




# Force Majeure and Insurance of Risks of Economic Emergencies

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**Keywords:** Insuperable Force, Force Majeure, Insurance, Risks, Economic Emergencies, Liability.

**Abstract:** The paper deals with the actual problem of developing new insurance products in the conditions of hybrid military actions and the application of economic sanctions. For modern Ukraine the “hybrid military actions” from the “neighbor-state” are actually for nine years. However, there are some legal issues on the way to a clear understanding of the difference between “insuperable force” and “force majeure”. It is also caused by misreading of the legal system from the representatives of different sectors, despite a good history of national insurance companies formation and development. Thus, in the paper authors present the results of correct understanding and usage of mentioned categories, pay attention to risks with grants in project management, and unclosed ways for development of new products according to economic situation and market needs.

## 1 INTRODUCTION

Emergencies cause great losses, both to the country’s economy, to companies (enterprises), and to individuals. The means of avoiding emergencies are usually: means of preventing their occurrence, means of minimizing their consequences and insurance (which can also be partially attributed to the means of minimization). Nevertheless, insurance still stands aside from the means of minimization, since it has both the original and the initial result is cash. While the rest of the means of minimization is associated with the additional expenditure of material resources.


In the practice of the EU countries, North America, Southeast Asia and Australia, the majority of companies (enterprises) and individuals *insure their activities and property against the occurrence of emergencies*. However, in Ukraine, the share of financing measures to minimize the impact of emergencies through insurance payments made by specialized insurance companies is still slowly growing, despite the full-scale aggression of Russian Federation, and projects to be realized instead of. This is mostly due to the fact that protection from emergency situations of the population (individuals) by means of insurance


is provided on a voluntary basis (Code of Civil Protection of Ukraine, 2013), and most Ukrainians avoid this (but legal entities (companies and enterprises) do it). Therefore, each person must decide for him on the need to insure his property (life, means of activity or health) in order to receive compensation for damages in the case of an emergency.


## 2 ANALYSIS OF THE PREVIOUS PUBLICATIONS

In many scientific publications (Bublik, 2009; Romanenko, 2007; Hargrave, 2022) and in practice, insurance is considered *as a means of minimizing the impact of natural and man-made emergencies*. According to Article 49 of the Code of Civil Protection of Ukraine (Code of Civil Protection of Ukraine, 2013) the purpose of civil protection insurance is:

1. property insurance of businesses and people against damages caused by an emergency, accident or emergency response operations;
2. insurance compensation on behalf of businesses operating high-risk facilities to third parties or their property and other legal entities for the damages caused by a potential emergency that occurred at such facilities.

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Regarding international level, the aspect of the international cooperation presented in (Dorussen et al., 2018; Barč et al., 2020). Assessing the capabilities of civil protection and preparing recommendations on how to implement these approaches presented in research of Kalynenko et al. (Kalynenko et al., 2020) only in 2020.

### 3 PROBLEM STATEMENT

Meanwhile, according to the above mentioned Code of Civil Protection of Ukraine (Code of Civil Protection of Ukraine, 2013) there are also *social and military emergencies*, which, namely, in Ukraine are most often considered as “*reasons of a force majeure essence*”, and therefore they are not the cause (reason) of the “*insured event*”.

But there is a problem regarding correct understanding categories for the correct insurance. As well as regarding correct implementation, especially nowadays.

The scientific novelty of the research is in formation of fundamentals for the disclosing and searching for the appropriate instruments of economic risks in Ukraine, for the possibility of effective management of emergent economy. It is due to the fact that “force majeure” has no one definition in modern Ukrainian legislation and it is the reason why such traditional instruments like insurance are not widely spread on the market of risks of economic emergencies, and this problem should be solved especially nowadays.

### 4 RESULTS

As there were mentioned above, the term “force majeure” was not officially enshrined in the legislation of Ukraine until recently, which gave rise to constant discussions about a clear interpretation of its definition (Sosnin, 2014). Thus, in the Civil Code of Ukraine, instead of the concept of “force majeure”, which has a global perception, the concept of “force majeure circumstances” appeared. In accordance with Art. 617 of the Civil Code of Ukraine, “A person who has violated an obligation is released from liability for violation of an obligation if he proves that this violation occurred as a result of an incident or force majeure. It is not considered a case, in particular, of non-compliance with its obligations by the counterparty of the debtor, lack of goods on the market necessary for the fulfillment of the obligation, lack of necessary funds from the debtor” (Tsyvilnyi

kodeks Ukrainy, 2003). Art. 218 of the Commercial Code of Ukraine also provides a definition of “insuperable force” (“force-majeure”), and specifies a list of circumstances that are not related to force majeure: “A party to economic relations shall be liable for non-performance or improper performance of an economic obligation or violation of the regulations of economic activity, unless it proves that it has taken all measures to prevent an economic offence. Unless otherwise provided by law or agreement, for breach of economic obligation an economic entity shall bear economic and legal liability, unless it proves that proper performance of the obligation was impossible due to irresistible force, that is extraordinary circumstances beyond control under these conditions of economic activity. Breach of obligations by the offender’s counterparties, deficiency of goods in the market required to fulfill the obligation, absence of required funds in a debtor shall not be classified as such circumstances” (Hospodarskyi kodeks Ukrainy, 2003). Thus, in their essence and the circumstances the appearance of the concept in both codes coincide.

However, the Supreme Economic Court of Ukraine in its one letter No. 01-2.2/279 of 09.09.2001 “Remarks to the Commercial Code of Ukraine” explained that the concepts of “force majeure” and “insuperable force” are not identical, since “the definition of the category of force majeure circumstances in part 2 of this article may cover not only events in public life, that is, the impossibility of fulfilling obligations as a result of targeted actions of persons who are outside the scope of the obligation (for example, embargo on export-import operations, hostilities, strikes, riots), but also natural phenomena that belong to a different category of circumstances that exempt from liability, namely insuperable force. Identifying these fundamentally different reasons for exemption from liability is legally wrong. The category of insuperable validity embodies only natural phenomena, which, due to their exclusivity, inevitability and unpredictability, determine the limitation of liability for damage in cases determined by law. Moreover, insuperable validity as a basis for limitation of liability can take place only in non-contractual (tort) legal relations and in cases of violation of contractual obligations, if it is directly provided for by law (for example, in cases provided for in Article 418 of the Commercial Code). At the same time, the category of force majeure covers only exceptional events of public life, which the parties themselves on dispositive grounds define in the contract as the right to exemption from further fulfillment of the obligation by agreement, if such events occur during the term of the contract. The parties may provide in the contract innocent liability

for non-fulfillment or improper fulfillment of obligations, but limit it to cases of force majeure provided for in the contract. Common to the circumstances of insuperable force and force majeure is only their external nature of influence on the causal-results chain of activity of participants in specific legal relations, that is, these circumstances are beyond the control of the participants in legal relations” (Supreme Economic Court of Ukraine, 2001). Consequently, *there was confusion about the interpretation of the terms “force majeure” and “insuperable force”*.

The concept of “force majeure circumstances (circumstances of insuperable force)”, that is, already related to each other, was defined only in 2020 in the law, which is not directly related to this concept, – the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine Aimed at Preventing the Emergence and Spread of Coronavirus Disease (COVID-19)” (COVID-19, 2020). Due to this law, amendments were made to the Law of Ukraine “On the Chambers of Commerce and Industry in Ukraine” (On Chambers of Commerce and Industry in Ukraine, 1998), by 1998. Since 2014, the law states that the Chamber of Commerce and Industry of Ukraine “confirms force majeure circumstances (circumstances of insuperable force) as well as trade and port customs adopted in Ukraine upon the request of business entities and natural persons; certifies force majeure circumstances in accordance with the terms and conditions of agreements upon the requests of business entities engaged in housing construction (customers, developers)”. And from 17.03.2020, Art. 14-1 of this Law, defined: “Force majeure circumstances (force majeure circumstances) are the extraordinary and unavoidable circumstances that objectively unable to fulfil the obligations stipulated in the terms and conditions of the agreement (contract, treaty, etc.), obligations under the legislative and other regulatory acts, namely: the threat of war, armed conflict or a serious threat of such conflict, including but not limited to enemy attacks, blockades, military embargoes, actions of a foreign enemy, general military mobilisation, military actions, declared and undeclared war, actions of a public enemy, indignation, acts of terrorism, sabotage, piracy, riots, invasion, blockade, revolution, mutiny, insurrection, mass riots, curfew, quarantine established by the Cabinet of Ministers of Ukraine, expropriation, forced seizure, seizure of enterprises, requisition, public demonstration, blockade, strike, accident, illegal actions of third parties, fire, explosion, long breaks in transport operation, regulated by the terms of relevant decisions and acts of state authorities, the closure of sea straits, embargo, ban (restrictions) of export/import, etc. as well as caused

by the exceptional weather conditions and natural disasters, namely: epidemic, strong storm, cyclone, hurricane, tornado, hurricane, flood, snow accumulation, ice, hail, frost, freezing of the sea, straits, ports, passes, earthquake, lightning, fire, drought, subsidence and landslide, other natural disasters, etc.”.

In principle, such a definition has the power to stop all insurance activities in Ukraine, because it classifies *almost all insurance* incidents related to social, natural or man-made emergencies as *force majeure circumstances*.

In *international practice*, force majeure circumstances are determined in accordance with Article 79 of the UN Convention on Contracts for the International Sale of Goods (UN, 1980), according to which “A party shall not be liable for non-fulfillment of any of its obligations if it proves that it was caused by an obstacle beyond its control and that it was unreasonable to expect this obstacle to be taken into account when concluding a contract or to avoid or overcome this obstacle or its consequences”.

In the international courts’ practices regarding the definition of “force majeure” the question often depends on which system of law is applied – precedent (Anglo-American) or constitutional (Roman, continental). For example, “English law distinguishes between two main means of protection by a party that has committed non-performance of the contract due to *insuperable force*. These circumstances, although they result in the release of a party from liability, are fundamentally different from force majeure in that they are *non-contractual instruments*, while *force majeure* is introduced by the *contract*” (Kurylo, 2019). That is, no “non-contractual means of protection against liability for improper performance of the contract due to insuperable force under English law do not work if the parties include a force majeure clause in the contract”.

Thus, insurance requires the most clear *definition of force majeure in insurance contracts* to develop a single consolidated position of the insurer, policyholder and reinsurer (if necessary).

Contra Anglo-American law *in the continental law, force majeure exempts from liability for improper performance of a contract only temporarily*: “French civil law, which follows Roman law, professes the principle of liability for violation of a contractual obligation in the presence of guilt (with certain exceptions). Reference to force majeure is not required if the non-fulfillment of the contract occurred in the absence of guilt on the part of the party to the contract that violated it” (Kurylo, 2019). That is, from the side of insurance companies, non-fulfillment of the contract becomes possible only for a certain pe-

riod of time, while the fault of the company itself is absent. *This actually makes it impossible to insure economic risks*, because when insuring funds against depreciation of inflation, the insurance company will not be to blame if it gives insurance payments with impaired funds.

Despite the confusion of the “force majeure” meaning in Ukraine, its definition in practice is simpler, which greatly simplifies its recognition in the insurance market. The regulations for certification by the Chamber of Commerce and Industry in Ukraine and by its regional chambers of the force majeure circumstances (insuperable force circumstances) provide that in order to recognize and confirm force majeure circumstances (insuperable force circumstances), the documents provided by the applicant must indicate:

- 1) “the extraordinary nature of such circumstances (are exceptional and are beyond the influence of the parties);
- 2) unpredictability of circumstances (their occurrence and consequences could not be foreseen, in particular, at the time of the making of the relevant agreement, before the term of the obligation or before the occurrence of a tax duty);
- 3) inevitability (insuperability) of the circumstance (of the event and / or its consequences);
- 4) causal-results chain between the circumstance / event and the inability of the applicant to fulfill his specific obligations (according to the contract, agreement, law, regulation act, act of local governmental institutions, etc.)” (On Chambers of Commerce and Industry in Ukraine, 1998).

Thus, mentioned *legal conflicts significantly affect the sphere of insurance against emergencies*, since the sphere of liability, depending on the cause and consequences of the emergency, may differ significantly. Especially in specific types of emergencies.

In the publications (Trush and Gorovyi, 2018; Trush et al., 2019) another type of emergencies is defined depending on the cause of their occurrence – *economic emergency*: “As an emergency of economic character (economic emergency) can be considered a situation that is the result of erroneous economic actions of the government, the action of economic sanctions by other countries, hybrid hostilities, inflation, impoverishment of the population and loss of savings, unemployment and bankruptcy of enterprises and organizations, the exit of investors from the country, depreciation of the national currency and securities”.

*For this type of emergencies the principles of insurance are not currently used*, but ‘the signs’ of such an emergency that cannot be used as force majeure

conditions in accordance with the current legislation of Ukraine. Force majeure are social reasons that will cause a social emergency, which in turn will entail an economic emergency. And directly appearance of economic emergencies – namely, inflation (and for export-oriented countries, such as Japan, deflation), bankruptcy, unemployment, loss of savings (according to their purchasing power), exit of investors from the country, depreciation of the national currency and securities, – could be insured events, and are not considered as force majeure circumstances. At the same time, “war, hostilities, invasion of troops, insurrection, civil unrest, confiscation, forced seizure, requisition, seizure or damage to property by order of the government or other authority are not insurance events and *exclude compensation for possible damages under an insurance contract*” (Hroshi, 2022). But, in practice in Ukraine these terms of the contract apply only if martial law or a state of emergency is introduced in the country or in its part in accordance with the procedure described by the Law of Ukraine “On the Legal Status of the State of Emergency” (On the Legal Status of the State of Emergency, 2000). That is, “until the statement and entry into force of an official decision, insurers have no legal grounds to refer to such cases (even if in fact those actions that inherently agree with the above definitions take place)” (Trush and Gorovyi, 2018). Also, “attention should be paid to the fact that in almost all contracts of voluntary land transport insurance, in the section of the basements of refusing to pay insurance compensation, there is a pp. stating that hostilities, riots, acts of terror, civil unrest are direct basements for the insurer’s refusal to pay insurance compensation” (Protsenko, 2016).

Thus, if the condition of the contract was precisely the insurance of certain economic emergencies, then the insurance company must compensate for the losses. At the same time, some of the economic emergencies are already included in the list of circumstances of unforeseen force. Consequently, in theory, you can insure against them in the insurance company, but the receipt of payments from it can be appealed, since they are included in the list of insuperable force. So, the ‘*circumstances of economic emergencies*’ we divide into:

1. Can be insured:
  - 1.1) erroneous economic actions of the government (however, it must be clearly stated in the contract what exactly should be considered as a wrong action);
  - 1.2) inflation;
  - 1.3) impoverishment of the population and loss of savings;

- 1.4) unemployment;
  - 1.5) bankruptcy of enterprises and organizations;
  - 1.6) depreciation of the national currency and securities;
  - 1.7) exit of investors from the country (but must be clearly stated in the contract, what exactly is meant).
2. Included in the list of irresistible forces in Ukraine:
    - 2.1) economic sanctions of other countries;
    - 2.2) hybrid military operations.

Looking further, we should pay attention to inflation, its dynamics, and emergencies.

Deeply, the categories of 'cause' and 'effect' generalize one of the concrete and specific forms of relations, from a philosophical point of view. Thus, every event or group of events creates interacting phenomena; meanwhile, phenomena act for/regarding other reason. In its turn, the cause itself generates consequence. That creates a chain of causal relations between individual groups, defined "emergencies".

The economic impact of emergency is changing. At the same time, exactly the same problem could be solved as well during long time as immediately. From national example, the government did not stop quickly the sustainable growth rate of foreign currencies during 2014 in Ukraine, – and it had been already the period of war against Ukraine started. Moreover, the opposite case: panic on the currency market at the end of December 2018 was resolved in a few days.

In general, the economic growths of emergency can be represented as it shown in figure 1.

As it can be seen, there are two main causes/reasons of the economic impact emergency depends on the "source" – external or internal. The consequences made on the base of (Pettinger, 2021), define the traditional causes of inflation, trade deficit, loss of savings (uncontrolled printing of money, currency devaluation, fiscal deficit, excessive taxation, monopolization of markets).

Consideration of the causes of significant fluctuations Ukrainian hryvnia in 2017-2018 years makes us identify another consequence of the economic emergencies – 'information invasion'. Huge changes ('jumps') of the hryvnia / US dollar and euro during the period are not fluctuating economic indicators of the state (GDP, index of production, consumer price index, etc.) or even obtaining or not of macro-financial assistance from the IMF, the US, EU, etc. However, it coincides with the declared opposition protests and the spread of false information in the media by country-aggressor. Comparison the change

of hryvnia / US dollar with information events in the country is presented on figure 2.

That is, the preparation and sharing in the media of an informational event (which may later lead to the onset of an economic emergency) still leads to significant fluctuations in the exchange rate and creates the ground for the economic emergencies.

For example, emergency from the reason of pandemic caused such changes of inflation in EU (figure 3) (Lane, 2021).

Related issues, namely in the context of shaping the sustainable development, were deeply researched by Ukrainian famous scientists (Semerikov et al., 2020). Risk assessment on the mesoeconomics levels (Pursky et al., 2021) are in the center of future researches as well, especially for after-war reconstruction of Ukraine.

Today in Ukraine, insurance services are provided by many insurance companies. As a rule, they offer a standard set of services for life insurance against accidents, health insurance (including tourist insurance), property insurance against emergencies, movable property insurance (including car owner's liability), insurance of agricultural producers against adverse weather conditions, medical insurance, etc. However, some insurance companies also offer specific types of insurance comparable to economic emergency insurance:

- credit limit insurance, flight cost compensation for the passenger, notary liability insurance, third party liability insurance (Credo, 2022);
- insurance of cases related to transportation: cargo insurance, forwarder and transport operator liability insurance, carrier liability insurance (PZU S.A., 2022);
- reimbursement of *cases related to cyber incidents, which caused stoppage of the production – cyber risks, the need to recover data* (INGO, 2022), etc.

However, quite rarely insurance companies agree with the voluntary payment of insurance compensation, taking into account inflation losses (avtopomich.com, 2016). Although earlier it was inflation that was the object of insurance. In the early 1990s, with the onset of Ukraine's independence and the rapid inflation of the old currency ('karbovantsy'), some insurance companies (for example, (Verbyanyi, 2012)), offered insurance of savings against depreciation caused by rapid inflation. Now there are no such offers on the Ukrainian market.

Another option of the 'lost' instrument of insurance of economic emergencies in Ukraine can be considered *insurance of non-repayment of bank loans*, which can be used as a guarantee of loan repayment

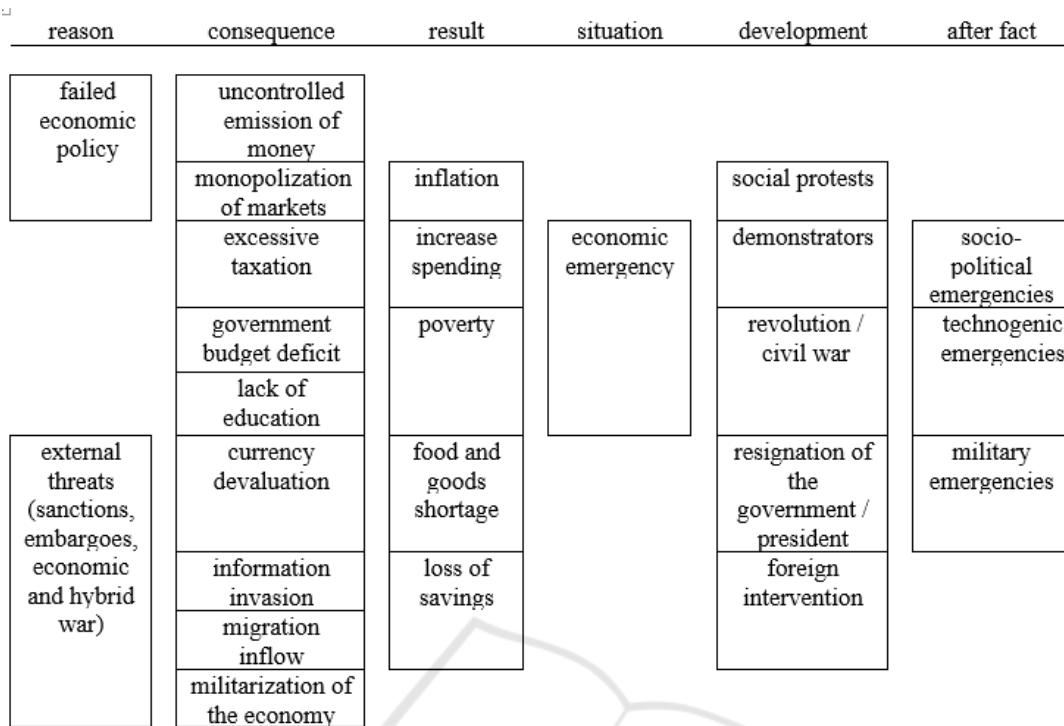


Figure 1: Scheme of emergency economic growths.

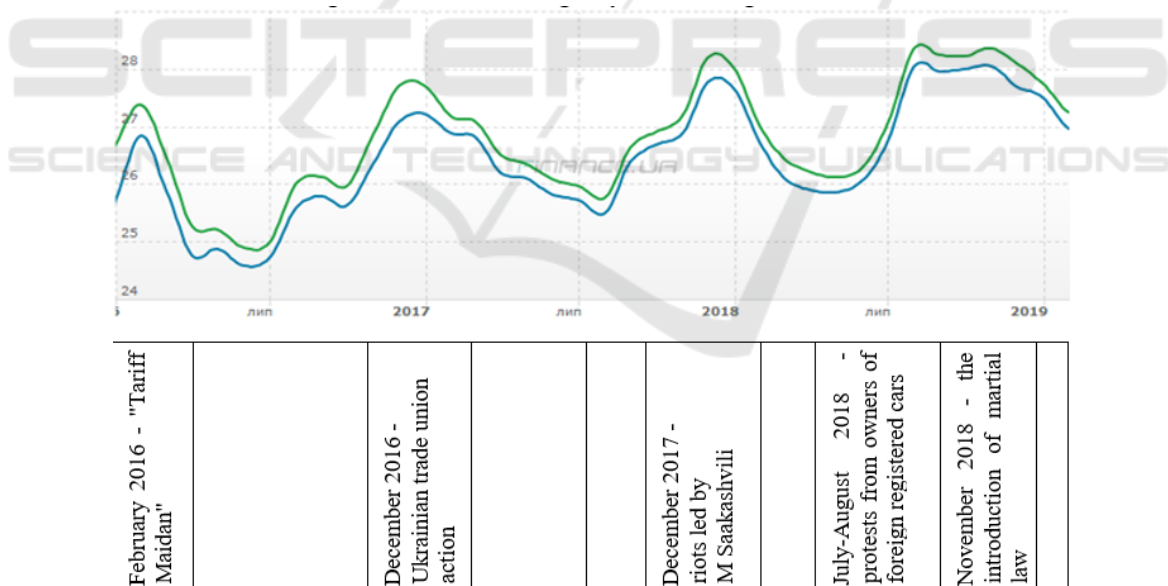


Figure 2: Comparison of change of hryvnia / US dollar with information events in Ukraine (charts.finance.ua, 2022).

(instead of a more common pledge of property or guarantees of third parties) (Katranzhy and Maryna, 2020). However, this form has not found its distribution due to a number of reasons (Chaykovskiy et al., 2001):

- “commercial banks cannot make extensive use of loan insurance today because they have well-

founded doubts about the reliability and solvency of insurance companies, although there is an annual mandatory disclosure of balances;

- high insurance premiums demanded by insurance companies cause an increase in production costs due to insurance payments, which in turn leads to an increase in prices for goods and services;

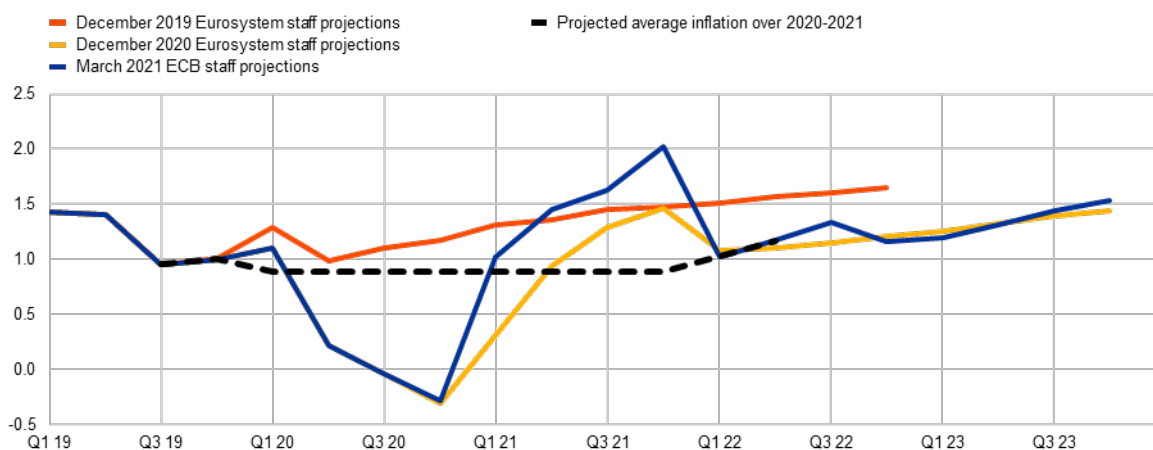


Figure 3: Selected (B)MPE projections for inflation.

- the procedure for issuing an insurance contract is complicated, which requires banks to work responsibly analytically to reconcile insurance rates, the nature of liability, and the transfer of insurance documents necessary for him to allow a regression claim against the borrower”.

The interaction of commercial banks and insurance companies today is more common in the consumer market, where insurance companies reimburse the bank that provided the consumer loan funds in case of impossibility of returning funds by the borrower in case of damage or malfunction of the goods under which the loan was taken (Shchedryi, 2005).

We also appeal to insurance of projects’ grant risks, as the last half of the year makes recipients think: to do them or not. For example,  $\frac{2}{3}$  of socio-economical grants were on the way to give money back to grantholders. For example, we note what exactly written in grant agreements, namely by the British Council – “the party shall be released from responsibility for non-performance or improper performance of its obligations under agreement, if this non-performance or improper performance was caused by *unforeseen circumstances of force-majeure, occurred after execution of the Agreement due to emergency reasons, which could not be either forecasted or prevented by reasonable measures*. Such circumstances include events that are in spite of the parties’ will, i.e. on which the parties have no influence and/or control and, therefore, for which they cannot be responsible. Such circumstances, inter alia, encompass natural calamities (for instance, earthquakes, inundation, flood, freezing, etc.), fires, other natural catastrophes and social cataclysm, strikes, *acts of terrorism, warfare, war*, etc. Such circumstances also include civil disorders, acts/inauspicious acts of government or other state bodies, blockade, embargo, other

international sanctions, other negative acts of states, etc., which a respective party is not in connection with and which it has no influence upon. The party that is unable to perform obligations under this agreement shall within five calendar days notify the other party of the onset and cessation of force majeure. The presence and duration of force majeure is to be confirmed by the competent and assigned authorities in the manner prescribed by the applicable legislation in force. In the event of force majeure execution of the agreement shall be postponed for the time of duration of force majeure circumstances. If the force majeure lasts more than three months, either of the party may terminate this agreement in respect of the scope of outstanding services by serving the written notice”. In contrast, in Ukrainian practice, according to the rules of insurance companies, “emergency states, special, or military emergencies; civil disorders, revolutions, insurrections, uprisings, strikes, putsch, lockout, terrorist act; nuclear incident, exposure to ionizing radiation, radiation pollution; illegal actions of state bodies, local governments, officials of these bodies” basically were called “exclusion from insured cases” (PZU S.A., 2022).

Regarding cases with insurance compensation the National Bank of Ukraine fixed 127 non-life insurance companies (01.09.2022). The total signed awards in the first half of 2022 compared to the first half of 2021 decreased by almost a third (-28%) and amounted to 17.8 billion. UAH. – at the same time, the reduction in volumes to a greater extent took place in the segment non-life (-29%); the volume of insurance payments/reimbursements paid in the first half of this year also fell proportionately in non-life segment (-32%). In the structure of the insurance portfolio, the volumes of insurance of property and fire risks (-60%), financial risks (-64%) and CASCO (-

30%) decreased the most. The drivers of non-life insurance business support were “Green Card” (+ 76%), MTPL (-13%), accident insurance (-16%). Insurance portfolio for the first half of 2022 by type of insurance presented in figure 4, and changes in activity volumes (21.03-04.09.2022), non-life, presented in figure 5 (National Bank of Ukraine, 2022).

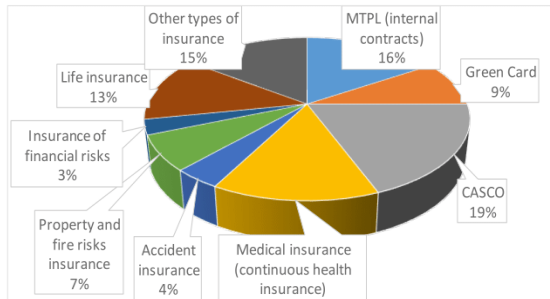


Figure 4: Insurance portfolio for the first half of 2022 by type of insurance in Ukraine (National Bank of Ukraine, 2022).

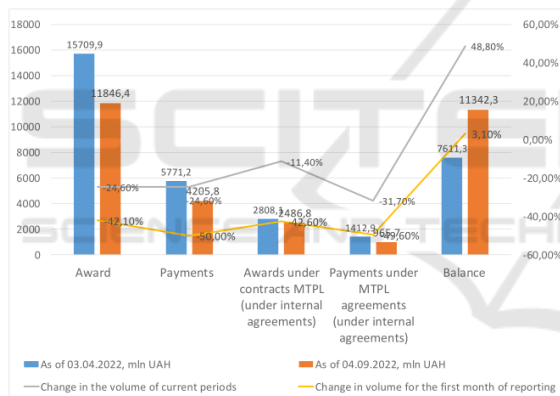


Figure 5: Changes in activity volumes (21.03-04.09.2022), non-life (National Bank of Ukraine, 2022).

The positive solutions for further development and for giving the most relevant results depend on possibility to change fast, to modernize organisation of all business-processes (Bogoyavlenska and Bereznytskiy, 2020), being resilience to economic shocks (Bruneckienė et al., 2018). Moreover, new finances instruments, namely “innovation vouchers” developing too fast (Klímová and Žitek, 2020). In addition, according to American experts “by 2025, cyber insurance volume is expected to reach 15to20 billion. However, cyber liability insurance is a niche market, with risks that are largely underinsured. (...) The COVID-19 pandemic took a toll on the decades-long growth in merger and acquisition insurance. For instance, in the first quarter of 2020 alone, deal value and volume dropped by around 30%. Global premi-

ums income shrank by 3.8% in 2020 due to the pandemic. In addition, property and casualty premiums went down by 2.9%. In a similar vein, life insurance premiums were down by 4.4%. According to the National Association of Insurance Commissioners, 83% of all business interruption policies have virus exclusions. Moreover, 98% of such policies include a property damage requirement. However, the question that remains is whether the virus itself can be equated to physical damage to property. This will likely be thrashed out in a lawsuit against the insurers and decided on a case-per-case basis.” (Andre, 2022). In this way, and because the insurance industry is a growing sector, we are thinking of the necessity of creating new products for the insurance market (in hybrid military actions conditions it is very necessary).

## 5 CONCLUSIONS

Thus, partly due to the reasons and consequences of economic emergencies today in Ukraine in one form or another, it is possible to insure the risks associated with inflation, unemployment, impoverishment of the population and loss of savings, bankruptcy of enterprises and organizations, depreciation of the national currency and securities.

The circumstances of insuperable force (force majeure) are hybrid military actions and the application of economic sanctions by other countries.

And such reasons for economic emergencies as the withdrawal of investors from the country and the erroneous economic actions of the government have not yet been offered by anyone as an object of insurance. Therefore, they can be the direction of further research of both scientists and practitioners in order to find new insurance products.

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