction should apply to a hypothetical transaction involving cryptocurrency: just such are transactions aimed at the alienation of objects, limited or excluded from turnover<sup>30</sup>. Theoretically, as the case in point concerns violation of the law, can it be possible to invoke means of responsibility established by administrative or criminal legislation while sanctions for the introduction and turnover of surrogates do not figure currently in the CoAO or the CC?<sup>31</sup>.

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<sup>29</sup> In 2014 the Information message of the Central Bank cited the norm concerning the prohibition of surrogates, which shall be discussed further.

<sup>30</sup> P. 85 Resolution of the Plenum of the Supreme Court of Russia of 23.06.2015 № 25 “On the application of certain provisions of section 1 first part of the Civil Code of the Russian Federation by the courts”.

<sup>31</sup> The Code of administrative provisions includes a prohibition on the “unlawful emitting of documents authenticating monetary obligations” but firstly this prohibition is difficult to apply to surrogates — for they are not money and relations involving relations with their use are not monetary, and secondly this norm is inapplicable to physical entities.

In practice, prior to its extension to transactions with cryptocurrencies, prohibition on the emitting of monetary surrogates figured in contemporary law enforcement practice only once — within the framework of the so-called “Case on colions”<sup>32</sup>, that involved private currency (“colions”), printed typographically by M.Yu. Shlyapnikov, Moscow Region resident. The claim was filed by the public prosecutor of the city of Egoryevsk, Moscow Region, and on 6 July 2015 the Egoryevsk City Court, satisfied the prosecutor’s claim in full; subsequently, the Moscow District Court dismissed Shlyapnikov’s appeal, and the Supreme Court refused to examine it by way of supervision.

In January 2014 the site of Central Bank carried a press release “On the use of “virtual currencies” in executing transactions, including the Bitcoin”<sup>33</sup>. *Inter alia*, the document cited Article 27 of the law “On the Central Bank” prohibiting the introduction of monetary surrogates. Thus, cryptocurrency was relegated obliquely to surrogates. This was followed almost immediately by appearances of representatives of fiscal and law enforcement agencies in the same key. This started a futile struggle with cryptocurrency that lasted until 2018.

The attempt to stop the spread of cryptocurrencies by administrative efforts led to the adoption of the Resolution of the President dated 25.03.2014 № Pr-604 regarding the establishment of responsibility for the use of monetary surrogates and prohibition on the circulation of cryptocurrencies. Already in the summer of 2014 the Ministry of Finance had drawn up two draft laws regarding prohibition of cryptocurrencies: amendments to the CoAO including the emitting of monetary surrogates, the distribution of software designated for mining and similar actions<sup>34</sup>, also amendments to the Criminal Procedure Code<sup>35</sup> introducing criminal liability for participation in the turnover of a monetary surrogate. The draft laws received posi-

<sup>32</sup> Decision of the Egoryevsk City Court on case № 2-1125/2015 (M-666/2015) 01.07.2015; Appellate determination of the Moscow District Court 28.09.2015 on case № 33-23296/2015.

<sup>33</sup> Information of the Bank of Russia “On the use of “virtual currencies” in transactions including the Bitcoin” dated 27.01.2014. Available at: [https://www.cbr.ru/press/pr/?file=27012014\\_1825052.htm](https://www.cbr.ru/press/pr/?file=27012014_1825052.htm) (accessed: 12.07.2020)

<sup>34</sup> Draft law “On the introduction of amendments to separate legislative acts of the Russian Federation” Available at: URL: <https://regulation.gov.ru/projects#npa=18934> (accessed: 12.07.2020)

<sup>35</sup> Draft law “On the introduction of amendments to the Criminal Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation” Available at: <https://regulation.gov.ru/projects#npa=46853> (accessed: 12.07.2020)

tive conclusions and went through public discussion but were never passed to the Government for examination and, consequently, were not submitted to the State Duma.

Further work on the draft laws and related documents was suspended and mention of surrogates was excised from Central Bank documents. The final version of the Resolution of the Plenum of the Supreme Court of Russia "On the judicial practice in matters of legalization (laundering) of monetary means"...<sup>36</sup> was worded in the same style; its text allows an oblique conclusion that cryptocurrencies in Russia are not excluded from turnover. Why, in the first place, did the Supreme Court, having added<sup>37</sup> cryptocurrency to the matter of legalization of criminal income in 2019 under Articles 174 and 174.1 of the Criminal Code, not include them in p.2 of the Resolution devoted to laundering criminal income by the acquisition of assets excluded from legal turnover (narcotics, weapons etc.)? This is highly significant in qualification, as transactions with proscribed objects do not fall under the composition of laundering. Secondly, the Preamble to the Resolution of the Plenum in the new version contains a reference to FATF Recommendation 15, pursuant to which cryptocurrency is to be interpreted as "property" or "asset" but not as "surrogates"<sup>38</sup>. The bodies of executive power also confirmed the development of a legal mechanism for the confiscation of cryptocurrency<sup>39</sup> — as it is well known that confiscation of assets is not implemented regarding assets proscribed for turnover or removed from turnover<sup>40</sup>.

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<sup>36</sup> Resolution of the Plenum of the Supreme Court of the Russian Federation 7 July 2015 № 32 (in the version of 2019) "On judicial practice in the matter of legalization (laundering) of monetary means or other property acquired by unlawful means, and acquisition or disposal of other property consciously acquired by criminal means."

<sup>37</sup> Resolution of the Plenum of the Supreme Court of Russia 26 February 2019 № 1 "On the introduction of amendments into the Resolution of the Plenum of the Supreme Court of the Russian Federation 7 July 2015 № 32 "On judicial practice in the matter of legalization of monetary means or other property acquired by unlawful means and acquisition or disposal of property acquired by criminal means."

<sup>38</sup> FATF Guidance for a risk-based approach. Virtual assets and virtual asset service providers. 2019. Available at: URL: <https://www.fatf-gafi.org/media/fatf/documents/recommendations/RBA-VA-VASPs.pdf> (accessed: 12.07.2020); Clarifying note to Recommendation №15: The FATF Recommendations. P. 15, 70–71.

<sup>39</sup> MIA confirmed development of a mechanism for the arrest and confiscation of cryptocurrencies. Available at: URL: <https://1prime.ru/finance/20191204/830642774.html> (accessed: 12.07.2020)

<sup>40</sup> P. 14 Resolution of the Plenum of the Supreme Court RF dated 14.06.2018 № 17 "On certain questions regarding implementation of confiscation of property and criminal judicial procedure."

Thus at present apart from money and surrogates there is a certain third group of quasi-monetary substances to which cryptocurrency belongs. Consequently, transactions with it have legal force. The question is whether a contract executed with cryptocurrency implies a monetary obligation, can cryptocurrency be considered as payment for a contract? In examining the regime by M.B. Zhuzhalov and A.Yu. Tolkachev of “ordinary money” (things commonly accepted as forms of payment), suggest considering such transactions an exchange if both provisions are things<sup>41</sup>, or an atypical transaction if one of the provisions is not material. If the parties agree to an alternative execution in money or cryptocurrency, the obligation will have a “flickering causation” dependent on the final counter-offer [Zhuzhalov M.B., Tolkachev A.Yu., 2018: 106]. A.I. Savelyev notes that if the debtor offers to settle the existing monetary obligation with an unlawful means of payment (*inter alia* with cryptocurrency) then with the consent of the creditor there can be a novation instead of settlement of the obligation, which ceases to be monetary [Saveliev A.I., 2017: 139–141].

## 4. “Combating Money Laundering” (AML CFT)

### 4.1. Cryptocurrency in the Russian Financial System

The architecture of the global financial system, formulated *inter alia* on the basis of international standards regarding the combating the laundering criminally acquired income and the financing of terrorism envisages that electronic payments should be accompanied by information concerning the sender and recipient of payment (the so-called “forwarding rule” or “travel rule”). Moreover, an intermediary organization must have the power to freeze suspicious electronic payments<sup>42</sup>. However these demands regarding cryptocurrencies cannot be implemented fully, firstly because information about senders and recipients of the relevant payments is pseudonymized and secondly because the participants of direct cryptocurrency transactions

<sup>41</sup> Under Russian law such a transaction will be considered an exchange if both provisions under the contract are goods (Art. 567 of CC; p. 3 Information Letter off the Presidium of the HAC RF 24.09.2002 № 69). “Review of the practice of resolving cases concerned with exchange agreements”.

<sup>42</sup> Recommendation № 16 from “40 recommendations of FATF” The FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation. FATF/OECD, 2012-2019. Available at: URL: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> (accessed: 12.07.2020)

are not financial institutions or other entities<sup>43</sup>, conducting monitoring of clients.

Having realized this situation, Central Bank and Federal Financial Monitoring Service (Rosfinmonitoring) issued official prohibitive positions in 2014 regarding the cryptocurrency regime. Both documents charged supervisory financial organizations to treat cryptocurrencies with extreme caution, however firstly they offered no specific measures for the legalization of cryptocurrency transactions, and secondly there were questionable press releases issued with no definite legal force.

The first "cryptocurrency" press release of Central Bank in January 2014 stated that:

*Granting legal entities services on the exchange of digital currency into roubles and foreign currency, also to goods (works, services) shall be regarded as a potential participation in the execution of questionable operations in the light of legislation aimed at combating the legalization (laundering) of income acquired by unlawful mean and the financing of terrorism.*

Although this position had no legal power, in the eyes of the public it became the first precedent for the state to affirm its stance concerning the regulation of cryptocurrencies. One month later, Rosmonitoring, the body responsible for combating legalization of unlawful income. issued a similar message regarding its position:

*The aforesaid circumstances, and in the first place the anonymity of the payment, led to the active use of cryptocurrencies in the trafficking of drugs, arms, counterfeit documents and other criminal activity. The given facts, and also the possibility of uncontrolled trans-border transfer of monetary means and their subsequent cashing serve as grounds for a high risk of potential introduction of cryptocurrencies into schemes aimed at legalizing (laundering) income derived by unlawful means and financing terrorism...*<sup>44</sup>

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<sup>43</sup> Such monitoring is also performed by representatives of "established non-financial enterprises and professions" — e.g. independent accounting companies or dealers in precious metals (recommendation 22).

<sup>44</sup> Information message from Rosfinmonitoring "On the use of cryptocurrencies". 06.02.2014. Available at: URL: <http://www.fedsfm.ru/news/957> (accessed: 12.07.2020)



In 2015, 2018 and 2019 the Group developing financial means of combating money laundering issued recommendations concerning cryptocurrencies. These recommendations cannot be applied directly in the member-states of the FATF but must be implemented through national legislation.

In 2015 states of the FATF were apprised of the need to regulate the activity of organizations changing cryptocurrencies into fiat money (i.e. the activity of money exchangers and cryptocurrency exchanges with the ability of withdrawal and input of generally accepted money). It was indicated that if the use of cryptocurrency is prohibited in a country, it is necessary to bear in mind the risk of underground turnover of cryptocurrencies<sup>45</sup>.

Amendments concerning virtual assets were introduced into the FATF Recommendations in 2018. *Inter alia* a determination of a virtual asset was established, and the qualification of crypto assets as assets was recommended.

In 2019 FATF published a number of documents<sup>46</sup>, establishing additional requirements regarding cryptocurrencies (“virtual assets”) and for providers of services in the relevant sphere, including crypto exchanges and online wallets (custodians): among other things, the latter were endowed with the “right of transfer”, that had applied previously only to traditional financial transactions<sup>47</sup>. Presumably, member-states of the FATF shall introduce new rules within 12 months. This has already occurred in several jurisdictions — for example, analogous demands are contained in the Fifth “antilauchering directive” of the EU<sup>48</sup>.

Clarifications by the FATF concerning cryptocurrency were not practically incorporated into Russian legislation. In 2017 there was an updating of the Information of Central Bank “On the use of private “virtual curren

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<sup>45</sup> FATF Guidance for a risk-based approach. Virtual currencies. 2015. Available at: URL: <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-RBA-Virtual-Currencies.pdf> (accessed: 12.07.2020)

<sup>46</sup> FATF Guidance for a risk-based approach. Virtual assets and virtual asset service providers. 2019. Available at: URL: <https://www.fatf-gafi.org/media/fatf/documents/recommendations/RBA-VA-VASPs.pdf> (accessed: 12.07.2020); Clarifying note to Recommendation №15: The FATF Recommendations. P. 70—71.

<sup>47</sup> Ibid. P. 111—119.

<sup>48</sup> Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU. Available at: URL: [https://ec.europa.eu/info/law/anti-money-laundering-aml-directive-eu-2018-843\\_en](https://ec.europa.eu/info/law/anti-money-laundering-aml-directive-eu-2018-843_en) (accessed: 12.07.2020)



cies”(cryptocurrencies)”<sup>49</sup>: the new edition excluded the reference to monetary surrogates, and the need to develop an approach to determination and regulation of cryptocurrencies was noted. Also in 2019 the Supreme Court executed the FATF recommendation in the part of recognizing cryptocurrencies as a tool for committing crimes: they were named directly in the Resolution of the Plenum “On judicial practice in matters concerning the legalization (laundering) of monetary means...”

It should be understood that the FATF Recommendations allow a full prohibition on cryptocurrencies on the territory of member-states (which is being watched by Russian legislators<sup>50</sup>). However, within the framework of the risk-oriented approach adopted by the FATF, it is impossible to prohibit cryptocurrencies without a definition of their substance and regulation of their turnover in other operations of natural entities). Consequently, the Russian legislator cannot evade defining cryptocurrencies in legislation; on the other hand, defining their legal status is not obligatory.

#### **4.2. The Activity of Law Enforcement Agencies Regarding Cryptocurrencies**

At present, a paradoxical position has emerged: the state does not voice its position regarding the cryptocurrency market, taking unofficial measures against their use in entrepreneurial activity. This results in the impossibility of scaling activity connected with cryptocurrency, as at a certain stage the risks with compliance become too high.

The cause of the situation is that the “acts” of the Central Bank and Rosfinmonitoring at this time regarding the “suspicious nature” of operations with cryptocurrency, can be relegated even theoretically to controlled financial organizations and certain other participants of the financial system. If operations with cryptocurrencies are performed, for example, by natural entities, neither the Central Bank, nor Rosfinmonitoring, nor the General Prosecutor’s Office (as an office performing general supervision over the observation of legislation) have any actual leverage to influence them. Ac-

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<sup>49</sup> Central Bank of Russia. On the use of private “virtual currencies” (cryptocurrencies). 04.09.2017. Available at: URL: [https://www.cbr.ru/press/pr/?file=04092017\\_183512if2017-09-04T18\\_31\\_05.htm](https://www.cbr.ru/press/pr/?file=04092017_183512if2017-09-04T18_31_05.htm) (accessed: 12.07.2020).

<sup>50</sup> Director, Legal Department of Central Bank. We oppose institutions for the organization of emitting cryptocurrency in Russia. Available at: URL: <https://www.interfax.ru/interview/699260> (accessed: 12.07.2020)

tivity in the cryptocurrency sphere is neither a criminal nor an administrative beach of the law, and natural and legal entities as such are not obligated to check their contracting parties under AML/CFT.

In fact, with regard to judicial and official persons, the General Prosecutor's Office has implemented various measures of influence:

Official warning regarding the unacceptability of breaching the law<sup>51</sup>;

Summons to appear at the local law enforcement offices "for a discussion" within the framework of verifying observance of legislation<sup>52</sup>;

Conducting a verification of observance of legislation including extraction of documents and confiscation of equipment presumably destined for use in breaching the law<sup>53</sup>;

Filing of a claim for the blocking of a website on the grounds that it contains information forbidden by law or calling for a breach of legislation.

Although all measures are employed in practice, only blocking of a website is performed in a judicial procedure which leaves a sufficiently broad trail to enable evaluation of the statistics concerning site blockings and to reach conclusions, therefore I shall address this issue in greater detail.

The blocking of a site *per se* is permitted by Article 15.1 of the Federal law "On information..."<sup>54</sup>, pursuant to which, if the court finds the information on the site to be "information, the dissemination of which is proscribed in the Russian Federation", the Federal Service for Supervision of Communications, Roskomnadzor, enters the site into a special register that is sent to the providers for blocking. At the same time, the legislation contains no prohibition on the dissemination of information regarding cryptocurrencies. The closest formulation (usually cited in such cases by an administrative claimant is contained in p.6 of Art. 10 of the Law "On information...": "Dissemination of information is forbidden...dissemination of which

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<sup>51</sup> See e.g. The Prosecutor's Office issued a warning to the director of a car salesroom, who posted an Internet ad regarding the sale of a car for 55 "bitcoins". Prosecutor's Office of the Krasnoyarsk Region, 13.12.2017. Available at: URL: <http://www.krasproc.ru/news/krsk/16647-prokuratura-obyavila-predosterezhenie-direktoru-avtosalona-kotoryi-razmestil-v~> (accessed: 01.06.2020)

<sup>52</sup> Available at: URL: <https://www.kommersant.ru/doc/3380400> (accessed: 12.07.2020)

<sup>53</sup> Available at: URL: [https://www.rbc.ru/technology\\_and\\_media/01/09/2018/5b890f069a794729ceaa4791](https://www.rbc.ru/technology_and_media/01/09/2018/5b890f069a794729ceaa4791) (accessed: 12.07.2020)

<sup>54</sup> Federal Law of 27 July 2006 no 149-FZ «On information, information technologies and protection of information».

carries criminal or administrative liability.” It is clear that no criminal or administrative liability is envisaged for the dissemination of information concerning cryptocurrency or any other activity related to it. However, this does not deter the Prosecutor’s Office, which files claims for blockings — apart from cryptocurrency, sites on dozens of subjects are blocked<sup>55</sup>. Rulings are almost always in favour of the Prosecutor’s Office.

An analysis of the sudact.ru site shows that as of 2016, the Prosecutor’s Office lodged demands for the blocking of no less than one hundred sites that published information about the sale of crypto assets<sup>56</sup>. One of the significant cases of this type that reached the Supreme Court was the case of the “Bitcoininfo” site<sup>57</sup>, blocked on 12 January 2017 at the request of the Prosecutor’s Office of the Vyborg District Court of Saint Petersburg. The court justified its decision on the circumstance that the site disseminates information about a monetary surrogate — the “bitcoin” cryptocurrency, that is decentralized from virtual means of settlement and accumulation that is not supported by real value. In the “Bitcoininfo” case the holders of the site were able to have the decision reversed, having proved that interested parties (administrator of the domain name) were not included in the case, but there was no discussion concerning information on cryptocurrency as being unlawful.

Reversal of a court ruling in similar cases is an exception rather than the rule. Although in the period of active discussion about legislation concerning cryptocurrencies in 2018–2019 there was a certain degree of decline in the number of site blockings, and even the Prosecutor’s declining rate of claims<sup>58</sup>, sites carrying information about cryptocurrency continue to be blocked<sup>59</sup>.

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<sup>55</sup> See e.g. A user of Zakon.ru wrote how builders circumvent the law and the Procuracy fails to react. He was blocked by Roskomnadzor. Available at: URL: [https://zakon.ru/discussion/2019/08/13/polzovatel\\_zakonru\\_napisal\\_o\\_tom\\_kak\\_zastrojschiki\\_obhodyat\\_zakon\\_i\\_prokuratura\\_ne\\_reagiruet\\_ego\\_zab](https://zakon.ru/discussion/2019/08/13/polzovatel_zakonru_napisal_o_tom_kak_zastrojschiki_obhodyat_zakon_i_prokuratura_ne_reagiruet_ego_zab) (accessed: 12.07.2020)

<sup>56</sup> The reader can repeat my experience by accessing: <https://bit.ly/3cTJsE8>

<sup>57</sup> The ruling of the Vyborg District Court, 18.07.2016 on case № 2-10119/2016 (M-9635/2016). Appeal decision of the Saint Petersburg City Court 13.02.2017 on case № 33a-2537/2017.

<sup>58</sup> See e.g. ruling of the Kuybyshev District Court, City of Omsk, 24 July 2018 on case № 2a-2861/2018; application by the Omsk Procuracy 07.05.2019 №8-03-2019/6769.

<sup>59</sup> See e.g. ruling of the Nandomsk District Court, Arkhangelsk Region, 4 February 2020 on case № 2a-125/2020; Decision of the Anapa City Court, Krasnodar Region, 28 February 2020 on case № 2a-637/2020.

## 5. Conclusions

Cryptocurrencies have come a long way in the minds of Russian jurists over the past four years. Against a background of furious arguments between theoreticians and practitioners, the Russian lawmaker was force-marched through all the stages of attitudes to crypto assets on the well-known model of Elisabeth Kuebler-Ross: from rejection to depression (in the case of different types of tokens it even reached acceptance). However, as far as we are concerned, it is important to determine what food for thought these new phenomena brought to specialists; it is also important to look at how the state, that is — the lawmaker — has shown itself in practice.

The Regulator and other agencies (firstly, the Ministry of Finance) predictably agreed on a prohibiting policy, that was supported by the Government and the State Duma. There were significantly more prohibitive draft laws drawn up concerning cryptocurrencies than liberal ones, and it may be presumed that in one version or another, the prohibition will be implemented. This position is entrenched in the accepted regulatory policy regarding new information and financial technologies: they are either ignored (in the case of cryptocurrencies the scope of new technology did not allow this), or normatively limited. At the same time, this limitation of cryptocurrencies in Russia corresponds on the whole with the policy of the “hermetic sealing” of the global financial system being conducted by FATF.

As a prohibitive consensus has been reached by bodies of state power toward cryptocurrency, there was no comprehensive political-legal analysis during the development and discussion of the relevant normative acts, and the market (existing and potential) was not evaluated, alternative versions were not studied officially. What aims from the viewpoint of legal policy shall be served by a total prohibition on an entire group of economic relations? Shall this prohibition protect the rights citizens, investors, entrepreneurs? How shall it help to protect creditors’ rights, ensure execution of contracts including transborder ones?

The legislator has proved to be exceedingly unwieldy when the matter came to actual law-making — consolidation of dissimilar groups of interests and development of a compromise position, evolvment of hypotheses and their verification on the basis of empirical data. Supra-actual changes in the CC (eventually taking up three pages) were developed and passed over about a year (development at the beginning of 2018, first publication

in March, adoption in March 2019); a more detailed law "On digital financial assets" is under development for almost three years (Resolution of the President Pr-2132 — October 2017, first publication — December 2017, is still under discussion but not passed). As a result, the nascent market of cryptocurrencies and crypto assets was lawfully adopted at first by offshore jurisdictions, then by some countries such as Switzerland, Great Britain and Estonia. By comparison the Duchy of Liechtenstein has worked out an exemplary law on the blockchain (the overall volume of which, with accompanying materials, approaches 200 pages) in less than two years (November 2016 — August 2018); the law was passed by parliament and came into force<sup>60</sup>. It stands to reason that while the law was being developed the risks relating to the new market (swindling, committing of crimes with the use of cryptocurrencies, legalization of unlawful income) did not disappear and citizens who had invested money in the time of the cryptocurrency boom suffered losses.

The judicial community also proved to be conservative. In the storm of "digital" debates over these years, no consolidated (and constructive) position emerged regarding crypto assets. Despite the circumstance that the first attempts to introduce "digital rights" into the Civil Code seemed to unite lawyers against a "common enemy", subsequently all planned normative acts were adopted without any influence by the community. The impression is that the law-making process involves only lawyers working out positions regarding separate clients: as a result, legislation concerning cryptocurrencies looks increasingly like a patchwork blanket from diverse norms "affirmed" by references to subordinate legal acts.

With rare exceptions (the Tsarkov and the Bitcoiminfo cases) have played no active role in clarifying the legal nature of cryptocurrencies and allied questions. Alongside the inaction of theoreticians this has resulted in no resolution of principles in doctrine — what is the legal nature of virtual property in the context of Art. 128 of the Civil Code, what constitutes a monetary surrogate, etc.

The listed problems are not typically Russian. As much as can be judged from a distance, the same path was followed by other states. Unfortunately, the general unpreparedness for principled regulation of new institutions only confirms the arguments of the "crypto anarchists" that the state, facing

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<sup>60</sup> Available at: <https://impuls-liechtenstein.li/en/blockchain-act-liechtenstein/> (accessed: 12.07.2020)

the realities of globalization and digitalization of the world's markets — is no “night watchman” but a “settled bandit” that is not prepared to surrender seized powers — including the power to regulate financial relations, international payments, financial markets and information networks. I mean that in these matters the state has shown itself to be an ineffective regulator, but has no intention of giving up attempts as it knows no other means of influencing social relations apart from those based on submission to force. In future, as I see it, the tendency toward “nationalization” of information networks, establishment of sovereignty over citizens' data, mandatory collection of information and so forth shall only increase. In this sense, the situation with the regulation of cryptocurrencies has offered us a good example from which those willing can learn lessons.



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