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PROSPECTS FOR LEGAL REGULATION OF BANKS' PARTICIPATION IN THE DEPOSIT GUARANTEE FUND FOR INDIVIDUALS

Abstract. *The purpose* of this publication is to consider the prospects of legal regulation of banks' participation in the Deposit guarantee fund for individuals taking into account the adaptation of Ukrainian legislation to the EU acquis. Therefore, it is considered the legal basis of deposit guarantee relations, the legal status of the Deposit guarantee fund for individuals, the impact of Directive 2014/49/EU on the regulation of banking activities and the possibility of changes in the regulation of relations in the Deposit guarantee fund for individuals. **Research methods.** The paper is executed by applying the general research and special methods of scientific cognition.

Results. The legal regulation consists of legislative acts which, in addition to special laws, should also include the relevant acts of the National Bank of Ukraine and the Deposit guarantee fund for individuals. This approach needs to be further explored for compliance with the EU acquis and national choices in adaptation. It is quite perspective to change the legal status of the Deposit guarantee fund for individuals to deprive the body of supervisory powers and the formation of rights solely from the administration of the guarantee system and supervision only in this part of the banking activities (in the sense of audit). The lack of participation in the deposit scheme limits only one type of bank activity – attracting and placing deposits. In this case, the powers of Deposit guarantee fund for individuals to liquidate banks are disproportionate.

Conclusions. The status of the Deposit guarantee fund for individuals has the characteristics of state regulation of the guarantee system, and does not only administer the system, so its “participation” in these relations is not equal to other participants. Within the framework of adaptation of Ukrainian legislation to EU legislation and deregulation, the idea of depriving the Deposit guarantee fund for individuals of powers, introducing alternative guarantee schemes, as well as building an intermediate link between the National Bank of Ukraine and banks in accordance with the experience of EU member states is promising. Participation in the deposit guarantee relationship of individuals should be not only a basis for the provision of deposit services, but also a system that allows you to accumulate funds, offer best practices and administer the system, rather than control it.

Key words: deposit guarantee, Deposit guarantee fund for individuals, deregulation, state regulation, proportionality, EU acquis, deposit guarantee system, bank.

1. Introduction

The study of the legal status of the Deposit guarantee fund for individuals, its powers, the relationship of participation of banks in deposit guarantee, the ratio of legislation and other regulations is quite relevant and attracts attention especially in times of eco-

nomical downturn. Any legal regulation of economic relations must be predictable for both the parties to the relationship and the regulator. It is not only a matter of upholding the rule of law, but also of responding in a timely and proportionate manner to contemporary challenges.

Currently, the provisions on the mandatory participation of banks in deposit guarantee relations are controversial that are caused not only by the need to contribute costs to the Deposit guarantee fund for individuals but also by the actual powers of regulators and their relationship for regulatory purposes. The novelty of scientific research in this area is the formation of a consolidated economic and legal view on the regulation of deposit guarantee relations of individuals based on deregulation and in terms of fulfilling Ukraine's international obligations. The analysis of dissertation researches allows us to conclude that the issues in this area reduce to the participation of the Deposit guarantee fund for individuals in private relations (Voitsekhovska, 2016), as well as administrative and legal regulation of its activities (Naumenko, 2021).

This publication aims to consider the prospects of legal regulation of banks' participation in the Deposit guarantee fund for individuals taking into account the adaptation of Ukrainian legislation to the EU acquis. Therefore, we aim to consider the legal basis of deposit guarantee relations, the legal status of the Deposit guarantee fund for individuals, the impact of Directive 2014/49/EU on the regulation of banking activities and the possibility of changes in the regulation of relations in the Deposit guarantee fund for individuals. The methodological basis of the study is economic and legal views on the proportional regulation of relations, guaranteeing the deposits of individuals.

2. Legal basis for deposit guarantee in Ukraine

The law establishes: 1) the legal, financial and organizational principles of the deposit guarantee system for individuals; 2) the powers of the Deposit guarantee fund for individuals (hereinafter – the Fund); 3) the procedure for payment of deposit compensation by the Fund, and regulates relations between the Fund, banks, the National Bank of Ukraine; 4) functions of the Fund on withdrawal of insolvent banks from the market and liquidation of banks (Part 1 of Article 1 of the Law).

The purpose of this Law is: 1) protection of the rights and legitimate interests of bank depositors; 2) strengthening confidence in the banking system of Ukraine; 3) stimulating the attraction of costs into the banking system of Ukraine; 4) ensuring an effective procedure for withdrawal of insolvent banks and liquidation of banks (Part 2 of Article 1 of the Law).

In general, the system of guaranteeing deposits of individuals is defined as a set of relations regulated by this Law, the subjects of which are the Fund, the Cabinet of Ministers of Ukraine, the National Bank of Ukraine,

banks and depositors (paragraph 15, part 1 of Article 2 of the Law). At the same time, the true essence of the guarantee system is ambiguous, given the focus of the Law on the powers of the Fund and not on the private law principles of the system, which are the subject of separate legal research (Voitsekhovska, 2016, p. 78).

The analysis of the provisions of the Law gives grounds to conclude that the deposit guarantee system is not one-tier system, considering that the subject of regulation (parliament) empowers the Fund to regulate relations within this system. Thus, within the limits of its functions and powers, the Fund carries out normative regulation of the system of guaranteeing deposits of individuals and withdrawal of insolvent banks from the market (Part 1 of Article 6 of the Law). Thus, the Fund is granted a special status of a regulator in the relations that define it as a participant.

The Law of Ukraine "On Banks and Banking" should be singled out, the purpose of which is to ensure the legal protection of the legitimate interests of depositors and other bank customers, sustainable development and stability of the banking system (part 1 of article 1).

Such legal regulation of the Fund's position in the guarantee system should be critically analysed for compliance with Ukraine's international obligations, in particular – the Association Agreement between Ukraine and the EU (Uhoda pro asotsiatsiiu mizh Ukrainoiu, zodniiei storony, ta Yevropeiskym Soiuzom, Yevropeiskym spivtovarystvom z atomnoi enerhii i yikhnimy derzhavamy-chlenamy, z inshoi storony, 2014). Article 133 of the Agreement provides for the approximation of legislation to the EU acquis; thus, Ukraine will ensure the gradual alignment of its existing laws and future legislation with the EU acquis starting from the date of signing this Agreement and gradually extending to all elements of the EU acquis listed in Annex XVII to this Agreement.

V.V. Kochyn draws attention to Directive № 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit guarantee scheme, the provisions of which must be implemented within 4 years from the date of entry into force of this Agreement (i. e. before 01.09.2021), in particular, to the fact that the this Directive expired almost immediately after the signing of the Agreement on the basis of Directive 2014/49/EU of 16.04.2014 (European Union, 2014).

Thus, the legal regulation consists of legislative acts which, in addition to these laws, should also include the relevant acts of the National Bank of Ukraine and the Fund. This approach

needs to be further explored for compliance with the EU *acquis* and national choices in adaptation.

3. Legal status of the Fund

The legal status of the Fund is determined by Article 3 of the Law, according to which it is an institution (*установа*) that performs special functions in the field of guaranteeing deposits of individuals and withdrawal of insolvent banks from the market and liquidation of banks in cases established by this Law; legal entity under public law; property management entity; economically independent institution (*установа*); non-profit institution (*установа*) (parts 1–3). Such a legislative approach does not fully address the issue of organizational and legal form, which is perceived by some researchers as a foundation (*установа*) (Voitsekhovska, 2016, p. 41), although it may be an institution (*інституція*) in its broadest sense (Kochyn, 2017, p. 29).

Understanding the organizational and legal form of the Fund is important for the subsequent regulation of relations both within internal relations in the organization, and interconnected – external, which in accordance with Article 4 of the Law can be outlined through an understanding of the Fund's functions. So, we consider it appropriate to pay attention to the following functions:

- it accumulates costs received from the sources specified in Article 19 of this Law, monitors the completeness and timeliness of the transfer of fees by each participant of the Fund;
- it regulates the participation of banks in the system of guaranteeing deposits of individuals;
- it applies financial sanctions to banks and their managers, respectively, and imposes administrative fines.

Please note that Directive 2014/49/EU separately delimits:

- a) competent authority – a national competent authority as defined in point (40) of Article 4(1) of Regulation (EU) № 575/2013 (a public authority or body officially recognised by national law, which is empowered by national law to supervise institutions as part of the supervisory system in operation in the Member State concerned);
- b) designated authority – a body which administers a DGS pursuant to this Directive, or, where the operation of the DGS is administered by a private entity, a public authority designated by the Member State concerned for supervising that scheme pursuant to this Directive.

That means, there are a body of supervision and body of administration. In view of this, the question arises as to whether the Fund has the authority to regulate banking activities

and their relationship with the powers of the National Bank of Ukraine. So, in accordance with Article 30 of the Law, the Fund regulates the activities of banks by:

- 1) adoption, within the limits of its powers, of normative legal acts obligatory for execution by banks;
- 2) exercising control over the fulfilment of banks' obligations in connection with their participation in the deposit guarantee system for individuals;
- 3) withdrawal of insolvent banks from the market;
- 4) in other forms provided by this Law.

In accordance with Part 2, the regulatory powers of the Fund, defined by this Law, apply to all banks in Ukraine; banks are obliged to comply with the regulations of the Fund and comply with the requirements established by the Fund within its powers. Thus, the powers of the Fund have signs of regulatory influence within the meaning of Art. 12 of the Economic Code of Ukraine.

The legal literature states that deregulation of the economy involves reducing state control over economic activities by creating an appropriate market by: a) regulating the general principles of the market (stock, banking, insurance, etc.) through the formation of requirements for the status of their subjects and technical regulation of objects of relations; b) gradual empowerment of the regulator of self-regulatory organizations; c) providing a mechanism for the protection of economic entities regardless of their participation in self-regulatory organizations, as well as to form a mechanism of responsibility that will ensure the implementation of state policy on the way to a market economy and consumer protection (Kochyn, 2015, p. 117).

In this aspect, it should be added that Ukraine has a wide network of public audit bodies, so there are proposals to review the powers in the field of public administration of finance (Gurzhi et al., 2019, p. 293). The EU emphasizes the need to distinguish between so-called "mediation" and rule-making institutions (Nicolosi, Mustert, 2020, p. 300). Thus, it is quite perspective to change the legal status of the Fund to deprive the body of supervisory powers and the formation of rights solely from the administration of the guarantee system and supervision only in this part of the banking activities (in the sense of audit).

4. Directive 2014/49/EU and banking legislation

Directive 2014/49/EU in Article 1 provides that it applies to down rules and procedures relating to the establishment and the functioning of deposit guarantee schemes (DGSs): (a) statutory DGSs; (b) contractual DGSs that

are officially recognised as DGSs in accordance with Article 4(2); (c) institutional protection schemes (IPS) that are officially recognised as DGSs in accordance with Article 4(2); (d) credit institutions affiliated to the schemes referred to in points (a), (b) or (c) of this paragraph.

Participation in the guarantee scheme is not the same as participation in the Fund. That is, we are talking about models of voluntary participation in the Fund and understanding it as a self-regulatory organization rather than as a state regulator. This approach is somewhat traced in the draft law № 3942 of 28.07.2020 (Proekt Zakonu pro vnesennia zmin do Zakonu Ukrainy "Pro systemu harantuvannia vkladiv fizychnykh osib", 2020), but it seems that would be also state regulation, carried out by the Fund.

Article 4 of Directive 2014/49/EU regulates official recognition, membership and supervision. Firstly, each Member State shall ensure that within its territory one or more DGSs are introduced and officially recognised. Secondly, a contractual scheme as referred to in point (b) of Article 1(2) of this Directive may be officially recognised as a DGS if it complies with this Directive.

An IPS may be officially recognised as a DGS if it fulfils the criteria laid down in Article 113(7) of Regulation (EU) № 575/2013 and complies with this Directive. Thus, competent authorities are empowered to grant permission if the following conditions are fulfilled:

(a) the counterparty is an institution, a financial holding company or a mixed financial holding company, financial institution, asset management company or ancillary services undertaking subject to appropriate prudential requirements; the counterparty is established in the same Member State as the institution; there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities from the counterparty to the institution;

(b) the arrangements ensure that the institutional protection scheme is able to grant support necessary under its commitment from funds readily available to it;

(c) the institutional protection scheme disposes of suitable and uniformly stipulated systems for the monitoring and classification of risk, which gives a complete overview of the risk situations of all the individual members and the institutional protection scheme as a whole, with corresponding possibilities to take influence; those systems shall suitably monitor defaulted exposures in accordance with Article 178(1);

(d) the institutional protection scheme conducts its own risk review which is communicated to the individual members;

(e) the institutional protection scheme draws up and publishes on an annual basis, a consolidated report comprising the balance sheet, the profit-and-loss account, the situation report and the risk report, concerning the institutional protection scheme as a whole, or a report comprising the aggregated balance sheet, the aggregated profit-and-loss account, the situation report and the risk report, concerning the institutional protection scheme as a whole;

(f) members of the institutional protection scheme are obliged to give advance notice of at least 24 months if they wish to end the institutional protection scheme;

(g) the multiple use of elements eligible for the calculation of own funds (hereinafter referred to as multiple gearing) as well as any inappropriate creation of own funds between the members of the institutional protection scheme shall be eliminated;

(h) the institutional protection scheme shall be based on a broad membership of credit institutions of a predominantly homogeneous business profile;

(i) the adequacy of the systems referred to in points (c) and (d) is approved and monitored at regular intervals by the relevant competent authorities.

An important note about membership is the requirements that a credit institution authorised in a Member State pursuant to Article 8 of Directive 2013/36/EU shall not take deposits unless it is a member of a scheme officially recognised in its home Member State pursuant to paragraph 1 of this Article.

Please note that in accordance with Art. 47 of the Law of Ukraine "On Banks and Banking" the bank has the right to provide banking and other financial services (except for insurance services), as well as to carry out other activities specified in this article, both in national and foreign currency, in particular:

a) banking services include:

1) attraction of costs (deposits) and bank metals from an unlimited number of legal entities and individuals;

2) opening and maintaining current (settlement, correspondent) accounts of clients, including in bank metals, and conditional storage accounts (escrow) (shall be enforced from 01.08.2022);

3) placement of attracted costs (deposits), including on current accounts, costs and bank metals on their own behalf, on their own terms and at their own risk;

b) the bank has the right to provide its clients (except banks) with certain financial services by concluding agency agreements with legal entities (commercial agents). The Bank provides services to individuals and legal enti-

ties for trading in currency values in cash and non-cash form with simultaneous crediting of currency values to their accounts in accordance with the Law of Ukraine “On Currency and Currency Transactions”;

c) the bank, in addition to providing financial services, has the right to carry out activities related to: investments; issue of own securities; storage of valuables (including the accounting and storage of securities and other valuables confiscated (arrested) in favour of the state and/or declared ownerless) or the provision of property lease (rent) of an individual bank safe; collection of funds and transportation of currency values; provision of consulting and information services on banking and other financial services; provision of services of a bond issuer in accordance with the Law of Ukraine “On Capital Markets and Organized Commodity Markets”;

d) the bank has the right to provide payment services in accordance with the Law of Ukraine “On Payment Services” taking into account the requirements of this Law and regulations of the National Bank of Ukraine governing the activities of banks.

In addition, in the legal literature A.V. Kostruba has already proposed to form additional

(alternative) compensation systems (Kostruba, 2014, p. 189). Thus, the lack of participation in the deposit scheme limits only one type of bank activity – attracting and placing deposits. In this case, the Fund’s powers to liquidate banks are disproportionate.

5. Conclusions

Summing up certain results, we consider it expedient to pay attention to the following. The status of the Fund has the characteristics of state regulation of the guarantee system, rather than its administration, so its “participation” in these relations is not equal, and therefore, there are shortcomings regarding the dual purpose of legal regulation. Within the framework of the adaptation of Ukrainian legislation to the EU *acquis* and deregulation, the idea of depriving the Fund of power, introducing alternative guarantee schemes, as well as building an intermediate link between the National Bank of Ukraine and banks in accordance with the experience of EU member states, is promising. As a result, participation in the deposit guarantee relationship of individuals should be not only a basis for the provision of deposit services but also a system that allows ones to accumulate funds, offer best practices and monitor the system, not control it.

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ПЕРСПЕКТИВИ ПРАВОВОГО РЕГУЛЮВАННЯ УЧАСТІ БАНКІВ У ФОНДІ ГАРАНТУВАННЯ ВКЛАДІВ ФІЗИЧНИХ ОСІБ

Анотація. Мета. Публікація має на меті розглянути перспективи правового регулювання участі банків у Фонді гарантування вкладів фізичних осіб з огляду на адаптацію законодавства України до *acquis* Європейського Союзу. Тому розглядається правова основа відносин гарантування вкладів, правовий статус Фонду гарантування вкладів фізичних осіб, вплив Директиви 2014/49/ЄС на регулювання банківської діяльності та можливість змін у регулюванні відносин у Фонді гарантування вкладів фізичних осіб. **Методи дослідження.** Роботу виконано на підставі загальнонаукових і спеціальних методів наукового пізнання.

Результати. Правове регулювання складається із законодавчих актів, які, крім спеціальних законів, повинні включати також відповідні акти Національного банку України та Фонду гарантування вкладів фізичних осіб. Цей підхід потребує подальшого вивчення щодо відповідності зазначених актів законодавству Європейського Союзу та національним виборам у сфері адаптації. Цілком перспективно змінити правовий статус Фонду гарантування вкладів фізичних осіб, щоб позбавити цей орган наглядових повноважень та формування прав виключно від адміністрування гарантійної системи й наглядати лише в цій частині банківської діяльності (у сенсі аудиту). Відсутність участі в депозитній схемі обмежує лише один вид діяльності банку – залучення та розміщення депозитів. У цьому разі повноваження Фонду гарантування вкладів фізичних осіб щодо ліквідації банків є непропорційними.

Висновки. Статус Фонду гарантування вкладів фізичних осіб має ознаки державного регулювання системи гарантування, а не лише адміністрування системи, тому його «участь» у цих відносинах не є рівноправною щодо інших учасників. У межах адаптації українського законодавства до законодавства Європейського Союзу та дерегуляції вважається перспективною ідея позбавлення Фонду гарантування вкладів фізичних осіб повноважень, запровадження альтернативних схем гарантування, а також побудова проміжного зв'язку між Національним банком України та банками відповідно до досвіду держав – членів Європейського Союзу. Участь у відносинах гарантування вкладів фізичних осіб має бути не тільки підставою для надання депозитних послуг, а й системою, яка дає змогу акумулювати кошти, пропонувати найкращі практики та адмініструвати систему, а не контролювати її.

Ключові слова: гарантування вкладів, Фонд гарантування вкладів фізичних осіб, дерегулювання, державне регулювання, пропорційність, *acquis* Європейського Союзу, система гарантування вкладів, банк.

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