“Banking in Ukraine as an object of criminal and legal protection”

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BANKING IN UKRAINE AS AN OBJECT OF CRIMINAL AND LEGAL PROTECTION

Abstract

Banking institutions spend a lot of money and use various resources to ensure both their activities' security and their customers' security. States and international institutions make significant efforts in this regard. But, unfortunately, this cannot always completely protect bank or client from lawbreakers. This problem is not only of technical, economic and informational character, but also legal. The article deals with issues of ensuring the criminal law protection of banking in Ukraine. Current criminal legislation of Ukraine, and draft regulations as to the holding responsible for crimes in banking sector are analyzed. The proposals as to criminalization of actions dangerous for a society in the field of banking activity are put forward: illegal obtaining of a loan; willful evasion of satisfaction of accounts payable; improper execution of the bank deposit contract terms; abuse of authority in banking; fraud with bank electronic payments.

Keywords banking, crime, criminalization, criminal and legal responsibility, the Criminal Code of Ukraine

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INTRODUCTION

The changes that have occurred in Ukraine in recent decades have caused intensive changes in the banking sphere and have made banking sector one of the most important sectors of the economy. The processes taking place in the area directly affect all aspects of life activity, determining the society's stability. Since criminal law is the most radical legal instrument, criminal law regulation is one of the most important instruments influencing the stable society functioning. Banking in Ukraine is under the protection of the Criminal Code.

Reforming the country's banking system aimed at achieving its positive "cleaning" from insolvent banks can be leveled in the absence of stable state mechanism to counteract the banking criminalization. This issue is of key importance as part of Ukraine's European integration policy.

Crime in banking sphere was the focus of many researches in Ukraine; however, they do not have a comprehensive scientific analysis of banking criminal legal protection. To solve the criminalization problem in banking, as well as to to protect customers' rights and improve their financial health taking into account the interests of creditors, the appropriate mechanisms are introduced. And this, in turn, requires regulatory and legislative framework improvement.

1. LITERATURE REVIEW

Ensuring the criminal law protection of banking is a matter of great importance for world companies and even rating agencies. In particular, International Business Machines Corporation (IBM) gives the following statistics: the aggregate cost of projects annually falling under the influence of fraud is 4.7 trillion dollars; 71% of bank customers are trying to change the serving banking institution precisely because of the low security level; 65% of clients will never cooperate with banks that do not adhere to confidence; 85% of respondents say they will share their experience with other bank customers about an inadequate security level (IBM, 2014).

According to Deloitte International Company, 93 % of respondents claim the level of fraud in the banking sector has increased significantly over the past two years. Considering significant losses, banking institutions should develop appropriate measures to improve banks' reputation (Jayaprakash, 2016).

It should be noted that in the USA, in the first half of 2017, 791 bank offenses were recorded, compared to a 1091 violations for the whole 2016, indicating a negative trend (Fraud the facts, 2017).

Similar dynamics is also observed in the banking segment of the United Kingdom, since the total amount of fraud loss in 2016 amounted to 200.1 billion pounds sterling. Fraud losses are distributed according to the type of services provided: payment cards, checks or remote services. In the UK, for example, about 80% of fraud occurs with payment cards, 18 % – in the remote customer support, and only 2% of violations are related to check transactions (Steele, 2017).

In Ukraine, the crime rates in this area are very high, but level of responsidility for them is extremely low. Thus, Shpek in his article on FinPost website (2017) emphasizes that the maximum penalty (Article 222 of the Criminal Code of Ukraine) for fraud, which can cost millions to banks, is 180 thousand UAH and the minimum is 17 thousand UAH. For intentional making bankrupt (Article 219) the penalty of 34 thousand UAH up to 51 thousand UAH is reqired. Accountability for concealing bankruptcy is decriminalized; norms apply only in the form of administrative responsibility – penalty of up to 51 thousand UAH. Penalty of up to 8.5 thousand UAH or 2 years of corrective work or liberty restriction for the same term is imposed for illegal pledge operations.

As another example, the Fund for the Guaranteeing of Individuals' Deposits (2016) has recently filed 234 applications against the owners and managers of insolvent banks totaling UAH 88.7 billion, of which claims for making the bank insolvent amount to UAH 36.9 billion. In total, the Fund filed 1,291 applications for crimes totaling UAH 115.9 billion. Khvorostina and Yanitskiy (2017) reveal that according to the Fund's executives, more than 117 939 enforcement proceedings on their claims are executed in the State Enforcement Service bodies as of February 23, 2017. But it is very difficult to find examples of criminal cases initiated, and even more so with regard to cases brought to trial.

There is a great deal of illegal actions that can take place in the banking sector. Based on the established practice, crime in the banking sphere should be understood as a set of socially dangerous activities that encroach on the established procedure for carrying out banking activities or committed in the course of banking operations or with their use. As for the criminal and legal protection of banking operations, these are measures of state influence as a system of criminal law norms aimed at ensuring its security.

Transformation processes in Ukrainian banking sector demonstrated that the National Bank of Ukraine (hereinafter – NBU) does not perform sufficient functions to ensure the hryvnia's stability (three significant devaluations: 1998–1999, 2008–2009, and 2014–2015), and also to hold price stability. There is instability and widespread bankruptcy of banks. Special attention should be payed to some discrepancy, namely: the share of crime in the economic, financial, banking, and budgetary spheres has not exceeded 3% in recent years. At the same time, about 50% of Ukraine's economy is considered "shadow". According to Myslivyi (2016), this phenomenon requires a separate serious study, but in itself, against the backdrop of constant economic, financial and other problems,

it is a certain indicator of the lack of balanced criminal and legal state policy.

Meanwhile, there are a number of factors contributing to crime in banking sector in Ukraine, namely: criminalization of socio-economic relations in the country; concentration of significant financial resources in the shadow economy; insufficient employees' expertise and their loyalty to the bank; lack of trust and interaction between banks and law enforcement agencies; favorable environment for the unlawful actions and possibility of escaping responsibility; the declaration nature of many normative acts; lack of a clear mechanism for the implementation of established legal norms; contradictions in normative acts, etc.

Some features of commiting crimes in banking operations should be emphasized, namely: the size of the damage caused to the bank or its clients may be large; high level of crime latency; the use of bank institutions for the transfer of criminally-obtained funds to other countries; bank management "cooperation" with criminal organizations, etc. At the same time, corrupt practices in most cases look like a consent or support in creating fictitious companies to attract illegally received funds on their accounts, executing agreements knowingly unprofitable for a company or state, providing bank guarantees in the absence of mandatory procedures and restrictions, appropriation of credit funds, etc.

It can be assumed the main problems in the application of the existing criminal legal norms of Ukraine on liability for crimes in banking operations are primarily due to legislative miscalculations. The most significant shortcomings of the criminal legislation in Ukraine's banking are: limited range of criminal law standards holding liability for socially dangerous invasions; legal technology violation when placing criminal law in the Criminal Code of Ukraine's structure; lack of clarification of criminal law provisions providing liability for crimes.

In Ukraine, discussions are held about the possibility of recognizing banking segment as an independent institution of criminal and legal protection. Taking into account the social causality of socially dangerous acts criminalization (social danger, relative prevalence, impossibility of combating these offenses by other means), it can be assumed that the institution of criminal legal protection of banking activities is a matter of the near future development of the criminal legislation in Ukraine. Thus, in recent years, socially dangerous acts such as: "Making the bank insolvent" (Article 218^1 of the Criminal Code of Ukraine) and "Contravention of the maintaining a database on depositors or reporting" (Article 220^1 of the Criminal Code of Ukraine) have been criminalized and included in the structure of the Criminal Code of Ukraine (2001). While agreeing with the timeliness of these socially dangerous acts' criminalization, there is no escaping the fact that violations exist in legal technology when these norms are placed in the Criminal Code of Ukraine's structure (hereinafter – CC), and also when individual legal terms are used in their dispositions. For example, Dudorov and Movchan (2015) draw attention to the fact that the appropriation of certain criminal law numbers in the Criminal Code of Ukraine contradicts both the general rules for the placement of new articles in criminal law and rules for the location of subordinate special rules.

There are a lot of such examples, which determined the subject of the study.

The study objective is to analyze the current Ukrainian legislation (the Criminal Code of Ukraine) aimed at preventing violations of banking legislation and making suggestions for their improvement.

2. RESEARCH FINDINGS

When formulating specific proposals for improving the criminal legislation of Ukraine to ensure banking operations' security, it is necessary to consider a brief criminal legal characterization of such crimes. Public relations in banking are their generic object, and specific criminal law has direct objects (for example, credit relations between the creditor and the borrower, the legality of electronic payments, etc.). Banking activity is performed by a certain range of persons provided for in the Law of Ukraine "On Banks and Banking Activities" (2001). According to Article 4, banking activity should be understood as: 1) NBU' operations; 2)

operations of other banks; 3) activities of foreign banks' branches that are established and operate on the territory of Ukraine in accordance with this law provisions. Thus, bank can perform banking activities on a banking license basis through banking. Based on the character of connection with the subject, the targets of crime in banking sphere are: a) credit resources of banks; b) funds on citizens' bank accounts; c) items that are integral to bank secrecy; d) bank payment cards, etc.

According to the objective aspect design, crimes in banking consist of both formally and materially defined acts. In certain cases, their mandatory characteristics are: exclusionary doing (of an act) envisaged by the disposition of the criminal law norm (for example, in Article 209 of the Criminal Code of Ukraine), in other cases – an act, socially dangerous consequences, and causal connection (for example, in Article 218^1 of the Criminal Code of Ukraine). In some cases, the methods of committing such offenses affect their qualifications (for example, when the conducting a depositor database or reporting procedure are violated by putting false information to the database of depositors by the manager or another official of the bank).

The specificity of the subjective aspect of crimes in banking area is the deliberate form of these acts guilt. Careless interferences with public relations in this area in current criminal legislation of Ukraine are not criminal. However, numerous bankruptcies, financial pyramids and other similar problems show that, in addition to actual perpetrator of the crime, the individuals (in particular, bank executives or officials) who, because of their inaction, did not provide the necessary control, are responsible for the socially dangerous acts.

Subjects are not pertinent to banking activity may be direct participants in the crimes under investigation. Along with the fact that mostly people performing administrative functions in banking are the subjects of these crimes, they can be committed as part of criminal groups or criminal organizations.

Criminalization of public relations in banking segment, shortcomings in the legal regulation of banking legal relations, lack of a targeted state policy in this sphere make it necessary to form provisional criminal legal norms that will create conditions for the successful prevention of crimes in the banking sphere by law enforcement agencies.

Given the need to combat this type of crime, it is worthwhile to highlight in the structure of the Criminal Code of Ukraine section VII-I under the title "Crimes in the field of banking", where to place the relevant crimes.

Crimes in banking sphere are: illegal actions with documents for transfer, payment cards and other means of access to bank accounts, electronic money, equipment for their production (Article 200 of the Criminal Code of Ukraine); legalization (laundering) of income from crime (Article 209 of the Criminal Code of Ukraine); making the bank insolvent (Article $218^1$of the Criminal Code of Ukraine); causing to become bankrupt (Article 219 of the Criminal Code of Ukraine); violation in maintaining a database on depositors or reporting procedures (Article 220^1 of the Criminal Code of Ukraine); financial documents and financial organization reports falsification, non-disclosure of the financial institution's insolvency or grounds for revocation (cant cellation) of a financial institution's license (Article 220^2 of the Criminal Code of Ukraine); fraud with financial resources (Article 222 of the Criminal Code of Ukraine); illegal collection or using sensitive information (Article 231 of the Criminal Code of Ukraine); commercial or banking secrets disclosure (Article 232 of the Criminal Code of Ukraine).

It is also necessary to consider the issue of criminalizing and introducing into the structure of a new section of the Criminal Code of Ukraine the acts in which social danger is seen, namely: the illegal receipt of a loan; willful evasion of satisfaction of accounts payable; improper execution of the bank deposit contract terms; abuse of power in banking; neglect of duty in banking; fraud in using banking electronic technologies.

The acts proposed to criminalize in banking sphere will be further considered.

2.1. Illegal receipt of a loan

The Criminal Code of Ukraine contains separate norms, which stipulate responsibility for the illegal obtaining a loan, namely: fraud (Article 190 of the

Criminal Code of Ukraine), as well as fraud with financial resources (Article 222 of the Criminal Code of Ukraine). On the objective aspect, illegal obtaining a loan is similar to fraud. However, if in case of fraud, deception refers to various circumstances regarding the identity of the perpetrator or the subject of fraud, then fraudulent borrowing takes place by providing the bank with knowingly false information about the potential borrower. The difference between these components can be done from the subjective aspect. When it comes to fraud, the perpetrator is not going to return a loan at all. In the event of an unlawful receipt of a loan, the perpetrator does not seek to withdraw funds gratuitously, his first intent is only to use funds to meet certain needs. It should be emphasized that the criminal law in many countries provides for a set of measures aimed at ensuring the creditors' interests.

2.2. Willful evasion of satisfaction of accounts payable

Criminalization components of willful evasion of accounts payable satisfaction are the following: systematic non-return of credit resources; public danger of such behavior; absence of a criminal-legal prohibition of this act by other criminal law norms. Credit relations between the creditor and the borrower are a direct subject of willful evasion of satisfaction of accounts payable. Social relations in banking sphere are the generic object of this socially dangerous act. The objective aspect of willful evasion of satisfaction of accounts payable is expressed as inaction. Timeliness of this act criminalization, taking into account its relative prevalence in Ukraine, is beyond doubt.

2.3. Improper execution of the bank deposit contract terms

Citizens of Ukraine suffer from unlawful actions of banks that refuse to return funds to the depositors. Banks insist on the extension of contracts, referring to the need to stabilize the system or for other reasons. For example, depositors of CB Nadra public joint-stock company have been facing this problem since 2010. The Bank offered its customers to sign additional agreements on extending deposit for up to 16 months. However, such deposits were not guaranteed by Deposit Guarantee Fund, since PJSC CB Nadra in the specified period was granted the status of a temporary Fund's participant. According to the Fund, any renewal of the contract is considered a new contract. It is not covered by the return guarantee. Several thousand depositors upheld their right to return the bank money as a result of lawsuits. However, judicial decisions were not carried out, even after moratorium expiration on the deposits withdrawal. In 2009, the Committee on Legislative Support of Law Enforcement Affairs recommended that the Supreme Council of Ukraine take the draft Law as a basis, according to which fine or imprisonment for up to five years for the deposit non-payment upon first request was proposed to establish. Prokopchuk (2009), the author of the bill, noted that the adoption of these changes will give confidence to citizens-investors, support the entire banking system, and in general, the economy of Ukraine, as well as stimulate the subjects of banking activities to properly perform obligations to preserve and return deposits of citizens.

Thus, it would be desirable to criminalize the "violation of the terms of the bank deposit agreement" act by providing for the responsibility of banking institution officials for not paying the deposit to citizens in the terms established by the bank deposit agreement and entering it into the structure of the Criminal Code of Ukraine as an independent criminal law norm.

2.4. Abuse of power in banking

Corruptive abuses of bank officials are quite common. Therefore, criminal liability must be imposed to managers and other bank officials for application of authority contrary to the legal interests of bank, if these actions caused large material damage to citizens, creditors or state. It is also advisable to envisage the possibility of applying criminal law measures against legal entities for abuse of powers in banking sector, since these acts are corrupt. In these cases, for the purpose of properly qualifying and delimiting such acts from crimes in official activities sphere, it is necessary to have sufficient evidence that the crime was committed on behalf of a legal entity or in collusion with other officials or the head of a banking institution.

2.5. Neglect of duty in banking

This act that is proposed to criminalize can be committed both by action and inaction. Its difference from the criminal law norm should be determined according to the object and special subject. Thus, public relations in banking are the object of official negligence in banking sphere, and the object of the crime of official negligence provided for in Article 367 of the Criminal Code of Ukraine are public relations in official activity sphere. Both objective and subjective aspects of these socially dangerous acts are similar, but the subjects are different. The scope of officials in banking sphere, as already noted, is determined by the specifics of this activity and requires additional legislative clarification.

2.6. Fraud using banking electronic technologies

Banking institutions offer a significant number of electronic services: bank cards; remote banking customer service; interbank electronic transfers; electronic (digital) money, etc. Electronic payments and electronic money, which do not have their value and are in fact units for measuring ordinary money, are very likely the things of the future. For example, whether the crypto currency is money – is still an open question in most countries of the world, which also requires thorough research and regulation at the legislative level, as it turns out, technology is ahead of legislation.

Thus, international agreements are also taken into account. According to Article 2 "Crimes related to means of payment" of the Council of Europe Framework Decision (2001) "On combating fraud and counterfeiting of non-cash payment means", each member state takes appropriate measures to ensure such actions are recognized as criminal offence in the event of their commission intentionally, at least in relation to credit cards, Eurocheck cards, other cards issued by financial institutions, traveler's checks, Eurochecks, other checks and bills. The implementation of the EU Directive (2007) 2007/64 provisions has had a significant impact on the regulation of activities to prevent criminal infringements committed using electronic technologies in Ukraine. In recent years, the Law "On Payment Systems and Transfer of Funds in Ukraine" and the Regulation "On the Implementation of Operations Using Electronic Payment Mean" of 05.11.2014 No. 705 have been amended.

CONCLUSION

The analysis confirms that banking activity is associated with the attraction of significant funds; responsibility for the due course of law in banking sector is assigned to a certain scope of persons who are obliged to realize it and comply with the requirements of professional competence and personal characteristics established by the law. The necessity of criminal law protection of banking activities is due to the increased public danger of these acts at the present stage of the society's functioning, the crisis in the financial and banking spheres, the urgent needs to eliminate the gaps in the current legislation of Ukraine on security issues in the banking sphere. In addition, directly within the banking sector, the introduction of a regulatory framework for warning against possible crimes, attraction of qualified and highly moral personnel, introduction of effective systems for the banking information protection, etc., should be priority areas of management.

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