Stefan Babiarz[1]

# Harmonizacja podatku od spadków i darowizn a ochrona podatników nabywców spadków i darowizn transgranicznych

DOI: 10.5604/01.3001.0015.5417

## Streszczenie

Podatek od spadków i darowizn w państwach członkowskich Unii Europejskiej jest obliczany i pobierany w różny sposób. W większości krajów Wspólnoty Europejskiej jest odrębnym podatkiem. W kilku krajach nie jest pobierany albo pobierany jest w ramach podatków dochodowych. Mimo podjętych przez Komisję Europejską prób zharmonizowania ustawodawstw państw członkowskich w tym zakresie operacja ta nie przyniosła efektu. W artykule zostały przedstawione powyższe działania Komisji Europejskiej w tym zakresie i ich efekty, a także konsekwencje. Zostały wskazane sposoby unikania podwójnego, czy nawet potrójnego, opodatkowania nabycia spadków i darowizn transgranicznych. Ma to istotne znaczenie także dla obywateli polskich wykazujących coraz większą aktywność inwestycyjną w państwach Wspólnoty Europejskiej, a także w państwach trzecich.

**Słowa kluczowe:** harmonizacja ustawodawstw państw członkowskich Unii Europejskiej, spadek transgraniczny, darowizna transgraniczna, zasada swobody przepływu kapitału i płatności, zasada swobody przedsiębiorczości, zasada swobody przepływu pracowników, zasada zakazu dyskryminacji

[1] Doctor of law, judge of the Supreme Administrative Court

## Unification of gift and inheritance taxes and the protection of taxpayers – the inheritors and recipients of donations


## Summary

Gift and inheritance tax in the European Union Member States is calculated and charged in numerous ways. In the majority of countries of the European Economic Community it constitutes a separate tax. In several countries it is not charged at all or is part of the income tax. Despite the attempts made by the European Commission to unify the legislation of the Member States in this regard, there has been no success. The article presents the above-mentioned attempts of the European Commission, their results and consequences. It identifies methods of avoiding a double or even triple taxation on cross-border inheritances or donations. This is of crucial significance also to the Polish citizens who demonstrate higher and higher investment activity in the countries of the European Economic Community and third countries.


**Keywords:** unification of the legislation of the European Union Member States, cross-border inheritance, cross-border donation, free movement of capital and payments, freedom of establishment, freedom of movement for workers, principle of non-discrimination

## 1. Activities in the scope of the unification of the legislation of the EU Member States

There is no doubt that the taxation on inheritances and donations is not covered by the unification of the legislation of Member States through the provisions of the European Union law. In the European Commission Communication COM/2011/864 on tackling cross-border inheritance tax obstacles[2] within the EU, working paper SEC/2011/1488 discussing the case law of the CJEU concerning taxation on inheritances and donations and recommendations 2011/856/EU concerning double taxation on inheritances and donations[3], it has been indicated that eighteen Member States of the EU have the inheritance and gift tax, while nine Member States has not introduced it (Austria, Cyprus, Estonia, Latvia, Malta, Portugal, Romania, Slovakia and Sweden). Several years ago the Czech Republic joined the latter group of the Member States. However, some of them apply a tax on the receipt of an inheritance or donation within income taxes. This document also indicates reasons for lack of the unification of these taxes, for example the fact that the EU Member States in general pay little attention to the issue of double taxation on inheritances/donations or that revenue obtained by the EU Member States from the inheritance tax accounts for less than 0.5% of the total revenue from taxes, while the share of revenue from cross-border cases is even smaller. However, many EU Member States do not notice the growing problem of cross-border taxation on inheritances related to the increased migration within the EU and increasingly larger scale of real properties and other assets purchased by migrants abroad. Lack of the unification exposes citizens of the EU Member States to discriminatory double or even multiple taxation imposed on the same inherited assets/donation by several Member States. Also factors (connectors) connecting national tax regulations, i.e. the principle of 'personal link' and the principle of source (place and location of assets) constitute a significant problem for the unification of provisions concerning taxation on inheritances and donations. Within the principle of 'personal link', Member States impose a tax on the basis of one or a greater number of 'links' connecting the testator and the heir or the donor and the donee from the territory of a given Member State. These links include: the principle of residence, the principle of domicile and the principle of citizenship. Some Member States apply only one principle: the principle of residence: e.g. Belgium, Denmark, Lithuania, some apply two: the principle of residence and the principle of domicile: e.g. Germany, and some apply even three: the principle of residence, the principle of domicile and the principle of citizenship: e.g. Poland. It leads to three types of conflicts between the legislation of the EU Member States, i.e.: 'residence-source' conflict; 'residence-residence' conflict; 'source-source' conflict. In the first case, the same income is taxed twice: first in the country of the asset location, and then in the country of tax residence. In the second case, the testator and the heir are taxed as residents in two Member States, while in the third case the same asset may be covered by the principle of source by more than one Member State, which may concern not only real properties, but first of all intangible assets, such as: patents, proprietary copyrights, trademarks, computer software or shares.

[2] The concepts 'cross-border inheritance' and 'cross-border donation' are explained on pages 10-12. It should be noted here that the protection of payers of the inheritance and gift tax on the grounds of the provisions on freedoms within the European Union may exist in the case of a cross-border situation, i.e. situation in which elements of the tax and legal actual state are connected with more than one Member State (sometimes with a third country). In such situations, the provisions regulating the national inheritance and gift tax treat the national actual state and the actual state with a cross-border element differently.

[3] Documents on the following website: https://ec.europa.eu/taxation_customs/taxation/personal_tax/inheritance/index.eu.htm.

At the level of the European Union in subsequent years – after the adoption of the above documents – further attempts to harmonise and resolve the problem of double taxation on inheritances and donations were undertaken and they resulted in the adoption of the following documents:

- opinion of the European Economic and Social Committee of 18 and 19 September 2012 concerning the above-mentioned Communication of the Commission[4];
- result of the public consultation commenced by the Directorate General on 10 April 2014 – closed on 3 July 2014[5];
- responses received as a result of the public consultation[6];
- report published by the European Commission on 3 March 2016[7].

However, in the above-mentioned report (summary) no legislative or coordination initiatives were taken.

Nevertheless, the European Commission, as guardian of the Treaties, including Articles 63-66 of the Treaty on the Functioning of the European Union (consolidated version)[8], has taken further steps to act against any discriminatory tax regulations of Member States referring to taxation on inheritances and donations. Thus, the Commission sent Member States 6 reasoned opinions, as well as brought 2 cases before the Court of Justice of the European Union (CJEU) closed by judgements of the CJEU. The judgement of 26 May 2016 closed the first of them, i.e. Case C-244/15 *Commission v Greece*[9]. The Court of Justice stated in it that the Hellenic Republic, adopting and maintaining in force provisions providing for the exemption from the inheritance and gift tax concerning the main place of residence applicable only to citizens of the European Union Member States having their place of residence in Greece, failed to fulfil its obligations under Article 63 of the TFEU and Article 40 of the Agreement on the European Economic Area of 2 May 1992.[10] The Court of Justice assessed from the point of view of the above provisions the wording of Article 26A(1) of the Greek Code of Inheritance Taxes, which states that 'A residential building or premises or land property acquired by inheritance by the spouse or child of the deceased, constituting full ownership or co-ownership, is exempt from the inheritance tax if the heir or beneficiary, or their spouse or any of their underage children does not have the right of full ownership, use or residence covering the residential building or premises or its part sufficient to satisfy housing needs of their family or the right of full ownership to a building plot or part of the plot corresponding to the area of the building sufficient for their housing needs, located in a city/town or commune with over 3,000 inhabitants. Housing needs are deemed to be satisfied if the total area of the above-mentioned real properties and other real properties included in the inheritance is 70 $m^2$, increased by 20 $m^2$ for each of two first children and by 25 $m^2$ for the third and each subsequent child of whom the heir has custody. The Greeks and citizens of the European Union Member States are entitled to this exemption. Persons covered by the exemption must have their

4 Official Journal of the EU 2012.351.42.

5 https://ec.europa.eu/taxation_customs/consultation-get-involved/tax-consultations/transgraniczne-podatko-we-problemy-w-ue_en.

6 https://ec.europa.eu/taxation_customs/consultation-get-involved/tax-consultations/transgraniczne-podatko-we-problemy-w-ue_en.

7 Available only in English https://publications.europa.eu/en/publication-detail/-/publication/faa0871d--ca40-lle5-a4b5-01aa75ed71al.

8 OJ C 2012.326.47; Journal of Laws of 2004, no. 90, item 864/2, as amended; hereinafter: the TFEU.

9 ECLI:EU:C:2016:359, OJ L 1994.1.3.; Journal of Laws of 2004, no. 130, item 1375.

10 OJ L 1994.1.3.

permanent place of residence in Greece'. This permanent place of residence in Greece necessary for benefiting from the exemption from the tax has become the main reason for determining non-compliance of this provision with the free movement of capital. The judgement of 4 May 2017 closed the second case, i.e. Case C-98/16 *Commission v Greece*[11]. The Court of Justice stated in it that the Hellenic Republic, adopting and maintaining in force regulations providing for the preferential rate of the inheritance and gift tax in relation to legacies for non-profit organisations with registered offices in other Member States of the European Union or the European Economic Area, subject to reciprocity, failed to fulfil its obligations under Article 63 TFEU and Article 40 of the Agreement on the European Economic Area of 2 May 1992.[12]

## 2. Protection of recipients of cross-border inheritances and donations (selected problems)

The above means that the consequence of lack of the unification of provisions of the European Union Member States concerning taxation on inheritances and donations is the way of judicial protection within Member States and protection under Article 263 of the TFEU, and also the procedure described in Article 258 of the TFEU (reasoned opinion and then the European Commission's appeal lodged with the CJEU).

In general, it results from the provision of Article 263 of the TFEU that the CJEU is entitled to control the legality of legislative acts, acts of the Council, the Commission, the European Central Bank and the European Council intended to produce legal effects in respect of third parties. It also has the right to control the legality of acts of the EU authorities or organisational units intended to produce legal effects in respect of third parties. Therefore, the CJEU has jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on the grounds of lack of competence, infringement of essential procedural requirements, infringement of the Treaty or of any rule of law related to its application or misuse of powers. Additionally, each natural or legal person may bring an action, under the conditions provided for above, against acts addressed to it or which concern it directly and individually, and against regulatory acts, which concern it directly and do not require implementing measures.

The provision of Article 263 of the TFEU is the rule of procedure[13], and therefore it does not impose on national authorities and courts the obligation to act, which does not mean prohibition on permissibility of claiming the illegality of the EU law before a national court. The claim of its infringement may cover any EU legislative acts (Article 289 of the TFEU), i.e. regulations, directives or decisions. The same applies to non-legislative acts other than recommendations or opinions, e.g. resolutions of the Council, letters, unless they are intended to produce legal effects in respect of third parties, e.g. acts of the European Parliament concerning general interpretation of the Rules of Procedure, or the EU budget[14]. Provisions of the primary law and reform or accession treaties may not be contested under this procedure[15]. Actions preceding the Commission's action against a Member State may not be contested under this procedure[16]. Pursuant to

11 ECU:EU:C:2017:346, operative part of the judgement in the Polish version published in *the Electronic Collection of Court Reports (general collection – 'Information on unpublished judgements')* on the CJEU website https://curia.europa.eu.

12 OJ L 1994.1.3.

13 See K. Scheuring [in:] D. Kronobis-Romanowska, J. Łacny, A. Wróbel (ed.), *Treaty on the Functioning of the European Union. Commentary (Traktat o funkcjonowaniu Unii Europejskiej. Komentarz),* volume 3, Articles 223-358, Warsaw 2012, LEX/el., commentary to Article 263.

14 Judgement of the ECJ of 3 July 1986, C-34/86, ECR 1986, no. 7, item 2155.

15 Judgement of the ECJ of 28 April 1988, C-51/86, ECR 1988, no. 4, item 2285.

16 K. Scheuring [in:] D. Kronobis-Romanowska, J. Łacny, A. Wróbel, *op.cit,* commentary to Article 263.

Article 263 of the TFEU, the right of action after lodging an appeal under this provision vests in Member States, the Council, the Commission and the European Parliament, while the right to be a party in a case vests in institutions listed in this provision, as well as against e.g. the Office for Harmonisation of the Internal Market in connection with decisions issued.

In turn, the provision of Article 258 of the TFEU indicates that if the Commission considers that a Member State has failed to fulfil one of its obligations, it issues under the Treaties a reasoned opinion on this subject, after giving this Member State the opportunity to submit its observations. If the Member State does not comply with the opinion within the period laid down by the Commission, the latter may bring the case before the CJEU.

On the basis of the protection under this provision, it should be noted that all public authorities of Member States may implement the provisions of the EU law. However, 'the control of the fulfilment of the Treaty obligations by Member States has been entrusted to the EU institutions, i.e. the Commission and the Court of Justice. It may performed to a limited extent also by other Member States. Within this control, legal instruments have not been granted to private entities, however the role of these entities is significant in the initiation of the control performed by the Commission'[17]. Moreover, private entities do not have legal measures to enforce the initiation of this control by the Commission. Nevertheless, in the judgement of 12 July 1962 in case C-9/60 *Vloeberghs v High Authority,* the ECJ indicated that non-performance by the Commission of tasks included in Article 88 of the Treaty establishing the European Coal and Steel Community – being the equivalent to Article 258 TFEU, i.e. failure to react to the infringement of the Treaty by a Member State, results in liability for damage caused by this infringement[18]. However, it should be noted that the provision of Article 258 of the TFEU gives the Commission the power of discretionary character. Although private entities indicated there are not entitled to initiate control under Article 258 of the TFEU, they are entitled to lodge a complaint whose template has been developed and published by the Commission. The manner of examining them is indicated in the Commission Communication of 2002.[19] According to this Communication, a private entity does not have to demonstrate a legal interest to lodge a complaint, but it cannot be an anonymous entity. The fulfilment of formal requirements means recording the complaint, and in the case of refusal to record it the complainant must attach the notification presenting reasons for this refusal. Nevertheless, the notification of the complainant is necessary in the event of control of the Commission's decision issued in a given case, such as: letter of formal notice, reasoned opinion, bringing an action, closing a case[20]. It is not possible, however, to lodge an appeal against the Commission's failure to take actions in this case. In this regard it should be noted that in the Commission Communication – A Europe of results – Applying Community Law, COM (2007) 502, this procedure was changed by the implementation of the pilot project 'EU Pilot', in which however Poland does not participate.

Nevertheless, it should be emphasised here that the procedure indicated above in Article 258 of the TFEU does not exclude the possibility of a national court to examine an infringement of the EU law under

---

17 N. Półtorak [in:] D. Kronobis-Romanowska, J. Łacny, A. Wróbel, *op.cit,* commentary to Article 258.

18 Judgement of the Court of Justice of 12 July 1962, C-9/60, ECR 1962, item 171.

19 Commission communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community Law, COM (2002) 141 final.

20 N. Półtorak [in:] D. Kronobis-Romanowska, J. Łacny, A. Wróbel, *op.cit,* commentary to Article 258.

Article 267 of the TFEU. In accordance with this provision:

'The Court of Justice of the European Union has jurisdiction to give preliminary rulings on:

a) interpretations of Treaties;

b) validity and interpretation of acts adopted by the EU institutions, authorities or organisational units.

Where a question related to it is raised before a court of a Member State, this court may, if it considers that a decision on the question is necessary for the issue of a judgement, request the Court of Justice to give a ruling on the question.

If such a question is raised before a court of a Member State against whose decisions there is no judicial remedy under national law, this court is obliged to bring the case before the Court of Justice.

If such a question is raised in a case pending before a court of a Member State with regard to a person in custody, the Court of Justice acts with the minimum of delay'.

The procedure included in Article 267 of the TFEU may be initiated if a Member State has failed to fulfil one of its obligations under the Treaties, which result not only from the regulations, but also from general principles of the EU law[21].

The characteristic issue is that the preliminary reference cannot concern directly the compliance of the national law with the EU law, as the CJEU is not entitled to interpret it; in particular whether the competence of a court of a Member State is compliant with the national law, while most preliminary references are related to this problem. The preliminary reference may concern the interpretation of the EU law and its validity if the decision on this matter is necessary for the issue of a judgement. The control of the constitutionality of a national provision before the control under Article 267 of the TFEU in principle is not permissible, although such controls may both function, but with the reservation that the control of the constitutionality is permissible if the autonomy of a national court in the scope of its powers resulting from Article 267 of the TFEU is not infringed[22]. It should be underlined here that if a specific national provision is found to be non-compliant with the EU law, failure to repeal or change it will constitute an infringement of the EU law, and this may be the object of an action under Article 258 of the TFEU. Then, due to the qualified character of the infringement, the compensatory liability of the Member State is possible[23].

The above issues entail the issue of the binding force and impact of a judgement issued under Article 267 of the TFEU, establishing the interpretation of the EU law for the decision of a national court in a new similar case, obviously between different parties, in which the prejudicial issue is materially identical. For the first time the Court of Justice examined this issue in the *Da Costa* case[24]. It often happens that national courts are obliged to apply the EU law within the meaning established by the Court of Justice, while national courts, which would be obliged to submit the preliminary reference, are entitled to base on a previous

---

21 H. Schermers, D. Waelbroeck, *Judicial Protection in the European Union,* The Hague-London-New York 2001, p. 646; A. Kastelik-Smaza, *Consequences of the Infringement of the Obligation to Submit a Preliminary Reference to the Court of Justice (Konsekwencje naruszenia obowiązku skierowania pytania prejudycjalnego do TS),* 'European Judicial Review' (Europejski Przegląd Sądowy) 2007, no. 2, p. 24-31; A. Wyrozumska, J. Barcz (ed.), *European Union Law. System Issues (Prawo Unii Europejskiej. Zagadnienia systemowe),* Warsaw 2006, p. 150 et seq.

22 Judgement of the CJEU of 22 June 2010 in joined cases C-188/10 and C-189/10 *Melki and Abdeli,* ECLI:EU:C:2010:363, ZOTSiS 2010, no. 6B/I-5667-5742.

23 N. Półtorak, *Compensatory Liability of a Member State in the Law of the European Communities (Odpowiedzialność odszkodowawcza państwa w prawie Wspólnot Europejskich),* Kraków 2002, p. 168 et seq.; judgement of the ECJ of 19 November 2002 C-188/00, *Bulent Kurz v Lama Baden-Wurttemberg,* ECR 2002, no. IIB/I-10691.

24 Judgement of the ECJ of 27 March 1963 in case C-28-30/62, *Da Costa En Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Ireland Revenue Administration,* ECR 1963, p. 61, § 5-7.

judgement of the Court of Justice in an identical case. Finally, they are also entitled to submit the preliminary reference again, with the reservation that while submitting it they should refer to new circumstances and arguments[25]. This issue is also explained by the so-called CILFIT doctrine, i.e. doctrine of *acte clair* and *acte eclair.* The scope of this doctrine means[26] that:

a) the previous judgement of the Court of Justice does not have to concern actually identical preliminary reference, but the substantive similarity (coherence) of legal issues is important;

b) the binding force may result from each previous judgement of the Court of Justice, regardless of the procedural context in which it has been issued;

c) the binding force is addressed to lower or higher instance courts.

It is characteristic that the above principles (of the doctrine) have remained relevant until today[27].

### 3. Case law of the CJEU concerning cases from the scope of the inheritance and gift tax

Importantly, mention should further be made of a number of judgements of the Court of Justice of the European Union from the scope of legal grounds and permissibility of the protection of payers of the inheritance and gift tax based on:

- Article 18 of the TFEU (general prohibition against any discrimination based on nationality, i.e. citizenship – judgement of the Court of Justice of 11 September 2008 in case C-11/07 *Hans Eckelkamp and Others v Belgische Staat*[28]*;* judgement of the Court of Justice of 10 February 2011 in case C-25/10 *Missionswerk Werner Heukelbach e.V. v Belgische Staat*[29]*);*
- Article 21 of the TFEU (the principle of freedom of movement and residence in the Member States – judgement of the Court of Justice of 3 September 2014 in case C-127/12 *European Commission v Kingdom of Spain*[30]*);*
- Article 45 of the TFEU (free movement of workers – judgement of the Court of Justice of 11 December 2003 in case C-364/01 *Heritiers de M.H. Barbier v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te* Heer/en[31]; judgement of the Court of Justice of 22 April 2010 in case C-510/08 *Vera Mattner v Finanzamt Velbert*[32]*);*
- Article 49 of the TFEU (freedom of establishment – judgement of the Court of Justice of 15 September 2011 in case C-132/10 *Olivier Halley, Julia Halley and Marie Halley v Belgische Staat*[33]*);*

---

25 P. Dąbrowska-Kłosińska, *Effects of Preliminary Rulings of the Court of Justice of the European Union in Proceedings before National Courts in the Light of the Case Law of the Court of Justice and the European Union Law (Skutki wyroków prejudycjalnych Trybunatu Sprawiedliwości Unii Europejskiej w postępowaniu przed sądami krajowymi w świetle orzecznictwa Trybunatu i prawa Unii Europejskiej),* [in:] A. Wróbel (ed.).
*Ensuring the Effectiveness of Judgements of International Courts in the Polish Legal Order (Zapewnienie efektywności orzeczeń sądów międzynarodowych w polskim porządku prawnym),* Warsaw 2011.
p. 400-401.

26 See judgement of the ECJ of 6 October 1982 in case C-283/81, *Srl CILFIT and Lanificio on Gavardo SpA. v Ministero delia Sanita,* ECR 1982, p. 3415.

27 Judgement of the ECJ of 4 November 1997 in case C-337/95, *Parfums Christian* D/o *SA and Parfums Christian Dior DV v Evora BV,* ECR 1997, p. 1-6013; judgement of the ECJ of 15 September 2005 in case C-495/03, *Intermodal Transports BV v Staatsoecretaris von Financien,* Collection of Judgements 2005, p. 1-8151; judgement of the ECJ of 6 December 2005 in case C-461/03 *Gaston Schul Douane-expediteur,* ZOTSiS 2005, no. 12A/I-10513.

28 Collection of Judgements 2008, I-06845.

29 Collection of Judgements 2011, I-00497.

30 PP 2014, no. 10, p. 53.

31 Collection of Judgements 2003, no. 12/I-15013.

32 Collection of Judgements 2010, no. 46/I-3553-3580.

33 Collection of Judgements 2011, I-08353.

- Article 56 of the TFEU (freedom to provide services – judgement of the Court of Justice of 10 February 2011 in case C-25/10 *Missionswerk Werner Heukelbach e. V. v Belgische Staat*[34]*),*
- as well as Article 63 of the TFEU (free movement of capital and payments – judgement of the Court of Justice of 11 December 2003 in case C-364/01 *Heritiers de M.H. Barbier v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen*[35]*;* judgement of 25 October 2007 in case C-464/05 *Maria Geurts, Dennis Vogten v Administratie van de BTW, registratie eu domeinen and Belgische Staat*[36]*).*

The CJEU has determined the possibility of payers of the inheritance and gift tax to use them and the scope of this use.

### 4. Principle of free movement of capital and payments

Among the above-indicated principles (freedoms) of the protection of cross-border inheritance or cross-border donation and their impact on the national substantive provisions included in the Inheritance and Gift Tax Act, the principle of free movement of capital and payments (Article 63 of the TFEU) comes to the fore due to its scope, which covers not only cross-border situations on the European Union internal market, but also situations that involve third countries[37]. For citizens of the Republic of Poland it is of significant importance due to investments, including real properties acquired in Ukraine or Georgia. The standard of Article 63 of the TFEU covers with its scope the movement of capital between the EU Member States, but also between Member States and third countries. There is no doubt in the case law of the CJEU that, despite lack of the definition of movement of capital in the primary provisions, Article 1 of Directive 88/361 of 24 June 1988 for the implementation of Article 67 of the Treaty is of crucial importance here[38]. Pursuant to it 'Member States remove restrictions in the scope of movements of capital between residents of Member States. In order to facilitate the application of this directive, the movement of capital is classified in accordance with the nomenclature included in Appendix no. 1'. Title XI of this Appendix indicates 'Movements of capital of a personal nature' under letter B – donations, and under letter D – inheritances. Title XIII 'Other movements of capital' indicates that capital should be understood also as the inheritance and gift tax. It means that movement should be understood in particular as acquisition and disposal of capital (acquisition and disposal of assets – including real properties – and property rights being part of inherited assets or constituting the object of donation). Therefore, a cross-border inheritance and a cross-border donation are movements of capital of a personal nature independent of each other[39]. Across-border inheritance and a cross-border donation may occur when:

a) the inherited or donated real property is located in other EU Member State (or third country) than the country in which the testator or donor resided or in which the heir or donee resides[40];

34 Collection of Judgements 2011, I-00497.

35 Collection of Judgements 2003, no. 10/ I-15013.

36 Collection of Judgements 2007, no. 11/I-11531.

37 J.K. Szczepański, *Taxation on cross-border inheritances and donations (Opodatkowanie transgranicznych spadków i darowizn),* Poznań 2017, p. 304.

38 OJ L of 8 July 1988, no. 178.

39 J.K. Szczepański, *op.cit,* p. 305.

40 Cases: C-513/03 *Barbier, van Hilten - van der Heijden* (judgement of the Court of Justice of 23 February 2006, Collection of Judgements 2006, p. 1-1957), *C-*

b) shares in joint stock company with registered office in the EU Member State (or third country) other than the place of residence of the testator or the heir are inherited[41];

c) capital is inherited as bank deposits in the bank branch located in other EU Member State (or third country) than the country in which the testator or the heir resided at the time of their inheritance[42].

In the described situations, the protection and its scope are determined by two premises, i.e.:

a) the occurrence of different treatment of the above cross-border situations by the provisions of internal substantive law and

b) the determination of freedom, which will be applied in a given case[43].

The case law of the CJEU[44] defines the movement of capital in the case of the cross-border inheritance and the cross-border donation in the following way: 'The inheritance which consists in a transfer to one or several persons assets left by the deceased is also covered by the same title of the above-mentioned Appendix I (see e.g. judgements: of 17 January 2008 in case C-256/06 *Jager[45];* of 11 September 2008 C-43/07 in case *Eckelkamp and Others.[46];* in case *Arens-Sikken;* of 12 February 2009 C-67/08 in *Block* case[47]*;* as well as of 15 October 2009 in case C-35/08 *Busleyi Cibrian Fernandez[48])* and this inheritance should be treated in terms of taxes as donations, irrespective of the fact whether money, real properties or movables constituted their object. Therefore, it is covered by the provisions of the Treaty concerning the movement of capital, except for cases in which the occurrence of constitutive elements of donation is limited to the territory of one Member State (similarly judgement of 27 January 2009 in case C-318/07, *Persche[49])'.*

Therefore, according to Szczepański they are fairly general definitions.

In general, the provisions of Member States (as well as the provisions of third countries) concerning the inheritance and gift tax violate the provisions on free movement of capital if they provide for different tax treatment of the acquisition of assets, including real properties being part of the inheritance, depending on whether they have a specific connection with the territory of the country, particularly whether they are located there. It means that:

- methods of the valuation of assets cannot be less favourable for assets located abroad;
- the possibility to deduct charges (liabilities, debts) in relation to those located abroad should not be limited unless such limitations are provided for debts (liabilities) existing in this Member State;
- the provisions of Member States (as well as the provisions of third countries) concerning taxation on inheritances (donations) cannot provide for a higher rate of the inheritance and gift tax in relation

*256/06 Jager* (judgement of the Court of Justice of 17 January 2008, Collection of Judgements 2008, p. I-00123), C-181/12 *Eckelkamp, Mattner* and case: *Welte,* i.e. judgement of the Court of Justice of 17 October 2013 Won *Welte vel Finansamt Velbert* (curia, europa.eu); J.K. Szczepański, *op.cit,* p. 295.

41 Case *van Hilten - van der Heijden, Halley;* J.K. Szczepański, *op.cit.,* p. 295.

42 *Ibidem,* p. 296.

43 J.K. Szczepański, *op.cit,* p. 296.

44 See e.g. *Mattner* case*,* point 20.

45 Collection of Judgements 2008, p. I-00123.

46 Collection of Judgements 2008, p. I-06887.

47 OJ of 24/04/2009, p. 6-7.

48 OJ C 2009.297.7/1.

49 OJ C 2009.69.8/1.

to assets of inheritances and donations located abroad[50];

- Member States (and third countries) cannot set different limitation periods for the re-evaluation of registered shares for inheritance tax purposes depending on the location of the issuing company's centre of effective management[51].

## 5. Principle of freedom of establishment

It is an exception to the above-mentioned principle of free movement of capital as it has been assumed that it may apply when elements of the cross-border inheritance or the cross-border donation may fall outside the scope of the application of the principle of free movement of capital[52]. In the *Vogten* case, the CJEU assessed the provisions concerning the exemption from taxation of family businesses in which at least 50% of shares vested in the testator or their spouse. The criterion for the exemption from the inheritance and gift tax was the number of workers engaged in the company's matters in Belgium. The company that wanted to take advantage of the exemption had its registered office in the Netherlands and did not meet the condition of the number of workers, while the testator resided in Belgium. In this case, the CJEU indicated that in the event of the transfer of the place of residence to one EU Member State (from the Netherlands to Belgium) and the simultaneous transfer of most shares in the company with registered office in another EU Member State (the Netherlands), the case concerns the principle of freedom of establishment[53]. The CJEU indicated that the principle of freedom of establishment functions only within the EU internal market and it does not apply to actual states in which elements of this state are located in a third country. It meant that the CJEU transferred the principle functioning on the grounds of the income tax to the grounds of the inheritance and gift tax. Therefore, the application of the principle of freedom of establishment precedes the application of the principle of free movement of capital.

## 6. Principle of non-discrimination

In accordance with the established case law of the CJEU, discrimination can take place in the event of different treatment of comparable situations or in the event of treatment of different situations in the same manner.

On the grounds of Article 18 of the TFEU it is important that the national procedure providing for different treatment should be compatible with freedoms determined in the Treaty and, moreover, it must concern situations that are not objectively comparable or situations in which different treatment is justified by overriding reasons of the public interest. Furthermore, the national procedure may not in any event be more restrictive than necessary for the achievement of the assumed purpose, in other words, it must proportionate[54].

---

50 And this happens e.g. in the case of taxation on the acquisition by a Polish citizen of inherited assets located in Ukraine. See S. Babiarz, *Taxation on the Acquisition of Inheritance and Donation in Ukraine (Opodatkowanie nabycia spadku i darowizny na Ukrainie),* Scientific Journals of the University of Rzeszów (Zeszyty Naukowe Uniwersytetu Rzeszowskiego), no. 113, Legal Series, Law (Seria Prawnicza, Prawo) 31, 2020, p. 11-23, text in the English language.

51 Working paper SEC/2011/1488.

52 *Vogten* case.

53 *Ibidem.*

54 Working paper SEC/2011/1488.

The principle of non-discrimination refers to nationality (Article 18 of the TFEU). This provision may be applied independently only in situations subject to the EU law in relation to which the Treaty on the Functioning of the European Union does not contain specific provisions prohibiting any discrimination. It means that if the provisions on free movement of capital and payments apply to a case, they prevail over specific provisions prohibiting any discrimination[55].

## 7. Principle of freedom of movement for workers

The issue of applying the principle of freedom of movement for workers to the inheritance and gift tax was the object of the CJEU consideration in several cases. In the *Barbier* case, the Court of Justice did not analyse the conformity of Belgian regulations with this principle. However, it indicated that 'effects that can be produced by the inheritance and gift tax belong to this consideration which a citizen of one Member State may legitimately assess while taking the decision whether they should exercise their right to free movement of workers within the EU internal market'[56]. The Court of Justice took a similar position in the *Vogten* case, while in the *Missionswerk* case, the Court of Justice underlined that the principle of freedom of movement for workers does not apply to the inheritance and gift tax in the case of the assessment of national provisions in relation to the principle of free movement of capital and payments[57].

## 8. Other legal acts of international law in the scope of the protection of rights of payers of the inheritance and gift tax (selected problems)

Obviously an important role was also fulfilled by the OECD Model Double Taxation Convention on Estates, Inheritances and Gifts (models from 1966 and 1982). However, as at 2010 only some EU Member States made such agreements. Poland made such agreements before World War Two with Austria, the Czech Republic and Hungary.

Legal acts binding Poland in the scope of avoiding double taxation on inheritances are:

- Convention between the Republic of Poland and the Republic of Austria on the prevention of double inheritance tax, signed in Vienna on 24 November 1926[58];
- Agreement between the Republic of Poland and the Czechoslovak Republic on the prevention of double inheritance tax, signed in Warsaw on 23 April 1925[59];
- Convention between the Republic of Poland and the Kingdom of Hungary on the prevention of double inheritance tax, signed in Warsaw 12 May 1928[60].

The common feature settled uniformly in these conventions is the fact that inherited immovable assets of the deceased citizens of each of both contracting states, including appurtenances, are subject to the inheritance tax only in the state in which they are located. In order to resolve the issue:

---

55 *Missionswerk* case.

56 J.K. Szczepański, *op.cit,* p. 301; *Barbier* case.

57 *Missionswerk* case.

58 Journal of Laws of 1928, no. 61, item 557.

59 Journal of Laws of 1926, no. 13, item 78.

60 Journal of Laws of 1931, no. 75, item 602.

- whether the inherited property should be considered as immovable property;
- what is meant by appurtenance;

the acts of this state in which the immovable property (inheritance) is located should be applied.

The rights to use the real property which are secured on it or with which it is encumbered should be treated in the same way as real properties (Article 1 of the above Conventions):

- this property in general is subject to the inheritance tax in the state whose citizen the testator was at the time of their death (Article 2(1)(a) of the above-mentioned Conventions);
- if the testator at the time of their death resided in another state, the inherited property located there should be subject to taxation in this state (Article 2(1)(b) of the above-mentioned Conventions);
- if the testator at the time of their death had their place of residence in both countries, the property is subject to the inheritance tax in the state whose citizen the testator was (Article 2(1)(c) of the above-mentioned Conventions).

The characteristic issue is that these Conventions refer only to double taxation on inheritances, but they do not concern the acquirement of the ownership title to assets and property rights on the basis of donation[61]. Therefore, if a Polish resident inherited assets from an Austrian citizen, they are subject to taxation only in Austria. Thus in such a case a Polish citizen does not have to submit a tax return (SD.-3, SD-3A), or pay the inheritance and gift tax in Poland[62].

Nevertheless, the Convention between Poland and Hungary provides here for one more exception to the principle of source, place of residence and citizenship of the testator. It results from Article 2(1)(d) of the Convention that if the recipient of the inherited assets (heir, recipient of the inheritance) was at the time of death of the deceased a citizen of one of the contracting states, the inherited assets acquired by this recipient are subject to mandatory inheritance tax in this state whose citizen the recipient was at the time of the acquirement. However, this exception does not apply in the case when the recipient had their place of residence in the other contracting state.

These Conventions also uniformly define the concept of the place of residence, understanding it as a place where a person has residential premises which, as circumstances indicate, this person intends to keep in possession permanently, or as a place where this person stays if it may be assumed based on circumstances that they intend to stay there not only temporarily.

## 9. Summary

The above consideration leads to the conclusion that payers of the inheritance and gift tax, despite the fact that regulations of Member States are not harmonised in this scope, have not lost the entire battle in the scope of the protection against double and discriminatory taxation on their assets, although the way to this protection is long. They have protection on the grounds of tax, administrative court proceedings,

61 Judgement of the Supreme Administrative Court of 29 August 2012, II FSK 1236/11, LEX no. 1244031.

62 J. Budziszewski, *The Inheritance and Gift Tax on the Inheritance from Austria in the Light of Convention of 24 November 1926 on the Prevention of Double Collection of the Inheritance Tax (Podatek od spadków i darowizn od spadku z Austrii w świetle Konwencji z dnia 24 listopada 1926 r. o zapobieżeniu dwukrotnemu pobieraniu podatku spadkowego),* 'Tax Consultancy' (Doradztwo Podatkowe) 2012, no. 9, p. 32-33.

with preliminary references to the Court of Justice. They may also choose protection under Article 263 and Article 258 of the Treaty on the Functioning of the European Union. Therefore, against this background the protection provided by principles determined in Article 18, Article 21, Article 45, Article 49, Article 56, and primarily Article 63 of the Treaty on the Functioning of the European Union is essential.

**Bibliography**

**Legal acts**

1. Traktat o funkcjonowaniu Unii Europejskiej (Dz. Urz. UE C 2012.326.47; Dz U. z 2004 r. Nr 90, poz. 864/2 ze zm.)
2. Porozumienie o Europejskim Obszarze Gospodarczym z dnia 2 maja 1992 r. (Dz. Urz. UE L 1994.1.3)
3. Dyrektywa 88/361 z dnia 24 czerwca 1988 r. w sprawie wykonania art. 67 Traktatu (Dz. Urz UE L z 8 lipca 1988 r. Nr 178)
4. Opinia Europejskiego Komitetu Ekonomiczno-Społecznego z dnia 18 i 19 września 2012 r. dotyczącą wspomnianego wyżej Komunikatu Komisji Dz. Urz. UE 2012.351.42
5. Konwencja między Rzecząpospolitą Polską a Królestwem Węgierskim w celu zapobieżenia podwójnemu opodatkowani u spadków, podpisana w Warszawie dnia 12 maja 1928 r. Dz. U. z 1931 r. Nr 75, poz. 602.
6. Konwencja między Rzecząpospolitą Polską a Republiką Austriacką o zapobieżeniu dwukrotnemu pobieraniu podatku spadkowego, podpisana w Wiedniu dnia 24 listopada 1926 r. Dz. U. z 1928 r. Nr 61, poz. 557.
7. Umowa pomiędzy Rzecząpospolitą Polską a Republiką Czechosłowacką w sprawie zapobieżenia dwukrotnemu opodatkowaniu w dziedzinie podatków spadkowych, podpisana w Warszawie dnia 23 kwietnia 1925 r. Dz. U. z 1926 r. Nr 13, poz. 78.
8. Commission communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community Law, COM (2002) 141 final.
9. Dokument roboczy SEC/2011/1488

**Scientific books and articles:**

1. Babiarz S., *Opodatkowanie nabycia spadku i darowizny na Ukrainie,* Zeszyty Naukowe Uniwersytetu Rzeszowskiego nr 113, Seria Prawnicza, Prawo 31, 2020.
2. Budziszewski J., *Podatek od spadków i darowizn od spadku z Austrii w świetle Konwencji z dnia 24 listopada 1926 r o zapobieżeniu dwukrotnemu pobieraniu podatku spadkowego,* „Doradztwo Podatkowe" 2012, nr 9.
3. Dąbrowska-Kłosińska P., *Skutki wyroków prejudycjalnych Trybunatu Sprawiedliwości Unii Europejskiej w postępowaniu przed sądami krajowymi w świetle orzecznictwa Trybunału i prawa Unii Europejskiej,* [w:] A. Wróbel (red.), *Zapewnienie efektywności orzeczeń sądów międzynarodowych w*

*polskim porządku prawnym,* Warszawa 2011.

4. Kastelik-Smaza A., *Konsekwencje naruszenia obowiązku skierowania pytania prejudycjalnego do TS,* „Europejski Przegląd Sądowy" 2007, nr 2 .
5. Półtorak N. [w:] D. Kronobis-Romanowska, J. Łacny, A. Wróbel (red.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz,* tom 3, art. 223-358, Warszawa 2012, LEX/el.
6. Półtorak N., *Odpowiedzialność odszkodowawcza wprawie Wspólnot Europejskich,* Kraków 2002.
7. Schermers H., Waelbroeck D., *Judicial Protection in the European Union,* The Hague-London-New York 2001.
8. Scheuring K. [w:] D. Kronobis-Romanowska, J. Łacny, A. Wróbel (red.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz,* tom 3, art. 223-358, Warszawa 2012, LEX/el.
9. Szczepański J.K., *Opodatkowanie transgranicznych spadków i darowizn,* Poznań 2017.
10. Wyrozumska A., Barcz J. (red.), *Prawo Unii Europejskiej. Zagadnienia systemowe,* Warszawa 2006

**Case law**

1. Wyrok z dnia 26 maja 2016 r. w sprawie C-244/15 Komisja przeciwko Grecji (ECLI:EU:C:2016:359, Dz. Urz. UE L 1994.1.3.; Dz. U. z 2004 r. Nr 130, poz. 1375.)
2. Wyrok TSUE z dnia 4 maja 2017 r. w sprawie C-98/16 *Komisja przeciwko Grecji* (ECLI:EU:C:2017:346, sentencja orzeczenia w wersji polskiej opublikowana w *Elektronicznym Zbiorze Orzeczeń (zbiór ogólny - „Informacje o orzeczeniach niepublikowanych")* na stronie internetowej TSUE https://curia.europa.eu.)
3. Wyrok ETS z dnia 3 lipca 1986 r., C-34/86, ECR1986, nr 7, poz. 2155.
4. Wyrok ETS z dnia 28 kwietnia 1988 r, C-51/86, ECR 1988, nr4, poz. 2285.
5. Wyrok TS z dnia 12 lipca 1962 r, C-9/60, ECR 1962, poz. 171.
6. Wyrok TSUE z dnia 22 czerwca 2010 r. w sprawach połączonych C-188/10 i C-189/10 *Melki i Abdeli,* ECLI:EU:C:2010:363, ZOTSiS 2010, nr 6B/I-5667-5742.
7. Wyrok ETS z dnia 27 marca 1963 r. w sprawie C-28-30/62, *Da Cosła En Schaake NV, Jacob MeijerNV, Hoechst-Holland NV przeciwko Netherlands Ireland Revenue Administration,* ECR 1963, s. 61, § 5-7.
8. Wyrok ETS z dnia 19 listopada 2002 r. C-188/00, Bulent Kurz przeciwko Lama Baden-Wtirttemberg, ECR 2002, nr 11 B/I-10691.
9. Wyrok ETS z dnia 6 października 1982 r. sprawa C-283/81, *Srl CILFIT i Lanificio on Gavardo SpA. przeciwko Ministero delia Sanita,* ECR 1982, s. 3415.
10. Wyrok ETS z dnia 4 listopada 1997 r. w sprawie C-337/95, *Parfums Christian Dio SA i Parfums Christian Dior DV przeciwko Evora BV,* ECR 1997, s. I-6013;
11. Wyrok ETS z dnia 15 września 2005 r. w sprawie C-495/03, *Intermodal Transports BV przeciwko*

*Staatsoecretaris von Financien,* Zb. Orz. 2005, s. I-8151;

12. Wyrok ETS z dnia 6 grudnia 2005 r. w sprawie C-461/03 *Gaston Schul Do-uane-expediteur,* ZOTSiS 2005, nr 12A/I-10513.
13. Wyrok NSAz dnia 29 sierpnia 2012 r., II FSK 1236/11, LEX nr 1244031.
14. Wyrok TS z dnia 11 września 2008 r. w sprawie C-11/07 Hans Eckelkamp i inni przeciwko Belgische Staat (Zb.Orz. 2008, I-06845)
15. Wyrok TS z dnia 10 lutego 2011 r. w sprawie C-25/10 Missionswerk Werner Heukelbach e.V. przeciwko Belgische Staat (Zb. Orz. 2011, I-00497)
16. Wyrok TS z dnia 3 września 2014 r. w sprawie C-127/12 Komisja Europejska przeciwko Królestwu Hiszpanii (PP 2014, nr 10, s. 53)
17. Wyrok TS z dnia 11 grudnia 2003 r. w sprawie C-364/01 Heritiers de M.H. Barbier przeciwko Inspecteur van de Belastingdienst Particulieren/Onder-nemingen buitenland te Heerlen (Zb.Orz. 2003, nr 12/1-15013.)
18. Wyrok TS z dnia 22 kwietnia 2010 r. w sprawie C-510/08 Vera Mattner przeciwko Finanzamt Velbert (Zb. Orz. 2010, nr46/I-3553-3580)
19. Wyrok TS z dnia 15 września 2011 r. w sprawie C-132/10 Olivier Halley, Julia Halley i Marie Halley przeciwko Belgische Staat (Zb. Orz. 2011,1-08353)
20. Wyrok TS z dnia 10 lutego 2011 r. w sprawie C-25/10 Missionswerk Werner Heukelbach e.V przeciwko Belgische Staat (Zb. Orz. 2011, I-00497)
21. Wyrok TS z dnia 11 grudnia 2003 r. w sprawie C-364/01 Heritiers de M.H. Barbier przeciwko Inspecteur van de Belastingdienst Particulieren/Onder-nemingen buitenland te Heerlen (Zb.Orz. 2003, nr 10/1-15013)
22. Wyrok z dnia 25 października 2007 r. w sprawie C-464/05 Maria Geurts, Dennis Vogten przeciwko Administratie van de BTW, registratie eu dome-inen i Belgische Staat (Zb.Orz. 2007, nr 11/1-11531)
23. Wyrok TS z dnia 23 lutego 2006 r. w sprawie Barbier, van Hilten - van der Heijden sygn. akt. C-513/03, (Zb.Orz. 2006, s. 1-1957),
24. Wyrok TS z dnia 17 stycznia 2008 r, w sprawie Jager sygn. akt. C-256/06 (Zb. Orz. 2008, s. 1-00123),
25. Wyrok TS z dnia 17 października 2013 r. Yvon Welte vel Finansamt Velbert sygn. akt. C-181/12 Eckelkamp, Mattner oraz sprawa: Welte, (curia.europa.eu)
26. Wyrok TSUE z dnia 11 września 2008 r. C-43/07 w sprawie Eckelkamp i in. (Zb. Orz. 2008, s. I-06887.)
27. Wyrok TSUE z dnia 12 lutego 2009 r. C-67/08 w sprawie Block (Dz. Urz. UE z 24.04.2009 r.)
28. Wyrok TSUE z dnia 15 października 2009 r. w sprawie C-35/08 Busley i Cibrian Fernandez (Dz. Urz. UE C 2009.297.7/1.)
29. Wyrok z dnia 27 stycznia 2009 r. w sprawie C-318/07, Persche (Dz. Urz. UE C 2009.69.8/1)