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Combination of Private Law and Public Law Principles in the Regulation of Investment Relations

Abstract

Regulatory documents aimed at governing relations contain both private law and public law norms. There are not so many monoimperative legal acts in the legislation of Ukraine, and there are no monodispositive ones whatsoever. Only the right combination of dispositive and imperative prescriptions will allow achieving the desired result of legal regulation. This ensures a balance of interests of all participants in the investment process. An equally important aspect of the legal regulation of investment activity is the attraction of foreign investment, which is necessary to ensure sustainable economic development. However, creating a favourable investment climate for foreign investors cannot discriminate against the national commodity producer. State participation in international organisations and international treaties has an undeniable impact on

ensuring the balance of private and public interests in these circumstances. It was established that efficient legal regulation of investment activities requires a combination of private law and public law foundations (principles), which will ensure proper conditions for investment activities. Private law principles ensure equal rights for all participants in investment relations, recognise the value of the investor's rights, and provide an opportunity to choose objects, forms, and spheres of investment activity. Thus, investment relations undergo a dispositive impact.

KEYWORDS: law, protection, construction, housing, legislation, investment climate.

1. Introduction

It is common knowledge that the content of legal relations is their essential characteristic, which determines the method of legal regulation. Studying private and public law, most researchers note excellent approaches (methods) for organising public relations. At the same time, almost no attention is paid to the issues of their interaction. The state, as a subject of public legal relations, is interested in attracting both internal and external investment, regulating new and existing relations arising in society. To this end, it implements the regulatory function assigned to it by adopting legislative acts, as well as by concluding international treaties.

Regulatory documents aimed at governing relations contain both private law and public law norms. There are not so many monoimperative legal acts in the legislation of Ukraine, and there are no monodispositive ones whatsoever. Only the right combination of dispositive and imperative prescriptions will allow achieving the desired result of legal regulation. This ensures a balance of interests of all participants in the investment process.

Therewith, it is necessary to protect non-professional investors from unfair actions of institutional investors. This refers to the sphere of investment in the construction of residential and non-residential facilities. At the same time, excessive protection of minority shareholders may provide opportunities for unscrupulous entities to illegally seize corporate rights and create obstacles in the activities of a joint-stock company. This is one of the ways to eliminate competitors in promising markets for goods, works, and services. It is obvious that regardless of the form of investment, it is necessary to adhere to reasonable (proportional) state intervention in investment legal relations. Such interference requires the need to protect the rights and legitimate interests of participants in these relations.

An equally important aspect of the legal regulation of investment activity is the attraction of foreign investment, which is necessary to ensure sustainable economic development. However, creating a favourable investment climate for foreign investors cannot discriminate against the national commodity producer. State participation in international organisations and international treaties has an undeniable impact on ensuring the balance of private and public interests in these circumstances.

The principle of the rule of law is manifested in a combination of private law and public law foundations (principles) and norms for governing investment activities.

2. General principles of legal regulation of investment activity

One of the tasks of cooperation between the European Union and Ukraine is to make every effort to establish a stable and attractive investment climate [1]. To make progress in this area, it is necessary to provide institutional, legal, fiscal, and other necessary conditions. At the same time, the principle of non-discrimination is established only relating to mutual investment in the energy sector. It appears that the creation of an appropriate legal framework

for streamlining investment activities determines other terms and conditions defined in an international treaty.

By their legal nature, investment relations are civil. Thus, these relations are described by legal equality, free expression of will and property independence. To these relations, it is necessary to apply private law tools in legal regulation with certain restrictions (public law elements). The main regulation governing the investment activity remains the Law of Ukraine "On Investment Activity" of September 18, 1991 [2]. It does not contain legally established principles of investment activity. They can be derived from the analysis of the content of certain articles of the specified Law.

First, at the legislative level, it is necessary to ensure the equality of investors regardless of their status – an individual or legal entity or a state, resident, non-resident. In the current version, this principle is formulated as equal rights of all investment entities, regardless of their forms of ownership and management, unless otherwise prescribed by legislative acts of Ukraine. The content suggests that the legislator can make provision for certain preferences for certain participants in investment activities, and not only investors. Furthermore, the terms "form of ownership" and "business entities" cannot be applied to individuals without the status of an entrepreneur as investors. After all, the state cannot be considered a business entity either.

Ensuring equality of participants in investment activities cannot serve as a basis for establishing discriminatory norms in the field of tax, customs, or currency legislation. Otherwise, such an imbalance in the protection of rights may lead to the exclusion of national producers from competition. Moreover, in 2000, the Law of Ukraine "On the Elimination of Discrimination in Taxation of Business Entities Created Using Property and Funds of National Origin" was adopted [3], which provided equal competitive conditions regardless of attracting foreign investment in the creation or operation of a business entity. The interpretation of the norms of this legislative act was the subject of

consideration by the Constitutional Court of Ukraine, which pointed out the need to ensure equal conditions in matters of currency, customs regulation, as well as the collection of taxes and other mandatory payments (fees), regardless of the type of investment (national or foreign) [4].

Moreover, the principle of equality should apply to all areas and forms of investment, as well as restrictions. Thus, the legislator provides an opportunity for the investor to choose objects and forms of investment, but makes provision for reasonable exceptions to this dispositive (private law) principle. Recognising the right to invest as inalienable and protected, the general rule applies to restrict the constitutional rights and freedoms of participants in public relations, which can be established exclusively by the laws of Ukraine. Thus, the restrictions cannot be established at the sub-legislative level, as prescribed by the Law of Ukraine "On Investment Activity" (Article 7). The list of such restrictions should be clear and exhaustive. Restrictions must be justified.

This refers to objects or areas wherein investment is prohibited or restricted by the legislation of Ukraine. Thus, the Law of Ukraine "On Concession" of October 03, 2019 prescribes that objects that cannot be transferred to the concession include as follows:

1. objects of state, municipal property, property of the Autonomous Republic of Crimea (the ARC) that are leased until the end of the lease agreement;
2. state facilities used in the manufacture and repair of all types of weapons in service with the Armed Forces of Ukraine, other military formations created pursuant to the legislation of Ukraine, and the Security Service of Ukraine [5].

These norms demonstrate the rational approach of the legislator that attracting investment cannot violate the rights of third parties, as well as terminate existing contractual obligations, or encroach on the sovereignty of the state. At the same time, they concern both national and foreign investors. Restric-

tions may also apply to depleted (limited) natural resources. The legislation of foreign countries is actively implementing the principle of responsible investment, which is novel for Ukrainian legislation. The principle of responsible investment is professed by various participants in public relations – joint-stock companies [6], universities [7], etc.

Conventionally, there are three main components of responsible investment: environmental, social, and managerial [8]. In Ukraine, the foreign practices of socially responsible investments are analysed at the level of theoretical intelligence. Therewith, attention is focused on the social aspect. Under socially responsible investments, the author suggests considering open and transparent business practices based on ethical values, respect for its employees, shareholders, and consumers, as well as concern for the environment [9]. The researcher understands the term "socially responsible investments" more broadly than the term he uses to refer to them.

Attracting investment in alternative electricity sources is an urgent need considering the existing gas crisis in European countries. It is common knowledge that gas, oil, and other natural resources are considered exhaustive or limited. Trying to find an equivalent replacement for them without harming the environment remains a serious challenge for each of the states that care about energy security.

Legislative consolidation of the principle of responsible investment and promotion of its application in the implementation of investment activities is one of the preconditions for the harmonisation of the legislation of Ukraine with the legislation of the European Union. An integral part of this principle should be national support for responsible investment as a strategic one.

A striking example of how the principle of responsible investment works is the investment agreement between the European Union and the People's Republic of China (the PRC) in 2020 [10]. Under this agreement, PRC has undertaken to meet the requirements of the Paris Climate Agreement of

December 12, 2015 [11], as well as the conventions of the International Labour Organization. These commitments lie in raising the standards of environmental protection and occupational safety.

The stability of the conditions for engaging in investment activities remains another principle of legal regulation of investment activity. In truth, the dynamics of adopting new legislative acts and introducing changes to the available ones remains extremely high. However, the quality of adopted laws should not suffer in the pursuit of the number of regulatory changes. Despite the common economic space of the European Union and the subordination of the legislation of the EU Member States to general principles and rules of legal regulation, states are given a certain dispositivity in the regulation of public relations, including investment relations. Each state has features of economic development and security requirements that need to be considered upon engaging in investment activities. They should be reflected in the adoption of investment laws, as well as in the conclusion of international treaties, particularly in the form of reservations to them.

The last principle lies in protection of investments from free nationalisation, requisition, and other similar measures. Even though this wording is contained in the legislation of Ukraine, the latter does not define nationalisation. No regulation of Ukraine contains such a term. At the same time, there are several similar institutions: alienation of real estate objects for reasons of public necessity, confiscation. In case of failure to protect the investor's rights, the principle of full compensation for losses caused applies. Protection of the rights of investors in Ukraine is a long-standing and rather acute issue. For example, the case of Sovtransavto-Holding v. Ukraine (application No. 48553/99) [12] remains a relevant warning regarding the adoption of all measures to ensure the right to a fair trial. At the same time, the rights of Ukrainian companies as investors are violated by the Russian Federation. This refers

to at least eight cases that are being considered regarding violations of the rights of Ukrainian investors in Crimea [13].

Therefore, the legal grounds for interaction between participants in investment relations and the state should be clearly regulated. Moreover, their main purpose should be to protect the investment rights of all subjects. Statutory regulation of investment relations with ensuring the rights of their participants should be conducted both at the international and national level of legal regulation. In the context of the problem of protecting the rights of investors in Crimea, it is necessary to consider the need to introduce effective convention-based protection of such rights.

3. A combination of private law and public law principles upon investing in construction

Investment activities, including in the construction sector, combine private and public interests. Private law principles of civil law, namely the inviolability of private property rights, freedom of contract, and the inadmissibility of arbitrary state interference in the sphere of private interests of individuals, determine the value and purpose of investor rights in modern conditions [14]. Civil law constitutes an essential factor that ensures the approval and protection of a wide scope of rights of participants in investment relations, restrains excessive, unjustified interference of public authorities in the economic sphere. Public principles in governing investment activities in construction are reflected in the system of restrictions and proportionality of state intervention in civil relations. Restrictions can manifest themselves in restricting the freedom of contract and the freedom to make other transactions, prohibiting subjects of civil law from exercising powers relating to objects of civil relations in a certain way, in depriving certain benefits of a property and personal non-property nature [15].

All stages of investment activity in construction should be aimed at achieving the result – commissioning of fixed assets, production facilities and

registration of ownership of the construction object under the legislation of Ukraine. This purpose is achieved by an optimal combination of private principles of self-regulation of investment activity with public legal regulations of a permissive nature, considering the specific features of the construction sector. The symbiosis of private law and public foundations does not contradict the mechanism of legal regulation of investment relations in construction.

Public entities (state authorities, local self-government bodies) undoubtedly have imperative-public levers of influence on the investment activity subjects in construction. An essential aspect of updating the investment legislation of Ukraine is the need to develop private principles of participation of state and territorial self-government bodies in contractual relations in the field of housing construction, including on a share basis.

The public-legal basis for regulating investment activities in construction should be combined with the private interest of the state and territorial communities within the framework of equity participation agreements in investment projects. The share contribution of these entities could be, apart from local budget funds or state subventions, land plots and other property rights. The problem of correlation of market regulation of the sphere of joint equity investment should be solved based on a combination of private and imperative factors. At the same time, investment relations also include corporate relations, which are also governed on a combination of the principles of private or public law, depending on their content [16]. This approach is becoming generally accepted and does not contradict the trend of integrated regulation of public relations.

Corporate investment in construction combines the principles of legal regulation of corporate relations and provisions governing the procedure for implementing construction investment policy. The latter are mainly reduced to public regulations concerning the granting of appropriate permits and appro-

val of technical specifications, and private relations that mediate contractor's agreements and determine the legal status of the subject of corporate rights.

In investment relations, subjects of private law function on the principles of equality and lack of control over each other. Therewith, they must comply with the authority and administration regulations of public legal entities. The latter may violate the subjective civil rights of participants in private investment relations. In this aspect, it is necessary to strike a balance between state control over investment activities in the construction sector and the exercise of investors' rights according to the general principles of civil rights implementation.

Among the key issues demanding an urgent solution is provision of an effective mechanism for completing the construction of those facilities wherein investors have invested and which were not put into operation within a certain period. Thus, in its decision of April 10, 2018 in case No. 910/25314/13, the Supreme Court indicates that the fallacy of identifying property rights to an investment object and ownership rights to newly created real estate or objects under construction results in the choice of ineffective ways to protect the investor's rights [17]. If it is objectively impossible to complete the procedure for putting into operation an object completed by construction, the practice when the investor's property rights to the investment object are recognised is considered established (this refers to the decision of the Grand Chamber of the Supreme Court of March 20, 2019 in case No. 761/20612/15-ts) [18].

The lack of legal mechanisms to protect the rights of investors in case of unfinished construction projects, regardless of subjective or objective circumstances, create gaps, because of which investors are deprived of effective protection. The Supreme Court is trying to make up for the lack of norms that would govern the protection of investors' rights by applying the analogy of

statute, as well as creating essentially legal norms that would ensure the investor's right to access justice and efficient protection.

4. Combination of private law and public law foundations for the exercise of corporate rights

The exercise of corporate rights, which essentially constitute investment rights, is based on certain general provisions (principles) that govern the actions of participants in corporate legal relations. Even though the meaning of the principles is only general provisions, they can be provided for exclusively by law, that is:

[1] directly established by it;

[2] follow from its general meaning.

Thus, the principles of exercising corporate rights are provisions directly established by law or arising from its general meaning, which determine the content, conditions, and methods of exercising these rights.

Since the content of the rights of participants in business entities, which are corporate by their legal nature, is covered in the Civil Code of Ukraine [19], their civil nature is obvious. The principles of exercising corporate rights, as a rule, are of a private law nature.

Guided by the general meaning of the provisions of the Civil Code of Ukraine, the Laws of Ukraine "On Joint-Stock Companies" [20] and "On Limited and Additional Liability Companies" [21], it is necessary to distinguish a separate private legal basis for the exercise of corporate rights. It lies in the "correlation" relative to the size of the share(s) in the authorised capital of a business entity, namely in the "proportionality" of the exercise of corporate rights. In turn, depending on the type of ratio regarding the size of the share (number of shares), the principle of proportionality in the exercise of corporate rights can have two manifestations: proportionality "to" the size of the share (number of shares) that belongs to each particular participant (sharehol-

der), and proportionality "with" the percentage of the share (shares) established by law (5, 10, 95, etc. percent).

Codified private law principles for the exercise of all civil rights, including corporate ones, are prescribed in Article 12 of the Civil Code of Ukraine. It makes provision for two principles for the exercise of civil rights: the exercise of civil rights freely, at one's own discretion, and the exercise of civil rights in good faith and reasonably.

Thus, considering the provisions of the Civil Code of Ukraine, as well as the general meaning of acts of sectoral corporate legislation, the private law foundations for the exercise of corporate rights can be distinguished as follows:

1. exercise of corporate rights in proportion to the size of the share (number of shares) in the authorised capital of the company;
2. exercise of corporate rights freely, at its sole discretion;
3. exercise of corporate rights in good faith and reasonably.

The exercise of corporate rights is described by a combination of private law principles with public law ones. The public-legal foundations for the exercise of corporate rights are manifested in the case of restrictions on their implementation.

By their scope, there are two types of restrictions on the exercise of corporate rights:

1. restrictions on the exercise of independent subjective rights;
2. restrictions on the exercise of certain powers that are included in their content.

Thus, according to Part 1, Article 36 of the Law of Ukraine "On Prevention of Corruption" [22], persons authorised to perform the functions of the state or local self-government, as well as officials of legal entities under public law, are obliged to transfer their corporate rights to another person for management within 30 days after their appointment (election) to the position ac-

cording to the legislatively established procedure. This legislative provision exemplifies restrictions on the exercise of the entire set of corporate rights, since it prohibits such categories of persons from exercising their corporate rights personally.

Restrictions on the exercise of certain corporate powers are established in the Laws of Ukraine "On Capital Markets and Organised Commodity Markets" [23] and "On Joint-Stock Companies". Thus, according to Part 8, Article 9 of the Law of Ukraine "On Capital Markets and Organised Commodity Markets", preferred shares grant their owners the right to take part in the management of a joint-stock company only in cases prescribed by the charter and the law governing the creation, operation, and termination of joint-stock companies. Such is the Law of Ukraine "On Joint-Stock Companies". Part 5, Article 26 of this Law defines the list of issues that are resolved by the general meeting of a joint-stock company involving the voting of shareholders-owners of preferred shares. In other words, holders of preferred shares do not have the right to vote on all issues resolved by the general meeting, but only on those established in Part 5, Article 26 of the Law of Ukraine "On Joint-Stock Companies". Thus, the law makes provision for restrictions on the exercise of the right of shareholders-owners of preferred shares – the right to vote.

Restrictions on the exercise of corporate rights may also be conditioned upon proportionality with the size of the legislatively established (determined) share (number of shares). In particular, the comparison of the scope of the rights of participants (shareholders) with the minimum percentage size of the legislatively established share in the authorised capital (5, 10, or 95 percent), one can pay attention to the fact that other participants (shareholders) who have smaller shares are limited in certain rights: they cannot independently convene a general meeting of the company, their proposals to the draft agenda are not subject to mandatory inclusion, they do not have the right to independently conclude an agreement with an auditor to conduct an audit of the com-

pany's economic activities, they cannot demand the forced sale of shares to them by other shareholders of the company, etc. Thus, the scope of rights of the company's participants who do not have the required, legislatively established share size (they are entitled to less than 5, 10, 95 etc. percent, respectively) is narrowed in comparison with the scope of rights of those participants to whom such a share size belongs, since it does not include an entire scope of corporate rights.

The legal content (essence) of restrictions in the exercise of corporate rights is that they (restrictions) narrow the scope of rights of some subjects of corporate legal relations in comparison with other participants (shareholders) of the company. These restrictions, in particular, relate to the narrowing of the scope of rights: participants of the company who belong to the category of persons authorised to perform the functions of the state, and those who do not perform these functions (hereinafter referred to as "authorised persons"); owners of preferred shares in comparison with shareholders—owners of ordinary shares; participants who own a certain legislatively established amount of share, in comparison with participants without such a size, etc. These examples refer not to participants (shareholders) of a business company, but to certain categories (groups) of participants. For instance, these groups (categories) of participants include authorised persons; owners of preferred and ordinary shares; participants with less than the size of the legislatively established share and participants who have the same in the size prescribed. Restrictions in the exercise of corporate rights cannot be established regarding members of the company who are individualised on discriminatory grounds (Section 2, Part 1, Article 1 of the Law of Ukraine "On the Fundamentals of Preventing and Countering Discrimination in Ukraine") [24].

Thus, restrictions in the exercise of corporate rights are established according to the criterion of the category (group) of participants, in comparison of one category (group) of participants of a business company with another,

which is the key to avoiding possible inequality in the exercise of corporate rights.

5. Social aspects of investment activity

Investment activity in Ukraine is carried out not only for the sake of profit. The special law states about achieving a social effect as one of the likely results of investment. Therefore, in modern conditions, the economic and social components of investment activity can be both independent and combined business goals. Ultimately, solving social problems and meeting the needs of society, combined with the desire to profit, is a unique symbiosis of social mission and business processes.

Although most enterprises are created to increase the invested capital, there are also those that start their work to social problems. The latter, considering the purpose of their creation, are called social enterprises [25; 26]. For social entrepreneurship, social activity is the main, not secondary, i.e., such that is possible due to the accumulation of excess profits. Therefore, if a business invests part of the profit to meet social needs, this still does not indicate that such an enterprise is social. At the same time, the social effect of investment activity is obvious.

The social effect of investment activities is primarily traced in increasing the level of employment, increasing incomes of the population, fighting poverty, ensuring a decent standard of living, and improving the state of the environment [27]. And the usual financing of socially useful events by enterprises was transformed into the so-called corporate social investment, which constitutes a component of the social responsibility of business, a kind of its obligation to act economically, socially, and environmentally justified methods, considering the interests of investors, customers, employees, partners, territorial communities, and the public in general [28]. As a result, the interests of all stakeholders are satisfied: the investor makes a profit, the state gets an increase in

opportunities for implementing the social function, and the population – an increase in the level and quality of life [29]. After all, social investing is not just about giving away money and other benefits, it is a sound and rationally organised strategy for building socially responsible behaviour. The implementation of such a strategy allows establishing a constructive public dialogue, provide opportunities for consolidating society on a constructive basis [30].

The concept of socially responsible business, which underlies social investment, requires a high level of transparency and openness of business activities, conscious rejection of unethical and illegal cooperation with partners, timely and full performance of obligations assumed to all business entities. The rejection of narrow corporate interests and the attitude towards obtaining a positive social effect, along with making a profit, allows enterprises to develop their original strategic line of behaviour in the market, according to which business is increasingly involved in the development of local communities and the development of society in general [31].

In Ukraine, special regulations to mediate the social component of investment activity have not yet been adopted. And legal support for investment to solve social problems is indirectly carried out according to the Economic and Tax Codes of Ukraine, the Law of Ukraine "On Public Associations", the Law of Ukraine "On Charitable Activities and Charitable Organisations", the Law of Ukraine "On Social Services", the Law of Ukraine "On State Targeted Programmes", and the Law of Ukraine "On Public-Private Partnership" [32].

Despite this, social entrepreneurship exists and functions quite successfully. The lack of regulatory requirements for characterising investment activity as social makes it difficult to attract a wider range of entrepreneurs to this socially important activity. Therefore, since 2013, the Verkhovna Rada of Ukraine has discussed several draft laws on social enterprises, the developers of which sought to change the ideology of social entrepreneurship: from charitable activities funded by the state to economic activities to achieve state so-

cial results. The last of these draft laws provides the following definition of a social enterprise: "a business entity formed by legal entities and/or individuals whose priority is to achieve social results, particularly in the field of healthcare, education, science, culture, the environment, the provision of social services and support for socially vulnerable groups of the population (unemployed, low-income, elderly, persons with disabilities, and other legislatively established persons) [33]. In addition, the same draft law proposes the main requirements and criteria of social enterprises, and expressly describes the algorithm for obtaining the corresponding status. However, not a single draft law was ever passed. The obstacles that the developers of these draft laws came across were too broad and vague definitions of concepts and excessive tax incentives. Moreover, the draft laws were recognised as dangerous from the standpoint of corruption risks.

The development of Ukraine as a socially oriented state largely depends on the cooperation of national policy and business efforts in expanding social investment. Notably, social entrepreneurship, unlike conventional entrepreneurship, carries a double burden and double risks: social and economic. Therefore, there is a growing need to adopt a law that would define the basis for legal incentives for investment in social entrepreneurship as one of the main types of entrepreneurial activity.

6. Conclusions

Efficient legal regulation of investment activities requires a combination of private law and public law foundations (principles), which will ensure proper conditions for investment activities. Private law principles ensure equal rights for all participants in investment relations, recognise the value of the investor's rights, and provide an opportunity to choose objects, forms, and spheres of investment activity. Thus, investment relations undergo a dispositive impact.

Investors are granted a wide scope of rights to streamline investment relations by entering into investment agreements based on the content, which can be either named or unnamed, as well as in the approved constituent documents of corporate-type legal entities. Thanks to this private law tool, investment activity is self-regulated. In the absence of a particular legal norm in the investment legislation of Ukraine, the courts may use the relevant norms contained in the above-mentioned documents to resolve the issue of protecting the rights of investors in particular investment disputes.

The public-legal foundations of investment activity make provision for the establishment of justified, sound restrictions on the implementation of investment activities, as well as the implementation of state control to prevent dishonest behaviour of participants in investment relations. The establishment of regulatory responsibility in the field of investment activity, the introduction and application of the principle of responsible investment should be considered a manifestation of public principles. At the same time, state interference in investment (civil) relations should be justified and performed solely to ensure the rights of participants in investment relations and ensure the national and social security.

The establishment of private law and public law foundations for legal regulation of investment activity should be systematic. Therewith, such consistency should manifest itself at all levels of legal regulation: from international to local.

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