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LICENSING OF NON-BANKING ACTIVITIES IN UKRAINE: FEATURES OF PUBLIC ADMINISTRATION

Abstract. The *purpose of the article* is to consider the peculiarities of the implementation of public administration in the field of licensing of non-banking activities in Ukraine, to determine the boundaries of state regulation and identify shortcomings in legal regulation.

Research methods. The paper is executed by applying the general research and special methods of scientific cognition.

Results. The authors have analyzed the legal regulation of non-banking financial services markets, the legal status of non-banking financial institutions, the relevant powers of the National Bank of Ukraine, as well as the features of licensing activities for the provision of non-banking financial services. The Law of Ukraine “On Financial Services and State Regulation of Financial Services Markets” establishes general legal principles in the field of financial services, regulatory and supervisory functions of financial services. In general, the authors refer to various special legal statuses of non-banking institutions that have separate legal regulation of the order of creation and operation, in particular: credit unions, pawnshops, leasing companies, trust companies, insurance companies, funded pension institutions, investment funds and companies, other legal entities, the exclusive activity of which is the provision of financial services. It should be argued that there is a need to discuss the unification of legal status and types of economic activity (especially given the common approaches to licensing their activities). In addition, having its own powers of the National Bank of Ukraine in relation to rule-making activities, there is no special need for additional regulation.

Conclusions. Legal regulation of financial services markets requires further improvement in terms of consistent separation of certain groups: banking services and non-banking financial services. The legal status of non-banking financial institutions should be reviewed in view of the changes specified by Law of Ukraine “On Financial Services and State Regulation of Financial Services Markets”. The authors believe that the National Bank of Ukraine’s authority to regulate the entire financial services market is a transitional one amidst self-regulation of the financial services market. The grounds for granting and terminating licensing activities within the framework of committing offenses and non-compliance with licensing conditions should be clarified.

Key words: licensing, non-banking financial institution, state regulation, public administration, National Bank of Ukraine, economic freedoms, financial services market.

1. Introduction

The market of financial services has the appropriate specifics, given the general definition of state regulation of economic activity, state influence on the financial market, as well as the limits of public interference in the economic

activities of market participants. The performance of certain functions of the public sector in a market economy (for example, support, incentives, mobilization, control, etc.) in the financial services market is an indicator of the efficiency of the domestic economic system.

Under conditions of deregulation, approaches to the so-called non-banking financial services market have been changed. Thus, the procedure for public management in this area has changed, and new approaches to licensing and supervision have been formed. The authors believe that such legislative approaches are the basis for further changes, in particular, regarding the formation of self-regulation of the financial services market.

The purpose of this publication is to consider the features of the implementation of public administration in the field of licensing of non-banking activities in Ukraine, to determine the boundaries of state regulation and identify shortcomings in legal regulation.

The methodological basis of the research is economic and legal views on the proportional regulation of relations, the central bank's place and role, as well as the effectiveness of public administration in the relevant market.

2. Legal regulation of the markets of non-bank financial services in Ukraine

The legal literature draws attention to the existence of various models of state intervention in the exercise of economic freedoms in the light of respect for human rights and proportionality. As a result, there is: 1) the concept of transaction costs (any agreement requires some time and effort, which has a material dimension and affects the final price of the product, service or item on the market, resulting in regulated contracts and guarantees of compliance); 2) value theory (analysis of the permissible limits of state intervention in economic freedoms through clarifying the constitution's goals and principles); 3) the theory of values (interventions are considered through the recognition of some values, which serve as the main criterion for the legitimacy of decisions of public administration) (Savchyn, 2020, pp. 62–63).

Mechanisms of state regulation of the economy in the generalized sense are sets of inter-related methods, tools, and forms of targeted regulatory influence of the state, which are grouped into mechanisms according to areas for regulating business, regulation of monetary and fiscal spheres, investment and innovation, etc. (Bodrov et al., 2010, p. 130).

General legal principles of financial services, regulatory and supervisory functions of financial services are established by the Law of Ukraine "On Financial Services and State Regulation of Financial Services Markets" (hereinafter – Law № 2664). In addition, the Preamble of the Law defines its purpose – to create a legal framework to protect the rights and interests of clients of financial institutions, individuals – entrepreneurs providing financial services, legal support and development

of a competitive financial services market in Ukraine, legal support for a single state policy financial sector of Ukraine.

In view of this, it seems that Law № 2664 is aimed at the implementation of the theory of values, which is generally correlated with the constitutional principle of the state system, formed in Art. 3 of the Constitution of Ukraine.

According to the development strategy for the financial services market, special attention is paid to the non-banking financial market, in particular, to bring the regulatory environment closer to international standards by implementing the rules of IAIS (International Association of Insurance Supervision), IOPS (International Organization of Pension Supervision), IOSCO (International Organization of Securities Commissions) and EU acts (Strategy for the Development of the Financial Sector of Ukraine until 2025, 2021, p. 8).

Law № 2664 separately regulates the tasks and powers of the National Bank of Ukraine in the field of state regulation of non-bank financial services markets. This legislative approach is driven by the need to reduce the number of regulatory and supervisory authorities in non-banking financial services markets by dividing the functions of the National Commission for State Regulation of Financial Services Markets among other bodies for state regulation of financial services markets.

In fact, the regulator was replaced, leaving the main tasks of regulation, as well as the separation of non-banking financial services from the object of regulation. Thus, in accordance with Art. 27 of the Law № 2664, the National Bank of Ukraine carries out:

1) strategy generation and implementation of development and solution of systemic issues of the functioning of financial services markets in Ukraine;

2) state regulation and supervision of the provision of financial services and compliance with the relevant legislation;

3) protection of the rights of consumers of financial services by applying measures of influence within their powers in order to prevent and stop violations of the law in the financial services market;

4) generalization of the practice of application of the legislation of Ukraine on financial services and markets and development of proposals for their improvement;

5) development and approval of binding regulations on issues within its competence;

6) coordination of activities with other state bodies;

7) introduction of internationally recognized rules for the development of financial services markets.

3. Non-banking institutions

The legal status of a non-bank financial institution is quite specific. Thus, Law № 2664 does not provide a separate definition and features of this institution. In accordance with the Regulations on the procedure for issuing a license to transfer funds in national currency without opening accounts, approved by the Resolution of the Board of the National Bank of Ukraine dated August 17, 2017 № 80, it is established that: *non-banking institution* – a non-banking financial institution or postal operator with a valid license (sp. 15, p. 4); *non-bank financial institution* – a legal entity that is not a bank in accordance with the legislation of Ukraine and is entered in the Register of Financial Institutions in the manner prescribed by the legislation of Ukraine (sp. 16, p. 4).

That is, in one case it is about licensing, and in another – the presence of the organization in the register (which is a consequence of licensing). Obviously, it would be more appropriate for the law to differentiate between the legal status of a bank and a financial institution in order to avoid logical errors (the ratio of generic and specific concepts).

I.V. Borysov defines financial institutions as participants in the financial services market, which are created and operate in “modified” (“complicated”) organizational legal forms, which arise by including in the structure of elements of basic organizational legal forms of legal entities additional, functional legal means that reflect the special requirements for the relevant types of legal entities depending on the economic and legal interests of their founders / participants (Borysov, 2016, pp. 3–4).

In general, we are talking about various special legal statuses that have separate legal regulation of the order of creation and operation, in particular: credit unions, pawnshops, leasing companies, trust companies, insurance companies, funded pension institutions, investment funds and companies, other legal entities, exclusive the type of activity of which is the provision of financial services. Thus, it should be argued that there is a need to discuss the unification of legal status and types of economic activity (especially given the common approaches to licensing their activities).

4. Powers of the National Bank of Ukraine

Given the changes in the legal regulation of licensing of non-banking financial activities and the tasks of the National Bank of Ukraine, the question arises as to the ability of this constitutional body to perform them. Thus, according to Part 2 of Art. 99 of the Constitution of Ukraine, the main function of the domestic central bank – the National Bank of Ukraine – is to ensure the stability of the currency. A separate

norm stipulates that the Council of the National Bank of Ukraine develops the basic principles of monetary policy and monitors its implementation, and the legal status of the Council of the National Bank of Ukraine is determined by law (Art. 100).

Keeping in mind this constitutional wording, the Law of Ukraine “On the National Bank of Ukraine” delimits the main function (Art. 6), under which the National Bank of Ukraine must proceed from the priority of achieving and maintaining price stability in the country and other functions (Art. 7), which, in particular, includes the implementation of *state regulation* and *supervision on an individual and consolidated basis* in the markets of non-banking financial services for non-banking financial institutions and other persons who are not financial institutions but have the right to provide certain financial services and other laws of Ukraine (sp. 8-1, p. 1).

Referring to the licensing of non-banking financial services, we should focus on certain powers of the National Bank of Ukraine in the field of state regulation of non-banking financial services (Art. 28 of Law № 2664), namely:

- issues non-banking financial institutions and persons who are not financial institutions but have the right to provide certain financial services, licenses to conduct financial services, determines the procedure for their issuance, suspension, renewal and revocation (cancellation);

- determines the requirements for persons who intend to conduct financial services activities, including requirements for their ownership structure, corporate governance system, risk management and internal control, conditions of financial services activities, the implementation of which requires a license (license conditions), and the procedure for monitoring their compliance;

- establishes mandatory criteria and standards of capital adequacy and solvency, liquidity, profitability, asset quality and risk of operations, compliance with the rules of financial services and other indicators and requirements that limit the risks of transactions with financial assets;

- provides information on requests for information, provides conclusions on the attribution of transactions to financial services;

- imposes restrictions on the combination of certain types of financial services;

- determines the professional requirements for managers, chief accountants (persons responsible for accounting, including on the basis of contracts) of financial institutions and may require dismissal of persons who do not meet the established requirements for such

positions, or termination of relevant contracts;
 – sets the conditions and procedure for conducting internal audit (control) in financial institutions;

– establishes the procedure for approval in accordance with this Law of the acquisition or increase of significant participation in a financial institution.

Such a legislative approach is to some extent sufficient to regulate the provision of non-bank finance, in particular in terms of licensing. In addition, having its own powers of the National Bank of Ukraine in relation to rule-making activities, there is no special need for additional regulation.

However, according to Art. 34 of the Law № 2664, separate norms on licensing of non-banking financial services are established. Thus, the principles of licensing activities for the provision of non-banking financial services, which essentially duplicate the constitutional provisions of Art. 8, part 4 of Art. 13, Art. 19 of the Constitution of Ukraine: 1) freedom and equality of rights of economic entities; 2) a comprehensive analysis, which provides for a comprehensive analysis by the National Bank of Ukraine of each person to make decisions in the field of licensing; 3) legal certainty and reasonable doubt, which provides for the establishment of regulations in the field of licensing requirements for persons, the conditions of their activities and documents submitted by them to the National Bank of Ukraine within licensing procedures, as well as granting the National Bank of Ukraine rights, if there is reasonable doubt as to compliance with such requirements, or if there is information that requires further evaluation, require clarifications, clarifications and/or additional documents necessary to ensure that the requirements are properly met.

5. Features of licensing activities for the provision of non-banking financial services

The classification of the procedure for licensing economic activity depending on the specifics of legal regulation is proposed and substantiated in the legal literature: 1) general – unified procedure established by the Law of Ukraine “On Licensing of Economic Activities”; 2) special – based on the general provisions of the law, but has certain features defined by a special law; 3) special – is fixed by special laws and does not provide for the extension of the law (Averianova, 2019, p. 3).

According to p. 2 of Art. 34 of the Law № 2664, the National Bank of Ukraine within its competence in the field of state regulation of non-banking financial services issues licenses for financial services to *non-banking financial institutions* and *persons who are not financial*

institutions but have the right to provide certain financial services, (according to sp. 3–9, 11 p. 1 of Art. 4): trade in currency values; attraction of financial assets with the obligation to return them later; financial leasing; lending, including on the terms of a financial loan; providing guarantees; financial payment services; in the field of insurance; factoring.

According to Art. 35 of the Law № 2664, a person who intends to conduct a certain type of financial services subject to licensing, applies to the National Bank of Ukraine for a license, which must contain: 1) information about the identity of the applicant (name, location, banking details, identification code); 2) other information specified by regulations of the National Bank of Ukraine; 3) if the applicant has branches, other separate divisions, which will carry out activities on the basis of the obtained license, the application shall indicate their location.

The license application shall be accompanied by documents, the exhaustive list and requirements for the content of which are established by laws on regulation of certain financial services markets and regulations of the National Bank of Ukraine (these are resolutions of the Board of the National Bank of Ukraine: March 26, 2021 № 26 and December 24, 2021 № 153).

The National Bank of Ukraine shall decide on the issuance of a license or refuse to issue it within 30 working days from the date of receipt of the application for a license and the full package of documents attached to the application, unless otherwise provided by law (Art. 36 of the Law № 2664). The grounds for deciding to refuse to issue a license are:

1) inaccuracy of the information provided by the applicant;

2) non-compliance of the applicant and/or submitted documents with the requirements of the law and/or regulations of the National Bank of Ukraine, which determine the procedure and conditions for issuing a license established for the activity specified in the application for a license.

According to Art. 38 of the Law № 2664, in the case of a decision to issue a license, the National Bank of Ukraine no later than the next working day from the date of its adoption: makes an appropriate entry in the State Register of Financial Institutions or the Register of Persons who are not financial institutions but have the right to provide certain financial services; provides the applicant with an extract from the relevant register on the issuance of a license (the license takes effect from the date of entry by the National Bank of Ukraine of the entry in the relevant register).

The grounds for revoking (revoking) a license to provide financial services (Art. 38-1) should be analyzed separately, in particular those that are not related to the violation of licensing conditions or other violations of the law, namely:

– detection of the fact (facts) of *non-banking financial institution or a person* who is not a financial institution, but has the right to provide certain financial services, *risky activities* that threaten the interests of depositors and/or other creditors of such institution (person). The list of signs, the presence of which is the basis for the conclusion of the National Bank of Ukraine on the conduct of non-banking financial institution or a person who is not a financial institution but has the right to provide certain financial services, law of order;

– non-provision of any financial service by a non-banking financial institution or a person who is not a financial institution, but has the right to provide certain financial services, *within one year from the date of obtaining the license*.

The first ground is revealed in the Regulation on the application by the National Bank of Ukraine of measures of influence in the field of state regulation of activities in the markets of non-banking financial services, approved by the Resolution of the Board of the National Bank of Ukraine of February 1, 2021 № 12. Thus, such signs include systematic violations of the legislation on consumer protection and advertising in the field of financial services (for advertising that is considered unfair advertising); as well as certain violations of credit unions, insurers, non-bank financial institutions

licensed to provide guarantees (p. 9 of the Regulation), which in general should be characterized as violations of the law and not risky activities in understanding the nature of entrepreneurship.

In turn, failure to provide any financial services within a year from the date of obtaining a license appears to violate the freedom to conduct business, as it does not correlate with violations of licensing conditions or other legislation (of course, it is not a matter of concealing business “shelf”, “fiction” or “paper” organizations).

6. Conclusions

Summing up some results, the authors consider it appropriate to pay attention to the following. Legal regulation of financial services markets needs further improvement in the sequential separation of certain groups: banking services and non-banking financial services, which will promote unity in approaches to public financial management in general. The legal status of non-banking financial institutions, determined by separate laws, should be reviewed keeping in mind changes defined by Law № 2664. There is some doubt about the need to authorize the National Bank of Ukraine to regulate the entire financial services market. The authors believe that this approach is transitional in the context of the formation of self-regulation of the financial services market. The grounds for granting and terminating licensing activities within the framework of committing offenses and non-compliance with licensing conditions should be clarified that will promote good faith practice in the financial services market.

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ЛІЦЕНЗУВАННЯ НЕБАНКІВСЬКОЇ ДІЯЛЬНОСТІ В УКРАЇНІ: ОСОБЛИВОСТІ РЕАЛІЗАЦІЇ ПУБЛІЧНОГО УПРАВЛІННЯ

Анотація. Мета статті – розглянути особливості реалізації публічного управління у сфері ліцензування небанківської діяльності в Україні, визначити межі державного регулювання та встановити недоліки правового регулювання.

Методи дослідження. Роботу виконано на підставі загальнонаукових та спеціальних методів наукового пізнання.

Результати. У статті проаналізовано правове регулювання ринків небанківських фінансових послуг, правовий статус небанківських фінансових установ, повноваження Національного банку України в цій сфері, а також особливості ліцензування діяльності з надання небанківських фінансових послуг. Загальні правові засади у сфері фінансових послуг, регуляторні й наглядові функції фінансових послуг встановлені Законом України «Про фінансові послуги та державне регулювання ринків фінансових послуг». Загалом ідеться про різні спеціальні правові статуси небанківських фінансових установ, які мають окреме правове регулювання порядку створення та діяльності, зокрема кредитних спілок, ломбардів, лізингових компаній, довірчих компаній, страхових компаній, накопичувальних пенсійних установ, інвестиційних фондів і компаній, інших юридичних осіб, виключним видом діяльності яких є надання фінансових послуг. Варто стверджувати, що є необхідність обговорення уніфікації їхнього правового статусу та видів господарської діяльності (особливо з огляду на єдині підходи до ліцензування їхньої діяльності). Крім того, з огляду на власні повноваження Національного банку України щодо нормотворчої діяльності немає особливої потреби в додатковому регулюванні.

Висновки. Правове регулювання ринків фінансових послуг потребує вдосконалення щодо послідовного виокремлення окремих груп – банківських послуг та небанківських фінансових послуг. Правовий статус небанківських фінансових установ доцільно переглянути з огляду на зміни, визначені Законом України «Про фінансові послуги та державне регулювання ринків фінансових послуг». Вважаємо, що покладення на Національний банк України повноважень щодо регулювання всього ринку фінансових послуг є перехідним в умовах формування саморегулювання ринку фінансових послуг. Варто уточнити підстави для надання та припинення ліцензійної діяльності в межах вчинення правопорушень і невиконання ліцензійних умов.

Ключові слова: ліцензування, небанківська фінансова установа, державне регулювання, публічне управління, Національний банк України, економічні свободи, ринок фінансових послуг.

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