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FEATURES OF INVESTMENT IN THE NATURAL GAS MARKET

The article studies aspects of investment process in one of important energy market sectors - natural gas market. The peculiarities of the investment in the natural gas market are outlined, as well as possible sources, subjects, forms and objects of investment are identified and studied. Author analyzed investment environment on the natural gas market and identification of possible legal problems of investment process. The article examines basic legal forms of feasibility of investment in the natural gas market in the current conditions of Ukraine - the contract form and the corporate form of investment. The attention is focused on the legal issues of investment process in the domestic gas market of Ukraine.

Key words: natural gas market, reforming, investment, investment activities, investment contract.

Problem setting. Attracting investment in Ukrainian economy is an issue of great significance, especially in the context of numerous reforms including reforms in the energy sector. Today this problem gains special importance in terms of imbalance of the national economic system and numerous attempts to build a new model of the natural gas market by European standards. It should be noted that foreign investment attraction is a key indicator of market economy of any country and a guarantee of national economy maintenance and growth. But this should be proved by the state's active part in the process of investments attraction. For this an effective legal framework should be formed, as well as effective mechanisms to ensure the investment attractiveness of priority sectors and industries. The largest drawbacks of the current national investment policy and including certain economic sectors is its unsystematic character, as some scholars have repeatedly stated.

The objective of this paper is the analysis of investment environment on the natural gas market and identification of possible legal problems of the investment process. The subject of research is the procedure for investing in the natural gas market.

Recent research and publication analysis. Different aspects of public investment policy, investment, and particularly the conclusion of investment contracts were previously studied by many jurists and economists, such as O. M. Vinnyk, D.V. Zadyhaylo, O. Znamenskyi, V. I. Kukhar, V. K. Mamutov, O. P. Podtserkovny, V.V. Poedinok, V.V. Kafarskiy, O. E. Simson, L. Hrytsenko, etc.

V.I. Kukhar¹ analyses the state investment policy of Ukraine as an integral object of legal regulation. O. E. Simson² conducts the research of relations, which arise in the process of carrying out the investment activity, their essence, forms and element structure, and also the development of legal adjustment of such relations in Ukraine.

It should be noted that issues of the gas industry investment have always been a subject of study among academic economists. For example, T. V. Savchuk analyses the effectiveness of oil and gas companies, which is suggested to carry through the analysis of profitability of invested capital on the basis of adjusted economical profit. V. V. Lucash reviews the current problems of gas transmission system of Ukraine and the mechanism of foreign investment attraction. G. F. Bodnar studies the organizational forms of public-private enterprises and disclosed potential benefits of their creation and activity in the supply of natural gas consumers. K.V. Gorbova considers the investment activity of oil and gas enterprises in the conditions of concession. However, the issues of the natural gas market investment have been relatively outside the scope of researchers' attention.

Paper main body. Article 10 of the Economical Code of Ukraine (hereinafter - EC) refers to one of the main directions of economic policy, which is determined by the state investment policy, and establishes

¹ Кухар, В.І. (2008). *Господарсько-правове забезпечення державної інвестиційної політики в Україні*: автореф. дис. канд. юрид. наук: 12.00.04. Харків: НЮАУ ім. Ярослава Мудрого.

² Сімсон, О.Е. (2001). *Правові особливості договорів інвестиційного характеру*: автореф. дис. канд. юрид. наук: 12.00.03. Харків: НЮАУ ім. Ярослава Мудрого.

that it is aimed at creation of necessary conditions for economic entities to attract and concentrate funds for expanded reproduction of fixed assets mainly in the spheres, which development is determined as a priority for structural and sectorial policies, and ensurance of effective and responsible use of resources and control over them¹.

We agree with the position of D.V. Zadyhaylo who states that the vector of state investment policy for the formation of investment legislation had changed its direction several times and as result adjusted the composition and content of the investment law until a radical change in some of its important fragments was made². The same opinion is presented by O. M. Vinnyk who emphasizes that public investment policies as part of economic policy throughout the period of independent Ukraine existence varied in dependence on the economic and social conditions in the country. It seems reasonable to apply this statement to the process of investing in gas field, which was updated with the adoption of a special law of Ukraine "On the market of natural gas" from 09.04.2015 № 329-VIII (hereinafter - Law № 329-VIII).

It should be underlined that despite the attempts to streamline the investment processes that occur in the natural gas market, Law № 329-VIII does clearly define the main elements of legal relationship in terms of investment activity in the gas market. For instance, the range of possible subjects of investment in natural gas market and the possible basic legal forms of investments are not established; order of investors' additional guarantees receiving is not outlined. In this regard, it is of a great importance to define aforementioned categories.

The main investors in the natural gas market can be: 1) the state as a major strategic investor; 2) institutional investors; 3) individual (private) investors; 4) corporate investors. Traditionally, depending on the activity of certain subjects and sources of origin, investments are divided into types that are appropriate for the gas market: internal (domestic investment), foreign (investments owned by foreign investors), collective investment (investments owned by domestic and foreign investors) as well as private and state - depending on the ownership of certain subjects.

In accordance to common classification provided by O. M. Vinnyk³ and V.V. Poedinok⁴ the following types of investments are enlightened which we consider to be possible in the gas market (depending sources, ownership and investment targets): the internal-economic investments (the main source of income in favor investment entity investor) and external-economic investments (the main source of investment - assets investor, whose costs involve others under the relevant agreements), capital investment (can be implemented in the form of integral property complexes acquisition, reconstruction and modernization of gas transportation system) and financial investments (operations with profitable types of financial instruments).

However, it must be emphasized that the basic legal forms of feasibility of investment in the natural gas market in the current conditions of Ukraine is the contract form that mediates not only investments but also the organization of the investment process, and the corporate form of investment, the consideration of certain types in connection with analysis of the relevant provisions of Law № 329-VIII.

It should be underlined that the issue of contracts in investment activity was analyzed in many researchers conducted by V.V. Poedinok, V.V. Kafarskiy, O. E. Simson and others. Thus, the subject O. E. Simson's research is also a legal model of public-private partnerships and specific mechanisms for its implementation in the legislation of Ukraine on innovation activity.

Based on aforementioned studies of natural gas market, the presence of the following types of investment contracts, which are concluded within public-private partnership, may be identified: contract concession agreement on joint activities and production sharing agreements.

Thus, G. Bondar made a justification of public-private partnerships for use in the processes of transformation of gas supply companies in the public-private partnership, as recommended by the concession contracts. It was shown that domestic instruments enable the development of concession contracts in gas business entities that are able to meet the needs of society in reliable and efficient supply of

¹ *Господарський кодекс, ст. 10, гл. 2 (2003)* (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <<http://zakon2.rada.gov.ua/laws/show/435-15/page5>> (2016, March, 14).

² Задихайло, Д.В. (2002). Економіко-правові передумови формування інвестиційного законодавства України. *Державне будівництво та місцеве самоврядування: зб. наук. пр.*, 3, 41.

³ Вінник, О.М. (2009). *Інвестиційне право: навчальний посібник*. 2 вид., перероб. та доп. Київ: Правова єдність, 15-19.

⁴ Поєдинок, В.В. (2013). *Правове регулювання інвестиційної діяльності: теоретичні проблеми*. Ніжин: ТОВ «Видавництво Аспект – Поліграф».

natural gas. A special interest is attracted by O. M. Vinnyk's study of corporate forms of public-private partnership¹, that focuses on the problems of legal support of corporate form of public-private partnership and their solutions, emphasizing the complexity of the relationship, connected with the ability to use its various forms and models.

Prior to consideration of investment activity in the natural gas market there is a necessity to analyze main provisions of the investment policy in this area. Law № 329-VIII contains provisions which indicate a direct connection between the tariffs and providing the necessary investment in gas transmission and gas distribution system, gas storage, and installation of LNG (liquefied natural gas). However, according to the part 6 Article 4 of Law № 329-VIII, the requirements for pricing and tariffs are confirmed as well as tariffs for transportation, distribution, storage (pumping) natural gas are established. It also states that service of setup LNG should create economic incentives for implementation investments and maintenance in good condition gas transmission and distribution systems, storage facilities, installation of LNG, and improve interaction and communication between them. The setting of tariffs in accordance with Law № 329-VIII is the responsibility of the National Commission for state regulation in energy and communal services that has received the regulatory status in the natural gas market. However, Law № 329-VIII has not fixed any possible forms of investment on gas transmission, gas distribution systems (to promote security of supply), natural gas storage and services to setup LNG. According to Article 6 of abovementioned law, central executive authority, which provides the development and implementation of state policy in the oil and gas sector, develops and follows the consultations with the subjects of natural gas market, representatives of consumers (including residential customers) and in agreement with Regulator approves National Action plan, which is binding for all the subjects of natural gas market that determines the measures to eliminate or reduce the general negative impact of crisis situation². This article establishes market measures to be applied to overcome crisis situation at all levels, which are divided into two groups: 1) measures aimed at increasing the supply of natural gas; 2) measures to decrease natural gas consumption. The first group is considered to stimulate investment in the objects of gas infrastructure. But in the current conditions of state monopoly on gas infrastructure, central executive authorities are unlikely to be able to carry out effective and the transparency private investment without such obligation stated in law. In addition, in the context of natural gas supply security monitoring the duty of central executive body is established to ensure formation and implementation of state policy in the oil and gas sector on report preparation in a timely manner for the previous calendar year about the results of security monitoring of natural gas supply as well as taking or planning measures on these issues. Moreover, the report should contain information on mechanisms to stimulate investment in production, transportation, distribution, storage of natural gas and services to setup LNG, provided by the Ukrainian legislation. Thus, report should reflect incentives of investment, which are not stated in national laws.

Today the regulation of investment in the gas market is not completed. The Ministry of Energy and Mines located "Report for 2015 on the results of safety monitoring of natural gas supply" (hereinafter - Report) which does not contain specific information on mechanisms of investment stimulation in production, transportation, distribution, storage natural gas and services to setup LNG³. However, this report contains information on measures to reform the gas sector and modernization of existing facilities. Thus, the European Commission and the World Bank concluded an agreement on implementation of the Trust Fund directed to support the modernization of Ukraine's gas transportation system and providing technical assistance in the amount of 2.5 million euros within the "Joint Declaration on the modernization of the gas transportation system» from 23 May 2009. In addition, the Report provides the information about the finalization of the JSC "Ukrtransgaz" to implement two investment projects involving credit funds of the European Investment Bank, European Bank for Reconstruction and Development and the «Deutsche Bank AG» for the reconstruction of the main gas Urengoy-Pomary-Uzhgorod pipeline and compressor station "Bar" pipeline "Union". Also, Report draws attention to preparation for the initiation of construction

¹ Вінник, О.М. (2012). *Корпоративна форма державно-приватного партнерства: проблеми правового забезпечення на тлі зарубіжного досвіду*. Суми: «Мак Ден».

² *Закон про ринок природного газу 2015* (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <<http://zakon3.rada.gov.ua/laws/show/329-19>> (2016, March, 14).

³ *Звіт за 2015 рік за Результатами проведення моніторингу безпеки постачання природного газу Постійна www-адреса статті Міністерства енергетики і вугільної промисловості 2015* (Міністерство енергетики та вугільної промисловості). *Офіційний сайт Міністерства енергетики та вугільної промисловості*. <<http://mpe.kmu.gov.ua/minugol/control/uk/doccatalog/list>>(2016, March, 14).

project Interconnector pipeline between Ukraine and Poland, the construction of which is planned to raise funds from international financial institutions. The above intentions and actions to implement investment in gas sector confirm the importance of investment cooperation between Ukraine and the EU, which is realized in cooperation of our country with the European Investment Bank.

The priority areas of lending activity is Ukraine's energy sector is the modernization of transport and energy infrastructure and energy efficient economy of Ukraine. However, the enumerated cases show that the procedure violated the report, namely, in the above report is no basis in the law as obligatory information on the mechanisms to encourage investment in production, transportation, distribution, storage of natural gas and services to setup LNG, which can be a consequence of the investment lack at the time of drawing up the report or reluctance to disclose some information.

The basis of investment activity in many areas of the gas market is a real investment in the form of capital investment. Capital investment is necessary for the development of gas transmission and distribution networks and storage of natural gas. Thus, the legal regulation became the order of the investment planning for the development of the gas transportation system and gas storage. In particular, Article 30 of Law № 329-VIII establishes the procedure for investment planning on the transmission system, which includes the plan of gas transmission system development in a specified period, which is to ensure the conformity that needs of gas transmission system of the natural gas market and the interests of security of supply of natural gas. In addition, the plan for the development of gas transmission system introduces the confirmed investments and new investments which are implemented within a specified period and general the timing of all investment projects.

Analogous demand for a gas storage plan is contained in Article 50 of Law № 329-VIII that includes the development of carrier gas storage development plan for gas storage for a definite period, which should ensure compliance of gas storage market with needs and interests of the natural gas supply security. As for the internal economic sources of financial resources (which is the basis of self-investment), there is a "Procedure for forming the investment program of gas supply, gas distribution, gas transmission and gas-saving enterprises", approved by the Decree of National Electricity Regulatory Commission of Ukraine № 2255 from 28 November 2011¹ (hereinafter - Decree № 2255). It applies to economic entities that got a license to conduct business relevant activity. This order defines the procedure for filing, formation, evaluation, approval and implementation of investment programs licensees to determine the feasibility of the planned investment by the licensee (expenses) in the structure of tariffs for the relevant area of activity in the natural gas market on the basis of economic feasibility and targeted use of the licensee. The relevant investment programs are aimed at the development and stable functioning of an enterprise. The content of programs should contain substantiation proving feasibility of investment activities, sources of funding and a timetable. Decree № 2255 establishes three types of possible sources of financing of investment programs: 1) depreciation deductions; 2) income; 3) other sources of financing, which may be the funds received from the economic activity exercise (related or not related to the licensed activity), operating costs and involved borrowed funds with consent to their use. Usually, most of the planned investment is carried out for construction, reconstruction, modernization and repair of gas pipelines and facilities on them, which is the guarantor of the proper technical level of operation and reliability of supply. In practice, the main sources of implementation of investment programs licensees are the primarily depreciation deductions and own income, which, in our opinion, is the result of the imperfection of the implementation mechanism of additional investment sources, which are made impossible to use.

Therefore, proper realization of some investment program depends primarily on the availability of a certain volume of investment resources, implementation mechanisms which should be optimal and clearly established in law. In view of the need to bring the norms of gas legislation in conformity with the current updated legislation and improving investment processes at all levels it is appropriate to make some changes to the Decree № 2255 on the implementation of additional sources of investment. It is necessary to note that all investment mechanisms and rules proposed by the Law № 329-VIII, meet European standards, although these norms are not implemented in full. Considering the fact that Law №329-VIII was adopted with the aim of reforming and building an effective natural gas market, which currently requires appropriate investment development through significant investments in the relevant areas of activity and infrastructure,

¹ *Постанова про затвердження порядку формування інвестиційних програм газопостачальних, газорозподільних, газотранспортних та газозберігаючих підприємств 2011* (Національна комісія регулювання електроенергетики України). *Офіційний сайт Верховної Ради України*. <<http://zakon5.rada.gov.ua/laws/show/z1502-11>> (2016, March, 14).

it is important to accelerate the liberalization process. Because involvement of private investors is practically not possible in conditions the imperfections of the legal mechanism for regulating relationships in the natural gas market. To ensure the proper reform it is necessary to use maximally expedient forms of investment, depending on the types of economic activity and their functional separation on the natural gas market.

Thus, the most relevant forms of investment in gas market are the corporate and investment contract forms of investment, namely the conclusion of a public-private partnership concession agreements, agreements on joint activity and production sharing agreements.

It should be stressed that in the present conditions, the most relevant of investment funds attracted in the gas market are the gas transportation system, gas distribution (gas supplier) systems, gas storage and objects related to gas production. Consequently, the definition of investment objects from a legal point of view is an important issue.

It seems reasonable to agree with the fact that objects of investment activity may be legal or material. They are inextricably connected, and as a result have a dual legal nature. Thus, according to norms of Article 4 of Law of Ukraine "On the investment activity" from September 18, 1991, № 1560-XII, the objects of investment activity are: any property, including capital assets and working capital in all sectors of the economy; securities (except of bills); targeted cash deposits, scientific and technical products; intellectual values; other objects of property and property rights¹. The main objects of investments in the natural gas market are integral property complexes (as a whole and individual parts); entities (investment which is done by investing in shares of the relevant entities in the statutory funds (property) organization of corporate type or by collective investment, which is a form of co-investment); the right to use natural resources (right to production and implementation of the most important natural resources that can perform both the state and private companies).

As for the regulatory consolidation of realization forms of investment relations in the gas market, the closest to a proper regulation of investment forms list is the «Energy Strategy of Ukraine for the period till 2030» which was approved by the Cabinet of Ministers of Ukraine on July 24, 2013 № 1071 (hereinafter - Energy Strategy) and contains general rules for the financing of fuel-energy complex (hereinafter - FEC). Law contains separate section on the financial security of FEC development, the rules which establish the development of the energy sector by 2030. Energy Strategy focuses on the fact that almost all energy sectors gave an urgent need for investments in modernization and development to maintain and increase competitiveness, while in some areas the need for investment is critical to provide continuous and stable functioning. In this case, total amount of investments in the FEC necessary for economic development is established - about 1.8 trillion USD.

Investments and financing of FEC of Ukraine according to the standards of Energy Strategy will be carried out by commercial companies (private or public) and state under the following main mechanisms: 1) independent investment commercial companies (private or public) under natural processes functioning business from their own funds or debt financing; 2) use methods tariff policy to ensure sufficient investment capital in commercial companies that operate in regulated markets; 2) direct public investment if energy facilities owned by the state and the state plans to continue to maintain control over them². Separately, in the Energy Strategy defined the additional measures to stimulate investment in the objects of FEC from the government such the indirect stimulation, as a temporary introduction more favorable taxation policy on favorable customs import equipment for capital projects and the use of accelerated depreciation, domestic engineering support for oil and gas industry. The top priority for the rules of the Energy Strategy should be financing the development production of gas and oil by attracting private investment of minimizing the burden on the budget. A possible option is to encourage investment in capital in public-private partnerships. In other words, according to the rules of Energy Strategy the private funds should be the main source of investment in production of oil and gas. The provisions of paragraph 6.2. of Energy Strategy establish strategic priority of the state in the near future and is attracting private producing and service companies for exploration and production of gas in Ukraine that will require significant investment, the application of new technologies and modern work organization. In this case, total amount of investment should be involved in development of industry to achieve the production targets. Energy

¹ Закон про інвестиційну діяльність, ст. 4 (1991) (Верховна Рада України). Офіційний сайт Верховної Ради України. <<http://zakon3.rada.gov.ua/laws/show/1560-12>> (2016, March, 14).

² Енергетична Стратегія України на період до 2030 р. (2013) (Кабінет Міністрів України). <www.zakon.rada.gov.ua/signal/kr06145a.doc> (2016, March, 14).

Strategy contains provisions on the need to attract investment in gas transmission system (hereinafter - GTS), which determine that in order to achieve reliable functioning and development of the GTS the country should choose management model GTS, which will lead to transit volumes maximization in the long term prospective. One possible solution is the creation of a consortium with the participation of strategic investors and maintenance of control by state.

Energy Strategy provides the establishment of transparent and stable conditions for exploration and production of hydrocarbons in our country. In order to reach this objective, long-term program of natural resources should be developed and continually updated to intensify exploration of new spheres and additional prospecting old efforts of public companies to increase issuing special permits and signing of production sharing agreements to the required amount¹. Thus, Article 9 of Law № 329-VIII contains reference norms regarding the features of licensing investors - participants of the production sharing agreements concluded in accordance with Law of Ukraine "On Production Sharing Agreements" from 14.09.1999 № 1039-XIV (hereinafter - the Law № 1039-XIV), at the same time not specifying the status of the investing subject. Thus, the fourth article of Law № 1039-XIV establishes that the parties are Ukraine (hereinafter - the state) and investor (investors) who agrees to perform the work assigned to prospecting, exploration and extraction resources in the defined area, at its own risk and compensation expenses, receiving payments (compensation) in the form of profitable products. Law № 329-VIII contains legal forms for the above types of investment.

Thus, we can draw the following conclusions: 1) legislative acts contain only partially possible kinds and forms of investment in the natural gas market; 2) the list of investment objects that match the types and forms of investment in the gas market is legally not established. In fact, there are no norms that would establish appropriate form of implementation of the investment in relation to the extraction of natural gas, despite the urgent need for the development of new gas field, increase its own gas production, as well by attracting investment capital to agreement on joint activities and concession which currently has no practical application. It is necessary to improve the mechanism of concession and public-private partnership (areas of application which are legally defined prospecting, exploration, mining and transport, supply and distribution and supply of natural gas), production sharing agreements and placing possible forms of investing through joint activities and establish all possible forms of investment in law as unlimited list, giving priority to the long-term planning in the Energy Strategy.

As for corporate investment in our opinion, possible means of attracting long-term investment to the gas sector is the public listing, the use of which contributes to the development of the stock market as one of the most effective mechanisms for attracting, distribution and redistribution of investment resources. It is also advisable to determine the need for concluding an investment-related contract in the implementation of accession the subject of natural gas market (customer) to gas networks to the prediction of relevant guarantees and compensations.

Conclusions. On the background of the conducted research the following conclusions about the types of relevant elements inherent gas market can be made. The main subjects of investment activity who can place funds in the form of investments in the gas market include: the state as the main strategic investor, the individual (individuals and entities) and institutional investors (legal entities). The main types of investment in the natural gas market include domestic investment (by placing domestic investments); foreign investment (where investment owned by foreign investors); joint (where the investments jointly owned by domestic and foreign investors); private investment (which is done by placement of individual investors) and public investment (which is carried out entirely by public funds).

Forms and mechanisms of investment realization are suggested as following: self-financing (including through the implementation of the amortization policy as a reliable source of investment financing in view of certain restrictions on use within the purposes of Article 10 of the EC); implementation of public-private partnerships, agreements on production sharing, concessions, joint venture and corporate investment; optimization of pricing and tariff policy (by taking into account funds as the investment component in the tariff); investment budget (at the expense of the state budget by investing investment to support and develop the gas sector) and optimization monetary policy (by improving conditions for interest rates to business investment).

Regarding the definition of objects in investment legal relations of the gas market, three main groups

¹ Жорнокуй, Ю.М. (заг.ред.), Шуміло, О.М., Суц, О.П., Атаманова, Ю.Є., Гетманець, О. П., Єфремова, К.В., Жорнокуй, В.Г., Рекша, А.В., Сліпченко, С.О., Сядристий, А.О., Чорна, А.М., Шаповалов, С.М., Шеховцов, В.В., Шуміло, І.А. (2015). *Інвестиційне право*: Підручник. Харків: Право, 348.

can be identified: integral property complexes (which are fully or partially can be objects of investment); legal entities (investments are made by corporate or collective investment); the right to use natural resources (right for production and implementation of the most important natural resources that can be performed by both state and private companies).

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