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## CONSTITUTIONAL AND LEGAL BASIS OF BUILDING THE INSTITUTIONAL CAPACITY OF THE NATIONAL BANK OF UKRAINE

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### **Naturkach R.P. Constitutional and legal principles of building the institutional capacity of the National Bank of Ukraine.**

The article is devoted to the study of the issue of the constitutional and legal foundations of the development of the institutional capacity of the National Bank of Ukraine. The Constitution of Ukraine, the Law of Ukraine «On the National Bank of Ukraine», the Regulations «On the Audit Committee of the Council of the National Bank of Ukraine» and other legal acts in the context of strengthening the institutional independence of the NBU, as well as draft laws, were analyzed. Attention is focused on the evolution of the development of the institutional capacity of the National Bank of Ukraine. Attention is drawn to the Board of the National Bank of Ukraine, the Audit Committee of the NBU and their role in the institutional independence of the National Bank of Ukraine. Their powers and formation procedure are described. It is emphasized that the advisory working body of the Council of the National Bank of Ukraine - the Audit Committee of the NBU was created in accordance with the legislation and the principles of collegiality in making management decisions in the central bank. He started his work in November 2016.

The shortcomings of the Law of Ukraine «On the National Bank of Ukraine» regarding the development of the institutional independence of the National Bank of Ukraine have been identified, and proposals have been developed regarding directions for its improvement with the aim of bringing it into line with the Constitution of Ukraine, as well as strengthening the functional independence of the National Bank of Ukraine: set out Art. 74 of the Law of Ukraine «On the National Bank of Ukraine» in the new version, which would provide that the claim is secured by stopping the decisions and acts of the National Bank of Ukraine, and also contained provisions regarding the establishment by the court of a ban or obligation to perform certain actions for the National Bank of Ukraine; to be fixed in Part 1 of Art. 9 of the Law of Ukraine «On the National Bank of Ukraine» list of «other working bodies»; exclude from the Law of Ukraine «On the National Bank of Ukraine» restrictions on the audit examination of the financial activities of the National Bank of Ukraine by independent auditors; to enshrine in the text of the Law of Ukraine «On the National Bank of Ukraine» the powers of the Audit Committee, the procedure for their implementation; exclude in the Law of Ukraine «On the National Bank of Ukraine» the duplication of its norms with the provisions of Part 2 of Art. 78 and Article 120 of the Constitution of Ukraine regarding the restriction, according to which a person cannot be a member of the Council of the National Bank, if he has a representative mandate or is a member of the Cabinet of Ministers of Ukraine, or holds or has held the position of head of a state authority (deputy head) and other state body (if one year has not passed since the date of her dismissal from such a position), or is a person authorized to perform the functions of the state or local self-government; clarification of duties of members of the Council of the National Bank of Ukraine.

**Key words:** constitutional and legal regulation, the central bank of the state, institutional independence, effectiveness of constitutional and legal regulation, quality of legal norms, duplication of norms, legal certainty, Council of the National Bank of Ukraine, Audit Committee.

### **Натуркач Р.П. Конституційно-правові засади розбудови інституційної спроможності Національного банку України.**

Статтю присвячено дослідженню питання конституційно-правових засад розбудови інституційної спроможності Національного банку України. Проаналізовано Конституцію України, Закон України «Про Національний банк України», Положення «Про Аудиторський комітет Ради Національного банку України» та інші нормативно-правові акти в контексті саме посилення інституційної незалежності НБУ, а також законопроекти. Акцентовано увагу на еволюції розбудови інституційної спроможності Національного банку України. Звертається увага на Раду Національного банку України, Аудиторський комітет НБУ та їх роль в інституційній незалежності Національного банку України. Охарактеризовано їх повноваження та порядок формування. Підкреслюється, що консультативний робочий орган Ради Національного банку України – Аудиторський комітет НБУ був створений відповідно до законодавства й принципів саме колегіальності прийняття управлінських рішень у центральному банку. Він розпочав свою роботу з листопада 2016 р.

Виявлено недоліки Закону України «Про Національний банк України» щодо розбудови інституційної незалежності Національного банку України та розроблено пропозиції щодо напрямів його вдосконалення з метою його приведення у відповідність з Конституцією України, а також посилення функціональної незалежності Національного банку України: викласти ст. 74 Закону України «Про Національний банк України» у новій редакції, яка б передбачала, що забезпечення позову здійснюється шляхом зупинення рішень та актів Національного банку України, а також містила положення щодо встановлення судом для Національного банку України заборони або обов'язку вчиняти певні дії; закріпити у ч. 1 ст. 9 Закону України «Про Національний банк України» перелік «інших робочих органів»; виключити з Закону України «Про Національний банк України» обмеження аудиторської експертизи фінансової діяльності Національного банку України незалежними аудиторами; закріпити в тексті Закону України «Про Національний банк України» повноважень Аудиторського комітету, порядку їх реалізації; виключити у Законі України «Про Національний банк України» дублювання його норм з положеннями ч. 2 ст. 78 та ст. 120 Конституції України щодо обмеження, згідно з яким особа не може бути членом Ради Національного банку, якщо вона має представницький мандат або є членом Кабінету Міністрів України, або обіймає чи обіймала посаду керівника органу державної влади (заступника керівника) та іншого державного органу (якщо не минув один рік з дня її звільнення з такої посади), або є особою, уповноваженою на виконання функцій держави або місцевого самоврядування; уточнення службових обов'язків членів Ради Національного банку України.

**Ключові слова:** конституційно-правове регулювання, центральний банк держави, інституційна незалежність, ефективність конституційно-правового регулювання, якість норми права, дублювання норм, правова визначеність, Рада Національного банку України, Аудиторський комітет.

**Formulation of the problem.** In the Comprehensive Program for the Development of the Financial Sector of Ukraine until 2020, which was approved by the Resolution of the Board of the National Bank of Ukraine dated June 18, 2015 No. 391, it was stated that the market of financial services remains very fragmented with low capitalization due to unstable business conditions, insecurity of ownership and low level corporate governance [1]. In addition, partial observance of the principle of independence in the activities of the National Bank of Ukraine, in particular, such a component as functional independence, does not contribute to its development. Since then, the situation has not fundamentally changed, although a number of changes have been made to the Law of Ukraine «On the National Bank of Ukraine» [2].

The National Bank regularly assesses the risks for the financial sector and the economy as a whole, and in order to achieve financial stability, it applies the following approaches: conducts macroprudential policy; supports banks as a lender of last resort; contributes to the financial stability of banks, primarily systemically important; supervises (oversite) banks, payment systems and settlement systems; carries out stress testing of the banking system and the largest bank borrowers.

**The purpose of the article** is to identify the shortcomings of the Law of Ukraine «On the National Bank of Ukraine» and to develop proposals for its improvement in order to bring it into line with the Constitution of Ukraine, international acts, as well as to strengthen the functional independence of the National Bank of Ukraine.

**Presenting main material.** On April 24, 2015, in accordance with Article 93 of the Constitution of Ukraine [3], the President of Ukraine submitted to the Verkhovna Rada of Ukraine draft Laws of Ukraine

«On Amendments to Certain Legislative Acts of Ukraine on Building the Institutional Capacity of the National Bank of Ukraine» [4] and «On Amendments to of the Budget Code of Ukraine on building the institutional capacity of the National Bank of Ukraine» [5]. The President of Ukraine identified them as urgent for extraordinary consideration by the Verkhovna Rada of Ukraine.

The innovation of the draft laws consisted in the addition of the Law of Ukraine «On the National Bank of Ukraine» Art. 131 regarding the creation by the Council of the National Bank of Ukraine of the Audit Committee «for the purpose of assessing the reliability and effectiveness of the internal control system at the National Bank, the completeness and reliability of the annual financial statements of the National Bank. On June 18, 2015, the Verkhovna Rada of Ukraine adopted the Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine on Building the Institutional Capacity of the National Bank of Ukraine.» According to Art. 131 of the Law of Ukraine «On the National Bank of Ukraine» «The Council of the National Bank establishes an Audit Committee for the purpose of assessing the reliability and effectiveness of the internal control system at the National Bank, the completeness and reliability of the annual financial statements of the National Bank. The Audit Committee is a consultative working body of the Council of the National Bank and acts on the basis of regulations approved by the Council of the National Bank. In addition to members of the Board of the National Bank, the Audit Committee may include independent experts. An independent expert can be a person who has a full higher education in the field of economics, finance or law or a scientific degree in these fields, has at least 10 years of professional work experience and has an impeccable business reputation, in particular, does not have a criminal record that has not been extinguished or removed from the according to the procedure established by law. Independent experts are subject to restrictions established by the fourth part of Article 10 and the first part of Article 65 of this Law. The number of members of the Audit Committee cannot be more than five people. Meetings of the Audit Committee are held at least ten times a year.»

Thus, the Audit Committee has the status of a consultative working body of the Council of the National Bank. It operates on the basis of provisions approved by the Council of the National Bank of Ukraine. At the same time, in accordance with Clause 10, Part 1 of Art. 9 of the Law of Ukraine «On the National Bank of Ukraine», the Council of the National Bank of Ukraine approves by November 1 of the reporting year an audit firm for the audit of the annual financial statements of the National Bank, determined based on the results of the procurement procedure in accordance with the Law of Ukraine «On State Procurement» [6].

It can be seen that the norms of Clause 10, Part 1, Art. 9 of the Law of Ukraine «On the National Bank of Ukraine» limits the audit examination of the financial activities of the National Bank of Ukraine to independent auditors. In addition, this calls into question the reliability of the assessment of the legality of the relevant actions of the National Bank of Ukraine. Moreover, as a result, this will lead to limited access to information regarding the assessment of the financial activities of the National Bank of Ukraine.

In addition, the Law of Ukraine «On the National Bank of Ukraine» does not establish the powers of the Audit Committee, the procedure for its implementation. In Art. 131 of the Law of Ukraine «On the National Bank of Ukraine» only states that the audit committee acts on the basis of the provisions approved by the Council of the National Bank.

The Audit Committee started its work in November 2016. It is a consultative working body of the Council of the National Bank of Ukraine, created in accordance with the legislation and the principles of collegiality of management decision-making in the central bank (in accordance with the Decision of the NBU Council dated 24.11.2016 No. 2.3 (as amended by the Decision of the NBU Council dated 26.06.2019 No. 25-rd [7])).

The main purpose of the Audit Committee's activities is to assess the reliability and effectiveness of the internal control system at the National Bank, the completeness and reliability of its annual financial statements.

Despite the fact that the Law of Ukraine «On the National Bank of Ukraine» was amended with the aim of improving the legal status of the Council of the National Bank of Ukraine, the provisions of this Law still require clarification.

Yes, according to Clause 7 Part 1 of Art. 9 of the Law of Ukraine «On the National Bank of Ukraine», the Council of the National Bank approves the Regulations of the Council of the National Bank of Ukraine, provisions on the Audit Committee and other working bodies of the Council of the National Bank. In paragraph 16, part 1 of Art. 9 of the Law of Ukraine «On the National Bank of Ukraine» states

that the Board of the National Bank creates the Audit Committee and other working bodies of the Board of the National Bank, determines their composition and heads.

Along with what other working bodies are meant in the above-mentioned clauses of Part 1 of Art. 9 of the Law of Ukraine «On the National Bank of Ukraine» is not defined. This leads to an ambiguous understanding of certain provisions of the law, which refer to «other working bodies of the Council of the National Bank». Therefore, these provisions are such that they are laid out in violation of the requirements of Art. 8 of the Constitution of Ukraine regarding the legal certainty of legislative acts.

In accordance with clause 17, part 1 of Art. 9 of the Law of Ukraine «On the National Bank of Ukraine», the Council of the National Bank appoints and dismisses the head of the internal audit unit. At the same time, this clause does not specify at whose request such appointment/dismissal takes place.

Needs revision and Part 3 of Art. 10 of the Law of Ukraine «On the National Bank of Ukraine», according to which a person cannot be a member of the Council of the National Bank if he has a representative mandate or is a member of the Cabinet of Ministers of Ukraine, or holds or has held the position of head of a state authority (deputy head) and other state body (unless one year has passed since the date of her dismissal from such position), or is a person authorized to perform the functions of the state or local self-government, or is the head (deputy head) of an enterprise, institution, or organization, or is the head of a political party or a member of the governing bodies of a political party, is an official who is in labor relations or provides services in accordance with a civil law contract to a legal entity that provides financial services and is under the supervision of the National Bank, or is the owner of a significant share in such a legal entity. According to Art. 10 of the Law of Ukraine «On the National Bank of Ukraine» «Members of the Council of the National Bank (except for the Chairman of the National Bank) receive remuneration for the performance of their functions at the expense of the National Bank. The size of the remuneration is determined in accordance with the methodology approved by the Council of the National Bank at the request of the Board of the National Bank.»

Yes, since the members of the Council of the National Bank of Ukraine receive material remuneration for their work, the restriction according to which a person cannot be a member of the Council of the National Bank if he has a representative mandate or is a member of the Cabinet of Ministers of Ukraine, or holds or has held the position of head of a state body authority (deputy head) and other state body (if one year has not passed since the date of her dismissal from such position), or is a person authorized to perform the functions of the state or local self-government - duplicates the provisions of the Constitution of Ukraine.

In particular, in accordance with Part 2 of Art. 78 of the Constitution of Ukraine «people's deputies of Ukraine may not hold any other representative mandate, be in public service, hold other paid positions, engage in other paid or entrepreneurial activities (except for teaching, scientific and creative activities), be a member of the governing body or supervisory board of an enterprise or profit-making organization». According to Art. 120 of the Constitution of Ukraine, members of the Cabinet of Ministers of Ukraine, heads of central and local executive bodies do not have the right to combine their official activities with other work (except for teaching, scientific and creative work outside of working hours), to be part of the governing body or supervisory board of an enterprise or organization, which aims to make a profit. Although making a profit is not the goal of the National Bank of Ukraine, nevertheless, the members of the Council of the National Bank of Ukraine receive material remuneration for their work, such activity does not fall under the characteristics of teaching, scientific and creative activity, and therefore falls under the restrictions established by Art. 78 and Art. 120 of the Constitution of Ukraine.

In addition, since the Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine on Building the Institutional Capacity of the National Bank of Ukraine» abolished the performance of duties by members of the Council of the National Bank of Ukraine on a public basis, it is considered necessary and appropriate to clarify their official duties.

The main scientific and expert department of the Apparatus of the Verkhovna Rada of Ukraine emphasizes that clarifications are needed in the legislation of Ukraine and the issue of the regime of the exercise of powers by the members of the Council of the National Bank of Ukraine, the conditions and procedure for their remuneration [8]. It can be seen that these issues are regulated by the norms of labor law.

Also, the functional independence of the National Bank of Ukraine was strengthened by making the following changes to Art. 74 of the Law of Ukraine «On the National Bank of Ukraine»: «An appeal against a decision, act or action of the National Bank of Ukraine does not stop their implementation.

Securing a lawsuit by stopping decisions and acts of the National Bank of Ukraine, as well as establishing a ban or obligation for the National Bank of Ukraine to take certain actions is not allowed.»

The specified norms contradict the Constitution of Ukraine (Article 3 of the Constitution of Ukraine, because it is judicial protection recognized by international judicial institutions and organizations as a means of legal protection, which is subject to exhaustion [9–17] Article 124, Article 129, Article 1291 of the Constitution of Ukraine).

Both scientists and practitioners are unanimous in their opinion: in the event of establishing a limitation on the enforcement of a claim by the court in cases related to the appeal of acts, actions (inaction) of the National Bank of Ukraine, the guarantees of a person and a citizen for the restoration of violated rights will be limited and the inequality of the participants in the process before the law will be established and the court, preferences will be given to one of the participants in the proceedings, whose acts, actions or inaction are contested [15].

Also Art. 74 of the Law of Ukraine «On the National Bank of Ukraine» contradicts Part 3 of Art. 22 of the Constitution of Ukraine. Thus, Part 3, Item 22 of the Constitution of Ukraine states that when adopting new laws or making changes to existing laws, it is not allowed to narrow the content and scope of existing rights and freedoms.

Therefore, it is not legitimate to narrow the content and scope of the existing rights of the relevant subject of appeal to the court. A person has the right to request the suspension of a decision, act or action of the National Bank of Ukraine.

Moreover, according to the decision of the Constitutional Court of Ukraine dated May 31, 2011 No. 4-пр/2011, «the institution of securing a claim is an element of the right to judicial protection and is aimed at preventing the irreversibility of certain consequences of relevant actions regarding the restoration of the violated right. It belongs to the mechanism of protection of human rights and freedoms, in particular in the judicial procedure, and is a guarantee of their protection and restoration, and therefore, an element of justice. Enforcement of the claim concerns all stages of court proceedings (preparation, appointment, consideration of the case, execution of the decision) and is a component of a complex of measures aimed at protecting the public legal and material legal interest in administrative proceedings, as well as one of the guarantees of real implementation of possible positive for a person decision, as it enables the court to take measures to ensure the implementation of claims before adopting a resolution in an administrative case. The application of the institution of securing a claim should not have exceptions regarding the acts, actions or inaction of individual subjects - participants in the legal process.»

Moreover, Art. 74 of the Law of Ukraine «On the National Bank of Ukraine» does not ensure compliance with the provisions of Art. 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provide for the right to a fair trial and the right to an effective remedy.

Lepushynskiy V. draws attention to the following aspect, which directly affects the institutional independence of the NBU: «The Law on the NBU clearly defines that making a profit is not the goal of the central bank's activities. And for good reason. Such a goal may conflict with the National Bank's mandate to ensure price and financial stability and promote sustainable economic growth.

Yes, the profits of the National Bank of Ukraine usually increase during high inflation, devaluation of the national currency and a drop in international reserves. On the contrary, they decrease when the situation stabilizes» [18].

We share the position of V. Lopushynskiy that «the Central Bank, unlike a commercial bank, cannot go bankrupt, because it does not run out of money - it creates it. However, it is believed that the losses have a negative impact on the financial independence of the central bank. Therefore, every year central banks form a certain reserve from part of the profits, at the expense of which they can finance their activities in unprofitable years. The corresponding reserve is also in the NBU» [18].

### **Conclusions**

In order to bring the Law of Ukraine «On the National Bank of Ukraine» into compliance with the Constitution of Ukraine, as well as to strengthen the functional independence of the National Bank of Ukraine, the following proposals regarding directions for its improvement are substantiated: the elaboration of Art. 74 of the Law of Ukraine «On the National Bank of Ukraine» in the new version, according to which the enforcement of the claim is carried out by stopping the decisions and acts of the National Bank of Ukraine, as well as regarding the establishment by the court of a prohibition or obligation to perform certain actions for the National Bank of Ukraine; consolidation in Part 1 of Art. 9

of the Law of Ukraine «On the National Bank of Ukraine» list of «other working bodies»; exclusion in the norms of Clause 10, Part 1, Art. 9 of the Law of Ukraine «On the National Bank of Ukraine» limiting the audit expertise of the financial activities of the National Bank of Ukraine by independent auditors; enshrining in the text of the Law of Ukraine «On the National Bank of Ukraine» the powers of the Audit Committee, the procedure for its implementation; exclusion in Part 3 of Art. 10 of the Law of Ukraine «On the National Bank of Ukraine» duplication with the provision of Part 2 of Art. 78 and Article 120 of the Constitution of Ukraine regarding the restriction, according to which a person cannot be a member of the Council of the National Bank, if he has a representative mandate or is a member of the Cabinet of Ministers of Ukraine, or holds or has held the position of head of a state authority (deputy head) and other state body (if one year has not passed since the date of her dismissal from such a position), or is a person authorized to perform the functions of the state or local self-government; clarification of duties of members of the Council of the National Bank of Ukraine.

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