

Digital Rights as an Object of Civil Rights

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ABSTRACT

Digital technology is an integral element of modern life. The market of tokens and cryptocurrencies is developing; contracts using computers and smartphones are being concluded. Paying for goods online is a daily activity for consumers. Participants in civilian traffic de facto have long been using instruments that are attractive from an economic point of view. However, due to the lack of direct regulatory consolidation, there are risks existing when making transactions in the digital sphere using Internet technologies. Persons acquiring digital rights, their creditors and heirs did not have legal protection. As a result, cryptocurrencies, tokens, and other products based on blockchain technology have been the subject of legal disputes.

This circumstance implies the need to establish regulation in relation to the entire system of Russian law. Without consolidation of the basic concepts of digital rights in the Civil Code of the Russian Federation, it is impossible to carry out statutory regulation in the field of the digital economy, which is developing rapidly.

In order to introduce digital rights into the legal field, the legislator has provided for such an object of civil rights as digital rights. Moreover, the Civil Code determines its place in the system of civil rights and indicates its circulation. These rules providing for the circulation of digital rights will provide judicial protection of the rights of Internet technology market participants. However, significant changes in the regulation of the digital asset market did not occur since the amendments are of a framework nature.

Keywords: *digital right, objects of civil rights, digitalization of the economy, method of consolidation of rights, property rights*

1. INTRODUCTION

The process of digitalization of all spheres of public life due to the development of information and communication technologies (hereinafter referred to as "ICT") stimulates legal science in solving topical issues in the search for new legal structures.

Recent scientific and technological progress has had a significant impact on the transformation of Russian private law. Technology transforms public relations and therefore requires new legal structures or amendments to existing legislation.

Civil law as a classic branch of law has formed and today it does not meet the interests of society in the new digital realities. The introduction of digital technologies into the economy involves the adjustment of the category of civil rights object.

Many authors noted the need to amend the existing legislation in terms of clarifying the rules of the Civil Code of the Russian Federation, including V. Laptev, L. Vasilevskaya, O. Rodionova, L. Novosyolova, V. Gavrilov, A. Asoskov.

However, it is important to analyze the rules contained in the Civil Code regarding digital rights as objects of civil circulation and identify weaknesses that require adjustment. To achieve this goal, it is required to analyze

the existing standards, to trace their impact on law enforcement activities, including judicial practice.

2. RESEARCH METHODOLOGY

The research methodological base was composed of formal-legal, comparative-legal methods, and the method of interpretation of rules of law.

3. RESEARCH RESULTS

The implementation of the Digital Economy of the Russian Federation Program [1] approved by the Government of the Russian Federation by Order No.1632-r, dated July 28, 2017, resulted in the adoption of a bill amending the Civil Code of the Russian Federation regarding the introduction of digital rights as an object of civil rights.

As indicated in the explanatory note to the bill No.424632-7 "On Amendments to the First, Second Parts, and Article 1124 of the Third Part of the Civil Code of the Russian

Federation" (hereinafter the "bill No. 424632-7") [2] submitted to the State Duma on 03/26/2018, its goal was "to consolidate several basic provisions in civil law, based on which, the Russian legislator could regulate the market for new objects of economic relations existing in the information and telecommunication network." As a consequence, the concepts of "digital right," "digital money," and "smart contract" should have been enshrined in the Civil Code of the Russian Federation (hereinafter the "CC RF").

The above bill was discussed in conjunction with the draft Federal Law No. 419059-7 "On Digital Financial Assets" [3] (hereinafter the "Digital Financial Assets Bill") and the draft Federal Law No. 419090-7 "On Attracting Investments Using Investment Platforms" [4] (hereinafter referred to as the "Crowdfunding Bill"). Participants in the discussion of the above bills agreed on the need for a unified approach to terminology and understanding the nature of those objects used in cyberspace, which do not fit into the usual regulatory system. As a result, the conclusion on the introduction, as a matter of priority, of the provisions on digital rights in the CC RF as a statutory legal act, which was the base of civil law regulation, was adopted.

On 03/13/2019, the bill was approved by the Federation Council and on 03/18/2019, it was signed by the President. Federal Law No. 34-FZ "On Amendments to the First, Second Parts, and Article 1124 of the Third Part of the Civil Code of the Russian Federation" [5] came into force on 10/01/2019.

By and large, amendments to the CC RF relating to digital rights were not applied until January 1, 2020 (until the crowdfunding law came into force), due to the absence of an indication of the types of digital rights in other laws.

According to the new edition of Article 128 of the Civil Code, digital rights are objects of civil rights as a separate type of property rights, along with cashless funds and paperless securities.

In essence, digital rights are an example of legal fiction since they certify rights to objects of civil rights, items, results of work (including results of intellectual activity), provision of services, exclusive rights, and other property.

"Digital rights," as provided for in Article 141.1 of the Civil Code of the Russian Federation, should meet the following requirements:

- named as digital in the law;
- have the nature of both binding and other rights;
- the content and conditions for the exercise of digital rights are determined in accordance with the rules of the information system;
 - the exercise, disposal, encumbrance, or restriction of the disposal of the digital right is possible only in the information system; and
 - the obligated person in advance agrees that the digital right will be transferred according to the rules of the information system.

Bill No. 424632-7 [2] defined digital rights as the totality of electronic data (digital code or designation) existing in a decentralized information system, information technology

and technical means of which provide a person with unique access to this digital code or designation, as well as the opportunity to familiarize with the description of the corresponding object of civil rights at any time (Clause 1 of Article 141.1).

3.1. Drawbacks of the Wording of Article 141.1 of the CC RF

- the problem associated with the conceptual apparatus: the concept of the "digital right" is too broad; there is no description of the information system; no indication of its (decentralized) nature, binding to certain crypto technologies; the legal nature of the cryptocurrency has not been determined;

- criteria for distinguishing between the rules of the Civil Code and legislation on the securities market are not indicated;

- there are no requirements for the technology required for the issue and circulation of digital rights;

- an indication that the information system determines the content of digital rights and the conditions for their exercise, as well as the fact that the exercise of the right is possible only in the information system, is contrary to the principles of civil law. Thus, in accordance with the CCRF, civil rights and obligations arise from the grounds provided for by law and other legal acts (Article 8); the need for the unhindered exercise of civil rights is recognized (Clause 1 of Article 1 of the Civil Code). According to S. Sarbash, right holders become hostages of information systems;

- there is no indication of the possibility of the existence of digital rights certifying various property rights (mixed digital rights);

- since the rules of information systems may differ, then the binding of the holder of digital rights to the rules of the information system specified in Clause 2 of Article 141.1 of the CCRF provides an opportunity for abuse;

- the wording that the transaction does not require the consent of the person obligated under such the digital right is not formulated correctly because conditions for the issuance of digital rights may provide for certain restrictions on their free circulation;

- the meaning of restricting the holder's rights by the provision on that the exercise and disposal of the digital right in digital form is possible without applying to a third party is not clear; and

- the wording "obligation and other rights" is not correct since it in no way contributes to the interpretation of the concept of the digital right. "Other" rights already include all types of property rights.

After analyzing Article 141.1 of the CC RF, many questions remain unanswered. If the digital right can be exercised only in the information system, then how will, for example, the right to demand the transfer of an item be implemented? How does the debtor fulfill the obligation to transfer an item exclusively in the information system? How will the Federal Bailiffs Service enforce judicial acts

directly related to the exercise of digital rights?

4. DISCUSSING THE RESULTS

To date, the only law, in which digital rights are named, is the Federal Law "On Attracting Investments Using Investment Platforms and Amending Certain Legislative Acts of the Russian Federation" (hereinafter referred to as "Crowdfunding Law") [6]. It provides for utilitarian digital rights, i.e. the rights to demand the transfer of items or intellectual rights that are created and circulated in the information system, the rights to demand the performance of work or provision of services. The listed rights are binding.

Moreover, digital rights are also provided for in the digital financial asset bill [3], particularly, digital financial assets certifying the right to a monetary claim, the right to issue securities or to transfer them, and the right to participate in the capital of a business entity. The bill was supposed to regulate the status of cryptocurrencies. However, it was adopted only in the first reading and, since March 2019, it is at the preparatory stage for the second reading.

Recognition of a token as an object of right provides legal certainty to legal entities when performing digital transactions with tax authorities. Thus, in accordance with the Letter of the Ministry of Finance of Russia No. 03-03-06/1/94158 dated 12/04/2019, when making transactions with digital rights, their taxation will be performed in the general manner established for property rights by the provisions of the Russian Federation [7].

The CC RF regarding digital rights actually establishes only a framework regulation that requires consolidation in other laws. This circumstance suggests that the main regulation will be carried out by special laws, instead of the CC RF. Perhaps this wording appeared in the interests of the Central Bank as a regulator of the financial market, which will independently determine the content of digital rights and signs of information systems.

The analysis of the content of Article 141.1 of the CCRF allows recognizing as positive the fact that the article has no restrictions on the types of digital rights.

However, the semantic content of the definition of the "digital right" established by the legislator is extremely unsuccessful, which has caused a sufficient amount of criticism. This article uses the concept of "right" as a synonym for a token, to which information about the property right is linked. The digital right does not contain a special right (right to right).

According to S. Sarbash, the digital right is not a new object of civil law or it is no right previously unknown to civilian science. In his opinion, the digital right cannot be independent since it represents only a form of any well-known right, i.e. property right, obligation right, corporate right, etc., and the fact that the holder uses the information system for some legally significant actions does not change anything dramatically. From the point of view of the scientist, it is vain and even harmful to indicate the digital form in the law every time since the legislator will

never keep up with the rapid development of technology [8].

If it is required to adopt new concepts and structures to Russian law, then they need to be given meaningful adequate definitions in order to prevent legal uncertainty [9].

According to many specialists [8], the digital right, based on the meaning of Article 141.1 of the CCRF, has common features with a paperless security (paragraph 2 of Clause 1 of Article 142 of the CC RF). Particularly, the property right (most often obligation one) is not tied to a material carrier, and the attribution of the right and certificates of disposal are documented by making entries in the accounting system. Therefore, both are a special way of securing property rights, the exercise, and disposal of which is possible only in compliance with the rules of the corresponding type of accounting (centralized or decentralized).

L. Novosyolova believes that a "cashless money" phenomenon is similar in nature. Particularly, data on the availability of funds in bank accounts serve as a means of payment, and the transfer of property to another person is performed by making entries in the account.

It is worth agreeing with the opinion of L. Yu. Vasilevskaya, who believes that it would be possible to envisage a regime of digital rights, by analogy with paperless securities, that is, accounting in an open registry on a blockchain platform that provides an algorithm for transferring digital rights similar to transferring rights to paperless security [10].

It is required to abandon the regulation of relations based on their form, and it is required to use an essential approach to regulation. It is important to develop a common understanding of the nature of those objects of civil rights that do not fit into the conventional regulatory system.

4.1. Digital Rights Abroad

Many foreign legal systems today are moving along the path of covering some types of tokens by legal regulation associated with paperless securities.

Since April 1, 2017, Japan has a currency regulation law that stipulates that cryptocurrency, including bitcoins, is a means of payment [11].

In the USA, there is no unified approach to the concept of cryptocurrency. At the same time, it is considered as money, as property, and as exchange commodities. Blockchain-based tokens have various characteristics. The status of tokens in accordance with the US securities laws is not determined, according to J. Rohr and A. Wright, which entails difficulties in the lawful behavior of participants in the public cryptocurrency market [12].

In China, according to the law on the regulation of cryptocurrencies, cryptocurrencies have the status of "virtual property" and there is a ban on exchange trading in cryptocurrencies, as well as a ban on the use of ICOs.

In the UK, the qualification of cryptocurrencies as information (data) prevailed until recently. Thus, the court issued an order on the temporary freezing of cryptocurrency on the Coinbase exchange, believing that the rules on ownership of property should be applied to crypto assets [13].

In December 2019, the European Union did not allow in its territory the use of stable cryptocurrencies, including Libra launched by Facebook, until all legal, regulatory, and supervisory risks and tasks associated with them were identified and solved [14]. A number of EU member states, such as France, Germany, and Malta, have their own national regulatory cryptocurrency bills. But most of the EU member states agree with the recommendation of European supervisory authorities that cryptocurrency markets go beyond borders and, as a result, pan-European standards are required.

According to P. Hacker and C. Thomale, only international legal regulation will effectively balance the protection of the rights and interests of investors and their access to the cryptocurrency market [15].

5. FINDINGS (CONCLUSION)

The extension of the concept of "property," enshrined in Article 128 of the Civil Code of the Russian Federation will contribute to the protection of property rights, which are certified by records in various information systems.

The specificity of the digital right in accordance with the CC RF lies in the fact that it emerges directly in the information system, at the initiative of the obligated person, who deliberately agrees that the right is transferred following the rules of the information system. And as a consequence, **Clause 3 of Article 141.1** of the CC RF establishes that the transfer of the digital right based on a transaction does not require the consent of a person obligated under such the digital right. At the same time, the main parameters of digital rights will be determined in other laws and then probably in the by-laws of the Bank of Russia.

The main disadvantage of Article 141.1 of the CCRF is the declarative nature of the concept of the "digital right" because the content and conditions for the exercise of digital rights will be determined by the rules of the information system, which, in turn, will meet the signs established by law.

The effectiveness of the proposed regulatory method is of great concern. At the same time, the civil status of cryptocurrency remained uncertain.

It is possible that after accumulating experience in law enforcement at the next stage of improving Russian civil law, digital rights and paperless securities as ways of certifying property rights will become a united legal institution. The existing legislation should primarily focus on harmonization with international rules of the game in the financial markets. However, the existing Civil Code does not contribute much to this.

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