

INTEGRATION OF LEGISLATION ON COUNTERING TAX CRIMES IN THE EU: OPPORTUNITIES AND LIMITATIONS

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The subject. The article examines the norms of the current tax and criminal legislation of the EU, the experience of which in the future may be in demand in the process of integrating the legal regulation systems of the EAEU states when developing issues of countering tax crimes. The subject of the article is to analyze the problems of: methodology of tax crime research in the EU and data sampling criteria; integration of national tax systems; definition of tax crime in the EU; spread of VAT fraud.

Modern law enforcement practice is analyzed using the system-logical method, which indicates the complication of forms of tax evasion and concealment of actual financial and economic transactions.

The main results. It is noted that the need for effective law enforcement to ensure the financial stability of states, to counteract distortions of competition resulting from tax evasion is due to the organized and highly structured nature of a significant part of tax crimes, the expansion of the scale of cross-border tax crimes involving foreign elements. The European legislation does not contain a definition of a tax offense as such, but contains a list of types of behavior with specific descriptions of prohibited behavior. It seems that national legislators deliberately preserve a certain amount of ambiguity between prohibited and permitted tax evasion, offering a broad definition of tax evasion, since narrow specifics in the definition of such offenses can lead to undesirable impunity, exclude a flexible approach in responding to changes in this area of legal relations.

As a result of the application of the formal legal approach and comparative analysis, conclusions were obtained that, subject to careful preliminary research and practical verification, successful decisions in the field of combating tax evasion and tax fraud adopted in some jurisdictions can be used to improve the legislative provisions of other states.

1. Introduction

The tax and budgetary system of the Russian Federation, which has been operating for more than 30 years, is aimed at preferential taxation of economic activity turnover. This leads to a disproportionate distribution of the tax burden between various spheres of the national economy, fiscal promotion of trade and finance, restraint of industrial production, which, in turn, stimulates the outflow of funds not only to the trade and financial, but also to the shadow sector, stimulating the growth of tax violations and related economic and corruption crimes.

Foreign authors point out that such a provision is widespread. Links between corruption and the shadow economy are noted in the EU member States [1, p.19], especially in countries with "post-transition" economies [2, p.11-23]. In particular, in Greece, the shadow economy is considered only an attribute of corruption [3, pp.61-80].

On the one hand, the logic of long-term rapprochement with the West orients the Russian tax system to the tax legislation of the European Union (this is especially noticeable on the example of legal regulation of value added taxation) and thereby predetermines the use of European rules not only in national legislation and constitutional and legal assessment of its provisions, but also in current judicial enforcement.

In particular, the Constitutional Court of the Russian Federation refers to paragraph 62 of the ruling of the European Court of Human Rights in the case "Bulves AD" ("Bulves AD") v. Bulgaria¹, arguing in its definition² the possibility of restricting by federal law the right to own, use and dispose of property, as well as freedom of entrepreneurial activity. Earlier, the Arbitration Court of the City of Moscow appealed to the provisions of this

resolution, justifying its decision of August 4, 2016 in case No. A40-189785/2015³.

On the other hand, the negative trends taking place in the Russian economy, the tasks of developing the integration space of the EAEU [4; p. 40-48] in the context of legal non-regulation in the field of taxation, as well as the need to build more optimal structures of economic relations within the BRICS group, require a comprehensive understanding.

In this context, information about the experience of countering tax crime and law enforcement practices in the European Union, which unites 27 states in 2023, is important.

An independent value can be knowledge about the capabilities of the modern state in the fight against tax crimes; sets of measures to solve problems taken at the legal, political and organizational levels against international criminal communities. These circumstances determine the subject of the proposed study.

2. Modern studies of tax crime in the European Union: methodology, sampling criteria and data characteristics

The formation of state policy in any sphere of relations, and even more so in the sphere of fiscal redistribution of the material wealth created in society and its legal protection, requires intense and systematically carried out activities to critically rethink the norms of law in the context of economic, social, political and civilizational factors that collectively determine the specific historical background of such distribution.

The research carried out with the aim of developing effective measures to counteract tax crimes can be fully attributed to the words of R. Lering that law is a continuous work, and not only the exclusive work of state power, but also every individual who takes part in this national work, brings his contribution to the implementation of the legal idea. He's writing: "The highest task is to find boundaries and establish a balance between individuals and social groups that rise above them [5, p.25]. Therefore, it is no coincidence that European researchers choose a comprehensive and systematic

¹ Judgment of the European Court of Human Rights of 22.01.2009 "Bulves AD case against Bulgaria" (Complaint No. 3991/03)

² Ruling of the Constitutional Court of the Russian Federation dated 04.07.2017 No. 1440-O "On refusal to accept for consideration the complaint of citizen Buneev Sergey Petrovich on violation of his constitutional rights by the provisions of Articles 146, 153, 154, 247 - 249 and 274 of the Tax Code of the Russian Federation".

³ URL: www.arbitr.ru (accessed: 10.01.2022).

approach that allows them to solve the problems of identifying elements, internal relationships and qualitative characteristics of a wide geography of tax crimes.

The cases of tax crimes considered by them are selected according to the following criteria: corporate participation; significant damage - more than 500 thousand euros; availability of information on court decisions; transnational and cross-border aspect; involvement of a wide range of actors (professional intermediaries); attracting the attention of the public and the media [6].

Studies of tax crimes [7], which allow a deeper understanding of the specifics of national tax regimes, which are important in the context of prevention, administrative counteraction and prosecution of tax crime, are conducted on the materials of the most significant EU member states. The researchers pay the most attention to the following characteristics:

- (1) the legal basis of taxation and its applicability for resolving a tax conflict without initiating prosecution (for example, by agreement on postponement of prosecution);
- (2) definition of a tax offence in national legislation;
- (3) the existence of a legal concept of corporate responsibility and its applicability to tax crimes; types of activities subject to corporate tax crimes and types of tax crimes related to the corporate sector;
- (4) the legal norms used for the prosecution of tax crimes and the existence of a pre-trial admission of guilt in the legislation;
- (5) threshold values of criminal liability for tax crimes;
- (6) the range of sanctions in sentencing for the most common types of tax crimes;
- (7) persons and organizations responsible for law enforcement and prosecution of tax crimes;
- (8) the main problems in the prosecution of tax crimes and the type of prosecution applied (civil or criminal);
- (9) the role of professional intermediaries in tax crimes;
- (10) regulation of cooperation between various authorized bodies and publication of statistical data measuring their effectiveness (number of convictions, number of cases, information on assets

returned);

(11) the role of information and intelligence provided "from the inside" (the legal status of the informant).

3. The question of the method of integration of legal regulation systems: unification or harmonization

The question of the method of convergence of the legal systems of taxation of national states, in our opinion, directly depends on the method of their formation. In the event that supranational legal regulation is created first of all, unification is quite logical, when approximately equal in economic status members of the union build their national legislation in order to achieve complete unity in essence and details.

An example in this case can now be the supranational system of legal regulation of value added taxation of the member States of the Gulf Cooperation Council [8, pp. 232-238]. Its basis is being developed by the Committee for Financial and Economic Cooperation of the GCC in the form of a Convention⁴ on Value Added Tax at a basic rate of 5%, which is signed on July 24, 2016 by the United Arab Emirates (UAE), the Kingdom of Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, the State of Qatar and the State of Kuwait.

In the case of the EAEU, when the member states have significantly different taxation systems, their convergence is possible on the basis of purposeful harmonization of national legislation. In this regard, the analysis of the European experience of building a unified VAT system is of interest, which allows us to comprehensively comprehend the complexities of the problematic and difficult process of harmonization of value added taxation.

The long-term efforts of the European legislator since the adoption of the first EU Council Directive No. 67/227/EEC of April 11, 1967 "On the harmonization of the legislation of the Member States on turnover taxes"⁵, which establishes the

⁴ Unified VAT Agreement for the countries of the Gulf Cooperation Council. Umm al-Qura. 2016. No. 4667 dated 07/24/1438 Al-Hajri (In Arabic)

⁵ First Council Directive 67/227/EEC of 11 April 1967 on the harmonization of legislation of Member State

procedure for the implementation and general principles of VAT, have not yet achieved the goal of effective integration of VAT legal regulation.

In general, the idea of the European VAT consists of an economic and legal impact on a complex system of public relations in order to multiply the common good based on the coordination of the interests of various social groups. As long as the fiscal function of VAT was not considered dominant in the economically developed EU countries, but acted only as a security component of fiscal regulation, the governing elites reconciled themselves with numerous flaws in the VAT structure itself, as well as with a high level of tax evasion and tax fraud. However, under the influence of the turbulent aggravation of the economic situation in recent years, fiscal tasks have again become dominant [9, pp.75-76], and the fight against tax evasion is the main political challenge in the EU states. The effectiveness of such a struggle is directly dependent on the degree of integration of the tax and criminal legislation of States whose national economies closely interact within the framework of a common economic space.

The European Union still has no general rules for combating tax evasion, unlike other economic crimes [10, p. 527], such as money laundering [11, p. 815], corruption and organized crime [12].

The inability of the 27 EU member States to effectively combat tax crimes due to different legal and institutional frameworks objectively complicates cross-border cooperation between national authorities and may lead to pockets of impunity in certain EU regions. The shortcomings of the legal regulation of one jurisdiction create risks for the entire Union.

Choosing the means of countering tax crime, the Brussels bureaucracy gives a clear advantage not to unification, but to harmonization [13, p. 32; 14, p. 385], which is a process of gradual convergence of various national criminal norms in order to eliminate contradictions and increase their consistency [15, p.149].

concerning turnover taxes. Official Journal of the European Communities. 1967. 14 Apr. P. 1301–1303.

4. Tax crimes in the EU: characteristic features and national peculiarities in the definition of the concept

States in the implementation of criminal policy in the field of taxation have historically defined tax evasion and assess the consequences of their commission with the help of extremely diverse legal approaches and tools [16]. However, there is no universal or generally accepted definition in the EU.

The law on tax crimes must comply with the principle of legality and the consequences resulting from it, which are recognized in the EU states. At the same time, the definition of tax offenses should reflect modern business practice, be precise and unambiguous, so that everyone can understand their meaning and guide their actions accordingly.

In some jurisdictions (for example, Italy), the regulatory constructions of tax crimes are difficult for an ordinary citizen to understand. In addition, the definitions of tax crimes themselves in the law of the EU states have different contents, which causes objective difficulties in comparing and qualifying tax offenses in different national legal systems, the structures of tax violations themselves differ significantly.

The German Tax Code 2002148 "Abgabenordnung" (hereinafter - AO) is the main tax law of Germany aimed at combating tax crimes. Its article 369 states that tax crimes include the following: acts that are punishable in accordance with tax legislation; illegal import, export or transit of goods; forgery of tax stamps or preparatory actions for this, if this act concerns tax stamps; aiding the person who committed the act provided for by the first and third of the above crimes. The main tax crime is tax evasion, stipulated in Article 370.149 of the AO.

The General Tax Code of France (CGI)⁶ in article 1741 contains a definition of a tax crime, which provides that anyone who fraudulently and deliberately tried to evade taxes is considered guilty regardless of the means used for this purpose.

French law provides for the confiscation and return of assets related to tax crimes. The provisions

⁶ Art 1741 of General Tax Code (CGI— Code Général des Impôts) 2018 (France)

of the Criminal Procedure Code of 1958⁷ establish the use of restorative procedures in the form of confiscation without a conviction or on its basis⁸. The tax offence is punishable by a fine of up to 500,000 euros and imprisonment for up to five years. Sanctions can reach 3 million euros, together with a seven-year prison sentence, if the crime was committed as part of an organized group.

Since 2005, in accordance with article 121/2 of the French Criminal Code, legal entities can be held criminally liable for any criminal violation of French law. In this case, it should be pointed out that the application of corporate criminal liability is not a general rule. For example, the concept of corporate responsibility does not exist in Germany⁹.

There is a consensus in the legislation of European countries that a tax offense can be committed at least with indirect intent. Austria occupies a special place, where criminal liability is provided for negligent tax reduction (§34 FinStrG). However, the maximum penalty is relatively small – a fine of no more than the amount of such arrears.

In Germany, the mere negligence of the violator is not enough. For the criminal legal qualification of violations of the tax law, it is necessary to recognize the taxpayer's behavior as frivolous (§§ 378-381 AO). In the rest of the EU, negligent tax reduction is considered an administrative offense (for example, in Spain).

In Finland, a "tax crime" is defined in accordance with paragraph 1 of Section 4 of Chapter 29 of the Criminal Code of 1996: "A person who, in order to obtain financial benefits for himself or another person, does not pay one of the following payments on time for a reason other than insolvency or suspension of payments imposed by a court: (1) withheld tax, withholding tax or transport

tax; (2) turnover tax calculated for a calendar month or tax payable on certain insurance premiums; (3) value added tax; (4) the employer's contribution to social insurance is subject to collection for a tax violation, unless this act is punishable as tax fraud."

At the same time, paragraph 2 of section 4 clarifies that a small error that was eliminated without delay is not considered a tax violation. Criminal liability for evasion of payment of small amounts of taxes is provided for in the EU member States rather as an exception.

In some countries, there is no specific definition of criminal behavior related to tax crimes. The Austrian formulation of tax evasion links tax cuts with violations of tax obligations, without disclosing their concepts. Duties as such are established by tax legislation. Section 33 (1) of the Austrian Tax Offences Act 1958 (FOA) states that: "A person guilty of tax evasion is any person who, in violation of the tax obligation to notify, disclose information or truthfulness, intentionally understates taxes."

The composition of tax offenses in the EU may include provisions criminalizing incitement, aiding and abetting conspiracy, when specialists in the field of taxation, accounting and law may participate in the commission of offenses.

With regard to the types of taxes covered by tax torts, the analysis of the legislation of the EU states reveals two approaches. Holistic - without distinction between types of taxes when determining a tax offense and special, when appropriate elements of offenses are provided for different types of taxes. In particular, Austria, Germany, Greece and Portugal do not distinguish between types of taxes, except for special treatment of VAT. Italy and Malta follow the second approach.

Penalties imposed on tax offenders vary depending on the level of their public danger, which depends not only on the amount of damage, but also on the duration and type of the criminal scheme in question. The maximum term of imprisonment applied in Europe ranges up to twenty-five years (Poland) or even theoretically life imprisonment under the common law of Ireland.

Taking into account the principle of proportionality of punishment, the legislator may also take into account the specific conditions of the commission of the crime, the subjective side

⁷ French Code of Criminal Procedure (CPP - Code de Procédure Pénale) 1958 (France)

⁸ Ministère de la Justice, Guide for Asset Recovery in France. <https://star.worldbank.org/sites/star/files/Guide-for-Asset-Recovery-in-France.pdf>.

⁹ Section 73 ff, 29a OWiG; Luise Warmuth Zur Strafbarkeit von Unternehmen «No body to kick, no soul to damn?» Das Beduerfnis einer echten Ungternehmensstrafbarkeit in Deutschland <https://iurratio.de/journal/zur-strafbarkeit-von-unternehmen/>

(intention or motive).

Aggravating circumstances may also affect the qualification of tax offenses. Among those, the following stand out: committing a tort for commercial purposes; acting as a gang member; committing violent acts; involving a government official, especially from the tax or customs administration; using legal entities established in tax shelters; using fake individuals and legal entities.

he considered examples illustrate the differences in the definitions and qualifications of tax evasion in different countries.

As a rule, the legislation does not contain a definition of a tax offense as such, but contains a list of types of behavior with a specific description of prohibited behavior.

It seems that national legislators deliberately retain a share of ambiguity between prohibited and permitted tax evasion, offering a broad definition of tax evasion, since narrow specifics in the definition of such offenses can lead to undesirable impunity, exclude a flexible approach in responding to changes in this area of legal relations.

5. Tax fraud in the field of VAT

A special phenomenon of European tax crime is VAT fraud, the possibility of which is closely related to the very design of this tax. In particular, the actions of tax criminals using VAT "carousels" are based on it [17, p. 183]. Criminal schemes of fraud with this payment became widespread after the abolition of customs borders within the EU in 1993 and in conditions of increasing VAT tax rates [18, p. 23].

Exposing the essence of the VAT fraud problem, the European Commission notes the fundamental reason for the need to change the legal mechanism of its regulation: "It is fragmented and excessively complex for a growing number of enterprises operating in cross-border markets, and leaves the door open for fraud"¹⁰. In the context of a protracted financial crisis, the viciousness of the

legal mechanism of value-added taxation significantly exacerbates the risk of abuse of VAT, prompting the European bureaucracy to take emergency measures. This is stated by the Commissioner of the European Union for Economic and Tax Affairs P. Moscovici, commenting on the need for VAT reform: "Member states should not accept such a shocking loss of VAT revenue. Our reform can reduce cross-border VAT fraud by 80% and get much-needed money back into the coffers of the member state"¹¹.

Compensation for methodological imperfections of VAT is achieved by expanding the information competence of the state control and reducing the level of protection of information about economic agents. It is no coincidence that the European Commission considers the existing legal regulation of VAT as a "transitional system that cannot keep up with the challenges of the modern global, digital and mobile economy"¹² and suffers high losses from criminal abuses.

Assessing the VAT budget losses incurred by European countries in the 2010s, the European Commission notes that no tangible improvement has been achieved in the fight against VAT fraud. The "VAT gap" in the form of the difference between the estimated tax collection and the actual receipt of VAT in the European Union is still very large. It amounts to 170 billion euros in 2013¹³, 152 billion euros in 2015¹⁴. In the future, the measures taken led to a certain reduction in losses. According to the statement of the European Commission in 2021, the revenues lost in 2019 as a result of fraud and VAT evasion amounted to 134 billion euros¹⁵. At the same time, cross-border VAT fraud causes damage in the amount of 50 billion euros annually.

Analyzing illegal financial flows, Alex Cobham and Peter Yansky argue that tax crimes and shadow

¹⁰ Press release of the European Commission. Brussels. 4.10.2017. http://europa.eu/rapid/press-release_IP-17-3443_en.htm (date of reference: 01.10.2022).

¹¹ Ibid.

¹² Ibid.

¹³ Press release of the European Commission. Brussels. 07.04.2016. http://europa.eu/rapid/press-release_IP-16-1022_en.htm (accessed: 01.10.2022).

¹⁴ Press release of the European Commission. Brussels. 28.09.2017. http://europa.eu/rapid/press-release_MEX-17-3545_en.htm (accessed: 01.10.2022)

¹⁵ https://taxation-customs.ec.europa.eu/news/vat-gap-eu-countries-lost-eu134-billion-vat-revenues-2019-2021-12-02_en

money flows deprive governments of the income they need [19], contributing to an unfair distribution of resources and provoking other financial crimes. However, the measures taken so far include (1) information exchange and cooperation; (2) developing the potential of tax authorities; (3) increasing transparency and harmonization of tax systems clearly do not correspond to the scale of cross-border tax fraud[20].

The expansion of problem areas in the legal regulation of VAT, in particular, contributes to the transfer of the main arrays of commercial transactions in the field of electronic commerce; a sharp increase in the speed of banking transactions; inconsistency and asymmetry of tax legislation in various jurisdictions. The noted facts allow us to conclude that VAT fraud in the EU easily crosses state borders and penetrates into all new areas of commercial activity, is closely related to illegal monetary transactions [21].

An important turn in the fiscal policy of the European Union came in 2017, when the fight against fraud affecting its financial interests moved to the stage of intensification of measures to counteract crimes in the field of taxation (which is hindered by the absence of a common code of criminal law of the EU) [22, p. 87].

In particular, Article 3 of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017. "On combating fraud affecting the financial interests of the Union through criminal law" contains a rule that States must criminalize and effectively punish fraud committed intentionally to the detriment of the financial interests of the European Union¹⁶. The document develops the concept of organized VAT fraud to denote coordinated actions in the field of taxation, characterized by a certain level of sophistication and aimed at obtaining financial benefits to the detriment of the state budget [23, p. 245].

6. Conclusion

It should be noted that the convergence of substantive criminal law in the field of taxation intensified after the entry into force on December 1, 2009 of the provisions of the Lisbon Treaty on Organized Crime in the European Union. At the same time, the process of Europeanization of the fight against tax evasion is significantly limited by the competence of the EU in tax and criminal matters. Researchers note that the lack of EU powers in the field of substantive criminal law weakens the integration of criminal justice, contributes to the preservation of significant discrepancies between the norms of national legislation [24, p. 163-179; 25, p. 163].

Tax fraud and tax evasion at the national and cross-border levels not only undermine the social cohesion of the EU countries, but also significantly affect the size of the tax deficit of the pan-European budget and the budget of the member states, threatening the financial stability of the EU [26, p. 108].

The widespread occurrence of cross-border tax crimes, including the creation of trusts and shell companies in various jurisdictions, as well as interaction between violators of the law, require closer international cooperation. However, in reality, its implementation faces a number of obstacles: (1) incompatible organizational structures and different legal standards; (2) lack of mutual trust and the necessary resources; (3) absence of a common supranational cooperation body; (4) maintaining offshore jurisdictions with favorable secrecy laws and double taxation avoidance agreements.

Comparative analysis shows that successful solutions can be imported to other jurisdictions. In particular, simple and precise definitions of tax crimes and tax fraud adopted in some jurisdictions, subject to careful preliminary analysis and practical verification, can be applied when reforming the provisions of the criminal legislation of other States.

¹⁶ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L198/ 29.

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