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ON THE ISSUE OF DEFINING THE CONCEPT OF INVESTMENT IN LAW AND SCIENCE

Summary

The article deals with General theoretical and practical problems of defining the concept of investment in legislation and legal science. It is noted that, despite the rapid development of investment relations, there are still regulations that require either cancellation or serious revision. One of the problems is the use of the concept of investment in different meanings in the three main laws regulating investment relations. In this regard, it is emphasized that the use of a single term that allows for different interpretations contradicts the legislative technique and negatively affects law enforcement practice. The authors identify the reasons why there is no single legal definition of investment to date, the main ones being the lack of demand for the laws in question in law enforcement practice, as well as the lack of a single doctoral approach to the concept of investment. As a result, it is concluded that the scientific understanding and development of this concept with subsequent amendments to legislative acts is one of the most important tasks of the science of business law at this stage.

Keywords: investment, investment law, concept of investment, definition of investment, definitions, legal technique, investment, investment relations, investment activity, investment legal relations.

In recent years, a large number of papers have been devoted to investment issues, both in law and Economics. This is no accident. The problem of increasing investment is acute for all countries. Russia is no exception. President of the Russian Federation Vladimir Putin regularly mentions the need to increase investment in the Russian economy.

The most serious issue of attracting investment in any country is to create the necessary conditions for the investor, including transparency of current legislation and guarantees of compliance with their rights.

Despite the fact that the issue of investment has attracted great attention from scientists, practitioners, and legislators, not all problematic issues related to investment have been sufficiently studied and resolved.

In our opinion, one of the most important issues is the definition of investment in regulatory acts.

Several laws deal with investment issues, but the concepts of investment enshrined in these regulations are not identical, and sometimes differ sharply from each other.

Thus, in accordance with The law of the RSFSR of 26.06.1991 № 1488-1 «On investment activities in the RSFSR» (hereinafter – The law on investment in the RSFSR), investment means money, securities, machinery, equipment and other property and property rights. In other words, the investment in this regulatory act refers to the object of investment itself, what the investor puts into the business to make a profit.

Investment activity in the law is called investment activity, or investment. Note that this law continues to operate in the part that does not contradict Federal law № 39-FZ of 25.02.1999 «On investment activities in the Russian Federation carried out in the form of capital investments» (hereinafter – The law on investment in the Russian Federation).

According to article 1 Of the law on investment in the Russian Federation, investment, for the purposes of using this law, means money, securities, as well as other property and property rights.

The definition of investment has undergone minimal changes. The essence remains the same – investment here refers to the property that the investor invests in the business to make a profit.

At first glance, there are no contradictions in connection with different definitions of the concept of investment in these laws. Indeed, as mentioned above, the Law on investment in the RSFSR operates in a part that does not contradict The law on investment in the Russian Federation. Thus, the legislator, having made certain changes to the definition of investment in the new law, terminated the definition of investment formulated in the first law.

However, a more detailed analysis of these two laws makes it clear that both definitions are currently valid. Only the definition set out in the law on investment in the RSFSR applies to a wide range of issues related to investment, since the law does not specify otherwise, while the definition contained in the law on investment in the Russian Federation applies only for the purposes of this law, that is, it applies to investments in the form of capital investments.

Indeed, as stated in the preamble to article 1 of this law, all the definitions in this article are used exclusively for the purposes of this law and, therefore, do not in any way cancel the definition of investment contained in the law on investment in the RSFSR.

Given that the definitions in these two laws differ slightly and the definition In the law on investment in the Russian Federation is rather an amended definition from the first law, it can be concluded that most likely the legislator planned to replace one definition with another, but due to the incorrect legislative technique, both definitions are currently valid.

Further, we note that not only in these two laws considered by us, there is a definition of the concept of investment.

According to article 2 of Federal law № 160-FZ of 09.07.1999 «On foreign investment in the Russian Federation» (hereinafter referred to As the law on foreign investment), a foreign investment is an investment of foreign capital made by a foreign investor.

Thus, in this law, investment is not the subject of investment, as in the previous two laws, but the process of investing the property or rights described in the Law in the business. In this law, investment refers to what was defined in the previous two laws as investment activity. We should immediately note that the concept of investment activity is not included in the law on foreign investment. When analyzing the concepts of investment contained in the Law on investment in the Russian Federation and the Law on foreign investment, it is necessary to take into account that these laws were adopted in one year, but it seems that they were written not just by different people, but by experts who have a diametrically opposite opinion about the definition of investment, as will be discussed below.

When analyzing these normative acts, it should be borne in mind that the same legal relations fall under the scope of both laws, in which the defining concept is interpreted differently: in one case-as the object of investment (investment), and in the second – as the investment process itself, the investment itself. Indeed, according to article 5 Of the law on investment in the Russian Federation, this law regulates, in particular, relations related to investment activities carried out by foreign investors in the form of capital investments. The law on foreign investment also regulates relations related to the activities of foreign investors on the territory of the Russian Federation.

Thus, even in this case, we are dealing with a violation of the rules of legislative technique, which affects the lack of formal certainty of the rule of law. Formal definiteness as one of the main features of law in legal science means, among other things, the accuracy and clarity of wording, which should be facilitated by the specific structure of legal norms and the legal technique of their design [1, 80]. In legal science, there are quite a large number of definitions of legal and legislative techniques. These issues have been the subject of research by such scientists as A. B. Vengerov [2, 424], V. K. Babayeva [3, 373], V. N. Kartashov [4, 56], Yu. A. Tikhomirov [5, 6], as well as many others.

Most scientists consider a system of principles, tools, and rules for the preparation and presentation of normative acts as a legislative technique.

According to scientists, the legislative technique must comply with certain rules:

- informative and legal (informative);
- structural (normative and structural);
- formal (documentary and technical);
- linguistic;
- procedural;
- logical.

Questions of compliance with logical rules are reflected in detail in the works of T. V. Kashanina. Among the most important logical rules, the author highlights a uniform understanding of terms as one of the primary conditions for making a competent normative document [6, 122-127]. Indeed, if a single document (or related documents) contains a term that can be understood in several mutually exclusive terms, then readers and law enforcers of such documents are misled about the legal essence of such a document.

Also, in this case, it is impossible to exclude a situation when in the process of enforcement of these laws, the law enforcement officer will encounter contradictions, thus revealing a conflict of law. Thus, according to N. A. Vlasenko, a conflict is recognized as inconsistency and inconsistency of legal norms [7, 23]. A. F. Cherdantsev considers a conflict as a case when at least two norms, different in content, compete with each other in order to be applicable to the same legal relationship [8, 211].

Recently, when preparing legislative acts, definitions of the main concepts used in this normative act or definitions are often made, usually in the preamble or first articles of a normative act. Such definitions reflect the qualitative characteristics of the defined object or phenomenon.

In our opinion, there are several reasons why definitions are increasingly introduced by the legislator in normative acts, of which the following can be identified as the main ones:

1. The Rapid development of scientific and technological progress in recent decades has led to the emergence of new inventions that are already entering the economic and social life of society as a commodity. They only get their names, which are not yet known to a wide range of consumers.

2. The Development of science has led to new types of economic interaction, transactions and new concepts that are also not known to a wide range of people.

3. For the reasons indicated in the first two paragraphs, the law itself is becoming more complex, regulating new forms of emerging legal relations, which gives an impetus to the development and formation of new legal concepts.

4. The recent socio-political activity of citizens, as well as the availability of normative acts on the Internet, contributes to a wider interest of people in independent study of legislation, which, of course, contributes to the introduction of the main definitions used in the normative act at the beginning.

Thus, the significance of definitions in legislation is difficult to overestimate. However, all legal definitions of a normative act must exclude double interpretation, since otherwise such definitions in the law will only be harmful.

Based on this, certain requirements are imposed on definitions in legislative acts [6, 126]. They must:

- reflect only those features that have a significant legal significance for the given subject or phenomenon;
- do not contain contradictory judgments, as well as tautologies;
- be based on definitions developed by legal science.

All legal definitions can be divided into two groups:

- legislative (normative) documents, which are usually written by representatives of the legislative power;
- scientific (doctrinal), offered by legal scholars.

It seems that the optimal situation will be when after scientific understanding and discussion of a new concept, taking into account the laws of logic, a new definition is developed, which subsequently finds its place in the preamble of the normative act regulating the relevant legal relations.

At the same time, we should agree that the speed of changes in all spheres of our life is such that not only the development of new scientific knowledge, but also the legislative process does not always manage to regulate the newly created social relations. The simplest example of this is artificial intelligence, the legal regulation of which is significantly behind in almost all countries, including developed countries, from the speed of development and expansion of its application in public life.

Returning to the definition of investment in domestic legislation, it should be noted that the definitions we are considering also appeared at the dawn of the development of the Institute of investment in our country. In Soviet legal science, the concept of investment was poorly developed, and new scientific knowledge did not keep up with the rapid development of the economy.

However, almost 15 years have passed since the adoption of the last laws under consideration, and the problems of defining the concept of investment outlined in this article have not been resolved to date, despite all the negative consequences described above.

In our opinion, there are two main reasons for this:

1. Despite the active development of investment in recent years and the emergence of new types of investment agreements, the laws in question have been left on the sidelines of economic life. In law enforcement practice, as a rule, either the main civil law contracts through which investments are made (purchase and sale agreement, construction contract agreement, etc.) are considered. or new regulatory acts regulating newly emerging relations in the investment field (Federal law № 259-FZ of 02.08.2019 «On attracting investment using investment platforms and on amendments to certain legislative acts of the Russian Federation», Federal law № 335-FZ of 28.11.2011 «On investment partnerships» and others).

In order to bring the Law on investment in the Russian Federation and the law on foreign investment considered in this article back to life, it is necessary, in our opinion, to carry out a deep reform of the current investment legislation, with the abolition of all duplicative and outdated norms and the elimination of all regularly detected problems.

2. The second reason is the absence of a unified doctrinal approach to the concept of investment.

Thus, L. G. Kropotov identifies four different, only legal concepts to define the concept of investment [9, 6]. However, it should be noted that even within the same concept, the authors offer significantly different definitions from each other.

A.V. Belitskaya describes in detail the views of Russian scientists on the definition of investment [10, 67-75].

N. G. Doronina and N. G. Semilutina refer to investments as any instrument that makes it possible to save or increase the invested funds, as well as provide any income [11, 10].

A. G. Bogatyrev believes that investment is closely related to the concept of property [12, 11], while M. M. Boguslavsky rightly, in our opinion, notes that just as not all property becomes an investment, so not all investments are the property of the investor, since the latter can use borrowed funds in the process of investment [13, 55].

Despite the fact that the concept of investment differs among the above-mentioned scientists, they have one thing in common-they define investment as an object of civil rights, that is, as an object of investment. These authors investments represent what the investor puts into the

business. If we do not delve into the different views of the object of civil rights as an object of investment, this approach coincides with the definition of the concept of investment in the Law on investment in the Russian Federation.

A similar position on this issue is also taken by B. T. Kuznetsov [14, 8], S. S. Zankovsky [15, 219], P. V. Sokol [16, 18] and other authors.

Meanwhile, there is a group of scientists who understand investment as the process of investing the object of investment in a business for the purpose of making a profit.

Thus, according to M. G. Kholkina, the concept of investment is a certain action-investment of capital, since the ownership of property itself does not allow the investor to make a profit without performing any actions [17, 13]. A similar opinion in their works is also held by V. V. Gushchin and A. A. Ovchinnikov [18, 72], V. N. Kokin [19, 46] and a number of other authors.

It should be noted that the opinion of these scientists essentially coincides with the definition of the concept of investment in the law on foreign investment.

V. N. Lisitsa considers investment relations as a subject of investment law, which, in his opinion, arise during the implementation of investment activities [20, 75]. O. M. Antipova [21, 30], I. A. Vdovin [22, 117] and other scientists also offer to study the Institute of investment through the prism of investment relations in their works.

Some scientists believe that the formulation of a single concept of investment is significantly difficult given the large variety of their various types. Thus, A. P. Garmonza believes that arbitrators should independently interpret the term investment depending on its context in a specific bilateral investment agreement [23, 74]. A similar position is held by V. V. Dolinskaya [24, 3-12], S. V. Usoskin [25, 104-112] and a number of other authors.

From the point of view of A.V. Belitskaya, investment in legal terms is an investment of civil rights objects that have a monetary value, which is aimed at making a profit or achieving another useful effect [10, 74].

It should be noted that there are other scientific views on the definition of investment.

In this article, the author has identified a range of problems related to the lack of a common opinion on this issue both in the scientific community and a complete definition in the legislative acts regulating General provisions on investment. The development of such a concept, in our opinion, should be an independent in-depth study.

However, note that the definition of such concepts as investment, is impossible without a detailed study of the legal nature and essence of the investment (in our opinion, it is though similar, but still different legal category) of the dual economic and legal nature of the investment, as well as in-depth study of this concept in retrospect, economic and legal teachings.

Given the different types of investment, which, for example, direct and indirect (indirect), differ significantly from each other, it is possible to develop a common definition of investment, corresponding to their legal nature and satisfying the entire range of investment relations. Such a definition of investment should be contained in the basic law on investment activity, and «special» investment laws may contain their own narrow detailed definitions. This can be represented by the example of the concept of «contract» in the Civil code of the Russian Federation, in the first part of which a fairly simple definition is given, while in the second part of it all types of contracts are described in great detail.

The above, as well as the primary signs of investment identified by physiocrats in the XVIII century, allow us to propose for discussion the following definition as a General one: investment is an investment of capital at one's own risk in order to obtain a profit or other useful effect. At the same time, it should be noted that, in the author's opinion, investment is precisely the process of making capital for the purpose of making a profit in any field of activity in various ways (investment in fixed capital or securities, concession agreement or crowdlanding, etc. d.), and not the subject of investment (not the object of civil rights).

Based on the above we can draw the following conclusions:

1. Despite the rapid development of investment relations, there are still legislative acts that require either cancellation or serious revision.
2. Thus, the three main laws regulating investment relations use different definitions of the key concept – investment.
3. the Use of a single term that allows for different interpretations is contrary to the legislative technique and has a negative impact on law enforcement practice.
4. to date, the scientific community has not developed a unified approach to the definition of one of the most important concepts of today's economy – investment.
5. Scientific understanding and development of this concept with subsequent amendments to legislative acts is one of the most important tasks of the science of business law at this stage.
6. the author's General definition of investment is Proposed, which in the future should be described in detail in the «special» investment laws.

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