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# Models of Legal Regulation of Digital Rights and Digital Currency Turnover



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## Abstract

Currently all countries form or are in process of forming rules of law regulating turnover of new digital objects of rights that are called differently as digital rights, tokens, digital assets, digital currency, and cryptocurrency. The difference in wording does not allow to develop common international approaches to the cross-border turnover of such new objects of rights. States are only looking for ways to regulate relations in the digital economy. To find optimal solutions, a comparative legal research is needed to evaluate models of regulation and find effective ways and means of response to the modern challenges. Aim of the research is to analyze models of legal regulation of the turnover of digital rights and digital currency and offer model of regulation that allow such objects of rights to be fully included in the Russian civil turnover. The following tasks are being solved: choice of jurisdictions and analysis of legal norms that regulate turnover in the field; formulation of regulative models of the turnover of digital rights and digital currency based on legislation, doctrine and law enforcement; study of measures and means of regulation used in various states; analysis of different points of researchers on regulation of relations in the digital economy in Russia and abroad; proposal to the legislator of measures and means of regulation, based on the chosen regulative model of the turnover of digital rights and digital currency. Such methods as comparative legal, formal legal, legal modeling methods were used to compare experience of various jurisdictions and formulate regulative models in need. Also general methods of synthesis, analysis, induction, deduction, comparison, analogy, etc. were used. The study showed that the approaches used in the legal regulation in the field differ both in terms of legal norms and in creation of institutions and conditions for functioning digital market. Models of the corresponding legal regulation also differ. States use both prohibitive model of turnover regulation (prohibition of their issuance and turnover), partially prohibitive (restrictions on the turnover of digital rights and digital currency), partially

permissive (admission of turnover of digital rights and digital currency, subject to conditions — licensing, regulatory sandboxes, etc.) and permissive model (allowing the turnover of digital rights and digital currency to all market participants, subject to minimum requirements). Terms like cryptocurrency, tokens, crypto assets, digital assets are more popular abroad, while in Russia the concepts of digital rights and digital currency are used to refer to similar legal phenomena. It would be necessary to compare categories under consideration for the possibility of their use in supranational regulation, and cross-border relations, in order to be able to speak with representatives of other jurisdictions in the same language. From the foreign experience, attention of legislator should be drawn to the need and possibility of licensing in relation to participants in the digital market, as well as to the success of regulatory sandboxes in this area, for example in Britain. At the same time, when establishing law enforcement practice in Russia in the field, especially with participation of consumers, experience in US, Britain, Australia as well as the legal regulation of the crypto industry in Japan shall be considered.

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### Keywords

digital rights; digital currency; cryptocurrency; token; blockchain; comparative legal research; digital economy.

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## Introduction

The study aims to find the best model for the legal regulation of digital rights and digital currency circulation in the Russian Federation with account for the existing international experience in this sphere. Conclusions will be made as a result of this search, in particular with respect to the means and methods of such legal regulation, and we would advise the Russian legislator to take them into consideration them.

Various aspects of digital rights and digital currency regulation have been researched in academic literature. Foreign publications point out that the regulators in various countries and even in different parts of a single country take differing points of view at the legal regulation and legal nature of digital currency [Trautman L., 2019: 473–491]. Importantly, the tasks

and directions of government regulation in this sphere have already been formulated. These include harmonisation of legislation, and search for and application of best practices (which is highly relevant for cross-border co-operation), alongside with taxation policy and tax planning, consumers protection, market development including better market transparency, monetary stability, and financial transparency [Allen J., Blandin A. et al., 2019: 30–34]. We are convinced that both the legislator and the law-enforcer should take all these spheres into account and develop them further.

Russian scholars hold different views on whether particular foreign experience is applicable and on the vectors of development in this sphere. Overall, A.B. Bylya notes that a thoroughly considered law development strategy (model) is needed to prevent the risks of digital rights and digital currency abuse, and that the non-existence of the relevant laws and regulations precludes the use of blockchain technologies, which creates additional problems for the state and prevents its growth into a powerful economy [Bylya A.B., 2020: 196]. This necessitates a search for acceptable alternatives to develop the legal framework.

I.A. Mankovskiy comes to an unhappy conclusion that there are no appropriate conditions in the Eurasian Economic Union, in particular legal ones, for development of the cryptocurrency market and for the safe use of cryptocurrency, nor are the rights of digital wallet holders safely protected against possible unauthorised access, which reduces investment prospects of the common economic space [Mankovskiy I.A., 2020: 64]. In our opinion, special attention must definitely be paid to investor protection in the digital market, including consumer protection against possible abuse stemming from the unique aspects of this technology.

At the same time, it is difficult to agree with A.G. Guznov and T.E. Rozhdestvenskaya that, for the purpose of public good, barriers should be established that would prevent both the use of cryptocurrencies instead of a legal means of payment (or by way of consideration) and legal functioning of exchange institutions such as cryptoexchanges, cryptocurrency bureaus de change etc. [Guznov A.G., Rozhdestvenskaya T.E., 2021: 63]. On the contrary, it would be desirable to bring the relations involving the circulation of digital rights and digital currency (cryptocurrency) into the scope of law; this would ensure proper regulation (taxation, in particular), help to protect consumer rights, make information available for the business sector and public at large etc. Furthermore, settlements in digital currency should not be artificially restricted because this would not prevent the successful use of such currency in the shadow economy. Legal regulation of

digital rights and digital currency circulation must be prudent and in line with reasonable needs of the digital agenda.

The Concept of Legal Regulation of Digital Currency Circulation Organisation Procedures in Russia approved 8 February 2022 is worthy of note. In the opinion of the Concept authors, both the lack of legal regulation of digital currency, a high-risk financial instrument, and imposing a blanket ban would result in the growing shadow economy, surging fraud cases, and economic destabilisation in general. The proposed legislative changes are intended to create legal cryptocurrency market, establish the circulation rules and the criteria for cryptocurrency market participants and their qualification requirements<sup>1</sup>. In agreement with the Concept, we believe that based on the current statutory regulations one can infer that the legislator is creating a new environment for cryptoprojects, introducing the electronic platform operator and regulating transactions of any other new operators<sup>2</sup>, at the same time failing to regulate the present-day projects and cryptocurrency circulation. As a result, government bodies, law enforcement agencies and courts note there are lots of controversies in legal regulation of digital currency (cryptocurrency) and digital rights.

For instance, in case No. 22-5295/2020 the Petrograd District Court in Saint Petersburg ruled that cryptocurrency cannot be considered as the subject matter of a theft because it is not an object under civil law and cannot be categorised as a chose (which includes money, securities or any other property). The prosecutor did not agree with this view and appealed against it to the City Court. In the prosecutor's opinion, the decision of the court of first instance to exclude cryptocurrency from the scope of charges was unjustified; and the prosecutor stated that, by implication of civil law, cryptocurrency must be considered 'other property'. In its decision of 23 November 2020, the Court of Appeal agreed with the position of the court of first instance, clarifying that cryptocurrency cannot be considered as electronic money or currency<sup>3</sup>. However, the Third General Court of

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<sup>1</sup> Available at: URL: <http://static.government.ru/media/files/Dik7wBqAubc34ed649ql2Kg6HuTANrQZ.pdf> (accessed: 18.11. 2022)

<sup>2</sup> Federal Law No. 331-FZ "On Amendments to Certain Legislative Acts of the Russian Federation and on Suspension of Individual Provisions of Article 5-1 of the Federal Law "On Banks and Banking Activities Official Internet Portal of Legal Information" of 14 July 2022. Available at: URL: <http://publication.pravo.gov.ru> (accessed: 18.11.2022)

<sup>3</sup> Ruling on Appeal of the Saint Petersburg City Court of 24 November 2020 No. 22-5295/2020 on Case No. 1-95/2020. Available at: URL: <https://bsr.sudrf.ru/big5/portal.html> (accessed: 18.11.2022)

Cassation pointed out that the courts should have taken into account that digital currency, which should include bitcoins, may have been accepted as a means of payment. In essence, the main difference between cryptocurrency and money lies in the way it originates, and, although concept of cryptocurrency is not regulated by legislation, the Court was entitled to designate it as other property<sup>4</sup>.

The study aims to tackle the above issues and propose adequate legal regulation, which would help fully include digital rights and digital currency in the Russian civil transactions with account for applicable foreign experience. It will be considered regulation of digital rights and digital currency circulation in Russia and abroad and draw digital rights and digital currency models that originate in this connection together with the corresponding means and measures of legal regulation. In doing so, it is necessary to look at the jurisdictions that have attracted the researchers' interest owing to application of legal regulation methods, means and measures that differ from the Russian ones. The author uses a dialectical approach to analyse the digital rights and digital currency legal regulation in its historical development in various foreign jurisdictions in the context of a set of objective and subjective factors. Also of use are methods of system and functional analysis, alongside with formal and comparative legal analysis and legal modelling methods that allow us to highlight the features of legal regulation and offer recommendations for its improvement to legally and effectively circulate digital rights and digital currency in Russia.

## **1. Prohibitive Model of Regulation**

While most countries apply the permissive model to issue licences, apply anti-money-laundering laws etc. (in particular, countries of Europe, USA and Japan), there also are countries that use a most stringent approach to the regulation of digital rights and digital currency circulation.

China, for example, has the most stringent legal regulation for digital rights and digital currency (cryptocurrency) among the jurisdictions under review. The literature used also notes the stringency of this approach [Alekseyenko A.P., 2021: 55–65]; [Huang Y., Mayer M., 2022: 329]; [Martino P., 2021: 81–82], pointing out the Chinese government's desire to regulate all relations, including those in the digital sphere [Ponsford M., 2015: 35–37].

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<sup>4</sup> From recognition to denial: how courts decide cryptocurrency cases. Pravo.ru. 11.05.2022. Available at: URL: <https://pravo.ru/story/239374> (accessed: 18.11.2022)

One can list the following bans in China: financial institutions are prohibited from dealing in crypto currency; issuers are prohibited from issuing tokens (ICOs), and those who have already conducted their ICOs must return the funds to the investors. On the other hand, it is not prohibited to own cryptocurrencies and tokens. All national and foreign websites, and platforms related to trading and hosting crypto currencies have been included in the ban list and blocked. [Molotnikov A.E., Troschinsky P.V., 2019: 317]. We must agree that the downside of this is a less developed digital marketplace and a less developed relevant infrastructure, including crypto-exchanges and other professional and non-professional market participants [Huang R., 2021: 122–123].

China's approach to digital rights and digital currency is more than paternalistic. At the same time, China also takes advantage of the underlying blockchain technology and smart contracts based on this technology [Martino P., 2021: 90–91], and the recently adopted Civil Code provides for the inheritance of cryptocurrency. Available judicial practice confirms the legitimacy of ownership of cryptocurrencies (bitcoins). Courts perceive cryptocurrencies and tokens as property [Riley J., 2021: 142–144].

China has issued the digital Yuan, its digital currency used to effect payments on digital platforms. Crypto currency exchanges must undergo state registration in order to operate legally. The People's Bank of China protects the rights of consumers in the financial markets through control, management and supervision.

The Chinese government has been cautious in drafting and adopting legislation to regulate the area in question. The Chinese legislator uses an experimental procedure, which involves approving regulations with a limited validity period and making them final only after their advisability and effectiveness has been established.

The predominance of regulation at the level of secondary legislation, the deliberate vagueness and uncertainty of the terminology used in legal regulation, and the lack of clear procedures and mechanisms in the area under consideration also are largely negative aspects [Molotnikov A.E., Troschinsky P.V., 2019: 318–319]. In other words, the legal regulation is clearly prohibitive; it, however, does not completely prevent innovation in the digital sphere. It appears that the Russian legislator takes this model of regulation into account, but cannot fully embrace it, because, in the absence of Russian analogues of digital currency, it will lead to an outflow of funds abroad, and will not allow to develop new technologies at full scale.

## **2. Partially Prohibitive Model of Regulation**

Another Asian jurisdiction that is tough and prohibitive is the Republic of Korea. Unlike China, Korea has not only banned cryptocurrency and digital rights. The issuance and circulation of tokens, i.e. digital rights, was originally banned in Korea, and this is still the case today. At the same time, cryptocurrency circulation is legal, provided that, as in other jurisdictions, the rules governing circulation of cryptocurrencies for anti-money laundering and counter-terrorist financing apply [Dolgiyeva M.M., 2018: 125]. As of 30 January 2018, only non-anonymous accounts ('accounts with real names') may be used for cryptocurrency circulation for the purposes mentioned in Korea [Tedejev A.A., 2019: 137]. This partially prohibitive approach comes from the need to comply with FATF (Intergovernmental Organisation for Financial Monitoring) requirements, several major hacks of crypto currency exchanges, and the peculiarities of legal regulation in Korea. Compared to China, this approach has advantages in that it does not artificially prohibit the circulation of crypto currencies and stimulates economic development in this area.

Legal regulation in the Russia is another example of a partially prohibitive model. The reasons for this are: 1) Digital rights have been named in law<sup>5</sup>; the legislator has defined their categories, which currently include utility digital rights (rights to demand to hand over a chose or exclusive copyrights, demand the performance of certain works or granting of certain services),<sup>6</sup> and digital financial assets (monetary claims; the ability to exercise rights over stock and shares; the right to participate in the capital of a non-public joint stock company; the right to demand transfer of stock and shares)<sup>7</sup>; 2) digital currency, on one hand, is an asset and can be a store of value, even investment asset, but, on the other hand, its circulation is restricted for Russian legal entities and individuals. They cannot pay for goods, works or services with digital currency<sup>8</sup>.

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<sup>5</sup> Civil Code of the Russian Federation (Part One) of 30 November 1994. No. 51-FZ (as amended on 25 February 2022). Article 141.1 // SPS Consultant Plus.

<sup>6</sup> Federal Law of 02 August 2019 No. 259-FZ (as amended on 31 July 2020) 'On Attracting Investment through Investment Platforms and on Amendments to Certain Legislative Acts of the Russian Federation'. Article 8 // SPS Consultant Plus.

<sup>7</sup> Federal Law of 31 July 2020 No. 259-FZ 'On Digital Financial Assets, Digital Currency and Amendments to Certain Legislative Acts of the Russian Federation'. Article 1 // SPS Consultant Plus.

<sup>8</sup> Ibid. Article 14.



Thus, digital currency is currently understood to be a *de facto* private digital currency (cryptocurrency), which is issued by private individuals and whose exchange rate is set in a speculative manner. Cryptocurrency is a special contractual right, the characteristics of which are also determined by its digital form. There are similarities in this respect to jurisdictions like Germany, where bitcoin is treated as a private means of payment; but in Germany there are no restrictions on cryptocurrency payments, except for anti-money laundering legislation.

There is a reason for conclusion that, based on Russian law, digital rights and digital currency exist and circulate within a certain information system. The legislator has defined individual types of digital rights, and their specifics are regulated; as for digital currency, its circulation is strictly limited in Russia. Digital currency acts more as a store of value and in very rare cases (acquisition of digital rights for digital currency or acquisition of one digital currency for another one) as a means of exchange payment. Therefore, legal regulation of digital rights and digital currency in Russia is stringent, and this model of legal regulation is partially prohibitive (because the circulation of digital currency is restricted; the legislator also limits the list of digital rights—these must be named in the law).

## 2. Partially Permissive Model of Regulation

The following jurisdictions are variations of the relatively lenient legal framework. At the same time, they can also be divided into smaller classification groups because the partially permissive model is the most used and most widespread model around the world.

The doctrine knows the following classifications of legal regulation models in the digital economy. For example, V.K. Shaydullina identifies approaches (models) such as new legal norms, including laws amending the current legislation, are adopted; the regulator provides clarifications on the application of the current legislation [Shaydullina V.K., 2019: 22]. Other classifications are also possible. A.A. Volos points out the following models: direct establishment of a new digital institution in civil law (some US states, Italy), i.e. direct regulation; application to a smart contract of the rules applied by similar legal institutions (the Electronic Transactions Acts in Australia and in New Zealand, Indian law), i.e. indirect regulation [Volos A.A., 2020: 24, 25]. L.G. Efimova, I.E. Mikheyeva, D.V. Chub adhere to a similar attitude by pointing out the models of legal regulation such as: creation of



special legislation on contractual relations in cyberspace (some US states, Italy, Belarus); application of general provisions of contract law to new institutions and relations (European countries) [Efimova L.G., Mikheyeva I.E., Chub D.V., 2020: 91]. N.B. Krysenkova similarly identifies models of legal regulation: adoption of a separate legal norm to regulate a given area of legal matters; amendments to existing legislation, e.g. on electronic commerce, contracts, information technology [Krysenkova N.B., 2019: 29, 30].

In view of author, the following conclusions result from the analysis. The jurisdictions under review range from those that have specifically adopted rules on digital rights and digital currencies circulation (some US states, France) to those that do not create any new rules, but adapt the existing rules to the new challenges of the times by establishing licensing requirements, etc. Clarifications from law enforcement agencies that extend the applicability limits of existing legislation can also be used (UK, Australia, Germany, Japan).

While all of the jurisdictions considered in this section establish a permissive model for the regulation of digital rights and digital currency circulation, ways and methods used differ from country to country. These will be discussed in detail below.

The US was one of the first jurisdictions to codify blockchain, cryptocurrency, tokens and smart contracts in the laws of individual states. Amendments to the laws were very general, one could even say superficial, codifying the possibility of using blockchain technology, cryptocurrency, and smart contracts in civil circulation <sup>9</sup>. The main purpose of legal regulation is to enshrine the possibility of using blockchain technology as a means of recording and storing information for the purpose of providing procedural evidence, and to recognise the legal validity of digital rights and digital currency circulation through a smart contract. The concept of token is considered instead of digital rights, and the legal norms use the

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<sup>9</sup> See e.g.: Vermont Statutes, Title 12, Chapter 81, Subchapter 1. 2016. Available at: URL: <https://law.justia.com/codes/vermont/2016/title-12/chapter-81/section-1913> (accessed: 18.10.2022); Senate Bill No. 398. Nevada Legislative Counsel Bureau. June 5, 2017. Available at: URL: [https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB398\\_EN.pdf](https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB398_EN.pdf) (accessed: 18.10.2022); Senate Bill 69. Delaware General Assembly. July 21, 2017. Available at: URL: <https://legiscan.com/DE/bill/SB69/2017> (accessed: 18.10.2022); Legislative Bill 695. Legislature of Nebraska. April 18, 2018. Available at: URL: <https://legiscan.com/NE/text/LB695/2017> (accessed: 18.10.2022); Tennessee Senate Bill 1662. Tennessee State Legislature. March 26, 2018. Available at: URL: <https://legiscan.com/TN/text/SB1662/2017> (accessed: 18.10.2022)

concept of cryptocurrency instead of digital currency. There is also concept of cryptoassets, which refers to the economic value of tokens and cryptocurrency<sup>10</sup>.

Owning and disposing of cryptocurrency is not restricted, but cryptocurrency exchanges in the US are required to identify customers so as to comply with anti-money laundering laws. Licensing requirements for digital rights and digital currency dealers are emerging at the level of individual states [Martino P., 2021: 76]. One example is BitLicense in the state of New York, which has received mixed reviews in terms of regulatory effectiveness [Alkadri S., 2018: 84] both from market participants and government agencies themselves. There are examples of regulatory sandboxes in individual states, but these are not widespread<sup>11</sup>.

Moreover, the jurisdiction is known for its rigidity with regard to investment projects [Boreiko D., Ferrarini G., Giudici P., 2019: 684]; [Goforth C., 2021: 643–700] offering tokens for sale in exchange for investor funds. Foreign literature emphasises that the US Securities and Exchange Commission has been sufficiently active on tokens, applying both government regulation and educating the public about the implications of offering tokens to the public [Henderson M., Raskin M., 2019: 449–455]. This policy aims to prevent fraud and other unlawful behaviour.

In the US, if a token meets the characteristics of a security, the relevant securities market regulations are applied, including rules on registering the issue of securities, providing information on the person attracting the investment, on whether the person has the necessary capital etc.<sup>12</sup> This procedure involves the Howie Test. The test, which takes its name from the name of the defendant in the court case, answers the question of whether there is an investment agreement based on the main criterion, namely the existence of a reasonable expectation of profit resulting from the actions of someone other than the investor<sup>13</sup>. The position of US government bodies,

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<sup>10</sup> Blockchain & Cryptocurrency Laws and Regulations 2022. USA. Available at: URL: <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/usa> (accessed: 18.10. 2022)

<sup>11</sup> Ibid.

<sup>12</sup> The Laws that Govern the Securities Industry. US. Securities and Exchange Commission. Investor.gov. Available at: URL: <https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry> (accessed: 18.10. 2022)

<sup>13</sup> SEC v. W.J. Howey Co., 328 U.S. 293 (1946). US. Supreme Court. Available at: URL: <https://supreme.justia.com/cases/federal/us/328/293/> (accessed: 18.10. 2022)

unchanged to this day, is that securities can take a variety of forms, and the purpose of the legislation on securities is to regulate investment relationships, no matter what they are called<sup>14</sup>. Thus, a similar position applies to tokens.

As an example, there have been a number of court cases involving the US Securities and Exchange Commission, the first of which was *SEC v. REcoin Group Foundation*. This case involved fraud and non-compliance with REcoin token securities registration requirements since those were not actually backed by investments in real estate and diamonds<sup>15</sup>. In the case *SEC v. Reginald Middleton, Veritaseum Inc. and Veritaseum LLC*<sup>16</sup> of a fraudulent scheme to sell tokens to investors and manipulate the markets for said tokens, the court applied a freezing order (freeze) to the assets acquired by the defendants in an illicit securities offer.

One can also cite the *Munchee* case, in which the SEC stated that a token can be recognised as a security even if it has some kind of perceived utility, regardless of the name of the technology used [Boreiko D., Ferrarini G., Giudici P., 2019: 685] and demanded that all funds collected be returned to investors<sup>17</sup>.

In addition, the US Securities and Exchange Commission filed a lawsuit stating that Gram tokens to be delivered by Telegram Group constituted securities and therefore should have been registered with the SEC. The US District Court for the Southern District of New York supported the SEC's position in the case *SEC v. Telegram Group Inc. and TON Issuer Inc.*<sup>18</sup>,

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<sup>14</sup> *Reves v. Ernst & Young*, 494 U.S. 56 (1990). US. Supreme Court. Available at: URL: <https://supreme.justia.com/cases/federal/us/494/56/> (accessed: 18.10. 2022)

<sup>15</sup> *Securities and Exchange Commission v. REcoin Group Foundation, et al.*, Civil Action No. 17-cv-05725. Litigation Release No. 24081 March 26, 2018. US. Securities and Exchange Commission. Available at: URL: <https://www.sec.gov/litigation/litreleases/2018/lr24081.htm> (accessed: 18.10. 2022)

<sup>16</sup> Final Judgement as to Defendants Reginald Middleton, Veritaseum, Inc. and Veritaseum, LLC. United States District Court Eastern District of New York. 19 Civ. 4625. Available at: URL: <https://www.sec.gov/divisions/enforce/claims/docs/middleton-judgment.pdf> (accessed: 18.10.2022)

<sup>17</sup> Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing a Cease-and-Desist Order. US Securities and Exchange Commission. Available at: URL: <https://www.sec.gov/litigation/admin/2017/33-10445.pdf> (accessed: 18.10.2022)

<sup>18</sup> *Securities and Exchange Commission v. Telegram Group Inc. et al*, No. 1:2019cv09439. US Law. Available at: URL: <https://www.sec.gov/news/press-release/2020-146> (accessed: 18.10.2022)

upholding the SEC's motion on a preliminary injunction prohibiting Telegram Group Inc. from issuing the tokens. The court found that the SEC had succeeded in proving that the token issue would be an offer of securities. As a result, the company agreed not to issue the Gram token, to return \$1.2 billion to its investors and pay \$18.5 million in penalties to the government<sup>19</sup>.

The Commission demonstrated a similar approach with regard to Kik, which issued Kin tokens in open and closed offerings to investors, which the Commission recognised as securities. As a result, the company had to stop this unlawful activity and pay \$5 million in penalties to the government<sup>20</sup>. The argument offered by the plaintiff (SEC) was that the lack of registration of the securities offered by the defendant deprived investors of the information they were entitled to have under US law.

It is possible to observe a continuation of this policy in new SEC cases, such as the insider trading charges against a former Coinbase product manager, his brother and a friend for a trading scheme involved multiple advertisements promoting certain cryptoassets on Coinbase<sup>21</sup>. Actually, it means legal norms of investments, integrity and fair business practices have been spreading to the crypto-market as well. Numerous class action lawsuits against crypto-projects in the US confirm this<sup>22</sup>.

This approach has certainly affected the digital market and caused an exodus of digital projects involving token issuance, whether tokens that in

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<sup>19</sup> Telegram to Return \$1.2 Billion to Investors and Pay \$18.5 Million Penalty to Settle SEC Charges. US Securities and Exchange Commission. June 26, 2020. Available at: URL: <https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1v2019-cv09439/524448/227/> (accessed: 18.10.2022)

<sup>20</sup> SEC Obtains Final Judgment Against Kik Interactive For Unregistered Offering. US. Securities and Exchange Commission. October 21, 2020. Available at: URL: <https://www.sec.gov/news/press-release/2020-262> (accessed: 18.10.2022)

<sup>21</sup> Available at: URL: <https://www.sec.gov/news/press-releases> (accessed: 18.10. 2022)

<sup>22</sup> See e.g.: *George Kattula vs. Coinbase Global Inc. and Coinbase Inc.. Complaint Class Action/ United States District Court for the Northern District of Georgia, Atlanta Division. Case 1v22-cv-03250-TWT.* Available at: URL: <https://storage.courtlistener.com/recap/gov.uscourts.gand.306368/gov.uscourts.gand.306368.1.0.pdf> (access: 18 October, 2022); *Jeffrey Lockhart v. Bam Trading Services Inc. and Brian Shroder. Jury Demanded Class Action Complaint. United States District Court Northern District of California. Case 3v22-cv-03461.* Filed 06/13/22. Available at: URL: <https://www.docdroid.net/zl5YX9G/binance-us-luna-class-action-pdf> (accessed: 18.10. 2022); *William Ballou and Joan Williamson v. Asset Marketing Services LLC. Class Action Complaint. United States District Court of Minnesota. CASE 0v21-cv-00694.* Filed 03/12/21. Available at: URL: <https://www.classaction.org/media/ballou-et-al-v-asset-marketing-services-llc.pdf> (accessed: 18.10.2022)

some way resemble a security or tokens that grant rights to use a particular information resource. As a result, the US has not become a cradle of crypto-projects and other projects of digital industry. At the same time it has arguably protected the rights of thousands of consumers in the financial markets who suffer from fraudulent projects and schemes. To achieve this goal, the US Securities and Exchange Commission created *howeycoins.com*, which is a website of a fake token issuance project (ICO)<sup>23</sup>. This is a kind of educational tool designed to warn investors about the possible risks of participating in ICOs, pointing out the signs that a certain project is fake and fraudulent. It seems to be a very interesting and successful experience of presenting information to consumers in a plausible and compelling way. In has a sense to conclude that US government agencies are paying special attention to consumer protection in the digital environment and take a consumer-oriented approach.

Other US government agencies, alongside with the Securities and Exchange Commission, do the same. The US Commodity Futures Trading Commission (CFTC) filed a cryptocurrency fraud lawsuit. According to the CFTC, the defendants encouraged consumers to transfer funds and cryptocurrency in exchange for expert advice on real-time cryptocurrency trading, and in exchange for the defendants purchasing and trading cryptocurrencies on behalf of consumers. As a result, the defendants took possession of the consumers' assets, following which they shut down the website, removed all the information from social media, and ceased any interaction with the consumers. Following a review of the case, a US District Court judge for the Eastern District of New York found the defendants guilty of dishonest and fraudulent conduct and ordered them to pay over \$ 1.1 million in restitution to consumers and a penalty to the government<sup>24</sup>.

Upon analysing legislative and other measures to regulate digital rights (tokens), digital currency (cryptocurrency), and cryptoassets in the US, we see the following: basic concepts of the digital marketplace, such as cryptocurrency, are enshrined in the legislation of individual states; law enforcement agencies offer clarifications on the application of existing legislation related to tokens, cryptocurrency, etc. (US Securities and Exchange Com-

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<sup>23</sup> Howey Coins. Available at: URL: <https://www.howeycoins.com/#white-paper> (accessed: 21.07. 2022); ICO–Howey Coins. Available at: URL: <https://www.investor.gov/ico-howeycoins> (access: 18.10.2022)

<sup>24</sup> CFTC Wins trial against virtual currency fraudster. August 24, 2018. Commodity Futures Trading Commission. Available at: URL: <https://www.cftc.gov/PressRoom/Press-Releases/7774-18> (accessed: 18.10.2022)

mission clarifies whether tokens can be considered securities); licensing of individual digital marketplace actors at state level; stringent regulation of token issuance and circulation among US citizens and residents due to the application of the securities law and the relevant registration rules, and, in the event of a breach of the above legislation, severe sanctions are imposed to protect the rights of individual investors.

The UK legal system is conservative and rigid in its approach to digital assets. There is no specific law for the circulation of these assets, but there is licensing persons offering such assets for sale<sup>25</sup>. In its Report ‘Smart Legal Contracts. Advice to Government’, the UK Law Commission explored and addressed, *inter alia*, issues related to the circulation of digital assets. It may be concluded from the paper its authors believe and advise the legislator not to change legislation, but to make good use of the existing laws, referring to the need to develop practices and model provisions by the market participants themselves<sup>26</sup>. The issues of the legal nature of digital assets have not yet been resolved and are still relevant in the UK today. The interim report of the Law Commission concludes that there is a need for a special legal regime for digital assets that would be different from the legal regimes for choses and liabilities. In particular, the report points to the need for international legal norms in this area due to the decentralised nature of blockchain, which underpins the emergence and circulation of digital assets<sup>27</sup>. However, no specific legislation on digital assets, i.e. digital rights and digital currency as understood by the Russian legislator, has been approved to date.

In general public bodies, such as the UK Financial Conduct Authority, that has a duty to respond to changes in the financial market and to warn consumers of the risks involved, issue statements on digital assets. Particularly, the Authority makes consumers aware about the legal consequences of purchasing cryptoassets. It explains the concept of crypto-assets includes payment tokens (cryptocurrency) security tokens, and stablecoins. Stablecoins, just like cryptocurrency, are used to make payments but their

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<sup>25</sup> Available at: URL: <https://www.fca.org.uk/publication/documents/cryptoasset-registration-flowchart.pdf> (accessed: 18.10.2022)

<sup>26</sup> Available at: URL: <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/11/Smart-legal-contracts-accessible.pdf> (accessed: 18.10.2022)

<sup>27</sup> Digital Assets. Interim Update. Available at: URL: <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/11/Digital-Assets-Interim-Update-Paper-FINAL.pdf> (accessed: 18.10.2022)



value is less volatile than the value of cryptocurrency. Hence, in this context, the concept of crypto-assets is synonymous with digital assets. The consequences of buying crypto-assets include the unclear nature of certain legal issues and the impossibility of seeking protection from consumer protection authorities<sup>28</sup>. At the same time, the Authority sets licensing requirements for digital asset operators, but not all of them have been licensed<sup>29</sup>. As a result, market participants file thousands of complaints about fraudulent schemes definitely of concern to the regulator, and government enforcement agencies commence investigations.

One example is a dispute that has reached the UK High Court. Ion Science Ltd., a company registered in England and Wales, and its CEO and sole owner, claimed they had incurred damages from the defendants in connection with a fraudulent ICO<sup>30</sup>. The company stated that it invested £577,000 in purportedly genuine cryptocurrency products and paid substantial commissions to the defendants for the promised profits. The defendants transferred the funds paid to accounts with cryptocurrency exchanges.

The High Court began by confirming that crypto-assets constitute property, mentioning also other courts rulings<sup>31</sup>. The Court considered that UK law was applicable to the present dispute on the basis of the *lex situs* test in relation to a crypto-asset, i.e. where the person in possession of such an asset is located. The Court also drew attention to a number of other criteria, namely that the assets were transferred within the UK, the cryptocurrency was in the jurisdiction of the UK, the documents were drawn up in English, and the witnesses were in the UK. The Court has issued two main orders: a freezing order covering assets located anywhere in the world (taking into

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<sup>28</sup> Cryptoassets. Available at: URL: <https://www.fca.org.uk/consumers/cryptoassets> (accessed: 18.10.2022)

<sup>29</sup> The Risks of Token Regulation. Available at: URL: <https://www.fca.org.uk/news/speeches/risks-token-regulation> (accessed: 18.10.2022)

<sup>30</sup> Ion Science Ltd v Persons Unknown, No. CL-2020-000840. 21 December 2020. England & Wales Commercial Court. Available at: URL: <https://uk.practicallaw.thomson-reuters.com> (accessed: 18.10.2022)

<sup>31</sup> AA v persons unknown & Ors, Re Bitcoin [2019] EWHC 3556. England and Wales High Court (Commercial Court). Decisions. Available at: URL: <https://www.bailii.org/ew/cases/EWHC/Comm/2019/3556.html> (accessed: 18.10.2022); Ruscoe v Cryptopia Ltd (in liquidation) [2020] NZHC 782. High Court of New Zealand. Available at: URL: <https://www.grantthornton.co.nz/globalassets/1.-member-firms/new-zealand/pdfs/cryptopia/civ-2019-409-000544---ruscoe-and-moore-v-cryptopia-limited-in-liquidation.pdf> (accessed: 18.10.2022)



account the nature of the defendants' operations); and an order to disclose information about the defendants. Based on the other decisions mentioned above, the Court also took into account such circumstances as the need for urgent measures regarding the cryptocurrency, the risk of its loss, a possibility of its circulation on a click of the mouse.

Another case, also heard in the UK jurisdiction, again demonstrates the willingness of English courts to satisfy plaintiffs seeking to recover cryptocurrency. In the following case, as in the previous case, a disclosure order against the defendants was used to enable the plaintiffs to trace the perpetrators internationally. In the Fetch case, the Court granted the plaintiffs, the two Fetch.ai companies, a wide range of remedies against: unidentified fraudsters who had accessed the plaintiffs' cryptocurrency accounts and transferred funds from them; two Binance entities, which managed accounts and exchanges; the recipients (guilty or not) of the misappropriated cryptocurrency<sup>32</sup>. This gives hope that it is possible to recover cryptocurrency even if someone has illegally gained possession over it.

Also of note is the development in the UK of a market institution, such as the regulatory sandbox that can also be used for cryptocurrency. Through such a sandbox, UK government agencies become more familiar with the regulated technologies, and market participants have the right to develop their own rules for regulating their business activities. Transparency of these regulatory sandboxes and the focus on innovative products and services are important criteria [Lessambo F., 2020: 35-36] as they serve to ensure that the interests of other market participants and consumers are taken into account. This experience should be viewed positively given the significant numbers of blockchain and cryptocurrency projects and cryptocurrency exchanges in the UK, despite the relatively high costs of setting up and maintaining such projects in a reputable jurisdiction such as the UK.

Analysing measures government applies to the regulation of tokens, cryptocurrencies, cryptoassets and digital assets, noteworthy is the following: no new legislation or legal norms relating to the regulation of digital market are approved; the question of legal environment to be created for the circulation of digital assets (crypto-assets) is raised at the level of doctrinal clarifications and law commissions; the need to change legislation has not been indicated (but the possibility of creating law enforcement

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<sup>32</sup> Fetch.AI Lrd & Anor v Persons Unknown Category A & Ors [2021] EWHC 2254 (Comm) (15 July 2021). London Circuit Commercial Court. Available at: URL: <https://www.bailii.org/ew/cases/EWHC/Comm/2021/2254.html> (accessed: 18.10. 2022)

practices, building expertise by market participants and issuing international law norms on the relevant issues has); authorities pay attention to certain features of digital assets (crypto-assets) and pay increased attention to consumers of financial services; market entities, such as token issuers and cryptocurrency exchanges, are licensed; favourable environment is created for the development of the crypto-industry through the operation of a regulatory sandbox.

Australia, on the one hand, like the US and UK, develops its approaches to digital rights and digital currency in the spirit of the Anglo-Saxon legal system; on the other hand, it is not a favoured and likely place for crypto- and other projects related to the digital environment.

The Australian Digital Currency Commerce Association has adopted its Code of Conduct. This Code of Conduct sets basic standards for the industry, but only the members of the Association are obliged to observe it. An annual audit has been introduced to control the compliance and re-issue membership certificates. If the audit reveals violations, the Association imposes penalties<sup>33</sup>.

At the same time, digital currency operations must be licensed, and the lack of a licence leads to sanctions, including criminal prosecution. It is also mandatory to comply with the anti-money laundering and counter-terrorism financing norms, so the Anti-Money Laundering and Countering Financing of Terrorism Amendment Bill was passed in 2017.<sup>34</sup> It is now mandatory to verify (identify) the clients and monitor suspicious transactions [Martino P., 2021: 83].

Australian authorities state while there is no law specifically dealing with the circulation of cryptocurrencies or tokens, this does not preclude their inclusion in control and oversight regimes under the Australian regulatory system<sup>35</sup>. With regard to law enforcement practice, we may note that the courts also include cryptocurrencies and tokens in the legal field

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<sup>33</sup> Cryptocurrency regulation. A study of the experiences of different countries. Eurasian Economic Commission. January 2018. Available at: URL: <http://www.eurasiancommission.org/ru/act/dmi/workgroup/Documents/Регулирование%20криптовалют%20в%20странах%20мира%20-%20январь.pdf> (accessed: 18.11.2022)

<sup>34</sup> Available at: URL: <https://www.legislation.gov.au/Details/C2017A00130> (accessed: 18.10.2022)

<sup>35</sup> Available at: URL: <https://www.austrac.gov.au/business/how-comply-guidance-and-resources/guidance-resources/guide-preparing-and-implementing-amlctf-program-your-digital-currency-exchange-business> (accessed: 18.10.2022)

and the current legal regulation. The decision of the District Court of New South Wales in *Hague v Cordiner* case is one example. The court granted the plaintiff's request to secure court costs with cryptocurrency held on a cryptocurrency exchange, confirming the position that cryptocurrency is deemed as 'property'.<sup>36</sup> Moreover, the judge took an interesting approach to the volatility of cryptocurrency pointed out by the defendant, requiring the plaintiff to notify the defendant within 24 hours if the cryptocurrency account balance falls below the collateral amount and provide periodic bank statements to the defendant.

So, Australian government bodies use the following regulatory measures: Crypto currencies and tokens (crypto-assets) are included in regulation, particularly into norms of anti-money laundering and countering the financing of terrorism; mandatory licensing has been introduced for professional operators in the digital currency market; self-regulation has been introduced in digital currency circulation; law enforcement bodies have embedded new objects of rights in the existing legal framework with progressive views on the legal nature of digital currency and the possibilities for its use in circulation.

Germany also has no legislation that provides basic definitions of new digital law phenomena [Chiu I., Deipenbrock G., 2021: 100–135]. The approach of German law enforcers and researchers is that the current legal regulation is sufficient, and no additional regulation is needed to encourage private initiatives; only the absence of prohibitions in the area is required.

The German National Bank and other German public bodies repeatedly claimed regarding cryptocurrencies and tokens stating that acquiring it involves a risk of losing one's money, and in general, cryptocurrencies are volatile and their exchange rates are unpredictable<sup>37</sup> [Kamalyan V.M., 2020: 198–199]. These statements were mainly aimed at ordinary consumers, while at the same time they have little impact on the success and implementation of blockchain projects in Germany.

Crypto currency trading (exchanges and similar platforms) is licensed by the Federal Financial Supervisory Authority (BaFin). This implies meeting a

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<sup>36</sup> *Hague v Cordiner* (No. 2) [2020] NSWDC 23. 24 February 2020. District Court of New South Wales. Available at: URL: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWDC/2020/23.html> (accessed: 18.10.2022)

<sup>37</sup> Available at: URL: [https://www.bafin.de/EN/PublikationenDaten/Jahresbericht/Jahresbericht2017/Kapitel2/Kapitel2\\_7/Kapitel2\\_7\\_3/kapitel2\\_7\\_3\\_node\\_en.html](https://www.bafin.de/EN/PublikationenDaten/Jahresbericht/Jahresbericht2017/Kapitel2/Kapitel2_7/Kapitel2_7_3/kapitel2_7_3_node_en.html) (accessed: 18.10. 2022)

number of requirements, which include regular reporting, qualified personnel, a detailed business plan, a share capital of at least EUR 730,000, and application of anti-money laundering and counter-terrorist financing methods [Shaydulina V.K., 2018: 49–51]. It is the way anti-money laundering legislation is enforced in the field. At the same time, ‘digital currency’ (in the understanding of the Russian legislator) is recognised as a contractual means of payment, private money, as an equivalent of legal tender [Pechegin D.A., 2019: 24–26].

As for approaches in law enforcement practice, they remain very cautious. The context of the case under review is as follows: the defendant was prosecuted for operating a bitcoin trading platform without obtaining an investment services licence, which would be a criminal offence if bitcoins qualified as financial instruments. The defendant was convicted by the first instance court and acquitted by the Land Court of Berlin, and the prosecutor appealed to the Higher Land Court in Berlin. And in 2018, the Berlin Higher (Land) Court ruled that bitcoins (a type of cryptocurrency) are not financial instruments. Therefore, the defendant did not have to obtain a BaFin licence<sup>38</sup>, despite BaFin’s position both at the time of the case and at the present time.

In general, state regulation in Germany is as follows: there are no additional legislation regulating the digital market; tax and banking regulations, as well as provisions of European anti-money laundering legislation, are applied to the regulation of cryptocurrency and token circulation; crypto currency exchanges are licensed; no special conditions for the digital industry are used, i.e. a general legal regime applies; there is an inconsistency in the statements and decisions of public authorities, largely due to a lack of specific legal provisions.

At the same time, despite the lack of special approaches to regulation and enforcement by government authorities, Germany is currently considered an attractive jurisdiction for crypto-investors due to its stable and favourable business environment in the area under review.

France offers another variation of the permissive model of regulation where one can observe specific legislation on digital assets. In 2019, the PACTE Law introduced a legal regime for digital asset providers and token (digital rights) issuers under the French Budget and Finance Code. These issuers voluntarily seek approval from the French Financial Market Authority in order to be whitelisted and obtain other related benefits. Failure

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<sup>38</sup> The Higher Regional Court of Berlin — KG (4. Strafsenat), Urteil vom 25.09.2018 — (4) 161 Ss 28/18 (35/18). Available at: URL: <https://openjur.de/u/2254032.html> (accessed: 18.10. 2022)

to do so entails certain legal restrictions on the issuer. The following steps are required to obtain approval: the issuer is to register as a self-employed person in France; detailed transparent description of token issuance must be provided; security requirements to investor funds collected must be complied, as well as anti-money laundering and counter-terrorist financing legislation must be compiled [Barsan I., 2019: 22–23]. As for circulation of tokens (digital rights) and cryptocurrency (digital currency), both compulsory and voluntary licensing are provided for<sup>39</sup>, depending on the type of operations carried out, their focus on the French market, and other criteria. At the same time, if not so much as voluntary licensing has been performed, this entails certain legal restrictions for the digital market operator, such as the inability to promote and market its services in France.

As for the law enforcement practice in France, it is so far very limited, as is the case in other jurisdictions, and reflects the inclusion of digital assets (understood in France as cryptocurrencies and tokens) in the current legal framework. For example, the Nantera Commercial Court of First Instance, analysing the loan agreements under which the borrower received bitcoins, considered that bitcoins were consumable, equivalent to each other and fungible, meaning that bitcoins could be freely exchanged and substituted for other bitcoins. In this case, BitSpread, a FinTech company offering alternative asset investment services, entered into several loan agreements with French crypto-asset exchange Paymium, receiving 1,000 BCH bitcoins. A few months later, upon the expiry of the loan agreements, BitSpread repaid Paymium the original amount of the loan in BTC bitcoins. However, Paymium also demanded the transfer of BCH bitcoins. The Court held that the defendant was not obliged to return BCH bitcoins specifically, but fulfilled its obligation by returning BTC bitcoins<sup>40</sup>.

Thus, legal regulation of digital rights and digital currency in France has the following features: special legal norms are passed, largely due to the peculiarities of the continental legal system; both voluntary and compulsory licensing as well as registration are applied (the ‘carrot and stick’ principle); advanced law enforcement practices for the full incorporation of new objects of rights into civil law are developed.

<sup>39</sup> Blockchain & Cryptocurrency Laws and Regulations 2022. France. Global Legal Insights. Available at: URL: <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/france> (accessed: 18.10.2022)

<sup>40</sup> Paymium vs BitSpread, Tribunal de Commerce de Nanterre, 26 février 2020, 2018F00466 Available at: URL: [http://www.rdmf.es/wp-content/uploads/2020/03/TRIB.-COMERCIO-NANTERRE-26\\_February\\_2020-Bitcoin.pdf](http://www.rdmf.es/wp-content/uploads/2020/03/TRIB.-COMERCIO-NANTERRE-26_February_2020-Bitcoin.pdf) (accessed: 18.10.2022).

Japan is an example of a jurisdiction that skilfully regulates the circulation of new types of objects in the digital economy using licenses and regulatory sandboxes. Overall, the objects of rights in Japan include: digital currency and utility tokens included in the concept of crypto-assets subject to special regulation under the Payment Services Act; security tokens regulated as securities under the Financial Instruments Act and the Stock Exchange Act, respectively; stablecoins, i.e., tokens whose value is linked to the value of fiat currency, hence they are not volatile, are more secure, and are used as a means of payment<sup>41</sup>.

Under the new regulations, the Financial Services Agency of Japan supervises cryptocurrency exchanges: these are to register, fill annual financial reports, and regular audits. The Japanese government believes this will prevent money laundering and increase consumer protection in the financial services marketplace. To a large extent, this policy was caused by the collapse of the major exchange MtGox in Japan back in 2014, which caused great public outcry and serious economic repercussions. And currently, cryptocurrency exchanges in Japan are the most trusted among exchanges based in different jurisdictions.

A significant development in global cryptocurrency regulation occurred in Japan in April 2017, when a law recognising cryptocurrencies as legal tender came into force. It resulted in the use of cryptocurrency as one of the payment methods in retail shops. Other benefits of this are that the law codified anti-money laundering, and counter-terrorist financing and KYC procedures with respect to entities dealing with digital currency and digital rights. So in this respect, Japan is one of the most advanced states in terms of legal regulation of digital rights and digital currency.

Japan has also issued the digital yen, which is used to pay for goods and services with smartphones (QR-codes) across the country. The issuer of the digital yen is a private bank, and its value is pegged to the yen. Moreover, Japan has successful regulatory sandboxes developing blockchain technology and other new digital technologies [Martino P., 2021: 81, 91].

Hence, the Japanese legislator's approach to the legal regulation of digital rights and digital currency should be considered justified and appropriate to meet the challenges of the times, both in terms of the introduction of

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<sup>41</sup> Blockchain & Cryptocurrency Laws and Regulations 2022. Japan. Available at: URL: <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/japan> (accessed: 18.10. 2022)

timely licensing of market participants and the integration of digital currencies into the Japanese payment system.

#### **4. Permissive Model of Regulation**

This final group of jurisdictions is the most lenient towards crypto-projects and the most focused on innovative collaborative development between business and the regulator.

Italy is an example of such a jurisdiction. It is one of the few countries in the world where certain aspects of digital economy are regulated by law. As early as back in 2017, Legislative Decree No. 9024, which makes cryptocurrency service providers similar to currency exchange operators, was issued. Italy does not recognise cryptocurrency as legal tender; it may only be a private, contractual means of payment, which brings this jurisdiction closer to Germany.

The key regulatory objective here, as in other legal traditions, is to protect the public interest relating to money laundering and terrorist financing. Therefore, professional digital market operators are subject to registration and, notably, all data on cryptocurrency transactions must be recorded. At the same time, entities need only to notify of their registration [Kamalyan V.M., 2020: 201-205], and there is no compulsory licensing. It is admissible to agree that the Italian state seeks to ensure full control over the use of digital technologies, given the increased risks of money laundering and financing of terrorism. At the same time, the approach is lenient owing to the absence of compulsory licensing.

The Decree approved by the Italian Parliament establishes the concept of a decentralised distributed ledger (blockchain) and its specific applications in civil law. Transactions in such a register may be qualified as the use of an electronic signature and meet the requirements for identification [Cappiello B., Carullo G., 2021: 104].

Recently, Decree of the Italian Ministry of Economy and Finance No. 100, in force since 17 July 2021, established regulatory sandboxes to enable the development of the FinTech sector.<sup>42</sup> The Decree establishes a Fintech Committee, comprising officers of all related executive bodies, that reviews applications from companies and grants them conditions for their business activities.

As for law enforcement practice, in Italy it is very varied with regard to the legal nature of the new objects of rights (e.g. cryptocurrency can

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<sup>42</sup> Decreto no. 100. Ministero dell'Economia e delle Finanze. Gazzetta Ufficiale. 30.04.2021.



be deemed as a financial instrument or as an interchangeable commodity, or as a means of payment)<sup>43</sup>. Also, courts have pointed out that to be able to use crypto-assets to pay for an equity stake in a company, their value (exchange rate) must be determinable, usually on public cryptocurrency exchanges [De Caria R., 2020: 368].

Thus, Italy, just like France, a continental law country, has adopted legal provisions on new digital phenomena: blockchain, smart contracts, digital currency, digital regulatory sandboxes, etc.; it does not provide for compulsory licensing for digital market participants; registration is notification-based, which allows us to speak of a permissive model of legal regulation; it develops law enforcement practices with regard to new objects of rights and empowers market participants through the functioning of a FinTech sandbox.

Switzerland is another example of a permissive regulatory model. This jurisdiction has traditionally been regarded as a favourable jurisdiction for crypto and other projects related to the digital industry. The Guidelines issued by the Swiss Financial Market Supervisory Authority (FINMA) clarify the regulatory framework and the government's position on digital rights (tokens) [Kondova G., Simonella G., 2019: 45]. Tokens are classified based on their economic function as follows: payment tokens, which, like cryptocurrencies, are a means of payment for goods or services and a monetary expression of value (subject to Swiss anti-money laundering law); utility tokens intended to grant access rights to an application or service in blockchain; asset tokens, which grant rights of claim to the issuer similar to securities falling under the relevant legal requirements. It seems correct and reasonable that the classification is not exclusive and other variants of tokens may appear within the economic functions of tokens<sup>44</sup>. Also attached to the Guidelines is a questionnaire for persons wishing to issue tokens. It can be concluded for the Russian legislator that it is impossible to enumerate all categories of digital rights in an exhaustive way and that new varieties of digital rights may emerge over time.

Since 2018, Switzerland has been licensing fintech companies, and Swiss banks have been opening corporate accounts for companies operating in

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<sup>43</sup> Blockchain & Cryptocurrency Laws and Regulations 2022. Italy. Available at: URL: <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/italy> (accessed: 18.10.2022)

<sup>44</sup> Guidelines for Enquiries Regarding the Regulatory Framework for Initial Coin Offerings (ICOs). February 16, 2018. Available at: URL: <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/1bewilligung/fintech/wegleitung-ico.pdf> (accessed: 18.10. 2022)

the blockchain technology sector. The Swiss Bankers Association has issued Guidelines for the opening of such accounts<sup>45</sup>.

The FINMA website provides comprehensive answers to questions about ownership and circulation of crypto-assets, including the need for a FinTech licence<sup>46</sup>. It also offers an opportunity to consult with FINMA staff in order to get clarification on the application of current legislation. FINMA also warns of the risks associated with crypto-assets (meaning both tokens and cryptocurrencies), namely the risks in the acquisition and use of crypto-assets due to the lack of full regulation in this area, the increased risks of money laundering, and informs about the investigation of violations of existing regulations related to crypto-assets<sup>47</sup>.

It is of note many market participants vote with their feet for the favourable nature of the Swiss jurisdiction and the development of its cryptoeconomy. After the US and the EU introduced more stringent state regulation of cryptocurrencies and tokens, many companies found a safe haven in Switzerland<sup>48</sup> with its very cautious and transparent regulation of new technologies and a very limited number of requirements, which makes it an example of a permissive model of legal regulation. FINMA's experience in regulating the burgeoning fintech industry in Switzerland is undoubtedly positive.

## **5. Applicability of Foreign Experience to Legal Regulation of Digital Rights and Digital Currency in Russia**

To answer this question, it is useful to consider the views of the Russian explorers and formulate our own conclusions on the object in question.

The position of V.K. Shaydullina is interesting, and an analysis of foreign experience confirms her views. She identifies the following government regulation measures in the sphere of digital rights and digital currency circulation: measures to prevent money laundering and the financing

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<sup>45</sup> SBA Guidelines on Opening Corporate Accounts for Blockchain Companies. 2018. Available at: URL: <https://www.finma.ch> (accessed: 18.10.2022)

<sup>46</sup> FinTech Financial Services Providers. Available at: URL: <https://www.finma.ch/en/authorisation/fintech> (accessed: 18.10. 2022)

<sup>47</sup> Cryptoassets. May 1, 2022. Available at: URL: <https://www.finma.ch> (accessed: 18.10.2022)

<sup>48</sup> Switzerland and the cryptocurrency challenge. Available at: URL: <https://www.swis-sinfo.ch/rus/швейцария-и-крипто-валютный-вызов-/47019366> (accessed: 18.10. 2022)

of terrorism; operators and other legal entities involved in the trade are obliged to introduce KYC procedures and other measures to mitigate general reputational risks in a particular jurisdiction; appropriate taxation systems are developed for new types of objects of rights; the accountability of exchangers and other operators performing operations with new objects of rights to their customers grows. This, in turn, includes providing financial security, increasing cyber security, and offering customers alternative dispute resolution mechanisms [Shaydullina V.K., 2018: 141]. Her proposal to the legislator to create a ‘regulatory sandbox’ to test new financial technologies and to set the rules for digital rights and digital currency transactions is worth noting, and there are examples of this kind in foreign practice. On 28 January 2021, Federal Law No. 258-FZ ‘On Experimental Legal Regimes for Digital Innovation in the Russian Federation’ came into force, which essentially implies using a regulatory sandbox (also called a digital sandbox) for digital innovation. The Bank of Russia monitors and evaluates the effectiveness and efficiency of experimental legal regimes in the financial market (Part 9, Article 18 of the Law)<sup>49</sup>. At the same time, the Bank of Russia’s regulatory sandbox for piloting innovative technologies and services in the financial market whose implementation requires changes in legal regulation has been in operation since 2018<sup>50</sup> to test prototype services without real clients and without conducting market transactions. In this regard, we recommend using the experience of jurisdictions such as the United Kingdom that have successfully functioning regulatory sandboxes, including sandboxes in the digital domain, to improve the effectiveness of the domestic regulatory sandbox.

Also, based on analysis of Japanese legislation and practice, M.M. Dolgiyeva makes quite right observation: the model of digital rights and digital currency legal regulation chosen by Japan is worthy of attention and the most successful. At the same time, one cannot deny that even this model fails to resolve the issue of digital market actor identification [Dolgiyeva M.M., 2018: 126–127], and the experience of cryptocurrency exchanges confirms this [Hiramoto N., Tsuchiya Y., 2021]. Probably one possible solution to this issue is to require licensing of activities directly related to cryptocurrencies [Shaydullina V.K., 2018: 51–52] (cryptocurrency exchanges, issuing of digital

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<sup>49</sup> Federal Law of 31 July 2020 No. 258-FZ (as amended on 2 July 2021) // SPS Consultant Plus.

<sup>50</sup> Regulatory Sandbox. Bank of Russia. Available at: URL: <https://www.fca.org.uk/news/speeches/risks-token-regulation> (accessed: 18.11. 2022)

rights and digital currencies, etc.). Surely, special requirements for compliance with anti-money laundering legislation could be introduced; the measure would oblige professional market participants to identify individual clients. To avoid and prevent hacker attacks, enhanced cyber security standards are required, with account for international experience in the field.

Protection of consumer rights in the digital marketplace is an undeniably important and urgent issue. Based on regulative models discussed above, the following most common and proven measures that may be recommended both to Russian legislators and law enforcement agencies: first, government agencies must inform token (digital rights) issuers on how this issuance should be conducted (what information to disclose, what legal requirements to comply with). Second, the agencies should explain to consumers in the digital marketplace the risks associated with acquisition of such token (digital rights). It is especially relevant because the Russian legal system does not yet regulate licensing of the activities of crypto-exchanges, bureaux de change and crypto-purses, which creates an unregulated crypto-space. Such approach of the legislator cannot be considered as well founded, as regulation would allow to weak illegal activities and risks for individuals and entrepreneurs.

Specific proposals for improving legislation should also be taken into account when drafting domestic legal regulation: issue a clarification from the Federal Tax Service on how to pay direct and indirect taxes depending on the situations in which digital rights and digital currency are used; publish investment risk assessment recommendations for investors; encourage development of voluntary certification systems for cryptocurrency projects [Ermokhin I.R.et al., 2019: 95-97]. It is reasonable to implement licensing for participants in the crypto-market similar to what is in use in Japan that is a jurisdiction that has proven to be adequate in its legal regulation experience.

## **Conclusion**

Overall, the models of digital rights and digital currency legal regulation applied in various jurisdictions differ both in terms of the legal norms approved and the creation of institutions and conditions for functioning digital market. There is no uniform terminology in the area in question. For example, terms such as cryptocurrency, tokens, cryptoassets and digital assets are very popular abroad, while Russia uses the concepts of digital rights and digital currency. At the same time, the terms 'digital rights' and 'digital currency' have a different meaning abroad: 'digital rights' is under-

stood in the context of human rights, and ‘digital currency’ means central bank currency in digital form. Consequently, there is a need to clarify what term is implied in a particular context.

When assessing the regulation of digital rights and digital currency in Russia and foreign jurisdictions, the general conclusion is enshrining the basic concepts in law and reflecting specifics of their civil legal regime has yielded positive results in the form of legal certainty and the regulation of aspects of the digital economy. Still, creating favourable conditions for development of that sector and legalisation of the crypto-industry may be attained by other means. General regulation is necessary; law enforcers should develop approaches to digital currency and digital rights, and the necessary infrastructure should be established for the functioning of the digital market (including the licensing of participants, creation of a relevant control system, supervision over AML compliance etc.). In other words, what is required is a more lenient regulation system implemented under the permissive model is confirmed by practice in various countries.

Knowing regulatory experience abroad, the legislator should pay attention to the need and possibility of licensing crypto- and digital marketplace participants, which is done in one way or another in all jurisdictions surveyed, and to the successful experience of regulatory sandboxes in this area (e.g., in the UK, the first country to use them successfully). As for developing law enforcement in the field in Russia, particularly involving consumers, it would be purposeful to draw attention to the experience in jurisdictions like the US, the UK, and Australia. The protections and liability measures, the criteria used in selecting the jurisdiction under whose law a dispute over digital rights or digital currency should be resolved, approaches to allow for the volatility of cryptocurrency and the use of it as collateral etc. Certainly, the experience of more paternalistic jurisdictions like China, South Korea and Japan, is also significant, due to the respective specificities of doing business in the digital sphere.



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