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INTERMEDIATE RESULTS AND LIMITS OF HARMONIZATION OF DIRECT TAXES IN THE EUROPEAN UNION

The article is devoted to analysis of tax harmonization in the area of direct taxation in the European Union. Questions of positive and negative integration, common market and tax harmonization are analyzed. The author mentions the following benchmarks of the European tax integration: these are tax harmonization in the area of direct taxation, prohibition of discrimination and of unfair competition, leading role of fundamental freedoms in field of European integration.

The special role of the European Court of Justice in forming of EU tax law is emphasized.

Keywords: law enforcement, integration, tax law, European Union, direct taxes, European Court of Justice, tax sovereignty, harmonization.

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Coordination of various taxes has many facets, from avoiding contradictions within the national tax system to the allocation of taxing rights between sovereign Member States. We have selected a few important starting points of the European tax integration. These are tax harmonization in the field of direct taxation, the prohibition of discrimination and restriction of competition, as well as the leading role of fundamental freedoms in European integration.

Tax law scholars use multiple synonymous concepts: tax coordination, tax harmonization, approximation of tax laws, integration in the field of tax law, etc. Thus, professor G.P. Tolstopyatenko states that the concept of "integration" is a broader concept in comparison with "harmonization and approximation" [1, p. 223]. Actions to achieve the internal market objectives identified in the European science of tax law as a positive and negative integration [2, p. 12; 3, p. 811]. The phenomenon of tax coordination is the base of these integration processes.

The concept of tax coordination is typically used in Russian and foreign legal science to refer to the phenomenon of integration which helps to eliminate tax obstacles in the EU internal market and establishes a level playing field for purely domestic situations and cross-border situations [4, p. 47; 5, p. 28; 6, p. 745]. However, some authors do not share this terminological and conceptual equating and maintain a more accurate categorization of integration phenomena in EU tax law. Thus, P. Pistone believes that tax coordination should be seen as one of the possible ways to implement the tax integration into the mechanism of the internal market [7, p. 331].
Tax coordination has many facets: from avoiding inconsistencies in the national tax system to the distribution of taxing rights between sovereign states.
There are two possible ways of coordination:
vertical coordination of tax powers between different levels of government;

horizontal coordination of tax authorities of different jurisdictions at the same level.

Lack of coordination can lead to excessive tax burden. Thus, inadequate horizontal coordination can lead to distortions, preventing optimal allocation of economic resources and to the reduction of the population's welfare. The lack of vertical coordination can undermine the fiscal autonomy of a certain level of state power.

For the purposes of this study we will understand the horizontal coordination of direct taxation in the EU Member States as the ordering of all measures aimed at ensuring tax neutrality for economic transactions within the internal market [8, p. 92; 9, p. 5] by removing the obstacles arising from the parallel existence and interaction of different national tax systems.

Horizontal tax coordination has two directions:
approximation of material tax law and of the relevant procedural rules of the tax law of the Member States in order to overcome or at least reduce the differences between national tax systems to the extent that these differences lead to distortions of competition or increase the costs of compliance and increase the administrative burden;
coordination of the requirements of the Member States to the taxpayer in order to avoid double taxation of cross-border trade.

European researchers [10, p. 28; 3, p. 811], the European Commission and the European Court of Justice (hereinafter - the ECJ) distinguish tax coordination and tax harmonization through European legislation. Thus, J. Malherbe draws a line between the measures which do not affect the tax sovereignty, and measures which significantly modify the national tax system [11, p. 312]. According to this concept, tax coordination is only possible by means of soft law, like recommendations, communications, codes of conduct, etc.

European scholars underline differences between the need for the concept of horizontal tax coordination and the removal of barriers to market access, as well as the distortion of competition resulting from discrimination or restrictive measures, which form part of the tax system of the same Member State [12, p. 44, 9, p. 5]. Of course, one can not dispute the fact that these obstacles should also be regarded as a necessary prerequisite to facilitate access to foreign national markets within the EU and to ensure the fact that competition in the internal market is not distorted. However, scholars agree that a level playing field within the national tax jurisdiction is not a sufficient condition for a competitive environment within the entire European internal market, unless threats of double taxation or market inequalities still exist [13. p. 244; 14, p. 1].

One of the most important principles enshrined by the Treaty on the Functioning of the European Union (hereinafter - TFEU[1]), the principle is the principle of conferral: the Union has only the competences conferred on it by the Treaties (Art. 5 TFEU).

B. Terra and P. Wattel divide powers of the Union into three categories:

1) exclusive competences, listed in the Art. 3 TFEU;
2) shared competences with “preemption” (both the Union and the Member States are competent, but whenever the Union exercises its competence, the Member States lose their competence in the field where the Union exercised its competence), listed in the Art. 4 TFEU;

[1] Treaty on the Functioning of the European Union of 13 December 2007. OJ C115 (2008).

3) shared competences without “preemption”, meaning that the Union is only competent to support, coordinate or supplement, without superseding the competence of the Member States (listed in the Art. 6 TFEU) [12, p. 42].

Obviously, direct taxation issues fall into the second category. The long-term aim of harmonizing both direct and indirect taxes is the creation of the internal market. However, it should be emphasized that the internal market in the EU has still not been established, and Europe still moves move in this direction [15, p. 110; 16, p. 441]. The idea of the internal market will be realized only when the tax systems of the Member States will be integrated at least sufficiently to eliminate tax obstacles created by rules and practices that create conditions for discrimination, restrictions, state aid and distortion of the internal market. This does not mean that all taxes in Europe should be harmonized, but in any case the European fiscal integration should remain a part of common European policy.

Harmonization of direct taxation is a politically highly sensitive area. Tax harmonization is brought into life by the decisions of the European Court of Justice [17, c. 153]. Although the way of harmonization of direct taxes today seems to be difficult passable, the EU Court of Justice, to a certain extent has taken on the role of the “engine of integration”, promoting the principle of negative integration. As a result, the Court formulated its legal positions at a very high, even abstract level, as they are not based on the norms of EU secondary law, and to the founding treaties [18, p. 611]. The Court of Justice has issued a number of decisions of fundamental importance, according to which Member States are obliged to avoid discriminatory effects on taxpayers within their national tax systems: the taxation of the company or individual who realize their freedom of movement in the internal market, as noted by Professor M. Lang, should not be in worse conditions in comparison with the taxpayer who remains in the home state [19, p. 585].

The Court does not make decisions regarding the tax liability of individual taxpayers. National courts may apply to the request for interpretation to the ECJ. Subsequently, the Court's answers to these requests are used by national courts in the resolution of similar disputes. Although Member States have the right to create their own laws governing tax relations, they are obliged to realize this right in accordance with the EU law.

The Court of Justice considers hundreds of tax cases. As noted by K.K. Baranova and V.B. Belov, the chief legal principle of decisions in the area of direct taxation is the principle of realization of fundamental freedoms. At the same time the Court of Justice should take into account the tax sovereignty of Member States in the field of direct taxation [20, p. 117].

In 2001 G.P. Tolstopyatenko mentioned the fact that "the decisions of the European Court of Justice perform the function of interpretations which clarify and sometimes supplementthe provisions of the tax laws of the Member States and that the effect of the Court's decisions on the development of European tax law would be strengthened [1, p. 300]. The current state of affairs in the field of direct taxation in the EU demonstrates the validity of his statements. The role of the European Court of Justice has even become much more important since then
.
A. Miller and Lynn A. believe that Member States should check their tax regime for compliance with the TFEU. Otherwise, sooner or later, they should expect many requests from their own taxpayers, and as a consequence, the need to bring national acts in the sphere of taxes in accordance with the decision of the European Court of Justice [21, p. 412]. Each tax case before the EU Court of Justice, could potentially be the basis for changes in national tax laws of each Member State, and not only of the State that is directly involved in the dispute.

Fundamental freedoms empower market participants to carry out economic activity in each Member State or in the State where it is more advantageous from a tax perspective. However S. Hindelang, notes that the application of those freedoms to the tax revenues of the Member States is not neutral [22]. If market participants want to use the fundamental freedoms, Member States may try to make it less attractive through discriminatory regulations. In order not to sacrifice the protectionist policy in favor of the common market, it is necessary to establish the limits. The relevant experience of the European Court of Justice supports the balance of national tax sovereignty and the effectiveness of fundamental freedoms [23, p. 145].

In accordance with the ECJ practice fundamental freedoms prohibit not only direct discrimination but also all indirect forms of discrimination, for example, arising from nationality. This is especially important for tax and legal regulations: the fundamental principle of tax law is to claim for payment of taxes not on the basis of nationality, but due to the fact if the person is a resident or non-resident.

The principle of universality is used for residents and spreads usually the taxpayer's income from operations around the world. This principle is based on the idea that a resident of a particular state regularly produces the largest part of his income in this State. The person should also contribute to the related public expenditure in proportion to his ability. All the circumstances of the individual, personal and family matters should be also taken into account. The best way for the state to collect taxes, the state is suitable accommodation person, since there is his center of vital interests, the Court stressed the EU judgment in Schumacker case[2].

Schumacker was a Belgian national and resident who worked and earned almost all his family income through his employment in Germany. Under the German tax rules that existed at the time, Schumacker was denied certain personal and family allowances in Germany because he was a non-resident. Germany argued that Schumacker should receive his personal and family allowances in his Member State of residence (Belgium) because he was only subject to limited taxation (on his employment income) in Germany.
However, under the Belgo-German double tax convention, the right to tax Schumacker's employment income vested in Germany, as the State of employment. Consequently, Schumacker was unable to obtain his personal allowances in Belgium, because he had insufficient taxable income there. Schumacker argued that Germany should provide the same personal allowances it provided for its residents, because from the point of view of his family income, it was earned almost entirely in Germany
The ECJ was, therefore, faced with a 'host' State (the State of employment) tax rule which failed to grant to a non-resident certain tax benefits which it granted to a resident. The Court found that generally this different tax treatment was not discriminatory, because the two categories of taxpayer were not in a comparable situation. However, a non-resident was in a comparable situation to a resident when the non-resident received 'no significant income in the State of his residence and obtains the major part of his taxable income from an activity performed in the State of employment, with the result that the State of his residence is not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances' (Schumacker para 36).
In such circumstances the Court declared that there was no objective difference in situation between the non-resident and the resident which could justify the different tax treatment. The Court explained that in the case of a non-resident who received the major part of his income and almost all his family income in a Member State other than that of his residence, 'discrimination

[2] Case C-279/93 Finanzamt Köln-Altstadt v Roland Schumacker, judgment of 14 February 1995.

arises from the fact that his personal and family circumstances are taken into account neither in the State of residence nor in the State of employment' [18, p. 621].

The basis for the exemption can perform effective removal of tax, in particular, the authorities of the tax control. For the free movement of capital is, in contrast to other fundamental freedoms, regulated by Article 65 (1) TFEU. Member States shall take measures to ensure a clear and unambiguous definition of income and the amount of damages, as well as how to apply the Directive in a specific case [24, S. 149]. Thus, in Marks & Spencer the Court recognized the EU's balanced division of taxation powers between the Member States and prevention of double counting of losses. In this and other decisions the idea of providing more space for the tax sovereignty of Member States is obviously taken as a basis.

The important issue is the balance of interests of EU citizens who realize fundamental freedoms and of the Union which implements the common market mechanisms, on the one hand, and the interests of sovereign states, on the other [25, p. 100]. Fundamental freedoms and sovereignty of States have equal weight, so the interests of neither the one nor the other will not be a priority.

EU Tax Law does not receive adequate protection because of its systemic inconsistencies and lack of "internal coherence". Existing taxation rules need to be coherent in the EU. Positive integration requires a unanimous decision of all the Member States, and this mechanism is difficult to implement. So the actions of the European Commission are aimed to maximize the effect of negative integration pursued by the practice of the Court of the EU in cases of direct taxation and creation of acts of "soft" law on these solutions, which "invite" Member States to adapt national legislation to the Commission's interpretation.

The EU tax policy strategy is explained in the Commission communication entitled 'Tax policy in the European Union – Priorities for the years ahead' (COM(2001) 0260). Provided that the Member States comply with EU rules, each is free to choose the tax system it considers most appropriate. Within this framework, the main priorities for EU tax policy are:
the elimination of tax obstacles to cross-border economic activity,
the fight against harmful tax competition, tax evasion and tax fraud;
the promotion of greater cooperation between tax administrations in ensuring control and combating fraud. Increased tax policy coordination would ensure that the Member States' tax policies support wider EU policy objectives, as set out most recently in the Europe 2020 strategy for smart, sustainable and inclusive growth. [3].

The third goal has been largely achieved in recent years, especially in the area of corporate taxation, after joining the the new EU Eastern members. The last decade has, in the words of B. Terra and P. Wattel, a significant shift from taxation of income to taxation of consumption [12, p. 156].

In terms of corporate taxation policy of the Commission aims to overcome the distortion of the internal market, preventing cross-border economic activity and a decrease in cost of doing business throughout the Union. These operations are conducted in two aspects.
In the short term: specific measures to overcome the obstacles of cross-border economic activities, such as taxation of cross-border mergers, the impossibility of cross-border accounting for losses of transfer pricing difficulties, leading to double taxation and excessive administrative burden.

[3] Communication on "Tax policy in the European Union – Priorities for the years ahead", Brussels, 23 May 2001 (COM (2001) 260).

In the long term, this measure, eliminating a whole range of obstacles that limit the more serious national tax sovereignty. The most striking example of this are the Commission's proposals on the introduction in the EU common consolidated tax base on corporate income (hereinafter - OKBKN) [26, p. 205-212].

The Common Consolidated Corporate Tax Base (CCCTB) is a single set of rules to calculate companies' taxable profits in the EU. With the CCCTB, cross-border companies will only have to comply with one, single EU system for computing their taxable income, rather than many different national rulebooks. Companies can file one tax return for all of their EU activities, and offset losses in one Member State against profits in another. The consolidated taxable profits will be shared between the Member States in which the group is active, using an apportionment formula. Each Member State will then tax its share of the profits at its own national tax rate.

Review of practice of the EU Court of Justice on tax matters said that the lack of capacity to compensate tax losses in one Member State by the benefits in the other is a key issue for corporate groups operating in several Member States (the case Marks & Spencer[4], Papillon[5], Philips Electronics[6] and others).

The CCCTB Proposal will automatically provide the ability to reduce the taxable profits of the amount of loss. Losses within a group of companies will be deducted from the taxable profit and other group companies. According to studies, 81% of companies suffered tax losses in one or several Member States, but 96% of those companies that carry foreign losses were not able to get the full amount of this reduction in profit margins [27, p. 28]. However, some countries (Belgium, Greece, Italy) allow compensation for losses within groups under national law, and they will unlikely reason participate in CCCTB. The other side of this medal is the issue that the country, where profitable divisions of the group are resident, it is believed that once the profits within a group is excluded, their corporate tax base will be reduced.

The Commission has therefore announced in the Action Plan that it will come forward with a new proposal within 18 months to revive the CCCTB. The proposal will be for a mandatory CCCTB, introduced through a step-by-step approach.

Negotiations on the CCCTB proposal, which was put forward by the Commission in 2011, are currently stalled, largely due to its sheer scale. In November 2014, President Juncker announced that the Commission would examine how to re-launch the CCCTB in order to break this deadlock. This idea was well received by Member States, MEPs, businesses and many other groups, as the benefits of the CCCTB are widely recognised.

On June 17, 2015 the Commission presented an Action Plan to fundamentally reform corporate taxation in the EU. The Action Plan sets out a series of initiatives to tackle tax avoidance, secure sustainable revenues and strengthen the Single Market for businesses. Collectively, these measures will significantly improve the corporate tax environment in the EU, making it fairer, more efficient and more growth-friendly [29, p. 81 – 87].

[4] Case C-446/03 Marks & Spencer Plc v David Halsey (HM Inspector of Taxes), ECJ, 13 December 2005.

[5] Case C-418/07 Société Papillon.v Ministry of Finance (France), ECJ, 27 November 2008.

[6] Case C-18/11The Commissioners for Her Majesty's Revenue & Customs v Philips Electronics UK Ltd, ECJ, 6 September 2012.

Key actions include a strategy to re-launch the Common Consolidated Corporate Tax Base (CCCTB) and a framework to ensure effective taxation where profits are generated. The Commission is also publishing a first pan-EU list of third-country non-cooperative tax jurisdictions and launching a public consultation to assess whether companies should have to publicly disclose certain tax information. On 28 January 2016 the Commission presented its proposal for an Anti-Tax Avoidance Directive as part of the Anti-Tax Avoidance Package[7]. On 20 June 2016 the Council adopted the Directive (EU) 2016/1164[8] laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

The Anti-Tax Avoidance Directive contains five legally-binding anti-abuse measures, which all Member States should apply against common forms of aggressive tax planning.The anti-avoidance measures in the Anti-Tax Avoidance Directive other than the rule on hybrid mismatches, are: CFC rule, GAAR (General Anti-Avoidance Rules) and interest limitation. These measures correspond to OECD BEPS Action Plan[9].

Member States should apply these measures as from 1 January 2019. It creates a minimum level of protection against corporate tax avoidance throughout the EU, while ensuring a fairer and more stable environment for businesses.

The primary goal of the CCCTB proposal was to strengthen the Single Market by making it easier and cheaper for companies to operate cross-border in the EU. It would enable them to file a single tax return for all their activities in the EU through one tax authority, rather than having to file a tax return in every country where they operate. The consolidation element in the CCCTB would also allow companies to offset losses in one Member State against profits in another (see section on offset losses).

However, the CCCTB could also be an important instrument to combat tax avoidance. It would eliminate many of the weaknesses in the current corporate tax framework which enable aggressive tax planning and would make corporate taxation in the EU much more transparent.

Thus, we can say that in the field of direct taxation in the EU the major steps taken in the direction of negative integration. The main reason for this requirement is seen in the mechanism of unanimous decisions on taxation and the perception of the Member States of their fiscal sovereignty on the background of the "lack of taxing power" of the Union. Lack of coordination at the legislative level also determines the point character of the ECJ practice. This fact leaves the process of integration in the field of direct taxation on dependance on random cases.

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