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Yuriy Pyvovar[1]
Mykola Pashynskyi[2]

LEGISLATIVE COLLISIONS OF LEGAL REGULATION OF ADMINISTRATIVE ENFORCEMENT WITHIN ACTIVITIES OF NATIONAL BANK OF UKRAINE AND METHODS OF THEIR ELIMINATION

National Aviation University
1, Komarova Prospect, Kiev 03680, Ukraine
E-mails: [1]pyvovar_yuriy_2008@ukr.net; [2]mpashinsky@kp-legal.com

Abstract

Purpose: *Determining legislative conflicts and gaps related to imposing sanctions by the National Bank of Ukraine to banks as well as developing the grounded offers on how to eliminate the respective legal defects.* ***Results:*** *Comparing the aim of banking regulation assigned to the NBU and the aim of regulation in other areas of the state economy (e.g., financial, environmental protection and safety and etc.) allows assuming that the state has vested the NBU with a 'superfunction' that would be more appropriate for the Verkhovna Rada (Parliament) of Ukraine as the single state legislative authority authorized to create the system of the rules of law in different areas of the social life of the country (including the banking sector). Based on the general legal doctrine, we consider that the provision of the Law of Ukraine on the National Bank of Ukraine stipulating the primary aim of banking regulation, especially the development of the system of rules, should be amended by replacing the term 'banking regulation' by the category 'banking legal regulation' in particular. Therewith, it should be defined that the latter aims at harmonizing social relations in the banking sector. We also thing that it is reasonable to – first and foremost – define the term 'banking legal regulation' and its meaning in the basic sectoral legislative act – the Law of Ukraine on Banks and Banking. In this article accentuated that the most controversial direction of banking regulation is 'the responsibility for the violation of banking laws.' Having analysed the effective laws, we can state that today the NBU covers the powers at three levels with different organization: first, making a decision on bank liquidation; second, implementing this decision (particularly by registering the bank liquidation in the Unified State Registry of Legal Entities and Individual Entrepreneurs); third, controlling and supervising the process of the implementation of the bank liquidation decision. Furthermore is concluded that the legal status of the NBU in the banking sector (related to banking activity) has peculiarities, which – in total – consecutively define this state authority as: 1) a regulator; 2) a controlling and supervising body; 3) a body with judicial powers.* ***Discussion:*** *Comparative legal research contributed to the conclusion that the legal model that is formulated by legislative acts and is a legal basis for the banking sector conflicts with the Constitution of Ukraine. To solve the detected legal conflict is proposed to implement two main methods.*

Keywords: administrative enforcement; bank liquidation; bank regulation; constitutional validity; means of control and supervision; National Bank.

1. Introduction

Experts think that in the modern situation of the restart of the banking sector being accompanied by the financial crises in Ukraine, effects that are opposite to economic recovery take pace – and they are the decline in the banking market and the drastic reduction of banking institutions. Mass media and politics often associate grounds for such a situation with banks liquidated due to ill-conceived and ineffective business management policies. However, experts and bank employees often stress that the National Bank of Ukraine that incorrectly reforms the banking sector is also engaged in the banking crises in Ukraine – and to the same or greater degree. Inconsistency in regulatory activities of the central bank of the country, including constant changes in banking business rules and conditions, emphasizes such incorrect reforms. We may take as an example the order of the National Bank of

Ukraine (NBU) dated 6 August 2014 requiring that all and any banks increase their authorized capitals up to UAH 300 mln by 2020 [1], and the NBU resolution dated 4 February 2016 requiring that this amount should be realized by 11 January 2017 [2]. In addition, the Ukrainian society also reproaches the NBU policy on bank liquidation. It is well known that the world practice has two key methods of bank liquidation: by an administrative (out-of-court) procedure or through the courts. We are convinced that considering positive and negative aspects of both methods, every country chooses its own option based on the peculiarities of its legal system and the specifics of its mechanism of the banking system management. So, we think that the respective choice should be based on the single legal principles determined by the main legislative act of the country (the Constitutional Act), particularly the Constitution of Ukraine.

However, the general review of the Ukrainian legal environment and judicial practice related to the recognition of bank insolvency and liquidation allows making an assumption that some standards of the sectoral laws that govern the public relations in the banking sector do not meet the constitutional provisions.

2. Analysis of the latest research and publications

Scholars and experts from different sectors of legal and economic sciences very often consider various issues related to the activity of banks in general, and means of control and supervision of the main bank regulator in particular. These issues are deeply examined by T. Vlasova [3], S. Naumenkova and V. Mishchenko [4], A. Selivanov [5], O. Orliuk [6], V. Shpachuk [7], M. Thammarak [8], N. Dincer and B. Eichengreen [9], C. Hadjiemmanuil [10], L. Siklos Pierre, T. Bohl Martin and E. Wohar Mark [11] and others. Without depreciating the value of the results of the researches carried out by the said and other scholars, we should state that there is no any innovative complex and solid paper dedicated to problems of sanctions imposed by the National Bank of Ukraine and providing any real methods to settle such problems to be considered by the scientific society and the legislator.

3. Research tasks

Based on the mentioned above, this article aims at determining legislative conflicts and gaps related to imposing sanctions by the National Bank of Ukraine to banks as well as developing the grounded offers on how to eliminate the respective legal defects.

4. Research results

As stipulated by §4 and §5, Part 1, Article 1 of the Ukrainian Law on the National Bank of Ukraine, one of the functions of the National Bank of Ukraine (NBU) as a state authority is *banking regulation*. This function provides for developing the system of rules, which regulate the activities of banks, define the general principles of banking business, the procedure for bank supervision, responsibility for violations of banking laws. Based on the mentioned legal interpretation, banking regulation primarily aims at developing the system of rules (rules of behaviour). We also note that that the term ‘rule’ used in this case has a very wide contextual meaning as it covers legal rules (i.e., rules of law that are formal rules of behaviour of general effect determined or approved by the state and aiming at regulating social relations), as well as other types of rules (including technical, software, accounting standards and etc.).

Comparing the aim of banking regulation assigned to the NBU and the aim of regulation in other areas of the state economy (e.g., financial, environmental protection and safety and etc.) allows assuming that the state has vested the NBU with a ‘superfunction’ that would be more appropriate for the Verkhovna Rada (Parliament) of Ukraine as the single state legislative authority authorized to create the system of the rules of law in different areas of the social life of the country (including the banking sector).

We consider that such standard interpretation of this function of the NBU (provided by the laws) results in the fact that researchers tend to choose a wrong way in formulating their theories related to the issue. So, we cannot agree with the position stated by V.I. Mishchenko that banking regulation means the creation of the respective legal basis aiming at, first, formulating and adopting *laws* (italicized by the author), which regulate the activities of banks; second, adopting by the respective state-authorized institutions provisions, in the form of regulatory acts, instructions, directives, and which regulate the activity of banks and which (legislative and regulatory provisions) collectively determine the boundaries of the behaviour of banks promoting the reliable and effective work of the banking system [4]. We are convinced that the second part of this thesis may be applied to the

jurisdiction of the NBU while its first part (on the formulation and adoption of acts) obviously is beyond the law-making competence of the NBU. We would like to note that even the Cabinet of the Ministers (Government) of Ukraine as the highest executive authority is limited in its law-making powers required for performing its tasks. Such limits in the development of the system of rules provide for, in particular, adopting and approving only by-laws (that contain sublegislative rules of law) as well as formulating draft laws to be furtherly passed to and approved by the Parliament.

We consider that – within the most general meaning – banking regulation may be defined as the system of measures, which the NBU applies to ensure the stable and secure work of banks and prevent any destabilization in the banking sector. Such an interpretation falls within a general legal opinion on the essence of the legal regulation of social relations realized by civil society as well as the state with the help of all and any legal means of the harmonization, fixation, protection, safety and development of social relations [12].

So based on the general legal doctrine, we consider that the provision of the Law of Ukraine on the National Bank of Ukraine stipulating the primary aim of *banking regulation*, especially the development of the system of rules, should be amended by replacing the term 'banking regulation' by the category 'banking legal regulation' in particular. Therewith, it should be defined that the latter aims at harmonizing social relations in the banking sector. In addition, we thing that it is reasonable to – first and foremost – define the term 'banking legal regulation' and its meaning in the basic sectoral legislative act – the Law of Ukraine on Banks and Banking.

Following the logics of the research methodology, the next task to be completed is to learn the context of the function of the banking regulation of the NBU.

The legal analysis of the abovementioned legal rule allows – on the one hand – determining *three directions* of the implementation of the said administrative and legal function, and – on the other hand – expressing warnings about the sector, which this function influences. We want to note that some researches offer to emphasize the administrative forms of banking regulation by the NBU being realized by exercising, first, only law-making powers (to establish the terms and conditions of registration and licensing, procedures for control and supervision, requirements to and limits on activities of banks; to provide recommendations on activities of banks and etc.), second, organizational powers (to register banks and license their activities), third, control powers (to inspect banks and apply administrative or financial sanctions, to supervise activities of banks) [13]. By supporting such a position in general, we would like to consider the directions of banking regulation in this article.

The *first direction* of the implementation of such a function – which as we think should be normatively specified – is *regulating* activities of banks and defining the general principles of the banking activity. Though Article 100 of the Constitution of Ukraine stipulates that the Council of the National Bank of Ukraine develops key principles of the monetary and credit policy and exercises control over its implementation [14], no other regulatory document states who should formulate and implement the said policy. Based on the fact that the NBU is a special central state authority, and using the method of the determination of the area of activity of state authorities (and central executive authorities in particular) set by the law making, we offer to fix in the Law of Ukraine on the National Bank of Ukraine a provision, which accurately determines the competence of the National Bank of Ukraine (as a special entity of the public administration) to develop and implement the monetary and credit policy in Ukraine. Therefore, we think that it is necessary to make changes to Article 2 of the said law. In addition, minimizing (and ideally eliminating) abuses committed by the NBU in setting legal orders to banks (the example is specified in the Problem Statement) related to an increase in their authorized capitals up to the amount determined by the law will require stating in Article 31 of the Law of Ukraine on Banks and Banking the respective schedule of a gradual increase in their capitals up to UAH 500 mln. Meanwhile, interim amounts specified in the schedule should be economically grounded and agreed with the Independent Association of Banks in Ukraine.

The *second direction* covered by the legislative interpretation of the meaning of banking regulation by the NBU is introducing the procedure for banking supervision. In general, we can agree with regulatory provisions on vesting the NBU with such a function. Meanwhile, the theory and practice discusses an issue whether it is legal to vest one entity with the right to set supervision rules and powers to realize such supervision. The legislative definition states

that banking supervision is the system of control and well-aligned active actions of the NBU aiming at the compliance by banks and entities supervised by the NBU with the Ukrainian laws and the set standards to ensure the stability of the banking system and protect the interests of depositors and creditors of banks [15].

Supporting the position of administrative scientists and researchers to separate the terms 'banking regulation' and 'banking supervision' (e.g., T.M. Vlasova [16]), we are convinced that the basic banking supervision rules (requirements) should be formulated by a lawmaker only. We also consider that it is rational to carry out legal examination and register by-laws of the NBU in the Ministry of Justice to ensure their compliance with legislative orders.

The *third* and the most controversial direction of banking regulation is 'the responsibility for the violation of banking laws.' Taking into account the topicality and multilateralism of this type of an administrative and legal enforcement measure, we will consider sanctions as its part within the subject described above.

Having analysed Part 1, Article 73 of the Law of Ukraine on Banks and Banking, we can determine several general grounds for administrative and legal enforcement measures to be applied by the NBU to the activities of banking institutions, particularly: a) when banks or other entities controlled by the NBU violate banking laws; b) when banks or other entities controlled by the NBU violate laws related to the prevention of and fight with illegal income legalization (laundering) or terrorism financing and weapon of mass destruction financing; c) when banks or other entities controlled by the NBU violate regulatory acts and requirements of the NBU stipulated by Article 66 of the Law; d) when banks or other entities controlled by the NBU carry out risky activities, which threaten the interests of depositors and creditors of banks; e) when foreign states, intergovernmental associations or international organizations impose sanctions on banks or major shareholders of banks, which threaten the interests of depositors and creditors of banks and/or the stability of the banking system.

To adequately respond to the abovementioned violations or threats, the NBU is empowered to apply different corrective measures to bank institutions. In recent years, the most applicable and radical though disputable measures are, first, *recognizing a bank as a problematic and insolvent entity*, second, *revoking bank licences and liquidating the bank*. It is worth noting that the law determines, in addition to the general grounds for applying these measures, more specific grounds. The recognition by the NBU of a bank as a problematic and insolvent entity should be preceded by at least one of the conditions stipulated by Part 1, Article 76 of the Law of Ukraine No. 2121-III:

1) the bank has failed to align its activities with the applicable laws, including the NBU regulations, after it was recognized as a problematic bank, but not later than 180 after the recognition date;

2) the regulatory capital or capital ratios of the bank have decreased to one third of the minimum amount stipulated by the applicable law, and/or the NBU regulations;

3) the bank has failed – within five business days – to fulfill 2% or more of its liabilities before depositors and other creditors and/or to put in the bookkeeping records the documents of bank's clients that were not performed by the bank in due time, as required by the law, after the bank was recognized as a problematic bank;

4) after being recognized as a problematic bank, the bank has performed transactions (except for accrual of interest rate on deposits, payment of salaries, alimony, pensions, scholarship, other social and government transfers to bank clients) and executed (re-executed) agreements, whereby the liabilities before individuals within the guaranteed redemption amount increase owing to reduced liabilities before the individuals exceeding the guaranteed redemption amount and/or liabilities before individuals not to be redeemed by the IDGF, and/or liabilities before legal entities;

5) the bank recognized as a problematic bank has failed to fulfil the orders or resolutions of the National Bank of Ukraine (including those related to applying corrective measures/sanctions) and/or requirements of the National bank of Ukraine to eliminate violations of the banking laws and the NBU regulations within the period specified by the National Bank of Ukraine [17].

If the NBU decides to recognize a bank as an insolvent entity, informs the Individual Deposit Guarantee Bank, apply a provisional administration, and liquidate the bank, the NBU suspends its banking supervision. As stipulated by Part 5, Article 76 of the Law, the NBU may resume its banking supervision based on the resolution of the Individual Deposit Guarantee Fund (IDGF) on the termination of powers of the supervisor of the Deposit Guarantee

Fund due to bringing the bank's activities in compliance with the banking laws of Ukraine related to capital and liquidity ratios [17]. Based on the mentioned regulatory algorithm, we can summarize that the main grounds for the NBU to apply sanction of 'the recognition of a bank as a problematic and insolvent entity' are the situational failure of a bank to comply with capital and liquidity ratios. The said above allows referring this sanction to administrative suspension measures as well as legal facts of a bank liquidation process.

We should note that the *second* administrative sanction of the NBU actually consists of two legal actions: a) revoking a banking licence; b) liquidating a bank. As these actions are distinguished as independent types of sanctions that may be applied collectively or separately (including liquidating a business entity prior revoking a licence before), we think that the first legal action belongs to the exclusive authorities of the NBU, and the second action is ungrounded as the competence of the NBU and does not meet the constitutional provisions.

It is worth noting that a banking licence is revoked by the NBU at its own discretion, or at the discretion of the IDGF, or when the bank is liquidated at the discretion of the shareholders of the bank (part 2 – 4, Article 77). Meanwhile, we think that stating it as the right of the NBU, the lawmaker has incorrectly defined the form of the powers of the NBU when deciding whether a banking licence should be revoked. Based on the competence of the NBU and its role in the system of the state management, we think that it is reasonable to change the form of this power replacing the 'right' by the 'obligation'. Our position is additionally supported by the list of the regulatory grounds for revoking a banking licence: 1) the NBU has established that the documents submitted by the bank to obtain a banking license contains inadequate information; 2) the bank has not performed any banking transaction within a year from the day it received a license; 3) a bank has repeatedly violated the laws covering the issues of anti-money laundering/fighting with terrorism financing and weapons of mass destruction distribution financing (Part 2, Article 77). This list shows that the first and third grounds are obvious grounds that require a mandatory reaction of the authorized supervision body (the NBU) as ignoring or failing to react in time may be considered as concealing the violation (crime). So, we think that the mentioned change will reduce abuse and corruption in this process as well as eliminate preconditions for accusing by banking institutions the NBU of the preconception (subjective position) when deciding on revoking a banking licence.

In addition, we also consider that the procedural form of the address of the IDGF to the NBU recommending to revoke a banking licence and liquidate a bank is improper. The legislative provision stipulates that such a form should be an 'offer' that – as we think – would be more contextually closer to a facultative (recommended) form of address. From our perspective, the IDGF should – within its powers in settling this issue – file a document in the form of an *order to revoke* a banking licence from a bank and submit it to the NBU to make a final decision in fact of such a public address of this institution. In such a case, there is an analogous procedure for tax authorities to address the State Treasury or the Pension Fund with the order to carry out certain managing actions, including to make a decision. Meanwhile, the laws (Part 3, Article 76 of the Law of Ukraine No. 2121-III and Part 3, Article 44 of the Law of Ukraine No. 4452-VI) stipulates for the obligation of the NBU to make decision based on the request of the IDGF to revoke a banking licence from a bank within five days, that additionally shows that this initiative of the IDGF is imperative.

Within the enforcement measures applied to banking institutions, *bank liquidation* as a special sanction actually is the most severe, repressive and punitive one aiming at the organizational area of a bank – and it is irreversible [16]. Drawing an analogy between the legal consequences of this sanction and legal responsibility measures applied to individuals at different times, we can agree with T.M. Vlasova [16] and assimilate bank liquidation with capital punishment for individuals.

Having analysed the effective laws, we can state that today the NBU covers the powers at three levels with different organization: first, *making a decision* on bank liquidation; second, *implementing* this decision (particularly by registering the bank liquidation in the Unified State Registry of Legal Entities and Individual Entrepreneurs); third, *controlling and supervising* the process of the implementation of the bank liquidation decision. This conclusion is based on the regulatory provisions as follows:

§19, Part 1, Article 15 of the Law of Ukraine No. 679-XIV stipulates that the NBU is authorized to *make a decision* on applying *corrective measures (sanctions*) to banks and other entities controlled by

the NBU according to the Law of Ukraine on Banks and Banking and other Ukrainian laws [15]. In its turn, §13, Article 73 of the Law of Ukraine No. 2121-III provides for a sanction to revoke a banking licence and *liquidate a bank*. This position is supported by Part 3, Article 77 of the Law of Ukraine No. 2121-III where the NBU is set as *the final authority in making a final decision* on revoking a banking licence as well as *liquidating a bank* at the request of the IDGF. The executive function of the NBU to implement the decision on bank liquidation is formally reduced to registering the bank liquidation in the Unified State Registry of Legal Entities and Individual Entrepreneurs based on the decision of the IDGF on approval of liquidation balance sheet and the report of the liquidator (part 7 and 8, Article 77). The *control and supervision function of the NBU* in the process of bank liquidation is usually realized by receiving from the IDGF a notification on: the violation by the bank of the laws; the results of the bank inspection carried out by the IDGF; the provisional administration of the bank and the bank liquidation; the approval of the settlement plan; the suspension of the provisional administration of the bank and the completion of the bank liquidation; the condition of the provisional administration and liquidation of the bank (Article 57 of the Law of Ukraine No. 4452-VI).

Drawing a legal parallel between the mentioned functions of the NBU within banking regulation and analogous mechanisms of liquidation of business entities stipulated by the Law of Ukraine on Recovery of Debtor's Solvency and Recognition its Bankruptcy No. 2343-XII dated 14 May 1992, we should note that the latter states that these and other powers are within the jurisdiction of courts (economic courts). As stipulated by Article 9 of the Law of Ukraine No. 2343-XII, bankruptcy cases are settled by economic courts based on the rules set in the Economic Procedural Code of Ukraine and taking into account particularities of this Law. But the practice shows that, when liquidating insolvent banks, the NBU actually manages the entire process of the bank liquidation concentrating in its hands the range of powers of the state authority on bankruptcy, creditors' committee, and court.

So, the analysis of the mentioned provisions of the Law of Ukraine on the National Bank of Ukraine and the Law of Ukraine on Banks and Banking, allows us to conclude that the legal status of the NBU in the banking sector (related to banking activity) has peculiarities, which – in total – consecutively define this state authority as: 1) a regulator; 2) a controlling and supervising body; 3) a body with judicial powers.

Insofar, we would note that within the bankruptcy procedure (including bankruptcy of business entities) an economic court can quickly and effectively interfere in the actions of the participants of the process by making procedural decisions and settling legal conflicts. Meanwhile, the court may apply measures to ensure exercising the rights and obligations of the participants of the case. The judicial form of the bankruptcy management has historically proven its effectiveness for ages restricting the opportunity for state management authorities to interfere in the bankruptcy procedure. In addition, the constitutional validity of the Law of Ukraine on Recovery of Debtor's Solvency and Recognition its Bankruptcy is beyond any doubts. However, we are focusing on the fact that when bank insolvency (bankruptcy) cases are considered in the banking sector, legal provisions and mechanism of the recovery of the debtor's solvency or recognition its bankruptcy are applied taking into account the provisions of the Law of Ukraine on the National Bank of Ukraine and the Law of Ukraine on Banks and Banking, which – based on our evidence – conflict with the Constitution of Ukraine.

The key inconsistency is that the lawmaker vests the National Bank of Ukraine with the function of justice that is unreasonable and inordinate.

Part 1, Article 124 of the Constitution of Ukraine states, 'Justice in Ukraine is administered exclusively by the courts. The delegation of the functions of the courts as well as the appropriation of these functions by other bodies or officials shall not be permitted' [14]. Parts 2 and 3 of the same article state that the jurisdiction of the courts extends to all legal relations that arise in the state and judicial proceedings are performed by the Constitutional Court of Ukraine and courts of general jurisdiction. Meanwhile, courts of general jurisdiction focus on civil, criminal, economic, administrative cases as well as administrative offence cases as stipulated by Part 1, Article 188 of the Law of Ukraine on Judicial System and Status of Judges.

In the context of the problem under examination, we should understand that the right of an individual/a legal entity (the citizen of Ukraine, a foreigner, a stateless person, a legal entity) to apply to court to settle a dispute may not be limited by a law or other regulatory acts. So, the Constitution of Ukraine guarantees that every person is entitled to

judicial protection of his/her/its rights within constitutional, civil, economic, administrative and criminal proceedings of Ukraine. Therefore, the provisions stipulating for dispute settlement, and recovery of the infringed right in particular, cannot conflict with the principle of equality of every person before the law and court and, thus, restrict the right to judicial protection.

As stipulated by §2, Part 1, Article 12 of the Economic Procedural Code of Ukraine, cases on bankruptcy of business entities are settled by economic courts [18]. When settling cases on jurisdiction of acts of officer appointment and dismissal, the Constitutional Court of Ukraine provides in its Resolution No. 8-rp/2002 dated 7 May 2002 [19] that the judicial protection of the rights and freedoms of a person and a citizen must be considered as a type of state protection of the rights and freedoms of a person and a citizen. And it is a state that commits itself to do so as determined by Part 2, Article 55 of the Constitution of Ukraine. The right to judicial protection also provides for specific guarantees of the effective recovery of rights by applying justice. The absence of such an opportunity restricts this right. And Part 2, Article 64 of the Constitution of Ukraine states that the right to judicial protection may not be restricted even by marital law or the state of emergency.

If the effective procedure for bank liquidation is considered as the method of pre-trial dispute settlement (out-of-court settlement would be more appropriate), we should note that its essence can be determined based on the current official interpretation of the Constitutional Court of Ukraine. So, the Resolution No. 15-p/2002 dated 9 July 2002 states that '…choosing a certain measure of judicial protection, including *pre-trial dispute settlement*, is a right rather than an obligation of a person/an entity who voluntary uses it based on his/her/its interests. If a law stipulates for *obligatory pre-trial dispute settlement* (in the context of our research, this is the right of the NBU to make decisions on the recognition of a bank as an insolvent entity and bank liquidation), it restricts an opportunity of exercising the right to judicial protection' [20]. Therefore, we can soundly state that the existing procedure for bank liquidation in Ukraine is anticorruption.

As stipulated by Parts 1 and 2, Article 152 of the Constitution of Ukraine [14], laws and other regulatory acts can be recognized as unconstitutional by the Constitutional Court of Ukraine if they do not meet the Constitution of Ukraine or the procedure for their consideration, approval or effectiveness determined by the Constitution of Ukraine has been violated. Laws, other regulatory acts or their separate provisions recognized as unconstitutional become null and void upon the adoption of the respective resolution by the Constitutional Court of Ukraine.

5. Conclusions

Therefore, this analysis allows stating that the legal model that is formulated by legislative acts and is a legal basis for the banking sector conflicts with the Constitution of Ukraine. We particularly think that the provisions of §25, Clause 1, Part 1, Article 15 of the Law of Ukraine on the National Bank of Ukraine No. 679-XIV and the provisions of Clauses 12 and 13, Part 1, Article 73, and Parts 1 and 2 Article 76, and part 3, Article 77 of the Law of Ukraine on Banks and Banking No. № 2121-III are unconstitutional (conflict with the Constitution of Ukraine).

We offer to settle this legal collision by applying two key methods. The first method provides for preparing the respective request to the Constitutional Court of Ukraine [21] to recognize that the provisions of §25, Clause 1, Part 1, Article 15 of the Law of Ukraine on the National Bank of Ukraine No. 679-XIV and the provisions of Clauses 12 and 13, Part 1, Article 73, and Parts 1 and 2 Article 76, and part 3, Article 77 of the Law of Ukraine on Banks and Banking No. № 2121-III are unconstitutional (conflict with the Constitution of Ukraine) and further cancel these provisions; and the second method provides for instituting out-of-court law-making proceedings by developing a draft law with the respective changes and amendments to the said laws and submitting it for approval and adoption. In the context of such legislative initiatives, we consider that it is necessary to add to the Law of Ukraine No. 2121-III provisions stipulating that a bank shall be liquidated within the economic procedural arrangements (and when a bank is liquidated at the discretion of a bank holder in particular; pre-trial complex pre-liquidation inspection of such a bank must be carried out), and within administrative proceedings if a public legal dispute arises (when a bank is liquidated at the discretion of the public administration). The mentioned position is additionally supported by the positive international practice, e.g., in the People's Republic of China [22] where the powers of the central bank (the People's Bank) within the forced

liquidation of banks are limited to the right to submit the respective offer to the court.

From our perspective, the mentioned provisions will promote the legal mechanism of guaranteeing the rights of legal entities (banks) to judicial protection and recovery of their legal interests in business within the banking sector of economy.

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Ю. І. Пивовар[1], М. М. Пашинський[2]

Законодавчі колізії правового регулювання адміністративного примусу в діяльності Національного банку України та шляхи їх усунення

Національний авіаційний університет, проспект Космонавта Комарова 1, Київ, Україна, 03680
E-Mail: [1]pyvovar_yuriy_2008@ukr.net; [2]mpashinsky@kp-legal.com

Мета: Виявлення законодавчих протиріч та прогалин щодо застосування Національним банком України санкцій до банків, а також розроблення обґрунтованих пропозицій, спрямованих на усунення відповідних правових недоліків. **Результати:** Співставлення мети регулювання банківського, що покладається на НБУ, та мети регулювання в інших сферах економіки держави дає підстави стверджувати про наділення державою НБУ «надфункцією», здійснення якої більш правильно відносити до компетенції Верховної Ради України як єдиного державного законодавчого органу, уповноваженого на формування національної системи норм права, у тому числі в різних сферах суспільного життя країни (включаючи банківську). Виходячи з загальноправової доктрини, уважаємо, що викладене в Законі України «Про Національний Банк України» положення щодо визначення основної мети банківського регулювання потребує уточнення, зокрема шляхом заміни самого терміну «банківське регулювання» категорією «банківське правове регулювання». При цьому метою останнього необхідно визначати – упорядкування суспільних відносин в банківській сфері. Убачається доцільним закріпити сам термін «банківське правове регулювання» та його трактування передусім в базовому галузевому законодавчому акті – Законі України «Про банки та банківську діяльність». У роботі акцентується, що найбільш дискусійним напрямом банківського регулювання є «відповідальність за порушення банківського законодавства». В результаті аналізу чинного законодавства констатується, що нині в одній особі (НБУ) збігаються повноваження трьох організаційно різних рівнів: по-перше, щодо прийняття рішення про ліквідацію банку; по-друге, щодо виконання цього рішення (зокрема, шляхом внесення запису про ліквідацію банку до Єдиного державного реєстру юридичних осіб та фізичних осіб – підприємців); по-третє, щодо здійснення контролю та нагляду за процесом виконання рішення про ліквідацію банку. Крім того робиться висновок, що правовому статусу Національного банку України в банківській сфері (відносно діяльності банків) характерні риси, сукупність яких визначають цей орган влади одночасно як 1) регулятора; 2) контрольно-наглядовий орган; 3) орган з судовими повноваженнями. **Обговорення:** Порівняльно-правове дослідження дозволило дійти висновку, що правова модель, яка сформована в законодавчих актах та які становлять правову основу банківської сфери, та зокрема застосування до банків ліквідаційних санкцій, не відповідає положенням Конституції України. Вирішення виявленої правової колізії пропонується здійснити двома основними способами.

Ключові слова: адміністративний примус; банківське регулювання; конституційність; контрольно-наглядова діяльність; ліквідація банку; Національний банк; правосуддя; санкції.

Ю. И. Пивовар[1], Н. Н. Пашинский[2]

Законодательные коллизии правового регулирования административного принуждения в деятельности Национального банка Украины и пути их устранения

Национальный авиационный университет, проспект Космонавта Комарова 1, Киев, Украина, 03680
E-Mail: [1]pyvovar_yuriy_2008@ukr.net; [2]mpashinsky@kp-legal.com

Цель: выявление законодательных противоречий и пробелов о применении Национальным банком Украины санкций к банкам, а также разработка обоснованных предложений, направленных на устранение соответствующих правовых недостатков. **Результаты:** Сопоставление цели банковского регулирования, возлагаемой я на НБУ, и цели регулирования в иных сферах экономики государства дает основания утверждать о наделении государством НБУ «сверхфункцией», осуществление которой более правильно относить к компетенции Верховной Рады Украины как единого государственного законодательного органа, уполномоченного на формирование национальной системы норм права, в том числе в различных сферах общественной жизни страны (включая банковскую). Исходя из общеправовой доктрины, считаем, что изложенные в Законе Украины «О Национальный Банк Украины» положения, определяющие основную цель банковского регулирования, требуют уточнения, в частности путем замены самого термина «банковское регулирование» категорией «банковское правовое регулирование». При этом целью последнего необходимо определять – упорядочение общественных отношений в банковской сфере. Представляется целесообразным закрепить сам термин «банковское правовое регулирование» и его трактовку прежде всего в базовом отраслевом законодательном акте – Законе Украины «О банках и банковской деятельности». В работе акцентируется, что наиболее дискуссионным направлением банковского регулирования является «ответственность за нарушение банковского законодательства». В результате анализа действующего законодательства констатируется, что в настоящее время совпадают в одном лице (НБУ) полномочия трех

организационно различных уровней: во-первых, о принятии решения о ликвидации банка; во-вторых, касающиеся выполнения этого решения (в частности, путем внесения записи о ликвидации банка в Единый государственный реестр юридических лиц и физических лиц – предпринимателей); в-третьих, по осуществлению контроля и надзора за процессом выполнения решения о ликвидации банка. Кроме того авторами обосновывается вывод, что правовому статусу НБУ в банковской сфере (относительно деятельности банков) характерные черты, совокупность которых определяют этот орган власти одновременно как 1) регулятора; 2) контрольно-надзорный орган; 3) орган с судебными полномочиями. **Обсуждение:** Сравнительно-правовое исследование послужило общему выводу, что правовая модель, сформированная сегодня в законодательных актах, составляющих правовую основу банковской сферы, и в частности основу применения к банкам ликвидационных санкций, не соответствует положениям Конституции Украины. Решение выявленной правовой коллизии предлагается осуществить двумя основными способами.

Ключевые слова: административное принуждение; банковское регулирование; конституционность; контрольно-надзорная деятельность; ликвидация банка; Национальный банк; правосудие; санкции.

Pyvovar Yuriy. PhD, Associate Professor.
Head of Department of constitutional and administrative law of Educational and Research Institute of Law of National Aviation University, Kyiv, Ukraine.
Education: National academy of internal affairs of Ukraine, Kyiv, Ukraine (1997).
Research area: legal regulation of public finances.
E-Mail: pyvovar_yuriy_2008@ukr.net

Pashynskyi Mykola. Graduate student.
Department of constitutional and administrative law of the Educational and Research Institute of Law of the National Aviation University
Education: Taras Shevchenko National University of Kyiv, Kyiv, Ukraine (2001).
Research area: public administration and justice in the banking sphere.
E-Mail: mpashinsky@kp-legal.com