

## DICHOTOMIC APPROACH TO SYSTEMATISM OF LICENSED PROCEEDINGS ENTITIES



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*The article deals with the analysis of entities, arising in the process of licensed proceedings as a special type of licensed proceedings based on the dichotomic approach to their distribution. The necessity of transformation of licensed proceedings entities is grounded.*

**Key words:** licensed proceedings, licensing, entities, licensing authorities, licensee.

Efficiency of securing public interests is achieved by influence of the state on the relations in the sphere of economic activities through the relevant bodies of the public administration by establishment of legal and administrative licensing regimes.

Now in Ukraine 57 types of economic activity and more than 200 types of work are subject to licensing, and almost for each of them a separate licensing body is envisaged [1]. This situation leads to slowdown of domestic business through direct and indirect losses both of business entities and the state (the cost of maintaining the excessive staff of public authorities, low position in international rankings regarding investment attractiveness – 162 seat at the World Bank in 2014 [2]).

Legal and scientific-theoretical definition of licensed proceedings entities is almost absent. In the existing scientific works these issues are studied fragmentarily or within other administrative and juristic matters at issue without a comprehensive approach, reflecting the realities of the former command and administration system. Administrative proceedings were investigated by: D. Bakhrakh, V. Bevzenko, V. Kolpakov, Y. Kozlov, V. Kovalenko, A. Komzyuk, O. Kuzmenko, A. Mikolenko, R. Melnik, L. Popov, I. Pastukh, V. Perepelyuk, V. Sushchenko, etc.

The study of such type of administrative proceedings as licensed proceedings, to some extent, was carried out only by a few scientists, who deal with admin-

istrative law, in particular, A. Alekhin, H. Heiko, O. Glushko, O. Ivanchenko, A. Karmolytsky, Y. Kozlov, G. Melnychuk, G. Osadchuk, V. Sereda, V. Sorokin, K. Tymoshenko, L. Shestak, V. Shkarupa, etc. But beyond their focus remained the clear definition of licensed proceedings entities and their characteristics.

Problematics of the category "licensed proceedings entities" in administrative law and process first of all is due to such shorfalls in the licensed proceedings rules as the lack of legislative consolidation of comprehensive list of participants and the scope of their procedural rights, duties and responsibilities (legal status); discrepancy of "time requirements" and contradictory laws and regulations governing the procedure of licensed proceedings.

Therefore, the purpose of this article is to ascertain the types, nature and characteristics of the licensed proceedings entities on the basis of dichotomous approach and analysis of existing scientific, journalistic and regulatory sources.

Distinction of dichotomous approach is that the participants are determined by the presence or absence of certain characteristics, exhaust the entire amount of shared concept, every object, classified by kind, falls into the one or the other class [3, p.18]. Applying this approach to the delineation of varieties of licensed proceedings entities is appropriate based on the purpose of the legal regulation of public relations for private and public law. As aptly noted by A. Krupchan "for private law it is a person, citizens, for public – society, the state". Criterion of interest of legal regulation in licensed relationship lies in dichotomy – public (state) interests (to protect consumers

from poor quality works, products and services in areas that are socially dangerous) – private interests: person, citizens, groups of people, etc. (use of the right to engage in business activities) [4, p. 6].

Revealing the essence of the category "licensed proceedings entities", its necessary to apply to such fundamental concepts as "licensed proceedings."

There is no common standpoint of the scientists on separation of administrative proceedings into the types, because most of them classifies administrative proceedings by their own criteria (see V. Sorokin [5, p. 56], D. Bashrash [6, p.154-155] V. Kolpakov [7, p. 56], P. Kononov [8, p. 23-24] Y. Kozlov, L. Popov [9, p. 367], S. Mahina [10, p. 73-89 ], A. Mikolenko [11, p. 221], O. Kuzmenko [12, p. 22-26]). However, most of them refer licensed proceedings to subvarieties of permissive proceedings.

Definition of "licensed proceedings" is limited by K.Tymoshenko by the licensing procedure, i.e the procedure of issuance, renewal, cancellation and control of compliance with license requirements [13, p.146]. But in addition to these procedures, there are many actions of the competent authorities on implementation of the measures, such as: annulment of a license, suspension of a license, issuance of a license duplicate, license copy, renewal of a license, conduct of license cases, improvement notice of license provisions, etc.

These procedures are characterized by the following features. Firstly, by a large number of power [14] and powerless entities, taking part in it [15, p.92]; secondly, all activities that are a part of licensing procedures, depending on the activity specified by law can be carried

out both by local authorities and central executive bodies [14]; thirdly, on the basis of the management act of the power entity, a person acquires special administrative legal personality [14]; Fourthly, licensed proceeding is a system of consistent actions, i.e. with a phasic nature [16, p.281]; Fifthly, when it is due to indissolubility of technological process, it is possible to conduct license cases simultaneously in several bodies (for instance, while carrying out construction, erection works related to erection and maintenance of fire protection means and heating systems) [15, p.101].

Thus, the conducted critical analysis of perspectives of the scientists, scientists, who deal with administrative law and the regulations of current legislation, allows us to assert that the licensed proceeding is a type of administrative proceedings, because it has all the features of the latter, but still it has its specific identifying characteristics.

Given the presence of administrative procedural status of each licensed proceedings entity and considering the approaches of the lawyers, who deal with administrative law – V. Kolpakov, O. Kuzmenko, I. Pastukh, V. Sushchenko, V. Kovalenko [17], V. Bevzenko, A. Komzyuk and R. Melnik [18] to the determination of the administrative proceedings entities (in cases of administrative offenses), we can make a ranking of the licensed proceedings entities into the following groups: 1) entities that solve the case; 2) entities in favor of which the case is solved; 3) additional participants.

Endorsing the view of V. Perepeylyuk, it is worth noting that the differences of the legal status of these groups of entities lie, respectively, in the pres-

ence or absence of power [19, p. 159], and the extent of liability.

The scientist states that the legal process theorists (M. Tishchenko, V. Horshenyev) consider the main criterion of dividing the participants of the process to be the specific purpose of their participation in the process – to protect their rights or the rights of others, and divide them into the "organizers" (so-called leading entities that provide the implementation of "foreign interests") and participants (citizens and other individuals in the person of their representatives, that have the rights and bear certain responsibilities that allow them to take part in the administrative proceedings for the purpose of protecting their rights and legitimate interests or the rights and legitimate interests of persons they represent, groups of individuals or organizations, and to promote the implementation of the administrative process) [19, p. 160].

Given the dichotomous approach to the distribution of licensed proceedings entities, they can be divided into two groups: 1) *entities vested with power of authority*; 2) *entities, that do not have the power of authority, that can be divided into subvarieties: a) interested persons; b) additional participants of licensed proceedings*.

To characterize the community of the first group "entities vested with power of authority" – public administration bodies in the area of licensing, the analysis of approaches to the concept of "public administration bodies" is fundamental.

The scientists understand the concept of "public administration bodies" as: executive bodies that exercise executive func-

tion, and local authorities that solve a significant part of local affairs (T. Kravtsova and A. Solonar [20, p. 523].) set of authorities and institutions, established to exercise public authorities (V. Kolpakov, [21, p. 135]); a set of executive bodies and public executive authorities, which are subordinate to political power (V. Averyanov) [22, p. 117]; system of organizational and structural formations, which acquired powers of authority on legal grounds for their exercising in public interest [23, p. 36];

In our view, the understanding of "public administration" in the interpretation of T. Matselyk as a "system which includes structural, functional and procedural elements, which are inextricably linked and, having common integrative qualities interact with other systems, realizing its goal and potential [24, p. 117] is quite accurate.

The scientists propose to expand the structure of public administration through the inclusion of: a) executive bodies; b) local authorities; c) specially established authorities for the implementation of certain functions of the executive bodies.

This approach to public administration entities is in line with the current legislation on licensing.

Thus, the licensing authority according to the Law of Ukraine "On licensing of certain types of business activities" [25] dd June 1, 2000 N 1775 - III, – executive body, determined by the Cabinet of Ministers of Ukraine, collegial body, constituted by law, specially authorized executive body for licensing of certain types of business activities.

The new Law of Ukraine No. 222-VIII as of 2 March 2015, which takes ef-

fect on 26.06.2015 defines the licensing authority as the "... – executive body, determined by the Cabinet of Ministers of Ukraine, or collegial body, constituted by law" [26].

The list of licensing authorities under the Law of Ukraine "On licensing of certain types of business activities" is approved by the Regulation of the Cabinet of Ministers of Ukraine as of November 14, 2000 No.1698 «On approval of the list of licensing authorities", and identifies 34 bodies, namely: the Ministry of Interior, The State Service of Mining Supervision and Industrial Safety, Ministry of Natural Resources and Environment, the State Service of Geology and Mineral Resources of Ukraine, the State Service of Mining Supervision and Industrial Safety Ukraine, the State Service of Ukraine on drugs, the State Service of Ukraine on Drug Control, Veterinary and Phytosanitary Service of Ukraine, Ministry of agrarian policy, Council of Ministers of Autonomous Republic of Crimea, regional, Kyiv and Sevastopol municipal state administration, State Security Service of Ukraine, Administration of the state special communications, Ministry of Finance, State Assay Service of Ukraine, National Electricity Regulatory Commission, the National Commission, which performs state regulation in the sphere of public utilities, Council of Ministers of Autonomous Republic of Crimea, regional, Kyiv and Sevastopol municipal state administrations, State Space Agency of Ukraine, Ministry of Healthcare, State service of social diseases, State Inspection of Ukraine on safety in maritime and river transport, the State aviation service, State Agency of Ukraine

for Tourism and Resorts, State Service of Ukraine on Emergencies, Ministry of economic development and trade, Public employment service, State Agency of Land Resources of Ukraine, State Agency for Fisheries, State customs service, Ministry of Education, Youth and Sports of Ukraine, State service of intellectual property, the Commission for Regulation of Financial Markets, Ministry of Energy and Coal Industry, State tax service of Ukraine, the Ministry of Industrial Policy [14].

However, this list of licensing authorities is not exhaustive.

Thus, the National Council of Ukraine on Television and Radio Broadcasting [25] is developing and implementing public policies of broadcasting licensing. National Bank of Ukraine [27] performs licensing of banking activities and issues licenses to non-bank financial institutions that intend to become parties to the payment systems, for money transfer without opening accounts and withdraws them in accordance with the law. The National Commission on Securities and Stock Market performs licensing of certain types of professional activities at stock market [28].

Thus, the entities vested with public authority in Ukraine currently include such public administration bodies as the Cabinet of Ministers of Ukraine, which provides implementation of state policy in the field of licensing through the adoption of legal acts in the field of licensing; specially authorized licensing body - the State Regulatory Service of Ukraine; executive bodies, determined by the Cabinet of Ministers of Ukraine (ministries, services, commissions, agencies, inspections); specially established bodies to im-

plement certain functions of executive bodies, state collegial bodies, constituted by law (e.g. National Commission for Securities and Stock Market, Expert and Appeal Board, etc.); specially authorized executive bodies of councils, authorized to carry out licensing of certain types of business activities.

In this case, it is appropriate to define the main features of the system of licensing authorities in the United States of America, caused by the decentralization of power:

a) public authorities have the powers for licensing and independent bodies dealing only with licensing and certification (e.g. a department for issuing professional licenses to psychologists was opened in the Department of Education of New York) can be established;

b) the most common is the implementation of licensing by the commissions, independent from the public administration bodies;

c) depending on the nature of the activity licensed (beyond the state or not) the licensing authorities will, accordingly, be the federal authorities (broadcasting or production of drugs) or local authorities (demonstration of films, sale of alcoholic beverages);

d) possible empowerment of public administration bodies, the main activities of which are focused on another area (e.g. Court of Appeal of the District of Columbia licenses attorneys (attorneys admitted to trials) [29, p.79].

The "entities that do not have the power of authority" include the interested persons and additional participants of licensed proceedings.

Interested persons against whom the case is decided in licensing can be: indi-

viduals, legal entities and individual entrepreneurs.

Identification of "interested entities" of licensed proceedings depends on the following factors: type of business activity that is licensed; stages of licensed proceedings, such as proceedings to issue licenses or proceeding with compliance by the licensee with license terms and conditions that can be used for their classification.

Thus, according to the type of business activity that is licensed, interested persons will be divided into:

*a) exclusively entities.* For example, in licensing proceedings based on the "Procedures and conditions for issuing the license for certain types of professional activities at stock market (securities market), license renewal, issuance of duplicate and copy of license" approved by the National Commission on Securities and Stock Market as of 14.05.2013 No.817 will be the following entities: the licensee or applicant - exclusively entity.

*b) individuals and business entities (individual entrepreneurs and legal entities).* For example, in the proceeding for issuance of individual license for the placement by residents (legal entities and individuals) of currency values on accounts outside Ukraine (according to the Regulation, approved by the Decision of the Board of National Bank as of 14.10.2004 N 485) are such subjects as: license holder or resident-applicant – individual - individual entrepreneur, legal person.

*c) business entities (individual entrepreneurs, legal entities).*

Distribution of the interested persons as the licensed proceedings entities,

based on the stage of licensed proceeding can be carried out as follows:

1) *licensees (persons who are licensed to carry out a type of business, established by the law);*

2) *license applicants (persons who submitted an application to the licensing authority for obtaining a license, together with supporting documents in accordance with the relevant licensing conditions);*

3) *persons engaged in activities subject to licensing without license for its implementation [26]);*

The question that has to be answered is whether a person without the status of "entrepreneur" is recognized by law as a licensed proceedings entity – an interested person? The legislator states: "A business entity..... refers for a license to the appropriate licensing body with an application form" [25].

We find in the Law of Ukraine "On licensing of certain types of business activities" [25] the definition of the business entity as the "legal entity, registered in the order established by law, regardless of its organizational and legal form and ownership, engaged in economic activities, except for public bodies and local authorities, as well as the individual entrepreneur and investor, including foreign investor, which is the party to the production sharing agreement under the Law of Ukraine "On Production Sharing Agreements" [30] "

It is stated in the Economic Code of Ukraine as of 16.01.2003 No.436-IV, Article 58 that the business entity is subject to state registration as a legal entity or individual entrepreneur in the manner prescribed by law.

Thus, the basic regulatory legal act in the sphere of licensing – the Law "On licensing of certain types of business activities" does not recognize an individual without a status of "entrepreneur" as a licensed proceedings entity (other than a natural person that is a party to the production sharing agreement), that should be brought into line with the realities of the present, using, for example, the experience of the United States of America, where a natural person is a full value licensed proceedings entity.

In the USA many activities require a permit for a legal entity as a whole to conduct certain types of business. Licenses can be obtained by the legal entities for their specialists (they are terminated in case of change of employment) and by the specialists for the further opportunity to work within a profession (architects, lawyers, accountants, estate agents) [29, p.78].

The additional participants of the licensed proceedings are the Centers of administrative services, specialists (experts).

The specialists (experts) in licensed proceedings assess evidence that is crucial for rendering the final administrative action, i.e making the decision on whether the applicant will become the licensee or its legal status will not change (in case when given the submitted documents the applicant will be rejected a license) [15, p.98].

The centers of administrative services – mediators in the licensed proceedings. Provision of administrative services in the field of licensing through the center of administrative services in Ukraine is in its infancy.

*Analysis of the problem under study suggests that the absence of a legislative recognition of the list of licensed proceedings subjects increases entropy in relationship between public administration body and the licensee or license applicant and leads to confusion, unnecessary expenditure of material and human resources.*

*Creating convenient, "transparent" appropriate conditions for obtaining by the entities of the administrative services in the field of licensing has to become one of the main tasks of the public administration bodies.*

*For this purpose: firstly, there must be an exhaustive list of licensing authorities without reference to a "special regulatory legal act", which can be implemented using a single register of licensing authorities (as part of the Common Licensing Register), secondly, an individual without a status of "entrepreneur" must be recognized as the licensed proceedings entity.*

*The submitted offer can be implemented by amending the following regulatory legal acts:*

*- paragraph 4, Article 1 and indent 1, Article 10 of the Law of Ukraine "On licensing of certain types of business activities" [25] must be added with the words: "..... and an individual";*

*- paragraph 2 of the Regulation of the Cabinet of Ministers "On approval of the Procedure for formation, maintenance and use of the license registry data and presenting it to the Unified License Registry" [31] must be added with the words: "..... record keeping to the fullest extent of licensing authorities - as well as the types of economic activities that they are licensed".*

**Literature list:**

1. Про ліцензування видів господарської діяльності: Пояснювальна записка до проекту Закону України [Електронний ресурс]. Режим доступу: <http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=52683&pf35401=318515>.
2. Index of economic freedom 2014. Heritage Foundation [Електронний ресурс]. Режим доступу: <http://www.heritage.org/index/explore.aspx?view=byregion—country-year>
3. Жеребкін В. Є. Логіка / В. Є. Жеребкін – Харків: Основи, К.: Знання, 2008. – 255 с.
4. Крупчан О. Д. Приватноправові та публічно-правові засади регулювання підприємницьких відносин / О. Д. Крупчан // Приватне право і підприємництво. Збірник наукових праць.— 2013.— № 12. — С. 5—8
5. Сорокин В. Д. Административный процесс и административно-процессуальное право / В. Д.Сорокин. — СПб. : Изд-во Юрид. ин-та (Санкт-Петербург), 2002. — 401 с.
6. Бахрах Д. Н. Адміністративне право. Підручник. – М.: Изд. «БЕК», 1996. – С. 154—155
7. Колпаков В. К. Адміністративно-деліктний правовий феномен Монографія. — К.: Юрінком Інтер, 2004. — 528 с.
8. Кононов П. Н. Административный процесс: подходы к определению понятия и структуры / П. Н. Кононов // Государство и право. — 2001. — № 6. — С. 23 — 24
9. Административное право: Учебник / [Под ред. Ю. М. Козлова, Л. Л. Попова] — М.: Юристъ, 1999. – 728 с.
10. Махина С. Н. Административный процесс: Проблемы теории, перспективы правового регулирования / С. Н. Махина. – Воронеж : Изд-во Воронеж. Ун-та, 1999. — 232 с.
11. Миколенко О. І. Адміністративний процес та адміністративна відповідальність в Україні : навч. посіб. / О. І. Миколенко. — Х. : Одиссей, 2010. — 368 с.
12. Кузьменко О. В. Адміністративний процес: сутність та структура / О. В. Кузьменко // Право України. — 2003. — № 2. — С. 22—26.
13. Тимошенко К. В. Ліцензійне провадження в адміністративному процесі / К. В. Тимошенко. — Актуальні проблеми держави і права. – Збірник наукових праць. — 2005. — № 26. — С. 144 — 152.
14. Про затвердження переліку органів ліцензування : Постанова Кабінету Міністрів України : від 14.11.2000 р. № 1698// Офіційний вісник України. — 2000. — № 46. — Ст. 2001
15. Шестак Л. В. Ліцензування як адміністративно-правовий інститут : дис... канд. юрид. наук: 12.00.07 / Шестак Лілія Володимирівна ; Національна академія держ. податкової служби України. — Ірпінь, 2005. — 188 с.
16. Кузьменко О. В. Теоретичні засади адміністративного процесу : монографія / О. В. Кузьменко. — К.: Атіка, 2005. — 352 с.
17. Курс адміністративного права України: підручник / В. К. Колпаков, О. В. Кузьменко, І. Д. Пастух, В.Д.Сущенко [та ін.] / за ред. В.В.Коваленка. — К.: Юрінком Інтер, 2012. — 808 с.
18. Адміністративний процес України: навч. посіб. / А. Т. Комзюк, В. М. Бевзенко, Р. С. Мельник; Харк. нац. ун-т внутр. справ. — К.: Прецедент, 2007. — 531 с.
19. Перепелюк В. Г. Адміністративний процес. Загальна частина : навчальний посібник / В. Г. Перепелюк. — Чернівці : Рута, 2003. — 367 с.
20. Кравцова Т. М. Поняття та принципи діяльності публічної адміністрації [Електронний ресурс] / Т. М. Кравцова, А. В. Солонар // Форум права. —2010. — № 4. — С. 522—525 — Режим доступу: <http://www.nbuv.gov.ua/ejournals/FP/2010-4/10ktdmpa.pdf>
21. Колпаков В. К. Поняття публічної адміністрації / В. К. Колпаков: матеріали міжнародної наукової конференції [«Ста-



новлення держави в умовах глобалізації: теоретичний та практичний аспект», (24 лютого 2012 року, м. Київ). — К. : НАУ, 2012. — С. 135—137

22. Авер'янов В. Б. Реформування українського адміністративного права: ґрунтовний привід для теоретичної дискусії // Право України. — 2003. — № 5. — С. 117—122.

23. Колпаков В. К. Предмет адміністративного права: сучасний вимір / В. К. Колпаков // Юридична Україна. — 2008. — № 3. — С. 33—39.

24. Суб'єкти адміністративного права: поняття та система: [монографія] / Т. О. Мацелик. — Ірпін: Видавництво НУДСУ, 2013. — 342 с.

25. Про ліцензування певних видів господарської діяльності : Закон України від 01.06.2000 № 1775-III // Офіційний вісник України. — 2000 р. — № 27. — Ст. 1109

26. Про ліцензування видів господарської діяльності: Закон України : від 2 березня 2015 року № 222—VIII // Офіційний вісник України. — 2015 р. — № 25. — Ст. 722

27. Про Національний банк: Закон України: від 20.05.1999 № 679—XIV / Офіційний вісник України. — 1999 р. — № 24

28. Про Національну комісію з цінних паперів та фондового ринку: Указ Президента України від 23 листопада 2011 року № 1063/2011/ Офіційний вісник Президента України. — 2011 р. — № 31 — Ст. 1193

29. Власюк А. В. Зарубіжний досвід використання дозвільних процедур у сфері підприємницької діяльності / А. В. Власюк // Право і суспільство. — № 2. — 2014. — С. 76—80

30. Про угоди про розподіл продукції: Закон України : від 14.09.1999 № 1039—XIV // Офіційний вісник України / — 1999 р. — № 40

31. Про затвердження Порядку формування, ведення і користування відомостями ліцензійного реєстру та подання їх до Єдиного ліцензійного реєстру: Постанова Кабінету міністрів від 08.11.2000 № 1658. — Офіційний вісник України. 2000 р. — № 45. — ст. 1937

### **Мацелик Т.О., Шапочкіна М.В. Дихотомічний підхід до систематики суб'єктів ліцензійного провадження**

*У статті подається аналіз суб'єктів, які виникають в процесі ліцензійного провадження, як особливого виду ліцензійних проваджень виходячи з дихотомічного підходу до їх розподілу. Обґрунтована необхідність трансформації суб'єктів ліцензійного провадження.*

**Ключові слова:** ліцензійне провадження, ліцензування, суб'єкти, органи ліцензування, ліцензіат .

### **Мацелик Т.А., Шапочкіна М.В. Дихотомический подход к систематике субъектов лицензионного производства**

*В статье дается анализ субъектов, возникающих в процессе лицензионного производства, как особого вида лицензионных производств исходя из дихотомического подхода к их распределению. Обоснована необходимость трансформации субъектов лицензионного производства.*

**Ключевые слова:** лицензионное производство, лицензирование, субъекты, органы лицензирования, лицензиат.

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