

CONCEPTS AND CHARACTERISTICS OF BANK AS A MAIN ELEMENT OF
THE BANKING SYSTEM

Annotation

Concept and characteristics of bank are defined. The peculiarities of bank in comparison with other financial institutions are explored.

Keywords: banking system, activity, law, credit organization, market economy, financial institution.

Анотація

Визначено поняття та ознаки банку. Досліджено особливості банку в порівнянні з іншими фінансовими установами.

Ключові слова: банківська система, діяльність, закон, кредитна організація, ринкова економіка, фінансова установа.

Аннотация

Определено понятие и признаки банка. Исследованы особенности банка по сравнению с другими финансовыми учреждениями.

Ключевые слова: банковская система, деятельность, закон, кредитная организация, рыночная экономика, финансовое учреждение.

Introduction

Noting the important contribution of many scientists in developing various aspects in the field of bank activity, you can not state the fact that in the conditions of transition to market economy many categories are conceptualized in new ways, including the term «bank» and determination of its role in the banking system. However, the presence of many, often contradictory, views on this issue requires investigation not of a random set of issues that characterize banking, but of answers to specific questions raised by methodology. The first definition of «bank» appeared in the Law of Ukraine «On Banks and Banking». According to the Article 3 of this Law banks are defined as institutions, whose function was crediting subjects of economic activity and citizens through attracting funds of companies, institutions, organizations, population and other credit resources, cash and settlement services of the national economy, implementation of foreign exchange and other banking operations. This definition was too broad. This is because, first of all, 16 such operations were noted in the Law, but it was not specified whether the bank should perform all these operations or only one of them in order to obtain the appropriate status of the structural element of the banking system. This gave an opportunity to interpret the term «bank» and the field of bank activity too broadly. Therefore, there was no clear

legal boundary between banking and non banking financial institutions.

Analysis of recent research

Works of G. Bashnyanyn, A. Vovchak, A. Halchynskiy, O. Dzyublyuka, M. Kozoriz, O. Kopylyuk, A. Kirichenko, A. Moroz, S. Mochernoho, A. Petrick, M. Savluk, T. Smovzhenko, M. Surzhynskoho, S. Reverchuka, S. Horunzhny, T. Chernychko, V. Yushchenko and others are devoted to the problems of regulating the banking system of Ukraine under conditions of transition economy.

Statement of research objectives

– to define the concept and characteristics of the bank;

– to investigate the peculiarity of the bank compared to other financial institutions.

Results

In 1993, changes and amendments were made to the Law under which non-bank financial institutions were forbidden to open accounts, accept deposits, and carry out payments and credits. So they were considered purely banking activities and, therefore, other financial institutions were not allowed to be engaged in it. But even these changes and amendments did not finally solve the question of what the Ukrainian legislation means by the term «bank». Is it an institution, which performs named above four operations, which are forbidden

for non-banking institutions or only one of them, or any of the 16 operations listed in the Article 3 of the Law of Ukraine «On Banks and Banking» from March 20th, 1991. The requirement for the bank about the deposit insurance, as it was done under the U.S. law in the Ukrainian law was not even mentioned.

Second of all, definition of the concept «bank» from the perspective of the law was not entirely successful, because organizations that were created by the owner to carry out managerial, social, cultural and other functions of noncommercial character, and that were financed by him fully or partially were traditionally understood in the law as institutions. Thus, the legal nature of bank as the main element of the banking system remained not entirely clear. In addition, the legislation allowed institutions that were not banks by defining them as «other credit institutions to perform certain banking operations».

Definition of the concept financial and credit institution appeared much later in the Law of Ukraine «On the National Bank of Ukraine.» Concept of «credit institution» was used separately, although in the glossary of this Law the term «bank» was defined through the concept of legal person, who carried out activities on attracting deposits from physical and legal persons, maintaining accounts and providing loans on its own conditions based on the license of the National Bank of Ukraine. According to A. A. Selivanov, «the distinctive features of the banking institution are sometimes ignored in the legal sense, as evidenced by the terminology of some laws, in which the term «banks» are covered by general definitions, such as economic entities» [1, p. 46].

All mentioned above shortcomings were due to transition the economic situation in which the Ukrainian banking legislation arose. They were also caused by the fact that there had been a lack of theoretical study of this issue. Especially important is the fact that over time an understanding of bank acquires a new meaning that reflects its place in society and in the state, and in the banking system. With good reason known representative of the Russian pre-revolutionary law school M. Agarkov emphasized that there is no such logically correctly constructed definition that would exactly conform to the notion that is meant while using the term «bank».

In the dictionary edited by Professor A. Gorbunov term «bank» is also viewed through the concept of «credit institution», which has the exclu-

sive right to perform certain banking operations in the aggregate [5, p. 25].

Characteristics of the bank as a credit institution envisage revealing the range of operations that the bank has the right to exercise. At the same time, based on the above, the concept of a credit institution should be broader because it covers both banks and non-banking credit organization. Moreover, bank acts as if the most perfect credit organization. This is because it can carry out any activities such as bank and non-bank activities. Non-banking credit organizations can carry out any banking operations, except of those which by the law are related to the competence of the bank. This means that the term «bank» includes the term «credit institution» next to the term «non-bank credit organization», with which they form this common definition.

The question of what means the notion «bank» in the U.S. banking legislation also remains controversial. So, American scientist P. Rose characterizes the bank as a financial institution that offers a wide range of services [14, p. 3].

After analyzing different views on the nature of a bank, scientists-economists concluded that bank is a «special credit and financial company that carries out a variety of operations in particular, provides main basic functions, in the process of implementation of which, as well as of appropriation of available assets in it, occurs a certain set of production relations between different economic entities to generate income primarily the appropriation of profits» [12, p.7].

As we can see scientists-economists define the concept of bank in different ways:

The first ones call the bank an institution, the second – a credit institution, the third – an institute, the fourth – a financial and credit institution, the fifth – a credit and financial enterprise, the sixth – an associate legal category of «bank» with the statute and permissible banking activity. And sometimes the term «bank» is defined by listing certain functions performed by it, most frequently identifying functions of banks with certain areas or types of their activities and sometimes just with some transactions.

Identification of the bank as any institution that accepts deposits that the depositor may lawfully withdraw on demand, and which carries out activities to provide commercial loans, means limiting the subject of banking activities to just these functions. Many banking services remain outside the scope of banking activities with such a nar-

row approach. There are many organizations and institutions, which on the basis of permits may grant commercial loans, but they avoid defining themselves as banks. Hereby, they do not violate the law, but also have no legal basis for classifying themselves as «banks».

Analyzing scientific researches of the term «bank», it can be said that this issue is not as simple as it seems at first glance.

Words that were similar to the word *bank* and marked different concepts in the field of monetary circulation entered most of European languages almost simultaneously in the era of development of trade in the medieval Europe.

In his monograph A. P. Orlyuk points out that there are different approaches to the definition of «bank» in the Central European and Anglo-Saxon system of law [13, p. 6]. Countries belonging to the continental system of law consider banking institution through a set of functions performed by it. Countries of Anglo-Saxon system of law, unlike continental countries moved away from the traditional approach in defining the banking institution. For example, in English law the emphasis on the concept of «bank» moved to the regulation of banking activities, i.e. rules (for example, conditions of contracts), which are used in banking practice [2, p. 6].

Concept of the credit institution in the EU legislation was approved by the First Banking Directive. All of the following EU regulations, which related to issues of regulation of credit institutions, came out from the concept of «credit institution» provided by the First Banking Directive [16]. According to the First Banking Directive, company is recognized as the credit institution if its activity is in taking deposits or other funds from the public with mandatory return and providing loans at its own expense. This definition is based on the classic comprehension of the term «bank» in the law of continental Europe as an institution that is constantly engaged in adoption deposits and granting loans.

Based on this definition, A. A. Vishnevsky concluded that in order to the enterprise to be seen as a credit institution, it must meet three criteria [3, p. 28]: 1) acceptance of deposits and other funds by the credit institutions with mandatory their return; 2) acceptance of deposits should be the principal activity of such enterprise; 3) enterprise is only then a credit institution when its activity is connected not only with acceptance of money with their further return, but also with credit exposures

at its own expense. The author believed that this approach was too broad to determine the bank. Moreover, «European banking reality in the part of subjects of banking activities was such that much of the institutions remained outside the definition, such institutions that provided services traditional to banks, but did not fall under the definition of credit institution, provided by the First Banking Directive» [3, p. 28].

Of course, it could not be considered as the imperfection of the First Directive. This once again proved the fact that difference in the banking legislation of various European countries and in the forms of organization of banking business in these countries is so huge that it could not be overcome only by one Directive. The First Directive was seen as first a step towards the harmonization of banking law in Western Europe, as was pointed out in its preamble: «given the extent of these differences (differences between the banking laws of states – members of the EU), the conditions necessary for a common market for credit institutions can not be created by adopting one Directive.» As a result, the need for harmonization of banking law in the EU was proclaimed.

With the adoption of the EU Directive from the 20th of March, 2000 much earlier Directives (and including the First one) became invalid. Directive 2000/12/EC of the European Parliament and the Council of the 20th of March, 2000 (as amended by the Directive of the European Parliament and the Council 2000/28/YEES from September 18th, 2000) [15, p. 23] laid the foundation of the main legal principles of banking.

«Credit institution» is considered by this Directive:

1) subject of entrepreneurial activity, activity of which is to receive deposits or other funds from the public on a returnable basis and grant credits at its his own expense, or

2) institution which conducts electronic money within the meaning of the Directive 2000/28/YES of the European Parliament and the Council from 18th September, 2000 regarding its establishment and its conduct by institutions conducting electronic money of prudential supervision.

In order to introduce supervision on a consolidated basis, the credit institution is a credit institution, as well as any business entities or government agencies that meet the definition of credit institution and which are licensed to operate in a third country.

In order to introduce monitoring and controlling over great risks, the credit institution is a credit

institution, as defined in the definition, including branches – structural units of credit institution in third countries, and any business entities or government agencies, including their affiliates that meet the definition of credit institution and which are licensed to operate in a third country.

Financial institution, based on the above mentioned Directive, is a subject of entrepreneurial activity that is not a credit institution, main activity of which lies in acquiring participation in a financial institution or implementing one or more types of the activities specified in paragraph 2.12 of Appendix 1 (including providing loans, financial leasing, money transfer services, issue and maintenance of means of payment – credit cards, traveler's and bank checks, etc.).

Law of Ukraine «On the National Program for Adaptation of the legislation of Ukraine to the legislation of the European Union,» identified a mechanism for Ukraine to achieve compliance with the third Copenhagen and Madrid criteria for membership in the European Union [13, p. 6]. This mechanism involves the adaptation of legislation and creation of appropriate institutions necessary for effective law creation and law enforcement. EU Common Strategy on Ukraine supported the process of economic reforms in Ukraine and the gradual approximation of Ukraine to the EU legislation in certain priority areas, including the banking law.

Thus, taking into account all of the above, let us try to define the term «bank» by highlighting above all its main characteristics.

Some scholars have identified the contractual nature of the relationship between the bank and its customers as the main feature of the bank. But it should be noted that the bank compared to other business entities has some powers of an administrative nature that do not allow defining the legal nature of the relationship between the bank and the client fully as a negotiated one.

We consider the proposal to see the bank as an enterprise that provides a specific kind of services – banking services or as an enterprise of a special type as more correct definition. But it is precisely here it is necessary to consider the fact that banking services can be provided by not only banks but by other financial institutions. In this connection there is a need for clear delineation of these concepts.

It is known that money serve as the main financial tool of banking activities. The article 99 of the Constitution of Ukraine stipulates that the

monetary unit of Ukraine is the hryvnia [11]. Banks must make payments and do calculations in the territory of Ukraine only in local currency.

A. P. Orlyuk states: «If in normal activity of the enterprise funds serve mainly the role of means of payment, in banking activity the money itself serve as a commodity. This peculiarity of the banking enterprise makes it so unique that it objective-ly requires special legal regulation which differs from the general laws on enterprise.» As noted by O. P. Orlyuk, «currently banks are among the oldest and the largest financial intermediaries by assets.» I. B. Zaverucha offers also to consider the bank as a special category of businesses – financial intermediaries. As the author states, «financial intermediation envisages attracting funds from investors (depositors) and investing (attachment) of funds with the purpose of making profit. Financial intermediaries are deployed between the investor and the end user of investment. Investors in financial intermediation enter into a relationship only with the agent, not with the company or project in which funds are invested». [6, p. 34]

Economic Code of Ukraine, adopted on January 16th, 2003, financial intermediation regards as activities relating to the receipt and redistribution of financial assets. As indicated in the Code, «financial intermediation is carried out by banks and other financial-credit organizations» [4].

Today the bank as a legal category is reflected in the Article 1 of the Law of Ukraine «On Banks and Banking Activity». According to it the bank is defined as a legal entity which has the exclusive right based on the license of the National Bank of Ukraine to exercise in the aggregate the following operations: attracting funds of individuals and legal entities into deposits; placing these funds on its behalf, on its own terms and its own risk; opening and maintaining bank accounts of physical and legal persons [9].

For the first time in a new version of the Law of Ukraine «On Banks and Banking Activity» the legislator determines the priority role of the basic operations and the fact that only banks can exercise them in the aggregate. Exactly the combination of these three operations: deposit operations associated with the involvement of money in deposits, credit and payment operations reveal the main features of the bank, because some of these operations can be carried out also by non banking institutions.

Some inconsistency was with the notion of a financial institution in the current legislation. For instance, in accordance with the Article 1 of

the Law of Ukraine «On the National Bank of Ukraine», the financial institution was seen as a legal entity that carried out one or more operations that could be carried out by banks, except attracting deposits. Wider meaning was given to the concept of financial institution in the Article 1 of the Law of Ukraine «On Financial Services and State Regulation of Financial Services Markets». According to the Law a legal entity that provided one or more financial services and was included in the relevant registry is recognized as financial institution [8]. On January 10th, 2002 the Parliament adopted the Law of Ukraine «On amending some legislative acts in relation to the adoption of the Law of Ukraine «On Banks and Banking Activities» [10]. As a result the term «financial institution» is excluded from the Law of Ukraine «On the National Bank of Ukraine.» Currently this issue is regulated by the Law of Ukraine «On Financial Services and Regulation of the Market of Financial Services.» We believe that in any case, the main feature of the financial institution is a provision of financial services, which is subject to the receipt of the appropriate legal status and permission to implement them.

Thus, bank is a financial institution, which under the NBU license has the exclusive right to carry out in aggregate deposit, credit and payment operations. The peculiarity of the bank compared to oth-

er financial institutions lies in the fact that the bank is a major financial institution, which is designed to carry out banking activities, which has an exclusive character. At the same time all other financial institutions are mainly specialized organizations that perform a defined range of banking transactions depending on their legal status. Legal category of «banking operations», which reveals the contents of their activities and which we will also try to explore, is an integral part of such concepts as «bank» and «financial institution».

Conclusions

Thus, based on the conducted research, we can conclude that the main features of the bank include:

1) bank as a legal entity may be a state institution or a subject of commercial activities aimed at making a profit;

2) bank is created in the form of open joint stock company or cooperative bank;

3) bank not only carries out banking operations, but also in aggregate exercises such banking operations as deposits, credit and payment;

4) bank is obliged to have statutory fund (capital);

5) bank has a special competence, i.e., it makes a profit only by means of defined operations;

6) bank operates under a license issued by the NBU;

7) bank is a key element of the banking system.

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