ФІНАНСИ. БАНКІВСЬКА СПРАВА

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BANKING CONDITIONS OF CONSERVATIVE STORAGE (ESCROW) AS A MECHANISM FOR IMPLEMENTATION OF FORCED EXCHANGE OF SHARES (SQUISE-OUT) IN UKRAINE: PROBLEMATIC ISSUES

Urgency of the research. *The topic is relevant, since legislative regulation of accounts of this type occurred in March-June 2017, and subordinate regulation – at the end of 2017.*

Target setting. *To investigate the peculiarities of conditional storage (escrow) accounts functioning in Ukraine.*

Actual scientific researches and issues analysis. *Due to the lack of a relevant regulatory framework until recently, the peculiarities of the operation of the escrow accounts, taking into account Ukrainian specificity, were not investigated.*

Uninvestigated parts of general matters defining. *Although Escrow accounts were widely considered in foreign literature, the Ukrainian specificity of these accounts has not been studied.*

The research objective. *Submit substantiated proposals to improve the mechanism of the operation of escrow accounts based on an analysis of the newly adopted legislation on these issues.*

The statement of basic materials. *It is shown that this type of accounts was actually implemented for a specific purpose – the implementation of compulsory share purchase (squeeze-out) in Ukraine, which left its imprint on the inconsistency with the traditions of global regulation. In Ukraine the conclusion of contracts for the opening of escrow accounts is usually made between the client of the bank (the account holder) and the bank itself, without participation and, accordingly, without taking into account the interests of the beneficiaries; accordingly the account belongs to the named «holder». In the context of the implementation of the squeeze-out procedure, the issue of the proper identification of minority shareholders who sell shares is not resolved, which is likely to lead to difficulties in obtaining funds for these shares. Neither the laws nor the subordinate regulation are aimed at protecting the rights of minority shareholders in the process of squeeze-out.*

Conclusions. *In order to bring Western-style legal regulation of the operation of escrow accounts and protect the rights of minority shareholder – beneficiaries, appropriate changes must be made to the legal regulation.*

Keywords: *escrow accounts; account holder; beneficiary; squeeze-out.*

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БАНКІВСЬКІ РАХУНКИ УМОВНОГО ЗБЕРІГАННЯ (ЕСКРОУ) ЯК МЕХАНІЗМ РЕАЛІЗАЦІЇ ПРИМУСОВОГО ВИКУПУ АКЦІЙ (СКВІЗ-АУТ) В УКРАЇНІ: ПРОБЛЕМНІ ПИТАННЯ

Актуальність теми дослідження. *Тема є актуальною, оскільки законодавче унормування рахунків такого типу відбулося у березні-червні 2017 року, а підзаконне регулювання – наприкінці 2017 року.*

Постановка проблеми*. Дослідити особливості функціонування рахунків умовного зберігання (ескроу) в Україні*

Аналіз останніх досліджень і публікацій. *У зв'язку із відсутністю до останнього часу відповідної нормативної бази, особливості функціонування ескроу-рахунків, з урахуванням української специфіки, не досліджувалися.*

Виділення недосліджених частин загальної проблеми. *Хоча рахунки ескроу достатньо широко розглядалися у закордонній літературі, українська специфіка цих рахунків не вивчалася*

Постановка завдання. *Подати обґрунтовані пропозиції щодо удосконалення механізму функціонування ескроу-рахунків на підставі аналізу новоприйнятого законодавства з даних питань.*

Виклад основного матеріалу. *Показано, що даний тип рахунків фактично впроваджувався під конкретну мету – реалізацію примусового викупу акцій (сквіз-аут) в Україні, що наклало свій відбиток невідповідності традиціям світового регулювання. В Україні укладання договорів щодо відкриття ескроу-рахунків здійснюється, як правило, між клієнтом банку (володільцем рахунку) та самим банком, без участі і, відповідно, без врахування інтересів бенефіціарів; відповідно рахунок належить названому «володільцю». У контексті здійснення процедури сквіз-ауту не вирішене питання належної ідентифікації міноритарних акціонерів – продавців акцій, що, скоріш за все, призведе до труднощів в отриманні коштів за ці акції. Ані закони, ані підзаконне регулювання не спрямоване на захист прав міноритарних акціонерів у процедурі сквіз-ауту.*

Висновки. *З метою приведення до західних правових традицій регулювання функціонування ескроу-рахунків та захисту прав міноритарних акціонерів – бенефіціарів необхідно внести відповідні зміни у правове регулювання.*

Ключові слова: *ескроу-рахунки; володілець рахунку; бенефіціар; сквіз-аут.*

Urgency of the research. One of the common mechanisms for ensuring transparency and conscientiousness of the transaction abroad is escrow (from *escrow* – conditional deposition) [1]. In

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Ukraine, the legislative regulation of escrow accounts was initiated by the Law of Ukraine of 23.03.2017 № 1983-VIII «On Amendments to Certain Legislative Acts of Ukraine on Increasing the Level of Corporate Governance in Joint-Stock Companies» (Entered into force 04.06.2017). So, escrow accounts are a new economic mechanism for the banking system for Ukraine, so its research is relevant.

Target setting. To investigate the peculiarities of conditional storage (escrow) accounts functioning in Ukraine.

Actual scientific researches and issues analysis. Due to the lack of a relevant regulatory framework until recently, the peculiarities of the operation of the escrow accounts, taking into account Ukrainian specificity, were not investigated. The first publications in Ukrainian sources of information are mainly informative, and in some cases, a brief analytical nature [1-3]. Russian experience and experience of the USA are considered in the Russian article [4], as well as a certain idea of the specifics of escrow accounts in the United States can be obtained from the English-language source [5]. Regarding the implementation of the squeeze-out procedure, let us pay attention on the publication [6] of allegedly securing the implementation of a squeeze-out in Ukraine for civilized European rules, which is in fact far from reality. It is more realistic to recognize the assessment based on practical Russian experience, which states that the squeeze-out occurs without the consent of minority shareholders, as a rule, an unfair price, with complete neglect of the rights of minorities under such a procedure [7]. Consequently, there is a need to clarify the peculiarities of the operation of the Escrow accounts as a mechanism for the implementation of a squeeze-out in Ukraine - in order to improve and mitigate the negative consequences for minority shareholders.

Uninvestigated parts of general matters defining. Although Escrow accounts were widely considered in foreign literature, the Ukrainian specificity of these accounts has not been studied.

The research objective. Submit substantiated proposals to improve the mechanism of the operation of escrow accounts based on an analysis of the newly adopted legislation on these issues.

The statement of basic materials. As noticed above, in Ukraine the legislative regulation of the operation of escrow accounts was initiated by the Law № 1983-VIII. The main idea behind this law was the introduction of allegedly European procedures for mandatory and / or forced execution of squeeze-out and/or sale out procedures [6] in Ukraine (although it is unclear why these procedures should be considered purely European, because they are more similar to Russian as they are described in the sources [4; 7]). Accordingly, as will be shown below, the legal regulation of the escrow procedures is configured, mainly for performing squeeze-out and/or sale out. Subsequently, a number of key by-laws were adopted: changes to the Regulations on the conduct of depositary activities, approved by the Decision of the National Commission on Securities and Stock Market dated September 14, 2017 No. 692, and amendments to the Instruction on the Procedure for Opening, Use and Closing Accounts in the National and foreign currencies, approved by the Resolution of the Board of the National Bank of Ukraine dated December 18, 2017, No. 133.

Since the main act of the civil law of Ukraine is the Civil Code of Ukraine (CCU), it is logical, first of all, to make changes on escrow accounts in the CCU, namely to make changes of Chapter 72 «Bank Account» § 2 «Account of conditional storage (escrow)» (Articles 1076-1 – 1076-8). In addition, to make changes the Law «On Joint Stock Companies», in particular, the squeeze-out procedure are described in the new article 65-2.

Thus, according to p.1 of art.1076-1 CCU, under the contract of conditional storage account (escrow), the bank undertakes to accept and enter into the conditional storage account (escrow), opened to the client (account holder), cash received from the account holder and / or from third parties, and to transfer such funds to the person (s) indicated by the account holder (the beneficiary or beneficiaries), or to return such funds to the owner of the account on the grounds stipulated by the contract of the conditional storage account (escrow). According p.3 of art.1076-2 CCU, for the onset of the grounds provided for by the contract of the conditional storage account (escrow), the bank shall, within the time period established by the agreement (in its absence, within 5 working days from the date of the relevant grounds), transfer the amount, which is on the account of conditional storage (escrow), to the beneficiary. Conditional storage account (escrow) may provide for the transfer to the beneficiary of the amount in the conditional storage account (escrow), parts depending on the

occurrence of the grounds specified in the contract.

In addition, according p. 9 of the newly introduced art.65-2 of the Law «On Joint Stock Companies», the applicant demands for the acquisition of shares in all shareholders of the company pays the price of shares to the shareholders by transferring monetary amounts to a banking institution in which the claimant has opened an account of conditional storage (escrow), the beneficiaries of which are shareholders in which shares (their successors or other persons who are entitled to receive funds in accordance with the law) are acquired.

The analysis and comparison of these norms suggests that the Ukrainian system of escrow accounts is not an American or European system. This is imitation (formal copying) of western terms and concepts, without comprehension, assimilation and implementation of their deep essence.

First, in American and European legal traditions, the buyer (the person who transfers the funds to the escrow agent), the seller (the person receiving the funds - in terms of p. 1 of art. 1076-1 CCU – the beneficiary), as well as escrow agent (in terms of p. 1 of art. 1076-1, the CCU – the bank opening the escrow accounts) necessarily conclude a trilateral agreement [4, 7]. The CCU describes only a bilateral agreement between the buyer and the bank. The CCU does not stipulate the conditions and circumstances of the beneficiary's participation in the signing of such an agreement, although this possibility implies ***implicitly***.

So, according to p.1, 2 art.1076-7 of the CCU, any amendments to the contract of conditional storage account (escrow), except those specified in part two of this article, shall be entered solely provided that the written consent for such changes is made by the beneficiary, regardless of whether the beneficiary is a party to the contract of the conditional storage account (escrow) ***If the beneficiary is not a part of the contract*** of conditional storage account (escrow), without its consent such changes shall be made to the changes that do not restrict the rights of the beneficiary arising from the contract of conditional storage account (escrow). In the event of a dispute, the obligation to prove that the relevant changes to the contract of conditional storage account (escrow) do not restrict the rights of the beneficiary shall be borne by the bank [end of quotation]. But the unclear reservation is «***if the beneficiary is not a part of the contract***» since p. 1 of art. 1076-1 CCU does not provide for such participation.

However, taking into account that beneficiaries in the sense of p. 9 of the new art. 65-2 of the Law «On Joint Stock Companies» are numerous minority shareholders of a joint stock company, the number of which can reach thousands or even tens of thousands, then it becomes clear intention to avoid the participation of the beneficiaries in signing a contract of conditional storage (escrow) – since the authors of the Law of Ukraine № 1983-VIII sought to resolve all issues without these beneficiary shareholders, and this goal was consistently achieved, as shown by the experience of Russia [7].

Secondly, in the American and European legal traditions, the buyer (the person who transfers funds to the escrow agent – in terms of p.1 of art.1076-1 of the CCU – the «owner» of the account) is the owner of the escrow account, and this owner is exactly escrow agent (in terms of p.1 art.1076-1 CCU – bank that opens the escrow account) [4; 7]. Thus, in the article [4, p. 2] cited in art.1075 of the California Civil Code, according to which «the property subject to transfer under the contract may be transferred to a third part, which, upon certain conditions, must transfer it to the performance of the contract. Owning a third person under the condition is called escrow». However, if the escrow account does not belong to this third party, then it cannot be said that the funds belong to this third party. In the article [1] it is also noted that the Law № 1983-VIII in the changes of the CCU «confuses» the concept of the owner of the account (in essence, the escrow agent) and the person who transfers funds to such an account (in essence, the depositor of funds).

As stated above, the key task of the escrow agent, according p. 3 of art. 1076-2 CCU, is, on the basis of the grounds provided by the contract of conditional storage account (escrow), to transfer the amount contained in this account to the beneficiary. At the same time according to p. 1, 2 art. 1076-3 CCU, if the contract of conditional storage account (escrow) involves providing the bank with documents confirming the onset of grounds for transferring funds to the beneficiary or the funds specified by him to the person holding the conditional storage account (escrow), or returning such funds to the account holder , the bank checks such documents for compliance with the terms of the contract of conditional storage account (escrow) solely on the basis of external features, unless

otherwise provided by law or contract of conditional storage account (escrow). If the bank considers that the documents provided by the person do not correspond to the conditions of the contract of conditional storage account (escrow) on the external grounds or other requirements, established by the contract of conditional storage account (escrow), the bank is obliged to refuse to this person in the transfer of funds with the written notification from indicating the reasons for the refusal within five working days from the day of receipt of documents for the transfer of funds on the account of conditional storage (escrow), unless otherwise provided by the account agreement conditionally of storage (escrow).

However, in the context of the new article 65-2 of the Law «On Joint Stock Companies» is a great danger for the beneficiary shareholders that neither the law nor the by-laws have resolved the issue of proper identification of minority shareholders – stock sellers. Thus, according p. 10 of the new article 65-2 of the Law «On Joint-Stock Companies», a joint-stock company, within 5 business days from the date of receipt from the Central Securities Depository of securities, the list of shareholders is obliged to draw up a list of persons, in which the shares are purchased, with the indication of the amount of funds to be paid by the applicant claims in favor each shareholder whose shares are purchased, as well as provide such a list to a banking institution in which, according to part nine of this article, a conditional storage account (escrow) is opened. The said list is drawn up by the company on the basis of the list of shareholders received from the Central Securities Depository in accordance with this part.

Instead, it should be borne in mind that these data are very outdated, since the vast majority of shareholders received shares in joint-stock companies during the privatization process, that is, in the mid-1990s, the 20th century. During this period, personal data, passport data of many shareholders has changed, in many cases there were successors. But the list of persons who purchased shares was not kept up to date. Therefore, the gap is that there are no defined instructions for banks that will open escrow accounts, how to identify individuals in various cases of non-compliance of the actual owner (actual beneficiary) data with the information given in the shareholders list. All this will lead to the actual inability to obtain funds for redeemed shares.

Conclusions. The above mentioned proves that in order to bring Western legal traditions regulation of the operation of escrow accounts and protection of the rights of minority shareholders – the beneficiaries must make the appropriate changes in the legal regulation: to correctly define the «owner» of the escrow accounts; determine that the contracts of conditional storage (escrow) are concluded by three parties - the buyer, the seller (the beneficiary) and the escrow agent (in terms of p. 1 art. 1076-1 CCU – a bank opening the escrow account); to implement the mechanism of escrow accounts in the process of squeeze out to be identified as the beneficiary – signatory to the contract of minority shareholders; to protect the rights of minority shareholders in the implementation of the squeeze-out procedures, to develop a typical contract of conditional storage account (escrow); to establish the rules for the proper identification of minority shareholders – stock sellers in cases where the actual data on the shareholder (the actual beneficiary) are not in accordance with the list of shareholders.

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