

LEGAL FOUNDATIONS OF REGISTRATION AND LICENSING OF CREDIT INSTITUTIONS IN UKRAINE: IN THE CONTEXT OF UKRAINE ENTERING THE EUROPEAN UNION**Mykola Sidak ***

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Summary. Ukraine, seeking to become the member of the European Union, has to harmonize its national legislation with the provisions of European Union legal acts. In the article „Legal Foundations of Registration and Licensing of Credit Institutions in Ukraine: in The Context of Ukraine Entering the European Union“ problems, arising in pursuance of adaptation of legal acts regulating registration and licensing of credit institutions, are analyzed.

In the first part of the article the established in Ukraine banking system is discussed. It is defined as a two-level system, in the first level of which is the National Bank of Ukraine, and in the second one commercial and national banks act on the equality basis. In the second part of the article definitions of bank conception in legal acts of European Union and of Ukraine are analyzed, also activities, which may be operated by the banks in EU and in Ukraine, are compared. The third part of the article is dedicated to the analysis of the legal regulation of bank registration. The requirements of minimum statute capital and principals of its formation while establishing banks are analyzed in the fourth part of the article. The fifth part of the article analyzes legal regulation of licensing procedures of bank activity.

Keywords: bank, credit institutions, licensing, registration.

INTRODUCTION

The motive power of each developed economics is bank sector, which operates within defined by the state institutional, economic and legislative limits, in which the bank system realizes its tasks on the market principles.

Authors define the problems of the given research, as considering of legal foundations of registration and licensing of credit institutions in Ukraine.

The aim of the article is to define the following tasks in the context of foreign-policy direction of Ukraine: to define the legal status of credit institutions; to consider the legal foundations of creation, registration and licensing of banks in Ukraine; to develop scientific-practical recommendations as to the mastering of legal regulation of bank relations in Ukraine. It is worth while mentioning, that the chosen direction of research is in the inevitable connection with the realization of the Strategy of integration of Ukraine in the EU; the adaptation of legislation of Ukraine foresees the reforming of its legal system and gradual bringing into accordance

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with the European standards, and it includes private, financial, custom, labour, tax legislation.

For the aim to be reached, authors have generalized main theoretical developments and legislation of Ukraine and EU, which are concerned with the legal foundations of registration and licensing of credit institutions, which have not been highlighted in the scientific literature, namely in works of: Bilenchuk P.D. [1], Korobova U.I. [2], Vyshnevskyy A.A. [3], Voronova L.K. [4], Jerypl'ova N.Y. [5], Orliuk O.P. [6], Selivanov A.O. [7], etc., who provided analysis of the legal status of credit institutions of EU and Ukraine only.

LEGAL FOUNDATIONS OF BANK SYSTEM FORMATION IN UKRAINE

Bank system is inside organized, interconnected, clearly structured, united by the general aim totality of credit institutions, which are created and act on the basis of the Constitution of Ukraine and laws of Ukraine [8]. So, the uniting of all banks into the system as independent structure has certain organizational-legal mounting. It foresees: the unity of legal regulation of the bank activity in the state; creation of the only for all banks, regulated by the National Bank, mechanism of movement of bank reserve; clear legislative delimitation of rights and duties of each chain of the system; regulation of inter-bank relations and system of correspondent relations [9].

Two-level bank system is characterized by the mutual relations between banks both vertically and horizontally. The relations of subordination between central bank and banks are vertical; horizontally relations are formed according to the principle of equal partnership between any banks and credit institutions, i.e. there are two subsystems in the bank system [10]: first – realizes functions of management, second – is an object of regulative influence. It is conditioned by the fact, that each system is characterized by the self-regulation, i.e. purposeful management influence on the system in general or inside it.

The bank system of Ukraine realizes the following functions: 1) regulative, 2) transforming; 3) stabilizing.

The bank system of Ukraine has been built following the experience of Germany, Austria, Czech Republic according to example of centralized two-level system with the model of mixed bank activity [6; 8], where the bank system consists of central bank and commercial bank, which realize its activities simultaneously in two spheres – commercial and investment.

The first level of the bank system is occupied by the central bank – National Bank of Ukraine, the second – commercial banks and state banks [10].

FOUNDATIONS OF THE LEGAL STATUS OF THE CREDIT INSTITUTION – BANK

The most clear definition for the term “credit institution” is the definition mentioned in the directives of the EU, which define the notion of bank (directives of

the Council of the European Union №77/780EHS) as the subject of business undertakings, the activity of which consists of receiving deposits or other finances, credits provision on the personal account [3; 11; 12].

In Ukraine the term “bank” according to the Law of Ukraine “About banks and bank activity” is understood as a legal person (state and private form of ownership), who has sole right on the basis of license of the National bank of Ukraine to realize the following operations in totality [1; 2; 13]: involvement into investments of finances of physical and legal persons and placement of the mentioned finances in its name, on the own conditions and on the own risks, opening and operating bank accounts of physical and legal persons.

Banks in Ukraine can be created and registered in the following organizational-legal forms [13; 14]: joint-stock company, company with limited responsibilities and co-operative bank.

So, the legal person can be registered as the bank in Ukraine, the same as in EU, if it corresponds to the following conditions [4; 5; 10]:

1. It is created in the form of joint-stock company, company with limited responsibilities or co-operative bank.
2. Provision of credits and receiving of deposits is the subject of bank activity, with which it differs from other subjects of business undertakings. To the special powers of bank in Ukraine are added opening and operating of bank accounts of physical and legal persons.
3. It has a right to act as a bank institution, i.e. it is registered as a bank in the Register of banks (which is hold by the national Bank of Ukraine).
4. It has a license for realization of bank operations, which is provided by the Central bank of the country.

Bank individually defines its directions of activity and specialization on the types of operations, therefore it individually runs all risks. Banks realize their activities according to the principle of free competition [15].

The bodies of state power are not allowed in any way either influence the governing body or workers of the bank while they are fulfilling their duties or interfere into the activity of banks, except cases of governing of state banks.

Central bank of Ukraine realizes regulation of activities of banks through economic normatives and normative-legal provision of realized by banks operations.

In the title there must be the word “bank”.

Bank realizes accounting and financial reporting according to the rules [16], established by the National bank of Ukraine and Act № 563/1991 “About Accounting”.

The bodies of bank management in Ukraine [17] are general meetings of participants (shareholders), supervisory board, and bank administration.

The body of bank control [18] is the inspection committee and inside auditing of the bank.

According to the Law of Ukraine “About banks and bank activities” [13], and also on the basis of li-

cense on the realization of bank operations, banks in Ukraine have a right to realize the following bank operations [19; 20]: deposit receiving; credits provision; opening and operating of current accounts of clients and banks–correspondent, including money transfer from these accounts with the help of payment instruments and extra charging of finances on these accounts; operations with foreign currency; emission of personal valuable papers; organization of buying and sale of valuable papers after the assignment of clients; realization of operations on the market of valuable papers in own name; grants and guarantees provision; receiving of rights on demands for the realization of obligations in the money form for the things supplied (works, services), taking risk for the nonobservance of these requirements; factoring operations; financial leasing; services on the correspondent keeping and provision in rent of safes for the keeping of valuables and documents; issue, buying, sale and services of checks, bills and other circulating instruments; issue of bank payment cards and realization of operations with making use of these cards; buying and sale of monetary metals; involvement and placement of precious metals; provision of bank information; financial brokerage; realization of hypothecary operations; realization of the function of depository; consultative services and other operations.

We should mark here, that the First bank directive of EU №77/780/EU and the Second bank directive of EU №89/646/EU have established universal list of types of bank operations, which are multilaterally accepted on the territory of states of the EU [11; 12; 21; 22].

This list contains: receiving of deposits and other means on the basis of coming back from undefined circle of persons; credit provision, including consumers credits, hypothecary credits, realization of new credit–calculation operations – factoring and forfeiting; financial leasing; services on money extra charging; issuing of pay–sheet documents (including credit cards, ect); provision of bank guarantees; trading with money instruments on the personal or clients' accounts (checks, bills), trading on the currency market; participation in the issuing of valuable papers and this kind of service provision; consulting of enterprises on issues of the structure of the capital, industrial strategy, consulting and services on issues of merge and buying of enterprises; money mediation; investing consulting; depositing services and valuable papers operation; inquiry credit services; custodial services.

This list is not limited by WEU as to the types of bank operations. The content of the list lies in defining of bank operations, in relation to which acts the principle on mutual acceptance, i.e. license given to the credit institution by the competent state bodies at the palace of registration gives the right to realize activity of any listed above types of activity on the territory of other state of EU without additional agreement in the competent authority bodies of the state in the activity realization [23].

We should mark that there is one more important conclusion – to the listed operations do not belong only

operations, which are characterized as “commercial bank operations”, but also operations on the market of valuable papers, which are traditionally referred to the sphere of activity of specialized investing firms. It means, that the banking law of EU comes out of the construction of “universal bank” [24], i.e. bank which has a right to realize both traditional banking activity and investing activity.

FOUNDATIONS OF REGISTRATION OF CREDIT INSTITUTIONS

Legal and physical persons, residents and non-residents, government can become participants of commercial bank in Ukraine. The owners of the major participation in the bank must have clear business reputation and satisfactory financial state.

For the state registration of bank in Ukraine the empowered by the founders' person or the head of supervision board sends to the territorial administration of the National bank of Ukraine at the place of creation of the bank the following documents [13; 25]:

a) Application concerning registration of the bank with the signature of the empowered person or head of supervision board;

b) Commissioned agreement signed by the founders (participants) of the bank and testified by the seal. Signatures of the physical persons – founders (participants) are testified in the notarial order. For the registration of state and co–operative banks this kind of agreement is not needed.

c) The bank statute approved by the commissioned meeting (meeting of participants) and signed by the head of the bank management. The Cabinet of Ministers of Ukraine approves statute of the state bank. The statute must correspond to the norms of Laws of Ukraine “About banks and bank activity”, “About economic societies”, Economic codex of Ukraine and other legislative acts.

d) Protocol of commissioned meeting (meeting of participants) signed by the head and secretary of the meeting where place and date of meeting holding is indicated, as well as their competence, agenda, voting procedure. The protocol must include: decision concerning bank creation, statute approve, bank supervision board and revision commission election, appointment of the head of the board of administration (board of directors), main accountant, members of bank administration (board of the bank) and commissioned person, who is responsible for the registration of the bank in the National bank, other positions according to the operating legislation of Ukraine. In the case of creation of the state bank the resolution of the Cabinet of Ministers of Ukraine about the creation of the state bank is needed.

e) Business plan, which defines types of activities, which bank is planning to realize during the current year and strategy of activity on the following three years (each year separately) signed by the bank founders and/or head of the supervision board.

f) Information about membership of the supervision board, board of administration (board of directors), revision commission;

g) Documents, which give rights to make conclusion about clear business reputation of the head, his/ her deputies and members of the supervision board of the bank;

h) Copy of report about the sequences of subscribing on shares for the bank, which is created in the form of open joint-stock company registered by the State commission on valuable papers and fund market with the provision of the list of shareholders of the bank;

i) Agreement concerning the transfer of premises in the property (by means of donation, sale, etc.) for the placement of the bank with the signature of the person commissioned by the agreement or agreement of the rent of the premises for the period not less than five years from signing date;

j) Documents, which give possibility to make conclusions about professional suitability and clear business reputation of the head and his/ her deputies, members of executive body (board of administration or board of directors) and main accountant, candidatures of which respond to the following demands: higher education in the sphere of economics, legal education or education in the sphere of management – for the head and his/ her deputies, board of administration (board of directors) members, and higher economical education or accountant education – for the main accountant and his/ her deputies; length of service of the head, his/ her deputies and board of administration (board of directors) members of the bank, main accountant and his/ her deputies in the bank system according to the correspondent specialty not less than three years, including for the head board of administration and main accountant on the leading positions – not less than one year; clear business reputation; absence of reminders of the correspondent territorial administration of the National bank and facts of violation of bank legislation of Ukraine and inner documents of banks during the period of work in the bank institutions;

k) Copies of pay-sheet documents concerning realization by the legal and physical persons – bank participants payment to the statute capital (supplied not later then 15 working days before the term finishes for the document considering and state registration of the bank);

l) Conclusions of the auditing firm (auditor), which are provided after the summing up check (hold on particular date) of financial reporting of legal persons – bank participants, independent of their organizational-legal form and form of ownership, who are called to keep accounting and provide financial reporting;

m) Physical persons – bank participants, who bring finances into the statute capital of the bank in the amount of 3400 hrv. (for the confirmation of availability of income, which is sufficient to bring in finances to the statute capital of the bank, provide: certificate of the State Tax Administration of Ukraine about incomes for the period of the latest reporting period (year));

n) Accountant and financial reports of legal persons – bank participants, who will participate essentially in the bank, for the period of the latest four reporting periods (quarters), testified by the signatures of the head and main accountant, and seal of the legal person.

o) Commissioned documents of bank participants (notarially approved copies);

p) Copy of the certificate about the state registration of participants, testified in the notarially order;

q) Copy of the license of the State commission on valuable papers and fund market on realization of activity of keeper and trader of valuable papers of founder (shareholders), bank participants (if they realize such activity);

r) Copy of decision of bodies of Anti-monopoly Committee of Ukraine about provision of agreement on the creation of the correspondent bank in cases, foreseen by the operating legislation of Ukraine;

s) Documents, which confirm the business reputation of legal persons – bank participants (except local co-operative bank), which have essential participation;

t) Copies of commissioned documents of owners of the essential part of participation in the legal person – participant, who will have essential part in the bank, testified in the notarially order, conclusions of auditory firm (auditor) about its financial state, accountant and financial reports for the period of the latest four reporting periods (quarters);

u) Documents, which confirm the business reputation of physical persons – bank participants (except local co-operative bank), which have essential participation in the bank;

v) Copy of the pay-sheet documents concerning payment of finances for the state registration of the bank [388].

Registration of banks is realized by the National bank by means of correspondent record in the State register of banks, after which the bank receives the status of the legal person.

The head of the administration and main accountant occupy their positions after the written permission provision of this by the National bank (territorial administration of the National bank).

STATUTE CAPITAL

The minimum size of the statute capital of the bank is the main condition for the provision of the permission on the bank establishment.

For the newly-creating credit institutions on the territory of countries-EU members requirements of the minimum size of the statute capital are defined, which according to the article 4 of the Second bank directive must be not less then 5 mln. Euro [3; 11; 12; 26; 27].

The minimum size of the statute capital (paid out fully and registered signed capital) on the moment of registration of the commercial bank in Ukraine cannot be less [1; 2; 7; 8; 13]:

- For the local co-operative banks, which operate on the territory of one oblast region – 1 mln. euro;
- For the banks, which operate on the territory of one oblast, including specialized savings banks and hypothecary banks – 3 mln. euro;
- For the banks, which realize their activities on the territory of Ukraine including specialized investing, calculating (clearing), savings and hypothecary, central co-operative – 5 mln euro.

National bank of Ukraine establishes requirements of to the minimum size of the statute capital only during the time of its creation and registration of banks for the provision of stable activity of the bank and execution of bank operations.

The formation and enlargement of the statute capital of the bank can be realized only by the way of the financial contribution of participants. The financial contributions for the formation and enlargement of the statute capital of the bank residents of Ukraine realize in hryvnya, non-residents – legal persons, physical persons – foreigners – in the foreign freely converted currency or hryvnya. The statute capital of the bank must be formed on the account of money, sources of which are confirmed.

Banks are not allowed to involve counter investments into the statute capitals of one another and counter investments into the statute capital of their participants.

Finances for the formation of the statute capital of the newly-creating bank in the amount, foreseen by the operating legislation of Ukraine and commissioned documents, are accumulated by the bank participants (residents) on the accumulating account, which is opened in the territorial administration of the National bank at the place of the bank creation. With this aim during one week from the date of documents provision for the state registration of the bank the commissioned by the founders person gives to the territorial administration of the National bank application concerning the opening of accumulating account for the formation of the statute capital. On the basis of these documents and application of to the territorial administration the National bank opens accumulating account, where finances of the statute capital of the bank are accumulated.

LICENSING OF THE BANK ACTIVITY

The harmonization of the bank right of EU countries in the sphere of licensing considers two aspects: first – the very necessity of the license provision, second – defines conditions within which the license could be provided [28; 29].

The approach of directives of EU towards given issue comes out two principles. According to the first principle each state has a right to define own national requirements, keeping of which is necessary for the license obtaining by the credit institution. According to the second – the minimum requirements defined by the norms of EU must be presented. In particular the First

directive has established the following requirements the credit institution must correspond to in order to obtain the license necessary to realize the bank business: availability of the defined minimum of the own means [30]; availability of at least two persons who really lead the credit institution and have the necessary experience of practical work, reliable reputation.

Directives of EU, thus, only indicated the directions of harmonization of “license–bank” right of countries and claimants on the EU, having defined rather clear quantitative criteria.

The principle of the only bank license has been confirmed. This principle means, that the bank at the place of the operations realization only announces the bodies of the bank supervision that it has license of the state at the place of the bank registration.

The correspondent state must inform itself the Committee of EU about each fact of the license provision to the credit institution.

The criteria of economic purposefulness is not used while license provision, i.e. application for the obtaining of license to the credit institution should not be assessed from the point of view of economic market needs.

Harmonizing the bank legislation to the norms and standards of EU, bank in Ukraine has a right to realize the bank activity only after the receiving of the bank license.

The bank license is given by the national bank of Ukraine on the basis of the application of the bank and availability of the documents, which confirm [7; 8; 10; 13; 25]:

- Availability of paid-out and registered signed capital of the bank;
- Availability of the proper bank equipment, computer technique, soft-ware, premises according to the demands of National bank of Ukraine;
- Availability of minimum three persons, appointed by the board of administration (board of directors) of the bank, who have correspondent education and experience necessary for the bank management.

National bank of Ukraine has a right to refuse the request about license provision, if the mentioned above conditions are not fulfilled by the bank during one year since the date of the state registration of the bank. In such case the state registration of the bank is cancelled and bank is liquidated.

The decision about bank license provision or refusal to provide it is taken by the National bank of Ukraine during one month since the time of receiving of complete package of documents.

CONCLUSIONS

We should point out, that the bank is considered to be created and has a status of legal person since the moment of its state registration in the State register of banks of Ukraine, and the right to realize bank operations – after the license obtaining.

So, realizing the harmonizing of the process of the national legislation of Ukraine with the norms of EU with the aim of formation of the only home market of Ukraine with that of EU, it is necessary to implement changes to the Law of Ukraine “About banks and bank activity” concerning the introduction into the circle of subjects of bank relations the branches and representatives of foreign banks with the obligatory registration of them by the National bank of Ukraine.

Since the legislation of Ukraine does not correspond to the norms of EU concerning the minimum size of the statute capital, it is necessary in the shortest period to establish the minimum size of the statute capital of commercial banks of Ukraine independent organizational-legal forms of creation, types of activity or territory of realization of activity – 5 mln. Euro.

The peculiarity of the bank institutions of particular European countries is the provision on non-bank services (preparation and financing of building, mediation in the insurance services, etc.). The Law of Ukraine “About banks and bank activity” forbids banks to realize any non-bank activity. The authors of the research think that legally confirmed right to provide non-bank services by banks in Ukraine will both enlarge their incomes and give possibility to the consumers of such services to solve the problem of insufficient own financial resources, provide professional market approach to the solving of economic issues.

It is useful to implement norms of the First and the Second bank directives of EU to the Law of Ukraine “About banks and bank activity” as to the list of bank operations, namely: unify titles of bank operations according to the examples of EU.

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TEISINIAI KREDITO INSTITUCIJŲ REGISTRAVIMO IR LICENCIJAVIMO PAGRINDAI UKRAINAI SIEKIANČIAMS NARYSTĖS EUROPOS SĄJUNGOJE

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Santrauka

Ukraina, siekdama tapti Europos Sąjungos nare, nacionalinius teisės aktus turi suderinti su Europos Sąjungos teisės aktų reikalavimais. Straipsnyje „Kredito institucijų Ukrainoje steigimo ir licencijavimo teisiniai pagrindai Ukrainai siekiant narystės Europos Sąjungoje“ nagrinėjamos problemos, kylančios siekiant suderinti teisės aktus, reglamentuojančius kredito įstaigų steigimą ir licencijavimą.

Pirmoje straipsnio dalyje aptariama Ukrainoje įtvirtinta bankininkystės sistema. Ji apibūdinama kaip dviejų lygių sistema: pirmas lygis – Nacionalinis Ukrainos bankas, o antras lygis – lygiateisiais pagrindais veikiantys komerciniai ir valstybiniai bankai. Antroje straipsnio dalyje analizuojami Europos Sąjungos ir Ukrainos teisės aktuose pateikti banko sąvokos apibrėžimai, taip pat lyginama veikla, kuria gali verstis Ukrainos ir Europos Sąjungos bankai. Trečia straipsnio dalis skirta banko steigimo teisinio reguliavimo analizei. Ketvirtoje straipsnio dalyje analizuojami minimalaus įstatinio kapitalo steigiant banką reikalavimai ir jo formavimo principai, o penktoje nagrinėjamas bankų licencijavimo procedūrų teisinis reglamentavimas.

Pagrindinės sąvokos: bankas, kredito institucijos, licencijavimas, registravimas.

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