

THEORETICAL ASPECTS OF THE DEFINITION AND LEGAL REGULATION OF SECURITIES IN CIVIL AND COMMON LAW SYSTEMS

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Abstract. In the current global climate, including the active development of financial markets, stock trading, and the emergence of new technologies such as social media, many stocks favored by retail investors have experienced significant price volatility. This paper aims to outline the theoretical framework of securities market regulation and to propose some improvements. It also reviews the various theories and practices that are used to analyze securities market regulation globally. This research describes the emergence of securities as a financial instrument. In the scope of the abovementioned, differences between the legal regulation of securities and the scientific definitions of researchers are observed. The author provides a comparative description of approaches to defining the concept of securities in common law and civil law countries.

Keywords: security, financial market, property rights, obligations, right of claim.

Introduction

The issue of defining the nature of securities has been an object of intense discussion for scholars from around the world. This discussion has persisted from the sixteenth–seventeenth century, when the first prototype securities began to appear, until today, where securities are not just financial instruments that serve to accumulate finance around a particular project. Today, as financial markets, investments, and global corporations have become integral parts of people’s lives, securities need to be clearly defined and regulated by national legislation.

The purpose of this research is to consider the legal definitions of securities from the legislation and research of civil law and common law countries, and to conduct a comparison between these definitions and the legal regulation of securities.

A brief history of the emergence of securities

The first securities to appear were governmental. During this period, states began to issue and place securities both domestically and abroad in order to attract additional funds necessary to cover the deficit of funds for state needs.¹

In Belgium, in 1531, the first stock exchange appeared in the city of Bruges, as a result of the development of securities. The advent of securities led to the need to form a market in which they could be traded. The second well-known exchange where securities were traded was the Antwerp exchange, where government securities were placed. The Netherlands was one of the first countries to establish joint stock companies and exchanges in their traditional sense. In addition, the country was an innovator in creating elements of the modern financial system, in particular introducing: the creation of a public debt market; a money market; a central bank with an extensive system of commercial banks; and the issuing of ordinary shares that were in free circulation. The stock market formed in the Kingdom of the Netherlands is historically considered to be the first securities market in its modern sense. The real achievement of Amsterdam in the development of the stock market was in the formation of new methods of securities trading. In seventeenth–eighteenth century England, joint-stock companies began to appear, and their shares were

¹ Елена Борисовна Стародубцева, *Рынок ценных бумаг: учебник* (Москва: ИД «ФОРУМ»: ИНФРА-М, 2018).

traded on the London Stock Exchange, which was created in 1773.

Definitions of securities in the scope of scientists

Approaches to defining the concept of securities according to European and US scholars

There are various approaches to defining securities. In the university textbook *Investments*, by Jeffery V. Bailey, Gordon J Alexander, and William F. Sharpe, a security is defined as “a piece of paper that is evidence of ownership.” Such a security can be transferred to another investor who, in this case, together with the security, acquires all rights and obligations under it.²

According to Gareth D. Myles, a security can be defined as “a legal contract representing the right to receive future benefits under a stated set of conditions.” This approach is based on the concept by which a physical form of security is a piece of paper defining property rights.³

Fabozzi and Peterson give another definition of securities as a document that gives the owner a “claim on future cash flows.”⁴ These authors also point out that securities can take physical form, as a piece of paper such as a bond, but can also exist as an entry in a register (for example, a computer record).

Approaches to defining the concept of securities according to Eastern European scholars

According to E.B. Starodubtseva, securities are a special kind of product that act as a title of ownership or a promissory note that give the right to receive income and are circulated on the market.⁴

Ukrainian scholar Yavorska gives another definition of securities:

“A security is a document of the prescribed form with the relevant details, certifying monetary or other property rights, defines the relationship between the issuer of the security (the person who issued the security) and the person entitled to the security, and provides for the fulfillment of obligations under such security, as well as the possibility of transferring

² Bailey Jeffery V, Gordon J Alexander and William F. Sharpe, *Investments* (Prentice Hall College Div, 1994).

³ Gareth D. Myles, *Investments Analysis*, (2003), <https://people.exeter.ac.uk/gdmyles/Books/IA.pdf>.

⁴ Frank J. Fabozzi and Pamela P. Peterson, *Financial Management and Analysis* (Jon Wiley & Sons Inc., 2003).

rights to the security and rights under the security to others.”⁵

The most comprehensive definition of securities is proposed by V.L. Yarotsky:

“Securities are paper documents expressed in documentary or non-documentary form with obligatory requisites or accounts made by the custodian, which have a special instrumental purpose (object-instrument) in the mechanism of legal regulation of issuance-certification relations, legitimize the authorized person and the right holder, certify its substantively standardized property rights, the order of origin, transfer, implementation, restoration and protection of which is determined by the legal regime of negotiable objects of civil rights of normatively defined types and groups and specified by the issuer in its unilaterally authorized transaction (the form of which is paper document or global certificate, depending on the form of their issue and circulation) and terms of issue.”⁶

Scientists identify a number of reasons for classifying securities as movable property:

- 1) securities testify to the preemptive right to acquire property values – “things” in the narrow sense, or money;
- 2) securities themselves exist in the form of material objects (paper documents);
- 3) there exists a close relationship between securities and the rights they certify;
- 4) this connection is of such a nature that the method of transfer of rights certified by the security is clearly similar to one of the methods of transfer of property rights (both can be done through a material object – a document or thing, respectively).

Among the given examples of the definition of the concept of securities in the scientific works of scientists, lawyers, and economists from Ukraine, the USA, and the Russian Federation, it is possible to identify common features and obvious differences.

The concept provided by Jeffery V. Bailey, Gordon J. Alexander, and William F. Sharpe does not include the division into documentary and non-documentary forms of securities, while Fabozzi, Peterson, and V. L. Yarotsky distinguish such forms.

⁵ Олександра Степанівна Яворська, Правове регулювання обігу цінних паперів: навч (Посібник, Львів, 2015), 336.

⁶ Віталій Леонідович Яроцький, Цінні папери в механізмі правового регулювання майнових відносин: Монографія (Харків: Право, 2006), 544.

According to American scholars, the concept of securities indicates a document that gives the right to claim. In concurrence with the opinion expressed by Z.V. Romovska, it should be noted that a person can dispose of property rights at their own discretion, and that some may pass to heirs, while personal non-property rights have a different nature, primarily because the person cannot give them up.⁷ Therefore, this concept of property will include only property claims which belong to property rights.

Ukrainian scholars, on the other hand, consider securities as documents that certify the property rights of a person as the owner of securities. This approach to the definition of Ukrainian scientists, in the opinion of this author, has both positive and negative consequences. On the one hand, such definitions are quite clear and precise, which indicates a unified approach to the definition. On the other hand, the very fact that the definitions of other scholars point to other features of securities in their concepts indicates not only a difference in understanding of the concept of securities, but also that this difference can be embodied and transformed into a more holistic and working notion.

Analysis of legislation defining securities

Civil law countries

A good example of the implementation of more concepts is current legislation in the field of financial regulation as stipulated by different countries. When considering and comparing the legal definitions of countries with a private law system and countries with a common law system, it is also worth noting differences in the definition of securities in European and post-Soviet countries.

In Ukrainian legislation (Law of Ukraine “On Securities and Stock Market” No. 3480-15 of February 23, 2006), the concept of a security is defined as:

“A document of the prescribed form with the relevant details, certifying monetary or other property rights, defines the relationship between the issuer of the security (the person who issued the security) and the person entitled to the security, and provides for the fulfillment of obligations under such security paper, as well as the possibility of transferring rights

⁷ *Tsyvilnyy Kodeks Ukrainy: Naukovo praktychnyy Komentar* (Kyiv: Istyna, 2004), 236.

to the security and rights to the security to others.”⁸

This definition has many features in common with the concepts considered, which are used by Ukrainian scientists in their works. According to the Law of Ukraine “On Securities and the Stock Market”, it is stated that securities exist in electronic (electronic securities) and paper (paper securities) forms, and that they are recognized in both forms as documents certifying the ownership of certain property, including funds.

The Civil Code of the Republic of Kazakhstan defines the concept of securities more succinctly than the earlier examples. In accordance with this definition, a security is a set of certain records and other designations certifying property rights. Further, the Civil Code contains provisions defining an exhaustive list of documents that relate to securities, including: shares, bonds, and other types of securities determined in accordance with this Code and other legislative acts of the Republic of Kazakhstan.⁹

The Civil Code of the Russian Federation contains the following definition of the concept under consideration: “Securities are documents that meet the requirements established by law and certify obligations and other rights, the exercise or transfer of which is possible only upon presentation of such documents (documentary securities).”¹⁰ If we consider the differences between this definition and the one contained in the Civil Code of the Republic of Kazakhstan, several points can be noticed. The Civil Code of the Russian Federation applies a broader concept to what rights a security certifies. In this case, the security certifies obligations and other rights, while the provision contained in the Civil Code of the Republic of Kazakhstan includes only property rights. Accordingly, it can be concluded that the legislator of the Republic of Kazakhstan includes in the concept of property rights and the definition of securities other types of rights that are certified by the document, but at the same time discloses them in parts 1.1-3 of the Civil Code.

Common law countries

Definitions that can be found in the law of countries with common law systems have common features and differences with those listed abo-

⁸ “Law of Ukraine “On Securities and Stock Market”, National Securities and Stock Market Commission, <https://www.nssmc.gov.ua/en/regulations/>.

⁹ “Гражданский кодекс Республики Казахстан. Кодекс Республики Казахстан от 27 декабря 1994 года № 268-ХІІІ”, https://adilet.zan.kz/rus/docs/K940001000_.

¹⁰ “Гражданский кодекс Российской Федерации (ГК РФ) 30 ноября 1994 года N 51-ФЗ”, <https://docs.cntd.ru/document/9027690>.

ve. When analyzing examples of definitions of securities in countries with common law systems, certain features stand out. Definitions which directly list the types of documents that are called securities, but which do not go into the legal characteristics of such documents, prevail – similarly to the examples of definitions from civil law countries. The first example to consider is the concept used in US law.

The definition of security according to the Securities Exchange Act of 1934 (USA) is:

“Any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, [...] or in general, any instrument commonly known as a “security”; [...] but shall not include currency or any note, draft, bill of exchange, or banker’s acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.”¹¹

The definition contained in the US Act is very extensive and contains an exhaustive list of documents that may be called securities, as well as documents that may not be referred to as securities. At the same time, however, the legislator gives some freedom of definition, applying the legal construction: “or in general, any instrument commonly known as a ‘security.’” This approach, in the view of this author, has a positive effect on the development of the securities market in such a way that, in case of dispute in opinions on the definition of a document that is not included in the exhaustive list in the Act as a security, courts may act at their discretion.

According to the Canadian Securities Act, the term “security” “includes any document, instrument or writing commonly known as a security; any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company [...]”¹²

The Canadian approach to defining the term securities has similarities to those used by Ukrainian scholars and Ukrainian law. The right to be protected is inextricably linked with the right to a security, which embodies monetary rights, other property rights, and non-property rights in cases determined by law. In his study, V. I. Gostyuk notes that the sys-

¹¹ “Securities Exchange Act of 1934”, Cornell Law School, access 27 March 2022, https://www.law.cornell.edu/wex/securities_exchange_act_of_1934.

¹² “Securities Act, R.S.O. 1990, c. S.5”, Ontario, access 27 Marc 2022, <https://www.ontario.ca/laws/statute/90s05>.

tem of rights that can be attested by securities includes, individually or in combination, property, binding, and membership (management) rights. As further specified in the Canadian definition of securities:

“[...] a bond, debenture, note or other evidence of indebtedness or a share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription.”¹³

The legislation of the United Kingdom does not provide an exact definition of the term security or securities, but there is a definition, which is used in different sources, provided by the Financial Conduct Authority (FCA) – a financial regulatory body in the United Kingdom which “regulates financial firms providing services to consumers and maintains the integrity of the financial markets in the United Kingdom.”¹⁴

“[...] the term ‘security’ applies only to equities, debentures, alternative debentures, government and public securities, warrants, certificates representing certain securities, units, stakeholder pension schemes, personal pension schemes, rights to or interests in investments, and anything that may be admitted to the Official List.”¹⁵

The FCA is an independent authority that funds the collection of contributions to the organization for regulation.

As can be seen, for countries with a common law system, the legislation defining the concept of securities mostly contains exhaustive lists of specific documents relating to securities. One of the broadest definitions, and therefore a broader list of documents, is contained in the Indian Securities Contracts (Regulation) Act, 1956. This act provides the definition of securities (according to clause (h) of the section 2) as: “shares, scrips, stocks, bonds, debentures, debenture stock or other *marketable securities of a like nature* in or of any incorporated company or other body corporate; derivatives which includes: a contract which derives its value from the prices, or index of prices, of underlying securities; a security derived from a debt instrument, share, loan, whether secured or unsecured, risk [...]”¹⁶

¹³ “Securities Act, R.S.O. 1990, c. S.5”, *supra note*, 12.

¹⁴ Vina Gonzalo, “U.K. Scraps FSA in Biggest Bank Regulation Overhaul Since 1997”, *BusinessWeek*, June 16, 2010.

¹⁵ FCA Handbook, Financial Conduct Authority, cited from: “Security (finance)”, Wikipedia, access 27 March 2022, [https://en.wikipedia.org/wiki/Security_\(finance\)](https://en.wikipedia.org/wiki/Security_(finance)).

¹⁶ “Securities Contracts (Regulation) Act, 1956”, Securities and Exchange Board of India, access 27 March 2022, https://www.sebi.gov.in/legal/acts/apr-2021/securities-contracts-regulation-act-1956-as-amended-by-the-finance-act-2021-13-of-2021-w-e-f-april-1-2021-_49750.html.

Securities are a type of commodity that have no value, compared to the general understanding of the concept of a commodity (except for the resources used on their production, transportation, etc.), which has a consumer value and represents the right to receive the spent part of the profit.

One of the key issues in understanding the relationship between monetary and productive factors in economic development is the question of the role of the securities market as ownership of the means of production as the basis of the method of production. Relationships arising from the issue and placement of securities, as well as their purchase and sale, mediate the movement of loan capital, reflecting the process of production and the appropriation of surplus value.

This means that an analysis of the changes taking place in the functioning of the securities market shows that it retains its essence as an important element of the economy, serving the processes of mobilization, concentration, and redistribution of monetary capital.

Conclusion

Examples and comparative analysis of the definitions contained in the legislation of countries with general and civil legal systems demonstrate the approaches of scholars from different countries to the definition of securities. Both similar and distinctive features of these definitions can be highlighted. In countries with common law systems, the legislation defining the concept of securities mostly contains exhaustive lists of specific documents relating to securities.

The functioning of the securities market retains its essence as an important element of the economy, serving the processes of mobilization, concentration, and redistribution of monetary capital. Relationships arising from the issue and placement of securities, as well as their purchase and sale, mediate the movement of loan capital, reflecting the process of production and the appropriation of surplus value.

To conclude, the certainty of legislative regulation in terms of securing and guaranteeing rights to securities, ensuring transparency and clarity in fixing these rights, and streamlining the activities of participants should be made a priority in order to achieve maximum efficiency of the securities market and to promote stock market trading.