Legal Regulation of Digital Financial Assets (Requirements) for Transfer of Securities

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Abstract: In modern Russia, digital investment technologies are actively developing and legitimized at the level of law enforcement, including for such an economic entity as a non-public joint-stock company. For example, Federal Law No. 259-FZ dated 07/31/2020 "On Digital Financial Assets" establishes several types of digital rights; one of them is the requirement to transfer equity securities. The owner of the specified type of digital financial assets has the right to demand the transfer to him of securities that were previously provided for in the Decision on the issue of these digital financial assets acquired by the owner. The Decision sets a deadline or event that determines the transfer of securities to him. The operator of the information system in which digital financial assets were issued provides access to the document on the issue of the relevant securities, as well as information on the pre-emptive right to purchase them, and the procedure for exercising such right. There is also a special feature that digital financial assets can certify the requirement to transfer not any equity securities. As such, only shares of a non-public joint-stock company and equity securities of the same company convertible into its shares are allowed. However, there is not a single non-public joint-stock company in Russia that has issued such digital financial assets. The lack of demand for the design was proved in the course of research, as well as by actual investment practice and the absence of at least one issue of digital financial assets of this type in the 4th year of the said Federal Law. The improvement of investment tools, in its particular case, the studied variety of digital financial assets, should, together with the deep modernization of the domestic financial market, enter into the anti–sanctions legislation emerging in the Russian Federation.

1 INTRODUCTION

In the quantitative composition of the economic entities of the Russian Federation in 2024, non-public joint–stock companies are in third place. More, than 4 million individual entrepreneurs are in the lead; more than 2 million limited liability companies are in second place; closed joint-stock companies are in fourth place; unitary enterprises are in fifth place; peasant (farmer) farms; on the seventh – production cooperatives (artels); on the eighth – open joint–stock companies; on the ninth - public joint-stock companies.

A comparison of the number of commercial organizations with the organizational and legal form of a legal entity massively used in entrepreneurial activity - a limited liability company (as of 05/01/2024 – 2545,789 persons) shows that there are 72 times fewer non–public joint–stock companies (as of 05/01/2024 - 35035 persons). (Federal Tax

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Service, 2024) The absolute accuracy of this information is not of fundamental importance for our research, however, we agree with A.V. Gabov that there is a problem of timely failure to bring information included in the Unified State Register of Legal Entities in accordance with actual (changed) life circumstances (Gabov A.V., 2021a). In addition, in the specified number of non-public joint-stock companies, we do not include, as noted by the specified author, organizations formally represented in the register, but actually ceased their activities (Gabov A.V., 2022).

Federal Law No. 208-FZ of 26.12.1995 "On Joint-Stock Companies" in Article 7 defines that, provided that non-publicity is reflected in the text of the charter and non-placement by open subscription (by offering otherwise for purchase to an unlimited number of persons) shares and equity securities convertible into its shares. Such a company will be a non-public joint-stock company (Federal Law No. 208-FZ of 26.12.1995).

This article of the law establishes quite wide dispositive possibilities for the formation of the provisions of the charter of this legal entity and the conditions for the adoption of these provisions. In particular, on the pre-emptive right of acquisition by its shareholders of shares alienated by other shareholders under reimbursable transactions and the procedure for exercising such right; on the price of shares; on the types of transactions of alienation of these shares; on the proportions when shareholders acquire alienated shares. In addition, the charter allows the non-public company itself to be given a preferential right to purchase alienated shares if its shareholders have not used their right. The Charter of a non-public company may (or may not) provide for obtaining the consent of shareholders to alienate shares to third parties. This provision of the charter is temporary – its maximum term is 5 years from the date of state registration of a non–public company (state registration of relevant amendments to the company's charter). The law also provides for the legal consequences of not obtaining consent from shareholders (Chekhovskaya S.A., 2016).

According to article 7 of Federal Law No. 208-FZ of 26.12.1995, the charter of a non-public company may not include provisions on the pre-emptive right of shareholders to purchase additional shares or equity securities convertible into its shares. The same decision on the absence of a pre-emptive right may be adopted by the general meeting of shareholders unanimously by all shareholders of a non-public company. Special attention is drawn to the rule that the charter of a non-public company may provide for additional obligations of shareholders of the company, in addition to those provided for by the Civil Code of the Russian Federation for participants in business companies. The charter of a non-public joint-stock company must contain a provision on the audit commission, including its absence in this company, on cases of its creation under certain conditions (Civil Code of the Russian Federation).

According to article 11 of the said law, the charter of a non-public company may even limit the number of shares owned by one shareholder, their total nominal value may be limited, and the maximum number of votes granted to one shareholder may be set. The Charter of a non-public company may provide for one or more types of preferred shares granting the right to vote on all or some issues within the competence of the general meeting of shareholders (Article 32). In this regard, A.V. Gabov quite rightly notes that the content of a stock as a security is very difficult (Gabov A.V., 2011). As a result, more than 50 times the legislator makes references to the statutory possibilities of regulating the corporate structure and activities of a non-public joint-stock company. In our opinion, the legal regime of this business company in the current state of legislation is quite flexible and dispositively variable, at the same time, this does not detract from the corporate responsibility of shareholders in the least (Gutnikov O.V., 2019).

2 RESEARCH

In modern Russia, digital investment technologies are actively developing and legitimized at the level of law enforcement, including for such an economic entity as a non-public joint stock company. For example, the legislative innovation of 2020 was the correction of Article 12 (paragraph 7) of Federal Law No. 208-FZ of 26.12.1995 "On Joint Stock Companies", which established that when establishing a company, an indication on the issue of shares of a non-public joint stock company in the form of digital financial assets can be included in its charter. Then (Article 25) all undocumented shares of a non-public company must be issued taking into account the specifics and conditions defined by Federal Law No. 259-FZ of 31.07.2020 "On Digital Financial Assets, Digital Currency and on Amendments to Certain Legislative Acts of the Russian Federation" (Federal Law No. 259-FZ of 31.07.2020). In this regard, A.V. Gabov correctly points out that the situation with the implementation of electronic forms of interaction of those shareholders who own shares of a joint-stock

company in the form of digital financial assets certifying the rights to participate in the capital of a joint-stock company requires separate regulation (Gabov A.V., 2021b).

According to article 1 (paragraph 2) of the said law, digital financial assets are digital rights, including (among other things) the right to demand the transfer of equity securities, which are provided for by the decision on the issue of these digital financial assets. Federal Law No. 259-FZ of 31.07.2020 establishes several types of the mentioned digital rights, the fourth of which is the requirement to transfer equity securities. We agree with Rozhdestvenskaya T.E. and Guznov A.G. that digital law always presupposes an obligated person who issues this right (either in the form of a utilitarian digital right or in the form of digital financial assets) (Rozhdestvenskaya T.E., Guznov A.G., 2021). At the same time, it should be clarified that digital financial assets (requirements for the transfer of equity securities) have nothing to do with derivative financial instruments (Gruzdev O.S., 2017, 2018). The definitive interpretation of digital rights is enshrined in the Civil Code of the Russian Federation (Article 141.1), as it seems to us, in a controversial formulation, in this regard, we are impressed by the position of understanding digital rights, justified by the team of authors in the work (Banakas S., Popondopulo V.F., Petrov D.A., Silina E.V., 2023).

Why is the existing legitimate opportunity not of interest to any of the issuers - business entities? After all, the shadowing of the economy gives access to resources to a wide range of businesses, and allows minimizing to some extent the consequences of economic crisis phenomena (Kharitonova Y.S., Sannikova L.V., 2021). The specifics of the issue and placement of digital financial assets certifying the right to demand the transfer of equity securities are regulated in Article 12 of Federal Law No. 259-FZ of 31.07.2020. The owner of the specified type of digital financial assets has the right to demand the transfer to him of securities that were previously provided for in the Decision on the issue of these digital financial assets acquired by the owner. The Decision sets a deadline or event that determines the transfer of securities to him. The operator of the information system in which digital financial assets were issued provides access to the document on the issue of the relevant securities, as well as to information on the pre-emptive right to purchase them, and the procedure for exercising such right. There is also a special feature that digital financial assets can certify the requirement to transfer not any equity securities. As such, only shares of a non-public joint-stock company and equity securities of the same company convertible into its shares are allowed. At the same time, the procedure for their issue fully complies with the norms of Federal Law No. 39-FZ of 22.04.1996 "On the Securities Market" (Federal Law No. 39-FZ of 22.04.1996).

Hypothetically, a non–public joint-stock company can issue digital financial assets in the information system of one of the operators (as of June 2024, there are eleven in the Russian Federation) and immediately offer them to investors in June 2024 (The Bank of Russia, 2024a). It should be clarified that the operators of financial platforms (nine of them), the operators of the exchange of digital financial assets (two of them) are also entitled to issue digital financial assets (The Bank of Russia, 2024b, 2024c).

In order to interest an investor, these investment objects must have a yield significantly higher than the percentage on traditional bank deposits and other positively proven investment assets (Kozhevnikov O., Romanov A., Chudinovskikh M., 2017). In addition, the investor must clearly understand the degree of liquidity of digital financial assets, the procedure and methods for receiving periodic income payments, as well as guarantees for the timely return of their investments. For example, the Decision on their issue will indicate that the investor has the right in six months – in December 2024 – to file a claim for receiving bonds convertible into ordinary shares of this non-public joint stock company in exchange for the presented digital financial assets. If the investor does not exercise his right, the non-public joint stock company will pay the investor the income due on time and the entire amount invested six months ago in digital financial assets. If the investor exercises his right, a non-public joint stock company transfers the above-mentioned bonds to him. Suppose that the document on the issue by this non–public joint–stock company of bonds convertible into its ordinary shares establishes that a year later - in December 2025 - the bondholder will receive a certain number of ordinary shares of a non-public company on a set date as a result of the conversion of those bonds available to the investor. During the one-year period of bond ownership, the investor must also receive regular income that corresponds to his financial interests.

Along with the analysed theoretical scheme, which includes intermediate securities convertible into shares of a non-public joint-stock company, it is undoubtedly allowed to issue digital financial assets (requirements for the transfer of equity securities of a non-public joint-stock company), initially providing for the receipt of a certain number of ordinary shares

of a non-public company within a certain period. It is likely that intermediate bonds as their issuer can redeem convertible securities. A non–public joint stock company, if, due to some circumstances, this business entity is not interested in converting debt on bonds into shares of the company. Such termination of the investment relationship is also quite acceptable.

Let's ask ourselves, why is the multi-way scheme presented, aimed at acquiring shares of a non-public joint-stock company, needed and demanded by whom? Essentially, an investor, by acquiring digital financial assets (requirements for the transfer of equity securities of a non-public joint-stock company), invests his capital in a place in the queue to receive equity securities of a non-public joint-stock company at a certain date in the future. The money enters the issuer's household at a time, remains a working asset all the time, after a certain period, the requirements corresponding to investments are transformed into shares of the authorized capital of a non-public joint-stock company. During the entire waiting period for receiving these shares, the investor receives income on the invested capital.

Perhaps the time lag delaying the receipt of shares would be beneficial to the investor in addition to the fact that he receives regularly paid income on digital financial assets, of which he is the owner. If the price, for example, of ordinary shares were fixed in advance for the entire period, and after its expiration would increase in the market. This is the economic meaning of the issuer's options. However the shares of a public joint stock company do not have a market turnover of shares, their prices do not increase. Let us also ask the question, is this investor an outsider who intends to wait for a fee and join his shareholders in six months or a year? After all, a joint-stock company is non-public, how does an investor receive information about the state of its financial and economic activities? Can an investor be a foreign entity, or has the legislator come up with such an exotic multi-way scheme for the shareholders of a non-public joint-stock company themselves, so that they use digital rights to invest in additional issues of shares of their company? In this situation, a non-public joint-stock company does not have the obligation to provide information. Then one of the goals of the existence of this institution is not achieved – minimizing the information asymmetry of various market participants, so that their decision-making is determined solely by economic factors, and not by priority access to information (Gabov A.V., 2020). It should be noted here that the owner of digital financial assets (requirements for the transfer of equity securities of a non-public joint-stock company), undoubtedly, can be any shareholder of any non-public joint-stock company, but may not be a shareholder, in accordance with Federal Law No. 259-FZ of 31.07.2020.

We believe, firstly, the legislator intended to use this digital investment tool to help a non-public joint-stock company obtain financial resources before the company issues equity securities in order to launch these investments into economic activity as soon as possible. In addition, when the money has already been invested in the business, you can safely engage in the issue of shares of a non-public joint-stock company and (or) equity securities of the same company, convertible into its shares. Secondly, it is established by law that a non-public joint stock company is deprived of the right to publicly offer its shares to a wide range of investors. However, there is no ban on targeted work with individual investors personally; it is obvious that digital financial assets (requirements for the transfer of equity securities of a non-public joint-stock company) are a legitimate way to attract third-party investors. Which are not shareholders and their subsequent involvement in the business of this non-public joint-stock company on a long-term basis by deferred sale of additional shares issued to them. Thus, digital financial assets, figuratively speaking, allow you to "open a closed subscription" to shares of a non-public joint stock company and form a public offer for a limited number of people.

These brilliant ideas of the legislator would have positive practical results, would be very widely demanded by business entities. If the issue of digital financial assets in the information system (requirements for the transfer of equity securities of a non-public joint-stock company) were significantly simpler, cheaper and faster than the issue of additional shares of a non-public joint-stock company, which are the purpose of all this digital legal investment constructions. We believe that the release of digital requirements of this type is not difficult.

According to Article 2 of Federal Law No. 259-FZ of 31.07.2020, both the release and termination of digital financial assets in the same closed loop – in an information system, without contacting the exchange operator, are provided for. The primary emergence (release) of digital financial assets, the emergence of the rights they certify, is expressed by an entry in the information system about their transfer to the first owner; the operator himself usually makes the entry. Digital financial assets can be credited by the operator to the depository as a nominee holder, taking into account the rights to these assets owned by other

persons. According to article 3 of the Law, at least 12 mandatory provisions are included in the Decision on the issue (drawn up in electronic form) (Idrisov H.V., 2020). In particular, the first is information about the person issuing digital financial assets, including information about his website; the second is information about the operator issuing digital financial assets; the third is the type and scope of rights certified by digital financial assets of this issue. As part of our research topic, this will be the requirement of the asset owner to transfer to him, for example, in December 2025, fifty ordinary shares of a non–public joint stock company. It should be clarified that the law allows for the certification of several types of rights by issued digital financial assets. In addition, one of them, at his choice, the owner of the issued digital financial assets has the right to implement according to the Decision (Andreev V.K., 2020a).

Along with the mandatory provisions, the Decision may contain an explicit and unambiguous indication of the responsibility of the person issuing digital financial assets. It is mandatory to place the Solution in open access on Internet sites, firstly, the person issuing the assets, and secondly, the operator of the information system. Such a document is recognized as a public offer. As part of our research topic, the Decision to issue digital financial assets certifying the right to demand the transfer of ordinary shares of a non-public joint-stock company will provide that it be addressed to a certain circle of persons.

Let us further evaluate, for comparison, the algorithm for issuing shares by a non-public joint-stock company, including the submission of electronic documents via the Internet information and telecommunications network. The first is the adoption of a decision on the placement of equity securities. The second is the approval of a decision on their issue. The third is the registration of the issue of equity securities. The fourth is the placement of these securities. The fifth is the state registration of a report on the results of the issue or the submission of a notification on the results of the issue of equity securities. We do not find that this is a complex and cumbersome mechanism in modern regulatory regulation (Federal Law No. 514-FZ of 27.12.2018). The Regulation of the Bank of Russia of 19.12.2019 No. 706-P "On Standards for the Issue of Securities" (hereinafter – the Standards of Issue) regulates in detail: general requirements for the procedure for issuing securities; the implementation by the Bank of Russia of state registration of issues (additional issues) of securities, when required. Features of the issue of securities placed by subscription; features of the issue of securities placed by converting convertible securities into them (Regulation of the Bank of Russia, 2019). Note, for example, an interesting new rule (clause 36.11), which was not in the Emission Standards until 2020, – when placing shares only among shareholders, it is allowed to increase the authorized capital of a joint-stock company not by a whole number of times. The total term of the placement of shares is the same (no more than 1 year), it is possible to extend this period up to 3 years.

It should also be noted that if the shareholders of a non-public joint-stock company have signed a corporate agreement, the process of placing shares of the company might depend on its provisions. Firstly, the sequence of exercising the pre-emptive right to purchase shares placed by a non-public joint-stock company. Secondly, the procedure for placing shares (securities convertible into shares), if, according to the company's charter or corporate agreement, this procedure for exercising the pre-emptive right to purchase placed shares (securities convertible into shares) differs from that established by Federal Law No. 208-FZ of 26.12.1995 and Emission standards.

A corporate agreement may dispositive add various conditions for interaction between shareholders of a non-public joint-stock company, allowing them to regulate in their company a non-standard procedure for exercising the pre-emptive right to purchase outstanding shares (securities convertible into shares). It is possible that a certain shareholder (shareholders) or all of them do not have such an advantage; or a certain shareholder (shareholders) has an advantage disproportionately to the available blocks of shares, etc. Here, an investor who intends to invest in digital financial assets with the far-reaching goal of acquiring shares of this non-public joint-stock company faces the difficult task of studying the provisions of the charter and corporate agreement of this company. At the same time, legal uncertainty arises because there is no prohibition on adjustments to the articles of association. And (or) the corporate agreement of a non-public joint stock company in the period after the date of issue of digital financial assets by the company and before the date of issue of shares by the company (securities convertible into shares).

Federal Law No. 208-FZ of 26.12.1995 establishes that the decision of the general meeting to increase the authorized capital of the company by placing additional shares is taken by a majority of 3/4 of the votes of shareholders (owners of voting shares) who participated in the general meeting of

shareholders of a non-public joint stock company (Article 28). Because of this decision, shares are placed by closed subscription: in a circle of pre-determined persons, shares are offered to them for purchase. Shareholders who voted against (as well as those who did not vote at all) have the pre-emptive right to purchase additional shares in proportion to their existing blocks of shares (article 40). It should be clarified that within the framework of these procedures, it is necessary to interact with the registry holder (registrar), who is currently authorized to register the issue (additional issue) of shares of a non-public joint stock company; it is not necessary to contact the Bank of Russia for this (clause 1.8 of the Emission Standards). Registrars (thirty-one legal entities) are also entitled to register issues of shares placed on investment platforms (The Bank of Russia, 2024d). Although, initially, as V.K. Andreev correctly notes, investment platforms had narrower powers (Andreev V.K., 2020b). In this regard, we support the definition of A.V. Gabov: "an investment platform is information contained in databases, as well as technologies and technical means that allow an investor and a person attracting investments to interact, perform legally significant actions, and most importantly, conclude investment contracts" (Gabov A.V., 2021c).

Perhaps, at some stages, the procedure for issuing additional shares by a non-public joint-stock company may be characterized as difficult, but its relative difficulty still does not cancel out its additional burdening and preceding issue of digital financial assets. Moreover, if, after the release of digital financial assets, it is necessary to issue intermediate securities first, which are later converted into shares of a non-public joint-stock company. Therefore, digital financial assets as requirements for the transfer of shares of a non-public joint-stock company and equity securities of the same company convertible into its shares cannot be of interest to these business entities, as well as their potential investors. They will not be in demand due to an excessive number of procedures involving the issuance and circulation of intermediate assets along the way to achieve the goal of investing capital in shares of a non-public joint-stock company. Despite this, in this regard, I would like to share the optimism of the authors who claim that the result of the digital transformation of management tools for modern corporations will be an increase in business profitability and competitiveness in the market (Laptev V.A., Chucha S.Yu., Feyzrakhmanova D.R., 2022).

3 CONCLUSIONS

The contention of K.A. Ponomareva and A.O. Simonov that digital financial assets are digital rights combining the features of traditional exchange–traded financial instruments confirming corporate rights and obligations with tokenization trends is controversial (Ponomareva K.A., Simonov A.O., 2023).

We believe that the legislator, within the framework of Federal Law No. 259-FZ of 31.07.2020, has identified a type of digital financial assets – digital rights, which simultaneously combine a digital object for investment and a digital certificate of the special rights of their owner (investor) to demand shares of a non-public joint stock company in the future. Because of this, the legal nature of digital financial assets of this type is difficult. A particular difficulty lies in the fact that digital financial assets themselves certify the requirements for the counter-provision of equity securities, which in turn certify other rights; an overly cumbersome construction of "rights to rights to rights" is being built.

V.A. Rybakov quite correctly points out that the effectiveness of law is the ratio of the purpose of legal regulation and the positive result obtained, taking into account material costs and legal tools (Rybakov V.A., 2019). If we use the formula of the specified author, we will end up with zero efficiency in regulating digital financial assets certifying the requirements for the counter-provision of securities of a non-public joint-stock company. The complete lack of demand for the design was proved during the research process, as well as by actual investment practice and the absence of at least one issue of digital financial assets of this type in the 4th year of Federal Law No. 259-FZ of 31.07.2020. At the same time, we observe quite active use by business entities – recipients of investments of the simplest (natively digital) type of digital financial assets – monetary claims.

We also believe that during the period up to 2030. A unified Internet platform should be created under the Ministry of Justice of the Russian Federation, on which digital registration and accounting of legal entities of all organizational and legal forms, including non-public joint-stock companies with digital shares of authorized capital, will be carried out. Thus, during 2023, releases were carried out in the information systems of operators, in particular: Atomize LLC - 152; ALFA-BANK JSC - 72; Sberbank PJSC – 57 issues. For the first 4 months of 2024: Atomize LLC - 34; ALFA-BANK JSC - 53; Sberbank PJSC – 11 issues (Cbonds, 2024). Digital

financial assets in the form of monetary claims are quite in demand, since they are the original digital instruments, they are easy to use in investment relations, and are not burdened with a pile of "rights to rights to rights".

Without denying the likelihood that after some time in the financial market, the investment structures we have studied will be perceived quite ordinarily, we consider it necessary to adjust the legislation on digital financial assets. We believe that as part of the current changes, it is necessary to regulate the legal regime for the transfer of securities of a non–public joint stock company based on legal fiction - digital investment equivalents (digital equivalents of bonds, shares, issuer's options, Russian depositary receipts, etc.). As E.V. Abramova notes, the use of legal fictions in lawmaking in some cases is the only possible means of regulating public relations (Abramova E.V., 2019). Even if, as A.V. Gabov quite correctly points out, such a solution is a palliative, a temporary measure that, according to our national tradition, can often exist for more than a significant period of time (Gabov A.V., 2019). It should be noted that the conclusions formulated by Kirillova E.A., Zulfagarzade T.E., Metelev S.E. on digital objects are in tune with our proposals. Digital objects are an independent legal category, a cryptographic code that gives the owner of a digital object the right to own, dispose of, alienate, make transactions with it and other actions not prohibited by law (Kirillova E.A., Zulfugarzade T.E., Metelev S.E., 2022).

In general, the identified problems should be solved comprehensively by modernizing the relevant legislation and the entire regulatory model of the accounting and registration infrastructure of the financial market. Touching upon this issue here in the most general terms, we propose a single platform of digital investment equivalents (analogous to the digital ruble platform) in the structure of the Bank of Russia. On this single platform, all domestic issuers issue digital investment equivalents according to the centralized prudential blockchain scheme (transactions are registered, recorded, and stored on it), the species diversity of which will be as wide as possible and will allow digitizing all existing equity securities by 2030 (Goncharova M.V., Goncharov A.I., 2023). Then such heaps of the "rights to rights to rights" type, which are so difficult for investment application, including digital financial assets issued in the form of demands for their transfer to the owner of securities of a non–public joint–stock company, will be replaced by original digital investment equivalents that are understandable for use in investment relations - digital shares.

The improvement of the studied investment tools, in its particular case, one type of digital financial assets, undoubtedly, together with the deep modernization of the domestic financial market, should enter the anti–sanctions legislation emerging in the Russian Federation, cleared of unnecessary declarations and illusions, with simple and effective means to solve state tasks (Gabov, A.V., 2023).

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