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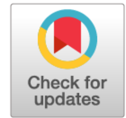

Regulating Liability for Crimes Against Monetary Systems in the Context of Digitalized Economic Relations

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***ABSTRACT*:** A monetary system is a historically established model of organized monetary circulation that includes the national monetary unit (legal tender), the types of banknotes, and the order of their issue and circulation. This model is normatively fixed, since it is a core component of the national economy. At the same time, the security of a monetary system is a primary strategic goal in the economy of a nation. The achievement of such a goal is possible by solving specific tasks related, inter alia, to the prevention of criminal actions in the analyzed area.

As key elements of crimes against the monetary system, national criminal legislation should highlight property obtained by criminal means, including laundering of funds (Articles 174 and 1741 of the Criminal Code of the Russian Federation), counterfeiting (Article 186), and the illegal turnover of payment funds (Article 187). Given the dynamics of changes taking place in society and the state, the structures of criminal elements are likewise subject to transformation, especially with regard to the development of digital financial technologies.

The legal vacuum of the new sphere of public relations, its subordination to algorithms and programs on the one hand, and the blank nature of these norms of criminal law, on the other, as well as the imperfections of procedural mechanisms focused on regulating “analog” public relations, as opposed to digital, on the other, form barriers to legal influence. This article is devoted to the analysis of these and other problems of the legislative regulation of crimes that encroach upon the monetary system via digital economic relations.

Keywords: monetary crimes; digitalization; cryptocurrencies; digital finance; criminal liability.

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Проблемы законодательной регламентации уголовной ответственности за преступления, посягающие на денежную систему, в условиях цифровизации экономических отношений

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Аннотация. Денежная (валютно-денежная) система представляет собой исторически сложившуюся модель организации валютно-денежного обращения и включает в себя национальную денежную единицу (законное платежное средство), виды денежных знаков, порядок их выпуска (эмиссии) и обращения. Данная модель фиксируется нормативно, поскольку является стержневым компонентом национальной экономики. При этом состояние ее защищенности составляет одну из основных стратегических целей обеспечения национальной безопасности в области экономики. Достижение такой цели возможно посредством решения конкретных задач, связанных в том числе с профилактикой, предупреждением и предотвращением преступных и противоправных действий в анализируемой сфере.

В качестве ключевых составов преступлений, посягающих на валютно-денежную систему, в национальном уголовном законодательстве следует выделить легализацию (отмывание) денежных средств или иного имущества, полученных преступным путем (статьи 174 и 174[1] УК РФ), фальшивомонетничество (статья 186 УК РФ), а также неправомерный оборот средств платежей (статья 187 УК РФ). Конструкции соответствующих составов преступлений подвержены трансформации в силу динамики происходящих в обществе и государстве преобразований, связанных с разработкой и внедрением цифровых финансовых технологий. Правовой вакуум новой сферы общественных отношений, ее соподчиненность, в первую очередь, алгоритмам и программам, с одной стороны, и бланкетный характер указанных норм уголовного законодательства, а также несовершенство процессуальных механизмов, которые ориентированы на регулирование «аналоговых», то есть не цифровых, общественных отношений, с другой, формируют барьеры правового воздействия. Статья посвящена анализу этих и иных проблем законодательной регламентации уголовной ответственности за преступления, посягающие на денежную систему, в условиях цифровизации экономических отношений.

Ключевые слова: валютные преступления; цифровизация; криптовалюты; цифровые финансы; уголовная ответственность.

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The legalization of money or other property obtained by criminal means (aka “money laundering”), counterfeiting, and illegal circulation of payment funds violate the proper functioning of the national monetary system through its so-called contamination with economic goods that do not have a legal basis, mainly monetary funds [1, p.106]. These types of illegal activities are recognized by researchers as “shadow” processes and are considered one of the main threats to the banking sector, along with corruption, false bankruptcy, and cybercrime [2; 3, p. 12], especially in the context of the development of financial technologies and the digitalization of economic relations.

“Financial technologies (“fintech”) and regulatory technologies (“regtech”) are new, dynamically developing phenomena of public life both in Russia and in many countries abroad” [4; 5, p.47; 6; 7]. Due to the inherent structure of such technologies, however, their use allows criminals to circumvent the boundaries and barriers that are laid down in the legislation in connection with countering economic crimes [8]. In this regard, it is important to point out the problems that arise in the field of legislative regulation of criminal liability for crimes that infringe on the monetary system. Let us examine some of them.

1. Inconsistency of national and international levels of regulation

The construction of the corpus delicti associated with the laundering of money or other property is due to the significant influence of international regulation on countering this type of socially dangerous behavior. Key among the many relevant pieces of legislation are the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[1], the United Nations Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime[2], the United Nations Convention Against Transnational Organized Crime[3], the United Nations Convention Against Corruption[4], the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism[5], European Union directives,[6] and FATF documents.

These international instruments primarily address the definition of what constitutes the subject of a monetary crime, which is any economic benefit obtained or extracted, directly or indirectly, as a result of the commission of crimes. Such a broad approach to the definition of the crime subject makes it possible to regulate specific measures at the international level to counter this type of socially dangerous behavior, regardless of the form of obtaining the corresponding benefit by the attacker. This is effective in qualitatively eliminating existing risks and preventing the emergence of new ones in the context of the constantly changing nature of threats, including in connection with the development of technologies. For example, the relevant measures are consistently implemented in the European Union at the level of Mandatory Directives for Member States on Combating Money Laundering.

In contrast to international regulation, national regulation aimed at countering this type of socially dangerous behavior is limited by the peculiarities of legislation, not only in criminal law, but also in civil law, financial law, and other spheres.

The subject of a monetary crime, according to the definition by the Plenum by the Supreme Court of the Russian Federation (Resolution No. 32 of 07.07.2015), is money or other property knowingly acquired by a person or persons in a criminal way, as well as received as a material reward for a crime committed or as a payment for the sale of items restricted in civil circulation. At the same time, in accordance with the wording of the aforementioned Resolution No. 1 of 26.02.2019, “cash” means cash in the currency of the Russian Federation or a foreign currency, as well as non-cash funds, including electronic funds. “Other property” includes movable and immovable property, property rights, and documentary and non-documentary securities, as well as property obtained as a result of processing property acquired by criminal means or as a result of committing a crime (for example, a building constructed with materials acquired by criminal means).

This explanation follows the civil-legal characteristics of the objects of civil rights. In accordance with Article 128 of the Civil Code of the Russian Federation, objects of civil rights include tangible things (including cash and documentary securities); other property, such as property rights (including non-cash funds, non-documentary securities, digital rights); the results of work and the provision of services; protected results of intellectual activity and equated means of individualization (intellectual property); and intangible goods. However, it should be recognized that the objects of civil rights listed in Article 128 of the Civil Code of the Russian Federation still do not give a complete picture of the analyzed crime subject.

Analysis of the legislation on digital financial assets, the national payment system, as well as on currency regulation and control does not allow to directly attribute the so-called foreign tokens, cryptocurrencies, and other

[1] Concluded in Vienna on 20.12.1988.

[2] Signed in Strasbourg on 08.11.1990.

[3] Adopted in New York on 15.11.2000 by Resolution 55/25 at the 62nd plenary meeting of the 55th session of the UN General Assembly.

[4] Adopted in New York on 31.10.2003 by Resolution 58/4 at the 51st plenary meeting of the 58th session of the UN General Assembly.

[5] Signed in Warsaw on 16.05.2005.

[6] For example, Directive No. 2015/849 of the European Parliament and of the Council of the European Union “On the prevention of the use of the financial system for the purposes of money laundering or terrorist Financing, on the amendment of Regulation (EC) 648/2012 of the European Parliament and of the EU Council and on the repeal of Directive 2005/60/EC of the European Parliament and of the EU Council and Directive 2006/70/EC of the European Commission” (adopted in Strasbourg on 20.05.2015), the EU Directive on Combating Money Laundering, etc.

digital financial instruments to the crime subject under consideration.

According to the FATF recommendations, however, cryptocurrencies are a kind of virtual money; namely, they are decentralized, convertible, distributed, open-source peer-to-peer virtual currencies based on mathematical principles, and do not have a central administrator, centralized control, or centralized supervision [9]. Today, the functions of money can be performed not only by money that has the power of payment [10, p. 47]; that is, by money that has the power of payment. Signs that are legal tender, but also digital financial instruments, and in the future, other monetary "surrogates" [11] (for example, quantum "money").

From an economic point of view, digital financial instruments are an economic boon for their owner, since they can be exchanged for traditional forms of money, accepted as payment in certain jurisdictions, perform the function of storage, etc. For this reason, it is appropriate to assert the transformation of the "payment power" concept, which, in relation to digital financial instruments, is now mediated not only by legal means, but also by economic laws, as well as by the free goodwill of participants in digital transactions [12]. This confirms the legitimacy of using the term "economic good" at the international level to express the crime subject related to money laundering.

These instruments represent an expression of value to their owner and, for this reason, are an economic good at the international level, subject to the requirements of AML/CFT/FRMU. Thus, the feature of the subject in the context of the analysis for the features of the crime structure related to the money laundering is expressed today to a greater extent by economic (financial) categories (benefits), usually cloaked in a legal form, which is not considered at the national level.

2. The "lack" of positions' unity (on the example of counterfeiting and illegal turnover of payment funds)

The circulation of money and securities for the purposes of qualifying the offense under Article 186 of the Criminal Code of the Russian Federation in the criminal law science is traditionally associated with cash, which exists in the form of banknotes and coins [13] as well as securities in documentary form [14]. However, with the advancement of technology, the issue of counterfeiting non-cash, electronic, and digital funds merits special attention.

Most scholars who analyze the problem of counterfeiting of such funds agree that the non-cash, electronic, and digital forms of banknotes and valuables in the form of records on accounts in the information systems of credit and financial organizations precludes their forgery [14; 15], since the subject of the crime affects the object of the material world, directly named in the disposition of the corresponding article [16] (via production, storage, and transportation). The above explanations, in general, indicate in favor of the materiality of the subject of the analyzed corpus delicti. This conclusion is also confirmed by the features of the functioning of information systems, which take into account the records of crediting or debiting funds.

The technologies that form the basis of such systems exclude the possibility of giving electronic or digital records the property of significant similarity with funds in non-cash or electronic or digital forms, since they will not be integrated into the information space of the corresponding system as fake. The validation stage of an electronic (digital) record allows one to determine with certainty whether the record is authentic. If the system confirms the "falsified" record, it does not become fake, since it excludes the possibility of verifying this reality fact.

Meanwhile, some researchers recognize the possibility of forging non-cash, electronic, and digital funds [17, p. 41–45]. Scientists see the rationale for this thesis in the law, which expresses the economic dependence between the commodity mass, the price level and the speed of circulation. Thus, the I. Fischer equation shows that the economy is equally subject to fluctuations and crisis shocks, depending on the amount of funds in circulation in comparison with the amount of goods and services produced.

The introduction into circulation of funds not controlled by the state, both in cash and in non-cash form, may lead to a violation of the balance between the amount of money in circulation and the total amount of money spent in the state economy during the year, causing a crisis in the economic situation and violating the direct object of Article 186 of the Criminal Code of the Russian Federation-relations established in the monetary system of Russia. [18, p. 118–119].

The immediate object of the analyzed corpus delicti undergoes negative changes not only as a result of forging cash, but also in cases of falsifying non-cash, electronic, or digital funds. Therefore, the composition of the analyzed crime is formed not only by the partial falsification of banknotes or documents (valuables) certifying property rights (alteration of the nominal value, change of the number, series and other details), but also by their unauthorized release (imitation) in full [19].

It seems that both points of view on this issue are valid. The fact that the information system may not recognize a "fake" in an electronic or digital image does not mean that the corresponding record is not, in fact, fake. In this case, we are talking about the fact that the information system identified the record submitted for verification with the true state of affairs, but only in form and not in content. In exactly the same as when an ATM accepts a fake bill as genuine and credits its face value to the attacker's account. If in the latter case we recognize the existence of the crime of counterfeiting, and not fraud, as is the case in some foreign jurisdictions that consider it likely to "cheat" the receiving/payment terminal, then we should not reject with absolute certainty the possibility of counterfeiting non-cash,

electronic, or digital currency. Actions aimed at the illegal entry into circulation of such electronic (digital) records for the purpose of sales and personal enrichment are possibly due to the imperfection of the technologies used in the field of finance and may therefore harm the direct crime object.

This thesis is confirmed by the example of the actions of the Swiss financial intelligence agency FINMA. In 2017, FINMA shut down the unauthorized suppliers of the fake E-Coin cryptocurrency and initiated bankruptcy proceedings against the participating legal entities. The developers of the electronic coin accepted several million Swiss francs for deposits without having the necessary banking license. For more than a year, the QUID PRO QUO association has been issuing so-called "electronic coins," a fake cryptocurrency developed by the association independently. Working together with DIGITAL TRADING AG and Marcelco Group AG, the association provided interested parties with access to an online platform on which to trade and transfer electronic coins. Funds from several hundred users were accepted through this platform. With its help, legal entities-suppliers managed virtual accounts that reflected their state both in the number of legal means of payment and electronic coins. Such activities in Switzerland are similar to a bank's deposit business and are illegal if the company does not have the appropriate license in the financial market. Unlike real cryptocurrencies, which are stored in distributed networks and use blockchain technology, electronic coins were completely under the control of providers and were stored locally on their servers. Suppliers assumed that 80% of the e-coins would be backed by tangible assets, but the actual percentage was significantly lower. Moreover, significant tranches of E-Coin were issued without sufficient asset support, resulting in the gradual erosion of the E-Coin system to the detriment of investors and, consequently, the financial system[7].

A similar lack of doctrinal unity is seen when addressing the issue of the possibility of forgery of electronic means of payment. Most scholars agree that in this case it is necessary to speak about the sign of the intended purpose of payment funds for illegal turnover, and not about their forgery. However, this position is at odds with practice. Forgery of electronic money transfer orders, according to the established judicial practice[8], is de facto achievable due to the peculiarities of the functioning of information systems, which assume the presence of a set of measures for the authentication of certain commands. This is possible if the relevant electronic document is fictitious in its content. Fictitiousness in this case is expressed in the presence of false information in the content of the document itself, for example, when the data on the purpose of payment is distorted, as well as the indication of false information about the sender, or when the payment order itself is drawn up for use by an unauthorized person on behalf of another person.

3. Procedural inability to ensure the state of security of the monetary system in the new conditions

The effectiveness of legislative regulation of criminal liability for crimes that infringe on the monetary system in the context of digitalization of economic relations is immanently linked to the arsenal of means available to the law enforcement officer [20], including procedural ones.

Despite the positive experience of introducing digital financial instruments into civil circulation in specific jurisdictions, we still note that most of the decisions aimed at ensuring the security at the new sphere of relations, and therefore the financial system, are not legal in terms of their essence related to ensuring security by technical and organizational means (FinTech). The development of modern technologies and their implementation in public and state practice is not yet accompanied by the presence of a virtual space infrastructure that could provide legal protection. Such infrastructure remains only in the real world so far. Street lighting, video surveillance cameras, police patrolling, the presence of centralized structures and systems (the administrators of which can be addressed by a power order), the system of state coercion and other institutions and means: all these things are intended to deter and prevent crime. And if, for example, the cash register in a store is faulty, the seller can still sell a particular product or provide a service for cash, simply making an entry in a special book and cutting a check to cover the glitch. In the event that a bank's payment instrument fails to work during a transaction, the customer can always petition the bank and/or the courts and demand compensation for any losses.

In the virtual environment, there are no illuminated streets or security cameras, police officers, or good citizens who can help to the virtual person. In other words, the very infrastructure of rights protection is practically absent. The state does not have the technological ability to interfere in any way without the voluntary consent of the virtual community in the processing of digital technologies and, above all, cryptocurrencies, since in the new ecosystem of relations there are no familiar persons to whom power orders can be addressed, and there is no possibility to return funds or suspend a transaction, or to restore them in case of "loss" due to a technical failure, court decision, etc.

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[7] FINMA closes down coin providers and issues warning about fake cryptocurrencies. URL: https://www.finma.ch/en/news/2017/09/20170919-mm-coin-anbieter/(дата обращения: 31.03.2021).

[8] For example: the verdict of the Sovetsky District Court of Ryazan in case No. 1-138/2018 daetd 14.08.2018 / Official website of the Sovetsky District Court of Ryazan. URL: https://sovetsky-riz.sudrf.ru/ (date of appeal: 02.02.2020); verdict by the Pervomaisky District Court of Izhevsk of the Udmurt Republic in case No. 1-211/2017 dated 06.06.2017 / Official website of the Pervomaisky District Court of Izhevsk of the Udmurt Republic. URL: https://pervomayskiy-udm.sudrf.ru/ (accessed: 02.02.2020); the verdict by the Kumertau Interdistrict Court of the Bashkortostan Republic in case No. 1-278/2017 dated 21.11.2017 / Official website of the Kumertau Interdistrict Court of the Bashkortostan Republic. URL: https://kumertauskiy-bkr.sudrf.ru/ (accessed: 02.02.2020).

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The complexity of countering the commission of crimes that encroach on the monetary system in the new conditions, including through the mechanism of legislative improvement of the design of specific compositions, lies in their liminal and virtual nature. From a procedural point of view, this circumstance requires reference to the provisions of the Criminal Procedure Code of the Russian Federation related to activities aimed at international cooperation. However, the analysis of the Criminal Procedure Code of the Russian Federation confirms the lack of special procedural tools for effective criminal proceedings in the field of digital finance. The norms of the criminal procedure legislation regulating the requirements for the procedure for initiating a criminal case, evidence, collection and storage, seizure of property, and the production of other investigative actions are not adapted to the new digital reality, which prevents the effective selection of the necessary tools for the legislative regulation of criminal liability for crimes that infringe on the monetary system.

Thus, the legal vacuum of the new sphere of public relations, its subordination, first of all, to algorithms and programs, on the one hand, and the blank nature of the analyzed norms of criminal legislation, as well as the imperfection of procedural mechanisms that are focused on the regulation of "analog" (i.e., not digital) public relations, on the other, form barriers to achieving the proper level of legislative regulation effectiveness. The digital space is still left without an "infrastructure" that can provide online preventive protection of the virtual rights and freedoms of citizens, as well as public relations protected by criminal law.

It seems that a more active introduction of digital technologies into national financial systems is possible only if the definition of crimes that encroach on the monetary system is improved, appropriate virtual principles and rules are developed for the subjects of digital finance, and effective procedural mechanisms are developed.

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