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Treaty Freedoms and the Principles of Law

Abstract

This article aims to show the similarity between the arguments developed regarding the Treaty freedoms and the approach to the legal principles proposed by R. Alexy. Treaty freedoms from the Treaty on the functioning of the European Union, developed in the course of the Court's many years of judicial activity, have a number of similarities to the concept of the principles of law proposed by prof. Robert Alex. This is evidenced by – the position of the principles of law in the legal system, the possibility of grading them, or a separate method of resolving the conflict of two opposing principles of law. The article analyses selected treaty freedoms in relation to tax matters and compares them with theoretical schemas proposed by prof. Robert Alexy.

Keywords: taxes, principles of law, European Union

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Foreword

This article will offer an attempt to characterise EU treaty freedoms concerning the matter of taxes and to depict the similarities that occur between the Court of Justice of the European Union's reasoning regarding treaty freedoms and the formulas developed by the theory of law with respect to the principles of law. Given the limitations regarding the length of the publication, it is impossible to offer an exhaustive set of all principles formulated by the CJEU (former ECJ) regarding the matter in question. This is why the scope of the discussion will be limited to a discussion of treaty freedoms in the context of tax law. Two remarks need to be made first, though – the first is that the doctrine has a point in that the CJEU allows itself to shape the law by way of the judicial decisions it issues.[2] The second is that this law-shaping activity affects legal systems – and speaking more precisely, the authorities enforcing law in EU Member States according to the principle of the so-called *de facto* precedent.[3]

Before we proceed with a review of the judicial decisions regarding the matter of taxes, it is reasonable to first quote two rulings that have established the CJEU in the legal order of the EU. The first and crucial ruling is the judgement issued in case C-26/62 of 5 February 1963 (referred to commonly as the Van Gend & Loos case), in which the Court opened the door for individuals to pursue their rights on the basis of the Treaty (the Treaty establishing the European Economic Community) being in force – which granted individuals legal capacity and recognised the legal order shaped after the Treaty was ratified as a legal order separate from the legal orders of particular member states or the international legal order.[4]

The second of the said rulings is the judgement issued in case C-6/64 of 15 July 1964 (referred to commonly as the Costa vs E.N.E.L. case), in which the Court

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2 Cf. e.g.: P. Marcisz, *Koncepcja tworzenia prawa przez Trybunał Sprawiedliwości Unii Europejskiej*, Warszawa 2015, p. 157 et seq.

3 Ibidem, p. 203 et seq.

4 "(...) the conclusion to be drawn from this is that **the Community constitutes a new legal order of international law** (emphasis – M.B.) for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and **the subjects of which comprise not only the member states but also their nationals** (emphasis – M.B.) (...)."

reviewed and quoted the summary from the previous judgement, and introduced the principle of the precedence of community law over national laws.[5]

The principles of law from a theoretical perspective

The notion of a principle of law is a subject of dispute in the doctrine on theoretical and legal grounds;[6] no uniform concept of interpretation of this notion has been worked out yet in the Polish jurisprudence. Prof. Jerzy Wróblewski has suggested that the notion of a principle of law shall be understood as a certain legal norm, distinguishable from the entire set of legal norms because of a set of qualities substantiating its principled nature.

A principle of law – according to J. Wróblewski – is a special legal norm that can be distinguished from a larger set of norms on the basis of the following criteria:[7]

1. The norm's positioning at a specific rank in the hierarchy of a legal system,
2. The norm's relationship with other norms within a system,
3. The norm's role in the isolation of a normative whole,
4. The norm's legitimacy as suggested by extra-legal analyses.

M. Zieliński, Z. Ziembiński, and S. Wronkowska, in turn, have offered a different understanding of the notion, dividing principles into principles viewed from a prescriptive (directive-related) perspective and principles viewed from a descriptive perspective.[8] The prescriptive understanding of principles implies that a principle offers a normative value in the sense that it requires/prohibits certain type of behaviour – with the example being the principle of non-retroactivity, expressed under the Latin maxim of *lex retro non agit*. The descriptive perspective, in turn, is about viewing a principle of law as referring to a legal institution – such as a criminal trial – which it defines and organises; e.g. the disclosure principle or the principle of substantial truth.

On the grounds of the Anglo-Saxon doctrine, the dominant concept of understanding the principles of law is the concept proposed by Ronald Dworkin.[9]

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5 The relevant fragment reads as follows: "(...) **the precedence of community law is confirmed by Article 189** (emphasis – M.B.), whereby a regulation '**shall be binding**' **and** '**directly applicable in all member states**' (emphasis – M.B.) (...)."

6 S. Tkacz, *O zintegrowaniu koncepcji zasad prawa w polskim prawoznawstwie*, Toruń 2014, p. 24.

7 W. Lang, J. Wróblewski, S. Zawadzki, *Teoria państwa i prawa*, Warszawa 1979, pp. 359–360.

8 M. Zieliński, Z. Ziembiński, S. Wronkowska, *Zasady prawa. Zagadnienia podstawowe*, Warszawa 1977, pp. 5–6, 28, 50–51.

9 R. Dworkin, *Biorąc prawa poważnie*, Warszawa 1998, pp. 176–177, 185.

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Dworkin suggested a division of the system of legal norms into rules, principles, and policies. Principles differ from rules in that the latter can take effect in an all or nothing system whereas the former can be graded in terms of their enforceability. Policies, in turn, are a kind of demand addressed to the authorities of a given state, featured in the content of a normative act. On account of their nature, they are not subject to balancing law.

An example is norm (rule) N_1 ordering X to pay 100 tax units. X may comply with the order verbalised as above, but may also decide not to comply with it. But if X pays 99.99 units, the order will not be complied with.

In the case of a principle of law, e.g. the principle of the adversary procedure in a criminal trial or the principle of the freedom of contract in civil law, such problems do not occur. Principles are always enforced, but the extent of this enforcement is limited on account of the difference in the principles applied in particular systems.

The Anglo-Saxon concept was developed by R. Alexy, who suggested his own definition of principles of law: "principles are norms requiring that something be realized to the greatest extent possible, given the factual and legal possibilities at hand."[10]

Moreover, Alexy improved Dworkin's concept of the avoidance of conflicting legal principles, which is a different issue than in the case of conventionally understood principles of law.

Here, if there is a conflict between legal norms, the extents of standardisation or of the application of both norms are modified in a way so that both norms can be applied. If such measures appear to be insufficient, the solution is to reach for conflicting rules and decide which of them is to be applied. The situation is different with principles of law, though. Principles often come with a certain significance, so the process of resolving conflicts has come to be called balancing. A law-enforcing entity – e.g. a court, when faced with a conflict between two principles of law, decides which of them is enforced to a greater extent in a given case (meaning which of them has a greater significance).

Example: In the event of a conflict between the principle of the freedom of contract and the principle of contractual nominalism, the court will decide if a given contract includes elements that make it a nominate contract or if the parties have modified their legal relationship to the extent that the contract may not be classified as a nominate contract.[11] Even if the court finds that a given contract is a nominate contract in civil-law terms, it may not be said that the principle of the freedom

[10] R. Alexy, *A Theory of Constitutional Rights*, Oxford 2002, p. 47.

[11] Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna*, Warszawa 2014, pp. 129 and 149.

of contract is not materialised (even though the rate of detectability of the principle of contractual nominalism compared to the principle of the freedom of contract may be 99:1).

In the light of the above discussion, it appears that there is no single way to interpret principles of law on the grounds of the Polish jurisprudence. Which is why it is necessary to adopt a consistent definition of the concept of the principles of law, as proposed by R. Alexy.

Treaty freedoms

Treaty freedoms are legal norms applicable on the grounds of the Treaty on the Functioning of the European Union. Defined *expressis verbis* in Part III, Title II, Article 28 – establishing the free movement of goods and Title IV accordingly: Article 45 – free movement of persons, Article 49 – freedom of establishment, Article 56 – free movement of services, Article 63 – free movement of capital – are the fundamental legal norms of the EU law.

The first of the mentioned freedoms – one concerning the free movement of goods under Article 28 of TFEU,[12] acts also as the foundations for CJEU's further decisions regarding the interpretation of treaty freedoms. The first paragraph – of relevance to our discussion – reads as follows:

> "1. The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries."

Based on a regulation formulated in such a general manner, the Court of Justice, in the course of formulating legal conclusions, derived three so-called *formulas*[13] concerning the said measure of an effect equivalent to quantitative limitations.

In judgement C-120/78, the Court of Justice determined how it controlled the regulation (norm) of the Member State in terms of compliance with the treaty freedom. The adopted formula has a "steplike" structure (meaning that if the first

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[12] More on the freedom in question – see e.g.: S. Leible, *Swobody wspólnotowe w Traktacie ustanawiającym Wspólnotę Europejską. Swoboda przepływu towarów, usług i przedsiębiorczości. Komentarz*, Warszawa 2009, pp. 15–79.

[13] This concerns rulings issued in the following cases: C-8/74 of 11 July 1974 (Dassonville); C-120/78 of 20 February 1979 (Cassis de Dijon); joint cases C-267/91 and C-268/91 (Keck).

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criterion is fulfilled, the Court of Justice proceeds to the next, and so on), and is as follows:

a) The application of domestic measures restricting trade may be justified on the grounds of Article 36 of the Treaty on the Functioning of the European Union,[14]
b) There are no EU harmonisation regulations in a given field,[15]
c) The domestic measures are applied in a non-discriminating manner (to both domestic and foreign goods),[16]
d) The applied measures are proportional – commensurate to the intended objective,[17]
e) They take the EU interest in the freedom of movement of goods into consideration.[18]

The above line of reasoning of the Court of Justice needs a few words of commentary. First, Article 36 of the Treaty on the Functioning of the European Union includes a set of values the Court of Justice needs to take into consideration when issuing rulings because of their significance. These are: public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.

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14 "(...) as regards the protection of public health the German government states that the purpose of the fixing of minimum alcohol contents (...) is to avoid the proliferation of alcoholic beverages on the national market, (...) since, in its view, such products may more easily induce a tolerance towards alcohol than more highly alcoholic beverages" – judgement C-120/78 of 20 February 1979.

15 "(...) **in the absence of common rules relating to the production and marketing of alcohol** (emphasis – M.B.) – a proposal for a regulation submitted to the Council by the Commission (...) not yet having received the Council's approval – it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory" – judgement C-120/78 of 20 February 1979.

16 "(...) in practice, the principle effect of requirements of this nature is to promote alcoholic beverages having a high alcohol content by excluding from the national market products of other Member States which do not answer that description" – judgement C-120/78 of 20 February 1979.

17 "(...) **this line of argument cannot be taken so far as to regard the mandatory fixing of minimum alcohol contents as being an essential guarantee of the fairness of commercial transactions** (emphasis – M.B.), since it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of products" – judgement C-120/78 of 20 February 1979.

18 "(...) it is clear from the foregoing that **the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods** (emphasis – M.B.), which constitutes one of the fundamental rules of the Community".

If a Member State has imposed restrictions to a treaty freedom because of a possibility of one of such values being violated – such a restriction should be considered compliant with the EU law. This is why the Court of Justice first checks if a given regulation subject to control may not be justified on the grounds of the values listed in Article 36 of TFEU. If so, there is no need for a further analysis. If there is a need, the Court proceeds to the next item.

As for the EU harmonisation measures, the Court of Justice means both directives and rulings. If such a directive (which should be implemented into the legal system of a given Member State after some time) or ruling is issued – it is enough for the Court of Justice to quote such regulations and the case is closed (even if a given directive is not implemented into a given Member State's legal system). But if it is not so, the Court of Justice moves to the third item of the formula.

The application of national measures does not lead to discrimination – the fact of imposing restrictions by a Member State may be in accordance with the freedom of movement of goods if it applies to both domestic and foreign goods in equal measure. If this is not the case, the Court of Justice refers to the fourth item of the formula in question.

The commensurability of measures consists in a State raising an argument for a given restriction – e.g. an obligation to obtain a special certificate, and the Court of Justice examines if the objective is achievable using less severe measures than a measure equivalent to a quantitative restriction. If the answer is positive, the Court of Justice considers the measure against the treaty freedom at issue – otherwise it moves to the last point of the said formula.

Measures of effects equivalent to quantitative restrictions may, according to the Court of Justice, remain in application if the examination of the remaining four sub-items gives a negative outcome, but only if they take the EU interest in the free movement of goods into consideration. However, no definition of the EU interest in the free movement of goods has been offered yet. This is a non-specific concept, whose content may be looked at in more detail in the course of an analysis of CJEU's judicial decisions regarding this freedom of movement of goods. It is therefore at the CJEU's discretion to decide if the legislation of a Member State takes the EU interest in the free movement of goods into consideration or not.

The above line of thought, regarding measures of an effect equivalent to quantitative restrictions, is similar to the formula of weighing the principles of law. It is important to mention that the Court of Justice assigns significance to values given in Article 36 of TFUE (which will always appear more significant in this case than a treaty freedom) already at the beginning of its line of argument.

Furthermore, when determining if the measures considered are proportionate, we are also dealing with assigning significance – even though it seems that the Court

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of Justice looks for a least burdensome alternative. This is not true as the free movement of goods (under Article 28 of TFUE) is what is behind this alternative. If such an alternative is found, the freedom that expresses it will overrule the regulation implemented by a given Member State.

In the last of the judgements that shaped the so-called *formulas* to the greatest extent – meaning the judgement issued in joint cases C-267/91 and C-268/91 (referred to as the Keck judgement), the Court of Justice added one more condition the provision of a Member State needs to fulfil in order not to be considered contrary to the treaty freedom of movement of goods. The Court of Justice found that the measures implemented by a Member State were in accordance with the freedom of movement of goods as long as they applied to all traders operating within the national territory of the State and as long as they did not hinder market access to foreign goods more than they did so to domestic goods.[19]

The Court of Justice's abovementioned argumentation offers a case of application of the optimisation of a treaty freedom. It seems that the Court of Justice found the previous judgement, which established the formula of analysis of provisions with respect to the violation of a treaty freedom, non-exhaustive, which is why it was supplemented. We can therefore add item "f" to the abovementioned formula, with the item reading as follows: "The measures applied by the Member State affect both domestic and foreign goods in equal measure". A provision that has fulfilled the criteria of all sub-items of the above formula except for the last one may thus be considered in violation of the treaty freedom of movement of goods by the Court of Justice. It is enough for such a provision to apply to not all traders operating in the market of a given Member State to be in breach of the treaty freedom of the movement of goods – which proves the highly discretionary nature of the Court of Justice's judgements and the non-specificity of the notion of the treaty freedom of the movement of goods. It can therefore be said that the significance the Court of Justice assigns to the freedom of movement of goods, as a result of the judgement issued in the "Keck" case, has become greater because individual Member States find it much harder to implement regulations which the Court of Justice would not consider measures equivalent to quantitative restrictions – which is against the treaty freedom of the movement of goods.

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[19] "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] ECR 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 State**" (emphasis – M.B.).

In the case of other treaty freedoms, the Court of Justice's judicial decisions have resulted in the creation of a so-called discrimination test.[20] To put it in simple terms, the test works as follows:

1. First, the Court of Justice decides if the taxable person is within the subjective-objective scope;
2. Second, it checks if the provisions impose a tax obligation in a manner differentiating the amount of the taxes payable for e.g. domestic entities and foreign entities;
3. Third, it checks if the differences in the taxes payable are based on the criteria prohibited in the Treaty;
4. Fourth, it checks if the differentiation occurring in a given case is sufficiently justified and motivated.

It needs to be stressed that the test described above is essentially similar to the procedure of weighing the principles of law. By applying the test to Member States' legislation, the Court of Justice refers basically to values. The Court of Justice checks if the principle of non-discrimination has already been violated at the second stage.

The third stage involves a reference to the set of values under Article 36 of TFUE mentioned above (this is to mean the remaining criteria, i.e. not listed under Article 36 of TFUE as the EU legislator has considered this set exhaustive).

At the last stage, the Court of Justice may refer to "any"[21] values regarding a regulation's violation of a given treaty freedom. Yet, it is necessary to bear in mind that the Court of Justice may also refer to the objective and the "spirit" of the Treaty, which is also, in a sense, a value of the EU law.

Each reference to the values in question requires the Court of Justice to assign appropriate weights to them and, in consequence, follows up with the procedure of weighing the principles worked out by the theory of law.[22]

But in order to offer a complete picture of the Court of Justice's application of treaty freedoms, we need to look into the judicial decisions issued in relation to the remaining treaty freedoms applied to tax matters. The content-wise limitations of the paper make it possible to cover all of the relevant judicial decisions – hence the analysis will focus on the following:

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20 Cf. e.g.: A. Zalasiński, *Test podatkowej dyskryminacji sprzecznej z prawem w postępowaniu sądowo-administracyjnym WE*, "Monitor Podatkowy" 2007, 8, p. 10 et seq.

21 "Any" – since it is impossible to imagine that the Court of Justice refers to values not related to a given treaty freedom.

22 As for the method of weighing the principles of law – see: M. Kordela, *Zasady prawa. Studium teoretycznoprawne*, Poznań 2012.

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1. As for the freedom of establishment[23] – Judgement C-81/87 (Daily Mail case) and judgement C-80/94 (Wielockx case);
2. As for the free movement of persons[24] – Judgement C-204/90 (Bachmann case) and judgement C-279/93 (Schumacker case);
3. As for the free movement of services[25] – Judgement C-136/00 (Danner case) and judgement C-234/01 (Gerritse case);
4. As for the free movement of capital[26] – Judgement C-35/98 (Verkooijen case) and judgement C-319/02 (Mannien case).

In the case of the first of the abovementioned freedoms, meaning the freedom of establishment under Article 49 of TFEU – it is necessary to emphasise that when referring to this freedom in case C-81/87 (Daily Mail case), the Court of Justice shifted its considerations to the sphere of the interpretation of law. In the first item of the summary of its judgement, the Court of Justice argues:

> "Therefore, in the present state of Community law, Articles 52 and 58 of the Treaty, **properly construed** (emphasis – M.B.), confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State."[27]

According to the existing theory of law, principles of law shall be taken into consideration at the stage of external system interpretation. Such a view is in line with the Court of Justice's argumentation. Whenever the Court of Justice mentions the concept of "properly construed", it means the interpretation of law. Moreover, the use of this expression implies a recommendation regarding the optimisation of the application of treaty freedoms. A treaty freedom may not be interpreted freely and discretionarily. Its content shall be read appropriately to given factual circumstances. Moreover, the Court of Justice does not rule out an option to transfer a company's management elsewhere pursuant to a given treaty freedom – which is substantiated by e.g. the following expression: "in the present state of Community

23 More on this freedom – see e.g.: U. Forsthoff, A. Randelzhofer (eds.), *Swobody wspólnotowe w Traktacie ustanawiającym Wspólnotę Europejską. Swoboda przepływu towarów, usług i przedsiębiorczości. Komentarz*, Warszawa 2009, p. 363 et seq.

24 Ibidem, p. 209 et seq.

25 Ibidem, p. 408 et seq.

26 Ibidem, p. 209 et seq.

27 In this judgement, the British company wanted to change its tax residence by transferring its management to another (more tax-favourable) Member State.

law." We need to remember that the judgement was passed in 1988 – and the Community law has changed considerably since then.

In the second of the said cases concerning the freedom of establishment – i.e. case C-80/94 (Wielockx case),[28] the Court of Justice used the abovementioned discrimination test and argued in the summary of the judgement that:

> "**A rule laid down by a Member State** (emphasis – M.B.) which allows its residents to deduct from their taxable income business profits which they allocate to form a pension reserve but denies that benefit to Community nationals liable to pay tax who, although resident in another Member State, receive all or almost all of their income in the first State, cannot be justified by the fact that the periodic pension payments subsequently drawn out of the pension reserve by the non-resident taxpayer are not taxed in the first State but in the State of residence – with which the first State has concluded a double-taxation convention – even if, under the tax system in force in the first State, a strict correspondence between the deductibility of the amounts added to the pension reserve and the liability to tax of the amounts drawn out of it cannot be achieved by generalizing the benefit. **Such discrimination is therefore contrary to Article 52 of the Treaty** (emphasis – M.B.)."

The Court of Justice's interpreting a treaty freedom this way becomes quite problematic. On the one hand, the Court of Justice indicates a Member State's regulations which are contrary to the Treaty. Moreover, it points to the value of equality of EU citizens before the law (also tax law) and the conflicting value of a Member State's tax control (and even refers to the abovementioned discrimination test, which is essentially similar to the procedure of principle weighing) – but it is impossible to say in what ways this control could be exercised even to the smallest extent with respect to the conflicting value of EU citizens' equality before the law. Determining the degree of applicability of the principle of tax control of a Member State is impossible in the circumstances at issue (it would be necessary to assume that the challenged norms of the Member State have been derogated in this case, but the Court of Justice has no such competence).

In the case of the next freedom – the freedom of movement of persons, the Court of Justice addressed it in the context of tax matters in the judgement issued

[28] More on this judgement – see e.g.: M. Uss, *Komentarz do wyroku TS z dnia 11 sierpnia 1995 r. w sprawie C-80/94 G.H.E. J. Wielocx v. Inspecteur der Directe Belastinger, ECR 1995*, [in:] W. Nykiel, A Zalasiński (eds.), *Orzecznictwo Trybunału Sprawiedliwości Unii Europejskiej w sprawach podatkowych*, Warszawa 2014, pp. 115–123.

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in case C-204/90 (Bachmann case) – in this case, the plaintiff demanded the possibility to deduct the sickness and invalidity insurance contributions paid to a German insurance company for income earned in Belgium. The Belgian authorities refused the plaintiff such a right, and the case was referred to the Court of Justice.[29] In the summary of the judgement issued in the case in question, the Court of Justice states directly:

> "legislation of a Member State which makes the deductibility of sickness and invalidity insurance contributions and pensions and life assurance contributions conditional on those contributions being paid in that State **is contrary to Articles 48 and 59 of the Treaty (now Article 45 and 59 of the Treaty – note by M.B.)** (emphasis – M.B.). However, that condition may be justified by the need to preserve the cohesion of the applicable tax system. That need may exist, for example, where the tax system of a Member State is such that the deductibility of the contributions is offset by the taxation of payments made by insurers pursuant to the contracts, and vice versa, and where it would be impossible to ensure that the deductions were offset by subsequent taxation of payments because payments arising from the deductible contributions were made by a foreign insurer established in another country where there would be no certainty of subjecting them to tax. **Such legislation is not incompatible with Articles 67 (now repealed – note by M.B.) and 106 of the Treaty (now Article 107 of the Treaty)**" (emphasis – M.B.).

In the light of the above, it needs to be acknowledged that this is an example of the Court of Justice treating a treaty freedom like a principle of law. The Court of Justice found that there was a contradiction between national regulations and a treaty freedom, but as a result of the weighing procedure, it was found that the value behind the consistency of the tax system of the Member State was higher than the value of the treaty freedom at issue. We cannot say that the Court of Justice ruled out the treaty freedom at issue definitely – since as it has been said, the Court of Justice argued in the summary of the judgement that the national legislation was at variance with the treaty freedom. It can be assumed that in any other case a conflict between the freedom of movement of persons with another value (other than the consistency of a Member State's tax system) would be settled

[29] More on the matter – see e.g.: A. Jerzykowski, *Komentarz do wyroku TS z dnia 28 stycznia 1992 r. w sprawie C-204/90 Hans Martin Bachmann v. Państwo Belgijskie, ECR 1992*, [in:] ibidem, pp. 80–94.

in favour of the former. The principle of law at issue was optimised, taking the factual and legal circumstances into consideration.

In the second case regarding the free movement of persons, i.e. case C-279/93 (Schumacker case),[30] Mr Roland Schumacker, a citizen of Belgium, earned his income in Germany in the period from May 1988 to December 1988. According to the provisions of the Double Taxation Agreement between the Federal Republic of Germany and the Kingdom of Belgium, the income gained by the plaintiff was taxed in the country of his employment (Germany). A simplified, flat-rate tax procedure was applied to the plaintiff, which resulted in him being classified under tax category I. The plaintiff claimed, in turn, that the fact that he was married and had children, and his wife was unemployed, he should have come under tax category III and was therefore entitled to a return of the occurring difference. The case was referred to German tax authorities, and eventually to the Court of Justice, who interpreted the free movement of persons in a very extensive manner. It found as follows:

> **1.** "Accordingly, Article 48 of the Treaty (now Article 45 of the Treaty) **must be interpreted as being capable of limiting the right of a Member State to lay down conditions concerning the liability to taxation of a national of another Member State and the manner in which tax is to be levied on the income received by him within its territory, since that article does not allow a Member State** (emphasis – M.B.), as regards the collection of direct taxes, to treat a national of another Member State employed in the territory of the first State in the exercise of his right of freedom of movement less favourably than one of its own nationals in the same situation.
>
> **2.** It follows that Article 48 of the Treaty (now Article 45 of the Treaty) **must be interpreted as precluding the application of rules of a Member State** (emphasis – M.B.) under which a worker who is a national of, and resides in, another Member State and is employed in the first State is taxed more heavily than a worker who resides in the first State and performs the same work there when the national of the second State obtains his income entirely or almost exclusively from the work performed in the first State and does not receive in the second State sufficient income to be subject to taxation there in a manner enabling his personal and family circumstances to be taken into account.

[30] More on the matter – see e.g.: M. Jamroży, *Komentarz do wyroku TS z dnia 14 lutego 1995 r. w sprawie C-279/93 Finanzamt Koln-Altstadt v. Roland Schumacker, ECR 1995*, [in:] ibidem, pp. 106–115.

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> **3.** Article 48 of the Treaty (now Article 45 of the Treaty) **must be interpreted as precluding legislation of a Member State on direct taxation** (emphasis – M.B.) under which the benefit of procedures such as annual adjustment of deductions at source in respect of wages tax and the assessment by the administration of the tax payable on remuneration from employment is available only to residents, thereby excluding natural persons who have no permanent residence or usual abode on its territory but receive income there from employment."

This extensive, three-item summary of the judgement results from the line of thought adopted by the Court of Justice. It is all the more interesting in the light of this article because it refers again to the sphere of the interpretation of law. Starting from the first item of the judgement, the Court of Justice defines how the free movement of persons should be interpreted. First, Article 45 of TFEU is to be interpreted as "being capable of limiting (...) the manner (...)", which proves that the Court of Justice decided that the conflict occurring in the case in question could not be settled in an absolute terms. And so it is necessary to optimise one of the conflicting values – not now but "for future consideration", so to speak. This is why the Court of Justice points to a potential conflict between the said treaty freedom and the tax control of the Member State. Secondly, the Court of Justice finds that Article 45 of TFEU: "must be interpreted as precluding the application of (...)" tax discrimination of employees on the grounds of the place of residence. Referring to strict interpretation in this case is no coincidence – because as it is raised at the beginning of this chapter, the Court of Justice applies the so-called discrimination test, which is clearly similar to the procedure of weighing the principles of law – and this is exactly what is occurring here. In addition, the Court of Justice refers to the sphere of the application of law, and so we can assume that the law enforcing authorities may refuse to apply regulations which are against Article 45 of TFEU in the context of employee discrimination.[31]

Thirdly – and this is the most interesting part of the judgement, the Court of Justice finds that Article 45 of TFEU: "must be interpreted as precluding (...)" – which is a clear reference to the principles of law, but not to the very procedure of weighing, but rather to their significance and the large degree of generality. The Court of Justice gives Member States clear instructions on how to understand the freedom in question – and even, one could say, instructs them on how to solve potential future conflicts between domestic legislation and the treaty freedom.

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[31] As for the authorities' application of the EU law ex officio – see e.g.: M. Baran, *Stosowanie z urzędu prawa Unii Europejskiej*, Warszawa 2013 and the sources cited therein.

When it comes to another treaty freedom – the freedom to provide services under Article 56 of TFEU, we should look into judgement C-136/00 of 3 October 2002 (Danner case) first. In the case in question, the Court of Justice found as follows:

> "**Article 59 of the Treaty (now Article 56 of the Treaty – note by M.B.) is to be interpreted as precluding a Member State's tax legislation from restricting or disallowing the deductibility for income tax purposes of contributions to voluntary pension schemes paid to pension providers in other Member States** (emphasis – M.B.) while allowing such contributions to be deducted when they are paid to institutions in the first-mentioned Member State, if that legislation does not at the same time preclude taxation of the pensions paid by the abovementioned pension providers."

Mr Rolf Dieter Danner was a doctor working in Germany and paying the obligatory social insurance contributions there. In 1977 he went to Finland where he still worked as a doctor and voluntarily kept paying – contributions in Germany in case of disability and to be entitled to a higher pension. The Finnish legislation initially provided for a possibility to deduct the contributions for pension plans – both domestic and foreign – from the tax base for the income tax in full. But as of 1 January 1996, as a result of an amendment, the possibility to make tax deductions for foreign insurance plans was limited. In the light of the above, the Finnish tax authority decided, based on transitional regulations, that Mr Danner had the right to deduct only 10% of the tax base. Mr Danner disagreed and the case was eventually referred to the Court of Justice in the form of a request for a preliminary ruling.

The abovementioned summary of the judgement passed in case C-136/00 is all the more interesting because it is based – again – on a reference to the interpretation of law. First it was argued that the Court of Justice actually created law, and that the nature of its judicial decisions is that of the so-called *de facto* precedent. Such a perspective prevents significant interference because it does not so much derogate norms contrary to a given system of law as it deprives the national legislator of its competence. The Court of Justice stresses here that a correct interpretation will determine a Member State's inability to establish legislation that would prevent deducting pension contributions paid to an insurance institution in another Member State from income tax. From the point of view of the Polish legal system, such an interpretation is contrary to e.g. Article 81 of the Constitution of the Republic of Poland, which defines an exhaustive set of the sources of law. Depriving a national legislator (Member State) of the ability to establish norms not because of the fact of a treaty freedom being in force in the system but because of a correct interpretation of this freedom, where the interpretation is to be in line with the Court

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of Justice's construction thereof, is a far-reaching instance of interference in Member States' sovereignty, especially in their respective tax control frameworks. Therefore here the Court of Justice refers to an abstract sphere, on the level of which it is impossible to settle the conflict related to the principles of law – as they have to always be viewed from the perspective of particular factual circumstances.

As for the matter of the freedom at issue, another case under analysis is case C-234/01 of 12 June 2003 (Gerritse case). Here, we should look into only the following part of the judgement summary, where the Court of Justice argues as follows:

> "**1. Article 59 of the EC Treaty (now Article 56 of TFEU – note by M.B.) and Article 60 of the EC Treaty (now Article 57 of TFEU – note by M.B.) preclude a national provision such as that at issue in the main proceedings which, as a general rule, on the one hand, takes gross income into account when taxing non-residents, without deduction of business expenses** (emphasis – M.B.), whereas residents are taxed on their net income after deduction of their business expenses (...)"

The Court of Justice applied the discrimination test in the judgement at issue. But unlike the previous judgement regarding the freedom in question, there is no reference to the sphere of interpretation. Instead, the Court of Justice deduces the impossibility of the application of Member States' legislation contrary to the freedom at issue on the basis of the very fact of this freedom being in force. In addition, there appears an option for the Member State to implement regulations that would differentiate the situation of residents and non-residents, which would be in accordance with the freedom to provide services. We can imagine a regulation that makes the net income of non-residents of a Member State subject to taxation as a rule – which is *a contrario* to the Court of Justice's claim. Such a solution makes both principles – i.e. the treaty freedom and a Member State's tax control framework in force, but according to the existing body of the theory of law, the applicability of these legal principles has been graded. However, it is impossible to say whether the Court of Justice has made an optimisation, taking the factual and legal circumstances into account, as it has not formulated any conditions regarding the future regulations of the Member State implemented in this matter.

As for the last treaty freedom, i.e. the freedom under Article 63 of TFUE, we should take a closer look at case C-35/98 (Verkooijen case). In the fragment of the judgement summary of relevance to us, the Court of Justice finds that: "**Article 1(1) of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty** (now Article 63 of the Treaty – note by M.B.) **precludes a legislative provision of a Member State which, like the one at issue in the main**

proceedings (emphasis – M.B.), makes the grant of an exemption from the income tax payable on dividends paid to natural persons who are shareholders subject to the condition that those dividends are paid by a company whose seat is in that Member State. The position is not in any way changed by the fact that the taxpayer applying for such a tax exemption is an ordinary shareholder or an employee who holds shares giving rise to the payment of dividends under an employees' savings plan" – in order to understand the argument, it is necessary to look into the facts of the case, if only superficially.

Mr Verkooijen, working in a company with its seat in the Netherlands, acquired a block of shares in a Belgian company who was his Dutch employer's shareholder. As a shareholder, he received a dividend in the amount of NLG 2,337 from the Belgian company. The dividend was subject to deduction at source of 25% in Belgium. In his Dutch tax return, Mr Verkooijen included that dividend as part of his taxable income – but the Dutch system offered exemptions that were not applied in the case in question (e.g. a tax exemption up to the amount of NLG 1 thousand, and up to NLG 2 thousand in the case of married couples and of collecting tax on dividend from a Dutch resident who received the dividend from a Dutch company – the tax then was an advance payment towards personal income tax paid, but if the dividend was paid out by a foreign company – the amount did not become such an advance payment).

In the light of the above, Mr Verkooijen appealed against the decision of the tax authorities, and the case was referred to the Court of Justice. The Court of Justice applied the said discrimination test and ruled as above. As regards the analysis of the judgement's summary with respect to the principles of law, it needs to be said that – as quoted in the introduction to this chapter – the discrimination test is highly similar to the procedure of weighing the principles of law. Moreover, the Court of Justice found as follows: "Article 1(1) of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (now Article 63 of the Treaty – note by M.B.) precludes a legislative provision of a Member State which, like the one at issue in the main proceedings (...)" – which is incontrovertible proof that the treaty freedom was treated like a significant norm, one having an impact on the legal systems of the Member States. Given such a formulation of provisions causing the same effect as a provision examined by the Court of Justice, such a provision – if questioned – will be contrary to the treaty freedom of movement of capital under Article 36 of TFEU. As mentioned earlier, examining a norm resulting from a provision in terms of its compliance with the principles of law occurs only at the judicial stage of the application of law – which leads to the assumption that it will not occur at the stage of application of law by a tax authority. To conclude, the judgement needs to be interpreted as a guideline for Member States' courts

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who are to adjudicate on the matter of the non-compliance of provisions having a purpose similar to that above with the EU law (if this is within the scope of their competence) – and speaking more specifically, with the freedom under Article 36 of TFEU. The judgement under analysis also includes arguments against treating the treaty freedom like a principle of law – The Court of Justice does not apply an optimisation thesis here. It assumes that every provision of the Member State, established for the same purpose as the challenged provision, will be contrary to the treaty freedom of movement of capital, which makes it impossible to tell the extent to which the Member State could make use of the conflicting value – being its exercised tax control. The following fragment seems to prove just that: "(...) The position is not in any way changed by the fact that the taxpayer applying for such a tax exemption is an ordinary shareholder or an employee who holds shares giving rise to the payment of dividends under an employees' savings plan." Such an interpretation completely rules out the option to differentiate the situation of taxable persons who have acquired shares as part of an employee savings plan from situations of taxable persons who have acquired shares otherwise, e.g. on the free market. In the light of the above, the judgement provides arguments both for the Court of Justice's recognition of treaty freedoms as principles (or subconscious implication of the body of the existing theory regarding the principles of law with respect to treaty freedoms) and against the Court of Justice's constructing them as such.

Another case that should be analysed in the context of the free movement of capital is case C-319/02 (Manninen case). In the case in question, the Court of Justice found as follows:

"**Articles 56 EC and 58 EC (now Article 63 and 65 of TFEU – note by M.B.) preclude legislation** (emphasis – M.B.) whereby the entitlement of a person fully taxable in one Member State to a tax credit in relation to dividends paid to him by limited companies is excluded where those companies are not established in that State." – in this judgement, as in the previous one, the Court of Justice applied the discrimination test, which, as said earlier in the chapter, is highly similar to the procedure of weighing the principles of law. It is also important to bear in mind the expression used by the Court of Justice, which is: "(...) preclude legislation (...)". The Court of Justice interpreting the scope of a treaty freedom in such a way is quite problematic. But it shall be assumed that the Court of Justice intended to encompass any and all legal regulations (provisions) of EU Member States in its judgement since this was only way could it prevent re-examining cases that have already been subject to hearing.[32]

[32] It is, of course, important to bear in mind the *acte claire* and *acte eclaire* worked out in the case law and the doctrine.

Such an expression shall be understood as indicating a very broad range of possible applications of the treaty freedom in question. As mentioned in the first chapter of the paper, principles of law are highly general, which makes them applicable to an entire range of cases. Nevertheless, the main problem is whether the Court of Justice intended to (next to pronouncing the regulations currently in force contrary to the EU law) prevent Member States from establishing new legislation of a similar purpose by including a relevant prohibition in the judgement. If this is so – and the expression the Court of Justice used can be understood as such,[33] then according to what has been established earlier, it needs to be said that this is an act of considerable interference of the Court of Justice in the competence of the Member States. But it should be assumed that if this were the case, the Court of Justice would mention such a prohibition explicitly in the summary of the judgement. Still, it is impossible to say that the Court of Justice optimised the treaty freedom in question taking the factual and legal circumstances into account as it did not formulate any criteria that would determine when a Member State could introduce regulations providing for a differentiation in the situation at issue – and so the outcome of the weighing procedure was that one of the principles (here, a treaty freedom) was given precedence, and if there is a conflicting principle, it is impossible to determine the extent to which it applies.

Conclusion

To summarise, the judicial decisions of the Court of Justice of the European Union have borne fruit in the form of methods similar to weighing the principles of law appearing in the existing legal framework, i.e. the previously mentioned discrimination test or particular "formulas". Unfortunately, the judicial practice concerning particular treaty freedoms (including the tax matter covered in this article) is inconsistent as cases occur – like the ones discussed above – in which the Court of Justice speaks in categorical terms of an impossibility of establishing norms contrary to a treaty freedom, which makes it impossible to say whether it would treat a given freedom as a principle of law in a given case. Such a diversification in the judicial practice does not favour the standardisation of understanding treaty freedoms – either as principles of law or as norms (rules).

[33] The expression "preclude legislation" can, after all, be understood as – "oppose regulating" a certain matter (e.g.: in the field of levy relationships) for future consideration or as regulating a given matter at present.

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