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APPLICATION OF INTERNATIONAL STANDARDS FOR THE REGULATION OF DEPOSITORY AND CLEARING ACTIVITIES IN UKRAINE

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SUMMARY

The article, through the definition of an international standard of legal regulation, identifies and examines the key principles that are necessary for the functioning of a reliable and efficient accounting, settlement and clearing system. A list of international and regional organizations, that elaborate standards in the field of depository activity organization, is presented and the main documents, containing international standards for payments, clearing and settlement systems, are analyzed. Measures for the further implementation of international standards in domestic legislation for the effective functioning of post-trade infrastructure in Ukraine are proposed.

Key words: international standards, depository activity, clearing activity, stock market.

АНОТАЦІЯ

У статті через поняття «міжнародного стандарту правового регулювання» виділяються та досліджуються ключові принципи, дотримання яких є необхідним для функціонування надійної та ефективної облікової і розрахунково-клірингової системи. Наводиться перелік міжнародних та регіональних організацій, які розробляють стандарти у сфері організації системи депозитарної діяльності, та аналізуються основні документи, які містять міжнародні стандарти для платежів, клірингових і розрахункових систем. Пропонуються заходи щодо подальшої імплементації міжнародних стандартів у вітчизняне законодавство з метою ефективного функціонування пост-торговельної інфраструктури в Україні.

Ключові слова: міжнародні стандарти, депозитарна діяльність, клірингова діяльність, фондовий ринок.

Formulation of the problem. Adaptation of the national legislation of Ukraine to international law is a priority component of the process of Ukraine's integration into the European Union (hereinafter the EU) and to the world community, which in turn is a priority area of Ukrainian foreign policy.

The domestic legislation on the regulation of depository and clearing activities in the context of international integration is influenced by the requirements and recommendations of international organizations.

International law draws attention to the system significance for the functioning of the securities markets of Central Securities Depositories (CSDs) and central counterparties (CCP), which promote post-trade infrastructure, protect financial markets and provide market participants with confidence that securities transactions will be properly executed.

Contemporary trends in world capital markets are encouraging participants in local stock markets to change approaches to building accounting systems for securities ownership, clearing and settlement of securities agreements in accordance with international standards.

The degree of scientific development. Issues of legal regulation of depository and clearing activities were highlighted in the works of Ukrainian and foreign scientists, such as K.R. Adamova, B.O. Bondarenko, M.O. Burmaka, S.I. Brus, S.Ia. Vavzhynchuk, Yu.V. Vashchenko, A.T. Holovko, O.V. Kolohoida, Z.Ia. Lapyshko, I.R. Nazarchuk, I.V. Pavlova, V.I. Poliukhovych, A.V. Popova, A.A. Puchkov, S.H. Khoruzhyi, B.V. Cherkaskyi and others.

The subjects of these studies, among other things, were the preconditions for the implementation of the recommendations of global organizations for regulating the stock market in the domestic securities market.

At the same time, issues of the application of international standards in the legal regulation of depository and clearing activities remain insufficiently highlighted.

The purpose of the article is to study international standards for the regulation of depository and clearing activities, the state of their implementation in Ukrainian legislation, the de-

termination of prospects for further coordination, alignment of legal regulation with international standards and improvement of domestic legal regulation in this area.

The main material. The standard in the broad sense can be defined as a sample, a model that is adopted for output to compare with other similar objects.

Scientists use the term "international legal standards" to refer to the set of rules, enshrined in various international documents, which define some standardized (unified) rules of conduct of subjects of international law in those or other areas of interstate cooperation [1, p. 136].

That is, under the standards of depository activity, we understand some common requirements and rules for the establishment of depository systems, which are examples of the best world practices, enshrined in the relevant regulatory acts.

In accordance with the Law of Ukraine of 05.06.2014 № 1315-VII "On Standardization", a standard is a normative document, based on a consensus, adopted by a recognized body, which establishes rules, instructions or characteristics of an activity or its results for a general and repeated use and aimed at achieving the optimum degree of order in a certain area.

The International Standard for the regulation of depository and clearing activities can be defined as an international organization's document, containing the fundamental universal rules, methods, conditions, designed to create an effective system for accounting for securities rights, clearing and settlement transactions with them to ensure the development of a stable and reliable stock market.

Thus, the term international standard is used in two meanings – as a document and as a separate rule (principle) for the construction and functioning of depository and clearing systems.

The development of international standards is the result of the work of relevant international and regional organizations in the field of depository activity, such as: the International Organization of Securities Commissions (IOSCO); Committee for Payment and Settlement Systems of the Bank for International Settlements (CPSS of BIS); The Group of Thirty (G30);

International Securities Services Association (ISSA); Association of European Central Securities Depositories (ECSDA); Committee of European Securities Regulators (CESR); Association of Eurasian Central Depositories; Parliament and Council of the European Union and others.

Among the main documents, that contain international standards for payment, clearing and settlement systems, it's expedient to highlight "Principles for financial market infrastructures", published by the Committee on Payment and Settlement Systems (CPSS) and the International Organization of Securities Commissions (IOSCO) [2]; Global Clearing and Settlement: A Plan of Action, adopted by The Group of Thirty in 2003 [3]; Recommendations of International Securities Services Association (ISSA); Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement system [4]; Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims [5]; Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements [6]; Regulation (EU) № 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) № 236/2012 (Regulation № 909/2014) [7].

1. CSD should have appropriate rules and procedures to help ensure the integrity of securities issues, minimize and manage the risks associated with the safekeeping and transfer of securities.

This principle is enshrined in the Principles for Financial Market Infrastructure under № 11 and related to the activities of Central Securities Depositories directly.

In Ukraine, in order to limit risks in the course of depository and clearing activities, the above principles are reflected in the Regulation on prudential standards for professional activities in the stock market and requirements for a risk management system [8], which, in particular, identifies the main risks of depository and clearing activities in the stock market, establishes the procedure of calculation and normative values of the prudential indicators used for their measurement and evaluation, defines the requirements for the depository and clearing entities to prevent and minimize the impact of risks in their activities.

2. CSD should maintain securities in an immobilised or dematerialised form for their transfer by book entry.

The depository reform in Ukraine allowed to ensure the immobilization and dematerialization of securities. Procedure of actions of the issuer and professional participants of the depository system of Ukraine in order to ensure the existence of securities in a non-documentary form, the issues of which were not translated into this form before the Law of Ukraine "On the Depository System of Ukraine" (10.12.2013) came into force, shall be established by the relevant decisions of the National Securities and Stock Market Commission (NSSMC) [9; p. 10].

The depository assets for the CSD in Ukraine are, among others, the global / temporary global securities certificates - for securities of non-documentary form of existence, certificates of immobilization of registered securities, temporarily stored in the Central Depository until the moment of dematerialization or cancellation of issue of securities [11].

3. The principle of delivery versus payment (DVP), in accordance with G30 recommendation № 5, should be employed as the method of settling all securities transactions.

The mentioned principle is not fully implemented in Ukraine, since not all securities transactions are performed on the principle of "delivery of securities against payment".

Settlements on securities transactions performed outside of the stock exchanges may be carried out both in accordance with the principle of "delivery of securities against payment" and without observance of this principle (part 6 article 20 of the Law "On Depository System of Ukraine" – V.M.).

It is necessary to ensure the full functioning of this principle, by enshrining in the legislation a norm according to which settlements for all securities transactions and cash account between direct participants of the securities settlement system used by the CSD should be executed on the terms of DVP (delivery against payment – V.M.).

DVP in G30 Recommendations is defined as follows: simultaneous, final, irrevocable and immediately available exchange of securities and cash on a continuous basis throughout the day.

According to the Glossary of terms used in payments and settlement systems, adopted by The Committee on Payment and Settlement Systems Bank for International Settlements, DVP is a link between a securities transfer system and a funds transfer system that ensures that delivery occurs if, and only if, payment occurs [12, p. 20].

According to the definition given in article 1 of the Law of Ukraine "On the Depository System", settlement according to the principle "securities delivery versus payment" is a mechanism of securities transactions settlement, which assumes that securities and / or rights in securities and securities entitlements are transferred immediately after the corresponding cash transfer.

That is, Ukrainian legislation interprets this principle so that the transfer of securities should take place immediately after the transfer of funds, not simultaneously.

The moment of settlement finality, in accordance with the Principles for financial market infrastructures, should have a legal definition (Principle 1: Legal Framework) [2, p. 22].

The moment of settlement finality for transactions with securities, records of which are kept by the CSD, is defined in part 1 of article 20 of the Law "On Depository System". However, the moment of settlement finality for transactions with securities, records of which are kept by the National Bank of Ukraine (NBU) is not currently established in the legislation.

We consider it necessary to eliminate the mentioned gap and fix in the article 20 of the Law of Ukraine "On Depository System" the moment of settlement finality: Settlement of DVP transactions (executed on a stock exchange or OTC – V.M.) with securities, records of which are kept by the National Bank of Ukraine according to the terms of reference covered by this Law, is considered to have been accomplished only if the following conditions had been met:

- the NBU submits information resulting from securities transactions settlement to depository institutions;
- on the grounds of the received information depository entities transfer rights in securities on depositors' securities accounts;
- the NBU receives information from depository institutions on completed transference.

The peculiarity of the implementation in Ukraine of DVP principle is the monopoly of the Settlement Center, whose exclusive competence is to carry out cash settlements of DVP transactions with securities and other financial instruments executed on stock exchanges and OTC.

The indicated situation is not in accordance with the requirements of part 2 article 34 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, which sets that regulated markets in the Member States territory are required to offer all their partic-

ipants the right to designate the system for the settlement of transactions in financial instruments undertaken on that regulated market [13].

The settlement functions that are assigned to the Settlement Center in Ukraine are performed globally by central depositories and central banks. The deprivation of the Central Depository's ability to make settlements through its own account with the NBU and the presence of such an intermediary as the Settlement Center deforms the settlement mechanism by the principle of "delivery of securities against payment" (DVP). Additionally, according to international standards, such depository cannot be recognized as a fully functional central depository, capable of interacting with similar entities from other countries.

Taking into account the above, we consider it expedient to concentrate the settlement functions on the securities market in the Central Depository by opening an account with the NBU and granting the CSD the status of participant in the Electronic Payment System.

4. Time limits for the execution of concluded contracts: all matching transactions between all direct market participants should be performed on day $T + 0$, and the final execution of the agreements must occur no later than on the day $T + 3$. The specified standards are set out in the Recommendations of Group 30 (recommendations 1 and 7) and the Recommendations for securities settlement systems of the Committee on Payment and Settlement Systems and Technical Committee of the IOSCO (recommendations 2 and 3) [14].

These standards are implemented in the legislation of Ukraine. Settlements on securities transactions and an appropriate exchange of information between the Central Depository and the Settlement Center are carried out only during the current operational day of the Central Depository. All securities settlements on depositor's accounts of depositories entities, initiated by the Settlement Center on the relevant business day and for which confirmation of cash settlement completion has been provided, shall be ended by depository institutions before the end of the current trading day of the settlement of the Central Depository [11].

According to article 20 of the Law "On Depository System of Ukraine", DVP securities transactions executed on a stock exchange shall be settled not later than on the third business day from the day, on which a corresponding transaction has taken place.

5. Using of central counterparties (CCP) in the process of settlement of securities agreements. Recommendation № 6 of the G30 Plan of Action is topical to Ukraine. Central counterparties stabilize the financial market, because they guarantee the fulfillment of market participants obligations and, in fact, take on all the risks. This institute is currently used by all major stock exchanges in the world.

The Settlement Center (SC) is the only clearing institution in Ukraine. However, the SC cannot be considered to be a full-fledged central counterparty, according to the international experience, in view of its non-implementation of operations with OTC derivatives (the centralized clearing technology for derivatives are actually implemented by stock exchanges – V.M.).

In addition, the SC acts as a bank now, and the central counterparty has its own functions and specifics of work, that are not combined and should not intersect with banking activities.

Reforming Ukrainian legislation to fully implement the central counterparty institution is one of the key areas for further Ukraine's depository reform.

6. The codes and structure of messages for workflow on transactions with securities must comply with the international standards SWIFT Securities Messages, the International Organization for Standardization (ISO). In addition, countries should use the ISIN Securities Numbering System in accordance with ISO 6166 [15].

In pursuance of one of the ISSA recommendations regarding the adherence to the international securities issue number system, Ukraine has adopted the ISO standards for documents on transactions with securities and also uses the ISIN securities identification numbering system (according to ISO 6166). Transnational securities operations and functional interaction with foreign depositories are provided by the information processing system S.W.I.F.T., to which Ukrainian CSD joined in 2008.

7. Principle of interaction and convergence of securities servicing systems at the transnational level, if it helps to eliminate operational risk, reduce costs and increase the efficiency of market functioning.

Currently, Ukrainian CSD has established links with Clearstream Banking Luxembourg, National Settlement Depository (Russian CSD), Republican Central Securities Depository (Belorussian CSD).

8. Centralization of the depository system. In international practice of stock market functioning, the central securities depository (CSD) is the key institution of the depository system.

Based on the Group 30 recommendations each country was recommended to have the Central Depository fully developed and working effectively prior to 1992 (Recommendation 3) [16].

The full centralization of the depository system and the existence of a single Central Depository prevails in the EU countries and most of the countries with a market economy.

The Comprehensive Program of the financial sector's development in Ukraine up to 2020 approved by the Decree of the National Bank of Ukraine dated from June 18, 2015 № 391 [17] defines the tasks to ensure the centralization of the Ukrainian depository functions. The program involves obtaining the status of the Bank by Central Depository and the transfer of the government / municipal bonds, records of which are kept by the National Bank of Ukraine, to the CSD.

9. Abidance of high technical requirements. Regulation No. 909/2014 emphasizes the necessity for CSD to have a robust software and maintain appropriate IT tools that ensure a high degree of security and operational reliability, and have adequate capacity. IT tools shall adequately deal with the complexity, variety and type of services and activities performed so as to ensure high standards of security, and the integrity and confidentiality of the information maintained.

Requirements for the software used by the Central Depository of Ukraine are established by CSD in its internal documents in accordance with the legislation. Since hardware and software are key to ensuring a reliable depository record of securities ownership and other functions, it is appropriate to consolidate more detailed requirements for IT tools not only in internal documents, but also at the level of law or separate regulation.

10. Use of uniform reporting and information exchange standards.

Legislation of Ukraine establishes that professional participants of the depository system compile financial statements and consolidated financial statements, as well as disclose information about their activities according to international financial reporting standards [18; p. 19].

The International Financial Reporting Standards are standards issued by the International Accounting Standards Board (IASB) to provide a common global language for business affairs so that company accounts are understandable and comparable across international boundaries.

The Comprehensive Program of the financial sector's development in Ukraine up to 2020 for this purpose provided the implementation of following legislation acts in accordance with the Association Agreement between Ukraine and the EU: Council Directive 86/635/EEC of 8 December 1986 on the an-

nual accounts and consolidated accounts of banks and other financial institutions; Directive 2001/65/EC of the European Parliament and of the Council of 27 September 2001 amending Directives 78/660/EEC, 83/349/EEC and 86/635/EEC as regards the valuation rules for the annual and consolidated accounts of certain types of companies as well as of banks and other financial institutions.

Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (further – Directive 2013/34/EU) is the EU's basic regulatory framework for accounting [20].

Directive 2013/34/EU establishes that the annual financial statements shall constitute a composite whole and shall for all undertakings comprise, as a minimum, the balance sheet, the profit and loss account and the notes to the financial statements.

Contrary to the European legislation, in Ukraine there is no exigency to provide a management report and a report on corporate governance; the criteria for assigning enterprises to micro-enterprises, small, medium-sized and large enterprises, which affects the presentation of their financial statements, are not defined.

The reporting procedure for the SC as for bank is provided both in the normative act of the NBU [21] and in the Rules of the Settlement Center (hereinafter – the Rules of the SC) [22].

In order to bring normative legal acts, which regulated the reporting of the Central Depository, to the requirements of the Directive 2013/34/EC, we consider it necessary to change sub-clause 6 of clause 4 of the Procedure for disclosure by the Central Securities Depository of information about the results of its activity and structure of property [23], setting it in the following revision:

- annual report of the Central Depository, including a statement of financial position (balance sheet);
- profit and loss statement and other comprehensive income (statement of financial results);
- statement of changes in equity (statement of equity);
- statement of cash flows;
- notes.

And it's expedient to supplement clause 4 of the Procedure for disclosure by the Central Securities Depository of information about the results of its activities and ownership structure by the following points:

- 1) management report and report on corporate governance;
- 2) a conclusion provided by an official auditor or an audit firm.

Also, the clause 6 of the Procedure and Conditions for the provision of the status of the CSD approved by the Decision of the NSSMC of 04.16.2013 № 597, should be supplemented with the paragraph 10, according to which the Rules of the Central Depository should provide for a separate section dedicated to the reporting procedure and the procedure for disclosure and promulgation information of the Central Depository's activities [24].

The definition of “public-interest entities” is used in Directive 2013/34/EC and means undertakings which are, among others, designated by Member States as public-interest entities, for instance undertakings that are of significant public relevance because of the nature of their business, their size or the number of their employees (clause d of paragraph 1 of article 2). Additional disclosure requirements should apply to this category of enterprises.

It is obvious that National Depository of Ukraine (Ukrainian CSD) with a share of state ownership of 95.8% (at the end of the 1st quarter of 2017) and Settlement Center with a state

share of 90.8%, which occupy a monopoly position and are key participants in the depository system, ensuring the stability of the post-trading infrastructure of the stock market, are “public-interest entities”.

The further introduction of these additional disclosure requirements in accordance with the requirements of articles 17–18 of the Directive 2013/34/EC is necessary in order to fully implement the principle of compliance unified reporting and information exchange standards.

Article 30 of Directive 2013/34/EC requires undertakings to publish the duly approved annual financial statements and the management report, together with the opinion submitted by the statutory auditor or audit firm within a reasonable period of time, which shall not exceed 12 months after the balance sheet date.

For the CSD in Ukraine the reporting deadline is set at 4 months 24 [24] and for SC – month (paragraph 17.4 SC Rules), which is much smaller than in most European countries, where this period is averagely 7 months (Czech Republic, Spain, Finland, France, Norway – V.M.) [25, p. 8].

11. Systems for clearing and settlement of securities transactions should be subject to regulatory oversight, and designed to ensure that they are fair, effective and efficient and that they reduce systemic risk.

This principle is provided in the IOSCO Objectives and Principles of Securities Regulation and is implemented in Ukrainian legislation.

In the Comprehensive Program of the financial sector's development in Ukraine up to 2020, among measures aimed at building the institutional capacity of financial sector regulators, there are provided a phased transition to supervision based on risk assessment: firstly – established necessity for analysis of international experience and secondly – established standards of supervision based on risk assessment, including the IOSCO Objectives and Principles of Securities Regulation, in order to bring adaptation of legislation and internal regulations of state regulators to international standards of supervision.

Requirement of article 34 of Directive 2013/34/EC, with regard to ensuring that the financial statements of public-interest entities, medium-sized and large undertakings are audited by one or more statutory auditors or audit firms, has been reflected in Ukrainian legislation. In accordance with part 12 of article 9 of the Law “On Depository System of Ukraine”, the Central Depository is obliged to perform annual audit of its activity according to international audit standards in keeping with requirements, defined by the NSSMC.

An auditor's conclusion (independent auditor's report), submitted by the Central Depository during an annual audit of its activity, should be drawn up in accordance with the requirements of the International standards on quality control, audit, inspection, other assurance and related services [26].

Conclusions. The study and analysis of international standards of depository and clearing activities allows us to conclude that, despite their partial implementation in domestic legislation, there is presence of incomplete implementation of the principles declared by them, which impedes the effective functioning of post-trade infrastructure.

Further adaptation of international standards, in particular, the complete centralization of depository system and the full implementation of the central counterparty institution, will ensure successful output to international capital markets for Ukrainian investors, reduce the level of risk in concluding agreements, allow foreign investors to be attracted to the domestic stock market and promote the inflow of foreign capital into Ukraine.

The author's further research directions are the issues of harmonization of Ukrainian legislation with the norms of European and international law with regard to depository and clear-

ing activities, in particular, regarding the implementation of international reporting standards for CSD and SC, as well as the role of regulatory bodies and the Central Bank in ensuring the application of standards for depository and clearing activities.

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