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ISSUES OF LEGAL REGULATION OF SETTLEMENT OPERATIONS OF BANKS IN UKRAINE

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Annotation. The report is devoted to the definition of the peculiarities of contracts related to the services for the transfer of funds under the legislation of Ukraine and to compare their content with payment services in accordance with the EU legal acts. A larger number of contracts are investigated, which, as a rule, are the basis for settlement and cash servicing. It is confirmed that the use of the terms ‘payment services’ and ‘funds transfer’ in all the contracts in which banks provide payment and related services will bring the Ukrainian legislation closer to the term ‘payment services’, which is used in the EU legislation.

Анотація. Тези присвячено визначенню особливостей договорів, пов’язаних з послугами переказу коштів відповідно до законодавства України та порівнянню їх змісту з платіжними послугами відповідно до законодавчих актів ЄС. Досліджується велика кількість контрактів, які, як правило, є основою для розрахунково-касового обслуговування. Доведено, що використання термінів «платіжні послуги» та «переказ коштів» у всіх контрактах, в яких банки надають платіжні та супутні послуги, наблизить українське законодавство до терміну «платіжні послуги», який використовується в ЄС законодавства.

Keywords: bank, bank account, funds transfer, entrepreneurship, payment services.

With a variety of banking services, their level of development and availability is most often determined by the proper provision of settlement services.

Settlement transactions in Ukraine are regulated by the following normative legal acts: Laws of Ukraine ‘On Payment Systems and Funds Transfer in Ukraine’ [1], ‘On Banks and Banking’ [2], ‘On Financial Services and State Regulation of Financial Service Markets’ [3], ‘On Prevention and Counteraction of the Legalization (Laundering) of the

Proceeds from Crime, Terrorist Financing and the Financing of the Proliferation of Weapons of Mass Destruction' [4], Decree Cabinet of Ministers of Ukraine 'About the System of Currency Regulation and Currency Control' from February 19, 1993 № 15-93 [5], On approval of the Regulation on the implementation by banks of financial monitoring, approved by Decree Board of the National Bank of Ukraine (further- DB NBU) from June 26, 2015 № 417 [6], On Approval of the Regulations on Supervision (Overtime) of Payment Systems and Payment Systems in Ukraine, approved by DB NBU from November 28, 2014 № 755 [7], About the Approval of the Regulation on Currency Control, approved by DB NBU from February 8, 2000 № 499 [8], Instruction on the opening, use and closing of accounts in national and foreign currencies, approved by DB NBU from November 12, 2003 № 492 (further – Instruction № 492) [9], Instruction on Interbank Transfer of Funds in Ukraine in the National Currency, approved by DB NBU from August 16, 2006 № 320 [10], Instruction on Cashless Settlements in Ukraine in the National Currency, approved by DB NBU from January 21, 2004 № 22 [11], Instruction on the Procedure for Regulating the Activities of Banks in Ukraine, approved by DB NBU from August 28, 2001 № 368 [12], Methodology of complex evaluation of systemically important payment systems, approved by DB NBU from September 24, 2015 № 635 [13], List of cash and cash services operations that are not subject to taxation, approved by DB NBU from August 1, 2017 № 73 [14], DB NBU «On transactions with the use of electronic payment facilities» from November 5, 2014 № 705 [15] etc.

Separately, it should be noted that the consolidation of currency regulation in the Law of Ukraine 'On Currency and Currency Transactions' was adopted on 21.06.2018, and comes into force on 07.02.2019.

Also, the functions of observing public interests have a special impact on banking operations, as evidenced by the order of notification of the banking institutions of the fiscal service of the opening of accounts to business entities (Item 1.14 of Instruction № 492, Art. 69 of the Tax Code of Ukraine). In addition, the public interest justifies the restriction on cash turnover for economic entities and individuals, which is established in Section II of the Regulation on the conduct of cash transactions in

the national currency in Ukraine, approved by the RB National Bank of Ukraine on January 29, 2017, № 148, and provides for the actual transfer settlements in economic activity in a non-cash form, which is impossible without the use of the current account, which in this aspect becomes more a means of realization of economic competence than an independent service.

The legislation of Ukraine provides for the following types of contracts and their meaningful purpose at the same time for the legitimation of business entities, for making settlements, transferring funds and lending an account, or conducting other operations and services by banks that facilitate the transfer of funds and the functioning of payment systems.

1. An agreement on a bank account (items 1066, 12068 of the Civil Code of Ukraine provide the acceptance of funds for account and transfer from the account, the commission of other actions; the instruction № 492).

2. The only banking service agreement (Part 3 of the Instructions on interbank transfer of funds in Ukraine in national currency, approved by the RB National Bank on August 16, 2006, № 320). The subject of the agreement is the receipt of such services by the NBU as settlement and information service in the electronic payment system of the NBU; providing services by e-mail system of NBU; providing for use of information security means of the NBU.

3. Agreement on settlement and cash servicing (item 5 Article 341 of the Civil Code of Ukraine, item 1.37 of the Law of Ukraine 'On Payment System and Funds Transfer in Ukraine', Instruction № 492); The subject of the contract is the services provided by the bank to the client on the basis of the relevant agreement contracted between them, which are related to the transfer of funds from the account (to the account) of this client, the issuance of cash withdrawal, as well as the implementation of other operations provided with the contracts.

In 2017, the valid for today List of cash and settlement servicing operations, which is not the subject to taxation, was approved by the NBU on 01.08.2017, № 73 (hereinafter- the List). So it included transactions for the opening (closing) of customer accounts in bank metals, transactions with electronic payment facilities. Also, the List of certain types of settlement and cash services was expanded. For example, it is possible to

add an addition to the list of operations for documentary registration or confirmation of customer settlements by providing information related to cash withdrawal services of clients, as well as necessary information for the formation of an audit report, etc. That is, this list of actions is related to cash withdrawal services as an object of taxation, but not to the list of direct settlement and cash services as services of banks related to the basic service of 'funds transfer'. On the contrary, the Directive of the European Parliament and the Council of 2015/2366 provides a list of transactions relating to payment services, item 3 of Art. 4 Section I and in Appendix №1.

4. The correspondent account agreement (part 1 of section 2 of the Instruction on interbank transfer of funds in Ukraine in national currency, approved by the RB National Bank on August 16, 2006, № 320).

5. Agreement on payment settlements with a settlement bank (part 3, section 10, Regulations on oversight of payment systems and payment systems in Ukraine, approved by the RB National Bank on November 28, 2014, № 755) and the payment organization.

6. Agreement with the payment organization on the issue of electronic payment means (item 14. 2) of the Law of Ukraine 'On Payment Systems and Funds Transfer in Ukraine').

7. Agreement on the use of electronic payment instrument (item 14.8 of the Law of Ukraine 'On Payment Systems and Funds Transfer in Ukraine', item 4 of Section 2 of the NBU 'On the implementation of transactions with the use of electronic payment facilities' dated 5.11.2014, № 705).

8. Acquiring agreement (Part 72 of the Civil Code of Ukraine, item 14.18 of the Law of Ukraine 'On Payment Systems and Funds Transfer in Ukraine', Section 5 of Regulation № 705). Under the terms of the acquiring agreement, acquirer is obliged to provide technological, informational services to business entities and other persons (hereinafter - the trader) and to settle them with transactions performed between traders and users using electronic payment means, based on the contract.

9. Contractual storage contract (escrow) (Instruction № 492). The subject of the agreement is the account opened by the bank for the client on a contractual basis for enrolment and transfer of funds / cash withdrawal in cases stipulated by the legislation of Ukraine to the person (persons) indicated by (specified) the client (beneficiary or beneficiaries) or the

return of such funds to the client for the onset of the grounds stipulated by the contract.

10. Contract of a bank deposit (§ 3 of Chapter 71 of the Civil Code of Ukraine, Instruction № 492). The subject of the contract is the sum which is deposited or transferred to the deposit account and the payment of interest or income in a different form.

11. Contract for the issuance of a corporate card (governed by Section 2 of the NBU 'On the Operations with the Use of Electronic Payment Facilities' dated 5.11.2014, № 705).

12. An agreement on the provision of services for inter-bank transportation and the collection of currency valuables. (RB NBU 'On approval of the Instruction on Organization of Cash Collection and Transportation of Currency Values of Banks in Ukraine' dated 31.03.2017, № 29).

13. Agreement on performance by the National Bank of the functions of the settlement bank SEP (Part 3 Section 4 Instructions on interbank transfer of funds in Ukraine in national currency, approved by the RB National Bank of Ukraine, dated 16.08.2006, № 320).

Thus, the separate components of the features and conditions of a bank account agreement are actually contained in all contracts in the field of settlement and lending, and the bank account agreement itself may be interpreted as an agreement that is a type of contract in relation to other types of contracts using bank accounts that become special types of contracts including those connected with the additional to the payment ones. The transfer of funds is a general direction, the main common criterion for all treaties in the field of settlement and cash relations, which involves changing the owner of funds or rights to funds and reveals the essence of the service and facilitates the qualification of the listed contracts as economic ones. It is possible to say that the current bank account becomes an attribute for legitimizing an economic entity that maximizes its economic competence, as well as opening an account, ensures the implementation of economic activities with full consideration of the public interest.

The provision of cash and cash services must be unified as payment services, having a single directed link with the transfer of funds, which, while conducting business, requires the improvement of the legal mechanism for regulating these services. In the presence of complicated economic

activities of money transfer operations, there are features associated with additional functions and operations when servicing customers of banks. Moreover, the service of cash and cash services from public liabilities of banks that arise during client servicing under the legislation on prevention and counteraction to legalization (laundering) of proceeds from crime, monetary and tax legislation (in particular, Article 69 of the Tax Code Ukraine) and cash operations, etc. are greatly influenced. The above confirms that the use in all contracts in which banks provide payment and related services, namely, the terms ‘payment services’ and ‘funds transfer’ will approximate the legislation of Ukraine to the term “payment services”, which is used in Directives 2013/36/ EU [16], 2015/2366/ EU [17].

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