

THE OTHER SIDE OF TAX DISCRIMINATION. LACK OF LEGAL RECOGNITION FOR SAME-SEX COUPLES AND ITS FISCAL CONSEQUENCES

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Summary

The purpose of the paper is to present the tax consequences resulting from the lack of recognition of registered partnerships¹ and same-sex marriages in certain EU member states, taking the example of Poland. These aspects are usually perceived as discrimination of citizens based on their sexual orientation. The author of this paper has focused on various aspects of possible discrimination, mainly concerning discrimination on the grounds of personal taxation, including inheritance and gift taxes. For these purposes, the author analysed the domestic tax rules differentiating couples living in a marriage and couples without that possibility. These legal provisions have been analysed together with the most recent domestic jurisprudence. Furthermore, the paper presents comparative analyses of domestic rules with EU law. Due to the lack of case-law oriented towards fiscal discrimination due to sexual orientation, the relevant CJEU (the Court of Justice of the European Union, hereinafter: the CJEU) and ECHR (the European Court of Human Rights, hereinafter: the ECHR) case-law have been recalled to reveal possible violations of fundamental freedoms and tax discrimination. The author makes a connection between the lack of proper regulations implemented in the domestic law with the unjustified differentiation of cross-border families on tax grounds. In the long run, only the harmonisation of personal taxation at the EU level can lead to a resolution to this situation. Alternatively, as an interim solution, the relevant ECHR judgment may be of assistance.

Keywords: *cross-border; sexual orientation; tax; discrimination; inheritance.*

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1 For the purpose of this paper, the author uses the terms “registered partnership” and “civil union” interchangeably.

1. INTRODUCTION

The European Union currently encompasses 28 Member States, all differing in their languages, history, traditions, legal systems and personal taxation. Under EU law, some existing systems have been harmonised, such as the Value-Added Tax (VAT), which is a part of the *acquis communautaire* and two directives,² while other systems, including certain fields of taxation, are still at the sole discretion of the particular Member States. Personal taxation is one of these fields. Even though it is partially covered by existing treaties on the avoidance of double taxation, there are still points referring to cross-border families that are not harmonised, and so remain ignored by the law.

At the time of preparing this paper, in the EU there are at least two existing legal acts that should comprehensively regulate the cross-border elements of marriage and inheritance.³ It should be underlined, however, that not all the Member States have already participated in the EU cooperation in these fields.⁴ For Poland and other nine countries, the main reason for this non-cooperation is that registered partnerships are not recognised in their domestic legislation. This may pose problems in terms of taxation or inheritance items that affect cross-border families who live in a country that does not recognise them as a couple, and creates additional tax liabilities for them in terms of personal taxation or additional inheritance obligations.

The purpose of this paper is to identify a practical problem for cross-border families that is caused by local laws not keeping up with the changing world and trends in the EU region. Moreover, questions have arisen as to whether these laws are compliant with certain provisions of the European Convention of the Human Rights and the EU Treaty.

Marriage is a legal institution currently recognised in all 28 EU Member States. In 14 States, marriage is open to both opposite-sex and same-sex couples. In 21 EU countries, registered partnerships are allowed.⁵

2 Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes and Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

3 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

4 Jourova, V., EU Regulations on the property regimes of international couples. Fact Sheet, January 2019, available at: https://ec.europa.eu/info/sites/info/files/190129_international_couples_factsheet.pdf, [31 May 2019].

5 https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice/family-law/property-international-couples-marriages-and-registered-partnerships_en. More information can be found also at a Eurobarometer survey (Special Eurobarometer 393: Discrimination in the EU in 2012. On page 41 of the Report it is concluded that the acceptance of LGBT people is greatest in northern and western EU Member States, and least common in a number of Eastern European countries, available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_393_en.pdf, [31 May 2019].

As the author of this paper is a Polish citizen, the main axis of the problem highlighted in the paper is focused around Polish law and its compliance with supranational regulations. As the Polish non-recognition of civil unions and same-sex marriages is rather common for eastern Member States of the EU, the considerations analysed in the paper may be treated as common for other states that do not have registered partnerships regulated in their domestic law.

2. LEGAL ASPECTS USING THE EXAMPLE OF POLAND

2.1. General remarks

As a rule, people in a marriage are entitled to social or tax benefits as described in various domestic acts. In Poland, couples living in a marriage can be treated in a more favourable way than single persons or people living in partnerships. According to the census carried out in Poland, 75% of families lived in marriages, while only 3% lived in partnerships.⁶ This 75% of population is under the protection of Article 18 of the Constitution of the Republic of Poland, which indicates that marriage, which is deemed to be a union between a man and a woman, along with family, motherhood and parenthood, will be placed under the protection and care of the Republic of Poland. It has a direct impact on the benefits of other domestic legal acts, e.g. the Polish Code of Criminal Procedure,⁷ in which Article 185 enables a person remaining in a particularly close personal relationship to be exempt from testifying or answering questions about the person they are close to. Previously, only a spouse in a marriage could have been exempted from testifying. Nowadays, due to certain developments made by the Polish courts,⁸ the scope of this exemption has also been extended to persons living in same-sex partnerships.

Other benefits reserved only to persons in marriages are also described in the Polish Civil Code.⁹ According to Article 691 of that code, in the event of the death of a tenant, the lease of the flat may be inherited by: a spouse, children of the tenant (...) and a person who lived with the tenant. In previous years, the authorities and the courts presented the approach that this provision does not enable persons living in a same-sex partnership to benefit. Only a significant judgment made by the Supreme Court¹⁰ has changed that negative jurisprudence and forbade the differentiation of partnerships in terms of sexual orientation.

6 Polish National Census 2011, available at: <http://stat.gov.pl/spisy-powszechno/nsp-2011/nsp-2011-wyniki/>, [31 May 2019].

7 The Polish Code of Criminal Procedure of 6 June 1997, as amended, available at: <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970880553>, [31 May 2019].

8 Resolution of the Polish Supreme Court from 25 February 2016, I KZP 20/15, Judgment of the Polish Supreme Court from 21 March 2013, III KK 268/12.

9 The Polish Civil Code of 23 April 1964, as amended, available at: <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19640160093>, [31 May 2019].

10 Resolution of the Polish Supreme Court from 28 November 2012, III CZP 65/12.

2.2. Family aspects

Benefits from being in a marriage can also be found in connection with the Family and Guardianship Code.¹¹ According to Article 115 §1 of that code, adoption can be made jointly only by spouses. On the other hand (Article 114 §1 of the code), A person with full legal capacity may adopt, as long as their personal qualifications justify the belief that they will properly carry out the obligations of an adopter. Moreover, the person should also have a training certificate issued by the adoption centre. These provisions may lead to the conclusion that adoption can only be made jointly by spouses in a marriage, or by a single person. A literal interpretation of the provisions implies that persons living in partnerships cannot adopt jointly.

According to the Report of the Supreme Audit Office,¹² officials often create non-statutory criteria giving marital supremacy over those in partnerships for the adoption of a child. The report shows that, from the beginning of 2015 to mid-2017, out of 76,000 children in a foster care, only 6,009 were adopted, of which 710 were adopted by families residing abroad.

2.3. Inheritance aspects

Another area where differences between marriages and partnerships are widely seen is the inheritance law. In Poland, under certain conditions testate succession is not limited and anyone described in the will may inherit after the deceased person. Differences between marriages and partnerships are, however, explicitly highlighted if there is no will, because then intestate succession provisions are in force, in which there are no provisions in place for inheritance by a person who lived with the deceased. In line with Book IV of the Polish Civil Code,¹³ which comprehensively describes persons eligible for inheritance, the spouse and descendants are listed as the first-line statutory heirs. In the absence of descendants – the spouse and parents of the deceased inherit, and if one of the parents is deceased at the time of opening the estate, then that person's share of the estate falls to the deceased person's siblings, or their descendants. If there are no descendants, the parents inherit along with the spouse. If there is no spouse of the deceased person, the entire estate will fall to the parents in equal parts. In the absence of the spouse, or descendants, parents, siblings or siblings' descendants – the grandparents of the deceased or their descendants are to inherit. Next come the children of the deceased person's spouse whose parents are dead when the estate is opened. Last of all to inherit are the local municipality or the State Treasury.

As this shows, it is not possible for a person who lived with the descendant in a partnership to inherit. That person is recognised as a third party without any rights to inherit. Only a properly prepared will in advance could secure such a person's rights,

11 The Polish Family and Guardianship Code of 25 February 1964, as amended, available at: <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19640090059>, [31 May 2019].

12 Performing tasks by adoption centres, the Supreme Audit Office, August 2018.

13 Articles 931 - 935 of the Polish Civil Code define groups of heirs and the order of inheritance specifically. Moreover, there are precisely described shares of inheritance.

but even then it is not entirely the same situation, as additional tax burdens will arise in that scenario.

2.4. Cross-border families in confrontation with Polish law

All these rules also affect cross-border families. At this moment, there are no binding supranational provisions that could exclude these provisions in any case of cross-border families. In other words, a person who concluded a legal same-sex marriage in a country that recognises that institution, or who is living in a partnership registered abroad, is still deprived of the opportunity to inherit. On the basis of domestic law, that person is a third person to his/her partner. This situation seems to be improving slightly as these couples start to receive certain rights thanks to developing jurisprudence granting them tenancy and witness rights. However, there is no relevant case law associated with these issues in connection with adoption or inheritance, and the Polish authorities will refuse any possibility of adopting or being included in the group of statutory heirs (without a will). In other words, a Danish-Polish couple living in a partnership in Poland (with a registered partnership concluded in Denmark) will not benefit from their legal relationship in Poland.

3. TAXATION DIFFERENCES

3.1. Personal income tax burdens for registered couples

More differences between relationships and marriages can be widely seen regarding personal taxation. The basic acts that regulate these issues are the Personal Income Tax Act,¹⁴ the Inheritance and Gift Tax Act¹⁵ and the Tax Ordinance Act,¹⁶ which includes provisions regulating tax proceedings before the Polish tax authorities.

The first difference that all people living in relationships in Poland must face, compared with people living in a marriage, is that even if they have some rights guaranteed and obligations imposed under other legal acts (i.e. tenant's rights), on the ground of personal taxation they are treated as third parties. As Polish law does not recognise the institution of registered partnerships or same-sex marriage, people who run a common household cannot file a joint tax declaration. This benefit is reserved only for people who have concluded a marriage. Only they can submit a joint tax declaration allowing them to divide their cumulative income by two, and then calculate the preferential tax rate. Depending on the numbers, they can save up to PLN 12 000 (approximately EUR 3 000) per year by applying for a joint tax declaration. The Polish tax authorities adopt the position that this possibility applies only for people

14 The Polish Personal Income Tax Act of 26 July 1991, as amended, available at: <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19910800350>, [31 May 2019].

15 The Polish Inheritance and Gift Tax Act of 28 July 1983, as amended, available at: <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19830450207>, [31 May 2019].

16 The Polish Tax Ordinance Act of 29 August 1997, as amended, available at: <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19971370926>, [31 May 2019]; The Tax Ordinance Act is an act describing tax procedure in Poland.

being in a marriage, which is understood in line with the Polish Constitution as a legal relationship between a man and a woman. Even if a couple concluded a legal marriage outside of Poland where same-sex marriages are recognised, they will be refused the possibility for a joint tax declaration while in Poland. The main line of argumentation being presented by the administrative courts in Poland concerns the fact that any tax provisions providing for tax savings, tax relief or any tax benefits to taxpayers should be interpreted strictly in a conservative way, without possible extensions to other groups. As registered partnerships are not recognised in Poland, benefits for married people cannot be extended to those couples who are living in partnerships. The same line of interpretation is used to justify whether a legal marriage between same-sex partners concluded abroad in a regime that allows for concluding marriages between the same gender can be treated in Poland as a marriage. The approach represented by the Polish tax authorities and the courts is the same – only a marriage between a man and a woman, namely in line with the Polish Constitution, can enjoy the benefits from a joint tax declaration. According to the current opinion presented by the Polish legislator, a contrary interpretation would be an unjustified attempt to implement the legal construction of same-sex marriages or registered partnerships into the Polish legal system. For this reason, all requests for joint tax declarations have been rejected, and argumentation presented by the applicants, citing jurisprudence represented by the European Court of Human Rights (details will be presented in point 3.5), have been considered as inaccurate to the factual background of the applicants.

3.2. Tax consequences concerning inheritance tax

As long as the joint tax declaration institution can still be perceived as a tax benefit for a narrow group of taxpayers, significant differences between partnerships and marriages can be seen on the basis of the Inheritance and Gift Tax Act. These tax provisions can be divided into two types – concerning inheritance aspects and donations made between a donor and a beneficiary. Both differentiate groups of taxpayers because of their civil status, excluding couples in same-sex marriages and couples living in partnerships from the group of relatives.

In line with the law, the acquisition of assets located in Poland, or rights executed in Poland, will be subject to the inheritance tax. The same rules may apply to assets located abroad. These assets and rights will, however, be exempted from taxation in any case when neither the donor nor the beneficiary were Polish citizens, and their place of residence was located outside of Poland. This exemption depends only on the citizenship or tax residence of taxpayers, which is a commonly used form of differentiation in cross-border taxation.

Determining the base and the rate of inheritance tax depends on belonging to a specified tax group. It determines the tax-exempt amount, the tax rate and further exemptions. Those acquiring the inheritance are placed into three tax groups, though the criteria are based only on the personal relation of the person acquiring the inheritance to the person from whom the inheritance was acquired.¹⁷

¹⁷ Article 14 of the Inheritance and Donation Tax Act provides that the amount of tax is determined

Group I includes: a spouse, descendants (children, grandchildren), ascendants (parents, grandparents), stepchildren, sons-in-law, daughters-in-law, siblings, stepfather, stepmother and in-laws; group II: descendants of siblings, siblings of parents, descendants and spouses of stepchildren, spouses of siblings and siblings of spouses, spouses of spouses' siblings, spouses of other descendants; and group III: other persons acquiring inheritance (unrelated persons and relatives of distant family belonging in tax group II). The tax free amounts differ from PLN 9 637 to PLN 4 902 (approximately EUR 2 200 to EUR 1 160) per year, while tax rates for certain groups range from 3% to 20%.

It should be also underlined that the act also defines a so-called group 0, which includes members of the closest family:¹⁸ spouse, descendants, ascendants, stepson, siblings, stepfather and stepmother. Being in the closest bonds with a testator allows the acquisition of assets or rights that are fully exempted from taxation, irrespective of the value of those assets. An analysis of those provisions leads to the conclusion that also on a basis of the inheritance tax, the Polish legislator favours members of the closest family, compared to other taxpayers, by giving lower tax rates, higher tax-free amounts and full exemptions. Nevertheless, also on those grounds, marriage is understood only as a legal relationship concluded between a man and a woman. All partners (including same-sex and opposite-sex partners) are deprived from any rights of favourable taxation of inherited assets. In other words, persons living in long-term relationships who have gained valued assets over those years are treated in the same manner as strangers. It creates complicated tax scenarios in which a widowed partner is forced to pay inheritance tax on assets that belonged equally to him/her and his/her partner during a year. There are also scenarios seen where properties maintained by both partners are inherited by members of the family belonging to the II group of taxpayers. In order to continue living in the property, the widowed partner is forced to start legal proceedings in order to buy the apartment from the family, which creates more tax obligations for him/her. In both scenarios (inheritance and lack of inheritance), additional taxes are imposed towards a part of the assets belonging to the partner.

3.3. Donations between partners – gift tax

The same approach is seen in the case of donations. It should be underlined that inheritance tax and gift tax are regulated by the same act. For this reason, the thresholds, tax rates and exemptions provided above are also applicable in the case

depending on the tax group, to which the beneficiary is included. Belonging to those groups is determined on the personal relationship of the beneficiary to the person from whom or after which the property and property rights were acquired. There are three groups of taxpayers on a basis of the Act.

18 Article 4a of the act provides that the acquisition of ownership of things or rights is exempt from tax by the spouse, descendants, ascendants, stepchildren, siblings, stepfather and stepmother, if they report that acquisition to the competent head of the tax office within six months from the date of acquisition, and, if the object of acquisition is cash, provide proof of transfer to a payment account.

of donations being made between spouses and partners. Not surprisingly, Polish law also differentiates the tax treatment of donations made between these two groups. Donations made between persons living in a marriage are, as a rule, exempted from taxation under certain conditions, while donations made between partners are normally taxed as donations made between strangers. From a practical point of view, it creates some uncertainties. As the registered partnership is not defined in Polish law, these people are not visible for the state as partners. They are strangers. For this reason, any fluctuation of assets between them can be subject to a tax audit. If these asset flows are of insignificant value (e.g. daily affairs, current expenses), they can be considered as tax neutral. The problem arises when these transactions exceed a certain threshold, which for group III is PLN 4 902 (approximately EUR 1 160). All donations above that limit should be subject to normal taxation, which may cause significant problems for both donor and beneficiary. It is even impossible (or at least causing technical problems for these taxpayers) to verify whether transactions between their bank accounts would have exceeded the threshold, and as such created tax reporting obligations during a tax year, not to mention the fact that some payments between partners can be considered as a donation from a legal point of view.

Polish law does not define whether unequal divisions of incurred expenses between partners (e.g. based on the difference in their earnings), or payments made on behalf of the partner to utilities' suppliers in exchange for taking care of the household can be perceived as donations. The current tax law does not provide clear answers from a fiscal point of view on how to treat a situation when one partner does not work because of maternity obligations and the second partner maintains the family. Would that benefit be considered as a taxable donation for the first partner? Current legislation does not provide answers to these issues either, though considering the literal definition of a donation, in such a case the answer should be positive.

Another issue may be recognised in connection with cross-border families living in Poland. Not all of them are in marriages, and at least they are not all considered as marriages in line with the Polish concept of a family. Same-sex spouses will be considered as strangers, which would cause serious problems if one of them dies. For instance, under Dutch law they are considered in a legal marriage with all the respective rights and obligations. Notwithstanding the foregoing, Polish law does not consider them as spouses. As Poland does not currently participate in the EU cooperation around matrimonial property regimes, only Polish law will apply in this case, and it is not possible under the law to treat those partners equally with spouses. Even if there was a will granting the rights to an inheritance to a widowed partner, or Dutch intestate provisions were chosen by the deceased in line with the Council Regulation (EU) 650/2012,¹⁹ Polish tax inheritance provisions would still prevail for any assets inherited by a widowed partner who was a Polish citizen or a Polish tax resident. It means that all assets (including assets located in the Netherlands) inherited

19 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

by such a partner will be subject to taxation in Poland in the same manner as assets inherited by a stranger. That example shows how tax provisions in Poland, in terms of inheritance and donations, differentiate persons considering their legal bonds and ignoring their factual relationship.

3.4. Domestic inaccuracies under Polish law – ‘family’ in the meaning of the Tax Ordinance

Surprisingly, Polish tax law is not fully consistent with the presented approach of not recognising civil unions or same-sex marriages in terms of their tax rights and obligations. As mentioned, marriage is considered a relationship between a man and a woman. This literal definition was fully transposed to the Polish tax law with one exception. According to Article 111 of the Tax Ordinance, if a member of a taxpayer’s family cooperated with the taxpayer in a business activity and gained (directly or indirectly) benefits from this activity, then that member is jointly responsible along with the taxpayer for his tax arrears resulting from the taxpayer’s business activity. Point 3 of the analysed provision defines a family member by extending the catalogue to descendants, ascendants, siblings, spouse’s descendants and any person remaining with the taxpayer in a factual relationship. It should be underlined that the last category of a family member is mentioned only once in the analysed act. There are no other tax provisions that include partners as family members for tax purposes. What is also worth mentioning is that provision does not give any tax relief or rights to the partners, but instead imposes tax obligations in the form of tax responsibility for the tax liabilities of the partner who runs his business activity.

Because of that position, the state does not recognise partners or same-sex spouses for fiscal purposes by granting these couples certain rights in terms of tax relief and/or tax benefits, while it recognises these partners as legal partners for potential tax liabilities. It may be compared to a situation of business partners with unlimited liability. In that way, the state equated the tax obligations of business partners to partners living in a factual relationship.

3.5. Current position of the Polish tax authorities and legislature

The author came across certain cases where partners living in relationships were trying to apply for a joint tax filing. These partners believed they should have that right granted on the basis of the definition of family members from the Tax Ordinance. These applications have been refused by the tax authorities, and these refusals have been sustained by the administrative courts. In one case, the judges argued that the provision of the Polish Income Tax Act does not allow the joint taxation of heterosexual persons living together (outside of marriage). Therefore, it is not possible to refer to a definition of a family member from the Tax Ordinance.²⁰ In the written justification of the judgment, the Court underlined that the essence of marriage was properly regulated in the provisions of the Family Code. Based on that regulation, there is no reason to seek a different understanding of marriage than the one outlined in the family law. In

²⁰ Supreme Administrative Court, Poland, *judgment from 20 March 2012*, II FSK 2082/10.

fact, in the absence of any indication of the institution of marriage laid down by the provisions of the family law, there are no different regulations applicable based only on the tax law. The Court also rejected the line of argumentation presented by the applicants referring to a potential violation of Article 8 and Article 14 of the European Convention of Human Rights. With that argumentation in mind, the Court refused the request of the applicants. In another case, the Court highlighted that the analysed provision from the Tax Ordinance only regulates the possibility of the tax liability for tax arrears of the taxpayer's family members. Therefore, it does not contain a universal definition of a family member applicable to other scenarios covered by the tax law.²¹

For this reason, Polish tax law finds only one definition of family, which is exclusive to heterosexual families that have concluded a legal marriage.²² As such, the Polish tax law is binding for cross-border families treated as Polish tax residents. Registered partnerships concluded in a country of origin are not recognised in Poland in any way, neither are marriages concluded between same-sex partners. That approach excludes these families from the possibility of enjoying tax relief and tax benefits described in connection with individual taxation.²³ Furthermore, these couples are also considered as strangers with regard to inheritance and gift tax, which makes their assets subject to taxation despite the existence of a will, or the fact that the property at hand already belonged to the widowed partner. On the other hand, the same law described in the Tax Ordinance forces partners to be responsible for any tax arrears of their partners who conduct business activity.

One might ask whether there is there a solid basis to state that in Poland and other eastern EU Member States there is discrimination in respect of personal taxation as far as sexual orientation is concerned?²⁴

4. DISCRIMINATION

4.1. General remarks

There are a few definitions of discrimination that are currently in use for various purposes. In Poland, the 2010 Equal Treatment Act²⁵ introduced several legal definitions that were previously included only in the Labour Code and concerned the employment field only. Direct discrimination takes place when a person, because of their gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age or sexual orientation, is treated less favourably than another person

21 Supreme Administrative Court, Poland, *judgment from 25 May 2012*, II FSK 2116/10.

22 Judgment of the Polish Supreme Court from 6 December 2007, IV CSK 301/07.

23 Papadopoulou, L., *In(di)visible Citizens(hip): Same-sex Partners in European Union Immigration Law*, Yearbook of European Law, vol. 21, 2002, pp. 229-262.

24 Tryfonidou, A., *EU free movement law and the legal recognition of same-sex relationships: the case for mutual recognition*, Columbia Journal of European Law, 21, 2/2015, pp. 195-248.

25 The Polish Act on the Implementation of Certain Regulations of the European Union Regarding Equal Treatment of 3 December 2010, available at: <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20102541700>, [31 May 2019].

is, has been or would be treated in a comparable situation. Indirect discrimination is when an unfavourable difference or particular disadvantage occurs (or could occur) for persons because of their gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age or sexual orientation, due to an apparently neutral provision, criterion used or practice/action undertaken, unless that decision, criterion or action is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

4.2. Tax discrimination

While discrimination can easily be defined on the basis of the Equal Treatment Act²⁶ (in Poland and in other states), law practitioners and scholars face difficulties in clearly defining the term “tax discrimination”. There have been several attempts to conclude one, all-encompassing definition, but there is currently no single term that could describe that aspect coherently.²⁷ The CJEU has interpreted the fundamental freedoms of the Treaty on the Functioning of the European Union (hereinafter: TFUE) as mechanisms that are to prevent tax discrimination by EU member states.²⁸ At the same time, an explicit prohibition on tax discrimination appears in the model tax treaties of the Organisation for Economic Cooperation and Development²⁹ (hereinafter: OECD) and the United Nations.³⁰ In line with Article 24 thereof, in order to prevent unjustified discriminatory tax treatment to foreign taxpayers, the OECD Model Tax Convention has a set of rules based on national treatment principles. Paragraph 1 of Article 24 provides for a non-discrimination rule based on the nationality of the taxpayer.

4.3. Free movement and direct taxes

The fundamental purpose of all EU Treaties was to unite European nations into one economic and single market that could eliminate barriers to cross-border trade, investment, business and work.³¹ One of the primary concepts recognisable in the treaties revolves around free movement and trade. Since 1976, the European Union has been acknowledged as being “not merely an economic union”, but also creates binding social rights for people to “ensure social progress and seek the constant

26 Jabłoński, M., Jarosz-Żukowska, S., W sprawie prac nad ustawą wdrażającą dyrektywy równościowe UE do polskiego porządku prawnego, *Przegląd Prawa i Administracji*, LXXXII, pp. 111-138.

27 Bennett, M., The 2006 David R. Tillinghast Lecture: Non-discrimination in International Tax Law: A Concept in Search of a Principle, 59 *TAX L. REV.* 439.

28 Mason, R., 2015, *Primer on direct taxation in the European Union*, St. Paul, 2005, pp. 37-113.

29 OECD Model Tax Convention on Income and on Capital, article 24, condensed version available at https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en#page1, [31 May 2019].

30 U.N. Model Double Taxation Convention between Developed and Developing Countries, Article 24, available at: https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf, [31 May 2019].

31 Barnard, C., *The Substantive law of the EU. The Four Freedoms*, Oxford, 2013, pp. 229-271.

improvement of the living and working conditions of its peoples.³² Articles 28 to 37 of the TFUE establish the principle of the free movement of goods in the EU, while Articles 45 to 66 require the free movement of persons, services and capital. These “four freedoms” were thought to be inhibited by physical, technical and fiscal barriers for EU nationals. Moreover, these freedoms represent the cornerstones of the EU’s internal market, and the principle of tax non-discrimination may be perceived as deriving from them.³³

As mentioned, each EU Member State has its own tax system, and since national income tax laws are not harmonised in the EU like the VAT system, it means that tax bases, rates, relief and deductions vary significantly across the Member States, as do methods of taxing cross-border income. These differences in Member State tax systems may create barriers to EU nationals exercising their fundamental freedoms to work, reside, invest, provide services, and establish businesses anywhere in the EU.³⁴

It should be underlined, however, that, in terms of the non-discrimination clause, in relation to taxes, most of the cases analysed so far have referred to different treatment of residents and non-residents in EU Member States.³⁵

4.4. Lack of recognition of registered partnerships as a type of tax discrimination

How should we define a problem for EU citizens who have concluded a cross-border legal relationship in one EU Member State, or a same-sex marriage, which is then not recognised for fiscal purposes in a different Member State? If the partners are able to move to a different tax regime, there may be arguments to reject claims of discrimination in taxation as they opted to live in a country whose legal system does not recognise registered partnerships or legal marriages. But what happens when these two taxpayers reside in Poland and have assets in other EU Member States? In line with the mentioned provisions, if one of them dies, the widowed partner will still be obliged to pay inheritance taxes on assets falling to him on a basis of the will. These assets would not be subject to taxation in a tax regime where registered partnerships are recognised, or at least they would be accepted by the authorities in the case of cross-border families.³⁶ In the absence of the definition of tax discrimination, the only definition at hand is a simplified one. With that in mind, a widowed taxpayer is treated less favourably than another taxpayer because of his/her sexual orientation. If Poland recognised same-sex marriages or civil unions, the widowed partner would be treated in the same manner as he/she would be treated in the Member State where

32 The European Union Court of Justice, *Defrenne v Sabena*, Case 43/75.

33 Mason, R., Knoll, M., 2012, What Is Tax Discrimination?, Faculty Scholarship. Paper 404.

34 Graetz, M., Bennett, M. C., The 2006 David R. Tillinghast Lecture: Non-discrimination in International Tax Law: A Concept in Search of a Principle, 59 TAX L. REV. 439.

35 The European Union Court of Justice, *Gilly v. Directeur des Services Fiscaux du Bas-Rhin*, Case C-336/96 or *Gerritse v. Finanzamt Neukölln-Nord*, Case C-234/01. For more information see: Mason R., Tax Expenditures and Global Labor Mobility, 84 N.Y.U. L. REV. 1540, 2009, pp. 1608-1610.

36 More information can be also found in the Commission Recommendation of 15 December 2011 regarding relief for double taxation of inheritances, 2011/856/EU, OJ 6/81 (2011).

the marriage/partnership was concluded. In the area of inheritance, a widowed partner cannot opt for another tax regime as he is treated as tax resident in Poland. In line with Polish tax provisions, he/she inherited assets from an unrelated person and these assets should be subject to standard rules applicable for third parties because as such they are considered as income. However, if that partner was heterosexual and had concluded an opposite-sex marriage, he/she would be exempt from inheritance tax in Poland.

The lack of recognition of registered partnerships and same-sex marriages places couples who conclude those relationships abroad in a worse fiscal situation than couples whose relationships are legally recognised.³⁷ The problem concerns in particular these cross-border families who sanctioned their relationship abroad, but no live in countries in Eastern Europe that do not recognise these relationships. Although the reality of modern society is changing, no jurisdiction has adjusted its legal system to meet the new challenges.³⁸ The lack of harmonisation or the recognition of registered partnerships concluded abroad may pose significant challenges in the analysed field. As mentioned above, there is one Polish case³⁹ that – despite rejecting the possibility of a joint tax filing for a same-sex partner – admitted that those applicants remained in actual partnerships that can be compared to the institution of marriage. Moreover, according to the judges adjudicating in the case, the provisions of the Polish tax law, as well as civil law, grant specific rights to anyone remaining in a marriage, and in such cases it would not raise doubts that the same analogous rights should be granted to homosexual couples on the basis of equality, fairness, non-discrimination and the protection of property. However, because of the clear division in the Polish legal system into three branches: legislature, executive, and judiciary, it was impossible to implement those rights for registered partnerships or same-sex marriages without engaging the Polish legislator. That case-law, besides the obvious conclusion, still gave a clear signal that the legislator's actions do not reflect the changing reality by concluding that the same rights should be granted to those couples in order to avoid a violation of equality, fairness and non-discrimination.

The recognition of registered partnerships and same-sex marriages is an aspect that has been changing over the past 20 years, with the first same-sex marriage legislation passed in the Netherlands in 2001⁴⁰ and most recently replacing the institution of registered partnership with that of same-sex marriages, passed in Germany in 2017. That may be a reason why aspects of sexual orientation and potential related discrimination in taxes have not been widely analysed by scholars so far.

37 Bell, M., *EU Directive on Free Movement and Same-Sex Families: Guidelines on the implementation process*, Brussels, 2005, pp. 13.

38 Merin, Y., *Equality for same-sex couples. The Legal Recognition of Gay Partnerships in Europe and the United States*, Chicago, 2002, pp. 6-60.

39 Supreme Administrative Court, Poland, *judgment from 20 March 2012*, II FSK 2082/10.

40 The Dutch Marriage Opening Act from 1 April 2001 as amended.

5. EU LAW

5.1. *The concept of free movement in terms of cross-border families*

As mentioned, personal taxation is not harmonised within the EU.⁴¹ For this reason, there are no binding regulations that could be of assistance in determining tax discrimination in the described scenario. In that case, general provisions must be analysed in this respect.

The legal basis at the level of the EU is the TFEU. Article 18 of the TFEU states that, within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality is prohibited.⁴² The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination. That general rule is clarified in subsequent provisions, e.g. in Article 19 setting out a non-discrimination rule on a basis of sexual orientation (*without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*).

Finally, Article 21 pointed out that every citizen of the EU has the right to move and reside freely within the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.⁴³

That concept of free movement was consolidated by adopting Directive 2004/38/EC.⁴⁴ Recital 31 of the directive states that *This Directive respects the fundamental rights and freedoms and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation*.

Article 2 of the same directive defines family as a spouse or partner with whom

41 Feranecová, A. et al., Possibilities of harmonization of direct taxes in the EU, *Investment Management and Financial Innovations*, 14(2-1), 2017, pp. 191-199.

42 Brouwer, E., de Vries, K., Third-country nationals and discrimination on the ground of nationality: Article 18 TFEU in the context of Article 14 ECHR and EU migration law: time for a new approach, Amsterdam, 2015, available at: <http://dare.uvu.vu.nl/bitstream/handle/1871/54014/Brouwer-and-de-Vries-Third-country-nationals-and-discrimination.?sequence=1>, [31 May 2019].

43 Douma, S., *Optimization of Tax Sovereignty and Free Movement*, IBFD, 2011.

44 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

the EU citizen has contracted a registered partnership, based on the legislation of the Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage, and in accordance with the conditions laid down in the relevant legislation of the host Member State. Article 3 clarifies that the directive will apply to all EU citizens who move to or reside in a Member State other than that of which they are a national, and to their family members, as defined in point 2 of Article 2, who accompany or join them. Point 2 of the analysed article states that, without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State will, in accordance with its national legislation, facilitate the entry and residence for the following persons:

- a. any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependents or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
- b. the partner with whom the Union citizen has a durable relationship, duly attested.

According to the directive, the host state may have the right to undertake an examination of the personal circumstances of whether a couple is in a factual relationship.⁴⁵

The concept of free movement has been developed and is currently perceived as a system that encourages EU citizens to exercise their right to move and reside freely within the EU, to cut back administrative formalities to the bare essentials, to provide a better definition of the status of family members, and to limit the scope for refusing entry or terminating the right of residence.⁴⁶

5.2. Coman's case and its conclusions for tax discrimination

In this respect, on 5 June 2018 the CJEU ruled on case C-673/16⁴⁷ that the term "spouse", for the purpose of granting the right of residence to non-EU citizens, also includes same-sex spouses. The background of the case refers to R. Coman (a Romanian-American citizen) and R. Hamilton who had married in Belgium in 2010. In 2012, Mr Hamilton requested a permanent right to residence in Romania in his capacity as a member of Mr Coman's family. His request was rejected by the Romanian authorities on the basis that the Romanian Civil Code prohibits same-sex marriage and does not recognise such unions even if contracted abroad. The spouses challenged this decision, claiming that it is a case of discrimination on the ground of sexual orientation, and that the latter provision of the Romanian Civil Code is unconstitutional. The Romanian Constitutional Court asked the CJEU for a preliminary ruling on whether the term "spouse" in Article 2(2)(a) of the Citizens'

45 Costello, C., Metock: free movement and normal family life in the Union, *Common Market Law Review*, Issue 2, 46/2009, pp. 615-616.

46 Guild, E., Peers, S., Tomkin, J., *The EU Citizenship Directive, a commentary*, Oxford University Press, 2014.

47 The European Union Court of Justice, *Coman and Others vs. Romania*, Case C-673/16.

Directive (2004/38/EC) includes a non-EU national that is legally married to an EU citizen in another Member State than the EU host State.

The ruling in the case held that the term “spouse” is gender neutral and may therefore include spouses of the same sex. Therefore, Romania cannot rely on its national law as justification to refuse the recognition of a marriage between two persons of the same sex legally concluded in another Member State. That ruling has certain visible aspects that are crucial for determining the thesis presented in the paper:

- EU citizens have the right to lead a normal family life (coming from case C-165/16⁴⁸).
- The term ‘spouse’ used in that provision refers to a person joined to another person by the bonds of marriage (coming from case C-127/08⁴⁹).
- The term ‘spouse’ within the meaning of Directive 2004/38 is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned.
- Aspects of marriage fall into the competence of the Member States and EU law does not detract from that competence.⁵⁰ The Member States are therefore free to decide whether to allow marriage for same-sex persons, but in exercising that competence, Member States must comply with EU law, in particular the Treaty provisions on the freedom conferred on all Union citizens to move and reside in the territory of the Member States.⁵¹
- Moreover, it is established case-law that a restriction on the right to the freedom of movement for persons, which is independent of the nationality of the persons concerned, may be justified if it is based on objective public-interest considerations, and if it is proportionate to a legitimate objective pursued by national law. It is also apparent from the Court’s case-law that a measure is proportionate if, while appropriate for securing the objective pursued, it does not go beyond what is necessary to attain that objective.

In the analysed case, the governments of Poland, Latvia and Hungary joined the proceedings before the CJEU. These countries have not established any same-sex marriage laws. The Latvian government stated that marriage, as a relationship between a man and a woman, is protected by the Latvian constitution. Any other understanding of the term could violate the Latvian public policy and national identity. The CJEU, however, repeated that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly. For this reason, the judges concluded that an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the Member State concerned.

The analysed case may have a significant impact on the topic forming the main subject of this paper. As long as there is no established case-law in the field of tax discrimination from a sexual orientation point of view, scholars might analyse and draw

48 The European Union Court of Justice, *Lounes*, Case C-165/16.

49 The European Union Court of Justice, *Metock and Others*, Case C-127/08.

50 The European Union Court of Justice, *Garcia Avello*, Case C-148/02, *Maruko*, Case C-267/06, *Grunkin and Paul*, Case C-353/06.

51 The European Union Court of Justice, *Bogendorff von Wolfersdorff*, Case C-438/14.

conclusions from similar case-law that refers to discrimination, sexual orientation and taxes separately.⁵² The Coman case-law does not change the perception of same-sex marriages. It should not be interpreted as a judgment that orders same-sex marriages to be implemented in domestic legal systems, or even registered partnerships. It is, however, an important judgment in which the CJEU explicitly stated that there is no space for discrimination against same-sex marriages under Directive 2004/38/EC. Spouses have the rights to continue their family life without any interruptive actions of the Member States. Moreover, the CJEU repeated once again that the recognition of same-sex marriages for the sole purpose of granting the right of residence is not a violation of the Member States' sole competence of regulating marriages in their domestic law. As a result, the Member States cannot use arguments that public policy or national identity could prevent them from respecting the fundamental rights of such marriages concluded abroad.⁵³

In the analysed issue, these arguments could also be used for the purposes of determining tax discrimination. As mentioned, in the EU Member States that do not recognise registered partnerships or same-sex marriages concluded abroad, couples could be deprived of their basic rights concerning personal taxation. That issue is widely seen in respect of donation and inheritance. A scenario where a widowed partner or widowed spouse who is perceived as a stranger from a Polish tax point of view cannot inherit part of his or her partner's assets, or is forced to incur additional taxes because he or she is considered as an unrelated person, represents a violation of the rights to continue his or her family life. Moreover, a country that does not respect marriages or partnerships concluded abroad may not be compliant with EU law, in particular with Article 21 of TFUE. Any restrictions of free movement should be properly justified by the EU Member States. At the moment, it is difficult to imagine how countries that do not recognise these types of relationships concluded abroad could argue that they cannot recognise them for reasons of public policy or national identity. There is no place for speculation, as there have not been any tax-related cases in this respect, but scholars could easily use the same arguments as judges from the Coman case to challenge these arguments presented by the governments.

More resources can be found in certain judgments presented by the ECHR where discrimination on the grounds of sexual orientation has been the subject of numerous, well-established case-laws.

52 The European Union Court of Justice, *Grant v. South West Trains*, Case C-249/96, joined cases *D and Sweden v. Council*, Case C-122/99 P and Case C-125/99P, *Romer*, Case C-267/12, *Asociatia Accept*, Case C-81/12, joined cases *Minister voor Immigratie en Asiel v. X and Y and Z. v. Minister voor Immigratie en Asiel*, Cases C-199/12 and C-201/12. For more see: Rijpma J., Koffeman, N., *Free Movement Rights for Same-Sex Couples under EU Law: What Role to Play for the CJEU?* In: Gallo D., Paladini L., Pustorino P., *Same-Sex Couples before National, Supranational and International Jurisdictions*, Springer, 2014, pp. 484-487.

53 See more: Opinion of Advocate General Jääskinen in Case *Römer* C-267/12,

6. ECHR RELATED CASE-LAW

6.1. Fundamentals of the Convention for potential tax discrimination aspects

Corresponding values presented in the *Coman* case can also be seen in the European Convention of Human Rights (the Convention).⁵⁴ Article 8 of this Convention concerns the fundamental right to respect for private and family life. According to the article, everyone has the right to respect for his private and family life, his home and his correspondence. Point 2 of the analysed article clarifies that there will be no interference by a public authority with the exercise of this right, except in accordance with the law and as necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Article 14 of the Convention states that the enjoyment of the rights and freedoms set out in this Convention is secured without discrimination on any ground such as sex, race, colour, language, religion, politics or other opinion, national or social origin, association with a national minority, property, birth or other status. Finally, Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (the Protocol), concluded in Paris on 20 March 1952, pointed out that every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one will be deprived of his possessions except in the public interest and subject to the conditions provided for by the law and by the general principles of international law. These provisions will not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.⁵⁵

The Convention is another supranational act that should protect families against any discrimination. As mentioned, tax discrimination has not been explicitly pointed out in the act, but it can be interpreted from a joint analysis of the mentioned provisions. On the one hand, the Convention ensures that private and family life comes under the protection of the state. In addition, that right is emphasised by Article 1 of the Protocol, which clarifies that these persons (e.g. anyone leading a family life) should be entitled to the peaceful possession of their assets. Furthermore, the enjoyment of these rights should be secured without any discrimination on any grounds, including sexual orientation. On the other hand, any restrictions of these rights can be justified by reasons of national security, public safety, protection of morals (Article 8.2) or state rights regarding general interests or the secure payments of taxes. The prohibition of tax discrimination may, therefore, be derived from the joint provisions of Articles 8 and 14 of the convention in conjunction with Article 1 of the Protocol.

The analysed cases suggest that cross-border families who live in civil unions or

54 The Convention for the Protection of Human Rights and Fundamental Freedoms from 4 November 1950 as amended, available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf, [31 May 2019].

55 Nowicki, M. A., *Wokół Konwencji Europejskiej*, Warszawa 2017.

same-sex marriages that are not recognised in their countries may face discrimination also on the basis of the Convention.⁵⁶ Article 8 should secure their rights by giving their family life some protection. Possessions gathered during their lifetime should also benefit from conventional protection and any restrictions should be properly justified. In a scenario when partners cannot inherit from each other without tax burdens (which are not applicable for opposite-sex marriages), there are open questions as to whether these couples face discrimination because of their sexual orientation. Had they not been homosexuals, they could have concluded an opposite-sex marriage and then would have been entitled to the peaceful enjoyment of their possessions.

Member States have the right to regulate their taxes and family issues internally. Furthermore, they have the same rights to create fiscal policy without being accused of violating the provisions of the Convention. It should be underlined, however, that, although these states have the right to control the use of property in accordance with the general interest, or to secure the payment of taxes, they cannot discriminate against any group of taxpayers. These conclusions come from analysing Article 1 of the Protocol, together with a general non-discrimination clause from Article 14 of the Convention. As well as in the Coman case, the CJEU admitted that recognition of same-sex marriages for residence purposes does not undermine national identity or pose a threat to the public policy of the Member State concerned. It should be justified also at the level of the Conventional level that the lack of recognition of same-sex marriages for fiscal purposes could violate morals or protection of the rights and freedoms of others.

6.2. *Relevant case law*

There have been many judgments based on the Convention that referred to similar cases as in the analysed problem.⁵⁷ It should be noted, however, that the applicants in those cases indicated more general potential violations of their rights, rather than narrowing them to tax discrimination.⁵⁸ In the most significant case-law that has changed the perception of same-sex marriage discrimination by the ECHR,⁵⁹ the applicants complained that they had no means of legally safeguarding their relationship, in that it was impossible to enter into any type of civil union in Italy. Consequently, they complained that they were being discriminated against in breach of Article 14 in conjunction with Article 8. The Court held that Italy had violated Article 8 of the Convention through its failure to legally recognise same-sex relationships. This led the Court to focus on the discrepancy between social reality and the law. The Court also emphasised the conflict between the social reality of the applicants,

56 Scherpe, J. M., *The legal recognition of same-sex couples in Europe and the role of the European Court of Human Rights*, *The Equal Rights Review*, vol. 10, 2013, pp. 83-96.

57 Hayward, A., 'Justifiable discrimination - the case of opposite-sex civil partnerships', *Cambridge law journal*, vol. 76, 2/2016, pp. 243-246.

58 Trispiotis, I., *Discrimination and civil partnerships: Taking 'legal' out of legal recognition*, *Human Rights Law Review*, 14, 2/2014, pp. 343-358.

59 The European Court of Human Rights, *Case of Oliari and Others v. Italy*, application Nos 18766/11 and 36030/11.

who already live their lives in a relationship in Italy, and the silence of the law.⁶⁰ What is more important, the judges explicitly emphasised that the absence of a legal framework allowing for the recognition and protection of a relationship violates the applicants' rights under Article 8 of the Convention. It was also emphasised that the legal recognition of same-sex partnerships/marriages has continued to develop rapidly in Europe since the previous judgment in *Shalk and Kopf*.⁶¹ In that case, although the Court decided that the non-recognition of same-sex partnerships did not violate Article 8 of the Convention, it considered it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy a "family life" for the purposes of Article 8. According to the judges adjudicating in the *Shalk and Kopf* case, the relationship of the applicants, a cohabiting same-sex couple living in a stable partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.

In another case – *Taddeucci and McCall vs. Italy*⁶² – with a similar factual background, the Court underlined that protection of the traditional family may, in some circumstances, amount to a legitimate aim under Article 14 of the Convention. Nevertheless, the refusal to grant a residence permit for family reasons to a homosexual foreign partner is not a convincing and weighty reason. Accordingly, that refusal creates discrimination on the grounds of sexual orientation. Moreover, the Court noted that, although Italian law did not treat unmarried heterosexual couples differently from unmarried homosexual couples, the heterosexual couples had the possibility to obtain legal recognition of their relationship and satisfy some requirements of domestic law, while that option was not available to the homosexual couples. That differentiation was not justified, and for these reasons the Court saw discriminatory treatment of homosexual couples.⁶³

The *Taddeucci* case can be directly compared to the issue that is the subject of this paper. Lack of recognition of the same-sex marriages or partnerships concluded abroad may be perceived as unjustified discrimination for fiscal purposes. A cross-border, opposite-sex couple can conclude their marriage in Poland, or at least have this marriage recognised. Hence, they can enjoy the possibilities of a joint tax declaration and of tax exemptions in terms of donations and inheritance. Same-sex couples do not have that possibility and cannot conclude a registered partnership that could be recognised by the Polish authorities. For this reason, their assets may be doubly taxed or be part of taxation in the case of any donation and inheritance. In this sense, a widowed partner will be deprived of his inherited assets. Moreover, following the line of argumentation included in recent case-law presented by the Court, a member

60 Ragone, S., Volpe, V., An Emerging Right to a "Gay" Family Life? The Case *Oliari v. Italy* in a Comparative Perspective. *German Law Journal*, vol. 17, 3/2019, pp 451-485.

61 The European Court of Human Rights, *Case Schalk and Kopf v. Austria*, application No 30141/04.

62 The European Court of Human Rights, *Case Taddeucci and McCall v. Italy*, application No 51362/09.

63 Grzeszczak, R., Gniadzik, M., The Right of European Union Citizens and Their Family Members to Move Freely within the Territory of Member States, *Polish Rev. Int'l & Eur. L.*, vol. 4, 2015, pp. 73-88.

State that does not recognise these partnerships, and thereby creates exclusions from the general anti-discrimination clause, should demonstrate that these restrictions are justified. It seems, however, that the arguments previously used by governments, referring to the protection of traditional families or national identity, may now be rejected by the judges, taking into consideration the social reality and the gradual evolution of the Member States on the matter.⁶⁴

7. CONCLUSION

After the many years of gradual developments in the EU Member States, there are still differences between them. These differences may have various backgrounds, but they cannot compete with fundamental freedom of the EU, which is the free movement of people. In times of dynamic global mobility, the existence of cross-border families is much more common than 20 or 30 years ago. As long as social trends are developing, the same approach should be seen in law. A situation where there is a silence of the law is not desirable. Legislators should always have clear answers and solutions for a changing society. As indicated, all restrictions to free movement (on the basis of the EU law) or restrictions to human rights should be properly justified by the legislators and should have a solid background.

Given these times of more prevalent global mobility, such arguments as the protection of national identity or the traditional concept of the family should be considered as futile. They are no longer supported in the CJEU case-law, considering the main thesis from the Coman case. Furthermore, they will not be reflected in the current jurisprudence presented by the ECHR, which clearly considers same-sex relationships or same-sex marriages as a family in the meaning of the Convention.

With that in mind, it should be noted that there are still countries in Eastern Europe that do not recognise these types of relationships in their legal system. Using arguments from the ECHR cases, that situation should be understood as direct discrimination. None of the applicants, however, have used arguments in their cases relating to potential tax-discrimination, which is a narrower concept of discrimination because of sexual orientation than a general anti-discrimination approach.

That direction should not be completely rejected by the scholars, however, as, taking the example of Poland, it was shown that the lack of proper legal regulations may cause serious problems for registered partnerships and same-sex marriages, who may be deprived of their rights to joint taxation, or even deprived from their right to assets gathered during their relationship. Additional tax burdens imposed in the case of any donations or inheritance place these couples at a disadvantage compared to marriages in Poland or marriages in countries where these institutions have already been implemented in the legal system. This may have a significant fiscal impact on cross-border couples where one of the partners is from a country where these relationships are recognised and, in line with this law, inheritance between same-sex partners is exempted from taxation. Because of tax residence, a widowed partner will

64 Guth, J., *When is a Partner not a Partner? Conceptualisation of 'family' in EU Free Movement Law*, 'Journal of Social Welfare and Family Law', vol. 33, 2/2011, pp. 193-204.

not be able to inherit (and tax) in line with provisions applicable for his spouse due to the absence of harmonisation between these two systems.

The author of the paper views the only possibility to avoid these situations is through the harmonisation of personal taxes at an EU level.⁶⁵ For obvious reasons, this harmonisation would not be as coherent as the VAT system, but it could implement rules applicable to all tax regimes (such as the recognition of same-sex partnerships for residence purposes on the basis of Directive 2004/38/EC). In the interim, an alternative to the proposed solution would be an ECHR judgment that will indirectly order the implementation of these institutions in a domestic system. This, however, would require the applicants' involvement, and does not guarantee that the applicants' Member State would apply the directions set out in the judgment.

Nonetheless, as long as Member States continue to differentiate between couples because of their sexual orientation, these couples will face discrimination. If these couples do not have a possibility to obtain legal recognition of their relationship, and therefore to satisfy the requirements for tax exemptions of their inheritance and donations (whereas that option is available to heterosexual partners), the treatment of homosexual couples can be recognised as discriminatory. In this particular case, it would be tax discrimination because of their sexual orientation.

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65 Boele-Woelki, K., *The Legal Recognition of Same-Sex Relationships within the EU*, *Tulane Law Review*, vol. 82/2018, pp. 1981.

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Sažetak

DRUGA STRANA POREZNE DISKRIMINACIJE: NEDOSTATAK PRAVNOG PRIZNAVANJA ISTOSPOLNIH PAROVA I FISKALNE POSLJEDICE

Svrha ovog rada je predstavljanje poreznih posljedica koje proizlaze iz izostanka priznavanja registriranih partnerstava i istospolnih brakova u nekim državama članicama EU-a, a kao primjer se uzima Poljska. Ovi se aspekti uglavnom smatraju diskriminacijom građana na temelju njihove spolne orijentacije. Ovaj se rad usredotočuje na različite aspekte moguće diskriminacije, posebice one temeljem osobnog poreza, što uključuje poreze na nasljedstvo i darove. Zbog toga se u radu analiziraju nacionalna porezna pravila, koja prave razliku između parova u braku i onih kojima je ta mogućnost uskraćena. Te su pravne odredbe analizirane zajedno s recentnom nacionalnom sudskom praksom. Nadalje, rad komparativno analizira nacionalna pravila i europsko pravo. Budući da postoji nedostatak sudske prakse usmjerene k fiskalnoj diskriminaciji temeljem spolne orijentacije, u radu se analizira i relevantna praksa Suda EU-a (Sud Europske unije, nadalje: Sud EU) i ESLJP-a (Europski sud za ljudska prava, nadalje: ESLJP) radi otkrivanja mogućih povreda temeljnih sloboda i porezne diskriminacije. Smatra se da je neopravdana porezna diskriminacija prekograničnih obitelji povezana s nedostatkom uređenja u nacionalnom pravu. Samo harmonizacija osobnog oporezivanja na razini EU-a može dugoročno dovesti do rješavanja ove situacije. Kao alternativa i privremeno rješenje može poslužiti i relevantna praksa ESLJP-a.

Ključne riječi: *prekograničnost; spolna orijentacija; porez; diskriminacija; nasljedstvo.*

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Zusammenfassung

**DIE ANDERE SEITE DER STEUERDISKRIMINIERUNG.
FEHLENDE RECHTLICHE ANERKENNUNG FÜR
GLEICHGESCHLECHTLICHE PAARE UND DEREN
STEUERLICHE FOLGEN**

Ziel dieses Beitrags ist es, die von der fehlenden rechtlichen Anerkennung von eingetragenen Partnerschaften und gleichgeschlechtlichen Ehen in manchen Mitgliedsstaaten ausgehenden steuerlichen Folgen darzustellen, wobei man sich auf das Beispiel Polens konzentriert. Diese Aspekte erkennt man gewöhnlich als Diskriminierung von Bürgern aufgrund sexueller Orientierung. Im Mittelpunkt dieses Beitrags stehen unterschiedliche Aspekte möglicher Diskriminierung, insbesondere Diskriminierung aufgrund personenbezogener Steuern, was Erbschafts- und Schenkungsteuer einschließt. Deshalb analysiert man in diesem Beitrag die nationalen Steuerregeln für eheliche Partnerschaften und Partnerschaften, denen diese Möglichkeit verweigert wurde. Diesbezüglich wird auch die jüngste nationale Rechtsprechung analysiert. Ebenfalls werden im Beitrag die nationalen Regeln und das EU-Recht rechtsvergleichend analysiert. Wegen fehlender Rechtsprechung über Steuerdiskriminierung aufgrund sexueller Orientierung zieht man die relevante Rechtsprechung des EuGHs (der Gerichtshof der Europäischen Union, nachstehend: EuGH) und des EGMR (der Europäische Gerichtshof für Menschenrechte, nachstehend: EGMR) in Betracht, um die Verletzungen grundlegender Freiheiten und Steuerdiskriminierung aufzudecken. Es wird behauptet, dass der Mangel an relevanter Regulierung auf nationaler Ebene mit der unrechtfertigten Unterscheidung von grenzüberschreitenden Familienbeziehungen aufgrund Steuer zu tun hat. Langfristig kann nur die Harmonisierung personenbezogener Steuer auf der EU Ebene die Lösung für dieses Problem bieten. Anderenfalls kann die relevante Rechtsprechung des EGMR als eine Zwischenlösung dazu beitragen.

Schlüsselwörter: *grenzüberschreitend; sexuelle Orientierung; Diskriminierung; Erbschaft.*

Riassunto

L'ALTRA FACCIA DELLA DISCRIMINAZIONE FISCALE. L'ASSENZA DI RICONOSCIMENTO GIURIDICO DELLE COPPIE DI PERSONE DELLO STESSO SESSO E LE RELATIVE CONSEGUENZE FISCALI

Lo scopo di questo lavoro è di illustrare le conseguenze fiscali risultanti dall'assenza di riconoscimento delle unioni registrate e dei matrimoni di persone dello stesso sesso in alcuni Stati membri dell'UE, prendendo ad esempio la Polonia. Tali aspetti vengono solitamente intesi quali discriminazioni dei cittadini fondate sul loro orientamento sessuale. L'autore di questo lavoro s'è focalizzato su vari aspetti di possibile discriminazione, principalmente riguardanti la discriminazione fondata su ragioni di tassazione personale, incluse le tasse di successione e di donazione. A tali fini, l'autore analizzerà le regole fiscali domestiche che distinguono le coppie unite da matrimonio rispetto alle coppie che non hanno tale possibilità. Tali previsioni legali sono state analizzate unitamente alla giurisprudenza nazionale più recente. Ancora, il lavoro presenta analisi comparate delle regole domestiche con il diritto dell'UE. Vista l'assenza di giurisprudenza volta ad individuare la discriminazione fiscale in ragione dell'orientamento sessuale, la giurisprudenza rilevante della Corte di Giustizia dell'UE e della Corte dei diritti dell'uomo è stata richiamata al fine di rivelare possibili violazioni delle libertà fondamentali e la discriminazione fiscale. L'autore fa un collegamento tra l'assenza di un'appropriata regolamentazione nel diritto interno ed una ingiustificata differenziazione delle famiglie cross-border. Sul lungo termine, soltanto l'armonizzazione della tassazione personale sul piano dell'UE può risolvere tale situazione. In alternativa, quale soluzione ad interim, la giurisprudenza di Strasburgo può essere d'aiuto.

Parole chiave: *cross-border; orientamento sessuale; tasse; discriminazione; successione.*