

PRACTICE OF LEGAL REGULATION OF THE CRYPTOCURRENCY MARKET IN THE USA

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Annotation. The last decade has seen an increase in the circulation of cryptocurrencies around the world. Various legal orders are attempting to integrate these new digital assets into their legal field. The formation of a legal framework for the regulation of this sphere is also taking place in Russia. In this regard, the study of foreign experience is of certain interest, which would potentially allow to avoid some of the problems that other states have already faced in the framework of this work. In particular, the article considers the experience of the United States, where in recent years there has been an intensive development of the cryptocurrency market.

Keywords: cryptocurrency, legal regulation of cryptocurrency turnover, USA, investments.

Currently, there is a rapid development of cryptocurrency turnover all over the world. At the same time, until recently, most legal systems lacked any systematic regulation of this sphere. Today, the states are passing the stage of formation of approaches, principles and, most importantly, the normative and legal framework for regulation of the cryptocurrency market.

In this regard, it is of particular interest to study the history of the development of legal regulation of relations related to the circulation of cryptocurrencies in foreign jurisdictions. In the framework of this work we will consider the experience of the United States, which is one of the most characteristic representatives of states with a precedent system of law. This experience is of interest, because in recent years the country has been actively working in the field of rulemaking and formation of law enforcement practice in the sphere of turnover of cryptocurrencies and other digital assets related to Blockchain technology.

Due to the peculiarities of the US constitutional structure, legal regulation of cryptocurrencies is established both at the federal level and at the level of individual states. The most significant law at the federal level is the Cryptocurrency Act¹ of 2020 (HR 6154) passed by the House of Representatives. In particular, this legislative act formulated a legal definition of cryptocurrency, as well as other special terms that are important for the regulation of the area in question. According to the definition given in the law, cryptocurrency is understood as a “representation” of the United States currency or synthetic derivatives based on Blockchain technology or distributed cryptographic register. The legislature also includes various digital financial assets fully collateralized in a correspondent bank account that are reserve digital assets, so-called stablecoins; synthetic derivatives defined by decentralized oracles or smart contracts; or collateralized by cryptocurrencies, other cryptocurrencies or cryptocurrencies.

In addition to terminology, the Act defines the range of government agencies that serve as crypto regulators at the federal level. In particular, they include the Commodity Futures Trading Commission (CFTC), the Financial Crimes Enforcement Agency (FinCEN), and the Securities and Exchange Commission (SEC). It is important to note that each of the federal agencies has a specific area of

¹ Crypto-Currency Act of 2020: от 9 марта 2020 года/ Палата представителей США // Официальный интернет-портал правовой информации США: [сайт]. – URL : <https://www.congress.gov/bill/116th-congress/housebill/6154/text?q=%7B%22search%22%3A%5B%22crypto-currency+act%22%5D%7D&r=1&s=2>

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oversight. Thus, the legislator attempts to delineate the responsibilities of federal and state agencies in order to avoid duplication of administrative and supervisory functions².

Taking into account the procedure of public control over the circulation of cryptocurrencies enshrined in the law, we would like to note the developed sectoral regulation of the US financial system. At the federal level, there are many commissions and regulators responsible for one or another sector of the financial system. At the same time, in the author's opinion, at present the most significant contribution to the formation of American cryptocurrency regulation in the United States is made by the SEC. This body is actively working on the development of legal regulation of cryptocurrency turnover, and has repeatedly acted as a defender of public interests in many precedent-setting cases in this area.

Returning to the analysis of the provisions of the Cryptocurrency Law of 2020, it is important to mention that this act establishes requirements for regulatory authorities to ensure the availability of information related to the state supervision of the circulation of cryptocurrency and other digital assets. It establishes a regime of access to information available to state authorities in the framework of control over participants in the crypto-market. It is also important to note that this law establishes requirements for the circulation of cryptocurrencies (in particular, for tracking transactions, conducting audits, and carrying out transactions). Finally, it sets out the requirements for trading, as well as a number of other basic provisions related to cryptocurrency.

The next law that plays an important role in the cryptocurrency regulatory system at the U.S. federal level is the Bank Secrecy Act, also known as the Currency and Foreign Exchange Reporting Act. This act was passed back in the 1970s, but applies to cryptocurrency transactions as the main one in the field of anti-money laundering of illegal assets. Given the active use of cryptocurrencies in these kinds of criminal frauds, it is difficult to overestimate its importance for the entire sphere of cryptocurrency regulation. Most importantly for the cryptocurrency market, cryptocurrency transactions are subject to the requirement to report suspicious transactions exceeding \$10,000 to regulatory authorities. In the U.S., as mentioned earlier, such supervisory authority is FinCEN, a bureau within the U.S. Department of the Treasury³.

At the federal level, some steps have also been taken to shape tax regulation. Back in March 2014, the US Internal Revenue Service (IRS) adopted⁴ a document according to which virtual currencies, including cryptocurrencies, are considered as property and therefore should be taxed and, for tax purposes, require the calculation of profits and losses in transactions with them. The obligation to make such calculations and subsequently pay taxes lies with the participants in transactions involving virtual currencies.

As far as the US tax code is concerned, there was a certain problem with the taxation of virtual currencies, including cryptocurrencies, until 2017. Despite the fact that since 2014 virtual currencies have been recognized as property, the principles of taxation of property and transactions with it are not directly compatible with virtual currencies. In particular, a virtual currency exchange transaction could be recognized as an investment under certain conditions, and under provision 1031(a) of the

² Public law 91-507: от 26 октября 1970 года / Палата представителей США // Официальный интернет-портал правовой информации США: [сайт]. – URL: <https://www.govinfo.gov/content/pkg/STATUTE84/pdf/STATUTE-84-Pg1114-2.pdf>

³ Internal Revenue Service. Notice 2014-21, IRS Virtual Currency Guidance: Virtual Currency Is Treated as Property for U.S. Federal Tax Purposes; General Rules for Property Transactions Apply / Internal Revenue Service. – 25.03.2014. – URL: <https://www.irs.gov/pub/irs-drop/n-14-21.pdf>

⁴ Internal Revenue Code: от 22 октября 1986 года / Сенат США // Официальный интернет-портал правовой информации США: [сайт]. – URL: <https://www.irs.gov/privacy-disclosure/tax-code-regulations-andofficial-guidance>

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Internal Revenue Code, transactions related to investments are exempt from taxation. In this regard, the US tax code was amended at the end of 2017 to eliminate this contradiction.

In this regard, for the purposes of application of tax legislation it is very important to understand what the US law understands by investment, what is the content and main features of this concept. Back in 1946, the U.S. Supreme Court made a decision in the case of SEC v. W. J. Howey Company, which became a precedent, also known as the case of W. J. Howey. J. Howey, which became a precedent, also known as the Howey Test. The dispute concerned the payment of securities taxes on investment contracts. Among other things, the Supreme Court stated that an investment must be defined as an investment of money involving the anticipated receipt of a profit as a result of certain acts performed by a third party for a commercial purpose. If these conditions are met, the investment is recognized as an investment regardless of whether the transaction is speculative in nature, whether prices are set different from market prices, or any other such circumstances.

The Supreme Court's position on the nature of investments, expressed in the case, played an important role in the formation of US jurisprudence in the XXI century regarding the taxation of cryptocurrency transactions. On 06.08.2013, the Federal Court of the Eastern District of Texas issued a decision in the case of SEC v. Shavers, which became an important precedent in the practice of cryptocurrency regulation. Subsequently, the court's findings in the case have been applied in many cryptocurrency disputes across the country. According to the case, Trendon Shavers, who was the founder of Bitcoin Savings and Trust, was accused of fraud related to the purchase of 700,000 bitcoins totaling \$64 million.

The position of the defense was based on the fact that the company made transactions exclusively in cryptocurrency, and there was no direct investment of funds, which is one of the necessary conditions for the recognition of transactions as investments, i.e. the application of the Howey Test. However, the court disagreed with the arguments of the defense, concluding that cryptocurrency actually meets all the criteria of the Howey Test, which means that it can be recognized as an analogue of cash and can be used as money. In support of this thesis, the court also pointed out that bitcoins can be used to purchase goods, services, as well as to pay other expenses. In addition, cryptocurrencies can be exchanged for classical currency, which means that bitcoin should be recognized as an analog of money. Based on these arguments, the court concluded that numerous transactions with Bitcoin Savings and Trust were investments, and therefore the relevant legislation, including tax legislation, should be applied to them.

At the end of consideration of the issue of changes in tax legislation related to the circulation of cryptocurrencies, it is necessary to mention one more draft law. In September 2017, a bill (HR 3708) was prepared aimed at promoting and supporting technology startups. It also contained amendments to the US tax code. The developers of the new law proposed to exclude from the taxable base income from the sale or exchange of virtual currencies not exceeding \$600. However, so far the law has not been adopted and is still at the discussion stage.

Having considered the legal regulation of cryptocurrencies at the U.S. federal level, it is also necessary to turn to the practice of individual states. As stated earlier, due to the constitutional structure of the United States, each state has a fairly wide autonomy in rulemaking, and therefore, the legislation adopted at the regional level makes an important contribution to the formation and

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development of cryptocurrency regulation. It is interesting that the first legal regulation in this area began to appear at the level of individual states⁵.

At the same time, prior to the adoption of the laws discussed above at the federal level, there was no single clear definition of “cryptocurrency” in the states. In particular, until 2017, most states refused to recognize cryptocurrency as analogous to money. However, in May 2017, the U.S. Federal Court for the Second Circuit ruled in the case of *U.S. v. Ulbricht*. After this precedent, a rather systematic approach to cryptocurrencies as an analog of “money” and “funds” was formed in the judicial practice, which was later reflected in the legislation. A similar position was later expressed in another precedent case, *US v. Faiella*, where the court referred to the provisions of Article 18 § 1960 of the US tax code.

The first US state to take a step towards legalization of cryptocurrency circulation was California. The authorities of this state in 2015 authorized the use in circulation under certain conditions of various analogs of cash, which, according to US law, formally are not a means of payment. In addition, in June 2016, the first restrictions on the circulation of cryptocurrencies were established at the level of state law (Senate Bill No. 843), related to the prohibition of purchasing lottery tickets with them. And in December of the same year, the Federal District Court for the Northern District of California authorized the IRS to request information on cryptocurrency transactions. In addition to California, Georgia, North Carolina, and Pennsylvania passed special legislative acts in 2016. In the next few years, similar acts appeared in other states.

As of 2022, most U.S. states have enacted specific laws either directly regulating the circulation and production of cryptocurrency or applying them in practice for these purposes, despite their lack of explicit mention of cryptocurrency⁶. However, a number of states still lack any systemic regulation related to cryptocurrency (Kansas, Alaska and Mississippi). This can be explained by the absence of a large volume of transactions with cryptocurrency or difficulties with the adoption of such laws, because, to be fair, it should be noted that there are attempts to adopt such acts. In addition, the issue of introducing a license for transactions with cryptocurrencies is decided at the state level. Each state independently decides on the introduction of licensing for such operations, as well as sets the amount of the license fee.

In conclusion, we would like to note that in recent years, the use of cryptocurrencies has become an increasingly important factor affecting the development of the U.S. financial market. In addition, one cannot ignore the obvious prospects that digital financial assets can bring to the country's economy as a whole. All this, of course, poses new challenges for the state. It seems that in this regard, the main tasks of the legislative bodies are to bring the regulatory framework in line with the needs of the market and society, as well as to combat attempts to use new digital assets for criminal purposes. At the same time, it is equally important to legalize people's income and develop a balanced and fair approach to taxation. Such steps will help to integrate cryptocurrencies into the U.S. legal framework, and, as the acts adopted in recent years show, the U.S. legislature is already moving in this direction.

⁵ Public law 115-97: от 22 декабря 2017 года / Палата представителей США // Официальный интернетпортал правовой информации США. – URL: <https://www.congress.gov/115/plaws/publ97/PLAW-115publ97.pdf>

⁶ H-Y Chiu, I. (2021). Hegemony, self-regulation or responsive regulation: International regulation competition in crypto-finance. *Currents: Journal of International Economic Law*, 24(2), 3-28;

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