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The practice of the ECtHR in economic and civil law and process: international legal experience

Практика ЄСПЛ в господарському і цивільному праві та процесі: міжнародно-правовий досвід

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Abstract

The article examines the practice of the European Court of Human Rights (hereinafter referred to as the ECtHR) in commercial and civil law and process, in particular, in the context of implementing compliance in the company. In particular, it is determined which complaints regarding which provisions of the Convention affect business compliance practices and which conclusions from relevant cases the business community implements when building a compliance system. The article examines the question of classifying compliance as an asset that constitutes the company's added value, namely, the category of "goodwill" in accordance with the practice of the European Court of Justice in this area. The purpose of the work is to analyze the international legal experience of using the practice of the ECtHR in economic and civil law and process. The methodological basis of this study is the following methods: methods of analysis and synthesis, methods of induction and deduction, the system method, structural method, functional method, technical-dogmatic method, special-legal method, comparative method,

Анотація

У статті досліджується практика Європейського суду з прав людини (далі – ЄСПЛ) в господарському і цивільному праві та процесі, зокрема - у контексті реалізації комплаєнсу в компанії. Зокрема, визначається, скарги щодо яких положень Конвенції впливають на комплаєнс-практики бізнесу та які висновки з відповідних справ бізнес-спільнота імплементує при побудові комплаєнс-системи. У статті досліджується питання віднесення комплаєнсу до категорії активу, що становить додану вартість компанії, а саме до категорії «гудвіл» відповідно до сформованої у цій сфері практики Європейського суду. Метою роботи є аналіз міжнародно-правового досвіду використання практики ЄСПЛ в господарському і цивільному праві та процесі. Методологічним підґрунтям даного дослідження слугують такі методи, як: методи аналізу та синтезу, методи індукції та дедукції, системний метод, структурний метод, функціональний метод, техніко-догматичний метод, спеціально-юридичний метод, порівняльний метод, метод правового

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method of legal modeling, method of analysis and synthesis, a method of theoretical generalization and systematization. As a result of the study, the foreign experience of implementing the judicial practice of the ECtHR in economic and civil law and process was analyzed.

Keywords: European Court of Human Rights, precedent, decision, law enforcement, international legal experience.

моделювання, метод аналізу та синтезу, метод теоретичного узагальнення та систематизації. В результаті дослідження проаналізовано зарубіжний досвід впровадження судової практики ЄСПЛ в господарському і цивільному праві та процесі.

Ключові слова: Європейський суд з прав людини, прецедент, рішення, правозастосування, міжнародно-правовий досвід.

Introduction

Modern economic and civil procedural law is developing under the influence of European integration processes, which determine its relationship and agreement with the principles and norms of international law.

One of the sources of international law is the practice of the ECtHR. Decisions of the ECtHR affect the law enforcement activities of judicial bodies and the practice of national courts of individual states in resolving disputes. The execution of decisions of the European Court of Human Rights, taking into account their specificity, is a specific legal institution, different from those provided for the execution of decisions of national courts, in connection with this, special mechanisms for the implementation of its decisions have been established.

With the establishment of the main foundations of the development of the market economy and European integration processes in Ukraine, connected with legal reforms, the legislation of Ukraine establishes guidelines for the application of the provisions of the ECtHR case law. Article 17 of the Law of Ukraine "On the Implementation of Decisions and Application of the Practice of the European Court of Human Rights" provides that courts apply the Convention on the Protection of Human Rights and Fundamental Freedoms and the practice of the European Court of Human Rights as a source of law when considering cases (Law 3477-Iv, 2006).

According to the Convention on the Protection of Human Rights and Fundamental Freedoms and the Law of Ukraine "On the Implementation of Decisions and Application of the Practice of the European Court of Human Rights", the following aspects are distinguished that characterize the specificity of the decisions of the European Court of Human Rights:

- qualification of the Court's decision as an executive document;
- availability of a "single window" for the applicant to receive monetary compensation;
- the existence of a special item of state budget expenses for the payment of monetary compensation based on Court decisions;
- the existence of a special procedure for the execution of the Court's decisions, which differs from the procedure for the execution of the decisions of national courts;
- the existence of legal responsibility for non-execution or improper execution of the Court's decision;
- availability of a supervisory mechanism by the Council of Europe for the implementation of the Court's decision;
- consideration of ECtHR decisions in national practice (United Nations, 1950; Law 3477-IV, 2006).

Although Ukraine has recently observed a trend of increasing cases of courts applying general jurisdiction in civil and commercial cases based on the ECtHR's case law, not all countries have established such provisions at the legislative level. Thus, the place of the Convention in the national legal systems of states is determined differently, accordingly, the procedure for the execution of ECtHR decisions is characterized by certain features in different countries.

Therefore, there are several peculiarities in the foreign experience of using and implementing decisions of the ECtHR in the consideration of court cases. These necessitates need a detailed theoretical analysis of the legal features of the application of ECtHR decisions during the settlement of civil and economic cases, which was done by the researches.

The authors also paid attention to the special mechanisms for the implementation of the orders of the Strasbourg Court and to the recommendations regarding the use and

justification of decisions by the courts of different states. The mechanisms of implementation of the provisions of decisions of European courts in the administration of justice by national courts are revealed in detail, attention is paid to problematic issues, and ways of improving the existing practice are proposed to ensure the rule of law.

In addition to the above, the authors of the article investigated the practice of the ECtHR in the context of implementing compliance in the company. It is worth emphasizing that human rights and business are closely related, since (1) the rights provided for by the Convention in certain cases also apply to legal entities, respectively – companies can apply to the European Court of Human Rights; (2) companies may violate the rights of employees or other stakeholders guaranteed by the Convention. In the second case, as in other areas, the practice of preventing offenses through the company's internal regulation of processes, rules and rights of employees and other stakeholders, which is called "compliance", is based on the formed case-law of the ECtHR in the relevant field. As scientists note, if stakeholders take effective preventive measures, the likelihood of adverse impacts and therefore the need for remedial action is reduced. Business can relate well to the emphasis on prevention as it allows them to be proactive in their human rights strategy rather than reactive to allegations of adverse impacts over which they have little or no control. In addition, many corporate compliance regimes such as those concerning food safety, financial services, human trafficking, and modern slavery seek to protect third parties often beyond national boundaries. This is precisely the ambition of business and human rights, which makes the corporate compliance function a useful tool for implementation of business and human rights standards (Korshun, 2022). In this context, compliance practitioners are guided by the experience of the ECtHR in providing mechanisms for the functioning of the compliance system.

Theoretical Framework or Literature Review

The specifics of the application of ECtHR decisions in the consideration of civil cases are discussed in the study guide by Andrusiv, Verba-Sydor, & Verkhola (2019). In the mentioned work, considerable awareness is settled on the place of the ECHR and its Protocols in the system of sources of private law under the legislation of Ukraine, a general description of the decisions of the ECHR is carried out, the peculiarities of the interpretation of the ECHR and the ECHR in deciding civil cases are characterized, as well as the peculiarities of the application of the practice of the ECHR in the interpretation of general provisions and principles of civil justice, analyzed the right to a fair trial in the practice of the ECtHR. Particular engagement is paid to the civil protection of personal non-property and other rights following the ECHR and its Protocols, as well as the procedure for applying and enforcing decisions of the ECHR in civil cases.

The foreign experience of the application of procedural means of protection of the defendant and the possibility of its use in the civil process of Ukraine was studied in the work of Gongalo (2019). In particular, attention is born to the institution of annulment in the case used in Great Britain and other progressive possibilities of foreign civil procedural legislation.

In the studies of Zavhorodniy (2013, 2020), the foreign experience of implementing decisions of the European Court of Human Rights was studied in detail and the influence of the practice of the European Court of Human Rights on legal activity in Ukraine was analyzed from the point of view of theoretical, methodological and applied aspects. The author noted that comparing the procedure for the implementation of ECtHR decisions in EU countries and Ukraine, one can see certain similar features, although each of the considered countries is characterized by its special approach. However, there are features specific to the countries of the European Union in question: a significant role in monitoring the implementation of decisions of the ECHR of the Constitutional Court; lack of possibility to review decisions of national courts on administrative or economic cases; availability of control functions for the implementation of ECtHR decisions in the legislative body of the state; participation in the implementation of ECtHR decisions by the human rights commissioner, the general prosecutor.

The mechanism of ensuring the principle of "reasonableness of the terms of consideration of the case by the court" given foreign experience and application of the practice of the ECtHR was analyzed in the work of L. Zagorui & Zagorui I. (2020).

Some aspects of Ukraine's implementation of ECtHR decisions are considered in the research of Kochura (2015). The author concluded that a system of enforcement has been created in

Ukraine, according to which every Decision of the European Court of Human Rights must be enforced by the state. Including the adoption of the Law of Ukraine "On the Implementation of Decisions and Application of the Practice of the European Court of Human Rights", according to the Court itself, is a positive experience of the system organization at the state level in the implementation of its decisions.

McBride (2010) explores the principles governing the interpretation and application of the European Convention on Human Rights. Jurisprudence regarding mass (group) and derivative lawsuits in the context of the regime of civil procedural security became the object of research by Melnyk (2018). The question of the application of precedent practice of the ECtHR by the courts of Ukraine in the context of human rights protection was investigated in the study of Orkhimenko (2022).

The experience of using the practice of the ECtHR in the courts of Great Britain and Ukraine was analyzed in the article by Popov (2010). The author believes that the decisions of the European Court of Human Rights in the context of precedential value are not necessarily persuasive precedents. They cannot be considered either as binding precedents under the doctrine of common law stare decisis, or as non-binding precedents under the doctrine of jurisprudence constante continental law. English and Ukrainian judicial practices, in the opinion of the author, confirm this conclusion.

General theoretical problems of the right to proper evidence in the Ukrainian judiciary in the context of the practice of the Strasbourg Court were examined in the work of Rabinovych and Ratushnaya (2014). In the study of Stoyanova (2017), the practice of the European Court of Human Rights is considered as a source of the civil procedural law of Ukraine.

A general study of the application of the practice of the European Court of Human Rights in the administration of justice was conducted by Fulley (2015). The experience of foreign countries in ensuring the right to a fair trial within a reasonable time in the context of the implementation of ECtHR decisions was reviewed by Tsuvina (2014). The author noted that the analysis of the legislation of individual states allows, depending on the purpose of the means of the legal protection of the right to a fair trial within a reasonable time, to distinguish two groups of such means: expediting and compensatory. The essence of the first is to influence the terms of the trial utilizing a special complaint or a request to accelerate the trial to the head of the court or a higher court, which is used to prevent a violation of the reasonableness of the trial when the proceedings in the case have not yet ended. The essence of compensatory means is to award compensation for the already violated reasonable period of trial by filing a complaint or lawsuit, as a rule, to a higher court during the proceedings of the case or after it ends. The legislation of most foreign states provides for both remedies, which is more effective than using them separately.

Shcherbina and Reznikova (2018) investigated the main principles (principles) of the economic justice system of Ukraine, taking into account the provisions of the European Convention.

The literature analysis carried out above confirms the relevance of the question of the role of the ECtHR in civil and economic proceedings, and also indicates the need for a more detailed study of international legal experience on this issue.

Methodology

During the study of the international legal experience of using the practice of the ECtHR in economic and civil proceedings, methods of analysis and synthesis were used, which as logical operations made it possible to divide the whole into its constituent parts, as well as to study the phenomenon in general based on combining interrelated elements into a single whole. The specified methods contributed to the disclosure of the concepts that make up the subject of the study and made it possible to formulate intermediate and general conclusions.

Thanks to the benefit of induction and deduction methods, that is, through the transition from the partial to the general and vice versa, it became possible to conclude the content of the concepts "practice of the ECtHR", "implementation of decisions of the ECtHR", "judicial practice", "implementation", "legal influence".

Taking into account the complexity of the study of the foreign experience of applying the practice of the ECtHR, a system method was used, which makes it possible to consider the practice of the ECtHR as a certain system involved in a higher-level system and performing certain functions in it, connected to it by various connections. A systemic method is a universal tool for understanding complex phenomena and their impact on social relations, and its application is

critical in the study of both the essence of the practice of the ECtHR itself, as well as its impact on the economic and civil process, as well as the mechanism of implementation of decisions of the ECtHR, which are systemic phenomena of legal realities and consist of entities that are smaller in volume.

The usefulness of the structural method provides knowledge of the internal structure of the practice of the Strasbourg Court as a complex legal phenomenon, as well as the structure of the mechanism of implementation of the ECtHR practice in the national legal system, and judicial practice.

The functional method was used to determine the main aspects of the impact of the practice of the ECtHR on legal activity in Ukraine and its effectiveness.

The technical-dogmatic method served as an equally important research method. The specified method provides the study of state-legal phenomena as such, which exist independently of other types of social and state activity, outside the sphere of economics, politics, etc. The cognitive capabilities of this method in the study of the practice of the ECHR and its impact on legal activity made it possible to formulate definitions of the concepts that make up the subject of scientific knowledge, as well as to single out their essential features. Also, the application of a special-legal method of knowledge played an important role in revealing the content of the legal positions of the ECtHR in the field of civil and economic proceedings.

With the help of the comparative method, various homogeneous legal concepts, processes, and phenomena were compared to clarify their common and distinctive features. This made it possible to determine the relationship of the concept with adjacent categories that form a conceptual series. Also, the comparison method made it possible to find out the common features and differences in the mechanisms of implementation of the ECHR practice in the economic and civil process both in Ukraine and in individual states of the Council of Europe.

The application of the legal modeling method helped to study the object comprehensively and to prepare proposals and recommendations for improving national legislation on the implementation of ECtHR decisions in civil and commercial proceedings. By using this method, it became possible to create an ideal model of the behavior of subjects endowed with state-authority powers to take into account the legal positions of the ECHR.

Results and Discussion

Before proceeding to the analysis of the international legal experience of the use of ECtHR decisions in civil and economic proceedings, let us consider the general concepts of the legal nature of ECtHR decisions.

The most common positions regarding the legal nature of ECtHR decisions are to attribute them to interpretative acts or judicial precedents. The first position is based on the understanding of the decisions of the European Court as acts of interpretation of the Convention, while the other considers them as legal precedents and is somewhat controversial, although it can be considered more consistent. At the same time, it is worth noting that there are different types of judicial precedents: judicial precedent in the Anglo-Saxon legal family, the Romano-Germanic legal family, and persuasive precedent. In particular, given that the legal system of Ukraine belongs to the Romano-Germanic legal family, the main contradictions exist as to whether the decisions of the ECtHR can be included in the second or third categories. Popov notes that the precedent practice of the ECtHR, although confirmed many times, is difficult to include in the established judicial practice under the doctrine of continental precedent since the practice of the ECtHR is not the practice of the courts of the national judicial system, its decisions have the force of a convincing precedent (Popov, 2010). However, we cannot agree with this position, since the norms of the Commercial Procedural Code of Ukraine and the Civil Procedural Code of Ukraine stipulate that national courts apply the Convention and the practice of the ECtHR as a source of law when considering cases (Law 1798-XII, 1991; Law 1618-IV, 2004).

Let's consider the practice of foreign countries in more detail (Table 1).

Table 1.
Characterization of the role of ECtHR practice in foreign civil and commercial proceedings.

Country	Application mechanism
Czech Republic	The procedure for using the practice of the ECHR was developed within the framework of social and political consensus regarding the high value of human rights and freedoms and the need for integration into European structures for the development of the country. This approach is reflected in the country's Constitution. The procedure for the application and execution of ECtHR decisions is formalized. It is defined by normative legal acts regulating the activities of the office of the authorized representative of the country at the ECtHR, as well as by-laws and acts that determine the competence of various authorities. The state has created a mechanism aimed at bringing laws and law enforcement practices in the country into compliance with the standards of the ECHR. This task is performed by the Constitutional Court, which monitors the practice of the ECHR and explains its content to subordinate courts in the form of recommendations. Also, the harmonization of national legislation with the standards of the ECHR is ensured by the participation of the State Representative in the ECHR in the law-making process. Parliament is obliged to receive opinions on each draft law from the Ministry of Justice, the structural division of which is the office of the Representative. Because the Constitution obliges the authorities to fulfill the international obligations of the state, the Constitutional Court has the authority to consider cases on the implementation of international treaties. These powers also apply to ECtHR decisions, as Czech legal doctrine considers them an integral part of the Convention.
France	The procedure for the execution of ECtHR decisions is poorly formalized, but, despite this, the practice of implementing ECtHR decisions has developed in France, and this is primarily due to the high status of judicial acts in the country's national system. Court decisions are considered the most important source of law, as they provide interpretation of laws. Decisions of the ECtHR are regarded as sources of Convention standards. France seeks to implement the decisions of the ECtHR not by changing the laws, but by improving the law enforcement practice in specific categories of cases, as well as by using the principles and standards defined in the Convention and decisions of the ECtHR. Therefore, an important role in the implementation of ECtHR decisions in terms of measures of a general nature is played by state judicial bodies, prosecutor's offices, and other law enforcement entities. The Ministry of Justice coordinates the activities of these bodies.
Germany	In the German legal system, the Convention and the decisions of the ECtHR have the status of federal laws. Germany considers it necessary to implement not only the decisions of the ECtHR issued against it but also considers it necessary to integrate the decisions of other countries into its legal system. In Germany, the procedures for the execution of the decisions of the ECtHR are generally formalized by legislative and by-laws that determine the competence and procedure of work of various authorities, but there is no special law in Germany that would summarize all the norms related to the implementation of decisions of the ECtHR. The procedure for reviewing court decisions on civil and economic cases is currently not regulated. It is worth noting that the Constitutional Court of the Federal Republic of Germany defined the provisions of the Basic Law as having higher legal force than the provisions of the Convention, which provides for the implementation of national constitutional control of the provisions of the Convention and the practice of its interpretation by the European Court. (Zavhorodniy, 2013)

(Data provided by Zavhorodniy, 2013)

Taking into account the above analysis, we can conclude that other member states of the Convention define the role of applying the practice of the ECtHR as a source of law and control over the correct application of such decisions in different ways. Thus, the functions of the Constitutional Court, the human rights commissioner, the general prosecutor, etc., are assigned to this issue.

Regarding the experience of applying the practice of the ECHR by the national courts of Ukraine, it is also worth noting that the following problematic issues are present (Table 2).

Table 2.
Problematic issues of the application of the ECtHR practice by general and commercial courts of Ukraine.

A problematic question	Effect	Content
Reference to the practice of the ECtHR by the parties	Positive	In their statements/explanations, the parties refer to the Convention and the practice of the ECtHR, and in the future such a reference may be reflected in the relevant court decision in the case. In fact, the reference of such an interested party to the Convention and the practice of the ECtHR is formulated in such a way as to draw the attention of the Ukrainian court to certain violations of the Convention that have already occurred during the consideration of the relevant dispute, but could still be corrected at the national level without recourse to international judicial institutions.
Difficulties in providing judges with official translations of ECtHR decisions	Negative	To date, there is no information on the state of providing courts with official translations of ECtHR decisions.
Unequal application of ECtHR decisions by courts	Negative	The analysis of judicial practice shows the absence of a single approach to the application of ECtHR decisions. Courts of Ukraine have emphasized that when applying the decisions of the ECtHR as a source of law, the court must, firstly, clearly indicate which legal positions set forth in the decisions of the ECtHR do not correspond to the issue under consideration in a specific case, and secondly, show an obvious connection between the factual circumstances in which the ECtHR reached the relevant conclusion, and the case in which the Ukrainian court will already apply such a conclusion.

(Data provided by LIGA platform: ZAKON, 2018)

Thus, regarding the procedure for the application of ECtHR decisions by commercial and general courts in cases, there are problems of providing courts with translations of ECtHR decisions and uneven application of relevant decisions by courts.

As for the compliance there is currently no specific generalized definition of compliance either in the international arena or in the national legislation of Ukraine. Taking into account the numerous variations of its coverage, in our opinion, we should focus on the fact that compliance is an internal process organized by the company to ensure compliance of its activities with the requirements of legislation, norms of international legal acts of extraterritorial effect, internal documents of the company, standards of self-regulatory organizations in a certain area and best practices , through a certain toolkit (forming a corporate culture, carrying out compliance control of risks that may lead to the application of legal and financial sanctions to such a business entity, loss of business reputation or other damage, as well as with the help of other means of implementing compliance) (Korshun, 2022).

The first thing to find out is whether the practice of the European Court exists in the context of establishing a relationship between the presence/absence of a compliance system in a company and a violation of the provisions of the Convention. In the course of the study, the relevant practice was analyzed and it was established that there is no established direct connection between the specified facts in the practice of the ECtHR.

However, the practice of the ECtHR concerns compliance in slightly different aspects. When studying the materials of the European Court and scientific sources, one can come to the conclusion that the presence of a compliance system in the company is an asset that can be considered as protected by the Convention. Thus, in general, the property rights of individuals are protected by Protocol No. 1 to the Convention. Under the protection of this provision of the Convention there are various types of "property" and other property interests, for example, future income, claims and debts under a court decision, company shares and other financial instruments, business licenses, future income, intellectual property, destruction of property in situations international or internal armed conflict (Drozdov, Plotnikova, & Drozdova, 2019), as well as the company's right to the so-called "goodwill"… The practice of the ECtHR recognizes the right to goodwill regardless of its formal consolidation at the level of national legislation. The subjects of such a right can be both natural persons who carry out a certain type of professional and (or) entrepreneurial activity

that generates income, and legal entities (Poberezhnyk, 2019).

This allows us to conclude that the compliance system as goodwill is protected by the provisions of the Convention and, if necessary, the company's right to peaceful possession of the asset in the broad sense of this understanding will be ensured.

Conclusions

1. The norms of the Convention have a generalized wording, and, therefore, the decisions of the ECtHR are extremely essential in the aspect of concretizing the norms of the Convention, and the principled positions, in particular, outlined in the so-called "model decisions" are decisive in the application of the norms of the Convention.
2. A comparative analysis of the application of the practice of the ECtHR in conducting economic proceedings in France, the Czech Republic, Germany, and Ukraine was conducted and both common and distinctive features were identified.
3. Among the features are various tools for bringing national judicial practice into line with the provisions of the decisions of the Strasbourg Court. In particular, these are: a significant role in monitoring the implementation of decisions of the ECHR of the Constitutional Court; the lack of opportunity to review the decisions of national courts in economic cases; availability of control functions for the implementation of ECtHR decisions in the legislative body of the state; participation in the implementation of ECtHR decisions by the human rights commissioner or the general prosecutor.
4. Attention is drawn to the problematic issues of applying the practice of the ECtHR by the courts of Ukraine, taking into account the uneven application of decisions and the difficulties in providing courts with official translations of such decisions.

Regarding compliance, it should be noted that companies are responsible for ensuring respect for human rights, which already involves risk management. Therefore, due diligence in the form of a system to prevent violations allows a company to monitor how human rights obligations are fulfilled by all divisions and structural parts of the company, and thus avoid the risk of negative consequences in the form of holding it accountable by national courts. At the same time, an additional positive point for the company is that such a system is protected by the Convention as positive goodwill, that is, it is an intangible asset, the peaceful possession of which is guaranteed by Article 1 of Protocol No. 1 to the Convention. The practice of the ECtHR, in turn, forms the best practices for implementing compliance in companies, from ensuring the effective functioning of the system of notification of violations and protection of whistleblowers to procedures for the company's protection of personal data and ensuring confidentiality, based on cases regarding possible violations of Articles 8 and 10 of the Convention.

Regarding further scientific research in the field of application of the practice of the ECHR in civil and economic proceedings, we consider it necessary to pay more attention to the question of compliance of the decisions of national courts with the provisions of the Convention and the practice of the ECHR, to analyze problematic issues in this area and ways to solve them.

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