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DYSFUNCTION OF LEGAL SERVICES BUSINESS IN UKRAINE: CONTENT, CONSEQUENCES, WAYS OF OVERCOMING

The article considers the social role of legal services business through a description of the system of its general and special functions as a social institution. The authors explain the content of the legal services business dysfunction and characterize legal quasi-consulting and its types. The authors also describe the consequences of legal services business dysfunction and propose measures to overcome this dysfunction.

Keywords: legal services business; legal consulting; quasi-consulting; law-based economy.

JEL classification: L26; D01; D82; E26.

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ДИСФУНКЦІЯ ЮРИДИЧНОГО БІЗНЕСУ В УКРАЇНІ: ЗМІСТ, НАСЛІДКИ, ПОДОЛАННЯ

У статті розкрито суспільну роль юридичного бізнесу на основі характеристики системи його загальних та спеціальних функцій як соціального інституту. Обґрунтовано зміст дисфункції юридичного бізнесу, охарактеризовано юридичний квазіконсалтинг та його види. Розкрито наслідки дисфункції юридичного бізнесу, запропоновано заходи з її подолання.

Ключові слова: юридичний бізнес; юридичний консалтинг; квазіконсалтинг; правова економіка.

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ДИСФУНКЦИЯ ЮРИДИЧЕСКОГО БИЗНЕСА В УКРАИНЕ: СОДЕРЖАНИЕ, ПОСЛЕДСТВИЯ, ПРЕОДОЛЕНИЕ

В статье раскрыта социальная роль юридического бизнеса на основе характеристики его общих и специальных функций как социального института. Обосновано содержание дисфункции юридического бизнеса, охарактеризован юридический квазиконсалтинг и его виды. Раскрыты последствия дисфункции юридического бизнеса и предложены меры по их преодолению.

Ключевые слова: юридический бизнес; юридический консалтинг; квазиконсалтинг; правовая экономика.

Problem setting. Development of a law-based state significantly enhances the social role of legal services business in the area of dissemination of law knowledge and information, legal behavior formation and legal culture of individuals and legal entities as well as facilitation of their activity within the legal framework. Nevertheless, legal services business in Ukraine does not fully serve its purposes. This fact evidences the dysfunction of legal services business as a social institution. As a result, research of contents and factors of legal services business development as a system of its functions, factors, expressions and consequences of its dysfunctional state along with the ways of its overcoming in Ukraine are of considerable importance.

Recent research and publications analysis. Nowadays, legal services business as a social institution has not become an object of complex theoretical economic and legal

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analysis yet. Scientists explore legal services and their market (Khokhuliak, 2011, 2016; Karlova, 2014; Havrish, 2011) and the frameworks of legal services firms' functioning (Shevchenko, 2016; Galkin, 2014).

Unresolved issues. Analysis of functions and dysfunctions of legal services business is an important direction in the development of theoretical frameworks of enhancement of the legal services' business role as a social institution and a regulator of social relations. Nevertheless, functions and dysfunctions of legal services business were not sufficiently examined in the contemporary academic legal, sociological, and economic literature.

The objective of this paper is to disclose the functions of legal services business, its contents, and expressions of its dysfunction to substantiate the measures of overcoming this dysfunction through the system and functional approaches.

Key research findings. Two interrelated intrinsic vectors are inherent to legal services business as the entrepreneurial activity of legal professionals, which is aimed at providing legal fee-based services for individuals and legal entities:

- the former is entrepreneurship, i.e. independent, initiative, and risky commercial economic activity of lawyers and law firms for the purposes of achieving a particular law result and gaining profit;
- the latter is intellectual activity of professionals in generation, involvement, transformation, accumulation, transferring, and dissemination of legal knowledge and information.

On the one hand, these intrinsic vectors determine those features of legal services business, which are general for entrepreneurial activity in any field: independence, riskiness, market certainty and directivity, orientation on gaining profit and minimization of expenses, innovativeness; on the other hand, they account for the specific characteristics of entrepreneurial activity of lawyers: knowledge intensity of juridical servicing; intellectual resources and intellectual product – a legal service, professional reputation, and juridical ethics. Legal services business is essentially intellectual, since knowledge of law and information are its resources as well as its products.

Intrinsic two-dimensional nature of legal service business determines its functions, which can be divided into general and specific ones. The entrepreneurial vector stipulates the general functions of business, which aims at effective functioning. General functions include business functions such as search and combination of resources, reduction of expenses, providing profit, innovation function etc.

Special functions of legal services business are the main directions of serving its purpose (the social role) as a social institution. At the microeconomic level, this purpose consists in conducing to achievement of goals of individuals and legal entities within the legal framework through providing legal assistance. At the macroeconomic level, it consists in providing and protection of law and order in all spheres of human activity, formation of legal culture and legal consciousness.

The system of special functions of legal services business comprises:

- a) accumulation and transmission functions – own functions, which indicate the essence of business as the professional activity of lawyers concerned with providing economic entities and citizens with relevant legal knowledge and information;
- b) a function of legal services business as a component of market infrastructure, which aims at minimization of transaction costs of market agreement participants;

c) imputed functions oriented on realization of the social purpose of business as the practical juridical activity of providing legal assistance. Legal services business has also the functions of law and performs rationalization, innovation, and regulatory functions.

Accumulation and transmission functions of business are directly related to its intellectual vector. There are certain requirements to effective legal services business. Firstly, accumulation of professional knowledge and information by lawyers, which is the ground for providing high-quality legal services and effective legal aid. The accumulation function encompasses the activity of professional consultants (lawyers) aimed at receiving, protection, and piling up the main resource of juridical consulting – knowledge of law and information. Secondly, legal services business is a special channel of dissemination of legal knowledge and information under market conditions. Its transmission function consists in conducting the activity on transferring legal knowledge and information through the mechanism of legal services.

Legal services business is a component of market infrastructure, which brings market transactions participants closer and leads to reduction of transaction costs. Thus, the infrastructural function is inherent to business. This function is fulfilled in the process of the activity related to legal support of effective agreements at the market. Firstly, legal services business is a structural element of the transaction sector of contemporary economy, which, according to the definition of S.I. Arhiereiev (2003, 2004), is a peculiar institutional sector of the economy, which provides transactions, i.e. exchange of ownership rights. Market activity of economic entities is now impossible without services of professionals in different areas of law. Consequently, servicing transactions, participators of which need professional legal aid is the most important role (the infrastructural function) of lawyers and law firms. This is confirmed by the share of legal services, which aim at law optimization of the activity of transactional sector economic agents (legal support of transactions) in the general amount of legal services provided in 2015 by law firms of Ukraine (in the top-50): financial and banking law – 31.8%; land and property law – 38.2%; completion law – 21.2%; international law – 10.6% (Nasadiuk, 2016).

Secondly, economic activity of business entities under the conditions of information imperfectness is related to significant expansion of market coordination. In the information society, economic activity, which is based on scarcity of resources, gives way to that business which possesses enough information as well as ways for its transmission (Strelets, 2003). It is worth mentioning that economic entities today operate under asymmetric distribution of information between participators of agreements as well as under the conditions of information surplus. Both surplus of information and its asymmetric distribution stipulate the increasing expenses for its selection, expertise, indication of conformity of obtained data with purposes of business and affect the growth of transaction costs. In such a case, market price ceases to be a sole and sufficient source of information for economic entities together with price signals determining their economic behavior. Non-price signals become more and more important. They encompass knowledge and information, which can substitute professional advice, recommendations etc. Therefore, consumption of professional legal services is a factor of overcoming imperfectness of information (asymmetric distribution, surplus). It facilitates the reduction of transaction costs.

Hence, contacting law firms for services is associated with certain expenses, including transactional, namely, expenses on search and selection of a lawyer, conclusion of an agreement, control over its performance etc. Since under conditions of information economy the activity concerned with search, selection, and analysis of essential information should be professional, business entities, which use legal services, win on business effectiveness and competitiveness. There are two factors conducting to reduction of transaction costs of business entities. The first one is formation of long-term relations with a law firm, which performs the functions of a permanent expert and a supplier of law knowledge and information. The second one is outsourcing, as full or partial transferring of functions of internal law consulting to independent lawyers or law firms. Consequently, the infrastructural function of legal services business consists in reduction of transaction costs under market agreement.

Intrinsic functions of economic consulting reveal its social role as a social institution. Firstly, the social role consists in fulfillment of law functions as directions of its immanent specific properties, the most important directions and aspects of its influence on social relations, which disclose the social nature and the purpose of law (Oleinykov, 2012). These functions are as follows:

- general social functions: informative and cognitive; value orientated; ideological and educative; cultural and historical; communicative and mediative;
- purely juridical functions: regulatory; security; protective functions (Isaieva, 2013).

Activity of legal services business entities assumes to fulfillment of law functions if it is oriented on dissemination of law knowledge and information, formation of legal culture, consciousness and behavior of economic agents. All these factors are important requirements for law-based state development.

Secondly, legal services business contributes formation and effective functioning of law-based economy, performing rationalization, innovative, and regulatory functions. Through the rationalization function, legal knowledge and information, transferred to clients in the process of legal servicing, are the most important factors in achievement of particular economic results, rationalization of business processes, and enhancement of management efficiency. Legal services business performs the innovative functions, which can be internal and external ones. Internal innovative function aims at development of juridical innovations and innovative legal services. External innovative function of business consists in formation of a certain legal environment for innovative activity of economic agents and legal protection of innovations and innovators.

Therefore, providing economic entities with necessary legal knowledge and information, legal services business directly influences their economic behavior and directs this behavior on optimization of resource use or enhancement of innovative activity.

It is worth mentioning that effective realization of general and specific functions of legal services business is based on information and educational activity of lawyers. Firstly, providing economic entities with legal information is an inherent element of legal services business functions fulfillment. At the same time, since providing information services may be a peculiar direction in the law firm activity, search, selection, and transmission of the latter to economic entities may be considered as a type of

legal consulting. Secondly, educational activity of lawyers, which helps citizens and other lawyers assimilate law knowledge and information, transferred in the process of legal servicing, is an important factor of effective realization of legal services' business functions. At the same time, education in the form of seminars, courses, qualification enhancement, and trainings can be a single type of law firm's activity.

Obviously, social role of legal services business is reflected in its infrastructure and intrinsic special functions, which are closely interrelated. Their realization in the process of legal servicing of individuals and legal entities is the factor of formation and development of a law-based state and law-based economy. In contrast, restricted realization of special functions and loss of some functions leads to the dysfunctional state of legal services business. Scientists have not considerably theoretically substantiated the nature, factors, and consequences of this state.

Defining the concept "dysfunction" is the basis in analysis of legal services business dysfunction. S.M. Oleinykov (2012) stated that dysfunctions are a type of relations, which characterize the unfavorable impact of a particular phenomenon, an event, action, or a process on a certain object. That is to say, dysfunction is defined as the dysfunctional influence of a particular phenomenon or a process on social relations. O.M. Nosyk (2016) proposes a definition of dysfunction in a broader sense: it is a particular degree of disturbance of intersystem dependence relations, i.e., a situation, when due to some reasons (including bad-quality fulfillment of functions) an object of a particular system (social, economic, political or legal) becomes fully or partially unfavorable for this system. In a narrow sense, it is the dysfunctional consequences of a particular system functioning, generating destabilization of the system as well as the object of its influence. Therefore, dysfunction is the dysfunctional state of a certain system and its negative consequences regarding an object of influence.

Legal services' business dysfunction stands for ineffective and restricted fulfillment or loss (full or partial) of general or special functions, leading to its dysfunctional (ineffective) state and negatively influence on social relations, particularly legal relations. Legal services business dysfunction is predetermined by numerous factors, which can be internal (related to the state of practical juridical activity) and external (activation of the grey market and criminalization of national economy, failures of government regulation). The most threatening phenomenon of the shadow economy at the national level is corruption. Expansion of quasi-consulting in practical juridical activity is one of the most negative factors and, simultaneously, expressions of legal services' business dysfunction.

Legal quasi-consulting is the activity of lawyers, which formally is the practical juridical activity related to providing legal assistance, but really aiming at meeting the demand of clients for services related to their problems settlement with the use of methods, which contradict professional and ethical norms of juridical activity and, in some cases, legal norms. In Ukraine, quasi-judicial services have a considerable share of demand and supply at the legal services market. These quasi services cover advisory, conclusions, projects, and actions, which aim at the activity beyond the legal framework and do not comply to professional and ethical principles of practical juridical activity. The legal quasi-consulting is presented by law firms and legal professionals, which offer:

a) unprofessional juridical consulting – providing bad-quality services at low price. Having thoroughly analyzed the state of the legal services market in Kharkiv region, O. Karlova (2014) points out there is a great number of providers of law-quality legal services. Such a situation is also inherent to the national market;

b) unlawful juridical consulting – lawyers act beyond the legal framework. Analysts of the journal "The Legal Practice" point to considerable extension of the "grey" market of legal services in Ukraine: "At the end of 2015, the volume of legal services market in Ukraine accounts for about 12 bln UAH and the amount of turnover of the top-50 firms accounted for 4 bln UAH. Since the rest of the market is mostly "in the shadow" and it is divided between individual practicing lawyers, it is complicated to measure this part of the market" (Ohliad rynku yurydychnykh posluh v Ukraini, 2016, www.kuluar.com.ua). A managing partner of Ukrainian law firm Ulysses O. Marchenko (Konkurentna perevaha, 2013, urist.ua) states: "A large majority of lawyers and law firms to some extent operate as mediators in "handling problems". Thus, we can frequently face advertisements of law firms of this kind: "we will make out the case at any court". Such principles of activity are supported by law firm clients, who need court victory regardless the ways of its achievement".

It is worth emphasizing that both the first and the second types of legal quasi-consulting infringe norms of practical juridical activity concerned with providing legal aid, i.e. they are unethical. A managing partner of law firm "KK&P" M. Kulkov (Koly advokatam slid vidmovliatysia vid nadannia svoikh posluh, 2016, zib.com.ua) mentions: "Decent firms leave, when they realize that they will be engaged in unsavoury businesses, for instance, consulting on moving money offshore or tax evasion". Managing partner of the law firm "Vasyl Kysyl and Partners" (which declares zero tolerance to illegal practices.) A. Stelmashchuk (Verkhovenstvo prava, 2016, pravo.ua) underlines: "We certainly do not participate in any corruption schemes on behalf of our clients or in own interest. We do not recognize such a way of managing business and we think that it bears no relation to jurisprudence. We want to operate at the market, where all the participants adhere to such standards. Although, this problem cannot be resolved during one day, market participants should aspire to achieve such results".

Existence of legal quasi-consulting is to some extent related to asymmetry of information at the legal services market. As a result, there may be significant information advantages of legal service producers. At the time of contract execution, client's evaluation of quality of an intangible legal service is based on some criteria, which are directly formed by a lawyer in the process of offering clients his/her service. Price is one of the most significant criteria. Offering a low price, quasi-consulting forms an illusion of choosing a consultant according to the price criterion. Clients think that, on the one hand, it is quite possible to receive a high-quality cheap service and, on the other hand, professionals, who set high prices, do not provide more qualitative legal services, but only overstate prices.

In the process of promotion of bad-quality legal services at the market, law firms and lawyers belonging to legal quasi-consulting of the first type involve clients through low price, which conduces to general decrease of quality of legal servicing, damages and causes emotional distress of specialists, who provide high-quality legal services. Negative consequences from non-professional legal consulting development

include: forcing out specialists, who provide high-quality services, from the market; decline of general professional level of legal aid for individuals and legal entities; distrust to lawyers, their services, and law as a social institution, which leads to the decrease of demand for legal services overall; formation of a long-held opinion on uselessness of professional legal aid in solution of many problems.

Secondly, there can be an opposite situation. If clients have information advantages, they can conceal a real purpose of their appeal for legal services to obtain unexpected benefits. Quality of legal services is not a criterion for price in this case, since receiving service is a formal reason for gaining real benefits of a client: conducting to positive solution of their problems at different government agencies on the basis of various means; mediation in relations with government; increase of expanses due to recognition of payments for legal services, which were not provided and, as a result, decrease of income before tax; development of different optimizing schemes, including tax evasion; obtaining confidential information on rivals, partners, and dissemination of inadequate information etc. In order to obtain "grey" services, a client is willing to pay more for formally "ordinary" legal advice. As a result, prices increase and legal services become unaffordable for many potential clients. Unlawful law consulting ruins reputation of lawyers and legal firms, forms doubts regarding their morality, competencies, and ethics of legal services business, conduces to formation of grey market and criminalization of entrepreneurship, deepening law nihilism.

Experience of unlawful solution of problems ruins respect for law, forms negative attitude to its creators and protectors, i.e. government and law enforcement bodies of different levels, lawyers, and law firms, and forms the whole subculture of unlawful behavior. Therefore, law quasi-consulting leads to dysfunction of legal services business and stipulates its further negative influence on social relations.

Important measures aimed at overcoming the dysfunction of legal services business are as follows: passing the Law "On Consulting Activities", which would determine the legal framework for legal services business operation ; recognition of legal services business as a special object on public and normative regulation (by the example of recognition of free legal aid in the Law of Ukraine "On Free Legal Aid", 2.06.2011, # 3460-VI); development of common regulation of legal service business on the part of professional organizations, unions of lawyers, and organizations of legal service consumers.

Conclusions. The two-dimensional nature of legal services business as entrepreneurial and intellectual activity stipulates its general functions oriented at providing effective entrepreneurial activity of lawyers and special functions, which are realizing its social role as a social institution. A system of special functions of legal service business is presented by its own functions: accumulation and transmission ones are related to social transferring of legal knowledge and information; infrastructural function of transactional costs minimization under market agreements; imputed functions, which encompass realization of law functions, rationalization, innovation, and regulatory functions.

Ineffective or restricted fulfillment or loss (full or partial) of these functions lead to the dysfunction of legal service business. Expansion of unprofessional and unlawful law consulting is one of expressions of this dysfunction. Such types of consulting ruin reputation of all lawyers and law firms, resulting in the dysfunctional position of

this business and impeding the development of law-based state. Overcoming legal services business dysfunction triggers the need for complex improvement of government and legal as well as common (professional) regulation of legal business. Further studies in this direction will be aimed at analysis of destructions at the legal services market in Ukraine.

Referenses:

- Про безоплатну правову допомогу: Закон України від 02.06.2011 № 3460-VI // zakon.rada.gov.ua.
- Pro bezoplatnu pravovu dopomohu: Zakon Ukrainy vid 02.06.2011 № 3460-VI // zakon.rada.gov.ua.
- Архипцев С.І.* Трансакційна архітектоніка // Економічна теорія. – 2004. – №1. – С. 69–83.
- Arkhiieriev S.I.* Transaktsiina arkhitektonika // Ekonomichna teoriia. – 2004. – №1. – S. 69–83.
- Архипцев С.І.* Трансакційний сектор економіки України: Монографія. – Харків: ХФНІСД, 2003. – 56 с.
- Arkhiieriev S.I.* Transaktsiinyi sektor ekonomiky Ukrainy: Monohrafiia. – Kharkiv: KhFNISD, 2003. – 56 s.
- Верховенство права // Юридическая практика. – 2016. – №36 // pravo.ua.
- Verkhovenstvo prava // Iuridicheskaia praktika. – 2016. – №36 // pravo.ua.
- Гавриш Г.* Аналіз ринку інтелектуальних послуг в Україні // Ефективна економіка. – 2011. – №12 // www.economy.nayka.com.ua.
- Havrysh H.* Analiz rynku intelektualnykh posluh v Ukraini // Efektyvna ekonomika. – 2011. – №12 // www.economy.nayka.com.ua.
- Галкин А.* Юридическая фирма на миллион. От частной практики до лидерства на рынке. – Р/на Д: Феникс, 2014. – 253 с.
- Galkin A.* Iuridicheskaia firma na million. Ot chastnoi praktiki do liderstva na rynku. – R/na D: Feniks, 2014. – 253 s.
- Ісаєва В.В.* Функції права: теоретично-правовий аналіз // Часопис Київського університету права. – 2013. – №1. – С. 45–48.
- Isaieva V.V.* Funktsii prava: teoretychno-pravovyi analiz // Chasopys Kyivskoho universytetu prava. – 2013. – №1. – S. 45–48.
- Карлова О.* Проблеми функціонування регіонального ринку юридичних послуг в умовах міжнародної інтеграції // Схід. – 2014. – №5. – С. 15–20.
- Karlova O.* Problemy funktsionuvannia rehionalnoho rynku yurydychnykh posluh v umovakh mizhnarodnoi intehtratsii // Skhid. – 2014. – №5. – S. 15–20.
- Коли адвокатам слід відмовлятися від надання своїх послуг // Закон і бізнес. – 2016. – №29 // zib.com.ua.
- Koly advokatam slid vidmovliatysia vid nadannia svoikh posluh // Zakon i biznes. – 2016. – №29 // zib.com.ua.
- Конкурентна перевага // Український юрист. – 2013. – №7–8 // urist.ua.
- Konkurentna perevaha // Ukrainskyi yuryst. – 2013. – №7–8 // urist.ua.
- Норт Д.* Институції, інституційна зміна та функціонування економіки / Пер. з англ. І. Дзюби. – К.: Основи, 2000. – 198 с.
- Nort D.* Instytutsii, instytutsiina zmina ta funktsionuvannia ekonomiky / Per. z anhl. I. Dziuby. – K.: Osnovy, 2000. – 198 s.
- Носик О.М.* Людський капітал інноваційного розвитку: економічні основи відтворення: Монографія. – Харків: Точка, 2016. – 490 с.
- Nosyk O.M.* Liudskiy kapital innovatsiinoho rozvytku: ekonomichni osnovy vidtvorennia: Monohrafiia. – Kharkiv: Tochka, 2016. – 490 s.
- Огляд ринку юридичних послуг в Україні // Юридична практика. – 2016. – №3 // www.kuluar.com.ua.
- Ohliad rynku yurydychnykh posluh v Ukraini // Yurydychna praktyka. – 2016. – №3 // www.kuluar.com.ua.
- Олейников С.М.* Архетипи правової культури й дисфункції правової антикультури // Вісник Юридичної академії України імені Ярослава Мудрого. – Серія: Право. – 2012. – №3. – С. 202–205.
- Oleinykov S.M.* Arkheptyru pravovoi kultury y dysfunktsii pravovoi antykultury // Visnyk Yurydychnoi akademii Ukrainy imeni Yaroslava Mudroho. – Serii: Pravo. – 2012. – №3. – S. 202–205.

Стрелец И.А. Новая экономика и информационные технологии: Монография. – М.: Экзамен, 2003. – 256 с.

Strelec I.A. Novaia ekonomika i informacjonnye tekhnologii: Monografiia. – М.: Ekzamen, 2003. – 256 s.

Хохуляк О.О. Методика проведення спеціальних досліджень ринку юридичних послуг та її конкретизація для потреб регіону // International Scientific Conference Formation of Modern Economic Area: Benefits, Risks, Implamantation Mechanisms: Conference Proceedings, Part II, April 29, 2016. – Tbilisi: SSTU, 2016. – P. 185–189.

Khokhuliak O.O. Metodyka provedennia spetsialnykh doslidzhen rynku yurydychnykh posluh ta yii konkretyzatsiia dlia potreb rehionu // International Scientific Conference Formation of Modern Economic Area: Benefits, Risks, Implamantation Mechanisms: Conference Proceedings, Part II, April 29, 2016. – Tbilisi: SSTU, 2016. – R. 185–189.

Хохуляк О.О. Ринок юридичних послуг в Україні: проблеми та перспективи // Сталий розвиток економіки. – 2011. – №7. – С. 39–44.

Khokhuliak O.O. Rynok yurydychnykh posluh v Ukraini: problemy ta perspektyvy // Stalyi rozvytok ekonomiky. – 2011. – №7. – S. 39–44.

Шевченко Л.С. Конкурентна діагностика юридичної фірми: світова практика та її запровадження в Україні // Економічна теорія та право. – 2016. – №1. – С. 76–86.

Shevchenko L.S. Konkurentna diahnostyka yurydychnoi firmy: svitova praktyka ta yii zaprovadzhenia v Ukraini // Ekonomichna teoriia ta pravo. – 2016. – №1. – S. 76–86.