

GENERAL PRINCIPLES OF EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF JUSTICE IN TAX CASES

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Abstract. The article is devoted to the study of the general principles of the execution of the decisions of the European Court of Justice in the field of taxation. The problems that arise when applying the case law of the European Court of Justice by tax authorities and courts of EU member states are analyzed. It has been established that, regardless of any legislative intervention aimed at ensuring the compliance of national legislation with European legislation, courts and tax authorities are obliged to implement the decisions of the European Court of Justice at the level of application of the law. That is, to refuse to apply provisions recognized by the European Court of Justice as incompatible with EU law. The features of the implementation of decisions of the European Court of Justice, the procedure for adopting which is determined by Articles 258 and 267 of the Treaty on the Functioning of the EU, are revealed, and a classification of previous decisions is also carried out.

A key aspect of the analysis is the issue of eliminating the consequences caused by the previous application of defective provisions of the law. In this context, the implementation of the judgment of the Court of Justice of the EU means the possibility of initiating special procedures aimed at excluding from regulation decisions adopted on the basis of provisions recognized by the Court of Justice of the EU as incompatible with EU law. The decision of the Court of Justice of the EU not only does not affect the validity of the provisions of national legislation, but does not even create an erga omnes effect.

The article also examines the impact of the case law of the European Court of Justice on national tax systems. It is indicated that such influence can be direct or indirect. Direct effect is the result of case law relating to a specific provision of national law. Indirect influence is the result of court decisions, regardless of the method of their adoption, made in similar cases under the laws of this country (strong indirect influence) or other countries (weak indirect influence).

Key words: sources of law, judicial precedent, application of law, EU tax law, enforcement of judgments of the European Court of Justice, preliminary rulings, tax harmonization.

ЗАГАЛЬНІ ЗАСАДИ ВИКОНАННЯ РІШЕНЬ ЄВРОПЕЙСЬКОГО СУДУ СПРАВЕДЛИВОСТІ В ПОДАТКОВИХ СПРАВАХ

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Анотація. Стаття присвячена дослідженню загальних засад виконання рішень Європейського суду справедливості у сфері оподаткування. Аналізуються проблеми, які виникають під час застосування судової практики Європейського суду справедливості податковими органами та судами держав-членів ЄС. Установлено, що незалежно від будь-якого законодавчого втручання, спрямованого на забезпечення відповідності національного законодавства європейському, суди й податкові органи зобов'язані виконувати рішення Європейського суду справедливості на рівні застосування права, тобто відмовитися від застосування положень, визнаних Європейським судом справедливості такими, що не відповідають праву ЄС. Розкриваються особливості виконання рішень Європейського суду справедливості, порядок ухвалення яких визначено статтями 258 і 267 Договору про функціонування ЄС, а також здійснено класифікацію попередніх рішень.

Ключовим аспектом аналізу є питання усунення наслідків, спричинених попереднім застосуванням дефектних положень законодавства. У цьому контексті імплементація рішення Суду ЄС означає можливість ініціювання спеціальних процедур, спрямованих на виключення з регулювання рішень, прийнятих на основі положень, визнаних Судом ЄС такими, що не відповідають законодавству ЄС. Саме ж рішення Суду ЄС не тільки не впливає на дійсність положень національного законодавства, а й навіть не створює ефекту *erga omnes*.

У статті також досліджується вплив прецедентного права Європейського суду справедливості на національні податкові системи. Указується, що такий вплив може бути прямим або непрямим. Прямий вплив є результатом прецедентного права, що стосується конкретного положення національного законодавства. Непрямий вплив є результатом судових рішень незалежно від способу їх ухвалення, винесених у подібних справах за законодавством цієї країни (суровий непрямий вплив) або інших країн (слабкий непрямий вплив).

Ключові слова: джерела права; судовий прецедент; застосування права; податкове право ЄС; виконання рішень Європейського суду справедливості; попередні рішення; податкова гармонізація.

Introduction. Under the Founding Treaties, Member States are obliged to respect the judgments of the Court of Justice of the European Union, whether preliminary or infringement judgments. The judgments of the Court of Justice are part of the 'acquis' that candidate countries must implement before joining [1, p. 9]. With the acquisition of the status of an EU candidate state, this rule also applies to Ukraine, which already has significant experience in applying the tax law practice of another authoritative international judicial body – the European Court of Human Rights [2], however, the application and enforcement of the judgments of the EU Court has its own peculiarities.

National jurisdictions must apply EU law as interpreted by the Court of Justice, and Member States must adapt their domestic law accordingly [3, p. 22]. While states are free to choose the means, they must respect effective implementation. There is a wide variation between Member States in terms of the number of cases in which their legislation has been examined by the EU Court of Justice. For example, while very few tax cases have been accepted in relation to Ireland or Italy, the tax laws of the Netherlands, Germany, the UK and even Finland are regularly challenged before the EU Court of Justice. In addition, there are different attitudes towards the efforts of Member States to adapt their tax laws to EU requirements. However, there is no direct correlation between the number of cases filed with the CJEU and the legislative changes made by Member States to adapt their tax systems to EU requirements. For example, Austria and Finland have implemented numerous tax reforms in order to comply with the freedoms provided for in the Founding Treaties, as interpreted by the CJEU in its judgments. However, despite this, the tax legislation of these countries is often the subject of review by the EU Court of Justice. On the other hand, despite the small number of judgments of the EU Court of Justice on taxation in Italy, the Italian tax system, according to scholars, has features that may impede the effective implementation of EU freedoms [4, p. 209, 230–231].

The issue of enforcement of judgments of the European Court of Justice in tax disputes remains poorly researched in the national financial law science. There are practically no special scientific studies by Ukrainian scholars. The existing developments are either too general or fragmentary. Therefore, the study is based on the works of European scholars D. Mączyński, P. Pistone, N. Póltorak, U. Šadl, D-M. Şandru, B. de. Witte and others.

The purpose of the study is to analyse the general principles of enforcement of judgments of the European Court of Justice with a view to accelerating the harmonisation of national tax legislation with EU law.

The provisions of the Founding Treaties do not specify how a state should execute the judgments of the Court of Justice. In this context, it is not surprising that the implementation of the Court's judgments varies between Member States, even at the level of national jurisdictions. For example, in Romania, the binding nature of the judgments of the Court of Justice of the European Union is enshrined in the Constitution and established directly by the Constitutional Court [5, p. 47], while in Poland this issue is regulated by sectoral legislation [6, p. 5–10]. However, as a rule, the judgments of the EU Court of Justice do not interfere with the scope of the law, as the EU Court of Justice cannot declare an act issued by a state in violation of EU law invalid [7, p. 278]. Thus, the obligation to comply with the judgement rests primarily with the tax authorities and courts, which, when deciding tax cases based on the case law of the CJEU, cannot apply national provisions deemed incompatible with EU law. As stated by the CJEU in its judgment in “Commission of the European Communities v Italian Republic”, failure to comply with obligations arising from European law should result in an automatic prohibition of the application of the challenged provisions by both judicial and administrative authorities of the Member State and imposes an obligation on these authorities to take all measures to ensure full application of the law [8]. As a result, irrespective of any legislative intervention aimed at ensuring the compliance of national legislation with the European one, the tax authorities and administrative courts are obliged to comply with the judgments of the Court of Justice of the European Union at the level of application of law. In practice, this means, in particular, refusing to apply provisions recognised by the CJEU as inconsistent with EU law.

Due to the fact that the judgments of the CJEU have *ex tunc* effect, according to D. Mączyński, the issue of eliminating the consequences caused by the previous application of defective provisions should also be considered in the field of application of law [9, p. 26]. In this context, the implementation of the CJEU judgment means the possibility of initiating special procedures aimed at excluding from regulation decisions made on the basis of provisions recognised by the CJEU as inconsistent with EU law. It is even more obvious that the effects of the case law of the Court of Justice of the European Union are applicable in the case of decisions on the interpretation of treaties and acts adopted by EU institutions, bodies or organisational units issued pursuant to a preliminary ruling, the procedure for which is set out in Article 267 of the Treaty on the Functioning of the European Union. Proceedings before the Court of Justice of the European Union are concluded with an order or judgment that is specifically binding. The case law of the Court of Justice of the European Union clearly shows that judgments and orders issued in this regime are binding on the court that requested the preliminary ruling, even if such binding does not directly follow from the wording of Article 267 of the Treaty on the Functioning of the European Union [10]. The obligation applies not only to the court that submitted the request, but also to all domestic courts that make a decision in the case. Thus, the judgment of the EU Court of Justice not only does not affect the validity of the provisions of national legislation, but does not even create an *erga omnes* effect. The importance of the CJEU judgment for other proceedings stems from the doctrine of *acte éclairé*, which states that a national court may refrain from submitting a request if the CJEU has already ruled on a similar case [11, p. 164]. As in the case of decisions issued at the request of the Commission pursuant to Article 258 of the Treaty on the Functioning of the European Union, the preliminary decision is binding from the moment of publication with *ex tunc* effect. As a result, in this situation, the application of the law should also assess the possibility of excluding from the legal order previously adopted decisions that do not comply with EU law. The above considerations show that the implementation of the judgments of the EU Court of Justice in tax cases, regardless of the way they are adopted, generally takes place in the field of application of law [12, p. 68–103].

In the case of judgments rendered in accordance with Article 258 of the Treaty on the Functioning of the European Union at the request of the Commission, their implementation at the level of application will be limited to refusing to apply provisions found by the Court of Justice to be inconsistent with EU law. However, with regard to judgments (rulings and decisions) rendered pursuant to Article 267 of the Treaty on the Functioning

of the European Union as a result of a request submitted by a national court for the interpretation of Treaties and acts adopted by EU institutions, bodies, services or agencies, the enforcement of the judgment will consist in the court and all other courts considering the case taking into account the interpretation of the provisions of EU law given by the Court of Justice of the European Union. Moreover, in accordance with the doctrine of *acte éclairé*, the effect of the CJEU's judgment will be to take into account the interpretation of other courts considering similar cases. The implementation of the judgments of the Court of Justice of the European Union in the field of application of law does not exclude legislative intervention. A change in legislation, although not necessary, if the effect of the CJEU judgment is achieved in the field of application of the law by refusing to apply the provision questioned by the CJEU, is a natural consequence of a judgment rendered under Article 258 of the Treaty on the Functioning of the European Union. Recognition of the provisions of national legislation as inconsistent with EU law justifies the need to repeal such regulation or amend it in accordance with EU law in order to avoid inconsistencies in the application of national law and European law. However, the need to change the legislation in the case of a preliminary ruling under Article 267 of the Treaty on the Functioning of the EU is less obvious. N. Póltorak notes that despite the different implications of the judgment of the Court of Justice of the European Union delivered under Articles 258 and 267 of the Treaty on the Functioning of the European Union, in practice the preliminary ruling procedure remains an effective tool for identifying violations of EU law and ensuring its enforcement [7, p. 251].

There are three groups of preliminary rulings: 1) judgments resulting from 'ordinary' questions of interpretation of EU law; 2) judgments triggered by requests for direct influence of EU law on the application of law by a national court; 3) judgments issued in connection with requests for compliance of national legislation with EU law [13, p. 15–25]. As a result, it may happen that a judgment rendered by the EU Court of Justice will require the abandonment of a national provision that is contrary to EU law. Thus, leaving such regulation in the national legal system may also lead to inconsistencies between the national legal system and the EU legal system, which justifies legislative intervention. Although the implementation of the CJEU judgments is mainly in the area of law application, their consequences should also be considered in the area of law-making. However, it is difficult to expect a national legislator to react to every judgment of the EU Court of Justice and incorporate its content into domestic tax legislation.

The European tax law doctrine indicates that the impact of the case law of the EU Court of Justice on national tax systems may be direct or indirect [14, p. 412–428]. Direct influence is the result of case law relating to a specific provision of national law. Indirect influence is the result of court decisions, regardless of the method of their adoption, made in similar cases under the laws of this country (strong indirect influence) or other countries (weak indirect influence). Direct impact can take different forms depending on how the CJEU ruling was made. In the case of decisions issued by the Court of Justice of the EU after the Commission has initiated an infringement procedure, their consequences are easier to take into account in case law and, possibly, at the legislative level. As D. Mączyński notes, this type of decision directly points to the provision of national law and states that it contradicts European Union law, and thus, it is a clear indication to authorities and courts considering tax cases that this provision cannot be the basis for decisions and should be omitted in the process of applying the law in tax and judicial proceedings [9, p. 28–29].

At the same time, a decision of the Court of Justice of the EU, issued in accordance with Article 258 of the Treaty on the Functioning of the EU, allows the legislator to amend the contested provision, repealing or amending it taking into account EU legal norms. However, it should be noted that in the case of court decisions issued following a complaint lodged by the Commission regarding a breach of EU law, controversial situations may arise. First, due to the retroactive effect (*ex tunc*) of the decisions of the Court of Justice of the EU, there is doubt as to whether the repeal of a provision that is incompatible with EU law is a sufficient measure to restore the state of conformity of national legislation with EU law. In particular, the question arises as to whether the legislator should not also provide for legal instruments allowing to attribute the state of conformity of national law to European law also in the period preceding the decision of the Court of Justice of the EU. The repeal of the provision of the tax law challenged before the Court of Justice of the EU resolves the problem of the compliance of the national legal system with EU law only from the moment it enters into force. Such a change does not automatically apply to proceedings concluded before its introduction. The dilemma is whether to reopen the proceedings to the authorities applying the law, using for this purpose the institution of resumption of proceedings that ended with the issuance of a final decision, or to leave the issue closed in this situation, or

whether the legislator should clearly define the consequences of the EU Court's decision on the inconsistency of the provision of national tax legislation with EU legislation separately for each decision, taking into account its specifics and, in particular, the time range of its validity. Secondly, it is necessary to consider whether the effects of a decision of the Court of Justice of the European Union that national legislation is incompatible with EU law should be limited only to periods for which the limitation period has not expired in the light of domestic tax provisions, or whether those effects should be inferred in relation to the entire period of validity of the provision which is contrary to EU law, regardless of the time limits resulting from national law [15]. Thirdly, the dispute concerns the issue of the assessment – both at the level of application and at the level of law-making – of existing provisions in a legal system similar to that covered by the CJEU ruling. It seems that the process of assessing the direct effect of decisions issued by the Court of Justice of the EU following preliminary proceedings under Article 267 of the Treaty on the Functioning of the EU is the most complex. The very fact that the decision was issued following a procedure initiated by a national court with a request for interpretation of the Constituent Treaties or acts adopted by institutions, bodies, services or agencies of the EU in order to apply this interpretation to a specific provision of domestic legislation does not determine the consequences for this tax system. Somewhat simplified, it can be noted that in the case of decisions made in accordance with the preliminary ruling procedure, the EU Court interprets the provisions of EU law, while the task of the national court is to interpret the provisions of national legislation taking into account the decision made by the EU Court. That is, the direct consequences of the decision of the Court of Justice of the EU do not mean the refusal to apply the provisions of national law. On the contrary, tax authorities and courts will be obliged to apply the provisions of national law, but in such a way that the legal norm resulting from it complies with EU law. Thus, even in the case of previous decisions of the Court of Justice of the EU, which have direct effect, the intervention of the legislator does not seem obvious. If the legislator decides to implement such a decision of the Court of Justice of the EU, such implementation will, in principle, not consist in repealing the provision of the national act, but in changing its content in such a way that it reflects the interpretation adopted by the Court of Justice of the EU in the decision. In the case of preliminary rulings, all dilemmas regarding the consequences of judicial decisions rendered pursuant to Article 258 of the Treaty on the Functioning of the EU, with particular emphasis on temporal issues and the legal and tax assessment of the impact of such decisions on events preceding the ruling. Moreover, there is another dilemma that arises due to the specificity of previous decisions of the Court of Justice of the EU regarding the validity of changing a provision under the influence of such a decision, when it is made on the basis of a specific factual situation. In other words, the doubts relate to whether, in the case of a judgment of the EU Court of Justice that relates to a specific factual situation, an abstract provision of national law that also applies to factual situations other than those analysed by the EU Court of Justice should be changed. This once again confirms our opinion that there are differences in the implementation of the decisions of the Court of Justice of the EU at the level of national jurisdictions of the Member States.

Conclusions. Summarizing the above, it can be noted that the obligations to implement the decisions of the Court of Justice of the EU in tax cases lie primarily with tax authorities and courts. Decisions and orders given under the procedure laid down in Article 267 of the Treaty on the Functioning of the European Union are binding on the court which has requested a preliminary ruling, even if such binding effect does not follow directly from the wording of that article. The obligation extends not only to the requesting court, but also to all national courts that rule on the case. In the case of court decisions issued under Article 258 of the Treaty on the Functioning of the EU at the request of the Commission, their implementation at the level of application will be limited to the refusal to apply the provisions found by the Court of Justice of the EU to be incompatible with EU law.

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