и других нормативно-правовых актов. Прежде всего, Декретом впервые урегулированы отношения относительно налогообложения акцизным налогом производства товаров (продукции) из давальческого сырья. Исчезла привязка плательщиков налога исключительно к субъектам предпринимательской деятельности, а также осуществлена их дифференциация на резидентов и нерезидентов. Этим актом впервые урегулировались объемы вещей или предметов, которые могут ввозить физические лица – резиденты и нерезиденты – на таможенную территорию Украины, в виде сопровождаемого или несопровождаемого багажа, а также физические лица, получающие такие подакцизные вещи (предметы), пересланные (присланные) из-за таможенной границы Украины в виде почтовых или других отправлений, или несопровождаемого багажа, в соответствии с нормой беспошлинного перевоза (пересылки) для таких физических лиц, определенной таможенным законодательством.

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THE LEGAL STATUS OF THE INTRA-EU BILATERAL INVESTMENT AGREEMENTS

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Summary

The article is devoted to the analysis of legal status of bilateral investment treaties that exist between EU Member States (intra-EU BITs). The author considers matters of emergence of these treaties, analyses positions of the EU Commission, EU Member States and investment tribunals regarding intra-EU BITs existence, as well as rules of international law. The author makes a conclusion that the EU seeks to gradually eliminate existence of intra-EU BITs and the independent dispute resolving mechanisms (arbitral tribunals).

Key words: the European Union, investment activity in the EU, intra-EU BITs, investment arbitral tribunals, Court of Justice of the European Union

Аннотация

Статья посвящена исследованию правового статуса двусторонних инвестиционных договоров, существующих между государствами-членами ЕС («внутренних» двусторонних инвестиционных договоров). Автор рассматривает вопросы возникновения данных договоров и анализирует позиции Комиссии ЕС, государств-членов ЕС, инвестиционных арбитражей относительно их существования, а также нормы международного права. Делается вывод, что ЕС постепенно пытается исключить существование таких договоров и независимых от него систем разрешения споров (арбитражей).

Ключевые слова: Европейский Союз, инвестиционная деятельность в ЕС, «внутренние» двусторонние инвестиционные договоры, инвестиционные арбитражи, Суд Европейского Союза.

Formulation of the problem. The role of bilateral investment agreements is to provide stable legal treatment for foreign investors, promote encouragement of investment and facilitate coordination of interests of capital investors and host countries. Transferring of direct foreign investment to exclusive competence of the European Union (the EU) raised the problem of correlation of bilateral investment treaties that exist between EU Member States (intra-EU BITs) and EU law. The legal status of extra-EU BITs is determined in Regulation No 1219/2012 of the European Parliament and the Council of 12 December 2012 [1], whereas the legal status of intra-EU BITs isn't regulated which leads to numerous discussions both in legal practitioners' and academic communities. For Ukraine which ratified the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part and concluded 24 BITs with the EU Member States [2], research of intra-EU BITs is relevant and useful.

The problem of legal status of intra-EU BITs and the issue of relation between these agreements' provisions and rules of EU law were studied by D. Rovetta, G. Matteo Vaccaro-Incisa, A. Canet, T. Doremus, A. Ispolinov, A. Anufrieva and others.

The aim of the paper is to conduct detailed analysis of legal status of intra-EU BITs in the EU and their correlation with the EU law.

Basic material. In the 90s of the XXth century many EU Member States, particularly Western Europe states, began to conclude bilateral investment agreements, primarily with Eastern, Central and Mediterranean European countries, which were "third countries" at that time [3, p. 7]. These agreements provided for additional protection for investors (for example, establishing compensation for expropriation, introducing arbitration dispute resolution), who wanted to invest into the economy of the so-called «EU 13» countries.

In 2003, 2004 and 2007 thirteen new countries became EU Member States, and as a result a large chain of Intra-EU BIT's emerged. The Treaty of Lisbon entering into force on 1 December 2009 led to the common commercial policy being

based on uniform principles, particularly with regard to foreign direct investment **(pursuant to Article 207 TFEU) [4].** Due to these changes the EU Member States have lost the right to conclude bilateral investment agreements on their own authority.

The EU Commission expressed its opinion on the existence of intra-EU BITs in 2006 before signing of Lisbon Treaty. In an informal note to the Economic and Financial Committee of the Council, the Commission suggested that ‘there appears to be no need for agreements of this kind in the single market and their legal character after accession (of new EU Member States – author's note) is not entirely clear. It would appear that most of their content is superseded by Community law upon accession of the respective Member State». EU Commission officials also noted that investors could try to practice forum shopping (choice of more favorable jurisdiction) by submitting claims to BIT arbitration instead of – or in addition to – national courts [5]. According to the Commission, this could lead to arbitration taking place without applying the relevant provisions of the EU law and to the discrimination of investors.

Later, the European Commission repeatedly argued that new BITs between EU Member States are not compatible with European Law and its single market provisions, hence such treaties should no longer be ratified [3, p. 10]. The Commission has strengthened its position due to the provisions of the Lisbon Treaty.

The Commission’s position is based on two arguments. First, bilateral investment treaties violate EU law, as they lead to discrimination of investors [3, p. 10]. Non-discrimination is one of the key principles of EU single market. According to Article 26 of the Treaty on the Functioning of the European Union (TFEU), the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties [6]. The violation of this principle means that some investors enjoy a broader degree of protection under Intra-EU BITs whereas other investors from the same country should only enjoy the protection offered by the EU Law [3, p. 13], in particular, TFEU, that contains several articles covering investors and their guarantees, for example, the provisions about freedom of establishment and freedom of capital movement (Articles 63 and 65 of TFEU).

Secondly, BITs can lead to arbitration taking place without applying the relevant provisions of EU law (as previously mentioned) if a host state violates investor protection provisions [3, p. 10]. Under EU law, investors who want to protect their rights under Article 56 of the Treaty establishing the European Community (which prohibits restrictions on the movement of capital) can either submit claim to the court of the state which violates their rights, or ask the EU Commission to initiate infringement proceedings against the mentioned state pursuant to Article 226 of the Treaty establishing the European Community. Therefore, some investors can initiate «investor-state» proceedings in an arbitration court under the provisions of BITs, but other investors do not have such possibility. Arbitration is often a preferred course of action for investors who want rapid and effective resolution of their case [3, p. 16]. D. Rovetta states that the reason of investors’ relying on arbitral tribunals rather than on national courts is basically in the fact that particularities of judicial system (corruption, speed and predictability of proceedings in a case, procedure of appointment of judges etc.), as well as the degree of real implementation of the EU law, vary depending on the EU Member State [11, p. 197]. In addition, many terms of BITs can be interpreted broadly or ambiguously. Therefore, there is a significant probability of the occurrence of collisions between BITs and the EU law [3, p. 16]. While in traditional proceedings an investor cannot influence the appointment of judges, in investment arbitrations an applicant has some degree of influence on the appointment of members of the arbitration tribunal. Moreover, tribunals often directly apply the provisions of BITs and rules of other sources of the international law, rather than national law [13].

The European Court of Justice (ECJ) in Opinion 1/09 dated 8 March 2011, delivered pursuant to Article 218(11) TFEU, clearly stated that establishment of arbitration courts whose decisions could not be reviewed by the ECJ was impossible. The ECJ stated: «the envisaged agreement creating a unified patent litigation system (currently called «European and Community Patents Court») is not compatible with the provisions of the EU Treaty and the FEU Treaty» [10]. According to D. Rovetta, the ECJ has de facto rendered impossible the establishment of an arbitration system, which is independent from the EU law and from its ultimate jurisdiction, basing its position on primary EU law [11, p. 296].

ECJ Opinion 2/2013 dated December 18, 2014, delivered pursuant to Article 218(11) TFEU has just reconfirmed such view. The ECJ stated, that the agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms. Reasons were, in particular, «it *(the agreement on the accession)* fails to have regard to the specific characteristics of the EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in Common Foreign and Security Policy matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body» [12].

As we can see, the EU seeks to gradually eliminate the existence of the independent dispute resolving mechanisms and decision making which shall not be reviewed by the ECJ.

While the Commission consistently and for many years pointed to the EU Member States that intra-EU BITs were incompatible with EU law, states’ reaction were different, many of these agreements have been effectively terminated [14, p. 12], but most states have not taken any measures. For this reason, the European Commission started the first stage of the initiation of infringement proceedings pursuant to Article 258 TFEU. In June, 2015, the European Commission initiated infringement proceedings against five Member States (Austria, the Netherlands, Romania, Slovakia and Sweden) requesting them to terminate intra-EU BITs between them [7].

Also, the European Commission is requesting information from and initiating an administrative dialogue with the

remaining 21 EU Member States which still have intra-EU BITs in place. It should be noted that only two EU Member States – Italy and Ireland – terminated all BITs with other EU Member States in 2012 and 2013 respectively.

Jonathan Hill, EU Commissioner for Financial Services, Financial Stability and Capital Markets Union said: «We must all act together to make sure that the regulatory framework for cross-border investment in the single market works effectively. In that context, the Commission is ready to explore the possibility of a mechanism for the quick and efficient mediation of investment disputes» [7]. Probably, he means the certain alternative to investment arbitration established under BITs.

With regard to applicability of intra-EU BITs, EU Member States that were defendant in cases against a private investor of another EU Member, as well as the European Commission, (acting as amicus curiae) have submitted observations arguing that intra-EU BITs have become invalid because of the accession within the European community, and because the EU law prevails over BITs concluded between Member States as it overrules national law [3, p. 13]. However, as we have mentioned above not all of EU Member States support the Commission's position (even "old" EU Member States). Arguments in favor of the validity of BITs are also suggested by arbitration tribunals.

For example, in Eastern Sugar case investment arbitration tribunal considered the dispute between the company from the Netherlands and the Czech Republic on the implementation of the 1991 BIT between these countries. The Commission expressed the view that the *pacta sunt servanda* principle does not apply to these agreements, as the EU law overrides not only of the national law of the EU Member States, but also BITs concluded between them (including those that were concluded before the state's accession to the EU). Because of this, BITs in whole and their provisions in part are not applicable in case of non-compliance with the EU law [15, p. 13]. The arbitration tribunal recognized its jurisdiction in this dispute, noting that intra-EU BITs and EU law are complementary things.

In case Eureko B.V. (Achmea B.V.) v. The Slovak Republic, the investment arbitration tribunal rejected the arguments that the case was not arbitrable due to the BITs' invalidity. Firstly, it noted, that 1969 Vienna Convention on the law of treaties does not provide for the automatic termination of treaties by operation of law (with the exception of treaties that conflict with rules of jus cogens) [8, p. 64]. This conclusion has been drawn on the basis of Article 65 of Vienna Convention («Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty»), according to which a party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefore [9]. The case had no notification complying with the mentioned requirements.

In addition, the tribunal rejected the statement that the protection afforded by the BIT provision on fair and equitable treatment was entirely covered by a prohibition on discrimination under the EU law. The respondent didn't allege that there was any principle of EU law that specifically forbade treatment that was not fair and equitable. Therefore, the Tribunal does not consider that any such principle, independent of concepts of non-discrimination, proportionality, legitimate expectation and of procedural fairness, is yet established in EU law [8, p. 68].

Russian researcher A. Anufrieva shares this view, noting that investor protection mechanisms granted by international investment law are broader, at least potentially, than those granted by EU law. Provisions of EU law on the freedom of capital movement can be only the exception to this conclusion. Such provisions are really potentially equivalent to the relevant provisions of the traditional sources of international investment law [16, p. 118].

The next issue of this research is the status of intra-EU BITs according to the international law. The question that has to be answered is whether or not Article 59 of the Vienna Convention on the Law of Treaties applies to the above cases This Article establishes three criteria of termination of a treaty implied by conclusion of a later treaty. According to Article 59, a treaty shall be considered as terminated if, firstly, all the parties to it conclude a *later treaty relating to the same subject-matter,* secondly, it appears from the later treaty or is otherwise established that *the parties intended that the matter should be governed by that treaty; or the provisions of the later treaty are so far incompatible with those of the earlier one* that the two treaties are not capable of being applied at the same time.

Analyzing the first criterion, the tribunal in Eastern Sugar case considered two treaties (intra-EU BIT and the Treaty establishing the European Community) and concluded that such agreements were not related to the same subject-matter. In addition, the tribunal emphasized the fact that at that time the legislation of European Community did not contain dispute resolving mechanisms (between EU Member States and investors), therefore BITs considered to be «the best guarantee that the investment will be protected against potential undue infringements by the host state» [3, p. 22]. With the Treaty of Lisbon entering into force and competence over foreign direct investment being transferred from the national level to the EU, EU law regulates investor-state dispute settlement mechanisms, so in this aspect subject-matters of appropriate treaties are the same. It should be noted, that in Article 207 TFEU portfolio investment isn't mentioned. Direct and portfolio investments aren't differentiated in most BITs. Although the European Commission considers that the EU has external competence for portfolio investment stems in accordance with TFEU provisions [18], the question arises: why with the adoption of the Lisbon Treaty EU competence was clearly established only on portfolio investments? We believe that EU law does not cover entirely the subject-matter of BITs.

Regarding the second condition (the intention of EU Member States to terminate their BITs), in the case between the Czech Republic and Dutch investors, the court concluded that the overall intention of termination could not be found. And now intentions of EU Member States differ radically, as previously mentioned, only two countries have terminated all their BITs. Therefore, the second criterion according to Convention has not been completed yet.

Regarding the third condition, nowadays foreign direct investment covered by EU competence in many aspects (admission/market access, treatment, expropriation and dispute settlement etc). As a result, the conclusion of new intra-EU BITs by EU Member States is prohibited, because it is considered interference in the EU investment policy. However, the Lisbon Treaty contains only a general rule on competence over foreign direct investment and neither clearly defines the procedure of its implementation nor requires automatic termination of existing BITs.

Conclusions. Thus, under international law, intra-EU BITs are not subject to the automatic termination after the Lisbon Treaty entering into force. EU law does not provide investor protection that would be fully equivalent to the provisions of intra-EU BITs. However, the European Commission has quite an opposite view, considering non-termination of intra-EU BITs a violation of obligations by EU Member States under the founding treaties of the EU, since such agreements: 1) lead to investor discrimination; 2) may lead to arbitration tribunals' case settlement without applying EU law.

Final position in this matter can be only provided in appropriate decision of the ECJ. But even now some of the ECJ's statements show EU policy in relation to arbitration tribunals in general which are created, in particular, under BITs. The EU seeks to gradually eliminate the existence of the independent dispute resolving mechanisms and decision making which shall not be reviewed by the ECJ.

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