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THE LICENSING OF BUSINESS ACTIVITY AND THE ADMINISTRATIVE LIABILITY FOR BREACH OF CERTAIN LICENCE CONDITIONS

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Maka Salkhinashvili, Giuli Giguashvili - The Licensing of Business Activity and the Administrative Liability for Breach of Certain Licence Conditions.

The legal reforms undertaken in Georgia have offered a number of novelties, including in the field of legal regulation of the issues related to licensing. Licensing is defined as granting of the right to a natural or legal person or any other organizational entity for undertaking certain activity. Such activity usually serves the business objectives and aims at deriving profit. It is therefore important to explore as to what extent the effective legislation ensures the protection of the rights of entrepreneurs in the process of licensing. The issues related to compliance with the licence and permit conditions or breach thereof and the related liabilities should become the subject of scholarly review.

Мака Салхінашвілі, Гіулі Гігуашвілі - Ліцензування підприємницької діяльності та адміністративна відповідальність за деякі порушення ліцензійних умов.

Правова реформа, що проведена в Грузії, запропонувала багато нового, в тому числі правове регулювання питань, пов'язаних з ліцензуванням. Ліцензування увазі надання права здійснення певної діяльності фізичним, юридичним або іншим організаційним утворенням. Здійснення такої діяльності, як правило, пов'язано з підприємницькими цілями і орієнтована на отримання прибутку. Тому досить значний питання, наскільки дієве законодавство захищає права підприємців в процесі їх ліцензування; підлягає вивченню на науковому рівні виконання ліцензійних та дозвільних умов, порушення і накладення відповідної відповідальності. У чинному законодавстві є певні прогалини і, на нашу думку, потребує вдосконалення. У статті вивчені суперечливі статті діють в Грузії законів і недоліки їх практичного застосування.

Мака Салхинашвили, Гиули Гигуашвили - Лицензирование предпринимательской деятельности и административная ответственность за некоторые нарушения лицензионных условий.

Проведенная в Грузии правовая реформа предложила много нового, в том числе правовое регулирование вопросов, связанных с лицензированием. Лицензирование подразумевает предоставление права осуществления определенной деятельности физическим, юридическим или другим организационным образованиям. Осуществление такой деятельности, как правило, связано с предпринимательскими целями и ориентирована на получение прибыли. Поэтому весьма значителен вопрос, насколько действующее законодательство защищает права предпринимателей в процессе их лицензирования; подлежит изучению на научном уровне выполнение лицензионных и разрешительных условий, нарушение и наложение соответствующей ответственности. В действующем законодательстве есть определенные пробелы и, по нашему мнению, нуждается в совершенствовании. В статье изучены противоречивые статьи действующих в Грузии законов и недостатки их практического применения.

The Law of Georgia on Licences and Permits was adopted on 24 June 2005, whereupon the Law of Georgia on the Grounds for Licensing and Permitting of Entrepreneurial Activity was

invalidated with immediate effect. As for the administrative liability for breach of licence conditions, it is governed by the Law of Georgia on Administrative Offences.

According to the Law of Georgia on Licences and Permits, the decisions on issuance of licence, refusal to issue or to revoke a licence [1, Article 10], as well as the decision on granting a user licence by an auction [1, Article 18] constitute the administrative legal acts. Hence, the protection of rights of licence seekers is ensured through the administrative legal proceedings. The Law also establishes that a refusal of an administrative body to issue a licence must be grounded [1, Article 10]. Furthermore, the Law specifically provides for the means of appeal of the refusal to issue a licence to operate. It is noteworthy that according to the Law of Georgia on Licences and Permits, in case of filing an administrative claim or appeal, the decision on issuance of a licence, refusal to issue a licence or revoke a licence shall not be suspended unless decided otherwise by the license issuing authority or the administrative body and/or the court, which is considering the claim (appeal). [1, Article 23]

The requirement for seeking a licence or a permit applies to any activity that is subject to the State regulation and is associated with the elevated risk to human life or health, concerns the State or public interests of high significance or involves the use of the State resources.

The Law of Georgia on Licences and Permits distinguishes two main types of licences: a user licence and a licence to operate. A licence can be general or special. The Law of Georgia on Licences and Permits, as currently in effect, recognizes 43 types of licences to operate 11 types of user licence and 55 types of permits.

In the recent years, the procedures of licensing and permitting have undergone simplification in Georgia. According to the Law, normally, the same simplified administrative procedure applies to issuing a licence to operate, as prescribed by Chapter VII of the Law for obtaining a permit. However, the public administrative procedure applies to issuing of certain types of licences to operate as specifically defined in the Law. [1, Article 8]

The Law of Georgia on Licences and Permits defines a licence as *the right to undertake certain activity, granted to a person by an administrative authority through an administrative act, subject to compliance with the conditions prescribed by the law.* [1, Article 3] In our opinion, this definition must be revised to reflect the 2005 amendment to the General Administrative Code of Georgia, whereby “an administrative act” is referred to as “an administrative legal act.” We therefore believe that the reference to “an administrative act” must be replaced by “an administrative legal act” in the Law of Georgia on Licences and Permits.

Based on Article 21 of the Law of Georgia on Licences and Permits, the fulfilment of licence conditions by a licence holder shall be monitored by the licence issuing authority. According to Article 22.1 of the referenced Law, failure by the licence holder to comply with licence conditions set by the law shall inflict a penalty upon the licence holder, pursuant to the rule prescribed by the legislation. The amount of penalty shall be determined by the law. [1, Article 22]

Failure of the licence holder to comply with the licence conditions within the fixed term shall cause tripling of the amount of penalty. This measure is legally supported by the provisions of Article 36¹ of the Code of Georgia on Administrative Offences.

Article 22.3 of the Law of Georgia on Licences and Permits stipulates that if the licence conditions have not been met by the licence holder by the expiry of the term set upon the imposition of the tripled penalty, the amount of the imposed penalty shall be tripled again. [1, Article 22]

The regulator does not specify as to which amount shall be subject to tripling, although it is assumed that the original penalty shall be tripled and then this amount shall again be tripled. We believe that the Law is excessively stringent in this case.

Based on Article 22.4 of the Law of Georgia on Licences and Permits, if, notwithstanding imposing of penalties, the licence holder fails to ensure fulfilment of licence conditions, the licence issuing authority shall make decision to revoke a licence, while revocation of a licence means that the decision on issuing a licence shall be rendered null and void in accordance with the provisions of the General Administrative Code of Georgia.

In the instances specified in the Code of Administrative Offences of Georgia, a protocol of an administrative offence shall be drafted, which shall then be reviewed by an authorized administrative body. For instance, in the event of failure by a licence holder in the power sector to fulfil the requirements set forth by the Georgian National Energy and Water Regulatory Commission (GNERC), the protocol of administrative offence shall be drafted by the GNERC [2, Article 228], whereupon, as prescribed by Article 228¹ of the Code of Administrative Offences of Georgia, the case of administrative offence shall be heard by the GNERC at the public meeting and the resolution [2, Article 267] shall be rendered within 7 days [2, Article 262]. We note an inconsistency in the effective laws of Georgia, namely, according to the Code of Administrative Offences of Georgia, an administrative body renders a resolution, while according to Article 5 of the Law of Georgia on Electricity and Natural Gas, the legal acts rendered by the GNERC are resolutions and decisions [3, Article 5]. The resolutions rendered by the GNERC are the normative administrative legal acts, while the decisions are individual administrative legal acts. This implies that the resolutions rendered on the cases of administrative offences are normative administrative legal acts, which is incorrect, because the resolution rendered in relation to the administrative offence is an individual administrative legal act by its meaning. We believe that the issue must be further refined. It is possible that the document rendered on the case of administrative offence may be referred to as “the decree” as suggested by the Draft Code of Administrative Offences. [4]

Also worthy of note is the rule of appeal of a decision on revocation of a licence, as regulated by Article 23 of the Law of Georgia on Licences and Permits, whereby in case an administrative claim or appeal is filed, the decision on revocation of a licence shall not be suspended, unless decided otherwise by the licence issuing authority or the administrative body and/or the court considering the claim (appeal). [1, Article 23] The referenced article contradicts with paragraph 5 of Chapter 2 of the Administrative Procedures Code of Georgia, which stipulates that the court shall not admit a claim against an administrative body if the claimant has not used the one-time opportunity of filing an administrative claim [5, paragraph 5, Chapter 2.], in line with the procedure prescribed by the General Administrative Code of Georgia. The General Administrative Code of Georgia, in particular, Article 178 thereof, states that a person may appeal to the court to protect his/her rights and freedoms, pursuant to the procedure prescribed by the General Administrative Code of Georgia. [6, Article 178] It appears that under the Law of Georgia on Licences and Permits, a person has the right to opt between the forms of appeal by either appealing to a higher administrative body or to the court, while the General Administrative Code and Administrative Procedures Code of Georgia clearly state that a person must appeal first to a higher administrative body before appealing to the court. We believe that this inconsistency in the legislation must be rectified. It is thought that the wording in the Law of Georgia on Licences and Permits is of more democratic nature and provides more protection of a person's rights and freedoms, as compared to the administrative legislation. We therefore consider it appropriate that a general rule of appeal of an administrative legal act should be amended and improved in the context of protection of the rights of individuals.

REFERENCES:

1. Law of Georgia on Licences and Permits.
2. Code of Administrative Offences of Georgia.
3. Law of Georgia on Electricity and Natural Gas.
4. Draft Code of Administrative Offences.
5. Administrative Procedure Code of Georgia.
6. The General Administrative Code of Georgia.

Ключові слова: Ліцензії та дозволи, ліцензування підприємницької діяльності, адміністративна відповідальність.

Ключевые слова: Лицензии и разрешения, лицензирование предпринимательской деятельности, административная ответственность.

Key words: Licences and permits, licensing of business activity, administrative liability.