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PROHIBITION OF DISCRIMINATORY TAXATION IN EUROPEAN UNION LAW

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Summary. Free movement of goods is an essential part of internal market functioning. Its effective functioning would be impossible if the prohibition of discrimination based on nationality would be legal. The general prohibition of discrimination stipulated in Art. 18 TFEU is applied also in the area of internal market, including the free movement of goods or prohibition of discriminatory taxation. The main focus of the article is dedicated to the difference between prohibition of charges having equivalent effect (Art. 34 and 35 TFEU) and prohibition of discriminatory internal taxation (Art. 110 TFEU). Further analyses focuses on Art. 110 TFEU and the two situations it covers: discrimination against similar foreign products (Art. 110, sect. 1 TFEU); discrimination against competing foreign products (Art. 110, sect. 2 TFEU). The Court of Justice makes difference between those goods that are similar and those goods that are in competition. From the cases law it is clear that the Court of Justice adopted a globalized approach to Art. 110 TFEU considering both paragraphs of Art. 110 TFEU together. It may happen that the Court considers the products not to be similar within the meaning of Art. 110, sect. 1 TFEU, but these products still may be regarded as being in partial competition within the meaning of Art. 110, sect. 2 TFEU.

Key words: internal market, anti-discrimination taxation, direct discrimination, indirect discrimination, taxes, similar product, competing product

INTRODUCTION

Free movement of goods is one of the freedoms of the internal market. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capita is ensured.[1] Since January 1993, controls on the movement of goods within the internal market have been abolished and the European Union is now a single territory without internal frontiers. The abolition of customs tariffs promotes trade between member states, which accounts for a large part of the total imports and exports of the member states.

The Treaties specify the conditions under which these freedoms shall be realized. The free movement of goods is established on [Varga 2009]: a) customs union (Art. 30 TFEU); b) prohibition of quantitative restrictions between member states (Art. 34 and 35 TFEU); c) prohibition of discriminatory taxation (Art. 110

[1] "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties" (Art. 26, sect. 2 TFEU).

TFEU); d) competition policy, i.e. rules applicable to undertakings (Art. 101 to 109 TFEU).

1. PROHIBITION OF DISCRIMINATION BASED ON NATIONALITY

Art. 18 TFEU stipulates that "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited." It is a general provision that prohibits any form of discrimination based in national origin [Tridimas 2009]. It is applied to goods or persons and this concept is crucial for internal market functioning [Karas and Králik 2012]. For illustration, there is still difference in treatment between persons from the EU and from persons from third countries. Such a treatment is however not tolerated between the EU member states and within the internal market [Foster 2011, 257].

Prohibition of discrimination based on nationality covers both the direct and indirect discrimination. EU anti-discrimination legislation also provides the definition of direct and indirect discrimination, whereby the direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation (Art. 2, sect. 2, point a of the Directive 2000/78/EC). Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Art. 2, sect. 2, point b of the Directive 2000/78/EC) [Barnard 2010, 59]. This means, that the indirect discrimination may be objectively justified, what may be described by the famous Cassis de Dijon[2] or Gebhard[3] case. The prohibition of discrimination is not limited to intentional discrimination, but also to unintentional provisions that have as their effect restrictions of imports or exports [Foster 2011, 257]. The current case does not limit the restriction on free movement of goods to the prohibition of discri-

[2] See Case 120/78 Rewe–Zentral AG v Bundesmonopolverwaltung für Branntwein, judgement of the Court of 20 February 1979 (ECLI: EU:C:1979:42): "Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."

[3] See case C–55/94, Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (ECLI: EU:C:1995:411); point 37: "It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."

mination, but to any provisions that form an obstacle to the free movement of goods, including the prohibition covered by Art. 110 TFEU.

2. NEGATIVE INTEGRATION VERSUS POSITIVE INTEGRATION

2.1. Negative integration

Negative integration brings deregulation as it consists in outlawing the national laws that constitute an obstacle for the internal market [ibid., 256]. Negative integration provisions are contained in the TFEU regulating each freedom of the internal market and have a form of ban of all national provisions that form a restriction. TFEU on the other hand, establishes statutory exceptions fulfilment of which does not constitute a restriction to the internal market functioning. The method of negative integration does not bring new legislation, but removes the obstructive laws to the free movement. Negative integration has been highly supported by the Court of Justice of the EU as it declared direct effect of the TFEU deregulatory provisions that prohibit the member states to adopt laws that constitute an obstacle for the internal market. The direct effect supports the individuals from private enforcement of their rights that are guaranteed by EU law against the member states. Art. 18 TFEU that prohibits discrimination on grounds of nationality is also considered as provision belonging to negative integration method.

2.2. Positive integration

Positive integration method brings new legislation on EU level. Its purpose is to regulate specific issues on EU level. It introduces new institutions, but also includes adoption of harmonization legislation and approximation of national laws by replacing the national divergent rules by common EU provisions [Foster 2011, 257].

This is achieved by the Treaty provisions that enable to adopt a special legislation in specific areas of internal market[4] or by general legal bases provisions.[5]

[4] E.g. in the area of free movement of workers the Art. 46 TFEU that "European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers." In the area of free movement of services the Art. 59, sect. 1 TFEU: "In order to achieve the liberalisation of a specific service, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall issue directives."

[5] Approximation of laws provision (Art. 114–118 TFEU) and the so called flexibility clause (Art. 352 TFEU) that contains a provision allowing the EU to adopt an act necessary to attain objectives laid down by the treaties when the latter have not provided the powers of action necessary to attain them.

3. FISCAL BARRIERS AND REGULATORY BARRIERS

Art. 34 and 35 TFEU prohibit quantitative restrictions on imports and exports and all measures having equivalent effect between member states. Charge having equivalent effect is defined as all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.[6] Further case law developed the interpretation of the term quantitative restrictions, including the principle that any product legally manufactured and marketed in a one member state in accordance with its fair and traditional rules, and with the manufacturing processes of that country, must be allowed onto the market of any other member state.[7] This principle of mutual recognition is applied even in the absence of harmonisation measures on EU level.[8] The application of Art. 34 TFEU is limited by the Keck judgment that concerns the selling arrangements [Tichý, Rainer, Zemánek, et al. 2009] which must be applied in a non-discriminatory way.[9]

From a legal assessment it is necessary to make difference between charge having equivalent effect and taxes. In case Reprographic Machines[10] the Court of Justice was considering the levy charged on copy machines in order to compensate the breaches of copyright. The levy was charged on copy machines because they are often used for breach of copyright. Only very few copy machines were produced in France and the levy seemed to be thus discriminatory. However, the Court of Justice held the levy to be a genuine non-discriminatory tax [Foster 2011, 265].

The charge having equivalent effect covers any charge exacted at the time of or on account of importation which, being borne specifically by an imported product to the exclusion of the similar domestic product, has the result of altering the cost price of the imported product thereby producing the same restrictive effect

[6] Case 8/74, Procureur du Roi v Benoît and Gustave Dassonville, judgement of the Court of 11 July 1974 (ECLI:EU:C:1974:82), point 5.
[7] Case 120/78, point 15.
[8] Ibid., point 8: "Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."
[9] Joined cases C–267/91 and C–268/91, Bernard Keck a Daniel Mithouard (ECLI:EU:C:1993:905), point 16: "By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment (Case 8/74 [1974] EC R 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States."
[10] Case 120/78.

on the free movement of goods as a customs duty.[11] The essential feature of a charge having an effect equivalent to a customs duty which distinguishes it from an internal tax therefore resides in the fact that the former is borne solely by an imported product as such whilst the latter is borne both by imported and domestic products.[12] The Court has however recognized that even a charge which is borne by a product imported from another Member State, when there is no identical or similar domestic product, does not constitute a charge having equivalent effect but internal taxation within the meaning it relates to a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products.[13] Those considerations demonstrate that even if it were necessary in some cases, for the purpose of classifying a charge borne by imported products, to equate extremely low domestic production with its non-existence, that would not mean that the levy in question would necessarily have to be regarded as a charge having an effect equivalent to a customs duty. In particular, that will not be so if the levy is part of a general system on internal dues applying systematically to categories of products according to the criteria indicated above.[14]

The Court of Justice accepted that the levy in issue forms part of a general system of internal dues and the levy in issue forms a single entity with the levy imposed on book publishers by the same internal legislation and from the fact, too, that it is borne by a range of very different machines which are moreover classified under various customs headings but which have in common the fact that they are all intended to be used for reprographic purposes in addition to more specific uses.

If a charge is imposed on imported or exported goods by a member state and that charge is a non-discriminatory tax levy, it cannot be a charge having equivalent effect. Such charge is caught by Art. 110 TFEU and as a tax underlies a different regime in comparison to the regime of prohibition of quantitative restriction under Art. 34 and 35 TFEU. The member states are free in establishing their own system of taxation which they consider to be most suitable for them. However, such system of taxation must be non-discriminatory to similar foreign products or competing foreign product according to Art. 110 TFEU.

It is necessary to make difference between a charge having equivalent effect and taxation [Weatherill 2010, 297]. These different charges underlie a different regime and different legal bases is applied on charges having equivalent effect (Art. 34 and 35 TFEU) and on taxes (Art. 110 TFEU), i.e. they are mutually exclusive categories. It is not possible, that both articles may be applied on one and the same charge. The Court of Justice held that the essential characteristic of a charge having an effect equivalent to a customs duty, which distinguishes it

[11] Case 90/79, European Commission v France, judgment of the Court of 3 February 1981 (ECLI:EU:C:1981:27), point 12.
[12] Ibid., point 13.
[13] Ibid., point 14.
[14] Ibid., point 15.

from internal taxation, is that the first is imposed exclusively on the imported product whilst the second is imposed on both imported and domestic products. A charge affecting both imported products and similar products could however constitute a charge having an effect equivalent to a customs duty if such a duty, which is limited to particular products, had the sole purpose of financing activities for the specific advantage of the taxed domestic products, so as to make good, wholly or in part, the fiscal charge imposed upon them.[15] Where the conditions which distinguish a charge having an effect equivalent to a customs duty are fulfilled, the fact that it is applied at the stage of marketing or processing of the product subsequent to its crossing the frontier is irrelevant when the product is charged solely by reason of its crossing the frontier, which factor excludes the domestic product from similar taxation.[16] Financial charges within a general system of internal taxation applying systematically to domestic and imported products according to the same criteria are not to be considered as charges having equivalent effect. This could be the case even where there is no domestic product similar to the imported product providing that the charge applies to whole classes of domestic or foreign products which are all in the same position no matter what their origin. The objective of Art. 110 TFEU is to abolish direct or indirect discrimination against imported products but not to place them in a privileged tax position in relation to domestic products. There is generally no discrimination such as is prohibited by Art. 110 TFEU where internal taxation applies to domestic products and to previously imported products on their being processed into more elaborate products without any distinctions of rate, basis of assessment or detailed rules for the levying there-of being made between them by reason of their origin.[17]

In another case, the Court of Justice was also dealing with the necessity to make the distinction between a charge having equivalent effect and internal taxation. The Court of Justice confirmed its case law and stated that any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier and which is not a customs duty in the strict sense, constitutes a charge having an equivalent effect and such a charge escapes that classification if it constitutes the consideration for a benefit provided in fact for the importer or exporter representing an amount proportionate to the said benefit. It also escapes that classification if it relates to a general system of internal dues supplied systematically and in accordance with the same criteria to domestic products and imported products alike.[18] The Court continued that it is appropriate to emphasize that in order to relate to a general system of internal dues, the charge to which an imported product is subject must: a) impose

[15] Case 78/76, Steinike & Weinlig v république fédérale d'Allemagne, judgement of the Court of 22 March 1977 (ECLI:EU:C:1977:52), point 28.
[16] Ibid., point 29.
[17] Ibid.
[18] Case 132/78, SARL Denkavit Loire v France, administration des douanes, judgement of the Court of 31 May 1979 (ECLI:EU:C:1979:139), point 7.

the same duty on national products and identical imported products; b) impose the duty at the same marketing stage; and c) the chargeable event giving rise to the duty must also be identical in the case of both products.

To exempt a charge levied at the frontier from the classification of a charge having equivalent effect when it is not imposed on similar national products or is imposed on them at different marketing stages or, again, on the basis of a different chargeable event giving rise to duty, because that charge aims to compensate for a domestic fiscal charge applying to the same products – apart from the fact that this would not take into account fiscal charges which had been imposed on imported products in the originating Member State – would make the prohibition on charges having an effect equivalent to customs duties empty and meaningless.[19]

4. ARTICLE 110 TFEU – PROHIBITION OF DISCRIMINATORY TAXATION

Art. 110 TFEU respects tax regimes of EU member states. However, it applies in situations when foreign goods are subject to internal taxation and a different tax regime is applied for foreign and domestic products. Art. 110 TFEU is not absolute and the restriction applies to indirect taxation of competing foreign products [Barnard 2010, 51].

From the text of Art. 110 TFEU it is clear, that it recognizes two categories: a) discrimination against similar foreign products (Art. 110, sect. 1 TFEU) and b) discrimination against competing foreign products (Art. 110, sect. 2 TFEU).

Art. 110, sect. 1 TFEU stipulates that no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. This provision prohibits taxation that would protect similar local products.

Art. 110, sect. 2 TFEU stipulates that, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products. This provision prohibits taxation that would indirectly protect other products.

4.1. Similar foreign products and competing foreign products

Art. 110 TFEU regulates two situations. Art. 110, sect. 1 TFEU applies if there is a discrimination of similar foreign product and Art. 110, sect. 2 TFEU applies to imported products that are in competition with domestic products.

4.1.1. Similar foreign products

The breach according to Art. 110, sect. 1 TFEU covers direct or indirect discrimination of similar foreign products. The prohibition of discrimination applies to domestic taxation that may cover different situations, e.g. different rates for tax

[19] Ibid., point 8.

for foreign and domestic products, different basis for assessment or different rules or regimes for tax payments for foreign or domestic products.

Art. 110, sect. 1 TFEU requires that the taxation is equal for foreign products and domestic products. The key question is which products are "similar." Over the years, the Court of Justice has used to tests to determine similarity [ibid., 55]. Firstly, a formal test is applied which examines whether the product falls within the same fiscal, customs or statistical classification. Subsequently, the Court of Justice adopted a broader test which is a combination of factual comparison of the products with an economic analyses of their use [ibid., 56].

In judgment 106/84 the Court of Justice was dealing with the question what constitutes a similar product (fruit wines and wines made from grapes in this case). From the judgment it is clear that the Court that similarity of products does not mean that the products are strictly identical, but also include similar products that have a comparable use. The Court continued: In order to determine whether products are similar within the terms of the prohibition laid down in para. 1 of Art. 95 (now Art. 110 TFEU) it is necessary to consider, whether they have similar characteristics and meet the same needs from the point of view of consumers. The Court endorsed a broad interpretation of the concept of similarity and assessed the similarity of the products not according to whether they were strictly identical, but according to whether their use was similar and comparable. Consequently, in order to determine whether products are similar it is necessary first to consider certain objective characteristics of both categories of beverages, such as their origin, the method of manufacture and their organoleptic properties, in particular taste and alcohol content, and secondly to consider whether or not both categories of beverages are capable of meeting the same need from the point of view of consumers.[20]

However, if the products are produced from the same ingredients, that does not mean, that they are similar. The Court of Justice was of opinion that the raw materials must be presented in the product in more or less equal proportion in order to be considered as similar. In case 243/84 (Johnnie Walker case) the Court of Justice had to deal with similarity of whisky and fruit wine of the liqueur type. It stated that the two categories of beverages exhibit manifestly different characteristics. Fruit wine of the liqueur type is a fruit-based product obtained by natural fermentation, whereas Scotch whisky is a cereal-based product obtained by distillation. The organoleptic properties of the two products are also different. The fact that the same raw material, for example alcohol, is to be found in the two products is not sufficient reason to apply the prohibition contained in para. 1 of Art. 95 (now Art. 110 TFEU). For the products to be regarded as similar that raw material must also be present in more or less equal proportions in both products. In that regard, it must be pointed out that the alcoholic strength of Scotch whisky

[20] Case 106/84, Commission of the European Communities v Ireland, judgment of the Court of 4 March 1986 (ECLI:EU:C:1986:99), point 12.

is 40% by volume, whereas the alcoholic strength of fruit wine of the liqueur type, to which the Danish tax legislation applies, does not exceed 20% by volume.[21] The contention that Scotch whisky may be consumed in the same way as fruit wine of the liqueur type, as an aperitif diluted with water or with fruit juice, even if it were established, would not be sufficient to render Scotch whisky similar to fruit wine of the liqueur type, whose intrinsic characteristics are fundamentally different.[22] The answer must therefore be that products such as Scotch whisky and fruit wine of the liqueur type may not be regarded as similar products.[23]

In case 184/85 (Commission v Italy) the Court of Justice was dealing with similarity between bananas and peaches and pears. It was taking into account the characteristics of the product on one hand and the consumer needs on the other hand. It stated that whether bananas and other table fruit typically produced in Italy have similar characteristics and meet the same consumer needs. Consequently, in order to assess similarity, account must be taken, on the one hand, of a set of objective characteristics of the two categories of product in question, such as their organoleptic characteristics[24] and their water content, and, on the other hand, whether or not the two categories of fruit can satisfy the same consumer needs.[25]

4.1.2. Competing foreign products

The breach according to Art. 110, sect. 2 TFEU covers the protectionist effect of domestic taxation. This provision also applies to situations where the level of taxation is the same, but the difference is in applying tax provisions to the effect of which is to grant as regards excise duty on spirits, beer and made wine, benefits to Irish producers in respect of deferment of payment which are refused to importers of the same products from other Member States.[26] This provision covers a situation if the goods are not sufficiently similar but are in competition with

[21] Case 243/84, John Walker & Sons Ltd v Ministeriet for Skatter og Afgifter, judgement of the Court of 4 March 1986 (ECLI:EU:C:1986:100), point 12.
[22] Ibid., point 13.
[23] Ibid., point 14.
[24] I.e. sensory characteristics of food or other substances that create an individual experience via the senses – including taste, sight, smell, and touch. With respect to bananas on one hand and other fruits on the other hand the Court of Justice stated: "It must be observed in this case that the two categories of fruit in question, that is to say, on the one hand, bananas, and, on the other, table fruit typically produced in Italy mentioned above have different characteristics. As the Commission has conceded, the organoleptic characteristics and the water content of the two categories of product differ. By way of example, the higher water content of pears and other fruit typically grown in Italy give them thirst-quenching properties which bananas do not possess. Moreover, the observation of the Italian Government, which has not been challenged by the Commission, that the banana is regarded, at least on the Italian market, as a foodstuff which is particularly nutritious, of a high energy content and well-suited for infants must be accepted."
[25] Case 184/85, Commission of the European Communities v Italian Republic, judgement of the Court of 7 May 1987 (ECLI:EU:C:1987:207), point 9.
[26] Case 55/79, Commission of the European Communities v Ireland, judgement of the Court of 27 February 1980 (ECLI:EU:C:1980:56), point 14.

each other, even if indirectly or potentially. It is applied if the tax provision of a member state has a protectionist effect to the detriment of imported goods that may be in competition with domestic goods. The key question is if the products are substitutable or interchangeable by each other. The aim of Art. 110, sect. 2 TFEU is to prove that the tax has protectionist effect to the detriment of imported competing products. If the domestic goods benefit from some kind of indirect fiscal protectionism, the prohibition of Art. 110, sect. 2 TFEU applies.

The Court of Justice of the EU has used several tests to discover whether the goods are in competition. Elasticity in demand is also reflected, especially in case if specific product is substituted by another product, e.g. if there is an increase in price. Other factors, like manufacture, composition of the product, consumer preference are also taken into account.

Probably the most famous and most important was the case 170/78 (wine and beer) in which the Court of Justice considered imposing higher duties on imported wines as a protectionist measure [Weatherill 2010, 306]. This measure indirectly protected beer which was a domestic product over imported still light wines. The Court of Justice was considering the nature of the competitive relationship between wine and beer and, secondly, the selection of a basis for comparison and the determination of an appropriate tax ratio between the two products.

The Court of Justice emphasized that Art. 110, sect. 2 TFEU applies to the treatment for, tax purposes of products which, without fulfilling the criterion of similarity laid down in Art. 110, sect. 1 TFEU, are nevertheless in competition, either partially or potentially, with certain products of the importing country. In order to determine the existence of a competitive relationship it is necessary to consider not only the present state of the market but also possible developments regarding the free movement of goods within the EU and the further potential for the substitution of products for one another which might be revealed by intensification of trade, so as fully to develop the complementary features of the economies of the Member States.[27] As regards the question of competition between wine and beer, the Court considered that, to a certain extent at least, the two beverages in question were capable of meeting identical needs, so that it had to be acknowledged that there was a degree of substitution for one another. It pointed out that, for the purpose of measuring the possible degree of substitution, attention should not be confined to consumer habits in a Member State or in a given region. Those habits, which were essentially variable in time and space, could not be considered to be immutable; the tax policy of a Member State must not therefore crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to respond to them.[28] In view of the substantial differences in the quality and, therefore, in the price of wines, the decisive competitive relationship between beer, a popular and widely consumed beverage, and

[27] Case 170/78, Commission of the European Communities v United Kingdom, judgement of the Court of 12 July 1983 (ECLI:EU:C:1983:202), point 7.
[28] Ibid., point 8.

wine must be established by reference to those wines which are the most accessible to the public at large, that is to say, generally speaking, the lightest and cheapest varieties. Accordingly, that is the appropriate basis for making fiscal comparisons by reference to the alcoholic strength or to the price of the two beverages in question.[29]

If the Court of Justice finds that the tax law of a member state has a protectionist effect to the detriment of imported goods that may be in competition with domestic goods, the member state may either lower the tax on imported product or raise the tax on domestic product, in order to eliminate the protection of domestic product.

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ZAKAZ DYSKRYMINACYJNEGO OPODATKOWANIA W PRAWIE UNII EUROPEJSKIEJ

Streszczenie. Swobodny przepływ towarów jest zasadniczą częścią funkcjonowania rynku wewnętrznego. Jego skuteczne funkcjonowanie byłoby niemożliwe, gdyby zakaz dyskryminacji ze względu na przynależność państwową był legalny. Ogólny zakaz dyskryminacji zawarty w art. 18 Traktatu o funkcjonowaniu Unii Europejskiej ma zastosowanie również w obszarze rynku wewnętrznego, w tym w zakresie swobodnego przepływu towarów czy zakazu dyskryminacyjnego opodatkowania. W artykule przeanalizowano głównie różnicę między zakazem nakładania opłat o skutku równoważnym (art. 34 i 35 TFUE) a zakazem dyskryminującego opodatkowania wewnętrznego (art. 110 TFUE). Dalsze analizy koncentrują się na art. 110 TFUE i dwóch sytuacjach, których dotyczy: dyskryminacja podobnych produktów zagranicznych (art. 110 ust. 1 TFEU); dyskryminacja konkurencyjnych produktów zagranicznych (art. 110 ust. 2 TFEU). Trybunał Sprawiedliwości dokonuje rozróżnienia między tymi towarami, które są podobne, a tymi, które są konkurencyjne. Z orzecznictwa jasno wynika, że Trybunał Sprawiedliwości przyjął globalne podejście do art. 110 TFUE, uwzględniając łącznie oba ustępy art. 110 TFUE. Może się zdarzyć, że Trybunał uzna, iż

[29] Ibid., point 9.

produkty nie są podobne w rozumieniu art. 110 ust. 1 TFUE, ale nadal można uznać, że produkty te stanowią częściową konkurencję w rozumieniu art. 110 ust. 2 TFUE.

Słowa kluczowe: rynek wewnętrzny, opodatkowanie antydyskryminacyjne, dyskryminacja bezpośrednia, dyskryminacja pośrednia, podatki, produkt podobny, produkt konkurencyjny

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