



8.9.2022

NOTICE TO MEMBERS

Subject: Petition No 1153/2020 by M. R. (Polish), on violation of EU rules by the Polish tax authorities

1. Summary of petition

The petitioner alleges that Polish tax authorities violate fundamental values of the European Union such as respect of human dignity, freedom, democracy, equality, the rule of law and the fundamental human rights such as respect for human rights, including the rights of persons belonging to minorities. Those violations stem from wrongful interpretation of tax law in case of sailors by tax authorities and courts as well as from setting new rules based solely on fiscal premises. In a lengthy and detailed submission, the petitioner enumerates the violations of the following articles: article 19 of TEU, articles 41, 47 of the Charter of Fundamental Rights, regulation 391/2009 on common rules and standards for ship inspection and articles of the ECHR. The violations concern sailors working on vessels not covered by agreements on avoiding double taxation; wrongful definitions of managing authority of ships and of sea transport by tax authorities; imposing taxes despite rules providing for tax exemptions; the standpoint of administrative courts as regards pro-fiscal policy of tax authorities, envisaged draft measures as regards taxation discriminating sailors (removal of tax relief).

2. Admissibility

Declared admissible on 12 February 2020. Information requested from Commission under Rule 227(6).

3. Commission reply, received on 8 September 2022

The petitioner, complains about the decisions of the Polish tax authorities relating to the double taxation regime for sailors working on vessels not covered by agreements on avoiding such double taxation.

The petitioner considers the interpretation of the existing Polish legislation by the Polish courts to be in violation of Council Regulation (EC) No 319/2009¹, of Article 19 of the Treaty on European Union (TEU), and of several fundamental rights enshrined in the EU Charter of Fundamental Rights, namely Article 41 (on the right to good administration), and Article 47 (on the right to an effective remedy and fair trial).

The Commission's observations

Under the Treaties on which the European Union is based², the Commission has no general powers to intervene with the Member States in the area of fundamental rights. It can only do so if an issue of European Union law is involved.

The EU Charter of Fundamental Rights does not apply to every situation of an alleged violation of fundamental rights. According to its Article 51(1), the Charter applies to Member States only when they are implementing EU law. Moreover, Article 6(1) TEU states that, 'the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties'. For more information concerning the Charter and the circumstances in which it applies, the petitioner may consult the fundamental rights section on the website of the Commission's Directorate-General for Justice and Consumers³.

This means – with respect to the scope of application of Article 47 of the Charter – that an individual may rely on that provision to invoke the protection of their right to an effective remedy and to a fair trial in the context of proceedings before national courts only insofar as those proceedings are related to the alleged violation of rights and freedoms which individuals may derive from EU law, or whose object is related to the application or the implementation of provisions of EU law.

In the present case, following an analysis of the information provided in the petition, the Commission could not identify any provision of EU law, which might find application in the context of the proceedings to which the petitioner refers, since the matters concerned are the sole competence of the Member States.

As EU law stands at present, direct taxation falls essentially within the competence of Member States. EU secondary legislation in the area of direct taxation is limited. In areas where no EU secondary legislation is applicable, it is for the Member States to design their own tax systems, and to decide whom and what to tax, when to tax, at what rate and how. However, they have to respect their obligations under the Treaty on the Functioning of the European Union (TFEU). Thus, they are not allowed to discriminate in their tax laws on the basis of nationality or residence against the nationals of any Member State or against anyone who exercises the freedoms granted under the TFEU. Nor can they apply unjustified and disproportionate restrictions on the exercise of these freedoms.

It follows that the TFEU prohibits discrimination on the basis of nationality within a strictly determined scope, i.e. in respect of persons exercising the fundamental freedoms of the internal

¹ Council Regulation (EC) No 319/2009 of 16 April 2009 clarifying the scope of the definitive anti-dumping duties imposed by Regulation (EC) No 85/2006 on imports of farmed salmon originating in Norway, *OJ L 101*, 21.4.2009, p. 1–4.

² Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU).

³ http://ec.europa.eu/justice/fundamental-rights/index_en.htm

market. The free movement of workers and the right of establishment granted to self-employed persons apply solely to persons active within the EU Member States (and the European Economic Area (EEA) States under the EEA Agreement).

In that context, it must be noted that seafarers who work on ships operated by an enterprise managed in Brazil, cannot therefore claim any benefits in relation to those freedoms.

Furthermore, even if they fall within the scope of the TFEU, which does not apply in this case, none of the freedoms require equal treatment of persons in cross-border situations governed by different double taxation conventions (concluded by a Member State with different jurisdictions). Similarly, the TFEU does not oppose differences in treatment on the basis of domestic law of a Member State referring to different double taxation conventions (Cases C-376/03 *D* and C-194/06 *Orange European Smallcap Fund NV*). The Court of Justice of the European Union (CJEU) regards those situations as non-comparable. Thus, there is no EU law requirement to treat seafarers equally between those who can claim the benefits of a double taxation convention concluded by a Member State and those who cannot do so (for example in absence of a double taxation convention between Poland and Brazil)⁴.

According to the CJEU, levying personal income tax, which remains unharmonised at EU level, cannot be regarded as implementing EU law (see cases C-469/18 *IN* and C-470/18 *JM*) and thus the Charter does not apply in that field.

For this reason, it is not possible for the Commission to follow up on this issue. In such cases, it is for Member States, including their judicial authorities, to ensure that fundamental rights are effectively respected and protected, in accordance with their national legislation and international human rights obligations. The petitioner may wish to seek redress at the national level through the competent national authorities, such as through an ombudsman or through the courts. For information on how to obtain a remedy in the Member State concerned, the petitioner can consult the fundamental rights section of the European e-Justice Portal⁵.

Conclusion

Based on the above, it is not possible for the Commission to follow up on this issue.

⁴ Poland concluded DTCs with all EU Member States. The list may be found here:

<https://www.podatki.gov.pl/podatkowa-wspolpraca-miedzynarodowa/wykaz-umow-o-unikaniu-podwojnego-opodatkowania/>

⁵ https://e-justice.europa.eu/content_fundamental_rights-176-en.do