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THE CONCEPTS OF LEGAL NATURE OF THE EURASIAN ECONOMIC UNION

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SUMMARY

The present article has been an attempt to study and analyze different concepts and approaches to legal nature of the Eurasian Economic Union. This paper also highlights competence of the Eurasian Economic Union as well supranationality phenomenon in the law of the EAEU.

Key words: Eurasian Economic Union, legal nature of the Eurasian Economic Union, international legal status of the Eurasian Economic Union, supranationality, competence of the Eurasian Economic Union.

КОНЦЕПЦИИ ЮРИДИЧЕСКОЙ ПРИРОДЫ ЕВРАЗИЙСКОГО ЭКОНОМИЧЕСКОГО СОЮЗА

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АННОТАЦИЯ

В статье рассмотрены и проанализированы концепции и подходы к определению юридической природы Евразийского экономического союза. Освещены компетенция Евразийского экономического союза, а также вопрос наднациональности в праве Евразийского экономического союза.

Ключевые слова: Евразийский экономический союз, юридическая природа Евразийского экономического союза, наднациональность, компетенция Евразийского экономического союза.

REZUMAT

Articolul examinează și analizează conceptele și abordările privind definirea naturii juridice a Uniunii Economice Eurasiatice. Competența Uniunii Economice Eurasiatice, precum și problema supranaționalității în legea Uniunii Economice Eurasiatice sunt acoperite.

Cuvinte cheie: Uniunea Economică Eurasiatică, natura juridică a Uniunii Economice Eurasiatice, supranaționalitatea, competența Uniunii Economice Eurasiatice.

Introduction. Active development of regional economic integration is one of the features of modern international relations. As the result of intense formation and development of interstate integration relations we deal with unions of states, which are seem to have more complicated legal status and legal nature in comparison with ordinary international intergovernmental organizations. Such integration unions may have some peculiarities of their international legal status, which without doubt require a deep and comprehensive scientific legal research and analysis.

There is no uniform concept or opinion towards the legal nature

of integration organizations. Some international lawyers consider such economic unions to have a complicated legal status due to supranational competence. While the others suggest economic unions to have simply the status of international organization. In contrast to that some lawyers are confident that economic unions have much in common with federal states by legal nature.

International legal status of international organization may be described as the specified by norms of international law set of rights and obligations of the international



organization defining its international personality [1, p. 81]. The states-founders grant to the international organization certain international rights [2, p. 29]. The scope of international personality of international organization is defined by its constituent documents, articles of association [3, p. 317].

Theory of International law specifies general rights of international organizations such as the right to conclude agreements with states, international organizations, the right to cooperate with other subjects of international law, the right to recognition of states and governments as well as other rights [3, p. 318]. Specific rights and features of legal personality of the international organization are set by and arise from functions of this organization. Thus international personality of international organizations is called “functional legal personality” [3, p. 318].

The aim of the article. The present article has been an attempt to study and analyze different approaches to legal nature of the Eurasian Economic Union. This paper also highlights competence of the Eurasian Economic Union as well as supranationality phenomenon in the law of the EAEU. Different concepts of the international legal status of the Eurasian Economic Union have been highlighted and analyzed in this research.

Materials used. International legal status of the Eurasian Economic Union (hereinafter referred to as “the EAEU”, “Union”) has been recently discussed by lawyers. The research on this issue was conducted mainly by Russian scientists, such as: K.A. Bekyashev, Ye.G. Moiseyev, A.Ya. Kapustin, B.K. Azanov, S.Yu. Kashkin, A.O. Chetverikov and others.

Key statements of the research. The EAEU was established by Treaty on the Eurasian Economic Union signed by Member States on the 29th of May 2014 [4]. EAEU was created to provide free movements of goods, services, capital and labour, perform coordinated, harmonized and single policy in the sectors determined by the Treaty on the Eurasian Economic Union (hereinafter referred to as “the Treaty”) [4]. Article 1 of the Treaty clearly defines the EAEU as the international organization of regional

economic integration. The EAEU has international legal personality.

It should be noted, that the institutional mechanism of the EAEU consists of the following organs: Supreme Eurasian Economic Council, Eurasian Intergovernmental Council, Eurasian Economic Union and Court of the Eurasian Economic Union.

According to provisions of the Treaty, the EAEU shall function within competence and powers granted to it by Member States. The competence of EAEU can be defined as the scope of rights and authorities granted to Union by Member States under the Treaty to perform its functions and reach the aims it was established for by Member States. The competence of EAEU is limited by the provisions of the Treaty and international agreements concluded within the EAEU [4].

In our opinion, the EAEU has few types of competence. First of all, it should be noted, that in certain spheres strictly defined by the Treaty the EAEU has exclusive powers. This type of competence covers the spheres in which Member States delegate their powers to Eurasian Economic Commission as the permanent regulatory body of the EAEU on the basis of the Treaty. According to the Eurasian Economic Commission Regulation (Annex 1 to the Treaty) the Eurasian Economic Commission performs its functions in the following spheres: customs tariff and non-tariff regulations; assignment and distribution of import customs duties; establishment of trade regimes for third parties; competition policy; transport and transportation and other spheres [5]. There is also so-called shared competence or “shared responsibility” [6], where the member-states perform coordinated and harmonized policy in certain sectors of the economy [6]. Here member-states should cooperate on the basis of joint approaches approved by the organs of the EAEU. Legal harmonization may be also conducted on the basis of decisions of EAEU organs.

The competence of the EAEU may be also classified as the internal competence (performed within the EAEU relating to internal market, customs union etc) and the external competence (rights and authorities

of the EAEU to act as the subject of international relations).

The Treaty on the Eurasian Economic Union is the basis for legal analysis of the international legal personality of EAEU. According to provisions of Article 1, EAEU is the international organization of regional economic integration that has international legal personality [4].

Article 7 of the Treaty on EAEU defines the powers of the EAEU in the sphere of international relations [4]. The EAEU within its competence has the right to act and perform international activities aimed at solving issues, which are to be solved by the EAEU. To this aim the EAEU has the right to cooperate with states, international organizations and international integration unions and conclude agreements with them independently or together with Member States. Supreme Eurasian Economic Council shall adopt the decision defining the rules for such international cooperation [4].

So the EAEU has the right to perform international activities provided such actions and measures are performed within its competence and aimed at the solving issues, which are held before the EAEU [4].

The process of concluding of international agreements between the EAEU and third states is regulated by the international treaty within the EAEU. Negotiations and signing of such international agreements shall be held on the basis of decision of Supreme Eurasian Economic Council after all Member States have made all the necessary national internal procedures [4].

Some lawyers consider, that the EAEU is the international regional organization by its legal nature [7, p. 18]. They refer to provisions of Article 7 of the Treaty on the EAEU and explain that process of concluding international agreements with third parties is regulated by international treaty within the EAEU and on the basis of consent between Member States. Supreme Eurasian Economic Council has the right to decide on the concluding of the respective international agreement only after Member States give their consent by completing all the necessary national internal procedures [7, p. 15].



A.Ya. Kapustin considers that international legal personality of the EAEU is more complicated than the international legal personality of ordinary international intergovernmental organizations [8, p. 61]. In his opinion, the decisive feature of the EAEU is lawmaking competence – the powers and ability to create international legal norms, which in turn constitute a new integration legal order within the EAEU [8, p. 61]. A.Ya. Kapustin also support the idea – the EAEU has certain features, that bring the EAEU closer to supranational organizations [8, p. 62].

While analyzing the legal nature of the EAEU, it is important to consider, whether the supranationality phenomenon does exist in the law of the EAEU. In our opinion, it is highly important to study and analyze the scope of supranationality in the legal status of the EAEU. This research has also been an attempt to analyze, whether the EAEU and its organs possess any features of supranational status.

The supranationality is the comparatively new phenomenon in international law, which have been widely discussed in the context of economic integration and legal nature of economic unions. Commonly the supranationalism applies to situations, where member states of integration union delegate the certain part of their powers to a specially created organ, which is composed of the independent offices. The distinguishing feature is that such independent organ may adopt and pass the decisions, which are binding for member states of this organization. The appearance of the term “supranationalism” is connected with the establishment of European Coal and Steel Community [9].

There are different indications and criteria of supranationality in the theory of international law. Supranational organs should be composed of the independent international officers, who cannot hold any imperative mandates from their governments and should act independently. Decisions of supranational organs should be adopted by the majority and should have the direct effect in the territory of the member states [10, p. 139]. In the European Union law the

supranationalism means independence of organs from any influence from member states [11, p. 13]. The main criterion of supranationality remains the delegation by member states certain powers to the competence of international organization [9].

S.Yu. Kashkin and A.O. Chetverikov consider that supranationality may occur in different degree or extent in the integrational organizations, depending on the certain stage of integration [12, p. 92]. The authors suggest: there are several forms or stages of supranationality – from the simplest one to the highest form, where the supranationality occur to the utmost [12, p. 98].

According to S.Yu. Kashkin and A.O. Chetverikov the simplest form of supranationality appears, where the integrational union has the right to adopt and pass the decisions, which are binding upon Member States and do not require any further confirmations or ratification on behalf of Member States [12, p. 92]. It should be stated that the Eurasian Economic Commission within its competence has the right to adopt and pass the acts, which abide the Member States. Such acts constitute the part of the EAEU legislation and should be directly followed within the territory of the Member States [13]. It is necessary to remind, that Eurasian Economic Commission consists of Council of the Commission and Board of the Commission. The Council of the Commission may amend or reject the decisions of the Board of the Commission upon request of a Member State or member of the Council of the Commission [13].

The next important feature or sign of supranationality is the direct effect of integration legislation, which is obligatory not only for Member States, but also for their citizens [12, p. 92-93]. In this regard we agree and support the opinion of S.Yu. Kashkin, who considers the acts of Eurasian Economic Commission do have a direct effect since these acts are binding on Member States as well as for natural persons and legal entities [14]. For example, we can refer to the EAEU Technical regulation “On the safety of fish and products made of fish” adopted by decision of the Council of the Commission No 162,

dated 18 of October 2016 [15]. The above Regulation governs production and sale of fish and products made out of fish, sets the requirements for fish producers. For the purposes of this Regulation, the fish producer shall mean legal entity or individual registered as private entrepreneur (article 4 of the Regulation) [15]. Thus we may conclude, that technical regulations of the Eurasian Economic Commission are binding on legal entities and individuals and may have the direct effect in the territory of the EAEU.

In supranational organs the decisions should also be adopted by majority [12, p. 92]. In relation to Eurasian Economic Commission the decisions of the Council of the Commission are adopted by consensus, Decisions of Board of Commission are adopted by qualified majority or by consensus (article 18 of Treaty on EAEU).

One of the important features of supranationality is the requirement for organs of integrational union to be composed of independent officers, who act impartially and independently and should not receive any instructions from their governments [12, p. 96]. All bodies of the EAEU consist of representatives of the respective governments, head of states of the Member States. According the article 31 of the Eurasian Economic Commission Regulation, the Board of the Commission shall be composed of representatives of Member States on the basis of the principle of equal representation of Member States. Article 34 of the Regulation outlines the independence of Board members of the Commission and provides, that members of the Board of the Commission, while performing their duties, should act independently and should not receive or ask for any instructions from the state organs or state officers of the Member States. This provision has been often referred to when considering the supranational status of the Eurasian Economic Commission. But in our opinion, the independence of the Board of the Commission can be challenged due to the fact, that any Member State or member of the Council of the Commission may during fifteen days following the date of publication of decision of the Board of the



Commission raise the offer to amend or cancel this decision [13]. In such a case the Council of the Commission during ten calendar days should adopt the respective decision. In addition to that, any Member State, that does not agree with the respective decision of the Council of the Commission has the right to appeal the decision at Supreme Eurasian Economic Council or Eurasian Intergovernmental Council.

Departments of the Commission are composed of the officers and employees, who are nationals of the Member States and possess respective qualifications [13]. Thus only Departments of the Commission consist of officers and employees. The Board of the Commission, as well as the Council of the Commission, are composed of representatives of Member States.

Some researchers pay attention, that organs of the EAEU are not elected directly. While the direct election of members of organs should be considered as the sign of supranational status of the integration union [12, p. 96]. V.L. Tolstyh considers that supranationalism does not appear in the functioning of the Eurasian Economic Commission or appears not significantly [16].

Professor Ye. Abdrasulov suggests to distinguish the terms “supranational functions” and “supranational organs” [17]. The researcher considers, that certain supranational functions, which are transferred to the organs of the EAEU by Member States, do not automatically lead to existence of supranational organs. Member States may agree to delegate to organs certain supranational powers and functions [17].

The attention should be paid to Article 38 of the Treaty on the EAEU, specifying, that Member States should perform coordination in the sphere of trade of services with third states. However, the coordination does not mean supranational competence of the EAEU in this sphere [4].

Authors of book “The Law of the Eurasian Economic Union” K.A. Bekyashev and Ye.G. Moiseyev consider that the EAEU being a public intergovernmental organization and secondary subject of International law possesses so-called “functional supranationality” [18, p 34], when Member States voluntarily limit their

powers (competence) in a technical sphere in favour of the EAEU.

K.A. Bekyashev considers, that functional supranationality appears, when Member-states voluntarily limit their rights in the technical sphere [19].

In their work “The Basics of Integration Law” S.Yu. Kashkin and A.O. Chetverikov explain, that integration organizations with features of supranationality are the specific subjects of international law [12, p. 90-91]. P.P. Myslivskiy considers the EAEU to be the supranational organization by its legal nature [20].

We agree with the position of R.V. Shmakov, who considers that the EAEU does possess some features of supranationality due to ability to adopt binding decisions in some spheres, where the Member States have delegated their powers to the EAEU organs. But in the opinion of R.V. Shmakov, this does not fully correspond to the concept of supranationality [21].

K.A. Bekyashev and Ye.G. Moiseyev think, that the EAEU possess “functional supranationality” [18], when Member States voluntarily limit their powers in the technical sphere.

B.K. Azanov holds a different point of view and explains and considers the EAEU as “soft confederation”, confederation state [22].

Conclusions. The issues of legal nature of the EAEU has been discussed by international lawyers. In our opinion, on the basis of the conducted research and analysis of materials, one can outline the following main approaches defining the legal nature and status of the EAEU. They are: 1). The EAEU has the particular legal nature with certain features of supranationality. 2). The EAEU is the international intergovernmental organization in the ordinary meaning of this term. 3). Concept of confederative legal nature of the EAEU.

Based on the analyzed sources and materials the majority of lawyers consider, that the international legal personality of the EAEU is more complicated, than the legal personality of ordinary international organizations with some features or signs of supranationality. Some researches outline the “functional supranationality” of the EAEU.

On the other hand, there are those, who follow the position that the EAEU is the international regional organization and has the respective legal status of the secondary subject of international law.

There are also some works that study and analyze the confederative nature of the EAEU. This concept lacks strong arguments to apply the term confederative nature in relation to the EAEU.

In our opinion, the EAEU may be considered as the international organization, that theoretically has some features of supranationality, which however do not fully reflect the concept of supranationality, existing in the international law.

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