

Abstract of the Doctoral Thesis

Author: Paweł Sz wajdler

Title: „Boundaries of the Negative Integration in the Area of Direct Taxation in the Legal System of the European Union”

The main aim of the doctoral thesis entitled „Boundaries of the Negative Integration in the Area of Direct Taxation in the Legal System of the European Union” is to show the boundaries of the competences of the European Court of Justice and the European Commission in the area of direct taxation in the European Union. This task was achieved by identifying the spheres in which Member States are free to create their legal regulations in the above- mentioned area.

The background of this work is the fact that Member States must respect fundamental treaty principles even in the sphere of direct taxation which belongs, in principle, to competences of these countries. The above- mentioned statement is based on judgements of the European Court of Justice related to fiscal state aid and fiscal problems concerning fundamental freedoms.

The author of this work decided to elaborate judgements of the European Court of Justice and decisions of the European Commission so as to find out what tax regulations can turn out to be contrary to the European Union’ s legal system. Consequently, it is showed in this work how Member States should create their tax systems so as to avoid risk of breach of the European Union law.

This doctoral thesis has not only theoretical significance, but it also includes practical guidelines which can be useable for legislators from the Member States.

The doctoral thesis includes seven chapters, the introduction and the summary. The work can be divided into three parts. The first of them consists of three initial chapters and concerns fundamental notions which are used in the whole work. These notions are elaborated on the basis of literature, judgements and legal regulations. The second part of the work consists of two next chapters

which are about overall and tax aspects of fundamental freedoms. The third part is composed of two last chapters and concerns problems related to state aid and fiscal aid.

The first chapter concerns the notions of direct and indirect taxes. The author states that there are lots of criterions which are used so as to distinguish both of the above-mentioned groups of taxes. It is presented in this part of the work that according to majority of tax experts, direct taxes are income and property taxes. The PhD candidate proves on the basis of judgments of the European Court of Justice that the statement presented in the previous sentence applies also to the European Union's tax system. The author expresses the concern that it exists possibility that the way of understanding of notion of direct taxes can be changed in the future what is notwithstanding unlikely.

Negative and positive legal integrations in the European Union are elaborated in the second chapter. There are discussed political and judicial definitions of the above-mentioned processes in this part of the work. The author states that positive and negative legal integrations are used so as to build internal market. He shows that positive integration is achieved by implementing common European standards of regulations in the Member States. The PhD candidate proves that the main aim of the negative integration is to avoid obstacles to fundamental Treaty principles in the areas which are not integrated in a positive way.

The third chapter is about overall and fiscal sovereignty of the Member States. The author elaborates legal and political conceptions of sovereignty. Finally, he notices that fiscal sovereignty of the Member States is very specific, because of the fact that these countries transferred to the European Union majority of their powers related to indirect taxes. By contrast, it is showed that Member States have unlimited competences in the area of direct taxation until their tax regulations are compatible with fundamental freedoms and regulations related to state aid. The author uses idea of function sovereignty created by M. Isenbaert so as to elaborate fiscal sovereignty of the Member States in the area of direct taxation.

The fourth chapter concerns overall problems on the topic of fundamental freedoms and their boundaries. The author elaborates issues related to free movement of persons, free movement of services, free movement of capital and freedom of establishment. The PhD candidate indicates that there are discriminatory and non-discriminatory cross-border obstacles to fundamental freedoms. Indication of such obstacles let set the boundaries of the negative integration in the area of direct taxation. The author proves that such obstacles to fundamental freedoms are compatible with internal market only if they are justified by principles of public order, public health or public security. Furthermore, obstacles to fundamental freedoms accepted by the European Court of Justice can be used to guarantee jurisdiction of the Member States and to counteract frauds.

The fifth chapter is about tax problems related to obstacles to fundamental freedoms. The author indicates that Member States have large competences in the area of direct taxation, but their fiscal regulations cannot be contrary to fundamental freedoms. It is stated in this chapter that obstacles to fundamental freedoms are created only by regulations which affects free movements between Member States. For that reason, regulations incompatible with the European Union law cannot be purely internal or only international. In the case of regulations of tax treaties between Member States, such countries are obliged only not to create discriminatory obstacles to fundamental freedoms. The author elaborates evolution of judgments of the European Court of Justice. He states that in the beginning of the process of the negative integration the European Court of Justice focused only on the problem of comparability of situation of residents and non-residents. Further, the European Court of Justice considered also non-discriminatory obstacles to fundamental freedoms. The PhD candidate proves on the basis of early judgments and recent case-law of the European Court of Justice that European countries cannot nowadays create not only discriminatory but also non-discriminatory obstacles to fundamental freedoms in their internal regulations which affect functioning of the internal market. It is also showed that the European Court of Justice justified obstacles to fundamental freedoms which are used not only to

counteract tax evasion but also to guarantee tax competences of the Member States, cohesion of tax systems, effectiveness of tax systems and fiscal control. The author shows that indication of such obstacles let set boundaries of the negative integration in the area of direct taxation. Furthermore, the PhD candidate proves that accepted by the European Court of Justice obstacles to fundamental freedoms must be proportional. Moreover, the author states that principles of equivalence and effectiveness are also boundaries of the negative integration in the area of direct taxation.

The sixth chapter concerns issues related to overall state aid and its boundaries. The author elaborates on the basis of judgments of the European Court of Justice, decisions of the European Commission and literature what regulations and what activities of the Member States can fulfill the criteria of unlawful state aid in the meaning of Article 107 of the Treaty on the Functioning of the European Union. It is stated on the basis of the above-mentioned regulation that the main boundary of state aid is existence of selective advantage for some entrepreneurs which is granted through state resources and affect trade between Member States. The PhD candidate focuses on problems related to direct and indirect advantage. Furthermore, it is also discussed the notion of entrepreneur. The author elaborates main kinds of state aid such as regional state aid, material state aid, horizontal state aid, *de iure* state aid and *de facto* state aid. The PhD candidate notices that state aid can be granted not only in cash, but also in the form of exemption from obligations. Finally, it is stated that fundamental boundary of all kinds of state aid is the fact that their beneficiaries are stipulated in a discriminatory way.

The seventh chapter is about fiscal aid and its boundaries. It is indicated in this part of the work that significant fiscal sovereignty of the Member States in the area of direct taxation is also limited by Treaty regulations related to state aid. The author proves that fiscal advantage can be granted not only by single tax regulations, but also by complex legal instruments and individual activities of tax authorities. The PhD candidate proves that apparently selective regulations justified by internal logic and scheme of tax system are in compliance with the European

Union law. It is indicated that such statement applies also to standard tax regulations which enforce tax progressivity, tax effectiveness and tax neutrality. Moreover, it is showed that apparent selective proportional anti-tax avoidance regulations are not against Treaty provisions related to state aid. Furthermore, it is proved on the basis of judgements of the European Court of Justice that sectoral special tax regimes and regional tax systems are also in compliance with the Treaty on the Functioning of the European Union. Sectoral special tax regimes should be applied to taxpayers whose legal and factual situation differ from situations of other taxpayers. Whereas, regional tax regimes should be into force in regions which are sufficiently fiscally autonomous. Finally, the PhD candidate states that indication of the above- mentioned justifications of apparent selective tax measures let set the boundaries of the negative integration in the area of direct taxation.

In the summary of the doctoral thesis, the PhD candidate proves that Member States are free to create their tax regulations in the area of direct taxation until their tax provisions do not affect in a negative way fundamental freedoms or do not constitute unlawful state aid in the meaning of Article 107 of the Treaty on Functioning of the European Union. The author states that also tax regulations, which are obstacles to fundamental freedoms or grant advantages to entrepreneur in an apparent selective way, can be in compliance with the European Union law. Such regulations must enforce fundamental principles of modern tax systems. These fundamental principles are elaborated in detail in fifth chapter and seventh chapter of the work. Furthermore, the above-mentioned regulations must be proportional. The author also notices that such regulations can only be standard what is limiting factor for innovativeness of tax systems of the Member States. Furthermore, the author commends that European Court of Justice and the European Commission approve, in some cases, untypical and distinctive tax regulations of the Member States such as provisions which enforce sectoral and regional special tax regimes.

The author focuses on the fact that some justifications of tax regulations, which are apparent against the European Union law, are unclear. Such unclear

justifications are for example notions of internal logic and scheme of tax system. Therefore, the author stipulates that the European Commission should develop these notions in some official document in the near future.

Furthermore, the author states that the existence of *de facto* state aid can limit legal certainty, because it is unable to estimate, if some tax regulation is against the European Union law until it is entered into force and then affects competition in a covert way.

The PhD candidate also stipulates that the best strategy for legislators from the Member States is to create only typical tax regulations so as to avoid enforcement of tax provisions which are against the European Union law.

Finally, the author expresses the opinion that even awareness of the existence of the negative integration in the area of direct taxation can affect tax systems of the Member States, because legislators from them prefer to avoid court proceedings in the European Court of Justice and formal procedures initiated by the European Commission. Therefore they create tax provisions in a very cautious way.