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УПРАВЛІННЯ МАЙНОМ ТА ІНВЕСТИЦІЙНИЙ РОЗВИТОК В УКРАЇНІ

Загорняк Н.Б.

*кандидат економічних наук, кандидат юридичних наук, доцент ААУ,
запрошений викладач Бізнес Школи КРОК*

FIDUCIARY MANAGEMENT OF ASSETS AND INVESTMENT-DRIVEN DEVELOPMENT IN UKRAINE

N. Zagorniak

*PhD in Law, PhD in Economics, Associate Professor of AAU, Visiting Professor of
KROK Business School*

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Annotation. The paper is establishing a scientific rationale for the promising outlook for fiduciary management of assets in investment-driven development realm in Ukraine. In the paper much attention directed to civil regulatory device mechanism concerning receiving of residential space into ownership by fund's for building financing trusters and the relevant system of investment activity, actual problems of balancing the legally protected interests of investors and other persons engaged in investment activity. Existing doctrines, civil regulation and judicial opinions concerning the research of promising outlook for Ukraine of escrow accounts are concluding. The paper starts by the concepts of investments and investment relations in residential construction under fund for building financing in aspect of economic and legal nature and then considers essence of legal investment relations respectively. Structural analysis of legal investment relations in residential construction under fund for building financing was summarized and concept of investment liability was characterized. Existing regulation in force and summary of Ukrainian civil and

economic courts ruling about misuse of resources of the fund for building financing are concluding. Suggestions concerning legislative changes including introduction of escrow accounts are defining. In the paper the conclusion is drawn that in Ukraine it is time to apply in domain of investment housing construction under the fund for building financing a facility based on the escrow account, which is widely spread in European and American new home loans practice and project financing as a means of securing an interest and risk reduction in aspect of performance of counter-execution. In keeping with the conception of an escrow account as specific bank account, which is managed by a third party in accordance with happening of trigger events ascertained by contract, in the article it is concluding that there has to be a change to the Law of Ukraine “On Financial and Credit Mechanisms and Property Management during House Building and Real Estate Operations” setting the escrow account as compulsory for a fund for building financing. The suggestions aimed at prevention of misuse of resources of the fund for building financing is elaborating. Suggestions concerning legislative changes to boost investment activity in Ukraine including application of escrow accounts are defining.

Key words: fiduciary asset management agreement; escrow account; contract for escrow account; investment activity; fund for building financing.

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Анотація. У статті обґрунтовується багатообіцяюча перспектива фідучіарного управління активами в області інвестиційного розвитку в Україні. У статті велику увагу приділено механізму цивільного регулюючого пристрою, що стосується отримання житла у власність фондами для фінансування довірчих керуючих, і відповідної системі інвестиційної діяльності, актуальних проблем балансування охоронюваних законом інтересів інвесторів та інших осіб, що займаються інвестиційною діяльністю. Існуючі доктрини, громадянське регулювання і судові висновку щодо дослідження перспективних для України перспективних рахунків завершуються. Стаття починається з концепцій

інвестицій та інвестиційних відносин в житловому будівництві в рамках фонду фінансування будівництва в аспекті економіко-правової природи, а потім відповідно розглядається сутність правових інвестиційних відносин. Також у статті узагальнено структурний аналіз правових інвестиційних відносин в житловому будівництві при фонді фінансування будівництва та охарактеризована концепція інвестиційної відповідальності. У статті робиться висновок, що в Україні настав час подати заявку в області інвестиційного житлового будівництва в рамках фонду для фінансування будівництва об'єкта на рахунку умовного депонування, який набув значного поширення в європейській і американській практиці надання нових житлових кредитів і проектного фінансування. як засіб забезпечення інтересу і зниження ризику в аспекті виконання контр-виконання. Відповідно до концепції умовного депонування в якості особливого банківського рахунку, який управляється третьою стороною відповідно до подіями, що ініціюють тригерні події, встановленими договором, в статті робиться висновок про необхідність внесення змін до Закону України. «Про фінансово-кредитні механізми і управління майном при житловому будівництві та операціях з нерухомістю», що визначають цільовий депозитний рахунок як обов'язковий для фонду фінансування будівництва. Розробляються пропозиції, спрямовані на запобігання нецільового використання коштів фонду для фінансування будівництва. Пропозиції щодо законодавчих змін для стимулювання інвестиційної активності в Україні, включно із застосуванням умовного депонування, є визначальними.

Ключові слова: договір довірчого управління активами; депозитний рахунок; договір на цільової депозитний рахунок; інвестиційна діяльність; фонд фінансування будівництва.

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Introduction. Economic development is widely cited as an essential pre-requisite for economic growth that require collective action through government concerning the “activities that expand capacities to realize the potential of individuals, firms or communities who contribute to the advancement of society through the responsible production of goods and services” [1, p. 21]. Modern understanding of a decent living of the person associated with the availability of accommodation, because the conduct policy aimed at the gradual and consistent supply all citizens with housing is the priority of any state, as indicated in the strategic documents of the international and national levels.

Ukraine's transition to market economy led to changes in the legal regulation of the exercise of the constitutional right to housing and allowed its implementation through construction of housing at the expense of private funds, the fund for building financing (FBF). Provisions of the Law of Ukraine “On Financial and Credit Mechanisms and Property Management during House Building and Real Estate Operations” (Law № 978-IV) define the general principles, legal and organizational basics for legal regulation of the civil relations in field of involvement of individuals and legal entities as trusters of the FBF [2].

Despite the potential of mobilizing free financial resources and business in the sphere of housing, the FBF has not helped to solve housing problems. Not conducive to the development of housing and the shortcomings and contradictions of certain norms of civil legislation that governs relations associated with the foundation and functioning of FBF; such rules are hindering the formation of a stable practice of law enforcement.

The courts contradictory resolved questions about the necessity of payback for trustee of the fund to the truster who decided to prematurely terminate the fudiciary asset management agreement; concerning the imposition of sanctions in the case of misuse of the FBF. Today, in the field of housing a special urgency to acquire a task of the state to arrange conditions for the safe and transparent, attracting funds of trusters

to the FBFs, for functioning of FBFs in accordance to its purpose, and establishing of control over the activities of all participants in the process.

Proceeding from the fact that the civil law expresses the interests of society, the civilians make a point of the universality of the principle of good faith concerning performance of civil rights and duties. Conscientiousness is one of the general principles of the civil legislation of Ukraine, so proper attention to the prevention of abuse of rights is important.

By force of Article 546 of the Civil Code of Ukraine [3] the list of means of securing an obligation is not exhaustive. The contractual structure of bank escrow accounts is worth looking at, because such an account a third person who is not the owner of the account can dispose only upon condition of occurrence of certain contract circumstances. Not only the dynamics of development of the financial markets, but also the future of the investment activity and development of markets of real estate assets require fixing of application of escrow accounts by special laws.

Analysis of recent research and publications. Individual issues of mechanisms to attract funds to finance housing construction have been studied mostly by the economists (I.I. Korkun, V.I. Kravchenko, K.V. Palyvoda, I.G. Chaliy, T.V. Savchuk). Scientific publications in recent years, devoted to legal aspects of housing construction, mostly relating to problems of contractors and residential issues, property management and peculiarities of different legal mechanisms to raise funds for the financing of housing construction (M.K. Galiantykh, L.I. Danchak, O.V. Demchenko, N.V. Drozdova, V.V. Kudriavtzeva, M.V. Mashenko, L.I. Radchenko, N.B. Soltys, T.D. Suyarko), and problems of legal regulation of investment activity has been described in economic and legal terms (Y.M. Grushimnsky, I.M. Zlakoman, A.V. Karkachov, V.I. Kuchar, D.V. Rubiy).

Analysis of recent studies and publications indicates a lack of attention to such economic category as the category "investment" is, and to these attributes of investment relations, which have legal value. The essence of investment relations in residential construction under FBF is not discussed in legal studies. In this case there is not enough

effort is devoted to ensure systematic transformation of civil legislation in view of the observance of the balance of interests in society. The reasonability of application of escrow accounts by special laws is not discussed. This obviously hinders the progress of the improvement of the domestic legislation.

Setting objectives. The purpose of this paper is to study the prospects for the introduction of framework of escrow accounts, and the approaches used in judicial practice of resolution of cases concerning residential construction under fund for building financing in Ukraine by general and economic courts, and substantiation of proposals to improve the domestic civil legislation concerning fiduciary management of assets.

Research results. The problem of investment activity and its regulation, of course, has an interdisciplinary character, and, despite boundless economic potential of this direction, underestimate the possibilities of legal science in its research and conceptualization unacceptable. Objectively, there is a conflict of interests of the trusters of the FBF and the developer.

You must agree with the position of those scholars, who consider civil relations first of all a special legal mechanism, the purpose of which is establishing relationships with other individuals own a legally significant actions [4, p. 397-398], and define it as a mechanism securing socially valuable results [5].

The concept of "investment" has not only the legal but also economic content. We believe it necessary to agree with T.V. Vlasova, who noted that ensuring the logical consistency of the borrowing conceptual apparatus of other sciences can be provided according to the term and the value provided to him by the relevant industry knowledge [6, p. 91-92] should also take into account the conclusions of D.S. Ratnikova [7], V. Gushchina, A. Ovchinnikova [8], O.M. Antipova [9], M. Kokin [10] and A.V. Majfat [11] with respect to the need to formulate a legal definition of investment relations according to economic substance. This phenomenon, because it will more clearly define the scope for the housing construction under the fund for building financing that is investment. Law of Ukraine «On the Investment Activity» in Article 1 applies the

approach to the definition of investment through the characteristics of the objects of capital placement, the values and the result [12]. Specific economic behavior of an investor concerning the transfer of money and other valuables owned by him to third parties on the basis of different legal titles, with the aim of further use for profit or other useful effect. Thus unscheduled increase of time spent to create profit is associated with a decrease in useful effect obtained by an investor. It is the declared motivation is distinguishing an investor from an owner of the treasure, so we can yield value, property and temporal components. Common idea of property as a right or as a bundle of rights or relations [13, p. 64, 302] fully corresponds to the definition of investment in the economic science. Our research of different economic approaches to the definition of the essence of investment (in macroeconomics, in microeconomics, in financial theory) allowed the conclusion that it is characterized by the following attributes: a) this is action or complex of actions; b) these actions result in capital formation means the growth of assets and income; c) property relationship [14, p. 120; 15, p.136; 16, p.171; 17, p.99; 18, p. 203-209; 19, p. 449; 20, p. 165]. By force of Article 1 of the Law of Ukraine «On Accounting and Financial Statements in Ukraine» the assets include “the resource controlled by the enterprise as a result of past events, which are expected to lead to economic benefits in the future” [21].

Therefore, it is advisable to determine investment relations in accordance to their economic substance, as the public relations arising with regard to capital formation, as the growth of assets and income. Such an understanding of the concept of investment relations fully complies with the provisions of the Article 7 part 5 of the Law of Ukraine «On the Investment Activity» [22].

Thus from a legal point of view the investments in residential construction under FBF can be defined as a system of property relations arising with regard to the transfer by the investor his own or acquired loan funds in order to obtain the property in accordance with the Law of Ukraine № 978-IV [2].

In our opinion, the investment relations can be considered a public relationship, which arises on the basis of legal regulations regarding investments, for obtaining

result targeted the investor, the subjects of which related to the legal rights and responsibilities specified with the investment legislation and systems insured by the state system of guarantees and sanctions. Accordingly, civil legal relations concerning investments in residential construction under FBF related to implementation of some civil rights and legal obligations according to the principles and within the frontiers defined by the legislation, as well as in treaties and other transactions applied to the specific parties.

The investment relationships being under investigation arise with a view to to obtain the property (housing) as the part of completed facility. Note that financial and credit mechanisms set by the Law of Ukraine № 978-IV provides only a service concerning process of organization and financing of the facility construction established by an agreement on participation in FBF (fiduciary asset management agreement), with the subsequent state property registration. It is clear that without the agreement of the developer and the whole construction work package to ensure the completed facility, is not possible to assure the goals set by the investors.

By the force of Article 9 of the Law of Ukraine «On the Investment Activity» the main legal document, which regulates the relations between the subjects of investment activity is a contract (agreement) [22]. Investigated legal relations are not limited to the legal relationship of the two subjects, it can be described as a chain of emerging consistently legal ties, and the actions of all participants aimed at the achievement of which is achieved by participating in each simple legal relation. The resulted relations are complex containing several simple legal relations. Investigated legal relations are dynamic, evolving through a gradual transition to one of the simple legal relations to another, moving in the direction to the result.

Moreover, because of absence of control under the use of FBF's funds for its intended purpose, neither the direct effect of the contract by the trustor and the FBF developer nor inclusion of the mechanism of fiduciary asset management into the scheme permitted by the Law №978-IV, apparently does not ensure the effective legal regulation of investments in residential construction under FBF.

For all that the universal proscription of power execution in contempt of the defined goal settled by Article 364-1 of the Criminal Code of Ukraine [23], the Ukrainian legislation neither define misuse of private funds nor duty of developer to open a different bank account for every housing project or limit a performer's freedom of setting fund for building financing's cash waterfall. We believe that under the misuse of the FBF together with the direction of funds which do not comply with the approved FBF Rules we should also understand its use on the pre-payment and advancing of money towards another undone work or its individual stages. It is necessary to establish by law the FBF trustee's obligation to open a separate account for each of the construction, which will contribute to the prevention of the use of funds of the FBF not for end-use.

Analysis of the approaches applied in judicial opinions concerning disputes arising from the relations associated with the establishment and functioning of FBF has shown that after the money transfer from the FBF to the developer in the case of breach of developer commitment, the trusters at most failed to ensure the return invested assets on their own [24, 25]. Promising remains the use of escrow accounts, which are worthy of special attention not only to the scientists but to the legislature as well. We deem it advisable, that there has to be a change to the Law №978-IV setting the escrow account as compulsory for a FBF.

Conclusions. The investment relations in housing construction under the FBF is a complex multilateral investment obligations legal relationship typified by a key role of the developer. Violation of the property interests of investors, the inhibition of the evolution of investment and credit relations in housing construction is caused by lack of legislative norms that would determine the content of investors and developer relationship.

We consider important to clarify the provisions, which determine the use of the funds of the operational reserve, setting a direct prohibition of the use of them at the discretion of the FBF's trustee for transactions not specified in Article 17 of the Law №978-IV.

The escrow account legal construction (Articles 1076-1-1076-8 of the Civil Code of Ukraine) is suitable for a functional mechanism, through which the money obtained by the escrow agent from one of the parties, are released for the benefit of the other party (the beneficiary) in terms of performance by this party of certain commitments agreed at the time of the transfer of money to the escrow agent, who shall keep the deposit escrow to complete fulfillment of the relevant obligations. Accordingly, the escrow account legal construction is obviously suitable for reliable performance guarantee of implementation of subjective civil rights of FBF's trusters.

Prevention of the use of funds of the FBF not for end-use remains a problem. In our opinion, the solution of the problem requires a complex change in domestic civil legislation.

It is proposed to lay out Part 10 of Article 11 of the Law №978-IV in the following edition: «The trustee for recording and blocking of funds received from trusters to transfer to the developer for construction financing, on condition that provided for in the FBF Rules, in accordance with direction of funds provided for in the fiduciary asset agreement financing schedule, set up a special bank account escrow (FBF account). The escrow bank account agreement (FBF account agreement), is concluded between the bank as the escrow agent, FBF's trustee as the deponent, and the developer as the beneficiary.

The FBF account agreement must necessarily contain the list of grounds, in case of occurrence of which the escrow agent shall transfer the beneficiary funds, indicating the size of the sum separately for each of the reasons in accordance with the financing schedule as its. The bank being the FBF's trustee sets up a special bank account escrow (FBF account) in its balance sheet.».

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