

DIGITAL ASSETS: KAZAKHSTAN'S EXPERIENCE

Abstract

This article is devoted to the study of digital assets in the Republic of Kazakhstan. The purpose of the article is to explore Kazakhstan's experience in the legal regulation of digital assets and to identify further areas for legislative improvements. It is noted that Kazakhstan's legislation does not regulate digital money, but the term "digital asset" is used. It is spoken in detail about secured and unsecured digital assets, as well as the procedure for their issuance and circulation in the financial market. The article gives a detailed analysis of the norms of the RoK Laws "On Payments and Payment Systems", and "On Informatization". Much attention is given to the history of cryptocurrencies and the attempts of individual states to introduce their own electronic payment systems in digital currency. In this regard, the main provisions of the draft Model Law of the Commonwealth of Independent States "On Digital Financial Assets" are analysed and some comments are made on the establishment of a single regime for secured and unsecured digital assets and on the distinction between corporate (investment) and obligation (credit) digital assets. As a result of this study, the Author concludes that digital assets have now become widely used and for this reason states need to change their attitude towards them, that is stop ignoring them, and it is necessary to define their legal regime.

Keywords: digital assets, cryptocurrencies, Kazakhstan's legislation, digital money, electronic money

Non-cash money includes electronic and digital money. As follows from paragraph 67 of Article 1 of the Law of the Republic of Kazakhstan dated July 26, 2016, No.

11-VI "On Payments and Payment Systems", electronic money is an unconditional and irrevocable monetary obligation of the issuer of electronic money that is stored in the electronic form and accepted as a means of payment in the electronic money system by other participants of the system [Bulletin of the Parliament of the Republic of Kazakhstan, 2016, No. 12]. However, unlike electronic money, digital money is not regulated in the legislation of the Republic of Kazakhstan, but such a category as a "digital asset" has been included. Therefore, according to paragraph 55-1 of Article 1 of the Law of the Republic of Kazakhstan dated November 24, 2015, No. 418-V "On Informatization" (hereinafter referred to as the Law on Informatization), a digital asset is a property created in the electronic and digital form with the application of cryptographic means and computer calculations, which is not a financial instrument, as well as the electronic and digital form of certifying property rights [Bulletin of the Parliament of the Republic of Kazakhstan, 2015, No. 22-V]. In accordance with paragraph 1 of Article 33-1 of the Law on Informatization, digital assets are not means of payment.

At the same time, digital assets can be secured or unsecured. Secured digital assets include a digital token and other digital assets serving as a digital means of certifying property rights to goods and (or) services issued (provided) by a person that issued a secured digital asset. A digital token is a type of digital asset that is a digital means of accounting, exchanging and certifying property rights (paragraph 56-1 of Article 1 of the Law on Informatization).

At the same time, a digital asset, as well as a secured digital asset, does not secure the rights to financial instruments and does not give relevant rights to its owner or

proprietor with respect to a legal entity (rights to a profit share or management rights in relation to a legal entity).

The Information Security Committee under the Ministry of Digital Development, Innovations and Aerospace Industry of Kazakhstan, as an authorized body, determines the procedure for the issue and circulation of secured digital assets. A secured digital asset shall be issued by making a record of the rights (which are certified by the secured digital asset) in the information system by its owner or proprietor, in accordance with an agreement between the owner or proprietor of the information system and the user, who is the issuer of the secured digital asset. The person issuing the secured digital asset is the owner of the property or another person who owns the rights certified by the secured digital asset [<https://adilet.zan.kz/rus/docs/V2000021546>, access 27 January 2021, Paragraph 3].

In turn, the circulation of a secured digital asset shall be carried out by certifying and transferring rights to secured digital assets, as well as their encumbrance with the rights of third parties, including alienation, acquisition, exchange of digital assets for electronic money, values and other property, by entering data into the information system, in accordance with an agreement between users of the information system [<https://adilet.zan.kz/rus/docs/V2000021546>, access 27 January 2021, Paragraph 4(1)].

The right to a digital asset is certified by a record in the blockchain by a person issuing a digital asset on a distributed data platform, in the manner prescribed by the legislation of the Republic of Kazakhstan.

Inclusion of data on the transfer of a digital asset or rights to it into the information system shall be allowed under the following conditions:

1. the person who has entered the data has access to the information system of the person who issues the digital asset on the distributed data platform, in the manner determined by the authorized body in the field of information security;
2. the information system of a person issuing the digital asset on the distributed data platform meets the requirements established by the Law on Informatization (paragraph 6 of Article 33-1) [<https://adilet.zan.kz/rus/docs/V2000021546>, access 27 January 2021, Paragraph 4(2)].

The proprietor, owner and user, who have access to the information system of the person issuing the digital asset, have equal rights to make changes in accordance with the

specified validation algorithm. In this case, the changes are synchronized for all users of the information system.

A person engaged in digital mining becomes the owner of digital assets that have arisen as a result of digital mining.

Persons engaged in digital mining shall inform the authorised body in the field of information security about the activities of digital mining in the manner determined by the authorised body in the field of information security.

Unsecured digital assets include digital tokens received as a reward for participating in maintaining consensus in the blockchain in the manner prescribed by the legislation of the Republic of Kazakhstan. It should be borne in mind that the issue and circulation of unsecured digital assets in Kazakhstan is prohibited, except in cases provided for by the laws of Kazakhstan (paragraph 3 of Article 33-1 of the Law on Informatization). Unsecured digital assets include digital currencies, as well as cryptocurrencies. The term “cryptocurrency” itself is spreading after the publication of Andy Greenberg’s article “Crypto Currency” in Forbes on April 20, 2011 [<https://www.forbes.com/forbes/2011/0509/technology-psilocybin-bitcoins-gavin-andresen-crypto-currency.html?sh=c050a01353ee>, access 27 January 2021]. The specificity of this category is that it is not electronic or digital money, but a type of digital currency. Cryptocurrency is an asset that is used as a medium of exchange and is considered reliable because it is based on cryptography [Suleimenov 2021, p. 21].

Since 2009, Bitcoins have been appearing and developing [<https://bitnovosti.com/2014/01/06/bitcoin-eto-finansovaya-platforma-s-raznymi-api/>, access 27 January 2021]. Bitcoins exist only as records in a replicated distributed database, in which all transactions are stored in a publicly accessible open (unencrypted) form, indicating the bitcoin addresses of senders/recipients, but without information about the real owner of these addresses [https://www.wired.com/images_blogs/threatlevel/2012/05/Bitcoin-FBI.pdf, access 27 January 2021]. In addition to Bitcoin, Altcoin, Namecoin, Litecoin, PPCoin, Novacoin, etc. have also become widespread. The circulation of cryptocurrencies is not directly prohibited in most countries, but almost no country is in a hurry to officially recognize them either. In China, for example, citizens are not prohibited from making transactions with cryptocurrencies, and the People’s Bank of China has established such a ban for financial organizations [<https://bitcoinmagazine.com/business/big-picture-behind-news-chinas-bitcoin-bans>,

access 27 January 2021]. Therefore, making transactions with cryptocurrencies is a rather risky activity, since it is not regulated in the legislation of most countries, including the Republic of Kazakhstan, and consequently there is no legal protection in case of possible violations or any other negative consequences for the participants in such transactions.

Regarding the legal nature of money, it should be recognised that money is an unconditional obligation of a state to all those persons (and each of them individually) who hold and use money issued by that state within the jurisdiction of that state (regardless of the form of money, whether it is bank notes, non-cash money or, as now it is widely discussed, digital currency) [Karagussov, Baisheva 2021, p. 106-107]. Recently, attempts by individual states to introduce their own digital currency electronic payment systems have been widely discussed. For example, the PRC is introducing the DCEP, i.e. the digital yuan, which will circulate and convert in the same way as ordinary Chinese banknotes and coins, and “China stands a good chance of becoming the first country to launch a sovereign cryptocurrency” [https://www.profinance.ru/news/2020/10/30/bzut-kitaj-pochti-gotov-k-zapusku-tsifrovogo-yuanya.html, access 27 January 2021]. The idea of introducing a digital euro has also spread in the EU. It is believed that this “could support the Eurosystem’s objectives by providing citizens with access to a safe form of money in the fast-changing digital world”, as well as “a digital euro could constitute a possible contingency mechanism for electronic retail payments that could remain in use even when private solutions are not available” [https://www.profinance.ru/news/2020/10/05/bzmv-etsb-dumaet-o-zapuske-tsifrovogo-evro.html, access 27 January 2021]. The initiative of the Central Bank of Russia to introduce a digital rouble is also widely discussed in the Russian Federation [Tsindeliani 2021, pp. 45-52]. Proposals to introduce a digital tenge are also being voiced in Kazakhstan. Thus, F.S. Karagussov and G.K. Baisheva note that if electronic money is issued by the National Bank of Kazakhstan, it will automatically turn into a digital equivalent of the national currency (digital tenge) and will perform the same functions of money as cash and non-cash tenge; at the same time, it may be acceptable to circulate digital tenge in parallel with cash and non-cash tenge as another form of money in the national currency [2021, pp. 113-114].

In this regard, I would like to dwell on the main provisions of the draft Model Law of the Commonwealth of

Independent States “On Digital Financial Assets”, initiated and developed by the CIS Interparliamentary Assembly [www.iacis.ru, access 27 January 2021] (hereinafter referred to as the Draft). As follows from paragraph 2 of Article 4 of the Draft, this Model Law defines:

1. general principles of the participants’ legal status in the digital financial assets market in the CIS economic space;
2. relations related to the use of digital financial assets in activities based in two or more CIS member states and (or) persons whose personal laws are the laws of different CIS member states;
3. conditions and procedure for applying the legislation on digital financial assets of one CIS member state in the territory of another CIS member state [www.iacis.ru, access 27 January 2021].

While generally supporting the idea and the main provisions of the Draft, there are a number of comments to be made. Firstly, although the Draft makes a distinction between secured and unsecured digital assets in paragraphs 1) and 3) of Article 3, it subsequently establishes a single legal regime for secured and unsecured digital assets. In our view, this is hardly the right thing to do. Primarily, this concerns cryptocurrencies, which are unsecured digital assets. Here we would like to draw attention once again to the fact that the issue and circulation of unsecured digital assets **in Kazakhstan is prohibited**, except in cases provided for by the laws of Kazakhstan (paragraph 3 of Article 33-1 of the Law on Informatization).

As already noted, in accordance with the legislative concept of the Republic of Kazakhstan, digital assets are not a means of payment. However, it should be borne in mind that, a digital asset **does not secure the rights to financial instruments and does not give relevant rights to its owner or proprietor with respect to a legal entity**.

At the same time, Article 12 of the Draft states that “Depending on the purpose and functions performed by a digital financial asset as a financial market instrument, it is allowed to issue and circulate two types of digital financial assets:

1. *Corporate (investment) digital financial asset – a digital financial asset that certifies corporate rights (rights to participate in a corporate legal entity).*
2. *Obligation (credit) digital financial asset – a digital financial asset that certifies a monetary claim or a claim for the transfer of securities or the performance of obligations from securities”* [www.iacis.ru, access 27 January 2021].

In our view, these provisions need to be adjusted, especially taking into account that, not all CIS member countries may have corporate or obligation digital assets.

Further, although the Draft distinguishes between digital assets and digital financial assets, which are a type of digital assets, there is no such distinction in the legislation of the Republic of Kazakhstan and it is expressly stated that a digital asset does not secure the rights to financial instruments. Therefore, the use of a term such as “digital financial asset” in the Draft seems somewhat premature; therefore, it may be necessary to adjust both the title of the Draft and the content of its articles.

We believe that the Draft should make a clear distinction between secured and unsecured digital assets, especially where holders and purchasers of digital assets are concerned - Articles 9-11 of the Draft. It does not seem appropriate to equally protect the rights of holders and purchasers of secured and unsecured digital assets. On the contrary, they should be distinguished and it should be established that the owners/holders and purchasers of unsecured digital assets are not entitled to judicial protection. Therefore, it is necessary to extend the legal consequences of in-kind obligations to unsecured digital assets, and, above all, to cryptocurrencies. In this regard, the provisions of Articles 17-21 of the Draft need to be adjusted accordingly.

Thus, digital assets, and, above all, unsecured ones, are now becoming increasingly popular and therefore it is necessary to develop appropriate approaches to regulating their circulation. Today, it is no longer possible to simply ignore them, as has been the case in the practice of most states in the last decade, it is necessary to legislatively determine what kind of property it is and what its legal regime is.

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Author biography

Svetlana P. Moroz – habilitated doctor in law, professor. Dean of Adilet Law School, Caspian University. Member of the Scientific Advisory Council, Supreme Court of the Republic of Kazakhstan. Author or co-author of over 200 articles, including monographs. Research interest focus on the issues of civil, business and investment law.