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Should the state aid prohibition impact the property tax legislation in EU member states?

Purpose of the article is to present the problem of applying the state aid rules (binding in EU) to the non-harmonized taxes such as property taxes, which differ strongly between Member States. The tax exemption from the real estate tax for the railway infrastructure which was introduced in Poland will be a subject to the investigation of Court of Justice of the European Union (CJEU). CJEU should answer to the question if the tax exemption from property tax in one Member State may be treated as a prohibited benefit granted to the entrepreneurs, having in mind that the same kind of property may be taxed significantly lower, or even not taxed at all in the other EU Member States. The verdict of CJEU will be important for the Polish entrepreneurs, but also will be significant for the tax policy in the EU. In case of the CJEU judgment declaring that the property tax exemption introduced by Poland constitutes illegal state aid it will be necessary to consider whether countries that do not tax the certain categories of property (or tax them at a very low level) do not grant illegal state aid to their entrepreneurs.

Keywords: real estate tax, property taxation, state aid, tax exemptions, tax harmonization, EU taxes.

Introduction

When designing tax regulations in the Member States of the European Union (EU), one should take into account the restrictions imposed on the legislator by regulations in the field of state aid. While this does not raise doubts in the case of easily comparable taxes (such as income taxes), it may be controversial in the case of taxes, the structure and amount of which varies greatly in individual EU countries. Such taxes are property taxes, for which the differences between individual countries are very large. The basic question is: can the tax exemption of a given asset granted in one Member State be considered as illegal state aid if such assets in other EU countries are not taxed at all or their taxation is much lower?

Materials and methods

Analysis of the standpoints of the tax authorities, courts jurisdiction and available literature (indicated in references).

Results and discussion

1. State aid in the EU — basic information

One of the most important institutions contained in the Treaty establishing the European Community [1], aimed at preserving the free movement of goods and services, which are the pillars of the common market created on the basis of the EC Treaty, is the protection of free competition between entrepreneurs from different Member States [2]. In particular, the issue of state aid granted to entrepreneurs by Member

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States is regulated by the currently applicable Article 107 of the Treaty on the Functioning of the European Union (TFEU) [3].

The term “state aid” has no legal definition, but the meaning can be derived from the wording of Article 107(1) TFEU, which sets out the conditions for recognizing aid granted to entrepreneurs by the State as prohibited. According to that provision, illegal state aid is any aid which:

- 1) is granted by a Member State or through state resources,
- 2) distorts or threatens to distort competition,
- 3) favours certain enterprises or the production of certain goods,
- 4) affects trade between Member States.

According to the general rule laid down in Article 107(1) TFEU, aid which meets all of the above conditions is prohibited in EU Member States (the so-called general prohibition of state aid). Due to the vagueness of the terms used in the provision, in practice the issue of meeting individual conditions in specific factual situations is a source of frequent doubts and disputes, both between entrepreneurs and the authorities of the Member States, as well as between Member States and the European Commission [4].

In principle, in the case of tax reliefs, there is no doubt that the first of the above conditions is met. European jurisprudence has established the view that aid granted from public funds is considered not only a direct transfer of public funds to an entrepreneur (e.g. in the form of co-financing, reimbursement or subsidy), but also a benefit incurred by the entrepreneur as a result of the State waiving taxes due to him, e.g. as a result of granting a tax relief or exemption to the entrepreneur [5].

The condition of distortion of competition is also most often fulfilled in the case of tax preferences. European case-law assumes that the necessary condition for that condition is satisfied if the entrepreneur obtains an economic advantage which he would not have obtained under normal market conditions, undistorted by State intervention [6]. Undoubtedly, an entrepreneur benefiting from an exemption or tax relief obtains a financial gain that he would not have obtained if certain regulations had not been in force.

More doubts are raised by the so-called selectivity condition. It is deemed to be fulfilled if the support granted by the State creates an imbalance between the aid recipient and its competitors due to their unequal treatment [2]. In the case of taxes, the selectivity of aid can be said to be in the case when an exception is introduced into the tax system (universal and equal for all taxpayers) which does not constitute a so-called general intervention measure (i.e. a systemic, universal and general social measure) [7; 67]. Potentially, therefore, a tax exemption or relief addressed to a selected entrepreneur, entrepreneurs from a selected region or entrepreneurs from a selected industry may be considered as a measure constituting selective state aid. *A contrario* the selectivity characteristic cannot be attributed to tax exemptions or reductions from which, at least potentially, all entrepreneurs on the market can benefit.

The last condition for considering the aid granted as illegal state aid, i.e. “the effect on intra-EU trade”, is interpreted very broadly. The condition is considered to be fulfilled, not only if it has the actual effect on trade (e.g. the increase in market share obtained by the aid beneficiary), but also in the case if such an effect is only possible [8]. According to the Notice of the European Commission [9], aid will not distort trade if:

- a) the aid does not attract demand or investment to the region concerned and does not create obstacles to the establishment of undertakings from other Member States;
- b) the goods produced and services provided by the beneficiary are local or of interest only in a defined geographical area;
- c) the impact on markets and consumers from neighbouring Member States is marginal.

A circumstance which excludes the possibility of an effect on trade is also the existence of a monopoly in law or in fact in relation to a given type of economic activity. As an example of a legal monopoly, the monopoly in force in Poland, for example, for municipalities to run cemetery services, is indicated. On the other hand, the so-called network monopoly (e.g. in the field of water supply) is mentioned as a *de facto* monopoly, which does not result from legal restrictions (theoretically, anyone can invest in the creation of a water supply network in a given municipality) but from economic realities (creating a competitive water supply network in a given municipality would be unprofitable) [7; 78-79]. In both cases, the application of aid measures, e.g. in the form of property tax exemptions or relief, can in principle be considered as having no effect on competition and trade.

2. Incomparability of property taxes in EU countries

Indirect taxes, in particular VAT, have been harmonized in the European Union. This means that they have been unified in the various Member States. On the other hand, direct taxes are not subject to harmoniza-

tion, which means that each EU country has full freedom in shaping them (although potentially limited, for example, by regulations in the field of state aid).

As far as income taxes (PIT, CIT) are concerned, despite their differences in individual EU Member States, they are largely comparable. This comparability is possible mainly because the subject of income taxes is very similar in all EU countries: income understood as revenues less costs. The structure of income taxes is also identical, assuming the multiplication of the tax base (income) by a specific tax rate. Therefore, there is no doubt that the exclusion of a category of income from taxation in a Member State (e.g. income from the activity of providing IT services) can easily be compared with the taxation of the same type of income in other countries. Such a comparison may lead to the conclusion that the income tax exemption constitutes unlawful state aid because it favours entrepreneurs operating in one Member State over their competitors with tax residence in other States.

It is difficult to talk about any comparability between EU Member States in the case of property taxes. In particular, this is due to the fact that individual countries have a completely different approach to property taxation. An example is a comparison of property taxes in Poland, Czech Republic and France [10; 269]. Although Poland and Czech Republic are neighbours located in Central Europe and countries with a similar level of economic development, their approach to property taxation is very different. The structure of the tax in both countries is generally similar, but in comparison with Poland, the vast majority of structures forming infrastructure (including railway infrastructure) do not qualify for tax in Czech Republic as not being subject to tax. What's more, the property tax rates in Czech Republic are even several dozen times lower than those operating in Poland. Even more far-reaching differences can be seen when comparing the tax system of France and Poland. In France, several property taxes are in force at the same time, but it is difficult to find an equivalent of the Polish real estate tax when it comes to taxing structures forming infrastructure, e.g. railways. In France, network companies (energy, telecommunications and railways) are subject to an additional flat-rate tax on network companies (imposition forfaitaire sur les entreprises de réseau), which provides flat rates of tax on the objects of taxation specified in the legislation, such as power stations, transmitters or locomotives. It should be pointed out that structures forming part of railway infrastructure (e.g. railway tracks) are not covered by taxation at all.

Therefore, the question arises whether, in view of such a diverse approach to property taxes in EU Member States, it is at all possible to find a common denominator that would allow to determine whether an entrepreneur owning a railway line is treated in a preferential manner by the State in which he operates over entrepreneurs with identical assets in other countries. On the example of the three countries mentioned above, in the case of owners of railway infrastructure, it can be argued that national tax legislation is the most advantageous for Czech and French entrepreneurs, because it does not provide for taxation of railway tracks at all, while Polish legislation generally treats tracks as a taxed structure. The land under the tracks is generally taxed in each of these countries, however in Czech Republic the tax rates are so low that the burden for entrepreneurs is symbolic. Can the tax exemption for railway infrastructure introduced in Poland be considered as a preference putting Polish entrepreneurs in a better situation? Bearing in mind the lack or symbolic taxation of railway assets in other EU countries, it can be concluded that such an exemption in Poland rather equalizes the opportunities of Polish taxpayers compared to their competitors operating in other countries. On the other hand, the absence of property tax paid for the ownership of locomotives can be considered as a tax preference enjoyed by Polish and Czech entrepreneurs in relation to their colleagues from France, which must pay such a tax. Finally, the general (regardless of the sector) very low level of property tax in Czech Republic vis-à-vis Poland and France can be considered as a general tax preference granted by the Czech State to its entrepreneurs. The owner of an industrial plant in Czech Republic, by paying very low property tax, enjoys a significant competitive advantage over a competitor operating in neighboring Poland, which must pay a high property tax. So, do all companies in Czech Republic benefit from state aid?

This long discussion regarding the incomparability of property taxes in different EU Member States leads to the conclusion that in the case of taxes as diverse as property taxes, the issue of potential state aid must be considered with particular caution. It is worth noting that EU regulations do not oblige Member States to collect property taxes. It is therefore possible that in given Member State the assets of entrepreneurs could be not taxed at all with the property tax (even very low). At the same time, it is difficult to imagine that all entrepreneurs operating in this Member State would be considered to benefit from illegal state aid. If so, tax exemptions from property tax for a given category of assets should not, in principle, be considered as state aid, provided, of course, that the condition of selectivity is not met (i.e. their tax exemption is not addressed only to a specific group of taxpayers).

3. Tax exemption for railway infrastructure in Poland — unresolved dispute

The condition of selectivity is a subject to the dispute that has arisen in Poland between tax authorities and taxpayers on the basis of the application of the property tax exemption for railway infrastructure.

On the basis of the Polish property tax, the subject of taxation are land, buildings and structures. Structures are defined as non-building objects and include a railway infrastructure. It should be emphasized that the real estate tax in force in Poland provides for very low rates for land and buildings not related to business activity, while structures owned by natural persons who are not entrepreneurs are excluded from the scope of taxation at all. At the same time, the tax rates on land and buildings used for business purposes are many times higher, and structures belonging to entrepreneurs are taxed at the rate of 2 % per annum on their initial value not reduced by depreciation write-offs (so this is a high burden, within 50 years the taxpayer pays a tax equal to the expenditure on the construction of structures). The provisions governing the real estate tax contained in the Act on Local Taxes and Fees (ALTF) [11] includes a catalogue of tax exemptions, some of which are addressed to owners of various types of transport infrastructure, including railways. In 2017, the Polish legislator significantly extended the scope of the tax exemption for railway infrastructure. Before that date, only public infrastructure was tax exempted, while since 2017, owners of private railway infrastructure (e.g. a railway siding located on the premises of an industrial plant) have also started to benefit from the exemption. The purpose of the introduced regulations was to encourage taxpayers to expand and modernize the railway infrastructure — the condition for benefiting from the tax exemption was the actual use of their infrastructure for transport. Polish local governments, which are beneficiaries of real estate tax and has a role of the tax authorities, have been negative about the changes in the law from the beginning. The potential benefits associated with the development of railway traffic (mainly related to safety and ecology) were less important to them than the measurable financial losses that the extended tax exemption brought to the budgets of municipalities. Local authorities lobbying led to a change in regulations in 2022, which again excluded private infrastructure from the scope of the tax exemption. However, this did not end the case, because starting from 2021, more and more municipalities began to deny taxpayers the right to benefit from the tax exemption for railway infrastructure, arguing that it constitutes illegal state aid.

It should be emphasized that Polish legislator, when introducing the extended exemption from real estate tax in 2017, did not decide to notify state aid to the European Commission, which is required by the provisions of the TFEU in the case of introducing aid measures [12]. However, this was not an oversight, but a conscious decision. The justification attached to the project of the act introducing the extended tax exemption states that the amendment is not subject to notification and is consistent with EU law, because its purpose is not to grant state aid to entrepreneurs, but only to adapt Polish regulations to the EU railway directive (i.e. provisions aimed at the development of railway infrastructure in EU countries).

Disputes between taxpayers and tax authorities began to reach administrative courts, which took a divergent position on state aid. Some courts considered the benefit resulting from the application of the exemption under Article 7(1)(1)(a) of the ALTF in the version from 2017-2021 to be selective, i.e. favouring only certain enterprises and not being able to be obtained under normal market conditions [13]. In other judgments, courts have recognized the right of taxpayers to benefit from the tax exemption unrestricted because they disagreed with the idea that it leads to selective state aid being granted to selected entrepreneurs [14]. In view of the discrepancies in the jurisprudence of Polish courts, the Supreme Administrative Court decided to issue a resolution [15] in which it addressed a question to the Court of Justice of the European Union (CJEU):

(1) In the light of Article 107(1) TFEU, is it distorted or threatened to distort competition for a Member State to grant a tax exemption addressed to all entrepreneurs, such as that provided for in Article 7 of the ALTF, consisting in the exemption from real estate tax of land, buildings and structures forming part of the railway infrastructure?

(2) If the answer to question 1 is in the affirmative, is an entrepreneur who has benefited from an exemption under the above mentioned provision, introduced without complying with the required notification procedure, obliged to pay the overdue tax together with interest?

4. A precedent that will cause a storm in Europe?

Until the judgment of the CJEU (which will most likely take place no sooner than in 2025), Polish entrepreneurs who have benefited from the tax exemption for railway infrastructure will live in uncertainty if they will not have to return the benefits obtained together with interest rates. The arguments for lack of selectivity seem to be quite strong. First of all, it should be pointed out that the exemption in question was addressed to an unlimited circle of taxpayers. Every entrepreneur in Poland can build and use the railway infra-

structure. For example, in case N 507/2007, the European Commission considered the R&D tax credit to be introduced in Italy as a measure not constituting state aid. It was addressed to all entrepreneurs, without differentiating their size and the industry in which they operate (of course, provided that they incurred expenses for research and development activities) [16]. Therefore, it seems that the chances that the CJEU ruling will be favorable for the taxpayers are high.

However, the problem is much broader and goes beyond the issue of railway infrastructure and beyond the borders of Poland. The judgment of the CJEU declaring that the property tax exemption introduced by Poland constitutes illegal state aid will mean serious doubts regarding the regulations in the field of property taxes in all EU countries. First of all, it will be necessary to consider whether countries that do tax the certain categories of property (or tax them at a very low level) do not grant illegal state aid to their entrepreneurs. They undoubtedly obtain a measurable financial advantage (equal to the amount of unpaid tax) compared to competitors who conduct business in countries that tax the same categories of property. It should be emphasized that these are not only theoretical problems. Currently, an investor wondering in which EU country to locate, for example, a factory must compare its future operating costs, including property tax. Differences in the level of taxation of the same factory between different countries can reach hundreds of thousands or even millions of euros per year. Until now, it has been widely recognized that due to the lack of harmonization and incomparability of property taxes, the advantage resulting from lower property taxation is not treated as state aid. The expected judgment of the CJEU may change this significantly interfering with the freedom of EU Member States to shape the property taxes applicable on their territory.

Conclusion

The analysis contained in the article indicates that the application of state aid rules to non-harmonized taxes may raise serious doubts as to the legitimacy of such approach. Member States are free to shape their tax systems, including deciding whether and which categories of property will be subject to property taxes. Meanwhile, considering the property tax exemption (addressed to all taxpayers, and thus not meeting the condition of selectivity) as state aid, interferes with the powers of the Member State. It also leads to unjustified inequality — taxpayers from countries that have not introduced property taxation are in a better position than those taxpayers whose countries taxed property and then exempted it. Such inequality is not justified. The results of the analysis presented in the article may be helpful in analyzing other cases of tax benefits granted on the basis of non-harmonized taxes, in terms of the possibility of treating them as illegal state aid. The article can also serve as a contribution to reflection on the shaping of regulations governing state aid, both in the EU and non-European countries that apply similar regulations or consider their introduction.

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Мемлекеттік көмекке тыйым салу ЕО-ға мүше мемлекеттердегі мүлік салығы туралы заңнамаға әсер етуі керек пе?

Мақаланың мақсаты — Еуроодаққа мүше мемлекеттер арасында айтарлықтай ерекшеленетін мүлік салығы сияқты келісілмеген салықтарға мемлекеттік көмек көрсету ережелерін (ЕО-да міндетті) қолдану мәселесін ұсыну. Польшада енгізілген теміржол инфрақұрылымын жылжымайтын мүлік салығынан босату туралы мәселені Еуропалық әділет соты (ЕӘС) қарайды. ЕӘС бір мүше мемлекеттегі мүлік салығынан босату кәсіпкерлерге берілетін тыйым салынған жеңілдік ретінде қарастырылуы мүмкін бе деген сұраққа жауап беруі керек, өйткені мүліктің ұқсас түріне айтарлықтай төмен салық салынуы мүмкін немесе ЕО-ға мүше басқа мемлекеттерде мүлдем салық салынбайды. ЕӘС үкімі поляк кәсіпкерлері үшін, сонымен қатар ЕО-дағы салық саясаты үшін маңызды. ЕӘС Польша енгізген мүлік салығынан босату заңсыз мемлекеттік көмек болып табылады деп шешкен жағдайда, мүліктің белгілі бір санаттарына салық салмайтын (немесе оларға өте төмен салық салатын) елдер өз кәсіпкерлеріне заңсыз мемлекеттік көмек көрсетпейтіндігі туралы мәселені қарастыру қажет болады.

Кілт сөздер: мүлік салығы, мүлікке салық салу, мемлекеттік көмек, салықтық жеңілдіктер, салықты үйлестіру, ЕО салықтары.

Adam Kałężny

Должен ли запрет на государственную помощь повлиять на законодательство о налоге на имущество в государствах-членах ЕС?

Цель данной статьи заключается в том, чтобы представить проблему применения правил оказания государственной помощи (имеющих обязательную силу в Европейском союзе (ЕС)) к несогласованным налогам, таким как налоги на имущество, которые сильно различаются между государствами-членами. Вопрос об освобождении от налога на недвижимость железнодорожной инфраструктуры, который был введен в Польше, будет рассмотрен *Европейским судом правосудия* (ЕСП). ЕСП должен ответить на вопрос о том, может ли освобождение от налога на имущество в одном государстве-члене рассматриваться как запрещенная льгота, предоставляемая предпринимателям, с учетом того, что аналогичный вид имущества может облагаться налогом значительно ниже или вообще не облагается налогом в других государствах-членах ЕС. Вердикт ЕСП будет важен не только для польских предпринимателей, но и для налоговой политики в ЕС. В случае решения ЕСП о том, что введенное Польшей освобождение от налога на имущество представляет собой незаконную государственную помощь, необходимо будет рассмотреть вопрос о том, не предоставляют ли страны, не облагающие налогом определенные категории имущества (или облагающие их очень низким налогом), незаконную государственную помощь своим предпринимателям.

Ключевые слова: налог на недвижимость, налогообложение имущества, государственная помощь, налоговые льготы, налоговая гармонизация, налоги ЕС.