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THE EUROPEAN UNION'S COURT PRACTICE IN DETERMINING A LEGAL STATUS OF LEGAL ENTITIES

Foreign economic activity can be carried out by legal entities on the territory of different states. At the same time, their legal status is determined on the basis of nationality. In some member states of the European Union it is determined on the basis of the theory of incorporation, in others, on the basis of the theory of real seat that poses national restrictions on legal entities' activities on the territory of different states. Because of the fact that the European Union has not developed unified mechanisms for relocating legal entities and also taking into account the national limitations of the Member States, it is difficult to determine the legal status of legal entities when they operate in different countries. The European Court of Justice has a significant impact on solving these issues. This paper investigated the European Union's court practice in determining the legal status of legal entities based on the analysis of certain cases. It is emphasized that the Court of justice of the European Union regulates certain aspects of such relocation in its decisions by means of interpreting the relevant legislation.

Keywords: foreign economic activity, legal entities, Court of justice of the European Union, legal status.

Formulation of the problem. Ratification of the Association Agreement between Ukraine, of one part, and European Union, European Atomic Energy Community and their member-states, of the other part, gave our country a tool and a roadmap for its own transformations. Implementation of that Agreement's requirements provides Ukraine with a possibility to become a full-scale member of the European Union in the future.

Even though nowadays legal entities cross the borders of the European Union on daily basis, a lot of issues concerning the trans-border activity of legal entities within the EU have yet to be harmonized. Thus, the answers to the main questions related to activities of legal entities abroad are provided by the Court of Justice of The European Union¹. The process of trans-border movement of legal subjects is an extremely complex matter, because of the significant difference that exists between the approaches of member-states to the laws that define legal status of those subjects. Taking into account our country's aspirations for European integration, practices of the Court of Justice of The European Union concerning regulations of this matter are of considerable interest for Ukraine.

Literature overview. Legal practice of the Court of Justice of the European Union in the context of the trans-border movement of legal entities was an object of research in the works of Ukrainian and foreign authors, such as E. A. Dubovitska, O. M. Kalinina and A. S. Kasatkina.

In particular, the article «Case Law of the European Union and its impact on the regulation of recognizing legal capacity of legal persons», authored by A. S. Kasatkina, contains an analysis of regulations, which are implemented in the countries of the European Union, criteria by which personal law of legal entities is defined, as well as judicial practice aimed at closure, harmonization and elimination of contradictions between different legal systems². T. V. Komarova explored jurisdiction of the Court of Justice of the European Union as a system of specific powers which characterize the Court's competence in different aspects, such as management of judicial authority, subject of the trial and subject of judicial

¹ Калініна, О.М. (2013). Перспективи транскордонного переміщення компаній в Європейському Союзі з урахуванням останніх правових змін. *Вісник Маріупольського державного університету*, 6, 297-303.

² Касаткіна, А.С., Рудерман, И.Ф. (2017). Прецедентное право Европейского союза и его влияние на регулирование вопросов признания правосубъектности юридических лиц. *Право. Журнал Высшей школы экономики*, 6, 121-135.

activity of the Court of Justice of the European Union, as well as institutional structure of the European Union's judicial system and procedural forms of its realization¹.

The results of the abovementioned researches demonstrate complexity of the problem of defining legal status of legal entities in the process of their relocation within the European Union, which implies the necessity of further research.

The purpose of this article is to characterize practices of the Court of Justice of The European Union related to determination of the legal status of legal entities within the European Union.

Basic material presentation. The key feature of the subjects of foreign economic activities in comparison to other economic entities is their ability to expand their activity beyond the territory of a single state. A question of defining the legal status of those subjects as they perform their economic activity on territories of different states arises in this case.

Legal entities comprise one of the categories of subjects of foreign economic activities of Ukraine and are included in the texts of both the law of Ukraine «On foreign economic activity» and economic code of Ukraine. The nationality of legal entities serves as a basis for defining their legal status as part of the legal order within which framework such an entity has emerged².

International legal practice envisages two main approaches to determining the nationality of the legal entity: the incorporation theory and the real seat theory. According to the incorporation theory the law of the state, on which territory the subject was created is applicable, regardless of actual location of the subject. On the other hand, the real seat theory prioritizes the actual location as a criterion of defining, which state's law should be applied to the subject, while also demanding that actual location of the subject should coincide with its statutory location³. As member-states of the European Union follow different approaches of defining the nationality, the difficulty arises in defining the legal status of legal entities in the process of performing their activities on the territories of different member-states of the European Union.

The Treaty on the functioning of the European Union secured the freedom of establishment of legal entities abroad for performing independent activities, aimed at making a profit. In particular, Article 49 of the Treaty on the functioning of the European Union prohibits placing of any restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Such prohibition shall also apply to restrictions on setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. The freedom of establishment includes the possibility of legal entities to transfer their location from one member-state of the European Union to another⁴. Said transfer is possible for both factual and statutory locations of the subject. In case of transferring of the factual location legal entity doesn't change its registration state and remains a legal entity of the state, within which it was established⁵. It is in the process of changing the location of the legal entities that the difficulty of defining of their legal status emerges.

In this context, it should be noted that Article 3 of the Law of Ukraine «On foreign economic activity» defines the permanent location of a legal entity in the territory of Ukraine as one of the characteristics that qualify such an entity as a subject of foreign economic activity of Ukraine. At the same time, the Economic Code of Ukraine doesn't mention such a characteristic. Apart from the Law on «On foreign economic activity» current legislation of Ukraine doesn't envisage connection between the location of a legal entity and the location of its management center and doesn't provide the definition of the term «permanent». V. V. Poyedynok emphasizes that the demand of permanent residency of the legal entity in the territory of Ukraine is a case of mechanical copying of the Soviet approach that created a situation in

¹ Комарова, Т.В. (2016). Суд ЄС та національні інтереси держав – членів Європейського Союзу. *Проблеми законності*, 134, 190-198.

² Довгерт, А.С., Кисіль, В.І. (2014). *Міжнародне приватне право*: підручник. 2-ге видання. Київ: Алерта, 247.

³ Касаткина, А.С., Рудерман, И.Ф. (2017). Прецедентное право Европейского союза и его влияние на регулирование вопросов признания правосубъектности юридических лиц. *Право. Журнал Высшей школы экономики*, 6, 132.

⁴ Cathiard, C. European Added Value Assessment on a Directive on the cross-border transfer of company seats (14th company law Directive), Annex I: Legal effects of the requested legislative instrument. *European Parliament*. <[www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOLJOIN_ET\(2013\)494460\(ANN01\)_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOLJOIN_ET(2013)494460(ANN01)_EN.pdf)> (2018, November, 02).

⁵ Дубовицкая, Е.А. (2004). *Европейское корпоративное право: Свобода перемещения компаний в Европейском сообществе*. Москва: Волтерс Клувер, 10-11.

which legal entity couldn't have been registered within the USSR's legal system, while having its managing bodies on the territory of another state¹. Thereby, taking into account provisions of the Law of Ukraine «On foreign economic activity» it can be argued that at the current stage of development factual relocation of a legal entity beyond the borders of Ukraine is impossible.

Another way of relocation is transfer of the statutory location of the legal entity, which results in the changing of its state of registration. At the same time, in case of transferring of the legal entity's statutory location from one member state of the European Union to another that entity has to retain its legal personality. To achieve that, exclusion of the company from the state register in the country of incorporation shouldn't lead to the company's liquidation, while registration in the host state shouldn't be considered as the creation of a new company². To facilitate the closure of national legislations of the European Union's member-states the project of Directive 14 was developed, which should allow transferring of the company's statutory location to another state while also changing the applicable legislation. This project is being reviewed for more than 15 years already, which doesn't help to facilitate the possibility for the companies to relocate their statutory location to other member-states of the European Union.

As one of the most dynamic modern legal systems, the legal system of the European Union finds itself in the state of permanent development. Unlike national legal systems, constitutionalisation of the European Union's legislation is provided not by the main legislative bodies that adopt, change or repeal constitutional acts, as it usually happens, but by the Court of Justice of The European Union³. Considering European aspirations of Ukraine, which are already enshrined in the Ukrainian legislation, in the course of adaptation of Ukrainian legal system to the European one, normative content of the acts of Court of Justice of The European Union should be taken into account⁴.

According to the article 19 of the Treaty on the European Union, the Court of Justice of The European Union ensures adherence to the law in the process of interpretation and implementation of the Treaties, namely the Treaty on the European Union and the Treaty on the functioning of European Union. For that purpose the court verifies the legitimacy of the acts issued by the institutions of the European Union ensures abidance of member-states by their commitments, stated in the Treaties of the European Union, interprets the law of the European Union by requests of the national courts and tribunals of the Union's member-states. The Supreme Administrative Court of Ukraine in its Informational letter on 18.11.2014 № 1601/11/10/14-14 determined that such a definition of the Court of Justice of The European Union's functions and capacities indicates at the obligatory character of the Court's decisions, first of all, for the sides of the dispute. Thereby, the Court's decisions can be used as precedents within the framework of the European Union's legal system and, in particular, can be used by the Court itself and judicial bodies of member-states whenever provisions of the European Union's law are applied.

As noted above, while the possibility of the companies' relocation is established within the European Union's legal system, the unified mechanisms of such relocation have yet to be developed, which leaves some space for national limitations on legal entities' activity in territories of different states and, thereafter, on recognition of their legal status. Taking that into account, the subject of the Court's consideration is accordance of national limitations put on the companies' relocation with the freedom of establishment of companies, which is secured by the law of the European Union. The Court's decisions, related to the issue of the companies' relocation helped to specify and expand the context of freedom of establishment, while also diminishing the impact of the real seat theory, without, however, completely eliminating it⁵. The Court's practice determines that if member-state of the European Union in which territory the company was established allows transferring of the company's factual location abroad while preserving its legal

¹ Поєдинок, В.В. (2007). Суб'єкти зовнішньоекономічної діяльності: проблеми законодавчого визначення. *Бюлетень Міністерства юстиції України*, 2 (64), 71.

² Дубовицкая, Е.А. (2004). *Европейское корпоративное право: Свобода перемещения компаний в Европейском сообществе*. Москва: Волтерс Клувер, 17.

³ Яворська, І. (2017). Рішення суду ЄС як джерело права внутрішнього ринку Європейського Союзу. *Вісник Львівського університету. Серія міжнародні відносини*, 42, 202.

⁴ Шевчук, С.В. (2008). *Загальнотеоретичні проблеми нормативності актів судової влади*: Автореф. дис. ... д-ра. юрид. Наук. Харків, 15.

⁵ Касаткина, А.С., Рудерман, И.Ф. (2017). Прецедентное право Европейского союза и его влияние на регулирование вопросов признания правосубъектности юридических лиц. *Право. Журнал Высшей школы экономики*, 6, 123.

personality (incorporation theory), the host country is obliged to recognize such a company regardless of the theory it follows itself. If, however, the state of establishment follows the real seat theory, the host country is not obliged to recognize the company, once again, regardless of the theory it adheres to itself, because in the process of transferring its factual location abroad, the company loses legal capacity, that was given to it as it was established¹.

T. V. Komarova notes that while the founding Treaties don't put direct obligations related to balancing the interests of member states and the Union on the Court of Justice, its legal practice has utmost importance for ensuring strength and democratic legitimacy of the Union. The Court of Justice of the European Union acts as a crucial element of supranational institutional system and a key link for the formation of unique and special legal order of the EU, which also includes searching for the most adequate forms and methods of development of the integration, while taking into account the interests of its subjects².

The impact of the Court's legal practice on determination of the legal status of the legal entities can be illustrated by the analysis of separate cases, presented in the Court.

One of the latest cases of the Court of Justice of The European Union related to accordance of transferring of the legal entities' with the freedom of establishment is the «Vale case». The essence of the case consists in the intention of Italian company «VALE Costruzioni S.r.l.» to transfer its statutory location to Hungary, which led to changing of the company's country of registration while preserving its legal personality. Because of this, the company asked the relevant state bodies of Italy to exclude it from the trade register. In accordance with that request, the relevant state bodies of Italy excluded the company from the trade register and specified that the company transferred its location to Hungary. After the exclusion of the company from Italian register, new statute of the company «VALE ÉpitésiKft» was adopted with an aim of registering in Hungarian commercial register as a limited liability company, which can be regulated within Hungarian legislation. In its turn, Hungarian court rejected the claim of an Italian company concerning its registration, because from the point of view of Hungarian law the company that was created and registered in Italy couldn't transfer its location to Hungary and couldn't thereby be registered by a Hungarian court as a legal predecessor of a Hungarian company.

Taking into account these circumstances, the case was considered by the Supreme Court of Hungary that sent a request to the Court of Justice of The European Union, considering the accordance of Hungarian legislation to the freedom of establishment in the European Union, as Hungarian law allows transformation of Hungarian companies, while forbidding transformation of foreign companies into Hungarian ones.

Regarding the accordance of this situation to the freedom of movement of legal entities within the European Union the Court decided that so long as national legislation of Hungary envisages only transformation of the companies, that are located in the Hungarian territory, this legislation differentiates the domestic and trans-border relocation, which thereby prevents the companies that are located in the territory of another state from using their freedom of movement, as it is envisioned by the Treaty on the functioning of the European Union³.

Apart from that, the Court of Justice of The European Union stated that hosting member-state has no right to refute the claim of a company from another member-state to become a company of a given host country if a procedure of transformation is provided by the laws of a host country. The meaning of this case consists in a positive response to the question of the host country's ability to allow the company to change the applicable law in the process of relocating to another state with an aim of adaptation to organizational and legal forms of companies that exist there while retaining its legal personality⁴.

Another of the latest cases from the EU's Court of Justice related to the determination of the legal entity's legal status in the context of its relocation is the «Polbud case». The essence of the case is in the intention of the company «Polbud», which was created and registered in Poland, to transfer its location to Luxemburg without changing its factual location of economic activity. The company made a request

¹ Дубовицкая, Е.А. (2004). *Европейское корпоративное право: Свобода перемещения компаний в Европейском сообществе*. Москва: Волтерс Клувер, 16.

² Комарова, Т.В. (2016). Суд ЕС та національні інтереси держав – членів Європейського Союзу. *Проблеми законності*, 134, 193-194.

³ *Case C-378/10 – VALE Épitési* [2012]. ECR I-0000.

⁴ Касаткина, А.С., Рудерман И.Ф. (2017). Прецедентное право Европейского союза и его влияние на регулирование вопросов признания правосубъектности юридических лиц. *Право. Журнал Высшей школы экономики*, 6, 131.

to the relevant Polish court, which performs necessary steps for registration and initiation of the procedure of liquidation. On the basis of said request, the beginning of the process of liquidation was registered in the commercial register and the liquidator was appointed. The general meeting of the company decided to change its name to «Consoil» and also to resume its economic activity in the form of a limited liability company, according to the law of Luxemburg, while retaining its legal personality. On the basis of this decision, the company «Consoil» was included in the commercial register of Luxemburg. After that the company made a request to the relevant Polish court, which performs necessary steps for registration, asking for its exclusion from the trade register of Poland, referring to the transfer of its statutory location to Luxemburg. To be excluded from the trade register of Poland the company needs to submit the necessary documents, related to the termination of its activity. The company stated that it fails to see the necessity of submitting these documents, as it has no intentions of terminating its activity, its assets weren't distributed between shareholders and the request for exclusion from the register was sent because of the company's relocation to Luxemburg, where it will resume its activity in accordance with the law of Luxemburg. The company's request for its exclusion from the register was rejected. The case was then considered by the Supreme Court of Poland, which had some doubts, concerning said rejection's accordance with the freedom of establishment in the European Union¹.

Considering the «Polbud case» the Court of Justice of The European Union noted that the Articles 49 and 51 of the Treaty on the functioning of the European Union should be interpreted in such a way, that freedom of establishment applies to relocation of the company, which was established in accordance with the law of a member state, on the territory of another member state, according to conditions, created by legislation of the hosting state, into the company, registered in accordance with the hosting member state's law, when factual location of the company doesn't change.

According to the Article 19 of the Law of Poland «On international private law» transfer of statutory location of a company, established in accordance with Polish law to another member-state, doesn't lead to loss of the company's legal personality. Nevertheless, according to Articles 270 and 272 of the Code of commercial companies of Poland, the decision of the company's shareholders to relocate statutory location of the company to another member state of The European Union results in termination of the company's activity by means of its liquidation. At the same time, the Article 288 envisages that the company can't be excluded from the commercial register unless its activity has been terminated by means of liquidation. Thus, while in principle a Polish company has the right to transfer its statutory location to another state without losing its legal personality, it can only be excluded from the trade register of Poland if it terminates its activity by means of liquidation².

The Court emphasized that the state where the company was established can install some limitations, related to the protection of public interests of the company's creditors, minor shareholders, workers etc., but in a given case it can't ask for an obligatory liquidation of the company.

Development of case law of the Court of Justice of The European Union changed the states' approaches to the issues of collision regulation of legal status of the legal entities by reducing the number of cases in which legal personality of foreign legal entities wasn't recognized in the process of their relocation to another state³.

Conclusions. Taking into account all of the above, it can be argued that in the absence of unified legislation of the European Union related to relocation of legal entities and determination of their legal status, the process of relocation leads to emergence of legal disputes, which are submitted for consideration of the Court of Justice of The European Union. While resolving such disputes the Court of Justice of The European Union interprets legislation of the EU's member states, therefore regulating controversial issues while simultaneously defining a certain approach to implementation of the norms, related to the freedom of movement. In the process of further reformation of legal system of Ukraine it's vitally important to take into account position of the Court of Justice of The European Union, among other things, on issues related to determination of legal personality of legal entities in the process of their relocation, in context of our state's association with the EU.

¹ Case C-106/16 – *Polbud-Wykonawstwo sp. z o.o* [2016]. OJ C 211/23.

² Case C-106/16 – *Polbud-Wykonawstwo sp. z o.o* [2016]. OJ C 211/23.

³ Касаткина, А.С., Рудерман, И.Ф. (2017). Прецедентное право Европейского союза и его влияние на регулирование вопросов признания правосубъектности юридических лиц. *Право. Журнал Высшей школы экономики*, 6, 132.

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