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ADMINISTRATIVE LAW PROVISIONS FOR ENGAGEMENT OF COMMERCIAL BANKS IN PUBLIC ADMINISTRATION IN UKRAINE

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Summary

The article analyzes the administrative law provisions for exercise of certain public administrative functions by commercial banks in Ukraine. The primary focus is placed on control activities, as well as the provision of administrative services. Problematic issues related to the delegation of public powers to non-state entities, including commercial banks, are considered. Conclusions about the possible prospects of the delegation of certain powers to commercial banks for public administration are made.

Key words: administrative law, public administration, delegation of powers, commercial banks, currency control, financial monitoring.

Аннотация

В статье анализируется административно-правовое регулирование реализации коммерческими банками в Украине отдельных публично-административных функций. Основное внимание уделено контрольной деятельности, а также предоставлению административных услуг. Рассмотрены проблемные вопросы, связанные с делегированием публично-властных полномочий негосударственным субъектам, включая коммерческие банки. Сделаны выводы о возможных перспективах делегирования коммерческим банкам отдельных полномочий для осуществления публично-административной деятельности.

Ключевые слова: административное право, публично-административная деятельность, делегирование полномочий, коммерческие банки, валютный контроль, финансовый мониторинг.

Description of problem. Public administration is traditionally considered primarily as a sphere of exercise of powers and functions of public authorities (especially the executive branch of power and local self-government). Russian author Grigoriy V. Atamanchuk, while analyzing the most studied component of public administration – state public administration (management) (Russian: государственное управление) – pointed out that the organizational structure of state public administration (management) relates to these activities (thus, introduces in management processes) almost all state and local authorities, which in one way or another get involved in the formation and implementation of public administration influences [1, p. 200].

It is not uncommon that delegation of powers takes place with regard to public administration within the executive branch of power and local self-government. In Ukraine, in particular, since the early 1990s significant steps have been taken with regard to deconcentration and decentralization of public administrative functions. Current Ukrainian legislation on local self-government and local state administrations contains various provisions for exercise of powers: a) delegated by state executive authorities to executive bodies of local (city, town and village) councils; b) delegated by oblast' and rayon councils to appropriate local state administrations. At the same time, the existing legal framework and law enforcement practice indicate that public administration or certain related functions may be performed by other actors (i.e., not belonging to state/national government or local self-government).

Nowadays, we may observe issues that are largely either overlooked or covered only partially by current Ukrainian legislation, such as: a) determining the overall range of subjects that may exercise delegated public powers; b) establishing uniform terms and conditions for their involvement in the exercise of public powers; c) providing for accountability, control, information management, and legal responsibility (liability) for irregularities in the exercise of public powers; d)

financial provisions for the exercise of public powers, etc. However, even Draft Law "On the Procedure of Delegation of Powers of Bodies of Executive Power and Bodies of Local Self-government" [2] did not mention non-public entities as possible subjects that may exercise delegated public powers. Existing regulations of relevant issues are occasionally found in specific Laws and acts of subordinated (delegated) legislation at various levels.

There are reasons that Ukrainian legislators did not define a set of universal rules for delegation of public powers (including those for the exercise of public administrative activities) to the entities that are not public authorities. These reasons stem from a number of problems regarding the delegation of powers to exercise public administration to non-public entities. First and foremost, the Constitution of Ukraine stipulates that sovereignty of the people of Ukraine is exercised by the bodies of state power and bodies of local self-government [3]. As such, these bodies form more or less hierarchical system with internal subordination and coordination. Those bodies of public power that exercise public administration are accountable to the people directly or via publicly elected officials. No such degree of subordination and public accountability exists in the private business sector or in the non-profit organizations (NPOs). Second, business entities and NPOs have particular goals of creation and existence of their own. Business works to make profit for its owners while NPOs pursue the satisfaction of social, cultural, ecological and other needs of their members. They are not obliged to act in the public interest because achieving public good is not their primary objective.

Scientific background. Public law researchers S.V. Kivalov, V.B. Aver'yanov, L.R. Bila-Tiunova, I.P. Holosnichenko, M.P. Orzikh, A.R. Krusyan, V.F. Pohorilko, O.F. Frytskyi, B.A. Perezhnyakin their scientific works turned to the issue of delegation of powers(including public administrative activities) by public authorities, in various scientific contexts, mainly, in constitutional and administrative law studies. However, problems regarding the exercise of delegated public administrative functions by private entities, including commercial banks, have not received due attention of scientists.

Ukrainian academician Vadym B. Aver'yanov pointed out that the subject of administrative law includes, inter alia, social relations, emerging during the implementation of executive powers delegated by the state to local self-government, NPOs and some other non-governmental institutions [4, p. 71]. This view is now shared by the majority of researchers in the field of administrative law in Ukraine. Contemporary Ukrainian scholars Serhiy V. Kivalov and Lyubov R. Bila-Tiunova, in turn, noted that the institute of delegation ofpublic (state) powers (Ukrainian: делегування державних повноважень),while not being novelty to the theory of administrative law, only recently started to emerge properly, especially in terms of legal description [5, p. 7]. Meanwhile, there is still a lot of work to be done with regard to laying proper theoretical foundation for delegation of powers before accordingly implementing it into national legislative framework and practice.

Natalya V. Galitsyna reflected that as per the concept by H. Wilsong the state transfers to the private sector a number of its functions only because it helps to more effectively address social and economic challenges. Reduction of functions performed by the state allows it to focus on important issues such as control over the bureaucracy and key strategic directions of the government [6, p. 83]. Based on her analysis, she concludes that the delegation of powers includes two sub-institutes: the delegation of powers from one body of public power to another and the delegation of public powers to private entities.

German researcher of administrative commercial law (German: Wirtschafts verwaltungsrecht) Rolf Stober indicates that the delegation aims to decentralize governance, to relieve public law organizations of excessive functions, to make use of private initiative and administrative resources, to guarantee the most effective way to utilize financial resources, technical and other expertise. Talking about the mechanism of delegation, he said that the delegation is carried out institutionally by law, by administrative act on the basis of law, by administrative law contract. Noteworthy is the author's position, according to which the delegation of powers should be distinguished from the performance of public tasks by virtue of the so-called duty of making a material or personal contributions for the benefit of public authorities. The entity that assumes such responsibilities does not perform public functions. It performs certain duties, guided by the interests of society, and thus helps the state to carry out public administration [7, p. 343–344].

According to Oksana Tereshchuk, delegation of powers is to be understood as an institute of administrative law that regulates the process (legal relations) of transfer of public administrative powers from delegating entity to another entity (public administration body, individuals or private/public legal entities) for a fixed period of time with mandatory provision of financial and property resources, appropriate control (oversight) restrictions and legal responsibility (liability) which is executed in the form of a contract or an act [8, p. 128].

Halyna V. Bublyk in her thesis in 2005 pointed at the controversial areas in the study of delegation of powers: a) the circle of subjects that delegate powers; b) acts of delegation of powers; c) free expression of subjects that delegate powers; d) scope, duration and area of implementation of delegated powers; e) determining the powers that belong to the exclusive competence of the body and which, accordingly, cannot be delegated to another entity; f) establishing a system of monitoring the exercise of delegated powers and responsibility (liability) for failure or improper execution of the delegated powers; etc. [9, p. 7]. Thus, the researchers note there is legal and theoretical basis for the delegation of powers, as well as some problems that need to be solved related to such a delegation.

Main study. Commercial banks in Ukraine are legal entities that under the appropriate banking licenses issued by the National Bank of Ukraine have the exclusive right to provide banking services. Details of commercial banks are included in the State register of banks. Legal and natural persons, residents and non-residents, as well as the state represented by the Cabinet of Ministers of Ukraine or its authorized bodies, may establish commercial banks. There are two legal formsfor banks created in Ukraine: public joint stock companies or cooperative banks. Commercial banks can

function as universal banks that provide a range of banking and other services or as specialized banks that focus only on a number of such services.

The core law regulating the activities of commercial banks in Ukraine is the Law «On Banks and Banking Activity» [10]. The Law states that commercial banks may provide banking and other financial services (except for insurance), and perform other activities specified in Article 47 of the Law. Banking services include: a) accepting deposits (savings) in currencies and precious metals from an unlimited number of businesses and individuals; b) opening and conducting current accounts of businesses and individuals and correspondent accounts of domestic and foreign banks in currencies and precious metals; c) provision of loans and other placement of funds in currencies and precious metals (accepted in deposits (savings) and held in current accounts) on its behalf, on its own terms and at their own risk. Other financial services include: a) issue of payment instruments, credit cards, traveler's checks and/or maintaining, clearing, otherwise providing for settlement of payments; b) trust management of financial assets; c) currency exchange; d) financial leasing; e) provision of guarantees and sureties; f) money transfer; g) professional activities in the securities market, subject to licensing; h) factoring; etc. Other activities that may be performed by commercial banks are: a) investments; b) issue of own securities; c) issue, distribution and conducting of lotteries; d) storage of valuables, including provision of individual deposit boxes for rent; e) cash collection and transportation of currency; f) keeping registers of securities (excluding own shares);g) providing consulting and information services relating to banking and other financial services.

The Law «On Banks and Banking Activity» does not mention any specific activities or functions related to the exercise of the powers of public authorities, including public administration, by commercial banks. We may assume that in this particular Law the legislators made emphasis on the components of the legal status of commercial banks reflecting the main purpose of their participation in social (especially economic) relations. However, other laws and subordinate legislation (regulatory acts)have defined certain functions of commercial banks, which, in our opinion, may be interpretedin the context of public administration.

The Law «On Prevention and Counteraction to the Legalization (Laundering) of Proceeds from Crime, the Terrorist Financing and the Financing of Proliferation of Weapons of Mass Destruction» [11] provides for the exercise of initial financial monitoring, including, in particular, compulsory and internal financial monitoring, by commercial banks. These types of financial monitoring include measures to detect the financial transactions subject to this monitoring (including using arisk-based approach), identification, verification of clients (clients' representatives), keeping records of transactions and information on their parties, mandatory reporting of the transactions of the competent authority (the State Financial Monitoring Service of Ukraine), filing of additional and other information in the cases provided by law.

Regulation on financial monitoring by banks, approved by the Act of the Board of National Bank of Ukraine on 26.06.2015 № 417 [12] contains detailed provisions on: 1) accounting of banks with the State Financial Monitoring Service of Ukraine as subjects of initial financial monitoring; b) identification and registration by the banks of financial transactions subject to financial monitoring or for which there are reasonable grounds to suspect that they are connected, related or intended for the terrorist financing or the financing of proliferation of weapons of mass destruction; c) development, approval, continuous updating of internal documents of the bank regarding financial monitoring; d) identification (simplified identification), verification of clients (clients' representatives), study of clients, clarification/additional clarification of information on clients; e) providing information by banks to the State Financial Monitoring Service of Ukraine in accordance with the laws of Ukraine on prevention of money laundering / terrorist financing; f) management of risk of money laundering / terrorist financing; g) suspension, resumption of financial transaction supon execution of decisions (orders) of the State Financial Monitoring Service of Ukraine; h) approval of appointments and dismissals of responsible financial monitoring officers of the banks.

Decree of the Cabinet of Ministers «On Currency Regulation and Currency Control» [13] stipulates that commercial banks that received general licenses for currency transactions from the National Bank of Ukraine, i.e. the authorized commercial banks, exercise control over foreign currency transactions conducted by residents and nonresidents through the relevant institutions. Regulations on currency control, approved by the Act of the Board of National Bank of Ukraine on 08.02.2000 № 49 and registered with the Ministry of Justice of Ukraine on 04.04.2000 with № 209/4430 [14] specify functions of commercial banks as agents of currency control. Currency control powers provide the authorized commercial banks with authority to prevent residents and non-residents from carrying illegal foreign currency transactions through these institutions and/or to timely inform the relevant authorities (in particular, the State Fiscal Service) about residents and non-residents violating the legislation relating to the conduct of their foreign currency transactions in the cases and in the manner prescribed by law.

In our view, imperative method of legal regulation (which prescribes certain course of action for the commercial banks in relations with their clients) and the core essence of functions of financial monitoring and currency control provide the ground to consider the relevant actions as public administrative activities of commercial banks.

When discussing engagement of commercial banks in public administration, it appears appropriate to focus on involvement of commercial banks in provision of administrative services. Russian scientist Yuriy A. Tikhomirov said that the public law regulation of the economy includes a mechanism of public participation in commercial activities, and the flexible choice of forms of public participation creates modes and conditions of effective activity for society and corporate structures [15, p. 208]. Ukrainian pundit for the Center of political and legal reforms Viktor P. Tymoshchuk offers to consider the privatization of administrative services and/or the introduction of competition either as an alternative to both a decentralization of powers to provide such services or as a parallel way to improve their quality [16, p. 119].

We can note that recently there wereattempts to establish legal framework for provision of certain administrative servicesby commercial banks. The Draft Laws on amendments to the law on state registration of property rights to real estate [17] as well as the state registration of legal entities and individual entrepreneurs [18] original lycontained rules that introduced commercial banks as subjects that exercise powers (provide services) in the above mentioned fields of state registration. In order to provide these state registration services commercial banks would have to be accredited by the Ministry of Justice of Ukraine in accordance with the procedure established by the Cabinet of Ministers of Ukraine and the National Bank of Ukraine. However, when the relevant draft laws were considered and amended before the second reading in the Verkhovna Rada of Ukraine, the appropriate provisions were excluded on the proposals of a number of Members of Parliament (People's Deputies)in favor of granting the relevant powers to accredited state and municipal legal entities.

In spite of the fact that Ukraine is yet to delegate the provision of public administrative services to commercial banks, there are already some other functions relating to these services that can be undertaken by commercial banks. Recently, the National Bank of Ukraine made some steps to streamline implementation of electronic remote identification of clients (users) by commercial banks in Ukraine for receiving administrative services via the Unified State Portal of Administrative Services or from providers of administrative services, as well as user access to information and telecommunication systems of public authorities (BankIDsystem) [19]. This system would enable businesses and individuals that have remote access to their banking accounts to use their banking remote identification to access administrative services through the Unified Portal or by directly interacting (via websites) with public authorities that provide such services.

Conclusions. Having researched the theoretical background and current legal provisions for engagement of commercial banks in public administration in Ukraine, we come up to the following conclusions.

First, currently there is no comprehensive legal framework for the delegation of public powers (including those for the exercise of public administration) to private entities in Ukraine. We believe that establishment of such framework with necessary restrictions and safeguards would significantly enhance any future steps towards delegating more public powers in the course of decentralization, deconcentration and privatization. In the meantime, it is essential that the development of appropriate legislation gets under way with active participation of legal experts, scientific community, government and private sector representatives, as well as political leaders.

Second, commercial banks in Ukraine are engaged in certain activities that are regulated by administrative law provisions. These activities include different types of public control: financial monitoring, which is exercised to prevent and counteract the legalization (laundering) of proceeds from crime, the terrorist financing and the financing of proliferation of weapons of mass destruction, and currency control, which is exercised to prevent residents and non-residents from carrying illegal foreign currency transactions. In our view, these activities should be analyzed and assessed in the context of public administration.

Third, we believe that there are sufficient conditions in Ukraine to create appropriate legislation for delegation of powers to provide administrative services to private entities. Some fields in which such administrative services may be provided by commercial banks are registration of businesses, registration of representative offices of foreign companies, registration of title and other property rights to real estate etc. It would be necessary to ensure compliance of any such provision with public interests and guaranteeing the implementation of relevant rights of individuals and legal entities.

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ПРАВОВОЙ РЕЖИМ ИМУЩЕСТВА ГОРНОГО ПРЕДПРИЯТИЯ

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Summary

The article analyzes the problematic issues of legal regime of property of mining enterprises. The author describes the material rights, on which is based the economic activity of mining companies, including the right of property, right of economic conduct and right of operational management. The types of mining companies, depending on the form of property on which they are based, are considered. Analyzed the definitions of «mining enterprise», «mining object», «complete property complex». Limitations of legal regulation of legal regime of property of mining enterprises are revealed. Suggestions for improvement of the mountain law of Ukraine are elaborated and sounded.

Key words: mining enterprise, mining object, right of economic conduct, right of operational management, responsibility.

Аннотация

В статье анализируются проблемные вопросы правового режима имущества горных предприятий. Автором охарактеризованы вещественные права, на основе которых базируется хозяйственная деятельность горных предприятий, в том числе право собственности, право хозяйственного ведения и право оперативного управления. Рассмотрены виды горных предприятий в зависимости от формы собственности, на которой они основаны. Проанализированы определения понятий «горное предприятие», «горный объект», «целостный имущественный комплекс». Выявлены недостатки правового обеспечения правового режима имущества горного предприятия. Выработаны и обоснованы предложения по усовершенствованию горного законодательства Украины.

Ключевые слова: горное предприятие, горный объект, право хозяйственного ведения, право оперативного управления, ответственность.

Постановка проблемы. В современных условиях хозяйствования в Украине, характеризующихся становлением частнособственнических отношений в процессе разгосударствления, приватизации и корпоратизации, в том числе предприятий горнодобывающей и горноперерабатывающей промышленности, наибольшего внимания заслуживают проблемные вопросы правового режима имущества субъектов хозяйственной деятельности. Несмотря на наличие довольно прочной правовой основы в виде соответствующих статей Конституции Украины, Хозяйственного и Гражданского кодексов Украины, Налогового кодекса Украины, законодательства о бухгалтерском учете и финансовой отчетности, необходимость дальнейшего теоретического исследования правового режима отдельных субъектов хозяйствования не вызывает сомнений. Ведь именно эта правовая категория – одна из тех, которая позволяет раскрыть особенности правового статуса того или иного субъекта хозяйствования в полном объеме, определить круг его имущественных прав и обязанностей в процессе хозяйствования, а также охарактеризовать особенности ответственности субъекта хозяйствования по его обязательствам.

Актуальность теми исследования. Исследованию правового режима субъектов хозяйствования посвящены работы известных ученых-юристов. В частности, в исследованиях О. Винник рассмотрены проблемные вопросы права собственности как основного правового режима имущества субъектов хозяйствования [1]; актуальные аспекты правового режима субъектов предпринимательской деятельности положил в основу своего диссертационного исследования Ю. Пацуркивский [2]; критический анализ норм хозяйственного законодательства, регламентирующих понятие и содержание правового режима имущества в сфере хозяйствования, осуществлен В. Щербиной. [3]. В то же время особенности правового режима имущества отдельных субъектов хозяйствования, в том числе горных предприятий, требуют дальнейшего исследования и доработки с целью устранения недостатков правово-