

EU HARMONIZATION WITHIN THE LAW OF WTO

Tatiana Ruban *

ABSTRACT

Coherence of regional and universal legal norms is always an issue: EU law and the law of WTO is not an exception. The two-stage procedure of UE harmonization in the field of trade law turns out to be more complex process within the framework of the law of WTO.

The main aim of the paper is to reveal possible problems of such harmonization. To this aim it is necessary to expound theoretical approaches to the harmonization within the law of WTO as well as legal practice on the matter.

Moreover the author observes the process of harmonization as possible in other regional economic integrations and beside that, the universal level in the framework of legal order of WTO.

* Post-graduate student at Kazan (Volga region) Federal University; markodeeva91@list.ru.

1. INTRODUCTION

Before speaking about harmonization one well-known statement should be emphasized: there is a general duty of the states to bring domestic law into conformity with obligations under international law.

States are free to decide how best to translate their international obligations into internal law and to determine which legal status these have domestically¹ - and whether will these norms have direct effect or not. These decisions basically depend on legal theories on relationships of international law and municipal law: monist and dualist theories.

When looking at the situation from the purposeful point of view it really does not matter which theory is applicable; whether the rule of international law automatically becomes part of internal legal systems and can be applied without legislative measures or not if the international obligation is fulfilled anyway. From this point of view the value of this theoretical polemics is somehow exaggerated.

But the practical importance of the question and unceasing discussion of this matter do not let us to come to the conclusion² that those theories have only scientific, doctrinal significance. Presumption that only results of the fulfillment of international obligations matter is inaccurate and incomplete.

The way to realize international rule and obligations in domestic system also counts: whether it is incorporation, adoption, transformation or reception.

This coherence arises from the fact that in the end states create legal rules both in international (including regional) and domestic legal orders and they don't have equal positions. This situation boldly appears in the process of harmonization.

2. HARMONIZATION

In spite of wide application and significance of the phenomenon of EU harmonization there is no common official definition of the process.

In doctrine, the harmonization is understood as a process or as a method.

Harmonization as a process is approximation of member states legislatures due to formation and effective functioning of internal market³.

¹ Shaw M., *International Law*, New York, 2008, p. 129.

² Wolfgang G. V., *International Law*, Moscow, Berlin, 2011, p. 128-129.

³ Davies K., *Law of the European Union*, Kiev, 2005, p. 43.

Harmonization as a method is one of the methods of legal integration, the essence of which is to transform legal rules by bringing them into conformity with each other. Within this method the Union creates legal basics and member states bring domestic law in accordance with this basis. The method of harmonization logically makes legal rules and systems of member states and EU similar without uniformity. Lack of uniformity distinguishes harmonization from unification which presumes common rules directly regulating social relations⁴.

Legal instrument of harmonization is directive, which should be implemented in the legal systems of EU member states as provided by the EU treaties. Article 288 of Treaty on the functioning of the EU (ex Article 249 TEC) provides the following: “directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”.

Directive is a legislative act obliging member state to fulfill some requirements, goals and results in fixed time without directing precise means by which it should be done; it leaves for member states freedom of choice which under the general international law is essential.

This implementation is held by way of transformation, also called transposition, meaning that member state creates a legal act normal for this or that situation in order to accomplish the goal provided by the directive. At that instead of one rule of law presented in directive there appear two provisions: one in internal legal system and another remains in international legal order as a rule creating international obligation; legal nature and addresses of these provisions are different.

Non-implementation and non-transformation of international rule should be regarded as a breach of international law and cause primary right to request fulfillment of an obligation on implementation and international responsibility.

It should be noted that the notion of transformation is narrower, than the notion of implementation. Implementation is a whole complex of measures that are necessary to translate international obligations into domestic law, including, for example, creating a new public agency. Transformation therefore is an element of implementation and actually the way harmonization takes place through.

Transformation does not belong only to the sphere of internal affairs; it is the way of realization of the rule of international law and therefore an obligation of a state. This statement is fair for directives and the process of harmonization.

⁴ Kashkin S., *Law of the European Union*, Moscow, 2011, p. 16.

There can be another approach within the terminology: the term transformation can be used sometimes as the synonym of harmonization itself. Therefore the notion implementation is understood as “implantation” of rules of directives into the legal systems of member states. Thus harmonization and transformation mean rapprochement of legal systems of EU and its member states.

Unfortunately binding nature of directives and obligation of its implementation does not clarify the question whether these acts have direct effect or not.

Basically direct effect can be regarded as one of the essential principles of European law. The issue of the direct effect has been scrutinized by the ECJ in the judgment on 5 February 1963 *Van Gend and Loos*⁵. The ECJ decided that the provisions of European primary legislation which are precise, clear and unconditional can be invoked by a person before national court or the ECJ.

The doctrine of direct effect also applies to acts of secondary legislation but only direct effect of EU regulations is provided explicitly by the EU treaties.

Directives can enjoy direct effect on conditions expounded by the ECJ.

First, only vertical direct effect is possible, meaning that directives do not apply by individuals *inter se*. Second, to enjoy direct effect provisions of directives should be unconditional, sufficiently clear and precise (*M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* 1986⁶, *Van Duyn v Home Office* 1974⁷, *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland* 1996⁸).

And third, there is a possibility of claim before the court if member state fails to fulfil the obligations on time or is inactive on this matter at all - do not implement the directive (*Pubblico Ministero v Ratti* 1979⁹). This exception can be regarded as one of consequences of non-implementation. The ECJ therefore encourages direct effect of EU directives due to protect rights and interests of individuals.

⁵ Case 26/62, ECJ, *Van Gend en Loos v Nederlandse Administratie der Belastingen*.

⁶ Case 152/84, ECJ, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*.

⁷ Case C-41/74, ECJ, *Van Duyn v Home Office*.

⁸ Case C-72/95, ECJ, *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland*.

⁹ Case 148/78, ECJ, *Pubblico Ministero v Ratti*.

3. EU AND WTO

Speaking about EU and WTO it should be first noted that WTO as an international organization has a whole complex of connections with other actors of international relations. Not only the effectiveness but also legitimacy of law of WTO depends on the coherence of its rules with other legal systems and on the character of relationships with other organizations. So it is a mutual process: on one hand, it is a sort of recognition of WTO and its importance on international trade arena; on the other hand, law of WTO as universal organization recognizes and encourages regional economic integration. Article XXIV of the GATT determines necessary conditions for the member states to create regional integration organizations. Also WTO includes the Committee on regional trade agreements aimed to exercise the supervision on the compliance of those conditions by regional organizations.

Regional integration creates international economic and legal subsystems which have numerous connections with multilateral trade system represented by WTO. The number of those connections is constantly growing: in 1990th there were only 20 agreements, by the year of 2007 the number rose till 159 and in 2010 almost reached 400¹⁰. The change from GATT to WTO and the strengthening of existing trade principles improved compliance of law of WTO members with WTO law and reduced the use of unilateral trade measures¹¹.

It is well-known that both EU and its member states are the members of WTO: EU enjoys legal personality and therefore can be a member of international organization; this fact should not be disputed. And so EU bears responsibility for breaching WTO agreements in full extent as its member states do. Still this rule is only applicable for trade agreements. In accordance with Article 133 of the EC Treaty it has competence to conclude treaties on the matters related to trade of goods. In the spheres of the GATS and the TRIPS the competence is mutual. The main consequence of parallel membership in WTO is this division of competences.

Unlike the most part of legal rules of the GATT-47 (meaning part II of the Agreement which is in accordance with the Protocol on provisional application of the GATT applied in the fullest extent not inconsistent with existing legislation of states), legal rules of law of WTO are totally and fully legally binding and obligatory for its members. EU, as a signatory and party to WTO

¹⁰ Bartels L., Ortino F., *Regional Trade Agreements and the WTO Legal System*, New York, 2007, p. 59-60.

¹¹ Princen S., *EC Compliance with WTO Law: The Interplay of Law and Politics*, *European Journal of International Law*, Vol. 15 (3) 2004, p. 556.

along with its member states, clearly accepts that the obligations contained in WTO agreements are legally binding upon it. Whether rules of law of WTO have direct effect or not can be a matter of dispute, but their binding nature cannot be doubted.

Speaking about direct effect it should be noted, that members of international community normally take an international obligation and free to decide how to fulfill it, it is pretty much the same thing with law of WTO: if law of WTO does not expressly declares whether its rules have direct effect or not, and does not specify the effect it should have in domestic legal order, it means that it is up to member states to decide whether to provide direct effect to these rules or not.

Actually the purpose of WTO agreements as eventually all agreements under international public law are, of course, to govern relations between states or regional organizations for economic integration and not to protect individuals and they do not expressly create rights on which private parties and individuals can rely on directly before the court. Addressees of legal rules are states, not individuals.

And furthermore, it turns out to be clear that the rules of law of WTO have no direct effect within the legal order of EU: between them and private parties there is always the filter of EU implementing norm. It means that WTO rules may be invoked by private parties before EC courts through the filter of legislative measures, such as directives. It also means that with taking international obligations EU political bodies have to ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in Agreements as it is stated in Article 16.4 of the Marrakesh agreement.

So WTO agreement and its annexes do not include rules by which the European Court of Justice review the legality of acts adopted by the Community institutions under Article 230 of the EC Treaty¹².

And the ECJ stands on that: no direct effect of WTO agreements except where the Community intended to implement a particular obligation¹³.

It was the same with the General Agreement on tariffs and trade: there was no direct effect provided. The ECJ stated that its provisions are flexible and not unconditional, derogation was possible, so Court denied in direct application in the domestic legal system¹⁴.

¹² Tancredi A., *EC Practice in the WTO: How Wide is the 'Scope for Manoeuvre'?*, *European Journal of International Law*, Vol. 15 (5) 2004, p. 938.

¹³ Case C-149/96, ECJ, *Portugal v Council*.

¹⁴ Case C-280/93, ECJ, *Germany v Council*.

Under the general rule, provided by the ECJ, international agreement can be granted direct effect within EU if its provisions are sufficiently unconditional, clear and precise (*Demirel v Stadt Schwäbisch Gmünd* 1987¹⁵). The Court states that the rules of WTO agreements are not enough specific and not self-executing and that is an argument against direct effect.

But still there are exceptions. Only where the Community intended to implement a particular obligation assumed in the context of WTO, or where the Community measures refer expressly to the precise provisions of WTO agreements, it is up to EC's courts to review the legality of the Community measure in question in the light of WTO rules.

Direct effect also may not be provided within EC for political reasons (that is what is called lack of reciprocity) – if the most important trade partners of the Community (such as US) do not provide direct effect to WTO rules, why the Community would. That, as the ECJ note can lead to non-uniform application of WTO rules.

If speaking about compliance with law of WTO, there can be distinguished two situations where the rules of EU law should be brought into conformity with law of WTO:

1. Law of WTO directly requires European law to be in accordance with WTO agreements. This idea is logically indisputable as far as law of WTO occupies centered position in the modern trade law and it is necessary for its effectiveness that legal orders of its members correspond with its legal provisions.
2. There is a DSB decision that should be fulfilled within the European legal order in a reasonable period of time. This situation appears if any trade measure adopted by EU in its directives violates law of WTO.

But even if there is a DSB ruling, which has to be implemented, the situation is not transparent.

There are two obstacles: first, this decision won't be necessarily implemented in reasonable period of time¹⁶. There are scientific papers that harshly criticize EC's reputation on this matter; they contain opinion that EU does not effectively implement rulings¹⁷. It does not mean that EU refuses to implement decisions at all but the practice of delays in implementing (when the reasonable

¹⁵ Case 12/86, ECJ, *Demirel v Stadt Schwäbisch Gmünd*.

¹⁶ Case EC – Measures Concerning Meat and Meat Products (Hormones), AB-1997-4, WT/DS26&48AB/R.

¹⁷ Tancredi A., *EC Practice in the WTO: How Wide is the 'Scope for Manoeuvre'?*, *European Journal of International Law*, Vol. 15 (5) 2004, p. 934.

period of time has already expired) has become frequent. The practice shows, that involving formal ruling does not mean that authorities will promptly implement it and bring the measures in compliance with law of WTO.

Compliance with law of WTO may even be less likely in cases that involve formal ruling than in cases that do not. That is exactly what happened in the Leghold trap regulation case: even though there was no formal WTO dispute and ruling, “the shadow of law of WTO” strongly affected the negotiating process and helped parties in dispute reach an agreement on restrictive measures avoiding an open trade dispute¹⁸.

Second obstacle appears when the parties in dispute can reach reciprocal and mutually advantageous agreement, even when the decision on a dispute has already been pronounced¹⁹.

Still law of WTO and rulings of the DSB vastly impact EU trading process and its regulation by the directives which under the pressure can be reversed or amended.

4. WTO AND EURASEC

EU is considered to be a standard for regional economic integration. Eurasian economic community (since January 1st, 2015 Eurasian economic union) passes the same stages of economic integration as EU did, focuses on entering in the international trade system as a large regional organization and it is logically expected to adopt EU approaches towards multilateral trade system. However such adoption does not seem to be possible.

First, not all member states of EurAsEC are simultaneously member states of WTO; those states are entering WTO each in its own rate. Second, an approach on the direct effect within EurAsEC is different from such of EU.

Article 1 of the Treaty on functioning of the Customs Union within the multilateral trade system provides the rule, that WTO agreements and obligations taken by member state of the Union under WTO (in accordance with the protocol of accession) become part of the legal system of the Customs Union. As an exception member state of the Customs Union, non-member state of WTO may not stick to these rules but only if it does not affect other member states of the Customs Union.

¹⁸ Princen S., EC Compliance with WTO Law: The Interplay of Law and Politics, *European Journal of International Law*, Vol. 15 (3) 2004, p. 561-565.

¹⁹ Case EC – Regime for the Importation, Sale and Distribution of Bananas. AB-1997-3. WT/DS27/AB/R.

Furthermore, the legal system of the Customs Union and decisions of its bodies should be brought in accordance with law of WTO (Article 2). Until that the rules of WTO agreements have priority on agreements within the Customs Union and decisions of its bodies.

The jurisprudence within EurAsEC is quite specific as well.

Basically, in accordance with the Statute of the Court of EurAsEC the Court does not have the competence to apply and interpret WTO agreements and obligations of member states under these agreements. Also the Court cannot directly decide whether measures of member state or decisions of EurAsEC bodies are in accordance with law of WTO.

Still there is a loophole. If those agreements under WTO are part of the legal system of EurAsEC it would not be correct to deprive the Court of the right to apply these agreements.

The Court of EurAsEC already had the case²⁰ when the private party disputed the decision of the Customs Union commission as non-consistent with WTO agreements.

Even though the Court decided to exclude law of WTO from applicable law, it can be stated that rules of law of WTO are granted the direct effect in the EurAsEC legal order. It means that the most significant consequence of integration of law of WTO in the EurAsEC legal system is the possibility for private parties to dispute decisions of EurAsEC bodies before the Court on the ground of its coherence with law of WTO.

As far as the rules of law of WTO promote the process of harmonization of legislations of member states of EurAsEC, these legislations have to be consistent not only with general principles of international law but also with the rules of law of WTO. Besides that, member states of EurAsEC have to coordinate actions to the accession in WTO aiming at analogous obligations under law of WTO.

EurAsEC Inter-parliamentary Assembly amended the Program of lawmaking and started work on implementation of the rules of WTO law into draft projects of legislative acts and recommendations on harmonization of legislature. The rules of law of WTO therefore create the framework for lawmaking of EurAsEC member states.

²⁰ Case 1-7/2-2013 [16.04.2013] The Court of the EurAsEC.

5. CONCLUSION

The notion harmonization appeared within European law and is used traditionally in its framework. Still the same tendency is observed in other regional organizations such as EurAsEC.

The instrument of EU harmonization (including harmonization in the trade sphere) is directive. Directive as an act containing legal goals and results should be implemented by member states due to rapprochement of legal systems.

EurAsEC harmonization has the same aim but its instruments are different. Rapprochement of legal systems is being achieved in two stages: comparison of legal systems and creating of draft legal acts that should be enacted by member states.

In both regional integrations harmonization of trade law is held under the influence of WTO as membership in the organization requires legal systems of its members to be in compliance with law of WTO. The influence of WTO law is stronger on EurAsEC legal order as far as WTO law became part of it and should be applicable directly.

Evolution of the international trade law, growing impact of law of WTO and strengthening requirements of the compliance with law of WTO are showing that the horizon has to be moved further.

The term harmonization should be used as a broad term covering the process of two or more systems of law approaching and accommodating each other.

But taking into consideration WTO the process of harmonization of trade turns out to be universal.

There are reasons for that. First, there is a general target – liberalization of trade. Second, law of WTO provides the most general rules of international trade, these norms are nowadays basis of international trade law, so it would be wrong to affirm that it does not influence the legal orders of the regional economic integrations.

All in all, it makes legal orders of WTO members similar to each other as far as they should be in compliance with WTO law. The universal harmonization is aimed to simplification of international trade by making it more legally predictable for trading actors.

Consolidation of the international trade law and strengthening of its principles after foundation of WTO in 1995 opened the doors for this process and made it significant even though there are still obstacles for compliance with the law of WTO such as non-implementation of the DSB ruling in reasonable period of time.

LITERATURE:

1. Appleton A., *The World Trade Organization: Legal, Economic and Political Analysis*, Vol.1, New York, 2005.
2. Bartels L., Ortino F., *Regional Trade Agreements and the WTO Legal System*, New York, 2007.
3. Davies K., *Law of the European Union*, Kiev, 2005.
4. Kashkin S., *Law of the European Union*, Moscow, 2011.
5. Princen S., *EC Compliance with WTO Law: The Interplay of Law and Politics*, *European Journal of International Law*, Vol. 15 (3) 2004.
6. Shaw M., *International Law*, 6th ed., New York, 2008.
7. Tancredi A., *EC Practice in the WTO: How Wide is the 'Scope for Manoeuvre'?*, *European Journal of International Law*, Vol. 15 (5) 2004.
8. Wolfgang G. V., *International Law*, Moscow, Berlin, 2011.

