

Financial Law Review

No. 15 (3)/2019
quarterly

UNIVERSITY OF GDAŃSK • MASARYK UNIVERSITY • PAVEL JOZEF ŠAFÁRIK UNIVERSITY • UNIVERSITY OF VORONEZH
<http://www.ejournals.eu/FLR>

CONSTITUTIONAL IDENTITY AND DIRECT TAXATION *SAVINA MIHAYLOVA-GOLEMINOVA**

Abstract

Currently the debate for constitutional identity and the hierarchy of legal norms of national, international and EU law is rife in Bulgaria. The purpose of the present article is to present these issues from the point of view of taxation trends.

Key words: Constitutional Identity; Direct Taxation; Hierarchy; Sovereignty

JEL Classification: K340

1. Introduction

Financial and tax doctrine is currently busy examining the new challenges facing the Republic of Bulgaria as a member of the European Union (EU), firmly rooted in

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constitutional, financial and administrative traditions, including case-law in the field of administrative justice. In the first place, the EU operates on the basis of competence conferred upon it by its Member States pursuant to the founding Treaties. Taxes are a symbol of the sovereignty of the State. Member States have broad sovereignty in the field of direct taxation. Currently, the European Union does not use direct taxes for its own resource collecting purposes.

In the second place, the complexity is further exacerbated by the new challenges in the field of taxation at a global level and the on-going process of modification of the rules of international taxation (BEPS project).

In the third place, another challenge reaches a wider field than the European Union, but all Member States will have to face it. The OECD Base erosion and profit shifting (BEPS) Actions were finalized in 15 Action Reports in 2015. Action 15 resulted in the signature by a large number of countries of a multilateral convention aiming at the modification of bilateral tax treaties¹ concluded between signatories, among which EU Members States. The dimensions of state fiscal sovereignty at domestic level are Legislative, Administrative and Judicial. In its international dimension the fiscal sovereignty of the state covers the freedom to enter and exit tax treaties.

Fourthly, there is a trend for the principles of supremacy of international law and EU law to no longer stand on a legally solid basis: in international law the pressure has subsided due to a return to Westphalian-type relations; in the field of EU law there is rivalry between the principle of primacy of EU law and the principle of constitutional identity (BVerfG n. 2735/14, ICC n. 269/17).

All of this necessitates a review of this pressing issue through the prism of direct taxation.

2.

My interest in the topic of constitutional identity and the hierarchy of legal norms of national, international and EU law was further inspired by the recent Decision No 13/27.07.2018 of the Constitutional Court of the Republic of Bulgaria under constitutional case No 3/2018. Recently the issue of the interaction between and the hierarchies of legal norms of national, international and EU law, not only in the field of taxation, are gaining

¹ The double taxation conventions (DTC), concluded between the Republic of Bulgaria and other states are, in essence, international contracts. In Bulgaria DTC are not applied directly. The procedure for proving grounds for application of valid DTC is regulated by Articles 135-142 of the Tax and Social Security Procedure Code (TSSPC). Valid DTC are listed on the official page of the National Revenue Agency: <http://www.nap.bg/page?id=424>. For more on DTC see a full list of the double taxation conventions concluded by Bulgaria can be found on the NRA's webpage: <http://www.nap.bg/en/page?id=530> [the page was accessed on 11.06.2019].

increasing significance. For this reason I would like to present the vision of Bulgarian constitutional doctrine and legal theory on this topical issue. Prof. Georgi Bliznashki, in his latest study, underscores that: Defining the relations between EU law and the constitutional law of Member States is one of the most complicated issues in European legal area. Given the current circumstances, the Lisbon Treaty set forth an explicit provision which provides that the European Union will respect the “national identities” of Member States, “inherent in their fundamental structures, political and constitutional” (see Article 4(2) of the Treaty on European Union). This creates the conditions for a more nuanced understanding of the relationship between EU law and the national law of Member States, going beyond the extreme position held by the European Court which supports the doctrine of absolute supremacy of European law even with regards to the constitutional law of Member States. The fact that the legal basis of the European Union arises not from the Union itself but from the Member States through the Treaties is of great significance for the role of national constitutions in the process of European integration. This means that the constitutions of Member States exert an influence over the primary law of the European Union. This is so because Member States are bound by their constitutions when they sign or ratify the relevant treaties for the purpose of deepening European integration. In this sense, national constitutions act – in the words of Dieter Grimm – as a ‘filter’ for EU primary law. In the end, national constitutions remain the constitutions of separate states within the Union. This is why their future is highly dependent on the fate of the states within united Europe. It is very probable that the separate states will remain the main element of a new political order. Inasmuch as they have, as yet, not ceded all their rights, in the future they will no longer possess all their rights. Nowadays it is precisely national constitutions that are the obstacle to the incessant transfer of more and more rights to the European level and the transformation of the European Union into a federal state [Bliznashki 2019: 856-858].

The concept of constitutional identity is enjoying increased visibility in the last decade, especially in scientific studies of comparative constitutional law and EU law. Studies of this concept are not peculiar to academic literature only. The concept is reflected in Article 4(2) of the Treaty on European Union which instructs the Union to respect the identity of the constitutional order of each Member State. It is on this basis that the respective constitutional jurisprudence unfolds. The practical implementation of this concept, however, has created several difficulties, as its contents have not yet received full clarity. This means that the concept of constitutional identity remains disputed (Bliznashki, *ibid*).

I believe that **constitutional identity finds its clearest manifestation in the sovereignty of a member state in the field of direct taxation. It appears, however, that taxation is the last EU policy area where decision-making exclusively relies on unanimity. Will this last bastion be seized? This will soon become evident.** Convinced that preserving unanimity for all decisions in the field of taxation would hinder the achievement of the level of tax

coordination required by Europe, the **European Commission presented proposals for moving from unanimity to qualified majority voting on certain tax matters. These proposals, however, were rejected by member states.** The Commission made a concerted effort to bring the proposal back on the agenda and to promote the shift from unanimity to **qualified majority voting** on tax matters. This proposal would not be readily accepted by member states for several reasons (limiting competition on the Single Market, interference in an especially sensitive area concerning national sovereignty, increased centralization, etc.).

The principle of constitutional identity and its relation to the principle of primacy is the object of review by legal doctrine – it neither abolishes, nor undermines the principle of primacy. For this reason member states cannot seek to rely on respect for **constitutional identity** in violation of EU law.

3. Conclusion

In conclusion, with view of the above, I believe that the constitutional identity of an EU member state should be regarded as a fundamental value in the field of direct taxation. This thesis can serve as basis for rethinking certain central concepts in the financial and tax law of states from Central and Eastern Europe, sharing a common historical and socio-political development.

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