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HARMONIZATION OF ADMINISTRATIVE AND LEGAL REGULATION OF STATE GOVERNANCE OF ECONOMIC ACTIVITY IN UKRAINE: SOME LANDMARKS

The aim *of this article is to consider the impact of international law and European Union law on legislation of Ukraine in general and on the state governance of economic field in particular.*

The methods *of formal logic are used: analysis, synthesis, induction, deduction, generalization. The author analyzes the notion of "international act" and "international treaty" and determines what acts impact to national legislation; synthesizes and generalizes her own vision of the degree of influence of acts of international law on the legislation of Ukraine. Elements of Europeanization of administrative and legal regulation of state governance of economic field is delimited deductively. Conclusions are drawn about the need to change the content of state governance functions in economic field with applying induction.*

Results and conclusions. *The author draws attention to the different status of international acts and international treaties. The Ukrainian state implements the European integration policy and development of its legislation, the systems of state agencies are influenced not only by treaties and acts that have been ratified, but also by those not ratified by the Verkhovna Rada, though approximation to which is being implemented. It is emphasized that the legal personality implemented by the state shall define the enforceable international acts. The analysis of international acts developed by non-governmental organizations (UNIDROIT, UNCITRAL, etc.) suggests that they are mostly of a private law nature and may become a source of regulation in state – business entity relations at the micro level, i.e. those relations in which the state exercises its economic competence by acting as the owner of the property. At the same time, the regulatory framework of state governance of economic activity at the macro level is influenced by international treaties, in which Ukraine participates as authority. International treaties governing state legal relations also contain rules governing certain private legal relationships (trade agreements, double tax agreements, legal aid agreements). The article also highlights one of the trends in the development of administrative law in many European countries, including Ukraine, i.e. the Europeanization of administrative law. The elements of Europeanization of administrative and legal regulation of state governance of economic activity are determined.*

Key words: international treaty, soft law, adaptation of legislation, Europeanization of administrative law, reform of administrative legislation.

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1. Introduction

Development of regulatory framework at the present stage is determined, primarily, by the European integration policy of our state, implementation of which has been put into practice since the proclamation of independence. The Declaration on State Sovereignty of Ukraine of July 16, 1990 states: "The Ukrainian SSR acts as an equal participant in international affairs, actively promotes the reinforcement of general peace and international security, and directly participates in the general European process and European structures". The Resolution of the Verkhovna Rada of Ukraine "On the Basic Directions of the Foreign Policy of Ukraine" of July 2, 1993, which became invalid on July 1, 2010, has already stated, that "an essential condition for the successful implementation of Ukraine's capabilities is its active and full-scale accession into the world community". To ensure the appreciation of Ukraine as a reliable partner, equal conditions for Ukrainian business entities to enter foreign markets, Ukrainian legislation should be harmonized with international law. The need to create its own regulatory framework, determined by the political and economic realities of that time, caused the need to address to existing developments in other legal orders. Article 2 of the Law of Ukraine "On the Principles of Domestic and Foreign Policy" of July 1, 2010 states as follows: "The domestic and foreign policy are based <...> on the generally recognized principles and rules of international law <...> on the supremacy of law, economic and political independence of the state, protection of its national interests, establishing Ukraine as a full and respected member of the world community". Such circumstances require from the regulatory framework that governs the nature of the relationships between the state and business, the boundaries, forms and methods of the state governance of economic activity to be marked by a significant influence of the international community's experience.

The need of adaptation of the Ukrainian laws to the EU laws, due consideration given to the international experience of regulation of a certain range of social relations is emphasized in many scientific publications. However, far less publications deals with impact of international and EU law on administrative and legal regulation. Implementation

of the principles of organization and activity of the EU institutions in administrative law of Ukraine became the subject of research in the doctoral thesis of K. Berezhna (2017). Some issues and problems of implementation of European standards into administrative and legal regulation are analyzed in the joint monograph *Ukraine and European Integration: Public Legal Aspects* (2010), and in separate publications by A. Pukhtetska (2012; 2014), V. Kolpakov (2014), Yu. Vaschenko (2016), O. Radyshevska (2018) and others. However, the issues of international legal impact in general as well as of European standards in the administrative and legal regulation of state governance of economic activity in particular have not been covered properly, which predetermined relevance of this article. Its object is to determine what international acts influence the change of approaches to the administrative and legal regulation of state governance of economic activity and what is the matter of its Europeanization.

2. International law impact

As it reasonably proceeds from the publications, the differences between the norms of national legal systems significantly interfere with the development and intensification of broad international cooperation on many important issues (Bakhin, 2003). Development of international economic cooperation in the context of globalization determines the need of legal approximation. On the other hand, legal approximation contributes to the development of economic cooperation (Mamutov, 2007). One of the ways of such approximation is execution of international treaties. The approximation of national legislation on the basis of international treaties has become so widespread that the conventional mechanism of legal integration is deemed to be decisive, if not exclusive (Bakhin, 2003). The modern world, as H. Corell points out, does not know any significant activity, whether at the individual or state level, which would be carried out beyond the influence of any treaty ... These treaties establish a comprehensive system of rules of law governing the conduct of states, as well as, in a way, human behaviour (Corell, 2001). Therefore, execution of international treaties is the key to approximation of the laws of different states and contributes to the development of international economic cooperation.

However, one should take into account that the movement towards approximation and unification of regulatory framework can be implemented in various ways. Taking into consideration the fact that international acts may be classified according to the issuing authority as those: 1) issued by the States (international treaties); 2) issued by international organizations, which were founded by the states; 3) issued by non-governmental international organizations, we may state that fewer than all of them fall under the concept of "international treaty" and thus have different effects on the unification (harmonization) of legal regulation.

International acts issued by the states make a special group of acts – international treaties. According to Article 2 of the Law of Ukraine "On International Treaties" of June 29, 2004 an international treaty of Ukraine – is executed in writing with a foreign state or other subject of international law governed by international

law, regardless of whether the treaty comprises one or more related documents, and regardless of their specific name (treaty, agreement, convention, pact, minutes, etc.). According to Art. 9 of the Constitution of Ukraine International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. The same rule of law is also duplicated in Art. 19 of the Law of Ukraine "On International Treaties of Ukraine". Enshrining such provision in one of the first articles of the Fundamental Law brings out clearly that Ukraine recognized and introduces the principle of supremacy of international law over national law in its law-making and law enforcement activities (Petrov, 2012). It appears clear that using the term of international treaties the legislator does not equate it with the term of international acts.

It should be noted as well that provisions of such treaties have dualistic legal nature. On the one hand, they retain all the original features of the rules of international law, and all the general rules (principles) of this law apply to them. On the other hand, they, being adopted into the national law and order, act as national rules of law, but rules which are "autonomous", "bound together", "immune" from arbitrary changes by national authorities (Velyaminov, 2002). Thus, in fact, only international norms which are ratified by the Verkhovna Rada of Ukraine and adopted into national law, are binding and have supremacy over the rules of national law.

The Ukrainian state implements the European integration policy and development of its legislation, the systems of state agencies are influenced not only by treaties and acts that have been ratified, but also by those not ratified by the Verkhovna Rada, though approximation to which is being implemented.

Acts issued by international organizations founded by the states, including international intergovernmental organizations, are attributed in the literature (Administrativne pravo Ukraini, 2018) to the "soft law" legal acts, meaning institutional, recommendatory rules contained in relevant sources. Legal acts of interstate, particularly economic, organizations are becoming extensive source of international law. That is not even the decision of the UN bodies, but rather legal acts of more binding importance adopted by such organizations as the WTO, not to mention acts adopted by the EU bodies, with their own specific features, determined by the specificity of the Union itself (Velyaminov, 2002). So far, neither the doctrine of international law nor the theory of state and law has the unified approach to the meaning of the "soft law acts". However, it is beyond question that the "role and significance of "soft law acts" for international law and order are important, despite their advisory nature. They are expected to gradually fill in the gaps in the legislation and bring the existing rules of law in line with the requirements and standards set by international bodies and organizations" (Shalinska, 2011).

Along with the regulatory framework, numerous international non-contractual instruments, including those of advisory nature, such as, for example, Incoterms, standard and uniform laws, arbitration rules, general terms of delivery, and so on, are becoming of practical importance. Therefore, defining the regulatory framework

of state governance of economic activity, the state should take into account such feature of carrying out of economic activity by economic entities as practical application of acts of non-contractual nature.

The analysis of international acts developed by non-governmental organizations (UNIDROIT, UNCITRAL, etc.) suggests that they are mostly of a private law nature and may become a source of regulation in state – business entity relations at the micro level, i.e. those relations in which the state exercises its economic competence by acting as the owner of the property. At the same time, the regulatory framework of state governance of economic activity at the macro level is influenced by international treaties, in which Ukraine participates as authority. International treaties governing state legal relations also contain rules governing certain private legal relationships (trade agreements, double tax agreements, legal aid agreements).

Considering the economic competence inherent in the state, we should point out that it should pay due attention to international legal acts developed and adopted by international reputable non-governmental organizations, which provide for building relationships on the principles of justice, fair practice and reasonableness. Being a holder of corporate rights and implementing state governance of economic activity at micro-level, the state should apply, in particular, the Principles of Corporate Governance, approved by the National Securities and Stock Market Commission of Ukraine of July 22, 2014, adjusted for the OSCE Principles of Corporate Government.

Thus, the current state of legal framework and state governance of economic activity is determined primarily by the integration aspirations of our state, globalization of the world economy and impact of international legal acts.

3. Association Agreement with EU and Europeanization

Ukraine's European integration intentions and steps towards their implementation gave rise to the problems of state governance of economic activity. These issues became the cornerstone in Ukraine's integration into the European area. The Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine, signed in 1994, became the impetus for developing new and amending existing legal acts. Launched in 1998, administrative reform was meant to rebuild the system of public administration agencies by the European example. The Concept of Administrative Reform in Ukraine states that the matter of administrative reform is to restructure the existing public administration system in Ukraine comprehensively in all spheres of public life. The Law of Ukraine "On the National Program of Adaptation of the Laws of Ukraine to the European Union Laws" provides that most of the areas which requires amendments relates to state governance of economic activity. At the national level, the addresses of the President of Ukraine and the programs of state development emphasizes the need to achieve compliance of Ukrainian legislation with the EU legislation.

According to the scientists, "the Association Agreement (AA) of March 30, 2012 initialled by Ukraine and the EU should become a significant step in

intensification of cooperation between the parties, since the document plays the paramount role in harmonization of the legislation of Ukraine with Union law (the concept of "approximation of laws" is mentioned five times in the Preamble of the AA only). In particular, according to the Preamble, the approximation of legislation is associated with the reformation process in Ukraine, thus promoting economic integration and deepening the political association of the parties". In general, harmonization of legislation covers almost all spheres of cooperation between Ukraine and the EU, including state governance of economic activity. However, this area is not segregated. As the periodicals reasonably point out, "economic activity has become a decisive subject for Ukraine's integration into the European environment, the result of which determine all the subsequent steps of the parties as regards the rapprochement policy" (Zamryga, 2016). Article 114 of the Agreement states: "The Parties recognise the importance of the approximation of Ukraine's existing legislation to that of the European Union. Ukraine shall ensure that its existing laws and future legislation will be gradually made compatible with the EU acquis". The Association Agreement not only specifies exactly which EU Directives shall be implemented into the national law, but also sets specific timeframes for their implementation.

However, let's remember that approximation of systems of legal regulation of economic activity does not imply their full unification, and does not impede innovations in this area in every state. Study of this problem in view of the present aspirations of Ukraine to join the EU has shown that this task is far from being simple, though quite resolvable, if we are talking about approximation, harmonization of legislation, as against full merger of national law by EU law (Mamutov, 2010). The purpose of harmonization at EU level is to create unified legal environment for economic activities within the common market; it covers, primarily, laws, regulations and administrative acts that directly influence the establishment and functioning of the common market (Petrov, 2013). Harmonization is a process of purposeful approximation of legal systems by eliminating contradictions between them and formation of minimum legal standards through the adoption of common legal principles, which provides for bringing the laws of Member States and non-member states into compliance with the requirements of international law based on the international treaties (Parhomenko, 2012). Harmonization should result in the introduction of uniform principles for regulating of appropriate public relations, which will provide a basis for the compatibility of Ukrainian legislation with the EU acquis.

According to T. Kolomoyets (2013), adaptation of legislation is a part of the harmonization of national legislation of Ukraine with appropriate international law-making and law enforcement standards, a step-by-step process of bringing national legislation into the line with international standards.

Considering the positions of the Cabinet of Ministers of Ukraine, the President of Ukraine, stated in recently approved Strategy and Concepts of our state's

development (Sustainable Development Strategy "Ukraine–2020", Strategy of Reformation of Public Administration of Ukraine for 2016–2020, Concept of the Development of E-Governance in Ukraine, Concept of the Development of Digital Economy and Society for 2018–2020), which provide for active implementation of the entrepreneurship deregulation program and proceeding from the previously announced commitments to acquire full membership in the EU, the issue of compatibility of state governance of economic activity with EU law as well as the importance of state governance of economic activity during adaptation to the EU legislation become increasingly actual.

As Ukrainian periodicals state, establishment of legal framework for regulation of the activity in the field of economy becomes a striking example of reformation of national administrative law pursuant to the requirements of EU legislation (Vaschenko, 2016). The author notes that the EU legislation, in particular, defines the requirements for institutional support of state regulation in certain (regulated) fields of the economy.

Recently, to characterize such a phenomenon as approximation of regulatory framework in Ukraine to the norms, rules and requirements of EU law, such term as "Europeanisation" has been widely used.

The process of approximation of administrative law systems of both EU member states and states seeking EU accession was designated in the literature as Europeanization of administrative law, which should result in the development of European administrative law, which has acquired rather crisp outlines even today (Petrov, 2013). Europeanization, i.e. reformation in the context of European integration in compliance with the principles and requirements of European Union law, is an important trend in the development of administrative law in many European states and in Ukraine as well (Vaschenko, 2016).

European researchers and scholars, in particular by Claudio M. Radaelli (Italy) (2003), Johan P. Olsen (Sweden) (2002), T. Börzel (Germany) (2003), J. Jagielski (Poland) (2005), interpret the concept of "Europeanization" in a different way. That is meant as a process of complex nature (Johan P. Olsen, 2002), as a new form of governance (T. Börzel, 2003), as a phenomenon that involves other processes (Claudio M. Radaelli, 2003), as well as a relevant influence of European law and European international organizations (J. Jagielski, 2005). Having analyzed these and other existing approaches to definition of this term, O. Radyshevska proposes to interpret the Europeanization of administrative law of Ukraine as an ongoing systematic process of direct/indirect impact of the European law (EU, European international organizations law) on the formation (structure and content) of administrative law, by including the rules of European legal order in it, as well as respect for European standards and principles, the use of representative models in state authorities' regulatory activity at national level with due regard to the peculiarities of the national legal system, to distinctive features of law enforcement activity and judicial practice in Ukraine (Radyshevska, 2018). Generally, we may agree with

this interpretation, though we consider it appropriate to point out that due account for the distinctive features should be a prerequisite for Europeanization.

It is worth noting that based on the above-mentioned concept of "Europeanization of administrative law", the main driver in its interpretation is "European law", which is meant by the researcher in a narrow sense as EU law, law of international European organizations. This law has shifted away from international to a large extent becoming a special (hybrid) legal phenomenon compliant with EU legal nature (Beschasnyi, 2011). At present stage, proceeding from the analysis of the current law-making process, EU law has the greatest influence in our state.

In his works, G. Moens distinguishes two basic principles that reflect the interaction between national and EU law. In particular, the principle of rule of law and the principle of direct action are universally recognized. He states that the principle of the supremacy of EU law over national law will be a fundamental guarantee of the unrestrained effect of EU law (Moens, 2010). However, such a principle is appropriate for EU Member States. In Ukrainian practice, the case law of the European Court of Human Rights, one of the sources of EU secondary law, has the legal basis for binding application only.

EU law actually has an indirect effect on law-making and law enforcement practices in Ukraine. In determination of the rule to be applied to settle the disputed relations, understanding the importance of EU law for the legal system of Ukraine as a whole, familiarity with the relevant provisions in EU law may effect on the interpretation of the applicable rule of law and appropriate consideration of the relationships to be settled.

As we know, there are two main types of EU law – primary and secondary. According to the National Program for the Adaptation of the Laws of Ukraine to the EU Legislation, approved by the Law of Ukraine of March 18, 2004, the primary laws includes: 1) Treaty establishing the European Economic Community of 1957, Treaty establishing the European Atomic Energy Community of 1957, as amended by the Maastricht Treaty of 1992, the Treaty of Amsterdam of 1997 and the Treaty of Nice of 2001, as well as acts of accession; 2) The Merger Treaty of 1965; 3) acts of accession of the new member states. The Program includes 13 clauses as regards the sources of secondary law, which, in our view, can be represented by eight: 1) directive; 2) regulation; 3) recommendation or conclusion; 4) the source of the law represented as an international agreement; 5) the general principle of European Community law; 6) judgment of the European Court of Justice; 7) the common strategy as defined in Article 13 of the Treaty on European Union; joint actions within, a common position, general provision or principle in the field of common foreign and security policy; 8) a framework decision on the harmonization of legislation, a common position, a decision in the context of the provisions of the Treaty on European Union on the cooperation of law enforcement and judicial authorities in criminal cases.

Considering the fact that secondary EU law is not an international treaty (which becomes binding in the territory of Ukraine upon implementation of legislative mechanism), Ukraine adapts its legal framework to EU law, though does not make

it binding, a special mechanism for such adaptation has been developed and certain institutions were created: the Verkhovna Rada Committee on European Integration, the Government Office for European Integration of the Secretariat of the Cabinet of Ministers of Ukraine, etc.

In particular, the Coordination Council on the approximation of the law of Ukraine to the European Union law is responsible for the coordination on the relevant issue, being created to ensure the interaction between state authorities and non-governmental institutions during the implementation of the National Program of Adaptation of the Law of Ukraine to the European Union Law. The Ministry of Justice of Ukraine organizes preparation of the annual action plan for the implementation of the Program.

The Action Plan for the Implementation of the Association Agreement between Ukraine, of the One Part, and the European Union, the European Atomic Energy Community and their Member States, of the Other Part, approved by the Cabinet of Ministers of Ukraine of October 25, 2017, contains 1943 clauses, each of them corresponds to an Article of the Agreement/Decision of an Association Body and/or an Act of EU Law. Implementation of this Plan should provide for the adaptation of the laws of Ukraine to the acts of law (Regulations, Directives) in the following areas: customs, technical barriers, initiation of business activities, trade in services and e-commerce; capital movement, state procurement, intellectual property; competition, energy trading, etc. At the same time, the Agreement extended and specified the list of areas where priority is given to the adaptation of the Ukrainian laws to the EU laws, comparing to the National Program, which also remains in force. It should be noted that the definition of an exhaustive list of priority areas for the adaptation of laws, which, of course, does not cover all possible areas of social interactions, neglects certain areas and actually limits the activities of state authorities in this field.

4. Conclusions Based on the ideas set out in the article, we consider it possible to specify that Europeanization of administrative and legal regulation of state governance of economic activity is based on the Europeanization of state governance, Europeanization of legal regulation of economic activity in general, and Europeanization of administrative law. Combination of these three directions will provide for the Europeanization of administrative and legal regulation of state governance of economic activity in Ukraine, which actually involves business deregulation (in particular, abolition of duties and payments). However, current deregulation in Ukraine shall be free from the abolition of state governance. The essence of state governance functions in relation to economic activity should be changed. Therefore, administrative and legal regulation of state governance of economic activity in the context of Europeanization should obtain the new essence, when effectiveness of its implementation shall depend on the level of Europeanization of administrative and legal regulation, administrative law in general, which involves, first of all, implementation of the principles of European administrative law, which require separate study.

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ГАРМОНІЗАЦІЯ АДМІНІСТРАТИВНО-ПРАВОВОГО РЕГУЛЮВАННЯ ДЕРЖАВНОГО УПРАВЛІННЯ У СФЕРІ ГОСПОДАРСЬКОЇ ДІЯЛЬНОСТІ В УКРАЇНІ: ОКРЕМІ ОРІЄНТИРИ

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***Мета** статті – розглянути питання впливу міжнародного права та права Європейського Союзу на законодавство України загалом та у сфері державного управління господарською діяльністю зокрема.*

*Використовуються **методи** формальної логіки: аналізу, синтезу, індукції, дедукції, узагальнення. Для визначення, які акти міжнародного права впливають на національне законодавство, автор аналізує поняття «міжнародні акти» та «міжнародний договір», на підставі чого синтезує та узагальнює власне бачення ступеня впливу актів міжнародного права на законодавство України. Дедуктивним шляхом визначаються елементи європеїзації адміністративно-правового регулювання державного управління у сфері господарської діяльності. З використанням індукції формулюється висновок щодо*

необхідності зміни змістового наповнення функцій державного управління стосовно господарської діяльності.

Результати та висновки. *Автором наголошено на різному статусі міжнародних актів та міжнародних договорів. Українська держава реалізує євроінтеграційну політику, на розвиток її законодавства, системи державних органів мають вплив не лише ті договори, акти, які ратифіковані, але й не ратифіковані Верховною Радою, проте до вимог яких ми наближуємо наше законодавство.*

Залежно від правосуб'єктності, яку реалізує держава, мають визначатися міжнародні акти, які вчиняють відповідний вплив. Міжнародні акти, що розробляються недержавними організаціями (УНІДРУА, ЮНСІТРАЛ і т. п.), здебільшого мають приватно-правовий характер і можуть бути джерелом регулювання відносин «держава – суб'єкт господарювання» на мікрорівні, тобто тих відносин, в яких держава реалізує свою господарську компетенцію, виступаючи власником майна. Водночас нормативно-правове забезпечення державного управління господарською діяльністю на макрорівні перебуває під впливом саме міжнародних договорів, в яких Україна бере участь як суб'єкт владних повноважень. Міжнародні договори, які врегульовують публічні правовідносини, містять одночасно і норми, що регламентують певні приватні правовідносини (торгові угоди, договори про уникнення подвійного оподаткування, угоди про правову допомогу).

У статті також відзначено одну з тенденцій розвитку адміністративного права у багатьох країнах Європи, в тому числі в Україні, – європеїзацію адміністративного права. Визначено складники європеїзації адміністративно-правового регулювання державного управління у сфері господарської діяльності.

Ключові слова: міжнародний договір, м'яке право, адаптація законодавства, європеїзація адміністративного права, реформа адміністративного законодавства.