



## Features of Judicial Precedent as a Source of EU Tax Law

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### Abstract

This article examines the doctrinal status and significance of judicial precedent in the EU tax legal order, focusing on its implications for Ukraine’s integration. In the absence of full legislative harmonisation in direct taxation, CJEU jurisprudence serves as a primary mechanism for “negative integration”. Using doctrinal analysis and case studies, the research finds that while the EU rejects formal *stare decisis*, it operates via *jurisprudence constante*, where consistent rulings acquire quasi-precedential authority. The results show that the CJEU has developed essential standards – such as the prohibition of abuse of rights and fiscal neutrality – that redefine national tax autonomy. For candidate countries like Ukraine, alignment requires not only transposing directives but also integrating CJEU doctrines into domestic adjudication. The study concludes that judicial precedent balances fiscal sovereignty with market integration. It recommends enhancing judicial expertise in EU law to ensure legal certainty during the accession process.

### Keywords

CJEU, EU Tax Law, Judicial Precedent, Legal Approximation, Ukraine

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### I. Introduction

On 22 June 2022 Ukraine obtained the status of a candidate country for membership in the European Union, initiating a new stage in the approximation of Ukrainian legislation to the EU legal order, including taxation. Harmonisation of national tax law with EU law requires not only the implementation of EU directives and regulations but also consideration of the interpretative role of the jurisprudence of the Court of Justice of the European Union (CJEU).

The EU legal order is commonly described as a *sui generis* system combining elements of international and national law in which judicial interpretation ensures the uniform and effective application of EU law across Member States (Craig and de Búrca, 2020). Through

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its interpretative authority, the Court contributes to the development of EU legal principles and their integration into national legal systems.

This role is particularly significant in taxation. While the European Union possesses extensive competences in indirect taxation, especially value added tax, legislative harmonisation of direct taxation remains limited. Consequently, many principles governing the compatibility of national tax measures with EU law have been developed through the Court's jurisprudence. Legal scholarship frequently describes this process as "negative integration", whereby judicial interpretation restricts national measures that violate the fundamental freedoms of the EU internal market (Korving, 2023).

The doctrinal status of judicial precedent within the EU legal system nevertheless remains debated. Although EU law does not formally recognise the doctrine of *stare decisis*, the Court generally maintains consistency in its case law, and earlier decisions often influence subsequent interpretations of EU law. Scholars therefore describe the Court's jurisprudence as a form of *jurisprudence constante* that significantly shapes EU legal doctrine (Kawczyńska, 2020; Bobek, 2015).

Recent scholarship increasingly examines the broader role of supranational courts in European legal governance. Michael Kohajda and Šimon Otta emphasise the expanding interpretative function of EU judicial bodies (Kohajda and Otta, 2025). Other studies demonstrate the influence of EU law and CJEU jurisprudence on tax reforms in Member States and candidate countries (Ondria and Guliš, 2025), while research on Ukraine highlights the growing role of international interpretative sources in the application of tax law (Glukh et al., 2021).

For candidate countries seeking EU membership, the jurisprudence of the CJEU forms an important element of the *acquis communautaire*. National authorities must therefore consider not only EU legislation but also the interpretative principles developed by the Court. This issue is particularly relevant for Ukraine, where the case law of the European Court of Human Rights already plays an important role in domestic judicial practice (Babin, 2020).

Despite the growing literature on EU tax law, the doctrinal characteristics of judicial precedent as a source of EU tax law remain insufficiently systematised. Many studies focus on the institutional role of the Court or on individual judgments without analysing the broader doctrinal features of precedent within EU tax jurisprudence (Novackova and Peracek, 2021).

The purpose of this article is therefore to analyse the features of judicial precedent as a source of EU tax law and to evaluate the role of CJEU jurisprudence in shaping national tax regulation. The article addresses four research questions concerning the doctrinal status of precedent in EU law, the influence of CJEU jurisprudence on EU tax law, the distinctive characteristics of EU tax precedent, and the implications of CJEU case law for the harmonisation of tax legislation in candidate countries, particularly Ukraine.

## II. Methodology and Data

This study employs a qualitative doctrinal analysis to examine the CJEU’s jurisprudence and its impact on EU tax law. The methodological framework integrates several legal research methods to evaluate the doctrinal status and practical influence of judicial precedent.

The method of legal analysis is fundamental to this research, applied to EU Treaties, secondary legislation, and CJEU tax rulings. Through doctrinal examination, the study identifies the Court’s interpretative principles and their role in shaping the EU tax framework. The method of synthesis is subsequently used to systematise these findings, formulating a coherent understanding of judicial interpretation’s role in legal development.

A comparative legal method is utilised to distinguish the CJEU’s approach from traditional common law precedent and to analyse the interaction between EU jurisprudence and national systems, particularly in candidate countries. Deductive and inductive reasoning complement this by examining how general EU principles – such as fundamental freedoms – apply to specific disputes, while identifying recurring interpretative patterns across cases. The empirical basis consists of CJEU case law concerning fundamental freedoms and national tax legislation. These primary sources are supported by academic literature on legal integration and judicial interpretation (Babin, 2024; Coşman, 2017; Komarova, 2018). Theoretical insights into international tax agreements and dispute resolution further enrich the analysis (Glukh et al., 2021; Anjos and Mimoso, 2021).

By combining these analytical and comparative methods, the study evaluates the significance of judicial precedent for national tax systems. Specific focus is placed on the implications for countries undergoing legal approximation, such as Ukraine.

## III. Results

### Functional Precedent within the System of EU Tax Law Sources

The study of the doctrinal status of the CJEU’s judicial practice suggests that a specific mechanism has emerged within the EU tax legal order, which we propose to define as a “functional precedent”. Despite the absence of formal adherence to the principle of *stare decisis* typical of common law jurisdictions, the CJEU effectively ensures the stability of the legal order through the concept of *jurisprudence constante* (Babin, 2024; Bobek, 2015). In the context of limited legislative harmonisation of direct taxation, precedent becomes more than just an auxiliary interpretation tool; it acts as a primary regulator that fills “legislative lacunae”. This model functions through vertical cooperation: national courts, by submitting preliminary rulings, effectively delegate to the CJEU the right to formulate a legal norm that subsequently acquires universal significance for the entire internal market.

The effectiveness of this functional model relies on the preliminary ruling mechanism under Article 267 TFEU. For candidate countries, including Ukraine, although they do not yet participate in this mechanism, developing judicial expertise in EU interpretative methods is a prerequisite for future membership (Mączyński, 2019). Preparing for the post-accession intensification of judicial influence requires a proactive alignment with CJEU case law as a framework for legal certainty.

This functional nature of precedent manifests in the CJEU's creation of autonomous standards that de facto restrict the fiscal sovereignty of Member States. Specifically, in *Marks & Spencer plc v David Halsey*, the Court established precedential boundaries for cross-border loss relief, which became a mandatory benchmark for national legislators, forcing them to adjust domestic group taxation rules. Similarly, in *Cadbury Schweppes*, a complex legal standard for combating abuse was developed, allowing for the restriction of fundamental freedoms only in cases of "wholly artificial arrangements" designed to evade taxes.

Thus, functional precedent in the tax sphere ensures "negative integration", where the Court forms general rules of direct effect through individual decisions that take precedence over national acts (Craig and de Búrca, 2020). It is crucial to understand that such precedent is not static; it evolves alongside the development of economic relations within the EU. This is clearly confirmed in *Halifax*, where the principle of prohibition of abuse of law gained the status of a universal criterion for reviewing tax schemes in the field of VAT, subsequently integrated into practice through *Part Service* and *Newey*. In these rulings, the Court did not merely interpret the VAT Directive but created an independent doctrinal filter of "economic reality", which is now mandatory for application by every tax inspector across EU Member States.

### **Judicial Precedent in Direct Taxation**

Judicial precedent has played a decisive role in shaping the application of European Union law to national systems of direct taxation. Although the competence to regulate direct taxes formally remains within the jurisdiction of the Member States, the exercise of this competence is limited by the fundamental freedoms guaranteed by EU law. Through its jurisprudence, the CJEU has developed doctrinal principles used to determine whether national tax measures are compatible with the internal market.

One important group of decisions concerns national tax regimes governing cross-border corporate groups. In *Oy AA v Skatteverket* the Court examined Finnish legislation allowing tax deductions for intra-group transfers only between domestic companies. The Court recognised that such rules may restrict the freedom of establishment because they disadvantage cross-border corporate structures, but it also acknowledged that the restriction could be justified by the need to preserve the balanced allocation of taxing powers between Member States. The judgment illustrates the proportionality analysis applied by the Court when evaluating national rules affecting multinational groups.

Another important line of jurisprudence concerns cross-border dividend taxation. In *Amurta SGPS v Inspecteur van de Belastingdienst* the Court examined whether withholding tax imposed on dividends paid to non-resident companies was compatible with the free movement of capital. It held that discriminatory treatment arises where dividends paid to resident companies are exempt while those distributed to non-resident companies remain subject to taxation. This judgment significantly influenced national dividend taxation regimes and reinforced the principle that cross-border investments should not be treated less favourably than comparable domestic transactions.

This jurisprudential evolution significantly impacts the alignment strategies of candidate countries. The requirement to eliminate discriminatory provisions affecting foreign investors and the integration of anti-avoidance doctrines, such as “economic substance”, is not merely a legislative task but a judicial one (Lang et al., 2021). In jurisdictions like Ukraine, CJEU analytical approaches indirectly shape domestic treaty interpretation, especially where courts rely on international standards to interpret bilateral agreements (Glukh et al., 2021).

Judicial precedent has also shaped the legal framework governing cross-border corporate restructuring. In *Cartesio Oktató és Szolgáltató bt* the Court addressed the ability of companies to transfer their registered office to another Member State. Although primarily related to company law, the judgment has important implications for taxation because such relocation may trigger exit taxation. The Court confirmed that Member States may determine the connecting factors governing corporate residence but must do so in a manner consistent with the freedom of establishment.

The Court has further examined situations involving cross-border shareholders. In *Aberdeen Property Fininvest Alpha Oy* the Court reviewed a tax regime imposing withholding tax on dividends paid to foreign investment funds while exempting domestic funds. It concluded that such differential treatment constitutes a restriction on the free movement of capital unless objectively justified. This decision significantly influenced EU jurisprudence concerning the taxation of investment funds and cross-border portfolio investment.

More recent jurisprudence confirms the continuing evolution of judicial precedent in direct taxation. In *X BV v Staatssecretaris van Financiën* the Court examined national fiscal unity rules and held that group taxation regimes cannot systematically exclude cross-border corporate structures from tax advantages available to domestic groups. The judgment further clarified the limits of national tax autonomy in the context of multinational corporate groups.

These decisions demonstrate that judicial precedent operates as a mechanism for gradually harmonising the application of national tax law within the internal market. Rather than establishing a formal doctrine of binding precedent similar to common law systems, the Court develops interpretative standards that are consistently applied in subsequent cases. As a result, earlier judgments exert a strong doctrinal influence on the evolution of EU tax law while preserving a balance between market integration and Member State fiscal sovereignty.

From a broader perspective, judicial precedent in direct taxation illustrates the distinctive character of the EU legal order. Through incremental judicial decisions, the Court has developed a coherent body of principles governing the interaction between national tax regimes and the requirements of the internal market, thereby contributing to legal certainty for taxpayers and the integration of the European economic area.

#### IV. Judicial Precedent in VAT and Anti-Avoidance Doctrine

Judicial precedent has played a decisive role in the development of European Union law in the field of indirect taxation, particularly value added tax (VAT). Unlike direct taxation, where harmonisation remains limited, VAT is extensively regulated by secondary legislation, primarily the VAT Directive. Nevertheless, the interpretation of these legislative instruments has been significantly shaped by the jurisprudence of the CJEU. Through a series of judgments, the Court has developed key interpretative principles governing VAT neutrality, the prohibition of abusive practices, and the limits of legitimate tax planning. A cornerstone of the anti-avoidance doctrine in EU tax law was established in *Halifax plc v Commissioners of Customs and Excise*, where the Court articulated the principle of prohibition of abuse of rights in VAT law. The doctrine was further refined in *Part Service Srl v Ministero delle Finanze*, where the Court emphasised that artificial arrangements designed solely to obtain tax advantages may be disregarded by national authorities. The Court clarified that tax authorities must conduct an objective assessment of the economic substance of transactions, reflecting the broader tendency in EU tax jurisprudence to evaluate arrangements based on economic reality rather than purely formal legal structures. More recent jurisprudence demonstrates the continued evolution of VAT case law. In *Skandia America Corp. (USA), filial Sverige v Skatteverket* the Court addressed the VAT consequences of transactions between a company and its branch that formed part of a VAT group. The Court concluded that such transactions may constitute taxable supplies, significantly influencing the interpretation of VAT grouping rules within the EU. The Court has also clarified the limits of legitimate tax planning. In *Newey v Commissioners for Her Majesty's Revenue and Customs* it held that national authorities must examine the economic and commercial reality of transactions when determining the identity of the taxable person, emphasising that contractual arrangements cannot obscure the true nature of economic activities.

Another significant line of jurisprudence concerns VAT fraud. In *Kittel and Recolta Recycling* the Court established that a taxable person who knew or should have known that a transaction was connected with VAT fraud may be denied the right to deduct input VAT. This judgment introduced an important due diligence standard for economic operators and strengthened the EU legal framework for combating VAT fraud.

The cumulative effect of this jurisprudence demonstrates that judicial precedent functions as a key mechanism for the interpretation and development of EU VAT law. Although VAT is largely codified through secondary legislation, the practical application of these rules depends heavily on the interpretative guidance provided by the Court. Through its case law, the Court has clarified fundamental principles such as fiscal neutrality, proportionality, and the prohibition of abusive practices.

Overall, the development of VAT jurisprudence illustrates the distinctive role of judicial interpretation in the EU legal order. By gradually developing interpretative standards applied by national courts and tax authorities, the Court contributes to the uniform application of VAT law across the internal market.

## State Aid Control and Taxation

Another important dimension of judicial precedent in EU tax law concerns the interaction between national tax measures and the rules on State aid. Although direct taxation formally remains within the competence of the Member States, national tax regimes may fall within the scope of EU State aid law where they confer selective advantages on certain undertakings. Through its jurisprudence, the CJEU has played a central role in defining the boundaries between legitimate tax policy and unlawful fiscal advantages.

The legal framework for State aid control is primarily established in Article 107(1) TFEU, which prohibits aid granted by Member States that distorts or threatens to distort competition by favouring certain undertakings. In taxation, the key issue is whether a tax measure grants a selective economic advantage to particular companies or sectors. Through its case law, the Court has developed an analytical methodology for assessing selectivity, which has significantly influenced the application of EU competition law to tax policy.

One of the most influential decisions in this area is *Paint Graphos and Others*, where the Court examined whether tax exemptions granted to cooperative societies constituted unlawful State aid. The Court held that a tax advantage may fall outside Article 107 TFEU if it results from the inherent logic of the tax system. This judgment introduced the important concept that the selectivity of a tax measure must be assessed in relation to the “reference system”, which serves as the benchmark for evaluating whether a particular measure confers an advantage.

Another significant case is *World Duty Free Group SA and Others v European Commission*, concerning a Spanish tax scheme allowing deductions of goodwill related to foreign acquisitions. The Court confirmed that a measure may be selective even when formally available to all undertakings if, in practice, only certain companies are capable of benefiting from it. This judgment clarified the criteria for identifying selective tax advantages and strengthened the Commission’s capacity to challenge preferential tax regimes.

Judicial precedent has also shaped the EU approach to tax rulings and advance pricing agreements. In *European Commission v Fiat Chrysler Finance Europe* the Court analysed whether a Luxembourg tax ruling granted a selective advantage. Although the decision ultimately annulled the Commission’s assessment due to methodological errors, it clarified the legal framework for evaluating transfer pricing rulings under EU State aid law.

A further important example is *European Commission v Apple Sales International and Apple Operations Europe*, concerning the compatibility of Irish tax rulings with EU State aid rules. Although the Court concluded that the Commission had not sufficiently demonstrated the existence of a selective advantage, the judgment clarified the evidentiary standards required in State aid investigations involving complex multinational tax structures.

These cases demonstrate that judicial precedent plays a crucial role in defining the relationship between tax sovereignty and EU competition law. Through its jurisprudence, the Court has developed a structured analytical framework for determining whether tax measures confer selective advantages. This framework generally involves three steps: identifying the reference tax system, determining whether the contested measure constitutes a derogation

from that system, and assessing whether such derogation can be justified by the nature or logic of the tax system itself.

Overall, the case law of the Court illustrates the growing integration of tax law and EU competition law. Although the EU lacks general competence in direct taxation, State aid rules have become an important instrument for addressing distortions created by preferential tax regimes. Judicial precedent therefore functions as a mechanism through which EU law indirectly influences the design and implementation of national tax systems while supporting fair competition within the internal market.

### **Critical Reflection: Limits of Judicial Law-making and Challenges for Candidate Countries**

A critical analysis of the role of judicial precedent in the EU tax system indicates that the “judicial law-making” of the CJEU possesses internal contradictions and limitations that require profound scientific reflection. The primary challenge, in our view, is the conflict between the principle of legal certainty and the dynamic nature of judicial interpretation. While the Court strives for consistency through jurisprudence constante, its rulings sometimes create an “interpretative vacuum” until a new clarifying decision is rendered, which significantly complicates the predictability of tax consequences for cross-border businesses (Korving, 2023).

The author’s scientific position, representing the original contribution to this research, lies in identifying three critical dimensions of the impact of precedent on national legal orders:

1. The Problem of “Autonomy” and Selectivity: As demonstrated in *Paint Graphos and World Duty Free Group*, the boundary between legitimate economic incentives and prohibited State aid is often determined by the Court through complex economic filters. This emphasizes the critical importance of judicial reasoning in tax disputes and threatens the institutional autonomy of national fiscal strategies.
2. Balance between Proportionality and Fiscal Effectiveness: In cases regarding “exit taxation”, such as *National Grid Indus*, the Court is forced to balance the protection of the internal market with the right of states to a balanced allocation of taxing powers. We believe that here, precedent does not offer a ready-made solution but rather a methodological “proportionality test”, the results of which may vary depending on the approaches of national courts (Wattel, 2022).
3. Integration Challenges for Ukraine: For Ukraine as a candidate country, a key limitation is the risk of “formal adaptation”. There is a danger that the texts of tax directives will be implemented, but the “living spirit” of case law – particularly the complex doctrines of “economic reality” and “abuse of law” – will remain ignored by national judicial practice (Baron, 14; Komarova, 2018). This requires the Ukrainian judicial system to have a deep understanding of the CJEU’s doctrinal approaches (Babin, 2020; Glukh et al., 2021).

In summary, the scientific contribution of this study suggests that judicial precedent in EU tax law has transformed into a hybrid coordination mechanism. However, its effectiveness is limited by the reactive nature of justice – the Court can only act within the scope of submitted cases, leading to a certain degree of fragmentation in regulation (Babin, 2020).

## V. Conclusion

The comprehensive analysis of the judicial precedent within the EU tax legal order leads to several key conclusions that reflect the original contribution of this study.

First, regarding the doctrinal status of judicial precedent, this research concludes that the EU legal system has developed a “functional precedent” model. While the EU does not formally follow the doctrine of *stare decisis*, it operates through the principle of *jurisprudence constante*, where consistent rulings acquire quasi-precedential authority. This model functions as a dynamic regulatory mechanism that fills “legislative lacunae” in areas where political consensus for harmonisation is lacking, particularly in direct taxation. Second, the Court’s jurisprudence has had a transformative and “judicializing” impact on EU tax law. In the absence of full legislative harmonisation, the CJEU has acted as a primary driver of “negative integration”. By applying fundamental freedoms to national tax measures, the Court has established autonomous standards – such as fiscal neutrality, the “economic substance” requirement, and the “prohibition of abuse of law” – which effectively redefine the limits of national tax sovereignty.

Third, the study finds that EU tax precedent is characterized by a hybrid and cooperative nature. Rather than a strict hierarchical imposition, the system functions through a “dialogue” between the CJEU and national courts via the preliminary ruling mechanism. This allows for the development of common interpretative standards while preserving a balance between the internal market requirements and Member States’ fiscal autonomy. However, a critical reflection reveals that this reliance on judicial law-making can create an “interpretative vacuum” and legal uncertainty until a sufficient body of case law is established.

The practical implications of this research are particularly relevant for EU candidate countries. For Ukraine, the Court’s decisions serve as an authoritative reference point for legal approximation. Since the integration process requires more than the formal transposition of directives, the harmonisation strategy must focus on:

- \* **Judicial capacity:** Moving from formalistic, document-based interpretation to the “abuse of law” and “proportionality” tests established by the CJEU.
- \* **Institutional monitoring:** Ensuring that national tax authorities align their clarifications and administrative practices with the dynamic evolution of CJEU jurisprudence.

Based on the research conducted, the following recommendations are proposed for policy-makers and judicial authorities in candidate countries (specifically Ukraine) to ensure a stable and predictable tax environment:

1. Specialized Judicial Training: Implementing advanced training programs for administrative judges focusing on the CJEU's methodology of "autonomous interpretation" and the specificities of EU tax doctrines. Understanding the functional nature of CJEU precedent is critically important for the correct application of EU law at the national level.
2. Mandatory Legislative Compatibility Reviews: Establishing a procedural requirement to review all new tax legislation against the "selectivity" and "proportionality" benchmarks derived from CJEU State aid and fundamental freedoms case law.
3. Systematic Monitoring and Judicial Adaptation: Establishing a dedicated analytical unit to track CJEU rulings in real-time. This ensures the dynamic alignment of national jurisprudence with the evolving EU legal order and provides updated guidance to taxpayers, thereby reducing litigation risks.
4. Implementation of the "Economic Reality" Doctrine: Integrating the anti-abuse standards developed by the CJEU, particularly the "wholly artificial arrangements" criterion, into national legislation and administrative guidelines to strengthen legal certainty.
5. Proactive Elimination of Discriminatory Barriers: Pre-emptively reviewing the taxation regimes of cross-border corporate groups and investment funds to eliminate discrimination against non-residents based on existing CJEU standards, thereby increasing investment attractiveness.

**Limitations and Future Research** This study is limited by the evolving and reactive nature of CJEU jurisprudence; as the Court can only act within the scope of submitted cases, the resulting legal framework remains somewhat fragmented. Furthermore, the practical implementation of EU tax principles in Ukrainian judicial practice is still in its nascent stages. Future research should therefore examine emerging case law in Ukraine to assess the "de facto" integration of these principles during the accession process.

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