3. ЦИВІЛЬНЕ ПРАВО І ЦИВІЛЬНИЙ ПРОЦЕС. СІМЕЙНЕ ПРАВО. ТРУДОВЕ ПРАВО. МІЖНАРОДНЕ ПРИВАТНЕ ПРАВО. ГОСПОДАРСЬКЕ ПРАВО. ГОСПОДАРСЬКО-ПРОЦЕСУАЛЬНЕ ПРАВО

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CORPORATE DISPUTES IN UKRAINE: THE APPLICATION OF THE CASE-LAW OF THE EUROPEAN COURT OF JUSTICE IN UKRAINE

The provisions of paper substantiate the necessity for the application of practice of the European Court of Justice in corporate disputes in Ukraine. The essence of the case law of the European Court of Justice is revealed. The necessity to fulfill obligations in the founding and activity of companies, corporate governance in accordance with the Association Agreement with the European Union is argued.

Keywords: *European Court of Justice, case law, EU directive, corporations, disputes.*

Introduction. The current state of legal practice in Ukraine is increasingly forcing practicing lawyers, advocates to come to terms that argue their positions on the basis of only national legislation becomes more difficult. Every year, for the highly skilled specialists, the kind of «must have» in the baggage of tactics of argumentation, substantiation, interpretation become the decision of the ECtHR, and more recently, based on the specifics of individual cases of the application of legal positions and legal conclusions of the European Court of Justice.

The European Court of Justice is a court of law exclusively of the European Union (located in Luxembourg), therefore, should not be confused as an institution with the European Court of Human Rights, the judicial institution of the Council of Europe (Strasbourg, France).

The Court of European Union is one of the most important EU institutions. It is a very influential institution that often goes to the forefront of European integration. In accordance with Article 19 of the Treaty on European Union, the Court of Justice of the European Union must ensure compliance with the law in the application of founding treaties.

Aim of research.

The aim of the paper is to draw the attention, analyze of case-law of European Court of Justice in the corporate sphere. To research the fulfillment of obligations in the founding and activity of companies, corporate governance in accordance with the Association Agreement with the European Union.

Main results and discussion. The practice of the Court of the European Union has the fundamental importance to the rule of law of the EU, and therefore to third countries facing the task of approximation of

legislation. In many respects, the EU law is based on a case-law system, and it is often surprising to those who deal with EU law. The Court's judgments are clarified when Member States violate EU law and how it needs to be interpreted and applied at the national level.

The court is reviewing most cases, including all cases of violation (*TFEU Articles 258-260*), all requests for a preliminary ruling (*Article 263 TFEU*), and actions for annulment filled by Member States against EU institutions (with the exception of the European Commission), as well as appeals for cancellations filed by EU agencies against other EU institutions [1].

The case-law of the Court of Justice of the European Union, as well as the case-law of the ECtHR, can not be compared or equated with the case law of the Anglo-American legal system. The European Court of Justice (ECJ) often base its decisions on previous decisions, without reference to this and a direct reference. As T.Komarova notes, in some cases the previous decision is cited in whole or in part without reference to its name and details or with reference to «settled case law». Such practice can be characterized as the observance of case law as a specific model, but without mandatory follow-up [2].

The key rule in determining the nature of the precedents of the European Court of Justice will be *Art. 153 of* ASSOCIATION AGREEMENT between the European Union and its Member States, of the one part, and Ukraine, of the other part (*Association Agreement)* which states that due consideration should be given to the precedents of the European Court of Justice when approximating legislation, in particular the EU Directives.

Thus, legislative adaptation is carried out in stages according to the periods defined in *Annex XXI-A* and in *the Annexes XXI-V-XXI-E, XXI-G, XXI-H and XXI-J* to this Agreement. *Annexes XXI-F* and *XXI-I* to this Agreement specify optional elements that do not require implementation in Ukrainian legislation, whereas *Annexes XXI-K-XXI-N* to this Agreement contain elements of the EU acquis that remain outside the scope of legislative approximation [Article 153, 3].

In this process, due attention should be paid to the relevant European Court of Justice case law and the implementing measures of the European Commission, as well as, if this is necessary, any changes to the EU acquis that will take place at the same time. The implementation of each period is evaluated by the Trade Committee and, after a positive evaluation, will be combined with mutual access to the market in accordance with *Annex XXI-A* to this Agreement. The European Commission informs Ukraine without undue delay of any changes to the EU acquis. The Commission will provide appropriate consultations and technical assistance with a view to introducing such changes [Art. 153, 3].

According to *Art. 306, 322* of the Agreement, if a dispute arises regarding the interpretation of the provisions of EU law and the Parties have been unable to resolve it by direct consultation, an arbitration team from the representatives of the Parties to the Agreement shall be set up to file a request to the Court of Justice of the European Union to take a decision on this matter [3].

Consequently, the main function of the European Court of Justice is to verify the legality of acts of EU bodies and to interpret EU law in the appeal of national courts. It should be noted that *Article 153* of the EU-Ukraine Association Agreement stipulates that, when adapting legislation, in particular, the EU Directives, due attention should be paid given to the precedents of the European Court of Justice.

I would point out that the sources of law used by the courts to resolve the case are set forth in the *Article 9 of the Constitution of Ukraine, Article 10 of the Civil Code of Ukraine, Article 7 of the CAC of Ukraine, Article 11 of the Code of Civil Procedure of Ukraine, the Law of Ukraine on Private International Law «and the Law of Ukraine» On the Enforcement of Judgments and the Application of the Case-Law of the European Court of Human Rights*» [4].

In this way, Ukraine must take into account the the Case-Law of European Court of Justice interpreting the Agreement, as well as the EU Directives and other EU legislation that Ukraine is obliged to implement and, therefore, to comply in accordance with the principle of good faith enforcement (pacta sunt servanda).

It is interesting that the Supreme Administrative Court of Ukraine in a newsletter dated 18/11/2014 № 1601-11-10-14-14 noted that the legal positions formulated in the Judgments of the European Court of Justice can be taken into account by administrative courts as arguments of reasoning concerning the harmonious interpretation of the national legislation Ukraine in accordance with the established standards of the legal system of the European Union.

At first glance, the court is critical of applying the practice of the European Court of Justice of the EU, since such decisions are binding only on the EU member states, but the letter contains a paragraph «... simultaneously, taking into account the European direction of development of Ukraine and the purpose of the adoption of the *Law of Ukraine* from March 18, 2004 No. 1629-IV «*On the National Program of Adaptation of Ukrainian Legislation to*

the Law of the European Union», as well as the commencement of the Agreement on Association between Ukraine and the European Union Legislation, the legal positions are formulated and the decisions of the European Court of Justice can be taken into account by administrative courts as an argument, arguments regarding harmonized interpretation of the national legislation of Ukraine in accordance with the established standards of the European Union legal system, but not as a legal basis (source of law) for settling the relations in respect of which a dispute arose «[5] .

Therefore, it is necessary to agree with T.Komarova's opinion that the Judgment of the Court of Justice can be called «quasi-precedents» because of their importance and the necessity of their observance as a certain model without a mandatory follow-up or as a certain principle used to resolve a dispute with a variety of variations.

The judgments of the Court of Justice are final, the appeal is not subject, their non-fulfillment is the basis for prosecution, which means that they have a higher legal force. Thus, the Kobler judgment, the EU Court of Justice recognized that a violation of EU law would be considered substantial and serious if the decision of the national court had been adopted in a manner incompatible with the Court of Justice's case law.

Ukraine is committed to gradually bringing its legislation closer to the EU legislation in the following terms:

First Directive (EU Council) 68/151 / EU of 9 March 1968, as amended by the Directive No. 2003/58, on the coordination of safeguards which, for the protection of the interests of members and other parties, are required by Member States from companies in the context of the interpretation of *paragraph 2 Article 58* of the Treaty establishing the European Community, in order to ensure the equivalence of such protective measures throughout the Community.

Second Directive 77/91 / EU of 13 December 1976, as amended by Directives 92/101 / EEC and 2006/68 / EC, on the coordination of protective measures required to protect the interests of members and other parties by Member States from companies within the meaning of Article 58 (2) of the Treaty establishing the European Community, on the formation of open-ended limited liability companies and on the management and modification (redistribution) of their capital, in order to ensure the equivalence of these safeguards.

The provisions of the two mentioned Directives should be implemented within 2 years from the date of entry into force of this Agreement.

Third Directive 78/855 / EU of 10 October 1978 based on Article 54 (3) (g) of the Treaty Establishing the EU on mergers of open joint stock companies with limited liability, as amended by the Directive No. 2007/63 / EU The provisions of the Directive should be implemented within 3 years from the date of entry into force of this Agreement. *Sixth Council Directive 82/891 / EEC* of 17 December 1982 based on Article 54 (3) (g) of the Treaty Establishing the EU on the division of public limited liability companies, as amended by the Directive No. 2007/63 / EU The provisions of the Directive should be implemented within 3 years from the date of entry into force of this Agreement. *Eleventh Council Directive 89/666 / EU* of 21 December 1989 on the disclosure requirements in respect of branches opened in a Member State in respect of certain types of companies governed by the laws of another state. The provisions of the Directive should be implemented within 2 years from the date of entry into force of this Agreement.

Twelfth Council Directive 89/667 / EU of 21.12.1989 relating to private limited liability companies. The provisions of the Directive should be implemented within 3 years from the date of entry into force of this Agreement.

According to the *Directive 2004/109 / EU* of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, amending and supplementing Directive 2001/34 / EU The provisions of the Directive should be implemented within 4 years from the date of entry into force of this Agreement.

Directive 2007/14 /EU of 08.03.2007 laying down detailed rules for the implementation of certain provisions of Directive 2004/109 / EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. The provisions of the Directive should be implemented within 4 years from the date of entry into force of this Agreement.

Directive 2007/36 /EU of the European Parliament and of the Council of 11.07.2007 on the implementation of certain rights of shareholders of companies registered in the register. The provisions of the Directive should be implemented within 3 years from the date of entry into force of this Agreement.

Second Council Directive 77/91 / EU on the coordination of safeguards which Member States require of companies, in the sense of the second paragraph of Article 58 of the Treaty, in order to protect the interests of members and third parties in relation to the establishment of public limited liability companies and the maintenance of their capital and changes to it in order to ensure the equivalence of such safeguards.

As regards Directive 77/91 / EU, refer to the case «Gerard Dowling and Others v Minister for Finance». The court decided that Article 8 (1) and Articles 25 and 29 of Directive 77/91 / EU should be interpreted as not precluding the application of the measure, such as the order under consideration in the main proceedings, if there is a threat to the financial stability of the European Union due to significant disturbances in the economy and financial system of the member state, and the result of such an event is an increase in the share capital of a public limited liability company without the consent of the general meeting of the shareholders of this company, the issue of new shares at a price lower than their nominal value, and failure to provide existing shareholders of the company the preferred right to purchase shares under the subscription. This decision is important for the law-making bodies of Ukraine, as it clarifies the scope of the powers of the Member States in adopting legislation similar to that mentioned in the case referred to above. This decision needs to be taken into account when developing relevant national tools to bring Ukrainian legislation closer to EU law.

In the *case of Alfred Hirmann v Immofinanz* AG C-174/12, the court ruled that Articles 12, 15, 16, 18, 19 and 42 of Directive 77/91 / EU should be interpreted as not precluding the application of national legislation which, in the context of Transposition: -Directs 2003/71 / EU -Directive 2004/109 / EU -Directive 2003/6 / EC firstly stipulates that a public limited liability company as the issuer of shares may be liable to the buyer of the shares of that company on the basis of violations of the information requirements set out in these directives and, secondly, obliges, within such a responsible the company concerned to reimburse the buyer the amount equivalent to the purchase price of the shares and redeem those shares. In addition, the liability imposed by the national legislation in question is not necessarily limited to the value of shares calculated on the basis of their price if the shares of the company are quoted on the stock exchange at the time of filing the claim. This decision is important for the Ukrainian authorities, since it clarifies the scope and scope of Directive 77/91.

Conclusion. In view of this, the decision must be taken into account when drafting / adopting the national legislation of Ukraine approximating to this Directive C-338/06 Commission of the European Communities v Kingdom of Spain The Court partially agreed with the applicant and held that Spain had indeed violated the provision of the said Directive because: - he provided preferential rights to purchase shares by subscription in the event of an increase in capital by monetary compensation not only to shareholders but also to holders of bonds that can be converted into shares; - granted preferential rights to purchase bonds that can be converted into shares not only to shareholders but also to holders of such bonds of previous issues; and - did not provide for the general meeting of shareholders the possibility to withdraw the preferential right to purchase bonds that can be converted into shares (see also paragraphs 23-57). Meaning: this decision is important for law-making bodies of Ukraine, because it explains what can not be foreseen in the national legislation of the member states. Therefore, this decision must be taken into account in the process of approximation of the national legislation of Ukraine to the provisions of Directive 77/91 / EU.

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Стаття надійшла до редакції 31.01.2019.