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DIRECT TAXATION IN THE EUROPEAN UNION

Possibilities and limitations in the national legislation

thesis of the doctoral dissertation

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SUBJECT OF THE DISSERTATION, TOPIC

The European Union is determined to create a single economy without customs borders, to allow free movement of goods, capital, services and persons. The same concepts characterized the Ancient Roman Empire, where the Roman Citizen had the right to relocate from Hispania or Gallia without first obtaining a permit therefor. The Empire not only evolved to become the centre of the world proper as illustrated by the proverb “all roads lead to Rome”, but – although claimed with a bit of exaggeration – it may well be deemed as the “point of departure” for European jurisprudence.

One thousand and five hundred years after the fall of the Roman Empire, with the roots of history still constituting an uniting factor, the prevailing circumstances, however, have undergone substantial changes on the emergence of sovereign nations and legal systems, which European business entities are to tackle on a continuous basis. It is particularly true in the field of Tax Law, as European enterprises must encounter as many as 27 different tax systems with the same number of administrative practices followed, which impose significant limitations particularly in case of cross-border transactions (in view of transfer-pricing regulations as well). Accordingly, European enterprises are at a significant disadvantage in contrast to the companies in the United States and Japan, which pursue their activities in a single market of considerable size, by using a single currency and in a single tax system on the state level.

Right from its creation, the European Union has sought to create – besides the single Community integration policies Member State were to implement – a harmonised system also in direct taxation; however, despite the efforts of its Institutions for unification and harmonisation, Member States still strive to retain sovereignty in the field of corporate and personal income taxation. The Member States exert this resistance as tax law is one of the last resorts in economic policy-making whereby national governments may exercise their influence with a view to improving the competitive edge of their economies. In addition to noble economic objectives, tax measures constitute the means whereby politicians may influence the level of their electors’ income, thereby indirectly influencing their choice in casting their votes.

It follows from the foregoing that taxation – and in particular direct taxation – is not to be regarded to have been duly harmonised, as the corporate tax systems of the Member States are to be deemed harmonised on the level of Directives – and in Community competition policy on the level of Decrees – applicable to certain special regulatory areas only. In personal income taxation, the level of harmonisation has not exceeded a Directive for the implementation of a data provision system as yet.

However, it would be wrong to come to the conclusion that the low number of mandatory acts leaves Member State with full freedom in this field. With objectives and means changed, harmonisation was replaced by coordination, positive harmonisation by negative harmonisation, and hard-core legal Acts by the range of “soft law” measures. In this Dissertation, the highly complex non-harmonised system of direct taxation as outline above is to be described. For methodological perspective, European Tax law as a scientific discipline covers three time levels: the past, the present and the future. The past is covered by the History of Tax Law, the present by Tax Law dogmatics, and the future by Tax Law policies. In fact these time aspects overlap considerably. Tax Law and the history of Tax Law are incomplete without dogmatic analysis and tax law dogmatics is also to be regarded complete with awareness of the past only. Time aspects are duly covered in separate chapters, in the description of the history of tax regulations, in the narration on the current set of regulations and in the presentment of the plans of the European Commission regarding the future.

The aim of my thesis is to define the minimum system of direct taxes, the rules which have to be observed by legislators of the EU member states when creating their tax rules. In the European Union, next to the narrow effect of directives, court decisions are the real engines of coordination, therefore the main objective of this thesis is the presentation of this adjudication regarding the crystallizing principles from it. I am seeking the answer for the following provided that the narrow areas regulated by positive harmonization are transplanted into a national legal system of a country then will the practice of the European Court of Justice evolved in the last 27 years under the topic of about 200 cases requires further measurements regarding the national tax system.

METHODOLOGY OF RESEARCH

Regulations on direct taxation are defined in the Treaty on the Functioning of the European Union (hereinafter: TFEU) on the one part and the Directives on the other. The rules setting out regulations as to “*how the Member State should amend its tax system*” as elaborated in the framework of positive harmonisation have been outweighed in volume and significance by negative harmonisation as defined by the European Court of Justice, the principles elaborated in rendering its judgements put forth prohibitions for the national legislator as to “*how not to amend its tax system*”. As Dániel Deák says: “*Thereby the negative harmonization is the “minimum programme” of harmonization, during which the objective is to create the equivalence of national laws.*”¹ The Member State are to observe these guidelines as otherwise their rules would be rendered inapplicable and would be deprived of their tax revenues.

In between positive and negative harmonisation there stand “soft law” amending the same, which is to be regarded as a separate form of harmonisation.² In this context (Ms.) Éva ERDŐS explains that “*Harmonisation despite efforts to this end proceeds at a low pace only; however in resolving conflicts new regulatory measures with no binding effect including Codes of Conduct, reports, EC communications have emerged and are applied by the Member State in their voluntary law-abiding conduct without applying sanctions*”³. The importance of “soft law” is to be given its due emphasis, with the European Committee attempting to regulate an increasing number of areas with this range of measures.

The methodology of my research is in line with the above categories. In this Dissertation, a detailed analysis is given to primary and secondary sources of law generally applied in the context of sources of law for positive harmonisation. For the purposes of direct taxation in the

¹ Dr. Deák Dániel: Adóverseny a kibővített Európai Unióban, *Gazdaság és Jog*, 1/2005, pp. 17-22.

² Cf. Éva Erdős: A nemzetközi adójog egyes alapelveinek érvényesülése az európai adójogban In: *Tanulmányok Nagy Tibor tiszteletére* (szerkesztette: Simon István) ELTE Állam –és Jogtudományi Kar tudományos kiadványai, *Libri Amicorum* 14. Szent István Társulat az Apostoli Szentszék Könyvkiadója, Budapest, 2009. p. 44.

³ Éva Erdős: Új tendenciák az egyenes adók harmonizációjában; *Miskolci Jogtudományi Műhely* 3., Magyarország az Európai Unió csatlakozás küszöbén (text of the scientific session held on 28 May 2003), szerk.: ed. Erika Róth, Bíbor Kiadó, Miskolc, 2003. p. 82.

context of primary sources of law, TFEU has a pronounced significance, as this is the instrument laying down the objectives for the creation of the internal market, which are to be attained by the abolishment of hindrances among the several Member States, including those relating to taxation. At the same time, the TFEU sets forth regulations on direct taxation in an indirect way only. It is for this reason that the most significant sources of law for positive harmonisation are the Directives. By the end of 2012, *three Directives were adopted in the field of corporate direct taxation and one in the field of private individuals* on the basis of Article 94 of the Treaty Establishing the European Union (or, Article 115 of TFEU)⁴. These Directives are described in detail in conjunction with the related legal practice.

I agree with Éva Erdős' above quotation regarding "soft law" without however covering the issue in a separate chapter, with non-mandatory recommendations and other acts being described in the context of tax policy and the Code of Conduct under the part on the history of the issue.

For the purposes of this Dissertation, one of the most revolutionary initiatives on behalf of the European Commission is the regulation relating to the establishment of the common consolidated corporate tax base. The European Commission and the Member State has made extraordinary efforts and work for the development of the norms. A draft directive has already been created however it has not attained any legal status.

At the same time, the issue of transfer pricing posing the most problems for international companies is of particular importance, for the regulation of which the European Union has taken serious measures even in view of the fact that – as regards their form - non-mandatory acts have been created: the requirements as to the range of documentation and the manner preliminary pricing agreements are concluded have been incorporated in communiqués and

⁴ Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (parent-subsidiary directive), Council Directive 90/435/EEC on a common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (the Merger Directive), Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated, companies of different Member States, Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (Savings Directive)

the issue of dispute resolution has been regulated by the European Union under a multilateral convention, with the relevant provisions described herein in a separate Chapter.

In view of the fact that the Member State – in their efforts to protect their sovereignty has hardly resorted to positive harmonisation, with their roles taken over the European Court of Justice. The Court – although not in a position to legislate – made an attempt to ensure concordance between internal tax regulations with EU Law. The relevant case law is highly complex and diverse, wherefore

I have selected certain underlying principles for their interpretation and presentation. The cases are described with two approaches in mind: first grouped in the context of fundamental freedoms and then secondly private individuals and companies are treated separately, providing an analysis on one of their typical activities.

In case of private individuals, cross-border transactions are analysed in relation to these issues: (a) relocation of residence, (b) personal circumstances, (c) objective circumstances, (d) pension and other social benefits, (e) revenues from properties located in another Member State, and (f) taxation of other cross-border economic activities.

Transactions effected by companies are by far more complex and diverse. In the Dissertation, first I have described the ways the freedom of establishment is ensured in the host country and the country of residence, and then the ways the freedom of cross-border provision of services is ensured in the host country and the country of residence. Then, I have covered the issue how consolidation and loss carry forward is regulated and exercised and the issue of taxation of dividends.

In addition to my examination of these issues, I also relied on international and Hungarian literature in this field. Foreign authors include B.J.M. Terra, P.J. Wattel, Michel Lang, Pasquale Pistone, Josef Schuch, Claus Staringer, Richard Lechner, Marjaana Helminen and Michael Devereux, to name only a few, while Hungarian sources include those written by Tamás Óry, Dániel Deák, Éva Erdős, Gábor Földes and György Herich. The volume of this Dissertation allows no room for making reference to each of the concepts mentioned in relevant literature however I emphasized some of the key notions, without attempting to be all-inclusive.

SUMMARY OF RESEARCH FINDINGS

Concept of tax law in the EU

On the one hand European tax as a separate category does not exist because the lack of the necessary political, legal and economic background and in the lack of that the necessary Community system of institution is not available. On the other hand, as Dániel Deák also points out that “*in the absence of federation it is not realistic to expect the Community regulation replacing national legislation.*”⁵

European tax does not exist but there is European tax law. *European tax law has not a clear definition accepted by everyone* but academics are trying to define this concept. The most evident is to draw a parallel with international tax law.⁶

As some states retain the right of taxation in international tax law, Member States retain it in the European Union as well. The national tax law of Member States shows significantly different features and as a result of this the conflict of tax discrimination, tax avoidance or double taxation may arise which becomes to be perceived beyond the boundaries of the European Union in international law. As in international law the legislators try to solve these conflicts by creating principles, similar taxation principles and methods also appear in European tax law, in particular the principle of equal treatment, the prohibition of discrimination and the prohibition of harmful tax competition.

Actually *the tax law of the European Union* can be defined as the approximation of tax rules inside the tax system of Member States. “*The European tax law is the sum all of primary and secondary sources of law which is formed as a result of tax harmonization.*”⁷

⁵ Dr. Deák Dániel: Adóverseny a kibővített európai Unióban, *Gazdaság és Jog*, 1/2005 17-22. o.

⁶ See more detailed: Erdős Éva: Az adójogi harmonizáció folyamata és eszközei az Európai Unióban In: Ünnepi Tanulmányok Prof. Dr. Kalas Tibor egyetemi tanár oktatói munkásságának tiszteletére Z-Press Kiadó, 2008. Miskolc 105-125.o.

⁷ See: Dr. Erdős Éva: Nemzetközi, illetve európai adójogi konfliktusok és kezelésének módjai: *Publicationes Universitatis Miskolcensis, Sectio Juridica et Politica Tomus XXV/1*. Miskolc University Press, 2007. 267-289.o.

It can be concluded that *in the area of direct taxes* due to the resistance of Member States the approximation of rules has been a considerably less significant, the positive harmonization is on a low level and the differences are remarkable. Therefore this process can be named as *the coordination of tax policies, not the harmonization of them*.⁸

It follows from the foregoing that European Tax Law (in the field of direct taxation) is a summary of norms laid down in primary sources of law and as constituted by the institutions of the European Union (secondary sources of law). *In a broader sense*, it includes the imaginary tax system as defined by negative harmonisation in which all principles to be present in any tax system of the Member States as a pre-condition for compliance with EU Law are contained.

The features of EU tax policy of direct taxes

The direct taxation plays an important role in the achievement of the single internal market. However as I presented in my Dissertation neither the EEAS not the TFEU did really create the legal framework for the harmonization of direct taxes. This is not a coincidence the Member States did not intend to give the asset of direct taxation out of their hands and as a result of this there are extremely very few primary or secondary sources of law.

The scope of tax law for the creation of the single internal market the most obvious solution appeared to be *the harmonization of regulations*. A harmonization like this enables to create and operate a system which was designed carefully and was well-planned and via this to eliminate rules which distort the operation of the single internal market. This harmonization was realized *solely in the area of indirect taxes*; in contrast the positive harmonization of direct taxes can be regarded as unsuccessful except for a relatively short period.

The consequence of the half success of the above efforts made toward harmonizing from the current system of the EU is that member states are hardly restricted, their obligation extends in connection with direct taxes to co-ordinate their tax systems, rather than harmonizing them. In the current system the principles of subsidiarity, ad hoc delegation of powers and proportionality form the base of constitutional structure. The bodies of the EU are not

⁸ Galántainé Máté Zsuzsanna: Az adójog-harmonizáció fő jellemzői az Európai Unióban, *Külgazdaság*, XLVII. évfolyam, 2003/6. szám.

typically authorized to take actions and the requirement of unanimity voting and the fact that the provisions relating to internal market legislation does not include tax matters makes it unrealistic that a significant change can occur.

In the absence of harmonization, the member states can compete with each other to attract investors and taxpayers. This competition can typically distort the decisions of enterprises and thus it does not help the Union to achieve its objectives.

If a national tax system in a member state meets with the directives and is exempt from disadvantageous discrimination or the restriction of free competition, then the tax system of this Member State is legally impeccable. If it operates a system which is harming the interests of other states, because it splits a too large slice from the common tax pie, then other Member States can force the transformation of their tax rules, but this is an exertion of political pressure, and does not take place in a legal process framework.

The constitutional system established by member states is not suitable legally for the harmonization of direct taxes. Bearing in mind that the European Parliament is not entitled with legislative power in fiscal affairs and the EU is not working on a federalistic basis, the creation of a common tax system is not only unrealistic but it could be also questionable from a democratic point of view.

The role of the European Court of Justice

According to the weakness of the above the national legislators can convert the direct taxes without limits. In those cases when several Member States are concerned the fundamental freedoms become applicable and this was the moment when the European Court of Justice has entered the stage of direct taxes, which is a difficult role. Some countries want to restrict its opportunities for this as an example the United Kingdom and Germany attempted this before the acceptance of the Amsterdam Treaty. Others believe that the verdicts are not sufficient to serve realization of single internal market, such as the extension of most-favoured-nation principle.⁹

⁹ Vaninstendael, F, „The ECJ at the crossroads: balancing tax sovereignty against the imperatives of the single market”, European Taxation, 2006, p. 413.

The action of the European Court of Justice is ambivalent. On the one hand from the nature of judgement it can only convert the tax law indirectly because its activity covers one matter and one Member State. However analysing the case law the court really did not express sufficiently purposively and progressively in a range of issues. However this is not actually the task of the applier of law but of the creator of law. At the same time has made a lot of efforts to keep the national legislators within borders with its own tools so that it would force the same application of the identical principles among Member States and that fundamental freedoms would prevail in the direct taxation of the European Union.

Discrimination and Restriction

The tax systems of the Member States regards residence as the factor constituting the basis for unrestricted right for taxation, while intending to tax foreign residents in its capacity as source state. As a consequence, different tax rules are applied to domestic and foreign residents, with domestic residence paying tax on their worldwide income in the particular Member State, and the foreign residents paying tax on the income earned by them in the particular country.

The concept of residence status has the meaning as defined in the internal regulations of the particular Member State, in other words, no relevant Community concept exists. The differentiation between domestic and foreign residents under tax law many times gives rise to discrimination. In accordance with the case law of the Court, fundamental freedoms do not impose the obligation on the Member States to provide one and the same conditions for domestic residents and residents in another Member State in view of the fact that tax allowances are to be provided for by the country of residence by default.

Regarding the discrimination the Court established, most of the times, the circumstances of taxpayers with domestic residence and foreign residence are not comparable therefore equal treatment is not imposed as requirement. At the same time, in cases where the circumstances of the taxpayer resident in another Member State is comparable with those of the domestic residents, the tax allowances must be granted and equal tax treatment under the same conditions must be ensured, except when approved grounds for exclusion are in place.

In contrast with this restriction or limitation is occurs if freedom and rights are restricted unreasonably regardless whether the restriction concerns domestic or foreigner.

As regards taxpayers with residence in a third state, the Member States have the right to set tax regulations at their sole discretion, which may deviate from those imposed on domestic residents. An exception lies in case of situations subject to the freedom of movement of capital, as in this case the requirements of equal treatment will apply.

The test of the applicability of EU law

In case-law a train of thought has been crystallized through which certain tax rules are examined to be in compliance with EU law, furthermore those arguments, which Member States set to protect their national law.

The justification of judgements typically begins with a statement which establishes the competency of the Court. In this context it is stating that *although according to the permanent judgement practice direct taxes belong to the competency of Member States, the latter ones are obligated to practise their powers with respect for community law.*¹⁰

After this in the following section the harmony of the given place of regulation with the community law will be examined through a *questionnaire* (test) which was formed in the wake of the principles laid down in the *Gebhard case*:

- *Does the effect of the TFEU expand to the particular case?*
- *If the answer to the previous question is yes, then is the particular provision discriminative or restrictive?*
- *If yes, then is the discrimination or restriction justified?*
- *If yes, then it is a further question, whether the justified restriction is necessary and its level is proportionate to the intended objective.*

¹⁰ C-311/97 Royal Bank of Scotland (ECR 1999 I-02651. o.) 19. paragraph; a C-319/02 Manninen (ECR 2004 I-07477. o.) 19. paragraph and a C-446/03 Marks & Spencer (ECR 2005 I-10837. o.) 29. paragraph.

Based on the above a tax law institution is not contrary to the community law if its effect does not extend to it – for example there is an exclusively internal element of the transaction, or it is non-discriminative or non-restrictive. The latter type of cases can only remain in force if their maintenance in force is justified and restriction is proportionate to the intended objective.

The exculpation reasons of Member States

In jurisprudence the arguments that Member States cite as reasons for a particular discrimination or restriction are also formulated and have become a standard term for reference. Of the above arguments, the European Court of Justice *does not typically accept* the following ones:

- *lack of harmonisation of direct taxes;*
- *taxpayer with an opportunity to attain the same economic objective in an alternative structure (e.g. foundation of a branch office rather than an affiliate);*
- *an existing disadvantage being compensated for by other advantages (e.g. although a country does impose taxes in a discriminatory manner, the particular revenue in the other country is tax-exempt);*
- *low tax rates for a particular revenue payable by the taxpayer in another Member State;*
- *ensuring efficiency of financial audits, difficulties in public administration in law enforcement and implementation;*
- *impact of double-taxation treaties, which might compensate for detrimental national regulations;*
- *protection of tax base, preventing tax revenues from reduction;*
- *maintaining the unity of the tax system.*

At the same time Member State have cited successful arguments which are typically categorized in the following:

- *combating tax evasion and tax fraud;*
- *ensuring the balance of the right of taxation between the Member States.*

If it is clear that the applied national tax provision serves one of these two objectives, then measure which breach the EU law that is non-residents are effected disadvantageously can still be accepted and consequently it can be sustainable in the national tax law.

The fight against tax avoidance and tax evasion

Most of the cases, regulations against tax evasion violate the freedom of cross-border transactions, however, Court case law proves that these provisions may continue in force and application where they are designed to exclude completely arbitrary agreements solely aiming to evade existing tax liability. This was laid down by the Court in the *Cadbury Schweppes*¹¹ and the *Thin Cap Group Litigation cases*¹². Where the activity is genuine, the restrictions in tax legislation of Member States for avoiding tax evasion may not be applied.

The Court has established a number of conducts that are not to be deemed as completely arbitrary agreements. Foundation of an affiliate in another Member State for example is not to be deemed as an attempt for tax evasion¹³. Further, the fact that a taxpayer could well maintain its secondary premises in the Member State it resides should not be deemed as a completely arbitrary agreement¹⁴. Reduction of the tax liability is a reasonable objective provided that it will not result in an arbitrary redirection of revenues¹⁵.

It follows from case law that the fight against abusing tax law can justify the national measure which is contrary to the EU law, if the national provision is sufficiently specific in order to attack the tax structure which was artificial and was only formed for the purpose of achieving

¹¹ C-196/04 Cadbury Schweppes (ECR 2006 I-07995. p.)

¹² C-524/04 Test Claimants in the Thin Cap Group Litigation (ECR 2007 I-02107. p.)

¹³ C-264/96 ICI (ECR 1998 I-04695. p.)

¹⁴ C-196/04 Cadbury Schweppes (ECR 2006 I-07995. o.)

¹⁵ C-294/97 Eurowings (ECR 1999 I-07447. o.)

tax benefits. In addition, the measure of the member state must be targeted as well. The existence of artificial formation must be settled under objective factors, through which taxpayers have given the opportunity to evidence to the contrary. Creating the opportunity of evidencing the contrary also supplies to promote that the concerned national provision comply with the requirements of proportionality and necessity.

From the extremely colourful legal practice a kind of a standpoint is outlined which leads to the conclusion that the definition of abuse of rights in tax law in the interpretation of EU law has objective and subjective criteria.¹⁶ The subjective criteria clearly refer to the intention of taxpayer to artificially create the structure which is the basis of decreasing their tax burden. The artificial conditions can be explored under objective circumstances (for example: actual physical presence, economic activity, employment of workers, own assets, etc.).¹⁷

The limited nature of the scope of operations of the European Court of Justice is also demonstrated by Dániel Deák's statement, claiming that "*[...] the European Court of Justice is capable of providing the framework for the interpretation of the particular piece of legislation, which on the other hand limits the scope of action on the part of national authorities, the responsibility for defining substantial rights however shall rest with the national authorities. Therefore, the discretion in assessing abuse of rights or refusing to legalise tax evasion shall be with the national authorities.*"¹⁸

The main context of national law and international conventions

Article 293 of the TFEU gives express authorisations to the Member States to conclude bilateral or multilateral conventions with a view to avoiding double taxation within the Community. Albeit this authority – by virtue of the amendment that follows from the Lisbon Treaty - was removed from the Treaties, the Member States however continue to have the powers to accept tax treaties in the relations between them.

¹⁶ Dr. Deák Dániel: A pozitív jog csődje: Adóelkerülés és adóparadicsomi tervezés, visszaélés az alapvető EK szabadságokkal, p. 98.

¹⁷ Dr. Deák Dániel: A pozitív jog csődje: Adóelkerülés és adóparadicsomi tervezés, visszaélés az alapvető EK szabadságokkal, p. 98-99.

¹⁸ Dr. Dániel Deák: A pozitív jog csődje: Adóelkerülés és adóparadicsomi tervezés, visszaélés az alapvető EK szabadságokkal, p. 95.

Member States divide their taxing rights mostly in their discretion among each other. There are just some exceptions where EU directives regulate the division of taxing power between the member states. Mostly the division occurs on the basis of the principles and criteria agreed in international practice, which at the same time permits a certain level of discretion for member states. Member States can decide that based on the residence of income earner or the place of the income earning in which scope they exercise their taxation rights and to apply the principles of offsetting and exemption and in order to avoid double taxation.

In several cases *the issues of neutrality of export and import of capital were affected in the Court's case law*¹⁹ and both methods were acceptable. At the same time the *Court mostly focuses on the analysis of national provision in question* (and the related double taxation agreement, if it is applicable), *rather than the actual situation of the taxpayer*.

The case law of the European Court of Justice until 2005²⁰ [in particular the judgement of the *European Commission v. French Republic (Avoir fiscal), the Shumacker, the Wielockx, the Gilly-, the Saint-Gobain and the De Groot case*] shows that tax treaties always deemed to compatible with community law as long as they are about division of tax jurisdiction and they intend to avoid double taxation. Member States are free to conclude tax treaties and they can determine the aspects of dividing tax jurisdiction, but at the same time they must completely respect the requirements of community law during the conclusion and application of tax treaties and therefore any incompatible and disadvantageous discrimination cannot arise and cannot be justified. This means that those benefits guaranteed in tax treaties which are available for resident taxpayers in one member state or in another cannot be granted or cannot be refused on a reciprocal basis but under community law they must be expanded for every non-resident taxpayer too, who is in a similar situation as the resident taxpayer.

Recently the Court has changed (see *the D, the FII Test Claimant and the ATC Test Claimant case*) this easy to follow interpretation. The essence of this new approach is that everything, which was agreed in the framework of a treaty, contributes to the balance of this treaty. The

¹⁹ C-319/02 Petri Manninen (ECR 2004 I-07477. o.), C-170/05 Denkvit Internationaal (ECR 2006 I-11949. o.), C-446/03 Marks & Spencer (ECR 2005 I-10837. o.)

²⁰ The issue is more detailed in: Erdős Éva – Rác Rita: A jövedelemadóval kapcsolatos diszkriminatív nemzeti rendelkezések igazolhatósága a közösségi jogban az Európai Bíróság ítélezési gyakorlatának tükrében, Sectio Juridica et Polica, Miskolc, Tomus XXVI 1/1. (2009), 257-286. o., 2009

consequence of this solution is that member states are practically exempted in every such solution whose tool is the given double tax convention. By following this principle the court contradicts or does not apply the fundamental freedoms and in addition there can be principles that it also contradicts to the direct effect and most of the basic principles of community law. Practically tax treaties set up a status “above Community Law” whose system of devices countries are free to form.

Based on the most-favoured-nation principle the question arises that whether a member state pursuant to a double tax convention can deny certain benefits from a person who is domestic in another member state, while it provides the same benefits under another double tax convention.

The Court thus excluded the obligation of enforcement of best treatment in the field of direct taxation, which is a contradiction because there are several different areas where the European Court of Justice has already accept the necessity to use this principle.

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