

# **CRIMINAL LEGAL PROTECTION OF BANKING IN UKRAINE IN ACCORDANCE WITH THE EU LEGISLATION**

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## **Introduction**

The banking system is an important element of the ongoing economic reforms in Ukraine. Euro-integration course of Ukraine has caused an intensive development of banking sphere. The processes of «clearing» the banking system from financial institutions that are insolvent along with the positive results have led to an increase in the level of criminalization of the banking sector.

Abuses aimed at taking possession of money from creditors and borrowers of banking institutions have become widespread. External threats to the stable functioning of the banking sector are combined with internal misconduct of unscrupulous bank managers, officials and persons related to the banks. The inconsistency between the possible legislative consolidation of criminal responsibility for socially dangerous acts in the banking sector and the objective needs of society in such protection becomes increasingly obvious in Ukraine.

## **Criminal legal protection of banking in Ukraine: the status and perspectives of development**

The goal of this research and related tasks consist in the analysis of the impact of the Ukraine's integration in EU and in WTO on its bank system and, partly, on the creation of the criminal legal protection of banking in Ukraine. The paper here presented is aimed to improve the activity of jurisprudence and of the legal advisers on this matter. This research should be helpful as well for university teachers and students.

The applied researched approach is mainly comparative analysis.

The line of Ukraine towards European integration nowadays is the main vector of its political, economic and social development. After an extension of the European Union in 2004, some border-countries of Ukraine have become its new members. It gave a respective impulse to the integration intentions of Ukraine. The banking system is an integral part of the economic system of

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Ukraine, therefore integration into the European Union economic sphere may have the respective consequences for the banking system of Ukraine.

The banking system of Ukraine is characterised by insufficient capitalization, the lack of capital concentration, sizable banking risks, low bank performance, insufficient banking management, doubtful quality, and quantity of banking services. Ukraine's integration with the European Union may create the additional risks for its banking system. Certainly, European integration is not a sudden phenomenon in the country's economic policy. Since the end of the nineties – beginning of 2000, Ukraine has been having the European integration program approved at the state level, according to which gradual adaptation is carried out (of legislation primarily) to the EU requirements and standards. The banking system is not an exception to this process (Mishenko V.I., 2007).

The criminalization of public relations in the sphere of banking activity of Ukraine in the current political and economic conditions predetermines the need to find ways to ensure the security of this sphere. Taking into account the changes taking place in Ukraine and the reforms in the banking sector aimed at getting out of the financial and economic and banking crisis, it is necessary to understand that the realization of strategic goals of providing accelerated economic growth and a fundamental change in the structure of the economy, strengthening of the banking system of the country is not possible without limitation of criminal offences in the sphere of banking activity. Crimes in the sphere of banking covers various types of damage to protected legal interests of both legal and natural persons. Finally, as it was noted by some authors, "the results of these crimes are not limited to infringements of individual personal interests, but cause harm to society as a whole" (Prohorov V.S., 1984). Criminal legal protection of banking activity of Ukraine in comparison with other countries is a relatively new institution, not sufficiently developed and that does not have its concrete consolidation in the structure of the current Criminal Code of Ukraine (hereinafter - CC).

Crimes in the banking sector were the subject of research of many leading scientists of Ukraine and neighboring countries. Among them we can distinguish the scientific works of Golubev V.O., Larichev V.D., Matusovskii G.A., Panov M.M., Satuyev R.S., Shrayev D.A., Yaskova N.Yu. and the other scholars which, to a certain extent, were devoted to the separate issues of banking protection. Such Ukrainian scientists as O.I. Baranovsky, I.V. Burakovsky, V.M. Geyets, V.V. Kozyuk, V.V. Korneyev, Z.O. Lutsyshyn, I.O. Lyuty, V.I. Mishchenko, A.M. Moroz, V.Y. Novytsky, V.Y. Pyschchyk, O.I. Rogach, M.I. Savluk, V.S. Stelmakh, S.L. Tygipko and A.P. Yatsenyuk, payed their considerable attention to the integration processes taking place in the financial and banking sphere as well as the influence of the foreign capital on the banking system of Ukraine.

Presently, the discussion is held among the specialists concerning an influence of Ukraine's integration into EU and WTO on the banking system. However, in the works of native and foreign scientists there is no complex approach to the treatment of problems and risks, which can arise on the way of Ukraine to European integration. The issue of criminal legal protection of banking activities in the modern period of adaptation of legislative provisions of Ukraine to the provisions of international legal acts requires a more detailed study. Protection of the banking system as one of the components of the country's financial security requires a higher level than enshrined in the current criminal law of Ukraine. According to the statistical data of the General Prosecutor's Office of Ukraine, in January-August 2016 about 811 crimes were committed in the sphere of economic activity related to insurance and financial activities. At the same time among these crimes 491 criminal offences (hereinafter - CO) were committed related to monetary intermediation. There were committed 298 CO related to the activities of the central bank and 193 CO related to the other types of money mediation. In the sphere of provision of the other financial services, except insurance and pensions 263 CO were fixed and 2 CO related to financial leasing. An indicator of unlawful actions related to the other types of lending was fixed in the amount of 26 CO. In addition to the above-mentioned crimes connected with insurance, reinsurance and non-state pension provision, except for compulsory social insurance 4 CO were committed; related to auxiliary activities in the sphere of financial services and insurance there were committed 49 CO (General Prosecutor of Ukraine, 2016).

The CC of Ukraine protects the most valuable social relations by its norms, however, in its current version, the legislator does not define the banking activity as a separate object of criminal legal protection. Criminal offences in the sphere of banking activities are attributed, first of all, to a group of crimes in the sphere of economic activity.

Some of these actions are placed in the Chapter XVI of the Special Part of CC of Ukraine "Criminal Offences Related to the Use of Electric Computing Machines (Computers), Systems and Computer Networks and Telecommunication Networks", some of them are contained in the Chapter "Criminal Offences Against Property" another criminal legal norms are included to the Chapter XVII of CC of Ukraine "Criminal Offences in Office"

However, at present the security of the banking system of Ukraine acquires the features of independent activity, which requires an appropriate legal status and protection. The incompatibility of the provisions of the criminal law with regard to the protection of banking activities of Ukraine, the absence of the crime compositions that most accurately characterize the committed actions leads to incorrect qualification of cases of abuse in the banking sector. This

raises doubts as to the effectiveness of the use of criminal liability and punishment for the offences in the current CC of Ukraine.

The existing system of criminal legal norms providing for liability for unlawful acts in the sphere of banking activity of Ukraine looks inappropriate and does not take into account the peculiarities of its functioning in the context of the functioning of the market. So, in our opinion, the actual problem is the lack of the protection by the means of criminal law of the lenders in the person of a bank institution and the clients of banks who can not return their deposits in time. In addition, the criminal law of Ukraine does not properly regulate the issue of liability of the legal entities involved in crimes committed in the sphere of banking activity.

An absence of appropriate incentive norms in the CC of Ukraine shows that the legislator probably does not see a significant problem and public danger in these criminal offences. However, the practice proves the opposite. In addition, the criminal law of Ukraine does not pay sufficient attention to the subject of offences committed in the banking sector.

An employee of a banking institution has the characteristics of a special subject of criminal offences and is an integral part of the crime composition in the system of criminal law of the certain foreign countries. This confirms the functioning of the institution of criminal legal protection of banking and an interest of the state to ensure the security of the banking system by criminal law means. Determination of the special features of the subject of a crime is conditioned by the specifics of individual offences, the commission of which is possible only in connection with the corresponding type of human activity, which can be carried out by a limited circle of the subjects.

The fight against criminal offences in the financial and banking spheres is entrusted to law enforcement agencies as the main subjects to ensure their protection. However, taking into account the sample statistical data of recent years on indicators of the crimes in the economic and financial spheres, it is possible to draw conclusions about the insufficient efficiency of the work of law enforcement agencies in this direction. Duplication of the powers of an extensive system of law enforcement agencies in investigation crimes in the financial and banking spheres leads to inhibition of these processes and the lack of reliable indicators for the disclosure of these offences. This means that the mechanism of social control of crime does not work in the law-enforcement system of Ukraine. At the same time, the absence in the CC of Ukraine of the institution of criminal law protection of banking activities does not form citizens of a negative attitude to these offences, since such actions are not declared criminal and punitive at the legislative level.

The concept of criminal offences in the sphere of banking as a special group of criminal actions is relatively new to Ukrainian legal science, but it

has long been known by foreign law. These actions are united by the generic object of infringement, and the specifics of sphere of the crime commission, namely, the sphere of credit and banking relations. We consider that an experience of the foreign countries in the legislative regulation of criminal liability for such actions may be useful for Ukraine. Unlike the criminal legislation of Ukraine, the criminal law of a number of the foreign countries, including EU countries, provides for a set of measures aimed at securing the interests of the creditors, which are the banking institutions.

For example, Swiss Criminal Code (Swiss Criminal Code, 1937) contains such criminal actions: fraudulent bankruptcy and fraud against seizure (Art. 163), reduction of assets to the prejudice of creditors (Art. 164), mismanagement (Art. 165), failure to keep proper accounts (Art. 166), undue preferenceto creditors (Art. 167), subornation in enforcement proceedings (Art. 168), disposal of seized assets (Art. 169), obtaining a judicial composition agreement by fraud (Art. 170). Article 297 of the Criminal Code of the Republic of Poland states (Criminal Code of the Republic Poland, 1997): "Whoever, in order to obtain for themselves or someone else from the bank, or organizational unit pursuing like economic activities under the Act or the authority or institutions with public funds - the loan, the loan payment, warranties, guarantees, letters of credit, grants, subsidies, confirmed by a bank obligation of a surety or guarantee or the like to provide money for a specific business purpose, an electronic payment instrument or contract, shall counterfeit, forged, testifying untruthfully or dishonest or unreliable document, written statement of the facts importance for obtaining the said financial assistance, the payment instrument or contract, be subject to imprisonment from 3 months to 5 years. The same penalty shall be one who despite the obligation does not notify the proper person if a situation arises that may impact on preventing or reducing the amount of granted financial support referred to in § 1, or a public contract or the opportunity to continue to use the electronic payment instrument. Is not subject to penalties, who prior to the initiation of criminal proceedings prevented the use of voluntary financial support or payment instrument, as defined in § 1 of this article, resigned from the grant or contract, or satisfied the victim claims". In this context, in Part 3 of Art. 297 the legislators have foreseen an encouraging the norm.

In the CC of Ukraine, certain steps have been taken to protect the rights of the creditors, however, the dispositions of the above norms is formed in such a way that they do not provide for liability for relatively common actions related to attempts to illegally obtain a loan. However, it should be noted that in practically every banking institution there is a booth or monitor, which covers the information about the search of persons who committed "fraudulent actions" with the bank's credit resources. Provisions stipulated in Art. 218-1 and 219

of the CC of Ukraine provide for liability for bringing the bank to insolvency and bringing it to bankruptcy if it caused significant material damage to the state or the lender. However, we consider that there exist the other threats to the rights of the creditors, which come from the unscrupulous clients. It turns out that the EU criminal law protects the above-mentioned social relations at a higher level in comparison to the Ukrainian criminal law.

The concept of criminal liability of legal entities in the criminal legislation of EU countries is of the great interest. This legal institution is developed in France, the Netherlands, Denmark, however, it is not foreseen in some Western European countries, for example, in Spain, Bulgaria, Hungary. The administrative liability of legal entities has been introduced in Germany, Italy, Portugal, etc. (Lukiyanetz D. M., 2000). In this case, individuals are also prosecuted in the event of the proving of their guilt in committing a crime.

The study of the question of the protection of banking activities at the criminal legal level should not be confined to an example of EU law only. Thus, a large number of criminal legal norms of the Criminal Code of the People's Republic of China is devoted to the protection of the banking sector (Section 2, Paragraph 4 of the CC of the People's Republic of China). We believe that providing employees of banks or other financial institutions with the signs of the special subject of crime in the sphere of banking is a definite, positive achievement of the criminal law of that country. In this case, the signs of a special subject of a crime are used by the legislator in describing the basic, non-qualified compositions of crimes. This means that a specific legally protected public relation are of the special attention, not of secondary importance in the criminal law of the country. The compositions of the crimes where the signs of a special subject are directly prescribed by law in the disposition of the article and determine the presence of such a subject as a constructive element of the crime, they are mandatory for the presence or absence of the composition of the crime as a whole. For example, according to Art. 186 of the Criminal Law of the People's Republic of China: "personnel of banks or other monetary institutions who violate the stipulations of laws and administrative regulations to grant fiduciary loans to related people or to grant secured loans with conditions better than those for granting similar loans to other borrowers, thus causing relatively big losses, are to be sentenced to not more than five years of fixed-term imprisonment or criminal detention, and to a fine of not less than 10,000 yuan and not more than 100,000 yuan; when the losses are serious, the sentence is to be not less than five years of fixed-term imprisonment, and a fine of not less than 20,000 yuan and not more than 200,000 yuan. Personnel of banks or other monetary institutions who violate the stipulations of laws and administrative regulations to grant loans to people other than the related people, thus causing serious losses, are to be sentenced

to not more than five years of imprisonment or criminal detention, and a fine not less than 10,000 yuan and not more than 100,000 yuan; when the losses are especially serious, the sentence is to be not less than five years of fixed-term imprisonment, and a fine not less than 20,000 yuan and not more than 200,000 yuan. Institutions that commit a crime mentioned in the preceding two paragraphs are to be sentenced to a fine, and personnel in charge directly responsible for the crime and other personnel directly responsible for the crime are to be punished in accordance with the stipulations in the paragraphs 1 and 2 of the Art. 186 of Criminal Law of the People's Republic of China" (Criminal Law of the People's Republic of China, 1997).

In the CC of Ukraine there is a norm stipulated in Art. 220-1: "Violation of the order of conducting a database of depositors or the order of reporting", which establishes the responsibility of the head or other official of the bank for inclusion in the database of false information. It is impossible not to agree with the legislator on the expediency of criminalization of such actions, however, one criminal legal norm, which explicitly provides for the responsibility of heads and officers of the banks, is not able to ensure the protection of banking activities in the country at an appropriate level.

Significant amendments were made to the CC of Ukraine by the Law of Ukraine "On Amending Certain Legislative Acts of Ukraine on Humanization of Responsibility for Violations in the Sphere of Economic Activity" (hereafter – the Law) dated from 15.11.2011 № 4025-VI. That period of time was characterized for Ukraine by unrealistically high level of criminalization of offences in the sphere of economic activity, which was considered as an obstacle for business development, as well as because of deficiency of the State budget of Ukraine adequate compensation for the harm caused by the wrongful actions in that area. The Law decriminalised certain some actions, which requalified into administrative offences. Among them: violation of the order of business activity execution, i.e. carrying out business activity without state registration, license etc. (article 202 of the CC of Ukraine); carrying out of prohibited business activity (article 203 of the CC of Ukraine); evasion from returning proceeds in foreign currency (article 207 of the CC of Ukraine); illegal opening/usage of foreign currency accounts beyond the territory of Ukraine (article 208 of the CC of Ukraine); sham bankruptcy (article 218 of the CC of Ukraine); forcing for anticompetitive actions (article 228 of the CC of Ukraine); stocks' floatation without registration of their issuance (article 225 of the CC of Ukraine) and others. The expediency of decriminalization of the Article 202 of the Criminal Code of Ukraine, in our opinion, raises doubts. These actions are considered criminal in the criminal legislation of the Russian Federation and China.

For example, according to Art. 174 Criminal Code of the People's Republic of China: "Whoever sets up a commercial bank or any other financial institution without the People's Bank of China's permission shall be sentenced to not more than three years in prison or criminal detention. He or she shall be fined, additionally or exclusively, not less than 20,000 yuan and not more than 200,000 yuan. If the circumstances are serious, he or she shall be sentenced to not less than three years and not more than 10 years in prison. In addition, he or she shall be fined not less than 50,000 yuan and not more than 500,000 yuan. Whoever forges, alters, or transfers the business licenses of commercial banks or other financial institutions shall be punished in accordance with the provisions in the paragraph 1 of the Art. 174 of Criminal Law of the People's Republic of China".

Moreover, Art. 174 of the Criminal Code of the People's Republic of China also establishes the responsibility of legal persons in the event of the said crime, Where the crimes mentioned in the Art. 174 of Criminal Law of the People's Republic of China are committed by a legal person, the legal person in question shall be fined, and the individual directly in charge of it and other people who are directly responsible shall be punished in accordance with the first paragraph of the Art. 174 of Criminal Law of the People's Republic of China. In the CC of Ukraine, to the crimes committed in the sphere of banking activities, which may incur criminal liability of the legal persons, the legislator took criminal legal norm under the Art. 209: "Legalization (laundering) of criminally obtained money" (Lyhova S.Ya., 2014). According to the provisions of Part 1 of the Art. 209 of CC of Ukraine: "Effecting financial transactions and other deals involving money or other property known to be proceeds from socially dangerous criminal offences prior to legalization (laundering) of incomes, and committing acts aimed at covering up the illegal origin of such money or other property or their ownership, the rights to such money or property, their origin, location, transfer, as well as obtaining, holding or use of money or other property known to be proceeds from socially dangerous criminal offences prior to legalization (laundering) of incomes shall be punishable by imprisonment for a term of three to six years, with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to two years, and with the forfeiture of criminally obtained money and other property and forfeiture of property". However, other abuses remained outside consideration, which could cause significant damage to the lawful interests of the citizens, for which, in our opinion, it is necessary to apply measures of criminal legal influence to legal entities. These crimes include, in particular, bankruptcy crimes related to business, banking offenses related to professional and professional activities in the provision of public services. The indicated actions may be complex, committed by the groups of persons united by a single criminal intention and who has the direct



access to bank resources in connection with the performance of their official duties.

For example, Article 3 of the "Act on the Liability of Collective Entities for Acts Prohibited Under Penalty" of the Republic Poland of October 28, 2002 lists the circumstances in which corporate entity incur criminal or quasicriminal. The liability can be imposed on such entities where a specific person commits a specific offence and his/her conduct has or may have resulted in the corporates' entity benefit. Those offences must be committed by persons who: act in the name or the interest of the entity pursuant to authority or obligations to represent it, undertaking in its name decisions or performing of internal reviews or by exceeding such authority or not fulfilling such obligation (art. 3 point 1 of the Law); permitted to act as a result of exceeding authority or non-fulfillment of obligations by persons described in point 1 (art. 3 point 2 of the Law); acting in the name or on behalf of the entity, with the consent or knowledge of persons described in point 1 (art. 3 point 3 of the Law) (Gmaj Marcin, 2016).

Another common feature of EU legislation is the indication that a criminal act must be committed in the interests and in favor of a legal entity. Art. 5 of the Criminal Code of Belgium states that legal entities are criminally liable for crimes committed for obtaining the benefits (Gryshuk V.K., 2013). In the criminal legislation of Ukraine, crimes in the sphere of banking activity mostly have a mercenary motive.

There is a need to substantiate current normative regulations, to improve their contex, to adapt normative rules to reality in Ukraine. It is also nesssary to criminalize the acts committed in the sphere of banking and having in its structure all the elements of the crimes as well as to decriminalize those criminal offences, the factual manifestations of which is null (Klochko A.N., Logvinenko N.I., Kobzeva T.A., Kiselev<sup>a</sup> E.I.,<sup>2016</sup>).

## Conclusion

The trend towards European integration in the development of Ukrainian economy requires immediate concrete measures for adequate adaptation of the banking sector in order to prevent the European integration course of Ukraine from risks. Thus, the current criminal law of Ukraine in comparison with the legislation of the foreign countries has adequate reserves for improvement of the criminal law means necessary to ensure the security of the banking sector. Political and economic integration of Ukraine into the world of the European Community needs a more effective protection of national economic and financial systems. There is a need to optimize the provisions of the CC of Ukraine in order to solve the problems of criminal liability of the legal entities for crimes committed in the sphere

of banking. Along with this, requires an analysis a number of other existing problems in the sphere of banking for possible timely criminalization of such acts.

In the line of raising conformity to the international standards of corporate management is a need for the following measures: existence of the individual strategy of bank development and management; raising of responsibility of managers and owners of a bank for its safety and stability; extension by the National Bank of Ukraine of the list of public information (information of individual financial situation, owners, structure and quality characteristics of management, major investments etc.) enhancement of efficiency of the internal control system; raising of protection of the rights of minority shareholders; continuation of work in adaptation of the regulatory and legal framework of Ukraine on the banking activity matters to the requirements of legislation of the European Union and the Basle Committee.

For the purpose of improvement the banking services quality and competitiveness there is a need for such measures: development of the banking sector structure; arrangement of conditions for the use of electronic banking technologies; activation of bank consolidation processes; focusing on the issues of safety of banking computer-aided systems; raising of educational level of banks' personnel; stimulation of banking services for small and medium business and the population, development of new segments of the market of banking services.

The need for criminal law enforcement of banking activities is conditioned by an increase in the public danger of these acts at the present stage of the functioning of society, the crisis in the financial and banking spheres of the state, the need to eliminate the gaps in the current legislation on security issues in the banking sector and the changes that have taken place in the banking sector of Ukraine in conditions of strengthening Ukraine's integration into the EU.

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## **CRIMINAL LEGAL PROTECTION OF BANKING IN UKRAINE IN ACCORDANCE WITH THE EU LEGISLATION**

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### **Abstract**

The research objective and task of the paper are to present the current status and perspectives of development of criminal legal protection of banking in Ukraine.

The applied methodology is mainly comparative analysis.

The main result achieved is to present the possibility of Ukraine to develop its criminal legal protection of the banking system in accordance with the EU legislation in this field. In spite of the fact that crimes in the banking sector were the subject of research of many scientists of Ukraine and abroad, this work represents an original research.

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**Key words:** banking institutions, criminal law, optimization.