

FEATURES OF INVESTMENT CERTIFICATES OF A MUTUAL FUND

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Summary

The purpose of this paper is to study the concept and features of investment certificates of a mutual investment fund as a type of securities of collective investment schemes in Ukraine. The study is based on the current legislation of Ukraine, as well as scientific works in this area. The main method of the study is the method of analysis and synthesis, which allows, on the basis of a comprehensive analysis of numerous regulatory legal acts of Ukraine in the field of collective investment, to identify the features of investment certificates of a mutual investment fund. In addition, the rights of holders of this type of securities under Ukrainian legislation are structured using the method of systematization. As a result of the study, the author provides a comprehensive definition of investment certificates of a mutual investment fund which contains all the features of this type of securities. In addition, the rights of holders of investment certificates of a mutual fund are systematized.

Key words: investments, collective investment schemes, mutual investment fund, investment certificates, the rights of holders of investment certificates.

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1. Introduction

In most countries of the world, collective investment is an important component of investment activities aimed at attracting funds from small investors. Ukraine is no exception in this regard. Throughout the period of independence, collective investment schemes have been developing in our country, and, despite all the events that are happening in our country, continue to play an important role in economic life. The securities of collective investment schemes are financial instruments, and their circulation creates conditions for the development of investment processes in our country and makes a significant contribution to the development of its economy. Therefore, all issues related to the subject of securities of collective investment schemes are extremely relevant and should be studied at the theoretical level.

One of the types of securities of collective investment schemes is investment certificates of a mutual investment fund. This article is devoted to the study of the features and characteristics of this type of securities of collective investment schemes.

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2. The definition of an investment certificate of a mutual fund

The investment certificate of a mutual fund is a type of security used in the process of collective investment that certifies the rights and interests of investors and is their legal connection with the mutual fund. According to the Law of Ukraine “On Collective Investment Schemes”, an investment certificate of a mutual fund means a security issued by a mutual fund asset management company and certifying the ownership of a mutual fund participant to a share in a mutual fund and the right to receive dividends (for a closed-end mutual fund) (*Zakon Ukrainy “Pro instytuty spilnoho investuvannia” № 1560-XII vid 18.09.1991*). This definition is duplicated in the Law of Ukraine “On Capital Markets and Organized Commodity Markets” (*Zakon Ukrainy “Pro rynky kapitalu ta orhanizovani tovarni rynky” № 3480-IV vid 23.02.2006*).

However, these definitions, in our opinion, do not reflect the entire essence of this type of securities. The author's proposals on this issue will be formulated at the end of the study.

3. Features of investment certificates of a mutual fund

The analysis of the current legislation of Ukraine in the field of collective investment, together with the developments of legal theory in this area, allows us to identify the following features of investment certificates of a mutual investment fund.

Investment certificates of a mutual fund are equity securities. The issuer of investment certificates of a mutual fund is an asset management company. This is due to the fact that a mutual fund is not a legal entity, but is a collection of assets managed by an asset management company. The essence of an equity security is that such a security within the same issue of securities certifies the same amount of rights of its holders in relation to the person who assumes the relevant obligations. Equity securities are the opposite of non-issue securities, i.e., securities issued to a specific creditor by a debtor in cases provided for by law (e.g., bill of exchange, bill of lading, mortgage, etc.) (*Nedopryadko, 2012; 81*).

Investment certificates of a mutual fund exist in electronic form. Article 51 of the Law of Ukraine “On Collective Investment Schemes” provides that investment certificates exist exclusively in book-entry form (*Zakon Ukrainy “Pro instytuty spilnoho investuvannia” № 1560-XII vid 18.09.1991*). At the same time, Article 8 of the Law of Ukraine “On Capital Markets and Organized Commodity Markets” provides that securities exist in electronic (electronic securities) and paper (paper securities) forms (*Zakon Ukrainy “Pro rynky kapitalu ta orhanizovani tovarni rynky” № 3480-IV vid 23.02.2006*). An electronic security is reflected in the form of an account in a securities account in the securities depository accounting system. Thus, the term “book-entry form of a security” is not used in the legislation on the capital market and organized commodity markets. Thus, the outdated terminology of the Law of Ukraine “On Collective Investment Schemes” should be changed.

Investment certificates of a mutual fund are registered. Investment certificates of a mutual fund are registered securities, which follows from the content of Article 51 of the Law of Ukraine “On Collective Investment Schemes” (*Zakon Ukrainy “Pro instytuty spilnoho investuvannia” № 1560-XII vid 18.09.1991*). Therefore, an investment certificate cannot be bearer, but can only be owned by a specifically identified person, namely the owner of a securities account opened with a depository institution or another person in cases established by law, where the relevant investment certificate is registered. This is due to the electronic nature of investment certificates as securities.

Investment certificates of a mutual investment fund may be paid for both in cash and other assets. According to the general rule set forth in Article 51 of the Law of Ukraine “On Collective Investment Schemes”, payment for investment certificates of a mutual fund is made in cash (*Zakon Ukrainy “Pro instytuty spilnogo investuvannia” № 1560-XII vid 18.09.1991*). However, there is an exception for exchange-traded mutual funds, where payment for investment certificates may be made in the appropriate proportion with assets specified in the investment declaration of the said institution, which follows from the content of paragraph 5 of Section II of the Regulation on the Procedure for Placement, Circulation and Redemption of Securities of a Collective Investment Scheme, approved by the Regulation of the National Securities and Stock Market Commission dated July 30, 2013 No. 1338 (*Rishennia Natsionalnoi komisii z tsinnykh paperiv ta fondovoho rynku...*).

Investment certificates of a mutual investment fund are classified by the legislator as equity securities. In accordance with part seven of Article 8 of the Law of Ukraine “On Capital Markets and Organized Commodity Markets”, investment certificates of a mutual fund are equity securities, i.e. securities that certify the participation of the owner of such securities (investor) in the authorized capital and/or assets of the issuer (including assets managed by the issuer) and give their owner (investor) the right to receive part of the profit (income), in particular in the form of dividends, and other rights established by law, as well as the prospectus or decision on issue, and for securities of collective investment schemes – the prospectus (decision on issue) of the Collective Investment Scheme.

However, there are some discussions in the legal theory of Ukraine on this issue. Thus, V.S. Shcherbyna supports the position of the legislator in this regard and refers investment certificates to equity securities (*Znamenskyi, Khakhulin, Shcherbyna, 2004; 275*). While, for example, O.S. Yavorska considers investment certificates to be equity securities with certain features (*Luts, Syvyi, Yavorska, 2004; 181*).

However, from our point of view, the classification of investment certificates of a mutual fund as equity securities is correct, given their legal nature – a security that certifies ownership of a share of a mutual fund managed by an asset management company, which, in turn, is the issuer of investment certificates of a mutual fund.

Therefore, within the framework of this study, it is appropriate to systematize the rights of holders of investment certificates of a mutual fund, as they reflect the role and importance of these securities.

4. Rights of holders of investment certificates of a mutual fund

In the definition of an investment certificate of a mutual fund given above, the legislator explicitly states that there are only two property rights of the holders of such securities: the right of a mutual fund participant to own a share in a mutual fund and the right to receive dividends for a closed-end mutual fund.

The legislative definition does not mention the existence of any other rights, whether property or non-property, in the legal definition. However, whether this is actually the case needs to be further established.

From our point of view, we can distinguish between universal and special property rights of holders of investment certificates of a mutual fund.

The universal property rights of holders of investment certificates of a mutual investment fund, which are characteristic of all types of mutual investment funds, include the following.

The holder of an investment certificate of a mutual fund owns a share in the mutual fund.

A mutual fund is a collection of assets managed by an asset management company. A mutual fund is not a legal entity, which means it does not have legal personality. In this regard, the holders of investment certificates of a mutual fund cannot have any rights in relation to it related to management.

At the same time, a mutual investment fund is a set of assets, which may include, in particular, cash, including in foreign currency, precious metals, securities, real estate, objects under construction, future real estate objects and special property rights to them, etc. All of this property, movable and immovable, is jointly owned by all participants of the mutual fund, and the size of the share is determined and confirmed by the investment certificate issued to each participant.

At the same time, the classical triad of property rights: the right to own, the right to use and the right to dispose of the object of property rights, cannot be applied to the right to own a share in a mutual fund. The owner's rights in these legal relations are exercised in a special way.

Thus, the assets of a mutual fund in the form of securities serviced by the depository system are accounted for in a securities account with a custodian – a special participant in collective investment relations, i.e., a depository institution with which the asset management company has entered into a relevant agreement for the storage of securities of the mutual fund and accounting of ownership rights to them.

Cash as assets of a mutual fund is kept on a separate bank account of the asset management company, which is opened specifically for a particular mutual fund.

Real estate, objects under construction, future real estate objects and special property rights to them are registered in the name of the asset management company in accordance with the established procedure with the mandatory indication of the details of such a mutual investment fund.

Therefore, the participants of the mutual investment fund do not own or use the assets of the mutual investment fund, which they own on the basis of the right of joint partial ownership in accordance with the legislative definition given above.

In addition, the participants of a mutual investment fund have no right to influence in any way the disposal of assets belonging to the mutual investment fund, all actions in this direction are also performed by the asset management company in accordance with the procedure established by the current legislation of Ukraine.

From the foregoing, it can be concluded that the ownership right of a member of a mutual investment fund to a share in a mutual investment fund consists only in the right of the holder of the investment certificate to claim the corresponding share of cash and other assets of the mutual investment fund accounted for by the relevant mutual investment fund at the time of its liquidation. Until the moment of liquidation of the mutual fund, the holder of the investment certificate of the mutual fund has no right to exercise any of the owner's rights in relation to the mutual fund as a set of assets managed by the asset management company.

In this regard, in our opinion, the definition of an investment certificate of a mutual fund provided by the legislator is not entirely correct. It would be more appropriate to define the investment certificate of a mutual fund as a security that certifies the ownership of a mutual fund participant to the corresponding share of assets accounted for by the mutual fund at the time of its liquidation and may be transferred to such a mutual fund participant in cash or other assets.

Thus, in fact, the ownership right of a member of a mutual fund to a share in a mutual fund is the right to participate in the distribution of funds and assets of a mutual fund in the event of its liquidation.

The right to redeem investment certificates of a mutual fund by the issuer. The Law of Ukraine “On Collective Investment Schemes” provides for the possibility of redemption of investment certificates of a mutual fund by their issuer, i.e. the possibility of payment by an asset management company to the owner of investment certificates of a mutual fund of the value of a part of the net assets in proportion to the number of investment certificates of a mutual fund owned by the participant, with the termination of the ownership of the participant of the mutual fund to such investment certificates. The right to redeem investment certificates of a mutual fund is not unconditional and depends on the type of mutual fund, although it can still be considered universal, since it is inherent in participants of all types of mutual funds.

The redemption of investment certificates of an open-ended mutual investment fund is carried out every business day starting from the day following the day of receipt by the official communication channel of the notification of the National Securities and Stock Market Commission on compliance of the mutual investment fund with the requirements for the minimum amount of assets of the collective investment scheme.

The redemption of investment certificates of an interval-type mutual investment fund is carried out from the day following the day of receipt by the official communication channel of the notification of the National Securities and Stock Market Commission on compliance of the mutual investment fund with the requirements for the minimum amount of assets of the collective investment scheme, within the terms established by the prospectus of issue of securities of such a mutual investment fund.

In addition, early redemption of investment certificates of a closed-end mutual investment fund at the written request of a member of the mutual investment fund is possible, provided that the possibility of early redemption at the initiative of a member of the mutual investment fund is provided for in the regulations of the mutual investment fund and if, as a result of such redemption, the value of the assets of the mutual investment fund does not fall below the established legal requirements for the minimum amount of assets of the collective investment scheme.

The special property rights of the holders of investment certificates of a mutual fund, which are typical for certain types of mutual funds, include the following.

The right to sell investment certificates on the secondary market. The right to sell investment certificates on the secondary market should also be considered as one of the special property rights of a member of a mutual fund. This right is not universal, since the Law of Ukraine “On Collective Investment Schemes” allows free circulation of investment certificates of a mutual fund only for closed-end mutual funds. In a mutual fund of interval type, free circulation, i.e. sale of investment certificates of a mutual fund, is allowed only during the period between intervals and exclusively on the organized capital market. Investment certificates of an open-ended mutual fund are also subject to free circulation on the organized capital market.

The right to convert investment certificates of a mutual investment fund into securities of another collective investment scheme. A special right of a participant of a mutual investment fund is the right to convert investment certificates of a mutual investment fund owned by him/her into a security of another collective investment scheme. This right cannot be considered universal, since the current legislation prohibits the conversion of securities of venture collective investment schemes into securities of any collective investment schemes, as well as the conversion of securities of collective investment schemes into securities of venture collective investment schemes.

The right to receive dividends. The provisions of the Law of Ukraine “On Collective Investment Schemes” provide for the possibility of paying dividends to participants of a

closed-end mutual fund, however, provided that such possibility and the procedure for paying dividends are set forth in the regulations of the mutual fund.

Due to the fact that a mutual fund is not a legal entity, the following peculiarities apply to the payment of dividends to the holder of investment certificates of a mutual fund: the need to make a decision of the authorized body of the asset management company to approve the regulations of the mutual fund in the relevant version, which provides for the possibility and procedure for paying dividends to the holder of investment certificates of the mutual fund; making a decision of the authorized body of the asset management company to pay dividends to specific holders of investment certificates of the mutual fund, determining their amount, payment terms and frequency of payment.

Currently, there is a significant gap in the legal regulation of relations with respect to the payment of dividends to participants in a closed-end mutual fund.

For example, the Law of Ukraine “On Collective Investment Schemes” expressly provides that the holders of investment certificates of a mutual fund have no right to influence the activities of an asset management company. Thus, at the legislative level, any leverage of the holders of investment certificates of a mutual fund on an asset management company is prohibited if the payment of dividends is provided for by the regulations, but the decision of the authorized body of the asset management company on their payment is not made.

Thus, it is important to introduce a procedural possibility at the legislative level to protect the rights of holders of investment certificates of a mutual fund to pay dividends. In our opinion, the only practical leverage to influence authorized persons to comply with their obligation to make decisions on dividend payments is to introduce personal liability of such persons at the legislative level.

It should be noted that holders of investment certificates of a mutual fund also have non-property rights. These include the right to receive information about the activities of the mutual fund, as well as the right to protect the violated, unrecognized or disputed rights and interests of such persons in court.

5. Conclusions

As a result of a brief study of the features of investment certificates of a mutual fund, the following conclusions can be drawn.

Investment certificates of a mutual investment fund are a type of emission, electronic, share, registered securities that can be paid in cash, and in cases where they are exchange-traded, and other assets, if determined by the investment declaration of the mutual investment fund, which certify the ownership of a participant of a mutual investment fund for the corresponding share of assets, assets accounted for by the mutual investment fund at the time of its liquidation, and may be transferred to the ownership of such a participant of the mutual investment fund in cash or other assets, as well as other property and non-property rights and corresponding obligations of the mutual investment fund and the asset management company provided for by the current legislation of Ukraine and internal documents of the mutual investment fund.

The rights of a participant of a mutual investment fund may be conditionally divided into property and non-property rights. It is proposed to divide the property rights of a shareholder of a mutual investment fund into universal rights, i.e., those inherent in shareholders of all types and types of mutual investment funds, and special rights, i.e., those characteristic only of shareholders of certain types and types of mutual investment funds.

The universal property rights of the holders of investment certificates of a mutual fund include: the right to participate in the distribution of funds and other assets of a mutual fund in the event of its liquidation; the right to redeem investment certificates of a mutual fund by the issuer.

Special property rights of holders of investment certificates of a mutual fund include: the right to sell an investment certificate on the secondary market; the right to convert investment certificates of a mutual fund into securities of another collective investment scheme; the right to receive dividends.

The non-property rights of a member of a mutual fund are the right to receive information about the activities of the mutual fund and the right to judicial protection of their violated, unrecognized or disputed rights and interests.

References

1. Luts V. V., Syvyi R. B., Yavorska O. S. (2004) *Aksionerne pravo [Shareholder Law]*. Kyiv : In Yure.
2. Nedopryadko Yu. V. (2012). *Pravova pryroda neemisiinykh tsinnykh paperiv [Legal nature of non-issue securities]*. Odesa: *Bulletin of Odesa National University. Series: Jurisprudence [in Ukrainian]*.
3. Rishennia Natsionalnoi komisii z tsinnykh paperiv ta fondovoho rynku «Pro zatverdzhennia Polozhennia pro poriadok rozmishchennia, obihu ta vykupu tsinnykh paperiv instytutu spilnoho investuvannia» vid 30.07.2013 № 1338 [Regulation of the National Securities and Stock Market Commission “On Approval of the Regulation on the Procedure for Placement, Circulation and Redemption of Securities of Collective Investment Institutions” dated 30.07.2013 No. 1338] [in Ukrainian].
4. Zakon Ukrainy “Pro instytuty spilnoho investuvannia” № 1560-XII vid 18.09.1991 [On Collective Investment Schemes : Law of Ukraine No. 1560-XII dated 18.09.1991] [in Ukrainian].
5. Zakon Ukrainy “Pro rynky kapitalu ta orhanizovani tovarni rynky” № 3480-IV vid 23.02.2006 [On Capital Markets and Organized Commodity Markets : Law of Ukraine No. 3480-IV dated 23.02.2006] [in Ukrainian].
6. Znamenskyi H.L., Khakhulin V.V., Shcherbyna V.S. ta in. (2004). *Naukovo-praktychnyi komentar Hospodarskoho kodeksu Ukrainy [Scientific and Practical Commentary on the Commercial Code of Ukraine]*. Kyiv : Yurinkom Inter [in Ukrainian].