



Dottorato di ricerca in Diritto tributario delle società – XX Ciclo

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Abstract

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ABSTRACT

In accordance with the title of the research, we studied the impact of EU Law and International Trade Law on the tax field in general and, particularly, on company taxation.

First of all, in the First Chapter we focused our attention on the fundamental characters of the European integration process and the development of the European Union from a customs union to an economic and monetary union. A particular attention was paid to the relationships between the main steps of the said process and the most important historical and economic events that followed World War II, in order to highlight that the transition from a merely customs union to a wider economic and monetary union occurred in a context of particularly favourable economic conditions on a world-wide scale.

From a tax perspective, we pointed out how, in the EU, taxation plays an "instrumental role", since EU institutions deal with the tax phenomenon only as far as it represents an obstacle for the achievement of the so-called "intermediate community goals", i.e. the correct working of the single market and of the economic and monetary union. In this sense, taxation is considered as a potential factor of distortion or alteration of the optimal conditions of fair competition in the internal market.

As to direct taxation, that is characterised by a stronger link with the movement of production factors (especially goods), the so-called "positive actions" of EU Institutions have already achieved relevant results, which of course change for each different tax. On the one hand, in the customs field there has been a real transfer of tax sovereignty from Member States to the EU, while, on the other hand, in other fields there was a mere harmonisation of national legislations. Nonetheless, such harmonisation policy was not evenly adopted: it was fragmentary for excises and much more widespread for other forms of indirect taxation (e.g. value added tax).

Following the analysis of the effects of EU integration on direct taxation, we demonstrated that the so-called "negative integration" played a central role, especially because of the very narrow constraints the EC Treaty establishes for positive actions.

EU Institutions' approach to positive integration has changed across the different phases of the EU integration process: after a first phase of favour towards the strengthening of the EEC role in the field of indirect taxation as well as in the field of direct taxation, the European Commission, since 1990, has been aware of the inopportunity of going on along the way of harmonisation in the field of direct taxation, especially for company taxation, because no significant results had been achieved.

This change of approach arises with particular evidence if one considers the relationship between company income taxation and shareholder income taxation.

The various aspects of the relationship between company income taxation and shareholder income taxation are dealt with in the Second Chapter. In particular, after a brief illustration of the possible ways of integration between these two forms of taxation, we analysed EU Institutions' studies before the

proposal of the Directive of 1975. These studies, though, never succeeded to achieve the necessary consent of all Member States in order to choose a single model of taxation to be put at the basis of the proposal of the Directive of 1975 (which provided for the "imputation method", that was adopted for a long time by most Member States).

In the 1990 the European Commission decided to adopt a different strategy for direct taxation. In a first phase it focused its attention on single aspects of direct taxation, especially on distortions deriving from cross-border operations. However, this strategy did not lead to satisfying results, mostly because of the natural inclination of all Member States to "jealously protect" their own sovereignty in the field of direct taxation. Therefore, the European Commission decided to abandon the so-called "piecemeal approach" in order to adopt the so-called "global approach": the goal pursued was no longer the harmonisation of national legislations for limiting the tax sovereignty of Member States, but the coordination of the different tax systems as well as the protection of national tax sovereignty, aimed at preventing harmful tax competition.

The adoption of measures against harmful tax competition still represents the main character of the policy carried out by the European Commission.

The exercise of relevant powers by the European Commission in the field of State aid rules should be considered by the same viewpoint: even in this case, the goal pursued is the contrast of harmful tax competition. Of course the successfulness of this policy is due to the fact that the goals pursued by the European Commission coincide with those pursued by all Member States.

Also the recent judgments of the European Court of Justice are inspired by the fulfilment of both the national prerogatives in the field of taxation and EU needs of protection and, if possible, of promotion of fair competition in the single market.

After a first phase in which the European Court of Justice's case-law on direct taxation was not willing to approve the adoption of discriminatory or restrictive tax systems by Member States on the ground of national tax interests, it has recently showed a more flexible approach. In fact the European Court of Justice has started to introduce a sort of balancing between Community interests and national interest, with the effect of turning its judgements in a sort of political choice. This change of approach is clearly perceivable from *Marks & Spencer* case and is due to different reasons.

First of all, it is worth to point out that in the recent cases examined by the European Court of Justice the assessment of the discriminatory or restrictive effect of national measures is becoming more and more difficult, because Member States are generally more respectful of the principles of non discrimination and non restriction. The adoption of the "global approach" by EU Institutions has led to the sharing of interests and purposes between Member States and EU Institutions, and of course the European Court of Justice could not ignore this new profitable policy of collaboration. Moreover, the European Court of Justice seems to be inspired by a "self-preservation instinct", because some Member States manifested the intention of abolishing its powers in the field of taxation in occasion of the reformation of the EC treaty.

In the Second Chapter we highlighted how the European Court of Justice has established a link between the *an* and the *quomodo* of the exercise of taxation

power: the fundamental freedoms no longer interfere with national choices about the exercise of taxation power, but they are taken into account only after the Member State has chosen the entities to be taxed.

The need of a balance between national interests and Community interests also arises when considering the "finalistic approach" adopted towards procedural and/or probational discrimination and restriction. For example, in the case of the regime provided for company dividends, while national rules pursue the aim of avoiding the double taxation of company profits, the European Court of Justice's concern is that this effect is produced towards both shareholders receiving internal source-dividends and those shareholders receiving foreign source-dividends, without considering the decision of the Resident State of the shareholder of achieving the same goal through different forms of integration between company taxation and shareholder taxation. In any event, the European Court of Justice makes this kinds of evaluations from the perspective of a single tax jurisdiction and does not lead its exam in the basis of a mutual recognition of the different national tax systems.

This attitude is also the cause of the "one-way effects" of double taxation conventions, as they are taken into account only as a possible way of avoiding a tax restriction, rather than being considered also as a possible source of discrimination or restriction towards those who exercise one or more fundamental freedoms.

In the Third Chapter we studied the role played by EU Law in relation to finance and tax autonomy of local entities. After a brief panoramic on the main features of "Decentralised States", either regional or federal States, we highlighted how the great success obtained by this model of State has been significantly determined by EU Law, and particularly by the principle of subsidiarity established by Art. 5 of the EC Treaty, with the consequent involvement of local entities in Community policies. The propulsive role of the subsidiarity rule is nonetheless accompanied by the constraints that EU Law provides for the tax autonomy of local entities.

These constraints derive from both EC Treaty rules on fundamental freedoms and provisions which forbid the grant of State aids to companies.

It is worth to point out that there is a consolidated case-law which recognises a different value to fundamental freedoms when applied to internal and not cross-border operations. Therefore the tax autonomy of local entities is influenced by an "asymmetric" application of the different fundamental freedoms provided by the EC Treaty, as this influence if the compatibility of local provisions is ascertained in respect of free movement of goods arises with more evidence than in the case it is ascertained with regard to other fundamental freedoms.

The oscillating and sometimes incoherent approaches of the European Court of Justice find their justification in the fact that the European integration process is presently "suspended" between the need of protecting the "intermediate goals" already achieved (the single market and the economic and monetary union) and the unwillingness to reach a real political union. The described condition of uncertainty about the future evolution of the EU harms local entities, and especially their effective participation to Community policies. On the contrary, Member States seem to get some advantages from this situation, because they

seem to have found the way to slow the European project and at the same time to preserve their national sovereignty. But this situation is only apparently favourable, as it will soon lead to the loss of representation power of the EU Institutions in a worldwide economic scenario.

Therefore, in order to prevent these negative consequences, an acceleration of the European project and the creation of a European federal State seems to be desirable. To this extent local entities could play a fundamental role as far as their political representatives are really conscious of the needs of the citizens and can consequently better fulfil them.

In such European federal State, the tax system should be accordingly provide for company taxation at a local level, based on income value added tax (i.e. production tax) rather than the traditional company income tax. As far as this European political subject is concerned, the constraints on the exercise of its taxation power could derive from international organisations.

In particular, a very important role could be played by the WTO, which is now in the middle of a complex process of balance between commercial values and non commercial values. Nonetheless, we have also to point out that if the WTO bodies better defined the said balance between different values, the constraints on European taxation power could become more effective.