ФІНАНСИ. БАНКІВСЬКА СПРАВА

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ON QUESTION OF THE PRINCIPLE OF EQUITY IN THE ENFORCEMENT OF MONETARY OBLIGATIONS

Urgency of the research. *Study of the problem of implementation of monetary obligations in the field of banking relations is determined by violation of the principle of equity in relation to individuals.*

Target setting. *The state has actually removed from the regulation of credit relations in the field of ensuring the fulfilment of monetary obligations that arise between the individual and the bank.*

Actual scientific researches and issues analysis. *Many modern scientists (I. Bezklubyi, T. Bodnar, A. Dzera, A. Kolodiy, V. Lutz, I. Opadchiy and others) studied the institution of the fulfilment of monetary obligations.*

Uninvestigated parts of general matters defining. *Behind attention of scientists was left the issue of protecting the rights of individuals who have monetary obligations to the bank and do not have the status of the subject of entrepreneurial activity.*

The research objective. *The purpose of the article is to develop legislative proposals taking into account international and foreign practice in the aspect of protecting the rights of individuals who have monetary obligations to the bank.*

The statement of basic materials. *Specifics of legal regulation of contractual relations is determined between banks and recipients of funds in the aspect of liability for late fulfilment of monetary obligations, propositions to the legislation were substantiated.*

Conclusions. *It is offered to solve the problem of violation of the principle of fairness in the aspect of fulfilment of monetary obligations in the field of banking relations through legislative changes.*

Keywords: *discount rate; the principle of equity; the monetary obligations; fine; individuals.*

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ДО ПИТАННЯ ПРО ПРИНЦИП СПРАВЕДЛИВОСТІ У СФЕРІ ЗАБЕЗПЕЧЕННЯ ВИКОНАННЯ ГРОШОВИХ ЗОБОВ'ЯЗАНЬ

Актуальність теми дослідження. *Дослідження проблеми виконання грошових зобов'язань у сфері банківських відносин зумовлено порушенням принципу справедливості щодо фізичних осіб.*

Постановка проблеми. *Держава фактично усунулася від регулювання кредитних відносин у сфері забезпечення виконання грошових зобов'язань, що виникають між фізичною особою і банком.*

Аналіз останніх досліджень та публікацій. *Чимало сучасних учених (І. Безклубий, Т. Боднар, О. Дзера, А. Колодій, В. Луць, І. Опадчий та інші) вивчали інститут виконання грошових зобов'язань.*

Виділення недосліджених частин загальної проблеми. *Поза увагою вчених залишилося питання захисту прав тих фізичних осіб, які мають грошові зобов'язання перед банком і не мають статусу суб'єкта підприємницької діяльності.*

Постановка завдання. *Метою статті є вироблення законодавчих пропозицій з урахуванням міжнародної і зарубіжної практики в аспекті захисту прав фізичних осіб, які мають грошові зобов'язання перед банком.*

Виклад основного матеріалу. *Визначено специфіку правового регулювання договірних відносини між банками та одержувачами грошових коштів в аспекті відповідальності за несвоєчасне виконання грошових зобов'язань, обґрунтовано пропозиції до законодавства.*

Висновки. *Запропоновано вирішити проблему порушення принципу справедливості в аспекті виконання грошових зобов'язань у сфері банківських відносин шляхом законодавчих змін.*

Ключові слова: *облікова ставка; принцип справедливості; грошові зобов'язання, пеня; фізична особа.*

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Urgency of the research. The Law of Ukraine "On Responsibility for late fulfilment of monetary obligations" of November 22, 1996 establishes responsibility for the untimely fulfilment of monetary obligations in the banking sphere. The legal system of Ukraine unfortunately allows us to speak only about untimely execution of such obligations by individuals, since Ukrainian legislation does not stipulate responsibility of the banking institution for the late return of the funds raised from the individuals (deposits). Such an approach to legal regulation of these relations is extremely unfair in relation to individuals.

Target setting. This law regulates contractual relations between payers and recipients of funds in terms of liability for late fulfilment of monetary obligations. Subjects of these legal relations are enterprises, institutions and organizations irrespective of the forms of ownership as well as individuals – entrepreneurs. The law protects the subjects of these legal relationships by limiting the amount of fines for the untimely fulfilment of their monetary obligations, namely: no more than double discount rate of the National Bank of Ukraine, in effect in the period for which the fine the was calculated.

The problem is in the fact that the Law is not applicable to individuals who do not have the status of an entrepreneur. This is firstly. Secondly, there is no other law that would limit the amount of penalties for untimely execution of monetary obligations by individuals or for delaying cash receipts on the bank account. Thus, the government does not protect individuals who have monetary obligations to the bank but do not have the status of an entrepreneur and can't fulfil these obligations in a timely manner (illness, loss of work).

Actual scientific researches and issues analysis. Some aspects of the institution of enforcement of monetary obligations became the subject of scientific research. This problem was addressed in due time by I. Bezklubyi, T. Bodnar, A. Dzera, A. Kolodiy, V. Lutz, I. Opadchiy and others. The subject of their research is outlined both by general theoretical developments of the institution of enforcement of monetary obligations and by in-depth analysis of certain constitutional, civil and other aspects of such obligations.

Uninvestigated parts of general matters defining. The doctrine of law has left out of proper attention the issue of protecting the rights of those individuals who have monetary obligations to the bank (banks) and can't fulfil these obligations in a timely manner for objective reasons.

The research objective. Task of the publication is to carry out a comparative analysis of national and foreign legislation and practice in the aspect of protecting the rights of individuals having monetary obligations to the bank and the goal is to develop legislative proposals to optimize these relations in the national sphere of legal regulation in the aspect of protecting the constitutional rights of such individuals.

The statement of basic materials. The UN Convention on Contracts for the international sale of goods, of 11 April 1980, established the requirement: "If a party has admitted a delay in the payment of a price or another amount, the other party has the right for interest from the overdue amount without prejudice to any claim for damages which can be recovered" (Article 78). However, the Convention contains a limitation on the amount of debt collection, in particular, losses for breach of contract by one of the parties constitute an amount equal to the damage, including the loss of profit that the other party experienced as a result of the breach of the contract. Such losses can't exceed the damage that the party that violated the contract envisaged or should have envisaged at the time of conclusion of the contract as a possible consequence of its violation, taking into account the circumstances about which it knew or should have known at that time (Article 74). So, international law deprives the creditor of the opportunity to arbitrarily impose penalties for financial delinquencies.

In Slovenia there is a restriction of contractual intentions of the parties. Legislation determines the maximum upper limit of contractual credit interest for individuals and legal entities. The Constitution of Lithuania established that economic activity is regulated by the state so that it serves the common good of the people (Article 46). German civil law established a requirement: "If the debtor delays payments under a consumer loan agreement, then he is obliged to pay interest on the amount of debt. The annual interest rate in this case is 5 points higher than the basic interest rate (3.62%)" [2]. At the same time, the legislation prohibited accrual of interest on interest. The Civil Code of Latvia of June 19, 2009 determined that the amount of interest should be precisely determined by an act or a contract, otherwise the law establishes it at a rate of 6% per year (Article 1765). Legislation in many countries of the world (Kazakhstan, Canada, Latvia, France, Switzerland) established a rule that allows the court decision to reduce the penalty (fine) for delay in the fulfilment of monetary obligations. Consequently, the legislation of foreign countries protects financial rights of its citizens.

The Law of Ukraine "On responsibility for late fulfilment of monetary obligations" of November 22, 1996, limits the penalty for untimely execution of monetary obligations in the amount of not more than the double discount rate of the National Bank of Ukraine. Discount rate is one of the monetary instruments by means of which the National Bank of Ukraine establishes a benchmark for banks and

other entities of the monetary and credit market by the cost of attracted and placed funds for the relevant period. This rate is the base interest rate relative to other interest rates of the National Bank of Ukraine. The size of the discount rate establishes "Regulations on the basis of interest policy of the National Bank of Ukraine" approved by the Resolution of the Board of the National Bank of Ukraine" on April 21, 2016 No. 277.

The discount rate is established on the basis of a comprehensive analysis and forecast of macroeconomic, monetary and financial development prepared by the National Bank. The size of the discount rate in Ukraine is established from June 25, 1992. From 1992 to 2017, the amount of the interest rate was constantly changing: the lowest is 6, 5% (2013), the largest – 300% (1994). In 2017 it is 13%. The higher the interest rate the worse is the economic situation in the state. So, the size of the discount rate varies because economic indicators in the state are changing.

And yet, for the delay in return of credit resources of enterprises, institutions and organizations (of all forms of ownership) as well as individuals who are entrepreneurs should pay a penalty that is calculated from an overdue payment and can not exceed the double discount rate of the National Bank of Ukraine in force in the period for which the penalty was charged. But such a provision of the Law isn't applicable to individuals who don't have the status of an entrepreneur. Therefore, banks set penalties for such categories of persons at their discretion. For example, one of the paragraphs of credit contracts of the Bank "Finance and Credit" states: "For the delay in return of credit resources and/or interest payments, the Borrower shall pay the Bank a penalty at the rate of 1% of the overdue amount for each day of delay".

Judicial practice shows that the penalty often exceeds the body of the loan tenfold, since the terms of such loan agreements are written in favour of the bank. But the bankers in court emphasize that individuals voluntarily agree to such terms of loan agreements. Indeed, this is so. But the trouble is that the consumer of the loan in the conclusion of such an agreement with the bank is in a weak position as he receives a contract the terms of which have already been registered by the bank solely. Consequently, if individual entrepreneurs are protected by the state, then individuals non-entrepreneurs are not. It violates the constitutional principle of justness of the Ukrainian citizens before the law as well as the constitutional principle of equality of all subjects of proprietary rights (Part 1, Article 24, Article 13 of the Constitution of Ukraine).

The Constitutional Court of Ukraine in its Decision of July 11, 2013 rightly noted that the terms of the contract are unfair if its consequence is a significant imbalance of contractual rights and obligations to the detriment of the consumer. The fact that the creditor has the ability to charge excessive amounts of money from a consumer as a penalty distorts its actual legal purpose, since the penalty turns into a source of unjustified additional incomes by the creditor. The Constitutional Court considers that the requirement to calculate and pay an obviously overstated amount of a penalty under a consumer credit agreement does not correspond to the principles of fairness and integrity defined by the Civil Code of Ukraine of January 16, 2003 (Articles 3, 509, 627) as constituent elements of the constitutional supremacy of law. The speaker in the constitutional proceedings on this issue was the judge of the Constitutional Court, Academician Yuriy Baulin. Thus, the state actually gave the regulation of this issue to the discretion of banks and banks, contrary to the principle of fairness, establish unfair conditions for lending to individuals.

Conclusions. Summarizing the above mentioned we come to the conclusions:

1. The Ukrainian state, in defiance of the rule of law, its constitutional obligations to protect the rights of consumers and control over the quality and safety of products, services and works, actually withdrew from the regulation of credit relations in the sphere of ensuring the performance of monetary obligations in the form "bank-individual". This gives banks unlimited opportunities in Ukraine to fix the penalty for untimely execution of monetary obligations by individuals.

2. The second sentence of the preamble of the Law of Ukraine "On Responsibility for late fulfilment of monetary obligations" of November 22, 1996 should be stated in this edition: "Subjects of these legal relations are enterprises, institutions and organizations, regardless of ownership and management, as well as individuals". This will eliminate the inequality in legal relations ensuring the fulfilment of monetary obligations to protect the constitutional rights of individuals - entrepreneurs and individuals who do not have this status.

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