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REVISITING THE DEFINITION OF THE TERM "INVESTMENT" AND ITS UNIFICATION IN UKRAINIAN LEGISLATION

Abstract. The article analyzes the scientific approaches to the definition of "investment", which are reflected in the foreign and domestic economic and legal literature. Four scientific schools have been identified: Western European, American, Russian and Domestic, each of which has demonstrated its own approaches to addressing the identified scientific issues.

The legislative definition of the category is determined, which is fixed in the domestic normative legal acts. It was stated that there is no single approach to the essence and content of the concept of "investment". Regulatory legal acts of different legal force provide different interpretations of the definition, while other legislative acts generally avoid, do not provide an appropriate interpretation. Such a state of regulatory provision not only generates discussions among scientists, but also does not create favorable conditions for the practical sphere of investment activity.

Based on the analysis of the norms of domestic and international law, taking into account the achievements of the economic and legal scientific heritage, the author's concept of "investment" as an investment in objects of entrepreneurial and / or other economic activity as property and / or property rights is proposed for the purpose of obtaining income (profit, interest), not excluding, however, the possibility of achieving an additional socially significant beneficial effect.

The necessity of unification of the concept of "investment" in the domestic normative-legal acts and bringing it in line with the norms of the European legislation is emphasized. The process of improving the legislation about investment activity should be based on scientific achievements, that was emphasized. It is concluded that the unification of the concept of "investment" will avoid arbitrary, voluntarist interpretation of it and clearly identify those areas of improvement in which the latest Ukrainian investment legislation should move.

Keywords: investment, investment activity, investor, property, capital.

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ДО ПРОБЛЕМИ ВИЗНАЧЕННЯ ПОНЯТТЯ «ІНВЕСТИЦІЯ» ТА ЙОГО УНІФІКАЦІЇ У ВІТЧИЗНЯНОМУ ЗАКОНОДАВСТВІ

Анотація. У статті проаналізовано наукові підходи до визначення поняття «інвестиція», відображені в зарубіжній та вітчизняній економіко-правовій літературі. З'ясовано законодавче визначення категорії, закріплене у вітчизняних нормативно-правових актах. Наголошено на необхідності вироблення єдиних підходів до розуміння змісту аналізованої дефініції та уніфікації в законодавчому просторі. Надано авторське визначення поняття «інвестиція».

Ключові слова: інвестиція, інвестиційна діяльність, інвестор, майно, капітал.

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К ПРОБЛЕМЕ ОПРЕДЕЛЕНИЯ ПОНЯТИЯ «ИНВЕСТИЦИИ» И ЕГО УНИКАЦИИ В ОТЕЧЕСТВЕННОМ ЗАКОНОДАТЕЛЬСТВЕ

Аннотация. В статье проанализированы научные подходы к определению понятия «инвестиция», которые отражены в зарубежной и отечественной экономико-правовой литературе. Выяснено законодательное определение категории, закрепленное в отечественных нормативно-правовых актах. Отмечена необходимость выработки единых подходов к пониманию содержания рассматриваемой дефиниции и унификации в законодательном пространстве. Предоставлено авторское определение понятия «инвестиция».

Ключевые слова: инвестиция, инвестиционная деятельность, инвестор, имущество, капитал.

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Introduction. The Ukrainian state has currently chosen the line of European integration once and for all. The approaches are taking place in political, economical and legal areas. To facilitate the process of integration Ukrainian legal scholars have to analyze and consider the priceless experience of European countries in the field of state building and formation of a strong economic platform. The latter is impossible to create without the involvement of new capital investment projects, which, in their turn, would strengthen the economic environment within the state and positively influenced on the development of the country. Hence, the study of investment activity institution at large and its structural elements on a standalone basis appears to be very important and indispensable.

Research analysis and problem statement. The interest to the stated problem is continually drawing attention of domestic and foreign lawyers, economists and financial experts. The scholars have not only studied the subject matter of the term but also provided it with the attributes and structural elements as well as classified it under different criteria, etc. Nevertheless, despite of considerable attraction of scholars the given problem has not been solved yet. Such a situation influenced normative consolidation of the term “investment”. Thus, various statutory instruments represent diverse details of the given category.

The purpose of the article has been the analysis of the term “investment” subject matter in the domestic and foreign legal heritage and national legislation as well as providing the author’s specification of the term for the benefit of unified approach of the term interpretation.

Results of research. It is to be recalled that the term “investment” comes from the Latin word “investire” meaning «to put up», “to save up”. The researchers began to take interest in the determining of the category which we are analyzing in our paper in the XIX century. Thus, one of the first scholars initiating the analysis of the problem was the Russian economist B. Brandt. In the scientific paper “Inostrannye capity” published in 1900, he identified the category “investment” with the term “capital expenditure” [1, 240]. However, not all the scholars of that time shared his views. Namely, the English economist and the father of the theory of investment J. Keynes placing the emphasis on the inseparability and interconnection of the terms “investment” and “capital expenditure” differentiated them [2, p.179].

Their contemporary, the German economist H. Lobes held to completely different point of view. He proposed to distinguish the terms “investment” and “capital expenditure”. Had analyzed the details of each category individually the scholar reached the conclusion that they were non-identical. H. Lobes interpreted capital expenditures as the expenses for recovery of the main funds and their accretion, while the investment, in his opinion, could be viewed as the process of living

and social labor costs to create productive capacities through which, in the production process, living labor creates more value than it consumes [3, p.198].

Sharing the views of the above-mentioned researcher we emphasize on the necessity of the terms “investment” and “capital” distinction since they have different economical and legal meaning. The term “investment” has wider meaning and combines a number of processes. All in all there are no synonymous terms in the science, but only synonyms.

Despite more than a hundred years of study the problem has not been solved yet. So, both foreign and national literatures lack the unified interpretation of the category “investment”. Besides, there are differences not only in its theoretical field but in the legislative area as well. The rules and regulations of diverse legal force provide contradictory definitions thus creating various kinds of disputes among scientists and restricting the ability of favorable conditions for the practical area of the investment activity creation. Therefore, we suggest considering the different scientific approaches to the term “investment” definition in the first part of our research while the second part of the research will be devoted to its legal interpretation.

The analysis of the term should be started with the division of modern scholarly traditions demonstrating different approaches to the stated problematic into four groups, namely, Western European school, American school, Russian school and Ukrainian school.

The term “investment” has been one of the most widely used categories in modern Western European economic and legal literature. Nevertheless its interpretation is relatively narrow and contradictory. Thus, Macmillan dictionary of legal terms defines investment as the expenses intended for the production of goods and capital expenditures, and not for their direct consumption [3, p.198]. Analyzing the essence of the given term Macmillan illustrates it through more stated category of “capital”, although the definition of the letter is not demonstrated through the prism of investment. In their turn, distinguishing the categories of investment and capital economists E. Dolan and D. Lindsey define the investment as “ the increase in the amount of capital that functions in the economic system, that is, the increase in the supply of productive resources” [4, p.28]. The definition provided is aligned with the scientific views of other English scholars. Thus, K. McConnell and S. Bru characterize investment as “production costs, accumulation of means of production, increase of material stocks” [5, p.76].

We adhere to the point that the statements provided are not fully justified, as far as the category “investment” is viewed as the means of productive resources increase and is narrowed down to the productive process of investment. Considering such an approach, involvement of capital into securities, bank deposits and intangible assets does not belong to the category “investment” as far as productive resources increase doesn’t occur. Hence, it contradicts the natural context of the category.

The use of complex approach in relation to the definition of the term analyzed by the English economists W. Sharp, G. Aleksander and J.Bailey allowed them to view the term “investment” in its wide and narrow sense. The narrow sense of the term implies the deposit of money with the purpose of getting benefit in future [6, p.150]. The wide sense of the term “investment” is stated in the definition "The financial market or the structure in which the investors operate, constituting the securities trade as well as the methods and conditions of their purchase and sale" [6, p.155]. Nevertheless, we consider this interpretation to be inaccurate and incomplete. That inaccuracy represents narrowing of its value to the investment of exclusively monetary forms. By defending this point of view the scientists reject the possibility of tangible and intangible investment as well as nominal assets investment activity.

Another American economic and legal school mostly analyzes the category “investment” taking as the basis the process of capital injection and its expenditure side. While analyzing the features and the types of investment the scholars put a focus on the expenditures incurred by the subject of such legal relations (an investor), along with the necessity of savings being the integral condition of the investment activity in the future. Investments are expenditures on the purchase of equipment, houses and residential property, which ensure the growth of the productive power of the entire economy in the future – says J. Sachs, – saving by the society a part of its current income

means that the part of its production income can be directed not at consumption, but at investment” [7 p.291].

The definition suggested has found its supporters and followers. Namely, L. Gitman and M. Joehnk supported J. Sachs and agreed to admit the dual nature of investment process combining tangible assets expenditures in a way of capital injunction and the development of earnings in the future [8, p.10]. In their turn the Professors of Boston University Z. Bodie and J. Marcus as well as the Professor of California University A. Kain gave the definition of “investment” as “the involvement of monetary and/or other resources in anticipation of future benefits” [9, p.92]. The scholars emphasized the main peculiarity of investments to be temporary tangible costs to gain benefit in the future.

To sum up the achievements of the American scientific school we consider the abovementioned approach to be the most comprehensive as far as the investments can include all the commercial operations of business entities along with all the deposits of physical persons.

In our research we give consideration to the Russian economists’ views as the third scientific school. Thus, analyzing the activity of the investment market and the means of its legal regulation, I. Komarov specified investment as the contribution of different financial, material and technical resources with the purpose of social and economic effect [10, p.3]. The stated viewpoint was supported by a great number of academic lawyers and economists of Russian Federation and was used as a basis for further research. Modern Russian scholars E. Rybina and O. Veretennikova analyzing the essence of investment within the economic system specified it as capital injunction made by state power entities, legal and physical persons being residents and non-residents of the country, held in securities with the purpose of strategic target achievement and reflected through the prism of economic effect achievement by the growth of capital or for the purpose of another goal achievement upon the condition of the obligatory risks and rewards forecasting [11, p.136–141]. As we can see, the modern Russian scientific school being limited with the relics of the past as well as fixations of the present proceeds the term analysis through the prism of capital injunction.

The achievements of the new Ukrainian science can be related to the fourth historiographic direction. Our national school has been in the process of its formation; while creating its own background it uses positive foreign experience of Russian, American and European scholars. So, we can find the meaning of the term “investment” in the Ukrainian defining dictionary as follows “monetary, material and intellectual assets deposited into various kinds of industrial and non-industrial activity [12, p.52]. We consider the definition of our modern Ukrainian researcher A. Omelchenko to be more specified. The researcher defines investment as “property assets or proprietary rights governed by legal regulations deposited in any kind of object for obtaining revenues or material wealth in the future” [13, p.29].

While analyzing legal regulation of foreign investments modern Ukrainian researcher Yu. Prytyka paid attention to the notion of “investment” category. The researcher viewed it in two aspects. The dynamic aspect reflects economic notion of the term; the static aspect specifies its legal content. “The investment is primarily property or intellectual ability unlimited in its commercial circulation, the purpose of which is obtaining some kind of profit, achieving another socio-economic effect. The objects of investment can be the objects of both commercial activity and certain spheres of social life (science, education, culture, etc.” [14, p.32].

Thus, the study of the term “investment” definition in current scientific papers allowed as to stand out four scientific schools, either of which demonstrates individual approach to the solution of the given problematic issue. While considering the differences in those approaches we emphasize on a common feature providing the ability to find the common denominator in the scientific approaches mentioned. The denominator means a single purpose of the investment activity, namely, the ability to obtain revenue in the future.

The analysis of the notion of the category “investment” in economic and legal literature provides us with the specification of four scientific schools, namely, Western European, American, Russian and Ukrainian either of which demonstrates individual approach to the solution of the given problematic issue. The same pattern is traced in the field of regulatory environment. The national

legislative instruments are not unified in relation to conceptual framework of the analyzed concept. Thus, fundamental rules and regulations in the field of investment activity, namely, the Law of Ukraine “On Investment Activity” dated September 18, 1991 [15], the Law of Ukraine “On the Regime of Foreign Investment” dated March 19, 1996 [17], the law of Ukraine “On Foreign Investment” dated March 13, 1992 [16] and Tax Code of Ukraine do not provide the unified interpretation of the term “investment”.

For instance, the Law of Ukraine “On Investment Activity” dated September 18, 1991 [15], borrowing the notion of investments from the Law of Ukraine “On Foreign Economic Activity” dated April 16, 1991 defines it as “all kinds of property and intellectual values, invested by foreign economic entities in Ukraine, resulting in making profit (income) or achievement of social effect” [18]. The given definition has been the basis for national investment legislation. However, we consider it does not fully correspond to legal and economic nature of the term “investment”. The legislature having defined the only purpose of the investment activity, namely, obtaining revenue in a way of some profit or interest, has not paid due consideration to the possibility of additional useful value achievement. According to the definition, provided that obtaining of revenue is not the primary purpose, such an activity cannot be considered to be investing; instead, other economic categories are used, like consumption, saving, expenditures, etc. It would be appropriate to view investments in the context of targeted deposit of capital in its various forms for a specific period in different objects.

The Law of Ukraine “On the Regime of Foreign Investment” dated March 19, 1996, provides the term “foreign investment” with the following definition “foreign investments are stores of value which are invested by foreign investors in objects of investment in accordance with the legislation of Ukraine with the aim of obtaining profit or achieving social results”. Though the definition of investment in this legal instrument is absent [17].

The Tax Code of Ukraine adopted December 2, 2010 is obviously intended to solve the given problem. Providing the process of investment activity it specifies the concept of investment as “business transactions involving acquisition of fixed assets, intangible assets, equity rights and / or securities in exchange for money or property” (Art. 14.1.81 TLU) [19].

Conclusion. To sum up, the analysis of national legislation in the field of investment activity has demonstrated the absence of the single approach to the nature and the context of the term “investment”. In our opinion, a new legal instrument does not always take into account the previous one, and the achievements of economic and legal literature has been beyond the legislator’s interest. Such an approach to rule-making shows a low level of legislative technique development and demonstrates contradictions in the statutory provisions of some rules and regulations.

On the basis of national and international legal provisions analysis and considering the achievements of economic and legal scientific heritage we suggest the definition of the term “investment” as “depositing assets and/or property rights into entrepreneurial and/or other economic activity for the purpose of obtaining revenue (in the form of profit or interest) not excluding the possibility of additional socially significant effect”. Having applied the complex approach legislators should unify the term “investment” in the national statutory provisions and bring it up to the norms of European legislature. As the basis of further improvement of investment activity legislation scientifically grounded and unified definitions specified for all fields of national law should be taken. In this way we can avoid arbitral and voluntary interpretations of abovementioned concepts and clearly identify those directions for the improvement of national investment legislation which must be followed.

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