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SPECIFIC FEATURES OF LEGAL REGULATION OF GREEN INVESTMENTS IN UKRAINE¹

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Abstract. It is established that Ukraine has begun to develop legislation on legal regulation of green bonds since 2020, which are the financial instrument of green investment in accordance with European standards. However, the Law of Ukraine “On Investment Activity” does not contain norms that would regulate various legal relations associated with green investments. Green bonds are the new subtype of securities in Ukraine, since the legislation on capital markets did not provide the existence of such securities until 2020.

It is emphasized that issues concerning the status, problems and perspectives of legal regulation of green investment; legal nature of green investment relations; specific features of the elements of legal relations on green investment; liability for non-fulfillment or improper fulfillment of obligations by legal relations participants in green investment; content of the notion of green investments; forms of existence of green investments are poorly studied at theoretical and legal level. Besides, there is no common opinion among scholars in defining the content of the concept of “green investments”.

Participants of investment legal relations in the field of green investment are classified into two groups: 1) a person implementing an environmental project and 2) a person providing finances for an environmental project. The legislator did not limit the possibility of acquiring the status of a person who implements an environmental project or a person who provides finances for an environmental project exclusively to subjects of private or public law. On this basis, we can talk about the mixed legal nature of relations in the field of green investment.

It has been identified that green bonds are one of possible green investment instruments, but not the only one.

The author has offered the definition of the concept of “green investments”, which should be understood as a set of property and intellectual values that have a price impact and are placed by the subjects of investment activity in an environmental project, with the aim to achieve an ecological and social effect and profit.

Key words: investments, green investments, green bonds, investment activity, subject of investment activity, investment legislation, state support.

Problem’s setting. Ukraine adopted the green investment development vector in accordance with European standards. The European Green Deal of 11 December 2019 (The European Green Deal, 2019) highlighted the need to better financial and capital flows orientation into environmental investments. Deterioration of the natural environment became the reason for the development of green policy to protect and improve the quality of the environment. Section 1 of the Law of Ukraine “On Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the Period by 2030” (On Basic Principles, ..., 2020) notes that globalization and social transformations processes have increased the priority of environmental protection, and therefore require Ukraine to take urgent measures. The economic development of the state has been accompanied for a long time by unbalanced exploitation of natural resources, low priority of environmental protection issues, which made it impossible to achieve balanced (sustainable) development. Ukraine has begun to develop legislation on legal regulation of green bonds since 2020, which are the financial instrument for green investment, however, it is worth noting that the following issues are poorly studied:

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- status, problems and perspectives of legal regulation of green investment;
- legal nature of green investment relations;
- specific features of elements of legal relations on green investment;
- liability for non-fulfillment or improper fulfillment of obligations by participants in green investment legal relations;
- content of the concept of green investment;
- forms of existence of green investments.

The Law of Ukraine “On Investment Activity” (1991) does not contain norms aimed at regulating the research issue.

The war in Ukraine has disrupted global energy markets and exposed a structural energy crisis that has been underway for decades (SEB’s Green Bond Report..., 2022). The strategy of the state environmental policy of Ukraine for the period by 2030 (The strategy of the state..., 2020) was developed in the pre-war period in 2020. The war in Ukraine has worsened the situation of the environment and energy infrastructure. It is currently difficult to talk about the possibility of implementing this strategy. Ukraine suffered great ecological losses: burned forests, blown up dams and hydroelectric power plants, destroyed power plants. The state needs significant investments during the post-war period precisely for restoration. National investors cannot cover the need for investments, and Ukraine does not have an attractive investment potential for foreign investors. The reason for this is imperfect legal regulation, the lack of real guarantees for foreign investors and lack of trust among foreign investors. Everything specified characterizes the relevance of studying the specifics of legal regulation of green investments in Ukraine. Therefore, studying the status and problems of legal regulation of green investment in Ukraine is a topical issue.

Analysis of recent research and publications. The works of economic, theoretical and legal orientation are focused on the scientific understanding of green investments. Theoretical and legal regulation of green investments in Ukraine was studied by O.M. Shumilo (Shumilo, 2015), Yu.M. Zhornokui (Zhornokui, 2015), T.S. Novak and V.O. Melnyk (Novak, Melnyk, 2021), A.Yu. Frolov (Frolov, 2019), M.M. Kuzmina (Kuzmina, 2020). The value of green investments in economic activity was studied within economics area by: S.V. Arestov (Arestov, 2008), Yu.V. Vikhort (Vikhort, 2018), S. Kharichkov, N. Andreeva (Kharichkov, Andreeva, 2010), T.V. Pimonenko (Pimonenko, 2019).

The analysis of modern scientific papers focused on studying certain aspects of legal regulation of green investments allows us to argue that appropriate attention is not currently paid to the research of problems arising in this area.

The purpose of the article is to study specific features and problems of legal regulation of green investments in Ukraine.

Main part. The Article 9 of Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment (Regulation (EU) 2020/852, 2020) contains six environmental objectives: 1) climate change mitigation; 2) climatic change adaptation; 3) the sustainable use and protection of water and marine resources; 4) the transition to a circular economy; 5) pollution prevention and control; 6) the protection and restoration of biodiversity and ecosystems.

Achieving the set objectives is possible by attracting “green investments”. The European Union Regulation 2020/852 on the establishment of a framework for the promotion of sustainable investments defines such investments as “environmentally sustainable investments” (Article 2 of Regulation (EU) 2020/852, 2020).

The Law of Ukraine “On Investment Activity” does not currently define the content of the concept of “green investment”, specific features of legal regulation of green investments and the specifics of the legal status of the participants in investment legal relations in the field of green investment. The

concept of green investments has a wide meaning and is considered at theoretical and legal level as “green finances”, “environmental investments”. It is worth supporting the opinion that, despite the use of the term of “green investments” in Western scientific literature, the understanding of the essential content of this category is actually absent in domestic science (Kharichkov, Andreeva, 2010: 17).

Attracting green investments in Ukraine takes place with the use of securities – green bonds. The use of green bonds is a novelty of Ukrainian legislation and was reflected for the first time at the legislative level in 2020 in the Law of Ukraine “On Amending Certain Legislative Acts of Ukraine on Simplifying Investment Attraction and Introducing New Financial Instruments” (On Amending Certain Legislative Acts..., 2020). This Law introduced a new type of financial instruments in Ukraine – green bonds and established rules for the participants of the relevant market. The existence of such a subtype of securities as green bonds was not provided by the legislation on capital markets until 2020.

Legal regulation of green bonds is being developed both at the European and Ukrainian legislative levels. The European Green Deal Investment Plan (Commission Communication..., 2020) of 14 January 2020 announced that the Commission would introduce the EU Green Bond Standard (The EU Green Bond Standard, 2019). Thus, the key features of green bonds are defined by the European Union Green Bond Standard (EU GBS) and the Green Bond Principles of the International Association of Capital Markets (GBP) (Green Bond Principles, 2021).

The development of the green bond market in Ukraine is consistent with European norms and includes: reorientation of capital flows to sustainable investments to achieve sustainable and inclusive growth, management of financial risks arising from climate change, resource depletion, environmental degradation and social problems, stimulation of transparency in finances and economics in the whole with a focus on long-term profits (The Commission approved recommendations, 2021).

Taking into account the specified environmental objectives, the Decision of the National Securities and Stock Market Commission (NSSMC) approved the Recommendations on implementing or financing environmental projects through the issuance of green bonds (On Approval of Recommendations for the Implementation..., 2021), amended the Law of Ukraine “On Securities and Stock Market” and approved the Concept on the introduction and development of the green bond market in Ukraine (On Approval of Recommendations..., 2022). These Recommendations approved the key features of the model of green bonds issued in Ukraine:

- compliance of the project, for which funds are raised through the issuance of green bonds, with internationally recognized taxonomy,
- target-oriented use of proceeds from the placement of green bonds,
- the issuer’s reporting on the impact of these projects on the environment,
- involvement of external independent controller (verifier) by the issuer,
- own policy of the issuer regarding green bonds.

Thus, the issuer of green bonds must ensure the proper fulfillment of all key features. It contributes to the protection of investors’ interests and the growth of investments into green bonds. Non-compliance with at least one of the specified features is the reason not to classify bonds as green ones. An attempt to classify bonds as green ones when they do not comply with key features gives reason to regard this as “greenwashing”. Green camouflage is a deliberate mislead of investors and state authorities in regard to the directions of using the amount of financial funds received from the issuance of green bonds. In order to prevent the facts of “green camouflage”, there was a need to develop international standards and to form countries’ own recommendations (On Approval of Recommendations for the Implementation..., 2021).

The issue of relations’ parties on green investment is important. Participants of investment legal relations in the field of green investment with the usage of the mechanism of green bonds can be classified into two groups: 1) a person implementing an environmental project and 2) a person providing finances an environmental project.

Green bonds according to the Art. 18 of the Law of Ukraine “On Securities and Stock Market” (2006) can be issued by a person implementing or providing finances an environmental project. Funds from green bonds placement are directed to financing and / or refinancing the costs for an environmental project. If the issuer of green bonds is the state of Ukraine, funds from their placement are used in accordance with the Budget Code of Ukraine. For example, it is stated in the literature that the main issuers of such bonds are such international financial organizations as the European Bank for Reconstruction and Development, the World Bank, the European Investment Bank, the International Finance Corporation, as well as private corporations (Unilever, Toyota). The buyers of such securities are usually institutional investors who demonstrate the social responsibility of own business (Kuzmina, 2020: 195).

The person implementing an environmental project is recognized as:

- the Council of Ministers of the Autonomous Republic of Crimea, a territorial community acting by a representative agency of local self-government, if there is a decision on the implementation of an environmental project, – as of the effective date of such a decision;
- the state of Ukraine acting by the authorized agencies, if there is a decision on the implementation of an environmental project or a state target-oriented program on implementing environmental (green) investments, – as of the effective date of such a decision;
- a legal entity of private law, including within the projects implemented in accordance with a public-private partnership agreement.

There is a ban for a person implementing an environmental project, for the financing of which green bonds were issued, to take any actions that may result in early termination, cancellation or other loss of rights to the environmental project and / or encumbering them (Part 4 of the Art. 18 of the Law of Ukraine “On Securities and Stock Market”, 2006).

The person providing finances for an environmental project is recognized as:

- a specialized financial institution established by the Cabinet of Ministers of Ukraine or by another specially authorized agency – in the manner and under the procedure outlined by the law determining its legal status;
- a legal entity under private law, in particular a bank, another financial institution;
- international financial organization.

A person providing finances for an environmental project can issue one turnout of green bonds to finance several environmental projects.

The duty to ensure the target-oriented use of revenues raised from investors for financing and / or refinancing the costs of an environmental project is entrusted by the legislator to a person implementing or providing finances for an environmental project (Part 6 of the Art. 18 of the Law of Ukraine “On Securities and Stock Market”, 2006).

As one can see, the legislator did not limit the possibility of acquiring the status of a person implementing an environmental project or a person providing finances for an environmental project exclusively to subjects of private or public law. On this basis, one can talk about the mixed legal nature of relations in the field of green investment.

Talking about the procedure for the selection and monitoring environmental projects financed from state and local budgets, this aspect is regulated taking into account the requirements of the Law of Ukraine “On Government Aid for Business Entities” (2014). The key point is the compliance of projects financed / refinanced with funds from the placement of green bonds with the Taxonomy for Sustainable Activities.

The issue of “green” bonds can become a promising instrument for attracting funds for the post-war reconstruction of cities. There are successful examples of issuing “green” bonds in Ukraine. National Energy Company “Ukrenergo” issued “green” bonds worth \$ 825 million in 2021, and despite the martial law in 2022, it made the first interest payment of \$ 28.4 million on these securities (Green Finance for the Reconstruction..., 2022).

The definition of the concept of “green bonds” is enshrined in Part 5 of the Art. 11 of the Law of Ukraine “On Securities and Stock Market” (2006). Green bonds are bonds, whose circular note (decision on issue, and for state bonds of Ukraine – placement conditions) provides the use of the funds raised exclusively for financing an environmental project or its certain stage. At the same time, an environmental project is a project in the field of alternative energy, energy efficiency, minimization of generation, utilization and processing of waste, introduction of environmentally friendly transport, organic farming, preservation of flora and fauna, water and land resources, adaptation to climate changes, as well as another project aimed at protecting the natural environment, implementing ecological standards, reducing emissions into the natural environment (Part 2 of the Art. 18 of the Law of Ukraine “On Securities and Stock Market”, 2006).

It is believed that the definition of the terms of “green bonds” and “environmental project” need to be revised. In our opinion, the definition stipulated in Part 5 of the Art. 11 of the Law of Ukraine “On Securities and Stock Market” does not fully reveal specific features of green bonds: “green bonds are bonds...”. We note that the conceptual and categorical apparatus must be clear at the level of the law and must reveal the essence of a certain phenomenon with a detailed characteristics. Dual understanding of the same phenomenon will be impossible under such grounds, as a result, the norm of law will be applied incorrectly and subjects of the relevant relations will be deprived of the opportunity to abuse the rights. This statement is also applied to the definition of the content of the term of “environmental project”. In fact, the legislator does not reveal the content of the concept, but indicates the types of ecological areas that require investment. It is important to note in terms of the imperfect conceptual and categorical apparatus that any legal relations can be developed, if there is proper legal regulation.

Thus, the policy aimed at the development of green investments in Ukraine was introduced through the development of the mechanism of legal regulation of financial instruments – green bonds. It is worth paying attention to the fact that the Art. 1 of the Law of Ukraine “On Investment Activity” (1991) provides other values that can be an investment. Thus, investments are all types of property and intellectual values invested into objects of entrepreneurial and other types of activity, as a result of which profit (income) is created and / or social and environmental effect is achieved. And such values can be: funds, target-oriented bank deposits, shares, stocks and other securities (except promissory notes); movable and immovable property (houses, buildings, equipment and other tangible assets); property rights of intellectual property; a set of technical, technological, commercial and other knowledge, formalized in the form of technical documentation, skills and production experience necessary for the organization of any type of production, but not patented (“know-how”); rights to use land plots, water, resources, houses, dwellings, equipment, as well as other property rights; other values (the Art. 1 of the Law of Ukraine “On Investment Activity”, 1991). Thus, it is believed that green bonds are not exclusive instrument of green investment, but are one of the possible values that have the nature of investment in accordance with the current investment legislation.

There is still no common approaches to the conceptual and categorical apparatus of green investment among scholars in regard to the definition of the content of the concept of green investments. Scholars consider the concept of green investments as a set of tangible and intangible values, as a form of international trade in emissions, etc.

S. V. Arestov claims that environmental investments are the product of co-evolution of commercial and environmental goals of an enterprise and defines them as types of property and intellectual values invested into objects of entrepreneurial and other types of activity, which result in the formation of ecological, economic and ecological, environmental and social effect (Arestov, 2008: 3).

Thus, Y. V. Vikhort defines green investments as a form of international trade in emissions, which involves the further investment of funds received from the implementation of quotas for projects and measures to reduce emissions at other environmentally hazardous objects (Vikhort, 2018: 7).

T. V. Pimonenko considers green investments as property and intellectual values oriented on resource-saving, as well as ecologically safe tangible and intangible assets, green financial instruments, measures to create an eco-conscious internal corporate and market environment with the aim of obtaining explicit and latent economic, ecological and social effects (Pimonenko, 2019: 9).

M. M. Kuzmina calls green bonds as one of the forms of environmental taxation around the world. They are the debt instrument, the funds from the sale of which are directed to financing “green” environmental projects, both new and existing ones. The scholar singles out the following types of bonds: 1) standard (Green Use of Proceeds Bond) – a standard debt obligation with the right of recourse to the issuer, who is obliged to inform the investor about deposits areas; 2) bonds secured by profit (Green Use of Proceeds Revenue Bond) – a debt obligation without recourse to the issuer, the credit position is secured by the profit from the investment project, about which the investor must be informed; 3) project bonds (Green Project Bond) – the investor bears the direct credit risk of financing a certain project; 4) securitized bonds (Green Securitized Bond) – a debt obligation secured by one or more green investment projects that are already profitable (Kuzmina, 2020: 195).

S. K. Kharichkov equates the term of “green investments” with the term of “environmental investments” in terms of considering the development priorities laid down in the “green economy” strategy, which are defined as investments into a wide range of environmental and socio-economic orientation: reduction and cessation of negative anthropogenic impact on the environment; preservation, improvement and rational use of the natural and resource potential of territories, ensuring environmental safety in the country, as a result of which ecological, social, economic and political results are achieved (Kharichkov, Andreeva, 2010: 17).

O. M. Shumilo defines ecological (green) investments in the form of international and now national system of trading emission quotas as an effective mechanism for reducing greenhouse gas emissions (Shumilo, 2015: 84).

As one can see from the specified scientific points of view, any author does not consider green investments exclusively through the instrument of green bonds. In our opinion, green bonds are one of the possible green investment instruments, but not the only one. It is believed that green investments are a set of property and intellectual values having a price impact and placed by the subjects of investment activity into an environmental project with the aim of achieving an ecological and social effect and profit. It is also important to note that the Law of Ukraine “On Investment Activity” (1991), when defining the content of the concept of investments, indicates the environmental and social effect as a result of investments, but does not reveal these concepts.

The ecological effect should be related to the development of certain areas in the green economy.

O. M. Shumilo refers to such areas: increasing the energy efficiency of old and new buildings; transition to alternative energy sources (wind, sun, biomass, geothermal one); increasing confidence in the balanced development of transport; stimulation of the planet’s ecological infrastructure, including drinking water, forests, soils, reefs; support for sustainable agriculture, including organic production (Shumilo, 2015: 293–294).

The social effect, in our opinion, is the result of investments placement, which can be expressed in improving the natural environment, the health situation of the population, the quality of food products, the standard of living of the population, the creation of new job places and social security of the population. Social effect and environmental effect are interrelated results of investment activities, especially when investing into environmental projects.

Conclusions. On the basis of the conducted research, it is possible to state the lack of common scientific approaches in defining the concept of “green investments” and the lack of definition of the content of this term at the national legislative level.

It has been established that the attraction of green investments in Ukraine takes place with the use of securities – green bonds. The use of green bonds is a new law in Ukraine and was first enshrined at

the legislative level in 2020 in the Law of Ukraine “On Amending Certain Legislative Acts of Ukraine on Simplifying Investment Attraction and Introducing New Financial Instruments”.

We believe that green bonds are not an exclusive instrument of green investment, but are one of the possible values having the nature of investments in accordance with the current investment legislation.

It has been noted in regard to the participants in green investment relations that the legislator did not limit the possibility of acquiring the status of a person implementing an environmental project or a person providing finances for an environmental project exclusively to subjects of private or public law. On this basis, we can talk about the mixed legal nature of relations in the field of green investment.

The concept of “green investments” has been offered to understand as a set of property and intellectual values having a price impact and are placed by the subjects of investment activity into an environmental project with the aim of achieving an ecological and social effect and profit. It is also important to note that the Law of Ukraine “On Investment Activity” while defining the content of the concept of investment indicates the environmental and social effect as a result of investments, but does not reveal these concepts.

The study of existing works, where the problems of legal regulation of green investments were the subject matter of their research, gives reason to state that the works of scholars are mainly oriented on studying financial instruments of green investment – green bonds. The study of specific features of the mechanism of legal regulation of green investments has a fragmentary nature and is a perspective area for further scientific works.

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