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STATE PROTECTION OF THE RIGHTS OF PARTICIPANTS OF CREDIT RELATIONS IN UKRAINE AND OTHER COUNTRIES

Abstract. The article deals with the peculiarities of the state regulation of credit relations in Ukraine and other countries of the world. Special attention is devoted to problems of protection of the rights of individuals-borrowers and the liability of financial institutions for violation of the terms of the loan agreements.

The authors draw attention to the imperfection of the domestic state regulations in protecting the rights of consumers of financial services. On the basis of analysis of normative sources, concludes that in Ukraine the rights of borrowers is implemented using the General civil-law methods, such as payment of penalty and compensation for damages and contractual penalties. Provides that when the borrower relationship involved a natural person, are also considered statutory provisions of the legislation on protection of consumer rights. The majority of legal provisions contained in the same law and to establish penalties for the violation of consumer rights does not apply to the provision of financial services. It is concluded that in connection with the above, means of influence on the creditor in the contract there are only penalties provided for by the parties themselves.

Due to the fact that today there is no possibility of application of the financial, administrative and criminal sanctions against credit institutions for violations of the rights of consumers of financial services, the authors made proposals on improving legislation in this sphere. In particular, it is proposed to determine the grounds and amount of payment of legal damages by a creditor for non-fulfillment of their obligations established by contract or by law; to develop the procedure and consequences of termination of the contract of consumer credit in connection with the failure of obligations of third parties (seller, executor). The necessity of regulatory consolidation of financial sanctions, administrative and criminal responsibility of managers of financial institutions for violation of credit services; the possibility of suspension, termination or revocation of appropriate licenses.

Keywords: loan, loan relations, loan agreement, creditors, financial facilities consumers' protection.

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ДЕРЖАВНИЙ ЗАХИСТ ПРАВ УЧАСНИКІВ КРЕДИТНИХ ВІДНОСИН В УКРАЇНІ ТА ІНШИХ КРАЇНАХ СВІТУ

Анотація. Розглядаються напрями державного регулювання кредитних відносин в Україні та інших країнах світу. Особлива увага присвячується проблемам захисту прав фізичних осіб — позичальників, а також відповідальності фінансових установ за порушення умов кредитних договорів.

Звернено увагу на недосконалість вітчизняних державних приписів у частині захисту прав споживачів фінансових послуг. На підставі аналізу нормативних джерел зроблено висновок, що в Україні права позичальників реалізується за допомогою загальних цивільно-правових способів, таких, як сплата неустойки і відшкодування збитків, а також договірними мірами відповідальності. Установлюється, що коли на боці позичальника у таких відносинах бере участь фізична особа, також ураховуються нормативні положення законодавства про захист прав споживачів. Обґрунтовується, що більшість правових положень, що містяться в однойменному законі і спрямовані на встановлення санкцій за порушення прав споживачів, не поширюється на сферу надання фінансових послуг. Зроблено висновок, що у зв'язку з вищезазначеним засобами впливу на кредитора в договорі є тільки міри відповідальності, передбачені самими сторонами.

У зв'язку з тим, що на сьогодні відсутня можливість застосування фінансових, адміністративних і кримінальних санкцій до кредитних установ за порушення прав споживачів фінансових послуг, зроблено пропозиції вдосконалення законодавства у цій сфері. Зокрема, пропонується визначити підстави та розмір сплати законної неустойки кредитором за невиконання чи неналежне виконання ним своїх обов'язків, установлених умовами договору чи законом; розробити порядок і наслідки розірвання договору споживчого кредитування у зв'язку з невиконанням обов'язків третіх осіб (продавця, виконавця). Доводиться необхідність нормативного закріплення фінансових санкцій, адміністративної та кримінальної відповідальності керівників фінансових установ за порушення правил надання кредитних послуг; можливість призупинення, зупинення чи анулювання відповідних ліцензій.

Ключові слова: кредит, кредитні відносини, кредитний договір, захист споживачів фінансових послуг.

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ГОСУДАРСТВЕННАЯ ЗАЩИТА ПРАВ УЧАСТНИКОВ КРЕДИТНЫХ ОТНОШЕНИЙ В УКРАИНЕ И ДРУГИХ СТРАНАХ МИРА

Аннотация. Рассматриваются вопросы государственного регулирования защиты прав участников кредитных отношений в Украине и других странах мира. Особое внимание посвящается проблемам защиты прав физических лиц — заемщиков, а также ответственности финансовых учреждений за нарушение условий кредитных договоров. Обращено внимание, что в Украине права заемщиков реализуется с помощью общих гражданско-правовых способов, таких как уплата неустойки и возмещение убытков, а также договорными мерами ответственности. В связи с тем, что на сегодня отсутствует возможность применения финансовых, административных и уголовных санкций к кредитным учреждениям за нарушение прав потребителей финансовых услуг, сделаны предложения совершенствования законодательства в этой сфере.

Ключевые слова: кредит, кредитные отношения, кредитный договор, защита потребителей финансовых услуг.

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Introduction. The economy of developed countries characterizes by the dominance of loan relations. Loan relations interpenetrate into international economic relations covering the whole system of social reproduction — production, distribution, exchange and consumption. Today, loan and loan relations become comprehensive. Such relations were an important element of the economy, but now it becomes an all-encompassing form of the modern economy. Commodity production was transformed into commodity-loan business. Loan is an important mean exchange sphere developing, it actively influences the population solvent demand, accelerates the processes developing in civilian circulation. Effectiveness of legislative provisions aimed at protecting the rights of credit relations participants is one of the most important factors in maintaining the stability of the economy of any country. Over the past years, liquidity in the banking sector has worsened profits of economic turnover participants have significantly decreased, that, in turn, has led to an increase of violations in the loan relations fields. Financial institutions concluding loan commitments abuse their position by offering consumers the disadvantages services, abusing a position of authority. In this regard, it is considered necessary to introduce additional methods of protecting the financial services consumers' rights.

Research analysis and problem statement. The research of theoretical and practical problems in the loan field were undertaken by such ukrainian and foreign scholars as M.I. Braginsky, V.V. Vitryansky, L.G. Efimova, S. Kompaniets, V.V. Luts, L.A. Lunts, D.I. Meyer, R.A. Maidanik, L.A. Novoselova, O.M. Oliynyk, O.P. Orlyuk, E.A. Pavlodsky, E.G. Polonsky, M.G. Rosenberg, O.A. Fleischitz, Yu.I. Chaly, G.F. Shershnyevich and others. Analyzing existing scientific legal literature devoted to loan relations, it can be argued that the issues of the legal status of participants in such contractual obligations are still not well-studied, as well as determination the types of their civil liability, and it also requires the relevant scientific researches.

The purpose of this article is to analyze the current mean of domestic legal regulation of loan relations, namely, the issues of the volume and types of financial institutions civil liability, as a stronger side of mentioned contractual obligations. The aim of the research to develop scientifically substantiated proposals to improve the legislation in the field of financial services consumers' rights protection.

Results of the research. Due to the fact that the loan agreement is bilaterally based on its legal characteristics, both parties have shared rights and obligations, therefore, borrower and lender could be liable for default obligation or its improper fulfilment. It should be noted that the peculiarity of domestic legislation is the lack of legal certainty of the grounds and the procedure for applying legal sanctions to loan institutions. In fact, borrowers can use the general remedies provided for by civil law (penalty, indemnity). If the financial institution does not agree to pay the penalty or indemnify the losses voluntarily, the borrower will have to apply to the court. However,

domestic legislation does not provide for special remedies: neither administrative liability nor financial consequences for violation the rights of legal entities or individuals in the loan field.

As a comparison, Article 23 of Directive 2008/48/EU establish the obligation of Member States to introduce the sanctions applicable to lenders that can generally be divided into: civil, administrative and criminal [1].

Civilian impact measures can be divided into two groups: 1) measures of general influence (Germany, Italy and Romania), applicable for any violation in the loan field; 2) specific measures of influence — relate to specific violations of regulations governing loan relations. Examples of civil enforcement measures provided for by national law include: the right to terminate a loan agreement (Greece); loan repayment without interest (France, Poland); invalidation of the contract or amendment of certain clauses of such agreement (Austria, Greece, Italy); application of the interest rate in the amount of the discount rate determined by law (Austria); early repayment of a loan without compensation (Austria) or claim for damages (Germany) [2].

Another separate group is the administrative-legal sanctions. These are fines, compulsory credit institution activity termination and returning illegally received funds or monitoring the agreement terms. Some countries separate administrative sanctions from lending rules by placing them in administrative codes (laws), while others include sanctions on special lending laws.

Among the European countries, criminal sanctions for violating the rights of borrowers-individuals apply only in Poland: a) for failure the obligations of the lender at the stage before the signing the agreement, b) for failure to provide standard information in advertising on the loan cost and c) for not conducting analysis and assessment of the borrower's creditworthiness [3].

Regarding the issue of regulating the liability of a lender in domestic law, it should be noted that civil, administrative and criminal sanctions are applied to financial institutions for non-fulfilment or improper fulfilment of the terms of a loan agreement. However, there is still no direct indication of this in any regulatory legal act.

The primary responsibility of a bank or other financial institution is to provide cash to the borrower. Regarding the responsibility of the lender for non-fulfilment of the terms of the loan agreement, certain authors suggest that there is not only a duty of the loan institution to compensate consumer's damages, but also they pay attention to the need of imposition of special liability for violation of loan granting conditions [4, p. 221]. However, it should be noted that such an approach does not correspond to the legal nature of the loan commitment. In this regard, the main type of lender's liability for failure its obligations are the damage compensation for borrower, exception is the legitimate refusal.

The civil liability of lenders has its own specifics in Ukraine, because it is regulated not only by the general provisions of the Civil Code of Ukraine, by special rules of chapter 71, but also by the Law of Ukraine «On protection of consumers' rights», respectively, in the case when the party of agreement is a borrower-individual [5]. It is also should be noted that the majority of provisions of the mentioned legal act do not apply to financing facility of banks and other loan institutions. However, this is explained not by the specific legal nature of the loan relations, but by the fact that this legal act is mostly intended for a commodity market, rather than a financial market and it protects, in the majority of cases, the rights of individual persons-consumers of goods and works. The issue of regulating the provision of financial facilities is only marginally resolved in this Law. It does not contain direct guidance on the rights related to financial facilities.

In the decision of November 10, 2011, № 15-rp/2011, the Constitutional Court of Ukraine eliminated the contradictions existing in the practice regarding the possibility of applying the provisions of the said Law to the financial facilities field. In the decision the Court ruled that the Law of Ukraine «On Protection of Consumers' Rights» applies to the legal relationship between the lender and the borrower; accordingly, consumers have the right to use the mechanisms of protection provided for by this Law throughout the entire period of execution of the loan agreement [6].

Taking into account the orientation of the provisions of this Law on the regulation of commodity circulation, it should be noted that only its general provisions applies o loan relationship. In particular, the rules providing for the consumers' right to receive information

(Article 15, Article 23), consumers' rights in case of violation of the terms of job execution agreement (service delivery) (Article 10), the rules establish the consequences of «unfair» terms in consumer contracts (Article 18), prohibit the implementation of unfair business practices (Article 19). Other consequences of breach of the terms of the consumer loan agreement are regulated by the Civil Code of Ukraine and the special blanket rule of Art. 11 of the Law of Ukraine «On Protection of Consumers' Rights», that refers to a special legal act — the Law of Ukraine «On Consumer Lending» [7], adopted in 2016.

The obligation of timely provision of information to the consumer on the conditions of consumer lending is established by Articles 11 and 15 of the mentioned Law. It is assumed that in case of failure to provide information, the lender is response concerning with the Articles 15 and 23 of this Law. It. 7 of Art. 15 stipulates that in case of providing the consumer with inaccessible, inaccurate, incomplete or untimely information, he is entitled to demand compensation for losses and termination of the agreement. However, it is worth noting that the sanctions set forth in it. 7 of Art. 15 and it. 7 part 1 of Art. 23 of the Law of Ukraine «On Protection of Consumers' Rights» can not be used as a measure of liability in case of violation of the requirements of Art. 11 of the said Law. It is clear from the context of these provisions that they apply only in the absence of necessary, accessible, reliable and timely information about the product.

Thus, with regard to the lender's responsibility towards the consumer-borrower, the investigated transaction deals only with the contractual penalty and other consequences established by the parties. Such a situation does not promote the protection of the borrower's rights, in fact, his rights are less secure than rights of consumers of other services (domestic, medical, etc.). Special regulation of relations arising from the provision of financial facilities is provided by the Law of Ukraine «On Financial Facilities and State Regulation of Financial Facilities Markets» [8]. The specified regulatory legal act contains provisions concerning the protection of consumer rights. In particular, general requirements for financial facilities agreements are established, it is forbidden to increase the interest rate one-sidedly, to demand early repayment of the loan debt, to distribute advertising containing false information about activities in the financial facility field. However, it should be noted that the said Law does not contain provisions on the liability of financial institutions for the violation of consumers' rights.

Considering the possibility of applying administrative sanctions to lenders, it should be noted that the Code of Ukraine on Administrative Offenses [9] provides for liability for violations of the rules in the trade field, service provision in the areas of finance, business and consumer protection. Thus, Article 156-1 of the said legal act establishes the liability for violation of the legislation on the protection of consumers' rights, however, it is a question of relations arising in the field of realm of goods, works and household services. Article 168-1 provides for the prosecution of guilty persons for the execution of works and the provision of services to citizens-consumers that do not meet the requirements of standards, norms and rules. However, this provision could be applied to consumer loan relations only if the relevant authorities will establish legislative requirements regarding standards for the financial facilities provision. The said allows us to conclude that there are no measures of creditors' administrative liability for violating the financial facilities consumer's rights' in domestic legislation.

Regarding the possibility of applying criminal sanctions to financial institutions, it should be noted that the content of the Criminal Code of Ukraine [10] recently excluded articles relating to the protection of consumers' rights (Articles 225—227), that provided for liability for the fraud of buyers and customers, for the falsification of means measurement and low-quality products. Such changes in the legislation are explained by the lack of statistics on the criminal liability of economic entities during the financial facilities provision. The complexity of the application of criminal sanctions deals with the problem of proving intent during rendering services to the customer. Therefore, the only criminal sanction that can be applied to unconscientious financial institutions in the field of consumer-borrower's rights violation, established by Art. 190 of the Criminal Code of Ukraine, that provides the prosecution for fraud. However, the statistics of the application of this article concerning the violation of consumer rights is also absent [3].

The state authorities play an important role in protecting the consumers — borrower's rights. They are entrusted with the function of exercising control over the provision of financial facilities to the population and the application of appropriate measures of legal liability for violations in this field. International experience shows that there are two main approaches to the institutional framework for protecting consumers of financial facilities. The first is the presence in the country of several agencies responsible for economy and trade issues. The second involves the presence in the state of a single specialized institution that protects the rights of consumers. The role of the latter can play the financial sector regulator (England), the general consumer protection agency (Sweden, Poland, Latvia, Lithuania) or the central bank (Czech Republic, Azerbaijan). Thus, for example, in accordance with the laws of England, financial ombudsman has the authority to protect the financial services consumers' rights; in the United States of America the Consumer Financial Protection Bureau conduct its activities [11].

In Ukraine the supervision of the banking sector is primarily carried out by the National Bank of Ukraine. The National Commission on Financial Facilities and the Antimonopoly Committee of Ukraine also implement certain functions of overseeing financial institutions. Immediate implementation of the protection of consumer rights is entrusted to the State Consumer Service. It is worth noting that in the legislation of Ukraine there is no clear division of responsibilities between the state authorities regarding the regulation of relations concerning with protection of the financial facilities consumers' rights, there is no way to determine the influence of these bodies on violations that arise in this area. In particular, an analysis of domestic legislation provisions suggests that the powers of the State Consumer Service concerning with the applying any sanctions to financial institutions for violating consumer rights are very limited.

Conclusion. On the basis of the above mentioned, we can conclude that domestic law does not adequately regulate the issue of bringing a lender to liability in a loan agreement. The protection of the borrowers' rights is realized through the general methods provided by civil law (penalty, indemnity), and in cases when the individual acts on the side of the borrower, the legal provisions of the consumer protection legislation also taken into account. However, most of the legal provisions contained in mentioned Law and aimed at imposing sanctions for the violation of consumer rights do not apply to the financial facilities field.

In this regard, the means of influence on the lender in the contract are only the liability measures, provided by the parties themselves. Also, the provisions of the current legislation of Ukraine testify to the impossibility of applying financial, administrative and criminal sanctions to loan institutions for violating the rights of individuals-consumers of financial facilities. In this regard, it is seeming necessary to establish the measures of influence that can be applied for the violation of the investigated relationship. In particular, it's necessary to determine the grounds and amount of payment of a legal penalty by the lender for failure or improper performance of his duties established by the terms of the contract or by the law (for example, for late funds payment, if such actions were not a consequence of a legitimate refusal of loan granting, for failure to perform the legal duties on the grounds for the refusal to conclude an agreement, for violation of terms of satisfaction of certain consumer's requirements, etc.). Due to the widespread use of consumer lending for the acquisition of goods, works and services, the procedure and consequences of termination of the consumer lending agreement in connection with non-fulfilment of the obligations of third parties (seller, executor) should be developed by the legislation. Regulatory legal acts should provide for financial sanctions, for administrative and criminal liability of the heads of financial institutions for violation of the rules of loan services providing; for the possibility of suspension or cancellation of the corresponding licenses.

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