

Legal Regime of Securities of Joint Investment Institutions

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Abstract. The article examines the peculiarities of legal regulation, emission and circulation of securities of joint investment institutions on the basis of which their comparative legal analysis was conducted for the first time. The subject of the study is the legal regime of securities of joint investment institutions – shares of corporate investment funds and investment certificates of unit investment funds. The purpose of the article is to study the features of the legal regime of securities of joint investment institutions – shares of corporate investment funds and investment certificates of unit investment funds, as well as to identify problems of their legal regulation. As far as methodology is concerned, in the course of the research general scientific and special legal methods of cognition were used. The comparative and legal methods made it possible to study the current legislation on the activities of joint investment institutions to establish common and distinctive features of securities of joint investment institutions. Methods of scientific induction and deduction provided an opportunity to investigate the legal nature of the relations that arise from securities of institution of joint investment. The problematic aspects of legislative regulation of securities of joint investment institutions were identified. The peculiarities of shares of corporate investment funds and investment certificates of unit investment funds were investigated. Common and distinctive features of securities of joint investment institutions were identified. Special attention is given to the fact that shares of corporate investment funds and investment certificates of unit investment funds, although assigned by the legislator in one category – securities of joint investment institutions, significantly differ in the legal nature of certifying relations. It is stated that the corporate investment fund shares give the investor of such a fund corporate rights instead of investment certificates of unit investment funds certify ownership. The article will be useful for practitioners in the field of law and economics, students of higher education, scientific and pedagogical workers of law and economics faculties, as well as all interested readers

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● INTRODUCTION

At the present stage of development, Ukraine is in the position of instability which extends to the legal regulation of corporate and investment relations. The state faces such problems as attracting investment without which industry development and implementation of investment projects is impossible due to lack of state funds or the reluctance of investors to risk their own capital. The reasons for this problem are the lack of sufficient funds in the state or the investors' unwillingness to risk equity as a result of imperfect legal regulation and the state guarantees of investment activity. According to the Ukrainian Investment Business Association, as of 27.06.2022, the number of joint investment institutions in Ukraine is 1,753 and there are 309 asset management companies. As of November 30, 2021,

the assets managed by the asset management company of corporate and mutual investment funds amounted to UAH 522,907 million [1].

Regain and development of economic processes in Ukraine are determined by the size and structure of investments, quality and speed of their placement. Joint investment institutions (corporate and unit funds) play a very important role in attracting investment to Ukraine's economy.

In Ukraine, the law defines two types of joint investment institutions, which, depending on the order of formation and operation, are divided into corporate investment funds and unit funds (Law of Ukraine "On Joint Investment Institutions" [2]). The collective form of investment through the joint investment institutions is becoming

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more attractive to individual investors due to the fact that participation in the joint investment institution is carried out through the purchase of securities of joint investment institutions such as shares of corporate investment funds or investment certificates of unit funds.

The legal regime of securities of joint investment institutions is determined by the Law of Ukraine "On Joint Investment Institutions" [2], "On Capital Markets and Organized Product Markets" [3] and other regulations on the functioning of the stock market. The basis of legal regulation of securities of joint investment institutions is the Law of Ukraine "On Joint Investment Institutions" [2], as its effect extends to public relations in the field of joint investment as part of the formation and operation of joint investment entities, to ensure guaranteeing the ownership of securities of joint investment institutions and protection of the rights of participants of joint investment institutions. The main legal acts regulating the activities of joint investment institutions at the international level are the Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) of 12/20/1985 [4], as well as the EEC Directive 93/22/EEC [5] on investment services in the securities field of 05/10/1993.

To date, the legal framework for the activities of investment funds in Ukraine has been formed, but due to constant changes in legislation it has many internal contradictions and certain problems and shortcomings.

A problematic aspect of the legal regulation of securities of joint investment institutions, in particular, shares of corporate investment funds is the fact that the provisions of the Law of Ukraine "On Joint Stock Companies" [6], which determines the order of emission and circulation of shares, as well as the rights certified by shares, are not implemented to the definition of legal regime of shares of corporate investment funds. These provisions can be found in Part 2 of Art. 3 of the Law of Ukraine "On Joint Investment Institutions" [2]. The legislation on joint stock companies does not apply to the regulation of corporate funds. This position of the legislator, in our opinion, is unfounded and inconsistent for the following reasons:

- firstly, the legislator defined the organizational and legal form of the corporate fund as a joint-stock company (JSC);

- secondly, the Law of Ukraine "On Joint Stock Companies" [6] is applied to:

- insurance companies – in accordance with Art. 2 of the Law of Ukraine "On Insurance" [7], insurers are financial institutions established in the form of JSC;

- stock exchanges – in accordance with Art. 33 of the Law of Ukraine "On Capital Markets and Organized Commodity Markets" [3], stock exchange is a JSC, which concentrates on the supply and demand of securities, promotes the formation of their exchange rate and operates in accordance with this Law, other legislation of Ukraine, the statute and rules of the stock exchange;

- commercial banks – in accordance with Art. 6 of the Law of Ukraine "On Banks and Banking" [8], banks in Ukraine are created in the form of a public JSC or a cooperative bank;

- holding companies – in accordance with Art. 1 of the Law of Ukraine "On Holding Companies in Ukraine" [9] a holding company is a JSC, which owns, uses and disposes

of holding corporate shares (parts, units) of two or more corporate enterprises.

All these entities, as well as the corporate fund, are also specialized joint-stock companies.

The purpose of the article is to study the features of the legal regime of securities of joint investment institutions such as shares of corporate investment funds and investment certificates of unit funds, as well as to identify problems of their legal regulation.

● LITERATURE REVIEW

Regarding the theoretical approaches to the study of securities of joint investment institutions in the legal aspect, the authors believe that the level of research on the problems of legal regulation and theoretical understanding of the legal regime of securities of joint investment institutions are insufficient.

Problems of legal regulation of joint investment institutions were studied in the works of V. Butuzov [10], O. Garagonich [11], M. Danyliuk [12], Yu. Zhornokuy [13], O. Susch [14], O. Slobodyan [15]. The works of V. Butuzov [10] were focused on the study of legal and organizational principles of the functioning of collective investment institutions in Ukraine. The scientific research of O. Garagonich [11] reveals the features of the economic legal personality of joint-stock companies, among which the legal status of corporate investment funds is partially analyzed. M. Danyliuk [12] paid attention exclusively to the legal status of corporate investment funds, while O. Slobodyan [15] determined the peculiarities of the activity of joint investment funds. Scientific research by Yu. Zhornokuy [13] and O. Susch [14] is devoted to the characteristics of legal relations on corporate (joint) investment. The authors state that scholars mostly studied the peculiarities of the legal status of joint and corporate investment funds and the legal nature of the relationship between the investor and the investment fund, or studied general issues of the legal regime of securities: O. Yavorska [16], V. Yarotsky [17]. Y. Kovalenko, T. Bilovus focused on the study of the macroeconomic indicators of individual investors and collective investment institutions in the securities market of Ukraine [18], Serdar Çelik and Mats Isaksson's article provides a framework for analysing the character and the degree of ownership engagement by institutional investors [19]. Among the foreign researchers who have studied the legal regulation of corporate investment funds, mutual funds, their asset management companies and securities in various aspects, the following should be mentioned: D. Gaukrodger [20], J. Morley [21] offer the first general examination of mutual fund capital structure regulation under the Investment Company Act of 1940. Thus, the problems of the peculiarities of the legal regime of shares of corporate investment funds and investment certificates of unit funds, as well as the legal nature of the relationship between the investor and the investment fund remain unexplored.

● MATERIALS AND METHODS

In the course of the research, general scientific and special legal methods of cognition were used. The comparative and legal methods made it possible to study the current legislation on the activities of joint investment institutions

and to establish common and distinctive features of securities of joint investment institutions – shares of corporate investment funds and investment certificates of union investment funds.

Using such methods of scientific induction and deduction, the legal nature of the relations that arise between the investor of the joint investment institution and the investment fund or asset management company on the basis of the acquisition of securities is studied and determined.

The information basis of the study was formed by the current legal acts, which determine the legal regime of securities of joint investment institutions: Civil Code of Ukraine [22], Law of Ukraine “On Institutions of Joint Investment” [2], Law of Ukraine “On Capital Markets and Organized Commodity Markets” [3].

● RESULTS AND DISCUSSION

Securities are a specific object of civil rights and legal relations. The basic principles of legal regulation of securities in Ukraine are reflected in the rules of the Civil Code of Ukraine [22]. In particular, art. 177 of the Civil Code of Ukraine [22], identified among other objects of civil rights, securities, art. 194 reveals the meaning of the concept of a security and art. 195 defines securities groups that can be in civil turnover in Ukraine.

According to art. 194 of the Civil Code of Ukraine [22], a security is a document of the established form with the corresponding details which certifies monetary or other property rights, determines the relations of the issuer of the security (a person who issued a security) and a person who is entitled to a security, and envisages the fulfillment of obligations on such security, as well as the possibility of transferring rights on the security and rights of security to other persons.

Securities according to the order of their placement or issuance are divided into emission or non-emission. Emission securities are securities that certify the same rights of their owners within the limits of one issue of securities in relation to a person who assumes appropriate obligations (issuer) (p. 1 art. 8 Law “On Capital Markets and Organized Commodity Markets” [3]). These include corporate investment funds and investment certificates. In addition, by p. 7 art. 8 Law “On Capital Markets and Organized Commodity Markets” [3] shares of corporate funds and investment certificates are classified as a group of unit securities. Unit securities are securities that certify the owner of such securities (investor) in the authorized capital and/or assets of the issuer (including assets in the management of the issuer) and give the owner (investor) the right to receive part of the income, in particular in the form of dividends and other rights established by law, as well as a prospectus or decision on issue, and for securities of joint investment institutions – a prospectus (decision on issue) of the joint investment institute.

Securities of the joint investment institution have the peculiarities of legal regulation, issue and circulation which are combined into one legal category “legal regime of securities of joint investment institutions”.

In accordance with paragraph 18 of Part 1 of Art. 1 of the Law of Ukraine “On Joint Investment Institutions” [2], securities of the joint investment institution are shares of the corporate fund and investment certificates of the unit

fund. The study of the legal regime of securities of joint investment institutions should begin with the very category of “legal regime”. In legal documentation, the legal regime is considered in a broad and narrow sense. In a broad sense, the legal regime is a special procedure for legislative regulation of activities, actions or behaviour of individuals and legal entities in various spheres of public relations or at certain facilities, including the establishment of the mechanism to ensure the actual implementation of permits, incentives, regulations, guarantees, prohibitions, restrictions, obligations, as well as competent implementation and application of coercive measures and bringing the perpetrators to justice. In a narrow sense, the legal regime should be understood as a special combination of legal tools (legal means) enshrined in the rules of law, characterized by special conditions, specificity (certainty) of social relations, the state of attitude to a particular object and pursues a useful purpose for society and the state [23].

The study of the legal regime of securities of joint investment institutions is relevant because:

- firstly, there are hardly any scientific papers devoted to the study of the legal regime of shares of a corporate investment fund and investment certificates of a unit investment fund;

- secondly, since the shares of corporate investment funds are the object of corporate investment [14] and give investors of such funds corporate rights, it is extremely important to properly regulate this type of securities in order to ensure the rights of investors of corporate investment funds;

- thirdly, the main law, regulating legal relations on corporate investment, is the Law of Ukraine “On Joint Investment Institutions” [2]. Although it has the character of a special law, its norms are references to other laws and bylaws (regulations) such as NCSSM (National Commission on Securities and Stock Market) decisions, statutes and agreements. This creates certain difficulties in their understanding for non-professional investors.

Features of shares of corporate investment funds. As far as shares of a corporate investment fund are concerned, the legislator understands a security issued by a corporate investment fund which certifies the property rights of its owner (corporate fund participant), including the right to receive dividends (for a closed corporate fund), part of the corporate fund in case of liquidation, the right to manage the corporate fund, as well as non-property rights provided by this Law (Paragraph 2, Article 1, Part 1). The Law of Ukraine “On Securities and the Stock Market” [3] also contains a definition of shares of corporate investment funds, but this definition actually duplicates the concept in the Law of Ukraine “On Joint Investment Institutions” [2].

Taking the concept of shares of a corporate investment fund as a basis, the authors can distinguish the features of their legal regime:

- 1) is an issue security;
- 2) the issuer is a corporate investment fund – a legal entity that is formed in the form of a joint stock company and conducts exclusively joint investment activities;
- 3) it certifies the corporate rights of a corporate investment fund participant;
- 4) dividends are charged and paid only on shares of a closed corporate investment fund;

5) dividends on shares of open and interval type of corporate investment funds are not charged and are not paid;

6) shares of a corporate investment fund may be only registered;

7) shares of the corporate fund are extremely simple and exist in an undocumented form;

8) shares of the corporate fund are not subject to the mandatory listing procedure.

The circulation of shares of corporate investment funds depends on the type of corporate investment funds: shares of corporate investment funds of closed type are subject to free circulation on the securities market; shares of corporate investment funds of interval type in the period between intervals are subject to free circulation on the securities market, and during the interval are subject to free circulation exclusively on stock exchanges; shares of corporate investment funds of open type are subject to free circulation exclusively on stock exchanges.

The Law of Ukraine "On Joint Investment Institutions" [2] uses different terminology to denote a person who acquires shares of corporate investment funds: investor, or a corporate fund member, but does not use the term "shareholder" [23]. Given Part 2 of Art. 3 of the Law of Ukraine "On Joint Investment Institutions" [2], according to which the legislation on joint stock companies does not apply to the regulation of corporate funds, it is clear why the term "shareholder" is not used. However, no matter how the purchaser of the shares of the corporate fund is called, his legal position will correspond to the term "shareholder" and the legal status of "shareholder" for the following reasons:

– firstly, the security that the investor acquires is a share of a corporate investment fund. The rights of investors-shareholders of the corporate fund appear from the moment of acquisition of shares of the corporate fund, each of which gives the shareholder a certain amount of authority;

– secondly, the issuer of such securities is a corporate investment fund, that is, a joint stock company;

– thirdly, the legal relationship that arises between the owner of shares of a corporate investment fund and the corporate investment fund itself is of legal nature.

Based on the analysis of the Law of Ukraine "On Capital Markets and Organized Commodity Markets" [3] and the Law of Ukraine "On Joint Investment Institutions" [2] the authors can affirm that the main interest of a corporate investment fund investor are securities of a corporate investment fund. These are shares and corporate rights from them (property rights and non-property rights).

Both the corporate investment fund and its investor-shareholder have a property interest, which is expressed in the fact that the shareholder, placing investments in the authorized capital of the corporate fund, pursues the goal of obtaining corporate rights, securities and dividends, and the recipient, corporate investment fund, in its turn, is interested in making a profit from the placement of investments in securities of other issuers (in the form of dividends or the difference between buying and selling shares), corporate rights and real estate.

Corporate rights from the shares of a corporate investment fund may arise on the basis of purchase and sale of shares of the corporate fund on the secondary securities

market or redemption of shares by private placement at the stage of creation of the corporate fund by its founders.

Features of investment certificates of unit investment funds. The legal regime of investment certificates of unit investment funds is determined by the Laws of Ukraine "On Joint Investment Institutions" [2], "On Capital Markets and Organized Commodity Markets" [3] and the Regulations of the NSSMC "On the procedure for registration of the emission and issue of investment certificates of unit investment fund prospectus" [24].

The concept of investment certificate is defined in paragraph 8 of Part 1 of Art. 1 of the Law of Ukraine "On Joint Investment Institutions" [2], according to which the investment certificate of a unit investment fund is a security issued by an asset management company of a unit investment fund and which certifies the ownership right of a unit fund participant to a share in a unit fund and the right to receive dividends (for a closed unit fund).

The features of investment certificates are manifested in the following characteristics:

1. The issuer of the investment certificate is the asset management company of the unit investment fund, as the unit fund is not a legal entity (Part 3 of Article 41 of the Law "On Joint Investment Institution" [2]), but is a set of assets belonging to the participants of such fund on the right of joint ownership, managed by the asset management company and accounted separately from the results of its economic activity (Part 1 of Article 41 of the Law "On Joint Investment Institution" [2]);

2. The certificate is a unit security in accordance with the Law of Ukraine "On Capital Markets and Organized Commodity Markets" [3]. The investment certificate assures the ownership right of the unit fund participant to a part in the unit fund. The investor does not lose ownership of the property transferred to the unit fund. Only the regime of property rights changes – from the right of private property to the right of joint partial ownership. Thus, all the property that constitutes the unit fund belongs to the participants of the unit fund on the right of joint partial ownership;

3. In exceptional cases, the investment certificate entitles the unit fund participant to receive dividends, but this applies only to investment certificates of a closed unit fund.

4. Investment certificates of a mutual investment fund exist exclusively in undocumented form (Part 2 of Article 51 of the Law of Ukraine "On Joint Investment Institutions" [2]).

5. A person who purchases securities of a unit investment fund from their issuer is obliged to pay for such securities within the period provided by the prospectus of the securities emission, but not later than three working days from the date of concluding the agreement on their acquisition. Paid securities in undocumented form are credited to the investor's account opened with the custodian, solely on the basis of the relevant order of the issuer of such securities (Part 4 of Article 51 of the Law of Ukraine "On Joint Investment Institutions" [2]).

Existing scientific research on the legal regulation of investment funds [10-13] and their securities does not pay enough attention to the peculiarities of the issue and circulation of securities of collective investment institutions [15-17]. For the first time a comparative and legal study of the legal regime of securities of joint investment

institutions with the separation of their common and distinctive features was conducted. On the basis of which it was established that investment certificates of unit investment funds and shares of corporate investment funds, although were united by the legislation in the name of “securities of joint investment institutions”, have significant differences in the rights that certify the specified securities, the mechanisms of their issue and circulation.

Considering that the corporate investment fund is the corporate investment fund issuer, and the issuer of investment certificates of the unit investment fund is the asset management company, authors propose to exclude a unit investment fund from the concept of “joint investment institute”. In our opinion, the contractual construction “unit investment fund” only complicates the mechanism of relations that arise between the investor and the asset management company.

● CONCLUSIONS

Thus, on the basis of a conducted study authors have identified problems of legal regulation and features of the legal regime of securities of joint investment institutions, which was not subject to previous scientific research. Authors can affirm that the shares of corporate investment funds and investment certificates of unit funds, although classified by the legislator in one category as securities of joint investment institutions, differ significantly in the legal nature of the relationship. Shares of a corporate investment fund give the investor of a corporate investment fund corporate rights, while investment certificates of unit funds certify the ownership of a unit fund participant for a share in a unit fund and the right to receive dividends (for a closed unit fund). In addition, issuers also differ. The issuer of shares of a corporate investment fund is a joint investment institution – a corporate investment fund (joint stock company), and the issuer of investment certificates of a unit investment fund is an asset management company of a unit investment fund, which is not a joint investment institution. A unit investment fund is not an issuer of securities because it does not acquire the status of a legal entity and has no legal personality, but is only a collection of assets belonging to investors of the share fund in the right of joint partial ownership. On behalf of the unit investment fund in the interests of the participants of the unit investment fund, operates a professional participant in the securities market – asset management company. Due to the fact that the unit

fund is a holistic property complex, and therefore, the object of legal relations, authors believe that it must be deduced for the scope of the concept of “joint investment institution”.

The researched securities also have certain things in common. This fact unites them in the concept of “securities of joint investment institutions”. First of all, the common features of shares of corporate investment funds and investment certificates of unit investment funds are that they are: issued securities; can only be nominal; exist in undocumented form; payment for securities of the joint investment institution is made exclusively in cash and is not allowed in installments; dividends on securities of an open and interval joint investment institution are not accrued or paid.

Authors have come to the conclusion that the features of the legal regime of shares of corporate investment funds are: the emission nature of securities; the issuer is a corporate investment fund – a legal entity formed in the form of a joint-stock company and conducts exclusively to joint investment activities; certifies corporate rights of the participant of the corporate investment fund; dividends are charged and paid only by shares of a closed corporate investment fund; dividends for shares of open and interval type of corporate investment funds are not charged and not paid; shares of the corporate investment fund can be only registered; corporate fund shares are extremely simple and exist in a non-documentary form; corporate fund shares are not subject to a mandatory listing procedure. Features of the legal regime of investment certificates of unit investment funds are: the emission nature of securities; the issuer is the asset management company of such a unit investment fund; certifies the liability of the participant of a unit investment fund; dividends are charged and paid only on investment certificates of a closed unit investment fund; exist exclusively in non-documentary form.

It should be noted that the study of the features of their legal regime of securities of joint investment institutions is a promising direction of research, which is due to insufficient research of legal relations that are certified by such securities, and the availability of legal regulation issues, which generates certain difficulties in understanding for unprofessional investors and protecting their rights.

The directions of further research in the field of corporate investment should be related to the development of proposals for improving the legislation in the protection of the rights of securities owners of joint investment institutions.

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Правовий режим цінних паперів інститутів спільного інвестування

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Анотація. У статті досліджено особливості правового регулювання, емісії та обігу цінних паперів інститутів спільного інвестування, на підставі чого, вперше проведено їх порівняльно-правовий аналіз. Предметом дослідження є правовий режим цінних паперів інститутів спільного інвестування – акцій корпоративних інвестиційних фондів та інвестиційних сертифікатів пайових інвестиційних фондів. Метою статті є дослідження особливостей правового режиму цінних паперів інститутів спільного інвестування – акцій корпоративних інвестиційних фондів та інвестиційних сертифікатів пайових інвестиційних фондів, а також визначення проблем їх правового регулювання. У роботі застосований комплекс методів наукового пізнання, що дало можливість усвідомити концептуальну єдність наукового дослідження. У ході дослідження застосовувалися загальнонаукові та спеціально-правові методи пізнання. Порівняльно-правовий метод надав змогу дослідити чинне законодавство з питань діяльності інститутів спільного інвестування, методи наукової індукції та дедукції надали можливість дослідити правову природу відносин, що виникають з цінних паперів інститутів спільного інвестування. Визначено проблемні аспекти законодавчого регулювання цінних паперів інститутів спільного інвестування. Було досліджено особливості акцій корпоративних інвестиційних фондів та інвестиційних сертифікатів пайових інвестиційних фондів. Виділено спільні та відмінні ознаки цінних паперів інститутів спільного інвестування. Акцентовано увагу на тому, що акції корпоративних інвестиційних фондів та інвестиційні сертифікати пайових інвестиційних фондів хоча і віднесені законодавцем до однієї категорії – цінні папери інститутів спільного інвестування, але суттєво відрізняються за правовою природою відносин, що посвідчують. Зазначено, що акції корпоративного інвестиційного фонду надають інвесторові такого фонду корпоративні права, натомість інвестиційні сертифікати пайових інвестиційних фондів посвідчують право власності. Стаття буде корисна для практикуючих фахівців у сфері права та економіки, здобувачам вищої освіти, науково-педагогічним працівникам юридичних та економічних факультетів, а також усім зацікавленим читачам

Ключові слова: корпоративне інвестування, інституційні інвестори, корпоративні інвестиційні фонди, пайові інвестиційні фонди, інвестиційні сертифікати, акції корпоративних інвестиційних фондів, правове регулювання