Sub-National Authority to Tax and the EU Law: A Relationship in Search of Principles

Conceptual bases

The European Treaties do not include any explicit restriction on the competences to be allocated to the local entities, in order to avoid problems with the EU system. Despite the fact that the only subject responsible on an international level for non-compliance with the European law is the Member State and not the sub-national authority, for this mechanisms are provided derogating from the ordinary rules, in order to allow the correct implementation of the EU law (i.e. art. 120(2) Italian Constitution and art. 19(2) LOFCA).

The EU is only interested in the result achieved (i.e. 8th additional measure to the law 42/1994 (Spanish case)) and it involves not only national boundaries but also internal ones (i.e. Carbonati Apuani case (C-72/03)). The prohibition of State aid is a complementary measure to the fundamental freedoms and it has a residual function. The European Treaties do not include any explicit restriction on the competences to be allocated to the local entities, in order to avoid problems with the EU system.

Application

- Customs union (art. 28-37 TFEU)
  - prohibition of customs duties

- Harmonized taxes (art. 113 TFEU)
  - no possibility for local entities to make a difference to the VAT

- Approximation of law (art. 115 TFEU)
  - directives on direct income tax
  - fundamental freedoms (artt. 45-66 TFEU)
  - prohibition of State aid (artt. 107-109 TFEU)

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C-88/03, para. 63-66 – when all the local entities have an autonomous power to decide (↑↓ taxation) – there is no selectivity, because a general framework is missing (EU Commission Decision n. 198/2005 - Italy - para. 44).

- Azores case (C-88/03)
- UGT La Rioja case (C-428/06 to 434/06)
- Gibraltar case (C-106/09 and C-107/09)

For the first time the Court of Justice opposed the circumstance in which the undertaking producing its income abroad has an advantage over the internal situation.

The prohibition of State aid could be helpful to avoid the “reverse discrimination”. The comparability test (i.e. R/NR) is shifted from the national level to the local one. For this mechanisms are provided derogating from the ordinary rules, in order to allow the correct implementation of the EU law (i.e. art. 120(2) Italian Constitution and art. 19(2) LOFCA).

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