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LEGAL NATURE OF FINANCIAL SERVICES AGREEMENT AND ITS PLACE IN CIVIL CONTRACTS' SYSTEM

In the article the legal nature of the financial services agreement is investigated. The place of the financial services agreement in civil contracts' system is defined.

Key words: financial service, financial services agreement, system of civil contracts.

Problem statement. Nowadays the financial services agreements are gaining the increasing popularity. First of all it is connected with the development and complication of civil circulation, differentiation of civil obligations. A significant amount of fundamental issues regarding these obligations didn't get appropriate decision in rule-making practice and lighting in theoretical researches that is caused by lack of studied doctrinal bases of regulation of financial services agreements. Referenced circumstances don't allow to define appropriate place of financial services in civil law system and accurately distinguish them from the related legal institutes. These problems don't give any opportunity to promote stability of development and legal regulation of financial services.

Analysis of recent researches and publications. The issues of financial services and their providing are widely discussed in scientific literature. In particular, in the works of M. M. Agarkov, A. B. Altshuller, G. Berman, N. I. Braginsky, J. Gold, V. P. Griбанov, R. David, N. V. Drozdov, F. Kann, K. Tsvaygert, R. Tsimmermann, I. Shikhat, etc.

Paper purpose. The purpose of the scientific research is the ascertainment of financial services agreement's legal nature and the definition of its place in the system of civil contracts.

Paper main body. All civil contracts establish uniform system which is characterized by both internal unity, and differentiation of the contractual relations that is caused by peculiarities of the concrete property relations that is mediated by contracts.

Classification of civil contracts can be carried out by various criteria. So, depending on the conclusion's purposes scientists distinguish the following groups of civil contracts: contracts about estate transferring in property, full economic maintaining or operational management (purchase and sale, delivery, loan, exchange, donation, supplying of energy resources); contracts about estate transferring in temporary use (property employment, rent, housing employment, household hire, free estate using, leasing); contracts about work

performance (contract of work and labor, independent-work contract for capital construction, contract for performance of project and prospecting works, contract for performance of auditor works); contracts about transferring of creative activity's results (author's contract, license contracts, contracts about transferring of scientific and technical products); services contracts (transferring, insurance, assignment, commission, storage, intermediary services, lifelong contents, credit agreement, financial services); joint activity contracts (foundation agreement, agreements about scientific and technical cooperation) [1, p. 358].

Financial services agreements are included to the system of services contracts. The famous civil scientist N. I. Braginskiy divided services contracts into two groups: 1) contracts which are constructed on consumer work agreement model, that is contracts are directed on work performance (for example, consumer work agreement on capital construction, on performance of project, research works); 2) contracts which are constructed on assignment contract model, that is services contracts (storage, expedition and transferring) [2].

In this situation it is worth reminding that service in civil law is identified with action, and it means that providing of any service is impossible without commission of a certain action. On the basis of the given by N. I. Braginsky classification of services contracts it is possible to come to a conclusion that in the result of performance of one of them the new thing is created or its properties change (for example, services on implementation of repair work), and other contracts cause movement of material object (for example, services in freight transferring) [2].

Article 901 of the Civil Code of Ukraine fixes legal definition of the services contract, noting that under such contract one party (performer) obligates to provide service which is consumed in the process of certain action or activity commission, on the instructions of the second party (customer), and the customer obligates to pay to the performer noted service if another isn't established by the contract.

It should be noted that a feature of commutative services contract follows from its legal definition, however the parties have an opportunity to provide other conditions in the contract. The object of services contract are the commission of certain actions by the performer (for example, granting hotel rooms for accommodation) or commission of certain activity (hairdresser's services). Thus, the object is the useful effect from commission of an action or activity by the performer who never gets form of a new thing or change (improvement of consumer qualities) of the already existing acts.

The parties of the services contract are the customer (service recipient) and the performer (service supplier). The last can be any subject of civil law, as in the legislation there are no restrictions about subject's composition of the obligation. However the special subject's composition of this contract can be provided by the law or follow from service's nature. For example, only doctors can render medical services, only financial institutions can grant the loans.

It should be noted that the essence of financial service is shown through the content of service in its classical understanding. M. I. Braginskiy and

V. V. Vitryanskiy, characterizing essence of service, allocate two elements connected among themselves — purpose to which service serves (advantage) and means of achievement of this purpose — commission of action by that who provides service [3, p. 209].

Regulation of issues concerning the financial services contract can be carried out on the basis of norms of several branches of law. The financial services contract is regulated by the special Law of Ukraine «About Financial Services and State Regulation of the Markets of Financial Services». In the Civil Code of Ukraine there are no special articles concerning the financial services contract, but to the last can be applied general provisions of Chapter 63 of the Civil Code of Ukraine, and also can be applied separate kinds of civil contracts which are combined in the financial services contract (for example, Art. 1058 of the Civil Code of Ukraine «Contract of a bank deposit»). In particular, in the condition of compliance to the provisions of the Law of Ukraine «About Financial Services and State Regulation of the Markets of Financial Services» and the Civil Code of Ukraine, separate provisions of the laws of Ukraine regulating financial activity (for example, the Law of Ukraine «About Banks and Bank Activity», «About Consumer Protection» and others) can be applied. However, at such significant amount of the law precepts, which regulate a certain sphere of the relations, it is very important to adhere to the uniform approaches of legal regulation of the corresponding public relations.

The Law of Ukraine «About Financial Services and State Regulation of the Markets of Financial Services» is priority. The specified law establishes the general legal bases in the sphere of providing financial services, implementation of regulatory and supervising functions behind activities for providing financial services. It also governs the relations arising between participants of the markets of financial services during implementation of operations from providing financial services.

So, according to Art. 1 of the referenced Law, financial service is the operation with financial assets which is carried out in interests of the third parties on their own expense or at the expense of these persons, in the cases provided by the legislation, at the expense of financial assets attracted from other persons for the purpose of receiving profit or preservation of real cost of financial assets [4, Art. 1].

So, it is possible to allocate three main features of financial service: 1) operations are carried out in favor of the third parties, thus they have intermediary character; 2) the object of the transaction are financial assets; 3) the operation purpose — receiving profit or preservation of real cost of a financial asset.

That is, the key moment of legal definition of the concept «financial service» is «financial assets». Along with it, legal definition of the concept «financial assets» doesn't exist, but only Para.1 of Art. 1 of the referenced Law contains the list of the objects which are relating to financial assets: money, securities, debt obligations and rights of requirement of a debt.

Concerning definition of the concept «financial assets» — here opinions of scientists are different. Some identify «financial asset» and «security», un-

derstand under them as «official confirmation of the right to future profits at observance of arrangements» [5, p. 324]. Others — concerning financial assets use the term «fictitious capital» as the capital embodied in security papers [6, with. 9]. Economists claim that the financial asset is non-thing asset that represents legal requirements of this asset's owners on obtaining the defined monetary income in the future [7, p. 10].

In our opinion, the term «financial asset» should be defined as the category which is connected with the movement of the objects having cost and is result of last events that are capable to bring economic benefits in the future and are in property and under control of economic subjects, in their existing form or in the form of monetary and financial instruments.

We suggest to improve legal definition of the concept «financial service», concretizing it through the studied categories, in particular to add Art. 1 of the Law of Ukraine «About Financial Services and State Regulations of the Markets of Financial Services of Ukraine» with the following contents: «Financial service is a certain operation which is consumed in the course of commission of a certain action or implementation of a certain activity which is connected with the movement of the objects which have cost and is result of last events that are capable to bring economic benefits in the future and are in property and under control of economic subjects, in their existing form or in the form of monetary and financial instruments which one party, on the instructions of other party, for a certain payment, undertakes to provide».

According to the Law of Ukraine «About Financial Services and State Regulation of the Markets of Financial Services», service supplier of financial services can be only legal entity or sole proprietor who has standardly certain right for it, that is allocated with the legal status determined by the law and carry out the activity according to the authorized documents, to the law and in the cases established by the law — it needs special permission (license).

That is the main subject is the financial institution. According to Art. 1 of the specified law the financial organization is the legal entity which according to the law provides one or several financial services, and also others services (operation) connected with providing financial services in the cases which are directly determined by the law, and it is also brought the corresponding register in the order, established by the law. To financial institutions pertained banks, credit unions, pawnshops, leasing companies, confidential societies, insurance companies, establishments accumulative provision of pensions, investment funds and companies and others legal entities which exclusive kind of activity is granting

financial services, and in the cases which are directly determined by the law — others services (operation) connected with providing financial services.

Concerning the customer (the consumer of service) we will notice that the legislation doesn't limit their circle. Therefore, any person — legal or physical which will address to a service supplier for the purpose of receiving a certain financial service — can become it.

So, all services contracts can be considered as public contracts (Art. 633 of the Civil Code of Ukraine). However, in our opinion, such a situation is

incorrect. For example, the loan is granted not to any natural or legal entity. To the discretion of bank, which is granting credit, it can be refused to person who, for example, has the outstanding credit.

The onerousness of financial service is shown in receiving profit or preservation of real cost of financial assets. Drozdova N. V. in her dissertation research recognizes the financial services contract to enterprise transactions [8]. It is proved by that the receiving profit is a characteristic sign of business activity that testifies to existence of enterprise nature of implementation of financial service which (enterprise character) is based on onerousness of such service. However, in our opinion, such an approach is not absolutely true, as in some cases, for example, in case of implementation of supplementary (deposit) operations, this service is free in its essence as the fact of attraction of funds of persons in bank deposits (deposits) doesn't demand from them implementation of payment in favor of bank. The payment for money storage on a bank deposit in banking institution is received only by the client (investor) in the form of percent. However, on the other hand, the bank receives benefit from that the last can carry out other operations with the help of invested funds.

In the Law «About Financial Services and State Regulation of the Markets of Financial Services» is very important the definition of the list of services which admit as financial (P.1 of Art. 4): 1) release of payment documents, payment cards, traveler's checks and/or their service, clearing, other forms of ensuring calculations; 2) trust management of financial assets; 3) activities for a currency exchange; 4) attraction of financial assets with the obligation of their following return; 5) financial leasing; 6) granting means in a loan, including on the terms of the financial credit; 7) provision of guarantees; 8) money transferring; 9) services in the sphere of insurance in system of accumulative provision of pensions; 10) professional activity on securities market, subject to licensing; 11) factoring; 11–1) administrations of financial assets for acquisition of goods in groups; 12) management of property for financing of construction objects and/or implementation of operations with real estate according to the Law of Ukraine «About Financial and Credit Mechanisms and Management of Property at Construction of Housing and Operations with Real Estate»; 13) operations with mortgage assets for the purpose of issue of mortgage securities; 14) banking and other financial services which are provided according to the Law of Ukraine «About Banks and Bank Activity».

Though the legislation contains the exhaustive list of types of financial services, however uniform criteria of classification are absent. We suggest financial services to subdivide behind subjects of granting on: 1) services of banks; 2) services of insurance companies; 3) services of the credit unions; 4) services of pawnshops; 5) services of the leasing companies; 6) services of confidential societies; 7) services of establishments of accumulative provision of pensions; 8) services of investment funds.

In a form of legal regulation: 1) financial services which are regulated by the general norms of civil law; 2) financial services which are regulated by special laws (management of property for financing of construction objects

and/or implementation of operations with real estate (The Law of Ukraine «About Financial and Credit Mechanisms and Management of Property at Construction of Housing and Operations with Real Estate»); 3) banking and other financial services (the Law of Ukraine «About Banks and Bank Activity»).

Depending on types of financial assets — the financial services connected with: 1) cash; 2) securities; 3) debt obligations; 4) rights of requirement of a debt that aren't carried to security papers.

Conclusions. The financial services contract has many common features with the services contract and is its version. On the basis of the carried-out analysis and detection of features of the financial services contract, we can offer its following definition. The financial services contract is a contract according to which the service supplier (financial institution or, in the cases established by the law — other subject of managing) provides to a service recipient (client) the financial service which is consumed in the course of commission of a certain action or implementation of a certain activity and which is connected with the movement of the objects, which have cost and is result of last events that economic benefits are capable to bring in the future, and are in property and under control of economic subjects, in their existing form or in the form of monetary and financial instruments, and the service recipient (client) undertakes to pay the specified service if another isn't established by the contract — on the professional beginnings.

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ПРАВОВА ПРИРОДА ДОГОВОРУ ПРО НАДАННЯ ФІНАНСОВИХ ПОСЛУГ ТА ЙОГО МІСЦЕ У СИСТЕМІ ЦИВІЛЬНО-ПРАВОВИХ ДОГОВОРІВ

Резюме

У статті досліджується правова природа договору про надання фінансових послуг та визначається його місце у системі цивільно-правових договорів. На основі проведеного аналізу та виявлення особливостей договору про надання фінансових послуг пропонується наступне його визначення. Договір про надання фінансових послуг — це правочин, згідно з яким послугонадавач (фінансова установа або у випадках, встановлених законом, інший суб'єкт господарювання) надає послугоотримувачу (клієнту) фінансову послугу, яка споживається в процесі вчинення певної дії або здійснення певної діяльності та яка пов'язана з рухом об'єктів, що мають вартість, та є результатом минулих подій, що здатні приносити у майбутньому економічні вигоди й знаходяться у власності й під контролем економічних суб'єктів, у їх наявній грошовій формі чи у формі грошових і фінансових інструментів, а послугоотримувач (клієнт) зобов'язується оплатити зазначену послугу, якщо інше не встановлено договором, на професійних засадах.

Ключові слова: фінансова послуга, договір про надання фінансових послуг, система цивільно-правових договорів.

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ПРАВОВАЯ ПРИРОДА ДОГОВОРА О ПРЕДОСТАВЛЕНИИ ФИНАНСОВЫХ УСЛУГ И ЕГО МЕСТО В СИСТЕМЕ ГРАЖДАНСКО-ПРАВОВЫХ ДОГОВОРОВ

Резюме

В статье исследуется правовая природа договора о предоставлении финансовых услуг и определяется его место в системе гражданско-правовых договоров. На основе проведенного анализа и выявления особенностей договора о предоставлении финансовых услуг предлагается следующее его определение. Договор о предоставлении финансовых услуг — договор, согласно которому услугодатель (финансовое учреждение, или в случаях, установленных законом, иной субъект хозяйствования) предоставляет услугополучателю (клиенту) финансовую услугу, которая потребляется в процессе совершения определенного действия или осуществления определенной деятельности и которая связана с движением объектов, имеющих стоимость, и является результатом прошлых событий, которые способны принести в будущем экономические выгоды, и находятся в собственности и под контролем экономических субъектов, в их существующей форме или в форме денежных и финансовых инструментов, а услугополучатель (клиент) обязуется оплатить указанную услугу, если иное не установлено договором, на профессиональных началах.

Ключевые слова: финансовая услуга, договор о предоставлении финансовых услуг, система гражданско-правовых договоров.