

Optimization of tax sovereignty and free movement

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Introduction

“Although direct taxation is a matter within the competence of the Member States, they must none the less exercise that competence in a manner consistent with European Union law”

[Case C-123/11 A Oy, para. 29]

➤ direct effect and precedence of EU free movement?

Current criticism

1. Too much respect for tax sovereignty
2. Too much respect for free movement
3. ECJ engages in positive harmonization (too little or too much)
4. ECJ case law is unclear

How to deal with this criticism

- A conceptual framework is needed which is external to and independent of current ECJ case law
- Which legal theory is appropriate?

Alexy's Theorie der Grundrechte

- Distinguish rules from principles
 - doctrine of collision
- Principles are optimization requirements
 - they appear only prima facie (widest possible scope)
 - their extent can only be determined in relation to another principle (wide notion of limits; however compatibility with other norms with similar status)
 - they are norms which require that something is realized to the greatest extent factually and legally possible (proportionality analysis)

Tax sovereignty as a principle

- Tax sovereignty: a prima facie general freedom of action of States
 - Tax jurisdiction is limited by international law
 - Within reserved domain freedom to design tax system and to pursue objectives of tax and social/economic policy
- Consequences: disparities, double taxation, discrimination

Free movement as a principle

- Prohibition of interference with economic freedom of market participants
 - prima facie prohibitions of obstacles to free movement and discrimination on grounds of nationality or the legal form of an establishment

A theoretical assessment model

- To which disadvantage does the tax measure lead?
- Does the tax measure at issue have a respectful objective?
- If yes, does the tax measure have a sufficient degree of fit in relation to its objective?
- If yes, is the tax measure suitable to achieve its objective?
- If yes, does the tax measure reflect the most subsidiary means to achieve its objective?
- If yes, is the cost to free movement caused by the tax measure in proportion to the objectives pursued by it?

Thank you!

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