

**THE BALANCE OF PUBLIC AND PRIVATE INTERESTS AS A PRINCIPLE
OF EFFECTIVE STATE REGULATION OF THE FINANCIAL MARKET
UNDER WARTIME CONDITIONS**

Iryna Svitlak

Doctor in Juridical Sciences, Professor, Professor at the Department of Law and Humanities,
Vinnytsia Education and Research Institute of Economics
of West Ukrainian National University, Ukraine
e-mail: svitlakiryna@gmail.com, orcid.org/0000-0002-4408-6868

Svyatoslav Mazurik

Candidate of Legal Sciences, Lawyer, Ukraine
e-mail: Svatoslavmazurenko0@gmail.com, orcid.org/0009-0002-0955-1733

Summary

The article is devoted to the study of the principle of balancing public and private interests as a fundamental basis of the administrative-legal mechanism for regulating the financial market of Ukraine under martial law. The full-scale war and the introduction of martial law in the country have led to a transformation of the regulatory paradigm and an objective intensification of public interest associated with ensuring financial security as a component of economic and national security. In this context, the principle of proportionality, enshrined in Article 21 of the Law of Ukraine «On Financial Services and Financial Companies», is considered a key instrument for legitimizing state interference in the sphere of private autonomy and a safeguard against excessive restrictions on the economic rights and freedoms of market participants and consumers of financial services.

The article substantiates that martial law entails the permissibility of the temporary predominance of public interest, manifested in the expansion of the discretionary powers of the National Bank of Ukraine, the introduction of special regulatory regimes, restrictions, and enhanced requirements for financial market participants. At the same time, such measures must comply with the criteria of legitimacy, necessity, and proportionality, as developed in the case law of the European Court of Human Rights and national judicial practice, in particular that of the Supreme Court.

Based on an analysis of doctrinal approaches and judicial practice, the study proposes conceptual frameworks for determining the limits of state intervention and for algorithmizing regulatory decision-making under crisis conditions. It is demonstrated that the effectiveness of state regulation of the financial market during wartime can be achieved only through a systematic pursuit of an optimal balance of interests, whereby the predominance of public interest does not transform into arbitrary interference with private rights but instead serves as a mechanism for ensuring the stable functioning of the financial system.

Key words: public interest, private interest, principle of proportionality, administrative-legal mechanism, state regulation, financial market, National Bank of Ukraine, martial law, financial security.

DOI <https://doi.org/10.23856/7428>

1. Introduction

The full-scale armed aggression against Ukraine and the introduction of martial law have transformed the paradigm of state regulation of the financial sector, bringing to the forefront the issue of ensuring a reasonable balance between public and private interests. In wartime, the financial sector performs not only an economic function but also a strategic security function, ensuring financial stability, continuity of payments, the functioning of the budgetary system, and support for the State's defense capacity. Under such circumstances, the principle of proportionality, enshrined in financial services legislation, acquires particular significance as an instrument for legitimizing state interference in the sphere of private autonomy.

Martial law objectively intensifies the public interest associated with the protection of national security, economic resilience, and the financial sovereignty of the State. In situations of direct threat to statehood, temporary dominance of the public interest over private interests becomes possible, manifested in the expansion of the discretionary powers of the National Bank of Ukraine (NBU), the introduction of special legal regimes, restrictions, and additional requirements for financial market participants. At the same time, even under wartime conditions, such interference must comply with the criteria of legitimacy, necessity, and proportionality, without encroaching upon the essential content of economic rights and freedoms.

Therefore, the study of the principle of balancing public and private interests in the financial sector during martial law has not only theoretical but also practical significance. It aims to substantiate the permissible limits of state intervention, to define the algorithms for implementing regulatory policy in times of crisis, and to develop a model of effective public administration in which the predominance of the public interest does not transform into arbitrary restriction of private rights but serves as a mechanism for ensuring stability, public trust, and the sustainable functioning of the State's financial system.

2. The Balance between Private and Public Interests as a Principle of State Regulation

The exercise by the National Bank of Ukraine (NBU) of its regulatory and supervisory functions is based on the principles set out in Article 21 of the Law of Ukraine «On Financial Services and Financial Companies», including the principle of proportionality. This principle provides that «state regulation and supervision of activities related to the provision of financial and ancillary services shall be carried out proportionately, having regard to the purpose of state regulation and supervision and the need to ensure a reasonable balance between private and public interests, taking into account a risk-based approach, as well as the circumstances and conditions of a particular situation (including the size of the provider of financial or ancillary services, the types of activities carried out by such provider and the risks inherent therein, the financial condition of such provider of financial or ancillary services and of the holders of qualifying holdings therein)» (*Zakon, 2021*).

In scholarly literature, principles are predominantly understood as guiding, fundamental provisions and indisputable requirements, compliance with which facilitates -within the scope of this study - the proper functioning of the mechanism of state regulation.

Of particular academic interest is the position of A. Popova, who investigates the content of the principle of proportionality using the example of regulating the activities of non-bank financial institutions. She notes that regulators of non-bank financial services markets adopt

decisions or take action proportionately, i.e., by maintaining the necessary balance between any adverse consequences for an individual's rights, freedoms, and interests and the objectives pursued by such decision or action. On the basis of the principle of proportionality, the NBU forms its professional judgment, which should take into account not only the general circumstances and conditions of the specific situation (the size of the financial services provider, the complexity, volume, types, and nature of operations performed, etc.), but also the organizational structure, risk profile, and features of the provider's activities as a systemically important and/or significant entity (where such status exists), as well as the activities of the financial group to which the financial services provider belongs (Part 5 of Article 21 of the Law on Financial Services) (Popova, 2024: 375).

The existence of a model of a reasonable balance between societal and individual interests is inherent in civil society and a democratic state governed by the rule of law. Ensuring an optimal balance between public and private interests under the conditions of a full-scale war is an exceptionally difficult task, and addressing this problem has both theoretical and applied significance, particularly given the fact that statutory criteria for achieving such a balance are currently absent.

At the same time, the implementation of state regulation and supervision in the financial services market should be guided by the principle of proportionality, which has been normatively enshrined and implemented in actual legal practice.

According to R. Raimov, «the concept of balancing the interests of market participants is a rather complex category, since it involves the correlation of each participant's interest in a particular outcome. Balance implies bringing all interests into equilibrium, which, according to this view, cannot be achieved simultaneously. Similarly, one may consider the possibility of ensuring a balance between public and private interests. In this case, a difficulty arises in distinguishing public from private interest, because public interest includes a set of private interests. The very notion of balance cannot be treated as something monumental, since maintaining equilibrium requires that any change in the vector of private interest be reflected in a corresponding change in public interest, and vice versa» (Raimov, 2018: 151).

3. Judicial Practice in Ensuring the Balance between Public and Private Interests

In view of the issues addressed in this study, particular attention should be paid to the analysis conducted by Ya. Bernaziuk of the case law of the European Court of Human Rights (ECtHR) concerning the maintenance of a (fair) balance between public (societal) and private interests. The scholar rightly notes that «observance of the necessary (fair) balance between societal (public) and private interests (the principle of proportionality) constitutes an essential requirement of civil society and of a democratic, social, and rule-of-law state, and forms an integral component of the principle of the rule of law».

According to the author, the criteria for ensuring such a balance include:

- interference by a public authority with an individual's private right is justified only where it is strictly necessary for the protection of societal (public) interests;
- the possibility for public authorities to amend or revoke their own administrative decisions is permissible solely in the public interest, where necessary, and with due regard to the rights and interests of private persons;
- the existence of mandatory and fair compensation to an individual in the event of interference with their private right justified by public necessity;

- the obligation to maintain a reasonable relationship (proportionality) between the objective pursued for the protection of the societal (public) interest and the means employed to achieve that objective (*Bernaziuk, 2021: 207*).

It is worth noting that the above-mentioned criteria, formulated in Ya. Bernaziuk's scholarly work, have been shaped by judicial practice, in particular paragraph 90 of the Resolution of the Supreme Court of 18 May 2022 in case № 280/988/19 (administrative proceedings No. K/9901/48691/21) (*Postanova, 2022*).

The issue outlined above is not new to the academic community. The Ukrainian state, like many other countries, previously faced the challenge of ensuring a balance between private and public interests when imposing quarantine restrictions aimed at preventing the spread of the COVID-19 pandemic. This situation intensified the debate regarding the admissibility of interference in the private sphere and the limits of restrictions on constitutional rights, thereby necessitating doctrinal and normative assessment of the balance between public and private interests in such circumstances.

While acknowledging the necessity and appropriateness of targeted public authority intervention in regulating specific spheres of social relations in pursuit of a particular public interest, an optimal and fair balance between the interests of the individual, society, and the State should ideally be maintained. The authors support the doctrinal position according to which these categories are not identical, and the dichotomous division of interests solely into «private» and «public», where societal interest is equated with public interest, no longer adequately reflects contemporary challenges.

Under the conditions of martial law in Ukraine, the heightened importance and «intensity» of public interest, as well as its priority over private interest, are evident. In such circumstances, it appears that the very content of public interest determines the permissible limits of state interference with the constitutional rights and freedoms of individuals.

In each specific case, the content of public interest is determined «with due regard to all the particular features of the situation; however, such interest is invariably associated with the necessity of guaranteeing human security in all its dimensions, including the preservation of life and health, as well as the preservation of state and supranational institutions designed to ensure these guarantees through appropriate legal and other civilizational mechanisms» (*Bernaziuk, 2023*).

Thus, the constitutional guarantee of fundamental human rights and the imposition of positive obligations on the State to secure those rights - both at the national and international levels - do not exclude the possibility of state interference with such rights. In particular, pursuant to paragraphs 1 and 2 of Article 15 («Derogation in Time of Emergency») of the European Convention on Human Rights:

«1. In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

No derogation from Article 2 shall be made under this provision, except in respect of deaths resulting from lawful acts of war, nor from Articles 3, 4 (paragraph 1), and 7 ...» (*Konventsia, 1959*).

In a state governed by the rule of law, according to S. P. Pohrebniak, «the prohibition of excessive state interference with individual freedom is regarded as an axiomatic requirement: the State may restrict human rights only where this is genuinely necessary, and only to the extent that such measures are proportionate to the aim pursued» (*Pohrebniak, 2012: 294*). The scholar

emphasizes that the fundamental principle to be applied when introducing prohibitions or restrictions on the exercise of constitutional rights and freedoms consists of three interrelated components: suitability (appropriateness), necessity, and proportionality in the strict sense.

4. Ensuring the Balance of Public and Private Interests as a Subject of Scholarly Debate

The problem of ensuring an optimal and harmonious balance between public and private interests exists alongside the issue of determining the permissible limits of state intervention in economic processes.

A conceptual understanding of the limits of legitimacy of state intervention in economic processes, as well as the essence of the State's negative and positive obligations in safeguarding economic freedoms, is presented in M. Savchyna's monograph «Legal Regulation and Economic Freedoms and Rights». The author emphasizes that «the idea of intervention as a legitimate influence in the sphere of private autonomy is based on the premise that the State is the most effective guarantor of human rights while simultaneously being their most potential violator. Therefore, such intervention must be properly justified, reasonable, foreseeable, and must not encroach upon the essential content of a right» (*Savchyn, 2020: 26*).

Considering the circumstances in which the national economy, particularly its financial sector, currently finds itself, attention should be paid to I. Mykhasiuk's views on the peculiarities of state economic regulation in times of systemic challenges. The academic argues that the evolutionary transformation of a stagnating national economy burdened by multiple challenges may be stimulated by a centralized economic policy of the State, often described as an «economic dictatorship». The necessity of introducing such a policy in Ukraine, including the declaration of an extraordinary economic regime, is determined by a prolonged and destructive crisis affecting all spheres of social life - economic, social, and political - and capable of triggering social upheaval. During a transitional period, such a policy may enable rapid restructuring of national production, thereby enhancing competitiveness and promoting economic growth. By contrast, economic regulatory methods and market mechanisms aimed at structural transformation tend to produce effects only in the long term and are frequently accompanied by increased unemployment and declining economic indicators. Economic centralization, conversely, may allow for a more rapid overcoming of negative phenomena entrenched during the formation of market relations. Moreover, it enables the State to use limited resources - particularly energy and investment resources - more efficiently and purposefully, as well as to rationalize foreign economic relations (*Mykhasiuk& Kosovych, 2021:14*).

In the context of state intervention in the economic sphere through public administration and regulation, V. Nahrebelnyi maintains that «under conditions of crisis phenomena, economic and social challenges and risks, there is an urgent need for more effective public management and for an organization of executive power adequate to existing property relations, whereby the State would finally acquire a long-term development strategy and the Government would become the generator and implementer of reforms. Instead of «manual control» and operating in a «firefighting» mode, it should move towards establishing stable, transparent, and equal rules for all participants in economic relations» (*Nahrebelnyi, 2013: 138*). Although this thesis was formulated in 2013, it remains highly relevant in the context of contemporary challenges. It appears that during wartime, the achievement of public interest - namely, ensuring the reliable and stable functioning of the entire financial sector and the uninterrupted operation of the

financial services market - is possible only through strengthening the institutional capacity of the Regulator and enhancing the effectiveness of public management.

As E. Dmytrenko notes, in conditions of a complex economic situation, decisions are often adopted that reflect a non-optimal correlation between the public and private interests of subjects participating in financial legal relations. The protection of these interests constitutes an important aspect of their interaction. Priority in safeguarding such interests is given to the activity of public authorities, which involves the issuance of normative prescriptions, restrictions, and prohibitions regulating the conduct of participants in financial legal relations. However, such regulatory activity must primarily serve the interests of society and the individual, operating within a framework of accountability (*Dmytrenko, 2016: 93*).

R. Boichuk also addresses the issue of balancing public and private interests in the economy, particularly when defining the limits of state regulation. The scholar argues that «as a result of the desire to abandon comprehensive state control characteristic of the administrative-command system, state regulatory policy in the sphere of economic activity was introduced as a direction of public policy aimed at improving the legal regulation of economic relations and administrative relations between regulatory authorities or other state bodies and business entities, preventing the adoption of economically inexpedient and ineffective regulatory acts, reducing state interference in business activities, and removing obstacles to the development of economic activity, all within the limits, procedures, and manner established by the Constitution and laws of Ukraine» (*Boichuk, 2017: 17*).

The introduction of martial law has undoubtedly led to the transformation of state regulation in all spheres of social life. In this context, the primary task of the legislator is to preserve, to the greatest extent possible, the proportionality (fairness, reasonableness, and optimality) of the balance between public and private interests. Consequently, a doctrinal issue arises concerning the admissibility of restricting economic rights and freedoms, considered within the framework of the conflict between private and public interests. Resolving this theoretical problem requires modeling, in practice, an algorithm of actions for public authorities aimed at achieving and protecting public interest under wartime conditions, which the authorities presently assess as exceptionally significant and acute.

At present, the NBU ensures the general public interest in the financial services market. As regards other market participants - namely, financial service providers and their clients, including consumers - their private interests undoubtedly differ. These private interests may interact with, align with, combine with, or directly conflict with public interests. Ideally, they should be balanced; however, achieving a proportionate, optimal, and harmonious balance between public and private interests under wartime conditions is extremely difficult.

M. Savchyna's comparative analysis of models of state intervention based on the principle of proportionality demonstrates that the implementation of specific measures by the State significantly depends on the structure of the economy, its degree of diversification and openness, and the level of guarantees of economic freedoms. This is linked to the institutional capacity of the State to facilitate the participation of economic agents in the development, reproduction, and improvement of norms and procedures that ensure stability and the good-faith performance of contractual obligations. From the perspective of societal constitutionalism, the State operates in cooperation with society, introducing advanced economic achievements and protecting the environment, thereby contributing to sustainable development.

There is currently an urgent need to explore the concept of global constitutional economics, where key aspects include the institutional diversity of the national economy and the State's capacity to implement adequate measures for the realization of economic values and public

goods. The formation of society's capacity for collective action - leading to the development of an institutionally capable constitutional democracy and a constitutional economy grounded in respect for fundamental goods - constitutes the foundation of sustainable economic development. These values foster the advancement of the national economy, including its competitiveness in the global context (*Savchyn, 2020: 37*).

5. Conclusions

Under conditions of martial law, public interest in the financial sector acquires heightened intensity and objective priority over private interests, due to the imperative of ensuring financial security. Its content is shaped by two strategic vectors: safeguarding the stable functioning of the financial system amid armed aggression and establishing the preconditions for post-war recovery and sustainable development of the State.

Martial law as a special legal regime substantially transforms the administrative-legal mechanism of financial market regulation, resulting in adjustments to the instruments of state influence and a recalibration of the relationship between public and private interests. In such circumstances, temporary restrictions on private economic rights may be permissible, provided that they meet the requirements of legitimacy, necessity, and proportionality. Ensuring a balance between public and private interests in the financial services market requires a clear delineation of the limits of state intervention. Despite the predominance of public interest during wartime, adherence to the principle of proportionality (fairness, reasonableness, and proportionality in the strict sense) remains a mandatory condition for the legality of regulatory decisions and a safeguard against excessive restrictions on the rights of market participants and consumers of financial services.

Public interest in the sphere of financial market regulation is directly linked to the safeguarding of financial security as a component of economic and national security. Achieving this objective necessitates strengthening the institutional capacity of the NBU, ensuring effective public management, and implementing the complex of anti-crisis measures, which may be imperative and stringent in nature but are aimed at market stabilization and the protection of clients' rights.

Although conflicts between public and private interests in financial legal relations are theoretically undesirable, they are practically possible. The effectiveness of administrative-legal regulation of the financial market can be achieved only through a systematic pursuit of an optimal balance of interests, whereby the predominance of public interest does not transform into arbitrary interference but serves as a mechanism for ensuring stability, maintaining trust in the financial system, and guaranteeing adequate protection of consumers' rights.

The ongoing modernization of special financial legislation is directed toward expanding the powers and enhancing the institutional capacity of the Regulator, reflecting the broader trend of strengthening the role of the State under wartime conditions. At the same time, the exercise of these powers must remain within the limits of the principle of proportionality, ensuring an appropriate balance between the protection of public interests and the safeguarding of private rights of financial market participants.

References

1. Bernaziuk, Ya. (2023). *Suspilni interesy ta yikh vplyv na zdiisnennia pravosuddia v umovakh voiennoho stanu* [Public interests and their impact on the administration of justice under martial law]. Retrieved from https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/2023_prezent/5_%20presentation_bernaziuk_public_interests.pdf [in Ukrainian]
2. Bernaziuk, Ya. O. (2021). *Pryntsyp proporsiinosti u praktytsi Yevropeiskoho sudu z prav liudyny* [The principle of proportionality in the practice of the European Court of Human Rights]. *Ekspert: paradyhmy yurydychnykh nauk i derzhavnogo upravlinnia*, 6(18), 197–214. [in Ukrainian]
3. Boichuk, R. P. (2017). *Problema pravovoho zabezpechennia balansu publichnykh i pryvatnykh interesiv u sferi investytsiinykh vidnosyn* [The problem of legal support for balancing public and private interests in the sphere of investment relations]. *Pravo ta innovatsiine suspilstvo*, 2(9), 14–22. [in Ukrainian]
4. Dmytrenko, E. (2016). *Osoblyvosti spivvidnoshennia publichnoho i pryvatnoho interesu u finansovomu pravi* [Peculiarities of the correlation between public and private interest in financial law]. *Naukovyi chasopys Natsionalnoi akademii prokuratury Ukrainy*, 2, 89–95. [in Ukrainian]
5. *European Convention on Human Rights. (1950). Konventsia pro zakhyst prav liudyny i osnovopolozhnykh svobod (z protokolamy)* [Convention for the Protection of Human Rights and Fundamental Freedoms (with Protocols)]. Retrieved from https://zakon.rada.gov.ua/laws/show/995_004#Text [in Ukrainian]
6. Mykhasiuk, I. R., & Kosovych, B. I. (2021). *Instrumentarii derzhavnogo rehuliuвання ekonomiky Ukrainy v chasy vyklykiv* [Instruments of state regulation of the economy of Ukraine in times of challenges]. *Ekonomichnyi prostir*, 172, 13–18. [in Ukrainian]
7. Nahrebelnyi, V. (2013). *Pravove zabezpechennia modernizatsii derzhavnogo upravlinnia ta derzhavnogo rehuliuвання v ekonomichnii sferi Ukrainy* [Legal support for modernization of public administration and state regulation in the economic sphere of Ukraine]. *Visnyk Natsionalnoi akademii pravovykh nauk Ukrainy*, 2, 133–140. [in Ukrainian]
8. Pohrebniak, S. P. (2012). *Pryntsyp proporsiinosti v ukrainskii yurydychnii praktytsi ta praktytsi YeSPL* [The principle of proportionality in Ukrainian legal practice and the practice of the ECtHR]. In *Pravove zabezpechennia efektyvnogo vykonannia rishen i zastosuvannia praktyky YeSPL: zbirnyk naukovykh statei mizhnarodnoi nauково-praktychnoi konferentsii* (pp. 294–310). Odesa: Feniks. [in Ukrainian]
9. Popova, A. V. (2024). *Meta ta pryntsypy derzhavnogo rehuliuвання rynkiv nebankivskykh finansovykh posluh* [The purpose and principles of state regulation of non-bank financial services markets]. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu. Seria «Pravo»*, 83(1), 372–378. [in Ukrainian]
10. Raimov, R. I. (2018). *Osoblyvosti publichnoho interesu* [Peculiarities of public interest]. *Yurydychnyi naukovyi elektronnyi zhurnal*, 2, 150–153. [in Ukrainian]
11. Savchyn, M. (Ed.). (2020). *Pravove rehuliuвання ta ekonomichni svobody i prava* [Legal regulation and economic freedoms and rights]. Uzhhorod, Ukraine: Vydavnytstvo «RIK-U». [in Ukrainian]
12. *Verkhovna Rada of Ukraine. (2021). Pro finansovi posluhy ta finansovi kompanii: Zakon Ukrainy vid 14.12.2021 r. № 1953-IX* [On Financial Services and Financial Companies: Law of Ukraine №. 1953-IX of December 14, 2021]. Retrieved from <https://zakon.rada.gov.ua/laws/show/1953-20#Text> [in Ukrainian]
13. *Verkhovnyi Sud. (2022). Postanova Verkhovnoho Sudu vid 18.05.2022 r. u spravi № 280/988/19 (administrativne provadzhennia № K/9901/48691/21)* [Judgment of the Supreme Court of May 18, 2022, case № 280/988/19]. Retrieved from <https://reyestr.court.gov.ua/Review/104360996> [in Ukrainian]