

## **Comprehensive Analysis of Independent Regulatory Authorities in Ukraine, Portugal and Lithuania**

*Стаття спрямована на вивчення незалежних регуляторних органів в Україні, їх приналежність до виконавчої гілки влади або їх незалежність, а також наявність таких органів у Португалії, їх види, функції та незалежність, якщо вона наявна, а також проведений аналіз незалежності регуляторних органів Литви та нормативних проблем їх функціонування.*

**Ключові слова:** право, незалежність, незалежний регуляторний орган, нормативний, державний орган.

*Статья направлена на изучение независимых регуляторных органов в Украине, их принадлежность к исполнительной ветви власти или их независимость, а также наличие таких органов в Португалии, их виды, функции и независимость, если она имеется, к тому же осуществлен анализа независимости регуляторных органов Литвы и нормативных проблем их функционирования.*

**Ключевые слова:** право, независимость, независимый регуляторный орган, нормативный, государственный орган.

*This scientific article is aimed to explore independent regulatory authorities in Ukraine, their affiliation with the executive branch of government or a separate functioning. The author also addresses the problems of legal certainty of the location of these independent regulatory bodies in the system of government of Ukraine, the need to improve Ukrainian legislation in the part of their controllability. Demonstrate the disadvantages of understanding of the state authorities concerning the place of independent regulatory authorities in the system of state government. Concluding from the legal analysis that that these authorities are not in any way subordinated to the Cabinet of Ministers of Ukraine, they are only to some extent linked the work of the Cabinet of Ministries of Ukraine. Therefore, information from the official web-site of the Cabinet of ministries of Ukraine is false, misleading not only ordinary people without legal education, but also some scholars. Moreover, the author demonstrates existence of such authorities in Portugal, their kinds, executable functions and actual independence with minor deviations in part of accountability. These regulatory agencies are independent public institutions. They have administrative and financial autonomy, but are accountable to the relevant parent ministry for the sector. Moreover, the author makes comparisons and parallels between the regulation of Ukrainian and Lithuanian independent regulatory authorities. In Lithuania, these bodies are generally scattered across a variety of group: some of them is called as independent, another – as independent accountable to the Parliament, or just accountable to the Parliament, other institutions are defined as independent state institutions. So, as in Ukraine, there are problems in Lithuania with the delineation of the place of independent regulatory authorities in the system of state bodies that only demonstrates imperfections of legal regulation and the need to its total improvement.*

**Keywords:** executive, independence, independent regulatory authority, normative, state body.

**Issue.** Independent regulatory bodies of Ukraine play an important role in regulating the spheres of society's existence, since they control such spheres as energy, informatization, finance, etc. Such bodies require a special study of their legal position, because it determines their correct functioning or creates additional problems.

**Analysis of recent researche and publication.** Issues of the legal status of independent

regulatory authorities not only in Ukraine but also in other countries were developed by the following scholars: V.S.Goshovsky Yuliya Vashchenko Aurelija Pūraitė, Ieva Deviantikovaitė.

**Unsolved problems before.** The problem of legal uncertainty of the legal status of independent regulatory authorities in Ukraine and in some other European countries, as demonstrated in this

scientific article, represents the factual need for such research and solution of the issues raised.

**Researched purpose.** Taking into account the uncertainty of the legal status of the activity of independent regulatory authorities in Ukraine, the author considers it appropriate to study the peculiarities of legal regulation of these bodies in other European countries for finding common defects and introducing advantages by using the aquired knowledge.

**Main body.** It has been historically formed that 1980s and 1990s characterized by a reforming of regulation in Western Europe. It is an era refusal of state monopolies, privatization and empowerment of European Community regulation. At this time we can monitor the formation of semi-independent or independent regulatory authorities at the level of Member State regulation for better management of such areas as environmental protection or utilities etc. This essay is aimed to explore independent regulatory authorities in different countries in order to learn the experience of other countries in regulating such important bodies for people's lives.

In accordance with the Constitution of Ukraine authorities are divided into executive, legislative and judicial branches. Scholars traditionally define a system of executive bodies as a three-level, consisting of a supreme body in the system of executive bodies - the Cabinet of Ministers of Ukraine, ministries and other central executive bodies, local authorities [4, p.211]. It is important to note that in Ukrainian system some bodies of executive power occupy a special position – central executive bodies with special status. It should be noted that for the first time this type of executive body is mentioned in the Concept of Administrative Reform in Ukraine (hereinafter – the Concept), the main provisions of which should have been the basis for reforming the system of public administration in accordance with the Decree of the President of Ukraine of July 22, 1998, No. 810/98 [5, p.32].

According to that Concept, the central executive bodies include ministries, state committees and central executive bodies with special status, from this moment we can see that legislator have been already included central bodies with special status in the system of executive bodies of Ukraine. It attempts to identify a special place of the central executive bodies with a special status: "central executive bodies with a special status are certain exceptions, which includes bodies, the status of

which is determined in each case by the laws of Ukraine. The existence of such bodies is already provided for in the Constitution of Ukraine f Article 106 Part 1 Paragraph 14, Clause 22 of Part 1 Article 85 or may be provided for by new laws that determine the powers and procedure of these bodies. Professor Yuliya Vashchenko think that the special features of the central bodies with a special status indicate their transitional nature and their temporary stay in the system of executive power shows the need for their removal outside the executive branch of government, which is already taking place today (for example, with the national commissions of regulation of natural monopolies).

Currently, in Ukrainian system of executive state bodies there is a group which is not included in it - independent state regulatory bodies, more detailed - national commissions that conduct the state regulation in certain spheres. It is for example National Connection and Informatization Regulatory Commission, National Energy and Utilities Regulatory Commission, National Financial Services Markets Regulatory Commission, National Securities and Stock Market Commission. Legal status of these national regulatory commissions is prescribed by the laws and regulations of Ukraine. In accordance with laws of Ukraine (in particular, Article 11 of the Law of Ukraine “On Natural Monopolies”, Article 6 of the Law of Ukraine “On State Regulation of Securities Market in Ukraine”, Article 23 of the Law of Ukraine “On Financial Services and State Regulation of Financial Services Market in Ukraine”, Article 17 of the Law of Ukraine “On Telecommunications”), national regulatory commissions in certain economic sectors have a status of state collegial bodies.

Nowadays, different approaches exist concerning independent regulatory authorities. Some specialists still mistakenly think that these bodies are special types of central bodies of executive power. It should be mentioned that the national regulatory commissions presented within the group “ministries and institutions” on the official website of the Cabinet of Ministers of Ukraine that sometimes also leads to misunderstanding regarding the place of these bodies in the system of public authorities. This group primarily includes ministries and other central state bodies of executive power [3, p.5]. Being in this group of executive bodies on the official website of the main authority of executive power actually

confuses people, because it means that these bodies are in it power, but is this true?

In accordance with art.1 of the Decree of President of Ukraine “On National Connection and Informatization Regulatory Commission» approved by Presidential Decree № 1067/2011 of 23.11.2011 National Commission, which carries out state regulation in Connection and Informatisation is a state collegiate body which subordinated to the President of Ukraine and accountable to the Verkhovna Rada of Ukraine (Parliament) [8, p.12].

Pursuant art.1 of the Regulation of the National Energy and Utilities Regulatory Commission which carries out state regulation in the fields of energy and utilities, is a permanently acting as an independent state collegial body whose purpose is state regulation, monitoring and control of the activities of economic entities in the fields of energy and utilities [6, p. 76]. These words tell us about the independence of this body from all others. Only art.6 states that the Commission annually, by April 1 of the year following the reporting, submits to the Verkhovna Rada of Ukraine a report on its activities, a statement on the use of funds. The regulator interacts with the Cabinet of Ministers of Ukraine, central executive authorities in matters of developing and implementing programs of economic and social development of Ukraine, and state target programs. It is clear from the words that the commission interacts only with the Parliament and only in the field of reporting and in relations with the Cabinet of Ministers the Commission only helps in the development of various programs that precisely does not indicate it controlled position.

The Regulation on National Financial Services Markets Regulatory Commission [9, p.41] states in art.1 that the National Commission, which carries out state regulation in the sphere of financial services markets (the National Financial Services Markets Regulatory Commission), is state-owned a collegiate body subordinated to the President of Ukraine, accountable to the Verkhovna Rada of Ukraine. The text of the entire regulation does not say anything about the control by the Cabinet of Ministers of Ukraine, just stipulates that the Commission promulgates in the official media the main provisions of its annual report.

What about the National Securities and Stock Market Commission it is important to note, that in accordance with art.1 of the Regulation on the National Securities and Stock Market Commission

National Securities and Stock Market Commission is a state-owned collegiate body subordinated to the President of Ukraine, accountable to the Verkhovna Rada of Ukraine [7, p.50].

Concluding from the aforementioned normative information, it is understandable that these Commissions are not in any way subordinated to the Cabinet of Ministers of Ukraine, they are only to some extent linked the work of the Cabinet of Ministries of Ukraine. Therefore, information from the official web-site of the Cabinet of ministries of Ukraine is false, misleading not only ordinary people without legal education, but also some scholars.

Summing up it's important to note say that independent regulatory authorities indeed exist in Ukraine and carrying out activities in various spheres, but unfortunately, their status is not allocated at the legal level, which suggests that Ukraine is still on the way of legal development of such bodies.

To improve the quality of exercising of the duties of these state bodies, the author proposes parliamentarians to fix the place of independent regulatory authorities and emphasize the peculiarity of the activity of these bodies, which demands their complete impartiality. Also, it should be noted that the administration of the official website of the Cabinet of Ministers of Ukraine should remove these bodies from the special group “ministries and institutions” for not to mislead people.

Concerning Portugal it should be highlighted that it has established a range of agencies with varied tasks and responsibilities. There are two broad categories. The first comprises seven independent regulators which cover the financial and insurance sectors, competition policy, communications, energy, and health care:

1) The Portuguese Securities Market Commission (CMVM – Comissão do Mercado de Valores Mobiliários), is charged with supervising and regulating securities and other financial instrument markets, as well as the activity of all those who operate within these markets.

2) The Portuguese Insurance and Pension Funds Supervisory Authority (ISP – Instituto de Seguros de Portugal) is responsible for the regulation, inspection and supervision in the markets of insurance, reinsurance, insurance intermediaries and pension funds, as well as connected or complementary activities. It is subject to the authority of the Ministry of Finance.

3) The National Regulatory Authority for Communications (ANACOM – Autoridade Nacional de Comunicações) is the regulatory body for electronic communications and postal services. Its framework was initially defined by Decree- Law 309/2001. It was modified by Law 5/2004 as a result of the transposition of the 2002 EU directives on electronic communications.

4) The Energy Services Regulatory Authority (ERSE – Entidade Reguladora dos Serviços Energéticos) is Portugal's regulatory authority for the electricity and natural gas sector. It was created by Decree Law 187/95 as the Regulatory Entity of the Electric Sector, and started its operations at the beginning of 1997. Its scope of activity was extended to the regulation of natural gas by Decree Law 97/2002, within the context of the 1998 EU Directive on the natural gas market.

5) The Competition Authority (Autoridade da Concorrência) was created in 2003. It has regulatory powers on competition over all sectors of the economy, including the regulated sectors. In this case the Competition Authority co-operates with the regulatory authority of the relevant sector.

6) The Health Authority (ERS – Entidade Reguladora da Saúde) is responsible for the regulation and supervision of the activities of health care providers. This includes ensuring right of universal and equitable access to public health care, ensuring competition among health care providers (in collaboration with the Competition Authority), monitoring quality of care.

7) The Bank of Portugal (Banco de Portugal) is responsible for the prudential supervision of credit institutions and financial companies, and for the supervision of their conduct in the retail market.

The organisation, functions, and powers of each agency are defined by the specific laws which set them up, but they share some common features relating to their powers and responsibilities.

They:

- Elaborate and adopt secondary regulations in cases specified by law and when shown to be indispensable for the exercise of their responsibilities; collaborate with the Assembly of the Republic and with the government in the formulation of the policies and the law relative to their sector;

- Monitor the development of activities of the entities under their oversight; disseminate information, publish studies;

- Monitor compliance with the law and applicable regulations in the sector; give orders and formulate recommendations, initiate and accompany cases to punish infractions; impose sanctions

These regulatory agencies are independent public institutions. They have administrative and financial autonomy, but are accountable to the relevant parent ministry for the sector. The parent ministry must approve their annual forward-looking activity plan and budget and they must submit an annual activity report and accounts for the previous year. Some agencies (in the financial sector for example) have developed their own Better Regulation initiatives. It is important that these initiatives remain inspired by the general framework defined by the government. Otherwise the multiplicity of programmes could lead to confusion for businesses and citizens [2, p.6].

Summing up, it should be noted that in Portugal, the practice of establishing independent regulatory authorities in certain spheres, in particular, seven of them, is sufficiently developed. Indeed, they are independent financially and administratively, but still are accountable to the relevant parent ministry for the sector.

So, Portugal has indeed inserted and recognized the existence of independent regulatory authorities, where Ukraine does not do, but at the same time Portugal demonstrates that these authorities cannot be completely independent, since somebody has to control even their activities.

Talking about Lithuania it has no such administrative legal category as “regulatory agency” or “regulatory body”, yet such kind of institutions exists in Lithuania. For example, the Competition Council, the National Bank, the Communications Regulatory Authority, the Securities Commission of the Republic of Lithuania, the National Health Board, etc. Lithuanian scholars use various terms, which include not only regulatory bodies but also other types of bodies, i. e. pretrial bodies, control bodies. The examples of terms are Institutions formulated by Parliament, or Bodies, established by the Seimas (parliament) of the Republic of Lithuania, or other central bodies, or institutions established and accountable to the Seimas or President, or institutions accountable to the Seimas.

Is it precise to name the above-mentioned institutions as accountable to the Seimas? Professors Ieva Deviatnikovaitė, Audrius Bakaveckas think that such a status is provisory. For example, one of



them is termed independent (Article 3 of the Law on the Bank of Lithuania defines the independence of the Bank of Lithuania: The Government of the Republic of Lithuania and State institutions must respect the independence of the Bank of Lithuania), another – as independent accountable to the Seimas (Lithuanian Radio and Television Commission), or accountable to the Seimas (article 3 of the Law on the National Audit Office of Lithuania states that the National Audit Office shall be the supreme public audit institution, accountable to the Seimas). Other institutions are defined as independent state institutions (for example, the Communications Regulatory Authority). It is important to emphasize that the director of this Authority shall be appointed by the President on the recommendation of the Prime Minister, besides, the written activity and financial report of the Authority must be submitted to the Seimas and to the Government. Some of the institutions accountable to the Seimas are entitled as budgetary independent state institutions (for example, the Seimas Ombudsman's Office), or state institutions accountable to the Seimas or President of

the Republic of Lithuania (for example, the State Security Department, the Special Investigation Service of the Republic of Lithuania), or state institutions (for example, the Office of the Inspector of Journalist Ethics, the Chief Official Commission), or public body (the Article 18 of the Law on Competition)[1, p.2].

Thus, it is important to note that in contrast to Portugal in Lithuania it is difficult to determine precisely whether an authority is an independent regulatory or not, because, as in Ukraine, the concept of independent regulatory authority is not fixed at the legislative level, which creates additional problems.

**Conclusions.** To sum up, it is important to say that independent regulatory bodies are significant, because they regulate various spheres of life that provide comfort for people. So, as we can see in Ukraine and in Lithuania such independent regulatory bodies exist, but the problem is that such bodies not defined normatively, in Portugal such authorities are defined in the laws where their independence is prescribed.

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