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Free movement of services in the European Union and in the Eurasian Economic Union. Similarities and differences

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ABSTRACT

The European Union (EU) and the Eurasian Economic Union (EAEU) are international organizations integrating member states, primarily in the economic field. Both organizations guarantee four economic freedoms: free movement of goods, services, labor, and capital. One of these freedoms: free movement of services is particularly important. It should be noted that within the customs union of the EU and the EAEU the internal customs barriers have been eliminated, and for the exchange of services between these organizations, only the borders between the two unions remain an obstacle. For this reason, legal regulations concerning the free movement of services in the EU and the EAEU determine the opportunities for economic exchange between these organizations.

Keywords: The European Union, the Eurasian Economic Union, a single market, free movement of services

1. INTRODUCTION

The European Union (EU) is an international integration organization, which was founded on the 1st of November 1993. The Eurasian Economic Union (EAEU) is also an

international integration organization, but it was founded on the 1st of January 2015. Both organizations integrate member states, primarily in the economic field. Until the completion of the procedure specified in the art. 50 of the Treaty of the European Union (TEU) about the withdrawal of the United Kingdom, the European Union includes 28 Member States. Until the procedure specified in art. 108 Treaty of the Eurasian Economic Union (Treaty of the EAEU) concerning the inclusion of the Republic of Tajikistan, the Eurasian Economic Union has 5 Member States. Both organizations guarantee four economic freedoms: free movement of goods, services, labor and capital.

Among the above mentioned four freedoms, a particular attention should be directed to the freedom of movement of services. Trade in services is one of the most dynamic components of the international economy. Moreover, in recent years, global indicators on trade in services have grown faster than the corresponding indicators on trade in goods.¹ For this reason, within the customs union of the EU and the EAEU the internal customs barriers have been eliminated, and for the exchange of services between these organizations, only the borders between the two unions remain an obstacle. Therefore, the legal regulations governing the free movement of services within the EU and the EAEU determine the possibilities of services exchanges between these title organizations.

2. FREEDOM OF MOVEMENT OF SERVICES IN THE EUROPEAN UNION

According to art. 26 of the Treaty on the Functioning of the European Union (TFEU) within the framework of the internal market of the EU is a guarantee of the freedom of movement for goods, labor, capital and services. Unfortunately, neither TFEU nor TEU defines the term: "service" in a comprehensive way. Only art. 57 TFEU specifies "services" within the meaning of the Treaties where they are normally provided for remuneration, unless they are governed by the provisions relating to freedom of movement for goods, capital and persons.² This means that the activity referred to as the provision of services should, in principle, be chargeable and may not have characteristics specific to the movement of goods, capital and persons. On the other hand, K. Witkowska-Chrczonowicz considers that a "service" understood by EU law cannot be of a free-of-charge nature and must be of a pecuniary nature only because such interpretation has been made by the Court of Justice in its ruling of 3 March 1994, *R. J. Tolsma v Inspecteur der Omzetbelasting Leeuwarden*.³ In this verdict, the Court of Justice stated that a service can only be regarded as an activity inextricably linked to remuneration for that activity, because if the remuneration for an activity is optional and voluntary, then there is no service according to EU law.⁴ For this reason, A. Kuś assumes that "service" in the EU law refers to all self-employed, paid, temporary and cross-border economic activity.⁵

¹ A. В. Журова, *Торговля услугами в Евразийском экономическом союзе*, Москва 2016, с. 7.

² *Traktat o funkcjonowaniu Unii Europejskiej*, Dz.U.2004.90.864/2 z dnia 2004.04.30.

³ K. Witkowska-Chrczonowicz, *Swobodny przepływ towarów, osób, usług i kapitału*, [w:] J. Galster, *Podstawy prawa Unii Europejskiej z uwzględnieniem Traktatu z Lizbony*, Toruń 2010, p. 521.

⁴ *Wyrok Trybunału (szósta izba) z dnia 3 marca 1994 r., R. J. Tolsma przeciwko Inspecteur der Omzetbelasting Leeuwarden*, <http://curia.europa.eu/juris/liste.jsf?language=pl&jur=C,T,F&num=16/93&td=ALL>, dostęp: 20.05.2017.

⁵ A. Kuś, *Podstawy prawa materialnego i swobód europejskich*, [w:] A. Kuś, *Prawo instytucjonalne Unii Europejskiej w zarysie*, Lublin 2012, p. 459;

The service provider or the recipient, in accordance with art. 3 TEU can be any EU citizen. It is worth pointing out that a citizen of the Union is a natural person who holds the nationality of one of the member states of this organization.⁶ Service provider or recipient, in accordance with art. 54 TFEU, may also be a legal person. An EU legal person are companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union.⁷

3. FREEDOM OF MOVEMENT OF SERVICES IN THE EURASIAN ECONOMIC UNION

According to art. 28 of the Treaty of EAEU within the internal market of the Eurasian Economic Union freedom of movement of services is guaranteed among other.⁸ Treaty of EAEU does not define the term "service". This term is defined in the literature of the Eurasian law. A. W. Zhurova states that what differentiates service from goods is the material result of existence, which is necessary in the case of goods, and not in the case of service. For service existence, therefore, only action is sufficient.⁹ G. D. Otyukova considers that the service, as opposed to the good, does not physically cross the border but may, like the good, be freely sold and bought in the common market covering the territories of the Member States of the Eurasian Union.¹⁰

The latter interpretation is allowed by the content of art. 65 of the Treaty of EAEU, which provides that the aim of the Eurasian Union is to ensure freedom of trade in services and the freedom to take action in this area.¹¹ This article, like art. 2 Act of the Russian Federation of 13 October 1995 on the state regulation of foreign trade¹² and art. 2 Act of the Russian Federation of 8 December 2003 on the basis of state regulation of foreign trade¹³, defines a service as a good which can be exported and imported.

Although the term: "service" is not defined in the founding act of the Eurasian Union, the definition of "trade of services" is contained in Annex 16 to the Treaty of EAEU, in the Protocol on Trade of Services, Entrepreneurship, Business and Investment. According to the above mentioned protocol, trade in services is to be understood as the provision of services which include: production, distribution, marketing, sale and supply of services either from the territory of one Member State in the territory of another Member State or in the territory of one Member State by a natural or a legal person from another Member State. This protocol also defines the territory of a Member State as a territory together with the economic zone and

⁶ Traktat o Unii Europejskiej, Dz.U.2004.90.864/30 z dnia 2004.04.30.

⁷ Traktat o funkcjonowaniu Unii Europejskiej, op. cit.

⁸ Договор о Евразийском экономическом союзе от 29 мая 2014 г., подписан в г. Астане, с изм. и доп., вступ. в силу с 12 февраля 2017 г., https://www.consultant.ru/document/cons_doc_LAW_163855, dostep: 06.05.2017 г.

⁹ А. В. Журова, op. cit., с. 13.

¹⁰ Г. Д. Отнюкова, Правовое регулирование услуг, "Юрист", 2014, № 1, с. 37-42.

¹¹ Договор о Евразийском экономическом союзе, op. cit.

¹² Федеральный закон от 13 октября 1995 № 157-ФЗ "О государственном регулировании внешнеторговой деятельности", http://www.consultant.ru/document/cons_doc_LAW_8043/, dostep: 20.04.2017.

¹³ Федеральный закон от 8 декабря 2003 № 164-ФЗ "Об основах государственного регулирования внешнеторговой деятельности", <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102084509&rdk=&backlink=1>, dostep: 20.04.2017.

zone of the continental shelf to which it exercises sovereign rights and jurisdiction in accordance with international law and its internal legislation.¹⁴

In addition, this above mentioned Protocol defines the concept of the service recipient and the service provider. The recipient of the service is a natural or a legal person from the Member State of the Eurasian Union who is provided with the service or who intends to use the service. The status of a service provider, in accordance with Eurasian law, is vested in a natural or legal person from a Member State of the Eurasian Union which provides the service.¹⁵

4. THE SCOPE OF COMPETENCE OF BOTH ORGANIZATIONS IN THE SPHERE OF FREE MOVEMENT OF SERVICES

According to art. 1 TEU, the Member States grant the European Union the competence to achieve objectives of this organization. Moreover, according to art. 3 TEU the European Union establishes an internal market¹⁶, under which, pursuant to art. 26 TFEU is guaranteed free movement of services.¹⁷ In addition, according to art. 5 TEU, the European Union operates exclusively within the limits of the powers granted by the Member States, and all the competences not granted to this organization still belong to the Member States. Competences awarded to the European Union can be divided into: (1) Union exclusive competences, (2) competences shared by the Union with the Member States, and (3) competences of the Union which complement the actions of the Member States. Member States may exercise the exclusive competence of the Union only of the authorization of that organization or by the exercise of its acts. Shared competences can be exercised by the Member States to the extent that the Union does not have to comply with it or stop exercising it. Finally, the complementary competences of the Union are to support and harmonize the actions of Member States within their own competences, which under no circumstances replace EU competence.¹⁸ According to art. 3 TFEU, European Union has exclusive competence to establish the competition rules necessary for the functioning of the internal market, under which, once again this should be emphasized, freedom of movement of services is guaranteed.

According to art. 3 TFEU European Union also has an exclusive competence in terms of concluding international agreements - if it stated so in primary law of the EU or is necessary for the exercise of the Union's internal competences or to the extent that the conclusion of international agreements may affect common rules or change the scope of their common rules.¹⁹ The European Union therefore has the exclusive right to conclude international agreements with third countries and other international organizations to the extent that is clearly stated in the Treaties, namely the Treaty on European Union and the Treaty on the

¹⁴ Приложение № 16 к Договору о Евразийском экономическом союзе от 29 мая 2014 г., Протокол о торговле услугами, учреждениями, деятельности и осуществлении инвестиций, <http://www.eaeunion.org/#info>, dostęp: 18.04.2017.

¹⁵ Ibidem.

¹⁶ Traktat o Unii Europejskiej, op. cit.

¹⁷ Traktat o funkcjonowaniu Unii Europejskiej, op. cit.

¹⁸ A. Wyrozumka, *Zasady działania Unii Europejskiej*, [w:] J. Barcz, M Górka, A. Wyrozumka, *Instytucje i prawo Unii Europejskiej*, Warszawa 2011, s. 64-82.

¹⁹ Traktat o funkcjonowaniu Unii Europejskiej, op. cit.

Functioning of the European Union. An example may be the content of art. 8 TEU, which empowers the European Union to conclude agreements with the countries concerned on reciprocal rights, obligations and joint actions – also in the trade in services. In addition, the European Union has the right to conclude international agreements in so far as it is necessary to achieve one of the objectives of the Treaties in the context of Union policies. An example of this may be the common commercial policy, which in Art. 3 TFEU was included in the exclusive competence of the EU. Thus, the conclusion of international agreements on trade in services is the exclusive competence of the EU.²⁰

Similarly, the Eurasian Union, according to art. 3 Treaty of the EAEU, take action only within the scope of the powers delegated to this organization by the Member States.

This article also points that the Member States create favorable conditions for the implementation of the tasks of the Eurasian Union and refrain from activities that could jeopardize the Union's objectives. The main tasks of this organization include: coordinating activities within the customs union and creating a common market for goods, services, capital and labor. Then, according to art. 7 of the Treaty of EAEU, this organization has the right, within its competence and in the exercise of its tasks, to conduct international cooperation with countries, international organizations and international integration societies. In addition, the Eurasian Union has the right, either independently or jointly with the Member States, to conclude international agreements with subjects of public international law, including other international organizations.²¹

Article 7 of the Treaty of EAEU therefore states that one of the objectives of the Eurasian Economic Union is to cooperate with foreign partners, governments and international organizations in the already established customs union and the continuously created Common Economic Space. This Common Economic Space of the Eurasian Union is still being created because, according to art. 104 Treaty of the EAEU, the common market for energy services will be established in 2019, and in accordance with art. 103 of the Treaty of EAEU, the common market for financial services will not be established until 2025. In addition, according to art. 38 Treaty of the EAEU, the Member States of the Eurasian Union are obliged to jointly coordinate foreign trade in services with third countries. The article, however, explicitly states that the Eurasian Union does not have an international competence in this area. Therefore, although the Eurasian Economic Union may conclude international agreements with third countries and other international organizations, either independently or jointly with the Member States – however, in the case of international agreements on trade in services, the Eurasian Union has no right, without the Member States, to conclude such agreements with a third party.²²

5. CONCLUSIONS

Both the Eurasian Economic Union and the European Union have been set up by the Member States to create, inter alia, a common market for goods, services, capital and labor. It

²⁰ P. Saganek, Komentarz do art. 3 TFEU, [w:] D. Miąsik, N. Półtorak, A. Wróbel, Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom I (art. 1-89), Warszawa 2012, s.

²¹ А. Я. Капустин, Договор о Евразийском экономическом союзе - новая страница правового развития евразийской интеграции, "Журнал российского права", 2014, № 12.

²² К. А. Бекашев, Е. Г. Моисеев, Право Евразийского экономического союза, Москва 2015, с. 37.

is obvious that the European Union, which operates in the international space much longer than the Eurasian Economic Union, is a much more advanced subject in the field of freedom of movement of services. The single market for services within the Eurasian Union, in accordance with the provisions of the Treaty of EAEU, should be fully operational in 2025. Nevertheless, there is no doubt that both organizations, in the area of their assigned objectives and tasks, are equipped with similar competences. The basic entitlement of both organizations is *ius tractatum*. Both organizations have secondary powers to conclude international agreements with third countries and other international organizations in terms of implemented and strictly defined objectives and tasks these organizations. Unfortunately, the Eurasian Union does not have transnational competencies in the area of foreign trade in services with third countries or other organizations. In this regard, only a mixed agreement can be concluded, parties of which will be – on the one hand – the Eurasian Union and its member states and – on the other hand – a third international entity. However, there is a possibility of cooperation of both organizations in the field *ius tractatum - ius contrahendi*.

This is not the only possibility of cooperation between the European Union and the Eurasian Union in terms of trade in services. Both organizations may also establish a common association with regard to trade in services. According to art. 217 TFEU The European Union may conclude agreements with one or more third countries or international organizations establishing an association involving reciprocal rights and obligations, common action and special procedure. Similarly, the Eurasian Union, in accordance with art. 7 Treaty of EAEU has the right, within its own competence, to take international action in order to meet the challenges facing the Union, and in doing so it has the right to conduct international cooperation with states, international organizations and international integration societies. However, in this case, an international agreement between the two title organizations will be indispensable. Moreover, in this case, the Eurasian Union again should be represented together with the Member States, because, in accordance with art. 38 Treaty of the EAEU, this organization does not have transnational competences in the area of trade in services.

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