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VICARIOUS RESPONSIBILITY OF THE MINISTRY OF DEFENSE FOR ECONOMIC COMMITMENTS OF A MILITARY UNIT AS A FEATURE OF THE SPECIFIC ECONOMIC ACTIVITIES IN THE ARMED FORCES OF UKRAINE

The article deals with legal regulation of vicarious responsibility of the Ukrainian Defense Department for economic obligations of military units during their economic activities.

There is indicated the specificity of such activity in the Armed Forces of Ukraine that shall be settled by special legislative acts.

Attention is focused on the existing inconsistencies of the current legislation on issues that are investigated, the need to eliminate them, and the need to rationalize the rules of military law through adherence of interconnection as to the theory of economic law, and taking into account the existing legal provisions in the field of economic legislation of the country as well.

Key words: non-profit economic activities, military units of the Armed Forces of Ukraine, military economy, military property, economic entity, vicarious liability, Ministry of defense of Ukraine, extrabudgetary incomes.

Introduction

The Armed Forces of Ukraine are special state organization (formation), which shall perform one of the most important functions of the state – defense of Ukraine, protection of the sovereignty, territorial integrity and inviolability¹.

Therefore, the implementation of measures aimed at strengthening the country's defense capability is a matter of public character, and maintenance of their own armed forces should occur only at the expense of the state budget.

But, the real economic situation in Ukraine in the current environment does not allow to ensure 100 percent provision for defense needs with the State budget, particularly in terms of reforming the Armed Forces of Ukraine. Such a situation resulted necessity of involvement the national Armed Forces to accomplishment of their own economic activities in order to obtain additional sources of funding everyday functions of troops directed to maintain their combat and mobilization readiness at the appropriate level (extrabudgetary incomes).

Participating of military units of the Armed Forces of Ukraine in economic relations, to date, on the one hand, though legally authorized by the State, but on the other hand, permeated with the spirit of the specificity and purpose limitations. This problem is exacerbated by some obsolescence, and therefore – mismatch and contradictory of legal regulation economic and commercial activities of military units, which inevitably causes difficulties in the practical implementation of the existing legislation on this issue.

However, the level of scientific research the legal status of military units, their economic activities remains negligible. Among the theoretical investigations of national researchers with stated issue works of O.Vinnyk, O.Zeldina, S.Ivanov, V.Kisel, P.Kondyk, O.Petrychenko, V.Scherbyna and some others have been devoted. Outside Ukraine, particularly in Russia Federation, where the level of investigation the issues of economic and business activity of military units is much deeper, it is necessary to note works of V.Baranenkov, A.Vinogradov, A.Kudashkin, V.Kudashkin, V.Lesovoy, V.Manov, L.Smorchkova, V.Strekozov, S.Tereshkovych and many others.

Main results of research

A significant proportion of economic relations in society constitute business relationships, which by their legal nature are formed both in the horizontal and in the vertical plane, but herewith characterized by a close interconnection, unity, as they have organizational-pecuniary nature.

¹ Конституція України 1996 (Верховна Рада України). *Відомості Верховної Ради України*, 30, 141.

The concept of economic relations is inextricably linked to the concept of business activities that G.L.Znamenskyy defined as activities in the sphere of material production associated with the organization of the use of property for the manufacture and sale of goods, works and services¹.

Other authors define economic activities as socially useful activities of business entities for the production of products, works and services in order to their realization for a fee (as a commodity) that is based on a combination of private and public interests is carried out professionally and undergo significant regulation for social orientation of the economy².

Despite the large number of definitions of economic activity in scientific works and in some legislation, more meaningful concept of economic activity is given in Art.3 of Economic Code of Ukraine, where such activity is determined by the activity of entities in the area of social production, focused on manufacturing and selling products, works or services of value character with price definiteness³.

Economic activities are classified according to various criteria. Thus, it should be noted that all the scientists in the field of economic law in their works, exactly as the legislator in the Economic Code of Ukraine, pay particular attention to research and regulating the differentiation of economic activity on the criteria of goal (purposefulness) of its implementation, dividing it into a business (commercial) and non-profit economic activity (Economic Code of Ukraine, 2003, Art. 3, 42, 52)⁴. Commercial economic activity (entrepreneurial) – is an economic activity that is carried out to achieve economic and social results and to make a profit. Non-profit activity is carried out without the purpose of generating profit.

In view of the chapters VII and VIII of the Economic Code of Ukraine, it is possible to distinguish certain types of economic activity by the criterion of specificity their realization (even among the diversity of economic relations in general), and thus also the specific means of their legal regulation of (special legal regimes). Among them: foreign-economic activity, foreign investment, special economic regimes. The latter include: the creation of special (free) economic zones, socially-oriented concessionary activities, activity in the exclusive (maritime) economic zone of Ukraine, on the State Ukraine's borders, in sanitary-protective and other protection areas, under the conditions of emergency or martial law, in some branches of national economy, in the Armed Forces of Ukraine.

Turning to the specifics of the legal regime of economic management in the Armed Forces of Ukraine, as the subject of this research, it is necessary to note the following.

According to O. Vinnyk, special legal regime of economic activity, inter alia in the Armed Forces of Ukraine, is established in order to stabilization (of economic situation – *note of the Author*) or accelerated development in this State organization. But the expressed idea is accurately and meaningfully complemented by O.Podtserkovnyy who draws attention to presence of and other purposes of the special economic management regime in the Armed Forces of Ukraine as well as other regimes of economic management related to governance of State property. Thus, in case of establishment the special economic management regimes in general sectors of economy, the public interest in the preservation and enhancement of state and municipal property is taken into consideration⁵.

Owing to research of the theoretical aspects of special economic management regimes scientist O. Zeldina gives the notion of a special economic management regime as a legal regime that defines the organization and carrying out economic activity in a particular area, in certain field of economy, which differs from general regime of economic activity set by law, and is introduced by the State with a purpose to provide reasonable combination of public and private interests through the establishment of limits and/or incentives for economic entities⁶.

¹ Знаменский, Г.Л. (2012). Новое хозяйственное право. Избранные труды: *сборник научных трудов*. Киев: Юринком Интер, 19.

² Вінник, О.М. (2008). Господарське право: *навчальний посібник*. 2-ге вид., змін. та доп. Київ: Всеукр. асоціація видавців «Правова єдність», 10, 714.

³ *Господарський кодекс України 2003* (Верховна Рада України). *Відомості Верховної Ради України*, 18, 19-20, 21-22, 144.

⁴ *Господарський кодекс України 2003* (Верховна Рада України). *Відомості Верховної Ради України*, 18, 19-20, 21-22, 144.

⁵ Подцерковний, О.П., Квасніцька, О.О., Смітюх, А.В. (2010). *Господарське право: підручник*. Харків: Одісей, 339, 599-600.

⁶ Зельдіна, О.Р. (2007). Теоретичні аспекти спеціального режиму господарювання: *автореф. дис. ... д-ра юрид. наук*: 12.00.04; НАН України. Ін-т екон.-прав. дослідж. Донецьк, 33.

Slightly differs from the present definition of the concept of a special economic management regime that L. Taran provides. She emphasizes that a special economic management regime is a special procedure for legal regulation of certain general relations, which is set to the concrete range of subjects, and which differs from general regime by preferential or restrictive orientation of regulation caused by public interest reflected in all elements of its mechanism, through guarantees, benefits, forms of government support, restrictions, prohibitions and additional grounds of legal liability.

In accordance with scientific classification of a special economic management regime, economic activity in the Armed Forces of Ukraine is attributed to restrictive special economic management regime and its such kind as departmental-constant one¹.

The restrictive special economic management regime is a mode where the legislator through the establishment of restrictions on the implementation of economic activity reaches certain goals for the protection of areas, facilities and more. The departmental-constant economic management regime is a mode which always operates in a certain department (e.g., economic provision of the Armed Forces of Ukraine belonging to the Defense Department).

The special regime of economic management in the Armed Forces of Ukraine is primarily established by law peculiarities of possession, use and disposal of property that is managed by the Armed Forces, that is a significant part of public property. Therefore the legal regime of this property and economic activities carried out by its use has not secondary importance to the economy and, in particular, for its State sector.

Economic activities of the Armed Forces of Ukraine is regulated through the establishment of restrictions in the organization and running economic operations by military units to maintain their everyday functions, combat and mobilization readiness that allows to balance public and private interests.

The established legal construction is aimed at ensuring systematic interaction between different subjects who are involved in this process (Ministry of Defense of Ukraine, military units, civilians, military personnel involved in business transactions) by defining the mutual rights, duties and responsibilities of all subjects of these complex relationships. Economic provision of the Armed Forces of Ukraine stipulates vertical (management) and horizontal (contractual) relationships.

Special legislative act regulating performing economic activity in the Armed Forces of Ukraine, except parts 2-4 of Article 414 of the Economic Code of Ukraine, is the Law of Ukraine “On economic activities in the Armed Forces of Ukraine”², and also a number of other legislative and normative legal acts adopted to the development of special laws.

According to the analysis of the legal framework on this issue, scientists concluded that the specific nature of economic activities in Armed Forces of Ukraine, which is determined by several criteria. Among them, in particular, the scientists observed: a) its non-profit nature; b) presence of a specific purpose due to difficult economic situation in the State. It is to obtain additional sources of funding for the Armed Forces of Ukraine to maintain the proper level of their combat and mobilization readiness; c) concretization and limitation of forms and types of economic activity permitted to military units of the Armed Forces of Ukraine; d) execution of certain kinds of activities which are subject to licensing, free of charge to pay for obtaining necessary licenses; e) special procedure for transmission by military units assigned to them movable and immovable property for rent; f) establishment of a special procedure for registration of military units as subjects of economic activities (economic entities). It should be noted that such features include also a special procedure of accounting and use of funds gained due economic activities of military units of the Armed Forces of Ukraine, as well as obligation of the Ministry of Defence to bear subsidiary liability for economic duties of a military unit – an economic entity, in the event of insufficient funds at the relevant accounts of budget expenses.

Thus, in accordance with the art. 5 of the Law of Ukraine “On economic activities in the Armed Forces of Ukraine” the military unit as an economic entity is responsible for its obligations by funds received on its account under the relevant articles of the estimate budget (except protected articles). And in the event of insufficient of allocated funds the Ministry of Defense bears finance responsibility for the military unit’s contractual obligations. That is actually the legislator establishes vicarious liability of central body of state administration of Ukraine – Ministry of Defense – for a military units’ obligations which

¹ Зельдіна, О.Р. (2007). Теоретичні аспекти спеціального режиму господарювання: автореф. дис. ... д-ра юрид. наук: 12.00.04; НАН України. Ін-т екон.-прав. дослідж. Донецьк, 33.

² Закон про господарську діяльність у Збройних Силах України 1999 (Верховна Рада України). *Відомості Верховної Ради України*, 48, 408.

emerged when exercising by the latter economic activities and in case of insufficient funds at the relevant budget articles (accounts).

Let us consider this very important and essential feature of specificity of the legal regime of economic management of military units in the Armed Forces of Ukraine.

Economic liability by itself is a special kind of legal liability, which is used in the economic management and realized via laying on the offender of certain economic and legal sanctions. Apart from stem features, economic liability also has aspectual (specific) ones. Among the latter, in particular, are the ones which presuppose the responsibility not only by law or relevant legal act of the authorized state bodies, but also by economic contracts, including the constituent ones, that are concluded with the legal requirements¹.

Also, unlike the civil, administrative or legal liability set by labor law, economic liability of the subject of economic management occurs usually regardless of the guilt of a violator of economic obligations². The latter exclude force majeure circumstances which in most cases should be taken into consideration when concluding of economic contracts. In other words, economic responsibility generally is based on the presumption of guilt of an offender – a subject of economic management³. But here it is necessary to consider that absence of fault in any case not preclude the application of such form of economic responsibility as the operational-economic sanctions⁴.

As a general rule regarding the scope of economic and legal liability the founders and members a subject of economic management (business entity) are not liable for the obligations of this subject (Economic Code of Ukraine, 2003, Art. 219; Civil Code of Ukraine, 2003, Art. 96)⁵. However, this rule can have exceptions provided by law or the constituent documents. This exception is cases of vicarious liability.

Reference literature⁶ include vicarious liability to civil liability species and define it as an additional liability of persons responsible with the debtor in cases provided by law or contract. According to the rules set out in Article 619 of the Civil Code of Ukraine, the essence of vicarious liability is that a creditor before making claims to the subsidiary debtor has to apply the requirements for the main violator of contract. And only if the creditor can not meet his demands by the principal debtor, he refers with his requirements to the vicarious debtor. If the latter satisfies the creditor claims, he acquires a right of recourse to the principal debtor.

Considering the multiplicity of subjects in economic obligations G. Smolin defines vicarious liability as a form of economic liability, which lies in the additional liability of a third party along with the principal violator, realization of which exercises “by turn”. Claims must be made primarily to the principal debtor and only if the failure to obtain from him their satisfaction in full or in part – to the person who has additional (subsidiary, vicarious) liability⁷.

Thus, understanding of vicarious liability in civil and economic law are identical. In addition, as a general rule established by the parts 1 and 2 of Art. 219 of the Economic Code of Ukraine, founders of subject of economic management (business entity) are not liable for the obligations of this entity, except as provided by law or the constituent documents of that entity. For failure or improper performance of economic obligations or violation of the rules of economic activities offender responds with belonging to him/it by the right of ownership or assigned to him/it under economic jurisdiction or operational management of the property, unless otherwise stipulated by normative legal acts of higher legal force.

As for the exceptions to this rule, they are, for example by virtue of part 7 of Art. 77 of the Economic Code of Ukraine concern an official government enterprise, which is responsible for its obligations only by

¹ Задихайло, Д.В. (2012). Розділ 8.2. Господарське право: *підручник*. <http://pidruchniki.ws/1584072048615/pravo/gospodarske_pravo_-_zadihaylo_dv>.

² Мамутов, В.К. (ред.) (2002). *Хозяйственное право: учебник*. Киев: Юринком Інтер, 862.

³ Щербина, В.С. (2003). *Господарське право: підручник*. Київ: Юрінком Інтер, 145.

⁴ Подцерковний, О.П., Квасніцька, О.О., Смітюх, А.В. (2010). *Господарське право: підручник*. Харків: Одісей, 339, 599-600.

⁵ *Господарський кодекс України 2003* (Верховна Рада України). *Відомості Верховної Ради України*, 18, 19-20, 21-22, 144.

Цивільний кодекс України 2003 (Верховна Рада України). *Відомості Верховної Ради України*, 40-44, 356.

⁶ Терминологический словарь. *Портал ЛІГА:ЗАКОН*.

<http://search.ligazakon.ua/l_doc2.nsf/link1/TS000793.html>.

Шемшученко, Ю.С. (відп. ред.) (1998). *Юридична енциклопедія: в 6 томах*. Київ: "Укр. енцикл.", Т. 1: А-Г, 436.

⁷ Смолин, Г.В. (2008). *Господарське право України. Загальна частина: навчальний посібник*. Львів.

funds that are at its disposal. In case of insufficiency of these funds, the Government represented by authorized state body in whose jurisdiction the enterprise is, bears full vicarious liability for economic obligations of the official government enterprise.

Such an exception, of course, and to be considered as established in Article 5 of the Law of Ukraine "On economic activities in the Armed Forces of Ukraine" Ministry of Defense's duty to be responsible for the obligations of a military unit – a subject of economic management in the event of insufficient funds on the relevant accounts of this unit's estimate budget (except the protected articles).

In this, it needs to remember that the property of a military unit owned by the State and under Art. 3 of the Law of Ukraine "On the legal regime of property in the Armed Forces of Ukraine"¹ and Part 3 of Art. 5 of the Law of Ukraine "On economic activities of the Armed Forces of Ukraine" is located in a military unit under the right of operational management and can not be subject to penalties for the obligations of a military unit. The only object of satisfaction of the creditor for the obligations of the military is just monetary funds that are found at the corresponding treasure account of a military unit, in case of which insufficiency the Ministry of Defense of Ukraine must bear vicarious responsibility. However, since the indicated Law regulates the legal basis of economic activities and responsibility of a military unit as a business entity in accordance with the Preamble and Article 5, it casts doubt on application of vicarious liability to the Ministry of Defense of Ukraine for budgetary commitments of a military unit. That is such commitments which, for example, although specified by certain contracts, but directed to purchase goods, services or works to the needs of the military unit at the expense of the State Budget and are not related to economic obligations of the military as a business entity (subject of economic management). The circumstance that military unit in the specified legal norm is defined as a business entity, emphasizes only the right of the military unit to participate in the economic circulation, but does not accentuate on the fact that a breach of its obligations, inflicting damage or loss or which it is to be responsible under law and contract, occurs during (or in consequence of) exactly economic activities of the military unit. That economic activity, purpose and content of which are specified in Art. 1 of the aforesaid Law – providing daily life activity of troops (forces) to obtain additional financing sources.

In general, establishing vicarious responsibility of the Defense Ministry of Ukraine for the obligations of a military unit is quite fair, because the State represented by the Ministry of Defence is the ultimate acquirer or consumer of results of performance (including economic) of any military unit². Thus, the State as the owner of the property on which military units are functioning, in a certain sense "stands behind each of their agreement, even if committed in their name"³, and, in fact, at any time can: a) withdraw military property (fully or partially); b) liquidate or relocate military unit; c) approve the estimate expenditures of the military unit (both in for General and for Special Fund of State Budget) in less than the needed a military unit to perform its commitments (including under economic contracts) amount, or make it with significant delays; d) etcetera. That is does not always precisely military unit will cause failure or improper fulfillment of contractual obligations, including those to make their own economic activities.

In this, it seems quite successful the above legal norm, enshrined by Part 7 of Art. 77 of the Economic Code of Ukraine on the specifics of property accountability of official government enterprises on the results of their economic activity, basic elements of which, in view of the foresaid, worth to introduce to the rules of economic liability of military units. Therefore, Partss 1 and 2 of Article 5 of the Law of Ukraine "On economic activities in the Armed Forces of Ukraine" needs further adjustment: Part 1 of Article 5 after the phrase "rights and interests of individuals and legal entities and state" should be supplemented with the words "as a result of economic activity", and the Part 2 of the same Article, after the words "and in case of their insufficiency" to supplement with the word "vicarious".

However, the problem remains the fact that a detailed procedure for implementing provision of Article 5 of the above mentioned Law concerning the involvement of the Ministry of Defense of Ukraine to responsibility for economic obligations of military units is still not developed. To that was indicated in some previous scientific researches in relation issues of tort ability of military units of the Armed Forces of

¹ Закон про правовий режим майна у Збройних Силах України 1999 (Верховна Рада України). *Відомості Верховної Ради України*, 48, 407.

² Іванов, С.О. (2007). До питання про цивільно-правовий статус МОУ. *Університетські наукові записки*, 4, 164.

³ Сергеев, А.П., Толстой, Ю.К. (ред.) (2005). *Гражданское право: в 3-х томах*. 4-е изд., перераб. и доп. Москва: «Проспект», Т.1, 225.

Ukraine¹. Indeed, military units are purely budgetary organizations which for certain Treasury regulations are financed from the State Budget. This circumstance requires special legal mechanism for the implementation of economic-proprietary commitments by the Defense Department to third parties in case of failure their performance by subordinate military units. The mechanism of settlement of accounts payable of military formations and law enforcement agencies for receiving military property (commodities, production), work performed and services rendered², can only be considered as an example of the legal settlement of this problem, but in no way can be applied as a mechanism for vicarious liability of the Ministry of Defense for economic obligations of military units, because the above Regulation: a) adopted in pursuance the Law of Ukraine "On the Procedure of Repayment Commitments of Taxpayers" (the Law of Ukraine "On the Procedure of Repayment Commitments of Taxpayers", 2000. The Law has expired in 2010 – *note of the Author*)³; b) directed to repay the tax obligations to the budget creditors being business entities – immediate suppliers of military equipment, executors and service providers to military units, but not vice versa; c) covers a certain time period which has remained in the past; d) determines the subsidiary debtor for liabilities of military units not the Ministry of Defense, but State as an immediate owner of military property represented by public body – the State Treasury of Ukraine (present time – State Treasury Service of Ukraine).

Conclusions

Thus, the charge of the Ministry of Defence to bear subsidiary responsibility for economic obligations of a military unit – the subject of economic management in the event of insufficiency funds the latter on the relevant articles of the estimate budget is a feature of the specificity of economic activities in the Armed Forces of Ukraine. However, the legal establishment of vicarious responsibility of the Ministry of Defense of Ukraine for economic obligations of military units in the event of insufficient funds in their possession on the relevant articles of the estimate of costs in the State Treasury agencies, not completely solve the problem of satisfying the legitimate claims of creditors (counterparties of military units in economic relations) at the expense of the subsidiary debtor. Such a legal mechanism requires separate development and adoption of a special act of the Government of the country. At the same time further normative work on this issue should take place in close relationship with both the theory of economic law, and taking into account the existing general legal provisions in the field of economic legislation when searching for solutions of assigned to the Armed Forces of Ukraine problems and economic challenges of our days.

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¹ Кісель, В.Й. (2005). Деякі аспекти деліктоздатності військових частин Збройних Сил України. *Вісник Господарського судочинства*, 5, 147-154.

² *Постанова про порядок погашення кредиторської заборгованості військових формувань та правоохоронних органів за отримане військового майно (товари, продукцію), виконані роботи та надані послуги* 2003 (Кабінет Міністрів України). *Офіційний вісник України*, 18-19, 819.

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