Case study 2

The fundamental treaties of the European Union have been reformed again. The Charter of Fundamental Rights has been incorporated. New competences have been created in the field of taxes. Based on these competences a "European System of Interest Tax" (ESIT) has been established which replaces the national taxes on interest revenues from bank accounts. The new interest tax is raised by the member states but a part of the revenue is forwarded to the Union.

The ESIT rules provide for an annual tax allowance of 3.000 € per person. For "married couples" there is a joined assessment allowing them to pay no interest tax if, for example, the husband has gained 4.000 € but his wife has only gained 2.000 € in the same year. Plans to extend the joined assessment to registered same-sex partnerships (as they are known in some European countries today) were rejected by the Council, due to the strong resistance of some member states.

In the years following the introduction of ESIT some member states have opened the legal institution of marriage to partners of the same sex. Their legal systems do not differentiate between married couples of different sexes and of the same sex. In one of these states, Mr. A (a local citizen) and Mr. B (an Erasmus exchange student) have married. Later they have moved to the home town of Mr. B where they live together.

The following year, Mr. A has gained an interest revenue of 6.000 € from his bank accounts, while Mr. B has accumulated debts only. The local tax authority refuses a joined assessment, because the legal institution of marriage has not been opened for same-sex relationships in this member state. The tax authority argues that the national "ordre public" does not allow granting legal privileges linked to this institution to people belonging to the same sex. When reminded to art. 9 of the (incorporated) Charter, the authority argues that this fundamental right is addressed to the institutions of the Union only. A second objection is that according to art. 9 the right to marry shall be guaranteed "in accordance with the national laws" only. The tax authority concludes that the concerned ESIT provisions have to be interpreted in conformity to the national law of that member state where the taxes have to be paid. (By the way, due to *that* national law, Mr. B has received social welfare benefits in spite of the considerable wealth of Mr. A). Mr. A and Mr. B, however, think that it is the national law of the member state where they married what matters.

I. Are they entitled to a joined assessment? Does it make a difference if the constitution of the member state where they are living does not allow the introduction of same-sex marriage? Does it make a difference if the constitution of the member state where they were married provides expressively for same-sex marriage and prohibits any discrimination on the grounds of sexual orientation?

II. In the member state where they are living, a health insurance contract provides for health care benefits not only for the contracting person but as well for his or her wife or husband. However, when Mr. B wants to profit from the contract of Mr. A, the benefits are refused. The insurance company argues that the term "married couples" in the national health insurance contract act has to be interpreted in another way than the same term in the ESIT rules, because there is no connection to European law. Mr. A and Mr. B, however, think that under the principle of the rule of law (in an "Etat de droit") identical legal terms within the same legal order must be interpreted identically. Is Mr. B entitled to the benefits?

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