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THE ACTS OF THE EU TAX LAW AND DOUBLE TAX TREATIES: THE PROBLEMS OF CORRELATION IN ESTABLISHING ANTI-TAX AVOIDANCE RULES**

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The subject. The specifics of the functioning of tax systems and the risk of double taxation require a solution to the issue of whether tax competence can remain only at the national level. Modern cross-border tax relations operate within a multi-level system of legal regulation based on the norms of international, supranational and national law
The difficulties of correlating these levels are rooted in the fact that, in accordance with international law, each State has the right to tax persons or transactions with which it has a sufficient connection. Different situations may occur when both countries believe that the taxpayer is their resident, or when each of them claims that the income was received in this state. States solve this problem both unilaterally with the help of national legislation, and on a bilateral basis with the help of a double tax treaty.
With the adoption of the Action Plan aimed at combating the erosion of the tax base and the withdrawal of profits (hereinafter referred to as the BEPS plan) and the EU Council Directive 2016/1164 (ATAD), tax strategies for using gaps and inconsistencies in tax rules to artificially transfer profits to low-tax jurisdictions were limited.
Purpose of the study. The article discusses possible scenarios arising from the interaction of tax agreements and acts of EU tax law. It is necessary to take into account the obligation of the Member States to eliminate inconsistencies between acts of national legislation and acts of EU law. Member States have committed to achieve this goal at the time of EU accession and, therefore, before the adoption of any secondary EU law.
Methodology. The research was carried out with the application of the formally legal interpretation of legal acts as well as the comparative analysis of international and European legal literature. Structural and systemic methods are also the basis of the research.
The main results. Due to the clear coordination between the European Union and the OECD of actions in terms of establishing common measures to combat tax evasion and focusing on the subjective element of assessing potential abuse situations, a new standard for combating tax evasion has been established.
Conclusions. The author comes to the conclusion that the priority of the EU law over DTTs has been established. However, Member States retain the right to establish their own tax regimes and enter into tax treaties, thereby creating conflicts in legal regulation. In order to be directly applicable, the norm of the treaty must be clearly and definitely formulated, as well as be unconditional and independent of any national implementation measures.
National legislation provides measures to eliminate the legal multiple taxation only for its residents. On the other hand, with respect to tax agreements concluded with third countries, the predominance of one system over another depends on the specific scenario, and in some cases the result achieved is the result of interpretation of existing provisions. In particular, tax treaties should prevail only when concluded before a state joins the EU.

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1. Introduction

The specifics of the functioning of tax systems and the risk of double taxation require a solution to the issue of whether tax powers can remain only at the national level. Modern cross-border tax relations operate within a multi-level system of legal regulation based on the norms of international, supranational and national law [1, p. 4].

The difficulties of correlating these levels are rooted in the fact that, in accordance with international law, each State has the right to tax persons or transactions with which it has a sufficient connection. States, as a rule, tax companies based on the criterion of residence or source. Double taxation is a challenge for the domestic market and can occur when both countries believe that the taxpayer is their resident, or when each of them claims that the income was received in it [2, p. 21].

States solve this problem both unilaterally with the help of national legislation, and bilaterally with the help of double tax treaties (hereinafter – DTT). Another problem is the distinction traditionally drawn between business (active) and investment (passive) income.

At the national level States may tax certain forms of passive income paid to foreign companies at lower rates or not tax at all, for example, dividends paid to shareholders who own a certain percentage of shares of a domestic company. At the bilateral level, primary tax rights are usually allocated to passive income, such as dividends and interest, taking into account the limited right of the state to levy withholding tax. As a result, the source countries lose the right to tax passive income paid to non-residents, or to reduce this tax. This function provides the basis for many tax planning structures. European Directives, in particular the Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (hereinafter referred to as the Parent Subsidiary Directive), the Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (hereinafter referred to as the Interest and Royalty Directive) and the practice of the Court of Justice of the European Union (hereinafter – the ECJ) significantly influenced the legislation of the member States and significantly restricted their freedom in designing acts of tax legislation in relation to cross-border activities.

At the same time, integration law, in particular integration tax law, as mentioned by Professor G.P. Tolstopyatenko, is aimed at bringing together the legislation of states on the basis of general rules created by their integration associations [3, p. 24].

The EU Member States have concluded DTTs with both third countries and other EU member States. The result of the relationship between the norms of such agreements and the norms of EU law depends on the status of the DTT party (EU Member State or the third country), as well as on the date of conclusion of the agreement (before or after the adoption of the act of secondary EU law). This article examines the correlation of the norms contained in the acts of two different systems – the DTTs network and the acts of EU tax law. There are certainly conflicts between these norms.

With the adoption of the Action Plan on Base Erosion and Profit Shifting (hereinafter – BEPS Action Plan) and the Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (hereinafter – ATAD), tax strategies for using gaps and inconsistencies in tax rules for the artificial transfer of profits to low-tax jurisdictions were limited. By introducing various forms of general rules to combat tax evasion, these acts made it "necessary for both taxpayers and tax authorities to master the art of separating tax avoidance from real economic activity" [4, p. 4].

The article discusses possible scenarios arising from the interaction of tax treaties and acts of EU tax law with applicable tax treaties, including the exemption method stipulated in the OECD Model Convention on Taxes on Income and Capital (hereinafter – the OECD Model). The article

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considers cases when tax agreements are concluded between EU Member States, as well as between EU Member States and third countries.

2. Conflicts between the EU law and the provisions of double taxation agreements

The EU Member States retain their tax sovereignty in the field of direct taxation, and DTTs do not solve all the problems of double taxation that arise. It is not surprising that this topic is of interest to scholars around the world [5-11]. Member States may, for example, decide to apply the principle of territoriality for income taxation purposes and tax non-residents only in part of income from sources in the relevant State.

At the same time, EU Member States must comply with EU law when adopting national laws and concluding tax treaties. This obligation also applies to the interpretation of the provisions of existing tax treaties [12, p. 33].

The norms of national law do not terminate due to the principle of the primacy of EU law; however, they cannot be applied in case of non-compliance with EU law (lex superior derogat legi inferiori). Otherwise, EU Member States could simply revise the DTT in order to circumvent the provisions of EU law, thus undermining the principle of the rule of law of the EU.

The internal market requires, among other things, a common economic policy, a system certifying that competition in the internal market is not distorted, as well as the convergence of the national legislations of the Member States necessary for the functioning of the internal market. As noted by Professor E. Kemmeren, "it is important that the internal market be similar in nature to the market of a single Member State" [13, p. 158]. In fact, DTTs also create a common market, but a bilateral one, between the contracting parties, and at a lower level than the internal market of the integration association [14, p. 57].

As a rule, taxes on income and capital are the subject of regulation of the DTT. On the one hand, EU Member States retain tax sovereignty on direct taxation issues. On the other hand, DTTs are the part of international law. Their status in national tax law is determined by the constitution of the respective State [15, p. 75].

While the purpose of the "tax treaty law" is primarily to regulate interstate relations through the redistribution of taxation powers between contracting States, EU tax law serves as the main mechanism for the creation and proper functioning of the internal market. The European Court of Justice noted that although EU Member States are free to determine binding factors in order to distribute taxation powers in the light of the DTT, they are nevertheless bound by obligations under the constituent treaties of the EU.

For example, Article 23A of the OECD Model provides for a method of exemption from double taxation: where a resident of a Contracting State derives income or owns capital which may be taxed in the other Contracting State in accordance with the provisions of this Convention (except to the extent that these provisions allow taxation by that other State solely because the income is also income derived by a resident of that State or because the capital is also capital owned by a resident of that State), the firstmentioned State shall, subject to the provisions of paragraphs 2 and 3, exempt such income or capital from tax.

Where a resident of a Contracting State derives items of income which may be taxed in the other Contracting State in accordance with the provisions of Articles 10 and 11 (except to the extent that these provisions allow taxation by that other State solely because the income is also income derived by a resident of that State), the firstmentioned State shall allow as a deduction from the tax on the income of that resident an amount equal to the tax paid in that other State. Such deduction shall not, however, exceed that part of the tax, as computed before the deduction is given, which is attributable to such items of income derived from that other State.

Let’s suppose that Company X, a resident of State R, operates through a permanent establishment in State S. The agreement between States R and S includes an article on the elimination of double taxation in accordance with Article 23A of the OECD Model. According to the tax treaty, State R is not allowed to tax income related to a permanent

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establishment if such income can be taxed in State S, since it will be required to provide a deduction. When applying the CFC regime in accordance with ATAD, due to the low level of taxation in State S, State R would declare the possibility of taxing income related to a permanent establishment, ignoring the exemption granted under the R – S tax agreement. Denial of access to State aid under a contract in State R in accordance with the CFC rule clearly creates a conflict [16, p. 147].

In principle, any conflict between EU law and international law should be resolved through the application of conflict of laws rules [17, p. 330], in particular, on the basis of article 351 of the Treaty on the Functioning of the European Union (hereinafter - the TFEU). The first paragraph of this article includes a "grandfather clause": The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

The second paragraph mitigates the first one: to the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

3. Peculiarities of the application of tax law norms depending on the legal status of the parties to the tax agreement

3.1. Tax agreements between EU Member States

The "protection" provided in accordance with paragraph 1 of Article 351 of the TFEU does not apply to tax agreements concluded between EU Member States. In such cases, the EU law norm always has priority action.

The provision of the tax agreement will not have priority if the agreement was concluded after the adoption of the secondary law act or after the accession of the State to the EU, but before the adoption of the secondary law act, since the EU member States are bound by the primacy of EU law. The ECJ has repeatedly spoken about the primacy of EU law, including over national law. Thus, in the Costa-ENEL case, it was found that in the EU, the tax law systems of the Member States and the EU tax law form two independent levels from a legal point of view: national law is at a "deeper" level, and EU law is subject to priority application compared to national law. A national norm that contradicts a norm of EU law should not be applied, and a norm of EU law is part of national law and does not require special implementation measures. The EU Court clarified that each national court is obliged to apply EU law in its entirety and protect the rights that the latter grants to citizens and to evade any provision of national law that may contradict it, regardless of whether it is adopted earlier or later than the norms of Union law.

Article 30 of the Vienna Convention on the Law of Treaties (hereinafter referred to as the Vienna Convention), which establishes the lex posterior principle, becomes relevant in cases where tax agreements were concluded before the states joined the EU or after joining the EU, but before the adoption of an act of secondary EU law.

Thus, taking into account that the parties to the previous DTT – EU Member States are also parties that participated in the adoption of the EU secondary law act (for example, a unanimous decision of all EU Member States is required for the adoption of the directive), the EU secondary law norm will have higher legal force than the norm of the DTT.

European scholars note that as a result, EU Member States must comply with EU law, even if this leads to a result contrary to contractual obligations
[18, p, 782].

Thus, EU law should always take precedence over DTTs, even those adopted later [18, p. 782].

3.2. Tax agreements of the EU Member States with third countries

Compliance with the principle of the primacy of EU law with respect to tax agreements concluded with third countries may be more difficult

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for EU member States, given that, according to article 34 of the Vienna Convention, the treaty does not create obligations or rights for a third State without its consent (pacta tertiis).

An example of a scenario that can be considered as a "gray zone" due to the possibility for EU Member States to continue to apply the provisions of tax agreements is the case of the conclusion of a DTT after the state's accession to the EU, but before the adoption of the EU secondary law act. Such a scenario is of particular importance, for example, when assessing the compatibility of the CFC regime established by Directive 2016/1164 (ATAD) with tax treaties, since most of the tax treaties in force between EU member States and third countries were concluded before the adoption of ATAD [19-21].

4. Discussions on the relationship between tax agreements and EU secondary law acts

In the European literature, there are arguments both for and against the thesis of the priority of tax agreements over secondary EU law. Let's look at them in more detail.

4.1. Arguments against the priority of tax agreements over secondary EU law

1. The transfer of powers by EU Member States in a particular area to the European Union prohibits Member States from taking measures in this area. In other words, as soon as the EU Member States endow the Union with competence, they renounce their sovereignty with regard to the adoption of legal norms in this area. Based on this interpretation, the transfer of powers to the European Union (the creation of an internal market) does not allow EU Member States to conclude a tax treaty with a third country, since this would be considered a violation of the competence of an EU Member State. Such a violation would invalidate the consent given by the EU Member States at the international level, thereby resolving "the conflict between the international obligations of this Member State under the treaty and its obligations under EU law. Such a result would legitimize the cancellation of the treaty, preventing guarantees of any kind of protection of the rights and economic interests of third countries, and therefore undesirable" [22, p. 94].

2. Considering paragraph 1 of Article 351 of the TFEU as lex specialis would narrow its application on the basis of a literal interpretation. A broader interpretation of this article should not be adopted, which would extend its protection to DTTs concluded before the adoption of secondary law in this area.

3. Even in cases where the conflict is resolved in favor of tax agreements, paragraph 2 of Article 351 of the TFEU requires the EU Member State to resort to any appropriate means to eliminate the identified inconsistencies. From the wording of this paragraph, it can be concluded that the TFEU provides only temporary protection to existing tax agreements, implying the principle of EU law to eliminate any inconsistencies arising from such agreements [17, p. 335].

Some European researchers conclude that paragraph 2 of Article 351 of the TFEU transfers the principle of the primacy of EU law to the treaties of EU member States with third countries. This highlights the discrepancy between the two paragraphs, which may lead to the conclusion that paragraph 1 of Article 351 of the TFEU is "the competence of EU Member States for a certain period" and grants the authority to deviate from compliance with EU law acts; the duration of such an interim period, as well as the consequences for EU Member States that do not comply with Article 351 of the TFEU, are not defined. Thus, it is concluded that, since the protection provided by Article 351(1) of the TFEU is only temporary, EU Member States are obliged to change their obligations arising from existing tax agreements so that they are compatible with EU law. It is possible that this requirement actually follows from the general principle of cooperation [23].

4.2. Arguments in favor of the priority of tax agreements over secondary EU law

1. According to paragraph (2) (a) of Article 4 of the TFEU, direct taxation issues fall within the joint competence of the EU Member States and the Union. According to Article 115 of the TFEU, the EU

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Council may issue directives, regulations and administrative regulations that directly affect the implementation of the internal market. However, the EU Council did not use these powers too widely. Therefore, an agreement concluded before the adoption of the secondary law act should not be considered as contradicting this act, since the EU member States retain their sovereignty to the extent that the European Union has not used the powers granted to it [16, p. 151]. The conclusion to the contrary would significantly limit the EU member States, based only on the remote possibility of the adoption by the European Union of a new act of secondary EU law in this area.

2. Although there is judicial practice supporting the principle of direct action of EU law, the same cannot be said with respect to the principle of "reverse direct action", according to which EU law can be directly applied to private entities even in the absence of the implementation of EU law into national law. The absence of a "reverse direct effect" follows from the decisions of the EU Court of Justice, which concluded that "the Directive itself cannot impose obligations on an individual and that the provision of the directive as such cannot be relied upon in relation to such a person."

This principle was revealed in the decision in the Kofoed case, in which the EU Court pointed out that the principle of legal certainty does not allow for the direct creation of obligations for private entities by directives, and an EU member State does not have the right to refer directly to the text of the directives for this. In addition, this decision revealed the general legal principle of the prohibition of abuse of law.

On February 26, 2019, the EU Court of Justice ruled on six cases concerning cross-border dividends and interest, which were called "Danish beneficial owner cases". In these cases, the Danish tax authorities challenged the beneficial owner status of the direct recipient of interest and dividends in accordance with the applicable DTT, the Parent Subsidiary Directive the Interest and Royalty Directive [24, p. 187]. An important feature of the Danish cases was that Denmark did not implement the norms fixing the rules for combating tax abuse into national legislation.

Despite the stated position in the Kofoed case, the EU Court consolidated in the decisions on the Danish beneficial owner cases the conclusion that the ban on abuse of EU law has a direct effect and does not require the implementation of directives into national legislation [24, p. 187].

Contrary to what was proposed by the Advocate General of the EU Court J. Kokott, it was concluded that the general principle of EU law, according to which EU law cannot be invoked for abusive or fraudulent purposes, should be interpreted as meaning that in the case of fraudulent or unlawful practices, national authorities and courts should refuse the taxpayer an exemption, even if there are no domestic or agreement-based provisions providing for such a refusal.

These decisions have created new tools for separating misconduct from real economic activity.

On the one hand, "the EU Court has provided the tax authorities with a powerful weapon to identify abuses and combat them. On the other hand, the EU Court defined the concept of tax abuse by clarifying that the subjective element of the abuse test is the economic assessment of activity" [4, p. 5].

The ECJ concluded that:

(i) the anti-abuse provision in the Directive, if not applied in accordance with domestic law, cannot be applied against an individual due to the absence of a "direct retroactive effect", and

(ii) there is a general principle according to which the abuse of law is prohibited by acts of EU law [25, 26].

In addition, through the interpretation of the Directive on Interest and Royalties and the Comments to the OECD Model, the EU Court concluded that the concept of beneficial owner should have an autonomous meaning in EU law, should not refer to similar concepts of national law and reduced it to the concept of abuse of law.

5. Individual institutions of tax law in the context of the problems of this article

Article 11 of the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit

Shifting ("Multilateral Instrument" or "MLI") provides for the so-called exclusionary clause – the use of the DTT to limit the right of a state to tax its residents. This provision follows from the Final Report on BEPS Action 6, aimed, among other things, at preventing the provision of contractual benefits. This article is not the part of the MLI minimum standard required for implementation by all Contracting States, and provides States with the opportunity only to indicate that the taxation of their residents does not depend on the tax treaty.

The inclusion or exclusion of this provision may cause discussion only to the extent that the inclusion of such a provision in the DTT is considered necessary in order to avoid any conflict between the application of the CFC rule as a national measure and the tax agreement [27, p. 720]. This argument should be contrasted with the explanation already contained in the Comments to the OECD Model regarding the compliance of the CFC regime with tax agreements. In particular, paragraph 81 of the Comments to Article 1 of the OECD Model confirms that the CFC regime does not contradict the provisions of the tax agreement, since the regime allows taxation of a resident of the state.

The BEPS Action 6 Final Report notes that the addition of this paragraph was necessary to "prevent interventions aimed at circumventing the application of the internal anti-abuse rules of the Contracting States." The inclusion of this clause in the tax treaty, especially taking into account the advisory nature of the Comments to the OECD MC, should limit uncertainty about the applicability of national special anti-avoidance rules (SAARs).

In contrast to the arguments of the OECD, scholars provide opposite arguments based on the refusal of a benefit provided by a country in accordance with the MLI in relation to the considered reservation, as a result of which the application of the internal SAAR (for example, the CFC rules) will contradict the current tax agreement, the acceptance of the reservation will not comply with the internal tax policy, and the CFC rules will not comply with the tax policy of these countries [27, p. 721]. We believe that such a provision can simply be considered as an exception to the general rule from the point of view of the taxpayer's state of residence, since it does not restrict the state in taxation of its own residents [28]. The State may tax its residents to the extent that it does not refuse to deduct them in accordance with the tax agreement.

6. Conclusions

The EU tax law, the national tax legislation of the EU Member States and the tax agreements concluded by the EU member States have their own language, concepts and objectives. Therefore, the provisions of these acts may conflict with each other. The relationship and the order of priority between the various "segments of tax law" should be determined in order to understand the tax consequences in a cross-border situation.

Considering the problem of the correlation of EU tax law acts and international tax agreements, it is necessary to note the priority of integration supranational law over DTT. However, Member States retain the right to create their own tax regimes and conclude tax agreements, thereby often creating conflicts.

The norm of the tax treaty should be clearly formulated, as well as be unconditional and independent of national implementation measures. The directly applicable norm of integration law is part of the national tax law. This means that they automatically operate in the national legal order, without requiring special implementation measures.

National legislation provides for measures to eliminate the legal multiple taxation only for its residents. On the other hand, with respect to tax agreements concluded with third countries, the priority of one system over another depends on the specific scenario, and in some cases the result achieved is the result of interpretation of the provisions of the DTT.

In addition, DTTs should have priority effect if they are concluded before the state's accession to the EU. However, the EU secondary law act has the highest legal force when tax treaties are concluded after the adoption of the EU secondary law act or in the period between accession to the EU and the adoption of the secondary law act. The "gray zone" (these cases need to be interpreted in a specific case) remains the cases of tax agreements concluded after the state's accession to the EU, but

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before the adoption of an act of secondary law with reference to the same act. In this case, it is necessary to take into account the obligation of the EU Member States to eliminate inconsistencies between acts of national legislation and acts of EU law.

However, it remains unclear how long Member States must comply with such provisions and what the consequences are if they fail to do so, as a result of which the relevant provisions of the DTT, leading to a conflict, should continue to apply for an unspecified period of time.

The above is important from the point of view of law enforcement in the field of combating tax abuses around the world. Thanks to the coordination of actions between the European Union and the OECD in terms of establishing common measures to combat tax evasion and focusing on the subjective element of assessing potential abuse situations, a new standard for combating tax evasion has been established. In order for this standard to be effective, it is necessary to evaluate these measures in order to determine the prospects for their real impact, as was done with MLI and its implementation as a minimum standard for combating contract abuse (treaty shopping).

Despite a lot of research on this issue, not much attention has been paid to the analysis of the consequences of the application of these doctrines [29, p. 4]. The literature states that an analysis of such an impact should be carried out before the introduction of general rules on combating tax evasion as a minimum requirement both in the EU and within the OECD, but in the absence of an optimal solution, the effectiveness of these rules should be considered [30]. Otherwise, any adverse consequences, for example, due to undesirable changes in the behavior of taxpayers, as well as the negative consequences of tax competition between states, can undermine the international tax system even after the BEPS reforms [31, p. 449].

ISSN 2658-4050 (Online)

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