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Taxation of cross-border inheritances and donations: suggestions for improvement

Dafnomilis, V.

Citation

Dafnomilis, V. (2021, June 3). *Taxation of cross-border inheritances and donations: suggestions for improvement*. Retrieved from <https://hdl.handle.net/1887/3182533>

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Author: Dafnomilis, V.

Title: Taxation of cross-border inheritances and donations: suggestions for improvement

Issue Date: 2021-06-03



Universiteit
Leiden

Taxation of cross-border inheritances and donations.
Suggestions for improvement

Vasileios Dafnomilis

TAXATION OF CROSS-BORDER INHERITANCES AND DONATIONS.

SUGGESTIONS FOR IMPROVEMENT

**BELASTINGHEFFING VAN GRENDOVERSCHRIJDENDE NALATENSCHAPPEN EN
SCHENKINGEN.**

VOORSTELLEN TOT VERBETERING

PROEFSCHRIFT

ter verkrijging van
de graad van doctor aan de Universiteit Leiden,
op gezag van rector magnificus prof.dr.ir. H. Bijl,
volgens besluit van het College voor Promoties
te verdedigen op donderdag 3 juni 2021

klokke 16.15 uur

door

Vasileios Dafnomilis
geboren te Amarousio, Athene, Griekenland
in 1990

Promotoren: prof. dr. F. Sonneveldt
 prof. dr. S.C.W. Douma (Universiteit van Amsterdam)

Promotiecommissie: prof. mr. T.J. Mellema-Kranenburg
 prof. mr. I.J.F.A. van Vijfeijken (Tilburg University)
 prof. G. Maisto (Università Cattolica del Sacro Cuore, Piacenza, Italy)
 prof. dr. T Lyons QC (City University of London, UK)

This research project is partially funded by the Foundation for Education and European Culture (IPEP).

The commercial version of this dissertation will be published in the series Fiscale Monografieën of Wolters Kluwer.

PREFACE

My decision to write a doctoral thesis on cross-border death and gift taxation was not taken lightly. I believe fate led me to this; fate accompanied by luck and interesting coincidences. During my bachelor studies at the Aristotle University of Thessaloniki, the chapter of the laws of succession of the Greek Civil Code was one of the most interesting ones to me. After graduating in 2012, I did not practice succession law as a trainee lawyer in Athens, but intuition told me that I had not finished with that topic. One year after graduating, I enrolled for the postgraduate programme on EU law studies at the University of Athens, to attend the 'European tax law' course. I was struck by how fascinating and dynamic this field of law can be as it combines the theoretical concepts of EU law with the mechanics of tax law. Under the excellent supervision of the inspiring course instructor, Associate Professor dr. Rebecca-Emmanuela Papadopoulou, I wrote a master thesis on the negative integration of taxes within the EU, with particular focus on death taxes.

I knew I wanted to deepen my knowledge of European tax law and of how inheritance and gift taxes worked in practice. In August 2014, Leiden University and ITC Leiden launched its Advanced LL.M. in European tax law programme. I met Professor dr. Sjoerd Douma, the then director of the programme, who in December 2014, asked me to consider preparing a doctoral thesis in international taxation, with him as supervisor. He was perhaps the first person who believed in me when I moved to the Netherlands and I would like to thank him for his unwavering support.

That same year, the EC Tax Review journal published an article of mine which was broadly based on my master thesis. It caught the eye of Professor dr. Frans Sonneveldt, the main instructor of the Estate Planning course in the Advanced LL.M., who encouraged me to attend the course. Death and gift taxation from an international and EU point of view was an area of law I wanted to specialise in further. I thank Professor Sonneveldt who inspired me to present this doctoral thesis, and gave me the benefit of his profound knowledge of this discipline.

I would also like to thank several people who have contributed to the completion of this thesis. They include my colleagues from PwC's Dutch Tax Knowledge Centre and especially, Professor dr. Ad van Doesum and Mariska van der Maas, who have supported my academic aspirations from the first, allowing me to combine my work as tax advisor with my academic work. Also, my PwC and UvA colleague, Professor dr. Hein Vermeulen, for being such a supportive friend and colleague through all these years. My thanks also go to the members of the Estate Planning group of PwC and especially Mitra Tydeman-Yousef who helped me understand some practical problems of cross-border death taxation. Finally, I thank the members of the manuscript committee for reading my manuscript and for their valuable comments, and the Foundation for Education and European Culture which has supported my studies since 2014.

Special thanks go to my friends and especially to Konstantina, Dora, Marthe and Serieke for all their unwavering support during all these years and to my family in Greece, without whose support I could never have achieved this. I would also like to thank my in-laws for their great interest in my progress. Above all, I would like to thank my husband, Stephan, for his unconditional support and ability to make me smile, especially when I needed it most.

Vassilis Dafnomilis,
Leiden, May 2021

TABLE OF CONTENTS

Preface / V

List of abbreviations used / XVII

PART I: INTRODUCTION TO DEATH AND GIFT TAXATION AND THE PROBLEMS OF
CROSS-BORDER DEATH AND GIFT TAXATION

CHAPTER 1

Scope, purpose, structure and methodology used in this study / 3

- 1.1 The current situation / 3
 - 1.1.1 The problems of death taxes in a domestic setting / 4
 - 1.1.1.1 The interaction of death taxes with other types of taxes / 4
 - 1.1.1.2 The difficulty of the public to grasp the justifications of death taxes / 4
 - 1.1.1.3 The nature and design of death taxes / 5
 - 1.1.2 The problems of death taxes in a cross-border setting / 5
- 1.2 The purposes of this study / 7
 - 1.2.1 Description and systemisation of the law as such / 7
 - 1.2.2 Suggestion of separate and holistic solutions / 8
- 1.3 Structure of this study / 8
- 1.4 Methodology used in this study / 10
 - 1.4.1 “Legal-dogmatic research” / 10
 - 1.4.2 Adding to the research in this area and the applicable approach / 12

CHAPTER 2

Death taxes and taxes on gifts / 13

- 2.1 Key features of death taxes and taxes on gifts / 13
 - 2.1.1 Inheritance and estate taxes / 13
 - 2.1.2 Other types of taxes levied upon death / 15
 - 2.1.3 Taxes on gifts / 15
- 2.2 Establishment of tax jurisdiction / 16
 - 2.2.1 Inheritance and estate taxes / 16
 - 2.2.1.1 The personal nexus / 16
 - 2.2.1.2 The objective nexus / 18
 - 2.2.2 Other types of taxes levied upon death / 18

2.2.3	Taxes on gifts / 19
2.3	History of death taxes and revenue trends / 19
2.4	Justifications of death taxation / 21
2.4.1	The ability-to-pay-taxes justification (the theory of value) / 24
2.4.2	The windfall justification (the accidental income theory) / 27
2.4.3	The tax equality justification / 30
2.4.4	The diffusion-of-wealth justification / 31
2.4.5	The sluice justification / 32
2.4.6	The work stimulating justification/incentive to work justification / 32
2.4.7	The wages-for-work justification / 33
2.4.8	The justification of less pain / 33
2.4.9	The profit justification (the benefits theory and the co-heirship theory) / 34
2.4.10	The belated fee justification / 35
2.4.11	The financing of the probate costs / 35
2.4.12	Penalty for the deceased's tax evasion (the back-taxes theory) / 36
2.4.13	The substitution for not imposed taxes justification (apart from tax evasion) / 36
2.4.14	A means for the abolition of the intestate inheritance / 37
2.5	Conclusion of Chapter 2 / 37

CHAPTER 3

The starting point of this study / 39

3.1	The problems of cross-border death and gift taxation / 39
3.1.1	Double or multiple taxation / 39
3.1.1.1	Variety of concepts determining the personal nexus between a person and a state / 39
3.1.1.1.1	Residence / 40
3.1.1.1.2	Domicile / 42
3.1.1.1.3	Nationality / 43
3.1.1.2	Assessment of the personal link with a different person (donor-based and donee-based taxes) / 44
3.1.1.3	Different taxable persons / 45
3.1.1.4	Different types of taxes / 45
3.1.1.5	Connection with civil law / 46
3.1.1.5.1	Determination of critical terms by civil law / 46
3.1.1.5.2	Private international law rules / 47
3.1.1.5.3	The EU Succession Regulation / 48
3.1.1.6	Qualification issues / 50
3.1.1.7	Divergent valuation rules / 50
3.1.1.8	Divergent debt deduction rules / 50
3.1.1.9	Situs taxation / 51
3.1.1.10	The ineffectiveness of the unilateral double taxation relief / 52
3.1.2	Double or multiple non-taxation / 53
3.1.2.1	Jurisdictional double or multiple non-taxation / 54

	3.1.2.1.1	Variety of concepts determining the personal nexus between a person and a state / 54
	3.1.2.1.2	Assessment of the personal link with a different person (donor and donee base) / 55
	3.1.2.1.3	Connection with civil law / 55
	3.1.2.1.4	Qualification issues / 55
	3.1.2.1.5	Situs taxation / 56
	3.1.2.1.6	Application of different types of taxes / 56
	3.1.2.2	Unilateral double tax relief by the state of the personal nexus / 57
	3.1.2.3	Unilateral abstention of the state of the objective nexus from taxing / 57
	3.1.2.4	Double or multiple non-taxation as a result of tax abuse / 57
3.1.3		Discriminatory treatment of cross-border inheritances and donations / 58
	3.1.3.1	Introduction / 58
	3.1.3.2	Examples of discriminatory inheritance and gift tax provisions / 58
	3.1.3.2.1	Tax deductions for certain liabilities and debts / 58
	3.1.3.2.2	Subjective tax exemptions / 58
	3.1.3.2.3	Objective tax exemptions / 59
	3.1.3.2.4	Valuation rules / 59
	3.1.3.2.5	Tax rates / 59
	3.1.3.2.6	Filing deadline / 59
	3.1.3.2.7	Payment deadline / 59
	3.1.3.2.8	Payment requirements / 60
	3.1.3.2.9	Penalties and fines / 60
3.1.4		Administrative difficulties / 60
	3.1.4.1	Introduction / 60
	3.1.4.2	The example of Mr D's beneficiaries / 61
	3.1.4.2.1	Problems arising in the state of the objective nexus / 62
	3.1.4.2.2	Problems arising in the state of the personal nexus / 63
3.2		Confirmation of the selection of the problems / 64
	3.2.1	The OECD IHTMTC / 64
	3.2.1.1	An overview of the OECD IHTMTC provisions / 64
	3.2.1.2	The objectives of the OECD IHTMTC / 67
	3.2.1.3	Why states do not often conclude inheritance and gift tax treaties / 69
	3.2.2	The 2015 inheritance tax report / 70
3.3		Addressing the problems at different levels / 71
	3.3.1	The national level / 71
	3.3.2	The OECD level / 71
	3.3.3	The EU level / 72
	3.3.3.1	Double or multiple taxation / 72
	3.3.3.2	Double or multiple non-taxation / 73
	3.3.3.3	Discrimination / 74
	3.3.3.4	Administrative difficulties / 75
3.4		Conclusion of Chapter 3 / 76

PART II: SEPARATE SOLUTIONS TO THE PROBLEMS OF CROSS-BORDER DEATH AND GIFT TAXATION

CHAPTER 4

Separate solutions at the OECD level / 81

- 4.1 Introduction / 81
- 4.2 The four elements of the proposed inheritance and gift tax / 82
 - 4.2.1 *Mortis causa* or *inter vivos* taxation / 82
 - 4.2.2 The levying of the tax on windfalls / 84
 - 4.2.3 The definition of critical terms by civil law / 85
 - 4.2.4 The ability-to-pay-taxes justification / 86
- 4.3 Conclusion of Chapter 4 / 86

CHAPTER 5

The provisions of the OECD IHTMTC and its Commentary that can be improved / 89

- 5.1 Double or multiple taxation / 89
 - 5.1.1 Narrow scope and subsidiary taxing rights (Articles 1,4, 7 and 9A and 9B) / 90
 - 5.1.2 Multiple taxation (Articles 1 and 4) / 92
 - 5.1.3 The tiebreaker rule for individuals (Article 4(2)) / 95
 - 5.1.4 Overlaps with the OECD ICTMTC (Article 2) / 97
 - 5.1.5 Estate and inheritance taxes (Articles 2 and 9B) / 100
 - 5.1.6 Inheritance/estate/gift taxes and income/capital gains taxes (Articles 2 and 9B) / 101
 - 5.1.7 Lack of common valuation rules (Articles 9A and 9B) / 103
 - 5.1.8 Conflicts of qualification (Articles 3 and 5-7) / 105
 - 5.1.9 The special features of the law of the Contracting States (Article 1) / 107
 - 5.1.10 Mutual agreement procedure (Article 11) / 109
- 5.2 Double or multiple non-taxation / 110
 - 5.2.1 Overlaps with the OECD ICTMTC (Article 2) / 110
 - 5.2.2 Conflicts of qualification (Articles 3 and 5-7) / 112
 - 5.2.3 Termination of the tax treaty (Article 16) / 113
- 5.3 Discriminatory treatment of cross-border inheritances and donations / 115
 - 5.3.1 Introduction / 115
 - 5.3.2 The OECD IHTMTC's nationality non-discrimination provision / 116
- 5.4 Administrative difficulties / 117
 - 5.4.1 Introduction / 117
 - 5.4.2 The OECD IHTMTC's nationality non-discrimination provision (Article 10) / 118
- 5.5 Conclusion of Chapter 5 / 118

CHAPTER 6

The suggested improvements to the OECD IHTMTC / 121

6.1	Double or multiple taxation / 121
6.1.1	Narrow scope and subsidiary taxing rights (Articles 1,4, 7, 9A and 9B) / 121
6.1.1.1	Primary taxing rights / 121
6.1.1.2	Subsidiary taxing right provision / 122
6.1.1.2.1	Taxation based on nationality / 123
6.1.1.2.2	Taxation based on links with beneficiaries / 124
6.1.1.2.3	Extended domicile / 124
6.1.2	Multiple taxation (Articles 1 and 4) / 127
6.1.2.1	Introduction / 127
6.1.2.2	Enhancing the effectiveness of the model in multiple taxation situations / 128
6.1.2.2.1	Nationality as a subsidiary criterion (Article 4) / 128
6.1.2.2.2	Conclusion of a multilateral tax convention (Article 1) / 130
6.1.3	The tiebreaker rule for individuals (Article 4(2)) / 131
6.1.3.1	The two aspects of the OECD IHTMTC's tiebreaker rule that can be improved / 131
6.1.3.2	Proposed amendments / 133
6.1.3.2.1	Specific tiebreaker rule / 133
6.1.3.2.2	Specific tiebreaker rule and broadening of the scope the general tiebreaker rule / 135
6.1.3.2.3	Update of the general tiebreaker rule / 136
6.1.4	Overlaps with the OECD ICTMTC (Article 2) / 137
6.1.4.1	Introduction / 137
6.1.4.2	Article 2(1)-(3): transition from an exhaustive to an indicative list / 137
6.1.4.3	Article 2(4): addressing the parallel application of an income tax and an inheritance and gift tax treaty / 140
6.1.5	Estate and inheritance taxes (Articles 2 and 9B) / 142
6.1.6	Inheritance/estate/gift taxes and income/capital gains taxes (Articles 2 and 9B) / 143
6.1.6.1	Introduction / 143
6.1.6.2	Bridging the gap between inheritance/gift taxes and other types of death taxes and taxes on gifts / 144
6.1.6.2.1	Taxes covered (Article 2) and "in relation to the same event" (Article 9B) / 144
6.1.6.2.2	A "comprehensive treaty" and a "consolidated treaty" / 144
6.1.6.2.3	The income tax treaty practice / 145
6.1.7	Conflicts of qualification (Articles 3 and 5-7) / 146
6.1.7.1	Conflicts of qualification due to the interpretation of the treaty rules / 146
6.1.7.1.1	The defined terms – Article 3(1) of the OECD IHTMTC / 147

	6.1.7.1.2	The insufficiently defined terms – the term “immovable property” / 148
	6.1.7.1.3	The undefined terms – update of Article 3(2) of the OECD IHTMTC / 150
	6.1.7.2	Conflicts of qualification due to differences in treaty application to the facts / 150
	6.1.7.3	Conflicts of qualification due to differences in domestic law classifications / 151
	6.1.8	Mutual agreement procedure (Article 11) / 152
	6.1.8.1	The importance of the procedure / 152
	6.1.8.2	Inclusion of arbitration clause / 153
6.2		Double or multiple non-taxation / 154
	6.2.1	Overlaps with the OECD ICTMTC (Article 2) / 154
	6.2.2	Conflicts of qualification (Articles 3 and 5-7) / 155
	6.2.2.1	Conflicts of qualification due to the interpretation of the treaty rules / 155
	6.2.2.2	Conflicts of qualification due to differences in treaty application to the facts / 155
	6.2.2.3	Conflicts of qualification due to differences in domestic law classifications / 156
	6.2.3	Termination of the tax treaty (Article 16) / 157
	6.2.3.1	Double non-taxation before the lapse of the minimum application period / 158
	6.2.3.2	Double non-taxation after the lapse of the minimum application period / 159
6.3		Discriminatory treatment of cross-border inheritances and donations / 160
	6.3.1	Introduction / 160
	6.3.2	Suggested improvements to the OECD IHTMTC's nationality non-discrimination provision / 160
6.4		Administrative difficulties / 161
6.5		Conclusion of chapter 6 / 162

CHAPTER 7

Separate solutions at the EU level / 165

7.1		Double or multiple taxation / 165
	7.1.1	EU fundamental freedoms and juridical double taxation of inheritances / 166
	7.1.2	The EC's recommendation 2011/856 regarding relief for double taxation of inheritances / 167
	7.1.2.1	Introduction / 167
	7.1.2.2	The innovative aspects of the recommendation / 170
	7.1.2.2.1	Broad scope / 171
	7.1.2.2.2	Double or multiple taxation / 171
	7.1.2.3	The aspects of the recommendation that could be improved / 172
	7.1.2.3.1	Unrelieved double or multiple taxation / 172
	7.1.2.3.2	The tiebreaker rule / 173

	7.1.2.3.3 The mutual agreement procedure / 174
7.1.3	Conversion of the EC's recommendation to an EU Directive / 174
7.1.4	A combination of a treaty-based and an EU law solution / 177
	7.1.4.1 Multilateral convention for the avoidance of double taxation of estates, inheritances and donations (treaty-based solution) in the form of an EU Directive / 177
	7.1.4.2 Extension of the scope of the Council Directive 2017/1852/EU (EU law solution) / 178
7.2	Double or multiple non-taxation / 179
7.3	Discriminatory treatment of cross-border inheritances and donations / 180
	7.3.1 The "EU compliant inheritance and gift tax" / 180
	7.3.2 The OECD IHTMTC and the EU fundamental freedoms / 181
	7.3.3 Two important issues arising from the Court's case law / 182
	7.3.3.1 The non-application of the Schumacker doctrine / 183
	7.3.3.1.1 Subjective tax exemptions by the EU Member State of the objective nexus / 184
	7.3.3.1.2 Subjective tax exemptions by the EU Member State of the personal nexus / 186
	7.3.3.1.3 Proportionate subjective tax exemptions: a fair solution? / 186
	7.3.3.1.4 Objective tax exemptions / 188
	7.3.3.2 Neutralisation / 190
7.4	Administrative difficulties / 192
	7.4.1 The Council Directive 2011/16/EU / 192
	7.4.2 The Council Directive 2010/24/EU / 193
	7.4.3 The Council Directive 2017/1852/EU / 193
7.5	Conclusion of chapter 7 / 194

PART III: A HOLISTIC SOLUTION TO THE PROBLEMS OF CROSS-BORDER DEATH AND GIFT TAXATION

CHAPTER 8

A holistic solution to the problems of cross-border death and gift taxation / 199

8.1	The three solutions of the EC's expert group / 199
8.2	Introduction to the "one inheritance – one inheritance tax" concept / 201
	8.2.1 Introduction / 201
	8.2.2 The objectives of the concept / 203
	8.2.2.1 The three primary objectives / 203
	8.2.2.2 The underlying objective / 204
	8.2.3 A concept consistent with subsidiarity and proportionality / 205
	8.2.3.1 The subsidiarity principle / 206
	8.2.3.2 The proportionality principle / 206
	8.2.3.2.1 A concept proportionate to the objectives to be achieved / 206

	8.2.3.2.2 A concept proportionate to EU Member States' fiscal sovereignty and international tax law principles / 208
8.2.4	The legal form of the concept / 209
8.2.5	Taxes covered / 210
8.2.6	Application to a cross-border inheritance / 212
8.3	The two steps of application of the concept / 213
8.3.1	Step one: the deceased's habitual residence as a connecting tax criterion / 213
8.3.1.1	The assessment of the habitual residence at the deceased / 214
8.3.1.2	Interpreting habitual residence / 215
8.3.1.2.1	Habitual residence: an EU autonomous term / 215
8.3.1.2.2	Three interpretation approaches / 217
8.3.1.2.3	Habitual residence under the EU Succession Regulation / 218
8.3.1.2.4	Habitual residence under the concept / 219
8.3.2	Step two: single taxation / 222
8.3.2.1	Taxation by the EU Member State of the deceased's habitual residence / 223
8.3.2.2	Taxation by any other EU Member State / 223
8.4	Application of the concept to the problems of this study / 224
8.4.1	From "obstacles" to "problems" / 224
8.4.2	An EU Directive implementing the "one inheritance – one inheritance tax" concept / 226
8.4.3	Enforcement mechanisms against discrimination / 227
8.4.3.1	Survey on the domestic rules on death and taxes on gifts / 227
8.4.3.2	Creation of an inheritance and gift tax forum / 228
8.4.3.3	Infringement procedure / 228
8.4.3.4	Introduction of compulsory rules / 228
8.5	Conclusion of chapter 8 / 229

PART IV: SUMMARY AND CONCLUSIONS

CHAPTER 9

Summary and conclusions / 233

Appendix I: A new version of the OECD IHTMTC / 245

Appendix II: Proposal for Council Directive on a multilateral Convention for the avoidance of double or multiple taxation of cross-border inheritances and gifts / 259

Appendix III: Proposal for an amendment to the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union / 269

Appendix IV: Proposal for Council Directive implementing the "one inheritance – one inheritance tax" concept / 273

SAMENVATTING (SUMMARY IN DUTCH)

Table of reference materials / 291

Table of case law / 301

Index / 303

Curriculum Vitae / 309

LIST OF ABBREVIATIONS USED

AG	Advocate General
DAC	Directive of Administrative Cooperation
EC	European Commission
EEA	Agreement on the European Economic Area of 2 May 1992
EU	European Union
ECJ, CJ	European Court of Justice (before 1 December 2009) or Court of Justice of the European Union (per 1 December 2009)
ECOFIN	Economic and Financial Affairs Council configuration / The council of ministers
MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting or Multilateral instrument
PE	Permanent establishment
OECD	Organisation for Economic Cooperation and Development
OECD IHTMTC	OECD Model Tax Convention for the avoidance of double taxation with respect to taxes on inheritances, estates and gifts
OECD ICTMTC	OECD Model Convention on Income and Capital
Para./paras.	Paragraph/paragraphs
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
US	United States

PART I: INTRODUCTION TO DEATH AND GIFT TAXATION AND THE
PROBLEMS OF CROSS-BORDER DEATH AND GIFT TAXATION

Scope, purpose, structure and methodology used in this study

Death is undoubtedly an event that can trigger a variety of taxes in a cross-border setting: inheritance taxes, estate taxes, generation-skipping taxes, income and capital gains taxes, land or registration taxes, property transfer taxes or even indirect taxes on business successions. In the context of this study, direct taxes¹ levied in the event of a person's death are called "death taxes".

1.1 The current situation

In my view, death taxation remains a neglected area of law, as to date limited progress has been made towards addressing the issues arising from the application of death taxes in an international context while the current academic literature lags behind in addressing this topic due to a lack of international developments. First, from a revenue perspective, death taxes are not considered "profitable" for the states; revenue derived from such taxes represents a meagre percentage of the total state budget, and collection costs often exceed the revenue that the states earn through death taxation.² Second, states seem to focus on cross-border corporate income tax issues, especially after 2015, as a result of the base erosion and profit shifting (BEPS) project of the Organisation for Economic Cooperation and Development (OECD). Besides, taxes on income, profits and capital gains represent an essential source of tax revenue for the states that justifies – to a certain extent – the focus of the states on cross-border corporate income tax issues. Finally, not all states levy death taxes and some states have even abolished their death taxes in the last 20 years.

These three reasons (low revenue, increasing interest in cross-border corporate income tax issues, no imposition or abolition of death tax laws) may explain – to a certain extent – the modest interest of states and international organisations (in particular, the OECD and the

1 In the literature, it seems that some types of death taxes (e.g. inheritance taxes) are classified as "indirect taxes" *on capital*. See Peter Essers and Arie Rijkers, "General aspects of an income taxation on income from capital" in *The Notion of Income from Capital*, eds. Peter Essers and Arie Rijkers (Amsterdam: EATLP/IBFD, 2007), 299. Furthermore, Szczepański notes that "(international) tax law scholarship of the 19th and early 20th centuries indicated a division between direct taxes and death duties (inheritance taxes). In this regard, death duties were not believed to be direct taxes and *vice versa*." See, Jan Szczepański, "Integration of Taxes on Inheritances, Estates and Gifts into the OECD Model Tax Convention on Income and on Capital: The Curious Case of Special Provisions – Part 1," *Bulletin for International Taxation* 73, no. 10 (2019): 548.

2 According to the OECD revenue statistics, in 2018, tax revenue from inheritance and estate taxes represented on average 0.4% of the total tax revenue earned in each OECD member country (OECD – average). See OECD revenue statistics, accessed 29 January 2020, <https://stats.oecd.org/Index.aspx?DataSetCode=REV>.

European Union) in changing the *status quo* around death taxes. This may not necessarily be a burden from the perspective of a state but it certainly poses problems for individuals. In that regard, I observe that the 2015 report of the European Commission (EC) expert group “Ways to tackle inheritance cross-border tax obstacles facing individuals within the EU” (hereinafter referred to as: “the 2015 inheritance tax report” or “the report”) represents the most recent effort discussing the problems which death taxes (and particularly inheritance taxes) may pose to individuals.³

In my view, the *status quo* around death taxes and their problems can be examined from both a domestic (section 1.1.1) and a cross-border perspective (section 1.1.2).

1.1.1 The problems of death taxes in a domestic setting

1.1.1.1 The interaction of death taxes with other types of taxes

One could identify several problems of death taxes in a domestic setting, however, in my view, there are three key problems of death taxes in a domestic setting. The first problem is the interaction of death taxes with other taxes that the deceased was periodically paying during his lifetime. More specifically, the opponents of death taxation put forward the argument that death taxes often give rise to *double or multiple taxation*. The deceased has been paying taxes (e.g. income taxes, capital gains taxes, wage taxes, wealth taxes, consumption taxes) during his lifetime and the value of his property (in the form of after-tax proceeds) is unjustifiably reduced upon his death through death taxes.⁴ Given that these taxes serve as the final taxes connected to the deceased and his property, the allegation of double or multiple taxation becomes even more prevalent.

1.1.1.2 The difficulty of the public to grasp the justifications of death taxes

Irrespective of the soundness of the double or multiple taxation allegation (which can be approached differently from an economic and a legal perspective), the mere *mortis causa* reduction in the value of the *mortis causa* transferred property raises questions on the mere fairness of death taxation, thereby amplifying the refusal of the public to pay death taxes. Such a refusal can be explained – to a certain extent – by the *difficulty of the public to grasp the justifications of death taxation* rendered, especially so when considering that death by nature is an emotionally charged event. This difficulty serves as the second problem of death taxation in a domestic setting. In that regard, it may not take long for the public to consider that death taxes are perhaps of an unclear nature and thus, unfair. People, however, have arguably paid scant, if any, attention to understanding the policies underlying the introduction of a death tax.⁵

3 EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group.

4 See also, Inge van Vijfeijken, “Contours of a Modern Inheritance and Gift Tax,” *Intertax* 34, no. 3 (2006): 152-153.

5 Barbara R. Hauser, “Death Duties and Immortality: Why Civilization Needs Inheritances,” *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 377.

1.1.1.3 The nature and design of death taxes

Finally, I am of the view that *the nature and design of death taxes* (which differ from those of other taxes) is the third significant problem of death taxes in a domestic setting. As a matter of example, the wrong perception concerning the “starting point of taxation” in the case of an inheritance tax, which is an example of an acquisition-based death tax, arguably makes the public keener to object to it. To elaborate on this point, an inheritance tax – the most common type of a death tax – is paid by the deceased’s beneficiaries. However, its tax base is determined either by the deceased’s or the beneficiaries’ personal nexus with a state (“the starting point of taxation”) or by an objective nexus in the absence of a personal nexus. Consequently, assuming that the deceased’s personal nexus with a state is the starting point of taxation of an inheritance tax, it may not take much for the public to erroneously regard the deceased as the taxpayer whose property is taxed twice, once during and once after his lifetime.⁶ Since the majority of inheritance tax laws take the deceased’s personal nexus with a state as the starting point of taxation, such a situation seems to be conceivable. Moreover, the connection of death taxes with civil law (family law, matrimonial property law, and the law of succession) makes the imposition of death taxes less straightforward. For example, the definition of critical terms (such as “residence”, “heir/beneficiary”, “immovable property”) in accordance with civil law sometimes renders the tax system dependent on civil law concepts. The same also applies to several legal arrangements that may be employed in the law of succession: trusts in common law jurisdictions and foundations, fideicommissum and usufruct in civil law jurisdictions.

Solutions to these problems fall outside the scope of this study, which only deals – to start with – with the problems of death taxes (and taxes on gifts, by analogy) in a cross-border setting. Therefore, I take the above problems of death taxes as a *given*.

1.1.2 The problems of death taxes in a cross-border setting

The second category of problems refers to problems relating to a cross-border inheritance. In this study, a cross-border inheritance is defined as an inheritance with at least a cross-border element, e.g. the foreign location of the *mortis causa* transferred assets, a foreign-located deceased or a foreign-located beneficiary. In addition, a cross-border inheritance may be subject to different types of death taxes, thus not only to the same type of death tax (e.g. inheritance tax) by one or more states.

This study focuses on the following essential problems of cross-border inheritances:

- a) double or multiple taxation,
- b) double or multiple non-taxation,
- c) discrimination, and
- d) administrative difficulties.

6 See also OECD, *The role and design of net wealth taxes in the OECD* (Paris: OECD Tax Policy Studies, no. 26, 2018), 58: “[d]ouble taxation is a commonly stated objection to estate and inheritance taxes: people have already paid income tax or capital gains tax on their income before it was used to purchase assets which will be taxed again at death”. Please note, however, that the opinions expressed and arguments employed in this report do not necessarily reflect the official views of OECD member countries.

The selection of these problems is confirmed by the two points of reference of this study, the OECD Model Tax Convention for the avoidance of double taxation with respect to taxes on inheritances, estates and gifts (referred hereinafter, the OECD IHTMTC or the inheritance and gift tax model or the model) and the 2015 inheritance tax report.⁷

In short, the parallel application of death taxes by two or more states may often result in double or even multiple taxation of a cross-border inheritance. The national tax laws differ substantially and do not always consider the international dimension of an inheritance. As a result, a unilateral double taxation relief should not always be taken for granted. Furthermore, despite the importance of this issue, it seems that hardly any progress has been made in recent years towards addressing it at the OECD level. The number of inheritance and gift tax treaties is considerably low.⁸ Moreover, one could argue that the OECD IHTMTC contains certain provisions that prevent the model from effectively achieving one of its purposes, i.e. to allocate taxing rights between tax jurisdictions for the avoidance of double taxation of inheritances.⁹ In addition, at the EU level, hardly any progress has been made towards addressing double or multiple taxation of cross-border inheritances. Double or multiple juridical taxation of inheritances is not considered a violation of the EU fundamental freedoms¹⁰ while a coordination measure issued by the EC¹¹ in 2011 seems to have failed to achieve its purpose.

Furthermore, it is conceivable that a cross-border inheritance may be left untaxed by all states involved. This situation is called “double or multiple non-taxation” and serves as the second problem of cross-border inheritances. In that regard, I note that the model does not seem to address this problem in all instances. Moreover, as is in the case of double or multiple taxation, hardly any progress has been made towards addressing this issue within the EU.

Moreover, states may discriminate a cross-border inheritance. For example, they may pose additional requirements or deny granting benefits such as tax exemptions and allowances to inheritances with a cross-border element. At the OECD level, the wording of the non-discrimination provision of the OECD IHTMTC seems insufficient to address this issue in certain instances adequately. On the contrary, at the EU level, the Court of Justice of the EU (hereinafter: the “ECJ”, the “CJ” or the “Court”) has already applied the EU fundamental freedoms to cross-border inheritances and donations that have been discriminated against by the EU Member States, thereby contributing to the so-called “negative harmonisation” of inheritance and gift taxes within the EU.¹² The Court’s case law has brought some amount of clarity and certainty to this matter and, thus, certain

7 It goes without saying that there may also be other problems of death taxes in a cross-border setting. However, those problems fall outside the scope of this study as they do not seem to be confirmed by the two points of reference of this study.

8 A quick search at the IBFD online research platform (January 2020) reveals that at the time of the writing of this study, contrary to 4060 income and capital tax treaties (a figure which changes regularly) there are only 87 inheritance tax treaties in force worldwide (some of which are also applicable to gift taxes).

9 See, amongst others, Commentary on the OECD IHTMTC (Introductory Report) and Commentary on Article 6 of the OECD IHTMTC, para. 13.

10 See, for instance, ECJ, *Kerckhaert and Morres* (C-513/04) and ECJ, *Block* (C-67/08), para. 31.

11 European Commission recommendation 2011/856/EU of 15 December 2011 regarding relief for double taxation of inheritances (hereinafter: the “EC’s recommendation” or the “recommendation”).

12 The protection against discriminatory (tax) provisions is safeguarded through the CJ, which interprets and applies the EU fundamental freedoms. Such a process represents the so-called “negative harmonisation”.

principles can be distilled from this. Nevertheless, one could argue that more research is required into certain aspects of Court's case law.

Finally, administrative difficulties may arise in the event of a cross-border inheritance for taxpayers. Arguably, the OECD IHTMTC does not address these difficulties, as it focuses only on the tax authorities' level. Furthermore, at the EU level, EU secondary legislation on administrative cooperation¹³ and assistance in the collection of taxes¹⁴ already applies to death and gift taxes. However, I observe that the effects of the legislation are again limited to the tax authorities' level.

As a final note, it follows from the suggestion of the international community to the above problems that the treatment of cross-border inheritances is often the same as that of cross-border donations. This is because taxes on gifts are often levied based on similar principles to death taxes¹⁵ and are often considered complementary to death taxes by some states.¹⁶ In that regard, I note that in the OECD's view, an inheritance tax *needs* to be complemented with a gift tax (given the strategy of transferring wealth through lifetime gifts that otherwise would have been left untaxed).¹⁷ Furthermore, the OECD IHTMTC applies to taxes on gifts,¹⁸ the CJ's case law on cross-border inheritances is applied by analogy to gift taxes and *vice versa*, and the EC's coordination measure issued in 2011 applies to taxes on gifts by analogy, where gifts are taxed under the same or similar principles to inheritances. As a result, it comes as no surprise that this study also covers taxes on gifts.

1.2 The purposes of this study

1.2.1 Description and systemisation of the law as such

The first purpose of this study is the description and the systemisation of death and gift tax laws as such. In that regard, I aim at providing an overview of death taxes and taxes on gifts (chapter 2 of this study) given the fact that the death and gift tax laws vary considerably from state to state. This overview is important for the understanding of the problems of cross-border death and gift taxation (chapter 3 of this study). More specifically, the overview provides the key features of death taxes and taxes on gifts, the establishment of tax jurisdiction, a brief history of death taxes and the revenue trends of death taxation through the years. Finally, the overview includes the justifications of death taxation that states may invoke to introduce or maintain a death charge.

13 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

14 Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

15 Frans Sonneveldt, "Application of death taxes in the emigration and immigration countries," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 8.

16 Taxes on *inter vivos* gifts are viewed in most countries primarily as a device for preventing erosion of the inheritance tax base; they do not seem to be intended to raise revenue anywhere nor, in themselves, to redistribute wealth. See Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International 70b* (London: IBFD, 1985), 55.

17 OECD, *The role and design of net wealth taxes in the OECD* (Paris: OECD Tax Policy Studies, no. 26, 2018), 68.

18 See Article 2(1) and (2) of the OECD IHTMTC.

1.2.2 Suggestion of separate and holistic solutions

The second – and perhaps primary – purpose of this study is to suggest “separate” and “holistic” solutions to the selected problems of cross-border death and gift taxation under the available mechanisms at the OECD and EU levels. The term “separate solution” means a solution that deals with (aspects of) only one selected problem of cross-border death and gift taxation. It is distinguished from the term “holistic solution” that means a solution, which deals with all problems of cross-border death and gift taxation altogether. To achieve the objective mentioned above, I first describe the problems of cross-border death and gift taxation that, in my view, significantly increase the burden on parties involved. Then, I discuss the reaction of the OECD and the EU to these problems.

Regarding separate solutions at the OECD level, it can hardly be denied that an updated and watertight OECD IHTMTC would serve as a useful tool in dealing with some or most of the aspects of the selected problems of cross-border inheritances and donations. In that regard, I observe that the model can be improved in a manner that is more in line with its objectives and the principles reflected in its Commentary. In addition, given that the model has not been updated since 1982, the subsequent amendments to the OECD Model Convention on Income and Capital (referred hereinafter, the OECD ICTMTC or the income and capital tax model) cannot be neglected. It should, therefore, be assessed whether they fit the system introduced by the OECD IHTMTC. As a result, with regard to the OECD level, this study aims at improving the inheritance tax model. Regarding separate solutions at the EU level, I aim to explore how the EU primary and secondary law, as well as the Court’s case law, can be used or optimized in order to effectively address the selected problems of cross-border inheritances and donations within the EU.

Regarding holistic solutions, I aim to continue the work of the EC’s expert group (hereinafter: the “group”) which resulted in the production of the 2015 inheritance tax report. In this report, the group suggested a holistic solution to the cross-border tax obstacles posed to individuals within the EU. This solution is based on the innovative concept “one inheritance – one inheritance tax” (hereinafter: the “concept”) that arguably addresses the cross-border obstacles identified by the group, altogether. Nevertheless, several aspects of this concept need to be further explored. Finally, it should be assessed whether the concept can also provide a holistic solution to the selected problems of cross-border inheritances and donations that are discussed in this study.

1.3 Structure of this study

The present study is structured in four parts. Part I serves as an introduction to the current situation and the problems of cross-border death and gift taxation. This part includes chapters 2 and 3 of this study. Chapter 2 provides an overview of death taxes and taxes on gifts. In this overview, I discuss the main elements of death taxes and taxes on gifts and the way that they are levied. The overview is not limited to inheritance and estate taxes, but it includes any tax levied in the event of death, i.e. any death tax (e.g. *mortis causa* income taxes, capital gains taxes, registration duties etc.). Finally, the overview includes the justifications based on which states may levy or maintain death taxes and taxes on gifts.

The problems of cross-border inheritances and donations are discussed in chapter 3 of this study and are as follows: i) double or multiple taxation, ii) double or multiple

non-taxation, iii) discriminatory treatment of cross-border inheritances and donations, and iv) administrative difficulties. The selection of these problems is not random. They increase the burden of the parties involved in a cross-border inheritance and donation. Furthermore, they are confirmed by the two points of reference of this study: the 1982 OECD IHTMTC and the 2015 inheritance tax report.¹⁹ Both points of reference, therefore, are discussed. Finally, I discuss the level at which the problems can be more effectively addressed.

Part II of this study examines separate solutions to the problems under the current mechanisms at the OECD level (chapters 4 to 6) and the EU level (chapter 7).

Chapters 4 to 6 focus on the OECD level and the updates to the OECD IHTMTC for the effective addressing of the problems. In my view, an up-to-date model will significantly contribute to addressing the problems of cross-border inheritances and donations. As a result, updated language and interpretation of several Articles of the model is recommended. In that regard, I observe that the update work requires a benchmark. In my view, a model that is in line with the elements of this benchmark addresses the problems of cross-border inheritances and donations in a more comprehensible manner (considering the objectives of the OECD IHTMTC) than a model that is not in line with (some of) these elements. As a result, in chapter 4, I present the benchmark of the update work. I decided to call this benchmark “the proposed inheritance and gift tax”. The introduction of this benchmark allows me to suggest improvements to certain provisions of the OECD IHTMTC and its Commentary. In the course of my research, I discovered that the proposed inheritance and gift tax consists of four elements as distilled from the OECD IHTMTC and its Commentary. Subsequently, in chapter 5, I examine certain provisions of the OECD IHTMTC concerning each problem of cross-border death and gift taxation, which I am of the view can be improved, having regard to the elements of the proposed inheritance and gift tax and the objectives expressed in the inheritance tax model. In chapter 6, therefore, I suggest improvements to these provisions regarding each separate problem of cross-border death and gift taxation.

Chapter 7 focuses on the EU level. In this chapter, I examine the progress made at the EU level towards addressing the problems of cross-border death and gift taxation. Moreover, I discuss separate solutions for each problem within the EU and provide clarifications to the Court’s case law. Chapter 7 concludes the second part of this study on the separate solutions.

The third part of this study focuses on holistic solutions to the problems of cross-border death and gift taxation. Those types of solutions are, in my view, conceivable only at the EU level that provides for the necessary tools under the EU treaties. A holistic solution for dealing with cross-border inheritance tax obstacles is not, however, a novelty. In fact, in 2015, the EC’s expert group put together an inheritance tax archetype in the 2015 inheritance tax report. The report introduced the innovative concept of “one inheritance – one inheritance tax” under which only one inheritance tax shall be chargeable in the event of a cross-border inheritance. In this respect, the deceased’s habitual residence was suggested to serve as a connecting tax criterion indicating the EU Member State that is allowed to tax the cross-border inheritance as a whole. The report is not a legal document nor has the group developed and fine-tuned the concept since 2015. Consequently, I am of the view that more research is needed into the scope and the application of the concept in my endeavour to address the problems of cross-border inheritances and donations within the EU from a holistic point of view.

19 EU, “*Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU*”, report prepared by the European Commission Expert Group.

Part IV contains the summary and the conclusions of this study.

1.4 Methodology used in this study

1.4.1 “Legal-dogmatic research”

In the present study, I suggest, amongst others, separate and holistic solutions to the problems of cross-border inheritances and donations by conducting a so-called “legal-dogmatic research”. As Vranken has put it, legal-dogmatic research concerns researching current positive law as laid down in written and unwritten European or (inter)national rules, principles, concepts, doctrines, case law and the literature.²⁰ In that regard, the analysis takes place from an internal perspective: the positive law is the starting point and its sources are considered as a *given*. Subsequently, the idea is to improve within the legal system as it is internal consistency and coherence: systemization of legal norms and case law²¹ with the ultimate aim to enhance legal certainty through systemization and theory-building for citizens, companies and public authorities.²² This type of research is normally a two-art process: first, the sources of the law should be identified and second, these sources should be interpreted, analysed, systemized and confronted with each other.²³

It follows that in answering the question of how to address the problems of cross-border death and gift taxation within the available international and EU mechanisms, the sources of the law that are relevant to address this question as well as their legal status first need to be identified. Without doubt, at the OECD level, the OECD IHTMTC and its Commentary are two important sources of law. The model has become a useful tool in addressing the problems of cross-border death and gift taxation and the OECD IHTMTC Commentary provides useful guidelines for states wishing to conclude an inheritance and gift treaty. Furthermore, with particular reference to the OECD IHTMTC Commentary, I observe that it reflects the principles of death and gift tax laws of the majority of the OECD member countries and therefore, I consider it an important source of (soft) law and it has been a great source of inspiration in my research. Last but not least, bilateral or multilateral inheritance and gift tax treaties have also been important sources of law in the course of my research.

At the EU level, I observe that the 2015 inheritance tax report is an important source of law and at the same time, it serves as the most recent reaction of the international community to the problems of cross-border inheritance and donations. In addition, the EC's recommendation 2011/856/EU of 15 December 2011 regarding relief for double taxation of inheritances (and the accompanying documentation of the European Commission)²⁴, the Court's case law on EU inheritance and gift taxation as well as the Council Directives

20 Sjoerd Douma, *Legal research in international and EU tax law* (Deventer: Kluwer, 2014), 18 and Jan Vranken, “Exciting times for Legal Scholarship”, *Law and Method* 2, no. 2 (2012): 43.

21 Sjoerd Douma, *Legal research in international and EU tax law* (Deventer: Kluwer, 2014), 18.

22 *Id.*, 20.

23 *Id.*

24 Such as, European Commission Staff Working Paper, “Non-discriminatory Inheritance Tax Systems: Principles Drawn from EU Case law” prepared by the European Commission (SEC(2011) 1488 final) and European Commission Staff Working Paper, Impact Assessment accompanying the document Commission Recommendation regarding relief for double taxation of inheritances, SEC (2011) 1489. See also EU, “Consultation on possible approaches to tackling cross-border inheritance tax obstacles within the EU,” summary of replies prepared by the European Commission, 2010.

2011/16/EU,²⁵ 2010/24/EU²⁶ and 2017/1852/EU²⁷ served as important sources of law at the EU level in the course of my research. Overall, the most important sources of law for this study are the OECD IHTMTC (and its Commentary) and the 2015 inheritance tax report as they both confirm the problems of cross-border death and gift taxation and thus, they serve as two important points of reference in this study.

Once the available sources of law are identified, the question arises how these sources should be interpreted and systemized.²⁸ This is the core of the normative part of my research. At the OECD level, I observe that certain provisions of the OECD IHTMTC model can be improved, having regard to the objectives of the model (section 3.2.1.2) and the principles reflected in its Commentary (chapter 4). It is important to note that these principles allow me to design a theory, the so-called benchmark of the study or “the proposed inheritance and gift tax”. Having regard to the objectives of the model and the elements of the proposed inheritance and gift tax, I suggest improvements to the OECD IHTMTC and its Commentary, thereby providing an updated system for addressing problems of cross-border death and gift taxation. Fitting new – but relevant – developments into this system was closely related to the process of interpretation and systemisation.²⁹ As a result, during my research, I considered relevant amendments to the OECD ICTMTC that have been implemented in this model since 1982. Not only have subsequent amendments to the OECD ICTMTC been taken into account when suggesting improvements to the model, but also a) existing tax treaties that the OECD member countries have agreed with each other following the suggestion of the OECD IHTMTC, and b) progressive elements of EU soft law instruments, such as the EC’s recommendation. The entire research work results in a proposal for an updated inheritance tax model (through so-called “legal engineering”³⁰), which is included in appendix I of this study.

The research work at the EU level focuses on the interpretation and systemisation of the EC’s recommendation, the Court’s case law on EU inheritance and gift taxation and the “one inheritance – one inheritance tax” concept of the 2015 inheritance tax report. In my view, the interpretation of these sources of law enhances legal certainty at the EU level on the tools that are available for addressing the problems of cross-border inheritances and donations. This is particularly relevant for the interpretation of the “one inheritance – one inheritance tax” concept. In addition, not only the interpretation of the above sources of law but also their systemisation serves as an important outcome of the legal-doctrinal research. This is because such a systemisation safeguards, in my view, a more articulate approach in identifying the problems and addressing them. Finally, the proposals for an introduction or amendment of harmonising measures within the EU (as included in

25 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, 2011 O.J. L 64/1.

26 Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, 2010 O.J. L84/1.

27 Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, 2017 O.J. L 265.

28 Sjoerd Douma, *Legal research in international and EU tax law* (Deventer: Kluwer, 2014), 38.

29 *Id.*, 26.

30 According to Smit, the term refers to such social engineering through law, by way of drafting and applying rules used to “[p]lan, build, direct, guide, manage, or work on systems to maintain and improve our daily lives”, See Sjoerd Douma, *Legal research in international and EU tax law* (Deventer: Kluwer, 2014), 27.

Appendices II to IV, again through “legal engineering”) serve as additional important outcomes of the legal-doctoral research.

1.4.2 Adding to the research in this area and the applicable approach

The approach taken in this study, in my view, is new in the sense that it aims at not only describing the problems of cross-border inheritances and donations but also at proposing solutions to these problems under the existing mechanisms available under international and EU law. The study, therefore, does not deal with the domestic problems of death and gift taxation that are taken as a *given*, as mentioned above. Furthermore, I note that there is no academic work that directly relates to an update of the OECD IHTMTC. In that regard, the International Fiscal Association (IFA) General Report of the 2010 Rome Congress covered some “outstanding issues” of the OECD IHTMTC.³¹ Moreover, the report did not put forward solutions to these issues.

In addition, the proposition of a benchmark and the suggestion of improvements to certain provisions of the OECD IHTMTC having regard to the elements of this benchmark and the objectives of the OECD IHTMTC distinguishes the current study from the excellent book of Patricia Brandstetter, *The Substantive Scope of Double Tax Treaties – A Study of Article 2 of the OECD Model Conventions*³² published in 2011 by the IBFD. More specifically, Brandstetter approached the issue of taxes covered by Article 2 of the OECD IHTMTC – which is only one of the OECD IHTMTC provisions that, in my view, can be improved – from the perspective of the nature of existing death tax legislations. On the other hand, my approach is based on a benchmark that consists of principles distilled from the OECD IHTMTC and its Commentary and, thus, not directly from existing death tax legislation.

Regarding the separate solutions within the EU, I observe that the literature has already discussed the 2011 coordination measure. However, the problematic aspects of this measure have not yet been dealt with. The same is true regarding the Court’s case law on EU inheritance and gift taxation. Although I have already discussed this case law in previous publications,³³ I deliberately left unanswered two issues in need of additional research. The results of this research are therefore included in this study.

Finally, I observe that the holistic solution relating to the “one inheritance – one inheritance tax” concept has also not been extensively discussed in the academic literature. Furthermore, I am of the view that several aspects of the concept require necessary clarifications.

31 Guglielmo Maisto, “General Report: Death as a Taxable Event and its International Ramifications,” in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010).

32 Patricia Brandstetter, *Taxes Covered: A Study of Article 2 of the OECD Model Tax Conventions* (Amsterdam: IBFD, 2011).

33 Vasileios Dafnomilis, “A Comprehensive Analysis of ECJ Case Law on Discriminatory Treatment of Cross-Border Inheritances – Part 1,” *European Taxation* 55, no. 11 (2015); Vasileios Dafnomilis, “A Comprehensive Analysis of ECJ Case Law on Discriminatory Treatment of Cross-Border Inheritances – Part 2,” *European Taxation* 55, no. 12 (2015).

CHAPTER 2

Death taxes and taxes on gifts

The purpose of this chapter is to provide an overview of death taxes and taxes on gifts. This overview is important for the understanding of the problems of cross-border death and gift taxation that I will present in chapter 3. Furthermore, the justifications of death taxation (section 2.4) contribute to the understanding of the benchmark of this study (that I will present in chapter 4 of this study) and of the impact of the problems in a cross-border setting (that I will present in chapter 5 of this study).

As mentioned above, death is an event, which can result in the imposition of different types of taxes from state to state. A brief look at the legislation of the states reveals that not only can inheritance and estate taxes be levied upon death but also *mortis causa* income and capital gains taxes, registration levies and stamp duties. It seems, therefore, that states have been very creative when deciding what type of death tax they will levy when a person dies in their territory or leaves property in their territory. Moreover, I note that even the legislation of states, which levy the same type of death tax, may vary considerably, thereby making the need for a comprehensive overview of death taxes essential in the context of this study. The same applies to taxes on gifts.

In the following sections, I will provide an overview of the key features (section 2.1) and the jurisdictional rules of death taxes and taxes on gifts (section 2.2). Furthermore, I will discuss the revenue trends of death taxes (section 2.3) as well as the justifications of death taxation (section 2.4).

2.1 Key features of death taxes and taxes on gifts

2.1.1 Inheritance and estate taxes

States imposing a transfer tax upon death levy either an inheritance or an estate tax. These taxes are the most common ones among the states. Civil law states usually levy an inheritance tax, which is an acquisition-based transfer tax applicable to the share of the inherited property received by each beneficiary (and, thus, not on the estate as a whole). Its taxable event is the enrichment of the beneficiary upon the deceased's death and the taxable person is each beneficiary who receives the inheritance.¹

The inheritance tax rates reflect, to a large extent, the state's overall conception of succession.² In the majority of states, the tax rates are progressive and often depend on the size of the inherited property for each beneficiary and the degree of kinship between

1 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 29.

2 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010): 29.

the deceased and the beneficiary.³ As a rule of thumb, the higher the amount of the *mortis causa* transferred property, the higher the applicable tax rate. Furthermore, the closer the kinship between the deceased and the beneficiary, the lower the applicable tax rate.⁴

On the contrary, the taxable event of the estate tax is the *mortis causa* transfer of property, in which case the deceased's entire estate (or sometimes the deceased) is regarded as the taxable person.⁵ As a result, the estate as a whole, rather than the property received by each particular beneficiary, becomes the point of departure.^{6, 7, 8} Moreover, the estate is often treated as a legal person under both domestic and tax treaty law and the tax is often determined based on progressive tax rates that depend on the size of the estate and usually the degree of kinship between the deceased and the beneficiaries. With regard to this point, Van Vijfeijken (2006) noted that the introduction of elements "looking at" the degree of kinship between the deceased and the beneficiaries have altered the nature of the otherwise "impersonal" estate tax, which initially focused on the mere transfer of property from the deceased to the beneficiaries.⁹ Finally, since estate tax is levied on the entire estate, it includes the money used to pay the tax, in comparison to inheritance tax.^{10, 11}

States levying inheritance and estates taxes usually provide for subjective and objective tax exemptions¹² and/or tax-free allowances. In most states, the subjective tax exemptions refer to the surviving spouse or the children and thus follow the kinship between the parties involved. On the other hand, the objective tax exemptions are numerous and find their origins in several different policy reasons (e.g. social, environmental and cultural reasons).¹³ I note that those exemptions are often territorial and are not only granted in cases where the deceased and the beneficiaries share a degree of kinship.

3 Or the marital status of the deceased and the beneficiary. See, Frans Sonneveldt, "Application of death taxes in the emigration and immigration countries," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 8.

4 Frans Sonneveldt, "General Report: Avoidance of Multiple Inheritance Taxation within Europe," *EC Tax Review* 10, no. 2 (2001): 89.

5 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 29.

6 Frans Sonneveldt, "General Report: Avoidance of Multiple Inheritance Taxation within Europe," *EC Tax Review* 10, no. 2 (2001): 83.

7 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 29.

8 Because of this, Maisto noted that estate taxes have been criticized insofar as they may frustrate the ability-to-pay principle and disregard the magnitude of the enrichment of the beneficiary and his relationship with the deceased.

9 Inge van Vijfeijken, "Contours of a Modern Inheritance and Gift Tax," *Intertax* 34, no. 3 (2006): 151.

10 Patricia Brandstetter, "Taxes Covered": *A Study of Article 2 of the OECD Model Tax Conventions* (Amsterdam: IBFD, 2011), 182.

11 Here, one must note that the inheritance tax rates in some states are determined based on the size of the estate as a whole and, therefore, not on the beneficiary's share of the inherited property. Thus, such an "inheritance" tax legislation combines elements of inheritance tax (e.g. available deductions and taxable persons) and estate tax (e.g. tax rates determined based on the estate as a whole). Interestingly in some states, the tax rates applicable in the event of inheritance between persons having no parental relationship can be extremely high, thereby having a *de facto* confiscatory effect.

12 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA, (The Hague: Sdu Uitgevers, 2010), 30.

13 *Id.*

It is not only the exemptions that vary considerably from state to state, but also the property valuation rules. Most inheritance and estate tax laws provide for a general principle of market value, but several exemptions exist (e.g. the cadastral value or even the market value after death).¹⁴ Furthermore, some states apply the same valuation rules for income/capital and death tax purposes.

On the contrary, rules on debt deductions show similarities in many states where tax debts of the deceased are deductible, along with the costs incurred after death (in principle, funeral expenses and probate or notary fees related to the inheritance proceedings). Moreover, some states provide an apportionment of liabilities and costs between the taxable and non-taxable shares of the property because, for example, some assets are not included in the tax base. This is because either an exemption applies to these assets or some assets are excluded from the jurisdictional scope of the applicable inheritance or estate tax legislation.¹⁵

2.1.2 Other types of taxes levied upon death

As mentioned above, death does not only trigger the levying of inheritance and estate taxes. It may also trigger other types of taxes, for example, *mortis causa* income or capital gains taxes. More specifically, there are states which levy *mortis causa* income taxes payable by the beneficiaries who receive “income from inheritance” that increases their ability-to-pay taxes. In other states, death results in a deemed disposition of the deceased’s property immediately before his death to his beneficiaries, with the deceased being the taxable person for whom his beneficiaries file his last income tax return. In some other states, a *mortis causa* capital gains tax is levied on the beneficiaries who are taxed on the accrued gain received upon the deceased’s death, with the acquisition price of the transferred property set at zero. Furthermore, some states levy territorial taxes, e.g. registration taxes and stamp duties on the mere transfer of immovable property located in their territory. Strictly speaking, however, those taxes are not death taxes but are levied on the mere transfer of the property located in their territory (irrespective of the event triggering such a transfer). Finally, there are states that levy taxes ancillary to the death taxes to counterbalance the deferral of a capital acquisition tax, which arises as a consequence of using several civil or common law arrangements such as trusts, usufruct, fideicommissum, and foundations.¹⁶

2.1.3 Taxes on gifts

The term “taxes on gifts” is intended to cover all taxes levied on the wealth, property or assets of an individual which are the subject of a gratuitous *inter vivos* transfer, whether such taxes are levied on the donor or the donee.¹⁷ I observe that states levy two types of taxes on gifts: gift taxes and income taxes on gifts. The taxable event of gift taxes is the enrichment of the donee who often becomes the liable person upon the receipt of the gift.

¹⁴ *Id.*, p. 31.

¹⁵ *Id.*, p. 31–32.

¹⁶ Frans Sonneveldt, “General Report: Avoidance of Multiple Inheritance Taxation within Europe,” *EC Tax Review* 10, no. 2 (2001): 84.

¹⁷ Wolfe D. Goodman, “General Report: International Double Taxation of Inheritances and Gifts,” in *Cahiers de Droit Fiscal International* 70b, ed. IFA (London: IBFD, 1985), 17.

Nevertheless, in some states, the tax is paid by the donor and not the donee. Furthermore, most states levy gift taxes in accordance with the same tables of rates as for inheritance taxes.¹⁸ As a result, the gift tax rates are often determined based on the size of the donation and the degree of kinship between the donor and the donee. Finally, I observe that states provide objective and subjective tax exemptions and/or tax-free allowances to donations. In many cases, these exemptions and allowances are the same as for inheritance tax purposes.

On the other hand, *inter vivos* income taxes on gifts often follow the income tax rules. As a result, the beneficiary is usually liable to pay the income tax on the received gift.

2.2 Establishment of tax jurisdiction

2.2.1 Inheritance and estate taxes

States establish inheritance or estate tax jurisdiction based on either a personal or an objective nexus of a person with their territory.

2.2.1.1 The personal nexus

As a rule of thumb, states levying inheritance or estate taxes rely on the deceased's or the beneficiary's personal nexus with their territory, which, if satisfied, makes the share that is attributable to the beneficiary (in the case of an inheritance tax) or the entire estate (in the case of an estate tax) taxable on a worldwide basis.¹⁹ Thus, the deceased's entire property is subject to inheritance or estate tax, usually including immovable or movable property outside the state's territory. Nevertheless, some states delimit their taxing rights even if a personal nexus is met, presumably to eliminate possible double or multiple taxation of the deceased's property. For instance, they may exempt the foreign-located immovable and/or movable property under certain conditions.

In most states, the deceased's personal nexus with the territory determines whether the state concerned enjoys worldwide inheritance or estate tax jurisdiction. If the deceased had a personal nexus with a particular state at the time of his death, then his worldwide property is subject to tax in this state with the tax being paid by the beneficiaries regardless of their personal nexus with the state. On the other hand, a few states use the *beneficiary's* personal nexus with their territory to levy an inheritance or estate tax on a worldwide basis. If, therefore, the beneficiary has a personal nexus at the time of the deceased's death with a state, this state can tax the share of the deceased's worldwide property inherited by the beneficiary (irrespective of the state of the deceased's personal nexus). Finally, the personal nexus may be assessed in some states at either *the deceased* or the *beneficiary*, meaning that an inheritance or estate tax may be levied on a worldwide basis if there is a personal nexus of the deceased or the beneficiary with their territory.

When levying inheritance or estate taxes, states apply a variety of concepts (or a combination thereof) to determine the deceased's or beneficiary's personal nexus with

18 Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International* 70b, ed. IFA (1985), 57.

19 See also, Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international* 95b, ed. IFA (The Hague: Sdu Uitgevers, 2010), 38.

their territory. Rust observed that there are certain characteristics that personal nexus concepts should meet. These are: i) maintaining equality among different jurisdictions, ii) being administratively easy, and iii) being difficult to be manipulated.²⁰

I observe that most states use the residence concept to establish worldwide inheritance or estate tax jurisdiction. In some states, the concept of residence for inheritance and estate tax purposes differs from that of residence for income tax purposes. Some other states also apply the income tax residence concept for inheritance and estate tax purposes. In that regard, Jones argued that residence, based on the six months' presence criterion, may be right for taxing one year's income, but seems much less apposite for charging lifetime capita. Nevertheless, some states apply income tax residence as a personal nexus concept.²¹ A notable factor is that some states apply extended residence rules and impose an extended worldwide tax liability on nationals who die within a certain number of years after immigrating to another state. These states usually provide for a credit for the taxes paid in the other state that may also seek to tax the deceased's worldwide property based on the deceased's actual residence there. The concept of residence for inheritance and estate tax purposes will be further examined in chapter 3 of this study.

Other states use the concept of the domicile to levy an inheritance or estate tax on a worldwide basis. The concept of domicile differs from that of residence as inferred by the income tax law; apart from the physical presence of a person in a state (on which the income tax concept of residence mainly focuses), the intention of the person to stay there indefinitely plays an essential role for the determination of whether he is domiciled there.

The concept of domicile may have different meanings. Under the domicile concept of the English law, every person must have a domicile, but cannot have more than one domicile. More specifically, every person is born with a domicile of origin. A domicile of origin is attributed to every person at birth by operation of law. This domicile does not depend on the place where the child is born, nor on the place where his mother or father reside, but on the domicile of the appropriate parent at the time of birth. As a result of this rule, a domicile of origin may be transmitted through several generations, no member of which has ever resided for any length of time in the country of the domicile of origin. It is generally accepted that a legitimate child born during the lifetime of his father has his domicile of origin in the country in which his father was domiciled at the time of his birth.²² Furthermore, a person may acquire a domicile of choice by moving from one state to another and living there with the intention to reside permanently or indefinitely in the new state (the so-called "animus manendi").²³ In such a case, the domicile of choice replaces his domicile of origin. It is noted that Sonneveldt (2002) was of the view that domicile as a concept aiming at finding a lifetime connection with a country, is particularly

20 Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto, (Amsterdam: IBFD, 2010), 86.

21 See also, J.F. Avery Jones, "A Comparative Study of Inheritance and Gift Taxes," *European Taxation* 34 (October/November 1994): 335.

22 More on the domicile of origin, see Dicey and Morris, *The Conflicts of Laws*, ed. Lawrence Collings (London: Sweet & Maxwell, 2012).

23 More on the domicile of choice, see Dicey and Morris, *The Conflicts of Laws*, ed. Lawrence Collings (London: Sweet & Maxwell, 2012).

suitable for death taxation. In comparing this criterion with residence, it may be said that it is more difficult to use than its civil law counterpart.²⁴

Finally, a state may establish worldwide inheritance and estate tax jurisdiction based on the deceased's or the beneficiary's nationality. It is true that nationality represents the most stable relationship between taxpayers and their state. Nevertheless, problems may arise in the case of multiple nationalities, which are becoming less rare due to globalisation and the free movement of persons, especially within the EU. Furthermore, taxation based on the nationality seems to disregard the individuals' intention not to live permanently in the state of their nationality, especially if they do not occasionally visit this state in the absence of familial and economic ties.

2.2.1.2 *The objective nexus*

In the absence of a personal nexus, states may still levy inheritance and estate taxes based on an objective nexus of the deceased or the beneficiary with the state concerned. The objective nexus justifies the levying of inheritance and estate taxes solely on domestic assets (the so-called "situs principle").

In that regard, states can be divided into two categories concerning the determination of domestic assets that may seek to tax. The first category includes states that seek to tax only a few types of assets located in their territory, such as immovable property and certain types of movable property (narrow basis). On the other hand, the second category includes states that seek to tax a broad range of assets (broad basis).

Several states rely on private international law rules to determine the situs of assets while other countries rely on specific tax criteria. The differences in these rules, however, can often lead to jurisdictional overlaps and double situs taxation if both states classify an asset (e.g. copyrights, shares, bonds, and other securities) as a situs/domestic asset. For example, the situs rules of a state may stipulate that the company shares are located in the state of the registered office of the company which issued these shares whereas the situs rules of the other state may prescribe that the company shares are located in the state of the deceased's or donor's last domicile or residence. Double situs taxation is arguably the worst form of double taxation since no unilateral tax relief is available in such a case, as is discussed in the next chapter.

Finally, it should be noted that there are states which abstain from levying inheritance and estate taxes based on the situs principle in the absence of a personal link of the deceased or beneficiary with their territory.

2.2.2 *Other types of taxes levied upon death*

States levying *mortis causa* income taxes on the "income from inheritance" often determine their taxing rights based on the income tax rules under which the residence/domicile of the income recipient is decisive. Therefore, the resident beneficiary declares his worldwide "income from inheritance" in his annual tax return, in aggregation with the other types of income earned worldwide. Alternatively, the non-resident beneficiary declares only the

24 Frans Sonneveldt, "Application of death taxes in the emigration and immigration countries," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 13.

“income from inheritance” sourced in the territory of the state concerned. Similar rules apply in states levying *mortis causa* capital gains taxes. Finally, registration and stamp duties are territorial taxes, levied on the mere transfer of immovable property located in the territory of a state irrespective of the beneficiary’s or the deceased’s personal nexus with the territory.

2.2.3 Taxes on gifts

Most states impose gift taxes on the total value of gifts made by a donor who has a personal nexus with their territory regardless of the situs of the donated property. Some other states impose gift taxes on the total value of gifts received by a donee who has a personal nexus with their territory. Finally, some states impose gift taxes both on the total value of gifts made by a donor who has a personal nexus with their territory and on the total value of gifts received by a donee who has a personal nexus with their territory. In that regard, the personal nexus is often determined under the same concepts used as for death tax purposes²⁵ (i.e. residence, domicile and nationality). Of note is that some states exempt foreign immovable property when they tax in their capacity as states of the personal nexus (as in the case of inheritance taxes).

In most countries where neither the donor nor the donee has a personal nexus with their territory, gift taxes are levied on gifts of the same category of locally situated property as those which are subject to death tax (e.g. an inheritance tax) (the objective nexus).²⁶

On the other hand, the tax jurisdiction in the case of income taxes on gifts is often determined under the income tax rules.

2.3 History of death taxes and revenue trends

Death taxation is one of the oldest forms of taxation, with roots that are believed to date back to ancient Egypt²⁷ and Greece. Researchers have traced land transfer taxes to the reign of Psameticus I (654–616 BC) in ancient Egypt. Land transferred by inheritance carried a ten per cent tax.²⁸ Close families members were not exempted.²⁹ Scholars assume that the Greeks borrowed the inheritance tax from the Egyptians. The tax apparently raised substantial revenue while simultaneously producing complaints, evasion, and fraud.³⁰

In ancient Rome, Emperor Augustus (r.27 BC–14 AD) established an inheritance tax in Rome in 6 AD to fund military pensions.³¹ By threatening the Roman people with the reimposition of a prior and reportedly much-hated direct land tax, Augustus won the passage

25 Wolfe D. Goodman, “General Report: International Double Taxation of Inheritances and Gifts,” in *Cahiers de Droit Fiscal International 70b* (London: IBFD, 1985), 57.

26 Wolfe D. Goodman, “General Report: International Double Taxation of Inheritances and Gifts,” in *Cahiers de Droit Fiscal International 70b* (London: IBFD, 1985), 57.

27 Wolfe D. Goodman, “General Report: International Double Taxation of Inheritances and Gifts,” in *Cahiers de Droit Fiscal International 70b* (London: IBFD, 1985), 17.

28 Barbara R. Hauser, “Death Duties and Immortality: Why Civilization Needs Inheritances,” *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 366; Max West, *Inheritance Tax* (New York: Columbia College Studies, 1893), 181–183.

29 William J. Shultz, *The taxation of inheritance* (New York: Houghton Mifflin Company, 1926), 3.

30 William J. Shultz, *The taxation of inheritance* (New York: Houghton Mifflin Company, 1926), 4.

31 See also Kenneth Scheve and David Stasavage, *Taxing the rich* (New Jersey: Princeton University Press and Russel Sage Foundation, 2016), 93.

of the inheritance tax in its place. The tax, known as *vicesima hereditatium*, applied only to Roman citizens. Unlike the Egyptians, who taxed the property transferred, the Romans taxed the property received.³² Certain close relatives and later all close relatives were exempt from the tax.³³ However, Hauser notes – quoting West – that Emperor Caracalla (r.212 – 217 AD) increased this fruitful revenue source by doubling the tax rate, abolishing exemptions for close relatives, and, in 212 AD, extending Roman citizenship, and with it liability to the inheritance tax, to all the free inhabitants of the whole Empire. The citizens did not welcome this change and the tax collector's position soon became a miserable one.³⁴

The basis, however, of the current death taxes was established in the feudal states during the Middle Ages when the ownership of immovable property indicated economic and political power. Thus, such economic and political power could generate revenue for the feudal states, e.g. through the imposition of “the relief”.^{35, 36} Of note is that in the Middle Ages wartime revenue considerations prompted states to introduce a death levy.³⁷ In some states, the church collected a death payment too (the so-called “mortuary”³⁸). According to van Vijfeijken (2006), the death tax of the past was based on the easily perceptible event of the death and was levied on the deceased's (presumably large) estate, with the states *usually* disregarding the beneficiaries' personal circumstances.³⁹ In this way, the death tax of the past (which, in essence, was an estate tax) could generate more tax revenue.⁴⁰

Nevertheless, in the 20th century, people invented more complex systems of attribution of property and, thus, the ownership of immovable property did not always result in economic and political power. Furthermore, the consideration of the beneficiaries' circumstances – as shown by the application of tax rates determined by the degree of kinship between the deceased and his beneficiaries – led to the “birth” of inheritance tax and the gradual “personalisation” of estate taxes. The same is true due to the increased exemption thresholds and the granting or broadening of the subjective tax exemptions

32 Barbara R. Hauser, “Death Duties and Immortality: Why Civilization Needs Inheritances,” *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 367.

33 Barbara R. Hauser, “Death Duties and Immortality: Why Civilization Needs Inheritances,” *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 367.

34 Barbara R. Hauser, “Death Duties and Immortality: Why Civilization Needs Inheritances,” *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 367.

35 “The relief” rested on the theory that the lord owned the land while the tenants occupied and farmed the land. When a tenant died, the tenant's heir could only obtain possession of the land by paying the relief tax to the lord. At first, the lords demanded arbitrary amounts, but later, the lords often fixed the amounts.

36 See also Max West, *Inheritance Tax* (New York: Columbia College Studies, 1893), 185–189.

37 For instance, in the Middle Ages, the “heriot tax” was one of the tenant's military support obligations. Tenants paid the tax on farm stock “loaned” to them based on the idea that the lords owned the chattels. See Barbara R. Hauser, “Death Duties and Immortality: Why Civilization Needs Inheritances,” *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 369. Furthermore, in latter centuries, wealth taxes had been imposed explicitly for raising revenues (e.g. in the UK in 1984, in order to finance an impending or an actual war, e.g. the First World War; – i) in the USA from 1797 to 1903 and in 1916; and ii) in Canada in 1941). See more, David G. Duff, “Taxing inherited wealth: A philosophical argument,” *Canadian Journal of Law and Jurisprudence* 1, no. 6 (1993): 7.

38 The church intended these death payments to compensate for tithes or other duties that laymen had missed during their lifetime. See Barbara R. Hauser, “Death Duties and Immortality: Why Civilization Needs Inheritances,” *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 370.

39 See also, Inge van Vijfeijken, “Contours of a Modern Inheritance and Gift Tax,” *Intertax* 34, no. 3 (2006): 151.

40 *Id.*

to close relatives and spouses, even in states levying “impersonal” estate taxes. Arguably, the gradual personalisation of death taxes resulted in their decreasing revenue-raising capacity.^{41, 42}

In relation to revenue trends of death taxes, the inheritance revenue rates in most OECD member countries are declining (according to the OECD Revenue Statistics). The revenue from death taxes represents less than 1% of the total revenue of the states,⁴³ and one can question whether states (should) attach significant importance to death taxes in general.⁴⁴ Nevertheless, I observe that the justifications of death taxes seem to be more important than their revenue-raising capacity.⁴⁵ According to Eisenstein, “[t]he permissible size of inherited wealth is an issue to be resolved on its own in the light of social policy. While one answer may collaterally yield more revenue than another, the wisdom of the answer has little to do with revenue.”⁴⁶

2.4 Justifications of death taxation

If, according to Eisenstein, the answer to the question “Why do states levy inheritance taxes?” has little to do with revenue, one may wonder why states continue levying these taxes in the 21st century. In my view, the justifications of death taxation provide the answer to this question.

It is true that the fact that death taxes have been in decline for the last 20 years comes as no surprise to the opponents of death taxation due to the inability of the traditional tax justifications to provide a convincing response as to why states should levy these taxes. It is worthy of note that some states do not levy death taxes and some other states have already abolished their death taxes.⁴⁷ Nevertheless, I question why only the traditional tax justifications need to be taken into account for the justification of death taxes, the nature and objectives of which differ from those of other types of taxes levied in a state.

Apart from the insufficient traditional justifications, the death taxation opponents put forward a fairness argument against death taxation. In their view, it is unfair that the deceased has to pay income tax during his lifetime and that his property is subject to death tax at the time of his death. To be blunt, the opponents of death taxation believe

41 See also, Guglielmo Maisto, “General Report: Death as a Taxable Event and its International Ramifications,” in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 33.

42 According to the OECD, “[l]ow revenues reflect the fact that inheritance/estate and gift tax bases are often narrowed by numerous exemptions and deductions, and avoidance opportunities are widely available.” OECD, *The role and design of net wealth taxes in the OECD* (Paris: OECD Tax Policy Studies, no.26, 2018), 23.

43 See also, J.F. Avery Jones, “A Comparative Study of Inheritance and Gift Taxes,” *European Taxation* 34 (October/November 1994): 335.

44 According to the OECD revenue statistics, tax revenue from inheritance and estate taxes represented on average in 2018 0.4% of the total tax revenue earned in each OECD member country (OECD – average). See OECD revenue statistics, accessed January 29, 2020, <https://stats.oecd.org/Index.aspx?DataSetCode=REV>.

45 See also Lynne Oats, Angharad Miller and Emer Mulligan, “Principles of International Taxation” (Haywards Heath, Bloomsbury Professional, 2017), 7: “Wealth taxes are generally not imposed for their revenue-raising capabilities, but rather for the purposes of equality and effectiveness.”

46 Louis Eisenstein, “The Rise and Decline of the Estate Tax,” *Tax Law Review* 11, no. 22, (1956): 253.

47 For example, Sweden, Russia, Austria, Czech Republic, and Norway.

that it is unfair that an “uninvited” beneficiary, i.e. the fiscus (state treasury), inherits part of the deceased’s savings upon his death. One could argue that this approach is flawed because two different persons pay two distinct and non-comparable taxes on two distinct taxable objects: the deceased was periodically paying income tax during his lifetime on his received income while his beneficiaries pay the inheritance tax upon the *mortis causa* receipt or transfer of a property. Thus, any allegation of *juridical* double taxation⁴⁸ may not be valid from a legal point of view.^{49, 50} In that regard, I note that the OECD mentions that “[i]n the case where wealth transfer tax is levied on the recipient rather than on the donor (i.e. an inheritance tax rather than an estate tax), there is no double taxation of the donor himself and the inherited wealth is also only taxed once in the hands of the recipient”,^{51, 52} Nevertheless, I would expect that an economist may not share this view, focusing on the effect of the accumulation of taxes.^{53, 54}

In parallel with the low contribution of death and gift taxes to the revenue inflow, the opponents of death taxation use the negative public opinion about death taxes as an argument against them in combination with the fact that not all states levy these taxes. Public opinion towards death taxes is indeed negative,⁵⁵ as people consider them unfair.

48 Double taxation is traditionally divided into two types, juridical double taxation and economic double taxation. Juridical double taxation may be described as the imposition of comparable taxes by two (or more) tax jurisdictions on the same taxpayer in respect of the same taxable object. Economic double taxation may be described as the imposition of two (or more) comparable taxes on the same taxable object.

49 In this respect, see Inge van Vijfeijken, “Contours of a Modern Inheritance and Gift Tax,” *Intertax* 34, no. 3 (2006): 152-53.

50 With regard to wealth and death taxes, Christer Silfverberg noted that no international double taxation may take place except in cases where the death tax and the wealth tax are based on similar justifications (e.g. in cases where a death tax is perceived as a postponed wealth tax). See Christer Silfverberg, “Correlation between death taxes and wealth taxes,” in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 63. Cf. Claudio Sacchetto and Laura Castaldi, “Relationship between personal income tax on income from capital and other taxes on income from capital (corporate income tax, wealth tax, inheritance and gift tax and real-estate tax),” in *The Notion of Income from Capital*, eds. Peter Essers and Arie Rijkers (Amsterdam, EATLP/IBFD, 2007), 81.

51 OECD, *The role and design of net wealth taxes in the OECD* (Paris: OECD Tax Policy Studies, no. 26, 2018), 58.

52 Stuart White is of the view that “[i]n fact, whether the [death] tax takes the form of a capital receipts tax or estate tax, it is always in effect the recipient who pays it. Quite simply, the ‘donor’ under the estate tax cannot pay the tax because he or she is dead. Dead people don’t do much, and that includes paying taxes. Even under an estate tax, the tax itself is paid by the recipients of the estate.” See Stuart White, “Moral objections to inheritance tax,” in *Taxation: philosophical perspectives*, ed. Martin O’Neil and Shepley Orr (Oxford: Oxford University Press, 2018), 173.

53 In the case of an estate tax, Maisto notes that “the argument of [...] double taxation [...] holds true primarily for countries that apply [an estate tax] in addition to net wealth tax so that wealth is taxed not only on a current basis throughout the life of the individual but also upon death. See Guglielmo Maisto, “General Report: Death as a Taxable Event and its International Ramifications,” in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 34.

54 Stuart White notes that, even if it could be argued that death taxes involve double taxation, there is little reason to regard double taxation, as such, as unfair. In White’s view, the reasons for favouring a death tax – such as equality of opportunity – are strong enough public interests to justify the tax even though it is a double tax, and in this specific respect, undesirable. See, Stuart White, “Moral objections to inheritance tax” in *Taxation: philosophical perspectives*, ed. Martin O’Neil and Shepley Orr (Oxford: Oxford University Press, 2018), 174.

55 Particularly, inheritance and estate taxes.

For example, in 2015, a new YouGov poll asked the United Kingdom (UK) public how fair or unfair it considered several types of taxes, including inheritance tax, VAT, and the BBC licence fee. Of the voters, 59% considered inheritance tax to be unfair – the highest figure for all the taxes polled.⁵⁶ Some years ago, in 2009, the Netherlands company, TNS NIPO, conducted a similar survey and inheritance taxes emerged as the most unfair in the Netherlands with gift taxes being the sixth most hated tax.⁵⁷ Interestingly, these surveys compared the inheritance tax to other taxes, e.g. VAT/GTT, income tax, and car or fuel taxes.

In that regard, I partly attribute the negative public opinion on death taxes to their nature and design. The example of the imposition of the inheritance tax is illustrative. As previously mentioned, the tax is paid by the beneficiaries, but its taxable base is determined either based on the deceased's or/and beneficiaries' personal nexus, or an objective nexus. This may often create uncertainty as to the person liable to pay the tax due. Moreover, the inheritance tax rates are determined based on the size of the inherited property and sometimes the kinship between the deceased and the beneficiary. This may increase, in my view, the degree of uncertainty as to the person who is liable to pay the tax due, especially for people who are not familiar with death taxation.

On the other hand, income taxes seem to be less complicated. More specifically, a salaried employee expects that he will be taxed on a fixed tax base – his earned income – and at a certain rate, which is determined based on the size of this income. Most importantly, the employee expects that his residence will determine whether his worldwide income will be subject to tax (“resident taxpayer”) or only the income sourced in the territory of the state (“non-resident taxpayer”).

Complexity, however, should not run against fairness.⁵⁸ In my view, the justifications of death taxation provide a convincing answer to Eisenstein's question mentioned above. I present a total of fourteen justifications of death taxation as discussed in the academic literature or the work of the OECD or invoked by the states when introducing a death tax (in particular, an inheritance tax and an estate tax). It follows that the death tax laws of a state may refer to only one or two justifications of the overview here below or adopt a differentiated weighting of these justifications.

In my opinion, there are four categories of justifications of death taxation. The first category refers to justifications that are explained from the perspective of the beneficiary. This category includes most of the justifications of this overview, i.e. the ability-to-pay-taxes justification, the tax equality justification, the diffusion-of-wealth justification, the work stimulating justification, the wages-for-work justification and the justification of less pain.

56 See more, Guy Bentely, *Inheritance tax seen as the most unfair by voters in all parties*, published at citya.m., accessed January 27, 2019, <http://www.cityam.com/212005/inheritance-tax-seen-most-unfair-voters-all-parties>.

57 See more, Manno van der Berg, *De 10 meest gehate belastingen*, published at Telegraaf, accessed January 27, 2019, <https://www.telegraaf.nl/nieuws/989570/de-10-meest-gehaat-belastingen>.

58 The public seems to oppose inheritance taxes for two more reasons:

- i) The inheritance tax is unfair because of the increasing house prices. Sharply rising house prices have brought net moderate estates within the purview of the inheritance tax, that is, estates that would have previously fallen well below the inheritance tax threshold.
- ii) The inheritance tax is unfair because it is not paid only by those who can most easily afford it, as they, through estate planning techniques, can reduce their tax burden to zero. See more Natalie Lee, “Inheritance Tax – An Equitable Tax no Longer: Time for Abolition?,” *Legal Studies* 27, no. 4 (2007): 690.

The second category includes justifications that are explained from the perspective of the deceased, i.e. the penalty for the deceased's tax evasion justification, the belated fee justification and the substitution for not imposed income taxes justification.

The third category includes justifications that are explained from the perspective of both the deceased and the beneficiary, i.e. the windfall justification and the profit justification.

Finally, the fourth category includes justifications explained from the public good perspective, namely the financing of the probate costs and a means for the abolition of useless intestate inheritance justification. It is worthy of note that some of these justifications apply by analogy to taxes on gifts that are usually considered complementary to death taxes.⁵⁹

2.4.1 *The ability-to-pay-taxes justification (the theory of value)*

The ability-to-pay-taxes justification, which is based on the theory of value, serves as the first, albeit not primary in my view, justification of death taxation. This justification is often discussed in parallel with the windfall justification (which is examined in the next section). Under the ability-to-pay-taxes justification, the *mortis causa* transfer of property increases the beneficiaries' financial capacity and, thus, their ability-to-pay-taxes. Therefore, any abolition of death taxation will create an "unjustifiable leak in taxation" as Tipke notes.⁶⁰ However, Ydema and Vording are of the view that it seems unreasonable for the states to levy death taxes based on the ability-to-pay-taxes justification. In their view, if it is argued that an inheritance constitutes taxable income for the beneficiary, any deviation from the normal rules of income taxation (author: as in the case of inheritance and estate taxes) would require another justification than the ability-to-pay-taxes one.⁶¹ On the contrary, West regarded the ability-to-pay taxes justification as a justification of death taxation but he considered that the increase of the beneficiaries' ability-to-pay-taxes should not always be taken for granted. He noted that it is not true in every case that the inheritance of property indicates a real increase of tax-paying ability.⁶² In that regard, West drew a distinction between transfers of property to close family members, on the one hand, and to distant relatives (or even to independent adult children), on the other. Regarding the former transfers, he noted – quoting Adam Smith – that the death of the head of the family may have a positive or a negative influence on the ability-to-pay-taxes of the rest of the family members: "If the deceased's income was from property and not from labour, the death of the head of the family will make little difference in the family income. In the case of passive income (e.g. interest), the economic situation of the family

59 Taxes on *inter vivos* gifts are viewed in most countries primarily as a device for preventing erosion of the inheritance tax base; there is no place where they seem to be intended to raise revenue or, in themselves, to redistribute wealth. See Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International 70b* (London: IBFD, 1985). Furthermore, in the OECD's view, an inheritance tax needs to be complemented with a gift tax (given the tax avoidance strategy of transferring wealth through lifetime gifts). See, OECD, *The role and design of net wealth taxes in the OECD* (Paris: OECD Tax Policy Studies, no. 26, 2018), 68.

60 Klaus Tipke, *Die Steuerrechtsordnung, Band II*, (Cologne: Verlag Dr. Otto Schmidt, 2003), 877.

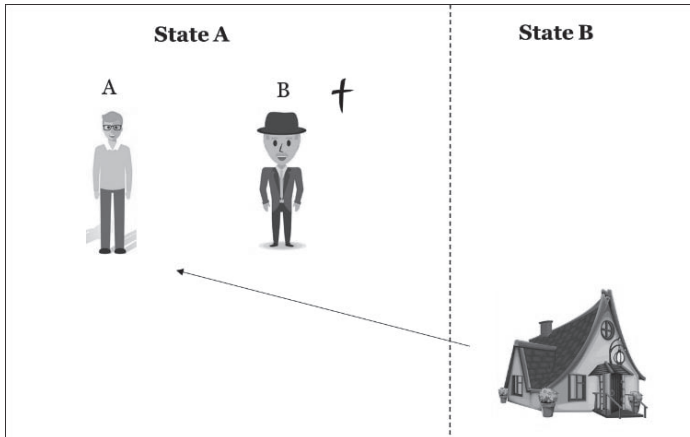
61 See also Onno Ydema and Henk Vording, "Charles Herckenrath's 100 Per Cent Death Tax Rate," in *Studies in the History of Tax Law*, ed. John Tiley (Oxford: Bloomsbury Publishing, 2011): 303-304.

62 Max West, "The Theory of the Inheritance Tax," *Political Science Quarterly* 8, no. 3 (1893): 434.

improves as the necessary expenditure diminishes by the death of a family member.⁶³ If, however, the deceased's income was wholly from labour, the increase of the beneficiaries' ability-to-pay-taxes should not be taken for granted if the deceased was the only working member of the family."⁶⁴ Concerning transfers of property to collateral relatives, West noted that "[w]here property goes to collateral relatives, or even to self-supporting adult children, there is a distinct increase of tax-paying ability."⁶⁵

Irrespective of the above, I observe that the ability-to-pay-taxes justification may justify the imposition of death taxes at progressive tax rates depending only on the *size* of the estate. On the contrary, it does not seem to be able to justify progression based on the kinship between the parties involved which is an important element of most death tax laws. Therefore, the ability-to-pay taxes justification should not be considered the main justification of death taxation.⁶⁶

Furthermore, in the literature, the ability-to-pay-taxes justification has been associated with the assessment of the personal nexus at the level of the deceased. More specifically, taxation based on the deceased's personal nexus with the state gives rise to the following logical gap if considered in the light of the beneficiaries' ability-to-pay-taxes, as shown by the two examples below.

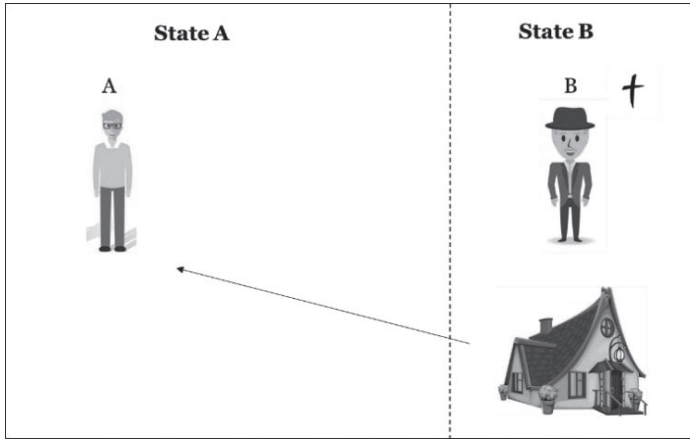


⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ On the contrary, the ability-to-pay-taxes justification may justify progression based on the proportion of the inherited wealth to the beneficiaries' wealth at the time of acquisition (the so-called "third progression").



In the first example, the deceased B was a resident of State A at the time of his death. His beneficiary A is also a resident of State A. He inherits property located in State B. State A levies inheritance taxes (as a type of death tax) based on the deceased's personal nexus (residence) and an objective nexus. As a result, beneficiary A has to pay tax in State A following the *mortis causa* transfer of the deceased's property that is located in State B (because the personal nexus with the deceased is satisfied).

In the second example, the deceased B was residing in State B at the time of his death. The deceased's beneficiary A is a resident in State A. The deceased's property is located in State B (i.e. the state of the deceased's residence). State A levies inheritance taxes based on the deceased's personal nexus (residence) and an objective nexus. In such a case, State A may not seek to tax the property inherited by beneficiary A as neither the personal nexus nor the objective nexus is satisfied: the deceased was not a resident of State A at the time of his death and the inherited property is not located in the territory of State A. However, one could argue that from State A's perspective, the ability-to-pay-taxes of beneficiary A in both examples increases following the *mortis causa* transfer of property. As a result, State A should treat them equally (as in the case of income taxation).

Because of this logical gap, it has been argued that the starting point of death taxation should be the beneficiary's and not the deceased's personal nexus with the state as being more in line with the ability-to-pay-taxes justification. More specifically, the supporters of the transition of the starting point of taxation from the deceased to the beneficiary invokes the personalisation of inheritance taxes argument mentioned in the previous section. In their view, the states already consider the situation of the beneficiaries through the increased exemption thresholds and the broadening of the subjective tax exemptions.⁶⁷

Concerning this point, Sonneveldt (2016) noted that a distinction should be made between estate taxes and acquisition-based taxes such as inheritance taxes. In his view, an estate tax focuses on the increase in the deceased's property during his lifetime. Thus,

67 Inge van Vijfeijken and Hedwig van der Weerd-van Jolingen, "Double Taxation of Inheritances and the Recommendation of the European Commission," *EC Tax Review* 21, no. 6 (2012): 315; Inge van Vijfeijken, "Contours of a Modern Inheritance and Gift Tax," *Intertax* 34, no. 3 (2006): 152.

the starting point of estate taxation shall be the deceased's personal link with the state concerned, as estate taxation focuses on the deceased's estate and not on the individual acquisitions. The same should apply in the case of *mortis causa* capital gains taxation.⁶⁸ On the other hand, in the event of acquisition-based taxes, such as inheritance taxes, Sonneveldt (2016) noted that it is arguable to take as the starting point of taxation the beneficiaries' personal nexus with a state in light of their ability-to-pay taxes. The same should also apply, in his view, in the case of *mortis causa* income taxes.⁶⁹

Nevertheless, the transition of the starting point of taxation from the deceased to the beneficiary may not be an easy task. Sonneveldt (2014) observed that worldwide taxation determined by the beneficiary's residence might not be easily applicable considering the limited control mechanisms that a state may have concerning the foreign property. Furthermore, he argued that a possible transition of the starting point of taxation would affect the OECD IHTMTC, which has been drafted based on the deceased's fiscal domicile (see section 5.1.1). Finally, most inheritance tax legislation has to be amended as it takes the deceased's personal nexus with their territory as the starting point of taxation.⁷⁰

The discussion on the transition of the starting point of taxation from the deceased to the beneficiary falls outside the scope of this study, which focuses solely on the problems of cross-border inheritance and gift taxation. It is true, however, that the assessment of the personal link at two different persons by two states can often result in double taxation of the cross-border inheritance and donation as discussed in the next chapter.

2.4.2 The windfall justification (the accidental income theory)

The windfall justification or the justification of the unearned advantage serves as the second justification of death taxation. This justification rests upon the fortuitous nature of acquisitions under the accidental income theory. These acquisitions are sudden and perhaps unexpected accretions of property without labour on the part of the beneficiaries and manifestly increase their ability-to-pay-taxes. According to West, "[i]t is conceivable that where there is an income tax, inheritances might be taxed as income; but on account of their accidental or gratuitous nature it seems more just to subject them to a distinct tax greater in amount than the income tax, or in addition to the property tax."⁷¹ The windfall justification seems also to have been officially recognised by the OECD. In that regard, the OECD notes that "[i]nheritances constitute an unearned advantage for recipients [...]. From an equal opportunity perspective, wealth transfers can be viewed as a source of additional opportunity that is not linked to the recipient's efforts and that should therefore be taxed [...]."⁷²

68 Frans Sonneveldt, "Ultimum Remedium ter Bestrijding van de Grensoverschrijdende Erfbelastingproblematiek binnen de Europese Unie," *WPNR Weekblad voor Privaatrecht Notariaat en Registratie* 7121 (2016): 786.

69 Frans Sonneveldt, "Ultimum Remedium ter Bestrijding van de Grensoverschrijdende Erfbelastingproblematiek binnen de Europese Unie," *WPNR Weekblad voor Privaatrecht Notariaat en Registratie* 7121 (2016): 786.

70 Frans Sonneveldt, *Wegwijs in de Successiewet* (The Hague, Sdu Uitgevers, 2018), 4.

71 Max West, "The Theory of the Inheritance Tax," *Political Science Quarterly* 8, no. 3 (1893): 435.

72 OECD, *The role and design of net wealth taxes in the OECD* (Paris: OECD Tax Policy Studies, no.26, 2018), 53.

Contrary, however, to the ability-to-pay-taxes justification that justifies the imposition of death taxes at progressive rates depending only on the size of the acquisition concerned, the windfall justification arguably justifies progression depending also on the kinship between the parties involved. This type of progression shows that it is considered fair if states tax incidental and unexpected receipts of wealth and *at the same time* protect the family property when received by family members. Therefore, the windfall justification dictates that states should tax a *mortis causa* transfer of property (because it is unexpected), but they should also take into account possible family property considerations (that make a *mortis causa* transfer of property less unexpected when family members receive the property at hand). As a result, it could be argued that the windfall justification does not only explain *why* states may seek to levy a death tax but also *how* states may design such a tax.

The idea of protection of the family property is long-standing, which has been deeply reflected in the law and in religion through the centuries. For example, some authors refer to the Roman *vicesima hereditatium*, quoting Gaius Plinius Caecilius Secundus who advocated that a 5% tax is tolerable when imposed on distant beneficiaries but it becomes a heavy burden when imposed on the deceased's close relatives.⁷³ As mentioned in section 2.3, *vicesima hereditatium* was a tax that was introduced by Emperor Augustus (Lex Julia Vicesimaria) in ancient Rome and consisted of a 5% levy that every Roman citizen had to pay to the Roman army upon any inheritance or legacy left to him, except for property left to a citizen by his nearest relatives, and property below a certain sum. Later, Emperor Trajan ordered the exemption of almost all close relatives. Praising this reform, Pliny the Younger commented that the heavy tax would have been unfair to those who were entitled to their inheritance by birth, kinship, and community of family worship; *who had always regarded the property as their own possession*, to be passed on from them in turn to their heirs.⁷⁴

Furthermore, Hauser notes that one of the oldest codes of law, dating from the rule of Hammurabi during the golden age of Babylonia (1792-1750 BC), refers, in places, to a sealed deed, an instrument similar to a trust, which directed *property to a family member* after one had “gone to his fate.”⁷⁵ Moreover, Hauser refers to the codifications which occurred in early Roman law in 451 BC, when a delegation went from Rome to Greece to study the laws of Solon, an Athenian statesman, lawmaker and poet. The codification resulted in the so-called “Twelve Tables”, which among other things, addressed inheritance as follows: “[i]f a man dies intestate to whom there is no *suus heres*,⁷⁶ let the nearest agnate⁷⁷ have the property [and] [i]f there is no agnate, let the members of the gens have the property.”⁷⁸

Finally, Hauser notes that many references in the Old Testament reinforce the importance of inheritance concerning the protection of the family property: “A good man leaveth an inheritance to his children’s children.” “The Lord forbid it me, that I should give the

73 See also Onno Ydema and Henk Vording, “Charles Herckenrath’s 100 Per Cent Death Tax Rate,” in *Studies in the History of Tax Law*, ed. John Tiley (Oxford: Bloomsbury Publishing, 2011): 304-305.

74 Barbara R. Hauser, “Death Duties and Immortality: Why Civilization Needs Inheritances,” *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 367.

75 Barbara R. Hauser, “Death Duties and Immortality: Why Civilization Needs Inheritances,” *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 394.

76 An heir (such as a wife, son, daughter or slave) under the paternal power of the decedent at the latter’s death.

77 *Agnati* were all persons from a common male ancestor.

78 Barbara R. Hauser, “Death Duties and Immortality: Why Civilization Needs Inheritances,” *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 395.

inheritance of my fathers unto thee.” and “The Lord knoweth the days of the upright: and their inheritance shall be for ever”.⁷⁹

The idea of the protection of the family property is also reflected in modern succession laws (for example, in forced heirship rules^{80, 81}) and in death tax laws (for example, through subjective tax exemptions to close relatives and spouse and the application of tax rates determined, amongst others, based on the kinship between the deceased and his beneficiaries). It follows that states, taxpayers and legislatures instinctively consider that kinship differentiates a family member from an alien (who does not have family bonds with the deceased). It is perceived in that regard that family members have contributed to the acquired property, and so the acquisition of the deceased's property becomes less incidental. On the other hand, the acquisition of the deceased's property by non-family members arguably remains incidental because it is perceived that they have not grown into the perception that the property would be eventually theirs;⁸² they did not always regarded the property as their own possession; they had not contributed to it; and there was no “natural instinct of the parents to equip the new generation as well as they can”.⁸³ As Hayek notes, “[t]he family's function of passing on standards and traditions is closely tied up with the possibility of transmitting material goods”.⁸⁴

Given the abovementioned considerations, West notes that “[o]n the whole, the accidental-income theory is perhaps the most satisfactory explanation of inheritance taxes as they actually exist”.⁸⁵ Without the windfall justification, death taxation would thus not be defensible as a separate mode of taxation: the size of *mortis causa* acquired property cannot be said to be a perfect criterion of faculty, which can differentiate a death tax from other taxes levied, based on the size of the property transferred or acquired (e.g. net wealth taxes or capital gain taxes).

I agree with West that the windfall justification should be regarded as the primary justification of death taxation. The windfall justification seems to be the most convincing, complete and unique justification of death taxation as it explains why states consider it fair to tax incidental and unexpected receipts of wealth (“why to tax”) and at the same time to protect the family property when acquired by family members (“how to tax”). Therefore, this justification can explain, in my view, progressivity based both on the size of

79 Barbara R. Hauser, “Death Duties and Immortality: Why Civilization Needs Inheritances,” *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 396.

80 See also, See also Onno Ydema and Henk Vording, “Charles Herckenrath's 100 Per Cent Death Tax Rate,” in *Studies in the History of Tax Law*, ed. John Tiley (Oxford: Bloomsbury Publishing, 2011): 304.

81 Forced heirship provisions restrict the individual's freedom to choose how their property is divided upon their death and confer an automatic entitlement on certain individuals to a portion of the deceased's estate. These individuals are known as “protected heirs” and typically include the surviving spouse, children and/or other relations of the deceased. These restrictive rules apply irrespective of the terms of the deceased's will and therefore, the stated wishes of the deceased may well be disrupted by disgruntled protected heirs.

82 See also, Onno Ydema and Henk Vording, “Charles Herckenrath's 100 Per Cent Death Tax Rate,” in *Studies in the History of Tax Law*, ed. John Tiley (Oxford: Bloomsbury Publishing, 2011): 304-305.

83 Friedrich A. Hayek, *The Constitution of Liberty*, ed. Ronald Hamowy (Chicago: The University of Chicago Press, 2011), 154.

84 Friedrich A. Hayek, *The Constitution of Liberty*, ed. Ronald Hamowy (Chicago: The University of Chicago Press, 2011), 154.

85 Max West, “The Theory of the Inheritance Tax,” *Political Science Quarterly* 8, no. 3 (1893): 435.

the *mortis causa* transferred property (taxation of accidental transfers of property) and the degree of kinship between the parties involved (protection of family property). However, a counterargument that one may bring forward is that the death tax laws (and particularly, the inheritance and estate tax laws) deem that a distant relative or a beneficiary without any family connection with the deceased has not contributed to the *mortis causa* acquired property, which, however, may not always be the case.

2.4.3 The tax equality justification

The tax equality justification dictates that the tax system cannot penalise relatively moral behaviours; states should not treat less favourably taxpayers who work and contribute to the social good than taxpayers who have not contributed to the creation of their received wealth and have not participated in upholding the social good. Therefore, death taxes safeguard the equality between taxpayers who work contributing to the social good and taxpayers who do not work and receive an unearned advantage without contribution to the society.⁸⁶ From this perspective, the tax equality justification resembles the windfall justification. However, the windfall justification seems to focus more on the protection of the family property than the contribution to the social good.

There is another aspect of the tax equality justification that is based on a comparison between the individuals who have received an inheritance and those who have not (regardless of whether they are working). In the absence of inheritance, these individuals have comparable natural abilities to develop and benefit from their skills. However, the receipt of inheritance can give rise to inequalities among the members of the society, as individuals who have not received an inheritance have presumably fewer opportunities to evolve and benefit from their skills in the absence of financial support. Inequality in inheritance, however, might translate into inequality of opportunity.⁸⁷

As a result, death taxation explained by the equality-of-opportunity justification safeguards the redistribution of inheritances through their taxation. It is input-oriented because it addresses the preconditions under which the members of the society enter competition over scarce material resources. By taking the private property that exists within the society and redistributing it equally as private property to the members of the next generation, this justification ensures that the members of the society will be given similar material starting positions.⁸⁸ Therefore, the equality-of-opportunity justification

86 See also Liam Murphy and Thomas Nagel, *The Myth of Ownership* (Oxford: Oxford University Press, 2002), 155. "Equal libertarianism implies that, in the absence of practical obstacles or other reasons to the contrary (a very large qualification), gratuitous receipts should be confiscated by the state and redistributed equally among all persons."

87 Rajiv Prabhakar, Karen Rowlingson and Stuart White, *How to Defend Inheritance Tax* (London: Fabian Society, 2008), 18.

88 Jens Beckert, "Why is the Inheritance Tax so Controversial," *The Foundation for Law, Justice and Society* 45, no. 6 (2008): 4.

safeguards the granting of equal chances to individuals with equal natural ability to develop and benefit from their skills.^{89, 90}

However, one could argue that the aspect of the windfall justification concerning the protection of the family property cannot be easily reconciled with the tax equality justification based on which private property should be equally redistributed to the members of the *society* (and thus not only to family members). Therefore, I do not consider the tax equality justification the most important justification of death taxation as it does not seem to encompass family property considerations (that justify progression based on the kinship between the parties involved and the granting of subjective tax exemptions and allowances to parties sharing a degree of kinship).⁹¹

2.4.4 The diffusion-of-wealth justification

The diffusion-of-wealth justification serves as the fourth justification of death taxation. This justification does not apply only to death taxes but to any tax. Death taxation addresses the accumulation of wealth in large families and safeguards the distribution of this wealth to all the members of the society. According to the OECD, “[t]here is a clear case on distributional grounds for taxing wealth transfers at death. Although there is limited evidence on the relative importance of inherited wealth in total wealth and in the persistence of wealth inequality, there is a strong case for taxing wealth transfers to reduce intergenerational inequality and increase equality of opportunity by reducing and dispersing wealth holding at death.”⁹²

West considered the diffusion-of-wealth justification a socialistic justification and stated that it might be better for the children of the deceased in every way to be left with only a moderate amount of property. The inheritance of a large fortune may prove an encouragement to idleness rather than an incentive to industry and may be harmful to both the heir and the society. It might have been some such considerations that led to Montesquieu’s remark: “La loi naturelle ordonne aux pères de nourrir leurs enfants; mais elle n’oblige pas de les faire héritiers.”⁹³

I note that the diffusion-of-wealth justification is closely related to the tax equality justification. Neither justification, however, explains the progressivity of the tax rates based on the kinship of the parties involved. Furthermore, it has been argued that death taxes do

89 Rajiv Prabhakar, Karen Rowlingson and Stuart White, *How to Defend Inheritance Tax* (London: Fabian Society, 2008), 18.

90 Stuart White notes that this does not necessarily mean that the person will have greater overall opportunity in the relevant sense, See Stuart White, “Moral objections to inheritance tax,” in *Taxation: philosophical perspectives*, ed. Martin O’Neil and Shepley Orr (Oxford: Oxford University Press, 2018), 170.

91 Cf. Mark Ascher, “Curtailling Inherited Wealth,” *Michigan Law Review* 89, no. 1 (1990): 151. The author of this article is of the view that “[c]urtailling inheritance would significantly increase equality of opportunity.”

92 OECD, *The role and design of net wealth taxes in the OECD* (Paris: OECD Tax Policy Studies, no. 26, 2018), 52.

93 “The natural law obliges the father to bring up his children but it does not oblige him to make them his beneficiaries”. Max West, “The Theory of the Inheritance Tax,” *Political Science Quarterly* 8, no. 3 (1893): 430.

not make a significant contribution to the objective of breaking up wealth concentration.⁹⁴ For these reasons, I do not consider this justification a primary justification of death taxation, such as the tax equality justification.

2.4.5 *The sluice justification*

The sluice justification (*sluisgedachte*⁹⁵) stipulates that tax burdens should be borne similarly by individuals who are in substantially similar circumstances, and differently where these circumstances differ.⁹⁶ According to this justification, an increase in property takes place either by employment income or by inheritance. Therefore, the income recipient and the beneficiary are comparable in the light of their property increase. Thus, as states levy income tax on individuals' employment income, the remainder of which becomes their "property", states should also levy a death tax upon a property increase due to an inheritance. In my view, this justification seems to be incomprehensible given that it does not explain why property should be taxed, even if states tax employment income.

2.4.6 *The work stimulating justification/incentive to work justification*

One of the most recent justifications for the death tax is that it motivates a person to work despite receiving gratuitous wealth, which is good for both the economy and the individual.⁹⁷ Under Wedgwood, an individual who inherits property might have less incentive to work to accumulate assets on his or her own. Therefore, taxing inherited wealth may increase the incentive for the beneficiary to work or, at least, will not act as a disincentive against work.⁹⁸

Hauser, however, is of the view that to state that the death tax *does* motivate a person to work, is not at all clear. Moreover, in her view, the market value and individual moral value of paid work are not obvious truths. Hauser also refers to some scholars (amongst others, Edward McCaffery) who argued that the estate tax in the US suppresses the motivation to work. If one purpose of working is to accumulate wealth for the next generation, then "the estate tax is a tax on virtue. It punishes industry, thrift, intergenerational altruism and savings."⁹⁹ However, some scholars disagree that the estate tax suppresses the incentive to work. Hauser referred to Professor Ascher who argued that the transmission of property to the family is not the sole motivation for work.¹⁰⁰

Regardless of whether a death tax does or does not suppress the incentive to work, I am of the view that one thing is clear: the work stimulating justification is based on the

94 John E. Donaldson, "The Future of Transfer Taxation: Repeal, Restructuring and Refinement, or Replacement," 50 Washington and Lee Law Review (1993): 542.

95 As mentioned in the Netherlands inheritance tax laws (Parliamentary Papers II, 2008/09, 31 930, no. 9, p. 6.).

96 Henry C. Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy* (Chicago: University of Chicago, 1938), 50.

97 Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 377.

98 Josiah Wedgwood, *The Economics of Inheritance* (Westminster, Penguin Books Limited, 1929), 206.

99 Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 380.

100 Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 380.

mere *assumption* that an individual may have no incentive to work if no death tax is levied. Thus, it should not be regarded as a primary justification of death taxation.

2.4.7 *The wages-for-work justification*

This justification is a combination of the sluice justification and the windfall justification. It stipulates that if states tax the employment income, they must also tax the inherited wealth, mainly because the beneficiaries have not contributed to the creation of the inheritance, as opposed to income recipients who have spent a lot of time and effort to receive their salary. One could argue, however, that this justification does not take into account family property considerations and therefore, it does not explain, in my view, progressivity based on the kinship between the parties involved. Consequently, I am of the view that it should not be regarded as a primary justification of death taxation.¹⁰¹

2.4.8 *The justification of less pain*

It was argued that death taxes might be justified on the ground that they satisfy Adam Smith's requirements for a "good" tax. One of these requirements is that, "[e]very tax ought to be levied at the time or in the manner, in which it is most likely to be convenient for the contributor to pay it."¹⁰² In Smith's view, taxation should be imposed when it does not inconvenience the taxpayer ("the justification of less pain"). Although Adam Smith was referring to "rents, profit and wages", one could argue that the levying of death tax on the inherited property results in the beneficiary being less resistant to the taxation of his inherited property than taxpayers with regular or recurring receipts.¹⁰³ This is because i) he receives property from which the inheritance tax will be ultimately paid, and ii) he does not yet own the wealth (so taking some of it in taxes seems to be convenient).

One must nevertheless acknowledge that the justification of less pain, under which a beneficiary is less likely to be vexed by a death tax than other taxpayers, seems to be a "weak" justification of death taxation. It requires a comparison between the beneficiaries and other taxpayers (so that in such a case, it overlaps the tax equality justification) without explaining why a *separate* death tax needs to be levied on *mortis causa* transfers of property. Furthermore, in my view, the emotionally charged moment of death may not be perceived by all taxpayers as the most suitable moment for taxation. Moreover, Adam Smith's requirements build on the premise that taxes produce meaningful revenue, something that is not the case with death taxes as mentioned in section 2.3. Finally, Donaldson argues that "this revenue, comparatively insignificant, comes at the expense of a 'bad' tax system, one that lacks fairness, efficiency, and neutrality."¹⁰⁴

101 Sonneveldt (2018), referring to J.P. Boer, is of the opinion that the wages-for-work justification is an insufficient justification of Netherlands inheritance tax legislation, see Frans Sonneveldt, *Wegwijs in de Successiewet* (The Hague, Sdu Uitgevers, 2018), 6.

102 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (New York: Bantam Classic Edition, 1776).

103 David G. Duff, "Taxing inherited wealth: A philosophical argument," *Canadian Journal of Law and Jurisprudence* 1, no. 6 (1993): 17.

104 John E. Donaldson, "The Future of Transfer Taxation: Repeal, Restructuring and Refinement, or Replacement," 50 *Washington and Lee Law Review* (1993): 544.

2.4.9 The profit justification (the benefits theory and the co-heirship theory)

According to the profit justification,¹⁰⁵ when explained by the benefits theory, death taxes are regarded as payment in return for the various services rendered by the state to the beneficiaries. This justification does not apply only in the case of death taxes, but in the case of any tax. The revenue generated from death taxation – albeit lower than the revenue generated from other types of taxes – goes directly to the state's treasury. In other words, the government, as an “uninvited heir”, “inherits” part of people's property and uses it to finance the payment of capital grants or services in line with its social and economic policies. Therefore, the levying of death tax serves as a medium for the state to finance the services that the state renders to the beneficiaries. Under the profit justification, however, these services do not have to be connected with the receipt of an inheritance.¹⁰⁶

The profit justification – when explained by the co-heirship theory – focuses on the deceased. Several writers have argued that the state should inherit property from individuals because of what it does for them during their lives by providing a stable government environment. The state is sometimes represented as a larger family; according to Umpfenbach, the bond of kinship between distant relatives loses itself in the whole nation, which, therefore, inherits the property of individuals as the family inherits the property of its members.¹⁰⁷ Eschenbach pictured the state as a silent partner in the business of each citizen, without whose aid and protection it would be impossible to transact business or to accumulate wealth; when the partnership is dissolved by death, the silent partner, the state, is entitled to a share of the capital. Stated in this form, the argument seems rather fanciful; but in its essence it is simply a statement of the intimate relations which exist between the individual and the state, and of the manifold useful offices performed by government, which may be conceived to give the state a better claim to the property of a decedent than can be advanced by any individual who was of no assistance to the owner in acquiring it.¹⁰⁸

Furthermore, according to West, the profit justification cannot justify progressivity in tax rates¹⁰⁹ based on the kinship between the parties involved. The same also applies, in my view, to tax deductions or tax-free allowances granted to close relatives. The profit justification justifies only the progressive, proportional or regressive rates, according to the view that could be taken of the relative importance of governmental action to the rich and to the poor.¹¹⁰ Finally, the argument that people owe a debt to the government at death can be criticized because death taxes do not raise sufficient revenue to promote

105 Boris Bittker, Elias Clark and Grayson McCouch, *Federal Estate and Gift Taxation* (7th edition) (Minnesota: West Academic Press, 1996), 5.

106 Max West, “The Theory of the Inheritance Tax,” *Political Science Quarterly* 8, no. 3 (1893): 431.

107 Max West, “The Theory of the Inheritance Tax,” *Political Science Quarterly* 8, no. 3 (1893): 436.

108 *Id.*, 431.

109 Although, surprisingly enough, Oliver Wendell Holmes, an American jurist, believed that the profit justification supported taxation and progressive rates. See also, Barbara R. Hauser, “Death Duties and Immortality: Why Civilization Needs Inheritances,” *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 385.

110 *Id.*, 436.

government stability reasons.¹¹¹ Based on the above reasons, the profit justification does not seem to be a primary justification of death taxation.

2.4.10 *The belated fee justification*

States may view death taxes as a belated fee for protecting the property during the deceased's lifetime.¹¹² The belated fee justification overlaps the profit justification (when explained by the co-heirship theory) as both justifications look at the relationship between the state and the taxpayers. Therefore, I am of the view that the belated fee justification should not be considered a primary justification of death taxation for the same reasons as mentioned in the previous section.

2.4.11 *The financing of the probate costs*

States may view death taxes as an appropriate toll charged for the use of the probate machinery (when probate is required) and for other services used in facilitating the transfer of private property at death. The financing of the probate costs justification is more specific to the profit justification since it applies only to death taxes. This justification is associated with the particular service connected with the institution of an inheritance or bequest. West mentioned that, as these services are conferred by positive law, those who benefit from these services owe something to the state in return for the legal regulations which give them the right to the property of another after his death, for the proceedings necessary to put them in possession, and for the protection of the property in the meantime, when it would be especially liable to unlawful depredation.¹¹³

Moreover, according to West, this justification justifies progressive tax rates based on the relationship between the parties involved “[a]s there is some degree of probability that property might be transmitted in the direct line in a given case even if there were no laws of inheritance; the state may, therefore, be said to render a greater service when property goes to distant relatives, or strangers in blood, than when it is simply handed down from father to son.”¹¹⁴

This justification does not seem to be a primary one, as not all states require that assets have to go through a probate process. Furthermore, the tax burden, in some cases, might be disproportionate to the aim of the financing of the probate costs.

111 Barbara R. Hauser, “Death Duties and Immortality: Why Civilization Needs Inheritances,” *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 385.

112 Boris Bittker, Elias Clark and Grayson McCouch, *Federal Estate and Gift Taxation* (7th edition) (Minesota: West Academic Press, 1996), 5.

113 Max West, “The Theory of the Inheritance Tax,” *Political Science Quarterly* 8, no. 3 (1893): 432.

114 *Id.*

2.4.12 *Penalty for the deceased's tax evasion (the back-taxes theory)*

States may view a death tax as a penalty for any tax evasion that the deceased may have indulged in during his life.¹¹⁵ According to Gutman and West, graduation according to kinship cannot be justified from this point of view, because the tax is regarded as being paid by the deceased and not by the beneficiaries. Furthermore, considered solely with reference to justice between individuals, the back-taxes theory is not very satisfactory, because the inheritance tax bears no necessary relation to the amount of taxes evaded in individual cases unless there is a tax which is so universally and uniformly evaded as to be practically a dead letter.¹¹⁶

I do not consider this justification a primary one as it takes for granted that the deceased was involved in tax evasion during his lifetime, which might not often be the case.

2.4.13 *The substitution for not imposed taxes justification (apart from tax evasion)*

West mentioned that death taxes could be viewed as in lieu of taxes that were not imposed during the deceased's lifetime. He stated in that regard that death taxes and, in particular, inheritance taxes are regarded as property transfer taxes which were not levied when the deceased was alive. Furthermore, West referred to Bastable who suggested that death taxes are a form of capitalised income tax, paid in a generation instead of once a year. It is paid after the death of the taxpayer, and hence at the time most convenient to him; or it may be regarded as being paid by the beneficiary in advance. The burden of annual taxes may thus be expected to be lightened (in light of the justification of less pain) when a death tax is introduced, and hence the latter is not an additional burden, but only a method of levying part of the property or income tax.¹¹⁷

In the same vein, with regard to taxes on gifts, Rudnick and Gordon stated that "[a]n income tax by itself does not tax wealth, only accretions to wealth. In virtually all income tax systems, gifts and bequests are not taxed as income to the recipient. There are a number of reasons for this exclusion, including problems of income averaging. Assuming that gifts and bequests are not included in the income tax base, a separate wealth transfer tax can serve as a surrogate to such inclusion."¹¹⁸

Finally, I note that according to the substitution for not imposed taxes justification, the tax must not be graduated according to the kinship of the parties involved, because

115 Laura and Noël Cunningham note in that regard that "[a]nother argument made by transfer tax proponents is that the taxes serve to backstop the income tax in two ways. First, they tax amounts that escape income taxation, and second, they add an additional degree of progressivity to a federal tax system that has become increasingly less progressive over the years." See Laura Cunningham and Noël Cunningham, *"The logic of the transfer taxes"* (St. Paul: West Academic Publishing, 2018), 4.

116 Max West, "The Theory of the Inheritance Tax," *Political Science Quarterly* 8, no. 3 (1893): 433.

117 Harry L. Gutman, "Reforming Federal Wealth Transfer Taxes after ERTA," *Virginia Law Review* 69, no. 7 (1983): 1185–1186, 1189–97. See also, Henry J. Aaron and Harvey Galper, "A Tax on Consumption, Gifts, and Bequests and Other Strategies for Reform," in *Options for Tax Reform*, ed. Joseph A. Pechman (Washington D.C.: The Brookings Institution, 1984), 106 and Barbara R. Hauser, "Death Duties and Immortality: Why Civilization Needs Inheritances," *Real Property, Probate and Trust Journal* 34, no. 2 (1999): 384.

118 Rebecca S. Rudnick and Richard K. Gordon, "Taxation of Wealth," in *Tax Law Design and Drafting* (volume 1), ed. Victor Thuronyi (Alphen aan den Rijn: Kluwer Law International, 2000), 292–339.

it merely takes the place of another tax that is not graduated according to such kinship. Therefore, this justification does not seem to be a primary justification of death taxation.

2.4.14 *A means for the abolition of the intestate inheritance*

Writers have advocated that death taxes facilitate the abolition of intestate inheritance as to all but the closest relatives. West noted that the operation of intestate inheritance between distant relatives could be viewed as irrational and useless. The family consciousness extends scarcely further than to cousins-german,¹¹⁹ and there is no good reason for extending rights of inheritance to the more remote degrees of relationship. However, since it is difficult to fix a precise point at which they should cease altogether, it is perhaps more equitable to take away these rights from some relatives only in part, by an inheritance tax graduated according to relationship and rising to a high percentage in the case of distant relatives.¹²⁰

This justification relates, in my view, to the windfall justification and, more specifically, to the aspect relating to the protection of the family property.

2.5 Conclusion of Chapter 2

In this chapter, I provided an overview of death taxes and taxes on gifts. Such an overview is in line with the first purpose of the study, i.e. the description and systemisation of death and gift tax laws as such. More specifically, the overview includes the key features of the death taxes and taxes on gifts. In that regard, I have distinguished between inheritance and estate taxes, the other types of death taxes and taxes on gifts. More specifically, I observed that states imposing a transfer tax upon death levy either an inheritance or an estate tax. The inheritance tax is an acquisition-based transfer tax applicable to the share of the inherited property received by each beneficiary. Furthermore, its taxable event is the enrichment of the beneficiary upon the deceased's death. On the other hand, the taxable event of the estate tax is the mere *mortis causa* transfer of the deceased's estate to the beneficiaries. It is important to note that the gradual introduction of elements looking at beneficiaries have altered the nature of the otherwise "impersonal" estate tax, which, in the past, focused only on the mere transfer of property from the deceased to beneficiaries. Finally, I noted that states levy two main taxes on gifts: gift taxes and *inter vivos* income or capital gains taxes on gifts. Gift taxes are acquisition-based property transfer taxes while *inter vivos* income taxes on gifts often follow the income tax rules.

Furthermore, I discussed the establishment of tax jurisdiction in the case of inheritance and estate taxes, the other types of death taxes and taxes on gifts. More specifically, I observed that states establish inheritance or estate tax jurisdiction based on either a personal or an objective nexus of a person with their territory. As a rule of thumb, states levying inheritance or estate taxes rely on the deceased's or the beneficiary's personal nexus with their territory, which, if satisfied, makes the share attributable to the beneficiary (in the case of an inheritance tax) or to the entire estate (in the case of an estate tax) taxable on a worldwide basis. In the absence of such personal nexus, states may still levy inheritance and estate taxes based on an objective nexus of the deceased or the beneficiary with the

¹¹⁹ The child of one's aunt or uncle.

¹²⁰ Max West, "The Theory of the Inheritance Tax," *Political Science Quarterly* 8, no. 3 (1893): 427.

state concerned. The objective nexus justifies the levying of inheritance and estate taxes solely on domestic assets (the so-called “situs principle”). Concerning the other types of death taxes, I observed that states levying *mortis causa* income or capital gains taxes often determine their taxing rights based on the income tax rules under which the residence/domicile of the income recipient is decisive. The same is true in the case of *inter vivos* income or capital gains taxes on gifts. On the other side, gift taxes are levied under a personal and objective nexus that is often determined under the same concepts used as for death tax purposes.

In addition, I noted that the death tax revenue rates in most OECD member countries are declining. Arguably, the gradual personalisation of estate taxes and the “birth” of the already personal inheritance tax resulted in the decreasing revenue-raising capacity trends of death taxes. Nevertheless, the justifications for death taxes seem to be more important than their revenue-raising capacity. In that regard, I provided an overview of the justifications of death taxation. However, not all justifications can be considered primary justifications of death taxation. Furthermore, there is a degree of overlap between certain justifications.

In my opinion, there are four categories of justifications of death taxation. The first category refers to justifications that are explained from the perspective of the beneficiary. This category includes most of the invoked justifications, i.e. the ability-to-pay-taxes justification, the tax equality justification, the diffusion-of-wealth justification, the work stimulating justification, the wages-for-work justification and the justification of less pain. The second category includes justifications that are explained from the perspective of the deceased, i.e. the penalty for the deceased’s tax evasion justification, the belated fee justification and the substitution for not imposed income taxes justification. The third category includes justifications that are explained from the perspectives of both the deceased and the beneficiary, i.e. the windfall justification and the profit justification. The fourth category includes justifications explained from the public good perspective, namely the financing of the probate costs and a means for the abolition of useless intestate inheritance justification. It is worthy of note that some of those justifications apply by analogy to taxes on gifts that are usually considered complementary to death taxes.

In my view, the windfall justification seems to be the most convincing, complete and unique justification of death taxation (and, by analogy, gift taxation) as it explains why states consider it fair to tax incidental and unexpected receipts of wealth (“why to tax”) and at the same time, to protect the family property when received by family members (“how to tax”). Therefore, this justification can explain progressivity both based on the size of the *mortis causa* transferred property (taxation of accidental transfers of property) and the degree of kinship between the parties involved (protection of family property). However, I note that the OECD IHTMTC seems to recognise both the windfall justification and the ability-to-pay-taxes justification as primary justifications of death taxation, as discussed in chapter 4.

CHAPTER 3

The starting point of this study

In the course of my research, I identified the following problems of cross-border death and gift taxation: double or multiple taxation and non-taxation, discriminatory treatment of cross-border inheritances and donations and administrative difficulties. I discuss these problems in section 3.1 of this chapter. Furthermore, those problems are confirmed, in my view, by the OECD IHTMTC and the 2015 inheritance tax report. Therefore, the selection of these problems in the context of this study becomes less arbitrary because it is confirmed by those two documents that serve as the two points of reference of this study. The OECD IHTMTC and the 2015 inheritance tax report will be presented in section 3.2 of this chapter. Finally, in section 3.3 I discuss at which level the problems of cross-border death and gift taxation should be most effectively addressed.

3.1 The problems of cross-border death and gift taxation

3.1.1 Double or multiple taxation

Double or multiple taxation is the first important problem of cross-border death and gift taxation. As national death and gift tax laws vary significantly from state to state, these differences often give rise to double or multiple taxation, which is not always effectively addressed by unilateral double tax relief provisions. After all, one may claim that the OECD IHTMTC efficiently addresses double taxation. This, however, may not always be true in certain situations, as I will discuss in chapter 5 of this study. In the next sections, I present some elements of death and gift tax laws that often result in double or multiple taxation of cross-border inheritances and donations.

3.1.1.1 Variety of concepts determining the personal nexus between a person and a state

As mentioned in chapter 2 of this study, the jurisdictional scope of inheritance and gift taxes – two representative examples of death taxes and taxes on gifts, respectively – is mainly determined by a personal nexus rule, which, if satisfied, results in a worldwide tax liability. Countries assess this nexus either at the level of the deceased or the beneficiaries or even at both levels of the deceased and the beneficiaries based on one or more concepts. The most representative personal nexus concepts are residence, domicile and nationality. However, the diverging interpretation of these concepts and the application of different concepts to a cross-border inheritance and donation may often give rise to double or multiple taxation of the *mortis causa* or *inter vivos* transferred property.

3.1.1.1.1 Residence

Unlike income taxation where the residence of an individual is assessed by certain factors,¹ sometimes in combination with a day-count test,² the concept of residence for inheritance and gift tax purposes is a more complex issue. In the course of my research, I identified five categories of states concerning the application of the concept of residence for inheritance and gift tax purposes.

The first category includes states that rely on the income tax concept of residence to determine tax residence for inheritance and gift tax purposes.³ This concept focuses on the physical presence of a person in a state, which is assessed by several, easily observable factors. A day-count rule can also apply in this respect.

The second category refers to states that rely on the civil law concept of residence,^{4, 5} which evaluates several factual circumstances (the “corpus”) and the intention of the person to stay within their territory (the “animus”).⁶ The civil law concept of residence or, at least, the consideration of a person’s intention to live in a state for determining tax residence for inheritance or estate tax purposes seems to be more suitable for death tax purposes. Rust noted in that regard that “[a]s all transfers of wealth from one person to another – like bequest, legacy, statutory share and donation [heir, inheritance, timing of death] – are terms used in the civil code, it seems natural to give to these terms the same meaning as in the civil code. It is then only a small step to interpret the term ‘residence’ as well in accordance with the meaning given by the civil code.”⁷ Inheritance and gift taxes are wealth taxes that are not periodically levied like income tax. In the context of income tax, the attachment of a person to a state needs to be determined every year, and therefore, a factual interpretation coupled with a day-count rule may suffice. However, the residence concept for inheritance and gift tax purposes should reflect, according to Rust, a lifelong or at least a long-lasting connection between the person and state and should ideally consider how much wealth was accrued during that time.⁸

1 For instance, the availability of a permanent home, the place of residence of the taxpayer’s family, the place where the children go to school, the place of banking, and the place of work, amongst other things.

2 Similar to the one used in income tax treaties – the “183-day rule”.

3 Alexander Rust, “The Concept of Residence in Inheritance Tax Law,” in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2010), 87 and Frans Sonneveldt, “Application of death taxes in the emigration and immigration countries,” in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 7.

4 Alexander Rust, “The Concept of Residence in Inheritance Tax Law,” in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2010), 87.

5 For example, a person who spends several years in a foreign hospital will nonetheless be considered resident for the purposes of inheritance tax or estate tax in the state where his family resides, as the intention of this person matters.

6 In that regard, it could be argued that a civil law concept of residence for tax purposes bears similarities to the concept of domicile. Nevertheless, the common law concept of domicile attributes much more significance to the intention of the person compared to that attributed by the civil law concept of residence.

7 Alexander Rust, “The Concept of Residence in Inheritance Tax Law,” in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2010), 87.

8 Alexander Rust, “The Concept of Residence in Inheritance Tax Law,” in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2010), 87.

Notwithstanding the above, I observe that, if for inheritance and gift tax purposes one state applies the income tax concept of residence and another state applies the civil law concept, the cross-border inheritance and/or donation may be taxed by both states given that they could regard the deceased as a resident of their territory – the first by applying a day-count rule, and the latter by assessing his *corpus* and *animus*.

	
Residence determined based on tax law (e.g. a day-count rule)	Residence determined based on civil law (<i>corpus</i> and <i>animus</i>)
Worldwide taxation	Worldwide taxation

The third category refers to states that resort to a more factual interpretation⁹ to determine the tax residence of a person for inheritance and gift tax purposes. Consequently, they consider that a person is a tax resident in their territory if, for example, he has family relations and/or the centre of his business relations there.

The fourth category includes states where residence for inheritance and gift tax purposes is defined as the possession of housing space.¹⁰ Therefore, it can be established very easily, by the performance of certain transactions connected to immovable property located in the state, for instance, by renting a property and using it with a certain frequency. It follows that double taxation may arise if one state applies the civil law concept of residence and the other state defines residence as the mere possession of housing space for inheritance or estate tax purposes. For example, a person, who moves to a state for work (with the intention of staying there twice per week) and dies there a few days after his arrival, may be considered resident for inheritance or estate tax purposes there and, thus, his worldwide property will be subject to inheritance tax or estate tax by that state. However, the state of his “actual” residence may also levy an inheritance tax or an estate tax on his worldwide property as he intended to live there with his family. The same applies if this person dies

9 Frans Sonneveldt, “Application of death taxes in the emigration and immigration countries,” in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 11, 24.

10 Alexander Rust, “The Concept of Residence in Inheritance Tax Law,” in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2010), 87 and Frans Sonneveldt, “Application of death taxes in the emigration and immigration countries,” in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 23.

in the state where his family was residing while possessing a housing space for working purposes in the other state.¹¹

Finally, it is worth mentioning that there are states that apply a concept of residence that is different from that of tax or civil law residence.¹²

Several variations of the concept of residence exist, the most important being the extended residence rules (usually based on the deceased's or beneficiary's nationality), considering that the residence criterion is susceptible to abuse. States thus combine the concept of residence and nationality¹³ to prevent abusive tax planning and, therefore, impose a worldwide liability concerning the property owned by their nationals or sometimes residents who move to another state some years before their death (trailing tax regime). Such a taxing right is usually retained for a limited period upon the deceased's immigration to another state. However, if one state levies taxes based on the deceased's "actual" residence and the other on the deceased's extended residence, double taxation of the cross-border inheritance is possible.¹⁴ This type of double taxation that gives rise to worldwide taxation of the deceased's worldwide property in both states, may be eliminated if the state that applies the extended residence rules grants relief for the taxes paid in the state of the deceased's actual residence.

3.1.1.1.2 Domicile

Common law states often apply the concept of domicile as a personal nexus concept. The common law concept of domicile requires a physical presence in combination with the intention of a person to stay *indefinitely* in a state.¹⁵ The requirements of the physical presence and the intention of staying *indefinitely* set a very high hurdle, leading to the assumption that an individual is still subject to tax in his former home state despite having lived several years in another state. This is the case where he might be considered to have the intention to return home one day. Rust maintained that the common law domicile does not seem to be the ideal solution for inheritance tax purposes as even a domicile can be established and given up if the individual moves from one state to another while harbouring the intention of leaving his home state forever and staying permanently in the new state.¹⁶ Finally, it is noted that there are states that apply extended domicile rules to migrating individuals for anti-tax abuse purposes.

Considering the above, I observe that double taxation of an inheritance or donation is possible if one state applies the common law concept of domicile whereas the other applies the civil law concept of residence. This is because the states concerned assess the

11 See also Anja Taferner, "Avoidance of Double Inheritance Taxation in Cases of Double Residence," *European Taxation* 39, no. 12 (1999): 486-488.

12 Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2010), 87.

13 In such a case, nationality operates as a dependent personal nexus concept.

14 See also, Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International 70b* (London: IBFD, 1985), 39.

15 I draw a distinction between the common law concept of domicile (which assesses the intention of the person to stay indefinitely in a state) and the civil law concept of domicile that I regard as residence determined under civil law.

16 Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto, (Amsterdam: IBFD, 2010), 89.

deceased's intention under different standards. This would arise where an executive of an international company was assigned to work for a certain period outside his own country. In such instances, the absence of a tax convention may prove extremely problematic.^{17, 18}

3.1.1.1.3 Nationality

A few states levy inheritance and gift taxes based on the nationality of the person independently or in combination with the previous criteria (extended residence/domiciled rules).¹⁹

It could be argued that if states desire to establish a permanent link with their individuals, they should tax them based on their nationality. Nationality establishes the longest-lasting link between a person and a state. Furthermore, it is difficult for a person to acquire a new nationality without having lived a minimum number of years in another state. Therefore, it would seem ideal for inheritance and gift tax purposes given that it guarantees a long-lasting link between a person and the state concerned. On the other hand, it has been argued that taxation based on nationality might not be ideal and reasonable for inheritance and gift tax purposes given that people build their wealth in their state of residence, which should have the right to tax their wealth. In that regard, Rust put forward that the taxation of nationals of a state living abroad and the non-granting of any (or only a few) public goods to them, and the non-taxation of aliens and the granting of public goods to them is apparently contrary to the idea that taxes should be paid in consideration for public goods provided by the government.²⁰

Regardless of the above, double taxation is possible if one state establishes its worldwide tax jurisdiction based on the nationality of a person while the other on his residence: if the deceased, national of the first state, resided in the latter state, both states might seek to tax the worldwide inherited or donated property, as seen in the following graphic.

17 Frans Sonneveldt, "Application of death taxes in the emigration and immigration countries," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 13.

18 Sanford H. Goldberg, "Estate tax conflicts resulting from a change in residence: double taxation resulting from the application of capital gains and death taxes," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 30.

19 Frans Sonneveldt, "Application of death taxes in the emigration and immigration countries," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 24.

20 Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto, (Amsterdam: IBFD, 2010), 89-90.

State A 	State B 
Nationality	Residence
Worldwide taxation	Worldwide taxation

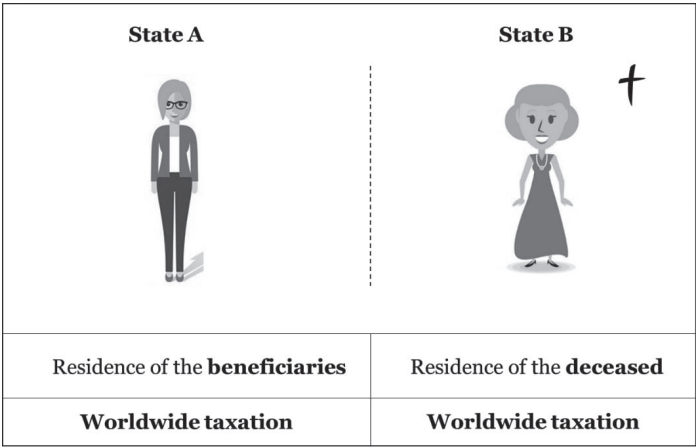
3.1.1.2 *Assessment of the personal link with a different person (donor-based and donee-based taxes)*

Not all states assess the personal nexus concepts at the level of the deceased. Although a vast majority of the states establish worldwide tax jurisdiction if the deceased had a personal link with their territory (for instance, if he resides or is a national of that state), some states establish worldwide tax jurisdiction if the beneficiary has a personal nexus with their territory.^{21, 22}

The parallel application of death tax legislation, assessing the personal link at a different person may often result in double taxation. This is possible, for instance, if State A imposes worldwide inheritance tax liability on the beneficiary because the deceased was residing in its territory at the time of his death, whereas State B imposes worldwide inheritance tax liability because the beneficiary resides in its territory.

21 See more, Willem van Der Berg, “Future of Inheritance and Gift Tax Treaties,” in *Tax Treaty Policy and Development*, ed. Markus Stefaner and Mario Züger (Vienna: Linde Verlag, 2005), 526.

22 The assessment of the personal nexus is important for determining the person on whom the tax is calculated rather than the person that is liable to pay the tax.



Furthermore, it is uncertain whether State A will provide double taxation relief for the tax paid in State B (see also section 3.1.1.10) as it was assessed on a different person (albeit being paid by the same taxable person).

3.1.1.3 *Different taxable persons*

As noted in chapter 2, death may often trigger two common types of taxes among the states, namely an inheritance tax or an estate tax. The taxable person for the application of an inheritance tax is the beneficiary while the taxable person for the application of an estate tax is, depending on the legislation of the state, either the estate or the deceased. The difference in taxable persons in the event of a cross-border inheritance may often give rise to double taxation in a cross-border setting.²³ According to Maisto, “[a] few states only provide relief if the foreign tax is levied on a different taxable person, as most states require the foreign tax to be borne by the same taxpayer claiming relief so that, a foreign tax levied on the estate as a taxable person or on the deceased person would not be creditable [...]”.²⁴ The same is expected to happen if one state levies inheritance taxes and another state levies capital gains taxes upon a deemed disposition of the deceased’s property. In the former state, the beneficiaries are liable to pay the tax while in the latter the deceased becomes the relevant taxpayer with the deceased’s beneficiaries filing his last income tax return.

3.1.1.4 *Different types of taxes*

As noted in section 2.1, there are different types of death taxes and taxes on gifts. Therefore, not all states levy the same type of death tax and tax on gifts. For example, one state may

23 See also Sanford H. Goldberg, “Estate tax conflicts resulting from a change in residence: double taxation resulting from the application of capital gains and death taxes,” in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 34.

24 Guglielmo Maisto, “General Report: Death as a Taxable Event and its International Ramifications,” in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 42.

levy an inheritance tax and the other state may levy a *mortis causa* income tax or capital gains tax on the cross-border inheritance. As a result, the cross-border inheritance is taxed twice by two different states and with two different types of taxes. In the same vein, one state may levy a gift tax on a cross-border donation and the other an income tax on gifts. It is noted that in such a case, both states qualify the transfer of property as a donation. However, they subject it to two different types of taxes.

Although one could argue that the imposition of different types of taxes on the cross-border inheritance or donation is not classified *per se* as juridical double taxation, the mere reduction of the value of the *mortis causa* or *inter vivos* transferred property and the multiplication of the tax burden should not be neglected.

3.1.1.5 Connection with civil law

3.1.1.5.1 Determination of critical terms by civil law

Several terms used by death and gift tax laws are usually determined by civil law (family law, matrimonial property law and the law of succession) whereas other terms are defined by the inheritance and gift tax legislation itself. In an internal situation, this may not give rise to problems, but it can be bothersome in a cross-border setting. The civil laws differ noticeably from state to state and contain a mixture of rules, which range from ownership law (which considers issues such as the identification of assets owned by the deceased upon his death) and matrimonial law (whose concerns include same-sex marriage, the rights of couples outside marriage and prenuptial agreements) to contract law (which deals with issues such as succession pacts).²⁵

For example, as noted in section 3.1.1.1.1, the interpretation of the concept of residence may result in double taxation in the event of a cross-border inheritance since the states concerned may have different parameters for evaluating whether a person is a resident of their territory. I note that this is true even if the states concerned apply the civil law concept of residence. There are also other terms that are usually defined by the applicable civil laws, e.g. “death”,²⁶ “estate”, “heirs/beneficiaries”, “surviving partner”, “habitual abode”, “permanent home”, “movable property”, “immovable property” and “receivable”. Furthermore, the deadline for the acceptance of the inheritance, as determined by the law of succession, is often considered also for death tax purposes with regard to the time limit for the payment of the death tax. Finally, the applicable law of succession determines the fraction of the deceased’s property, which each beneficiary is entitled to receive in the context of intestate taxation.

Finally, within the purview of the gift taxes, the applicable civil law usually defines the concept of donation and other terms of gift tax laws.

25 Guglielmo Maisto, “General Report: Death as a Taxable Event and its International Ramifications,” in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 22.

26 See also, Guglielmo Maisto, “The pursuit of harmonisation regarding taxes on death and the international implications,” *Bulletin for International Taxation* 65, no. 4/5 (2011): 254.

3.1.1.5.2 Private international law rules

In the case of a cross-border inheritance, the private international rules will be first considered for the determination of the applicable civil law, which will then also define some of the terms used for death tax purposes. Most legal systems contain private international laws that apply to a cross-border succession and determine which civil law governs the deceased's succession in the absence of international conventions.²⁷ In the case of a cross-border succession, therefore, those rules will apply first and indicate the relevant succession laws based on a chosen connecting factor. It is important to note that the private international rules do not indicate the death tax law governing the succession at hand, but only the relevant succession laws. In most states, the deceased's residence or domicile serves as the connecting factor²⁸ indicating the applicable succession laws. Accordingly, if the deceased was residing in State A at the time of his death, the succession laws of this state will apply. In some other states, the deceased's nationality indicates the applicable law of succession. Accordingly, if the deceased was a national of State B at the time of his death, the succession laws of this state will apply, regardless of his residence/domicile.

The choice of the connective criterion falls within the competence of the states, and each of the two above-mentioned connecting factors has its advantages and disadvantages. More specifically, the deceased's residence/domicile as a connecting factor dodges the application of foreign law by domestic courts, which might be difficult, especially for the administration of the estate.²⁹ On the other hand, the deceased's residence/domicile is prone to abuse by individuals who may immigrate to states with more favourable succession laws. This activity is often referred to as "succession law shopping". It was argued that such an abusive behaviour could be addressed if the deceased's nationality is taken as the connecting factor: the determination of the deceased's nationality is straightforward and does not involve multiple interpretations of the concept of residence.³⁰ According to Maisto, the advantages and disadvantages of each connecting factor make it hard to take a firm view on the most desirable connecting factor. He observed, however, that it is reasonable to endorse the prevailing view backed by scholars, which states that the connecting factor should be the deceased's nationality with the deceased having the right to designate the law of his residence as the civil law applicable to his succession.³¹

As noted above, the private international rules do not indicate the applicable *tax* laws. Instead, states apply their domestic death tax laws even if they (must) apply a law on succession of another state. I elaborate on this using the following example:

At the time of his death, the deceased was a resident of State A and his beneficiaries of State B. His property consisted of three apartments in state B. The deceased left no last will, therefore, intestate succession applied. According to State A's private international laws, the applicable law on succession is that of the deceased's last residence. State A

27 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 25.

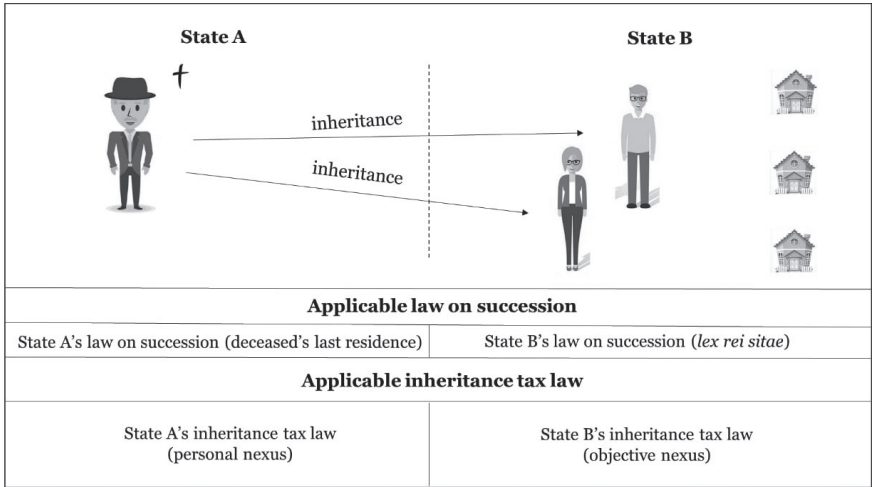
28 It is important to note the distinction between a "connecting factor" for private international rules and a "personal nexus concept" for death tax purposes.

29 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 26.

30 *Id.*

31 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 26.

will subsequently apply e.g. its inheritance tax laws on the worldwide inheritance as the deceased had a personal nexus with its territory. On the other hand, State B will apply its domestic succession laws based on the *lex rei sitae*³² and then seek to levy e.g. inheritance tax based on the objective nexus, as seen by the example below.



If, however, the applicable civil laws differ with regard to, for instance, the term “beneficiaries”, double taxation is possible, as states will not grant double tax relief for a foreign tax paid by a person who is not considered a beneficiary under their domestic law of succession.

3.1.1.5.3 The EU Succession Regulation

As mentioned above, the choice of the connecting factor falls within the competence of the states. This is no longer the case within the EU because of the application of the 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 (hereinafter: the “EU Succession Regulation” or the “Regulation”).³³

The Regulation harmonised the EU Member States’ private international laws on succession and applies to succession of persons who die on or after 17 August 2015. It follows from Article 1(1) of the Regulation that taxation falls outside the scope of the Regulation. It should, therefore, be for national law to determine, for instance, how taxes and other liabilities of a public-law nature are calculated and paid, whether these be taxes payable

32 *Lex loci rei sitae* is a Latin term that means ‘law of the place where the property is situated.’ The law governing the transfer of title to property is dependent upon, and varies with, the location of the property.

33 Regulation 650/2012 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, 2012 O.J. L 201.

by the deceased at the time of death or any type of succession-related tax to be paid by the estate or the beneficiaries. It should also be for national law to determine whether the release of succession property to beneficiaries under this Regulation or the recording of succession property in a register may be made subject to the payment of taxes.”³⁴

The legal basis of the EU Succession Regulation was Article 81(2) of the Treaty on the Functioning of the European Union (the “TFEU”), which forms part of the chapter “Judicial Cooperation in Civil Matters”. This Article allows the EU to adopt measures particularly for the proper functioning of the internal market, aimed at ensuring, *inter alia*, (a) the mutual recognition and enforcement, between EU Member States, of judgments and decisions in extrajudicial cases, and (b) the compatibility of the rules applicable in the EU Member States concerning conflicts of laws and of jurisdiction. The Regulation does not apply to the UK, Ireland, and Denmark, which, based on certain protocols – 21 (UK and Ireland) and 22 (Denmark) of the TFEU – do not participate in the adoption of measures in this area.

Briefly, the Regulation provides for the deceased’s habitual residence at the time of his death as the connecting factor for the determination of the applicable law of succession (Article 21(1) of the Regulation). Nevertheless, if it appears, from all the circumstances of the case, that a deceased was *manifestly* more closely connected with a state other than the state of his habitual residence, the law applicable to the succession shall be the law of that other state (“escape clause”). Under Article 22(1) of the Regulation, a person may choose the law of the state whose nationality he possesses at the time of making a choice or at the time of death to govern his succession. There is no escape clause in this case.

Although the Regulation does not define the term “habitual residence”, the preambles no. 23 and no. 24 shed more light on this concept. The term should “reveal a *close and stable connection* with the State concerned taking into account the specific aims of this Regulation.” (Italics, VD)³⁵ Such a close and stable connection is identified by “an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased’s presence in the State concerned and the conditions and reasons for that presence”.³⁶ Moreover, “[t]he deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located.”³⁷

Another point to keep in mind is that the applicable succession law can be any law, whether or not it is the law of an EU Member State.³⁸ Therefore, if the connecting factors of the Regulation designate the succession laws of a third state, these laws also embrace its private international laws as far as these rules make a *renvoi* to the law of an EU Member State or to the law of another third state that would apply its own law.³⁹

34 *Id.*, preamble no. 10.

35 *Id.*, preamble no. 23.

36 *Id.*, preamble no. 23.

37 *Id.*, preamble no. 24.

38 *Id.*, Article 20.

39 *Id.*, Article 34 (with certain exceptions). More on the concept of *renvoi*, see Dicey and Morris, *The Conflicts of Laws*, ed. Lawrence Collins (London: Sweet & Maxwell, 2012).

3.1.1.6 Qualification issues

According to the 2015 inheritance tax report, the number of different claims that the EU Member States may make with respect to assets may be multiplied because states might characterise the same property differently. The report provided the example of interests in the land, which some states may regard as real property and some other states as personal property. In cases where the land is held in an entity with a legal personality – such as a real estate company – a state may look through the entity and tax the land according to the situs principle. Another state may seek to tax the shares in the company⁴⁰ instead, based on the place of the domicile of the company. Differences of characterisation may thus occur if the states treat certain entities as transparent or opaque. This could result in double taxation, with one state taxing the real estate and the other the shares in the hybrid entity.⁴¹

3.1.1.7 Divergent valuation rules

The valuation of assets is an issue on which the diverse national legislation varies considerably. Some states consider the sale/fair market value of the property at the time of the deceased's death, others the cadastral value, and yet another may also consider a date after the deceased's death to value the assets. Consequently, two states may value the same property differently. Furthermore, the general valuation rules may grant several exemptions for specific kinds of property (for example, life insurance, non-interest-bearing financial assets, usufruct, undeveloped immovable property, listed stocks and shares, bonds, founders' shares, and state bonds). Therefore, it is likely that the state of the objective nexus will ascribe the property a higher value than the state of the personal nexus. If the latter state relieves double taxation by means of credit, one can observe that it may credit the taxes assessed under its domestic valuation rules. Double taxation could remain, however, with respect to the difference of the value of the property between the two states.

3.1.1.8 Divergent debt deduction rules

The different rules regarding the deduction of debts connected to the property may also give rise to double taxation. The state of the objective nexus may not grant any deduction of debts secured by the property that it taxes, or it may allow only the deduction of those debts that are charged on the property within its jurisdiction or that have an economic connection with such a property.⁴² According to Goodman, if debts are equal to a substantial portion of the value of the decedent's total assets, there may be a significant amount of double taxation. If the state of the personal nexus provides full deduction of debts, and the state of the objective nexus does not grant any deduction of debts linked to the property sited there, double taxation may arise based on the difference between the tax that would

40 EU, "Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU", report prepared by the European Commission Expert Group, 12, para. 4 (vi).

41 EU, "Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU", report prepared by the European Commission Expert Group, 12, para. 4 (viii).

42 Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International 70b*, ed. IFA (London: IBFD, 1985), 37–38.

have been paid in the state of the personal nexus and the tax levied at the state of the objective nexus.⁴³

3.1.1.9 *Situs taxation*

The taxation based on the situs of the property can also give rise to double taxation due to the different ways states tax based on the situs principle. First, the definition of the situs of a property may differ from state to state. This can often lead to double taxation as both states may consider an asset domestic. Double taxation relief is not in most cases available.

Furthermore, I note that defining the situs of the intangible property is far more complicated than that of tangible property, where the physical location of the tangible assets is decisive and is usually clearly visible.⁴⁴ On the other hand, the definition of the situs of intangible property is based on a notion⁴⁵ or mental concept.⁴⁶ Several examples have been mentioned in the literature.⁴⁷ For example, Maisto states that some states determine the situs of bank accounts and deposits based on the debtor's residence while others consider them liabilities incurred through a foreign permanent establishment (hereinafter: "PE").⁴⁸ Concerning copyrights, reference is made either to the state in which the literary work is published, the state in which the copyright may be enforced or the state in which the literary work was published.⁴⁹ Furthermore, the relevant situs criteria concerning corporate shares can be the domicile of the statutory head office of the corporation, the place of registration/incorporation, the social domicile of the corporation, the place where the share certificates are deposited or registered or the place of the register of the shareholders. Similar situs rules apply to corporate and government bonds.⁵⁰ In addition, the situs rules may differ as regards life insurance proceeds, book debts, mortgages and hypothecs, the interest of a beneficiary in a trust, partnership interests, personal effects of a deceased transient, ships and aircrafts.⁵¹

Double taxation arising due to the application of different situs rules is often a highly complex type of double taxation. Double taxation relief does not seem to work in the case of a conflict between two situs rules. In other words, relief is not often granted if both

43 Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International 70b*, ed. IFA (London: IBFD, 1985), 37–38.

44 See also Frans Sonneveldt, "Application of death taxes in the emigration and immigration countries," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 16.

45 See also, Wolfe D. Goodman, "The OECD Model Estate Tax Convention," *European Taxation* 34 (October/November 1994): 338.

46 Frans Sonneveldt, "Application of death taxes in the emigration and immigration countries," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 13.

47 Frans Sonneveldt, "General Report: Avoidance of Multiple Inheritance Taxation within Europe," *EC Tax Review* 10, no. 2 (2001): 85.

48 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 42.

49 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 41.

50 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 30.

51 Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International 70b*, ed. IFA (London: IBFD, 1985), 32.

states consider that the property is situated in their territory. What is more, the state of the personal nexus will most probably grant relief for the taxes levied by the other state, which, according to its domestic law, is the state of the objective nexus. Thus, it is unlikely to provide relief for the taxes imposed by any other state that is not the state of the objective nexus under its domestic law. In that regard, Goodman provided an example of the situs rules of the state of the personal nexus according to which the shares of a corporation incorporated in that state are regarded as being situated there. Accordingly, this state will tax the shares in its capacity as the state of the personal nexus and consider in all events that the shares are located in its territory as the company is incorporated under its domestic law. However, under the situs rules of another state, the share certificates, which are physically located in its territory, are treated as domestic property. Therefore, this state may also seek to tax the share certificates based on an objective nexus. As a result, the shares may be taxed twice in two different states. Nevertheless, the state of the personal nexus will not usually grant double taxation relief for the foreign tax levied on the shares.⁵²

3.1.1.10 *The ineffectiveness of the unilateral double taxation relief*

In light of all the problems arising from the application of national death and gift tax rules, one would expect that a unilateral relief for the avoidance of double taxation of inheritances would suffice for all potential double taxation conflicts (residence vs situs, residence vs residence and situs vs situs). Nevertheless, the effectiveness or even sometimes the availability of such relief by the state of the personal nexus should not be taken for granted.

First, not all states provide for relief for double taxation of inheritances and donations. Furthermore, such relief is sometimes granted for death taxes and not for taxes on gifts. In addition, relief may be granted only for federal taxes levied. Moreover, if relief is available, it is often granted only for the same type of death tax and tax on gifts. The state of the personal nexus may thus not grant a credit against e.g. its inheritance tax for the estate tax paid on the same property located in the other state. This, because a) the nature of the estate tax is different from that of the inheritance tax, and b) the taxable person differs. Likewise, the state of the personal nexus, which, for instance, levies an inheritance tax, may grant relief only for foreign-paid inheritance taxes and not for income or capital taxes levied *mortis causa*.⁵³ Furthermore, the state of the deceased's personal nexus may not grant relief if the other state taxes the worldwide estate based on the beneficiary's personal nexus. This, because both states tax the worldwide estate and double taxation relief is usually available in the event of a conflict between a personal and an objective nexus.

Sometimes the extent of the relief granted by the state of the personal nexus depends on the property that it would have taxed if it were the state of the objective nexus. Therefore, if this state defines its situs rights narrowly, it will probably grant a narrow relief. Of note

52 Wolfe D. Goodman, "General Report: International Double Taxation of Inheritances and Gifts," in *Cahiers de Droit Fiscal International* 70b, ed. IFA (London: IBFD, 1985), 36.

53 See also EU, "Consultation on possible approaches to tackling cross-border inheritance tax obstacles within the EU," summary of replies to the public consultation prepared by the European Commission, p. 4.

is that some states provide relief only for taxes on certain assets, for example, immovable property located abroad or a specific list of foreign assets.⁵⁴

Moreover, the state of the personal nexus will not grant relief if the situs of certain property is under dispute. Consequently, the situs vs situs conflict – one of the three types of conflicts giving rise to double taxation – is not often addressed by the unilateral relief provisions. The same applies in the case of double taxation resulting from the residence vs residence conflict: if both states regard, for example, the deceased or the donor as a resident of their territory, they will not provide relief for the taxes levied in the other state as both states may seek to tax the deceased's or the donor's worldwide property.⁵⁵

Furthermore, the 2015 inheritance tax report noted that the unilateral relief in some EU Member States is less efficient if the number of states involved exceeds two.⁵⁶ As mentioned above, the state of the personal nexus would provide relief only for the taxes levied abroad under its domestic situs rules.

Finally, if double taxation of inheritances is relieved by a foreign tax credit, then this credit means that the tax will be paid at the higher rate of the two taxes.⁵⁷ Furthermore, the credit is usually limited to the amount of the domestic tax that would be levied if the property is located in the state providing the credit ("ordinary credit").⁵⁸ Goodman argued in that regard that this might seem particularly unfair if the property is situated in two or more states other than the state of the deceased's residence and if one of those states levies tax at a higher rate and the other at a lower rate than the state of domicile.⁵⁹ Besides, the effectiveness of the double taxation relief is put at stake because of the different valuation and debt deduction rules. If the state of the personal nexus relieves double taxation using a credit, it will credit the tax levied on the foreign property as valued under its domestic valuation rules. Thus, the amount of the tax to be credited may be lower than the tax paid in the state of the objective nexus, if the latter state values this property at a higher amount. The same applies if the state of the objective nexus does not allow a deduction for any debt connected to the property located in its territory whereas the state of the deceased's personal nexus does.

3.1.2 Double or multiple non-taxation

Double or multiple non-taxation is the second important problem of cross-border death and gift taxation and, in my view, is attributable to various reasons. First, the national death

54 See also EU, "Consultation on possible approaches to tackling cross-border inheritance tax obstacles within the EU," summary of replies to the public consultation prepared by the European Commission, p. 4.

55 An exception often applies when a state taxes based on extended residence/domicile rules. The unilateral credit available by that state applies to taxes paid in the state of actual residence/domicile of the deceased.

56 EU, "Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU", report prepared by the European Commission Expert Group, 13, para. 6 (iii).

57 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 36.

58 Inevitably, the highest rate within the two, three, or multiple jurisdictions will prevail. See further, Willem van Der Berg, "Future of Inheritance and Gift Tax Treaties," in *Tax Treaty Policy and Development*, eds. Markus Stefaner and Mario Züger (Vienna: Linde Verlag, 2005), 528.

59 Wolfe Goodman, *International Double Taxation of Estates and Inheritances* (London: Butterworth, 1978).

and gift tax laws vary significantly from state to state and those differences can often give rise to double or multiple non-taxation of a cross-border inheritance and donation. I call this situation “jurisdictional double or multiple non-taxation” (section 3.1.2.1). Moreover, double or multiple non-taxation can arise in certain situations where the state of the personal nexus provides a unilateral double taxation relief by means of an exemption (section 3.1.2.2). In addition, double or multiple non-taxation can arise in situations where the state of the objective nexus abstains from levying taxes (for the avoidance of double taxation) while the state of the personal nexus does not levy death taxes and taxes on gifts in general or provides for an allowance/exemption/deduction/credit (section 3.1.2.3). Finally, double or multiple non-taxation can arise in the case of tax abuse (section 3.1.2.4).

3.1.2.1 Jurisdictional double or multiple non-taxation

In this section, I will discuss some of the reasons why a cross-border inheritance and donation may not be taxed anywhere due to differences between death and gift tax laws of the states involved. In that regard, I note that this section builds on the notions discussed in section 3.1.1 of this study. Therefore, I refer to this section for the explanation of these notions.

Furthermore, not all the cases below of double or multiple non-taxation are relevant when I discuss the provisions of the OECD IHTMTC and its Commentary that could be improved in relation to the double or multiple non-taxation problem (section 5.2 of this study). This is because it could be argued that most of the cases below of double non-taxation are attributable to the lack of harmonisation of the OECD member countries' legislation. However, the OECD IHTMTC does not aim at harmonising these tax legislations.

3.1.2.1.1 Variety of concepts determining the personal nexus between a person and a state

As discussed in section 3.1.1.1, the application of different concepts for the determination of the personal nexus and their different interpretation by the states may often lead to double or multiple taxation of the cross-border inheritance and donation. In the same vein, the application of those concepts and/or their divergent interpretation can also give rise to double or multiple non-taxation in situations where the states concerned cannot establish a personal nexus and/or an objective nexus.

Consider, for example, a situation where the deceased is a resident of State A that levies inheritance tax on a worldwide basis based on the deceased's nationality. The deceased is a national of State B. His beneficiaries reside in State B. State B levies inheritance tax on a worldwide basis based on the deceased's residence. The deceased's property is located in State C that does not consider the deceased's property a “domestic asset” and therefore, it does not establish an objective nexus.

It follows from the above example that the cross-border inheritance at hand will not be taxed anywhere. State A will not seek to tax it because the deceased is not a national of this state. State B will also not seek to tax the inheritance at hand since the deceased is not a resident of its territory. The fact that the beneficiaries reside in this state is immaterial for State B tax purposes. Finally, State C will not seek to tax the cross-border inheritance

because it does not consider the property at hand a “domestic asset” for which an objective nexus is established.

3.1.2.1.2 *Assessment of the personal link with a different person (donor and donee base)*

As mentioned in section 3.1.1.2, not all states assess the personal nexus concepts (residence, domicile, nationality) at the level of the deceased. Some states establish worldwide tax jurisdiction if the beneficiary has a personal nexus with their territory. Due to this difference in the assessment of the personal nexus, double or multiple taxation non-taxation is conceivable in a situation where none of the states involved can establish a personal nexus and/or an objective nexus.

For example, the deceased A is a resident of State A, which levies inheritance taxes on a worldwide basis based on the beneficiaries' residence. Deceased A's beneficiaries reside in State B, which levies inheritance taxes on a worldwide basis based on the deceased's residence. The deceased's property is located in State C, which does not consider the property a “domestic asset”. As a result, the cross-border inheritance of this example is not taxed anywhere as none of the states concerned will establish tax jurisdiction.

3.1.2.1.3 *Connection with civil law*

As mentioned in section 3.1.1.4, several terms used by the death and gift tax laws are usually determined by civil law (family law, matrimonial property law and the law of succession) whereas other terms are self-defined by the inheritance and gift tax legislation. The different interpretation of those terms, however, can give rise to double or multiple non-taxation in a situation where no personal nexus or objective nexus can be established by the states concerned.

For example, the interpretation of the concept of residence may result in double non-taxation of the cross-border inheritance if the states concerned apply different parameters for evaluating whether a person is a resident of their territory. For example, State A may consider that the deceased A is not a resident of its territory because he does not meet the 180-day test. State B may consider that the deceased A is not a resident of its territory because he does not meet the “animus” part of the civil law concept of residence. State C, the state where the deceased's property is located, applies its domestic civil law and thus does not consider the property to be a domestic asset. As a result, the cross-border inheritance at hand is not taxed anywhere.

3.1.2.1.4 *Qualification issues*

Qualification issues can give rise to double or multiple non-taxation of the cross-border inheritance and donation. In that regard, the 2015 inheritance tax report states the following: “Differences of characterisation may occur not only where ownership is split but also by virtue of the fact that some Member States, such as France, may treat certain entities as transparent or semi-transparent and others may treat them as opaque. This may result in

duplication of tax claims, or *double non-taxation*, with one state taxing the land and the other, for example, the shares in the entity.” (Italics, VD)⁶⁰

For instance, the deceased A is a resident of State A that establishes a personal nexus based on the deceased’s nationality. The deceased A is not a national of State A. The deceased’s property includes an interest in partnership operating in State B. The partnership holds immovable property in this state. State A will not establish a personal nexus as the deceased is not a national of this state. Furthermore, it will not establish an objective nexus as the property held by the partnership is located in State B. This state, however, may also not seek to tax the property if it considers the partnership opaque and interests in partnerships are not considered “domestic assets”. As a result, the cross-border inheritance at hand is not taxed anywhere.

3.1.2.1.5 *Situs taxation*

As in the case of the qualification issues, I observed in section 3.1.1.9 that the situs rules of states may differ as regards life insurance proceeds, book debts, mortgages and hypothecs, the interest of a beneficiary in a trust, partnership interests, personal effects of a deceased transient, ships and aircrafts. Due to these differences, not only double or multiple taxation but also double or multiple non-taxation can arise. Inspired by Goodman’s example of section 3.1.1.9, I observe that the shares of a company that form part of a cross-border inheritance may be left untaxed. For example, the deceased was a resident in State A at the time of his death. State A establishes a personal nexus based on the deceased’s nationality. It also applies an objective nexus rule if the share certificates of companies incorporated under its laws are located in its territory. The shares certificates of the company at hand, however, are located in State B. Therefore, State A will not seek to tax. However, State B may also not seek to tax if it establishes an objective nexus based on the law under which the company has been incorporated. As the company at hand has been incorporated under the laws of State A, State B will not seek to tax.

3.1.2.1.6 *Application of different types of taxes*

Double non-taxation situations are conceivable where the states involved apply different types of death taxes and taxes on gifts. For example, the donor is a resident of State A at the time of the donation. The donee is also a resident of State A. State A levies a gift tax and establishes a personal nexus based on the donor’s nationality. The donor, however, is not a national of State A and therefore, State A will not seek to establish a personal nexus with him. The donated property is located in State B that levies income taxes on gifts if the donees are resident in its territory. It also does not apply an objective nexus rule. As the donees of this example reside in State A, State B will not seek to levy income tax on the donation at hand. As a result, the donated property at hand is not taxed anywhere.⁶¹

60 EU, “*Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU*”, report prepared by the European Commission Expert Group, 9, para. 9, and 12, point viii.

61 I observe, however, that one could take the view that this is not a situation of double non-taxation because the taxes (that are not levied by each state) are not comparable.

3.1.2.2 *Unilateral double tax relief by the state of the personal nexus*

One could observe that the granting of a unilateral double tax relief (by means of an exemption) by the state of the personal nexus can give rise to double non-taxation of the cross-border inheritance and donation. For example, State A establishes a personal nexus if the deceased is a resident of its territory. Furthermore, it provides a unilateral double taxation relief by means of an exemption with regard to foreign-located property (regardless of whether the property is actually subject to tax abroad). If, however, this property is not actually taxed in State B (e.g. because it does not fall within the definition of “domestic assets” or because State B has abolished its death tax laws), the property is not taxed either by State A or by State B.

3.1.2.3 *Unilateral abstention of the state of the objective nexus from taxing*

In the same vein, one could observe that if the state of the objective nexus unilaterally abstains from levying death taxes and taxes on gifts e.g. in order to avoid double taxation, double non-taxation of the inherited or donated property is conceivable if the state of the personal nexus does not levy death taxes or taxes on gifts. One could arrive at the same conclusion if the state of the personal nexus grants an allowance/exemption/credit/deduction and therefore does not, in essence, tax the cross-border inheritance or donation at hand.⁶²

3.1.2.4 *Double or multiple non-taxation as a result of tax abuse*

Finally, double or multiple non-taxation of the cross-border inheritance is possible in situations where an abusive element is present. For example, a person A is a resident of State A that establishes personal nexus based on the deceased’s residence. The property of person A is located in State C. This property does not qualify as a domestic asset to which the objective nexus rule of State C applies. In order to minimize the tax burden on his property upon his death, person A decides to move to State B that does not levy death taxes. He dies two months after the transfer of his residence. In that regard, neither of the states involved will seek to tax the cross-border inheritance. The deceased A was not a resident of State A at the time of his death, State B does not levy death taxes in general and State C will not seek to apply a death tax based on an objective nexus rule as the property does not qualify as a domestic asset. Therefore, the cross-border inheritance will not be taxed anywhere due to an abusive transfer of residence.

I note that this category of non-taxation is, in principle, distinguished from the previous category as it prerequisites an abusive action of a person (e.g., in most instances, the person owning the property to be inherited). Furthermore, it focuses on the state of the personal nexus (rather than the state of the objective nexus). However, I note that double non-taxation is also conceivable if there is an abusive element for the establishment of the personal nexus with a state *and* the state of the objective nexus unilaterally abstains from

⁶² I note that the latter situation is called “factual double or multiple non-taxation” in the context of the OECD IHTMTC. As however, inheritance tax allowances and exemptions usually reflect the application of the windfall justification (section 2.4.2), one could take the view that this case of non-taxation should not be classified as “double or multiple non-taxation” from a legal point of view.

levying taxes (like in the case described in 3.1.2.3). This can be the case where the deceased abusively moves his residence to a state that does not levy death taxes and the state of the objective nexus abstains from taxing because it *assumes* that a tax is levied by the state of the personal nexus (thus, without establishing whether the state of the personal nexus levies a tax or taxes the inherited property from the very beginning).

Finally, I note that some states have introduced anti-abuse measures to safeguard their taxing rights in case of abuse⁶³ (e.g. extended residence/domicile rules).

3.1.3 *Discriminatory treatment of cross-border inheritances and donations*

3.1.3.1 *Introduction*

The application of discriminatory provisions is the third important problem of cross-border inheritances and donations. States tend to justify the application of less favourable provisions to cross-border inheritances and donations due to their cross-border element that differentiates them from the purely domestic ones. Such a cross-border element is often the deceased's or beneficiary's foreign nationality or residence and the foreign location of the inherited or donated assets or a combination of these elements. In the next section, I provide several examples of discriminatory death tax and gift tax provisions.

3.1.3.2 *Examples of discriminatory inheritance and gift tax provisions*

States can apply discriminatory tax provisions to several aspects of a cross-border inheritance and donation. Some examples of discriminatory inheritance and gift tax provisions are listed below.

3.1.3.2.1 *Tax deductions for certain liabilities and debts*

The death tax legislation of a state may preclude the deduction of debts and liabilities pertaining to domestic estates if the deceased is a foreign resident. In the case, however, of a resident deceased, such debts and liabilities would have been taken into account for the assessment of the death tax due. It follows that the cross-border element of the inheritance at hand is the deceased's foreign residence.

3.1.3.2.2 *Subjective tax exemptions*

Subjective tax exemptions are tax-free allowances or deductions granted to certain beneficiaries or donees due to their kinship with the deceased or the donor. In that regard, a state may provide for a smaller allowance for gift tax purposes in the case of a donation of immovable property located in its territory by a foreign resident donor. On the contrary, if

63 Andres Durán Preciado, "Inheritance and Estate Taxes: Tax Treaties, Connecting Factors and Worldwide Liability," *Bulletin for International Taxation* 72, no. 7 (2018). See also Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2010), 90 and Frans Sonneveldt, "Application of death taxes in the emigration and immigration countries," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 14.

the donor had resided at the time of the gift in the same state where the donated property is situated, a higher allowance would have been available. It becomes apparent that the donor's foreign residence is the cross-border element of the donation at hand.

3.1.3.2.3 Objective tax exemptions

Objective tax exemptions are exemptions attached to certain types of property and are justified by several policies of the states.⁶⁴ Furthermore, they are mostly territorial, i.e. available for domestic assets. A state may deny, for instance, the granting of an exemption concerning the inheritance of the deceased's primary residence on the grounds of the beneficiaries' foreign nationality. On the contrary, if the beneficiaries had been nationals of the state where the primary residence is located, the inheritance of such residence would have been tax-exempt or assessed at a lower amount. The beneficiaries' foreign nationality is the cross-border element of this example.

3.1.3.2.4 Valuation rules

The death tax legislation of a state may provide for a different valuation method for domestic and foreign inherited assets. More specifically, a state may provide for a more burdensome valuation method applicable to foreign-located assets in comparison to domestic ones. It follows that the foreign location of the inherited assets is the cross-border element of the inheritance at hand.

3.1.3.2.5 Tax rates

The death tax legislation of a state may reserve the application of the death tax at a reduced rate to domestic non-profit institutions and not to similar foreign ones. In this case, the cross-border element of the inheritance at hand is the beneficiary's foreign residence.

3.1.3.2.6 Filing deadline

A state may require that, in the case of a cross-border inheritance and donation, foreign national beneficiaries file the death tax return within a deadline that is shorter than that applicable to national beneficiaries. The beneficiaries' foreign nationality is the cross-border element of the inheritance/donation at hand.

3.1.3.2.7 Payment deadline

The death tax legislation of a state may prescribe that resident beneficiaries pay the death tax due within six months from the filing of the tax return whereas non-resident beneficiaries may do so within three months. It follows that the beneficiaries' foreign residence is the cross-border element of the inheritance/donation at hand.

⁶⁴ Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 30.

3.1.3.2.8 *Payment requirements*

The death tax legislation of a state may prescribe that non-national and non-resident beneficiaries must provide a guarantee before the payment of the death tax. In the case they fail to provide this guarantee, they could have the totality of the succession assets located in this state blocked by the tax authorities of this state. The beneficiaries' foreign nationality and residence is the cross-border element of the inheritance of the example.

3.1.3.2.9 *Penalties and fines*

A state may provide for higher penalties and fines being imposed on non-resident beneficiaries compared to resident ones. Those penalties can relate, for instance, to a late, inaccurate or non-filing of the death tax return. It is apparent that the beneficiaries' residence is the cross-border element of the inheritance of the example.

3.1.4 *Administrative difficulties*

3.1.4.1 *Introduction*

Administrative difficulties associated with a cross-border inheritance and donation constitute the fourth important problem of cross-border inheritances and donations. Cross-border inheritances and donations are often exposed to difficulties of administrative nature simply because of their cross-border element. The establishment of worldwide inheritance and gift tax jurisdiction based on the deceased's or donor's personal nexus often gives rise to a situation where the tax is also levied on foreign-located inherited or donated assets. Thus, the state concerned must be aware of the deceased's or donor's total property, including property located abroad. In the same vein, the persons who are liable to pay the inheritance or gift tax may not reside in the state that establishes worldwide tax jurisdiction due to the deceased's personal nexus with its territory. This means that they must pay the tax in the latter state and, thus, deal with a foreign body and a procedure with which they are not familiar.

The 2015 inheritance tax report lists the administration of inheritance and gift taxes as one of the three significant obstacles in a cross-border setting.⁶⁵ While the 2015 inheritance tax report is EU-orientated, I recognise that these obstacles can be identified in cases involving both EU and international inheritances and donations. Under the report, the administration of inheritance taxes runs the risk of the following barriers:

- The inability of national administrations to understand the problems of cross-border inheritances,
- Burdensome duplication or multiplication of administrative procedures and reporting obligations,
- Difficulties in providing proof of payment of inheritance taxes,
- Delays due to the inability of tax administrations to resolve problems promptly, and
- Payment and cash flow problems.

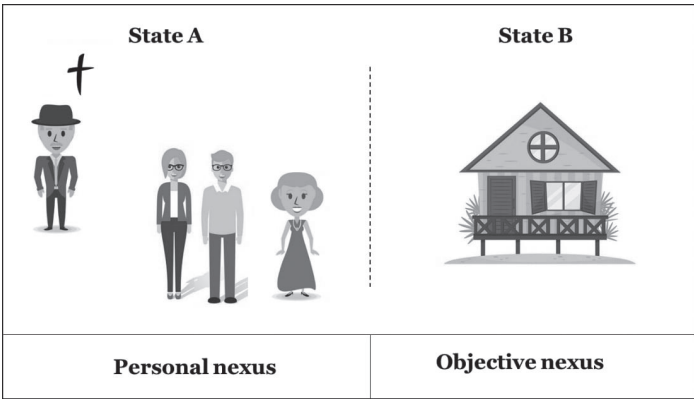
⁶⁵ EU, "Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU", report prepared by the European Commission Expert Group, 14-15.

I have decided to elaborate on the diversity of the obstacles arising with respect to the administration of cross-border inheritances and donations by means of an example.

3.1.4.2 The example of Mr D's beneficiaries

Mr D died in January 2015 while a resident of State A. His beneficiaries were also residents of State A. Mr D's estate included, amongst others, a summer house in state B. Both states' death tax laws include a worldwide tax liability (based on a personal nexus rule) and a limited tax liability (based on an objective nexus rule). It becomes apparent that State A taxes in its capacity as the state of the personal nexus and State B in its capacity as the state of the objective nexus. Furthermore, both states levy the same type of death tax, i.e. an inheritance tax.

Under the inheritance tax laws of State A, the entirety of the deceased's property is subject to tax there, including the summer house in state B. On the other hand, State B will also seek to tax the summer house since it is located in its territory.



Under state B's inheritance tax laws, the beneficiaries must itemise the estate by type, location, and value. Then, within two months from the deceased's death, file a declaration to the municipality, where the estate was registered, in one of state B's official languages. Subsequently, the municipality will determine the inheritance tax due – based on the guidelines of state B's tax authorities and then send a notification of payment to the beneficiaries. The inheritance tax due in State B must be paid within two months from the receipt of this notification.

Before travelling to state B, Mr D's beneficiaries unsuccessfully attempted to contact state B's tax authorities and the municipality. Consequently, they consulted a local accounting agency, which filed the declaration to the municipality on their behalf. In particular, they considered the two-month payment deadline very short. A few months later, the municipality informed Mr D's beneficiaries that the declared value of the summerhouse was too low. The process for the correct determination of this value took nearly a year and, hence, the inheritance tax due in State B was ultimately paid 14 months after the initial filing of the estate declaration.

Under State A's inheritance tax legislation, resident and non-resident beneficiaries must file a tax declaration within six months from the deceased's death. Moreover, a lump-sum payment of the tax due is, in principle, requested at the time of the filing. The payment of the tax may be deferred or divided into instalments under certain conditions, including the provision of a guarantee which, however, applies only to non-resident beneficiaries. Because State A's tax authorities were not certain whether there was property which is accessory to the summerhouse in state B, they sent a request for information to the tax authorities of state B. State B's tax authorities replied to this request six months later.

Under the inheritance tax laws of State A, double taxation is relieved by means of an ordinary tax credit for the taxes paid by the state of the objective nexus. Nevertheless, Mr D's beneficiaries could not obtain a credit in State A for the inheritance tax due in State B pending the assessment of the tax in the latter state. Moreover, State A's tax authorities were not eager to suspend the payment of the inheritance tax on Mr D's entire inherited property until the moment of the taxation of the summer house in state B, as requested. Such a suspension would, however, have allowed Mr D's beneficiaries to prove that the summerhouse has been taxed in state B.

Almost a year following the payment of the taxes in both states, Mr D's beneficiaries filed a refund request with State A's tax authorities, along with a certificate of the payment of the inheritance tax in state B. The application was accepted by the tax authorities who, however, imposed a fine and an interest payment because the deadline for the filing of the refund request had already expired. Thus, the credit for the foreign inheritance tax was effectively reduced to 75% of the total tax amount because of the delayed refund request.

The above example illustrates that a cross-border inheritance and donation is exposed to several and different administrative obstacles. I classify these problems in two categories based on the state in which they arise.

3.1.4.2.1 Problems arising in the state of the objective nexus

Assuming that the beneficiaries are residing in the same state where the deceased has his personal nexus at the time of the death, they must deal in the state of the objective nexus with a foreign body and an administrative procedure with which they are not familiar. Furthermore, these procedures may vary significantly from state to state. For example, the administration of inheritance and gift taxes in some states has been decentralised; the beneficiaries file a declaration with the competent municipality and not with the tax authorities' local office. They itemise the estate by type, location and value, and subsequently, the competent municipality computes the tax due based on the guidelines provided by the tax authorities. In addition, in federal states, the beneficiaries file the inheritance and gift tax declaration only in the district where the estate is located. Also, even in states where the tax authorities supervise the administration of inheritance and gift taxes, a court proceeding may be initiated. For instance, a copy of the estate's final inventory signed by the beneficiaries is sent to the local tax authorities and the probate court.

One more problem with which the beneficiaries are confronted at the state of the objective nexus is the tax officials' inability or limited experience in cross-border matters. As per the 2015 inheritance tax report, "[t]he complexity of the [inheritance taxes] has led to frequent complaints to the Commission by citizens that their national administrations do not understand the problems with which they are faced and are unable to answer their

questions as what they should do.” However, the efficiency of the tax authorities (or any other competent body) in the state of the objective nexus is vital for the provision of the ordinary tax credit by the state of the personal nexus. In this respect, the valuation procedure of the situs property and the subsequent payment of the inheritance tax in the other state may take a considerable amount of time, not accounting for the possible disputes that may arise with the tax authorities of the state of the personal nexus or even a third state with respect to the situs of the inherited property. Thus, as per the 2015 inheritance tax, “[t]he inability of tax administrations to resolve problems reasonably promptly, whether acting alone or in the context of mutual consultations, results in delay in determining the nature and size of a liability and therefore taxpayers’ interest payments and penalties being higher in cross-border situations than in purely national ones.”⁶⁶ Finally, the inability of the tax administration to deal with a cross-border inheritance must be considered in parallel with the applicable inheritance tax legislation, which often governs domestic and cross-border inheritances under the same rules (for instance, with respect to the payment deadlines).

Eventually, one must keep in mind that language barriers can pose more obstacles in the event of a cross-border inheritance. The communication with the competent bodies could become bothersome if the competent contact persons are not well versed in English. Furthermore, language barriers might arise if the tax returns/estate declaration forms are available only in the official language(s) of the state of the objective nexus. Undoubtedly, a non-resident beneficiary will usually have to request the support of a third party (for instance, a law firm or an accounting firm), to assist in the filing of the necessary forms and documentation, and the general handling of the case.

3.1.4.2.2 Problems arising in the state of the personal nexus

The most significant problem arising in the state of the personal nexus relates to the availability of the credit for the foreign inheritance and gift tax paid in the state of the objective nexus. The beneficiaries have to demonstrate that they have actually paid the inheritance or gift tax in the other state in order to obtain this credit. While it appears rational for the tax authorities to require evidence regarding the foreign inheritance tax, the application of the same payment deadline for domestic and cross-border inheritances does, in my view, seem to be irrational. The time taken to assess and then subsequently pay the inheritance tax in the other state often exceeds the deadline for the payment of the inheritance tax in the state granting the credit. In this respect, the 2015 inheritance tax report states that “[d]elays by one State, sometimes in providing proof of payment of taxes, may also make it impossible for an individual to make claims for reliefs, allowances, exemptions or refunds within the time limits applicable in another State.”⁶⁷ Moreover, even if the state of the personal nexus does grant a deferral of the payment of the inheritance tax, it may request a guarantee, which may not be required in the case of a domestic inheritance.

Only when the inheritance tax has actually been paid in the state of the objective nexus, do the beneficiaries become entitled to obtain a credit. If they have already paid the tax in the state of the personal nexus, the tax authorities will refund part of the tax paid.

66 EU, “*Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU*”, report prepared by the European Commission Expert Group, 15.

67 *Id.*

Nevertheless, penalties and fines may be imposed, as the refund request may have been filed after the expiration of the statutory time limit for refund requests. Those penalties and fines reduce the amount of the inheritance tax credit considerably, even though the beneficiaries cannot be held accountable for the delay in the state of the objective nexus.

Moreover, the valuation rules of the state of the personal nexus may give rise to additional administrative problems. More specifically, this state may apply valuation rules that depend on the determination of the value of the estate in the state of the objective nexus. For example, the legislation of the state of the personal nexus may require that the value attributed to the foreign immovable property declared there should not be lower than the value on which the foreign inheritance tax was levied.

Furthermore, language barriers may also be a problem. It seems reasonable for the competent body overseeing the administration of the taxes to request a sworn translation of the relevant certificates granted by the other state. However, in a situation where the beneficiaries do not reside in the state of the deceased's personal nexus, unobstructed and comprehensible communication with the tax authorities of this state is necessary.

3.2 Confirmation of the selection of the problems

3.2.1 The OECD IHTMTC

3.2.1.1 An overview of the OECD IHTMTC provisions

Double taxation is undoubtedly the most significant problem to have triggered the interest of the international community, with attempts being made to address the situation as early as 1923. In that year, four acknowledged experts in fiscal matters – Professors Bruins, Einaudi, Seligman, and Sir Josiah Stamp – submitted their report entitled “Report on Double Taxation” to the Financial Committee of the Economic and Financial Commission of the League of Nations.^{68, 69} In this report, the professors proposed a basis for reconciling the conflicting claims of the jurisdiction of personal nexus and that of the situs property. The report was followed by a second report prepared by the Committee of Technical Experts on Double Taxation and Tax Evasion in 1927. The 1927 report was submitted together with the “Draft Bilateral Convention for the Prevention of Double Taxation in the Special Matter of Succession Duties” to the League’s Financial Committee. In 1928, a general meeting of government experts on double taxation and tax evasion filed its report, with a revised Draft Convention, to the League of Nations. Further draft conventions were prepared at one conference in Mexico City and one in London in 1943 and 1946 respectively.⁷⁰ All those endeavours preceded the Draft Double Taxation Convention on Estates and Inheritances (“the 1966 OECD IHTMTC”), which was adopted on 28 June 1966 by the Council of the OECD. Three years beforehand, namely on 30 July 1963, this same Council had adopted

68 See Gijsbert Bruins, Luigi Einaudi, Edwin Seligman and Josiah Stamp, Report on Double Taxation, Document E.F.S.73. F.19 (5 April 1923), accessed January 28, 2019, <http://www.taxtreatieshistory.org>.

69 See also, Wolfe D. Goodman, “The OECD Model Estate Tax Convention,” *European Taxation* 34 (October/November 1994): 338.

70 *Id.*

the 1963 Income Tax Draft for the avoidance of double taxation on income and capital (“the 1963 OECD ICTMTC”).⁷¹

The 1963 OECD ICTMTC was subsequently updated in the light of the experience that the OECD’s Council had gained in the meantime and was presented on 11 April 1977 by the successor of the committee, the Committee on Fiscal Affairs. Subsequently, the Committee initiated the revision of the 1966 OECD IHTMTC to consider the current trends on estates, inheritance, and gifts and “[t]o adapt the 1966 Draft, where necessary, to the substance and form of the 1977 Income Tax Model”.⁷² It follows that the update of the OECD ICTMTC in 1977 triggered the discussions for an update of the OECD IHTMTC. Consequently, one had to assume that each of the concepts expressed in the same words in both the Model Conventions had the same application, wherever appropriate, to the different forms of taxation in question.⁷³ The committee presented the updated version of the OECD IHTMTC in 1982, accompanied by a recast of its Commentary.⁷⁴

According to the introductory report of the model, the 1982 OECD IHTMTC takes into account the current trends in the OECD Member countries’ attitudes towards the avoidance of double taxation and covers gift taxes. Furthermore, the model deals – to a certain extent – with the double non-taxation issue arising from the application of an inheritance and gift tax treaty or due to differences in domestic law classifications.

The inheritance and gift tax model has arguably contributed to addressing the double taxation problem associated with death and gift taxes and, in particular, taxes levied on inheritances, estates, and gifts. Furthermore, the Commentary of the OECD IHTMTC provides useful guidelines to states wishing to conclude an inheritance and gift tax treaty drafted along the lines of the OECD IHTMTC (“the inheritance and gift tax treaty”). It also permits the states to deviate from the Articles in the model and often suggests alternative language in that regard.

More specifically, the 1982 OECD IHTMTC applies to estates, inheritances, and gifts where the deceased/donor was domiciled at the time of his death in one or both the Contracting States. It also applies to gifts where the donor was domiciled in one or both Contracting States at the time of the gift (Article 1). Under paragraph 13 of the Commentary on Article 1 of the OECD IHTMTC, “[a]lthough the Article contains what could be called the “personal scope” of the Convention, it should be stressed that it does not apply to “persons” but to estates of, or gifts made by, persons domiciled in one or both of the Contracting States.” On the contrary, I note that the OECD ICTMTC applies only to natural and legal persons (and thus not to estates). This is an important difference between the two models that differentiates their “personal scope”.

Article 2(1) of the model stipulates that “[t]his Convention shall apply to taxes on estates and inheritances and on gifts imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.” Paragraph 2 defines the taxes to which paragraph 1 refers. Furthermore, under Article 3(2) of the model, “[a]s regards the application of the Convention by a Contracting State, any term not defined there shall, unless the context otherwise requires, have the meaning which it has under the law of that State concerning the taxes to which the Convention applies.”

71 See Commentary on the OECD IHTMTC (Introductory Report), para. 1.

72 *Id.*, para. 3.

73 See Commentary on the OECD IHTMTC (Introductory Report), para. 14.

74 *Id.*, para. 13.

Article 4(1) of the OECD IHTMTC clarifies the concept of “fiscal domicile” as used in several Articles of the model: “the term ‘person domiciled in a Contracting State’ means any person whose estate or whose gift, under the law of that State is liable to tax there by reason of the domicile, residence or place of management of that person or any other criterion of a similar nature.” It follows that the concept of “fiscal domicile” is broader than that of the common law domicile. Moreover, Article 4(2) of the OECD IHTMTC includes a tiebreaker rule that is very similar to that of the OECD ICTMTC to address cases where both Contracting States consider the deceased or the donor fiscally domiciled in their territory.

The model contains three distributive rules that are based on the economic allegiance theory.⁷⁵ Under Article 5, the immovable property that is situated in the Contracting State that is not the state of the deceased's or donor's fiscal domicile (the “other Contracting State”), *may be taxed* by that state. The same applies to movable property of a PE or a fixed base that is situated in the other Contracting State (Article 6 of the model). The remainder of the deceased's or donor's property *may only be taxed* by the Contracting State of the deceased's or donor's fiscal domicile (“the Contracting State of the fiscal domicile”) at the time of the death/donation (Article 7 of the model). This applies, for example, to the immovable or movable property located in the Contracting State of the fiscal domicile or in a non-Contracting State. The same holds true for movable property located in the other Contracting State that does not pertain to a PE or a fixed base.

The deduction of debts under Article 8 of the OECD IHTMTC follows, in principle, the allocation of taxing rights between the Contracting States, in line with the economic alliance theory.

Articles 9A and 9B of the model refer to the elimination of double taxation by the Contracting State of the fiscal domicile with regard to property which “may be taxed” in the other Contracting State under Articles 5 and 6. Article 9A refers to the exemption method and Article 9B to the credit method.

Article 10 of the OECD IHTMTC contains a non-discrimination provision, which is identical to the nationality non-discrimination provision of the 1977 income and capital tax model.⁷⁶ Interestingly, although the OECD IHTMTC applies to estates and not to persons, the non-discrimination provision refers to persons. Furthermore, Articles 11 and 12 of the OECD IHTMTC refer, respectively, to the mutual agreement procedure and the exchange of information, both reflecting the language of the corresponding Articles of the 1977 OECD ICTMTC. It is worthy of note that the OECD IHTMTC – like the 1977 OECD ICTMTC – does not contain an Article on the assistance in the recovery of tax claims.

75 The economic allegiance theory is specified by two principles: the principle of true economic situs and the principle of domicile. See Gijsbert Bruins, Luigi Einaudi, Edwin Seligman and Josiah Stamp, Report on Double Taxation, Document E.F.S.73, F.19 (5 April 1923), accessed January 28, 2019, <http://www.taxtreatieshistory.org/>. See also, Wolfe Goodman, *International Double Taxation of Estates and Inheritances* (London: Butterworth, 1978), 56-57.

76 Interestingly, nationals of a state that has concluded an income tax treaty whose non-discrimination provision applies to non-residents and to any kind of taxes may benefit from this principle not only for income tax purposes, but also in estate, inheritance and gift tax matters. See Patricia Brandstetter, “Taxes Covered”: *A Study of Article 2 of the OECD Model Tax Conventions* (Amsterdam: IBFD, 2011), 202: “Nevertheless, the OECD Tax Committee has stated that it is necessary to insert a non-discrimination clause in the estate, inheritance and gift tax treaties because the respective income tax treaty may not be applicable in certain case, e.g. where a treaty is unilaterally terminated by a contracting party” [or the scope of the non-discrimination provision of the income and capital tax treaty is limited to taxes covered by the treaty, VD].

Article 13 of the OECD IHTMTC refers to diplomatic agents and consular officers whose fiscal privileges, under the general rules of international law or other provisions of special agreements, prevail over the relevant inheritance and gift tax treaty.

Article 14 of the OECD IHTMTC refers to the territorial extension of the inheritance and gift tax treaty and Articles 15 and 16 of the OECD IHTMTC pertain to the entry into force and the termination of the tax treaty, respectively. These Articles, again, are similar to the corresponding Articles of the 1977 OECD ICTMTC.

Finally, Lang notes that “[i]n practice, a number of deviations from the [OECD IHTMTC] can be found. Many existing inheritance tax treaties – primarily those concluded before 1982 – are not applicable to gift taxes. Some treaties limit the scope to citizens of one of the two contracting states or tie it to tax liability. However, since a majority of OECD Member countries impose comprehensive tax liability if the deceased or the donor was domiciled in their countries, [Articles] 1 and 2 [of the OECD IHTMTC] were drafted accordingly.”⁷⁷

3.2.1.2 The objectives of the OECD IHTMTC

The primary objective of the 1982 OECD IHTMTC is undoubtedly to allocate taxing rights between the Contracting States⁷⁸ for the avoidance of double taxation of cross-border inheritances and donations⁷⁹ that takes place due to the parallel and uncoordinated application of the OECD member countries' inheritance and gift tax systems.⁸⁰ Such an allocation takes place through three distributive rules, Articles 5 to 7 of the OECD IHTMTC, as discussed in the previous section.

Furthermore, I observe that a few sections of the model deal with cases of double non-taxation arising from the application of an inheritance and gift tax treaty or the domestic law classifications. For example, I note that the Commentary on Article 7 of the OECD IHTMTC allows the other Contracting State to levy taxes on property that is not covered by Articles 5 and 6 under certain conditions for the avoidance of factual double non-taxation. More specifically, under paragraph 31 of the Commentary on Article 7 of the OECD IHTMTC, “[s]ome States, when giving up a taxation right in favour of another State under the Convention, may sometimes want to have the assurance that the tax which should then be levied in the other State can be collected there [...]”. It goes without saying that the other Contracting State usually gives up its taxation right concerning property that is not covered by Articles 5 and 6 of the tax treaty.

⁷⁷ Michael Lang, *Introduction to the Law of Double Taxation Conventions* (Amsterdam: IBFD, 2013), 165.

⁷⁸ Kevin Holmes, *International Tax Policy and Double Tax Treaties* (Amsterdam: IBFD, 2014), 58.

⁷⁹ See also, in the context of income and capital tax treaties, Alexander Bosman, *Other Income under Tax Treaties. An Analysis of Article 21 of the OECD Model Convention*, (Alphen aan den Rijn: Kluwer Law International, 2015), 48.

⁸⁰ See also Frank Engelen, *Interpretation of Tax Treaties under International Law*, (Amsterdam: IBFD, 2004), 428: “The primary purpose of a tax treaty [is] to avoid international juridical double taxation, in order to facilitate the international exchange of goods, services, capital, technology and persons.” Perhaps, following the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter, “MLI”), the avoidance of double non-taxation through tax evasion or avoidance could be considered another purpose of an *income and capital tax treaty*. See, Article 6, para. 1 of the MLI.

In that regard, those who drafted the OECD IHTMTC noted that the Contracting State of the fiscal domicile would often need to be assisted by the other Contracting State in the collection of the tax on assets that are located in the other Contracting State. For this reason, the states were advised to conclude a convention for mutual assistance in the collection of taxes or a specific Article providing for such assistance for the taxes covered by the convention. Nevertheless, under paragraph 33, “[s]ome States, which for some reason could not conclude between themselves such a mutual assistance convention or Article, have adopted in their conventions another solution. This solution involves the addition to Article 7 of a second paragraph, which provides that the State in which the deceased or donor was not domiciled may impose its domestic tax to the extent that tax has not been paid in the State of domicile. This provision applies notwithstanding the provisions of paragraph 1 of Article 7, but does not apply where no tax was paid in the State of domicile as a result of a specific exemption, deduction, credit or allowance there. Member countries wishing to include such a provision are free to do so in their bilateral negotiations.”

Furthermore, I observe that when discussing the conflicts of qualification due to differences in domestic law classifications, the Commentary on Article 7 of the OECD IHTMTC refers to situations where double non-taxation can arise. This is the case, for instance, of the interests in partnerships (paragraph 20 of the Commentary on Article 7 of the OECD IHTMTC). The same is true concerning the special features of the domestic laws of certain member countries as discussed in paragraph 28 and 29 of the Commentary on Article 7 of the OECD IHTMTC.

Finally, under paragraph 23 of the Commentary on Article 9B of the OECD IHTMTC, “[i]f the domestic law of the State of situs does not entitle it to make full use of the right to tax reserved to it by the Convention, then in order to avoid double non-taxation, Contracting States may find it reasonable in certain circumstances to make an exception to the obligation on the State of domicile to give exemption. In such cases it is left to States, in their bilateral negotiations, to agree upon the necessary modifications to the Article.”

In addition, the model includes a nationality non-discrimination provision (Article 10 of the OECD IHTMTC) and two provisions that facilitate the administration of the cross-border inheritances and donations by the tax authorities of each Contracting State.⁸¹ As a result, it could be argued that the model also aims at addressing certain cases of discrimination of cross-border inheritances and donations⁸² and certain administrative difficulties of cross-border inheritances and donations⁸³ (perhaps as secondary purposes supportive to the main purpose of avoiding double taxation).⁸⁴

81 Mutual agreement procedure (Article 11 of the OECD IHTMTC) and exchange of information (Article 12 of the OECD IHTMTC).

82 See, Commentary on Article 10 of the OECD IHTMTC.

83 See, Commentary on Articles 11 and 12 of the OECD IHTMTC.

84 See also Alexander Bosman, *Other Income under Tax Treaties. An Analysis of Article 21 of the OECD Model Convention*, (Alphen aan den Rijn: Kluwer Law International, 2015), 48. Bosman is of the view that other issues dealt with in tax treaties, such as the assistance in the collection of taxes and avoidance of discriminatory taxation are not to be considered a purpose of a tax treaty as such, or at most secondary purposes supportive to the main purpose of avoiding double taxation.

3.2.1.3 Why states do not often conclude inheritance and gift tax treaties

As previously mentioned, the OECD IHTMTTC was first adopted in 1966 and subsequently updated in 1982. However, the model and its Commentary have not been updated since 1982. Furthermore, the current number of the inheritance and gift treaties is considerably low and there are OECD member countries that do not plan to conclude new inheritance and gift tax treaties with other countries. Such a policy decision may be based on different reasons, for example:

- the clear focus of the OECD and the OECD member countries on cross-border income and capital tax problems,⁸⁵
- the clear focus of states on conclusion of income tax treaties with major trading states,⁸⁶
- the divergent legislation giving rise to difficulties in negotiating inheritance and gift tax treaties,⁸⁷
- the abolition of death and gift taxation in some states (which arguably mitigates the risk of double taxation in a cross-border setting),
- the incidental imposition of death and gift taxes⁸⁸ and the priority given by tax administrations to periodic taxes,⁸⁹
- the low effective tax rate of inheritances,⁹⁰
- the need for additional national negotiators specialised in death and gift taxes,
- the low contribution of death and gift taxes to the revenue inflow,⁹¹
- the small number of cross-border inheritances and donations,⁹² and

85 See Inge van Vijfeijken, "One Inheritance, One Tax," *EC Tax Review* 26, no. 4 (2017): 216; "[...] Member States are busy with other, more prominent international issues, such as the OECD action plan on base erosion and profit shifting (BEPS). So on a macro level there is no urgent problem". See also J.F. Avery Jones, "A Comparative Study of Inheritance and Gift Taxes," *European Taxation* 34 (October/November 1994): 335.

86 J.F. Avery Jones, "A Comparative Study of Inheritance and Gift Taxes," *European Taxation* 34 (October/November 1994): 337.

87 J.F. Avery Jones, "A Comparative Study of Inheritance and Gift Taxes," *European Taxation* 34 (October/November 1994): 337.

88 Inge van Vijfeijken, "One Inheritance, One Tax," *EC Tax Review* 26, no. 4 (2017): 216; "[...] income tax is imposed annually. In that case, double taxation is an annually reoccurring event, which makes it an annually reoccurring problem. On average each taxpayer receives an inheritance only once in thirty year."

89 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 45.

90 Copenhagen Economics Institute, *Study on inheritance taxes in the EU Member States and possible mechanisms to resolve problems of double inheritance taxation in the EU* (2010), 60. The study concludes that the effective tax rate has been decreased to around 3% in 2009.

91 According to the OECD revenue statistics, tax revenue from inheritance and estate taxes represented on average in 2018 0.4% of the total tax revenue earned in each OECD member country (OECD – average). See OECD revenue statistics, accessed January 29, 2020, <https://stats.oecd.org/Index.aspx?DataSetCode=REV>.

92 Copenhagen Economics Institute, *Study on inheritance taxes in the EU Member States and possible mechanisms to resolve problems of double inheritance taxation in the EU* (2010), 12. The study estimates the number of cross-border successions in 2011 at between 290,000 and 370,000.

- the unilateral mechanisms for the avoidance of double taxation of inheritances and donations (which arguably make the need for concluding tax treaties in this area less demanding).⁹³

Irrespective of the above reasons, the OECD IHTMTTC serves as the first point of reference of this study. As I will discuss in the next chapter, the model includes provisions aiming at addressing the problems of cross-border inheritances and donations, thereby confirming their existence in the event of a cross-border inheritance and donation.

3.2.2 The 2015 inheritance tax report

Back in 2014, an expert group was set up with the primary task to assist the EC in identifying and finding practical ways to remove any tax problems faced by individuals who move from one EU Member State to another in order to live, study, work or retire, or who invest in other EU countries or inherit property across borders within the EU. The group consisted of 21 members – representatives of different sectors who were selected based on responses received to a public call for applications. The group decided to divide the work into two reports: one with a focus on direct taxes (mainly income taxes) and the other on inheritance taxes. Despite the similarities of the problems between income and inheritance taxes, the EC's expert group decided to address the inheritance tax problems in a separate report. According to the group, the differences concerning the tax event, the persons involved, and the applicable rates justify the consideration of inheritance tax obstacles in a separate report.

The first report was called "Ways to Tackle Cross-Border Tax Obstacles Facing Individuals within the EU" ("the 2015 income tax report"). It discussed the practical problems that individuals face with regard to income taxes in the EU, which the CJ could not address. The 2015 income tax report considered both the problems arising from mismatches between taxation rules that lead to higher taxation in cross-border situations ("substantive tax provisions") and the problems resulting from the absence of suitable practical and administrative procedures ("procedural tax problems").

This second report was entitled "Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU" (the "2015 inheritance tax report"). Under this report, "[t]he number of people leaving property situated in two or more Member States when they die is growing rapidly. Many of their families will soon discover that tax on inheritance can often be claimed by each of the Member States concerned. It does not take long for multiple taxation, even at low rates, to amount to expropriation."⁹⁴

The group identified the following inheritance tax obstacles in a cross-border situation:

- the nature and design of national inheritance taxes,
- provision of relief from double taxation by the EU Member States, whether by means of treaties or by means of unilateral relief, and
- the administration of inheritance taxes.

93 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 44.

94 EU, "Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU", report prepared by the European Commission Expert Group, 5, para. 1.

I observe that the report regarded the nature and design of national inheritance taxes as an obstacle of a cross-border inheritance. Although differences in the national inheritance tax laws of the states seeking to tax a cross-border inheritance can often give rise to double taxation and administrative difficulties, I do not consider those differences a problem of cross-border inheritances and donations. On the contrary, the nature and design of national inheritance taxes is a domestic problem that thus, is taken as a fact in this study.

I consider the report an important point of reference of this study that confirms that cross-border inheritances and donations can be subject to double or multiple taxation and non-taxation and administrative difficulties. Furthermore, the report, drafted by distinguished scholars and practitioners, becomes a primary source of information on inheritance (and by analogy, gift tax laws) to which I will refer extensively in my study. Finally, in its report, the group proposed the innovative concept “one inheritance – one inheritance tax”, which has been a great source of inspiration in my research as presented in chapter 8 of this study.

3.3 Addressing the problems at different levels

Having presented the four most important problems of cross-border inheritances and donations as confirmed by the two points of reference of this study, in this section I examine the level at which the problems can be resolved more effectively. In that regard, I discuss three different levels, namely the national level, the OECD level and the EU level.

3.3.1 The national level

In my view, the problems of cross-border inheritances and donations cannot be addressed effectively at the national level. More specifically, double or multiple taxation is often the result of jurisdictional overlaps between two or more states. Although it is true that some states provide a unilateral double tax relief, I noted in section 3.1.1.10 that such relief is often granted under “national standards”. Moreover, the application of discriminatory tax provisions to cross-border inheritances and donations confirms that states fail to “think out of the borders”. Finally, many administrative difficulties of cross-border inheritances and donations result from uncoordinated administrative procedures. It follows from the above that the notion of fiscal sovereignty is particularly evident in the national inheritance and gift tax legislations.

Although unilateral measures addressing the problems of cross-border inheritances and donations should always be welcomed, a coordinating approach is necessary. Such an approach can only be guaranteed at the OECD level or the EU level, or even at both levels.

3.3.2 The OECD level

The OECD IHTMTC has undoubtedly become a valuable tool for dealing with the problems of cross-border inheritances and donations. The model primarily aims at resolving the double taxation problem of cross-border inheritances and donations due to the parallel and uncoordinated application of the states’ inheritance and gift tax legislations. It also aims at the avoidance of double non-taxation arising from the application of an inheritance and gift tax treaty or the domestic law classifications. It further includes a non-discrimination

provision and some provisions that facilitate the administration of the cross-border inheritances and donations by the tax authorities of each Contracting State.

It follows that the OECD level is a suitable level for addressing the problems of cross-border inheritances and donations. It could be argued, however, that certain provisions of the OECD IHTMTC and its Commentary can be improved, having regard to the objectives of the model and the principles reflected in its Commentary. In my view, a model that is in line with (some of) these principles seems to address the problems of cross-border inheritances and donations in a more comprehensible manner (considering the objectives of the OECD IHTMTC) than a model that is not in line with (some of) these principles.

Furthermore, the low number of such treaties demonstrates, in my view, that the OECD member countries have not endorsed the model as readily as they did the income and capital tax model. A quick search of the IBFD online research platform (January 2020) reveals that at the time of the writing of this study there are only 87 inheritance tax treaties in force worldwide (some of which are also applicable also to gift taxes) contrary to 4060 income and capital tax treaties (a figure which changes regularly).⁹⁵

3.3.3 The EU level

The EU level is a suitable level for addressing the problems of cross-border inheritances and donations. This is because at this level, not only are harmonisation or coordination mechanisms (that can guarantee a common approach towards addressing these problems) conceivable, but also enforcement mechanisms.

3.3.3.1 Double or multiple taxation

I observe that at the EU level very little progress has been made towards addressing the problem of double or multiple taxation of cross-border inheritances and donations. To start with, the EU fundamental freedoms do not provide protection against juridical double taxation, as first ruled by the Court in its judgment in *Kerckhaert and Morres* (C-513/04).⁹⁶ Although in the inheritance tax case *Van Hilten* (C-513/03) the Court did raise the importance of the unilateral credit for the foreign inheritance tax by the state of the deceased's extended residence (in the context of the Netherlands ten-year residence rule), it became apparent from its subsequent judgment in *Block* (C-67/08) that the EU Member States' legislatures are not obliged "[t]o adapt their own tax systems to the different systems of tax of the other Member States"⁹⁷

*"30. Community law, in the current stage of its development and in a situation such as that in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Community. Consequently, [...] no uniform or harmonisation measure designed to eliminate double taxation has as yet been adopted at Community law level (see Kerckhaert and Morres, paragraph 22, and Columbus Container Services, paragraph 45)."*⁹⁸

⁹⁵ The possible endorsement of the updated model by the OECD member countries falls outside the scope of this study because such an endorsement depends on the tax policy of each country.

⁹⁶ ECJ, *Kerckhaert and Morres* (C-513/04).

⁹⁷ ECJ, *Block* (C-67/08), para. 31.

⁹⁸ *Id.*, para. 30.

Although to date, such a uniform or harmonisation measure has not been proposed in the EU (albeit possible, in principle, under Article 115 TFEU), a coordinating measure had been proposed in 2011. This measure is the EC's recommendation 2011/856/EU of 15 December 2011 regarding relief for double taxation of inheritances (hereinafter: the "EC's recommendation" or the "recommendation"). The recommendation aims to coordinate the EU Member States' systems on relief for double taxation of inheritances and donations. In the EC's view, if the EU Member States follow the recommendation and integrate its provisions in their national inheritance and gift tax systems, the juridical double taxation problem of inheritances can be resolved.⁹⁹ Nevertheless, as the EC's expert group stated in its report, several years have passed since the adoption of the recommendation, and it seems that it has failed to generate sufficient action and is not going to lead to any fundamental change in the approach of EU Member States to the problem of double taxation of inheritances.^{100, 101}

3.3.3.2 Double or multiple non-taxation

As in the case of double or multiple taxation, very little progress has been made towards addressing the problem of double or multiple non-taxation of cross-border inheritances and donations. In that regard, I observe that Article 4.2. of the EC's recommendation 2011/856/EU deals with double non-taxation issues. More specifically, Article 4.2. of the recommendation precludes the EU Member State of the objective nexus to tax the movable property (other than movable property connected to a PE) "[p]rovided that such tax is applied by another Member State by reason of the personal link of the deceased and/or the heir to that other Member State". This Article is particularly effective in situations involving more than two EU Member States. This is because the EU Member State of the objective nexus is precluded from exercising its taxing rights *only* if the EU Member State of the deceased's or beneficiaries' personal nexus taxes. On the contrary, the EU Member State of the objective nexus may still exercise its taxing rights if no tax is levied by either the EU Member State of the deceased's or the beneficiaries' personal nexus. Therefore, Article 4.2. deals both with double or multiple taxation and double or multiple non-taxation issues.

However, as previously noted, the EC's expert group was of the view that several years have passed since the adoption of the recommendation, and it seems that it has failed to generate sufficient action and is not going to lead to any fundamental change in the approach of EU Member States to the problem of double taxation of inheritances.¹⁰² This is also true, in my view, for the problem of double non-taxation of inheritance in general (to which the report of the EC's expert group refers, in places, despite the fact that the group did not classify double or multiple non-taxation as an obstacle of cross-border inheritances).

99 Edouard-Jean Navez, "The Influence of EU Law on Inheritance Taxation: Is the Intensification of Negative Integration Enough to Eliminate Obstacles Preventing EU Citizens from Crossing Borders within the Single Market?," *EC Tax Review* 21, no. 2 (2012): 93.

100 However, as per the report, the recommendation has not been entirely ignored. For example, in 2011, it was debated in the Polish legislature and the Netherlands' finance minister has stated that the Netherlands' unilateral relief will be applied more liberally.

101 EU, "Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU", report prepared by the European Commission Expert Group, 18, para. 10.

102 EU, "Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU", report prepared by the European Commission Expert Group, para. 9, p. 9 and point viii, p. 12.

3.3.3.3 Discrimination

On the other hand, the negative harmonisation¹⁰³ of EU Member States' inheritance and gift tax legislation has been remarkable concerning the discrimination problem of cross-border inheritances and donations. The Court has delivered several judgments on inheritance and gift taxation, an area of tax law that seemed to be *terra incognita* concerning its examination under EU law 20 years ago.

In 2011, the EC published its Working Paper laying down the principles drawn from the Court's case law for non-discriminatory inheritance tax systems (the "2011 EC's Working Paper").¹⁰⁴ In the EC's view, "[i]t is of utmost importance in the Internal Market that Member States do not pose obstacles to the exercise of the fundamental freedoms by discriminating against cross-border inheritance cases compared to domestic situations. The principle of non-discrimination is a central element of the Treaty freedoms."¹⁰⁵ Moreover, the Court judgments "[h]ave brought a certain amount of clarity and certainty to this matter. However, in some instances, it may not be entirely clear what consequences a ruling involving legislation of one Member State should have on legislation of another Member State. Moreover, even where the Member States introduce new tax rules as a result of a ruling, they may do so in vastly differing ways."¹⁰⁶ Furthermore, under the 2011 EC's Working Paper, the Court judgments in individual cases may not make clear to EU citizens what principles Member States must respect when taxing cross-border inheritances.¹⁰⁷

Before the publication of the 2011 EC's Working Paper, the EC's Directorate-General for Taxation and Customs Union commissioned the Copenhagen Economics Institute to prepare a report on the problems of cross-border inheritances within the EU. This report was published in August 2010, and is called "Study on Inheritance Taxes in the EU Member States and Possible Mechanisms to Resolve Problems of Double Inheritance Taxation in the EU". Although the report focused mainly on the double taxation problem of inheritances in the EU, it briefly covered the discrimination problem of cross-border inheritances as well as the relevant Court judgments delivered up to its publication. In my view, the addition to the research in this report is the overview of the potential discriminatory elements of the EU Member States' inheritance and gift tax legislations. The overview is annexed to the report.

The Court's case law on EU inheritance and gift taxation has already dealt with significant elements of inheritance and gift taxes, among others:

- Special tax deductions for certain liabilities and debts [e.g. obligation to transfer title – *Barbier* (C-364/01), mortgage debt – *Eckelkamp* (C-11/07), overendowment debt – *Arens-Sikken* (C-43/07)],
- Subjective tax exemptions [*Geurts* (C-464/05), *Mattner* (C-510/08), *Welte* (C-181/12), *Hunnebeck* (C-479/14), *Commission v Germany* (C-211/13)],

¹⁰³ The protection against discriminatory (tax) provisions is safeguarded through the Court, which interprets and applies the EU fundamental freedoms. Such a process represents the so-called "negative harmonisation".

¹⁰⁴ European Commission Staff Working Paper, "Non-discriminatory Inheritance Tax Systems: Principles Drawn from EU Case law" prepared by the European Commission (SEC(2011) 1488 final).

¹⁰⁵ *Id.*, 3.

¹⁰⁶ European Commission Staff Working Paper, "Non-discriminatory Inheritance Tax Systems: Principles Drawn from EU Case law" prepared by the European Commission, (SEC(2011) 1488 final), p.3.

¹⁰⁷ *Id.*

- Objective tax exemptions [*Commission v Greece* (C-244/15), *Commission v Spain* (C-127/12), *Q* (C-133/12), *Huijbrechts* (C-679/17)],
- Valuation rules [*Jäger* (C-256/06), *Halley* (C-132/10), *Scheunemann* (C-31/11)],
- Extended residence rules [*Van Hilten* (C-513/03)],
- Reduced rates for domestic non-profit organisations [*Missionwerk Werner* (C-25/10), *Commission v Greece* (C-98/16)], and
- Reductions for the previously paid inheritance tax [*Feilen* (C-123/15)].

I believe that the Court's case law on EU inheritance and gift taxation is a *sui generis* case law. Although this case law builds on the concepts that it developed in its case law on personal taxation, it correctly deviates from them due to the different nature of inheritance and gift taxes from that of income taxes. This is, for instance, the case of the *Schumacker* doctrine whose application was rejected by the Court in inheritance and gift tax cases while it continues to apply to income taxes (albeit with certain exemptions).

In the context of the EU fundamental freedoms, a cross-border inheritance denotes an inheritance involving a foreign-located estate, a foreign-located deceased, a foreign-located beneficiary or a combination of all the above elements. Furthermore, the free movement of capital, as protected by Article 63 TFEU, is the most commonly invoked freedom in the context of inheritance and gift taxation. The Court has consistently maintained that an inheritance comes within the scope of the TFEU provision of the free movement of capital, save where the constituent elements of inheritances are confined to a single EU Member State. The Court considers an inheritance a movement of capital based on heading XI of Annex I to the Directive 88/361,¹⁰⁸ entitled "Personal Capital Movements". Hence, the *mortis causa* transfer of property is not regarded as an investment made by the deceased for his beneficiaries. In my view, the examination of national inheritance tax law provisions in light of the free movement of capital is critical. This freedom is unique in comparison to other EU fundamental freedoms as it covers third-country transactions, and thus inheritances whose cross-border elements are located in a third state. Likewise, the free movement of capital also applies to cross-border donations.¹⁰⁹

Nevertheless, I observe that more research is required on certain aspects of the Court's case law for the better understanding and application of the non-discrimination principle within the EU. Furthermore, it is not only the EU Member States' inheritance and gift tax laws that should be interpreted in line with EU law but also the treaties that they have concluded (at least, the treaties concluded between EU Member States).

3.3.3.4 Administrative difficulties

I note that the EU has already introduced measures, which aim at the better cooperation between the EU Member States' tax authorities in relation to the exchange of information and the recovery of tax claims.

¹⁰⁸ Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty.

¹⁰⁹ More on the Court's case law on EU inheritance and gift taxes, see Vasileios Dafnomilis, "A Comprehensive Analysis of ECJ Case Law on Discriminatory Treatment of Cross-Border Inheritances – Part 1," *European Taxation* 55, no. 11 (2015); Vasileios Dafnomilis, "A Comprehensive Analysis of ECJ Case Law on Discriminatory Treatment of Cross-Border Inheritances – Part 2," *European Taxation* 55, no. 12 (2015).

First, exchange of information on death and gift taxes already takes place within the EU under the EU Directive 2011/16/EU on administrative cooperation in the field of taxation. The Directive applies to all types of taxes and therefore, death and gift taxes fall within the exchange of information framework that the Directive has introduced. More specifically, under Article 1(1) of the Directive, “[t]his Directive lays down the rules and procedures under which the Member States shall cooperate with each other with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2.” Under Article 2, “1. This Directive shall apply to *all taxes of any kind* levied by, or on behalf of, a Member State or the Member State’s territorial or administrative subdivisions, including the local authorities.” (Italics, VD). As Article 2 does not explicitly exclude death and gift taxes from the scope of the Directive, EU Member States may exchange information regarding these taxes under the conditions laid down in Chapter II of the Directive.

Moreover, the EU Directive 2010/24/EU lays down rules on the assistance in the collection for the recovery of claims relating to taxes, duties and other measures of taxes between the EU Member States. Death and gift taxes also fall within the scope of this Directive. Under Article 2 of the Directive, “1. This Directive shall apply to claims relating to the following: a) all taxes and duties of any kind levied by or on behalf of a Member State or its territorial or administrative subdivisions, including the local authorities, or on behalf of the Union; [...]”.

Although both EU Directives apply to death and gift taxes, some of the problems of Mr D’s beneficiaries, as presented in section 3.1.4.2, might remain unsolved. This is because the available legal framework within the EU aims at the effective collaboration between the EU Member States’ tax authorities. On the contrary, the available legal framework within the EU does not deal with administrative issues arising at the micro level.

3.4 Conclusion of Chapter 3

In this chapter, I examined the essential problems of cross-border inheritances and donations: double or multiple taxation, double or multiple non-taxation, discrimination and administrative difficulties. These problems are confirmed, in my view, by the OECD IHTMTC and the 2015 inheritance tax report both of which serve as the two points of reference of this study. Furthermore, as previously noted, there could also be other problems of cross-border inheritances and donations. However, those problems fall outside the scope of this study as they do not seem to have been confirmed by the two points of reference of this study.

I further noted that the problems could not be effectively solved at the national level although unilateral measures should be welcomed in that regard. In my opinion, a more coordinated approach is required for addressing the problems. Such an approach can only be safeguarded at the OECD or the EU level because both levels provide for mechanisms to ensure a coordinated approach.

At the OECD level, the OECD IHTMTC is undoubtedly a valuable tool for addressing the problems. This is true regardless of the fact that the number of inheritance and gift tax treaties is not impressive. It could be argued, however, that certain provisions of the OECD IHTMTC and its Commentary can be improved, having regard to the objectives of the inheritance tax model and the principles reflected in its Commentary. In my view, a model that is in line with (some of) these principles seems to address the problems of

cross-border inheritances and donations in a more comprehensible manner (considering the objectives of the OECD IHTMTC) than a model that is not in line with (some of) these principles.

At the EU level, I observed that to date, no harmonisation measure had been proposed to address the problems of cross-border inheritances and donations. Only the EC's recommendation has attempted to coordinate the EU Member States' unilateral double tax relief provisions, but it seems to have failed to achieve this objective. Furthermore, the Court's case law has contributed to the so-called "negative harmonisation" of death taxes and taxes on gifts. However, the Court's case law has, in my view, two aspects that can be further discussed and explained, and the EU Directives 2011/16/EU and 2010/24/EU do not deal with administrative problems of cross-border inheritances and donations at the micro-level.

In conclusion, I would suggest that both the OECD and the EU levels are appropriate to address the problems of cross-border inheritances and donations because, as stated above, both levels provide for mechanisms to ensure a coordinated approach. First, at the EU level, the OECD IHTMTC and its Commentary serve as the basis for treaty negotiations. Second, at the EU level, the issuance of EU legislation is possible and can thus provide "separate" and "holistic" solutions to the problems of cross-border inheritance and gift taxation.

PART II:SEPARATE SOLUTIONS TO THE PROBLEMS OF
CROSS-BORDER DEATH AND GIFT TAXATION

CHAPTER 4

Separate solutions at the OECD level

It was previously argued that it could hardly be denied that an updated and watertight OECD IHTMTC would serve as a useful tool in dealing with some or most of the aspects of the problems of cross-border death and gift taxation. I observe, however, that the update work requires a benchmark. In my view, a model that is in line with (some of) the elements of this benchmark seems to address the problems of cross-border inheritances and donations in a more comprehensible manner (considering the objectives of the OECD IHTMTC) than a model that is not in line with (some of) these elements.

4.1 Introduction

In dealing with the suggested improvements to certain provisions of the model for the addressing of the problems of cross-border inheritances and donations, a benchmark is necessary. In that regard, I observe that the OECD IHTMTC does not have a concrete benchmark. However, if one reads between the lines of OECD IHTMTC and its Commentary, it could be argued that certain principles of death and gift tax laws can be identified. More specifically, as the OECD IHTMTC reflects the principles of death and gift tax laws of the majority of the OECD member countries, I argue that such a benchmark can be found only within the system that the OECD has introduced, namely the OECD IHTMTC and its Commentary. *This is the reason why the justifications of death and gift taxation (section 2.4), cannot operate as a whole as a benchmark; they are exogenous to the system which the OECD IHTMTC has introduced.* More specifically, they refer to existing inheritance and gift tax laws whereas the model applies, in my view, to one concept of an inheritance and gift tax. I decide to call this concept “the proposed inheritance and gift tax” which is the result of compromises among the OECD member countries.

Furthermore, I argue that the proposed inheritance and gift tax does not oblige the states to introduce a death and gift tax liability as this would be contrary to their fiscal sovereignty. The proposed inheritance and gift tax is merely a concept that consists of elements collectively assessed by those who drafted the OECD IHTMTC.

It is also important to note that the fact that a model does not meet (some of) the elements of the benchmark does not automatically mean that it becomes ineffective or a “bad model”. However, a model that is in line with the elements of this benchmark seems to address, in my view, the problems of cross-border inheritances and donations in a more comprehensible manner (considering the objectives of the OECD IHTMTC) than a model that is not in line with (some of) these elements.

In the course of my research, I discovered that the proposed inheritance and gift tax consists of the following elements: a) *mortis causa* or *inter vivos* taxation, b) the windfall

justification, c) the definition of critical terms in accordance with civil law and d) the ability-to-pay-taxes justification.

4.2 The four elements of the proposed inheritance and gift tax

4.2.1 *Mortis causa* or *inter vivos* taxation

The first element of the proposed inheritance and gift tax is its *mortis causa* or *inter vivos* imposition. More specifically, the proposed inheritance and gift tax is levied *by reason of (the event of) death or a donation* to the exclusion of other events that may trigger taxation.

The importance of the *mortis causa* or *inter vivos* imposition as an element of the proposed inheritance and gift tax is first derived from Article 2 of the OECD IHTMTC. This Article defines the taxes to which the model applies. Under Article 2(1), “[t]his Convention shall apply to taxes on estates and inheritances and on gifts imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.” Paragraph 2 defines the term “taxes on estates and inheritances and on gifts”. More specifically, “there shall be regarded as taxes on estates and inheritances taxes *imposed by reason of death* in the form of taxes on the corpus of the estate, of taxes on inheritances, of transfer duties, or of taxes on donations *mortis causa*. There shall be regarded as taxes on gifts taxes imposed on transfers *inter vivos* only because such transfers are made for no, or less than full, consideration.” (Italics, VD).

By using the phrase “by reason of death”, Article 2 draws, in my view, a distinction between the event of death and the taxable event of death, for example, the enrichment of the beneficiary upon the person’s death or the mere *mortis causa* transfer of property. The latter event seems to be immaterial for a tax to fall under Article 2 and therefore, also for the benchmark of the proposed inheritance and gift tax. Similar considerations apply to gift taxes.

The importance of the above distinction can also be derived from Article 9B(1) (credit method) of the OECD IHTMTC which reads as follows: “[t]he Contracting State in which the deceased was domiciled at his death, or the donor was domiciled at the time of the gift, shall allow as a deduction from the tax calculated according to its law an amount equal to the tax paid in the other Contracting State on any property which, *in relation to the same event* and in accordance with the provisions of this Convention, may be taxed in that other State.” (Italics, VD). It follows that, since the tax credit shall be granted for taxes levied “in relation to the same event”, the mere imposition of a tax in the event of death or donation suffices, in principle, for such a credit to be granted.

Furthermore, the *property* on which the proposed inheritance and gift tax is levied would seem to be immaterial as derived from Article 2 of the OECD IHTMTC. More specifically, it seems to be irrelevant whether the tax is levied on the corpus of the estate as a whole or parts of the estate as devolved on the different beneficiaries. The proposed inheritance and gift tax thus incorporates any death and gift tax regardless of its name or the property on which it is levied on the condition that the other three elements of the benchmark are present. Consequently, the proposed inheritance and gift tax includes, in principle, death taxes such as inheritance taxes, estate taxes, *mortis causa* income taxes, capital gains taxes and taxes on donations *mortis causa*. Likewise, the proposed gift tax includes gift taxes, income taxes on gifts or any other tax that is imposed on *inter vivos* transfers.

Furthermore, both *donor-based and donee-based taxes* seem to fall under the scope of the benchmark of the proposed inheritance and gift tax.¹ This seems to be contradictory to Article 1 of the OECD IHTMTC that reads as follows: “This Convention shall apply: a) to estates and inheritances where the deceased was domiciled, at the time of his death, in one or both of the Contracting States, and b) to gifts where the *donor* was domiciled, at the time of the gift, in one or both of the Contracting States.” (Italics, VD). Nevertheless, the suggestion of a subsidiary taxing right provision as laid down in paragraphs 70-72 of the Commentary on Articles 9A and 9B in conjunction with paragraphs 5-7 of the Commentary on Article 7 of the model confirms, in my view, that both types of taxes fall under the scope of the benchmark. However, I note that it follows from Article 1 of the model and the subsidiary taxing right provision that donor-based taxes take priority over donee-based taxes.

Finally, I note that the *starting point of taxation* seems to be immaterial for the application of the proposed inheritance and gift tax.² Nevertheless, I observe that starting points of taxation that reflect a degree of integration of the person with the community of a state take priority over starting points of taxation that do not (always) reflect such degree of integration. This is reflected in paragraph 1 of the Commentary on Article 1 of the OECD IHTMTC that reads as follows: “[M]ost Member countries take the view that it is preferable to limit the scope of a double taxation convention by reference to the property of persons who are either domiciled in or are residents of, one or both of the Contracting States. It is considered that, by taking part in the economic life of the State where he has settled, *although not possessing its nationality*, and by contributing to the public expenditure there like a citizen of the country, the deceased will normally have become sufficiently integrated in the community for it to be proper for him and his heirs to benefit from any international conventions for the avoidance of double taxation which may be concluded by his State of domicile.” (Italics, VD). It can be derived from the above section of the Commentary that those who drafted the OECD IHTMTC considered that residence and domicile indicate a degree of integration with the community of the state while nationality not (or at least, not in all cases). Therefore, nationality does not form a *primary* criterion for the establishment of the term “fiscal domicile”.

Nevertheless, nationality forms part of the *subsidiary* taxing rights provision. Concerning these rights, paragraphs 70-72 of the Commentary on Articles 9A and 9B in conjunction with paragraphs 5-7 of the Commentary on Article 7 of the model, allow states to depart from the rules of the OECD IHTMTC where there is a “compelling reason” to do so. Such a compelling reason can be the establishment of taxing rights under different rules and concepts than those endorsed in the model or addressing of tax avoidance where the deceased, in contemplation of death, or the donor, in contemplation of making a gift, moves his domicile to the other state with the intention of escaping taxation by his former state of domicile. In such a case, states can maintain their subsidiary taxing right on the grounds of the nationality/secondary domicile of the deceased or donor or the domicile/nationality of the heir, legatee, or donee for a limited period only, and in any event, not longer than ten years after the deceased or the donor has ceased to be domiciled in their territory.”

1 On the distinction between donor-based and donee-based taxes, I refer to section 3.1.1.2 of this study.

2 I refer to section 3.1.1.1 in which I explain the concept of the starting point of taxation.

The *mortis causa* and *inter vivos* imposition is an important element of the proposed inheritance tax given the possible overlaps between the OECD IHTMTC and the OECD ICTMTC and the application of the OECD IHTMTC to different types of death taxes.

4.2.2 The levying of the tax on windfalls

The second element of the proposed inheritance and gift tax benchmark is the windfall justification. More specifically, the proposed inheritance and gift tax is levied on the unearned advantage, the “windfall” which the recipient receives without contributing to it. Furthermore, the proposed inheritance and gift tax applies at a progressive rate based on both the size of the *mortis causa* or *inter vivos* transferred property and the kinship between the parties involved. As noted in section 2.4.2, progression based on the kinship between the parties involved shows that it considered it fair if states tax incidental and unexpected receipts of wealth and at the same time protect the family property when received by family members. Therefore, the windfall justification dictates that states should tax a *mortis causa* transfer of property (because it is unexpected) but they should also take into account possible family property considerations (that make a *mortis causa* transfer of property less unexpected when received by family members who apparently have contributed to the accumulation of this property). In that regard, I noted that the granting of subjective tax exemptions/deductions to close relatives and the determination of the applicable inheritance and gift tax rates based, *inter alia*, on the kinship between the deceased/donor and the beneficiaries/donees serve as two important indications that confirm the windfall justification.

The recognition of the windfall justification as an element of the proposed inheritance and gift tax can be derived from several Articles of the model and its Commentary. The definition of the “taxes on gifts” in Article 2(2) of the OECD IHTMTC is illustrative: “there shall be regarded as taxes on gifts taxes imposed on transfers *inter vivos* only because such transfers are made for no, or less than full, consideration.” In other words, gift taxes are taxes that are levied on the *inter vivos* received windfalls, for which the recipients have made no, or less than full, consideration. In the same vein and although the Commentary on Article 2(2) does not define the terms “estate” and “inheritance”, one can easily observe that taxes on estates and inheritances are imposed on transfers *mortis causa* for which no, or less than full, consideration was paid.

Furthermore, the Commentary on Article 9A (exemption method) implicitly refers to the windfall justification concerning the treatment of special deductions granted by the Contracting States. Under paragraph 26 of the Commentary on Article 9A of the model, “[d]ifficulties may arise because the laws of most States provide for special deductions from the net amount of the estate or gift, or from specific items of the estate or gift, on the *relationship* between the deceased or the donor and the heir, legatee, or donee.” (Italics, VD). The reference of the Commentary to these deductions shows, in my view, that the windfall justification is an important element of the proposed inheritance and gift tax on which the OECD member countries agreed. On the other hand, the OECD IHTMTC does not make direct reference to the determination of the death and gift tax rates based on the kinship between the parties involved, which often serves as another indication of the application of the windfall justification. Yet, the example of paragraph 79 of the Commentary on Articles 9A and 9B on the application of the credit method by Contracting States applying different

forms of death duties is built on the premise that different rates apply to the acquisition by each beneficiary: “the rates of tax in the State which levies the inheritance tax are 5% for the wife, 10% for the son and 15% for the mother.”

The recognition of the windfall justification as the second element of the proposed inheritance and gift tax benchmark limits in a way the broad scope of the first element of the benchmark. More specifically, the proposed inheritance and gift tax includes all *mortis causa* or *inter vivos* levied taxes that are levied on the whole amount of the transferred windfall. Conversely, the proposed inheritance and gift tax does not include those taxes that are not levied on the whole *mortis causa* or *inter vivos* transferred or received windfall. As a matter of example, the *mortis causa* levied capital gains tax that is not levied on the whole amount of the gain received does not seem to be consistent with the suggested benchmark, as explained in section 6.1.4.

4.2.3 The definition of critical terms by civil law

The third element of the benchmark of the proposed inheritance and gift tax is the definition of some critical terms for its imposition in accordance with civil law (family law, matrimonial property law and the law of succession). The OECD IHTMTC Commentary already acknowledges the connection of the existing inheritance and gift tax laws with the applicable civil laws in several sections. For example, paragraph 1 of the Commentary on Article 4 of the OECD IHTMTC states that “[i]n some Member countries estate and gift taxes are based on “residence” and, for them, “residence” has virtually the same meaning as “domicile”. In others, especially those whose legal system is based on English common law, these taxes are based on “domicile” which in those countries has a different meaning from residence, domicile denoting a more lasting connection with the country concerned.” I also observe that the applicable civil laws often define the terms “residence” and “domicile”. There are also other terms, which are defined by the applicable civil laws, such as “death”, “estate”, “heirs/beneficiaries”, “surviving partner”, “habitual abode”, “permanent home”, “movable property”, “immovable property” and “receivable”.

Furthermore, paragraphs 14-35 of the Commentary on Article 1 of the OECD IHTMTC refer to several legal arrangements, which may be employed in the law of succession: trusts in common law jurisdictions and foundations, fideicommissum and usufruct in civil law jurisdictions. These are the so-called “special features of the domestic law of the Contracting States”. The application of the OECD IHTMTC to these arrangements is sometimes difficult, especially concerning property transfers from and to the legal arrangement at hand. Nevertheless, the mere reference of the Commentary to these arrangements shows, in my view, that the OECD member countries acknowledged the connection of death and gift taxes with civil law. Finally, under paragraph 29 of the Commentary on Article 1 of the OECD IHTMTC, “[d]ue to the differences in the civil and taxation laws of Member countries, it was not possible to insert in the Convention provisions which would be acceptable to all States.” It can be concluded from the above that those who drafted the OECD IHTMTC and the OECD member countries acknowledged the connection of death and gift taxes with civil law. Such a connection, therefore, serves as the third element of the proposed inheritance and gift tax.

This element is particularly important with regard to problems arising from the special features of the domestic laws of the Contracting States and the conflicts of qualification with regard to rights or entities.

4.2.4 *The ability-to-pay-taxes justification*

The fourth element of the proposed inheritance and gift tax benchmark is the ability-to-pay-taxes justification. The *mortis causa* or *inter vivos* transfer of property increases the beneficiaries' financial capacity and, thus, their ability-to-pay-taxes. The ability-to-pay-taxes justification explains the imposition of the proposed inheritance and gift tax at progressive tax rates depending on the size of the acquisition. On the contrary, it does not justify progression based on the kinship between the parties involved that is explained by the windfall justification instead. For this reason, I argue that it should not be considered a primary justification of death taxation. Nevertheless, it seems that those who drafted the OECD IHTMTC considered the ability-to-pay-taxes justification when drafting the OECD IHTMTC.

The recognition of the ability-to-pay taxes justification as the fourth element of the proposed inheritance and gift tax can be derived, for example, from paragraph 3 of the Commentary on Article 9A of the OECD IHTMTC that refers to the application of the progression with exemption method. More specifically, under paragraph 38 of the Commentary on Article 9A of the OECD IHTMTC (exemption method), “[t]he question of preserving the progressive tax rate may also arise for the State which is not the State of domicile even though the Convention limits the taxation right of that State to property falling under Articles 5 and 6. This may happen for a number of reasons: because the domestic law of that State provides for *a progressive tax rate by reference to the total value of all taxable property* situated in its territory, or even by reference to the total value of the estate or gift, or when, in the absence of the Convention, that State would have had the right to tax the total estate or gift and, consequently, at the *rate of tax appropriate to that total* (such a situation is most likely to occur in those States which have a comprehensive right to tax on the basis of the nationality of the deceased or donor or the domicile or nationality of the heir).” (Italics, VD)

Furthermore, under paragraph 43 of the Commentary on Article 9B of the OECD IHTMTC (credit method), “[i]t is not necessary to have a clause maintaining the right of the State of domicile to calculate its tax at a *progressive rate*. Article 9B implies, in fact, that this State may also, if its domestic law entitles it to do so, tax property falling under Articles 5 and 6. The Convention thus does not lead to any modification in the rate of the tax calculated on the total estate according to the law of the State of domicile.” (Italics, VD)

4.3 Conclusion of Chapter 4

In this chapter, I presented the benchmark of the update work. As the OECD IHTMTC reflects the principles of death and gift tax laws of the majority of the OECD member countries, I argued that such a benchmark could be found only within the system that the OECD has introduced, namely the OECD IHTMTC and its Commentary. I called this benchmark “the proposed inheritance and gift tax” and observed that it consists of four elements: the *mortis causa* or *inter vivos* levying of the tax, the windfall justification, the definition

of critical terms in accordance with civil law and the ability-to-pay taxes justification. In that regard, it is important to note that the fact that a model does not meet (some of) the elements of the benchmark does not automatically mean that it becomes ineffective or a “bad model”. However, in my view, a model that is in line with (some of) the elements of this benchmark does seem to address the problems of cross-border inheritances and donations in a more comprehensible manner (considering the objectives of the OECD IHTMTC) than a model that is not in line with (some of) these elements.

The first element of the proposed inheritance and gift tax is its *mortis causa* or *inter vivos* imposition. More specifically, the proposed inheritance and gift tax is levied *by reason of (the event of) death or a donation* to the exclusion of other events that may trigger taxation. On the contrary, the taxable event, the taxable property, the taxable person and the starting point of taxation seem to be immaterial as derived from Articles 2 and 9B (1) of the model. Nevertheless, I note that donor-based taxes seem to take priority over donee-based taxes. In the same vein, starting points of taxation that reflect a degree of integration of a person with the community of a state seem to take priority over starting points of taxation that do not reflect such a degree of integration.

The levying of the tax on the *mortis causa* or *inter vivos* transferred or received windfalls serves as the second element of the benchmark. More specifically, the proposed inheritance and gift tax is levied on the unearned advantage, the windfall that the recipient receives without contributing to it. This can be derived from Articles 2(2) and Commentary on Article 9A of the model.

The third element of the benchmark of the proposed inheritance and gift tax is the definition of some critical terms for its imposition in accordance with civil law (family law, matrimonial property law and the law of succession). The Commentary on Articles 1 and 4 of the OECD IHTMTC already acknowledges the connection of the existing inheritance and gift tax laws with the applicable civil laws in several sections.

Finally, the fourth element of the proposed inheritance and gift tax benchmark is the ability-to-pay-taxes justification. The *mortis causa* or *inter vivos* transfer of property increases the beneficiaries' financial capacity and, thus, their ability-to-pay-taxes. The recognition of the ability-to-pay taxes justification as the fourth element of the proposed inheritance and gift tax can mainly be derived from the Commentary on Article 9A of the OECD IHTMTC, which refers to the application of the progression with exemption method.

In the following chapter, I will discuss the provisions of the OECD IHTMTC and its Commentary that, in my view, can be improved having regard to the objectives of the OECD IHTMTC and the proposed inheritance and gift tax, concerning each separate problem of cross-border death and gift taxation.

The provisions of the OECD IHTMTC and its Commentary that can be improved

In this section, I discuss the provisions of the OECD IHTMTC and its Commentary which, in my view, can be improved having regard to the objectives of the OECD IHTMTC¹ and the proposed inheritance and gift tax. The discussion of these provisions takes place in relation to each problem of cross-border inheritances and donations. The suggested provisions can subsequently form part of an updated OECD IHTMTC. Alternatively, the suggested provisions can be included in a multilateral convention that can amend the existing inheritance and gift tax treaties and form the basis of negotiation of new inheritance and gift tax treaties.²

5.1 Double or multiple taxation

As mentioned in section 3.2.1.2, the OECD IHTMTC primarily aims at resolving the double taxation problem of cross-border inheritances and donations due to the parallel and uncoordinated application of the OECD member countries' inheritance and gift tax systems. Nevertheless, I observe that certain cases of double or multiple taxation are not covered by the model or are solved in a manner that does not seem to take into account the elements of the proposed inheritance and gift tax.

In that regard, I note that double or multiple taxation is a problem that severely affects the application of the proposed inheritance and gift tax. More specifically, when the cross-border inheritance and donation is taxed in more than one state, the application of the ability-to-pay-taxes and the windfall justifications – two elements of the proposed inheritance and gift tax – seems to be severely hindered: the above justifications over-apply in a cross-border setting and thus inheritance and gift taxation seems to fail to achieve its objectives. Such over-application does not, however, take place in the event of a domestic inheritance and donation that is not subject to double taxation.

Arguably, inheritance and gift taxation also seem to fail to achieve its objectives even if the model solves the double or multiple taxation problem but in a manner that does not seem to take into account (some of) the elements of the proposed inheritance and gift tax. As a result, the OECD member countries may not easily endorse the model that in certain instances seems to contradict their death and gift tax laws as well as the elements of the proposed inheritance and gift tax. As a result and in the absence of an inheritance

¹ See, among others, Commentary on Article 6 of the OECD IHTMTC, para. 13.

² See in that regard, OECD's BEPS action 15 and the MLI approach.

and gift tax treaty, the cross-border inheritance and donations may be subject to double or multiple taxation.

In the following sections, I will discuss the provisions of the model with regard to double or multiple taxation that can be improved having regard to the objective of the OECD IHTMTC of addressing double or multiple taxation and the elements of the proposed inheritance and gift tax.

5.1.1 *Narrow scope and subsidiary taxing rights (Articles 1,4, 7 and 9A and 9B)*

Under Article 1 of the OECD IHTMTC, “[t]his Convention shall apply: a) to estates and inheritances where the deceased was domiciled, at the time of his death, in one or both of the Contracting States, and b) to gifts where the donor was domiciled, at the time of the gift, in one or both of the Contracting States.” The term “person domiciled in a Contracting State” is further defined in Article 4(1) of the OECD IHTMTC as follows: “For the purposes of this Convention, the term “person domiciled in a Contracting State” means any person whose estate or whose gift, under the law of that State, is liable to tax there by reason of the domicile, residence or place of management of that person or any other criterion of a similar nature. However, this term does not include any person whose estate or whose gift is liable to tax in that State only in respect of property situated there.”^{3, 4}

It follows that the term “fiscal domicile” is crucial because it determines the scope of the model and the inheritance and gift tax treaties at hand. The model and the treaties apply to estates of or gifts made by persons fiscally domiciled in one or both Contracting States. Under the Commentary on Article 1 of the OECD IHTMTC, “[m]ost Member countries take the view that it is preferable to limit the scope of a double taxation convention by reference to the property of persons who are either domiciled in, or are residents of, one or both of the Contracting States.” Furthermore, this person can be either the deceased (in the case of an inheritance or estate tax) or the donor (in the case of a gift tax): “[i]t is considered that, by taking part in the economic life of the State where he has settled, although not possessing its nationality, and by contributing to the public expenditure there like a citizen of the country, the deceased will normally have become sufficiently integrated in the community for it to be proper for him and his heirs to benefit from any international conventions for the avoidance of double taxation which may be concluded by his State of domicile.”^{5, 6}

Moreover, as the criteria establishing fiscal domicile are listed in Article 4(1) of the model, any other criterion, which under the Contracting States’ domestic laws may give rise to inheritance and gift tax liability on a worldwide basis, is, in principle, disregarded. I note, however, that, although the criteria establishing fiscal domicile are listed in Article 4(1) of the model, fiscal domicile is, in essence, a national term. The criteria “residence”,

3 On the contrary, the term “fiscal domicile” of Article 4(1) of the 1966 OECD IHTMTC was defined under each Contracting States’ domestic laws. Article 4(1) of the 1966 OECD IHTMTC, “For the purposes of this Convention, the question whether a person at his death was domiciled in a Contracting State shall be determined according to the law of that State.”

4 See also Frans Sonneveldt and Johan Zuiderwijk, “Harmonization of Inheritance, Estate and Gift Taxes within the EU?”, *EC Tax Review* 4, no. 2 (1995): 95.

5 Commentary on Article 1 of the OECD IHTMTC, para. 1.

6 Therefore, it could be argued that the OECD IHTMTC favours the donor-based taxes (see also section 3.1.1.2).

“domicile”, “place of management” and “criterion of a similar nature” are left undefined and are thus defined under the law of each Contracting State. This is derived from Article 3(2) of the model which reads as follows: “as regards the application of the Convention by a Contracting State, any term not defined there shall, unless the context otherwise requires, have the meaning which it has under the law of that State concerning the taxes to which the Convention applies.”

In addition, I observe that Article 4(1) of the 1982 OECD IHTMTC reflects the wording of Article 4(1) of the 1977 OECD ICTMTC, which, however, refers to a resident of a Contracting State instead of a person domiciled in a Contracting State.⁷ Nevertheless, under paragraph 1 of the Commentary on Article 4 of the OECD IHTMTC, “[a]lthough it was felt desirable that the wording [VD: of the two models] should be similar, “domiciled in” has been used instead of “resident of” as this was the term used in the 1966 Estate Tax Draft”.

This arguably narrow definition of the term “fiscal domicile” in Article 4(1) of the OECD IHTMTC seems to contradict some OECD member countries’ inheritance and gift tax legislations under which the personal nexus of a person is determined under concepts that are not mentioned in Article 4(1) of the model. I refer in that regard to the concept of nationality (section 3.1.1.1.3).

For instance, Goodman noted that the US inheritance and gift tax treaties must deal not only with the criterion of [fiscal] domicile, but also with the priority of taxation of the state of [fiscal] domicile over the state of nationality. For this reason, the US reserved its subsidiary right to impose an estate tax on a residual basis, granting a credit for the foreign tax paid in the state of domicile.⁸ Worthy of note is that fiscal domicile in the context of the Denmark – Finland – Iceland – Norway – Sweden Inheritance and Gift Tax Treaty (“Nordic inheritance and gift tax treaty”) is established, amongst others, based on the deceased’s or the donor’s nationality.

Second, the assessment of the fiscal domicile at the level of the deceased or the donor cannot be easily understood by those OECD member countries that assess the personal nexus at the beneficiary, the donee or both the beneficiary and the donee. For example, the application of the OECD IHTMTC based on the deceased’s or the donor’s fiscal domicile was the reason why Japan reserved its position on the model as a whole,⁹ given that under its domestic law, the sole criterion for worldwide tax liability is the domicile (the so-called “jusho”) of the beneficiary, legatee, or donee. Inevitably, countries like Japan

7 The sole reference in Article 4(1) of the 1966 OECD IHTMTC to the “domicile” of the deceased or the donor was replaced by the “domicile, residence or place of residence [...] or any other criterion of a similar nature”, Cf. Guglielmo Maisto, “General Report: Death as a Taxable Event and its International Ramifications,” in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 46.

8 Wolfe D. Goodman, “The OECD Model Estate Tax Convention,” *European Taxation* 34 (October/November 1994): 340.

9 Commentary on Article 1 of the OECD IHTMTC, para. 31.

cannot easily endorse the model and conclude inheritance and gift tax treaties with other OECD member countries.¹⁰

Nevertheless, I am of the view that the narrow scope of the model does not seem to counter the objective of the model of addressing double taxation and the proposed inheritance and gift tax *in situations involving only two states*.¹¹ This is because those who drafted the OECD IHTMTC suggested a “subsidiary taxing right” provision to compensate a possible narrow scope in certain instances (paragraphs 70-72 of the Commentary on Articles 9A and 9B of the model). These paragraphs read in conjunction with paragraphs 5-7 of the Commentary on Article 7 and paragraph 5 of the Commentary on Article 1 allow states to depart from the rules of the OECD IHTMTC where there is a compelling reason to do so. Such a reason is the establishment of taxing rights under different rules and concepts than those endorsed in the model with addressing of tax avoidance where the deceased, in contemplation of death, or the donor, in contemplation of making a gift, moved his domicile to the other state with the intention of escaping taxation by his former state of domicile. In these cases, states can maintain their subsidiary rights on the grounds of the deceased’s or the donor’s nationality/the secondary domicile, or the heir’s, legatee’s, or donee’s nationality/domicile. I note, however, that paragraph 71 of the Commentary on Article 9A and 9B states that these rights can be exercised for a limited period only, and in any event, no longer than ten years after the deceased or the donor has ceased to be domiciled in their territory.

While the provision for subsidiary taxing right counterbalances by some means the narrow scope of the model and the treaties,¹² the ten-year limitation period and the underlying tax-abusive motive are, in my view, two elements that could be perhaps revisited having regard to the objective of the OECD IHTMTC of addressing double taxation and the proposed inheritance and gift tax. Reference is made in that regard to section 6.1.1 of this study.

5.1.2 Multiple taxation (Articles 1 and 4)

The narrow scope of the OECD IHTMTC and the tax treaties has one more significant consequence: the elimination of *multiple* taxation of estates, inheritances and gifts is contingent on an extensive tax treaty network.¹³ This is particularly understood in situations where three (or more) states seek to tax the cross-border inheritance and donation. In that regard, paragraphs 9 (example 3) and 10 (example 4) of the Commentary on Article 1

10 Japan has concluded only one inheritance and gift tax treaty with the US, this in 1954. More on the application of this treaty, see Masatami Otsuka, “Intersection of the Japanese Inheritance Tax and the United States Estate Tax—Notes on International Double Taxation of Inheritances and Gifts,” *Intertax* 22, no. 2 (1994). See also Frans Sonneveldt, “Application of death taxes in the emigration and immigration countries,” in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 11.

11 On the contrary, it could be argued that the narrow scope of the model may counter the objective of the model of addressing double taxation and the proposed inheritance and gift tax when the cross-border inheritance and donation may be taxed by more than two states (see section 5.1.2).

12 Therefore, Goodman’s observation that, the OECD IHTMTC disregards any other criterion which, under the domestic law of a member country, may lead to a comprehensive tax liability, may not be completely accurate. Wolfe D. Goodman, “The OECD Model Estate Tax Convention,” *European Taxation* 34 (October/November 1994): 338.

13 See also, Timothy Lyons, “Double Taxation of Estates, Inheritances and Gifts in the EU and the Anglo-American Trust,” *European Taxation* 37, no. 3 (1997), 76.

of the OECD IHTMTC provide examples of situations where three states may seek to tax the deceased's property.

In example 3 of the Commentary, State A may seek to tax the deceased's worldwide property based on his nationality, State B based on the deceased's residence and State C may seek to tax the deceased's *mortis causa* transferred immovable property because it is located in its territory, as seen below.

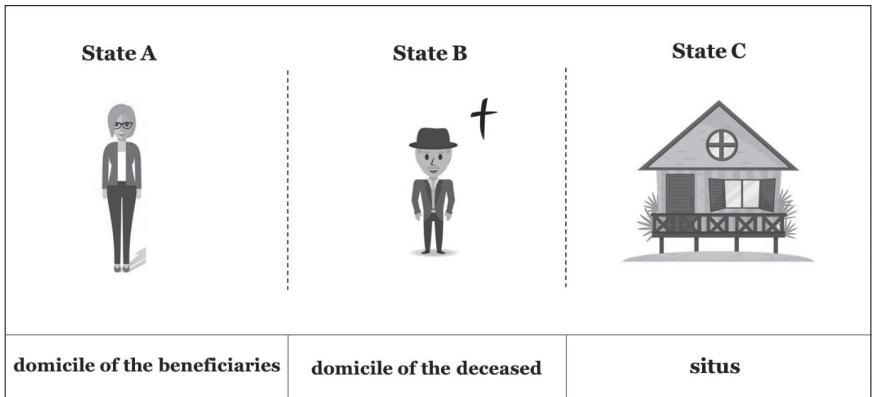
State A 	State B 	State C 
nationality	residence	situs

The parallel exercise of tax jurisdiction by States A, B and C may, therefore, result in multiple taxation of the immovable property located in State C.

In addition, under the Commentary, the state of the deceased's residence (State B) has not concluded a tax treaty with either State A or C.¹⁴ Only States A and C have concluded a double tax treaty. However, this is immaterial since this would not be applicable because of its narrow scope: the deceased had, at the time of his death, his fiscal domicile in a third country (State B). In other words, only if the deceased had been fiscally domiciled in either State A or C, would the A-C tax treaty have been applicable. Given, however, that the A-C tax treaty is not applicable and given the fact that State B has not concluded a tax treaty with either State A or C, the deceased's property is eventually taxed by all states involved (setting aside the unilateral relief mechanisms).

In example 4 of the Commentary, State A may seek to tax the beneficiary's worldwide property based on the beneficiary's domicile, State B based on the deceased's domicile and State C may seek to tax the deceased's *mortis causa* transferred immovable property because it is located in its territory, as seen below.

14 If this would be the case, only State B would have been entitled to tax the immovable property in State C under the A-B tax treaty (so State A cannot tax) and State C would have been entitled to tax the immovable property under the B-C tax treaty (with State B providing double taxation relief by means of an exemption or a credit). As a result, the multiple taxation problem of the cross-border inheritance at hand would have been addressed.



As a result, the parallel exercise of tax jurisdiction by States A, B and C may result in multiple taxation of the immovable property.

In addition and similar to the previous example, under the Commentary, the state of the deceased's domicile (State B) has not concluded a tax treaty with either State A or C.¹⁵ Only States A and C have concluded a double tax treaty. However, this is immaterial as this would not be applicable because of its narrow scope: at the time of his death, the deceased had his fiscal domicile in a third country (State B). In other words, only if the deceased had been fiscally domiciled in either State A or C, would the A-C tax treaty have been applicable. This is not the case since there is no link with the fiscal domicile of the deceased in either State A or C. Given therefore that the A-C tax treaty is not applicable and given the fact that State B has not concluded a tax treaty with either State A or C, the deceased's property is eventually taxed by all states involved (setting aside the unilateral relief mechanisms).

It follows from the above two examples of the Commentary that, due to the narrow scope of the OECD IHTMTC,¹⁶ cases of multiple taxation cannot always be addressed. This does not seem to be in line with the primary objective of the OECD IHTMTC, i.e. the allocation of taxing rights for the avoidance of double taxation and the proposed inheritance and gift tax; if double taxation arguably frustrates the application of the ability-to-pay taxes and windfall justifications – two elements of the proposed inheritance and gift tax – in a two-country situation, multiple taxation should have the same effect in situations involving more than two states.

The suggestion of those who drafted the OECD IHTMTC to the multiple taxation concern is stated in paragraph 12 of the Commentary on Article 1: "[t]he Committee on Fiscal Affairs decided not to include [...] residual cases within the scope of the Model Convention since such forms of tax liability are found only in a few Member countries. Moreover, in the rare

15 If this would be the case, only State B would have been entitled to tax the immovable property in State C under the A-B tax treaty (so State A cannot tax) and State C would have been entitled to tax the immovable property under the B-C tax treaty (with State B providing double taxation relief by means of an exemption or a credit). As a result, the multiple taxation problem of the cross-border inheritance at hand would have been addressed.

16 That results in the application of the tax treaties only if the deceased or the donor had his fiscal domicile – as determined in Article 4(1) of the OECD IHTMTC – in a Contracting State.

practical cases, double taxation will often be avoided by the unilateral reliefs provided in the countries concerned. Finally, where double taxation does occur, it will be prevented where Member countries adhere to the Council's recommendation and conclude double taxation conventions on the basis of this Model. Accordingly, as the network of double taxation conventions among Member countries becomes more widespread, unrelieved double taxation will become progressively rarer. There seemed therefore to be no need to enlarge the Convention to cover such special cases.”¹⁷

Nevertheless, bearing in mind that the narrow scope of the model is sometimes the reason why states do not conclude inheritance and gift tax treaties,¹⁸ it should be explored whether the inclusion of residual cases to treaties that are not applicable because the deceased is not fiscally domiciled in a Contracting State can potentially address or at least mitigate the multiple taxation problem. Reference is made in that regard to section 6.1.2.2.1 of this study. Furthermore, it should be explored whether the conclusion of a multilateral convention can address the problem as well. Reference is made in that regard to section 6.1.2.2.2 of this study.

5.1.3 *The tiebreaker rule for individuals (Article 4(2))*

Article 4(2) of the model contains a tiebreaker rule that aims to address dual fiscal domicile conflicts, i.e. situations where both Contracting States consider the deceased or the donor to be fiscally domiciled in their territory. More specifically, “[w]here by reason of the provisions of paragraph 1 an individual is domiciled in both Contracting States, then his status shall be determined as follows:

- a) he shall be deemed to be domiciled in the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be domiciled in the State with which his personal and economic relations are closer (centre of vital interests);
- b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be domiciled in the State in which he has an habitual abode;
- c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be domiciled in the State of which he is a national;
- d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.”

It follows that the OECD IHTMTC's tiebreaker rule for individuals is similar to that of the OECD ICTMTC, thereby adopting the same connective criteria (permanent home, centre of vital interests, habitual abode, nationality and mutual agreement procedure) with the latter for the determination of the deceased's or the donor's fiscal domicile, and affording the primary taxing right to the Contracting State which the connective criterion indicates. The fact that the Commentary on Article 4(2) of the OECD IHTMTC closely mirrors that

¹⁷ Commentary on Article 1 of the OECD IHTMTC, para. 11.

¹⁸ Especially states, which levy inheritance and gift taxes based on principles different from those adopted in the model.

of Article 4(2) of the OECD ICTMTC confirms the above.¹⁹ Both tiebreaker rules, thus, give preference to the Contracting State of the person's permanent home, his centre of vital interests, his habitual abode, his nationality and, as a last resort, to what the Contracting States will decide following a mutual agreement procedure. It follows that through the application of these connective criteria, the Contracting States aim at identifying the *attachment* of the individual with a state and at affording primary taxing rights to the Contracting State with which this person is the most attached. As a result, the attachment of a person with a Contracting State is examined alike in both models as also shown by the similarities of the commentaries on both OECD tiebreaker rules.

Nevertheless, it could be argued that the assessment of the attachment of a person with a Contracting State under the same connective criteria for both inheritance/gift and income tax treaty purposes may be problematic in some cases. In my view, the OECD IHTMTC's tiebreaker rule seems to counter the manner in which certain states establish the lifelong attachment of a person with their territory and the third element of the proposed inheritance and gift tax (connection with civil law). For example, the deceased's or donor's intention to fiscally domicile in a Contracting State – an essential element of some inheritance and gift tax legislations – seems to be deliberately ignored. Under paragraph 22 of the Commentary on Article 4, “[t]he determination of the individual's intention can result in endless disputes and, what is more, to manipulation on the part of the heirs.” One would expect, however, that those who drafted the OECD IHTMTC would have explicitly mentioned in the Commentary on Article 4 of the OECD IHTMTC that states are free to insert an intention test into the tiebreaker rule of their inheritance and gift tax treaty.

Likewise, the requirement of a minimum period of presence of a person in a Contracting State – usually forming part of the assessment of his lifelong attachment to the state – does also not seem to be reflected in the wording of the tiebreaker rule. For example, the determination of the fiscal domicile based on the availability of a permanent home *without a minimum period of presence* in a Contracting State seems again to contradict the manner in which certain states establish the lifelong attachment of a person with their territory and the proposed inheritance and gift tax. Sonneveldt (2001) stated in that regard that a minimum period of presence might need to be specified before the individual acquires a fiscal domicile in the Contracting State in which he is living.²⁰ In that regard, I note that the interpretation of the terms “permanent home” and “habitual abode” under the Commentary on Article 4 seems to favour such an approach.²¹

One could argue that due to the lack of an option for an intention test and of a minimum period of presence in a Contracting State Article 4(2) of the OECD IHTMTC, the tie-breaker rule counters a) the manner in which certain states aim to establish the lifelong attachment of a person with their territory and b) the third element of the proposed inheritance and gift tax (connection with civil law). In that regard, I observe that the tax treaty practice seems to have already recognised the lack of these two elements from the OECD IHTMTC's tiebreaker rule of individuals. Some treaties, thus, include a specific tiebreaker rule that takes precedence over the general one. This rule includes, amongst others, an intention and

19 Alexander Rust, “The Concept of Residence in Inheritance Tax Law,” in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto, (Amsterdam: IBFD, 2010), 92.

20 Frans Sonneveldt, “General Report: Avoidance of Multiple Inheritance Taxation within Europe,” *EC Tax Review* 10, no. 2 (2001): 95.

21 Commentary on Article 4(2) of the OECD IHTMTC, paras. 19 and 28.

minimum presence test. Furthermore, other treaties include a requirement for a minimum period of presence in a Contracting State in the existing tiebreaker rule for the assessment of whether the deceased or the donor has maintained a permanent home there. Reference is made in that regard to section 6.1.3 of this study.

5.1.4 Overlaps with the OECD ICTMTC (Article 2)

One of the most essential problems of the OECD IHTMTC relates to the possible overlaps of its subjective scope with that of the OECD ICTMTC. According to Brandstetter, “[i]t seems that there lies a key reason why so few [inheritance tax] treaties have been concluded.”²² At first sight, there seems to be no overlap between the two models, but a closer look shows that this is possible, especially if the states involved apply different kinds of taxes to the same transfer of property. These overlaps can give rise to double taxation or double non-taxation.²³ Lang provided the example of a donation from an Austrian foundation to its foreign-located beneficiaries after 1993.^{24,25} In 1993, Austria amended its inheritance and gift tax laws and introduced a gift tax exemption for donations from an Austrian foundation to its beneficiaries.²⁶ On the other hand, the Austrian income tax rules were amended to include an income tax liability at the level of the beneficiaries. In Lang’s example, Austria has concluded both an income and capital tax treaty and an inheritance and gift tax treaty with the state of the beneficiaries’ residence.

Lang noted first that “[o]ne could question whether the income tax liability in respect of these donations is identical or at least similar to the tax liability under the other taxes listed in the bilateral equivalents to [Article] 2(3) of the [OECD ICTMTC].” If, however, Austria taxes the transfer from the Austrian foundation under its income tax rules, it will seek to apply the income tax treaty with the state of the non-resident beneficiaries²⁷ and, more specifically, Article 21 (“other income”) of the *income and capital tax treaty*. Consequently, the state of the beneficiaries’ residence has exclusive taxing rights. Austria is thus precluded from taxing the donation in the hands of the non-resident beneficiaries. However, if the state of the beneficiaries’ residence regards the transfer from the Austrian foundation to its resident beneficiaries as a gift, it will apply Article 7 of the *inheritance and gift tax treaty*, which grants exclusive taxing rights to Austria, the Contracting State of

22 Patricia Brandstetter, “*Taxes Covered*”: A Study of Article 2 of the OECD Model Tax Conventions (Amsterdam: IBFD, 2011), 182.

23 Nevertheless, I note that this type of double taxation is not the outcome of two states qualifying the same transfer of property differently. On the contrary, it is the outcome of two states applying different tax *treaties*. Therefore, this type of double taxation could not be easily reflected in section 3.1 of this study. Considering, however, that in this situation both states would levy a different type of tax on the same transfer of property, one could argue that this situation of double taxation is covered in section 3.1.1.4 of this study.

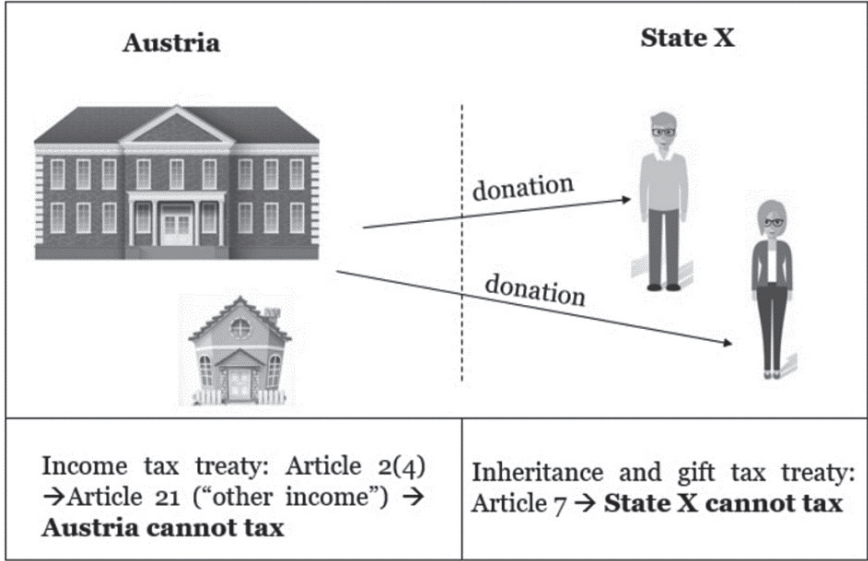
24 Michael Lang, ““Taxes Covered” in What is a “Tax” According to Article 2 of the OECD Model?,” *Bulletin for International Taxation* 59, no. 6 (2005): 223.

25 In that regard, I note that the example works only if the donated asset is not located in the state where the beneficiaries reside (see example below).

26 Please note that Austria abolished its inheritance and gift tax laws in 2008.

27 Either using the list of Article 2(3) of this treaty, which lists income taxes as existing taxes to which the treaty applies, or using applying Article 2(4) of the inheritance and gift tax treaty and concluding that the income tax is not substantially similar to the previously levied gift tax.

the fiscal domicile of the donor, the Austrian foundation.²⁸ The state of the beneficiaries' residence will thus not seek to levy tax on the gift concerned also given that the immovable property is located in Austria.²⁹ This leads to double non-taxation.



Moreover, I observe that, reversing the legal systems of the Contracting States, the donation from the Austrian foundation to its non-resident beneficiaries may be subject to double taxation. If Austria applies gift taxes to the *inter vivos* transfer of property, it may seek to apply the inheritance and gift tax treaty with the Contracting State of the non-resident beneficiaries. More specifically, it may seek to apply Article 7 of this treaty that grants exclusive rights to Austria with regard to immovable property located in Austria. On the other hand, the Contracting State of beneficiaries' residence that levies income taxes on gifts, may seek to apply the income tax treaty with Austria and more specifically Article 21 ("other income"). This Article allocates exclusive taxing rights to this State since the beneficiaries are resident in its territory. As a result, the Contracting State of the beneficiaries' residence may also seek to levy tax on the *inter vivos* transfer of property at hand under the income and capital tax treaty concluded with Austria. It follows that the same *inter vivos* transfer of property is taxed by both Austria and the state of the beneficiaries' residence under two different tax treaties.³⁰

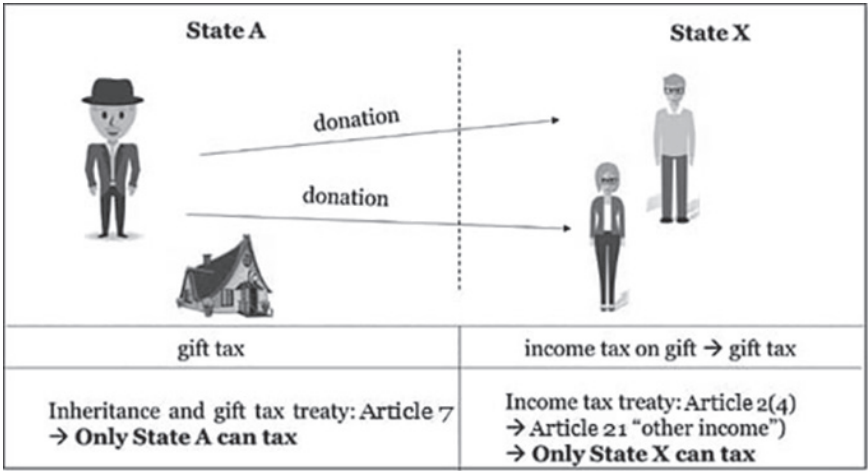
28 Patricia Brandstetter, "Taxes Covered": A Study of Article 2 of the OECD Model Tax Conventions (Amsterdam: IBFD, 2011), 198.

29 Therefore, State X cannot apply Article 5 of the inheritance and gift tax treaty and tax the immovable property.

30 In the same vein, Martín Jiménez refers to possible overlaps with regard to life insurances or private pension plans if the person who entered into the contract is different from the beneficiary and the company paying the benefit is a resident in the state of the objective nexus. See Martín Jiménez, "Defining the objective scope of income tax treaties: the impact of other treaties and EC law on the concept of tax in the OECD Model," *Bulletin for International Taxation* 59, no. 10 (2005): 437-438.

Lang’s example shows, in my view, that there are situations in which it is difficult to determine whether a certain tax liability shall be covered by an income and capital tax treaty or an inheritance and gift tax treaty.³¹ More importantly, it shows that the application of a different type of tax treaty by each Contracting State can lead to double taxation, or double non-taxation (as it will be discussed in section 5.2.1).

Similar problems may arise if a Contracting State amends its income tax legislation, introduces an inheritance and gift tax liability at the level of the beneficiaries and, *subsequently*, concludes an inheritance and gift tax treaty with another state. Considering that it may lose its taxing rights or have limited taxing rights in the case of a *mortis causa* or *inter vivos* transfer of property (not located in its territory) from a non-resident donor/deceased to his resident beneficiaries/donees, it may seek to safeguard its taxing rights arguing that the recently introduced inheritance or gift tax is substantially similar to the previously levied income tax. Therefore, it will seek to apply Articles 2(4) and 21 of the income and capital tax treaty and tax the resident beneficiaries/donees on their received inheritance or donation based on Article 21 of the income tax treaty.³² On the other hand, the Contracting State of the fiscal domicile may invoke Article 7 of the inheritance and gift tax treaty and tax the deceased’s or the donor’s worldwide property apart from the property that is listed in Articles 5 and 6 of the treaty and is located in the other Contracting State. Once again, the application of a different type of tax treaty by each Contracting State can give rise to double taxation of the same transfer of property, as seen by the example below.



In my view, the overlaps between the two models and types of tax treaties can be addressed by improving the OECD IHTMTC and especially Article 2 of the model. In my view, more taxes than those mentioned in Article 2 of the OECD IHTMTC can be included in the scope of the model as arguably, this would be in line with the proposed inheritance and gift tax

31 Michael Lang, “Taxes Covered” in What is a “Tax” According to Article 2 of the OECD Model?,” *Bulletin for International Taxation* 59, no. 6 (2005): 223.
32 Patricia Brandstetter, “Taxes Covered”: A Study of Article 2 of the OECD Model Tax Conventions (Amsterdam: IBFD, 2011), 198.

and the objective of the model of addressing double taxation. Improvements to Article 2 of the model in relation to this point are presented in section 6.1.4 of this study.

5.1.5 Estate and inheritance taxes (Articles 2 and 9B)

In line with Article 2(1) of the OECD IHTMTC, a tax treaty applies to taxes on estates and inheritances and on gifts. In this section, I will focus on the interaction between “the taxes on estates” and “the taxes on inheritances”. As noted in the previous section, Article 2(2) of the OECD IHTMTC defines these taxes: taxes on estates are taxes imposed by reason of death on the corpus of the estate and taxes on inheritance tax are “taxes on inheritances” that are levied “on the parts of the estate as devolved on different heirs or legatees”.³³

In section 2.2.1, I discussed the differences between inheritances and estate taxes. Civil law states usually levy an inheritance tax, which is an acquisition-based transfer tax applicable to the share of the inherited property received by each beneficiary (and, thus, not on the estate as a whole). Its taxable event is the enrichment of the beneficiary upon the deceased’s death. The taxable person is each beneficiary who receives an inheritance. On the contrary, the taxable event of an estate tax is the *mortis causa* transfer of property, in which case the deceased’s whole estate (or sometimes the deceased) is regarded as being the taxable person. As a result, the estate as a whole, rather than the property received by each particular beneficiary, becomes the point of departure.³⁴ Moreover, the estate is often treated as a legal person under both domestic and tax treaty law, and the tax is often determined based on progressive tax rates that depend on the value of the estate and usually the degree of kinship between the deceased and the beneficiaries.

Despite the remarkable differences between these two types of death taxes (taxable event, tax base, taxpayer), I observe that states have already concluded treaties which apply to both of them. For example, the US has signed 16 inheritance and estate tax treaties, most of them with states which levy an inheritance tax (e.g. France, Netherlands and Germany). In most of these treaties, the Contracting State of the fiscal domicile credits the estate tax levied by the US in its capacity as the other Contracting State on the property that it may tax under Articles 5 and 6 of the treaty. Likewise, the US, when taxing in its capacity as the Contracting State of the fiscal domicile, provides a credit against its estate tax for the foreign inheritance tax levied in the other Contracting State. Similarly, the UK that levies an estate tax (called “inheritance tax”) has concluded 13 inheritance and gift tax treaties most of them with states which levy an inheritance tax (e.g. France, Italy and the Netherlands).

The credit method for the elimination of double taxation is described in Article 9B of the OECD IHTMTC. Under this Article, “[t]he Contracting State in which the deceased was domiciled at his death, or the donor was domiciled at the time of the gift, shall allow as a deduction from the tax calculated according to its law an amount equal to the tax paid in the other Contracting State on any property which, *in relation to the same event* and in accordance with the provisions of this Convention, may be taxed in that other State.” (Italics, VD). In that regard, I note that the term “in relation to the same event” is left undefined in the Commentary. Nevertheless, the Commentary makes particular reference

33 Commentary on Article 9B of the OECD IHTMTC, para. 78.

34 Frans Sonneveldt, “General Report: Avoidance of Multiple Inheritance Taxation within Europe,” *EC Tax Review* 10, no. 2 (2001): 83.

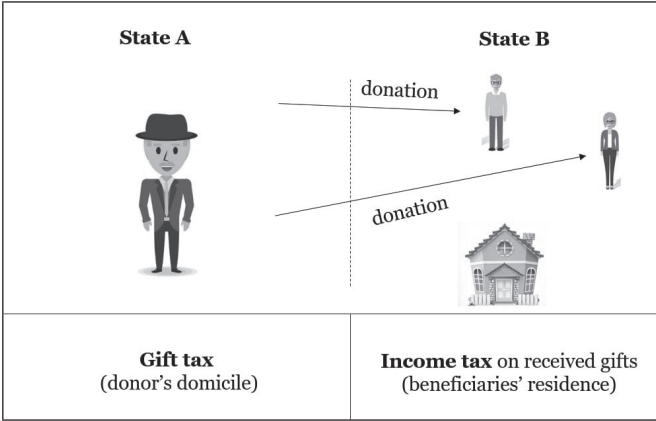
to the application of the credit method between States applying different forms of death duties (and in particular an inheritance tax and an estate tax). Under paragraph 78 of the Commentary on Article 9B of the OECD IHTMTC, “[t]he application of the credit method may become difficult between the Contracting States where one of them imposes an estate tax [...] whereas the other State imposes an inheritance tax [...]”. In addition, the Commentary states in paragraph 80 that “[i]f the State of domicile is the one which levies the estate tax, it may have to decide to what extent it has to give credit against its uniformly levied tax for the taxes which have been levied in the State of situs *on different persons at different rates*. Vice versa, if the State of domicile levies the inheritance tax, it may have to decide which taxes levied in a lump sum on the estate in the State of situs have to be attributed to the different heirs who have taken possession of the different parts of the estate. Member countries are free to settle these difficulties in bilateral negotiations.” (Italics, VD).

As per Maisto’s observation, “[t]he wording of Article 9B restricts the credit to foreign taxes levied ‘in relation to the same event’ without making restrictions on whether the tax is borne by a different person by virtue of differences in the domestic laws of the two states.”³⁵ I agree with Maisto’s observation and am of the view that the wording of Commentary on Article 9B on the application of the credit method between States with different forms of death duties (and, in particular, inheritance taxes and estate taxes) can be improved on this point having regard to the objective of the OECD IHTMTC of addressing double taxation and the elements of the proposed inheritance and gift tax.

5.1.6 *Inheritance/estate/gift taxes and income/capital gains taxes (Articles 2 and 9B)*

As mentioned above, death is an event that can trigger a variety of taxes in the event of a cross-border inheritance. Although most of the OECD member countries levy either an estate tax or an inheritance tax, there are still some states, which levy *mortis causa* income taxes on the beneficiaries or capital gains taxes upon the future alienation of the inherited assets. Some other states impose a capital gains tax liability assessed at the level of the deceased on the deemed distribution of his property as noted in chapter 2. Furthermore, a donation can be subject to a gift tax in a state and to an income tax in another state, as seen below.

35 Guglielmo Maisto, “General Report: Death as a Taxable Event and its International Ramifications,” in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 49.



Because of the wording of Article 2(2) of the OECD IHTMTC, it is unclear whether the model and the treaties apply to *inter vivos* or *mortis causa* income or capital gains taxes. If not, these taxes cannot be credited against the inheritance or the estate tax or gift tax and *vice versa* as the treaty would not cover these taxes.³⁶ More specifically, if the deceased was fiscally domiciled in a state which levies income tax on the beneficiaries' income from inheritance and part of the inherited property is located in a state that levies inheritance tax at the beneficiaries, the state of the deceased's fiscal domicile will most probably not grant a credit for the foreign paid inheritance tax because a) under its domestic laws the latter tax is not of the same nature with the income tax, and b) it will not apply the inheritance and gift tax treaty as the income tax is not covered by the inheritance and gift tax treaty. In the same vein, a state may not allow for a credit of a foreign paid income tax against its gift tax as a) it may consider the former tax not of the same nature with its gift tax, and b) it may not apply the inheritance and gift tax treaty. Double taxation of the same *inter vivos* or *mortis causa* transferred property is thus very likely in these cases.

The discussion on whether other types of *mortis causa* or *inter vivos* taxes can be covered by the model and the treaties is included in the section concerning the overlaps between the two OECD models. Therefore, I refer to section 5.1.4 of this study concerning this issue. If, however, other types of *mortis causa* or *inter vivos* taxes *should* be covered by the model and the inheritance and gift tax treaties, the question arises whether the OECD IHTMTC effectively addresses the double taxation problem arising from the parallel application of different forms of death and gift taxes. It could be argued that this is not the case given the restrictive interpretation of the phrase "in relation to the same event" as laid down in the Commentary on Article 9B of the model. I refer in that regard to the previous section in which I argued that the wording of the Commentary on Article 9B of the OECD IHTMTC can be improved having regard to the objective of the OECD IHTMTC of addressing double taxation and the elements of the proposed inheritance and gift tax with reference to the application of the credit method between States applying different types of death duties.

³⁶ Guglielmo Maisto, "The pursuit of harmonisation regarding taxes on death and the international implications," *Bulletin for International Taxation* 65, no. 4/5 (2011): 255.

5.1.7 Lack of common valuation rules (Articles 9A and 9B)

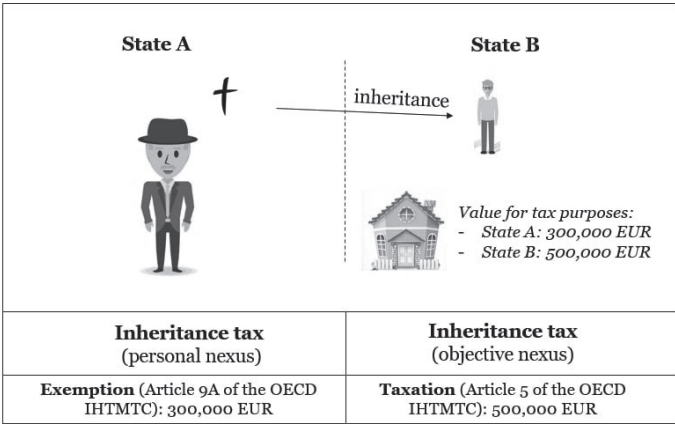
As noted in section 2.2.1, although most inheritance and gift tax laws refer to the market value of the inherited or donated assets and rights at the time of the death or the donation, the rules on the valuation of these assets – even at a market value – vary considerably from state to state. For instance, even though the value of the listed shares is often based on their listing value, there are discrepancies in domestic rules as to the reference date (the date of death, one day prior to it or the average computed over a specified period). Furthermore, some states apply special valuation rules regarding certain types of property, e.g. agricultural property, or rights, e.g. usufruct. In some other states, the cadastral value of the property is the starting point for its valuation for inheritance and gift tax purposes. It follows that the tax value of a property or a right may often differ from its market value at the time of the death or the donation.³⁷

Under paragraph 25 of the Commentary on Articles 9A and 9B of the OECD IHTMTC, “[t]he value of the property to be exempted from tax by the State of domicile is the amount which, but for the Convention, would be subject to its estate, inheritance or gift tax according to its domestic law. This value may differ from the amount subject to tax in the State of situs according to its domestic law.”³⁸ As a result, each Contracting State applies its domestic valuation rules to value the property that is entitled to tax based on the inheritance and gift tax treaty. Treaty practice is consistent with this approach. For example, under Article 9(1) of the Nordic inheritance and gift tax treaty, “[i]n determining the amount on which tax is to be computed, each Contracting State shall value property according to its own laws [...]”

The non-application of the OECD IHTMTC to the property valuation rules can often result in valuation mismatches that may affect the amount of the double taxation relief. More specifically, Articles 5 and 6 of the OECD IHTMTC are called “open distributive rules”. The other Contracting State may also tax the property listed there with the Contracting State of the fiscal domicile providing relief for the inheritance and gift tax paid in the former state under Articles 9A or 9B of the OECD IHTMTC and the treaty. It follows that the Contracting State of the fiscal domicile levies an inheritance or gift tax on the deceased’s or donor’s worldwide property, which is then valued based on its domestic valuation rules. Accordingly, double taxation may occur if the Contracting State of the fiscal domicile places a lower value on the property than that applied by the other Contracting State, as seen below.

37 Guglielmo Maisto, “General Report: Death as a Taxable Event and its International Ramifications,” in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 31.

38 Commentary on Articles 9A and 9B of the OECD IHTMTC, para. 25.



Maisto noted in that regard that “[i]t is odd that valuation of property is not covered by the OECD IHTMTC since this is an important cause for double taxation”. Nevertheless, I observe that also the OECD ICTMTC does not cover valuation rules. Paragraph 25 of the Commentary on Articles 9A and 9B of the OECD IHTMTC mirrors paragraph 39 of the Commentary on Articles 23A and 23B of the OECD ICTMTC which states that “[t]he amount of income to be exempted from tax by the State of residence is the amount which, but for the Convention, would be subjected to domestic income tax according to the domestic laws governing this tax. It may, therefore, differ from the amount of income subjected to tax by the State of source according to its domestic laws”. I also note that also for the application of Article 22 of the OECD ICTMTC (taxation of capital) the determination of the value of the assets rests entirely with the domestic law of each Contracting State.³⁹

In my view, it is not odd that the OECD IHTMTC does not cover property valuation rules. Although the differences in these rules can often result in double taxation of the inheritance or donated property, it should be borne in mind that tax treaties allocate taxing rights between the Contracting States and do not coordinate or harmonise their inheritance and gift tax systems. It follows that the non-application of the OECD IHTMTC to property valuation rules does not seem to contradict the objective of the OECD IHTMTC of addressing double taxation and the proposed inheritance and gift tax. Although this can give rise to double taxation of the cross-border inheritance and donation at hand, the application of different valuation rules by the Contracting States is a mere *disparity* between the tax systems of the Contracting States that can only be addressed through harmonising legislation or coordination.⁴⁰ On the contrary, the OECD IHTMTC does not aim at harmonising the legislation of the Contracting States. Reference is made in that regard to section 3.2.1.2 of this study in which the objectives of the model were discussed.

39 Alexander Rust, “Article 24. Non-discrimination,” in *Klaus Vogel on Double Taxation Conventions*, eds. Reimer Ekkehart and Alexander Rust (Alphen aan den Rijn: Kluwer Law International, 2015), 1573.

40 For example, the tax authorities of the Contracting State of the fiscal domicile may agree to voluntarily recognise the value that the other Contracting State applied to assess its inheritance or gift claim.

The above does not mean, however, that double taxation arising from the different valuation rules of each Contracting State *a priori* falls outside the scope of the inheritance and gift tax treaty. To address this type of double taxation, the Contracting States can initiate the mutual agreement procedure of Article 11 of their treaty. The mutual agreement procedure is discussed in section 5.1.10 of this study. In that regard, I observe that under Article 11(3) “the competent authorities may consult together for the elimination of double taxation in cases not provided for in the Convention”. Although the property valuation rules fall outside the scope of the model, it could be argued that double taxation arising from the application of different valuation rules can be addressed in the framework of a mutual agreement procedure.

5.1.8 Conflicts of qualification (Articles 3 and 5-7)

Although the three distributive rules of the OECD IHTMTC seem to be easily applicable, several conflicts of qualification may arise when the Contracting States apply these rules. This type of conflicts, however, seems to counter the objective of the OECD IHTMTC of addressing double taxation and the proposed inheritance and gift tax.

I observe that there are three types of conflicts of qualification. There are conflicts due to i) the interpretation of the treaty rules, ii) the differences in treaty application to the facts at hand, and iii) the differences in domestic law classifications.

More specifically, the Contracting States may apply different definitions to a treaty term. For example, under Article 5(3) of the OECD IHTMTC, “[i]mmovable property shall have the meaning which it has under the law of the Contracting State in which the property in question is situated.” Therefore, the Contracting State of the fiscal domicile is bound by the interpretation of the other Contracting State. The question arises, however, as to whether the reference to the domestic law of the other Contracting State concerns only its tax law or its laws in general, including its civil laws (as Article 3(2) of the OECD IHTMTC seems to suggest). This is an essential issue in the area of death taxation which, by its nature, is closely related to civil law. If thus the two Contracting States define the term “immovable property” differently, double taxation may arise. To elaborate on this point, the other Contracting State may define the term “immovable property” broadly based on its civil law whereas the Contracting State of the fiscal domicile may define it under the tax law of the other Contracting State, which provides a narrow definition of the term.⁴¹ Thus, under Article 5 of the OECD IHTMTC, the other Contracting State may levy an inheritance tax, for instance, on five assets whereas the Contracting State of the fiscal domicile will consider that the other Contracting State is allowed to levy inheritance tax on only three assets and thus, will levy inheritance tax on the remaining two.

Furthermore, a conflict of qualification due to the differences in treaty application to the facts occurs, for example, in the case of the movable property that forms part of a PE. If the Contracting State of the fiscal domicile considers that there is no PE in the other Contracting State, it will seek to apply Article 7 of the inheritance and gift tax treaty and, thus, tax the movable property. On the contrary, if the other Contracting State considers that there is a PE in its territory, it will seek to apply Article 6 of the treaty and tax the

41 Marc Walter, “Conflicts of Qualification and International Inheritance Cases,” in *Conflicts of Qualification in Tax Treaty Law*, ed. Michael Lang (Vienna: Linde Verlag, 2007), 301–302.

movable property forming part of this PE. The parallel application of Articles 6 and 7 of the treaty results in double taxation.

Finally, the tax treatment of partnerships is an illustrative example of conflicts of qualification arising from the differences in domestic law classifications. If the Contracting State of the fiscal domicile considers the partnership established in the other Contracting State opaque and the latter state considers it transparent, such different treatment may give rise to double taxation. More specifically, the former Contracting State may seek to apply Article 7 of the inheritance and gift tax treaty and thus, tax the interest in the partnership, which is treated as a separate legal entity under its law. On the other hand, the other Contracting State might seek to apply Article 5 of the treaty and tax the immovable property owned by the “transparent” partnership. The parallel application of Articles 5 and 7 of the treaty leads to double taxation.

I observe that the OECD IHTMTC Commentary discusses only the last category of the conflicts of qualification, i.e. conflicts arising due to differences in domestic law classifications. More specifically, the Commentary on Article 7 of the OECD IHTMTC refers to the following four examples of these conflicts:⁴²

- a) The interests in partnerships,
- b) The undistributed estates,
- c) The property held in a trust, and
- d) The companies holding immovable property.

The above conflicts can give rise to double taxation, as presented in paragraphs 17-23 of the Commentary on Article 7 of the OECD IHTMTC. In that regard, paragraph 24 of the Commentary suggests that the Contracting States insert the following paragraph in their treaties, thereby avoiding conflicts arising due to differences in domestic law classifications:

“If by the law of a Contracting State any right or interest is regarded as property not falling under Article 5 or 6, but by the law of the other Contracting State that right or interest is regarded as property falling under either of those Articles, then the nature of the right or interest shall be determined by the law of the State which is not the State of the deceased’s or the donor’s domicile”.⁴³

Under the suggested wording, the Contracting State of the fiscal domicile must follow the classification that the other Contracting State gives to the right or interest at hand. Therefore, if the Contracting State of the fiscal domicile applied Article 7 of the treaty and sought to tax the right or interest at hand, and the other Contracting State applied Articles 5 or 6 of the treaty and sought to tax that right or interest as well, the former state had to recognise the classification which the latter Contracting State gave to this right or interest. Therefore, the Contracting State of the fiscal domicile is required to grant double

⁴² The Commentary does not use the term “conflicts of qualification” but the term “conflicts of treatment”.

⁴³ It should be noted, however, that under paragraph 27 of the Commentary on Article 7 of the OECD IHTMTC, “[i]f Member countries consider that the solution proposed in paragraph 24 does not resolve all conflicts of treatment satisfactorily, they are free to adopt an alternative solution. For example, in the case of partnerships, they may resolve this problem in bilateral negotiations by determining the nature of the property by reference to the law of the State under which the partnership is established.”

taxation relief so that double taxation is avoided.⁴⁴ The proposed wording of paragraph 24 seems to effectively address double taxation arising from conflicts of qualification due to differences in domestic law classifications. Furthermore, it is in line with the so-called “new approach”, which the 1999 OECD’s report “The application of the OECD Model Tax Convention to partnerships” (“the partnership report”) brought to the paragraphs 32.2 and 32.4 of the Commentary on Articles 23A and 23B. Under paragraph 32.3, “[w]here, due to differences in the domestic law between the state of source and the State of residence, the former applies, with respect to a particular item of income or capital, provisions of the Convention that are different from those that the State of residence would have applied to the same item of income, the income is still being taxed in accordance with the provisions of the Convention, as interpreted and applied by the State of source. In such case, the two Articles require that relief from double taxation be granted by the State of residence notwithstanding the conflict of qualification resulting from these differences in domestic law”.

As a result, in my view, double taxation due to conflicts of qualification arising due to differences in domestic law classifications is adequately addressed. The same in my view, however, cannot be said regarding the other types of conflicts of qualification. In that regard, I refer to section 6.1.7 of this study.

5.1.9 *The special features of the law of the Contracting States (Article 1)*

The OECD IHTMTC Commentary makes particular reference to several civil or common-law arrangements such as trusts, usufruct, fideicommissum, and foundations. Paragraph 26 of the Commentary on Article 1 of the OECD IHTMTC, in combination with paragraph 28 of the Commentary on Article 1 of the OECD IHTMTC, states that Article 1 of the OECD IHTMTC covers the charges of setting up these arrangements.

According to the Commentary and Sonneveldt (2001), difficulties may arise concerning the identity of the transferor in the case of taxable events following the original transfer of the property to the arrangement at hand. This is because states may regard different persons as the transferor of the property.⁴⁵ For instance, under paragraph 22 of the Commentary on Article 1 of the OECD IHTMTC, section C (fideicommissum), the successor (ultimate beneficiary) is usually considered to have acquired the property from the creator of the fideicommissum. However, some OECD member countries may regard the property as being acquired for tax purposes from the previous beneficiary and, thus, not from the creator of the arrangement.

The identification of the transferor in such legal arrangements is critical for the application of the inheritance and gift tax treaty: the treaty applies to estates, inheritance, and gifts where the *transferor* – the deceased or the donor – was domiciled in one or both of the Contracting States. In the course of my research, I observed that a disagreement on the identity of the transferor in the case of a fideicommissum may result in the application of more than one inheritance and gift tax treaties with the state of the ultimate beneficiary, the treaty with the Contracting State of the fiscal domicile of the creator and that of the

44 See also, Marc Walter, “Conflicts of Qualification and International Inheritance Cases,” in *Conflicts of Qualification in Tax Treaty Law*, ed. Michael Lang (Vienna: Linde Verlag, 2007), 298 – 299.

45 Frans Sonneveldt, “General Report: Avoidance of Multiple Inheritance Taxation within Europe,” *EC Tax Review* 10, no. 2 (2001): 95.

previous beneficiary. This can give rise to double taxation of the property concerned. If both the state of the fiscal domicile of the creator of the arrangement and the state of the previous beneficiary apply the inheritance and gift tax treaty with the Contracting State of the ultimate beneficiary, they both will seek to tax the property falling under Article 7 of the treaty. The same seems to apply even if the ultimate beneficiary resides in either the state of the fiscal domicile of the arrangement's creator or in that of the previous beneficiary or even in a third state since the deceased's or the donor's fiscal domicile in a Contracting State is critical to the application of the treaty at hand. Similar problems arise regarding arrangements such as trusts, usufruct and foundations. For example, a state may regard the trust as the donor of the property while the state of the settlor's residence may regard the settlor as the relevant donor. As a result, both states may seek to apply different inheritance and gift tax treaties. This may result in double taxation of the same transfer of property from the trust to the trustees by both the state where the trust is established and the state where the settlor is fiscally domiciled.

To solve the difficulties regarding the application of the inheritance and gift tax treaty on the aforementioned legal arrangements, paragraph 27 of the Commentary on Article 1 of the OECD IHTMTC suggests three approaches. The tax treaty at hand could be made to apply on one of the following bases:

- a) to a trust, foundation, fideicommissum or usufruct created by a person domiciled in one or both of the Contracting States;
- b) to a trust, foundation, fideicommissum or usufruct where the beneficiary, on whose death (or at some other event) tax is imposed, is domiciled in one or both of the Contracting States; or
- c) to a trust or foundation established under the law of one of the Contracting States.

Furthermore, under Article 28 of the Commentary on Article 1 of the OECD IHTMTC, "[m]oreover, the Article may have to be modified to cover charges imposed by some States on events occurring subsequent to the creation of a trust, usufruct, fideicommissum or foundation because some States may take the view that the terms "estate" and "gift" are not sufficiently comprehensive to cover such charges (see paragraph 6 of the Commentary on Article 3)."

However, under paragraph 29 of the Commentary, "[d]ue to the differences in the civil and taxation laws of Member countries, it was not possible to insert in the Convention provisions which would be acceptable to all States. It is easier to decide in bilateral negotiations whether and to what extent two States may need special rules. The Contracting States are, therefore, left free to insert special provisions in their bilateral conventions to deal with these problems."

It follows that the application of the inheritance and gift tax treaty to the above legal arrangements and property transfers to and from them is a particularly complicated issue. The differences in domestic laws of the OECD member countries did not allow the formulation of a general rule in the OECD IHTMTC. Nevertheless, I submit that the deliberate non-inclusion of a general rule applicable to situations involving transfers to and from the above legal arrangements and the double taxation issues that may arise does not counter the objective of the model of addressing double taxation and the proposed inheritance and gift tax. The model does not aim at harmonising the legislation of the

Contracting States and, therefore, it is up to them to include a tailor-made provision on the application of their treaty to the legal arrangements of their laws. Besides, the OECD IHTMTC Commentary already suggests three approaches to the application of a treaty to the above legal arrangements.

As a final point, I observe that the mutual agreement procedure of Article 11 of the OECD IHTMTC may facilitate the resolving of disputes regarding the application of an inheritance and gift tax treaty to a legal arrangement and the taxation of the transfer of a property to and from a trust. For example, Article 12 of the Germany – US Inheritance and Gift Tax Treaty (1980) covers issues arising from the taxation of property held by a trust. Under paragraph 2 of this Article, “[w]here differences in the laws of the Contracting States lead to taxation at different times of transfers of property to and from an estate or trust, the competent authorities may discuss the case under Article 13 [mutual agreement procedure] with a view to avoiding hardship, provided that the difference in timing of taxation does not exceed five years.”

5.1.10 *Mutual agreement procedure (Article 11)*

The mutual agreement procedure framework is provided in Article 11 of the OECD IHTMTC. Under Article 11(1), “[w]here a person considers that the actions of one or both of the Contracting States result, or will result for him in taxation, not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic laws of those States, present his case to the competent authority of either Contracting State. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.”

Furthermore, the mutual agreement procedure can be initiated if the tax authorities of each Contracting State need to agree on the interpretation or the application of the treaty (Article 11(3) first sentence). Under paragraph 8 of the Commentary on Article 11 of the OECD IHTMTC, “[i]n practice, the procedure applies to cases, likely to be the most numerous, where the tax charges in question lead to double taxation which it is the specific purpose of the Convention to avoid. Among the most common cases mention must be made of the following: a) differences of interpretation by the two Contracting States as to the determination of domicile (paragraph 2 of Article 4) or the existence of a [PE] or a fixed base (Article 6); b) questions relating to the allocation of debts (Article 8); c) conflicts between the domestic laws of the Contracting States as to whether property falls under Articles 5 and 6 or Article 7.”⁴⁶

Finally, under Article 11(3) second sentence, the competent authorities may consult together for the elimination of double taxation in cases not provided for in the Convention.

It follows from the above that the mutual agreement procedure of the OECD IHTMTC is, in substance, similar to that of the 2017 version of the OECD ICTMTC (Article 25) with the exception that in the OECD IHTMTC there is no arbitration provision, which can be explained by the non-update of the model. The arbitration provision was added to the OECD ICTMTC in the 2008 update. Nevertheless, the Commentary on Article 11 of the OECD IHTMTC reproduces the well-known fact that the mutual agreement procedure provision includes a duty to negotiate, but the competent authorities are required only to use their

46 Commentary on Article 11 of the OECD IHTMTC, para. 8.

best endeavours to resolve the case. The Commentary suggests that the Contracting States could agree on a more far-reaching mechanism to produce a solution. In the case the domestic tax laws and provisions of the treaty preclude an agreement between the competent authorities, it could be reasonable, alternatively, to have regard to considerations of equity.⁴⁷ The Commentary also notes that it appears to be reasonable that the implementation of a mutual agreement procedure should be subject to the acceptance of the taxpayer and that the taxpayer withdraws his suit of law regarding matters that are resolved in the mutual agreement.⁴⁸

Considering the above, I am of the opinion that the OECD IHTMTC's mutual agreement procedure can be improved, having regard to the objective of the model i.e. the allocation of taxing rights between the Contracting States for the avoidance of double or multiple taxation. What happens, for example, if the competent authorities of each Contracting State, cannot resolve the cases submitted to the mutual agreement procedure? Under the current wording of Article 11 of the OECD IHTMTC, the issue seems to remain unsettled and the cross-border inheritance and donation is possibly taxed twice. As a matter of comparison, the OECD ICTMTC's mutual agreement procedure includes an obligatory referral of the unresolved issues to arbitration upon a person's request (Article 25(5) of the OECD ICTMTC).

In section 6.1.8.2 I will suggest the inclusion of an arbitration clause in Article 11 of the OECD IHTMTC for the purpose of addressing the double taxation problem in the context of the mutual agreement procedure.

5.2 Double or multiple non-taxation

As mentioned, the objective of the OECD IHTMTC is to allocate taxing rights between the Contracting States for the avoidance of double taxation of cross-border inheritances and donations that takes place due to the parallel and uncoordinated application of the OECD member countries' inheritance and gift tax systems. Nevertheless, I observed in section 3.2.2 that the model deals in some parts with the problem of double or multiple non-taxation as well.

In that regard, double or multiple non-taxation is a problem that severely affects the application of the proposed inheritance and gift tax. More specifically, when the cross-border inheritance and donation is not taxed anywhere, the application of the ability-to-pay-taxes and the windfall justifications – two elements of the proposed inheritance and gift tax – seems to be severely hindered: the above justifications do not apply in a cross-border setting and thus inheritance and gift taxation seems to fail to achieve its objectives. Such non-application of the above-mentioned justifications, however, does not seem to take place in the event of a domestic inheritance and donation.

5.2.1 Overlaps with the OECD ICTMTC (Article 2)

As mentioned in section 5.1.4 of this study, overlaps between the OECD IHTMTC and the OECD ICTMTC are conceivable. These overlaps can give rise to double taxation or double

⁴⁷ Commentary on Article 11 of the OECD IHTMTC, para. 24.

⁴⁸ Commentary on Article 11 of the OECD IHTMTC, para. 27.

non-taxation. Nevertheless, I note that this type of double non-taxation is not the outcome of two states qualifying the same transfer of property differently. On the contrary, it is the outcome of two states applying different tax treaties. Therefore, this type of double non-taxation could not be reflected in section 3.1.2 of this study.

More specifically, in section 5.1.4, I referred to Lang's example of the donation by the Austrian foundation to its non-resident beneficiaries in a situation where Austria has concluded both a gift tax treaty and an income tax treaty with the state of the non-resident beneficiaries. Lang noted in that regard that "[o]ne could question whether the income tax liability in respect of these donations is identical or at least similar to the tax liability under the other taxes listed in the bilateral equivalents to [Article] 2(3) of the [OECD ICTMTC]."⁴⁹ If, however, Austria taxes the transfer from the Austrian foundation under its income tax rules, it will seek to apply the income tax treaty with the state of the non-resident beneficiaries and more specifically Article 21 ("other income") of the treaty. Consequently, the state of the beneficiaries' residence has exclusive taxing rights. Austria is thus precluded from taxing the donation in the hands of the non-resident beneficiaries. However, if the state of the beneficiaries' residence taxes the transfer from the Austrian foundation under its gift tax rules, it will apply Article 7 of the inheritance and gift tax treaty, which grants exclusive taxing rights to Austria, the Contracting State of the fiscal domicile of the donor, the Austrian foundation. The state of the beneficiaries' residence, thus, will not seek to levy a tax on the gift concerned given that the immovable property is located in Austria. As a result, the *inter vivos* transfer of property from the Austrian foundation to its non-resident beneficiaries is not taxed anywhere.

Lang's example shows, in my view, that there are situations in which it is difficult to determine whether a certain tax liability is to be covered by an income and capital tax treaty or an inheritance and gift tax treaty.⁵⁰ More importantly, it shows that the application of a different type of tax treaty by each Contracting State can lead to double non-taxation. According to Lang, double non-taxation may be perfectly in line with the object and the purpose of tax treaties if a certain treaty precludes a Contracting State from exercising taxing rights and the other Contracting State does not exercise its taxing rights for domestic reasons.^{51, 52} Nevertheless, double non-taxation cannot be accepted, in Lang's view, if it is merely the result of the application of a different treaty (inheritance and gift tax treaty on the one hand and income and capital tax treaty on the other hand).⁵³

In my view, the overlaps between the two models and types of tax treaties seem to counter the objective of the OECD IHTMTC of addressing double non-taxation. This can be

49 Michael Lang, "Taxes Covered" in What is a "Tax" According to Article 2 of the OECD Model?," *Bulletin for International Taxation* 59, no. 6 (2005): 223.

50 Michael Lang, "Taxes Covered" in What is a "Tax" According to Article 2 of the OECD Model?," *Bulletin for International Taxation* 59, no. 6 (2005): 223.

51 Michael Lang, "Taxes Covered" in What is a "Tax" According to Article 2 of the OECD Model?," *Bulletin for International Taxation* 59, no. 6 (2005): 223.

52 However, I observe that even in such a case, paragraph 33 of the Commentary on Article 7 of the OECD IHTMTC (avoidance of factual non-taxation) recommends that the other Contracting State can still safeguard its taxing rights for the avoidance of double non-taxation due to the non-collection of the tax by the Contracting State of the fiscal domicile if the latter state does not exercise its taxing rights due to an exemption/deduction/allowance/credit.

53 Michael Lang, "Taxes Covered" in What is a "Tax" According to Article 2 of the OECD Model?," *Bulletin for International Taxation* 59, no. 6 (2005): 223.

addressed, in my view, by improving the wording of Article 2 of the model. Improvements to Article 2 of the model are presented in section 6.2.1 of this study.

5.2.2 *Conflicts of qualification (Articles 3 and 5-7)*

As mentioned in section 5.1.8, although the three distributive rules of the OECD IHTMTC seem to be easily applicable, several conflicts of qualification may arise when the Contracting States apply these rules. This type of conflicts seems to counter the objectives of the OECD IHTMTC of addressing double non-taxation. In that regard, the OECD IHTMTC does not provide an effective solution to double non-taxation that may arise where double taxation is avoided through an exemption by the Contracting State of the fiscal domicile (Article 9A of the OECD IHTMTC).

For instance, conflicts of qualification due to differences in treaty application to the facts may occur if the Contracting States disagree on the existence of a PE. More specifically, if the Contracting State of the fiscal domicile considers that there is a PE in the other Contracting State, it may refrain from taxing the movable property forming part of this PE (double taxation relief by means of an exemption). This is because it expects that the other Contracting State will tax such property based on Article 6 of the treaty. However, if the latter state considers that there is no PE in its territory, it will not tax the movable property at hand. As a result, the movable property is not taxed anywhere.

In the same vein, the tax treatment of interests in partnerships is an illustrative example of double non-taxation due to conflicts of qualification arising from the differences in domestic law classifications as mentioned in paragraph 20 of the Commentary on Article 7 of the OECD IHTMTC. If the Contracting State of the fiscal domicile (that applies the exemption method for the avoidance of double taxation under Article 9A of the OECD IHTMTC) considers the partnership that is established in the other Contracting State transparent and the latter state opaque, such a different treatment can give rise to double non-taxation. More specifically, the Contracting State of the fiscal domicile will refrain from taxing the interest because, under its domestic law, the interest is considered to be property belonging to a PE situated in the other Contracting State. On the other hand, the other Contracting State (that considers the partnership a separate legal entity under its law) may also refrain from taxing the interest because, under its domestic law, the deceased left property falling under Article 7 (such as in the case of shares in a company). The parallel application of Articles 5 and 7 of the treaty, therefore, leads to double non-taxation.

As mentioned above, the OECD IHTMTC Commentary only deals with conflicts arising due to differences in domestic law classifications. More specifically, the Commentary on Article 7 of the OECD IHTMTC refers to the following four examples of these conflicts:⁵⁴

- a) The interests in partnerships,
- b) The undistributed estates,
- c) The property held in a trust, and
- d) The companies holding immovable property.

⁵⁴ The Commentary does not use the term “conflicts of qualification” but the term “conflicts of treatment”.

To address possible double taxation and double non-taxation issues, paragraph 24 of the Commentary suggests that the Contracting States insert in their treaties the following paragraph, thereby avoiding conflicts arising due to differences in domestic law classifications:

“If by the law of a Contracting State any right or interest is regarded as property not falling under Article 5 or 6, but by the law of the other Contracting State that right or interest is regarded as property falling under either of those Articles, then the nature of the right or interest shall be determined by the law of the State which is not the State of the deceased’s or the donor’s domicile”.⁵⁵

Under the suggested wording, the Contracting State of the fiscal domicile must follow the classification that the other Contracting State gives to the right or interest at hand. Therefore, if the Contracting State of the fiscal domicile applied Article 7 of the treaty and sought to tax the right or interest at hand, and the other Contracting State applied Articles 5 or 6 of the treaty and sought to tax that right or interest as well, the former state had to recognise the classification which the latter Contracting State gave to this right or interest. Therefore, the Contracting State of the fiscal domicile has to grant double taxation relief whatsoever so double taxation is avoided.⁵⁶

I observe, however, that priority to the classification of the other Contracting State is given even if this state applied Article 7 of the treaty and, thus, did not tax the right or interest at hand whereas the Contracting State of the fiscal domicile refrained from taxing the right or interest concerned under Article 9A of the model. This situation could result in double non-taxation⁵⁷ in situations where the Contracting State of the fiscal domicile applies the exemption method for the avoidance of double taxation. This is also confirmed in paragraph 25 of the Commentary on Article 7 that reads as follows: “Under the Convention (without the provision in paragraph 24) State B would lose its right to tax since it regards the interest as falling under Article 7. If State A is a country using the exemption method, it would lose its right to tax the share of the immovable property and of the permanent establishment situated in State B. *Double non-taxation would therefore arise.*” (Italics, VD).

The insufficient addressing of the double non-taxation in the case of the conflicts of qualifications shows, in my view, that the model does not address (aspects of) the jurisdictional double non-taxation issue as presented in section 3.1.2.1.

5.2.3 Termination of the tax treaty (Article 16)

Under Article 16 of the OECD IHTMTC, “[t]his Convention shall remain in force until terminated by a Contracting State. Either Contracting State may terminate the Convention, through diplomatic channels, by giving notice of termination at least six months before the end of any calendar year after the year... In such event, the Convention shall cease to

55 It should be noted, however, that under paragraph 27 of the Commentary on Article 7 of the OECD IHTMTC, “[i]f Member countries consider that the solution proposed in paragraph 24 does not resolve all conflicts of treatment satisfactorily, they are free to adopt an alternative solution. For example, in the case of partnerships, they may resolve this problem in bilateral negotiations by determining the nature of the property by reference to the law of the State under which the partnership is established.”

56 See also, Marc Walter, “Conflicts of Qualification and International Inheritance Cases,” in *Conflicts of Qualification in Tax Treaty Law*, ed. Michael Lang (Vienna: Linde Verlag, 2007), 298 – 299.

57 See also, Wolfe D. Goodman, “The OECD Model Estate Tax Convention,” *European Taxation* 34 (October/November 1994): 342.

have effect: a) (in State A)... b) (in State B)..." I note that Article 16 of the OECD IHTMTC cites *verbatim* Article 31 of the OECD ICTMTC. In brief, an inheritance and gift tax treaty cannot be terminated for some years following its entry into force. This is because, according to paragraph 5 of the Commentary on Article 16, "[i]t is of advantage that the Convention should remain in force at least for a certain period."

Nevertheless, in my view, the *verbatim* citing of Article 31 of the OECD ICTMTC is problematic. The problem lies with the fact that the termination of an income and capital tax treaty, on the one hand, and an inheritance and gift tax treaty, on the other, is often based on opposite reasons. The exclusion of a state to tax a particular type of income is often the reason why this state may seek to terminate the income and capital tax treaty, which it has concluded with the other Contracting State. For example, Denmark terminated the Denmark – France Income and Capital Tax Treaty (1957) to safeguard the taxation of Danish pensioners.⁵⁸ On the contrary, tax treaty practice has shown that precisely the opposite reason has triggered the termination of an inheritance and gift tax treaty: the abolition of the inheritance and/or gift tax laws by a Contracting State. For example, when Norway abolished its inheritance tax legislation as per 1 January 2015, it terminated the inheritance and estate tax treaties that it had concluded with the US, Switzerland and with the other Scandinavian states.

I observe that the application of a minimum period for the application of the inheritance and gift tax treaty may not always be an advantage for the Contracting States, as the Commentary on Article 16 suggests, but, on the contrary, a disadvantage. To elaborate on this, I note that many inheritance and gift tax treaties provide for a minimum application period of five years. If, however, a Contracting State repeals its inheritance or gift tax laws within the five years, the other state is precluded from taxing the assets that it would have been entitled to do under its domestic law. This is true if double taxation is eliminated under the exemption method. Hence, the Contracting State of the fiscal domicile (which still levies inheritance and gift taxes and relieves double taxation by means of an exemption) will exempt the property mentioned in Articles 5 and 6 of the treaty irrespective of whether or not this property is taxed in the other Contracting State.⁵⁹ As this property is not taxed in the latter state (which has abolished its inheritance and gift tax laws), double non-taxation is possible.⁶⁰ The Contracting State of the fiscal domicile can terminate the treaty only after the lapse of the minimum application period.

It could be argued that double non-taxation may be perfectly in line with the object and purpose of tax treaties in a situation where the other Contracting State is not allowed to tax under Article 7 and the Contracting State of the fiscal domicile does not exercise its taxing rights. Nevertheless, double non-taxation due to the compulsory application of the inheritance and gift tax treaty by each Contracting State following the abolition of the inheritance and/or gift tax laws by a Contracting State seems to counter the objective of the OECD IHTMTC of addressing double non-taxation. As a result, if a tax treaty must apply for a certain number of years, double non-taxation (due to the tax relief by the state of the personal nexus), as discussed in section 3.1.2.2 of this study, is conceivable.

58 Wendy Singer and Jérôme Delaurière, "News Analysis: Why Is Denmark Terminating Tax Treaties?," *Tax Notes International*, no. 1 (2008): 13.

59 Commentary on Article 9A of the OECD IHTMTC, para. 22.

60 See also Massimo Antonini, "Abolition of the Italian Inheritance and Gift Tax," *European Taxation* 42, no. 3 (2002): 138.

5.3 Discriminatory treatment of cross-border inheritances and donations

5.3.1 Introduction

As noted in section 3.2, discrimination is the third problem of cross-border inheritances and donations. States tend to justify the application of less favourable provisions to cross-border inheritances and donations maintaining that their cross-border element differentiates them from the domestic ones. Such a cross-border element can be, for instance, the foreign location of the transferred assets, a foreign-located deceased or a foreign-located beneficiary.

Those who drafted the OECD IHTMTC had already recognised the problem of the application of discriminatory provisions to cross-border inheritances and donations. However, the current language of the non-discrimination provision of the model puts in doubt its effectiveness in dealing with common discriminatory situations. Unfortunately, the 2015 inheritance tax report does not address the issue of discrimination of cross-border inheritances and donations.

Under Article 10 of the OECD IHTMTC, “1. Nationals of a Contracting State, wherever they are domiciled, shall not be subjected in the other Contracting State to any taxation, or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that State in the same circumstances are or may be subjected. 2. The term “nationals” means a) all individuals possessing the nationality of a Contracting State; b) all legal persons, partnerships and associations deriving their status as such from the law in force in a Contracting State. 3. Stateless persons who are domiciled in a Contracting State shall not be subjected in either Contracting State to any taxation, or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of the State concerned in the same circumstances are or may be subjected. 4. The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description.”

I observe that Article 10(1) cites to a large extent Article 24(1) of the 1977 OECD ICT-MTC's nationality non-discrimination provision.⁶¹ Under this Article, “[n]ationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.”⁶² Furthermore, under the Commentary on Article 10 of the model, “[i]t was decided not to include paragraphs 4 to 6 of Article 24 of the 1977 Income Tax Model [at the OECD IHTMTC non-discrimination provision], since the provisions of those paragraphs relate, more or less exclusively, to taxes on income and capital and are not appropriate in the concept of this Model.”⁶³

61 Guglielmo Maisto, “General Report: Death as a Taxable Event and its International Ramifications,” in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 51.

62 The last sentence is reflected in the wording of the OECD IHTMTC's provision with the phrase “wherever they are domiciled”.

63 Commentary on Article 10 of the OECD IHTMTC, para. 2 (preliminary remarks).

The non-discrimination provision is accorded a stand-alone status within the treaty through the expression “wherever they are domiciled”, which refers to the nationals of each Contracting State who can rely on it. This observation is consistent with the general understanding of the non-discrimination principle of the OECD Tax Committee, which takes the position that this principle should apply to nationals of the Contracting States, irrespective of their residence.⁶⁴ Nevertheless, only residents of each of the Contracting States can invoke the non-discrimination provision in some inheritance and gift tax treaties.

Furthermore, it derives from the common understanding of the non-discrimination principle of the OECD Tax Committee that indirect discrimination does not fall within the scope of the non-discrimination provision. This applies to the non-discrimination provisions of both models. Under paragraph 3 of the Commentary on Article 10 of the OECD IHTMTC, “[t]his paragraph establishes the principle that, for the purposes of taxation, discrimination on the grounds of nationality is forbidden [...]”.⁶⁵ Moreover, paragraph 1 of the Commentary on Article 24 of the OECD ICTMTC states as follows: “The Article should not be unduly extended to cover so-called ‘indirect discrimination’ and [...] it could not be argued that non-residents of a given State include primarily persons who are not nationals of that State.”⁶⁶ Therefore, the OECD’s non-discrimination provisions do not apply to the indirectly discriminatory tax legislation of the Contracting States, i.e. legislation whose differentiating criterion is not the nationality of the persons but another criterion the application of which, however, results in covert discrimination on the grounds of nationality. Nevertheless, I note that the extension of the scope of the non-discrimination to cover indirectly discriminatory tax legislation would counter the general understanding of the OECD’s non-discrimination principle.

Discriminatory treatment of cross-border inheritances and donations is a problem that severely affects the application of the proposed inheritance and gift tax. When the cross-border inheritance and donation is discriminated, the application of the ability-to-pay-taxes and the windfall justifications – two elements of the proposed inheritance and gift tax – seems to be severely hindered. More specifically, discriminatory tax provisions increase the beneficiaries’ tax liability on behalf of the acquired property which, in its turn, results in an *over-application* of the ability-to-pay-taxes and the windfall justifications in a cross-border setting, which does not seem to happen in the event of a domestic inheritance and donation.

5.3.2 The OECD IHTMTC’s nationality non-discrimination provision

In the course of my research, I observed that the wording of the OECD IHTMTC’s nationality non-discrimination provision seems to contradict the scope of the model. More specifically, despite the desire for an interaction between the two non-discrimination provisions of each OECD model, the scope of each model differs. The OECD ICTMTC applies to a person who is a resident of one or both Contracting States⁶⁷ whereas the OECD IHTMTC applies to

64 Patricia Brandstetter, “Taxes Covered”: A Study of Article 2 of the OECD Model Tax Conventions (Amsterdam: IBFD, 2011), 19.

65 Commentary on Article 10 of the OECD IHTMTC, para. 3.

66 Commentary on Article 24 of the OECD ICTMTC, para. 1.

67 See, Article 1 of the OECD ICTMTC.

estates and inheritances and gifts (and thus not to persons) in one or both Contracting States where the deceased or the donor was domiciled at the time of his death or the donation.⁶⁸

Based on the above, one can argue that the wording of the OECD IHTMTC's nationality non-discrimination provision could be revisited considering the objective of the OECD of addressing discrimination of cross-border inheritances and donations and the proposed inheritance and gift tax. The provision seems first to be centred on the person's eligibility to invoke the non-discrimination provision and not the estates to which the model applies. Under paragraph 3 of the Commentary on Article 10(1) of the OECD IHTMTC, "[i]n the case of taxes on estates, inheritances and gifts, [the non-discrimination] principle must be applied with regard to the deceased or to the donor, and to the heirs and legatees or to the donees".⁶⁹ Furthermore, the wording of the provision gives the impression that the discriminatory element of the legislation of a Contracting State may only refer to the nationals of each Contracting State. It is therefore unclear whether the provision can be invoked in the case of discriminatory property valuation and debt deduction rules.

5.4 Administrative difficulties

5.4.1 Introduction

Administrative difficulties of cross-border inheritances and donations is a problem that seems to severely affect the application of the proposed inheritance and gift tax. When the cross-border inheritance and donation is subject to administrative difficulties in more than one state, the application of the ability-to-pay-taxes and the windfall justifications – two elements of the proposed inheritance and gift tax – seems to be severely hindered. More specifically, discriminatory administrative tax provisions increase the beneficiaries' tax liability on behalf of the acquired property which, in its turn, results in an over-application of the ability-to-pay-taxes and the windfall justifications in a cross-border setting, something that does not seem happen in the event of a domestic inheritance and donation.

Nevertheless, I note that the OECD IHTMTC does not include provisions aiming at addressing the administrative difficulties of cross-border inheritances and donations that were presented in chapter 3 of this study. More specifically, the mutual agreement procedure of Article 11 of the OECD IHTMTC does not seem to address the difficulties that the beneficiaries may encounter in the state of the objective nexus (section 3.1.4.2.1) or the state of the personal nexus (section 3.1.4.2.2). The same is true for the exchange of information framework of Article 12 of the OECD ITCMTC that refers to exchange of information between the competent authorities of each Contracting State for the application of the specific treaty. Therefore, this study does not cover improvements to the mutual agreement procedure and the exchange of information frameworks in relation to this point.

⁶⁸ See, Article 1 of the OECD IHTMTC. Furthermore, under paragraph 13 of the Commentary on Article 1 of the OECD IHTMTC, "although the Article contains what could be called the "personal scope" of the Convention, it should be stressed that it does not apply to "persons" but to estates of, or gifts made by, persons domiciled in one or both of the Contracting States."

⁶⁹ Commentary on Article 10(1) of the OECD IHTMTC, para. 3.

5.4.2 The OECD IHTMTC's nationality non-discrimination provision (Article 10)

Under Article 10 of the OECD IHTMTC, “[n]ationals of a Contracting State, wherever they are domiciled, shall not be subjected in the other Contracting State to any taxation, or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected.” Under paragraph 12 of the Commentary on Article 10 OECD IHTMTC “[t]he words ‘shall not be subject...to any taxation or any requirement connected therewith which is other or more burdensome...’ mean that when tax is imposed on nationals and foreigners in the same circumstances, it must be the same form for both, its basis of charge and method of assessment must be the same, its rate must be the same, and, finally, the formalities connected with the taxation (returns, payment, prescribed times, etc.) must not be more onerous for foreigners than for nationals.”

It follows from the above paragraph that the non-discrimination provision of the model and the treaties apply to both substantive and procedural tax provisions of the Contracting States. In other words, the OECD member countries agreed that the nationals of each Contracting State could invoke the non-discrimination provision of an inheritance and gift tax treaty also in the case of discriminatory procedural tax provisions, the so-called “formalities connected with the taxation”.

For instance, the domestic laws of a Contracting State may provide that the non-national beneficiaries must file the inheritance or gift tax return or pay the inheritance or gift tax within a shorter deadline than that applicable to national beneficiaries. Such a shorter deadline creates an additional administrative burden on the non-national beneficiaries who must also deal with a foreign tax administration and procedure with which they may not be familiar. The same is true if a Contracting State requests the non-national beneficiary to provide a guarantee before the actual payment of the inheritance or gift tax. Finally, a Contracting State may prescribe higher penalties and fines to non-national beneficiaries – for example, due to the late or inaccurate filing of the initial or amending tax return – than those applicable to national beneficiaries. In all these cases, the non-national beneficiary may be able to invoke the non-discrimination provision of the treaty against procedural tax provisions of a Contracting State that discriminates the beneficiary concerned on the grounds of his nationality.

In section 5.3.2, I argued that the OECD IHTMTC's nationality non-discrimination provision could be improved. Therefore, the proposed improvements to the wording of the scope of the nationality non-discrimination provision can arguably improve the application of the non-discrimination provision by offering treaty protection against discriminatory *procedural* tax provisions of the Contracting States.

5.5 Conclusion of Chapter 5

In this chapter, I discussed the provisions of the OECD IHTMTC that, in my view, can be improved having regard to the objectives of the OECD IHTMTC and the elements of the proposed inheritance and gift tax. More specifically, the discussion of these provisions takes place concerning each problem of cross-border inheritances and donations.

Furthermore, I noted that all the problems of cross-border death and gift taxation which are discussed in this study, seem to severely affect the application of the proposed

inheritance and gift tax. More specifically, when the cross-border inheritance and donation is taxed in more than one state/is not taxed anywhere/is discriminated against/subject to many administrative difficulties, the application of the ability-to-pay-taxes and the windfall justifications – two elements of the proposed inheritance and gift tax – seems to be severely hindered: the above justifications *over-apply* or *under-apply* in a cross-border setting and thus death and gift taxation seems to fail to achieve its objectives. Such over-application or under-application does not, however, seem to take place in the event of a domestic inheritance and donation. Arguably, death and gift taxation also seems to fail to achieve its objectives even if the model solves the problem but in a manner that does not seem to take into account (some of) the elements of proposed inheritance and gift tax. As a result, the OECD member countries may not easily endorse the model which, in certain instances, seems to contradict their death and gift tax laws as well as the elements of the proposed inheritance and gift tax.

More specifically, in relation to the double or multiple taxation problem, I observed that the ten-year limitation period for the exercise of the subsidiary taxing right provision and the underlying tax-abusive motive could be revisited having regard to the objective of the OECD IHTMTC of addressing double taxation and the proposed inheritance and gift tax. Furthermore, I noted that the model does not seem to deal with common cases of multiple taxation which are addressed only if the state of the deceased's fiscal domicile has concluded a treaty with all the other states. This situation can be improved, in my view, by an extension of the scope of the term "fiscal domicile" or a suggestion of a multilateral convention. Moreover, the tiebreaker rule for individuals seems to disregard the deceased's or the donor's intention to fiscally domicile in a Contracting State and does not require a minimum period of presence in a Contracting State. The tie-breaker rule, therefore, may be viewed as being counter to a) how some states determine the connection of the deceased or the beneficiary with their territory, and b) the third element of the proposed inheritance and gift tax (connection with civil law). In addition, I observed that overlaps between an inheritance and gift tax treaty and an income and capital tax treaty are conceivable. These overlaps can give rise to double taxation of the cross-border inheritance and donation. Such an outcome, however, seems to contradict the objective of the OECD IHTMTC of avoiding double taxation. Furthermore, the double taxation relief of Article 9B (credit method) does not seem to be broadly described in the OECD IHTMTC Commentary. As a result, I am of the view that the interaction between a) estate and inheritance taxes, and b) the different types of death and gift taxes becomes a challenging issue. In my view, the wording of the Commentary to Article 9B of the OECD IHTMTC can be improved having regard to the objective of the OECD IHTMTC of addressing double taxation and the elements of the proposed inheritance and gift tax. In addition, I observed that the lack of common valuation rules could often give rise to double taxation. Nevertheless, the non-application of the model to property valuation rules does not seem to contradict the objectives of the model as the model does not aim at harmonising the Contracting States' legislation. Moreover, conflicts of qualification due to the differences in domestic law classifications, the differences in treaty application to the facts at hand and the interpretation of the treaty rules are conceivable. Those conflicts, however, seem to counter the objective of the OECD IHTMTC of addressing double taxation and the proposed inheritance and gift tax. Moreover, I observed that double taxation could arise concerning

the special features of the Contracting State, namely civil or common law arrangements such as trusts, usufruct, fideicommissum, and foundations. Nevertheless, I argued that the deliberate non-inclusion of a general rule applicable to situations involving transfers to and from the above legal arrangements does not seem to counter the objectives of the model and the elements of the proposed inheritance and gift tax. This is because the model does not aim at harmonising the Contracting States' legislations. Finally, I observed that the mutual agreement procedure can be improved having regard to the objective of the model of addressing double taxation.

Concerning the double or multiple non-taxation problem, I observed that the model deals in a few sections with cases of double non-taxation. Therefore, one could argue that the model aims at the avoidance of double non-taxation as well. However, I observed that overlaps between OECD IHTMTC and the OECD ICTMTC could give rise to double non-taxation in certain situations. This situation, however, seems to counter the objective of the OECD IHTMTC of avoiding double non-taxation and can be addressed by improving the wording of Article 2 of the model. In addition, certain conflicts of qualification could give rise to double non-taxation. This situation, however, seems to contradict the objective of the model of addressing double non-taxation. Finally, I noted that double non-taxation due to the compulsory application of the inheritance and gift tax treaty by each Contracting State – even following the abolition of the inheritance and/or gift tax laws by a Contracting State – also seems to contradict the above-mentioned objective of the model.

Concerning the discrimination problem, I observed that the OECD IHTMTC's nationality non-discrimination provision is centred on the persons eligible to invoke the non-discrimination provision and not the estates to which the model applies. Furthermore, the wording of the provision gives the impression that the discriminatory element of the legislation of a Contracting State may only refer to the nationals of each Contracting State. It is therefore unclear, in my view, whether the provision can be invoked in the case of discriminatory property valuation and debt deduction rules. As a result, the provision seems to fail to address the discrimination problem of cross-border inheritances and donations in certain instances. As a result, it can be improved having regard to the objective of the OECD IHTMTC of addressing certain cases of discrimination of cross-border inheritances and donations, and the elements of the proposed inheritance and gift tax.

Finally, concerning the administrative difficulties of the cross-border inheritances and donations, I observed that Articles 11 and 12 of the OECD IHTMTC does not seem to address the administrative difficulties that beneficiaries may encounter in the state of the objective nexus or the state of the personal nexus. Therefore, this study did not discuss the mutual agreement procedure and the exchange of information frameworks from this perspective. Nevertheless, I argued that the proposed improvements to the wording of the scope of the nationality non-discrimination provision can arguably improve the application of the non-discrimination provision also to discriminatory procedural tax provisions of the Contracting States.

In the next chapter, I will address the above provisions of the model and its Commentary which, in my view, can be improved in the light of the objectives of the OECD IHTMTC and the elements of the proposed inheritance and gift tax.

CHAPTER 6

The suggested improvements to the OECD IHTMTC

In the previous chapter, I discussed the provisions of the OECD IHTMTC (and its Commentary) which, in my view, could be improved having regard to the objectives of the OECD IHTMTC and the proposed inheritance and gift tax. The discussion of these provisions took place in relation to each problem of cross-border inheritances and donations.

Furthermore, in chapter 4, I presented the benchmark of the update work, the proposed inheritance and gift tax. This benchmark, which consists of four elements, assists me in suggesting improvements to the provisions of the inheritance tax model I discussed in the previous chapter. Furthermore, I argued that the proposed inheritance and gift tax is closely related to the problems of cross-border inheritances and donations. More specifically, in chapter 5, I argued that the problems of cross-border inheritances and donations frustrate the application of the proposed inheritance and gift tax in a cross-border setting through an over-application or under-application of its elements in a cross-border setting. Finally, I noted in chapter 4 that the fact that a model does not meet (some of) the elements of the benchmark does not automatically mean that it becomes ineffective or a “bad model”. However, in my view, a model that is in line with (some of) the elements of this benchmark seems to address the problems of cross-border inheritances and donations in a more comprehensible manner considering the objectives of the OECD IHTMTC, than a model that is not in line with (some of) these elements.

In the following section, I will suggest improvements to certain provisions of the OECD IHTMTC and its commentaries having regard to the objectives of the inheritance tax model and the elements of the proposed inheritance and gift tax.

6.1 Double or multiple taxation

6.1.1 *Narrow scope and subsidiary taxing rights (Articles 1,4, 7, 9A and 9B)*

6.1.1.1 *Primary taxing rights*

In section 5.1.1, I mentioned that the term “fiscal domicile” seems to be defined relatively narrowly. This is because those who drafted the OECD IHTMTC decided that the fiscal domicile shall be a) assessed at the level of the deceased or the donor (Article 1 of the OECD IHTMTC), and b) established based on criteria that are exclusively listed in Article 4(1) of the model to the exclusion of other personal nexus concepts that under the domestic laws of the Contracting States can result in worldwide tax liability of the deceased's or the donor's property. By doing so, one could argue that those who drafted the OECD IHTMTC

completely disregarded the inheritance and gift tax laws of some OECD member countries, which are not based on the above principles.

It should further be noted that in paragraph 5 of the Commentary on Article 1, those who drafted the model acknowledged that “[s]ome Member countries also impose a comprehensive tax liability where: a) the deceased or the donor, although not, in fact, living there, is a national thereof; b) the heir, legatee, beneficiary or donee is either a national thereof or is domiciled there (even if the deceased or the donor was not so domiciled); or c) the deceased or the donor, or the heir, legatee, beneficiary or donee, is deemed to retain his domicile there for a certain period after he has transferred his real domicile to another State (the so-called “extended domicile”).” Nevertheless, they were not willing in the first instance to concede concerning this fact as evidenced, for example, in paragraph 5 of the Commentary on Article 7 of the OECD IHTMTC concerning taxation based on nationality as an independent personal nexus concept (see also section 3.1.1.3). In their view, “[t]he right to tax should belong, at least in the first instance, to the State with which the deceased’s or the donor’s personal and economic relations are closer, which is normally the State of domicile rather than the State of nationality [...]. The balance would not be equal if provision had to be made for credit against the tax due to the State of domicile for part of the tax due to the State of nationality; from the point of view of those States whose law does not impose tax according to nationality, giving such a credit would amount to the unilateral relinquishment of their right to tax on the basis of domicile without receiving any quid pro quo.”¹

6.1.1.2 *Subsidiary taxing right provision*

Nevertheless, I mentioned in section 5.1.1 that the narrow scope of the model does not seem to counter the objective of the model of addressing double taxation and the proposed inheritance and gift tax *in situations involving only two states*.² This is because those who drafted the OECD IHTMTC suggested a “subsidiary taxing right” provision to compensate a possible narrow scope of the treaty in certain instances (paragraphs 70-72 of the Commentary on Articles 9A and 9B of the model). As a result, the OECD IHTMTC does not, in my view, entirely disregard the OECD member countries’ inheritance and gift tax laws that are based on principles of paragraph 5 of the Commentary on Article 1. This is because taxation based on these principles can be agreed if it is *subsidiary* to taxation by the Contracting State of the fiscal domicile (subsidiary taxing right). The recognition of a subsidiary taxing right to the other Contracting State nuances, in my view, the narrow scope of the model.

More specifically, paragraphs 5-8 of the Commentary on Article 7 and 70-74 of the Commentary on Articles 9A and 9B refer to those rights exercised by the other Contracting State that establishes worldwide inheritance and gift tax jurisdiction based on either a) the deceased’s or the donor’s nationality, b) the heir’s, legatee’s, beneficiary’s or donee’s nationality or domicile, or c) the deceased’s/donor’s/heir’s/legatee’s/ beneficiary’s/donee’s

¹ Commentary on Article 7 of the OECD IHTMTC, para. 5.

² On the contrary, the narrow scope of the model may be considered as being counter to the objective of the model and the elements of the proposed inheritance and gift tax when the cross-border inheritance and donation may be taxed by more than two states (see section 5.1.2).

extended domicile.³ In essence, under the subsidiary taxing right provision, the other Contracting State may still tax the worldwide property of the deceased or donor but it is required provide double tax relief for the taxes paid in the Contracting State of the fiscal domicile. In that regard, paragraph 73 provides for wording for the subsidiary taxing right provision when the other Contracting State undertakes to eliminate double taxation under the exemption or the credit method.

Nevertheless, I observed in section 5.1.1 that the ten-year limitation period (during which the other Contracting State can exercise its subsidiary taxing right) applies to all the cases for which the Contracting States can agree on a subsidiary taxing right. This follows from paragraph 71 of the Commentary on Articles 9A and 9B: “Where States retain a subsidiary right to impose tax for *any* of the reasons given in paragraph 5 of the Commentary on Article 1, that right should be retained for a limited period only, and in any event, not longer than ten years after the deceased or the donor has ceased to be domiciled in their territory.” Furthermore, I observed that the subsidiary taxing right seems, in principle, to be linked to abusive changes of the fiscal domicile. This is based on paragraph 71 of the Commentary on Articles 9A and 9B which reads as follows: “[t]here may, however, be a compelling reason to deviate from these rules in the cases mentioned in paragraph 70 above⁴ especially where the deceased, in contemplation of death, or the donor, in contemplation of making a gift, has moved his domicile to the other State *with the intention of escaping taxation* by his former State of domicile.” (Italics, VD).

In my view, the ten-year limitation period and the underlying tax-abusive motive are two elements of the subsidiary taxing right provision that could be revisited given the objectives of the OECD IHTMTC and the proposed inheritance and gift tax. I will elaborate on this in the following sections in which I will discuss these two elements regarding the cases for which the Contracting States can agree on a subsidiary taxing right provision (taxation based on nationality, taxation based on the links with the beneficiary and extended domicile).

6.1.1.2.1 Taxation based on nationality

I am of the opinion that the ten-year limitation period should not apply if a state establishes worldwide inheritance and gift tax jurisdiction based on the deceased's or the donor's nationality as an independent personal nexus concept.⁵ This is based mainly on two reasons. First, there may be no abusive change of domicile from the other Contracting State to the Contracting State of the fiscal domicile because nationality does not establish fiscal domicile for treaty purposes under Article 4 of the OECD IHTMTC. Second, the moment that should determine when the other Contracting State should cease to apply its subsidiary taxing right cannot be easily determined as the deceased or the donor was never fiscally domiciled in the other Contracting State (again, because nationality does not establish fiscal domicile for treaty purposes). On the contrary, if nationality establishes worldwide tax jurisdiction on an alternative/dependent basis, the application of the ten-year limitation period for the exercise of the subsidiary taxing right by the other Contracting State seems to be more in

3 I note, however, that the Contracting States have to agree on the inclusion of a subsidiary taxing right provision in their treaty.

4 This paragraph refers to paragraphs 5 to 7 of the Commentary on Article 7 of the OECD IHTMTC.

5 See also section 3.1.1.1.3 of this study.

line with the objectives of the OECD IHTMTC and the elements of the proposed inheritance and gift tax (section 6.1.1.2.3).⁶

Based on the above, the other Contracting State shall be allowed to tax the deceased's or the donor's worldwide property without any time limitation on condition that it provides for relief for the taxes levied in the Contracting State of the fiscal domicile. As a matter of example, a state, which taxes the entire estate of a national who died while fiscally domiciled abroad for tax treaty purposes (irrespective of the number of years of such a domicile),⁷ may not be precluded from exercising its subsidiary taxing right, even if the national has never been fiscally domiciled in its territory.

6.1.1.2.2 *Taxation based on links with beneficiaries*

In the same vein, worldwide taxation based on the personal nexus of the beneficiary or the donee as the starting point of taxation⁸ has nothing to do, in my view, with an abusive change of the deceased's or the donor's fiscal domicile contrary to what paragraph 71 of the Commentary on Articles 9A and 9B seems to suggest. Therefore, the ten-year limitation period should also not apply in such a case.⁹ This suggestion also seems to be in line with the objectives of the model and the elements of the proposed inheritance and gift tax (under which both donor-based and donee-based taxes fall).

6.1.1.2.3 *Extended domicile*

Finally, a subsidiary taxing right can be agreed if one or both Contracting States levy inheritance and gift taxes based on extended domicile rules. I observe, however, that, contrary to taxation based on the deceased's/donor's nationality and taxation based on the beneficiaries' personal nexus, taxation based on extended domicile is always *subsidiary* to taxation based on another principle (e.g. the deceased's or the donor's domicile or residence).

Furthermore, states levying inheritance and gift taxes based on extended domicile seek to address the abusive transfer of a person's fiscal domicile from their territory to another. This is the case, for example, if the deceased in contemplation of his death, transfers his fiscal domicile to another state which, for instance, does not levy inheritance taxes. States levying inheritance and gift taxes based on extended domicile often provide a credit for taxes levied in the state of the deceased's or the donor's real domicile at the time of the death or the gift. As a result, those states apply their extended domicile rules up to a certain number of years following the abusive transfer of the domicile.

6 This, in my view, does not seem to contradict the fact that those who drafted the OECD IHTMTC considered that residence and domicile indicate a degree of integration with the community of the state whereas nationality does not (or at least not in all cases), as mentioned in section 4.2.1 of this study. In that regard, I note that subsidiary taxation based on nationality falls under the scope of the benchmark (as being part of the subsidiary taxing right provision).

7 Wolfe D. Goodman, "The OECD Model Estate Tax Convention," *European Taxation* 34 (October/November 1994): 340.

8 See also section 3.1.1.2 of this study.

9 The treaty practice also shows that the ten-year limitation period does not easily apply to the subsidiary taxing right based on beneficiaries' or donee's domicile. See, for example, the Denmark-United States Inheritance and Gift Tax Treaty (1983), the Germany-United States Inheritance and Gift Tax Treaty (1980) and the United Kingdom-United States Inheritance and Gift Tax Treaty (1978).

Based on the above, the ten-year limitation period of the subsidiary taxing right provision seems to be in line with the inheritance and gift tax laws of states applying extended domicile rules. It is understood that, if the domestic extended domicile rules of the Contracting States apply for a shorter period (e.g. seven years from the abusive transfer of domicile), the other Contracting State cannot exercise its subsidiary taxing right for a longer period even if this period is provided in the subsidiary taxing right provision of the treaty. This is because tax treaties cannot create new taxing rights for the Contracting States. I also note that the anti-tax avoidance function of the subsidiary taxing right is already recognised in paragraph 12 of the Commentary on Article 4 of the OECD IHTMT. This paragraph is entitled “extended domicile (nationality)” and confirms that the right of a state to tax based on extended domicile rule “is merely subsidiary to the right to tax of the State in which the deceased is deemed to have died domiciled according to Article 4.” Nevertheless, I observe that states often tend to safeguard *primary* taxing rights when applying extended domicile rules by introducing a specific tiebreaker rule. This tax treaty practice will be discussed in section 6.1.3 of this chapter.

There is one more aspect of the extended domicile rules, which, in my view, warrants attention. As mentioned above, the subsidiary taxing right based on extended domicile follows the taxation based on the deceased’s or the donor’s fiscal domicile and can be exercised within the ten-year limitation period. After this period, the Contracting State applying extended domicile rules is precluded from doing so. Contrary to this “all or nothing approach”, Rust suggested an apportionment approach/split mechanism following some innovative income tax treaty provisions which deviate from Article 13(5) of the ICTMTC. Article 13(5) refers to the taxation of capital gains deriving from the sale of shares (not connected to immovable property). Under Article 13(5) of the income and capital tax model, the state of the alienator’s residence enjoys exclusive taxing rights on the capital gains from the alienation of the property other than that referred to in the other paragraphs of the Article. It follows that, even if the alienator has resided for years before the alienation in the other Contracting State which provided the public goods for the increase in his wealth, this state is precluded from taxing the capital gains from the alienation of the property at hand.

Nevertheless, some income and capital tax treaties deviate from this Article. Rust referred to the Germany – Denmark and the Germany – Slovenia income tax treaties.¹⁰ More specifically, under Article 13(5) of the Germany – Denmark income and capital tax treaty (1995), the new residence state may levy a tax on the entire increase in the value of

10 Alexander Rust, “The Concept of Residence in Inheritance Tax Law,” in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2010), 95-96.

the property but must credit the taxes levied by the former residence state.¹¹ Furthermore, under Article 13(5) of the Germany – Slovenia income and capital tax treaty (2006), the new residence state must grant a step-up and tax only the difference between the amount realised and value of the property at the time of the immigration.¹² The state of the previous residence may tax the increase in value up to the moment of emigration. In essence, Germany agreed with Denmark and Slovenia on apportionment of tax revenue under these tax treaties.

Rust proposed that a similar apportionment rule could also apply in the OECD IHTMTC: the state of the former fiscal domicile (the other Contracting State) should be allowed to tax the increase in wealth during the time the deceased or the donor was fiscally domiciled in its territory. The state of the new fiscal domicile (the Contracting State of fiscal domicile) should then be allowed to tax the increase in wealth during the time the deceased or the donor was fiscally domiciled in its territory.¹³ In Rust's view, the apportionment rule seems to be a fair solution that recognises that each Contracting State has contributed to the increase of the deceased's or donor's wealth.

However, in my view, the application of such a rule does not seem to be in line with the Commentary on the OECD IHTMTC as it results in recognition of primary taxing rights to the Contracting State of the former fiscal domicile. This, however, does not seem to be in line with paragraph 12 of the Commentary on Article 4 of the OECD IHTMTC which states that only a subsidiary taxing right can be recognised regarding extended domicile rules. Furthermore, an apportionment rule would be difficult to administer as a) it requires effective exchange of information by each Contracting State, and b) the Contracting States do not apply common valuation rules on the property that they may seek to tax. Finally, Rust's suggestion "violates" the nature of inheritance taxes that tax values and not growth.

11 Article 13(5) of the Denmark - Germany Income, Capital, Inheritance and Gift Tax Treaty (1995): "In the case of an individual who was a resident of a Contracting State for a period of 5 years or more and has become a resident of the other Contracting State, paragraph 4 shall not affect the right of the first-mentioned State under its national laws to tax the individual on a capital appreciation up to the change of residence in respect of shares. Where the shares are subsequently alienated and the gains from such alienation are taxed in the other Contracting State in accordance with paragraph 4, that other State shall allow as a deduction from the tax on the income, an amount equal to the income tax which was paid in the first- mentioned State. Such deduction shall not, however, exceed that part of the income tax as computed before the deduction is given which is attributable to the income which may be taxed in the first-mentioned State in accordance with the first sentence of this paragraph."

12 Article 13(5) of the Germany - Slovenia Income and Capital Tax Treaty (2006): "Where an individual was a resident of a Contracting State for a period of 5 years or more and has become a resident of the other Contracting State, paragraph 4 shall not prevent the first-mentioned State from taxing under its domestic law the capital appreciation of shares in a company resident in the first-mentioned State for the period of residency of that individual in the first-mentioned State. In such case, the appreciation of capital taxed in the first-mentioned State shall not be included in the determination of the subsequent appreciation of capital by the other State."

13 Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2010), 96.

6.1.2 Multiple taxation (Articles 1 and 4)

6.1.2.1 Introduction

In the previous section, I observed that the narrow scope of the OECD IHTMTC and the tax treaties has one more significant consequence: the elimination of double taxation of estates, inheritances and gifts is contingent on an extensive treaty network. This could be particularly understood in situations where three or more states may seek to tax the cross-border inheritance and donation.

The Commentary on Article 1 of the OECD IHTMTC mentions two examples (no. 3 and 4) where three states may seek to tax a cross-border inheritance.¹⁴ It follows from the above two examples of the Commentary that due to the narrow scope of the OECD IHTMTC¹⁵ (i.e. the application of the model/tax treaty only if the deceased is fiscally domiciled in a Contracting State and the definition of the term “fiscal domicile”) cases of multiple taxation cannot always be addressed. However, I argued in the previous chapter that this does not seem to be in line with the primary objective of the OECD IHTMTC i.e. the allocation of taxing rights for the avoidance of double or multiple taxation and the proposed inheritance and gift tax; if double taxation frustrates the application of the ability-to-pay taxes and windfall justifications – two elements of the proposed inheritance and gift tax – in a two-country situation, multiple taxation should have the same effect in situations involving more than two states.

The suggestion of those who drafted the OECD IHTMTC with regard to the multiple taxation concern is stated in paragraph 12 of the Commentary on Article 1: “[t]he Committee on Fiscal Affairs decided not to include [...] residual cases within the scope of the Model Convention since such forms of tax liability are found only in a few Member countries. Moreover, in the rare practical cases, double taxation will often be avoided by the unilateral reliefs provided in the countries concerned. Finally, where double taxation does occur, it will be prevented where Member countries adhere to the Council’s recommendation and conclude double taxation conventions on the basis of this Model. Accordingly, as the network of double taxation conventions among Member countries becomes more widespread, unrelieved double taxation will become progressively rarer. *There seemed therefore to be no need to enlarge the Convention to cover such special cases.*” (Italics, VD)¹⁶

Bearing in mind, however, a) that the narrow scope of the model seems to be sometimes the reason why states do not conclude inheritance and gift tax treaties,¹⁷ and b) the failure of the states to agree on a subsidiary taxing right provision, one may consider whether the inclusion of residual cases can address or at least mitigate multiple taxation of cross-border inheritances and donations. Therefore, in the following section, I submit two suggestions that could arguably enhance the effectiveness of the OECD IHTMTC in addressing this problem. The first suggestion takes the form of the inclusion of nationality as a subsidiary

¹⁴ Commentary on Article 1 of the OECD IHTMTC, paras. 9 and 10.

¹⁵ That results in the non-application of the A-C tax treaty of the examples 3 and 4 of the OECD IHTMTC Commentary.

¹⁶ Commentary on Article 1 of the OECD IHTMTC, para. 11.

¹⁷ Especially states that levy inheritance and gift taxes based on principles different from those adopted in the model.

criterion establishing fiscal domicile (section 6.1.2.2.1). The second suggestion takes the form of a conclusion of a multilateral tax convention (section 6.1.2.2.2).

6.1.2.2 *Enhancing the effectiveness of the model in multiple taxation situations*

6.1.2.2.1 *Nationality as a subsidiary criterion (Article 4)*

The inclusion of residual cases can admittedly improve the effectiveness of the OECD IHTMTC in addressing multiple taxation. For instance, it could be suggested that the treaty between the state of the deceased's or donor's nationality and the state of the objective nexus can still be held applicable in the absence of a treaty concluded by either of these states with the state of the deceased's or donor's fiscal domicile. As a result, the "first double taxation" mentioned in example 3 of the Commentary on Article 1 of the OECD IHTMTC is addressed, with the state of the objective nexus being entitled to tax only the property mentioned in Articles 5 and 6 of the treaty which is actually the property which, in any case, it would have been allowed to tax if it had concluded a treaty with the deceased's or donor's fiscal domicile.

State A 	State B 	State C 
nationality	residence	situs
It cannot tax (A-C treaty)	It can tax (national law)	It can tax (A-C treaty)

The application of the treaty concluded by the state of the deceased's or donor's nationality and the state of the objective nexus (in the above example, the A-C treaty) can be achieved by the inclusion of the nationality as a *subsidiary criterion* for the establishment of the fiscal domicile under Article 4(1) of the OECD IHTMTC. This would mean that the establishment of the fiscal domicile based on nationality would prerequisite that *no treaty would be in force between the state of the deceased's or donor's fiscal domicile and either the state of the deceased's or donor's nationality or the state of the objective nexus*. Albeit innovative, the suggestion for the inclusion of the nationality as a subsidiary criterion for establishing fiscal domicile seems to achieve a balance between the narrow scope and the principles of the model and the need for efficient addressing of the multiple taxation problem.

I note that my suggestion differs from the approach taken in Article 4 of the 1966 version of the OECD IHTMTC. More specifically, under Article 4(1) of the 1966 OECD IHTMTC, fiscal domicile was established under the domestic laws of each Contracting State. This means that nationality could establish fiscal domicile in treaties concluded based on the 1966 OECD IHTMTC. This is the case, for example, of the France – US Inheritance and Gift Tax Treaty that was signed in 1978. As the US determines its worldwide estate tax jurisdiction also based on the deceased's citizenship, citizenship can establish fiscal domicile. On the contrary, Article 4(1) of the 1982 OECD IHTMTC does not list nationality as a criterion establishing fiscal domicile.¹⁸ Nevertheless, nationality, under my suggestion, can only establish fiscal domicile *if no treaty is in force between the state of the deceased's or donor's fiscal domicile and either the state of the deceased's or donor's nationality or the state of the objective nexus*.

Furthermore, my suggestion differs from the subsidiary taxing right framework provided in paragraphs 70 to 74 of the Commentary on Article 9A and 9B of the OECD IHTMTC. The subsidiary taxing right provision does not amend the term “fiscal domicile” under Article 4 of the OECD IHTMTC.¹⁹ On the contrary, the provision allows the other Contracting State (i.e. not the Contracting State of the fiscal domicile) to tax the whole deceased's property “as if it were the State of domicile of the deceased or the donor”.²⁰ An agreement on a subsidiary taxing right provision, therefore, does not mean that the other Contracting State automatically becomes the Contracting State of the fiscal domicile (although, in essence, it may tax as if it were the Contracting State of the fiscal domicile).²¹

Finally, my suggestion differs from my suggestion for an inclusion of a specific tiebreaker rule (section 6.1.3.2.1). In that regard, a specific tiebreaker rule indicates a different Contracting State of the fiscal domicile than that indicated under the general tiebreaker rule. In such a case, the indicated Contracting State of the fiscal domicile (which could arguably have been the “other Contracting State” in the absence of a specific tiebreaker rule) exercises its taxing rights in its capacity as the Contracting State of the fiscal domicile and not “as if it were the State of domicile of the deceased or the donor”.²² Furthermore, both the subsidiary taxing right framework and the specific tiebreaker rule prerequisite that the deceased or the donor is fiscally domiciled in a Contracting State (based on Article 4(1) of the OECD IHTMTC). On the other hand, my suggestion amends the term “fiscal domicile” in that the State of the deceased's or donor's nationality can be considered the Contracting State of the fiscal domicile only in the case where there is no treaty in force between the

18 However, I observe that Article 4(1) of the Nordic inheritance and gift tax treaty, which was signed in 1989, explicitly lists nationality as a criterion establishing fiscal domicile.

19 Cf. Jan Szczepański, “The Impact of European bilateral tax treaties with respect to taxes on inheritances, estates and on gifts on family multinationals in the internal market,” *British Tax Review*, no. 4 (2018): 453. In my view, Article 27 of the Denmark – Germany Income, Capital, Inheritance and Gift Tax Treaty (1995) should not be regarded as a subsidiary taxing right provision but a specific tie-breaker rule as it amends the term “fiscal domicile”/“residence” of the specific treaty.

20 See, in that regard, the wording of the subsidiary taxing right provision suggested in para. 73 of the Commentary on Article 9A and 9B of the OECD IHTMTC.

21 See, for instance, Article 11(1) of the Netherlands – United Kingdom Inheritance and Gift Tax Treaty (1979): “If the deceased or the donor was domiciled in one of the States at the time of the death or gift and was at that time a national of the other State and had been domiciled in that other State at any time within the ten years immediately preceding the death or gift, that other State *may impose tax according to its domestic law*.” (Italics, VD).

22 Cf. the suggested wording of the subsidiary taxing right provision suggested in para. 73 of the Commentary on Article 9A and 9B of the OECD IHTMTC.

state of the deceased's or donor's fiscal domicile and either the state of the deceased's or donor's nationality or the state of the objective nexus.

However, I note that the suggestion of the inclusion of the deceased's or donor's nationality as a subsidiary criterion for the establishment of fiscal domicile would not address, in most cases, the “first double taxation” that results from the non-application of the A-C treaty of the example 4 of the Commentary on Article 1 of the OECD IHTMTC. This is because, even following my suggestion, the deceased could not be considered to be fiscally domiciled in State A or C if he is not a national of either of these states.²³

6.1.2.2.2 Conclusion of a multilateral tax convention (Article 1)

As previously noted, addressing multiple taxation is dependent on an extensive tax treaty network. In view, however, of the relatively small number of the inheritance and gift tax treaties, multiple taxation often becomes the rule and not the exception. Therefore, it is suggested that the conclusion of a multilateral tax convention would address the multiple taxation problem of cross-border inheritances and donations. By the conclusion of a multilateral convention, the multiple taxation of the deceased's property of my example in section 5.1.2 seems to be effectively addressed. State A is precluded from taxing the immovable property located in State C, State C may tax this property under Article 5 of the treaty and state B may also tax the property, but it must provide double taxation relief, as seen below.²⁴

State A	State B	State C
		
nationality	residence	situs
It cannot tax	It can tax but double taxation relief	It can tax

23 I recall that State A in the example 4 of the Commentary on Article 1 of the OECD IHTMTC is the state of the deceased's beneficiaries.

24 Therefore, the suggestion for a conclusion of a multilateral convention seems to be a more effective solution than the solution presented in the previous section. This is because all possible levels of double taxation are addressed by a multilateral convention and thus, not only one such as in the case of the inclusion of nationality as a subsidiary criterion for the determination of the term fiscal domicile (*cf.* example 3 of the Commentary on Article 1 of the OECD IHTMTC). Furthermore, a multilateral convention would address situations such as those in the example 4 of the Commentary on Article 1 of the OECD IHTMTC (to which my suggestion for the inclusion of nationality as a subsidiary tax criterion would not work in most instances, as previously noted).

In that regard, I noted that the introductory report by the Committee on Fiscal Affairs explicitly refers to the possibility of a conclusion of a multilateral tax treaty. Under paragraph 17 of the introductory report, “[t]he Committee on Fiscal Affairs has considered whether the elaboration and conclusion of a multilateral double taxation convention would be feasible. As in 1966, the Committee has come to a conclusion that, in the present situation, this would meet with great difficulties. It might, however, be possible for certain groups of Member countries to study the possibility of concluding such a convention among themselves on the basis of the Model Convention, subject to certain adaptations they may consider necessary to suit their particular purposes.”

Although the conclusion of a multilateral tax treaty is a tough task according to the Committee, the Scandinavian states succeeded in concluding the Nordic inheritance and gift tax treaty in 1989. As noted in the previous section, fiscal domicile in this treaty is established also based on the deceased’s nationality under Article 4(1) of the treaty. Furthermore, the three distributive rules of the treaty are open distributive rules (“may be taxed”) which means that the Contracting State of the fiscal domicile is required to provide double tax relief. On the contrary, Article 7 of the OECD IHTMTC affords exclusive taxing rights to the Contracting State of the deceased’s or donor’s fiscal domicile, so the other Contracting State is not allowed to tax. Finally, I note that the Nordic inheritance and gift tax treaty includes a subsidiary taxing right provision for the avoidance of factual double non-taxation (Article 8 of the convention).

Within the EU, the conclusion of a multilateral tax convention had been already voiced by the EC in its 1994 Communication: “As double taxation in respect of inheritance tax and related taxes has become increasingly common, some Member States have negotiated specific agreements on this type of double taxation. Ten such agreements currently exist in the Community, most of them concerning inheritance tax. The question is, therefore, to find a general solution within the Community that (sic) will cover all Member States”.²⁵ Moreover, the 2015 inheritance tax report states that “[t]he need to find a general solution which the European Commission correctly identified in 1994 is, even more, pressing in 2015. The possibility that a multilateral European convention may be concluded in respect of taxes on inheritance was raised as long ago as 1993 at a Symposium in Brussels organised by the Commission. Its proposals are published as an annexe to the communication of 1994. In the past, the suggestion that a multilateral convention may be the solution to the problem of [inheritance tax] double taxation may have appeared somewhat optimistic. Some may think it less so now”. Bearing in mind that 22 out of the 37 OECD member countries are EU Member States, the EU Member States can be the group of Member countries to which the introductory report by the Committee on Fiscal Affairs refers (see also section 7.1.4).

6.1.3 *The tiebreaker rule for individuals (Article 4(2))*

6.1.3.1 *The two aspects of the OECD IHTMTC’s tiebreaker rule that can be improved*

The term “person domiciled in a Contracting State” as defined in Article 4(1) of the OECD IHTMTC is one of the most critical terms of the model and the treaties. It determines the

²⁵ Commission Communication to Member States on the transfer of businesses. Actions in favour of SMEs, 1994 OJ C 204/1 at point 10, p. 16.

estates, inheritances and gifts to which the treaty applies (Article 1), it solves cases where double taxation arises in consequence of the dual fiscal domicile of the same person (Article 4(2)) and solves cases where double taxation arises as a consequence of taxation in the Contracting State of the fiscal domicile and the other Contracting State (Articles 5-7).²⁶ This section is devoted to the second function of the term: the settlement of dual fiscal domicile conflicts through the tiebreaker rule for individuals of Article 4(2).

As noted in section 5.1.3, the tiebreaker rule of Article 4(2) of the OECD IHTMTC is similar to that of the OECD ICTMTC, thereby adopting the same connective criteria with the latter for the determination of the deceased's or the donor's fiscal domicile and affording the primary taxing right to the Contracting State which the connective criterion indicates. Through the application of these connective criteria, the Contracting States aim to identify the attachment of the person at hand with their territory and to afford primary taxing rights to the Contracting State with which this person is the most attached. It follows that the attachment of a person with a Contracting State is assessed under the same connective criteria for both dual fiscal domicile and residence conflicts. Nevertheless, I submitted in section 5.1.3 that although the tiebreaker rule seems to address dual domicile conflicts, Article 4(2) of the OECD IHTMTC seems to counter the manner in which certain states establish the lifelong attachment of a person with their territory and the third element of the proposed inheritance and gift tax due to the lack of an option for an intention test and for a minimum period of presence in a Contracting State.

More specifically, the nature and the imposition of inheritance taxes, estate taxes and gift taxes differ significantly from those of income and capital taxes. Income taxes are levied on an annual basis and thus, the person's attachment to a state needs to be determined on an annual basis, often through an easily administrable day-count rule. On the contrary, inheritance and estate taxes are levied only once (upon death) and, therefore, the deceased's *lifelong attachment to the state* needs to be determined.²⁷ The same seems to apply to gift taxes that are levied only in the event of a gift. On this basis, it should be noted that some inheritance and gift tax legislations regard the intention of the deceased/donor to reside in their territory as an important element for the assessment of his *lifelong* attachment with their territory (section 3.1.1.1.1).

The deceased's or the donor's lifelong attachment to a Contracting State can be demonstrated through, among others, the examination of his *intention* to reside in a Contracting State. However, such an intention does not seem to form part of any connective criterion of the OECD IHTMTC's tiebreaker rule, not even as an optional one. This, however, seems to counter the laws of some states that apply the civil law concept of residence or domicile for the application of their death tax laws and the third element of the proposed inheritance and gift tax. In these cases, the intention of the person to stay within the territory of the state (the "animus") plays an important role for the assessment of the deceased's or donor's lifelong attachment with their territory.

In the same vein, the requirement of a *minimum period of presence* of a person in a Contracting State – usually forming part of the assessment of his lifelong attachment to the state – does not seem to be reflected in the wording of the tiebreaker rule, not even as an

²⁶ See also, Commentary on Article 4 of the OECD IHTMTC, preliminary remarks, para. 2.

²⁷ Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto, (Amsterdam: IBFD, 2010), 86.

optional requirement. For example, the determination of the fiscal domicile based on the availability of a permanent home *without a minimum period of presence* in a Contracting State may not always result in an appropriate establishment of the deceased's or the donor's fiscal domicile for inheritance and gift tax treaty purposes, as it may not be in line with the inheritance and gift tax legislation of the Contracting States. In all events, it does not seem to be in line with the proposed inheritance and gift tax and its third element, i.e. the connection with civil law. As a result, the rule does not always seem to address dual domicile conflicts in a manner that is in line with the manner in which certain states establish the lifelong attachment of a person with their territory the proposed inheritance and gift tax. Therefore, one could argue that a minimum period of presence may need to be specified before the individual acquires a fiscal domicile in the Contracting State in which he is living.²⁸ The interpretation of the terms "permanent home" and "habitual abode" favours such an approach.²⁹

Based on the above, I am of the view that the OECD IHTMTC tiebreaker rule for individuals may be considered in many cases to be inappropriate to effectively resolve dual fiscal domicile conflicts because it seems to counter the taxes to which dual domicile conflicts it aims to address and the proposed inheritance and gift tax. The tax treaty practice seems to confirm this finding. More specifically, some states have already negotiated and inserted a specific tiebreaker rule in their tax treaty that takes precedence over the general tiebreaker rule in accordance with the rule *lex specialis derogat legi generali* (section 6.1.3.2.1). This shows, in my view, that the current tiebreaker rule can be improved although the introduction of a specific tiebreaker rule seems to have been triggered by the desire of some OECD member countries to safeguard their primary taxing rights also for situations for which the model and the Commentary do not seem to allow (section 6.1.3.2.2). On the other hand, I observe that there are treaties that include a requirement for a minimum period of presence in a Contracting State in the existing tiebreaker rule for the assessment of whether the deceased or the donor has maintained a permanent home there (section 6.1.3.2.3).

6.1.3.2 Proposed amendments

6.1.3.2.1 Specific tiebreaker rule

Although the OECD IHTMTC's tiebreaker rule for individuals does not include an intention test, I observe that some OECD member countries have agreed in their treaties on a specific tiebreaker rule that includes, amongst others, an intention test.

For instance, the Netherlands – UK inheritance and gift tax treaty (1979) contains a specific tiebreaker rule, which takes precedence over the general tiebreaker rule of Article 4(2). This rule reads as follows: "3. Notwithstanding the provisions of paragraph 2 of this Article, where by reason of the provisions of paragraph 1 of this Article an individual was at the time his domicile falls to be determined domiciled in both States and (a) was at that time a national of one of the States but not of the other, and (b) was resident in that other State but had been so resident for less than seven years out of the ten years

28 Frans Sonneveldt, "General Report: Avoidance of Multiple Inheritance Taxation within Europe," *EC Tax Review* 10, no. 2 (2001): 95.

29 Commentary on Article 4 of the OECD IHTMTC, paras. 19 and 28.

immediately preceding that time, and (c) did not intend to remain indefinitely in that other State, then he shall be deemed to be domiciled at that time in the State of which he was a national.” The France – Germany inheritance and gift tax treaty (2006) also contains a similar specific tiebreaker rule that applies, among others, if the deceased or the donor has a “clear intention not to maintain his domicile indefinitely in the other [Contracting] State”. It is clear that these specific tiebreaker rules include three tests: an *intention test* (“did not intend to remain indefinitely in that other State”), a *minimum presence test* (“was resident in that other State but had been so resident for less than seven years out of the ten years immediately preceding that time”) and a *nationality test* (“was at that time a national of one of the States but not of the other”).

It is important, however, to note that the inclusion of such specific tiebreaker rules does not, in principle, seem to have been justified by the desire of some OECD member countries to include an intention test in their treaty to better assess dual fiscal domicile conflicts for tax treaty purposes. On the contrary, they arguably sought to safeguard *primary* taxing rights in cases of a) persons present in the other Contracting State for a temporary purpose³⁰, b) taxation based on nationality (as an independent personal nexus criterium), and c) taxation based on extended domicile rules. Nevertheless, I note that, under the Commentary of OECD IHTMTC, only a subsidiary taxing right can be retained with regard to extended domicile rules and taxation on the basis of nationality as an independent personal nexus concept.³¹

The inclusion of an optional specific tiebreaker rule incorporating elements consistent with the nature of some inheritance and gift legislations and the proposed inheritance and gift tax is necessary, in my view, for the enhancement of the effectiveness of the OECD IHTMTC’s tiebreaker rule in certain situations. However, contrary to the current tax treaty practice, such a rule – which should take priority over the current one – should only address dual fiscal domicile conflicts of persons present in a Contracting State for a predefined temporary purpose, as suggested in paragraph 13 of the preliminary remarks of the Commentary on Article 4 of the OECD IHTMTC. On the contrary, the Contracting States cannot exercise primary taxing rights when they apply nationality as an independent personal nexus concept (Article 4(1)) and based on extended domicile rules (Commentary on Article 9A and 9B).

To this end, a specific optional tiebreaker rule could read as follows:

“Notwithstanding the provisions of paragraph 2, where an individual: (a) by reason of the provisions of paragraph 1, is fiscally domiciled in both these States on grounds other than extended domicile rules based on nationality; and (b) by reason of the provisions of paragraph 1, has been domiciled for business, professional, educational, training, tourism, or a similar purpose (or in his capacity as the spouse or a dependent member of the family of a person who was in that other State for such a purpose) in the State of which he is not a national, for less than (x) years in the aggregate (including periods of temporary absence) during the preceding (q)-year period and he did not intend to remain indefinitely in that other State, then he shall be deemed to be fiscally domiciled in the Contracting State of his nationality.”³²

30 Commentary on Article 4 of the OECD IHTMTC, preliminary remarks, para. 13.

31 Commentary on Article 4 of the OECD IHTMTC, para. 12.

32 At x, the maximum amount of years of presence in a Contracting State, at q, the total number of years for which the temporary presence will be tested.

In my view, the above optional provision provides for a determination of the deceased's fiscal domicile in a manner that seems to be more in line with the criteria that some states apply to levy death taxes and the elements of the proposed inheritance and gift tax. Furthermore, it seems reasonable that the Contracting State of the deceased's or the donor's "permanent fiscal domicile" maintains primary taxing rights also with regard to the increase in wealth during the period of the temporary presence in the other Contracting State. This is because it is expected that the main increase in the deceased's or donor's property will occur during the period of the "permanent fiscal domicile" in a Contracting State.

Furthermore, the definition of the type of presence in the other Contracting State has temporary purpose and the explicit exclusion of the extended domicile rules from the ambit of the suggested rule draw a dividing line between situations where the donor or the deceased is temporarily present in the other Contracting State with situations where the donor or the deceased aims to move his domicile to benefit from a more beneficial tax regime in the other Contracting State or to live there on a more permanent basis.

Finally, I note that the inclusion of a specific tiebreaker rule prerequisites an active exchange of information between the tax authorities of the Contracting States: the Contracting State of the deceased's/donor's "temporary fiscal domicile" may need to inform the Contracting State of the deceased's/donor's "permanent fiscal domicile" on the wealth that the deceased/donor owned during his temporary presence in its territory. In that regard, the exchange of information framework of article 12 of the OECD IHTMTC arguably makes the application of this rule easier for the Contracting States.

6.1.3.2.2 *Specific tiebreaker rule and broadening of the scope the general tiebreaker rule*

Under Article 4(1) of the OECD IHTMTC, primary taxing rights to the Contracting State taxing based on the deceased's or the donor's nationality cannot be afforded. This state may only maintain a subsidiary taxing right as noted in section 6.1.1.2.3. However, if the states deviate from Article 4(1) of the 1982 OECD IHTMTC and the term "person domiciled in a Contracting State" is defined under their domestic law (which may provide for taxation based on nationality), the question arises whether a specific tiebreaker rule is in line with the Commentary of the OECD IHTMTC, which, as said, only provides for a subsidiary taxing right by the Contracting State which taxes based on the deceased's or the donor's nationality.

More specifically, if both Contracting States define the term "fiscal domicile" under their national laws (and, thus, not based on Article 4(1) of the OECD IHTMTC), a specific tiebreaker rule clearly allows the Contracting State of the deceased's or the donor's nationality to tax the deceased's or donor's worldwide property. This is because under the general tiebreaker rule, this state would most probably be the loser state. This is probably the reason why the specific tiebreaker rule of the US Estate and Gift Model (1980)³³ was worded slightly differently from the specific tiebreaker rules of the inheritance and gift tax treaties, which were mentioned in the previous section. This rule reads as follows: "Where an individual was: (a) a citizen of one Contracting State but not the other Contracting State, (b) within the meaning of paragraph 1 domiciled in both Contracting States; (c) within the meaning

33 In 1980, the US Department of Treasury issued the US Estate and Gift Model and its related technical explanation. Although the model follows, in principle, the structure of the OECD IHTMTC, it contains a few different provisions, one of which is the specific tiebreaker rule of Article 4(3).

of paragraph 1 domiciled in the other Contracting State in the aggregate less than 7 years (including period of temporary absence) during the preceding ten-year period, then the domicile shall be deemed, notwithstanding the provisions of paragraph 2, to have been in the Contracting State of which he was a citizen.” Of note is that this tiebreaker rule does not include an intention test (e.g. “did not intend to remain indefinitely in that other State”). This can be an argument to demonstrate that the rule was not introduced to cover situations of persons present in a State for a temporary purpose but merely to safeguard the US taxing rights when taxing on the basis of the deceased’s or the donor’s citizenship.

As noted, however, in section 5.1.1 and 6.1.2.2.1, taxation based on the deceased’s or donor’s nationality can take place only on a subsidiary basis. Furthermore, the establishment of the fiscal domicile based on nationality can take place, as per my suggestion in section 6.1.2.2.1, on a residual basis if no treaty is in force between the state of the deceased’s or donor’s fiscal domicile and either the state of nationality or the state of the objective nexus. Accordingly, primary taxation based on the deceased’s or donor’s nationality does not seem to be in line with what the OECD IHTMTC and its Commentary seem to suggest in Article 4(1) of the OECD IHTMTC. For the above reasons, a specific tiebreaker rule which safeguards primary taxing rights to the state which taxes based on the deceased’s or donor’s nationality is not, in my view, in line with the OECD IHTMTC and thus, should not be suggested.

6.1.3.2.3 *Update of the general tiebreaker rule*

As noted above, the current OECD IHTMTC’s tiebreaker rule of Article 4(2) underestimates the deceased’s or the donor’s intention to live in the territory of a state. I submit, however, that the option for inclusion of a clear intention test and a minimum period of presence in a Contracting State before a person’s death/gift can make the rule more easily applicable by some states as it would be more in line with their inheritance and gift tax laws. It would also be more in line with the proposed inheritance and gift tax and its third element.

A reference to a minimum period of presence is not a novelty in treaty practice. The general tiebreaker rule of the Netherlands – US inheritance tax treaty (1969) already does so. Furthermore, an explicit reference to the intention of a person to domicile in the place where he has a permanent residence can be found in the Netherlands – Sweden inheritance tax treaty (1956). To this end, I suggest the following optional wording for the current OECD IHTMTC’s tiebreaker rule (additions indicated in brackets, VD):

2. Where by reason of the provisions of paragraph 1 an individual is [fiscally] domiciled in both Contracting States, then his status shall be determined as follows: a) he shall be deemed to be domiciled in the State in which he has a permanent home available to him [for X years or more immediately preceding his death or the donation with the clear intention to retain it]; if he has a permanent home available to him in both States, he shall be deemed to be domiciled in the State with which his personal and economic relations are closer (centre of vital interests); b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be [fiscally] domiciled in the State in which he has an habitual abode; c) if he has an habitual abode in both States or neither of them, he shall be deemed to be domiciled in the State of which he is a national; d) if he is a national of

both States or of neither of them], the competent authorities of the Contracting States shall settle the question by mutual agreement.

In my view, the suggested optional wording of Article 4(2) (as well as that of Article 4(3)) of the OECD IHTMTC) seems to be in line with the benchmark of this study, the proposed inheritance and gift tax. The third element of this benchmark is the definition of critical terms under civil laws and these laws often consider the intention of a person, for example, when determining his residence/domicile. Furthermore, the suggested optional wording seems to respect the manner in which certain states aim to establish the lifelong attachment of a person with their territory.

6.1.4 Overlaps with the OECD ICTMTC (Article 2)

6.1.4.1 Introduction

Article 2 of the OECD IHTMTC sheds more light on the taxes to which an inheritance and gift tax treaty applies. Under the Commentary on this Article, Article 2 is intended: a) to make the terminology and nomenclature relating to the taxes covered by the Convention more acceptable and precise, b) to ensure identification of the Contracting States' taxes covered by the Convention, c) to widen as much as possible the field of application of the Convention by including as far as possible, and in harmony with the domestic laws of the Contracting States, the taxes imposed by their political subdivisions or local authorities, d) to avoid the necessity of concluding a new Convention whenever the Contracting States' domestic laws are modified, and e) to provide for the periodic exchange of information about changes which have been made in their respective taxation laws.³⁴ In my view, Article 2 should also safeguard that there would be no overlap between the OECD IHTMTC and the OECD ICTMTC.

In section 5.1.4, I noted that the overlaps between the two models and types of tax treaties can be addressed by improving the OECD IHTMTC and especially Article 2 of the model. In my view, more taxes than those mentioned in Article 2 of the OECD IHTMTC can be included in the scope of the model as this would be in line with the proposed inheritance and gift tax and the objective of the model of addressing double taxation.

6.1.4.2 Article 2(1)-(3): transition from an exhaustive to an indicative list

Under Article 2 of the OECD IHTMTC, "1. This Convention shall apply to taxes on estates and inheritances and on gifts imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied. 2. There shall be regarded as taxes on estates and inheritances taxes imposed by reason of death in the form of taxes on the corpus of the estate, of taxes on inheritances, of transfer duties, or of taxes on donations *mortis causa*. There shall be regarded as taxes on gifts taxes imposed on transfers *inter vivos* only because such transfers are made for no, or less than full, consideration. 3. The existing taxes to which the Convention shall apply are a) (in State A)... b) (in State B)... 4. The Convention shall also apply to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition

34 Commentary on Article 2 of the OECD IHTMTC (preliminary remarks), para. 1.

to, or in place of, the existing taxes. At the end of each year, the competent authorities of the Contracting States shall notify each other of changes which have been made in their respective taxation laws.”

It becomes apparent that Article 2 of the OECD IHTMTC follows the logic and the structure of Article 2 of the OECD ICTMTC. This means that it should be afforded the same interpretation as Article 2 of the OECD ICTMTC unless its text suggests otherwise. The similarity of the commentaries on Article 2 of the income and capital tax model and the inheritance and gift tax model confirms the above observation. More specifically, paragraph 1 clarifies that the treaty applies to “taxes [...] imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied”. Paragraph 2 defines the term “taxes on estates and inheritances and on gifts”, paragraph 3 contains an *exhaustive* list of taxes to which the treaty applies. Finally, paragraph 4 clarifies that the treaty also applies to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. I observe, however, that very little has been written about the relationship between the four paragraphs of Article 2 of the OECD IHTMTC. In contrast, the relationship between the paragraphs of Article 2 of the OECD ICTMTC has been adequately discussed in the literature.³⁵

In this section, I will focus on the relationship between Articles 2(2) and 2(3). More specifically, the term “taxes on estates and inheritances and on gifts” of Article 2(1) of the OECD IHTMTC is defined in Article 2(2) as follows: taxes on estates and inheritances are imposed by reason of death on the corpus of the estate, of taxes on inheritances, of transfer duties, or of taxes on donations *mortis causa*. Consequently, the term includes the estate tax (which is levied on the corpus of the estate), the inheritance tax (which is levied on the share of the estate which each beneficiary inherits), the transfer duties and taxes on donations *mortis causa*. Finally, taxes on gifts are termed as taxes on the *inter vivos* transfers only because such transfers are made for no, or less than full, consideration.

In Article 2(3) of the inheritance and gift tax treaty each Contracting State lists by means of an exhaustive list the existing taxes on estates and inheritances and on gifts to which it intends to apply the treaty. It follows that a treaty does not apply to an existing tax if it was not explicitly listed in Article 2(3) of the treaty. As a matter of comparison, the list of the income and capital tax model is indicative.³⁶ Therefore, an income and capital tax treaty may also apply to taxes even though they have not been explicitly listed in Article 2(3).

The exhaustive listing of taxes on estates and inheritances and on gifts seems to be a deliberate choice of those who drafted the inheritance and gift tax model given that the list of the income and capital tax model has always been indicative as early as 1963. The question arises, however, whether a transition from an exhaustive to an indicative list of the existing taxes in Article 2(3) of the OECD IHTMTC would be a step in the right direction as it guarantees a more systematic approach towards the scope of the model and the nature of the taxes to which it applies and the proposed inheritance and gift tax. In my view, the question should be answered in the affirmative on condition that a safety net can be provided on the degree of the amplifying power that such an indicative list would have.

35 See for example, Michael Lang, ““Taxes Covered” in What is a “Tax” According to Article 2 of the OECD Model?,” *Bulletin for International Taxation* 59, no. 6 (2005).

36 On the contrary, the list of Article 2(3) of the OECD ICTMTC is not exhaustive. See in that regard, Commentary on Article 2 of the OECD ICHTMTC, para. 3.

The amplifying power of the indicative list of the income and capital tax model has already been discussed in the report of the Working Party no. 30 of the OECD Fiscal Committee.³⁷ Under this report, “[p]aragraph 3 has quite obviously the power (although being principally an illustration to paragraphs 1 and 2) to amplify the scope of the Convention even if they were not considered to be “taxes on income (capital)” within the meaning of paragraph 1 and 2”.^{38,39} In other words, the OECD Fiscal Committee was of the opinion that the states are “quite obviously” allowed to agree that the income and capital tax treaty can also apply to inheritance and gift taxes albeit that these taxes are not classified as taxes on income or capital. In that regard, Article 13 (capital gains)⁴⁰ and 21 (other income) seem to be the only Articles which can apply to inheritance and gift taxes.⁴¹ Considering, however, that these Articles grant exclusive taxing rights to the Contracting State of the taxpayer’s residence, they may not be appropriate to deal with a proper allocation of taxing rights in the case of inheritance and gift taxes for which a separate OECD model had to be drafted. Most importantly, I believe that the inclusion of inheritance and gift taxes in the scope of an income and capital tax treaty would seem to run counter to the nature of the taxes to which the model applies and the proposed inheritance and gift tax.

On the other hand, the inclusion of *mortis causa* or *inter vivos* levied income taxes or capital gains taxes in the scope of an inheritance and gift tax treaty would not, at first sight, seem to run counter to the nature of the taxes to which the model should apply since this would be in line with the proposed inheritance and gift tax. Therefore, if these taxes are levied by reason of death or a donation on the *mortis causa* or *inter vivos* windfalls, which increase the recipient’s ability-to-pay taxes, and some critical terms for their application are determined under civil laws, they should be covered by an inheritance and gift tax treaty.

For instance, an income tax on gifts should be included, in my view, in the scope of an inheritance and gift tax treaty if it is consistent with the above benchmark. For this reason, the application of the Nordic inheritance and gift tax treaty to “income taxes on the value of the gifts” levied in Denmark and Iceland seems to be in line with the proposed inheritance and gift tax. In the same vein, a capital gains tax should be included in the scope of the inheritance and gift tax treaty if it is consistent with the proposed inheritance and gift tax. It should thus be levied on the whole amount of the *mortis causa* or *inter vivos* transferred gain. Finally, I note that the EC’s recommendation adopts a broad definition of the term “inheritance tax”. The term means any tax levied at national, federal, regional, or local level upon death, irrespective of the name of the tax, of the manner in which the tax is levied and of the person to whom the tax is applied, including in particular, estate tax, inheritance tax, transfer tax, transfer duty, stamp duty, income and capital gains tax.

37 Working Party no. 30 of the OECD Fiscal Committee (Austria–Switzerland), received on 12 June 1969. The report was prepared to examine some issues of interpretation concerning Article 2 of the OECD ICTMTC.

38 Working Party no. 30 of the OECD Fiscal Committee (Austria–Switzerland), marginal number 40.

39 See also, Michael Lang, ““Taxes Covered” in What is a “Tax” According to Article 2 of the OECD Model?,” *Bulletin for International Taxation* 59, no. 6 (2005).

40 Paragraph 5 of the Commentary on Article 13 of the OECD ICTMTC states that the words “alienation of property” may also include the gift and even the passing of property on death.

41 On the contrary, under paragraph 1 of the Commentary on Article 22 (capital) of the ICTMTC states that this Article deals only with taxes on capital, to the exclusion of taxes on estates and inheritances and on gifts and of transfer duties.

It follows from the above that the amplifying power of an indicative list of the *existing* taxes in a tax treaty shall not undermine the importance of the general definitions of Article 2(2). Furthermore, the amplifying power of such an indicative list could be tested against the proposed inheritance and gift tax benchmark. In other words, a transition from an exhaustive to an indicative list should not result in the extension of the scope of the treaty beyond taxes that are not in line with the proposed inheritance and gift tax benchmark. On the other hand, if the Contracting States wish to explicitly exclude a tax from the scope of an inheritance and gift tax treaty, they should expressly do so.^{42, 43}

Based on the above, I am of the view that the optimization of Article 2(3) of the OECD IHTMTC arguably guarantees that the states involved will not seek to apply two different types of tax treaties to the same *mortis causa* or *inter vivos* transfer of property.

Article 2(3) applies to the taxes that are levied at the time of the conclusion of the treaty by two Contracting States. What happens, however, if a Contracting State repeals its gift tax laws and introduces an income tax liability concerning the received gifts at the level of the donees? Would the inheritance and gift tax treaty still apply to the newly introduced income tax? Article 2(4) of the OECD IHTMTC is relevant in that regard.

6.1.4.3 *Article 2(4): addressing the parallel application of an income tax and an inheritance and gift tax treaty*

Under Article 2(4) of the OECD IHTMTC, “[t]he Convention shall also apply to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. At the end of each year, the competent authorities of the Contracting States shall notify each other of changes which have been made in their respective taxation laws.”

This paragraph contains a rule, which guarantees, under certain conditions, that the inheritance and gift tax treaty will automatically cover any identical or substantially similar new tax introduced in addition to, or in place of, existing taxes. Article 2(4) of the OECD IHTMTC is of major importance given the trends of inheritance and gift taxes. More specifically, some states have replaced their inheritance laws with *mortis causa* capital gains taxes on the gain accrued from the *mortis causa* transfer of property. The mere transfer of the property to the beneficiary thus, does not have immediate tax implications, but the subsequent sale of this property would lead to capital gains liability in the hands of the alienator. Some states determine the value of the gain accrued based on the difference between the market price and the value of the property at the time of the death. Other states determine this value as the difference between the market price and the acquisition cost of the property set at zero. Likewise, a state may abolish its gift tax laws and include an income or capital gains tax liability at the level of the beneficiaries.

Accordingly, the question arises whether these newly introduced taxes can still be regarded as identical or substantially similar to the existing taxes under Article 2(4) of the inheritance and gift tax treaty. Since the current list of Article 2(3) of the OECD IHTMTC is exhaustive, it seems at first sight that the new tax must be identical or substantially similar

42 Working Party no. 30 of the OECD Fiscal Committee (Austria – Switzerland), marginal number 11.

43 See for example, the France – Germany Inheritance and Gift Tax Treaty (2006) and, in particular, Article 2(4) concerning the exclusion of the German tax on the property of a foundation or an association.

to a tax listed in Article 2(3). This would mark, in most of the cases, the “end of story” of the possible application of an inheritance and gift tax treaty to taxes that are not identical or substantially similar to the listed existing taxes. On the contrary, an indicative listing of the existing taxes – as per my suggestion in section 6.1.4.2 – arguably broadens the benchmark of similarity of the new tax also to non-listed taxes that should be considered as “taxes on estates and inheritances and on gifts” under the definitions of Article 2(2) of the inheritance and gift tax treaty and the proposed inheritance and gift tax.^{44,45} However, even without an indicative list, Lang was of the opinion that “[t]his does not mean that a newly introduced tax may fall under the treaty only if a similar tax was already levied at the time the bilateral treaty was signed. The equivalent of Articles 2(1) and (2) is not limited to the taxes levied at the time of the treaty was signed. Thus, the new taxes covered by the general definitions may fall within the scope of [that] treaty even if they are not identical or substantially similar to the taxes listed in the equivalent to Article 2(3).”⁴⁶

Unfortunately, the Commentary on Article 2(4) of the OECD IHTMTTC does not discuss the criteria based on which a new tax shall be considered identical or substantially similar to an existing tax on estates and inheritances and on gifts. However, guidance on these criteria is crucial, given the possible application of two different types of treaties by each Contracting State to the same transfer of property. For example, a state may apply the income tax treaty as the newly introduced income tax on gifts is included in Article 2(3) of the treaty whereas the other state may continue to apply the inheritance and gift tax treaty. The parallel application of two different types of treaties may give rise to double taxation or double non-taxation, as seen from the example of the donation by an Austrian foundation to its non-resident beneficiaries.

As per Lang’s observation, the model does not define the term “tax”,⁴⁷ so the term “identical or substantially similar tax” is also left undefined. He is of the view, however, that the *substance* of the preceding and the introduced tax liability⁴⁸ should be taken into account in that regard. In my view, guidance can be again found on the proposed inheritance tax. More specifically, if the new tax is levied by reason of death or a donation on the *mortis causa* or *inter vivos* windfall, which increases the recipient’s ability-to-pay taxes, and some critical terms for its application are determined under civil laws, then it should be considered substantially similar to an existing tax. As a matter of example, a capital gains tax that replaces an inheritance tax and applies to the accrued gain determined as the difference between the market price and the price of the property at the time of death does not seem to be in line with the proposed inheritance and gift tax benchmark.⁴⁹

44 Besides, this applies to the function of Article 2(4) of the ICTMTTC and its relationship with Article 2(2) and 2(3). As the list of Article 2(3) of the OECD ICTMTTC cannot be exhaustive the term “identical or substantially similar” is used.

45 Arguably, an indicative list may create uncertainty. Nevertheless, I am of the opinion that the benchmark of the proposed inheritance and gift tax mitigates to a large extent such risk of uncertainty.

46 Michael Lang, ““Taxes Covered” in What is a “Tax” According to Article 2 of the OECD Model?,” *Bulletin for International Taxation* 59, no. 6 (2005): 221.

47 Michael Lang, ““Taxes Covered” in What is a “Tax” According to Article 2 of the OECD Model?,” *Bulletin for International Taxation* 59, no. 6 (2005): 216.

48 Michael Lang, ““Taxes Covered” in What is a “Tax” According to Article 2 of the OECD Model?,” *Bulletin for International Taxation* 59, no. 6 (2005): 222.

49 The same analysis should apply to charges levied as compensation for the provision of public services, such as the probate fees.

The tax does not apply to the *mortis causa* windfall but only to the increase in the value of the property after death. As a result, the inheritance tax treaty should not apply to it. On the contrary, this tax should fall within the scope of the income and capital tax treaty.

6.1.5 *Estate and inheritance taxes (Articles 2 and 9B)*

In section 5.1.5, I mentioned that the Commentary on Article 9B of the OECD IHTMTC makes particular reference to the application of the credit method between States with different forms of death duties. Under paragraph 78 of the Commentary on Article 9B of the OECD IHTMTC, “[t]he application of the credit method may become difficult between the Contracting States where one of them imposes an estate tax [...] whereas the other State imposes an inheritance tax [...]”. However, in section 5.1.5 I argued – quoting Maisto⁵⁰ – that the wording of the Commentary on Article 9B of the OECD IHTMTC on this issue can be improved having regard to the objective of the model of addressing double taxation and the elements of the proposed inheritance and gift tax (and particularly the first element of the benchmark).

According to Maisto, “[t]he OECD [IHTMTC] does not resolve the problem [VD: when the taxable person differs], and paragraph 80 of the Commentary on Article 9B leaves the issue for bilateral negotiation. This is at least doubtful as the wording of Article 9[B] restricts the credit to foreign taxes levied “in relation to the same event” without making restrictions in the domestic laws on whether the tax is borne by a different person by virtue of differences in the domestic laws of the two states.”⁵¹ Maisto’s observation is correct. The wording of Article 9B only refers to the “same event” and not to any other element differentiating the taxes concerned. As a result, one could take the view that if the taxes concerned are levied “in relation to the same event”, the Contracting State of the fiscal domicile shall credit the tax of the other Contracting State (even if this tax is levied at a different person and at a different rate). In that regard, it could be helpful if the term “same event” would be defined in both Article 9B of the OECD IHTMTC and its Commentary. In my view, the term could be broadly defined as required by the proposed inheritance and gift tax that is levied in the event of death or donation irrespective of the taxable person or the taxable event. As a result, the term “event” could not mean the *taxable* event for the imposition of a death tax (that, as mentioned in section 2.1.1 of this study, can differ between different types of death taxes⁵²) but the mere event of the death or donation (as usually defined in civil law).

Finally, I note that the above interpretation of the term “taxable event” is not only relevant where a Contracting State levies an inheritance tax and the other an estate tax (to which the Commentary on Article 9B seems to focus). It should also apply to any type of death tax or tax on gifts, which shall be covered by an inheritance and gift tax treaty in line with the proposed inheritance tax as mentioned in section 6.1.4.2.

50 Guglielmo Maisto, “General Report: Death as a Taxable Event and its International Ramifications,” in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 49.

51 Guglielmo Maisto, “General Report: Death as a Taxable Event and its International Ramifications,” in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 49.

52 For example, as mentioned in section 2.1.1 of this study, the taxable event of the estate tax is the *mortis causa* transfer of property whereas the taxable event of the inheritance tax is the enrichment of the beneficiary.

6.1.6 Inheritance/estate/gift taxes and income/capital gains taxes (Articles 2 and 9B)

6.1.6.1 Introduction

As mentioned above, death is an event that can trigger a variety of taxes in the event of a cross-border inheritance. Although most of the OECD member countries levy either an estate tax or an inheritance tax, there are still some states which levy *mortis causa* income taxes on the beneficiaries or capital gains taxes upon the future alienation of the inherited assets. Some other states impose a capital gains tax liability assessed at the level of the deceased on the deemed distribution of his property as noted in chapter 2.

Different tax liability concerning the same *mortis causa* or *inter vivos* transfer of property by each state can often lead to double taxation or double non-taxation of the cross-border inheritance or donation. This is true if the states concerned a) have not concluded an income and capital tax treaty and an inheritance and gift tax treaty, or b) have concluded both an inheritance and gift tax treaty and an income and capital tax treaty.

If the states concerned have not concluded any tax treaty, they will apply their domestic laws. As a result, one state will apply its inheritance tax and the other state its income tax. The negotiation of an inheritance and gift tax treaty by these two states is undoubtedly a tough task due to the difference in the taxes levied by each of them. It is understood that, if the states fail to negotiate such a treaty, the double tax treaty relief is also not available. In addition, if they had concluded an inheritance and gift tax treaty, the double tax relief would not be available as the *mortis causa* income tax would not be covered by that treaty. On the other hand, the unilateral tax relief is often granted on the condition that the taxes levied in the other state are of the same nature with the taxes levied in the state of the personal nexus. Although one would argue that the imposition of different types of taxes on the cross-border inheritance or donation is not classified *per se* as juridical double taxation,⁵³ at least the mere reduction of the value of the *mortis causa* or *inter vivos* transferred property and the multiplication of the tax burden should not be neglected.

If both states have concluded both types of tax treaties, they may apply a different tax treaty concerning the same transfer of property, and in particular, Articles of these treaties that grant exclusive taxing rights to them. The parallel application of two different types of tax treaties between the Contracting States may easily give rise to double taxation as noted in section 5.1.4.

Finally, if only an income and capital tax treaty is in place, a state may repeal its income tax on inheritances, introduce an inheritance tax and still apply the income and capital tax treaty considering that the tax is substantially similar to the income tax, thereby compensating for the lack of an inheritance and gift tax treaty.

In the following sections, I will put forward suggestions to bridge the gap between inheritance/gift taxes and other types of death taxes and taxes on gifts. More specifically, I will discuss how Articles 2 and 9B of the model should be interpreted (section 6.1.6.2.1). Furthermore, I will present examples of “comprehensive” and “consolidated” treaties (section 6.1.6.2.2). Finally, I will present how the income tax treaty practice has safeguarded a degree of interaction between inheritance/gift taxes and income or capital gains taxes (section 6.1.6.2.3).

⁵³ See in that regard, chapter 2, section 2.5 of this study.

6.1.6.2 *Bridging the gap between inheritance/gift taxes and other types of death taxes and taxes on gifts*

6.1.6.2.1 *Taxes covered (Article 2) and “in relation to the same event” (Article 9B)*

In section 6.1.4.2, I suggested a transition from an exhaustive to an indicative listing of taxes in Article 2(3) of the inheritance and gift tax treaty. This is because by doing so the scope of the tax treaty broadens significantly.

First, two states applying different types of taxes to the same transfer of property can more easily conclude an inheritance and gift tax treaty if both taxes can be classified as taxes on estates and inheritances and on gifts under the general definition of Article 2(2) of the inheritance and gift tax treaty *and* are consistent with the proposed inheritance and gift tax (albeit not listed in Article 2(3)). This is the case, for example, of an income tax on gifts which “is imposed on transfer *inter vivos* only because such transfer is made of no consideration”.

Furthermore, the already concluded inheritance tax treaty can still apply to *existing* taxes that are not listed in Article 2(3) if, in essence, they are taxes on estates and inheritances and on gifts under Articles 2(1) and (2) of the inheritance and gift tax treaty and consistent with the proposed inheritance and gift tax. Therefore, even if a *mortis causa* capital gains tax was not listed in Article 2(3), the treaty could apply to it on condition that it is consistent with the proposed inheritance and gift tax.

Finally, the inheritance and gift tax treaty may also apply to substantially similar taxes introduced after its conclusion under Article 2(4). The benchmark of the similarity should again be based on the proposed inheritance and gift tax as presented in section 6.1.4.3.

It follows that a) the transition from an exhaustive to an indicative list of Article 2(3), and b) the interpretation of the phrase “identical or substantially similar taxes” based on the proposed inheritance and gift tax, widen the scope of the OECD IHTMTC and the treaties which can thus apply to any death tax and tax on gifts that is in line with the benchmark of the update work. In that regard, I refer to section 6.1.4 of this study. Subsequently, it does not take long to interpret the term “in relation to the same event” used broadly in Article 9B of the OECD IHTMTC, as suggested in section 6.1.5 of this study given that such interpretation would be in line with the wording of this Article and required by the proposed inheritance and gift tax.

6.1.6.2.2 *A “comprehensive treaty” and a “consolidated treaty”*

Under the Commentary on Article 1 of the OECD IHTMTC, “[m]ember countries desirous of concluding bilateral conventions applying to both taxes on income and capital, and taxes on estates and inheritances and on gifts, may combine the two Model Conventions.”⁵⁴ A treaty that can apply to taxes on income and capital and taxes on estates and inheritances and on gifts may guarantee that the double taxation relief will be available for all types of taxes covered by this treaty. To the best of my knowledge, such a “comprehensive treaty” has not yet been concluded.

⁵⁴ Commentary on the OECD IHTMTC (preliminary remarks), para. 14.

The term “comprehensive treaty” is contrasted to the term “consolidated treaty”. The latter term refers to treaty that applies to taxes on income and capital, and taxes on estates and inheritances and on gifts. However, there are separate rules applicable to each type of taxes and the same applies to the elimination of double taxation Article. In other words, the Articles applicable to income and capital taxes do not interact with those applicable to inheritance and gift taxes. I observe that there are some treaties of this kind. More specifically, the Denmark – Germany Income, Capital, Inheritance and Gift Tax Treaty (1995) applies to both income and capital and taxes on estates and inheritances and on gifts. However, there are distinct rules applicable to taxes on income and capital (chapter II) and to estates, inheritances and gifts (chapter III). Chapters II and III do not therefore interact. Nevertheless, the general provisions of chapter I (including the tiebreaker rules) apply to all taxes covered by the treaty. Likewise, the Germany – Sweden Income, Capital, Inheritance and Gift Tax Treaty (1992) should also be considered a consolidated treaty.⁵⁵

Furthermore, the Tax Regulation⁵⁶ for the Kingdom of the Netherlands (2010) covers, among others, income, capital, inheritance and gift taxes. Of note is that separate rules apply to income and capital and inheritance and gift taxes. However, as in the case of the Denmark – Germany Income, Capital, Inheritance and Gift Tax Treaty (1995), the general definitions of Tax Regulation apply to all kinds of taxes covered by the regulation.^{57, 58, 59}

I note that, although the conclusion of a “comprehensive treaty” by the Contracting States would guarantee the availability of the double tax relief to any type of tax covered by the treaty, conflicts of qualification due to differences in domestic laws of each Contracting State are still possible. For example, a Contracting State may apply the equivalent of Article 13 of the OECD IHTMTC (capital gains taxation) and the other Contracting State the equivalent of Article 7 of the OECD ICTMTC (inheritance taxation). If this is the case, double taxation may arise due to a conflict of qualification resulting from the differences in the domestic laws of the Contracting States. The conflicts of qualification will be extensively discussed in section 6.1.7 of this study.

6.1.6.2.3 The income tax treaty practice

States have already recognised that the variety of taxes levied in the event of a cross-border inheritance/donation may result in double taxation, thereby safeguarding a degree of interaction between inheritance/gift taxes and income or capital gains taxes. Such interaction has already taken place within the framework of *income and capital* tax treaties

55 See also, Jan Szczepański, “The Dual System of OECD Model Tax Conventions from the Evolutionary Perspective,” *Intertax* 46, no. 10 (2018): 789.

56 Please note that the Netherlands tax regulations are not considered tax treaties.

57 See also the Netherlands – St. Maarten Income, Inheritance and Gift Tax Arrangement (2014) and the Curaçao – Netherlands Income, Inheritance and Gift Tax Arrangement (2013).

58 Other examples of “comprehensive treaties” are the treaties that France has concluded with Gabon (1995), Guinea (1999) and Algeria (1999) as well as the West African Economic and Monetary Union Income, Capital and Inheritance Tax Treaty (2008). See also, Jan Szczepański, “The Dual System of OECD Model Tax Conventions from the Evolutionary Perspective,” *Intertax* 46, no. 10 (2018): 789.

59 Szczepański is of the view that one of the reasons for existing differences in “consolidated treaties” is evidently the lack of guidance in the Commentary to the OECD IHTMTC. See Jan Szczepański, “The Dual System of OECD Model Tax Conventions from the Evolutionary Perspective,” *Intertax* 46, no. 10 (2018): 791.

in the absence of an inheritance tax treaty concluded by the Contracting States. More specifically, Article XXXIX B of the Canada – US Income and Capital Tax Treaty (1980), as amended, provides for a credit against the Canadian income tax payable by Canadian residents and spousal trusts for US federal and state estate tax or inheritance tax paid on US situs property.⁶⁰ Double taxation, however, is not entirely relieved as the credit cannot be claimed against Canadian provincial income taxes.

A similar provision is included in the Canada – France income and capital tax treaty⁶¹ (1975) (as amended through 2010). Under Article 2(4) of this tax treaty, “[n]otwithstanding the preceding provisions of this Article, the existing taxes to which the Convention shall apply also include, in the case of France, the inheritance tax, but only for the application of Articles 4, 23, 25 and 26.” Article 4 of the treaty refers to the term “resident”, Article 23 to the elimination of double taxation and Articles 25 and 26 to the mutual agreement procedure and the exchange of information respectively. More specifically, under Article 23 of the treaty, each Contracting State grants a credit with regard to the taxes paid on capital gains for assets located in Canada (in the case of France) or for the inherited property located in France (in the case of Canada).⁶²

6.1.7 Conflicts of qualification (Articles 3 and 5-7)

In section 5.1.8, I mentioned that, although the three distributive rules of the OECD IHTMTC seem to be easily applicable, several conflicts of qualification might arise when the Contracting States apply their inheritance and gift tax treaty. This type of conflict, however, seems to counter the objective of the model of addressing double taxation and the proposed inheritance and gift tax. In that regard, the OECD IHTMTC does not provide an effective solution to these conflicts that can result, in some instances in double taxation.

As mentioned before, there are three types of conflicts of qualification. There are conflicts due to i) the differences in domestic law classifications, ii) the differences in treaty application to the facts at hand, and iii) the interpretation of the treaty rules. In section 5.1.8, I presented examples for each type of conflict. In the following sections, I will suggest solutions to address them.

6.1.7.1 Conflicts of qualification due to the interpretation of the treaty rules

I observe that the OECD IHTMTC defines very few terms (the “defined terms” – section 6.1.7.1.1). Furthermore, some terms are not sufficiently defined, for instance, the term “immovable property” (the “insufficiently defined terms” – section 6.1.7.1.2). Finally, there are many terms used in the model, which are left undefined (Article 3(2) – section 6.1.7.1.3).

60 See also Patricia Brandstetter, “*Taxes Covered*”: A Study of Article 2 of the OECD Model Tax Conventions (Amsterdam: IBFD, 2011), 200.

61 Guglielmo Maisto, “General Report: Death as a Taxable Event and its International Ramifications,” in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 50.

62 See also, Sanford H. Goldberg, “Estate tax conflicts resulting from a change in residence: double taxation resulting from the application of capital gains and death taxes,” in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 37.

6.1.7.1.1 *The defined terms – Article 3(1) of the OECD IHTMTC*

I note that that Article 3(1) of the OECD IHTMTC defines only the terms “property which forms part of the estate of, or of a gift made by, a person domiciled in a Contracting State” and “competent authority”. More specifically, the term “property which forms part of the estate of, or of a gift made by, a person domiciled in a Contracting State” includes any property the devolution or transfer of which, under the law of a Contracting State, is liable to a tax covered by the Convention”. Moreover, the term “competent authority” means: (i) (in State A)... (ii) (in State B)...”.

In addition, Article 10(2) defines the term “nationals” as follows: “The term “nationals” means: a) all individuals possessing the nationality of a Contracting State; b) all legal persons, partnerships and associations deriving their status as such from the law in force in a Contracting State.” At last, Article 4 “defines” the term “person domiciled in a Contracting State”. Nevertheless, as noted in section 5.1.1, although the criteria for establishing fiscal domicile are listed in Article 4(1), the term, in essence, is a national term. The criteria “residence”, “domicile”, “place of management” and “criterion of a similar nature” are left undefined and are thus defined under the law of each Contracting State.

Apart from the above terms, I observe that there are important terms for the application of the model and the inheritance and gift tax treaties that are left undefined. This applies, for instance, to the term “person” whose definition is not included in Article 3 of the OECD IHTMTC (general definitions) or in Article 4 (fiscal domicile). As a matter of comparison, Article 3 of the OECD ICTMTC defines the following terms: “person”, “company”, “enterprise”, “enterprise of a Contracting State”, “enterprise of the other Contracting State”, “international traffic”, “competent authority”, “national” and “business”. The definition of these terms in the income and capital tax model admittedly prevents many conflicts of qualifications due to the interpretation of the treaty rules.

Under paragraph 14 of the introductory report by the OECD’s Committee on Fiscal Affairs, “[i]n revising the 1966 Estate Tax Draft, the Committee on Fiscal Affairs saw no reason to deviate from that approach. The natural consequence of this is that concepts which are expressed by the same words in both Model Conventions must each be taken to have the same application, due regard being had, wherever appropriate, to the different nature of the forms of taxation in question.” Considering the above, I am of the opinion that the terms, which have been already defined in the OECD ICTMTC, can also apply to the OECD IHTMTC by analogy because their definition does not arguably change due to the different nature of the forms of taxation. Therefore, I propose the following wording of Article 3(1):

- “1. For the purposes of this Convention, unless the context otherwise requires:
 - a) the term “person” includes an individual, a company and any other body of persons, including the estate of a person⁶³;
 - b) the term “company” means any corporate or any entity that is treated as a body corporate for tax purposes;
 - c) the term “enterprise” applies to the carrying on of any business;

63 The fact that the term “person” also incorporates corporate entities derives also from Article 4(3) of the OECD IHTMTC, which states that “3. Where by reason of the provisions of paragraph 1 a person other than an individual is domiciled in both Contracting States, then it shall be deemed to be domiciled in the State in which its place of effective management is situated.”.

- d) the term “competent authority” means:
 - (i) (in State A):.....
 - (ii) (in State B):.....
- e) the term “national”, in relation to a Contracting State, means:
 - (i) any individual possessing the nationality or citizenship of that Contracting State; and
 - (ii) any legal person, partnership or association deriving its status as such from the laws in force in that Contracting State;
- f) the term “business” includes the performance of professional services and of other activities of an independent character;
- g) the term “property which forms part of the estate of, or of a gift made by, a person domiciled in a Contracting State” includes any property the devolution or transfer of which, under the law of a Contracting State, is liable to a tax covered by the Convention.”

6.1.7.1.2 *The insufficiently defined terms – the term “immovable property”*

I observe that there are terms, which are insufficiently defined in the OECD IHTMTC, and their interpretation by each Contracting State can often give rise to a conflict of qualification. For example, the term “immovable property” of Article 5(2) of the OECD IHTMTC may give rise to different interpretations by each Contracting State. Under Article 5(2) of the OECD IHTMTC, “[t]he term “immovable property” shall have the meaning which it has under the law of the Contracting State in which the property in question is situated [...]”. As a result, the Contracting State of the fiscal domicile should follow the interpretation, which the other Contracting State applies to the term “immovable property”. Nevertheless, the question arises as to whether the reference to the domestic law of the other Contracting State concerns only its tax law or its laws in general. This is an important issue because different interpretations of the same term can often give rise to double taxation or double non-taxation.

If, for example, the other Contracting State defines the term “immovable property” broadly based on its civil law while the Contracting State of the fiscal domicile defines the term under the tax law of the Contracting State of the objective nexus, which provides a narrow definition of the term.⁶⁴ Thus, under Article 5 of the OECD IHTMTC, the other Contracting State may levy an inheritance tax, for instance, on five assets whereas the Contracting State of the fiscal domicile will consider that the other Contracting State is allowed to levy inheritance tax on only three assets and, thus, will levy inheritance tax on the remaining two.

A suggestion for an amendment to the wording of Article 5(2) of the OECD IHTMTC would seem to resolve the above conflict of qualification. In my view, priority should be given to the *tax law* definition of the law of the other Contracting State. Both Contracting States will thus apply the same tax law definition of the term, so no conflict of qualification may arise. The fact that the tax laws of the other Contracting State may refer to the civil

⁶⁴ Marc Walter, “Conflicts of Qualification and International Inheritance Cases,” in *Conflicts of Qualification in Tax Treaty Law*, ed. Michael Lang (Vienna: Linde Verlag, 2007), 301–302.

law definition of the term “immovable property” is immaterial as both Contracting States will end up applying the same definition.

The priority of the tax law definitions is also supported by Article 3(2) of the income and capital tax model which reads as follow: “[a]s regards the application of the Convention at any time by a Contracting State, any term not defined there shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.” As a matter of comparison, Article 3(2) of the OECD IHTMTC does not specify the body of laws of each Contracting State which are required to define a term unless the context of the treaty otherwise requires. I will come back to this point in section 6.1.7.1.3.

Furthermore, Walter noted that commercial considerations could be taken into account when defining the term “immovable property”.⁶⁵ I agree with Walter’s observation and observe that Article 5(3) of the OECD IHTMTC already takes commercial considerations into account. Under Article 5(3), “[t]he provisions of paragraph 1 shall also apply to immovable property of an enterprise and to immovable property used for the performance of professional services or other activities of an independent character.” Likewise, commercial considerations were also considered in Article 13(4) of the OECD ICTMTC concerning the capital gains taxation of shares deriving more than 50% of their value directly or indirectly from immovable property. It follows that the term “transfer of immovable property” could also include indirect transfers, which would thus fall under Article 5 of the treaty and not Article 7.⁶⁶ Interestingly, the France – Sweden Inheritance and Gift Tax Treaty (1994) includes such indirect transfers within the ambit of Article 5. To this end, I suggest the following wording of Article 5 of the OECD IHTMTC (additions in brackets):

“1. Immovable property which forms part of the estate of, or of a gift made by, a person domiciled in a Contracting State and which is situated in the other Contracting State may be taxed in that other State. 2. The term “immovable property” shall have the meaning that it has under the [tax] law of the Contracting State in which the property in question is situated. The term shall, in all events, include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property. 3. The provisions of paragraph 1 shall also apply to immovable property of an enterprise and to immovable property used for the performance of professional services or other activities of an independent character. [4. The term “immovable property” shall also include shares, participations and other rights in a company or legal person the assets of which consist, directly or through one or more other companies or legal entities, mainly of immovable property situated in one of the Contracting States or of rights encumbering such property. These shares, participations and other rights shall be deemed to be situated in the Contracting State in which the immovable property is situated.]”

65 Marc Walter, “Conflicts of Qualification and International Inheritance Cases,” in *Conflicts of Qualification in Tax Treaty Law*, ed. Michael Lang (Vienna: Linde Verlag, 2007), 301–302.

66 Marc Walter, “Conflicts of Qualification and International Inheritance Cases,” in *Conflicts of Qualification in Tax Treaty Law*, ed. Michael Lang (Vienna: Linde Verlag, 2007), 301–302.

6.1.7.1.3 The undefined terms – update of Article 3(2) of the OECD IHTMTC

Article 3(2) of the model states that “[a]s regards the application of the Convention by a Contracting State, any term not defined there shall, unless the context otherwise requires, have the meaning which it has under the law of that State concerning the taxes to which the Convention applies.” This is the case, for example, of the terms “person”, “movable property”, “debt”, “company”, “business” and “enterprise”. Considering that the OECD member countries could not easily agree on commonly accepted definitions of the above terms due to the differences in their legal systems, the OECD IHTMTC intentionally left these terms undefined. Article 3(2) of the treaty comes thus into play.

Nevertheless, I noted that Article 3(2) refers, in general, to the laws of each Contracting State for the definition of an undefined term unless the context of the treaty otherwise requires. On the other hand, Article 3(2) of the OECD ICTMTC refers to the *tax* laws of each Contracting State for the definition of an undefined term. Walter argued that considering the aim and the purpose of the treaty, which is the avoidance of double taxation, and the similarity of the two model conventions, an implicit supremacy of the tax laws of a state can also be concluded for the [OECD IHTMTC].⁶⁷ Of note is that the priority of the tax laws over any other body of laws of each Contracting State was an amendment that was inserted in Article 3(2) of the income and capital tax model only in 1996.

To this end, Article 3(2) of the OECD IHTMTC could read as follows (additions in brackets):

“2. As regards the application of the Convention at any time by a Contracting State, any term not defined there shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that [specific State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.]”

Finally, I note that the treaty practice seems to have already identified the insufficient wording of the current version of Article 3(2) of the OECD IHTMTC. For instance, Article 3(2) of the UK – US Inheritance and Gift Tax Treaty (1978), “[a]s regards the application of the Convention by a Contracting State, any term not otherwise defined shall, unless the context otherwise requires and subject to the provisions of Article 11 (Mutual Agreement Procedure), have the meaning which it has under the laws of that Contracting State relating to the taxes which are the subject of the Convention.” Furthermore, under Article 3(2) of the France – US Inheritance and Gift Tax Treaty (1978) “2. [...] if the meaning of such a term under the laws of one of the Contracting States is different from the meaning of the term under the laws of the other Contracting State, the Contracting States may, in order to prevent double taxation or to further any other purpose of this Convention, establish a common meaning of the term for purposes of this Convention.”

6.1.7.2 Conflicts of qualification due to differences in treaty application to the facts

It was previously mentioned that conflicts of qualification might also arise if the Contracting States disagree on the facts of the case at hand. For example, a Contracting State may consider that there is no PE in the territory of the other Contracting State whereas the

⁶⁷ Marc Walter, “Conflicts of Qualification and International Inheritance Cases,” in *Conflicts of Qualification in Tax Treaty Law*, ed. Michael Lang (Vienna: Linde Verlag, 2007), 302.

other Contracting State may consider that there is. Alternatively, both Contracting States may claim that the deceased or the donor maintained a permanent home in their territory based on the facts of the case while the deceased had, in fact, only one permanent home.

Unfortunately, the Commentary on OECD IHTMTC gives no guidance for these conflicts. On the contrary, I note that the Commentary on Articles 23A and 23B of the OECD ICTMTC discusses this type of conflicts. Under paragraph 32.5 of the Commentary, the States should use the provisions of Article 25 (mutual agreement procedure), and in particular paragraph 3 thereof, to resolve this type of conflict in cases that would otherwise result in unrelieved double taxation.

It follows that the Commentary on Articles 9A and 9B of the OECD IHTMTC will be required to incorporate a section on the conflicts of qualification due to differences in treaty application to the facts. In that regard, I note that this section will follow the wording of paragraph 32.5 of the Commentary on Articles 23A and 23B of the income and capital tax model. It goes without saying that addressing those types of conflicts prerequisites an effective mutual agreement procedure (section 6.1.8).

6.1.7.3 *Conflicts of qualification due to differences in domestic law classifications*

The Commentary on Article 7 of the OECD IHTMTC mentions four examples of entities or rights for which conflicts of qualification may arise due to their different classification under the domestic law of each Contracting State: the interests in partnerships, the undistributed estates, and the property held in a trust, and the companies holding immovable property. I note that these conflicts are called “conflicts of treatment”. Admittedly, these conflicts can give rise to double taxation as shown from paragraphs 17 to 23 of the Commentary on Article 7 of the OECD IHTMTC. As a result, the OECD IHTMTC Commentary suggests the Contracting States adopt specific language in their tax treaty to address the issue.

Under the suggested language of paragraph 24 of the Commentary on Article 7, “[i]f by the law of a Contracting State any right or interest is regarded as property not falling under Article 5 or 6, but by the law of the other Contracting State that right or interest is regarded as property falling under either of those Articles, then the nature of the right or interest shall be determined by the law of the State which is not the State of the deceased’s or the donor’s domicile”. Consequently, if the Contracting State of the fiscal domicile applies Article 7 of the treaty and the other Contracting State Articles 5 and/or 6 and both states seek to tax the right or interest, the former Contracting State must recognise the classification which the latter Contracting State gives to this right or interest. It must also grant double tax relief for the tax paid in the other Contracting State.

It should be noted, however, that under paragraph 27 of the Commentary on Article 7 of the OECD IHTMTC, “[i]f Member countries consider that the solution proposed in paragraph 24 does not resolve all conflicts of treatment satisfactorily, they are free to adopt an alternative solution. For example, in the case of partnerships, they may resolve this problem in bilateral negotiations by determining the nature of the property by reference to the law of the State under which the partnership is established.”

As mentioned in section 5.1.8, the proposed wording of paragraph 24 seems to effectively address double taxation arising from conflicts of qualification due to differences in domestic law classifications. Furthermore, it is in line with the so-called “new approach”, which the 1999 OECD’s report “The application of the OECD Model Tax Convention to partnerships”

(“the partnership report”) brought to the paragraphs 32.2 and 32.4 of the Commentary on Articles 23A and 23B. Under paragraph 32.3, “[w]here, due to differences in the domestic law between the state of source and the State of residence, the former applies, with respect to a particular item of income or capital, provisions of the Convention that are different from those that the State of residence would have applied to the same item of income, the income is still being taxed in accordance with the provisions of the Convention, as interpreted and applied by the State of source. In such case, the two Articles require that relief from double taxation be granted by the State of residence notwithstanding the conflict of qualification resulting from these differences in domestic law”.

In line with the new approach,⁶⁸ the state of residence must follow the classification, which the state of source grants to the right or entity. This seems to be in line with the suggested language of paragraph 24 of the Commentary on Article 7 of the OECD IHTMTC.

6.1.8 *Mutual agreement procedure (Article 11)*

6.1.8.1 *The importance of the procedure*

The mutual agreement procedure is an important provision of the OECD IHTMTC for various reasons. First, the scope of this procedure is very broad. More specifically, the procedure can be first initiated if taxation in one or both the Contracting States is not imposed or will not be imposed in accordance with the provisions of the inheritance and gift tax treaty. For example, if the other Contracting State discriminates the non-national resident beneficiary on the grounds of his nationality, taxation in the other Contracting State is not levied in accordance with the provisions of the treaty. Furthermore, the mutual agreement procedure can be initiated if the tax authorities of each Contracting State need to agree on the interpretation or the application of the treaty (Article 11(3) first sentence) or in cases not provided for in the treaty (Article 11(3) second sentence).

Under paragraph 8 of the Commentary on Article 11 of the OECD IHTMTC, “[i]n practice, the procedure applies to cases, likely to be the most numerous, where the tax charges in question lead to double taxation which it is the specific purpose of the Convention to avoid. Among the most common cases mention must be made of the following: a) differences of interpretation by the two Contracting States as to the determination of domicile (paragraph 2 of Article 4) or the existence of a [PE] or a fixed base (Article 6); b) questions relating to the allocation of debts (Article 8); c) conflicts between the domestic laws of the Contracting States as to whether property falls under Articles 5 and 6 or Article 7.”⁶⁹

68 The “new approach” under the partnership report and the amendments to the OECD Commentary have been heavily criticized in the literature. See for example, Klaus Vogel, “Conflict of Qualification: The Discussion is not Finished,” *Bulletin for International Taxation* 57, no. 2 (2003): 41-44; Alexander Rust, “The New approach to Qualification Conflicts has its Limits,” *Bulletin for International Taxation* 57, no. 2 (2003): 45-50. Many scholars believe that the application of Article 23 A and B of the OECD IHTMTC cannot be justified if the state of residence applies a rule which affords it exclusive taxation rights. This also applies in the context of Articles 9A and 9B. If the Contracting State of the fiscal domicile applies Article 7 of the treaty (an exclusive distributive rule) and the other Contracting State applies Article 5 of the treaty (an open distributive rule), the Contracting State of the fiscal domicile has to apply double taxation relief even though it applies Article 7 of the treaty for which Articles 9A and 9B are not relevant.

69 Commentary on Article 11 of the OECD IHTMTC, para. 8.

Second, the mutual agreement procedure is important in light of the update work of the OECD IHTMTC regarding the elimination of double taxation of cross-border inheritances and donations. More specifically, the mutual agreement procedure is relevant when the Contracting States apply the updated general tiebreaker rule (section 6.1.3.2.3) or when they need to solve a conflict of qualification due to differences in treaty application to the facts (section 6.1.7.2). Furthermore, I put forward in section 5.1.7 that, although the property valuation rules fall outside the scope of the model, double taxation arising from the application of different valuation rules can be addressed in the framework of a mutual agreement procedure.

Nevertheless, I noted in section 5.1.10 that the OECD IHTMTC's mutual agreement procedure can be improved having regard to the objective of the model i.e. the allocation of taxing rights between the Contracting States for the avoidance of double or multiple taxation. This is because, if the competent authorities of each Contracting State cannot resolve the cases submitted to the mutual agreement procedure the issue remains unsettled and the cross-border inheritance and donation is possibly taxed twice. As a matter of comparison, the OECD ICTMTC's mutual agreement procedure includes an obligatory referral of the unresolved issues to arbitration upon person's request (Article 25(5) of the OECD ICTMTC).

6.1.8.2 *Inclusion of arbitration clause*

The uncertain outcome of the mutual agreement procedure seems, in my view, to be the reason why it could be argued that the application of the procedure may counter the objective of the model of addressing double taxation. It should be noted, however, that the OECD IHTMTC and the Commentary are products of their time (1982) and, therefore, are outdated also in terms of dispute resolution.

Furthermore, those who drafted the OECD IHTMTC had already acknowledged in 1982 that from the taxpayer's point of view, the mutual agreement provision is not entirely satisfactory, but it represented the maximum that the OECD member countries were willing to accept at that time: "Double taxation is still possible although contrary to the sense and purpose of a convention aimed at avoiding double taxation."⁷⁰ Therefore, according to the Commentary, if a convention is interpreted or applied differently in two Contracting States, and if the competent authorities are unable to agree on a joint solution within the framework of a mutual agreement procedure, it would be difficult to resolve the dispute within a mutual agreement procedure.⁷¹ In that regard, one solution, under the Commentary, could be to seek an advisory opinion. The Contracting States would ask for an opinion of an impartial third party. However, the final decision would still be made by the states. It could also be possible to ask the Committee on Fiscal Affairs to give its opinion of the correct interpretation. To conclude, the Commentary raises the possibility to ask for the opinion of certain persons acting as arbitrators.⁷² Based on the above, the Commentary does not take a stand on whether the resolution of arbitration would be binding and who would be entitled to request arbitration.

⁷⁰ Commentary on Article 11 of the OECD IHTMTC, para. 42.

⁷¹ Commentary on Article 11 of the OECD IHTMTC, para. 41.

⁷² Commentary on Article 11 of the OECD IHTMTC, para. 44.

As a matter of comparison, the OECD ICTMTC's mutual agreement procedure was updated in 2008 and includes an obligatory referral of the unresolved issue to arbitration upon a person's request. More specifically, under Article 25(5) of the income and capital tax model, "[w]here, a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the date when all the information required by the competent authorities in order to address the case has been provided to both competent authorities, any unresolved issues arising from the case shall be submitted to arbitration if the person so requests in writing.

These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph."

It goes without saying that the inclusion of this paragraph to Article 11 of the OECD IHTMTC makes the mutual agreement procedure more in line with the objective of the model of addressing double taxation. However, a mutual agreement procedure followed by arbitration can sometimes be lengthy and result in financial problems if the tax payment is not postponed during the procedure. For this reason, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter: "MLI") included provisions on the arbitration phase of the mutual agreement procedure of the income and capital covered tax agreements (Articles 19 – 26) which aim at addressing some of these issues. Arguably, these provisions can also apply to the suggested arbitration stage of the OECD IHTMTC's mutual agreement procedure. Therefore, I suggest that an update of Article 11 of the OECD IHTMTC should also take into account the changes, which the MLI brought to the mutual agreement procedure of the income and capital covered tax agreements.

Finally, I note that Article 14 of the France – Germany Inheritance and Gift Tax Treaty (2006) lays down an arbitration procedure that may be invoked if the competent authorities fail to reach an agreement within 24 months from the day the taxpayer has presented his case. More importantly, under paragraph 5 of Article 14 "[t]he decisions of the arbitration commission shall be made by the majority of votes of the members and they shall be binding. The absence of, or abstention from voting by, one of the members appointed by the Contracting States shall not prevent the commission from making a decision. In case of a tie, the chairman's vote is decisive."

6.2 Double or multiple non-taxation

6.2.1 Overlaps with the OECD ICTMTC (Article 2)

In my view, the overlaps between the two models that can lead to double non-taxation of the cross-border inheritance and donation provide the argument that Article 2 of the

OECD IHTMTC can be improved having regard to the objective of the model of addressing double non-taxation and the proposed inheritance and gift tax. Improvements to Article 2 of the OECD IHTMTC were presented in section 6.2.1 of this study through a) a transition from an exhaustive list of Article 2(3) of the OECD IHTMTC to an indicative list, and b) the definition of the term “identical or substantial similar tax” of Article 2(4) of the OECD IHTMTC in line with the proposed inheritance and gift tax. In that regard, I refer to section 6.1.4. of this study. In my view, the suggested amendments to the OECD IHTMTC that are proposed in this section also address double non-taxation issues due to overlaps between the two OECD models.

For example, based on section 6.1.4 of this study, a *mortis causa* income tax should be included in the scope of an inheritance and gift tax treaty if it is consistent with the proposed inheritance and gift tax. If this is the case, both Contracting States will apply the inheritance and gift tax treaty at hand. Therefore, the Contracting State of the fiscal domicile that, for instance, levies inheritance taxes based on the deceased's residence will apply the treaty and refrain from taxing the immovable property located in the other Contracting State if it eliminates double taxation through a tax exemption (Article 9A). On the other hand, the other Contracting State will apply Article 5 of the treaty and therefore apply a *mortis causa* income tax. Therefore, by optimizing Article 2 of the OECD IHTMTC, potential overlaps with the OECD ICTMTC that can lead to double non-taxation outcomes can arguably be addressed.

6.2.2 Conflicts of qualification (Articles 3 and 5-7)

In section 5.1.8, I mentioned that, although the three distributive rules of the OECD IHTMTC seem to be easily applicable, several conflicts of qualification might arise when the Contracting States apply their inheritance and gift tax treaty. This type of conflicts, however, seems to counter the objective of the OECD IHTMTC of addressing double taxation and the proposed inheritance and gift tax. In that regard, the OECD IHTMTC does not provide an effective solution to these conflicts, which can also result in double non-taxation.

As mentioned in section 5.1.8, there are three types of conflicts of qualification. There are conflicts due to i) the differences in domestic law classifications, ii) the differences in treaty application to the facts at hand, and iii) the interpretation of the treaty rules. In section 5.2.2, I presented examples of two of these conflicts and concluded that double non-taxation of the cross-border inheritance is likely due to these conflicts.

6.2.2.1 Conflicts of qualification due to the interpretation of the treaty rules

I refer to section 6.1.7.1 of this study concerning solutions to conflicts of qualification due to the interpretation of the treaty rules.

6.2.2.2 Conflicts of qualification due to differences in treaty application to the facts

I refer to section 6.1.7.2. of this study concerning solutions to conflicts of qualification due to differences in treaty application to the facts.

6.2.2.3 Conflicts of qualification due to differences in domestic law classifications

As mentioned in section 6.1.7.3, the question arises whether the suggested wording of paragraph 24 effectively addresses double non-taxation resulting from differences in domestic law classifications and especially in situations where the Contracting State of fiscal domicile provides an exemption based on Article 9A of the OECD IHTMTC to avoid double taxation of the cross-border inheritance. Paragraph 25 of the Commentary clearly states that double non-taxation is addressed through the suggested wording. Nevertheless, in my view, this is doubtful. In all the examples of the Commentary, the classification by the other Contracting State is decisive for the classification of the entity or the right at hand. This means, however, that double non-taxation may still arise if the other Contracting State applies Article 7 of the treaty and thus does not tax the right or interest, and the Contracting State of the fiscal domicile applies Article 5 or 6 of the treaty and therefore taxes but subsequently exempts the property under Article 9A of the treaty.

Of note is that the Commentary on Articles 23A and 23B OECD ICTMTC under the new approach distinguishes the situations where conflicts of qualification resulting from differences in domestic law classifications can result in double taxation and *double non-taxation*. In the first case, the right or the interest at hand is taxed in accordance with the provisions of the Convention, as interpreted and applied by the State of source. On the contrary, in the case of double non-taxation, the right or the interest at hand is not taxed in accordance with the provisions of the Convention. This follows from paragraph 32.6 of the Commentary on Articles 23A and 23B OECD ICTMTC which reads as follows: “where the state of source considers that the provisions of the Convention preclude it from taxing an item of income or capital which it would otherwise have had the right to tax, the State of residence should, for purposes of applying paragraph 1 of Article 23A, consider that the item of income may not be taxed by the State of source in accordance with the provisions of the Convention, even though the State of residence would have applied the Convention differently so as to have the right to tax that income if it had been in the position of the State of source. Therefore, the residence state is not required by paragraph 1 to exempt the item of income, a result which is consistent with the basic function of Article 23 which is to eliminate double taxation.”

In line with the new approach, I am of the opinion that the Contracting State of the fiscal domicile will not exempt the property that was not taxed by the other Contracting State that applied Article 7 of the treaty. The property was not taxed in the former state in accordance with the provisions of the tax treaty at hand and thus, the Contracting State of the fiscal domicile will not exempt it. As a result, the Contracting State of the fiscal domicile will not follow the classification that the other Contracting State gives to the property at hand⁷³ and thus, it will tax it.

In that regard, I note that this solution is in line with paragraph 22 of the Commentary on Article 9B of the OECD IHTMTC that provides an optional wording that reads as follows: “If the domestic law of the State of situs does not entitle it to make full use of the right to tax

73 This approach is also in line with paragraph 23 of the Commentary on Article 9A of the OECD IHTMTC. Under this paragraph, “[i]f the domestic law of the State of situs does not entitle it to make full use of the right to tax reserved to it by the Convention, then in order to avoid double non-taxation, Contracting States may find it reasonable in certain circumstances to make an exception to the obligation on the State of domicile to give exemption.”

reserved to it by the Convention, then in order to avoid double non-taxation, Contracting States may find it reasonable in certain circumstances to make an *exception to the obligation on the State of domicile to give exemption*. In such cases it is left to States, in their bilateral negotiations, to agree upon the necessary modifications to the Article.” (Italics, VD)

6.2.3 Termination of the tax treaty (Article 16)

I mentioned in section 5.2.3 that the *verbatim* reproduction of Article 31 of the OECD ICTMTC, in my view, can be problematic in some cases. More specifically, I observed that, according to Article 16 of the model, an inheritance and gift tax treaty could not be terminated for some years following its entry into force. This is because, according to paragraph 5 of the Commentary on Article 16, “[i]t is of advantage that the Convention should remain in force at least for a certain period”. In that regard, I noted that many inheritance and gift tax treaties provide for a five-year minimum application period. I observed, however, that the application of a minimum application period may not always be an advantage for the Contracting States but it can give rise to double non-taxation. Nevertheless, double non-taxation due to the compulsory application of the inheritance and gift tax treaty by each Contracting State even following the abolition of the inheritance and/or gift tax laws by a Contracting State seems to counter the objective of addressing double non-taxation. As per Maisto’s observation, “[i]nheritance taxes may be unexpectedly repealed in one country so that the wording adopted by the OECD IHTMTC might be an impediment for the other Contracting State to promptly terminate the treaty”.⁷⁴

More specifically, if a Contracting State repeals its inheritance or gift tax laws within the five years, the other state is precluded from taxing the assets that it would have been entitled to do under its domestic law. This is true if double taxation is eliminated under the exemption method. Hence, the Contracting State of the fiscal domicile (which still levies inheritance and gift taxes) will exempt the property mentioned in Articles 5 and 6 of the treaty irrespective of whether or not this property is taxed in the other Contracting State.⁷⁵ Given, however, that this property is not taxed in the latter state (which has abolished its inheritance and gift tax laws), double non-taxation is possible. The Contracting State of the fiscal domicile can terminate the treaty only after the lapse of the minimum application period.

On the other hand, I note that if double taxation is eliminated under the credit method (Article 9B of the OECD IHTMTC), double non-taxation is not possible. Under this method, the Contracting State of the fiscal domicile must credit the taxes levied in the other Contracting State. If the latter state does not levy these taxes for whatever reason, no credit is granted. Consequently, the Contracting State of the fiscal domicile can tax the property covered in Articles 5 and 6 of the treaty given that these Articles are open distributive rules (“may be taxed”). For example, the Austria – the Netherlands inheritance and gift tax treaty (2001) is still in force despite the abolition of the inheritance tax legislation in Austria as per 1 August 2008. Although the Netherlands could have terminated the treaty

74 Guglielmo Maisto, “General Report: Death as a Taxable Event and its International Ramifications,” in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 50-51.

75 Commentary on Article 9A of the OECD IHTMTC, para. 22.

as per 1 January 2009,⁷⁶ the credit mechanism under this treaty safeguards that double non-taxation is not possible before and after the lapse of the five-year minimum period.

6.2.3.1 *Double non-taxation before the lapse of the minimum application period*

It follows from the above that double non-taxation is possible before the lapse of the minimum application period of treaties in which double taxation is eliminated under the exemption method. As the Contracting States are precluded from terminating the treaty within this period, I suggest that a specific provision needs to be inserted which could allow the Contracting States, by exception, to terminate the treaty because of changes made in their tax laws.

To this end, I propose the following wording for Article 16 of the OECD IHTMTC (additions in brackets):

"1. This Convention shall remain in force until terminated by a Contracting State. Either Contracting State may terminate the Convention, through diplomatic channels, by giving notice of termination at least six months before the end of any calendar year after the year... In such event, the Convention shall cease to have effect: a) (in State A)... b) (in State B)... [2. Notwithstanding the provisions of paragraph 1, if the effects of this Convention are substantially altered as a result of changes made in the tax law of either Contracting State, either Contracting State may, through diplomatic channels, give a written notice of termination with effect not earlier than a period of six (6) months after such notice is given. In such an event, its provisions shall not apply to estates of persons who die or to gifts made on or after the effective date of the termination. 3. The Convention shall continue to apply in respect of the estate of any individual who has died before the end of that period and in respect of any event (other than death) occurring before the end of that period and giving rise to liability to tax under the laws of either Contracting State. 4. The termination of the present Convention shall not have the effect of reviving any treaty or arrangement abrogated by the present Convention or by treaties previously concluded by the Contracting States.]

Paragraph 2 of the suggested wording has been inspired by the France – US Inheritance and Gift Tax Treaty (1978). Under paragraph 2 of the suggested wording, the Contracting States can exceptionally terminate the treaty even before the lapse of the minimum application period in the case of changes in their tax laws. The term "changes of tax law" should be strictly interpreted. First, changes in tax law that do not affect the substance of the legislation should not give the right to the Contracting States to terminate their tax treaty. The proposed inheritance and gift tax benchmark can assist in that regard. As a result, if a Contracting State replaces its inheritance tax or estate tax laws with, for instance, *mortis causa* capital gains legislation that is substantially similar to the inheritance tax or estate tax laws based on the proposed inheritance and gift tax benchmark, such a change should not qualify as a change in tax laws. In addition, only changes in tax laws of either Contracting State should allow the exceptional termination of the tax treaty. Hence, any other change, for instance, in the applicable civil laws should not justify the termination of

⁷⁶ Considering a) the agreed five-year minimum period of the termination Article of this treaty, and b) the entry into force of the treaty in 2003.

the treaty. Finally, I note that the suggested wording provides an option to the Contracting States to terminate their tax treaty. On the other hand, it does not oblige them to do so.

The suggested wording includes a third paragraph that clarifies that the termination of the treaty at hand shall not prevent the application of the present Convention to taxable events occurring before the termination date. This paragraph has been inspired by treaty practice. Maisto noted in that regard that several treaties clarify that their termination does not prevent the application of the treaty to taxable events occurring before the termination date. Avoiding undesired effects of termination requires specific language, for instance, when the terminated treaty contained provisions which abrogated an earlier treaty.⁷⁷ Article 15(1) of the UK – US Inheritance and Gift Tax Treaty (1978) serves as an excellent example in that regard.

Finally, under paragraph 4 of the suggested wording, the termination of the tax treaty shall not have the effect of reviving any treaty or arrangement abrogated by the tax treaty at hand or by treaties previously concluded by the Contracting States. This paragraph has been inspired by Article 15(2) of the UK – US Inheritance and Gift Tax Treaty (1978).

I note, however, that, although based on the suggested wording, the Contracting State that still levies death taxes and taxes on gifts has the right to terminate the tax treaty under certain conditions, double non-taxation cannot be addressed if the domestic law of this state does not include a subject-to-tax clause for the application of the exemption method for the elimination of double taxation.

6.2.3.2 Double non-taxation after the lapse of the minimum application period

Furthermore, it would be good if a provision is inserted in the OECD IHTMTTC for situations giving rise to double non-taxation following changes in the tax laws of the Contracting States *after* the lapse of the minimum period. In that regard, I note that the Commentary already allows the Contracting States to modify Article 9A in order to address double non-taxation. More specifically, under this paragraph 22 of the Commentary on Article 9A, “[i]f the domestic law of the State of situs does not entitle it to make full use of the right to tax reserved to it by the Convention, then in order to avoid double non-taxation, Contracting States may find it reasonable in certain circumstances to make an exception to the obligation on the State of domicile to give exemption. In such cases, it is left to States, in their bilateral negotiations, to agree upon the necessary modifications to the Article. Conversely, an exception might also be possible in order to preserve the right of the State of situs to tax other property in addition to that falling under Articles 5 and 6 if the State of domicile is not entitled by its law to tax such other property.”

The abovementioned section refers to situations where the domestic law of the State of the objective nexus does not entitle it to make full use of the right reserved by the tax treaty. The Commentary does not, however, refer to the reasons why the State of the objective nexus cannot tax. In my view, the reference to “domestic law” should be interpreted broadly. Therefore, this paragraph of the Commentary should not only apply to situations where, for instance, the State of the objective nexus does not tax because of an exemption/deduction/credit/allowance but also where this state has abolished its death and gift tax

⁷⁷ Guglielmo Maisto, “General Report: Death as a Taxable Event and its International Ramifications,” in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 51.

laws. In these situations, the Contracting State of the fiscal domicile shall not be obliged to provide double taxation relief and thus exempt the property listed in Articles 5 and 6 of the OECD IHTMTC (provided that its domestic law includes a subject-to-tax clause for the application of the exemption method).

6.3 Discriminatory treatment of cross-border inheritances and donations

6.3.1 Introduction

In section 3.1.3, I discussed the third problem of cross-border inheritances and donations, the discriminatory treatment of cross-border inheritances and donations. In a tax treaty context, the protection against discriminatory inheritance and gift tax provisions of either Contracting State takes place under Article 10 of the treaty, the so-called “non-discrimination provision”. In section 5.3.2, I argued that the wording of the OECD IHTMTC’s nationality non-discrimination provision needs to be revisited considering the objective of the OECD IHTMTC of addressing discrimination of cross-border inheritances and donations and the proposed inheritance and gift tax.

6.3.2 Suggested improvements to the OECD IHTMTC’s nationality non-discrimination provision

It was previously mentioned that the OECD IHTMTC’s nationality non-discrimination provision follows that of the OECD ICTMTC in its 1977 version. The similarities between the two provisions show that those who drafted the OECD IHTMTC sought to achieve an interaction between them. Such an interaction is achieved through the similar wording of the provisions, on the one hand, and the application of each provision to taxes of every kind and description, on the other.

Nevertheless, I noted in section 5.3.2 that, despite the desire for interaction between the two OECD’s nationality non-discrimination provisions, the scope of the models differs. The OECD ICTMTC applies to *persons* that are residents of one or both Contracting States⁷⁸ whereas the OECD IHTMTC to *estates and inheritances and gifts* where the deceased or the donor was domiciled, at the time of his death or the donation, in one or both Contracting States.⁷⁹ One, therefore, can easily observe the inconsistency of the current wording of the OECD IHTMTC’s nationality non-discrimination provision with the scope of the model. The wording of the provision is centred on the persons who can invoke the non-discrimination provision (“the nationals of each Contracting State”) and not the property whose value is reduced due to the application of discriminatory legislation. Furthermore, the wording of the provision gives the impression that the discriminatory element of the legislation of a Contracting State shall only refer to the nationals of each Contracting State. It is therefore unclear whether the provision can be invoked in the case of discriminatory valuation and debt deduction rules.

In my view, the current wording of the provision unreasonably reduces the scope and the effectiveness of the provision in the endeavour of those who drafted the model

⁷⁸ See, Article 1 of the ICTMTC and Commentary on Article 1 of the OECD IHTMTC, para. 13.

⁷⁹ See, Article 1 of the OECD IHTMTC.

to achieve an interaction between the two types of the models. An alignment, however, of the wording of the OECD IHTMTC's nationality non-discrimination provision with the scope of the model arguably resolves the above issues. Furthermore, the wording of the provision seems to give the impression that the discriminatory element of the legislation of a Contracting State shall only refer to the nationals of each Contracting State. It is therefore unclear whether the provision can be invoked in the case of discriminatory valuation and debt deduction rules. To this end, I suggest the following wording (addition in brackets):

"[Estates of] nationals of a Contracting State, wherever they are domiciled, shall not be subjected in the other Contracting State to any taxation, or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which [estates of] nationals of that other State in the same circumstances are or may be subjected."

6.4 Administrative difficulties

As I mentioned in section 5.4, the OECD IHTMTC does not include provisions aimed at addressing the administrative difficulties of cross-border inheritances and donations that were presented in chapter 3 of this study. More specifically, the mutual agreement procedure of Article 11 of the OECD IHTMTC does not address the difficulties that the beneficiaries may encounter in the state of the objective nexus (section 3.1.4.2.1) or the state of the personal nexus (section 3.1.4.2.2). The same is true for the exchange of information framework of Article 12 of the OECD ITCMTC that refers to exchange of information between the competent authorities of each Contracting State for the application of the specific treaty.⁸⁰ As a result, this study does not cover the mutual agreement procedure and the exchange of information frameworks.

Nevertheless, I mentioned in section 5.4.2, that the nationality non-discrimination provision of the OECD IHTMTC and the treaties applies to both substantive and procedural tax provisions of the Contracting States. In other words, the OECD member countries agreed that the nationals of each Contracting State could invoke the non-discrimination provision of an inheritance and gift tax treaty also against discriminatory procedural tax provisions, the so-called "formalities connected with the taxation". Such formalities can be relevant to addressing some administrative difficulties presented in chapter 3 of this study in cases where they are discriminatory against cross-border inheritances and donations. Therefore, the suggested improvements to the wording of the nationality non-discrimination provision of the OECD IHTMTC that was presented in section 6.3.2 of this study are also relevant in situations where taxpayers may seek to invoke the provision against discriminatory procedural tax provisions of the Contracting States.

⁸⁰ Please also note that exchange of information on taxes on inheritances and gifts is also available under the amended multilateral Convention on Mutual Administrative Assistance in Tax Matters (1988 as amended in 2010). See also Jan Szczepański, "Is the Polish Inheritance and Gift Tax Incompatible with the Free Movement of Capital in Relation to Third Countries?," *European Taxation* 56, no. 9 (2016): 389.

6.5 Conclusion of chapter 6

In this chapter, I suggested improvements to certain provisions of the OECD IHTMTC having regard to the objectives of the OECD IHTMTC and the elements of the proposed inheritance and gift tax.

Concerning the double or multiple taxation, I observed that the subsidiary taxing right provision seems to counterbalance the narrow scope of the model. However, the ten-year limitation period for the exercise of these rights and the underlying notion that these rights are exercised for anti-abuse reasons should not apply, in my view, to all the cases of paragraph 5 of the Commentary to Article 1. Furthermore, I suggested that the inclusion of the deceased's or donor's nationality as a subsidiary criterion for the establishment of fiscal domicile as well as the conclusion of a multilateral tax treaty seems to address the problem of multiple taxation of cross-border inheritances and donations. Moreover, I suggested the inclusion of a specific but optional tiebreaker rule and/or the update of the current one with elements that would be more in line with the manner in which certain states aim to establish the lifelong attachment of a person with their territory and the proposed inheritance and gift tax. Concerning the overlaps between the two OECD models, I addressed the issue of the parallel application of the two types of treaties to a single transfer or property by i) suggesting a transition from an exhaustive list of Article 2(3) of the OECD IHTMTC to an indicative list, and ii) underlining the need for a definition of the term "substantially similar" to an existing tax on estates and inheritances and on gifts. In addition, I suggested that the double taxation relief of Article 9B of the OECD IHTMTC (credit method) broadly apply and not be limited to taxes that are levied based on the same taxable event or paid by the same person. This is true for the connection between the estate and inheritance taxes as well as death/gift taxes with *mortis causa* and *inter vivos* income and capital gain taxes. Moreover, I discussed how the OECD IHTMTC could more effectively deal with conflicts of qualification that result in double taxation. Finally, yet importantly, I suggested the inclusion of an arbitration clause to the mutual agreement procedure of Article 11 of the OECD IHTMTC that is in line with the objective of the model.

Concerning the double or multiple non-taxation problem, I suggested that i) a transition from an exhaustive list of Article 2(3) of the OECD IHTMTC to an indicative list, and ii) the definition of the term "substantially similar" to an existing tax on estates and inheritances and on gifts can address cases of double non-taxation due to the application of two different types of treaties to a single transfer of property. Moreover, I discussed how the OECD IHTMTC could more effectively deal with conflicts of qualification that result in double non-taxation. Finally, I suggested updates to Article 16 of the OECD IHTMTC to address the double non-taxation issue arising from the termination of an inheritance and gift tax treaty before the minimum application period.

Concerning the discrimination problem, I suggested updated language for the OECD IHTMTC's nationality non-discrimination provision that arguably would broaden the scope of the provision. Finally, concerning the administrative difficulties of cross-border inheritances and donations, I argued that the proposed improvements to the wording of the scope of the nationality non-discrimination provision can arguably improve the application of the non-discrimination provision by offering treaty protection against discriminatory procedural tax provisions of the Contracting States.

A new version of the OECD IHTMTC is included in appendix I of this study. This version incorporates the suggested improvements to the provisions of the model having regard to the objectives of the model and the elements of the proposed inheritance and gift tax. Moreover, the suggested version of the OECD IHTMTC includes general updates to the provisions of the model that have been inspired by the 2017 version of the ICTMTC. These amendments were incorporated for the sake of completeness and therefore do not aim at improving a provision of the model or its Commentary having regard to the objectives of the model and the elements of the proposed inheritance and gift tax.

It goes without saying that the above suggestions provide separate solutions to the problems of the cross-border inheritances and donations. They only focus on a particular problem and do not interact with the solutions of another problem. Furthermore, I note that, although the model can be substantially improved if the above suggestions are followed, some aspects of the problems of the cross-border inheritances and donations may remain unaddressed. For example, the OECD IHTMTC's non-discrimination provision does not protect against indirectly discriminatory inheritance and gift tax legislation. In the same vein, the Articles of the model, which relate to the administration of the cross-border inheritances and donations, focus on the tax authorities' level and thus, do not consider the taxpayers' aspect. The example of Mr D's beneficiaries in section 3.1.4.2 shows, however, that many administrative difficulties arise at the taxpayers' level due to uncoordinated and unharmonized tax procedures. Admittedly, those problems cannot be resolved at the OECD level because the OECD is not competent to harmonise the OECD member countries' tax legislations.

For the above reasons, a holistic solution to the problems of the cross-border inheritances and donations is required. I observe that such a solution is conceivable only at the EU level. Before, however, discussing this solution in chapter 8, I will examine in the next chapter the progress made in the EU towards addressing each problem of cross-border inheritances and donations separately and, where appropriate, suggest separate solutions to them.

Separate solutions at the EU level

This chapter deals with separate solutions to the problems of cross-border death and gift taxation at the EU level. Before suggesting solutions to these problems, however, I review the progress made in the EU regarding each problem to assess whether the current mechanisms employed at the EU level are effective.

In the course of my research, I observed that very little progress had been made at the EU level in addressing the problem of double or multiple taxation of inheritances. The same is true with regard to the double or multiple non-taxation of inheritances. On the contrary, by declaring several discriminatory inheritance and gift tax provisions of the EU Member States contrary to EU law, the Court has contributed the most to the so-called “negative harmonisation” of inheritance and gift taxes. Finally, administrative difficulties of the cross-border inheritances and donations are dealt with – up to a certain extent – by two EU Directives, which apply to any type of death and gift taxes.

7.1 Double or multiple taxation

The 2015 inheritance tax report extensively discussed the double or multiple taxation problem of cross-border inheritances and donations within the EU. According to the report, “[t]he number of people leaving property situated in two or more Member States when they die is growing rapidly. Many of their families will soon discover that tax on inheritance can often be claimed by each of the Member State concerned. It does not take long for multiple taxation, even at low rates, to amount to expropriation.”¹ In the same line, the report of the Copenhagen Economic Institute “Study on inheritance taxes in the EU Member States and possible mechanisms to resolve problems of double inheritance taxation in the EU”², issued in 2010, stated that “from a macro perspective, the existing evidence shows that the scale of double taxation problem in the field of inheritance is relatively small [...]. However, for the individual EU citizens who are exposed to double taxation, the conclusion may be far different. To these EU Citizens, it may have a major negative impact on their personal financial situation that their inheritance is taxed in more than one Member State.”³

1 EU, “*Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU*”, report prepared by the European Commission Expert Group, para. 5, p. 5.

2 Copenhagen Economics Institute, *Study on inheritance taxes in the EU Member States and possible mechanisms to resolve problems of double inheritance taxation in the EU* (2010), 13. This respectable report has been commissioned by the EC.

3 Copenhagen Economics Institute, *Study on inheritance taxes in the EU Member States and possible mechanisms to resolve problems of double inheritance taxation in the EU* (2010), 11.

While considering that in January 2014, the number of individuals living in an EU Member State other than their home state was estimated at 14 million⁴ and that an individual's wealth can be located in several EU Member States, double or multiple taxation can become a serious obstacle to the smooth functioning of the internal market defined in Article 26(2) TFEU as “an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of the Treaties.”

Nevertheless, the progress made within the EU towards addressing double or multiple taxation of inheritances and donations is admittedly not commensurate with the effects of the problem on the internal market and the EU taxpayers. This is true given that the EU fundamental freedoms do not deal with the juridical double or multiple taxation (section 7.1.1) and the EC's recommendation has failed to achieve its objective nine years after its issuance (section 7.1.2).

7.1.1 *EU fundamental freedoms and juridical double taxation of inheritances*

Despite the adverse effect of double or multiple taxation on the smooth functioning of the internal market, it is settled case law of the Court that the EU fundamental freedoms do not protect against juridical double taxation.⁵ Although in the inheritance tax case *Van Hilten* (C-513/03) the Court raised the importance of the unilateral credit by the state of the deceased's extended residence, it became clear from *Block* (C-67/08) that the EU Member States are not obliged “to adapt their own tax systems to the different systems of tax of the other Member States.”⁶

Ms Block, a German resident, was the sole beneficiary of a person who died in Germany. The inheritance of that person consisted of, *inter alia*, capital claims against financial institutions in Spain. Germany taxed these claims in its capacity as the state of the personal nexus (as both the deceased and the beneficiary were resident in Germany). On the other hand, Spain taxed the claims in its capacity as the state of the objective nexus (because the capital claims were sited in its territory under Spanish law). Ms Block, therefore, paid inheritance tax in both EU Member States and subsequently, requested a credit for the Spanish inheritance tax against the German inheritance tax. The German tax authorities rejected her application because the claims against financial institutions in Spain were not considered “foreign assets”, for which a foreign tax credit would be available.⁷ She was only allowed to deduct the Spanish tax from the German inheritance tax base as a debt of the estate.

Under German law, a foreign tax credit is available if the asset, which was subject to tax abroad, was considered a foreign asset under German situs rules. This was not the case of the capital claims at hand because Germany would not have taxed them if it were only the state of the objective nexus.⁸ On the other hand, Spain was subjecting those claims

4 EU, “*Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU*”, report prepared by the European Commission Expert Group, para. 5, p. 5.

5 ECJ, *Kerckhaert and Morres* (C-513/04), ECJ, *Jacques Damseaux v Belgian State* (C-128/08).

6 ECJ, *Block* (C-67/08), para. 31.

7 This is because, as noted in section 3.1.1.10, some states provide for a unilateral double taxation relief only for assets that they would have taxed if they were taxing them in their capacity as states of the objective nexus.

8 Germany was taxing the claims tax if the creditor (i.e. the deceased) was a resident of Germany.

to inheritance tax if the debtor (i.e. the financial institution) was a resident in Spain. As a result, the capital claims at hand were taxed in both Germany (personal nexus rule) and Spain (objective nexus rule). This gave rise to juridical double taxation due to a residence vs source conflict. Nevertheless, the Court held that:

“30. Community law, in the current stage of its development and in a situation such as that in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Community. Consequently, [...] no uniform or harmonisation measure designed to eliminate double taxation has as yet been adopted at Community law level (see Kerckhaert and Morres, paragraph 22, and Columbus Container Services, paragraph 45).

31. It follows from this that, in the current stage of the development of Community law, the Member States enjoy a certain autonomy in this area provided they comply with Community law, and are not obliged therefore to adapt their own tax systems to the different systems of tax of the other Member States in order, inter alia, to eliminate the double taxation arising from the exercise in parallel by those Member States of their fiscal sovereignty and, in consequence thereof, to allow the inheritance tax paid in a Member State other than that in which the heir is resident to be deducted in a case such as that of the main proceedings (see, to that effect, Columbus Container Services, paragraph 51).”⁹

It follows from the *Block* case – which is in line with the Court’s previous case law on juridical double taxation¹⁰ – that the Court views juridical double taxation as the outcome of disparities in tax systems of two EU Member States.¹¹ As a result, it falls outside the scope of the EU fundamental freedoms that protect against discrimination arising within a single EU Member State. On the contrary, juridical double taxation is the outcome of the parallel application of two or more EU Member States’ inheritances tax legislations. In the Court’s view, double taxation of inheritances and donations can only be addressed through a “uniform or harmonisation measure designed to eliminate double or multiple taxation” at the EU level. I observe, however, that to date, such a measure has not been proposed in the EU. On the contrary, the double or multiple taxation problem of cross-border inheritances and donations is currently dealt with by a coordination measure, the EC’s recommendation 2011/856 regarding relief for double taxation of inheritances.

7.1.2 The EC’s recommendation 2011/856 regarding relief for double taxation of inheritances

7.1.2.1 Introduction

On 15 December 2011, the EC released a package dealing with issues related to double taxation and discriminatory tax treatment in the area of inheritance and gift taxation. Among other documents, this package included a recommendation regarding relief for the

⁹ *Id.*, paras. 30, 31.

¹⁰ ECJ, *Kerckhaert and Morres* (C-513/04), ECJ, *Jacques Damseaux v Belgian State* (C-128/08).

¹¹ On the concept of disparities, see also ECJ, *Egon Schempp v Finanzamt München V* (C-403/03) and Sjoerd Douma, “Optimization of tax sovereignty and free movement” (Amsterdam, IBFD, 2011), 135-142.

double taxation of inheritances (the EC's recommendation 2011/856/EU).¹² Preceding the issuance of the EC's recommendation, the EC's Communication on "Double taxation in the Single Market"¹³ recognised that existing and planned legislation for relieving the double taxation of income and the capital could not efficiently handle cross-border inheritance and gift tax issues. Therefore, distinct solutions would be necessary for this area. The EC's recommendation serves in that regard as the one and only "separate solution" to the double or multiple taxation problem of cross-border inheritances and donations in the EU.

While being aware of the fact that a full harmonisation of national inheritance and gift tax systems would be disproportionate to the objective of addressing this problem, the EC, by proposing the recommendation, followed a soft law approach aiming at the *coordination* of the EU Member States' national legislations instead of their harmonisation.¹⁴ In its view, if the EU Member States follow the recommendation and integrate its provisions into their national inheritance and gift tax systems, the juridical double and multiple taxation problem of inheritances can be resolved.¹⁵

The general objective of the EC's recommendation is mentioned in its Article 3. The recommendation aims at "resolving cases of double taxation so that the overall level of tax on a given inheritance is no higher than the level that would apply if only the Member State with the highest tax level among the Member States involved had tax jurisdiction over the inheritance in all its parts."

The recommendation contains in Article 2(a) a broad definition of the term "inheritance tax". More specifically, "inheritance tax means any tax levied at national, federal, regional, or local level upon death, irrespective of the name of the tax, of the manner in which the tax is levied and of the person to whom the tax is applied, including in particular estate tax, inheritance tax, transfer tax, transfer duty, stamp duty, income and capital gains tax."¹⁶ Therefore, the recommendation applies to any death taxes levied by the EU Member States. Of note is that it applies by analogy to gift taxes where gift taxes are levied under the same or similar rules as inheritance taxes (Article 1.2). The recommendation further defines the terms "tax relief,"¹⁷ "assets" and "personal link".

However, it leaves the following terms undefined: "permanent establishment", "immovable property", "movable property", "resident", "domicile", "nationality", "habitual

12 See also Rik Deblauwe, Anouck Biesmans, Bianca de Kroon and Frans Sonneveldt, "Gift and Inheritance Tax with Regard to Charities," in *Taxation of Charities*, ed. Frans Vanistendael (Amsterdam: IBFD, 2015), 88.

13 European Commission Communication, Double Taxation in the Single Market, COM (2011) 712 final.

14 European Commission Staff Working Paper, Impact Assessment accompanying the document Commission Recommendation regarding relief for double taxation of inheritances, SEC (2011) 1489, 37.

15 Edouard-Jean Navez, "The Influence of EU Law on Inheritance Taxation: Is the Intensification of Negative Integration Enough to Eliminate Obstacles Preventing EU Citizens from Crossing Borders within the Single Market?," *EC Tax Review* 21, no.2 (2012): 93.

16 Furthermore, for the purposes of point (a), previously paid gift tax on the same asset is considered as inheritance tax for the purposes of granting tax credit.

17 Article 2(b) of the recommendation defines the term "tax relief" as follows: "'tax relief' means a provision contained in legislation and/or general administrative instructions or guidance whereby a Member State grants relief for inheritance tax paid in another Member State, by crediting the foreign tax against tax due in that Member State, by exempting the inheritance or parts of it from taxation in that Member State in recognition of the foreign tax paid or by otherwise refraining from the imposition of inheritance tax".

abode” and “permanent home”. These terms are defined either by the domestic law of the EU Member State applying them or by a mutual agreement procedure (Article 6).

The recommendation contains three main rules regarding the provision of tax relief. Under Article 4.1, an EU Member State should allow tax relief for inheritance tax applied by another EU Member State on immovable property situated in that other EU Member State (Article 4.1 (a)) and on movable property that is the business property of a PE situated in that other EU Member State (Article 4.1 (b)). It follows that the recommendation respects the allocation of taxing rights suggested by the OECD IHTMTC. Articles 4.1(a) and 4.1(b) are, therefore, in line with Articles 5 and 6 of the OECD IHTMTC respectively.

Furthermore, under Article 4.2, “[i]n respect of movable property other than business property as referred to in Article 4.1(b), a Member State with which neither the deceased nor the heir has a personal link should refrain from applying inheritance tax provided that such tax is applied by another Member State by reason of the personal link of the deceased and/or the heir to that other Member State.” Article 4.2 thus precludes the EU Member State of the objective nexus to tax the movable property (not connected to the business property of a PE) as long as another EU Member State taxes this property based on the personal nexus of the deceased and/or the beneficiary with it. It follows that this Article aims at limiting the broad situs rules of several EU Member States,¹⁸ which may otherwise claim to tax the movable property concerned.

Article 4.2 is similar to Article 7 of the OECD IHTMTC as it precludes the EU Member State of the objective nexus to tax.¹⁹ It has, however, a broader scope: Article 4.2 of the recommendation suggests that *any* EU Member State with which the deceased and/or the beneficiaries have no personal nexus is not allowed to tax the movable property that is situated there and is not connected to the business property of a PE. As a result, it addresses cases of double or multiple taxation. Moreover, I observe that the rule applies only if another EU Member State taxes the movable property based on the personal nexus of the deceased and/or the beneficiary with it, a condition which is not included in Article 7 of the OECD IHTMTC.

Moreover, under Article 4.3 “[s]ubject to paragraph 4.1, in cases where more than one Member State can apply taxation to an inheritance on the basis that a deceased had personal links with one Member State and the heir has personal links with another Member State, then the second Member State should give tax relief for the tax paid on the inheritance in the Member State with which the deceased had personal links.” It follows from Article 4.3 that the taxing rights of the EU Member State of the deceased’s personal nexus take precedence over those of the EU Member State of the beneficiaries’ personal nexus. The underlying principle of this Article is that inheritances have often been accumulated over the lifetime of the deceased. Moreover, the assets contained in an inheritance are more likely to be located in the EU Member State to which the deceased had personal links than in the EU Member State to which the beneficiary has personal links. Finally, a majority

18 See also, Frans Sonneveldt, “Voldoet Nederland aan de aanbeveling van de Europese Commissie op het gebied van grensoverschrijdende erfbelasting?,” *WPNR Weekblad voor Privaatrecht Notariaat en Registratie* 6334 (2012): 444.

19 *Id.*

of EU Member States impose death and gift taxes on a worldwide basis according to the personal nexus of the deceased with their territory.²⁰

The recommendation contains a tiebreaker rule in Article 4.4 in cases of multiple personal links of an individual (Article 4.4.1) or a person other than an individual (Article 4.4.2). It is suggested that the attachment of an individual or a legal entity to an EU Member State be determined through a mutual agreement procedure “set out” in Article 6, or otherwise. The connective criteria used in Article 4.4.1 (for individuals) and Article 4.4.2 (for persons other than individuals) are similar to those of the OECD ICTMTC’s and OECD IHTMTC’s tiebreaker rule.

Finally, under Article 5 of the recommendation, EU Member States should allow tax relief for a reasonable period, e.g. ten years from the time limit by which inheritance taxes that they apply have to be paid.

As noted in the 2015 inheritance tax report, several years have passed since the adoption of the recommendation and it seems that it has failed to generate sufficient action and is not going to lead to any fundamental change in the approach of Member States to the problem of double taxation of inheritances.²¹ However, it has not been entirely ignored. For example, as per the report, it was debated in 2011 in the Polish legislature and the Netherlands’ finance minister has stated that the Netherlands’ unilateral relief will be applied more liberally.²² Academic literature has already noted that the Netherlands broadly complies with the suggestions of the recommendation.²³

In the course of my research, I observed that the recommendation has some innovative aspects (section 7.1.2.2) and problematic aspects (section 7.1.2.3).

7.1.2.2 *The innovative aspects of the recommendation*

By issuing the recommendation, the EC attempted to *coordinate* the EU Member States’ provisions concerning relief for the double taxation of inheritances and donations by means of a non-binding legal instrument. The non-binding force of the recommendation derives from Articles 288 section 5 TFEU and 292 TFEU. Under Article 288 section 5 TFEU, “[r]ecommendations and opinions shall have no binding force.” Furthermore, under Article 292 TFEU, “[t]he Council shall adopt recommendations. It shall act on a proposal from the Commission in all cases where the Treaties provide that it shall adopt acts on a proposal from the Commission. [...]”

It follows from the above that recommendations do not have binding force. The EU Member States, thus, are not obliged to follow the recommendations and are not sanctioned if they ignore them. However, in *Grimaldi*, the Court ruled that:

“it must be stressed that the measures in question [author: two EC’s recommendations] cannot, therefore, be regarded as having no legal effect. *The national courts are bound to*

20 Preamble p. 17 of the recommendation and Frans Sonneveldt, “Voldoet Nederland aan de aanbeveling van de Europese Commissie op het gebied van grensoverschrijdende erfbelasting?,” *WPNR Weekblad voor Privaatrecht Notariaat en Registratie* 6334 (2012), 444.

21 EU, “*Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU*”, report prepared by the European Commission Expert Group, para. 10, p. 18.

22 *Id.*, p.18.

23 Frans Sonneveldt, “Voldoet Nederland aan de aanbeveling van de Europese Commissie op het gebied van grensoverschrijdende erfbelasting?,” *WPNR Weekblad voor Privaatrecht Notariaat en Registratie* 6334 (2012), 445–450.

take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions (Italics, VD)."²⁴

Despite its non-binding force, the EC's recommendation has some innovative aspects that should be considered when dealing with the double and multiple taxation problem of cross-border inheritances and donations.

7.1.2.2.1 Broad scope

First, the definition of the term "inheritance tax" in Article 2(a) of the recommendation is remarkably broad. The term shall mean *any* death tax levied in the event of death, thus, also *mortis causa* income and capital gains taxes. Furthermore, the recommendation applies by analogy to gift taxes (Article 1.2). The broad definition of the term "inheritance tax" and the application of the recommendation to gift taxes by analogy admittedly widen its scope as the EU Member States are suggested to grant double taxation relief also for foreign death and gift taxes that are different from those levied in their territory. Therefore, I am of the view that in relation to this point, the recommendation is in line with its objective, i.e. addressing double and multiple taxation cases, as mentioned in its Articles 1.1. and 3.

As a matter of example, the recommendation suggests that a *mortis causa* capital gains tax levied in the EU Member State B be credited against the inheritance tax levied in the EU Member State A, as both taxes shall be considered inheritance taxes.

7.1.2.2.2 Double or multiple taxation

Moreover, I note that Article 4.1 of the recommendation broadly follows the division of taxing rights of the OECD IHTMTC. Therefore, the primary taxing rights regarding immovable property and movable property connected to a PE are assigned to the EU Member State of the objective nexus. Nevertheless, I observe that the EC went one step further by suggesting in Article 4.2 of the recommendation the restriction of the EU Member States' situs rules with regard to *other* kinds of movable property. Therefore, under Article 4.2 of the recommendation, an EU Member State is precluded from taxing the movable property, which is located in its territory *and* is taxed under its domestic situs rules, if another EU Member State taxes this property by reason of the deceased's and/or the beneficiaries' personal nexus.

Article 4.2, in my view, is particularly effective in situations involving more than two EU Member States. More specifically, if the deceased died in EU Member State A and his beneficiaries are residing in EU Member State B while his movable property (not connected to a PE) is located in EU Member State C, the latter state is suggested to refrain from taxing this property if EU Member State A or B tax this property on the basis of the deceased's and/or the beneficiaries' personal nexus. Therefore, I am of the view that in relation to this point, the recommendation is in line with its objective, i.e., addressing cases of double and multiple taxation, as mentioned in its Articles 1.1. and 3.

24 Grimaldi (C-322/88), para. 18 and Jan Szczepański, "Personal Genuine Links under Domestic Inheritance Tax Rules in the light of International and European Standards," *Intertax* 43, no. 10 (2015): 607.

Article 4.2 admittedly contains a very practical rule, which, if followed by the EU Member States, addresses cases of multiple taxation. If the EU Member State of the objective nexus is precluded from taxing the movable property not connected to a PE, double taxation may only arise between the EU Member State of the deceased's personal nexus and the EU Member State of the beneficiaries' personal nexus.^{25, 26} Of note is that Article 4.2 suggests that the EU Member State of the objective nexus shall not tax, thus the EU Member State of the deceased's or beneficiaries' personal nexus does not have to provide relief in the first place.

In cases where both the EU Member State of the deceased's personal nexus and the EU Member State of the beneficiaries' personal nexus seek to tax the cross-border inheritance and/or donation, Article 4.3 suggests that the latter state provide relief for the tax paid in the former state. As a result, the primary taxing rights belong to the EU Member State of the deceased's personal nexus. Finally, I note that, contrary to Article 4.2, Article 4.3 does *not* preclude the EU Member State of the beneficiaries' personal nexus from taxing the cross-border inheritance or donation.

7.1.2.3 *The aspects of the recommendation that could be improved*

In my view, the recommendation has certain problematic aspects, which are all connected to the lack of definition of critical terms of its rules. More specifically, under Article 2, last section, “[t]he terms ‘permanent establishment’, ‘immovable property’, ‘movable property’, ‘resident’, ‘domicile/ domiciled’, ‘national/nationality’, ‘habitual abode’, and ‘permanent home’ have the meaning applicable under the domestic law of the Member State applying the term.”

The problematic aspects that are connected to the lack of definition of critical terms, are as follows: the unrelieved double taxation, the tiebreaker rule and the mutual agreement procedure.

7.1.2.3.1 *Unrelieved double or multiple taxation*

I observe that the lack of definition of the terms mentioned above may lead to cases of *unrelieved* double or multiple taxation, thereby making the rules of the recommendation practically ineffective. For example, the term “immovable property” is not defined. As a result, it has the meaning under the domestic law of the EU Member State applying this term. If, for example, the inheritance of a person resident in EU Member State A, includes a company holding immovable property in EU Member State B, both states may seek to tax. More specifically, EU Member State B may apply a look-through approach and seek to tax the immovable property in line with Article 4.1 (a) of the recommendation. On the other hand, EU Member State A may regard the company shares as movable property and

²⁵ In such a case, Article 4.3 of the recommendation would be applicable.

²⁶ On the contrary, if the assets of a cross-border inheritance/donation are located also in a third state which has not concluded a double tax treaty with the state of the deceased's fiscal domicile, the third state can still tax these assets even in the absence of any personal links with the deceased or the beneficiaries.

seek to tax them in line with Article 4.2 of the recommendation.²⁷ Both EU Member States, therefore, may consider that they have the primary right to tax. They will also not grant double taxation relief for the tax paid in the other EU Member State.²⁸ It follows that this situation gives rise to double taxation that is attributable to differences in domestic law classifications. This outcome, however, seems to counter the objective of the recommendation, as mentioned in its Articles 1.1. and 3.

The risk of double taxation due to differences in domestic law classifications has already been dealt with by the “new approach” within the framework of the income and capital tax model. In that regard, I suggested that this approach should also apply to the OECD IHTMTC due to the insufficient alternative wording of the Commentary of the model (section 6.1.7). In the same vein, it would have been better if the EC’s recommendation had contained a provision that could safeguard that differences in domestic law classifications would not result in double or multiple taxation. In line with this provision, the EU Member State of the personal nexus must follow the classification that the EU Member State of the objective nexus grants to the property at hand. It is understood that this approach applies only if the EU Member State of the objective nexus seeks to tax the property mentioned in Article 4.1.(a) or (b) of the EC’s recommendation because only in such a case, is this state, in principle, allowed to exercise its taxing rights.

7.1.2.3.2 *The tiebreaker rule*

As I mentioned in section 7.1.2.1, the tiebreaker rule of Article 4.4.1 of the recommendation is similar to that of the OECD IHTMTC (Article 4(2) of the model). As a result, preference is given, in descending order, to the individual’s permanent home, centre of vital interests, habitual abode, and nationality. In the case of a person other than an individual, its closer personal link could be deemed to be with the EU Member State in which its place of effective management is situated. It is noteworthy that the tiebreaker rule of the recommendation equally applies to both the deceased and the beneficiaries in comparison with the OECD IHTMTC’s tiebreaker rule, which applies only at the level of the deceased or the donor. Furthermore, like the OECD IHTMTC’s tie-breaker rule, the rule seems to disregard two important elements for the determination of the individual’s lifelong attachment with an EU Member State, namely the intention to reside and a minimum period of presence in a particular EU Member State. As a result, a minimum period of presence in an EU Member State preceding the death or the donation as well as a reference to individual’s clear intention to retain his permanent home in the EU Member State could have been inserted in Article 4.4.1 (a). In addition, the term “permanent home” should not have been left undefined.

Finally, I observe that the application of the connective criteria of the tiebreaker rule of Articles 4.4.1 and 4.4.2 seems to be optional to the EU Member States. This is based on the wording of Articles 4.4.1. and 4.4.2: “a closer personal link of an individual *could be*

27 To be accurate, Article 4.2. of the recommendation precludes EU Member State B to tax provided that EU Member State A taxes the deceased’s movable property (other than movable property of a permanent establishment).

28 See also Inge van Vijfeijken and Hedwig van der Weerd-van Joling, “Double Taxation of Inheritances and the Recommendation of the European Commission,” *EC Tax Review* 21, no. 6 (2012): 311, 314.

determined as follows:” (Italics, VD) and “in the case of a person other than an individual, such as a charity, its closer personal link *could be* deemed to be [...]” (Italics, VD), respectively. Nevertheless, this does not guarantee, in my view, a common and coordinating approach in case of multiple personal links of an individual and an entity.

7.1.2.3.3 *The mutual agreement procedure*

Under Article 6 of the recommendation, “[w]here necessary in order for the general objective set out in point 3 to be attained, Member States should operate a mutual agreement procedure to deal with any disputes connected with double taxation, including conflicting definitions of movable and immovable property or of the location of assets or the determination of the Member State which should provide tax relief in a given case.”

The question arises, however, whether the mutual agreement procedure of Article 6 can also be initiated in the absence of a tax treaty concluded between the EU Member States involved. At a second level, it is unclear whether the recommendation suggests the initiation of the mutual agreement procedure under an inheritance and gift tax treaty or also that of an income and capital tax treaty.²⁹

In my view, it would have been better if the recommendation had provided detailed rules for a mutual agreement procedure with clearly defined steps for settling disputes connected with the double and multiple taxation of inheritances and donations. As a result, the mutual agreement procedure can be improved considering the objectives of the recommendation, as mentioned in its Articles 1.1. and 3. As the EC decided to leave important terms undefined, the EU Member States should at least have been able to operate an effective mutual agreement procedure to deal with disputes, including those arising from the divergent definition of critical terms. Finally, the detailed rules should have taken into account that the dispute must be settled as soon as possible. According to the 2015 inheritance tax report, “[the mutual agreement procedure] is unlikely to be a speedy procedure and cannot be attractive in situations where free movement of individuals is fast increasing.”³⁰

7.1.3 *Conversion of the EC's recommendation to an EU Directive*

The issuance of the recommendation was not incidental as explained in the 2011 EC's Working Paper – Impact Assessment. This document accompanied the recommendation and explained why the EC decided to take specific actions to address, among others, the double and multiple taxation of cross-border inheritances and donations. In this document, the EC discussed the various policy options to address those problems and assessed the available

29 Notwithstanding the fact that “The mutual agreement procedures established under double tax treaties on IHT suffer from the well-known practical deficiencies, which are also present in the procedures established in treaties on income tax”, EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, para. 10, p. 14.

30 *Id.*, para. 25, p. 20.

options based on their effectiveness, proportionality, efficiency/ease implementation and flexibility.³¹ The policy options are as follows:

- Continuation of the current situation (policy option B1),
- EC's recommendation regarding (unilateral) national provisions designed to relieve double taxation of inheritances (policy option B2),
- EC's recommendation regarding relief for double taxation through bilateral agreements between EU Member States designed to relieve double taxation of inheritances (policy option B3),³²
- Binding rules governing bilateral agreements: adoption into EU law of a) a single basis for determining the tax liability, such as the location of assets or the residence of the deceased, etc. in bilateral relations, or b) minimum standard common rules for bilateral conventions (policy option B4),
- An EU-wide multilateral double tax convention (policy option B5),
- Binding EU legislation taking the form of an EU Directive for i) a single harmonised basis for taxation (policy option B6.a), ii) a combination of common definitions plus a single harmonised basis (policy option B6.b), iii) the relief of double taxation alone, by way of a binding unilateral relief provision coupled with a binding dispute resolution mechanism without making any changes in Member States' inheritance tax rules (policy option B6.c); and (iv) a combination of features of policy options B6.a, b and c, i.e. single harmonised basis, common definitions and a binding dispute settlement mechanism (policy option B6.d).

The issuance of a recommendation regarding (unilateral) national provisions designed to relieve double and multiple taxation of inheritances (policy option B2) scored the highest regarding its effectiveness, proportionality, efficiency and flexibility. On the contrary, the EC regarded the issuance of binding tax legislation taking one of the forms of the policy option B6 as a less effective, proportionate and flexible solution to the double and multiple taxation problem of cross-border inheritances and donations. With particular reference to the proportionality criterion, I note that the EC considered an option that results in harmonisation of EU Member States' laws disproportionate to the objective to be achieved, i.e. addressing double or multiple taxation of a single inheritance by several EU Member States. In that regard, a proportionate solution, in the view of the EC, is a solution that

31 European Commission Staff Working Paper, Impact Assessment accompanying the document Commission Recommendation regarding relief for double taxation of inheritances, SEC (2011) 1489,27.

32 The policy option B3 takes the following forms: Recommendation that EU Member States complete a full network of bilateral double taxation treaties on inheritances, based either on the OECD model convention on inheritance taxes of 1982 (Policy Option B3.a) or an alternative model such as an EU model treaty (Policy Option B3.b), or else include inheritance tax provisions within the scope of existing bilateral income tax treaties (Policy Option B3.c).

“[goes] no further in terms of EU measures/EU harmonisation than is necessary to achieve the objective”.^{33, 34}

Nevertheless, given the disappointing effect of the recommendation on EU Member States’ unilateral relief provisions, it would be arguable that a binding solution, in the form of an EU Directive, could address the problem of double and multiple taxation of inheritances and donations. This is conceivable, in principle, under Article 115 TFEU.³⁵ This Article provides the legal basis for the issuance of EU Directives for the approximation of the EU Member States’ laws that directly affect the establishment or functioning of the internal market. Under this Article “[w]ithout prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue *directives* for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.” I note that only EU Directives can be issued based on Article 115 TFEU. On the contrary, the issuance of an EU Regulation is not possible under this Article that explicitly refers to “directives for the approximation of such laws, regulations or administrative provisions of the Member States”.³⁶

In that regard, the EC’s expert group noted that “[a] regulation which contained the terms of the recommendation would go some way to resolving the problem of very high double taxation of inheritances”. The group notes, however, that “[a]lthough it would be reasonable for the Commission to propose that the terms of the recommendation be contained in EU legislation, it will be apparent that the need to accommodate the taxing rights of more than one Member State and the need to determine the existence of ‘personal links’ and ‘closer personal links’ requires a complex set of provisions [...]”.³⁷ I agree with this observation of the group. The application of an EU Directive regulating the granting of the relief for double taxation of inheritances (and donations) prerequisites harmonised rules for the determination of inheritance and gift tax liability and definition of critical terms used in its Articles. Defining, however, these terms and, most importantly, determining a new set of harmonised rules for the EU Member States on how to levy inheritance and gift taxes was already considered a disproportionate solution (see policy option B6) to the objective of addressing the double and multiple taxation of inheritances and donations,

33 European Commission Staff Working Paper, Impact Assessment accompanying the document Commission Recommendation regarding relief for double taxation of inheritances, SEC (2011) 1489, 32.

34 Jan Szczepański, however, is of the view that a coordinated system of taxation applicable to cross-border inheritances and gifts is proportionate to the objective of avoiding double or multiple taxation. See Jan Szczepański, “Proposal for the Coordinated System of Taxation Applicable to Cross-Border Inheritances and Gifts in the Internal Market,” *Intertax* 47, no.3 (2019): 252.

35 Cf. See Inge van Vijfeijken, “One Inheritance, One Tax,” *EC Tax Review* 26, no. 4 (2017): 219: “In the [2015 inheritance tax] Report, the expert group presents two alternatives. The first alternative solution is to turn the recommendation of 2011 into a Regulation.” Also, Frans Sonneveldt, “Na de Erfrechtverordening nu de Erfbelastingverordening?,” *NTFR Nederlands Tijdschrift voor Fiscaal Recht* 1732 (2015): “After the Succession Regulation, an Inheritance Tax Regulation could be considered. This Regulation could include the suggestions of the EC’s recommendation but it would have binding force” (translation, VD).

36 In the same vein, even if Articles 116 and 117 TFEU could be used as a legal basis for the issuance of EU measures in direct taxation (which that has not happened to date), I note that both Articles refer to the issuance of EU “directives”.

37 EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, para. 25, p. 20.

apart from the difficulty of achieving unanimity in the Council of Ministers (ECOFIN), that is one of the conditions for the adoption of an EU Directive under Article 115 TFEU.

7.1.4 *A combination of a treaty-based and an EU law solution*

7.1.4.1 *Multilateral convention for the avoidance of double taxation of estates, inheritances and donations (treaty-based solution) in the form of an EU Directive*

It has been previously mentioned that the conclusion of a multilateral inheritance tax convention within the EU had already been voiced by the EC in its 1994 Communication. As per the 2015 inheritance tax report “[t]he need to find a general solution which the European Commission correctly identified in 1994 is, even more, pressing in 2015. The possibility that a multilateral European convention may be concluded in respect of taxes on inheritance was raised as long ago as 1993 at a Symposium in Brussels organised by the Commission. Its proposals are published as an annex to the communication of 1994. In the past, the suggestion that a multilateral convention may be the solution to the problem of [inheritance tax] double taxation may have appeared somewhat optimistic. Some may think it less so now.”³⁸

Worthy of note is that the Nordic inheritance and gift tax treaty serves as an example of a multilateral convention in the area of inheritance and gift taxation within the European Economic Area (EEA). The convention has been concluded between Denmark, Finland, Iceland, Norway and Sweden. Denmark, Finland and Sweden are EU Member States and Norway and Iceland EEA countries.

The conclusion of a multilateral convention inspired by the OECD IHTMTC³⁹ and the EC’s recommendation seems, in my view, the most proportionate solution to the problem of double and multiple taxation of inheritances and donations in the EU. It does not involve substantial changes to EU Member States’ death tax laws, as it would deal only with the interaction of these diverse laws. As a result, such a solution would be proportionate to both the objective to be achieved and the EU Member States’ fiscal sovereignty.⁴⁰ Furthermore, such a convention can also amend the existing tax treaties, as was the aim of the MLI

38 EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, para. 27, 28, p. 21.

39 In that regard, I note that the EC’s expert group also considered the issuance of a multilateral convention a possible option for addressing the problem of double or multiple taxation of inheritances. More specifically, the group stated that “[w]ere a multilateral treaty to be considered as a solution to [inheritance tax] multiple taxation it could, perhaps, adopt an approach similar to that advanced in the [EC’s] recommendation”. See EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, 21, point 30. On the other hand, the suggestion put forward in this section – albeit taking the form of a multilateral convention – is based on an approach that combines the OECD IHTMTC and the EC’s recommendation.

40 It should be noted that the EC in its 2011 Working Paper – Impact Assessment recognised that a multilateral convention “[c]ould address triangular situations, where more than two Member States have taxing rights. However, in the EC’s view, “[i]t is very unlikely that Member States would agree on such a convention given a previous failed attempt at such a solution for income tax. Moreover, such a convention if proposed by the Commission could only be proposed in the form of a Directive [...]”. See European Commission Staff Working Paper, Impact Assessment accompanying the document Commission Recommendation regarding relief for double taxation of inheritances, SEC (2011) 1489, 29.

regarding the covered tax agreements in the area of income and capital taxes. It would, thus, reduce the time needed to renegotiate previous tax treaties and make it possible to interpret identical notions in an EU autonomous way. This would be possible, given that the convention could take the form of an EU Directive, thereby allowing the Court to interpret it.

Furthermore, I submit that the multilateral convention could have a broad scope (inspired by Article 2 of the EC's recommendation) and, therefore, apply to any death and gift tax levied by the EU Member States. In addition, it could include the amendments, which I suggested in chapter 6 as an improvement to the tie-breaker provision of the OECD IHTMTC. Therefore, it would be more in line with the nature of the taxes to which it would apply. It could also include an Article similar to Article 4.2 of the EC's recommendation (which, as noted, is very effective especially in situations involving more than two EU Member States) and possibly an Article similar to Article 4.3. Finally, it should contain an Article on a binding dispute resolution mechanism (mutual agreement procedure). The design of such a mechanism can be inspired by the Council Directive 2017/1852/EU which, however, does not apply to death and gift taxes.

A proposal for Council Directive on a multilateral convention for the avoidance of double or multiple taxation of cross-border inheritances and gifts is included in appendix II of this study.

7.1.4.2 *Extension of the scope of the Council Directive 2017/1852/EU (EU law solution)*

On 10 October 2017, the Council of EU Ministers adopted the EU Directive 2017/1852/EU on tax dispute resolution mechanisms in the European Union. The Directive aims at introducing mechanisms in the EU that ensure the effective resolution of disputes concerning the interpretation and application of such bilateral tax treaties and the Union Arbitration Convention, in particular, disputes leading to double taxation. The Directive introduces an enforceable obligation on the EU Member States to arrive at a resolution of all disputes that originate in tax treaties and affect the tax position of businesses and individuals. Most importantly, it introduces clearly defined and enforceable timelines with a standard period of 18 months for the arbitration phase.

The scope of the Directive is determined in Article 1: "This Directive lays down rules on a mechanism to resolve disputes between Member States when those disputes arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of *income* and, where applicable, *capital*. It also lays down the rights and obligations of the affected persons when such disputes arise. For the purposes of this Directive, the matter giving rise to such disputes is referred to as a 'question in dispute'." (Italics, VD). The term double taxation is further defined in Article 2(1) (c) of the Directive: "'double taxation' means the imposition by two or more Member States of taxes covered by an agreement or convention referred to in Article 1 in respect of the same taxable *income* or *capital* when it gives rise to either: (i) an additional tax charge; (ii) an increase in tax liabilities; or (iii) the cancellation or reduction of losses that could be used to offset taxable profits;" (Italics, VD). It follows that the Directive does not apply to disputes arising from the application of inheritance and gift tax treaties as evidenced from the definition of the term "double taxation" and the scope of the EU Directive.

I do not understand why the scope of the Directive has been limited to disputes relating to taxes on income and capital. An EU Member State which has already concluded both

an income and capital tax treaty and an inheritance and gift tax treaty with another EU Member State is expected to apply the same national law provisions for the application of the mutual agreement procedure regardless of the type of taxes to which this dispute relates. I suggest therefore that the Directive 2017/1852/EU be amended to also apply to disputes arising from the application of inheritance and gift tax treaties concluded between EU Member States.

A proposal for an amendment to the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union is included in appendix III of this study.

7.2 Double or multiple non-taxation

As previously noted, the EC's recommendation aims at "resolving cases of double taxation so that the overall level of tax on a given inheritance is no higher than the level that would apply if only the Member State with the highest tax level among the Member States involved had tax jurisdiction over the inheritance in all its parts." (Article 3). Nevertheless, I observe that Article 4.2. of the recommendation also deals with possible double or multiple non-taxation issues. Therefore, one could take the view that the recommendation aims (up to a certain extent) also at the avoidance of double or multiple non-taxation.

As previously mentioned, Article 4.2. precludes the EU Member State of the objective nexus to tax the movable property (other than movable property connected to a PE) "[p]rovided that such tax is applied by another Member State by reason of the personal link of the deceased and/or the heir to that other Member State". In that regard, I noted that this Article is particularly effective in situations involving more than two EU Member States. This is because the EU Member State of the objective nexus is precluded from exercising its taxing rights if the EU Member State of the deceased's or beneficiaries' personal nexus does so. On the contrary, the EU Member State of the objective nexus may still exercise its taxing rights if no tax is levied by either the EU Member State of the deceased's personal nexus or the EU Member State of the beneficiaries' personal nexus. Therefore, I observe that this Article deals with double or multiple non-taxation issues as well. This is undoubtedly an innovative aspect of the EC's recommendation.

Nevertheless, as in the case of double or multiple taxation, even if EU Member States apply the EC's recommendation, differences in domestic law classifications can result in double or multiple non-taxation due to the lack of definitions of the terms used in the recommendation in conjunction with the application of the exemption method for the avoidance of double taxation. For example, the non-definition of the term "immovable property" may lead to double non-taxation. Reversing the legal systems of the EU Member States of the example mentioned in section 7.1.2.3.1, EU Member State B may apply Article 4.2 of the recommendation and abstain from taxing the company shares of the company. On the other hand, EU Member State A may apply Article 4.1 and exempt the immovable property located in the EU Member State B. However, this result seems to counter the objective of avoiding double or multiple non-taxation (that seems to be reflected in the wording of Article 4.2. of the recommendation).

The risk of double non-taxation due to differences in domestic law classifications has already been dealt with by the "new approach" within the framework of the income and capital tax model. In that regard, I suggested that this approach should also apply to the OECD

IHTMTC due to the insufficient alternative wording of the Commentary of the OECD IHTMTC (section 6.1.7). In the same vein, it would have been better if the EC's recommendation had contained a provision that could safeguard that differences in domestic law classifications would not result in double or multiple non-taxation. In line with this provision, the EU Member State, which provides tax relief (in the form of an exemption), shall not exempt property that has not been *actually* taxed by the other EU Member State due to differences in domestic law classifications between the EU Member States concerned.

Despite the above, I note that a possible conversion of the EC's recommendation to an EU Directive providing common definitions of the undefined terms would be a disproportionate solution to the objective of addressing the double or multiple non-taxation problem of inheritances and donations, as in the case of double or multiple taxation. Therefore, I refer to section 7.1.3 of this study. However, the conclusion of a multilateral convention, in my view, would be a step in the right direction when dealing with double or multiple non-taxation issues (and thus, not only with double or multiple non-taxation issues). In that regard, I refer to section 7.1.4.1 of this study.

7.3 Discriminatory treatment of cross-border inheritances and donations

7.3.1 The "EU compliant inheritance and gift tax"

The application of the EU fundamental freedoms to cross-border inheritances and donations within the EU dates back to 2003 when the Court delivered its first judgment⁴¹ on the compatibility of a provision of the Netherlands inheritance tax legislation with the free movement of capital (Article 63 TFEU). Since then, the Court has delivered more than 19 judgments, examining several aspects of the EU Member States' inheritance and gift tax laws, amongst others:

- special tax deductions for certain liabilities and debts [e.g. obligation to transfer title – *Barbier* (C-364/01),⁴² mortgage debt – *Eckelkamp* (C-11/07), overendowment debt – *Arens-Sikken* (C-43/07)],
- subjective tax exemptions [*Geurts* (C-464/05), *Mattner* (C-510/08), *Welte* (C-181/12), *Hunnebeck* (C-479/14), *Commission v Germany* (C-211/13)],
- objective tax exemptions [*Commission v Greece* (C-244/15), *Commission v Spain* (C-127/12), *Q* (C-133/12), *Huijbrechts* (C-679/17)],
- valuation rules [*Jäger* (C-256/06), *Halley* (C-132/10), *Scheunemann* (C-31/11)],
- extended domicile rules [*Van Hilten* (C-513/03)],
- reduced rates for domestic non-profit organisations [*Missionwerk Werner* (C-25/10), *Commission v Greece* (C-98/16)⁴³], and
- credit for the previously paid inheritance tax [*Feilen* (C-123/15)].

41 ECJ, *Barbier* (C-364/01).

42 I note that issues on the incompatibility of EU Member States' inheritance and gift tax legislations have already been discussed in the literature, even after delivery of the ECJ's judgment in *Barbier*. See, for instance, Frans Sonneveldt, "The Barbier case," *European Taxation* 44, no. 6 (2004): 286-287.

43 See also Vasileios Dafnomilis, "European Commission v. Hellenic Republic (Case C-98/16): The Third Act of the Greek Tax Tragedy in Europe," *European Taxation* 57, no. 9 (2017): 408-417.

I am of the opinion that these judgments have contributed the most to the so-called “negative harmonisation” of the EU Member States’ inheritance and gift tax systems, thereby setting the framework of what I call the “EU compliant inheritance and gift tax”. As is the “proposed inheritance and gift tax”, the “EU compliant inheritance and gift tax” is a concept, which provides guidance to the EU Member States on how to apply their inheritance and gift tax laws in an EU compliant manner.

Under the EU compliant inheritance and gift tax, the EU Member States are required to apply the same valuation rules to both domestic and foreign-located assets.⁴⁴ Second, they shall allow the deduction of debts and liabilities pertaining to assets, which they tax in their capacity as states of the objective nexus.⁴⁵ Third, they shall grant the same objective and subjective tax exemptions to resident and non-resident beneficiaries when they tax in their capacity as the states of the objective nexus.⁴⁶ Moreover, the granting of these exemptions shall not depend on the exercise of an option by the non-resident beneficiary to be treated as resident beneficiary. Fourth, the EU Member States shall extend the application of the reduced rate applicable to transfers of assets to domestic non-profit organisations also to EU ones under certain conditions.⁴⁷

On the other hand, the application of extended residence or domicile rules by an EU Member State does not entail discrimination if these rules apply only to nationals of the EU Member State applying these rules.⁴⁸ Besides, reverse discrimination is allowed under EU law. In addition, the EU Member States of the personal nexus are allowed to grant an objective tax exemption pertaining to assets situated in their territory if they form part of its cultural and historical heritage.⁴⁹ Finally, the EU Member States do not have to provide for a reduction in the inheritance corresponding to the inheritance tax that another EU Member State has levied in respect of an earlier acquisition taxed in the latter EU Member State.⁵⁰

7.3.2 *The OECD IHTMTC and the EU fundamental freedoms*

I observe that EU law constellations can influence the application of an inheritance and gift tax treaty.⁵¹ This applies, in principle, to tax treaties concluded by the EU Member States and is based on the principle of sincere cooperation under Article 4(3) of the Treaty on European Union (TEU). For example, I submit that Article 8 of an inheritance and gift tax treaty shall apply in conformity with EU law. Under Article 8(1) to (3) of the OECD IHTMTC,

“1. Debts especially secured on any property referred to in Article 5 shall be deducted from the value of that property. Debts, not being especially secured on any property referred

⁴⁴ ECJ, *Jäger* (C-256/06); CJ, *Halley* (C-132/10).

⁴⁵ ECJ, *Barbier* (C-364/01); ECJ, *Eckelkamp* (C-11/07); ECJ, *D. M. M. A. Arens-Sikken v. Staatssecretaris van Financiën* (C-43/07).

⁴⁶ CJ, *Mattner* (C-510/08); CJ, *Welte* (C-181/12); CJ, *Commission v Germany* (C-211/13); CJ, *Hunnebeck* (C-479/14); CJ, *Commission v Spain* (C-127/12); CJ, *Commission v Greece* (C-244/15); CJ, *Huijbrechts* (C-679/17).

⁴⁷ CJ, *Werner* (C-25/10), *Commission v Greece* (C-98/16).

⁴⁸ ECJ, *Van Hilten* (C-513/03).

⁴⁹ CJ, *Q* (C-133/13).

⁵⁰ CJ, *Feilen* (C-123/15).

⁵¹ See also, Alexander Rust, “Article 24. Non-discrimination,” in *Klaus Vogel on Double Taxation Conventions*, eds. Reimer Ekkehart and Alexander Rust (Alphen aan den Rijn: Kluwer Law International, 2015), 1696.

to in Article 5, which are represented by the acquisition, conversion, repair or upkeep of any such property, shall be deducted from the value of that property.

2. Subject to the provisions of paragraph 1, debts pertaining to a permanent establishment referred to in paragraph 1 of Article 6, or to a fixed base referred to in paragraph 6 of Article 6, shall be deducted from the value of the permanent establishment or the fixed base as the case may be.

3. Other debts shall be deducted from the value of property to which the provisions of Article 7 apply.”

It follows that the allocation of debts follows the division of taxing rights of the inheritance and gift tax treaty. Debts economically linked to property that may be taxed by the other Contracting State, shall be deducted only in this state. All other debts shall be deducted in the Contracting State of the fiscal domicile. Regardless, however, of the above debt allocation rules, I submit that debts are required to be deducted in each EU Member State in an EU compliant manner.

The same applies to the granting of the so-called “special deductions”. Paragraph 26 of the Commentary on Article 9A of the OECD IHTMTC merely states that “[d]ifficulties may arise because the laws of most States provide for special deductions from the net amount of the estate or gift, or from specific items of the estate or gift, on the relationship between the deceased or the donor and the heir, legatee, or donee.” Nevertheless, under paragraph 28, “[i]n view of the wide variety of fiscal law and practice in the different States regarding the determination of tax, especially in relation to deductions, allowances and similar benefits, it is preferable not to propose an express and uniform solution in the Convention, but to leave each State free to apply its domestic law and practice. States which prefer to have a special problem solved in their conventions are free to do so in bilateral negotiations [...]”

It follows that those who drafted the OECD IHTMTC did not propose an express and uniform tax treatment of the special deductions granted by many states. On the contrary, this issue was left to bilateral negotiations. I note, however, that EU law sometimes obliges the EU Member States to grant the special deductions of their domestic law in an EU-conform manner.⁵² For example, the Court has already ruled, amongst others, in *Welte* that the EU Member State of the objective nexus shall provide the same tax-free allowances to domestic and cross-border inheritances and donations if both inheritances are comparable in light of the object and purpose of the inheritance and gift tax system at hand.

7.3.3 Two important issues arising from the Court’s case law

In my view, two important issues, which require further research, arise from the Court’s case law on EU inheritance and gift taxation. The first issue is the non-application of the *Schumacker* doctrine to EU inheritance and gift taxation (section 7.3.3.1). The second is the application of the neutrality argument in EU inheritance and gift taxation (section 7.3.3.2).

⁵² ECJ, *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt* (C-307/97); ECJ, *Elide Gottardo v Istituto nazionale della previdenza sociale (INPS)* (C-55/00).

7.3.3.1 The non-application of the Schumacker doctrine

Back in 1995, the ECJ held in *Schumacker* (C-279/93) that, although resident and non-residents are not in a comparable situation with respect to direct taxes,⁵³ the EU Member State of source shall grant national treatment to those non-residents who earn all or most of their income in its territory (the so-called “the *Schumacker* doctrine”). It must, therefore, grant them the person-related tax deductions, which it normally grants to its residents. On the other hand, if the non-residents do not earn most of their income in the EU Member State of source, the EU Member State of their residence remains competent to assess their ability-to-pay-taxes, and thus grant them the person-related tax deductions of its national law. Since 1995, the Court has delivered several judgments on personal income taxation in which it repeatedly applied or clarified the *Schumacker* doctrine.⁵⁴ It is important to note that the *Schumacker* doctrine applies only to person-related deductions, i.e. tax advantages, which are granted due to taxpayers’ personal and family circumstances. On the other hand, it does not apply to income-related deductions, i.e. deductions connected with the activity in the EU Member State of source.

I observe that the Court took another direction in EU inheritance and gift taxation, and in *Mattner* and *Welte* it rejected the application of the *Schumacker* doctrine. The Court considered in *Mattner* the German gift tax legislation, which provided for a smaller tax-free allowance if both the donor and the donee were not resident in Germany than in a situation when at least one of them was resident in Germany. It ruled that the free movement of capital precludes such different treatment because resident and non-resident donees were comparable in light of the German tax legislation. More specifically, the gift tax on immovable property situated in Germany was assessed based on the value of the property and the kinship between the donor and the donee. As neither criteria depended on the place of residence of the donor or the donee, there was no objective difference between the situation wherein neither person resided in Germany and what wherein at least one of them resided in Germany.⁵⁵

A few years later, the ECJ delivered a second “*Mattner* judgment” to confirm the non-application of the *Schumacker* doctrine to EU inheritance and gift taxation in the *Welte* case. This case concerned the German inheritance tax legislation, which provided for a higher tax-free allowance if at least one of the parties were resident in Germany in comparison with the tax-free allowance granted in case both parties were non-residents. The Court first observed that the amount of the tax-free allowance did not vary in relation to the amount of the taxable value of the inheritance and the allowance was granted to the beneficiaries in their capacity as taxable persons. The fact, therefore, that the non-resident

53 ECJ, *Schumacker* (C-279/93), para. 31.

54 See Sjoerd Douma, “*Optimization of tax sovereignty and free movement*” (Amsterdam, IBFD, 2011), 144-145, 174-175; Sjoerd Douma, “The Three Ds of Direct Tax Jurisdiction: Disparity, Discrimination and Double Taxation,” *European Taxation* 46, no. 11 (2006): 526-527; Isabella de Groot, “Case X (C-283/15) and the Myth of ‘Schumacker’s 90% Rule,’” *Intertax* 45, no. 8 (2017): 567-576. It should be noted that the *Schumacker* doctrine has been criticised in the literature. See Peter Wattel, “Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances: Why *Schumacker*, Asscher, Gilly and Gschwind Do Not Suffice,” *European Taxation* 40, no. 6 (2000): 210-223; Nils Mattsson, “Does the European Court of Justice Understand the Policy behind Tax Benefits Based on Personal and Family Circumstances?,” *European Taxation* 43, no. 8 (2003).

55 CJ, *Mattner* (C-510/08), para. 38.

beneficiary of a non-resident deceased had limited tax liability did not make his situation objectively different from that of a non-resident beneficiary of a resident deceased or from that of the resident beneficiary of a non-resident deceased. By arriving at this conclusion, the Court rejected the arguments of the Belgian and German governments, which were formulated in light of the *Schumacker* doctrine⁵⁶ and held that non-resident and resident beneficiaries were always comparable in the EU Member State of the objective nexus.⁵⁷ This finding clearly contradicted paragraph 31 of the Court's judgment in *Schumacker* in which it ruled that residents and non-residents are not, in principle, comparable with regard to direct taxes in the EU Member State of source. As inheritance and gift taxes are *direct* taxes, one would expect that the Court would have endorsed the application of the *Schumacker* doctrine also to them.

7.3.3.1.1 Subjective tax exemptions by the EU Member State of the objective nexus

In order to explain why the ECJ rejected the application of the *Schumacker* doctrine to the subjective tax exemptions of the inheritance and gift tax systems, one needs to distinguish between subjective tax exemptions of the inheritance and gift tax systems and subjective tax exemptions of the income tax systems.

As mentioned in section 2.1.1, the subjective tax exemptions of inheritance and gift tax systems are tax-free allowances or deductions granted to certain beneficiaries or donees due to their kinship with the deceased or the donor. I consider the kinship between the beneficiary or the donee and the deceased or the donor a personal and family circumstance. It entails several rights and obligations determined under the applicable family law, for example, care and protection. Moreover, the granting of the subjective tax exemptions is primarily based on the windfall justification: a subjective tax exemption is granted as a recognition of the fact that the beneficiaries or the donees have contributed to the creation of the deceased's or donor's wealth. Furthermore, the amount of subjective tax exemptions often depends on the proximity of the kinship between the parties involved. This is the reason why the granting of the subjective tax exemptions cannot be primarily explained, in my view, by the ability-to-pay-taxes justification as discussed in section 2.4.1. If this were the case, every beneficiary or donee would have been entitled to the same amount of a subjective tax exemption regardless of the proximity of the kinship with the deceased or the donee. To sum up, the subjective tax exemptions of the inheritance and gift tax systems are often granted due to taxpayers' personal and family circumstances and it could be argued that they are primarily explained by the windfall justification as discussed in section 2.4.2.

On the other hand, the granting of subjective tax exemptions of the income tax systems is explained by the ability-to-pay-taxes justification. These exemptions are granted in light of the taxpayers' personal and family circumstances and are based on the premise that a minimum level of substance should be left free of tax to the income recipient. An income tax exemption thus, is based on the presumption that below a certain level no tax is due. To sum up, the subjective tax exemptions of the income tax systems are often granted

⁵⁶ CJ, *Welte* (C-181/12), para. 53.

⁵⁷ CJ, *Welte* (C-181/12), paras. 53 – 56.

due to taxpayers' personal and family circumstances and it could be argued that they are primarily explained by the ability-to-pay taxes justification.

As previously mentioned, in 1995, the Court introduced the *Schumacker* doctrine that entailed the national treatment of non-resident taxpayers in the EU Member State of source on the condition that they earn most of their income there. The *Schumacker* doctrine – although heavily criticised in the literature⁵⁸ – was introduced to better implement the ability-to-pay-taxes justification for person-related tax exemptions of the income tax sphere. Besides, the *Schumacker* doctrine is merely an exception to the general rule that the EU Member State of the taxpayers' residence is in the best position to take into account the taxpayer's personal and family circumstances as it has available all the information needed to assess their overall ability to pay.⁵⁹ It follows that the ability-to-pay-taxes justification is assessed differently for resident and non-resident taxpayers. This does not apply, however, to the subjective tax exemptions of the inheritance and gift tax systems, which, as noted above, are primarily granted due to the windfall justification that is understood irrespective of the residence of the parties involved.

In my view, the Court unsuccessfully explained the fundamental differences between income and inheritance tax subjective tax exemptions to conclude that the *Schumacker* doctrine applies only to the former exemptions. It stated in *Welte*, paragraph 53 “[t]hat allowance [i.e. the tax-free allowance for inheritance tax purposes, a subjective tax exemption] is automatically granted to each heir simply because they are subject to inheritance tax in Germany, so as to ensure that part of the estate is exempted through the reduction of the total amount of the inheritance” and “[...] *that exemption aims to reduce the total amount of inheritance*” (Italics, VD). However, I submit that the reduction of the total amount of inheritance does not seem to be the objective of a subjective tax exemption but merely the outcome of its granting. Instead, a subjective tax exemption of the inheritance and gift tax system seems to be primarily granted as a recognition of the beneficiary's contribution to the creation of the deceased's or donor's wealth. This was the case in *Welte* concerning the allowance that was granted to the spouse and sole heir of Mrs Welte-Schenkel.

Even though the Court did not sufficiently explain the objective of the subjective tax exemptions (which, in my view, is primarily connected with the windfall justification), it correctly considered that these exemptions are automatically granted to each beneficiary because he is subject to tax in the EU Member State of the objective nexus. On the contrary, the subjective tax exemptions of the income tax sphere are *not* automatically granted to each income recipient simply because he is subject to income tax in the EU Member State of source. Instead, they are only granted if the income recipient is either a resident or a

58 Hein Vermeulen, “Individual Income Taxation,” in *European Tax law*, Ben Terra and Peter Wattel, eds. Peter Wattel, Otto Marres and Hein Vermeulen (Deventer: Wolters Kluwer, 2018), 859; Peter Wattel, “Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances; Why Schumacker, Asscher, Gilly and Gschwind Do Not Suffice,” *European Taxation* 40, no. 6 (2000): 210; Peter Wattel, “Non-Discrimination à la Cour: The ECJ's (Lack of) Comparability Analysis in Direct Tax Cases,” *European Taxation* 55, no. 12 (2015); Peter Wattel, “The Schumacker Legacy - Introduction - Taxing Non-Resident Employees: Coping with Schumacker,” *European Taxation* 35, no. 11/12 (1995): 347-423. Niels Mattsson, “Does the European Court of Justice Understand the Policy behind Tax Benefits Based on Personal and Family Circumstances?,” *European Taxation* 43, no. 6 (2003): 188.

59 ECJ, *Schumacker*, para. 33.

non-resident taxpayer who meets the *Schumacker* test in the EU Member State concerned. On the basis of the above, the Court concluded that the *Schumacker* test should not apply to EU inheritance and gift taxation.

Finally, there is one more reason why, in my view, the *Schumacker* doctrine should not apply to EU inheritance and gift taxation and it relates to abuse. If the *Schumacker* test was applicable, the deceased would be able to *choose* the EU Member State in which his beneficiaries would receive a subjective tax exemption. Therefore, a beneficiary inheriting 90% of the deceased's property would be entitled to such an exemption whereas the other beneficiary would not. I submit that the fact that the first beneficiary would have received the exemption would be in fact attributed to the deceased's decision to transfer all or most of his wealth to him.

7.3.3.1.2 *Subjective tax exemptions by the EU Member State of the personal nexus*

I observe that there is no Court case law referring to a subjective tax exemption the granting of which was denied by the EU Member State of the personal nexus. If, however, this EU Member State enjoys worldwide inheritance and gift tax jurisdiction, it may not have a compelling reason to deny the granting of a subjective tax exemption to the cross-border inheritance and donation. This is because the situation of a resident and a non-resident beneficiary would be comparable in light of the subjective tax exemption, as the EU Member State of the personal nexus is expected to apply the same rules to both a domestic and a cross-border inheritance and donation.

It could be argued, however, that by granting a lower subjective tax exemption to a cross-border inheritance and donation, the EU Member State of the personal nexus aims to avoid a situation in which the beneficiaries move certain assets of the deceased abroad. I do not believe that this argument is sufficiently convincing. The EU Member State of the personal nexus most often will retain its right to tax these assets, even following an abusive transfer of the beneficiaries' residence before the deceased's death (see also Article 7 of the OECD IHTMTC). Besides, it can request information from the EU Member State of the objective nexus on the basis of the Mutual Assistance Directive (2011/16/EU) or Article 12 of the applicable inheritance and gift tax treaty to safeguard its taxing rights.

7.3.3.1.3 *Proportionate subjective tax exemptions: a fair solution?*

It was argued that if both the EU Member State of the personal nexus and the EU Member State of the objective nexus must provide under EU law the full amount of their subjective tax exemptions to a cross-border inheritance and donation, the cross-border inheritance and donation may, in some instances, receive better treatment than a domestic one. This may give rise to unfair results.

In that regard, I note that Paternotte⁶⁰ and the Netherlands Advocate General ("AG") Wattel⁶¹ have already suggested that the EU Member State of the objective nexus provide a proportionate tax-free allowance/exemption when taxing a cross-border inheritance and

60 Rens Paternotte, "Welte, German inheritance tax. Different treatment of residents and non-residents violates free movement of capital," *Highlights & Insights on European Taxation* no 1 (2014): 33-34.

61 Opinion of the Netherlands AG, Wattel, in BNB 2015/87 (Netherlands Supreme Court).

donation.⁶² The percentage of the situs property to the whole inherited or donated property has been presented as a fair criterion which determines how much of the exemption each EU Member State may provide, thereby safeguarding that the taxpayer will not receive the tax-free allowances of two or more EU Member States in full. Therefore, in line with the concept of Van Raad's "fractional taxation",⁶³ Paternotte argued that the granting of the full tax-free allowance in *Welte* "goes too far": "From the facts, Mr Welte inherited a total value of EUR 532,197, of which EUR 329,000 (62%) is taxed in Germany. Would not the restriction of the free movement of capital be taken away if Germany allowed a tax allowance of 62% of EUR 500,000?" In the same vein, AG Wattel considered that a tax advantage proportionate to the amount of the situs property to the whole deceased's property should be granted to the non-resident beneficiary. The AG argued that the ECJ did not adequately explain why the tax-free allowances in *Welte* were not comparable to the income tax free-allowances to which the *Schumacker* doctrine applies.⁶⁴ However, he was of the opinion that the non-application of the *Schumacker* doctrine to EU inheritance and gift taxation created a good momentum for the non-application of the doctrine to direct taxes in general.⁶⁵

First, I believe that the above discussion will be limited to the *subjective* tax exemptions of the inheritance and gift tax sphere as only these exemptions are granted due to beneficiaries' personal and family circumstances. Furthermore, I observe that a proportionate subjective tax exemption would indeed address the granting of a tax exemption by more than one EU Member State with respect to the same cross-border inheritance and donation. If the EU Member State of the personal nexus grants 38% of its subjective exemptions and the EU Member State of the objective nexus 62% of its exemptions, the beneficiaries cannot receive two *full* tax exemptions in two different EU Member States. In addition, a proportionate subjective tax exemption would address the issue of abusive property transfers to EU Member States granting generous exemptions and tax-free allowances.

Nevertheless, I am of the opinion that the suggestion for a proportionate subjective tax exemption cannot apply to EU inheritance and gift taxation due to the lack of common valuation rules among the EU Member States. The valuation of the property is admittedly an essential element for the assessment of inheritance and gift taxes. Although the valuation rules of each EU Member State shall apply in an EU-conform manner, each EU Member

62 Furthermore, the Court has already accepted the granting of pro-rata personal deduction in multi-state situations. See CJ, *X v Staatssecretaris van Financiën* (C-283/15). See also CFE ECJ Task Force, "Opinion Statement ECJ-TF 4/2017 on the Decision of the Court of Justice of the European Union of 9 February 2017 in *X* (Case C-283/15) ("Pro-Rata Personal Deductions"), Concerning Personal and Family Tax Benefits in Multi-State Situations," *European Taxation* 58, no. 4 (2018); Hannelore Niesten, "Pro Rata Deduction of Negative Income from Income Received in Each Member State," *European Taxation* 58, no. 2/3 (2018).

63 Kees van Raad, "Non-Residents – Personal Allowances, Deduction of Personal Expenses and Tax Rates," *World Tax Journal* 2, no. 2 (2010). See also Frans Vanistendael, "Ability to Pay in European Community Law," *EC Tax Review* 23, no. 3 (2014): 134.

64 Opinion of the Netherlands AG Wattel in BNB 2015/87 (Netherlands Supreme Court), para. 8.5.

65 Opinion of the Netherlands AG Wattel in BNB 2015/87 (Netherlands Supreme Court), para. 8.17 (author's translation) "Hopefully, this inheritance tax case (the *Welte* case: VD) means that in time the incorrect *Schumacker* doctrine will also be buried for income tax purposes and non-residents will also be eligible for national tax treatment (which means: no worse treatment than fractional taxation: no worse treatment than when granting exemptions and allowances in proportion to the part of the total base taxed by the situs / source state)."

State determines the value of this property under its domestic valuation rules. It therefore, is conceivable that the EU Member State of the personal nexus and the EU Member State of the objective nexus may attach a different value to the same property. In the absence of common valuation rules (which only an EU harmonisation measure can introduce), the EU Member State of the personal nexus may consider that the property situated in its territory represents only 10% of the total inherited wealth. On the contrary, the EU Member State of the objective nexus may consider that the property located in its territory represents 70% of the total inherited wealth. Thus, if, under Paternotte's and Wattel's suggestions, each EU Member State would grant a proportionate tax exemption, the taxpayer would be entitled only to 10% of the inheritance tax exemptions in the EU Member State of the personal nexus and 70% of the exemptions in the EU Member State of the objective nexus. This, however, may lead to a cross-border inheritance being taxed more heavily than a domestic one that would also be an unfair outcome.

7.3.3.1.4 Objective tax exemptions

Objective tax exemptions are exemptions, which are connected to certain types of property and are justified by several EU Member States' policies. Furthermore, they are mostly territorial. For example, in the Netherlands gift tax case Q⁶⁶, the granting of an objective tax exemption with regard to the donation of a specific type of estates ("landgoed") was under review. The "landgoed exemption" was justified by the protection of the Netherlands natural and cultural heritage and was denied in the case of a donation of a property situated in the UK ('the Bean House'). Similarly, in *Commission v Greece*,⁶⁷ the Greek inheritance tax legislation provided, under certain conditions, an exemption concerning the *mortis causa* transfer of the deceased's primary residence located in Greece to Greek or EU national beneficiaries on condition that they were permanently resident in Greece.

I mentioned in chapter 2 that the objective tax exemptions are often not only granted in the case where the deceased and the beneficiaries share a degree of kinship. Instead, they are "attached" to a certain type of inherited or donated property. Therefore, the application of the *Schumacker* doctrine to these exemptions should be denied from the very beginning, as they are often not linked to the beneficiaries' personal and family circumstances and they are not justified by the ability-to-pay-taxes justification. The non-application of the *Schumacker* doctrine to these exemptions was also confirmed in the Court's judgment in *Miljoen et alii* with regard to the capital tax-free allowance of the Netherlands income tax legislation. In this case, the Court ruled that, in line with AG Jaaskinen's reasoning, "[a]n exemption, such as the one at issue in the main proceedings, which is an advantage granted to all resident taxpayers, irrespective of their personal situation, does not constitute an individual advantage connected with the personal situation of the taxpayer. As the Advocate General stated in point 83 of his Opinion, since such an exemption alters the tax base of the income

⁶⁶ CJ, Q (C-133/13).

⁶⁷ ECJ, *Commission v Greece* (C-244/15).

received by resident taxpayers, it is necessary to take that into account for the purposes of comparing the final tax burdens of resident taxpayers and those of non-resident taxpayers.”^{68, 69}

Furthermore, I observe that the objective tax exemptions granted by the EU Member State of the objective nexus are treated as income-related deductions through an analogous application of the Court’s case law in *Biehl*⁷⁰, *Scorpio*⁷¹ and *Gerritse*.⁷² In line with this case law, income-related deductions shall always be deducted in the EU Member State of source of income if they are directly connected to income generated there (as it does with its own residents in respect of the same income). In this respect, resident and non-resident income recipients are always objectively comparable in the light of these expenses and the activity generating income in the EU Member State of source.

The Court had already referred to the above-mentioned case law on income-related deductions in *Eckelkamp*⁷³ and *Arens-Sikken*⁷⁴ concerning the deduction of debts connected to property situated in the EU Member State of the objective nexus. In that regard, the Court considered debts connected to immovable property (mortgage-related charges relating to the immovable property, overendowment debts) similar to income-related deductions for which, however, a direct link should be established between the debt and the property concerned.

With regard to the treatment of objective inheritance tax exemptions granted by the EU Member State of the personal nexus, I refer to the *Q* case. *Q*, a tax resident of the Netherlands, was the owner of a property situated in the UK. She wanted to transfer that property to her son as a gift. Under Netherlands legislation, such a gift could be (partly) exempted from gift tax if the property qualifies as a “*landgoed*” under the Netherlands Law on nature protection. This law, however, only applies to estates situated in the Netherlands. In this case, the Court ruled that a cross-border donation is not objectively comparable to a domestic one considering the objective of the Netherlands Law on nature protection. The objective of this law was to protect the cultural and historical heritage of the Netherlands, which includes estates that are typical of the traditional Netherlands landscape.⁷⁵ In light of this legitimate objective, the situation of a taxpayer donating a property situated in the Netherlands that fulfils the requirements set by the Netherlands Law on nature protection is not comparable to that of a taxpayer donating a historic building situated in the territory of another EU Member State. The tax disadvantage, thus, experienced (i.e. no entitlement to the exemptions) by the latter is the inevitable result of the Netherlands legislation considering its stated objective.⁷⁶

It follows from *Q* that the EU Member State of the personal nexus may grant an objective tax exemption only to a domestic asset if the objective of such an exemption is consistent with its legitimate scope. Nevertheless, I observe that the granting of an objective tax

68 CJ, Joined Cases *Miljoen* (C-10/14), *X* (C-14/14) and *Société Générale* (C-17/14), para. 53.

69 See also, CFE ECJ Task Force, “Opinion Statement ECJ-TF 1/2016 on the Decision of the European Court of Justice in Joined Cases *Miljoen* (C-10/14), *X* (Case C-14/14) and *Société Générale* (C-17/14) on the Netherlands Dividend Withholding Tax,” *European Taxation* 56, no. 6 (2016): 258.

70 ECJ, *Biehl* (C-175/88).

71 ECJ, *Scorpio* (C-290/04).

72 ECJ, *Gerritse* (C-233/01), paras. 27 and 28.

73 ECJ, *Eckelkamp* (C-11/07), paras. 50 – 54.

74 ECJ, *Arens-Sikken* (C-43/07), para. 57.

75 CJ, *Q* (C-133/13), para. 24.

76 *Id.*, para. 26.

exemption must always be proportionate. The beneficiaries shall always be granted the opportunity to demonstrate that a foreign property may fulfil the objectives of the tax exemption concerned as provided by the EU Member State of the personal nexus. This is also derived from Q where the Court stated that the cross-border and domestic donations would be comparable if the property situated in the other EU Member State formed part of the Netherlands cultural and historical heritage.⁷⁷

7.3.3.2 Neutralisation

It should be noted that the term “neutralisation” has two different meanings. *First*, it refers to the obligation of the taxpayers’ EU Member State of residence to consider in full their personal and family circumstances (*Schumacker*⁷⁸) by granting them person-related allowances and exemptions unless i) it is released by way of an international agreement with the EU Member State of source, or ii) the EU Member State of source unilaterally or based on an international agreement takes into account these circumstances (*de Groot*⁷⁹, *Imfeld*⁸⁰). As mentioned in the previous sections, the Court has already rejected the application of the *Schumacker* doctrine in EU inheritance and gift taxation, thereby requiring the EU Member State of the objective nexus to grant the whole amount of the subjective tax exemptions to a cross-border inheritance and donation.

Second, neutralisation refers to the impact of the application of a tax treaty credit on the discriminatory or restrictive effect of the legislation of the EU Member State of source. Such a credit negates, under certain conditions, the discriminatory or restrictive effect of such legislation.⁸¹ The conditional neutralising effect of the tax credit stems from the Court’s case law on dividend taxation as first introduced in *Denkavit*⁸² and clarified in *Amurta*.⁸³ In the latter case, the Court held that a unilateral tax credit (i.e. credit granted under the legislation of the State of residence) could not neutralise the discriminatory taxation in the EU Member State of source.⁸⁴ On the contrary, a tax treaty credit may do so on condition that it enables the discriminatory or restrictive effect of the taxation at the EU Member States of source to be fully neutralised.^{85, 86} Apparently, the Court considered that the tax treaty forms part of the legal system of both EU Member States, thereby serving as the necessary link between their tax systems.⁸⁷ Besides, the granting of a tax

⁷⁷ *Id.*, para. 28.

⁷⁸ ECJ, *Schumacker* (C-279/93), para. 32.

⁷⁹ ECJ, *De Groot* (C-385/00), para. 99.

⁸⁰ CJ, *Imfeld* (C-303/12), para. 69. See also Hannelore Niesten, “Growing Impetus for Harmonization of Personal and Family Allowances: Current State of Affairs of the Schumacker-Docctrine after *Imfeld* and *Garcet*,” *EC Tax Review* 24, no. 4 (2015): 196 and Bruno Peeters, “Mobility of EU Citizens and Family Taxation: A Hard to Reconcile Combination,” *EC Tax Review* 23, no.3 (2014).

⁸¹ It is noted that the Court does not consider neutralization an overriding reason in the public interest. See CJ, *Miljoen et alii*, (C-10/14, 14/14 and 17/14), para. 89 and Karin Spindler-Simader, “Dividend Withholding Taxes after *Miljoen*, and *Société Générale*,” *EC Tax Review* 25, no. 2 (2016): 74.

⁸² ECJ, *Denkavit* (C-170/05), paras. 48 – 53.

⁸³ ECJ, *Amurta* (C-379/05), paras. 78 – 82.

⁸⁴ *Id.*, para. 78.

⁸⁵ *Id.*, para. 83.

⁸⁶ ECJ, *Commission v Spain* (C-487/08), para. 59; ECJ, *Commission v Italy* (C-540/07), para. 38.

⁸⁷ *Id.*, para. 80.

treaty credit is an obligation stemming from public international law:⁸⁸ although the tax treaty credit is granted by the EU Member State of residence, it is, in essence, agreed by both Contracting States.

For some years, it was believed that only a full tax credit could meet the “high standards” that the Court set in *Amurta* and its subsequent case law.⁸⁹ Such a requirement, however, seems to run counter to the tax treaty framework where the credit is usually capped up to the amount of the domestic tax, which would be liable if the foreign income was earned domestically. Therefore, in its later case law⁹⁰ and most recently in *Miljoen et alii*^{91, 92}, the Court ruled that neutralisation can also occur even by means of an ordinary tax credit if such a credit “*entirely*” offsets the discriminatory or restrictive part of source taxation. (*Italics, VD*)^{93, 94} If, however, the tax treaty credit refers to national law of the EU Member State of residence, it cannot neutralise the discriminatory or restrictive source taxation.⁹⁵ Therefore, only an autonomously formulated tax treaty credit provision can potentially give rise to neutralisation of discriminatory source taxation.

Unlike the first concept of neutralisation, the Court applied the second concept also to EU inheritance and gift taxation, by analogy. Notwithstanding the difference in nature between income and inheritance and gift taxes, the concept can also apply to EU inheritance and gift taxation as it is not dependent on the nature of the taxes concerned but their effect. The neutralisation argument was raised in *Eckelkamp* and *Arens-Sikken* (concerning inheritance taxes) and in *Mattner* (concerning gift taxes). In *Eckelkamp* and *Arens-Sikken*, the EU Member States involved had not concluded an inheritance and gift tax treaty. As a result, in line with *Amurta*, the unilateral credit of Germany in *Eckelkamp* and Italy in *Arens-Sikken* could not neutralise the discriminatory/restrictive effect of the inheritance tax levied in Belgium and the Netherlands, respectively. Similarly, in *Mattner*, the Court

88 ECJ, *De Groot* (C-385/00)

89 CFE ECJ Task Force, “Opinion Statement ECJ-TF 1/2016 on the Decision of the European Court of Justice in Joined Cases *Miljoen* (C-10/14), *X* (Case C-14/14) and *Société Générale* (C-17/14) on the Netherlands Dividend Withholding Tax,” *European Taxation* 56, no. 6 (2016): 258. On the AG’s Opinion in *Miljoen* see also Jasper Korving, “*Miljoen, X and Société Générale: The Final Curtain of the Dividend Withholding Tax Saga?*,” *EC Tax Review* 24, no. 5 (2015): 281–285.

90 ECJ, *Commission v Italy* (C-540/07), para. 38 and ECJ, *Commission v Spain* (C-487/08), para. 62. See also Opinion of AG in ECJ, *Commission v. Italy* (C-540/07), paras. 58–59.

91 CJ, *Miljoen et alii*, (C-10/14, 14/14 and 17/14).

92 However, according to the CFE ECJ Task Force, “The ECJ, in *Société Générale*, has (*finally*) made it clear that neutralization does not necessarily require a full tax credit. Rather, an ordinary tax credit can also achieve neutralization if it, in fact, leads to a full credit of the source state tax in the state of residence of the taxpayer (i.e. a set-off for the full amount of the difference in treatment arising under source state legislation)”. See CFE ECJ Task Force, “Opinion Statement ECJ-TF 1/2016 on the Decision of the European Court of Justice in Joined Cases *Miljoen* (C-10/14), *X* (Case C-14/14) and *Société Générale* (C-17/14) on the Netherlands Dividend Withholding Tax,” *European Taxation* 56, no. 6 (2016): 260.

93 *Id.*, para. 85.

94 See also “Such neutralization can also result from an “ordinary credit” (with a credit limitation), if the dividends are sufficiently taxed in the Member State of the shareholder and that, therefore, effectively a full credit results. Conversely, however, the mere fact that the residence state has “allowed” the source state to levy a (withholding) tax in a tax treaty does not relieve the latter from scrutiny under the fundamental freedoms”, Georg W. Kofler, “Tax Treaty “Neutralization” of Source State Discrimination under the EU Fundamental Freedoms?,” *Bulletin for International Taxation* 65, no. 12 (2011): 688.

95 *Id.*, paras. 81–82.

did not accept the neutralising effect of the Netherlands gift tax legislation in the absence of an inheritance and gift tax treaty concluded between Germany and the Netherlands.⁹⁶

It follows that there seems to be no reason to argue that the Court will not accept the neutralising effect of a credit provided by an inheritance and gift tax treaty. Therefore, if the Contracting State of the fiscal domicile eliminates double taxation of property listed in Articles 5 and 6 of the treaty by means of a credit under Article 9B of the OECD IHTMTC, the other Contracting State may still be allowed to levy a discriminatory or restrictive inheritance and gift tax on the condition that the credit entirely neutralises the effects of the inheritance and gift tax levied in the other Contracting State and does not refer to domestic legislation of the Contracting State of the fiscal domicile for its application.

7.4 Administrative difficulties

7.4.1 The Council Directive 2011/16/EU

Within the EU, exchange of information on death and gift tax currently takes place under the EU Directive 2011/16/EU on administrative cooperation in the field of taxation (Directive on Administrative Cooperation (“DAC”). As per 1 January 2013, DAC1 repealed the previously issued EU Directive 77/799/EEC concerning mutual assistance by the competent authorities of the EU Member States in the field of direct taxation (the “old Mutual Assistance Directive”) which did not apply to death and gift taxes, as the CJ first observed in the *Halley* case (C-132/10). The facts of this case dated back to 2003, when the old Mutual Assistance Directive was applicable. More specifically, the Belgian legislation was providing for a two-year limitation period within which an expert valuation in Belgium may be requested. The limitation period was extended to 10 years for foreign assets because the law did not provide for the possibility to request an expert valuation for foreign assets. The CJ ruled that such a different limitation period resulted in a restriction on the free movement of capital because the application of a longer limitation period in respect of a company with its centre of effective management in another EU Member State might deter Belgian residents from investing or maintaining investments in assets in other EU Member States. Furthermore, such a restriction could not be justified by the effectiveness of fiscal supervision.

Although the old Mutual Assistance Directive did not apply to inheritance taxes, the Court considered that administrative assistance could be requested under the applicable inheritance tax treaty concluded between France and Belgium. In that regard, it ruled that “[i]t is true that the [Council Directive 77/799/EEC] does not apply to inheritance tax. However, it appears from the file submitted to the Court that it may nevertheless have been possible for the Belgian tax authorities to have recourse to other mutual assistance instruments to verify the value of the shares in question, such as, for instance, the convention between France and Belgium for the avoidance of double taxation and the regulation of certain other issues in the field of inheritance tax and registration charges, done at Brussels on 20 January 1959.”⁹⁷

⁹⁶ CJ, *Mattner*, (C-181/12), para. 43.

⁹⁷ CJ, *Halley* (C-132/10), para. 37.

As stated above, the DAC applies to death and gift taxes. This follows from Article 2(1) of the EU Directive which lays down that: “This Directive shall apply to *all taxes of any kind* levied by, or on behalf of, a Member State or the Member State’s territorial or administrative subdivisions, including the local authorities.” (Italics, VD). Furthermore, death and gift taxes are not explicitly excluded in Article 2(2) and (3) of the EU Directive.

I observe that the situation where the tax authorities of an EU Member State may request information from the tax authorities of another EU Member State can be common in practice. For instance, the EU Member State of the personal nexus may need to be aware of the deceased’s worldwide property to correctly assess its inheritance tax claim. Nevertheless, it should be noted that, in general, the DAC in general focuses at the tax authorities’ level and therefore, does not directly deal with administrative difficulties at the micro level as discussed in chapter 3 of this study.

7.4.2 *The Council Directive 2010/24/EU*

Furthermore, I observe that within the EU, assistance in the collection for the recovery of claims relating to death and gift taxes takes place under Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures. As per 1 January 2012, the Directive repealed the Directive 2008/55/EC that did not apply to death and gift taxes.

Under Article 2 of the Directive 2010/24/EU, “1. This Directive shall apply to claims relating to the following: a) all taxes and duties of any kind levied by or on behalf of a Member State or its territorial or administrative subdivisions, including the local authorities, or on behalf of the Union; [...]”. Furthermore, death and gift taxes are not explicitly mentioned in Article 2(3) of the Directive, which lists the taxes to which the Directive does not apply. As a result, death and gift taxes fall within the scope of the Directive.

As a result, the tax authorities of an EU Member State can request assistance from the tax authorities of another EU Member State to collect a tax claim relating to death and gift taxes on its behalf.⁹⁸ I observe that in practice, this situation can be very common given that the EU Member State of the personal nexus – which enjoys worldwide justification over the deceased’s property – may have to collect its tax claim from a beneficiary who is a resident in another EU Member State.

Nevertheless, just as in the case of the DAC, Directive 2010/24/EU focuses at the tax authorities’ level and therefore, in my view, does not deal directly with administrative difficulties at the micro level as discussed in chapter 3 of this study.

7.4.3 *The Council Directive 2017/1852/EU*

In section 7.1.4.2, I suggested the extension of the scope of the Directive 2017/1852/EU to death and gift taxes. Such an extension will not only contribute to the mitigation of the double taxation problem of cross-border inheritance and donations but also facilitate the collaboration between the EU Member States’ tax authorities and guarantee an effective mutual agreement procedure. Like the previous EU Directive, this Directive focuses at the

⁹⁸ See also Ilse De Troyer, “New Developments in International Administrative Assistance in the Recovery of Taxes,” *European Taxation* 58, no. 5 (2018): 182.

tax authorities' level and therefore in my view, does not deal directly with administrative difficulties at the micro level as discussed in chapter 3 of this study.

7.5 Conclusion of chapter 7

In this chapter, I reviewed the progress made in the EU towards addressing the problems of cross-border inheritances and donations. It follows that, although the double and multiple taxation problem of cross-border inheritances and donations is an obstacle to the smooth operation of the internal market, very few initiatives have been taken at the EU level to address this issue. In that regard, I noted that the EC's recommendation was issued some years ago and has not been considered by many EU Member States. Although it contains some innovative provisions, it has some aspects that can be improved. In addition, I observed that the conversion of the recommendation to an EU Directive prerequisites a harmonised single tax base, which, in my view, seems to be a disproportionate solution to the problem of double and multiple taxation and non-taxation of inheritances. On the other hand, a multilateral convention taking the form of an EU Directive based on the optimised OECD IHTMTC and inspired by the innovative provisions of the recommendation has the potential to address the problem of double and multiple taxation of inheritances and donations. The same applies to the extension of the scope of the Council Directive 2017/1852 to double taxation disputes arising from the application of an inheritance and gift tax treaty.

Concerning the double or multiple non-taxation problem, I observed that Article 4.2. of the EC's recommendation deals with double or multiple non-taxation issues. However, due to the lack of common definition of the terms used in the recommendation, double or multiple non-taxation of the cross-border inheritance and donation is still conceivable. In that regard, I noted that the conversion of the recommendation to an EU Directive would be a disproportionate solution to the objective of addressing the double or multiple taxation problem of inheritances and donations, such as in the case of double or multiple taxation. However, the conclusion of a multilateral convention, in my view, would be a step in the right direction when dealing with double or multiple non-taxation issues.

Regarding the discrimination problem of cross-border inheritances and donations, I observed that the Court's case law on EU inheritance and gift taxation has contributed the most to the so-called "negative harmonisation" of the EU Member States' inheritance and gift tax systems, thereby providing guidance to the EU Member States on how to apply an EU compliant inheritance and gift tax system. With regard to the rejection of the *Schumacker* doctrine in EU inheritance and gift taxation, I observed that the Court did not distinguish between objective and subjective tax exemptions and it did not provide a convincing answer why the tax exemptions of the income tax systems differ from the tax exemptions of the inheritance and gift tax systems. Although, in my view, it arrived at the correct conclusion that the *Schumacker* doctrine shall not apply to the latter tax exemptions, the explanation of the Court seems to have some points that required additional explanation (e.g. the objective of subjective tax exemptions of death tax laws as compared to that of subjective tax exemptions of income tax laws). Furthermore, I observed that the neutralisation argument applies in the same way, regardless of the type of the treaty concerned (i.e. an income and capital tax treaty or an inheritance and gift tax treaty).

Finally, concerning administrative difficulties of cross-border inheritances and donations, I observed that the Directives 2011/16/EU and 2010/24/EU apply to death and gift taxes.

Nevertheless, I noted that these EU Directives focus on the tax authorities' level and therefore, do not deal directly with administrative difficulties at the micro level as discussed in chapter 3 of this study. I also suggested that the Directive 2017/1852/EU be amended to apply to disputes arising from the application of an inheritance and gift tax treaty.

It follows that all the above solutions to the problems of cross-border inheritances and donations are separate as they deal with only one problem. Furthermore, the separate solutions do not deal with all the aspects of a particular problem. For example, the EU Directives 2011/16/EU and 2010/24/EU focus on the tax authorities' level and do not deal with administrative difficulties at the micro level. Therefore, it should be explored whether a holistic solution to the problems of cross-border inheritance and gift taxation could apply at EU level.

PART III: A HOLISTIC SOLUTION TO THE PROBLEMS OF
CROSS-BORDER DEATH AND GIFT TAXATION

A holistic solution to the problems of cross-border death and gift taxation

The purpose of this study is to suggest separate and holistic solutions to the problems of cross-border death and gift taxation under the available mechanisms at the OECD and EU level. I discussed the separate solutions at the OECD and the EU level in chapters 4 to 7 of this study and concluded that they could solve only some aspects of the problems.

I observe, however, that at the EU level, it is possible to suggest a holistic solution to these problems. A holistic solution to the obstacles of cross-border inheritances had already been suggested by the EC's expert group in 2015, called "one inheritance – one inheritance tax". Nevertheless, I note that several aspects of this concept need to be further explored considering that the group's suggestion was included in a report that is not a legal document. As a result, in this chapter, I first aim to continue the EC's expert group's work concerning the addressing of inheritance cross-border tax obstacles posed to individuals within the EU. Second, I intend to assess whether the holistic solution of the group can also resolve the problems of cross-border inheritances and donations as identified in chapter 3 of this study.

8.1 The three solutions of the EC's expert group

Back in 2014, an expert group was created with the primary task to assist the EC in identifying and finding practical ways to remove any tax problems faced by individuals who move from one EU Member State to another. The group consisted of 21 members – representatives of different sectors who were selected on the basis of responses received to a public call for applications. The group decided to divide the work into two reports: one with a focus on direct taxes (mainly income taxes) and the other on inheritance taxes. This decision was justified, in the group's view, by the differences between income taxes and inheritance taxes.¹

In December 2015, the EC's expert group published the report "Ways to Tackle Inheritance Cross-border Tax Obstacles Facing Individuals within the EU" (the "2015 inheritance tax report" or "report"). In chapter 2 of this report, the group identified the following most common cross-border inheritance tax obstacles:

- the nature and design of national inheritance taxes,
- the limited availability of (the tax treaty or unilateral) relief of double taxation by EU Member States, and
- the administration of inheritance taxes.

¹ EU, "Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU", report prepared by the European Commission Expert Group, 11, point. 1.

Subsequently, in chapter 3 of the report, the group presented the following solutions to these obstacles:

- Solution no.1: proposal for EU legislation following the concept “one inheritance – one inheritance tax”,²
- Solution no.2: the conversion of EC’s recommendation to binding law, and³
- Solution no.3: a “treaty-based solution”.⁴

As I discussed in section 7.1.3 of this study, the EC considered converting the EC’s recommendation to an EU Directive a less effective, proportionate and flexible solution to the double and multiple taxation problem of cross-border inheritances and donations. In that regard, I noted that binding rules on the unilateral double taxation relief prerequisite an EU harmonised inheritance tax legislation and agreement on the interpretation of complex terms. Nevertheless, the EC has already considered harmonisation of national inheritance and gift tax laws (policy option B.2) disproportionate to the objective of addressing double or multiple taxation of inheritances and donations.⁵

Regarding a treaty-based solution, the EC’s expert group was of the opinion that such a solution could, in principle, address the double or multiple taxation of inheritances. However, in the group’s view, “[t]he number of treaties required and the level of resources, which their establishment would demand, strongly suggests that any solution based on bilateral treaties would be impracticable. If the solution is to be based on a treaty, it will have to be based on a more general, i.e. multilateral, solution.”⁶ In that regard, the group observed that “[w]ere a multilateral treaty to be considered as a solution to [inheritance tax] multiple taxation it could, perhaps, adopt an approach similar to that advanced in the recommendation. Instead of the solution being contained in the form of an EU instrument, it would be established by means of the Member States engaging in multilateral cooperation.” For several reasons, however, the group concluded that it seemed unlikely that a multilateral convention would solve the cross-border inheritance tax obstacles as effectively as EU legislation.⁷

I agree that a conclusion of a multilateral convention in the form of an EU instrument may be regarded as a solution to inheritance multiple taxation.⁸ A multilateral convention in the form of an EU Directive will allow the CJ to interpret it thereby safeguarding its application among the EU Member States. However, I disagree with the content of such a convention. The group suggested that the convention may adopt an approach similar to that of the EC’s recommendation.⁹ On the other hand, I put forward in section 7.1.3 that

² *Id.*, 18-19, points 13 – 19.

³ *Id.*, 19-20, points 20 – 29.

⁴ *Id.*, 20-21, points 27 – 31.

⁵ European Commission Staff Working Paper, Impact Assessment accompanying the document Commission Recommendation regarding relief for double taxation of inheritances, SEC (2011) 1489, 35.

⁶ EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, 20, point 27.

⁷ EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, 21, point 31.

⁸ EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, 21, points 30-31.

⁹ EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, 21, point 31.

such a convention may take the approach advanced in the updated OECD IHTMTC. This seems more reasonable to me given that the recommendation seems to be ineffective as it does not define complex, albeit important, terms.

I further note that the solutions no. 2 and 3 fail to address the cross-border inheritance tax obstacles and the problems of cross-border inheritances and donations altogether. They primarily aim at addressing the double and multiple taxation of inheritances and, thus, do not deal with discrimination and administrative problems at a micro level. In other words, they provide separate solutions to the obstacles and hence to the problems of cross-border inheritances and donations, which I discussed in chapter 3 of this study.

On the other hand, solution no. 1 has, in the group's view, the potential to solve the cross-border inheritance tax obstacles altogether. This solution builds on the concept of “one inheritance – one inheritance tax” (“the concept”) which I will present and comment on in the following sections to conclude whether it can provide a holistic solution to the problems of cross-border inheritances and donations as well.

8.2 Introduction to the “one inheritance – one inheritance tax” concept

8.2.1 Introduction

In its report, the EC's expert group suggested the proposal of an EU legislation based on which only one EU Member State is allowed to levy inheritance tax on the cross-border inheritance (“one inheritance – one inheritance tax” concept). This EU Member State would be that of the deceased's habitual residence. It follows that the deceased's habitual residence is used as a *connecting tax criterion* for the indication of the EU Member State that has the right to tax the whole cross-border inheritance provided that its domestic inheritance tax law so prescribes. On the contrary, any other EU Member State, which under its domestic inheritance tax laws would seek to tax parts of the cross-border inheritance is, in principle, precluded from doing so. It does not take long to realise that the “one inheritance – one inheritance tax” concept would result in single taxation.

More specifically, the group suggested that the applicable inheritance tax system may best be determined by following the approach of Article 21(1) of the EU Succession Regulation which reads as follows: “Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.”

The application of the deceased's habitual residence as the connecting tax criterion for the indication of the EU Member State which is entitled to tax the whole cross-border inheritance is, in the group's view, reasonable. First, the starting point of taxation of most EU Member States' inheritance tax laws aims at the recognition of the deceased's long-term association/close connection with the taxing state. Thus, “[h]abitual residence and close connection are [...] criteria which are well suited to determine the applicability to an inheritance of an [inheritance tax] system”.¹⁰ Furthermore, the concept of the habitual residence is an EU concept, which is perfectly suited to EU legislation. The concept has been already used as a connecting factor in secondary EU legislation, for instance, the

10 EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, 19, point 17.

Regulation no. 883/2004 on the coordination of social security systems (“the EU Social Security Regulation”)¹¹ and the EU Succession Regulation as per the report. Besides, in the group’s view, “[t]he use of the concept in relation to the avoidance of double taxation would not require the extension of the [EU Succession Regulation] to those Member States in which it does not apply”.

Although the EU Succession Regulation allows for a choice of law (in favour of the law of the deceased’s nationality), the group was of the opinion that “[t]here should be no provision for any citizen to choose which [inheritance tax] system would apply to any particular inheritance. [...] The absence of any such choice would not only ensure that inheritance taxation is not manipulated, but it would also ensure that the applicable rules are as simple as is possible. The law of the state of the habitual residence of the deceased would, therefore, apply. It would not be easy to abuse such a provision and, in any event, abuse may always be countered by applying the principle of ‘abuse of law.’”¹²

As I mentioned above, the “one inheritance – one inheritance tax” concept results in single taxation: under the report, “[t]he need to ensure that the applicable rules are as simple as possible also makes it undesirable that there should be any other kind of exception to the application of one [inheritance tax] system to one inheritance.”¹³ It follows that, if a cross-border inheritance falls within the ambit of the concept, no EU Member State, other than that of the deceased’s habitual residence, can exercise its taxing rights. This seems to be an innovative suggestion of the group, which also states that “[i]f Member States choose not to adopt this view, the taxing rights of the state of situs could be satisfied by a *compensatory payment*, calculated on a reasonable basis, between the Member States involved. This would ensure that individuals would have to deal with only one Member State in respect of one inheritance while satisfying Member States’ interests.” (Italics, VD).¹⁴ In relation to the above innovative suggestion of the group, I observe that EU legislation, which assigns (taxing) rights to only one EU Member State, has already been adopted within the EU in relation to social security. More specifically, the EC’s expert group referred to Article 11(1) of the EU Social Security Regulation that reads as follows: “Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.” In the group’s view, “[i]f Member States can ensure that individuals are to be subjected to the social security legislation of only one Member State, they ought to be able to ensure that one inheritance is subject to only one [inheritance tax] system.”¹⁵

11 Regulation (EC) no 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, 2004 OJ L 166.

The Regulation was issued under Article 308 of the Treaty establishing the European Community (“TEC”). This Article reads as follows: “If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.”. Article 308 TEC is the equivalent of Article 352 TFEU and is called the “flexibility clause”.

12 EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, 19, point 18.

13 *Id.*, 19, point 19.

14 *Id.*, 19, point 19.

15 EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, 19, point. 15.

It should be noted that the 2015 inheritance tax report should not be construed as in any way reflecting the official position of the EC and its services. Furthermore, not all members of the EC's expert group necessarily agree with every conclusion in the report. In cases of dissent, the report reflects the views of the majority of the group's members.

In the following sections, I will continue the work of the EC's expert group on the concept of the “one inheritance – one inheritance tax.” Undoubtedly, the concept requires several clarifications. These clarifications will allow me to conclude whether the concept can provide a holistic solution to the tax “obstacles” and “problems” of cross-border inheritances and donations.

8.2.2 *The objectives of the concept*

8.2.2.1 *The three primary objectives*

Although the objectives of the “one inheritance – one inheritance tax” concept are not clearly stated in the 2015 inheritance tax report, it can be easily observed that the concept aims at:

- a) the elimination of double and multiple taxation of inheritances with the EU,
- b) the reduction of the excessive administrative burden for individuals, and
- c) the overcoming of the different nature and design of national inheritance tax legislations.

First, concerning double and multiple taxation, if only the EU Member State of the deceased's habitual residence is entitled to apply its domestic inheritance tax laws and tax the whole cross-border inheritance, there seems to be no risk of double or even multiple taxation of the inheritance at hand. As a result, there would no longer be any need for negotiation of bilateral or multilateral treaties.¹⁶ Moreover, there would be no need to convert the EC's recommendation to an EU Directive. As the EU Member State of the deceased's habitual residence would be the only EU Member State entitled to tax the cross-border inheritance as a whole, it would also not have to grant double taxation relief. Finally, if only one inheritance tax system were to apply, the problems relating to the nature and the design of inheritance tax systems mentioned in the report would be effectively addressed.

In the same vein, if the beneficiaries deal with only one tax authority and pay the relevant tax at only one EU Member State, the administrative difficulties of cross-border inheritances attributable to the uncoordinated administrative tax procedures would be adequately addressed. Thus, no burdensome duplication or multiplication of administrative procedures and reporting obligations would take place. Furthermore, as per the report, the tax authorities themselves would not have to deal with other tax authorities.¹⁷ This, however, may not be completely correct in cases where the tax authorities would have to be informed on the foreign assets of the cross-border inheritance. In this case, I note that they could use the existing exchange of information mechanisms applicable within the EU that would allow them to request information from the other tax authorities (section 7.4).

16 EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, 18, point 13.

17 *Id.*

8.2.2.2 The underlying objective

In chapter 3, I observed that the connection of death taxes with civil law could often give rise to double or multiple taxation. I referred, for example, to the interpretation of the concept of residence for death tax purposes, which may be defined differently under the civil laws of the EU Member States involved. An EU Member State may assess a person's *corpus* and *animus* to conclude whether he is a resident in its territory for death tax purposes whereas another EU Member State may apply a factual approach, hence without considering his *animus*. Such a divergent interpretation of the concept of residence by the EU Member States involved may often result in double or multiple taxation if those EU Member States consider the person resident in their territory. The same is true regarding the interpretation of terms such as "death", "estate", "surviving partner", "habitual abode", "permanent home", "movable property", "immovable property" and "receivable". All these terms are usually defined by the applicable civil law, which, in its turn, is determined by private international laws in the event of a cross-border inheritance.

Van Vijfeiken (2012) provided the example of the divergent definition of the term "beneficiaries" due to the application of different civil laws by the involving EU Member States. The divergent definition of this term may create tensions in the event of a cross-border inheritance and often lead to double or multiple taxation. Taking as an example a cross-border inheritance consisting of, among others, a summerhouse in France belonging to a Netherlands resident deceased (who died before 17 August 2015¹⁸) with Netherlands resident children and spouse, Van Vijfeiken observed that both France and the Netherlands would apply their own laws on succession determined under their private international laws. France would apply French succession law on the basis of the *lex rei sitae* whereas the Netherlands would apply Netherlands succession law because of the deceased's residence in the Netherlands.

Under Netherlands succession law, the statutory distribution regime is applicable if the deceased leaves a spouse and children as beneficiaries. The surviving spouse becomes the owner of the inheritance as a whole and is liable to pay the inheritance tax due whereas the beneficiaries inherit only a monetary claim against the surviving spouse. On the other hand, under French succession law, the surviving spouse can opt for the usufruct of the summerhouse while the children can inherit the bare ownership. It follows that under Netherlands succession laws, the surviving spouse would be considered the sole beneficiary whereas both the surviving spouse and the children would be considered the beneficiaries under French succession laws.¹⁹

Such different definitions of the term "beneficiaries" by France and the Netherlands also create problems in the tax sphere. France, as the EU Member State of the objective nexus, would apply French tax law and seek to tax the summerhouse situated in its territory. On the other hand, the Netherlands, as the EU Member State of the personal nexus, would seek to tax the whole cross-border inheritance including the summerhouse in France. Furthermore, it would deny granting a double taxation relief for the tax paid in France as the tax in France would have been paid by the children and not by the surviving spouse

¹⁸ Thus, before the entry into force of the EU Succession Regulation.

¹⁹ Inge van Vijfeijken and Hedwig van der Weerd-van Joling, "Double Taxation of Inheritances and the Recommendation of the European Commission," *EC Tax Review* 21, no. 6 (2012): 311-312.

who paid the tax in the Netherlands. As a result, the summerhouse in France would be taxed twice.

As per 17 August 2015, the EU Succession Regulation addresses those types of problems that arise due to the parallel application of divergent succession laws to the cross-border inheritance. The Regulation harmonised the EU Member States’ private international laws on succession as of 17 August 2015, so one civil law on succession applies to the inheritance as a whole. In brief, the Regulation provides for the deceased’s habitual residence at the time of his death as the connecting factor. Nevertheless, if it appears from all the circumstances of the case that the deceased was *manifestly* more closely connected with a state other than the state of his habitual residence, the law applicable to the succession shall be the law of that other state (“escape clause”).

Furthermore, under Article 22(1) of the Regulation, a person may choose the law of the State whose nationality he or she possesses at the time of making a choice or at the time of death to govern his succession. There is no escape clause in this case. As a result, in the example mentioned above, Netherlands succession law applies to the whole cross-border inheritance. Therefore, France would apply Netherlands succession law and consider that the surviving spouse is the sole owner of the property located there. In such a case, the surviving spouse can more easily request double taxation relief from the Netherlands tax authorities as there is no discrepancy with regard to the identity of the beneficiaries.²⁰

Although taxation falls outside the scope of the EU Succession Regulation, the application of the “one inheritance – one inheritance tax” concept would result in an increased level of alignment between succession laws and inheritance tax laws. Thus, not only one civil law on succession would apply to the cross-border inheritance as a whole (based on the EU Succession Regulation) but also one inheritance tax law (based on the “one inheritance – one inheritance tax” concept).²¹ This would be very beneficial for cross-border inheritances. Back to the example mentioned above, if the deceased had died in 2018 in the Netherlands, both the Netherlands and France would have applied Netherlands succession laws. Subsequently, under the “one inheritance – one inheritance tax” concept, only the Netherlands – as the EU Member State of the deceased’s habitual residence – would be entitled to tax the cross-border inheritance as a whole, including the summerhouse. On the contrary, France would be precluded from taxing the summerhouse.

8.2.3 A concept consistent with subsidiarity and proportionality

Under the 2015 inheritance tax report, “[w]hatever course of [EU] action is taken, it must be proportionate (see TEU Articles 5.3 and 5.4)”. The EC’s expert group has borne this requirement in mind in its deliberations. It, therefore, has not considered harmonisation of EU Member States’ systems of [inheritance tax]. It is clear, at least from a technical perspective, that [inheritance tax] obstacles can be removed while retaining many of the distinctive elements of Member States’ differing systems of [inheritance tax] and certainly

²⁰ Inge van Vijfeijken, “One Inheritance, One Tax,” *EC Tax Review* 26, no. 4 (2017): 218.

²¹ I note, however, that if the deceased has chosen the law of his/her nationality as the applicable law to the succession as provided in Article 22 of the EU Succession Regulation, succession law and inheritance tax law may not be the same.

their different rates of tax.”²² The above statement reflects the group's opinion that the “one inheritance – one inheritance tax” concept is in line with the principle of proportionality as provided by Article 5(4) TEU. In my view, the concept is also in line with the principle of subsidiarity as provided by Article 5(3) TEU.

8.2.3.1 *The subsidiarity principle*

Under Article 5(3) of the TEU, “[u]nder the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.”²³

The principle of subsidiarity is an important principle of EU law. Although direct taxation does not as such fall within the purview of the EU,²⁴ taxation plays an important role for the smooth functioning of the internal market. Therefore, the EU should act only if and in so far as the smooth functioning of the internal market cannot be sufficiently safeguarded by the EU Member States. For example, the objective of the EC's recommendation was the reduction of the double taxation of inheritances within the EU. Such an objective could not be effectively achieved at the national level as per the 2011 EC's Working Paper – Impact Assessment since “[t]he problems of double taxation of inheritances are not currently being resolved in a satisfactory manner except to the extent that they are addressed by one of the few existing double taxation conventions dealing with, or extending to, inheritances”.²⁵

In my view, the subsidiarity of the “one inheritance – one inheritance tax” concept can be easily established considering a) the failure of the EC's recommendation to materially coordinate the national double tax relief provisions, and b) the imperative need for a proportionately harmonizing approach for addressing the “obstacles” and “problems” of cross-border inheritances.

8.2.3.2 *The proportionality principle*

8.2.3.2.1 *A concept proportionate to the objectives to be achieved*

The question arises whether the “one inheritance – one inheritance tax” concept is proportionate to the objectives to be achieved, as discussed in section 8.2.2. In that regard, it could be argued that the concept is proportionate to these objectives as it harmonises only those elements of EU Member States' inheritance tax laws, which can give rise to

22 EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, 7, point 7.

23 The Protocol no. 2 of the TEU and TFEU establishes the conditions for the application of the principles of subsidiarity and proportionality.

24 See, among others, ECJ, *Schumacker* (C-279/93), para. 21.

25 European Commission Staff Working Paper, Impact Assessment accompanying the document Commission Recommendation regarding relief for double taxation of inheritances, SEC (2011) 1489, 25.

tensions in cross-border situations: the parallel application of different personal nexus rules in combination with situs taxation. On the contrary, the concept *does not* harmonise the personal nexus concepts, which the EU Member States use to establish worldwide inheritance tax jurisdiction nor does it introduce a single harmonised basis of taxation to achieve its objectives. I refer to the 2011 Working Paper – Impact Assessment in which the EC considered a solution based on a single harmonised basis of taxation *disproportionate*, inefficient and inflexible.²⁶ With particular reference to the criterion of proportionality, the EC mentioned that a solution is proportionate if it “[goes] no further in terms of EU measures/EU harmonisation than is necessary to achieve the objective”.²⁷ Although several years have passed since the publication of this paper, the introduction of a single harmonised basis of taxation remains, in my view, a disproportionate solution. This is because the obstacles of cross-border inheritances can arguably be achieved by measures that harmonise only certain elements of the EU Member States’ inheritance tax laws, such as the “one inheritance – one inheritance tax” concept.

Moreover, the introduction of a single harmonised basis of taxation would be, in my view, disproportionate to EU Member States’ fiscal sovereignty, as discussed in the following section. Besides, a complete harmonisation of EU Member States’ inheritance tax laws seems practically impossible given the policy of the EU in the area of direct taxation, which aims at addressing – in a fragmentary manner – the obstacles that national tax legislations pose to the smooth functioning of the internal market. For example, for the avoidance of double taxation of dividends within the EU, the Parent-Subsidiary Directive²⁸ prescribes, amongst others, under certain conditions that the EU Member State of source shall not levy withholding tax for the avoidance of the double taxation of the dividend. In the same vein, the Anti-Tax Avoidance Directive²⁹ introduced five anti-abuse rules, which apply in parallel with the existing *unharmonized* corporate income tax systems of the EU Member States.³⁰

Nevertheless, I observe that in certain situations, the application of the concept may give rise to double or multiple non-taxation. Therefore, one could argue that the concept is disproportionate to the objective of addressing double or multiple non-taxation. Nevertheless, I am of the opinion that the concept shall not be automatically rejected as being disproportionate if it leads, in certain situations, to double or multiple non-taxation of the cross-border inheritance or donation. First, the EC’s expert group did not identify double or multiple non-taxation as a cross-border inheritance tax obstacle. In that regard,

26 European Commission Staff Working Paper, Impact Assessment accompanying the document Commission Recommendation regarding relief for double taxation of inheritances, SEC (2011) 1489, 36.

27 European Commission Staff Working Paper, Impact Assessment accompanying the document Commission Recommendation regarding relief for double taxation of inheritances, SEC (2011) 1489, 32.

28 Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, 2011 OJ L 345/8.

29 Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, 2016 OJ L 193/1 (ATAD I) and Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, 2017 OJ L 144/1 (ATAD II).

30 ATAD’s objective is to strengthen the average level of protection against aggressive tax planning in the internal market. Arguably, a full harmonisation of corporate income tax laws of 27 EU Member States would be disproportionate to this objective. Moreover, the ATAD does not oblige an EU Member State to tax if, theoretically speaking, it does not levy corporate income taxes.

I remind that in its report, the group identified the following most common cross-border inheritance tax obstacles: a) the nature and design of national inheritance taxes, b) the limited availability of (the tax treaty or unilateral) relief of double taxation by the EU Member States, and c) the administration of inheritance taxes. Double or multiple non-taxation was not classified as an obstacle of cross-border inheritances.

It is conceivable, however, that, if double or multiple non-taxation is considered a problem of cross-border inheritances and donations (such as in the context of this study), the cross-border inheritance may not be taxed anywhere if the concept applies. This can be the case if the EU Member State of the deceased's habitual residence does not levy death taxes and the EU Member State of the objective nexus is precluded from levying death taxes under the concept. Furthermore, one could argue that the cross-border inheritance is not taxed anywhere if the EU Member State of the deceased's habitual residence does not tax the property due to a deduction/exemption/allowance and the EU Member State of the objective nexus is precluded from levying death taxes under the concept (as described in section 3.1.2.3).³¹ One could also argue that an abusive element should always be present for double non-taxation to take place (as described in section 3.1.2.4).

In these situations, one could take the view that in order to address double or multiple non-taxation issues, the EU Member State of the objective nexus may still be allowed to exercise its taxing rights if the EU Member State of habitual residence does not exercise its taxing rights either because of a specific exemption, deduction, credit or allowance or because it does not levy death taxes *and* an abusive element is present. Nevertheless, I admit that more research is required in that regard and more specifically, as to whether an abusive element must always be present and secondly how abuse needs to be assessed by the EU Member States.

8.2.3.2.2 *A concept proportionate to EU Member States' fiscal sovereignty and international tax law principles*

Although the concept should be considered, in principle, proportionate to the objective to be achieved, one can argue that it is disproportionate to EU Member States' fiscal sovereignty. This is because it seems to go beyond EU Member States' fiscal sovereignty *and* international tax law principles. With reference to EU Member States' fiscal sovereignty, it could be argued that the clear-cut abolition of the situs taxation does not respect the

31 In that regard, the optional solution against "factual non-taxation" of the OECD IHTMTC seems to be relevant. More specifically, in paragraphs 30 – 33 of the Commentary on Article 7 of the OECD IHTMTC, those who drafted the OECD IHTMTC recognise that "[s]ome States, when giving up a taxation right in favour of another State under the Convention, may sometimes want to have the assurance that the tax which should then be levied in the other State can be collected there." In relation to this point, the OECD suggests, amongst others, that the State in which the deceased or donor was not fiscally domiciled may impose its domestic tax to the extent that tax has not been paid in the State of fiscal domicile as a result of a specific exemption, deduction, credit or allowance there.

taxing rights of the EU Member States.³² Furthermore, one could take the view that the concept leads to an indirect harmonisation of the EU Member States’ inheritance tax laws. With reference to international tax law principles, it could be argued that, in the context of property taxation, the situs taxing rights are the most intense; the state of the objective nexus is not obliged to grant any double tax relief for the tax paid for property located in its territory. This is also in line with the approach adopted by the OECD IHTMTTC which allows both the Contracting State of the deceased’s fiscal domicile and the other Contracting State to tax both the immovable property and movable property connected to a PE located in the latter Contracting State with the former Contracting State being obliged to provide double taxation relief for the tax paid in the other Contracting State. This is also generally in line with the approach adopted by the EC’s recommendation and its Articles 4.1. and 4.2.³³

In my opinion, the fact that the concept seems to go beyond EU Member States’ fiscal sovereignty and international tax law principles does not mean that it automatically becomes disproportionate. This is because the EU autonomous term and connecting tax criterion of the habitual residence guarantees, in my view, that there is always an EU Member State which will have the right to tax the whole cross-border inheritance. In such a case, it is arguable that the taxing rights of the EU Member State of the objective nexus cease to be the most intense given the genuine personal nexus which the EU Member State of the deceased’s habitual residence has built up with the deceased throughout his lifetime. Furthermore, I argued in the previous section that there should be cases where the taxing rights of the EU Member State of situs *should* be respected. Therefore, in these cases, the fiscal sovereignty of the EU Member State of the objective nexus is arguably respected.

In all events, I acknowledge that more research is required to assess whether the EU Member States are willing to abandon the current international tax principles (as embedded in their national inheritance tax laws) to address the problems of cross-border inheritances and donations.

8.2.4 The legal form of the concept

I observe that the group did not clarify the legal form of the EU legislation introducing the concept. It stated that “[a]ny proposal for EU *legislation* could take one of two approaches in particular. First of all, it could follow the approach of the Succession Regulation and provide that only one Member State should have rights to impose a tax in relation to any one estate, its heirs and personal representatives.” Nevertheless, with regard to the second solution on the conversion of the EC’s recommendation to binding law, the group noted that “[s]econd, [a proposal for EU legislation] could follow the approach of the [EC’s] [R]ecommendation and seek to pass a *regulation* implementing the terms of the recommendation.” (Italics, VD). As the term “regulation” was not capitalised, it is unclear whether the

32 From the perspective of the EU Member State of the deceased’s habitual residence, it should be noted that the deceased’s habitual residence is merely a connecting tax criterion. It only indicates the EU Member State which is entitled to apply its domestic inheritance tax laws to the whole cross-border inheritance. On the contrary, it does not create taxing rights to the indicated EU Member State, if these rights do not exist under its national law. Therefore, the concept should be considered proportionate to the EU Member States’ fiscal sovereignty from the perspective of the EU Member State of the deceased’s habitual residence.

33 See also Jan Szczepański, “Proposal for the Coordinated System of Taxation Applicable to Cross-Border Inheritances and Gifts in the Internal Market,” *Intertax* 47, no.3 (2019): 253.

group referred to EU legislation in general or to an EU Regulation issued under Article 288 TFEU.³⁴ I believe that the group was referring to an EU Regulation.

Nevertheless, I note the only available EU measure, which can harmonise elements of EU Member States' inheritance tax legislations, can only take the form of an EU Directive. This can be derived from Article 115 TFEU.^{35, 36} I also note that Article 114 TFEU – which refers to “measures” in general – cannot be used as a legal basis for harmonizing *tax* legislation. This can be derived from paragraph 2 of the Article 114 TFEU.³⁷

The most important requirement for the issuance of an EU Directive under Article 115 TFEU is the unanimity at the ECOFIN. It is true, however, that this is not always easy to achieve as is demonstrated by the low number of the EU Directives in the area of direct taxation. Furthermore, also EU Member States, which do not levy death taxes, must agree to an EU Directive introducing the concept. This may sound excessive, but I observe that the inheritance tax laws of an EU Member State may impact the free movement of persons who reside in another EU Member State which does not levy inheritance taxes. As per the report, “[a]ll Member States are affected by the problems in the field of [inheritance taxation] whether or not they impose [inheritance taxes] themselves. Even if attention is focused on the 19 EU Member States which impose [inheritance taxes], the extent of the problems arising is very considerable”.³⁸ Therefore, in my view, the unanimity requirement does not seem unreasonable.³⁹

8.2.5 Taxes covered

The scope of the “one inheritance – one inheritance tax” concept is arguably limited. The suggestion of the EC's expert group applies only to inheritance taxes. On the contrary, it does not seem to cover gift taxes⁴⁰ or other death taxes that the EU Member States may levy, for instance, *mortis causa* income or capital gains taxes.

First, the non-application of the concept to gift taxes seems strange considering that a) gift taxes are levied in most EU Member States under the same principles as inheritance taxes, and b) the EC's recommendation applies to gift taxes “[w]here gifts are taxed under

34 I note that the term “regulation” as laid down in Article 288 of the TFEU is also not capitalized.

35 Cf. Inge van Vijfeijken, “One Inheritance, One Tax,” *EC Tax Review* 26, no. 4 (2017): 219; “In the [2015 inheritance tax] report, the expert group presents two alternatives. The first alternative solution is to turn the recommendation of 2011 into a Regulation.” Also Frans Sonneveldt, “Na de Erfrechtverordening nu de Erfbelastingverordening?”, *NTFR*, 2015/1732: “After the Succession Regulation, an Inheritance Tax Regulation can be considered. This Regulation could include the suggestions of the EC's recommendation but it would have binding force”.

36 Or, alternatively, from Articles 116 and 117 TFEU.

37 Article 114(2) TFEU: “2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.”

38 EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, 17, point 5.

39 As an alternative, an EU Directive introducing the concept can be issued under Articles 326 et seq. TFEU which refer to the enhanced cooperation.

40 Inge van Vijfeijken, “One Inheritance, One Tax,” *EC Tax Review* 26, no. 4 (2017): 218 and Frans Sonneveldt, “Ultimum Remedium ter Bestrijding van de Grensoverschrijdende Erfbelastingproblematiek binnen de Europese Unie”, *WPNR Weekblad voor Privaatrecht Notariaat en Registratie* 7121 (2016): 786.

the same or similar rules as inheritances”.⁴¹ In relation to the second point, I note that there is a clear link between the 2015 inheritance tax report and the EC’s recommendation. According to the report, the EC’s expert group has, amongst others, the task to “assist the [EC] in assessing the progress made by EU Member States in implementing the principles of the [EC’s] recommendation regarding relief for double taxation of inheritances and to provide suggestions on how to take the work in the area forward”.^{42, 43}

One could argue that the EC’s expert group consciously excluded gift taxes from the scope of the concept because property transfers by way of gifts were also excluded from the scope of the EU Succession Regulation. More specifically, under Article 1(2) of the EU Succession Regulation, “[t]he following shall be excluded from the scope of this Regulation: [...] (g) property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature, without prejudice to point (i) of Article 23(2)”. In that regard, one could argue that the exclusion of gift taxes from the scope of the concept seems to be in line with the underlying objective of the concept, i.e. an increased level of alignment between civil law and tax law.⁴⁴ This is because the application of the concept to cross-border donations could lead, in some instances, to a discrepancy between civil law and tax law.⁴⁵

I am of the opinion that the exclusion of gifts from the scope of the concept restricts the scope of the concept in cases where gifts are taxed under the same or similar rules as inheritances. I note, however, that the application of the concept to cross-border donations would mean that the connecting tax criterion of the donor’s habitual residence may need to be interpreted under different principles than in cases involving a cross-border inheritance.

On the other hand, the interpretation of the term “habitual residence” should not, in my view, depend on the type of death tax levied on the cross-border inheritance. Therefore, the exclusion of other types of death taxes from the scope of the concept seems unreasonable. I can only understand such an exclusion due to the division of the group’s work into two reports, one on inheritance taxes and the other on income taxes. Thus, the reference of the inheritance tax report to *mortis causa* income and capital gains taxes would appear inconsistent with such a division. On the contrary, I believe that the application of the concept to any death tax would not only respect the division of work of

41 See also, Frans Sonneveldt, “Ultimum Remedium ter Bestrijding van de Grensoverschrijdende Erfbelastingproblematiek binnen de Europese Unie,” *WPNR Weekblad voor Privaatrecht Notariaat en Registratie* 7121 (2016): 786.

42 EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, 2 (about the reports).

43 According to Article 7.3. of the EC’s recommendation, “The Commission will follow up on the Recommendation with Member States and publish a report on the state of play of cross-border relief for inheritance taxes within the Union three years after the adoption of the Recommendation.”

44 In that regard, I refer to section 8.2.2.2 of this study.

45 For instance, the Council Regulation 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), that applies to gifts, adopts the spouses’ first common habitual residence as a primary connecting factor for the applicable law in the absence of choice by the parties in matters of matrimonial property regimes (Article 26(1)(a) of the Regulation). As a result, there may also be a discrepancy between the applicable law on gifts determined based on the spouses’ first common habitual residence (under the Council Regulation 2016/1103) and the donor’s habitual residence *at the time of the donation* (under the concept).

the group but it would also be in line with Article 2 of the EC's recommendation, which applies to any death taxes.

8.2.6 Application to a cross-border inheritance

The group suggested that the concept should apply to a cross-border inheritance. Therefore, the definition of the term "inheritance" and "cross-border inheritance" is essential.

First, an inheritance could be termed as a transfer to one or more persons of assets which transfer falls under heading XI of Annex I to Directive 88/361,⁴⁶ entitled 'Personal capital movements'. This is in line with the Court's case law on EU inheritance and gift taxation regarding the application of the freedom of capital to a specific inheritance. Furthermore, and in line with this case law, a *cross-border* inheritance constitutes a movement of capital within the meaning of Article 63 TFEU except in cases where its constituent elements are confined at the time of the death within a single EU Member State. In *Welte*, for instance, the Court ruled that:

"20 In that regard, it is apparent from settled case-law that inheritances, namely the transfer to one or more persons of assets left by a deceased person and falling under heading XI of Annex I to Directive 88/361, entitled 'Personal capital movements', constitute movements of capital within the meaning of Article 56 EC, except in cases *where their constituent elements are confined within a single Member State* (see, inter alia, Case C-364/01 *Barbier* [2003] ECR I-15013, paragraph 58; *van Hilten-van der Heijden*, paragraphs 40 to 42; and Case C-31/11 *Scheunemann* [2012] ECR, paragraph 22)." (Italics, VD)⁴⁷

The question arises in that regard whether the concept shall apply to all cross-border inheritances or only to those whose constituent elements are located within the EU. This issue has been already pointed out in the literature. More specifically, Sonneveldt (2016) mentioned the example of a deceased who was habitually resident in a third state with inherited property in an EU Member State⁴⁸ that levies inheritance taxes on the basis of the objective nexus. I also mention the example of a deceased who has been a habitual resident in an EU Member State, but his property is located in a third state. In the first example, the question arises whether the EU Member States can reserve their situs taxing rights when a deceased was a habitual resident in a third state. In the second example, the question arises whether the EU Member State of the deceased's habitual residence is exceptionally required to abstain from taxing parts of the cross-border inheritance if third countries tax these parts under their objective nexus rules.

It seems there are no grounds to apply the concept on a worldwide basis and reserve the situs taxing rights of the EU Member States in cases of a deceased who was a habitual resident in a third state. Besides, an EU harmonisation measure does not cover third-country situations unless the EU Member States themselves decide to transpose it into their domestic law more broadly.⁴⁹ On the other hand, the EU Member States, which do not levy inheritance

46 Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, 1988 OJ L 178/5.

47 CJ, *Welte* (C-181/12).

48 See also Frans Sonneveldt, "Ultimum Remedium ter Bestrijding van de Grensoverschrijdende Erfbelastingproblematiek binnen de Europese Unie," *WPNR Weekblad voor Privaatrecht Notariaat en Registratie* 7121 (2016): 789.

49 See ECJ, *Leur Bloem* (C-28/95).

taxes in general or do not levy inheritance taxes on the basis of situs may consider applying the concept on a worldwide basis as this would not affect their taxing rights.

In the second example, I observe that the concept could apply, because the deceased would have been a habitual resident in an EU Member State. However, the effects of the concept would be minimised in situations where a third state would levy inheritance taxes on the basis of the objective nexus. Although the EU Member State of the deceased's habitual residence would be allowed to tax the whole cross-border inheritance, the third state would not be bound by the concept.⁵⁰ It follows that both states would seek to tax the cross-border inheritance unless an inheritance and gift tax treaty or unilateral mechanisms for the avoidance of double taxation are in force.

8.3 The two steps of application of the concept

8.3.1 Step one: the deceased's habitual residence as a connecting tax criterion

The EC's expert group suggested the use of a *connecting tax criterion* for the indication of the EU Member State that is allowed to tax the cross-border inheritance as a whole. This criterion is the deceased's habitual residence. The application of the deceased's habitual residence as a connecting tax criterion serves as the first step for the application of the "one inheritance – one inheritance tax" concept.

The application of the deceased's habitual residence as a connecting tax criterion is undoubtedly inspired by the EU Succession Regulation that uses the deceased's habitual residence as a *connecting factor*. I observe, however, that the deceased's habitual residence as a connecting factor in the context of the latter Regulation indicates *the applicable civil law on succession*. On the contrary, the deceased's habitual residence as a connecting tax criterion in the context of the concept indicates *the EU Member State which is allowed to tax the cross-border inheritance as a whole under its domestic inheritance tax laws*.

The application of the deceased's habitual residence as a connecting tax criterion, in the group's view, is justified by the fact that most EU Member States levy "[i]nheritance taxes according to rules which seek to recognise the deceased's long-term association with the taxing state."⁵¹ In my view, this argument is not totally convincing, because it relates to the *second* step of the application of the concept (section 8.3.2). In other words, habitual residence in the context of the concept is used as a *connecting tax criterion* and not as the *starting point of taxation*.^{52, 53} This is true even though many EU Member States apply the deceased's (habitual) residence both as a connecting factor in the context of

50 Under Article 288 of the TFEU, "A directive shall be binding, as to the result to be achieved, upon each *Member State* to which it is addressed, but shall leave to the national authorities the choice of form and methods."

51 EU, "Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU", report prepared by the European Commission Expert Group, 19, point 17.

52 Therefore, the connecting tax criterion of the "habitual residence" should not be confused with the personal nexus concepts of (habitual) residence, domicile and nationality.

53 On the contrary, if the term "habitual residence" had been used as a starting point of taxation, it would have resulted, in my view, in a disproportionate harmonization of EU Member States' inheritance tax laws.

their private international rules (section 3.1.1.5.2)⁵⁴ and a starting point of taxation for taxation purposes (section 3.1.1.1.1).

In my view, the application of the deceased's habitual residence as a connecting tax criterion is justified by practical purposes due to the use of this concept in the EU Succession Regulation (section 3.1.1.5.3) and the underlying objective of the "one inheritance – one inheritance tax" concept (section 8.2.2.2). In that regard, I note that the term "habitual residence" is an EU autonomous term that differs from the term "fiscal domicile" as used in the OECD IHTMTC.

8.3.1.1 The assessment of the habitual residence at the deceased

Sonneveldt (2016) – who was a member of the EC's expert group – explained the reasons why habitual residence was suggested to be assessed at the deceased.⁵⁵ In his view, the character/nature of the tax at hand provides the answer of whether habitual residence should be assessed at the deceased or the beneficiaries. Referring to Van Vijfeijken,⁵⁶ he noted that it is not surprising that habitual residence is assessed at the deceased in the case of estate taxes and *mortis causa* capital gains taxes. On the other hand, in the case of acquisition-based taxes, such as inheritance taxes, habitual residence should better be assessed at the level of the beneficiaries in light of their ability-to-pay taxes.

Nevertheless, Sonneveldt argued that there are four reasons why death taxes should assess the habitual residence at the deceased. First, the benefit of the alignment between succession law and inheritance tax law would be lost if habitual residence would have been assessed at the beneficiaries' level under the concept. Second, EU Member States would have to amend their laws in such a case. Third, following these changes, the OECD IHTMTC would fail to function in view of the determination of the inheritance taxing rights under the new rules. Finally, the international aspect should be considered before any change as third countries would still levy taxes based on the deceased's personal nexus and that of the EU Member States based on the beneficiaries' personal nexus with their territory.

In my view, only the first argument put forward by Sonneveldt seems to be convincing. On the other hand, his second and fourth arguments refer to the starting point of taxation which, however, is not harmonised under the concept. As I noted above, the concept merely harmonises a step *before* the application of national inheritance tax laws, i.e. the connecting tax criterion for the determination of the EU Member State which is allowed to tax the cross-border inheritance as a whole.⁵⁷ Furthermore, with regard to Sonneveldt's third argument, the report states that "[t]he need to negotiate a multitude of bilateral treaties, or a multilateral treaty, for the avoidance of double taxation is avoided [if the concept

54 In such a case, however, the concept of (habitual) residence is a national law concept and not an EU autonomous concept.

55 See also Frans Sonneveldt, "Ultimum Remedium ter Bestrijding van de Grensoverschrijdende Erfbelastingproblematiek binnen de Europese Unie," *WPNR Weekblad voor Privaatrecht Notariaat en Registratie* 7121 (2016): 786-787.

56 Inge van Vijfeijken and Hedwig van der Weerd-van Jolingen, "Double Taxation of Inheritances and the Recommendation of the European Commission," *EC Tax Review* 21, no. 6 (2012): 315.

57 Nevertheless, one should acknowledge that the EU Member States may seek to amend their inheritance tax laws in order to safeguard their taxing rights.

applies]”.⁵⁸ Nevertheless, considering that the effects of the concept may be limited in situations between EU Member States and third states (section 8.2.6), the need for the EU Member States to negotiate bilateral tax treaties with third states remains intact.

Therefore, I am of the opinion that the group proposed the assessment of the habitual residence at the deceased because of the application of the deceased’s habitual residence as a connecting factor in the context of the EU Succession Regulation. The Regulation retains the law of the EU Member State of the deceased’s habitual residence, instead of the law of nationality, as it coincides with the centre of interest of the deceased and often with the place where most of the property is located. Such a connection is more favourable to their integration into the EU Member State of the habitual residence and avoids any discrimination regarding persons who are resident there without possessing the relevant nationality.”⁵⁹ Given the connection of inheritance taxes with civil law (section 3.1.1.5.1) and the objectives of the “one inheritance – one inheritance tax” concept (section 8.2.2), it does not take long to realize that the connecting tax criterion of the habitual residence should be assessed at the deceased’s level also in the context of the concept.

8.3.1.2 *Interpreting habitual residence*

8.3.1.2.1 *Habitual residence: an EU autonomous term*

The term “habitual residence” was not first used in the EU Succession Regulation. It was previously used in EU secondary legislation relating to both private international law and public law.⁶⁰ For instance, in the private international law sphere, the term was used in EU legislation relating to the determination of the applicable law and jurisdiction of national EU courts to contractual obligations (Rome I)⁶¹, to non-contractual obligations (Rome II)⁶²,

58 EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, 18, point 13.

59 See also chapter III (applicable law), Article 16 (a single scheme) of the explanatory memorandum of the proposal of the EU Succession Regulation: “The disadvantages of the so-called system of scission, in which succession to movable assets is subject to the law of residence of the deceased and succession to the estate is subject to the law of the State in which the property is located, were highlighted in the consultations. The system creates several bodies of assets, each one subject to a different law which determines differently heirs and their respective shares, and the division and liquidation of the succession. The choice to create a single scheme by means of a regulation allows the succession to be subjected to a single law, thereby avoiding these disadvantages. A single scheme also enables a testator to plan the division of their property between their heirs in a fair manner, irrespective of the location of this property. The connecting factor: the law of the last habitual residence of the deceased”.

60 I note that in the area of international law, within the Hague Conference, habitual residence as a connecting factor for determining applicable law was first used in the Convention of 15 June 1955 on the Law Applicable to International Sales of Goods. Hague Conference on Private International Law.

61 Regulation (EC) no 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, 2008, OJ L 177/6 (Rome I).

62 Regulation (EC) no 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, 2008, OJ L 177/1 (Rome II).

to matrimonial matters and parental responsibility,⁶³ to matrimonial property law⁶⁴ and the law on the property consequences of registered partnerships.⁶⁵ On the other hand, in the EU public law sphere, the term “habitual residence” was used, for instance, in EU legislation relating to social security,⁶⁶ expatriation allowance⁶⁷ and the tax exemption for certain means of transportation imported temporarily.⁶⁸

Just as other terms used in EU secondary legislation, habitual residence shall be determined through the *EU autonomous interpretation approach*. Pamboukis stated that this approach ensures the uniformity sought, not only with respect to its enactment but also to its implementation, except of course where the EU legislation itself refers to national law.⁶⁹ It follows that an EU autonomous interpretation is justified because habitual residence may differ – even marginally – from habitual residence employed by the laws of the EU Member States. I note, in that regard, that in *Marcredi* (C-497/10) the CJ ruled that:

“According to settled case law, it follows from the need for a uniform application of European Union law and the principle of equality that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an *independent* and *uniform* interpretation throughout the European Union, *having regard to the context of the provision and the objective pursued by the legislation in question*.[...]” (Italics, VD)⁷⁰

Consequently, the habitual residence shall be determined independently from national perceptions, legal concepts and pre-understandings having regard to the *context* of the provision and the *objectives* pursued by the EU secondary legislation using this term. Habitual residence, therefore, is functionally connected with the teleology of the EU legislation, which uses this term. Consideration of the context of the provisions and the objectives of this legislation may, however, result in different EU autonomous interpretations of the term from one EU legislation to another. Precisely for that reason, G. Khairallah referred to a *functional* understanding of the habitual residence.⁷¹ In *A* (C-523/07), for instance, the ECJ held that:

63 Council Regulation (EC) no 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) no 1347/2000, 2004, OJ L 338.

64 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, 2016, OJ L 183.

65 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, 2016, OJ L 183.

66 Regulation (EC) no 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, 2009, OJ L 284.

67 Regulation (EU, Euratom) no 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union, 2013, OJ L 287.

68 Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another, 1983, OJ L 105.

69 Haris Pamboukis, “Introductory Remarks,” in *EU Succession Regulation no 650/2012, A Commentary*, ed. Haris Pamboukis (Athens: Nomiki Bibliothiki, 2017), 13.

70 CJ, *Marcredi* (C-497/10), para. 46 and the case law mentioned there.

71 Georges Khairallah and Mariel Revillard, *Droit européen des successions internationales* (Defrénois, 2013), 50.

“The case law of the Court relating to the concept of habitual residence in other areas of European Union law (see, in particular, Case C-452/93 *P Magdalena Fernández v Commission* [1994] ECR I-4295, paragraph 22; Case C-372/02 *Adanez-Vega* [2004] ECR I-10761, paragraph 37; and Case C-66/08 *Kozłowski* [2008] ECR I-0000) cannot be directly transposed in the context of the assessment of the habitual residence of children for the purposes of Article 8(1) of the Regulation [no 2201/2003].”⁷²

Notwithstanding the preceding citation, Pamboukis rightfully observed that the Court’s case law on the conceptual formation of habitual residence by the various set of EU rules is not indifferent or irrelevant for the interpretation of the term in the context of the EU Succession Regulation. Although the determination of the term depends on the system and the aim of the specific set of EU rules, the conceptual core of the habitual residence, i.e. *stability and duration of the centre of vital interests of a national person*, is obviously identical in all EU rules. The term is just possible to differentiate slightly, or on a case by case basis, depending on the purpose or the function of each set of European rules. (Italics, VD).⁷³

8.3.1.2.2 Three interpretation approaches

In the course of my research, I observed that the EU legislature had adopted three different approaches to guarantee the EU autonomous interpretation of the term “habitual residence”. Under the first approach, the habitual residence was not defined so the CJ can subsequently interpret it if a national court should refer a question for a preliminary ruling to the Court. This approach has been followed in EU legislation, which first used the habitual residence as a connecting factor for private international law purposes such as the Regulation no 2201/2003.⁷⁴ For instance, in *A* (C-523/07), the ECJ interpreted the term “habitual residence” in the context of this Regulation as follows:

“[t]he concept of ‘habitual residence’ under Article 8(1) of the Regulation must be interpreted as meaning that it corresponds to the place which reflects some *degree of integration* by the child in a social and family environment. To that end, in particular the *duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration*. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.” (Italics, VD)⁷⁵

Under the second approach, the EU legislature chose to directly define habitual residence. This approach is likely to apply in cases where the EU legislature has used the term before and now seeks to explain it by means of an implementing Regulation. For example,

⁷² ECJ, *A* (C-523/07), para. 36.

⁷³ Haris Pamboukis, “Article 4 – General Jurisdiction,” in *EU Succession Regulation no 650/2012, A Commentary*, ed. Haris Pamboukis (Athens: Nomiki Bibliothiki, 2017), 113.

⁷⁴ Caravaca notes that, if habitual residence had been defined in any European regulation on private international law, this concept would have been constricted and probably automatically compared to the concept expressed in other regulations, although governing very different matters, thus producing in some cases unsatisfactory results, Alfonso-Luis Calvo Caravaca, “Article 21: General Rule,” in *The EU Succession Regulation: A Commentary*, ed. Alfonso-Luis Calvo Caravaca, Angelo Davi and Heinz-Peter Mansel (Cambridge: Cambridge University Press, 2016), 298-322.

⁷⁵ ECJ, *A* (C-523/07), para. 44.

Article 11(1) of the Regulation 987/2009 laying down the procedure for implementing the EU Social Security Regulation directly defines habitual residence (as used in Article 11(1) of the Regulation 883/2004) as follows:

“Where there is a difference of views between the institutions of two or more Member States about the determination of the residence of a person to whom the basic Regulation applies, these institutions shall establish by common agreement the centre of interests of the person concerned, based on an overall assessment of all available information relating to relevant facts, which may include, as appropriate: (a) *the duration and continuity of presence on the territory of the Member States concerned*; (b) *the person's situation, including: (i) the nature and the specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract; (ii) his family status and family ties; (iii) the exercise of any non-remunerated activity; (iv) in the case of students, the source of their income; (v) his housing situation, in particular how permanent it is; (vi) the Member State in which the person is deemed to reside for taxation purposes.*

2. Where the consideration of the various criteria based on relevant facts as set out in paragraph 1 does not lead to agreement between the institutions concerned, the person's *intention*, as it appears from such facts and circumstances, especially the reasons that led the person to move, shall be considered to be decisive for establishing that person's actual place of residence.” (Italics, VD)

The third approach combines elements of the first and the second approaches. Habitual residence is not defined but the preambles of the EU legislation contain important interpretative guidelines for the definition of the term. This is, for instance, the approach applied in the EU Succession Regulation. Although habitual residence is not defined in Article 21(1) of the EU Succession Regulation, recitals 23 and 24 are of special interpretative value (irrespective of their lack of authoritative value). More specifically, under preamble 23

“[i]n order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal *a close and stable connection* with the State concerned taking into account the specific aims of this Regulation.” (Italics, VD)

Furthermore, as the determination of the deceased's habitual residence can be very complex in several situations, preamble 24 states that the deceased's *nationality and the location of the assets could be a special factor in the overall assessment of all the factual circumstances.*

8.3.1.2.3 Habitual residence under the EU Succession Regulation

Caravaca notes that the EU Succession Regulation adopts an “overall, weighted, casuistic concept of the notion of habitual residence”. As regards the overall concept, he notes that a range of indications needs to be verified. “All relevant factual elements” are to be considered, generally amongst personal and professional criteria. As regards the weighted concept, he notes that the importance of each element is to be assessed; in other words, the concurrence of two or more indicators does not automatically entail that the mere

presence in a state equates to habitual residence. Lastly, habitual residence is a casuistic concept, given that the elements to be considered will always need to be analysed meticulously on a case-by-case basis, and such analysis cannot be replaced by vague references to general categories.⁷⁶

Furthermore, it follows from recitals 23 and 24 of the EU Succession Regulation that the examination of the deceased's close and stable connection with a state prerequisites the consideration of a material element, i.e. the physical presence of the deceased in a state (*corpus*) and a volitional element, i.e. the externalisation of an intention of permanent and principal establishment in a state (*animus*). The material element shall be assessed in light of its duration and stability. Pamboukis noted in that regard that in the modern globalised world there is intense mobility of persons (which is also a fundamental European principle and freedom) and therefore, *habitual residence is the place where one returns from travelling or residing abroad for professional reasons (even for long periods of time)*. (Italics, VD)⁷⁷ In regard to the volitional element, he mentioned that internal intention does not suffice. Instead, the deceased's intention to have a permanent and principal establishment in a state shall be externalised and emanate from certain facts. For instance, due to the absence of the volitional element, those forced to stay in a specific place (e.g. prisoners) do not acquire habitual residence at that place.⁷⁸

The parallel application of a material and a volitional element for the determination of the deceased's habitual residence consequently entails that multiple habitual residences are not possible. In that regard, I note that in *Wencel* the Court held in the context of the Regulation no 1408/71 (the old EU Social Security Regulation) that:

"Since the system introduced by Regulation no 1408/71 uses the residence of the person concerned as the connecting factor for the determination of the legislation applicable, it cannot be accepted, without depriving the provisions referred to in the preceding paragraph of all practical effectiveness, that a person may have, for the purposes of Regulation no 1408/71, a number of habitual residences in different Member States."⁷⁹

Finally, I also observe that, although multiple habitual residences are not possible, a person can nevertheless change his habitual residence throughout his lifetime. In that regard, I note that the deceased's habitual residence *at the time of his death* is decisive for the application of Article 21 of the EU Succession Regulation. The deceased can, thus, move his habitual residence several times throughout his lifetime.⁸⁰ Such a change, however, prerequisites a change of both the material and the volitional element as I discussed above.

8.3.1.2.4 Habitual residence under the concept

Above, I mentioned that the group was inspired by the EU Succession Regulation to suggest the use of the deceased's habitual residence as a connecting tax criterion for

⁷⁶ Alfonso-Luis Calvo Caravaca, "Article 21: General Rule," in *The EU Succession Regulation: A Commentary*, ed. Alfonso-Luis Calvo Caravaca, Angelo Davì and Heinz-Peter Mansel (Cambridge: Cambridge University Press, 2016), 298-322.

⁷⁷ Haris Pamboukis, "Article 4 – General Jurisdiction," in *EU Succession Regulation no 650/2012, A Commentary*, ed. Haris Pamboukis (Athens: Nomiki Bibliothiki, 2017), 114.

⁷⁸ *Id.*

⁷⁹ CJ, *Wencel* (C-589/10), para. 48 and the case law mentioned.

⁸⁰ Haris Pamboukis, "Article 4 – General Jurisdiction," in *EU Succession Regulation no 650/2012, A Commentary*, ed. Haris Pamboukis (Athens: Nomiki Bibliothiki, 2017), 114.

the determination of the EU Member State, which is allowed to tax the cross-border inheritance as a whole. Per the 2015 inheritance tax report, “[t]he identity of the applicable [inheritance tax] system may best be determined by taking the approach adopted in the [EU Succession Regulation].”⁸¹ The question arises, however, whether habitual residence under the concept should be given the same definition as that under the EU Succession Regulation. In my view, the question should be answered in the affirmative having regard both to the context and the objectives of the EU Succession Regulation and the concept.

I observe that the primary objective of the EU Succession Regulation is the coordination of legal orders for the smooth functioning of the internal market. More specifically, “[t]he proper functioning of the internal market should be facilitated by removing the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications. [...]”⁸² To achieve this objective, the EU Succession Regulation confines itself to the law of succession without affecting the material law of succession, specific to each Member State and attempts to avoid situations where the same succession is dealt with differently in the EU Member States or leads to decisions in one EU Member State that would not be recognised in another EU Member State.⁸³

In section 8.2.2.1, I discussed the objectives of the concept and observed that its primary objectives seem to be the following: a) the elimination of double or multiple taxation of inheritances with the EU, b) the reduction of the excessive administrative burden for individuals, and c) the overcoming of the different nature and design of national inheritance tax legislations. At first sight, the objectives of the concept seem to differ from those of the EU Succession Regulation. In my view, however, this is not valid as the achievement of the objectives of the concept, in essence, completes the above objectives of the EU Succession Regulation, which does not apply to tax matters.⁸⁴

Pamboukis discussed the problems arising from the exclusion of tax matters from the scope of the EU Succession Regulation (Article 1(1) of the EU Succession Regulation). He noted that “[i]n particular, one of the main objectives of the Regulation was to reduce excessive costs faced by heirs in successions having cross-border implications and, accordingly, to facilitate the exercise of basic Union freedoms, such as the freedom of movement of persons within the Union. By the exclusion of tax issues from the Regulation, the exercise of these freedoms is not facilitated, as there is a substantial risk of double taxation of heirs in relation to all or parts of the succession and of non-permitted discrimination between heirs depending on the nature of the assets of the estate and the State in which they are located, as well as on the law applicable to succession. This way, the principle of free movement of persons and capital under EU law and eventually the main objectives of the Regulation may be impaired.”⁸⁵

81 EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, 19, point 16.

82 See preamble 7 of the EU Succession Regulation.

83 Haris Pamboukis, “Introductory Remarks,” in *EU Succession Regulation no 650/2012, A Commentary*, ed. Haris Pamboukis (Athens: Nomiki Bibliothiki, 2017), 21-22.

84 Article 1(1) of the EU Succession Regulation. See also Matthias Weller, “Article 1 - Scope,” in *The EU Succession Regulation: A Commentary*, ed. Alfonso-Luis Calvo Caravaca, Angelo Davi and Heinz-Peter Mansel (Cambridge: Cambridge University Press, 2016), 77.

85 Haris Pamboukis, “Introductory Remarks,” in *EU Succession Regulation no 650/2012, A Commentary*, ed. Haris Pamboukis (Athens: Nomiki Bibliothiki, 2017), 27.

If the exclusion of tax matters from the scope of the EU Succession Regulation arguably impairs the achievement of its objectives, the application of the concept to tax matters completes the Regulation, thereby resulting in a *coherent interaction* between the succession laws and the inheritance tax laws. It follows that the interpretative guidelines of preambles 22 and 23 of the EU Succession Regulation become a useful tool also for the interpretation of the habitual residence at the first step of the application of the concept.

The use of the guidelines of the preambles 22 and 23 of the EU Succession Regulation to define the habitual residence at the first step of the application of the concept has, in my view, two important consequences. First, the term must not be interpreted under national perceptions but exclusively based on the principles of the preambles (see section 8.3.1.2.3). Second, individuals cannot abuse their “habitual residence” but only their “non-habitual residence” as multiple habitual residences are not possible (see section 8.3.1.2.3).

Concerning the first point, Sonneveldt (2016) observed that in certain situations the determination of the deceased’s habitual residence is particularly complex. Sonneveldt referred to the case of individuals with a cosmopolitan lifestyle with residence in different EU Member States where they provisionally stay.⁸⁶ In his view, all EU Member States involved may claim that the deceased had at the time of his death his habitual residence in their territory on the basis of a day count criterion. Although the determination of the deceased’s habitual residence can become a complicated issue in a specific case, the use of a “national” day count criterion seems to counter the EU autonomous interpretation of the term. Pamboukis, for instance, noted that tax residence constitutes, in principle, is a particularly important indicator for the determination of the habitual residence but this will not always be the case as it is determined unilaterally and does not preclude positive conflicts (i.e. a person considered a tax resident in two or more Member States).⁸⁷ Therefore, a person may have a habitual residence in one EU Member State and be a resident of another EU Member State for tax purposes. Tax residence in such a case shall be considered “non-habitual residence”. As a result, persons with a cosmopolitan lifestyle may be tax residents in various states but habitual residents of only one of them or even of a third state.^{88, 89}

Concerning the second point, the group noted in its report that “[i]t would not be easy to abuse [the law of the state of the deceased’s habitual residence] and, in any event, abuse may always be countered by applying the principle of ‘abuse of law’.”⁹⁰ In that regard, Sonneveldt (2016) observed that it is relatively easy for individuals to transfer their habitual residence

86 Frans Sonneveldt, “Ultimum Remedium ter Bestrijding van de Grensoverschrijdende Erfbelastingproblematiek binnen de Europese Unie,” *WPNR Weekblad voor Privaatrecht Notariaat en Registratie* 7121 (2016): 787.

87 Haris Pamboukis, “Article 4 – General Jurisdiction,” in *EU Succession Regulation no 650/2012, A Commentary*, ed. Haris Pamboukis (Athens: Nomiki Bibliothiki, 2017), 117.

88 Paul Legarde also discusses situations where the determination of the deceased’s habitual residence may prove complex, see Ulf Bergquist, *EU Regulation on Succession and Wills: Commentary* (Köln: Otto Schmidt, 2015): 123-124.

89 See also, in that regard, the pending case *IB* (C-289/20) in which the ECJ will decide on whether a spouse may have his habitual residence in two EU Member States, a situation that would result in competing jurisdictional competences of the courts of two EU Member States in the context of the application of the Council Regulation no 2201/2003.

90 EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, 19, point 18.

from an EU Member State to another EU Member State with more favourable inheritance tax laws.⁹¹ This should be considered, in his view, a disadvantage of the application of the term “habitual residence” under the concept and, therefore, specific anti-abuse measures should be introduced to address the abusive transfer of the habitual residence.

I believe that the interpretation of the term “habitual residence” suffices to address the above issue. Nevertheless, an escape clause such as that of Article 21(2) of the EU Succession Regulation⁹² can be added to the first step of the concept. Other anti-abuse measures, in my view, are not necessary.⁹³ The adjective “habitual” already implies a certain degree of stability, continuance, and a certain period of duration of residence at an EU Member State. In other words, it establishes a close and stable connection between a person and the territory of his or her residence.

8.3.2 Step two: single taxation

If the first step of the “one inheritance – one inheritance tax” concept was inspired by the EU Succession Regulation, the second step is inspired by the EU Social Security Regulation and its Article 11(1), which reads as follows: “Persons to whom this regulation applies *shall be subject to the legislation of a single Member State only [...]* (Italics, VD).” The CJ had already ruled in *Wencel* (C-589/10) that the provisions of the EU Social Security Regulation⁹⁴ “[a]re not only intended to ensure that the persons concerned are not left without social security cover because there is no legislation which is applicable to them [...], but also to ensure that the persons concerned are subject to the social security scheme of only one Member State in order to prevent more than one system of national legislation from being applicable and to avoid the complications which may arise from that situation.”⁹⁵

I call the second step of the application of the concept “single taxation” which can be summarized as follows: if the deceased had his habitual residence at the time of his death in EU Member State A, this state is allowed to tax the cross-border inheritance at

91 Frans Sonneveldt, “Ultimum Remedium ter Bestrijding van de Grensoverschrijdende Erfbelastingproblematiek binnen de Europese Unie,” *WPNR Weekblad voor Privaatrecht Notariaat en Registratie* 7121 (2016): 787.

92 The correct application of the term “habitual residence” in the context of the EU Succession Regulation is safeguarded by the so-called “escape clause” of Article 21(2) which reads as follows: “2. Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State.”

93 See also Inge van Vijfeijken, “One Inheritance, One Tax,” *EC Tax Review* 26, no. 4 (2017): 218.

94 Please note that *Wencel* was referring to the Council Regulation (EEC) no 1408/71 of 14 June 1971, which has been (partially) repealed by the EU Social Security Regulation (see recital 44 of the Regulation). Remarkably, Regulation 1408/71 first introduced the principle that a person shall be subject to the social security scheme of only one EU Member State (Article 13 (1) of the Regulation, which is similar to Article 11 of the EU Social Security Regulation).

95 CJ, *Wencel* (C-589/10), para. 46 and the case law mentioned.

hand under its domestic inheritance tax laws (section 8.3.2.1).⁹⁶ On the other hand, any other EU Member State is precluded from taxing elements of the cross-border inheritance (section 8.3.2.2).

8.3.2.1 Taxation by the EU Member State of the deceased's habitual residence

The identification of the EU Member State of the deceased's habitual residence in the first step is decisive for the application of the second step of the concept. Following the example of the EU Succession Regulation, the concept builds on the principle that only one inheritance tax law shall apply to the whole cross-border inheritance, i.e. that of the EU Member State in which the deceased had his habitual residence.

In section 8.3.1.2.4, I noted that the deceased's habitual residence is merely a connecting tax criterion. It only indicates the EU Member State, which is *entitled* to apply its domestic inheritance tax laws to the whole cross-border inheritance.⁹⁷ On the contrary, it does not create taxing rights for the indicated EU Member State, if these rights do not exist under its national law. In the same vein, if the EU Member State concerned levies inheritance taxes, the habitual residence operates only as a connecting tax criterion and thus *does not* harmonise the applicable inheritance law and its starting point of taxation. Of note is that those laws may *not* take the deceased's residence as the starting point of taxation but another personal nexus concept. This should be considered acceptable, in my view, because harmonisation of the starting point of taxation of the legislation of the indicated EU Member State seems disproportionate to the objectives of the concept and the EU Member States' fiscal sovereignty.⁹⁸

It follows that a distinction should be made between the *right* to apply inheritance tax laws (which becomes a matter of EU law) and the *actual levying* of inheritance tax (which remains a matter of national law). Such a distinction would demonstrate, in my view, that the concept is proportionate from the perspective of the EU Member State of the deceased's habitual residence.

8.3.2.2 Taxation by any other EU Member State

According to the report, “[t]he need to ensure that the applicable rules are as simple as possible also makes it undesirable that there should be any other kind of exception to the application of one [inheritance tax] system to one inheritance. The Member State in which

96 It seems that the notion of single taxation as the second step of the “one inheritance – one inheritance tax” concept differs from that of “single taxation” provided by Kemmeren and De Lillo. According to Kemmeren and De Lillo – who quote Avi-Yonah – single taxation is taken to mean a situation where income from cross-border transactions should be subject to tax once (*that is neither more nor less than once*) [...] at the rates established by the benefits principle, which traditionally attributes primary taxing rights upon active income to the source jurisdiction and ascribes to the residence state the primary tax claims over passive income. See Eric C.C.M. Kemmeren and Francesco De Lillo, “International Single Taxation: A Misguiding Notion,” in *Single Taxation?*, ed. by Joanna Wheeler (Amsterdam: IBFD, 2018), 220–221.

97 This is true even if the state does not levy inheritances taxed on foreign-located property.

98 It is true that states may seek to change their personal nexus concepts for the establishment of comprehensive tax liability to safeguard their taxing rights. In such a case, one could argue that the concept could *indirectly* harmonise the starting point of taxation of EU Member States' tax legislations. Nevertheless, such a harmonisation could not be fully attributed to an EU action.

immovable property of any estate is situated should not, therefore, be able to impose its [inheritance tax] on that property. If Member States choose not to adopt this view, the taxing rights of the state of situs could be satisfied by a compensatory payment, calculated on a reasonable basis, between the Member States involved.”⁹⁹ It follows from the above that the EU Member State of the objective nexus is precluded from taxing the immovable property and other assets located in its territory on the basis of the situs principle. As a result, there would be no double or multiple taxation as only the EU Member State of the deceased’s habitual residence would be allowed to tax the cross-border inheritance as a whole.

As an alternative and in the context of the double or multiple taxation discussion, the group suggested that, if the prohibition of the EU Member State of situs to tax cannot be accepted by the EU Member States, the taxing rights of the EU Member State of situs could be satisfied by a compensatory payment, calculated on a reasonable basis between the EU Member States involved. The reference to a compensatory payment instead of a tax seems to be deliberate. The whole idea of the “one inheritance – one inheritance tax” concept is that only one EU Member State is allowed to tax, so the inherited property is not taxed two or multiple times and the individuals deal only with one EU Member State concerning their whole cross-border inheritance. In all events, the suggestion of a compensatory payment is particularly vague. The classification of such compensatory payment from a public law perspective and its calculation are not further specified, elements which should be considered a drawback of the report.

On the proportionality of the prohibition of the EU Member State of the objective nexus to tax and with particular reference to the double or multiple non-taxation discussion, I refer to the section 8.2.3.2 on the proportionality of the concept.

8.4 Application of the concept to the problems of this study

8.4.1 From “obstacles” to “problems”

In chapter 3, I discussed the *problems* of cross-border inheritances and donations: double and multiple taxation, double and multiple non-taxation, discrimination and administrative difficulties. On the other hand, the EC’s expert group identified the following most common cross-border inheritance tax *obstacles*: a) the nature and design of national inheritance taxes, b) the limited availability of (the tax treaty or unilateral) relief of double taxation by the EU Member States, and c) the administration of inheritance taxes. In the group’s view, the concept “one inheritance – one inheritance tax” provides a solution to these tax obstacles. The question arises, however, whether the concept provides a holistic solution also to the problems of cross-border inheritances and donations, as discussed in this study.

First, double or multiple taxation and administrative difficulties (both at the tax authorities’ level and at the micro-level) of cross-border inheritances have been identified both by the group and myself as problems/obstacles of cross-border inheritances. On the other hand, I did not classify the nature and the design of national inheritance taxes as

⁹⁹ EU, “Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU”, report prepared by the European Commission Expert Group, 19, point 19.

problems of cross-border inheritances.¹⁰⁰ In my view, the diverging nature and design of national inheritance taxes is the outcome of the EU Member States' fiscal sovereignty and a problem of death taxes in a domestic setting that thus falls outside of the scope of this study. Furthermore, I observe that it is the parallel imposition of death taxes which gives rise, for example, to double taxation and not their divergent design as I explained in section 3.1.1.

Instead of the nature and the design of national inheritance taxes, I considered the discriminatory provisions of national death tax systems an important problem in a cross-border setting.¹⁰¹ Conversely, the EC's expert group did not classify this problem as an inheritance cross-border tax obstacle.¹⁰² This is because discrimination arises only within one EU Member State. On the contrary, double or multiple taxation is the outcome of the parallel application of tax legislations of two or more EU Member States. The same is true concerning the administrative problems of cross-border inheritances. Therefore, the "one inheritance – one inheritance tax" concept cannot provide by itself be an effective solution to the EU Member States' discriminatory inheritance and gift tax provisions. This is because at the second step of the concept, the indicated EU Member State is allowed to tax the cross-border inheritance under its domestic inheritance tax law that can, however, contain discriminatory elements.

In that regard, it could be argued that a solution to this problem could be the introduction of an obligation of the EU Member State of the deceased's habitual residence to treat the cross-border inheritance as a domestic one by way of fiction. Nevertheless, I believe that a fiction-based approach would be contrary to the Court's case law on EU inheritance and gift taxation as it would entail the obligation of the EU Member States to treat different situations under the same rules. This would be clearly disproportionate to the EU Member States' fiscal sovereignty. It follows, for instance, from the *Q* case that the EU Member State of the personal nexus can deny granting an objective tax exemption if this is in line with the objective of the exemption at hand. In such a case, the cross-border inheritance is not discriminated against.¹⁰³

On the other hand, an EU measure, which would require the EU Member States to apply their laws in a non-discriminatory manner, seems, in my view, to be a proportionate solution that is based on the Court's judgments in EU inheritance and gift taxation. Besides, this may also be compelling, given that, as per the 2011 EC's Working Paper, "[t]hese Court judgments have brought a certain amount of clarity and certainty to this matter. However, in some instances, it may not be entirely clear what consequences a ruling involving legislation of one Member State should have on legislation of another Member State. Moreover, even where Member States introduce new tax rules as a result of a ruling, they may do so in vastly differing ways."¹⁰⁴

100 To be more accurate, in section 1.1.1.3 of this study, I refer to the nature and design of death taxes *in general* (thus not only to that of an inheritance tax).

101 See section 3.1.3 of this study.

102 Unless it can be argued that the discrimination problem forms part of the design and nature of national death taxes.

103 CJ, *Q* (C-113/13).

104 European Commission Staff Working Paper, "Non-discriminatory Inheritance Tax Systems: Principles Drawn from EU Case law" prepared by the European Commission (SEC (2011) 1488 final), 4.

In the same vein, the report does not seem to classify double or multiple non-taxation as a cross-border inheritance tax obstacle.¹⁰⁵ However, in the context of this study, I considered double or multiple non-taxation to be a problem of death and gift taxation (section 3.1.2). I refer to section 8.2.3.2.1 of this study in which I discuss the possible double or multiple non-taxation concerns of the “one inheritance – one inheritance tax” concept. This aspect of the concept was taken into account in the following section.

8.4.2 *An EU Directive implementing the “one inheritance – one inheritance tax” concept*

I observe that the “one inheritance – one inheritance tax” concept can only be implemented by means of an EU Directive issued under Article 115 TFEU (section 8.2.4). Such Directive would contain compulsory rules for addressing the problems of cross-border inheritances and donations as identified in chapter 3 of this study.

First, the definition of the terms “inheritance” and “cross-border inheritance” is essential for the application of the EU Directive implementing the concept. An inheritance could be termed as a transfer to one or more persons of assets which transfer falls under heading XI of Annex I (section D: inheritances and legacies) to Directive 88/361, entitled ‘Personal capital movements’ (see section 8.2.6). A cross-border inheritance could be thus termed as an inheritance where the deceased was a habitual resident in an EU Member State and not all constituent elements of such an inheritance are confined within that EU Member State. In the same vein, a donation should be termed as a transfer to one or more persons of assets left by a person which transfer falls under heading XI of Annex I (section B: Gifts and endowments) to Directive 88/361, entitled ‘Personal capital movements’. A cross-border donation could be thus termed as a donation of assets (whether they are gifts of money, immovable property or movable property) where the donor is a habitual resident in an EU Member State and not all constituent elements of such a donation are confined within that EU Member State.

Furthermore, the EU Directive implementing the concept would apply to a cross-border inheritance regardless of the type of death tax levied by the EU Member States concerned. The Directive could thus apply the broad definition of the term “inheritance tax” as used in the EC’s recommendation. Therefore, death tax would mean any tax levied at national, federal, regional, or local level upon death, irrespective of the name of the tax, of the manner in which the tax is levied and of the person to whom the tax is applied, including in particular estate tax, inheritance tax, transfer tax, transfer duty, stamp duty, income and capital gains tax. Likewise, the EU Directive would also apply to a cross-border donation irrespective of the type of tax on gifts levied by the EU Member States concerned. Most importantly, the Directive would apply to a cross-border donation irrespective of the fact that the EU Succession Regulation would not apply to such a donation. As mentioned in section 8.2.5, the exclusion of a cross-border donation from the scope of the concept – as suggested by the EC’s expert group – unjustifiably restricts the scope of the concept in cases where gifts are taxed under the same or similar rules as inheritances.

¹⁰⁵ Although one could note that the report refers, in places, to double non-taxation as well. See EU, “*Ways to Tackle Inheritance Cross-Border Tax Obstacles Facing Individuals within the EU*”, report prepared by the European Commission Expert Group, 9, points 9 and 12 para. 4 (viii).

For the determination of the applicable inheritance and gift tax legislation, I suggest that the EU Directive follow the two-step approach as presented in section 8.3. As a result, I suggest that the EU Directive prescribe that a cross-border inheritance and donation would be subject to the legislation of only one EU Member State. The EU Member State concerned would be that of the deceased's or the donor's habitual residence. This EU Member State would thus be entitled to tax the whole cross-border inheritance and donation under its domestic inheritance and gift tax rules. On the contrary, any other EU Member State would be precluded from doing so. Consequently, the above two-step approach would effectively address the double or multiple taxation problem as well as the administrative difficulties of cross-border inheritances and donations. At the same time, the EU Directive may prescribe that the above approach should not apply if the EU Member State of the deceased's or donor's habitual residence does not exercise its taxing rights (because of a specific exemption, deduction, credit or allowance) or does not levy death taxes or taxes on gifts *and* an abusive element is present. In this way, undesirable double non-taxation could be addressed. Nevertheless, I acknowledge that more research is required in that regard and, more specifically, as to whether an abusive element must always be present and second, how abuse needs to be assessed by the EU Member States.

Nevertheless, I note that the above two-step approach does not address, at first sight, the discrimination problem. This is because the legislation of the EU Member State, which the connecting tax criterion of the habitual residence indicates, may contain discriminatory elements. Therefore, I suggest that the Directive implementing the concept include a non-discrimination clause that would oblige the EU Member States to apply their domestic inheritance and gift tax legislations in a non-discriminatory manner. In that regard, guidance could be found in the Court's case law on EU inheritance and gift taxation that has shaped the so-called "EU compliant inheritance and gift tax" (see section 7.3.1).

8.4.3 Enforcement mechanisms against discrimination

Nevertheless, I observe that, if an EU Member State does not consider a provision of its domestic inheritance and gift tax legislation contrary to EU law, it will not seek to amend it. As a result, the non-discrimination clause could become *lex imperfecta* without a mechanism that would allow the EC to safeguard the proper application of the clause. Such a mechanism could consist of four successive steps: a) the preparation of a survey on the EU Member States' rules on death taxes and taxes on gifts (section 8.4.3.1), b) the creation of an inheritance and gift tax forum for the review of the results of the survey (section 8.4.3.2), c) the initiation of infringement procedures against the EU Member States that maintain discriminatory inheritance and gift tax provisions (section 8.4.3.3), and d) the issuance of an EU Directive containing compulsory rules on abolishing of discriminatory features of EU Member States' domestic inheritance and gift tax legislation (section 8.4.3.4).

8.4.3.1 Survey on the domestic rules on death and taxes on gifts

The first step of the enforcement mechanism could be the preparation of a survey on the domestic rules of the EU Member States on death taxes and taxes on gifts. More specifically, the EU Directive implementing the concept could prescribe that the EU Member States provide an overview of their inheritance and gift tax rules to the EC. Subsequently, the

EC could prepare a survey on the EU Member States' rules on taxes levied upon death and taxes on gifts. The survey could build on the survey that the Copenhagen Economics Institute published in 2011 as an attachment to its "Study on inheritance taxes in the EU Member States and possible mechanisms to resolve problems of double inheritance taxation in the EU".¹⁰⁶ Contrary, however, to the latter survey, the EC's survey would be up-to-date and contain the official EC's view on the compatibility of an inheritance and gift tax provision with EU law.

8.4.3.2 *Creation of an inheritance and gift tax forum*

The second step of the enforcement mechanism could be the creation of an inheritance and gift tax forum entrusted with the task to discuss the results of the EC's survey. The forum could consist of officials of the EU Member States, the EC, the EC's expert group and distinguished scholars of the highest repute and expertise in EU inheritance and gift taxation. The official opinion of the forum on the results of the EC's survey could be subsequently shared with the EU Member States that can decide whether they will abolish, amend or maintain the reviewed provision. It is important to note that the opinion of the forum should bind the EC.

8.4.3.3 *Infringement procedure*

If the EU Member States ignore the opinion of the forum and do not amend their inheritance and gift tax laws, the EC could subsequently initiate the infringement procedure of Article 258 and 260 TFEU. Under Article 258 TFEU, "[i]f the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."

In that regard, I note that the application of a discriminatory inheritance or gift tax provision qualifies as an infringement of "an obligation under the Treaties" and more specifically Article 63 TFEU (the free movement of capital). The infringement procedure of Articles 258 and 260 TFEU could result in a Court judgment if the EU Member State concerned does not abolish or amend the discriminatory inheritance or gift tax provision.

8.4.3.4 *Introduction of compulsory rules*

As a final attempt to safeguard the avoidance of the discrimination of cross-border inheritances and donations, the EC could propose a new EU Directive introducing compulsory rule on abolishing of discriminatory features of the EU Member States' domestic inheritance and gift tax legislation. The proposed Directive would thus entail the obligation for the EU

¹⁰⁶ Copenhagen Economics Institute, Survey on the domestic rules on taxes levied upon death, attachment to the *Study on inheritance taxes in the EU Member States and possible mechanisms to resolve problems of double inheritance taxation in the EU* (2010), January 2019, https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/inheritance_taxes_report_2010_08_26_attachment_en.pdf.

Member States to transpose common substantive provisions into their national inheritance and gift tax systems in line with the Court's case law on EU inheritance and gift taxation that has shaped the so-called "EU compliant inheritance and gift tax". It is understood that those provisions would still not harmonise the basic elements of the EU Member States' inheritance and gift tax systems (e.g. the tax rate, the tax jurisdiction rules etc.) but they would apply in parallel with these elements, thereby keeping a balance between fiscal sovereignty and the non-discrimination principle.

8.5 Conclusion of chapter 8

In this chapter, I first discussed the "one inheritance – one inheritance tax" concept as proposed in the report of the EC's expert group. I continued the work of the group by shedding more light on the application of the concept to cross-border inheritances. In my view, the concept applies in two steps. At the first step, the deceased's habitual residence must be found given that it is used as a connecting tax criterion for the determination of the EU Member State, which is allowed to tax the cross-border inheritance. At the second step, the indicated EU Member State applies its domestic inheritance tax laws on the whole inheritance, whereas any other EU Member State is precluded from taxing elements of the inheritance. Albeit innovative, I observed that the concept could resolve the three cross-border inheritance tax obstacles that the EC's expert group identified.

Moreover, I believe the concept is proportionate to the objectives to be achieved as it harmonises only those elements of EU Member States' inheritance tax laws, which can give rise to tensions in cross-border situations: the parallel application of different personal nexus rules in combination with situs taxation. On the contrary, the concept does not harmonise the personal nexus concepts, which the EU Member States use to establish worldwide inheritance tax jurisdiction nor does it introduce a single harmonised basis of taxation to achieve its objectives. Furthermore, I observed that in certain situations the application of the concept might give rise to double or multiple non-taxation. In that regard, I suggested that the EU Member State of the objective nexus may still be allowed to exercise its taxing rights if the EU Member State of habitual residence does not exercise its taxing rights either because of a specific exemption, deduction, credit or allowance or because it does not levy death taxes and an abusive element is present. Nevertheless, I admit that more research is required in that regard and more specifically as to whether an abusive element must always be present and secondly how abuse needs to be assessed by the EU Member States.

Furthermore, I noted that the fact that the concept seems to go beyond EU Member States' fiscal sovereignty and international tax law principles does not mean that it automatically becomes disproportionate. In all events, I acknowledged that more research is required to assess whether the EU Member States are willing to abandon the current international tax principles (as embedded in their national inheritance tax laws) to address the problems of cross-border inheritances and donations.

After clarifying some important elements of the concept, I discussed whether the concept could provide a holistic solution to the problems of cross-border inheritances and donations. In that regard, I noted that the concept could address the double or multiple taxation problem as well as administrative difficulties of cross-border inheritances. On the other hand, the concept does not seem to provide, by itself, a solution to the EU Member States' discriminatory provisions applicable to cross-border inheritances and donations.

This is because at the second step of the concept the indicated EU Member State is allowed to tax the cross-border inheritance as a whole under its domestic inheritance tax law that, however, can be discriminatory.

Having considered this important finding, I put forward a proposal for an EU Directive implementing the concept. The proposed Directive could be issued under Article 115 TFEU and apply to cross-border inheritances and donations. In that regard, a cross-border inheritance could be termed as an inheritance where the deceased has been habitually resident at the time of his death in an EU Member State and not all constituent elements of such an inheritance are confined within that EU Member State. In the same vein, a cross-border donation could be termed as a donation where the donor has been habitually resident at the time of the donation in a Member State and not all constituent elements of such a donation are confined within that EU Member State.

Furthermore, the proposed Directive would apply to a cross-border inheritance regardless of the type of death tax levied by the EU Member States concerned. Likewise, the proposed Directive would also apply to a cross-border donation irrespective of the type of tax on gifts levied by the EU Member States concerned. Most importantly, the proposed Directive would apply to a cross-border donation irrespective of the fact that the EU Succession Regulation would not apply to such a donation. In terms of the determination of the applicable inheritance and gift tax legislation, I suggested that the proposed Directive prescribe that a cross-border inheritance and donation should be subject to the legislation of only one EU Member State. The EU Member State concerned would be that of the deceased's or the donor's habitual residence. This EU Member State would thus be entitled to tax the whole cross-border inheritance and donation under its domestic inheritance and gift tax rules. On the contrary, any other EU Member State would be precluded from doing so. Consequently, the above two-step approach would effectively address the double or multiple taxation problem as well as administrative difficulties of cross-border inheritances and donations. The two-step approach can also address double or multiple non-taxation if the Member States of situs would be allowed to tax under certain conditions.

Nevertheless, I noted that the above two-step approach does not, at first sight, seem to address the discrimination problem. This is because the legislation of the EU Member State, which the connecting tax criterion of the habitual residence would indicate, might contain discriminatory elements. Therefore, I suggested that the Directive implementing the concept include a non-discrimination clause that would oblige the EU Member States to apply their domestic inheritance and gift tax legislations in a non-discriminatory manner. In that regard, guidance could be found in the Court's case law on EU inheritance and gift taxation that has shaped the so-called "EU compliant inheritance and gift tax". Furthermore, I suggested that the proper application of the non-discrimination clause be safeguarded by a mechanism which could consist of four successive steps: a) the preparation of a survey on the EU Member States' rules on death taxes and taxes on gifts, b) the creation of an inheritance and gift tax forum for the review of the results of the survey, c) the initiation of infringement procedures against the EU Member States that maintain discriminatory inheritance and gift tax provisions, and d) the issuance of an EU Directive containing compulsory rules on abolishing of discriminatory features of EU Member States' domestic inheritance and gift tax legislation. A proposal for Council Directive implementing the "one inheritance – one inheritance tax" concept is included in appendix IV of this study.

PART IV: SUMMARY AND CONCLUSIONS

Summary and conclusions

In the first chapter of this study, I explained why I am of the view that it was necessary to write a book on the problems of cross-border death and gift taxation. A research work concerning death taxes and taxes on gifts in a cross-border setting would seem, at first sight, incongruous with the ongoing academic research that primarily focuses on income taxes. To a certain extent, this seems reasonable given the clear interest from states and international organisations (in particular, the Organisation for Economic Cooperation and Development: the OECD, and the European Union: the EU) in cross-border income tax issues relating to base erosion and profit shifting (BEPS), the relatively low contribution of death taxes and taxes on gifts to the revenue inflow and the abolition of death taxation by some states. Cross-border death and gift taxation, therefore, seems to be a neglected area of law by states, international organisations and academia: to date, limited progress has been made towards addressing the problems of death and gift taxation in cross-border situations at the national, the OECD and the EU level, and the current academic literature seems to be lagging behind in discussing the problems due to a lack of international developments. As a result, the problems remain unsolved in many instances, thereby nowadays making the need for separate and holistic solutions even more imperative. The term “separate solution” means a solution that deals with (aspects of) only one problem of cross-border death and gift taxation and is distinguished from the term “holistic solution”, which means a solution which deals with all problems of cross-border death and gift taxation altogether.

Before presenting these problems, in chapter 2 I provided an overview of death taxes and taxes on gifts. This overview is in line with the first objective of the study, i.e. the description and systemisation of death and gift tax laws as such. More specifically, I observed that death is an event that can trigger a variety of taxes in a cross-border setting: inheritance taxes, estate taxes, *mortis causa* income and capital gains taxes, land or registration taxes, property transfer taxes or even indirect taxes on business successions. Elements such as taxable event, personal and objective nexus rules, tax rates and available objective and subjective exemptions differ from one type of death tax and tax on gifts to another. In addition, I noted in this chapter that the death tax revenue rates in most OECD member countries are declining. The revenue from these taxes represents less than 1% of the total revenue of the states, and one can question whether states (should) attach major importance to death taxes in general. However, in the course of my research, it became clear that the *justifications* for death taxes are considered more important than their revenue-raising capacity. More specifically, I found a total of fourteen justifications of death taxation as discussed in the academic literature or the recent work of the OECD or invoked by the states when introducing a death tax (in particular, an inheritance and estate tax). Most of those justifications seem to have a social background, which confirms, in my view, that revenue raising is not the primary objective of death taxes. However, not all justifications

can be considered to be primary justifications of death taxation. Moreover, there is a degree of overlap between certain justifications.

In my view, the justifications of death taxation can be classified in four categories. The first category refers to justifications which are explained from the perspective of the beneficiary. This category included most of the justifications, i.e. the ability-to-pay-taxes justification, the tax equality justification, the diffusion-of-wealth justification, the work stimulating justification, the wages-for-work justification and the justification of less pain. The second category included justifications, which are explained from the perspective of the deceased, i.e. the penalty for the deceased's tax evasion justification, the belated fee justification and the substitution for not imposed income taxes justification. The third category included justifications, which are explained from the perspective of both the deceased and the beneficiary, i.e. the windfall justification and the profit justification. Finally, the fourth category included justifications explained from the public good perspective, namely the financing of the probate costs and a means for the abolition of useless intestate inheritance justification.

In my view, the windfall justification seems to be the most convincing, complete and unique justification of death taxation (and, by analogy, gift taxation) as it explains why states consider it fair to tax incidental and unexpected receipts of wealth (*"why to tax"*) and at the same time to protect the family property when received by family members (*"how to tax"*). Therefore, this justification can explain progressivity based both on the size of the *mortis causa* transferred property (taxation of accidental transfers of property) and the degree of kinship between the parties involved (protection of family property). However, the OECD Model Tax Convention for the avoidance of double taxation with respect to taxes on inheritances, estates and gifts (OECD IHTMTC) seems to recognise both the windfall justification and the ability-to-pay-taxes justification as primary justifications of death taxation.

In chapter 3, I discussed the problems of cross-border death and gift taxation. These problems, in my view, are a) double and multiple taxation, b) double or multiple non-taxation, c) discriminatory treatment of cross-border inheritances and donations, and d) administrative difficulties. In brief, the parallel application of death taxes and taxes on gifts by two or more states may often result in double or even multiple taxation of a cross-border inheritance and donation. The national laws differ substantially (e.g. in terms of the personal nexus concepts, the assessment of the personal nexus at a different person) and do not always consider the international dimension of an inheritance and donation. As a result, a unilateral double taxation relief should not always be taken for granted.

In the same vein, due to the differences in national laws, double or multiple non-taxation is conceivable. Moreover, double or multiple non-taxation can arise in situations where the state of the personal nexus provides a unilateral double taxation relief by means of an exemption but the property is not actually taxed in the state of the objective nexus (e.g. because the property does not fall within the definition of *"domestic assets"*). In addition, double or multiple non-taxation can arise in situations where the state of the objective nexus abstains from levying death taxes and taxes on gifts while the state of the personal nexus does not levy death taxes and taxes on gifts or provides for an allowance/exemption/deduction/credit. Finally, double or multiple non-taxation can arise in the case of tax abuse.

Moreover, states may discriminate a cross-border inheritance and donation. In particular, they may pose additional requirements or simply deny granting benefits such as tax exemptions and allowances to inheritances and donations with a cross-border element. Finally, administrative difficulties may arise in the event of a cross-border inheritance and donation for both taxpayers and tax authorities. The applicable administrative tax procedures of a state may be discriminatory against a cross-border inheritance and may fail to coordinate with administrative tax procedures of another state.

I am of the opinion that the OECD IHTMTC and the 2015 report of the European Commission (EC) expert group “Ways to tackle inheritance cross-border tax obstacles facing individuals within the EU” (hereinafter referred to as “the 2015 inheritance tax report” or “the report”) confirm the above problems. This also indicates, in my view, the appropriate levels at which the problems can be most effectively resolved by means of separate and holistic solutions: the OECD and the EU level. This is possible because both levels provide mechanisms that can guarantee a coordinating approach to address the problems.

First, at the OECD level, the OECD IHTMTC is a valuable tool for dealing with the problems at hand. The model has arguably contributed to addressing the double taxation problem associated with death and taxes on gifts and, in particular, taxes levied on inheritances, estates, and gifts. Moreover, the Commentary of the OECD IHTMTC provides useful guidelines to states wishing to conclude an inheritance and gift tax treaty drafted along the lines of the OECD IHTMTC (“the inheritance and gift tax treaty”). It also permits the states to deviate from the Articles of the model and often suggests alternative language in that regard. It could be argued, however, that certain provisions of the OECD IHTMTC and its Commentary can be improved, having regard to the objectives of the inheritance tax model and the principles reflected in its Commentary. In my view, a model that is in line with (some of) these principles seems to address the problems of cross-border inheritances and donations in a more comprehensible manner (considering the objectives of the OECD IHTMTC) than a model that is not in line with (some of) these principles.

At the EU level, I observe that the issuance of EU legislation for the smooth operation of the internal market is possible and for this reason, this level seems to be appropriate to address the problems of cross-border inheritances and donations. I observed, however, that no harmonisation measure had been proposed to date to address these problems. Only the EC’s recommendation of 15 December 2011 regarding relief for double taxation of inheritances (the recommendation) has attempted to coordinate the EU Member States’ unilateral double tax relief provisions, but it seems to have failed to achieve this objective. Furthermore, the case law of the Court has contributed to the so-called “negative harmonisation” of death taxes and taxes on gifts within the EU. However, in my view, the Court’s case law has two aspects that can be further discussed and explained. Finally, the EU Directives 2011/16/EU and 2010/24/EU do not deal with administrative problems of cross-border inheritances and donations at the micro-level.

Part II deals with the separate solutions, which the OECD and EU mechanisms can provide for the problems of cross-border death and gift taxation. More specifically, the reaction of the OECD to these problems was the suggestion of the OECD IHTMTC in 1966, which was subsequently updated in 1982. However, as mentioned above, it could be argued that certain provisions of the OECD IHTMTC and its Commentary can be improved, having regard to the objectives of the inheritance tax model and the principles reflected in the

Commentary. Therefore, in dealing with the suggested improvements to certain provisions of the model for addressing the problems of cross-border inheritances and donations, I designed a benchmark. In that regard, I observe that the OECD IHTMTC does not have a concrete benchmark. However, if one reads between the lines of OECD IHTMTC and its Commentary, it could be argued that certain principles of death and gift tax laws can be identified. More specifically, as the OECD IHTMTC reflects the principles of death and gift tax laws of the majority of the OECD member countries, I argue that such a benchmark can be found only within the system that the OECD has introduced, namely the OECD IHTMTC and its Commentary. This is the reason why the justifications of death and gift taxation – as presented in chapter 2 of this study – cannot operate *as a whole* as a benchmark; they are *exogenous* to the system which the OECD IHTMTC has introduced. More specifically, they refer to existing inheritance and gift tax laws whereas the model applies, in my view, to one concept of an inheritance and gift tax. I decided to call this concept “the proposed inheritance and gift tax” which is the result of compromises among the OECD member countries. It is also important to note that the fact that a model does not meet (some of) the elements of the benchmark does not automatically mean that it becomes ineffective or a “bad model”. However, a model that is in line with (some of) the elements of this benchmark seems to address, in my view, the problems of cross-border inheritances and donations in a more comprehensible manner (considering the objectives of the OECD IHTMTC) than a model that is not in line with (some of) these elements.

The first element of the proposed inheritance and gift tax is its *mortis causa* or *inter vivos* imposition. More specifically, the proposed inheritance and gift tax is levied by reason (of the event) of death or a donation to the exclusion of other events that may trigger taxation. On the contrary, the taxable event, the taxable property, the taxable person and the starting point of taxation seem to be immaterial as derived from Articles 2 and 9B (1) of the model. Nevertheless, I note that donor-based taxes seem to take priority over donee-based taxes. In the same vein, starting points of taxation that reflect a degree of integration of a person with the community of a state seem to take priority over starting points of taxation that do not reflect such a degree of integration. The levying of the tax on *mortis causa* or *inter vivos* windfalls serves as the second element of the benchmark. More specifically, the proposed inheritance and gift tax is levied on the unearned advantage, the windfall that the recipient receives without contributing to it. This can be derived from Articles 2(2) and Commentary on Article 9A of the model. The third element of the benchmark of the proposed inheritance and gift tax is the definition of some critical terms for its imposition in accordance with civil law (family law, matrimonial property law and the law of succession). The Commentary on Articles 1 and 4 of the OECD IHTMTC already acknowledges the connection of the existing inheritance and gift tax laws with the applicable civil laws in several sections. Finally, the fourth element of the proposed inheritance and gift tax benchmark is the ability-to-pay-taxes justification. The *mortis causa* or *inter vivos* transfer of property increases the beneficiaries’ financial capacity and, thus, their ability-to-pay-taxes. The recognition of the ability-to-pay taxes justification as the fourth element of the proposed inheritance and gift tax can mainly be derived from the Commentary on Article 9A of the OECD IHTMTC, which refers to the application of the progression with exemption method.

In chapter 5 of this study, I discussed the provisions of the OECD IHTMTC that, in my view, can be improved having regard to the objectives of the OECD IHTMTC and the proposed inheritance and gift tax. More specifically, the discussion of these provisions takes place in relation to each problem of cross-border inheritances and donations. Furthermore, I noted that all the above-mentioned problems seem to severely affect the application of the proposed inheritance and gift tax. More specifically, when the cross-border inheritance or donation is taxed in more than one state/is not taxed anywhere/is discriminated against/subject to many administrative difficulties, the application of the ability-to-pay-taxes and the windfall justifications – two elements of the proposed inheritance and gift tax – seems to be severely hindered. The above justifications *over-apply* or *under-apply* in a cross-border setting and thus death and gift taxation seems to fail to achieve its objectives. Such over-application or under-application does not, however, seem to take place in the event of a domestic inheritance and donation. Arguably, death and gift taxation also seems to fail to achieve its objectives even if the model solves the problem but in a manner that does not seem to take into account (some of) the elements of proposed inheritance and gift tax. As a result, the OECD member countries may not easily endorse the model that in certain instances seems to contradict their death and gift tax laws as well as the elements of the proposed inheritance and gift tax.

More specifically, in relation to the double or multiple taxation problem, I observed that the ten-year limitation period for the exercise of the subsidiary taxing right provision and the underlying tax-abusive motive could be revisited having regard to the objective of the OECD IHTMTC of addressing double taxation and the proposed inheritance and gift tax. Furthermore, I noted that the model does not seem to deal with common cases of multiple taxation, which is addressed only if the state of the deceased's fiscal domicile has concluded a treaty with all the other states. This situation can be improved, in my view, by an extension of the scope of the term "fiscal domicile" or a suggestion of a multilateral convention. Moreover, the tiebreaker rule for individuals seems to disregard the deceased's or the donor's intention to fiscally domicile in a Contracting State and does not require a minimum period of presence in a Contracting State. The tie-breaker rule, therefore, may be viewed as being counter to a) the manner in which some states determine the connection of the deceased or the beneficiary with their territory, and b) the third element of the proposed inheritance and gift tax (connection with civil law). In addition, I observed that overlaps between an inheritance and gift tax treaty and an income and capital tax treaty are conceivable. These overlaps can, in certain situations, give rise to double taxation of the cross-border inheritance and donation. Such an outcome, however, seems to contradict the objective of the OECD IHTMTC of avoiding double taxation. Furthermore, the double taxation relief of Article 9B (credit method) does not seem to be broadly described in the OECD IHTMTC Commentary. As a result, the interaction between a) estate and inheritance taxes, and b) the different types of death and gift taxes becomes, in my view, a challenging issue. In my view, the wording of the Commentary to Article 9B of the OECD IHTMTC can be improved having regard to the objective of the OECD IHTMTC of addressing double taxation and the elements of the proposed inheritance and gift tax. In addition, I observed that the lack of common valuation rules could often give rise to double taxation. Nevertheless, the non-application of the model to property valuation rules does not seem to contradict the objectives of the model as the model does not aim at harmonising the Contracting States'

legislation. What's more, conflicts of qualification due to the differences in domestic law classifications, the differences in treaty application to the facts at hand and the interpretation of the treaty rules are conceivable. This type of conflicts, however, seems to counter the objective of the OECD IHTMTC of addressing double taxation and the proposed inheritance and gift tax. Moreover, I observed that double taxation can arise concerning the special features of the Contracting State, namely civil or common law arrangements such as trusts, usufruct, fideicommissum, and foundations. Nevertheless, I argued that the deliberate non-inclusion of a general rule applicable for situations involving transfers to and from the above legal arrangements does not seem to counter the objectives of the model and the elements of the proposed inheritance and gift tax. This is because the model does not aim at harmonising the Contracting States' legislations. Finally, I observed that the mutual agreement procedure can be improved having regard to the objective of the model of addressing double taxation.

With regard to the double or multiple non-taxation problem, I observed that the model deals in a few sections with cases of double non-taxation. Therefore, one could argue that the model aims at the avoidance of double non-taxation as well. However, I observed that overlaps between OECD IHTMTC and the OECD Model Convention on Income and Capital (referred hereinafter, the OECD ICTMTC) could give rise to double non-taxation in certain situations. This situation seems, however, to counter the objective of the OECD IHTMTC of avoiding double non-taxation and can be addressed by improving the wording of Article 2 of the model. In addition, certain conflicts of qualification may give rise to double non-taxation. This situation, however, seems again to contradict the objective of the model of addressing double non-taxation. Finally, I noted that double non-taxation due to the compulsory application of the inheritance and gift tax treaty by each Contracting State – even following the abolition of the inheritance and/or gift tax laws by a Contracting State – also seems to contradict the above-mentioned objective of the model.

Concerning the discrimination problem, I observed that the OECD IHTMTC's nationality non-discrimination provision is centred on the persons eligible to invoke the non-discrimination provision and not the estates to which the model applies. Furthermore, the wording of the provision gives the impression that the discriminatory element of the legislation of a Contracting State shall only refer to the nationals of each Contracting State. It is therefore unclear, in my view, whether the provision can be invoked in the case of discriminatory property valuation and debt deduction rules. As a result, the provision seems to fail to address the discrimination problem of cross-border inheritances and donations in certain instances. As a result, it can be improved having regard to the objective of the OECD IHTMTC of addressing certain cases of discrimination of cross-border inheritances and donations, and the elements of the proposed inheritance and gift tax.

Finally, concerning the administrative difficulties of the cross-border inheritances and donations, I observed that Articles 11 and 12 of the OECD IHTMTC does not seem to address the administrative difficulties that beneficiaries may encounter in the state of the objective nexus or the state of the personal nexus. Therefore, this study did not discuss the mutual agreement procedure and the exchange of information frameworks from this perspective. Nevertheless, I reasoned that the proposed improvements to the wording of the scope of the nationality non-discrimination provision can arguably improve the application

of the non-discrimination provision by offering treaty protection against discriminatory procedural tax provisions of the Contracting States.

Consequently, in chapter 6, I suggested separate solutions to address the above-mentioned provisions of the model. I divided the update work into four parts, which corresponded to the problems of cross-border death and gift taxation. Concerning the double or multiple taxation, I observed that the subsidiary taxing right provision seems to counterbalance the narrow scope of the model. However, the ten-year limitation period for the exercise of these rights and the underlying notion that these rights are exercised for anti-abuse reasons should apply in my view only if the other Contracting State seeks to apply its extended domicile rules and not in the other cases. Furthermore, I suggested that the inclusion of the deceased's or donor's nationality as a subsidiary criterion for the establishment of fiscal domicile as well as the conclusion of a multilateral tax treaty seem to address the problem of multiple taxation of cross-border inheritances and donations. Moreover, I suggested the inclusion of a specific but optional tiebreaker rule and/or the update of the current one with elements, which would be more in line with the manner in which certain states establish the lifelong attachment of a person with their territory and the proposed inheritance and gift tax. Concerning the overlaps between the two OECD models, I addressed the issue of the parallel application of the two types of treaties to a single transfer or property by i) suggesting a transition from an exhaustive list of Article 2(3) of the OECD IHTMTC to an indicative list, and ii) underlining the need for a definition of the term "substantially similar" to an existing tax on estates and inheritances and on gifts. In addition, I suggested that the double taxation relief of Article 9B (credit method) broadly apply and not be limited to taxes that are levied based on the same taxable event or paid by the same person. This is true for the connection between the estate and inheritance taxes as well as death and gift taxes with *mortis causa* and *inter vivos* income and capital gain taxes. Moreover, I discussed how the OECD IHTMTC could more effectively deal with conflicts of qualification that result in double taxation. Finally, yet nonetheless important, I suggested the inclusion of an arbitration clause to the mutual agreement procedure of Article 11 of the OECD IHTMTC.

Concerning the double or multiple non-taxation problem, I suggested that i) a transition from an exhaustive list of Article 2(3) of the OECD IHTMTC to an indicative list, and ii) the definition of the term "substantially similar" to an existing tax on estates and inheritances and on gifts can also address cases of double non-taxation due to the application of two different types of treaties to a single transfer of property. Moreover, I discussed how the OECD IHTMTC could more effectively deal with conflicts of qualification that result in double non-taxation. Finally, I suggested updates to Article 16 of the OECD IHTMTC to address the double non-taxation issue arising from the termination of an inheritance and gift tax treaty before the minimum application period.

Concerning the discrimination problem, I suggested updated language for the OECD IHTMTC's nationality non-discrimination provision that arguably broadens the scope of the provision. Finally, concerning the administrative difficulties of cross-border inheritances and donations, I observed that the update of the OECD IHTMTC's nationality non-discrimination provision would increase the effectiveness of the provision in dealing with discriminatory procedural tax legislation of the Contracting States.

A new version of the OECD IHTMTC is included in appendix I of this study. This version incorporates the suggested improvements to the provisions of the model having regard to the objectives of the model and the elements of the proposed inheritance and gift tax. Moreover, the suggested version of the OECD IHTMTC includes general updates to the provisions of the model that have been inspired by the 2017 version of the ICTMTC. It is important, however, to clarify that these amendments were incorporated for the sake of completeness and therefore, do not aim at improving a provision of the model or its Commentary having regard to the objectives of the model and the elements of the proposed inheritance and gift tax.

In chapter 7, I reviewed the progress made in the EU towards addressing the problems of cross-border inheritances and donations. It follows that, although the double and multiple taxation problem of cross-border inheritances and donations is an obstacle to the smooth operation of the internal market, very few initiatives have been taken at the EU level to address this issue. In that regard, I noted that the EC's recommendation was issued some years ago and has not been considered by many EU Member States. Although it contains some innovative provisions, it does have some aspects that can be improved. In addition, I observed that the conversion of the recommendation to an EU Directive prerequisites a harmonised single tax base, which, in my view, seems to be a disproportionate solution to the problem of double and multiple taxation and non-taxation of inheritances. On the other hand, a multilateral convention taking the form of an EU Directive based on the optimised OECD IHTMTC and inspired by the innovative provisions of the recommendation has the potential to address the problem of double and multiple taxation of inheritances and donations. The same applies to the extension of the scope of the Council Directive 2017/1852 to double taxation disputes arising from the application of an inheritance and gift tax treaty.

Concerning the double or multiple non-taxation problem, I observed that Article 4.2. of the EC's recommendation deals with double or multiple non-taxation issues. However, due to the lack of a common definition of the terms used in the recommendation, double or multiple non-taxation of the cross-border inheritance and donation is still conceivable. In that regard, I noted that the conversion of the recommendation to an EU Directive would be a disproportionate solution to the objective of addressing the double or multiple non-taxation problem of inheritances and donations, such as in the case of double or multiple taxation. However, the conclusion of a multilateral convention would, in my view, be a step in the right direction when dealing with double or multiple non-taxation issues.

Regarding the discrimination problem of cross-border inheritances and donations, I observed that the Court's case law on EU inheritance and gift taxation has contributed the most to the so-called "negative harmonisation" of the EU Member States' inheritance and gift tax systems, thereby providing guidance to the EU Member State on how to apply an EU compliant inheritance and gift tax system. Concerning the rejection of the *Schumacker* doctrine in EU inheritance and gift taxation, I observed that the Court did not distinguish between objective and subjective tax exemptions and it did not provide a convincing answer as to why the tax exemptions of the income tax systems differ from the tax exemptions of the inheritance and gift tax systems. Although, in my view, it arrived at the correct conclusion that the *Schumacker* doctrine shall not apply to the latter tax exemptions, the explanation of the Court seems to have some points that require additional explanation

(e.g. the objective of subjective tax exemptions of death tax laws as compared to the objective of subjective tax exemptions of income tax laws). Furthermore, I observed that the neutralisation argument applies in the same way, regardless of the type of the treaty concerned (i.e. an income and capital tax treaty or an inheritance and gift tax treaty).

Finally, concerning administrative difficulties of cross-border inheritances and donations, I observed that the Directives 2011/16/EU and 2010/24/EU apply to death and gift taxes. Nevertheless, I noted that these EU Directives focus on the tax authorities' level and therefore, do not deal directly with administrative difficulties at the micro level as discussed in chapter 3 of this study. I also suggested that the Directive 2017/1852/EU be amended to apply to disputes arising from the application of an inheritance and gift tax treaty.

It follows that all the solutions mentioned above to the problems of cross-border inheritances and donations are separate as they only deal with one problem. Furthermore, the separate solutions do not deal with all the aspects of a particular problem. For example, the EU Directives 2011/16/EU and 2010/24/EU focus on the tax authorities' level and do not deal with administrative difficulties at the micro level. Therefore, I observed that it must be explored whether a holistic solution to the problems of cross-border inheritance and gift taxation could apply at the EU level. This concludes part II of this study.

In part III of this study, I discussed a holistic solution to the problems of cross-border death and gift taxation. Such a solution, in my view, is conceivable only at the EU level, where harmonisation of death and gift tax laws is possible. A holistic solution for dealing with cross-border inheritance tax obstacles has already been suggested by the EC's expert group under the concept of "one inheritance – one inheritance tax" in 2015. In that regard, I observed that the concept applies in two steps. At the first step, the deceased's habitual residence has to be found given that it is used as a connecting tax criterion for the determination of the EU Member State which is allowed to tax the cross-border inheritance. At the second step, the indicated EU Member State applies its own inheritance tax laws on the whole inheritance whereas any other EU Member State is precluded from taxing elements of the inheritance. Albeit innovative, I observed that the concept could resolve the three cross-border inheritance tax obstacles that the EC's expert group identified. Notwithstanding the above, I observed that the report is not a legal document and the "one inheritance – one inheritance tax" concept requires several clarifications on the subsidiarity and the proportionality of the concept as well as its scope of application and its effect on the problems identified in chapter 3. Regarding the last point, I noted that the group identified slightly different problems of cross-border inheritances from those identified in chapter 3. Both the group and I have identified double or multiple taxation and administrative difficulties relating to cross-border inheritances as problems/obstacles of cross-border inheritances. On the other hand, I did not classify the nature and design of national inheritance taxes as problems of cross-border inheritances.

In addition, I believe the concept is proportionate to the objectives to be achieved as it harmonises only those elements of EU Member States' inheritance tax laws, which can give rise to tensions in cross-border situations: the parallel application of different personal nexus rules in combination with situs taxation. On the contrary, the concept does not harmonise the personal nexus concepts, which the EU Member States use to establish worldwide inheritance tax jurisdiction nor does it introduce a single harmonised basis of taxation to achieve its objectives. Furthermore, I observed that in certain situations

the application of the concept might give rise to double or multiple non-taxation. In that regard, I suggested that the EU Member State of the objective nexus may still be allowed to exercise its taxing rights if the EU Member State of habitual residence does not exercise its taxing rights, either because of a specific exemption, deduction, credit or allowance or because it does not levy death taxes and an abusive element is present. Nevertheless, I acknowledged that more research is required in that regard and, more specifically, as to whether an abusive element must always be present, and secondly, how abuse needs to be assessed by the EU Member States.

Furthermore, I noted that the fact that the concept seems to go beyond EU Member States' fiscal sovereignty and international tax law principles does not mean that it automatically becomes disproportionate. In all events, I acknowledged that more research is required to assess whether the EU Member States are willing to abandon the current international tax principles (as embedded in their national inheritance tax laws) to address the problems of cross-border inheritances and donations.

After clarifying some important elements of the concept, I discussed whether the concept could provide a holistic solution to the problems of cross-border inheritances and donations. In that regard, I noted that the concept could address the double or multiple taxation problem as well as administrative difficulties of cross-border inheritances. On the other hand, the concept does not seem to provide, by itself, a solution to the EU Member States' discriminatory provisions applicable to cross-border inheritances and donations. This is because at the second step of the concept the indicated EU Member State is allowed to tax the cross-border inheritance as a whole under its domestic inheritance tax law that, however, can be discriminatory.

Having considered this important finding, I put forward a proposal for an EU Directive implementing the concept. The proposed Directive could be issued under Article 115 of the Treaty on the Functioning of the European Union and apply to cross-border inheritances and donations. In that regard, a cross-border inheritance could be termed as an inheritance where the deceased has been habitually resident at the time of his death in an EU Member State and not all constituent elements of such an inheritance are confined within that EU Member State. In the same vein, a cross-border donation could be termed as a donation when the donor has been habitually resident at the time of the donation in a Member State and not all constituent elements of such a donation are confined within that EU Member State.

Furthermore, the proposed Directive would apply to a cross-border inheritance regardless of the type of death tax levied by the EU Member States concerned. Likewise, the proposed Directive would also apply to a cross-border donation irrespective of the type of tax on gifts levied by the EU Member States concerned. Most importantly, the proposed Directive would apply to a cross-border donation irrespective of the fact that the EU Succession Regulation would not apply to such a donation. In terms of the determination of the applicable inheritance and gift tax legislation, I suggested that the proposed Directive prescribe that a cross-border inheritance and donation would be subject to the legislation of only one EU Member State. The EU Member State concerned would be that of the deceased's or the donor's habitual residence. This EU Member State would thus be entitled to tax the whole cross-border inheritance and donation under its domestic inheritance and gift tax rules. On the contrary, any other EU Member State would be precluded from doing so. Consequently,

the above two-step approach would effectively address the double or multiple taxation problem as well as administrative difficulties of cross-border inheritances and donations. The two-step approach can also address double or multiple non-taxation if the Member States of situs would be allowed to tax under certain conditions.

Nevertheless, I noted that the above two-step approach does not seem to address, at first sight, the discrimination problem. This is because the legislation of the EU Member State, which the connecting tax criterion of the habitual residence would indicate, might contain discriminatory elements. Therefore, I suggested that the Directive implementing the concept include a non-discrimination clause that would oblige the EU Member States to apply their domestic inheritance and gift tax legislations in a non-discriminatory manner. In that regard, guidance could be found in the Court's case law on EU inheritance and gift taxation that has shaped the so-called "EU compliant inheritance and gift tax". Furthermore, I suggested that the proper application of the non-discrimination clause be safeguarded by a mechanism which could consist of four successive steps: a) the preparation of a survey on the EU Member States' rules on death taxes and taxes on gifts, b) the creation of an inheritance and gift tax forum for the review of the results of the survey, c) the initiation of infringement procedures against the EU Member States that maintain discriminatory inheritance and gift tax provisions, and d) the issuance of an EU Directive containing compulsory rules on abolishing of discriminatory features of EU Member States' domestic inheritance and gift tax legislation. A proposal for Council Directive implementing the "one inheritance – one inheritance tax" concept is included in appendix IV of this study.

Considering the above, I am of the opinion that this study has achieved its purpose, namely to describe and systemise the death and gift tax laws as such and to propose separate and holistic solutions to the problems of cross-border death and gift taxation under the current mechanisms at the OECD and EU level. The benchmark for improving certain provisions of the OECD IHTMTC and the proposal for Council Directive implementing the "one inheritance – one inheritance tax" concept are two important outcomes of the legal-dogmatic research performed in the context of this study.

Appendix I: A new version of the OECD IHTMTC

In this appendix, I present a new version of the OECD IHTMTC that includes the suggested amendments to the provisions of the model as presented in chapter 6 of this study. The amendments are marked in italics. The amendments to the Commentary of the OECD IHTMTC are not reflected below. Optional provisions are included in brackets. This version also includes amendments to the OECD IHTMTC that are inspired by the 2017 version of the OECD ICTMTC.

OECD

Death taxes and taxes on gifts Model Convention

CONVENTION BETWEEN

(STATE A) AND (STATE B)

FOR THE AVOIDANCE OF DOUBLE TAXATION

AND

THE PREVENTION OF FISCAL EVASION

WITH RESPECT TO *DEATH TAXES AND TAXES ON GIFTS*

PREAMBLE OF THE CONVENTION

Note: The Preamble of the Convention shall be drafted in accordance with the constitutional procedure of both Contracting States.

CHAPTER I

Scope of the Convention

Article 1

Estates, inheritances and gifts covered

This Convention shall apply:

- a) to estates and inheritances where the deceased was *fiscally* domiciled, at the time of his death, in one or both of the Contracting States; and
- b) to gifts where the donor was *fiscally* domiciled, at the time of the gift, in one or both of the Contracting States.

Article 2

Taxes covered

1. This Convention shall apply to *death taxes and taxes on gifts* imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.
2. There shall be regarded as *death taxes any mortis causa tax levied on the received or transferred windfall*. There shall be regarded as *taxes on gifts taxes imposed on the inter vivos received or transferred windfall* because the transferor receipt of the property concerned is made for no, or less than full, consideration. A windfall is considered a sudden and an unexpected accretion of property without labour by the beneficiary which increases his ability to pay taxes.
3. The existing taxes to which the Convention shall apply are, *in particular*,:
 - a) (in State A)...
 - b) (in State B)...
4. The Convention shall apply also to any identical or substantially similar *death taxes and taxes on gifts* which are imposed after the date of signature of the Convention in addition to, or in place of, the existing *death taxes and taxes on gifts*. At the end of each year, the competent authorities of the Contracting States shall notify each other of changes which have been made in their respective taxation laws.

CHAPTER II

Definitions

Article 3

General definitions

1. For the purposes of this Convention, unless the context otherwise requires:
 - a) the term “person” includes an individual, a company and any other body of persons, including the estate of a person;

- b) *the term “company” means any corporate or any entity that is treated as a body corporate for tax purposes;*
 - c) *the term “enterprise” applies to the carrying on of any business;*
 - d) the term “competent authority” means:
 - (i) (in State A):.....
 - (ii) (in State B):.....
 - e) *the term “business” includes the performance of professional services and of other activities of an independent character;*
 - f) the term “property which forms part of the estate of, or of a gift made by, a person *fiscally* domiciled in a Contracting State” includes any property the devolution or transfer of which, under the law of a Contracting State, is liable to a tax covered by the Convention.
2. As regards the application of the Convention by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning which it has under the *tax* law of that State concerning the taxes to which the Convention applies.

Article 4A

Fiscal domicile

1. For the purposes of this Convention, the term “person *fiscally* domiciled in a Contracting State” means any person whose estate or whose gift, under the law of that State, is liable to tax therein by reason of the domicile, residence or place of management of that person or any other criterion of a similar nature. *The term also means any person whose estate or whose gift, under the law of that State, is liable to tax therein by reason of his nationality, if there is no treaty in place between the state of the deceased or donor’s fiscal domicile (as defined in the first section) and the other Contracting State.* However, this term does not include any person whose estate or whose gift is liable to tax in that State only in respect of property situated therein.
2. Where by reason of the provisions of paragraph 1 an individual is *fiscally* domiciled in both Contracting States, then *[subject to the provisions of paragraph 3 of this Article,]* his status shall be determined as follows:
 - a) he shall be deemed to be *fiscally* domiciled in the State in which he has a permanent home available to him *[for (x) years or more immediately preceding his death or the donation with the clear intention to retain it];* if he has a permanent home available to him in both States, he shall be deemed to be *fiscally* domiciled in the State with which his personal and economic relations are closer (centre of vital interests);
 - b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be *fiscally* domiciled in the State in which he has an habitual abode;
 - c) if he has an habitual abode in both States or neither of them, he shall be deemed to be *fiscally* domiciled in the State of which he is a national;
 - d) if he is national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

- [3. *Notwithstanding the provisions of paragraph 2, where an individual by reason of the provisions of paragraph 1, first section:*
- a) *is fiscally domiciled in both these States on grounds other than extended domicile rules based on nationality and*
 - b) *has been fiscally domiciled for business, professional, educational, training, tourism, or a similar purpose (or in his capacity as the spouse or a dependent member of the family of a person who was in that other State for such a purpose) in the State of which he is not a national, for less than (x) years in the aggregate (including periods of temporary absence) during the preceding (q)-year period and he did not intend to remain indefinitely in that other State, then he shall be deemed to be fiscally domiciled in the Contracting State of his nationality.]*
4. *Where by reason of the provisions of paragraph 1 a person other than an individual is fiscally domiciled in both Contracting States, then it shall be deemed to be fiscally domiciled in the State in which its place of effective management is situated.*

[Article 4B¹

Situs rules

The situs at the time of the transfer of any of the following property or property rights shall, for the purpose of this Convention, be determined exclusively in accordance with the following rules:

- a) *Tangible movable property shall be deemed to be situated at ...*
- b) *Shares or stock in a corporation shall be deemed to be situated at ...*
- c) *Ships and aircraft shall be deemed to be situated at ...*
- d) *Goodwill as a trade, business or professional asset shall be deemed to be situated at ...*
- e) *Patents, trade-marks, utility models and designs shall be deemed to be situated at ...*
- f) *Copyrights, franchises, rights to artistic and scientific works and rights or licenses to use any copyrighted material, artistic and scientific works, patents, trade-marks, utility models or designs shall be deemed to be situated at ...*
- g) *Mining or quarrying rights or mining leases shall be deemed to be situated at ...*
- h) *Fishing rights shall be deemed to be situated at ...]*

CHAPTER III

Taxing rules

Article 5

Immovable property

- 1. *Immovable property or rights thereon shall be deemed to be situated at ...*
- 2. *Immovable property which forms part of the estate of, or of a gift made by, a person fiscally domiciled in a Contracting State and which is situated in the other Contracting State may be taxed in that other State.*

¹ In case the Contracting States decide not to follow the allocation of taxing rights based on the OECD IHTMTC.

3. The term “immovable property” shall have the meaning that it has under the *tax law* of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property.
4. The provisions of paragraph 2 shall also apply to immovable property of an enterprise and to immovable property used for the performance of professional services or other activities of an independent character.
5. *The term “immovable property” shall also include shares, participations and other rights in a company or legal person the assets of which consist, directly or through one or more other companies or legal entities, mainly of immovable property situated in one of the Contracting States or of rights encumbering such property. These shares, participations and other rights shall be deemed to be situated in the Contracting State in which the immovable property is situated.*

Article 6

Movable property of a permanent establishment or a fixed base

1. Movable property of an enterprise which forms part of the estate of, or of a gift made by, a person *fiscally* domiciled in a Contracting State, which is the business property of a permanent establishment situated in the other Contracting State, may be taxed in that other State.
2. For the purposes of this Convention, the term “permanent establishment” means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
3. The term “permanent establishment” includes especially:
 - a) a place of management;
 - b) a branch;
 - c) an office;
 - d) a factory;
 - e) a workshop; and
 - f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.
4. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.
5. Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include:
 - a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
 - b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
 - c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

- d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise;
 - e) the maintenance of a fixed place of business solely for the purpose of carrying on for the enterprise any other activity of a preparatory or auxiliary character; or
 - f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.
6. Movable property which forms part of the estate of, or of a gift made by, a person *fiscally* domiciled in a Contracting State, used for the performance of professional services or other activities of an independent character and pertaining to a fixed base situated in the other Contracting State, may be taxed in that other State.

Article 7

Other property

Property, wherever situated, which forms part of the estate of, or of a gift made by, a person *fiscally* domiciled in a Contracting State, and not dealt with in Articles 5 and 6, shall be taxable only in that State.

Article 8

Deduction of debts

1. *Debts shall be deemed to be situated at ...*
2. Debts especially secured on any property referred to in Article 5 shall be deducted from the value of that property. Debts, not being especially secured on any property referred to in Article 5, which are represented by the acquisition, conversion, repair or upkeep of any such property, shall be deducted from the value of that property.
3. Subject to the provisions of paragraph 2, debts pertaining to a permanent establishment referred to in paragraph 1 of Article 6, or to a fixed base referred to in paragraph 6 of Article 6, shall be deducted from the value of the permanent establishment or the fixed base as the case may be.
4. Other debts shall be deducted from the value of property to which the provisions of Article 7 apply.
5. If a debt exceeds the value of the property from which it is deductible in a Contracting State, according to the provisions of paragraphs 2 or 3, the excess shall be deducted from the value of any other property taxable in that State.
6. Any excess still remaining in one Contracting State after the deductions referred to in paragraphs 3 or 4 shall be deducted from the value of the property liable to tax in the other Contracting State.
7. Where the provisions of paragraphs 2 to 6 would oblige one Contracting State to deduct debts to an extent greater than that provided for under its law, those provisions shall apply only to the extent that the other Contracting State is not obliged to deduct the same debts under its own law.

CHAPTER IV

Methods for eliminating double taxation

Article 9A

Exemption method

1. The Contracting State in which the deceased was *fiscally* domiciled at his death, or the donor was *fiscally* domiciled at the time of the gift, shall exempt from tax any property which, in relation to the same event (*death or donation*) and in accordance with the provisions of this Convention, may be taxed in the other Contracting State.
2. The former Contracting State shall also exempt from tax any property which, in relation to a previous gift and in accordance with the provisions of the Convention, may have been taxed in the other Contracting State. That former State, however, shall not exempt from tax any property which was taxable in that State in accordance with the provisions of Articles 5 or 6 of the Convention.
3. In each case the former Contracting State may take the exempted property into account in calculating the amount of tax on any remaining property.

Article 9B

Credit method

1. The Contracting State in which the deceased was *fiscally* domiciled at his death, or the donor was *fiscally* domiciled at the time of the gift, shall allow as a deduction from the tax calculated according to its law an amount equal to the *death tax or tax on gifts* paid in the other Contracting State on any property which, in relation to the same event (*death or donation*) and in accordance with the provisions of this Convention, may be taxed in that other State.
2. The former Contracting State shall also allow as a deduction from such tax an amount equal to the tax which has been paid in the other Contracting State on a previous gift in accordance with the provisions of the Convention to the extent that such a deduction has not been allowed under the provisions of paragraph 1 at the time of that gift. That former State, however, shall not allow a deduction in respect of tax paid on property which was taxable in that State in accordance with the provisions of Articles 5 or 6 of the Convention.
3. The deductions referred to in paragraphs 1 and 2 shall not, however, exceed that part of the tax of the former Contracting State, as computed before any deduction is made, which is attributable to the property in respect of which the deduction is to be allowed.

CHAPTER V

Special provisions

Article 10

Non-discrimination

1. *Estates of* nationals of a Contracting State, wherever they are *fiscally* domiciled, shall not be subjected in the other Contracting State to any taxation, or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which *estates of* nationals of that other State in the same circumstances, *in particular with respect to their fiscal domicile*, are or may be subjected.
2. The term “nationals” means:
 - a) all individuals possessing the nationality of a Contracting State;
 - b) all legal persons, partnerships and associations deriving their status as such from the law in force in a Contracting State.
3. Stateless persons who are *fiscally* domiciled in a Contracting State shall not be subjected in either Contracting State to any taxation, or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of the State concerned in the same circumstances are or may be subjected.
4. The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description.

Article 11

Mutual agreement procedure

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic laws of those States, present his case to the competent authority of either Contracting State. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.
2. The competent authority, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, shall endeavour to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the provisions of the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic laws of the Contracting States.
3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention *concerning death taxes and taxes on gifts*.

4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. When it seems advisable in order to reach agreement to have an oral exchange of opinions, such exchange may take place through a Commission consisting of representatives of the competent authorities of the Contracting States.
5. *Where,*
 - a) *under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and*
 - b) *the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the date when all the information required by the competent authorities in order to address the case has been provided to both competent authorities, any unresolved issues arising from the case shall be submitted to arbitration if the person so requests in writing.*

These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

Article 12

Exchange of information

1. The competent authorities of the Contracting States shall exchange such information as is *foreseeably relevant necessary* for carrying out the provisions of this Convention or to the *administration or enforcement* of the domestic laws of the Contracting States concerning *death taxes and taxes on gifts* imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Article 1 and may also refer to the civil laws of each Contracting State.
2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.

3. *In no case shall the provisions of paragraphs 1 and 2 be construed such as to impose on a Contracting State the obligation:*
 - a) *to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;*
 - b) *to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;*
 - c) *to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).*
4. *If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.*
5. *In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.*

Article 13

Assistance in the collection of taxes

1. *The Contracting States shall lend assistance to each other in the collection of revenue claims. This assistance is not restricted by Articles 1 and 2. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.*
2. *The term “revenue claim” as used in this Article means an amount owed in respect of taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to this Convention or any other instrument to which the Contracting States are parties, as well as interest, administrative penalties and costs of collection or conservancy related to such amount.*
3. *When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the other Contracting State. That revenue claim shall be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State.*
4. *When a revenue claim of a Contracting State is a claim in respect of which that State may, under its law, take measures of conservancy with a view to ensure its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of taking measures of conservancy by the competent authority of the other Contracting State. That other State shall take measures of conservancy in respect of that*

revenue claim in accordance with the provisions of its laws as if the revenue claim were a revenue claim of that other State even if, at the time when such measures are applied, the revenue claim is not enforceable in the first-mentioned State or is owed by a person who has a right to prevent its collection.

5. Notwithstanding the provisions of paragraphs 3 and 4, a revenue claim accepted by a Contracting State for purposes of paragraph 3 or 4 shall not, in that State, be subject to the time limits or accorded any priority applicable to a revenue claim under the laws of that State by reason of its nature as such. In addition, a revenue claim accepted by a Contracting State for the purposes of paragraph 3 or 4 shall not, in that State, have any priority applicable to that revenue claim under the laws of the other Contracting State.
6. Proceedings with respect to the existence, validity or the amount of a revenue claim of a Contracting State shall not be brought before the courts or administrative bodies of the other Contracting State.
7. Where, at any time after a request has been made by a Contracting State under paragraph 3 or 4 and before the other Contracting State has collected and remitted the relevant revenue claim to the first-mentioned State, the relevant revenue claim ceases to be
 - a) in the case of a request under paragraph 3, a revenue claim of the first-mentioned State that is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, or
 - b) in the case of a request under paragraph 4, a revenue claim of the first-mentioned State in respect of which that State may, under its laws, take measures of conservancy with a view to ensure its collection,the competent authority of the first-mentioned State shall promptly notify the competent authority of the other State of that fact and, at the option of the other State, the first-mentioned State shall either suspend or withdraw its request.
8. In no case shall the provisions of this Article be construed such as to impose on a Contracting State the obligation:
 - a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
 - b) to carry out measures which would be contrary to public policy (*ordre public*);
 - c) to provide assistance if the other Contracting State has not pursued all reasonable measures of collection or conservancy, as the case may be, available under its laws or administrative practice;
 - d) to provide assistance in those cases where the administrative burden for that State is clearly disproportionate to the benefit to be derived by the other Contracting State.

Article 14

Diplomatic agents and consular officers

Nothing in this Convention shall affect the fiscal privileges of diplomatic agents or consular officers under the general rules of international law or under the provisions of special agreements.

Article 15

Territorial extension

1. This Convention may be extended, either in its entirety or with any necessary modifications, [to any part of the territory of (State A) or of (State B) which is specifically excluded from the application of the Convention or] to any State or territory for whose international relations (State A) or (State B) is responsible, which imposes taxes substantially similar in character to those to which the Convention applies. Any such extension shall take effect from such date and subject to such modifications and conditions, including conditions as to termination, as may be specified and agreed between the Contracting States in notes to be exchanged through diplomatic channels or in any other manner in accordance with their constitutional procedures.
2. Unless otherwise agreed by both Contracting States, the termination of the Convention by one of them under Article 17 shall also terminate, in the manner provided for in that Article, the application of the Convention [to any part of the territory of (State A) or of (State B) or] to any State or territory to which it has been extended under this Article.

CHAPTER VI

Final provisions

Article 16

Entry into force

1. This Convention shall be ratified and the instruments of ratification shall be exchanged at... as soon as possible.
2. The Convention shall enter into force upon the exchange of instruments of ratification and its provisions shall have effect:
 - a) (in State A)...
 - b) (in State B)...

Article 17

Termination

1. This Convention shall remain in force until terminated by a Contracting State. Either Contracting State may terminate the Convention, through diplomatic channels, by giving notice of termination at least six months before the end of any calendar year after the year... In such event, the Convention shall cease to have effect:
 - a) (in State A)...
 - b) (in State B)...
2. *Notwithstanding the provisions of paragraph 1, if the effects of this Convention are substantially altered as a result of changes made in the tax law of either Contracting State, either Contracting State may, through diplomatic channels, give a written notice of termination*

with effect not earlier than a period of six (6) months after such notice is given. In such an event, its provisions shall not apply to estates of persons who die or to gifts made on or after the effective date of the termination of this Convention.

- 3. The Convention shall continue to apply in respect of the estate of any individual who has died before the end of that period and in respect of any event (other than death) occurring before the end of that period and giving rise to liability to tax under the laws of either Contracting State.*
- 4. The termination of the present Convention shall not have the effect of reviving any treaty or arrangement abrogated by the present Convention or by treaties previously concluded by the Contracting States.*

Appendix II: Proposal for Council Directive on a multilateral Convention for the avoidance of double or multiple taxation of cross-border inheritances and gifts

In this appendix, I present a Proposal for Council Directive on a multilateral Convention for the avoidance of double or multiple taxation of cross-border inheritances and gifts as suggested in section 7.1.4.1 of this study. Optional provisions are included in brackets.

The suggested version of the OECD IHTMTC, as presented in appendix I, was used as the basis of the proposed Directive (where appropriate). The amendments that are inspired by the EC's Recommendation are underlined. The amendments that are inspired by EU primary and secondary law are marked in italics. The text of the preamble to the proposal is not included.

The term "Contracting States" was replaced by the term "Member States". The term "beneficiary" also incorporates the term "donee".

Proposal for Council Directive on a multilateral Convention for the avoidance of double or multiple taxation of cross-border inheritances and gifts

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 115 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the European Economic and Social Committee,

Acting in accordance with a special legislative procedure,

Whereas:

[Preamble]

CHAPTER I

Scope of the Convention

Article 1

Estates, inheritances and gifts covered

This Convention shall apply:

- a) to estates and inheritances where the deceased and/or the beneficiary has personal links, at the time of the deceased's death, in one or more Member States, and
- b) to gifts where the donor and/or the donee has personal links, at the time of the gift, in one or more Member States.

Article 2

Taxes covered

1. This Convention shall apply to inheritance taxes imposed on behalf of a Member State or of its political subdivisions or local authorities. This Convention shall also apply to taxes on gifts, where gifts are taxed under the same or similar rules as inheritances.
2. There shall be regarded as inheritance taxes any tax levied at national, federal, regional, or local level upon death on the received or transferred windfall, irrespective of the name of the tax, of the manner in which the tax is levied and of the person to whom the tax is applied. The term "inheritance tax" includes in particular estate tax, inheritance tax, transfer tax, transfer duty, stamp duty, income and capital gains tax levied upon death. There shall be regarded as taxes on gifts any tax levied at national, federal, regional, or local level on the *inter vivos* transferred or received windfall only because the transfer or receipt of the property concerned is made for no, or less than full, consideration and irrespective of the name of the tax, of the manner in which the tax is levied and of the person to whom the tax is applied. The term "tax on gifts" includes, in particular, gift tax, income tax on gifts and capital gains tax levied in the event of a gift. A windfall is considered a sudden and an unexpected accretion of property without labour by the beneficiary which increases his ability to pay taxes.
3. The existing taxes to which the Convention shall apply are, in particular:
 - a) (in Member State A)...
 - b) (in Member State B)...
 - c) (in Member State C) ...
 -
4. The Convention shall apply also to any identical or substantially similar inheritance and taxes on gifts which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. At the end of each year, the competent authorities of the Member States shall notify each other of changes which have been made in their respective taxation laws.

CHAPTER II

Definitions

Article 3

General definitions

1. For the purposes of this Convention, unless the context otherwise requires:
 - a) the term “person” includes an individual, a company and any other body of persons, including the estate of a person;
 - b) the term “company” means any corporate or any entity that is treated as a body corporate for tax purposes;
 - c) the term “enterprise” applies to the carrying on of any business;
 - d) the term “competent authority” means:
 - (i) (in Member State A):.....
 - (ii) (in Member State B):.....
 - (iii) (in Member State C):.....
 - e) the term “national”, in relation to a Member State, means:
 - (i) any individual possessing the nationality or citizenship of that Member State; and
 - (ii) any legal person, partnership or association deriving its status as such from the laws in force in that Member State *in line with article 54 TFEU*;
 - f) the term “business” includes the performance of professional services and of other activities of an independent character;
 - g) the term “property which forms part of the estate of, or of a gift made by or received by a person with personal links with a Member State” includes any property the devolution or transfer of which, under the law of a Member State, is liable to a tax covered by the Convention;
 - h) the term “personal links” refers to the link of a deceased/donor or a beneficiary with a Member State that gives rise to a comprehensive tax liability in that Member State. Such a link may be based on domicile, residence, permanent home, centre of vital interests, habitual abode, nationality or centre of effective management or any other criterion of a similar nature,
 - i) “tax relief” means a provision contained in legislation and/or general administrative instructions or guidance whereby a Member State grants relief for inheritance tax or tax on gifts paid in another Member State, by crediting the foreign tax against tax due in that Member State, by exempting the inheritance or the donation or parts of it from taxation in that Member State in recognition of the foreign tax paid or by otherwise refraining from the imposition of inheritance tax;
2. As regards the application of the Convention by a Member State, any term not defined therein shall, unless the context otherwise requires, have the meaning which it has under the tax law of that Member State concerning the taxes to which the Convention applies.

Article 4

Personal links

1. For the purposes of this Convention, the term “person with personal links with a Member State” means any person whose estate or whose gift, under the law of that State, is liable to tax therein due to the presence of a personal link. However, this term does not include any person whose estate or whose gift is liable to tax in that State only in respect of property situated therein.
2. If, by reason of the provisions of the below paragraphs the deceased/donor is considered to have or to have had closer personal links with one Member State and the beneficiary is considered to have had closer personal links with another Member State, then the personal links with the deceased/donor shall be deemed to be the closest.
3. Where by reason of the provisions of paragraph 1 the deceased or the donor has personal links in two or more Member States, then his status shall be determined as follows:
 - a) he shall be deemed to have the closer links with the Member State in which he has a permanent home [available to him for (x) years or more immediately preceding his death or the donation with the clear intention to retain it]; if he has a permanent home available to him in two or more Member States, he shall be deemed to have the closer links with the Member State with which his personal and economic relations are closer (centre of vital interests);
 - b) if the Member State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in a Member State, he shall be deemed to have the closer links with the Member State in which he has an habitual abode;
 - c) if he has an habitual abode in two or more Member States or neither of them, he shall be deemed to have the closer links with the Member State of which he is a national;
 - d) if he is national of two or more Member States or of neither of them, the competent authorities of the Member States shall settle the question by mutual agreement *based on the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union*.
4. Notwithstanding the provisions of paragraph 3, the deceased/donor shall be deemed to have closer personal links with the Member State of his nationality, if, by reason of the provisions of paragraph 1, he:
 - a) had at the time of death/gift personal links with two or more Member States and at least one of them taxes based on the deceased's or donor's nationality, and
 - b) has been resident or domiciled for business, professional, educational, training, tourism, or a similar purpose in a Member State or Member States of which he is not a national (or in his capacity as the spouse or a dependent member of the family of a person who was in this Member State or Member States for such a purpose), for less than (x) years in the aggregate (including periods of temporary absence) during the preceding (q)-year period and he did not intend to remain indefinitely in the Member State of his residence/domicile].

5. Where by reason of the provisions of paragraph 1 the beneficiary has personal links with two or more Member States, then his status shall be determined as follows:
 - a) he shall be deemed to have the closer links with the Member State in which he has a permanent home available to him; if he has a permanent home available to him in two or more Member States, he shall be deemed to have the closer links with the Member State with which his personal and economic relations are closer (centre of vital interests);
 - b) if the Member State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in a Member State, he shall be deemed to have the closer links with the Member State in which he has an habitual abode;
 - c) if he has an habitual abode in two or more Member States or neither of them, he shall be deemed to have closer links with the Member State of which he is a national;
 - d) if he is national of two or more Member States or of neither of them, the competent authorities of the Member States shall settle the question by mutual agreement based on the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union.
- [6. Notwithstanding the provisions of paragraph 5, the beneficiary shall be deemed to have closer personal links with the Member State of his nationality if, by reason of the provisions of paragraph 1, he:
 - a) had at the time of death/gift personal links with two or more Member States and at least one of them taxes based on the beneficiary's nationality, and
 - b) has been resident or domiciled for business, professional, educational, training, tourism, or a similar purpose in a Member State or Member States of which he is not a national (or in his capacity as the spouse or a dependent member of the family of a person who was in this Member State or Member States for such a purpose), for less than (x) years in the aggregate (including periods of temporary absence) during the preceding (q)-year period and he did not intend to remain indefinitely in the Member State of his residence/domicile.]
7. In the case of multiple beneficiaries with closest personal links with different Member States, the latter states are the Member States of the closer personal links only in relation to the beneficiary with the closer personal links with their territory as determined in paragraph[-s] 5 [or 6] of this Article.
8. In the case of a person other than an individual, such as a charity, its closer personal link could be deemed to be with the Member State in which its place of effective management is situated.

CHAPTER III

Taxing rules

Article 5

Immovable property

1. Immovable property or rights thereon (not including any property for which specific provision is otherwise made in this Article) shall be deemed to be situated at ...
2. Immovable property which forms part of the estate of, or of a gift made by, and/or received by a person with personal links with a Member State and which is situated in a state other than the Member State of the closest personal links, may be taxed in that other Member State.
3. The term “immovable property” shall have the meaning that it has under the tax law of the Member State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property.
4. The provisions of paragraph 2 shall also apply to immovable property of an enterprise and to immovable property used for the performance of professional services or other activities of an independent character.
5. The term “immovable property” shall also include shares, participations and other rights in a company or legal person the assets of which consist, directly or through one or more other companies or legal entities, mainly of immovable property situated in a Member State or of rights encumbering such property. These shares, participations and other rights shall be deemed to be situated in the Member State in which the immovable property is situated.

Article 6

Movable property of a permanent establishment or a fixed base

1. Movable property of an enterprise which forms part of the estate of, or of a gift made by and/or received by a person with personal links with a Member State, which is the business property of a permanent establishment situated in a state other than the Member State of the closest personal links, may be taxed in that other Member State.
2. For the purposes of this Convention, the term “permanent establishment” means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
3. The term “permanent establishment” includes especially:
 - a) a place of management;
 - b) a branch;
 - c) an office;

- d) a factory;
 - e) a workshop; and
 - f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.
4. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.
5. Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include:
- a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
 - b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
 - c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
 - d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise;
 - e) the maintenance of a fixed place of business solely for the purpose of carrying on for the enterprise any other activity of a preparatory or auxiliary character; or
 - f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.
6. Movable property which forms part of the estate of, or of a gift made by, a person with personal links with a Member State, used for the performance of professional services or other activities of an independent character and pertaining to a fixed base situated in a state other than the Member State of the closest personal links, may be taxed in that other State.

Article 7

Other property

Property, wherever situated, which forms part of the estate of, or of a gift made by and/or received by a person with personal links with a Member State, and not dealt with in Articles 5 and 6, shall be taxable only in the Member State of the closest personal links. However, if no tax is applied by this latter State for reasons other than a specific exemption deduction, credit or allowance, the other Member State (or States) is (are) not precluded from applying inheritance tax or tax on gifts on the property concerned on the basis of this Convention, provided that the other States' national tax laws so allow.

Article 8

Deduction of debts

1. Debts shall be deemed to be situated at ...
2. Debts especially secured on any property referred to in Article 5 shall be deducted from the value of that property. Debts, not being especially secured on any property referred to in Article 5, which are represented by the acquisition, conversion, repair or upkeep of any such property, shall be deducted from the value of that property.

3. Subject to the provisions of paragraph 2, debts pertaining to a permanent establishment referred to in paragraph 1 of Article 6, or to a fixed base referred to in paragraph 6 of Article 6, shall be deducted from the value of the permanent establishment or the fixed base as the case may be.
4. Other debts shall be deducted from the value of property to which the provisions of Article 7 apply.
5. If a debt exceeds the value of the property from which it is deductible in a Member State, according to the provisions of paragraphs 2 or 3, the excess shall be deducted from the value of any other property taxable in that State.
6. Any excess still remaining in one Member State after the deductions referred to in paragraphs 3 or 4 shall be deducted from the value of the property liable to tax in the other Member State or Member States.
7. Where the provisions of paragraphs 2 to 6 would oblige one Member State to deduct debts to an extent greater than that provided for under its law, those provisions shall apply only to the extent that the other Member State is not obliged to deduct the same debts under its own law.

CHAPTER IV

Methods for eliminating double taxation

Article 9A

Exemption method

1. The Member State in which the deceased or the beneficiaries had/have closest personal links at the death, or in which the donor or the beneficiary have closest personal links at the time of the gift, shall exempt from tax any property which, in relation to the same event (death or donation) and in accordance with the provisions of this Convention, may be taxed in another Member State (Articles 5 and 6).

It shall also exempt from tax any property which, in relation to a previous gift and in accordance with the provisions of the Convention, may have been taxed in another Member State. It may take the exempted property into account in calculating the amount of tax on any remaining property.

Article 9B

Credit method

1. The Member State in which the deceased or the beneficiaries had/have closest personal links at the death, or in which the donor or the beneficiary has closest personal links at the time of the gift, shall allow as a deduction from the tax calculated according to its law an amount equal to the tax paid in another Member State on any property which, in relation to the same event (death or donation) and in accordance with the provisions of this Convention, may be taxed in another Member State under Articles 5 and 6 of this Convention.

It shall also allow as a deduction from such tax an amount equal to the tax which has been paid in the other Member State on a previous gift in accordance with the provisions of the Convention to the extent that such a deduction has not been allowed under the first section at the time of that gift.

2. The deduction referred to in paragraph 1 shall not, however, exceed that part of the tax of the Member State that shall grant the deduction, as computed before any deduction is made, which is attributable to the property in respect of which the deduction is to be allowed.

CHAPTER V

Special provisions

Article 10

Mutual agreement procedure

Member States shall apply the provisions of the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union to resolve disputes arising from the present Convention.

Article 11

Exchange of information

Member States shall apply the provisions of the Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC to exchange information with regard to taxes covered by the present Convention.

Article 12

Assistance in the collection of taxes

Member States shall apply the provisions of the Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures to facilitate the collection of taxes covered by the present Convention.

Article 13

Diplomatic agents and consular officers

Nothing in this Convention shall affect the fiscal privileges of diplomatic agents or consular officers under the general rules of international law or under the provisions of special agreements.

Article 14

Territorial scope

The territorial scope of this Convention shall be that defined in Article 52 of the Treaty on the European Union and Article 355 of the Treaty on the Functioning of the European Union.

CHAPTER VI

Final provisions

Article 15

Entry into force

1. This Convention will be ratified by the Member States. The instruments of ratification will be deposited at the office of the Secretary-General of the Council of the European Union.
2. This Convention shall enter into force on the first day of the third month following that in which the instrument of ratification is deposited by the last signatory State to take that step.
3. This Convention shall apply to inheritances of a deceased person or to gifts made on or after ...

Article 16

Termination

1. This Convention can be terminated by a Member State. In such a case, the Convention remains in force for the other Member States.
2. Notwithstanding the provisions of paragraph 1, if the effects of this Convention are substantially altered as a result of changes made in the tax law of a Member State, the Member State concerned may, through diplomatic channels, give a written notice of termination with effect not earlier than a period of six (6) months after such notice is given. In such an event, its provisions shall not apply to estates of persons who die or to gifts made on or after the effective date of the termination
3. The Convention shall continue to apply in respect of the estate of any individual who has died before the end of that period and in respect of any event (other than death) occurring before the end of that period and giving rise to liability to tax under the laws of the Member States.

Appendix III: Proposal for an amendment to the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union

In this appendix, I present the amendments to the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union as suggested in section 7.1.4.2 of this study. The amendments are marked in italics. The text of the preamble to the proposal is not included. The appendix includes only the articles of the Council Directive (EU) 2017/1852 that need to be adjusted.

Proposal for an amendment to the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 115 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the European Economic and Social Committee,

Acting in accordance with a special legislative procedure,

Whereas:

.

.

(7) The improved dispute resolution mechanism should build on existing systems in the Union, including the Union Arbitration Convention. However, the scope of this Directive should be wider than that of the Union Arbitration Convention, which is limited to disputes over transfer pricing and the attribution of profits to permanent establishments. This Directive should apply to all taxpayers that are subject to taxes

on income and capital *or estate, inheritance or gift* covered by bilateral tax treaties and the Union Arbitration Convention. At the same time, individuals, micro, small and medium-sized enterprises should have less of an administrative burden when using the dispute resolution procedure. In addition, the dispute resolution phase should be strengthened. In particular, it is necessary to provide for a time limit for the duration of the procedures to resolve double taxation disputes and to establish the terms and conditions of the dispute resolution procedure for the taxpayers.

Article 1

Subject matter and scope

This Directive lays down rules on a mechanism to resolve disputes between Member States when those disputes arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital *as well as of estates, inheritances and gifts*. It also lays down the rights and obligations of the affected persons when such disputes arise. For the purposes of this Directive, the matter giving rise to such disputes is referred to as a ‘question in dispute’.

Article 2

Definitions

1. For the purposes of this Directive, the following definitions apply:

....

- c) “double taxation” means the imposition by two or more Member States of taxes covered by an agreement or convention referred to in Article 1 in respect of the same taxable income or capital *or estate, inheritance or gift* when it gives rise to either: (i) an additional tax charge; (ii) an increase in tax liabilities; or (iii) the cancellation or reduction of losses that could be used to offset taxable profits;

Article 3

Complaint

.
. .
.

3. The complaint shall only be accepted if, as a first step, the affected person making the complaint provides the competent authorities of each of the Member States concerned with the following information:

- .
- .
- c) details of the relevant facts and circumstances of the case (including details of structure of the transaction and of the relationship between the affected person and the other parties to the relevant transactions, as well as any facts determined in good faith in a mutual binding agreement between the affected person and the tax administration, where applicable) and more specifically, the nature and the date of the actions giving rise to the question in dispute (including, where applicable, details of same income received *or same estate, inheritance or gift* in the other Member State and of inclusion of such *income or estate, inheritance or gift* in the taxable base of the other Member State, and details of the tax charged or that will be charged in relation to such income, *estate, inheritance or gift* in the other Member State), as well as the related amounts in the currencies of the Member States concerned, with a copy of any supporting documents;
- .

Article 16

Interaction with national proceedings and derogations

- .
- .
- 6. By way of derogation from Article 6, a Member State concerned may deny access to the dispute resolution procedure under that Article in cases where penalties were imposed in that Member State in relation to the adjusted income or capital *or estate, inheritance or gift* for tax fraud, wilful default and gross negligence. Where judicial or administrative proceedings were commenced that could potentially lead to such penalties, and these proceedings are being conducted simultaneously with any of the proceedings referred to in this Directive, a competent authority may stay the proceedings under this Directive as from the date of acceptance of the complaint until the date of the final outcome of those proceedings.

Article 23

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply to any complaint submitted from *[date]* onwards relating to questions of dispute *relating to estate, inheritance or gift commencing on or after [date]*. Competent authorities of Member States concerned may however agree to apply this Directive with regard to any complaint that was submitted prior to that day or to earlier tax years.

Appendix IV: Proposal for Council Directive implementing the “one inheritance – one inheritance tax” concept

In this appendix, I present a proposal for Council Directive introducing the “one inheritance – one inheritance tax” concept as suggested in chapter 8 of this study. The text of the preamble to the proposal is not included. Optional provisions are included in brackets.

Proposal for Council Directive introducing the “one inheritance – one inheritance tax” concept

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 115 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the European Economic and Social Committee,

Acting in accordance with a special legislative procedure,

Whereas:

[preamble]

Title I

GENERAL PROVISIONS

Article 1

General Objective

This Directive lays down rules on:

- the avoidance of double or multiple taxation of cross-border inheritances and donations,
- the avoidance of the discrimination problem of cross-border inheritances and donations,
- the addressing of the administrative difficulties of cross-border inheritances and donations.

Article 2

Cross-border inheritances and donations

1. This Directive applies to cross-border inheritances where the deceased has been habitually resident at the time of his death in a Member State and not all constituent elements of such an inheritance are confined within that EU Member State. This Directive applies to cross-border donations where the donor has been habitually resident at the time of the donation in a Member State and not all constituent elements of such a donation are confined within that Member State. The Directive does not apply if the deceased or the donor has been habitually resident outside the EU.
2. An inheritance is a transfer to one or more persons of assets (whether they are inheritance of money, immovable property or movable property) which transfer falls under heading XI of Annex I to Directive 88/361 of 24 June 1988 for the implementation of Article 67 of the Treaty establishing the European Economic Community. A donation is a transfer to one or more persons of assets (whether they are gifts of money, immovable property or movable property) left by a person which donation falls under heading XI of Annex I to Directive 88/361 of 24 June 1988 for the implementation of Article 67 of the Treaty establishing the European Economic Community.

Article 3

Taxes covered

1. This Directive applies to any type of death tax and tax on gifts levied by a Member State.
2. Death tax means any tax levied at national, federal, regional, or local level upon death, irrespective of the name of the tax, of the manner in which the tax is levied and of the person to whom the tax is applied, including in particular estate tax, inheritance tax, transfer tax, transfer duty, stamp duty, income and capital gains tax.
3. Tax on gifts means any *inter vivos* tax levied at national, federal, regional, or local level, irrespective of the name of the tax, of the manner in which the tax is levied and of the person to whom the tax is applied, including in particular gift tax and taxes on gifts.

Title II

DETERMINATION OF THE APPLICABLE TAX LEGISLATION

Article 4

Single taxation

1. Inheritances and gifts to which this Directive applies shall be subject to the legislation of a single Member State.
2. The Member State of the deceased's or donor's habitual residence is the only Member State that is entitled to tax the cross-border inheritance or donation. Any other Member State, even a situs state, is precluded from taxing (parts of) the cross-border inheritance or donation. The previous section does not apply if the Member State of the deceased's or donor's habitual residence does not exercise its taxing rights (because of a specific exemption, deduction, credit or allowance) or does not levy death taxes or taxes on gifts [*and an abusive element is present*].
3. The Member State of the deceased's or donor's habitual residence applies its domestic death and gift tax laws to the cross-border inheritance or donation.

Article 5

Non-discrimination clause

The Member State of the deceased's or donor's habitual residence applies its domestic legislation in a non-discriminatory fashion in line with the CJ case law.

Article 6

Role of the Commission

1. The Commission monitors the application of the present Directive in the Member States.
2. Member States shall communicate to the Commission their domestic death tax and taxes on gift legislation three months after the transposition of the present Directive into the Member States' national laws. The Commission undertakes the task to prepare a survey for the purpose of reviewing the possible discriminatory elements of Member States' domestic death tax and taxes on gift legislation.

Article 7

Review

By ..., the Commission shall evaluate the implementation of this Directive and the discriminatory elements of Member States' domestic death tax and taxes on gift legislation and shall present a report to the Council. That report shall, if appropriate, be accompanied by a legislative proposal.

Title III

FINAL PROVISIONS

Article 8

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ... at the latest. They shall forthwith communicate to the Commission the text thereof.
2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 9

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union and shall apply to cases where the death/donation took place after [date].

Article 10

Addressees

This Directive is addressed to the Member States.

Done at..., ...

Belastingheffing van grensoverschrijdende nalatenschappen en schenkingen. Voorstellen tot verbetering

In het eerste hoofdstuk van dit onderzoek leg ik uit waarom het naar mijn mening noodzakelijk was een boek te schrijven over de problemen rondom de grensoverschrijdende erf- en schenkbelasting. Op het eerste gezicht lijkt een onderzoek naar grensoverschrijdende erf- en schenkbelasting niet goed te passen bij de huidige stand van het wetenschappelijke onderzoek, dat zich voornamelijk richt op belastingen naar het inkomen. Tot op zekere hoogte laat de focus op belastingen naar het inkomen zich verklaren door het duidelijke belang dat staten en internationale organisaties (in het bijzonder de Organisatie voor Internationale Samenwerking en Ontwikkeling (OESO) en de Europese Unie (EU)) hechten aan de problematiek van grensoverschrijdende belastingen naar het inkomen met betrekking tot grondslagerosie (*base erosion and profit shifting* of *BEPS*), de relatief lage opbrengsten van erf- en schenkbelastingen en de afschaffing van de erfbelasting door sommige staten. Grensoverschrijdende erf- en schenkbelasting lijkt daarom een rechtsgebied dat is verwaarloosd door staten, internationale organisaties en wetenschappers. Op zowel nationaal, internationaal en EU niveau is slechts beperkte vooruitgang geboekt in het aanpakken van de problemen van erf- en schenkbelasting in grensoverschrijdende situaties. Bij gebrek aan internationale ontwikkelingen, lijkt de huidige wetenschappelijke literatuur wat achter te lopen waar het gaat om het bespreken van de problemen. Als gevolg blijven de problemen in veel gevallen onopgelost, waardoor de huidige noodzaak voor afzonderlijke en holistische oplossingen nog groter wordt. Met de term “afzonderlijke oplossing” wordt bedoeld een oplossing die slechts (deelaspecten van) één probleem met betrekking tot grensoverschrijdende erf- en schenkbelasting behandelt en deze term wordt onderscheiden van het begrip “holistische oplossing”, zijnde een oplossing die alle problemen met betrekking tot grensoverschrijdende erf- en schenkbelasting als één geheel behandelt.

Alvorens deze problemen uiteen te zetten, geef ik in hoofdstuk 2 een overzicht van erf- en schenkbelastingen. Dit overzicht is in lijn met het eerste doel van het onderzoek, te weten het beschrijven en systematiseren van erf- en schenkbelastingwetten als zodanig. Meer specifiek constateer ik dat in grensoverschrijdende gevallen het overlijden gepaard kan gaan met meerdere belastingen: erfbelastingen, boedelbelastingen, *mortis causa* inkomsten- en vermogenswinstbelastingen, land- en registratiebelastingen, overdrachtsbelastingen of zelfs indirecte belastingen op bedrijfsopvolging. Elementen zoals het belastbaar feit, persoonlijke en objectieve nexusregels, belastingtarieven en beschikbare objectieve en subjectieve

vrijstellingen kunnen verschillen tussen erf- en schenkbelastingen van verschillende staten. Bovendien constateer ik in dit hoofdstuk dat de opbrengsten van erfbelastingen in de meeste OESO-lidstaten teruglopen. De inkomsten uit deze belastingen vormen minder dan 1% van de totale opbrengsten van de staten, en men kan zich met recht afvragen of staten in algemene zin veel waarde aan erfbelastingen (zouden moeten) hechten. Echter, mijn onderzoek wijst uit dat meer belang wordt gehecht aan de *rechtvaardigingsgronden* voor erfbelastingen dan aan hun inkomstengenererende vermogen. Meer specifiek identificeer ik in totaal veertien rechtvaardigingsgronden, die gebruikt worden bij erfbelastingen en die genoemd worden in de wetenschappelijke literatuur of in het recente werk van de OESO of worden aangehaald door staten bij de invoering van een erfbelasting (in het bijzonder een erf- en boedelbelasting). De meeste van deze rechtvaardigingsgronden lijken een sociale achtergrond te hebben, hetgeen mijns inziens bevestigt dat het verhogen van inkomsten niet het primaire doel van de erfbelastingen is. Echter, niet alle rechtvaardigingsgronden lijken geschikt als primaire rechtvaardigingsgronden van erfbelastingen.

Mijns inziens kunnen de rechtvaardigingsgronden voor erfbelasting worden ingedeeld in vier categorieën. De eerste categorie betreft rechtvaardigingsgronden die worden uitgelegd vanuit het perspectief van de begunstigde. Deze categorie omvat het merendeel van de rechtvaardigingsgronden, bijvoorbeeld het draagkrachtbeginsel, het gelijkheidsbeginsel, het nivelleringsbeginsel, het stimuleren van arbeidsparticipatie, het beginsel van loon naar werken en het beginsel van de minste pijn. De tweede categorie bevat rechtvaardigingsgronden die worden uitgelegd vanuit het perspectief van de overledene, bijvoorbeeld dat belastingontduiking aan de kant van de overledene bestraft moet worden, de theorie van assurantie en belang, en de theorie van de nabelasting. De derde categorie bevat rechtvaardigingsgronden die worden uitgelegd vanuit het perspectief van zowel de overledene als de begunstigde, bijvoorbeeld het buitenkansbeginsel en het profijtbeginsel. Tot slot ziet de vierde categorie op rechtvaardigingsgronden die worden uitgelegd vanuit het perspectief van het algemeen belang, namelijk het financieren van het '*probate*'-systeem en het afschaffen van nutteloze *ab intestato*-erfopvolging.

Mijns inziens lijkt rechtvaardiging op basis van het buitenkansbeginsel de meest overtuigende en complete rechtvaardigingsgrond voor erfbelasting (en, analoog hieraan, schenkbelasting), omdat het verklaart waarom staten het rechtvaardig achten om incidentele en onverwachte vermogensontvangsten te belasten ("*waarom* belasten") maar om tegelijkertijd het familievermogen te beschermen als het wordt ontvangen door familieleden ("*hoe* belasten"). Deze rechtvaardigingsgrond verklaart daarom progressiviteit zowel op basis van de omvang van het *mortis causa* overgedragen vermogen (belasting van onbedoelde overdrachten van vermogen) als op basis van de mate van verwantschap (bescherming van familievermogen). Echter, het OESO-modelverdrag voor successie- en schenkingsrecht (1982) (hierna: OESO-successiemodelverdrag, het modelverdrag of het model) lijkt zowel het buitenkansbeginsel als het draagkrachtbeginsel als primaire rechtvaardigingsgronden voor erfbelasting te erkennen.

In hoofdstuk 3 bespreek ik de problemen van grensoverschrijdende erf- en schenkbelasting. Deze problemen zijn mijns inziens a) dubbele en meervoudige belastingheffing, b) dubbele of meervoudige niet-belasting, c) discriminatoire behandeling van grensoverschrijdende nalatenschappen en schenkingen, en d) administratieve problemen. Kort gezegd leidt de parallelle toepassing van erf- en schenkbelastingen door twee of meer staten vaak tot

dubbele of zelfs meervoudige belastingheffing van een grensoverschrijdende nalatenschap en schenking. Nationaalrechtelijke wetten zijn wezenlijk verschillend (bijvoorbeeld met betrekking tot het concept van de persoonlijke nexus of de vaststelling van de persoonlijke nexus bij een ander persoon) en houden niet altijd rekening met de internationale aspecten van een nalatenschap en schenking. Als gevolg moet eenzijdige voorkoming van dubbele belastingheffing niet altijd als vanzelfsprekend worden beschouwd.

In dezelfde zin is dubbele of meervoudige niet-belasting op basis van verschillen in nationale wetgeving denkbaar. Bovendien kan dubbele of meervoudige niet-belasting ontstaan in situaties waarbij de staat van de persoonlijke nexus eenzijdige voorkoming van dubbele belasting biedt door middel van een vrijstelling, maar de bezitting niet feitelijk wordt belast in de staat van de objectieve nexus (bijvoorbeeld omdat de bezitting niet onder de definitie van “binnenlandse bezittingen” valt). Daarnaast kan dubbele of meervoudige niet-belasting voorkomen in gevallen waarbij de staat van de objectieve nexus zich onthoudt van heffing van erf- en schenkbelasting terwijl de staat van de persoonlijke nexus geen erf- of schenkbelasting heft of een faciliteit/vrijstelling/aftrek/verrekening biedt. Tot slot kan dubbele of meervoudige niet-belasting voorkomen in gevallen van belastingmisbruik.

Bovendien kan het voorkomen dat staten een grensoverschrijdende nalatenschap of schenking discrimineren. Meer specifiek kunnen zij additionele vereisten stellen of simpelweg weigeren om voordelen, zoals belastingvrijstellingen of faciliteiten toe te staan bij nalatenschappen en schenkingen met een grensoverschrijdend element. Tot slot kunnen administratieve problemen een rol spelen voor zowel belastingplichtigen als de belastingautoriteiten bij een grensoverschrijdende nalatenschap en schenking. De toepasselijke administratieve belastingprocedures van een staat kunnen discrimineren tegen een grensoverschrijdende nalatenschap en kunnen tekortschieten voor wat betreft coördinatie van administratieve belastingprocedures met een andere staat.

Ik ben van mening dat het OESO-successiemodelverdragen het rapport van de Europese Commissie (EC) expert-groep *“Ways to tackle inheritance cross-border tax obstacles facing individuals within the EU”* uit 2015 (hierna te noemen “het 2015 erfbelastingrapport” of “het rapport”) de bovengenoemde problemen bevestigen. Dit geeft mijns inziens ook een indicatie van de juiste niveaus waarop deze problemen het meest effectief kunnen worden aangepakt door middel van afzonderlijke en holistische oplossingen, te weten op het niveau van de OESO en de EU. Dit is mogelijk doordat beide niveaus mechanismen bieden die een gecoördineerde benadering voor het aanpakken van de problemen garanderen.

Allereerst, op het niveau van de OESO is het OESO-successiemodelverdrag een waardevol instrument om met de genoemde problemen om te gaan. Betoogd kan worden dat het model heeft bijgedragen aan het aanpakken van het probleem van dubbele belastingheffing bij overlijden en schenkbelasting en, in het bijzonder, bij belastingen geheven op nalatenschappen, boedels en schenkingen. Bovendien biedt het Commentaar bij het OESO-successiemodelverdrag nuttige richtlijnen aan staten die een erf- en schenkbelastingverdrag wensen af te sluiten, dat is opgesteld conform het OESO-successiemodelverdrag. Het staat staten ook toe om af te wijken van de bepalingen van het model en stelt in dit verband vaak alternatieve bewoordingen voor. Het zou echter betoogd kunnen worden dat sommige bepalingen van het OESO-successiemodelverdrag en het bijbehorende Commentaar verbeterd kunnen worden, gelet op de doelstellingen van het modelverdrag en de beginselen zoals weergegeven in het Commentaar. Naar mijn idee zou een model,

dat in overeenstemming is met (een aantal van) deze beginselen, de problemen van grensoverschrijdende nalatenschappen en schenkingen op een meer begrijpelijke wijze aanpakken (gegeven de doelstellingen van het OESO-successiemodelverdrag), dan een model dat *niet* in overeenstemming is met (een aantal van) deze beginselen.

Op het niveau van de EU constateer ik dat de totstandkoming van EU-regelgeving voor de goede werking van de interne markt mogelijk is, en dat dit niveau om deze reden geschikt lijkt om de problemen van grensoverschrijdende erf- en schenkbelasting aan te pakken. Ik constateer echter dat er tot op heden geen voorstellen tot harmonisatie zijn om deze problemen aan te pakken. Alleen de EC poogde, met de aanbeveling van 15 december 2011 betreffende voorkoming voor dubbele belasting van nalatenschappen (2011/856/EU, hierna: de aanbeveling), de eenzijdige bepalingen omtrent de voorkoming van dubbele belastingheffing tussen EU-lidstaten te coördineren, maar lijkt deze doelstelling niet te hebben behaald. Bovendien heeft jurisprudentie van het Hof van Justitie van de EU (hierna: HvJ EU) bijgedragen aan de zogenoemde “negatieve harmonisatie” van erf- en schenkbelastingen binnen de EU. Echter, de jurisprudentie van het HvJ bevat mijns inziens twee aspecten die verder besproken en toegelicht kunnen worden. Tot slot behandelen de EU Richtlijnen 2011/16/EU en 2010/24/EU de administratieve problemen met betrekking tot grensoverschrijdende nalatenschappen en schenkingen op het microniveau niet.

Deel II behandelt de afzonderlijke oplossingen, die door de OESO en EU mechanismen geboden kunnen worden voor de problemen van grensoverschrijdende erf- en schenkbelasting. Meer specifiek reageerde de OESO op deze problemen met het voorstel voor het OESO-successiemodelverdrag in 1966 dat vervolgens is bijgewerkt in 1982. Echter, het kan worden betoogd dat bepaalde bepalingen van het OESO-successiemodelverdrag en het bijbehorende Commentaar voor verbetering vatbaar zijn gelet op de doelstellingen van het modelverdrag en de beginselen zoals weergegeven in het bijbehorende Commentaar. Daarom heb ik een maatstaf ontwikkeld die kan worden toegepast op de voorgestelde verbeteringen van bepaalde bepalingen van het model op het punt van grensoverschrijdende nalatenschappen en schenkingen. In dit verband merk ik op dat het OESO-successiemodelverdrag geen concrete maatstaf bevat. Echter, als men het OESO-successiemodelverdrag en het bijbehorende Commentaar volgt, dan zou betoogd kunnen worden dat hieruit wel bepaalde beginselen van erf- en schenkbelastingwetgeving zijn af te leiden. Aangezien het OESO-successiemodelverdrag de beginselen van erf- en schenkbelastingwetgeving weergeeft van de meerderheid van de OESO-lidstaten, ben ik van mening dat een dergelijke maatstaf slechts gevonden kan worden binnen het systeem dat door de OESO is geïntroduceerd, te weten het OESO-successiemodelverdrag en het bijbehorende Commentaar. Het is om deze reden dat de rechtvaardigingsgronden voor erf- en schenkbelastingen niet als gezamenlijk geheel als maatstaf kunnen dienen; zij zijn *exogeen* aan het systeem dat het OESO-successiemodelverdrag heeft geïntroduceerd. In het bijzonder verwijzen zij naar de bestaande erf- en schenkbelastingwetten, terwijl het model van toepassing is, naar mijn mening, op één concept van een erf- en schenkbelasting. Ik heb ervoor gekozen dit concept “de voorgestelde erf- en schenkbelasting” te noemen dat het resultaat is van compromissen tussen de OESO-lidstaten. Het is ook belangrijk om op te merken dat het feit dat een model niet voldoet aan (bepaalde) elementen van de maatstaf niet automatisch meebrengt dat sprake is van een ineffectief of “slecht model”. Echter, een model dat in lijn is met (sommige) elementen van deze maatstaf lijkt, naar het mij voorkomt, de problemen

van grensoverschrijdende nalatenschappen en schenkingen op een meer inzichtelijke wijze aan te pakken (gelet op de doelstellingen van het OESO-successiemodelverdrag) dan een model dat niet in lijn is met (een aantal van) deze elementen.

Het eerste element van de voorgestelde erf- en schenkbelasting is haar vereiste van *mortis causa* of *inter vivos*. Meer specifiek wordt de voorgestelde erf- en schenkbelasting geheven in het kader van het overlijden of van een schenking, met uitsluiting van andere gebeurtenissen die tot belastingheffing kunnen leiden. Integendeel, artikelen 2 en 9B, lid 1, van het model lijken te suggereren dat het belastbaar feit, belastbare verkrijging, het bepalen van de belastingplichtige en het aanknopingspunt voor de belastingheffing wellicht van ondergeschikt belang zijn. Desalniettemin constateer ik dat belastingen die aansluiten bij de erflater/schenker voorrang lijken te krijgen op belastingen die aansluiten bij de begunstigde. In dezelfde zin lijken aanknopingspunten voor belastingheffing die aansluiten bij de mate van integratie van een persoon met de gemeenschap, prioriteit te krijgen boven aanknopingspunten voor belastingheffing die niet aansluiten bij die mate van integratie. Het heffen van belasting op *mortis causa* of *inter vivos* buitenkansen dient als tweede element van de maatstaf. In het bijzonder wordt de voorgestelde erf- en schenkbelasting geheven op het voordeel dat niet verdiend werd, met andere woorden de buitenkans die de ontvanger krijgt zonder hieraan te hebben bijgedragen. Dit kan worden afgeleid uit artikelen 2, lid 2, en het Commentaar bij artikel 9A van het model. Het derde element van de maatstaf voor de voorgestelde erf- en schenkbelasting betreft het definiëren van enkele cruciale begrippen naar civiel recht (familierecht, huwelijksvermogensrecht en successierecht). Op verschillende plaatsen in het Commentaar op artikelen 1 en 4 van het OESO-successiemodelverdrag wordt het verband gelegd tussen de huidige erf- en schenkbelasting en de van toepassing zijnde civiele regels. Tot slot is het vierde element van de voorgestelde erf- en schenkbelastingmaatstaf het draagkrachtbeginsel. De *mortis causa* of *inter vivos* overdracht van eigendom vergroot de financiële draagkracht van de begunstigten en daarmee ook hun fiscale draagkracht. De erkenning van het draagkrachtbeginsel als het vierde element van de voorgestelde erf- en schenkbelasting kan voornamelijk worden afgeleid uit het Commentaar bij artikel 9A van het OESO-successiemodelverdrag, dat verwijst naar de toepassing van de vrijstellingsmethode met progressievoorbehoud.

In hoofdstuk 5 van dit onderzoek bespreek ik de bepalingen van het OESO-successiemodelverdrag die mijns inziens verbeterd zouden kunnen worden gelet op de doelstellingen van het OESO-successiemodelverdrag en de voorgestelde erf- en schenkbelasting. In het bijzonder vindt de bespreking van deze bepalingen plaats in relatie tot elk van de problemen van grensoverschrijdende nalatenschappen en schenkingen. Bovendien merk ik op dat alle bovengenoemde problemen de toepassing van de voorgestelde erf- en schenkbelasting sterk lijken te beïnvloeden. Meer specifiek lijken in gevallen waarbij een grensoverschrijdende nalatenschap of schenking wordt belast in meer dan één staat/nergens wordt belast/ wordt gediscrimineerd/wordt onderworpen aan veel administratieve moeilijkheden, de toepassing van het draagkrachtbeginsel en het buitenkansbeginsel – twee elementen van de voorgestelde erf- en schenkbelasting – ernstig te worden belemmerd. De bovengenoemde rechtvaardigingsgronden vinden te ruim of te beperkt toepassing in grensoverschrijdende situaties en derhalve lijkt de erf- en schenkbelasting haar doelstellingen niet te halen. Er lijkt echter geen sprake te zijn van een dergelijke te ruime of te beperkte toepassing bij een binnenlandse nalatenschap en schenking. Gesteld kan worden dat erf- en schenkbelasting

haar doelstellingen evenmin lijkt te behalen indien het model weliswaar het probleem oplost maar op een dusdanige wijze, dat geen rekening lijkt te worden gehouden met (een aantal) elementen van de voorgestelde erf- en schenkbelasting. Als gevolg hiervan zullen de OESO-lidstaten mogelijk niet snel geneigd zijn het model te onderschrijven, aangezien het model soms tegenstrijdig lijkt met de eigen erf- en schenkbelasting alsmede de elementen van de voorgestelde erf- en schenkbelasting.

In het bijzonder constateer ik met betrekking tot het probleem van dubbele of meervoudige belastingheffing dat de bepaling over de tienjaarstermijn voor het uitoefenen van subsidiaire heffingsbevoegdheid en het onderliggende anti-misbruik motief, opnieuw bekeken kunnen worden, gelet op de doelstelling van het OESO-successiemodelverdrag van het aanpakken van dubbele belastingheffing, en gelet op de voorgestelde erf- en schenkbelasting. Bovendien constateer ik dat het model geen rekening lijkt te houden met veel voorkomende gevallen van meervoudige belastingheffing, die enkel worden behandeld indien de staat waarvan de overledene fiscaal inwoner was, een verdrag heeft afgesloten met alle andere staten. Deze situatie kan mijns inziens verbeterd worden door een verbreding van de reikwijdte van het begrip “fiscale woonplaats” of door een voorstel voor een multilateraal verdrag. Daarnaast lijkt de tiebreaker-regel voor natuurlijke personen geen rekening te houden met de intentie van de overledene of schenker om fiscaal inwoner te zijn in een verdragsluitende staat en bevat het geen eis ten aanzien van een minimum verblijfsduur in een verdragsluitende staat. De tiebreaker-regel kan daarom worden gezien als tegenstrijdig met a) de wijze waarop sommige staten de band tussen de overledene of de begunstigde met hun grondgebied bepalen, en b) het derde element van de voorgestelde erf- en schenkbelasting (te weten het verband met het burgerlijk recht). Bovendien constateer ik dat er overlappingen mogelijk zijn tussen een erf- en schenkbelastingverdrag enerzijds en een inkomens- en vermogensverdrag anderzijds. Deze overlapping kan in sommige gevallen leiden tot dubbele belastingheffing in gevallen van grensoverschrijdende nalatenschap en schenking. Een dergelijke uitkomst lijkt echter tegenstrijdig met de doelstelling van het OESO-successiemodelverdrag van het voorkomen van dubbele belasting. Daarnaast lijkt de methode van voorkoming van dubbele belasting van artikel 9B (verrekenmethode) niet uitgebreid behandeld te worden in het Commentaar bij het OESO-successiemodelverdrag. Als gevolg hiervan is de interactie tussen a) boedel- en erfbelastingen, en b) de verschillende soorten erf- en schenkbelastingen mijns inziens een uitdagend probleem. Mijns inziens kunnen de bewoordingen van het Commentaar bij artikel 9B van het OESO-successiemodelverdrag verbeterd worden, gelet op de doelstelling van het OESO-successiemodelverdrag van het aanpakken van dubbele belastingheffing, alsmede gelet op de elementen van de voorgestelde erf- en schenkbelasting. Bovendien constateer ik dat het gebrek aan gemeenschappelijke waarderingsgrondslagen vaak tot dubbele belastingheffing zou kunnen leiden. Desalniettemin lijkt het niet toepassen van het model op de waarderingsgrondslagen van bezittingen niet tegenstrijdig met de doelstellingen van het model, aangezien het model niet gericht is op het harmoniseren van de wetgeving van de verdragsluitende staten. Sterker nog, kwalificatieconflicten door verschillen in de classificatie naar nationaal recht, verschillen in de toepassing van het verdrag op de feiten en de interpretatie van verdragsregels zijn denkbaar. Dergelijke conflicten lijken echter tegenstrijdig met de doelstellingen van het OESO-successiemodelverdrag van het voorkomen van dubbele belasting alsmede met de voorgestelde erf- en schenkbelasting. Bovendien

constateer ik dat dubbele belastingheffing kan plaatsvinden met betrekking tot specifieke kenmerken van de verdragsluitende staat, namelijk rechtsfiguren die hun oorsprong vinden in de *civil law* of in het Anglo-Amerikaanse recht zoals de trust, het vruchtgebruik, het fideï-commiss en de stichting. Desalniettemin betoog ik dat het opzettelijk niet opnemen van een algemene regel, die van toepassing is op alle gevallen van overdrachten van en aan bovengenoemde rechtsfiguren, niet in strijd lijkt te zijn met de doelstellingen van het model en de elementen van de voorgestelde erf- en schenkbelasting. Dit komt doordat het model niet ziet op het harmoniseren van de wetgeving van de verdragsluitende staten. Tot slot merk ik op dat de procedure voor onderling overleg kan worden verbeterd gelet op de doelstelling van het model, zijnde het aanpakken van dubbele belastingheffing.

Met betrekking tot het probleem van dubbele of meervoudige niet-belasting constateer ik dat het model in een aantal onderdelen dubbele niet-belasting behandelt. Daarom zou gesteld kunnen worden dat het model ook gericht is op het voorkomen van dubbele niet-belasting. Echter, ik constateer dat de overlapping tussen het OESO-successiemodelverdrag en het OESO-modelverdrag inzake inkomen en vermogen (hierna genoemd: het OESO-modelverdrag) in bepaalde gevallen zou kunnen leiden tot dubbele niet-belasting. Dit lijkt echter in strijd met de doelstelling van het OESO-successiemodelverdrag van het voorkomen van dubbele belasting, en kan worden aangepakt door de bewoordingen van artikel 2 van het model te verbeteren. Daarnaast kunnen bepaalde kwalificatieconflicten aanleiding geven tot dubbele niet-belasting. Dit lijkt echter in strijd met de doelstelling van het model van het aanpakken van dubbele niet-belasting. Tot slot merk ik op dat dubbele niet-belasting als gevolg van de verplichte toepassing van de erf- en schenkbelasting door beide verdragsluitende staten – zelfs na afschaffing van de erf- en/of schenkbelasting-wetgeving door een verdragsluitende staat – ook in strijd lijkt met de bovengenoemde doelstelling van het model.

Met betrekking tot het probleem van discriminatie constateer ik dat de non-discriminatiebepaling op basis van nationaliteit in het OESO-successiemodelverdrag zich richt op de natuurlijke personen die de non-discriminatiebepaling kunnen invoeren en niet op de boedels waarop het model van toepassing is. Bovendien wekken de bewoordingen van de bepaling de indruk dat het discriminatoire element van de wetgeving van de verdragsluitende staat enkel verwijst naar de onderdanen van elke verdragsluitende staat. Mijns inziens is daarom onduidelijk of de bepaling kan worden ingeroepen in het geval van een discriminatoire waardebepaling en regels betreffende de aftrek van schulden. Als gevolg hiervan lijkt de bepaling er in bepaalde gevallen niet in te slagen het probleem van discriminatie van grensoverschrijdende erf- en schenkbelasting aan te pakken. Gelet op de doelstelling van het OESO-successiemodelverdrag bij het aanpakken van bepaalde gevallen van discriminatie van grensoverschrijdende nalatenschappen en schenkingen, alsmede de elementen van de voorgestelde erf- en schenkbelasting, kan de bepaling daarom verbeterd worden.

Tot slot constateer ik met betrekking tot de administratieve problemen van grensoverschrijdende nalatenschappen en schenkingen dat de artikelen 11 en 12 van het OESO-successiemodelverdrag geen oplossing lijken te bieden voor de administratieve problemen waarmee begunstigten geconfronteerd kunnen worden in de staat van de objectieve nexus of de staat van de persoonlijke nexus. Daarom behandelt dit onderzoek de onderlinge overlegprocedure en de kaders voor de uitwisseling van informatie niet

vanuit dat perspectief. Desalniettemin ben ik van mening dat de voorgestelde verbeteringen voor de bewoordingen van de reikwijdte van de non-discriminatiebepaling op basis van nationaliteit mogelijk de toepassing van de non-discriminatiebepaling kunnen verbeteren door het bieden van verdragsbescherming tegen discriminatoire formeelrechtelijke belastingregels van de verdragsstaten.

Derhalve stel ik in hoofdstuk 6 afzonderlijke oplossingen voor om de bovengenoemde bepalingen van het model aan te pakken. Ik verdeel het werk aan de aanpassingen in vier delen, die overeenkomen met de problemen van grensoverschrijdende erf- en schenkbelasting. Wat betreft dubbele of meervoudige belasting, constateer ik dat de bepaling voor het subsidiaire heffingsrecht tegenwicht lijkt te bieden voor de nauwe reikwijdte van het model. Echter, de tienjaarstermijn voor het uitoefenen van deze rechten en de onderliggende gedachte dat deze rechten worden uitgeoefend voor het tegengaan van misbruik zouden mijns inziens alleen van toepassing moeten zijn indien de andere verdragsstaat zijn verlengde woonplaatsbepalingen wil toepassen, en niet in andere gevallen. Voorts stel ik voor dat het toevoegen van de nationaliteit van de overledene of schenker als een subsidiair criterium voor het bepalen van de fiscale woonplaats alsook het afsluiten van een multilateraal belastingverdrag, een oplossing zou kunnen bieden voor het probleem van meervoudige belastingheffing op grensoverschrijdende nalatenschappen en schenkingen. Bovendien stel ik een specifieke doch optionele tiebreaker-regel voor en/of het aanpassen van de huidige bepaling met elementen die meer in lijn zijn met de wijze waarop sommige staten een levenslange band vaststellen tussen een persoon en hun grondgebied, en met de voorgestelde erf- en schenkbelasting. Wat betreft de overlapping tussen de twee OESO modellen, benader ik de kwestie van de parallelle toepassing van twee typen verdragen op een enkelvoudige overdracht of bezitting als volgt. Ten eerste stel ik voor om de uitputtende lijst van artikel 2, lid 3, van het OESO-successiemodelverdrag te vervangen door een indicatieve lijst. Ten tweede benadruk ik de noodzaak voor een definitie van het begrip “substantieel vergelijkbaar” met een bestaande belasting op boedels en nalatenschappen en op schenkingen. Bovendien stel ik voor dat de voorkoming van dubbele belasting op grond van artikel 9B (verrekenmethode) algemeen wordt toegepast en niet beperkt wordt tot belastingen die worden geheven op basis van hetzelfde belastbaar feit of die worden betaald door dezelfde persoon. Dit geldt ten aanzien van het verband tussen de boedel- en verkrijgingsbelastingen en erf- en schenkbelastingen met *mortis causa* en *inter vivos* inkomens- en vermogenswinstbelasting. Daarnaast besteed ik aandacht aan de vraag hoe het OESO-successiemodelverdrag effectiever kan omgaan met kwalificatieconflicten die resulteren in dubbele belasting. Ten slotte en vooral, stel ik voor een arbitragebepaling op te nemen in de onderlinge overlegprocedure van artikel 11 van het OESO-successiemodelverdrag.

Met betrekking tot het probleem van dubbele of meervoudige niet-belasting, stel ik voor dat i) een transitie van een uitputtende lijst van artikel 2, lid 3, van het OESO-successiemodelverdrag naar een indicatieve lijst, en ii) een definitie van het begrip “substantieel vergelijkbaar” met een bestaande belasting op boedels en nalatenschappen en op schenkingen de problemen van dubbele niet-belasting als gevolg van de toepassing van twee verschillende types verdragen op één enkele overdracht van eigendom kunnen aanpakken. Bovendien bespreek ik hoe het OESO-successiemodelverdrag effectiever kan omgaan met kwalificatieconflicten die leiden tot dubbele niet-belasting. Tot slot stel ik aanpassingen

voor aan artikel 16 van het OESO-successiemodelverdrag, om het probleem van dubbele niet-belasting als gevolg van het eerder opzeggen van een erf- en schenkbelastingverdrag, dan de minimale toepassingsperiode van vijf jaar zoals genoemd in artikel 16 van het OESO-successiemodelverdrag, aan te pakken.

Met betrekking tot het probleem van discriminatie doe ik een voorstel voor bijgewerkte taal voor de non-discriminatiebepaling op basis van nationaliteit van het OESO-successiemodelverdrag, dat mogelijk de reikwijdte van die bepaling verbreedt. Tot slot, met betrekking tot de administratieve problemen van grensoverschrijdende nalatenschappen en schenkingen, constateer ik dat de update van de non-discriminatiebepaling op basis van nationaliteit van het OESO-successiemodelverdrag, de effectiviteit van de bepaling zou doen toenemen bij de behandeling van discriminatoire procedurele belastingbepalingen van verdragsluitende staten.

Een nieuwe versie van het OESO-successiemodelverdrag is als bijlage I bij dit onderzoek bijgevoegd. In deze versie zijn de voorgestelde verbeteringen van de bepalingen van het model opgenomen, gelet op de doelstellingen van het model en de elementen van de voorgestelde erf- en schenkbelasting. Bovendien bevat de voorgestelde versie van het OESO-successiemodelverdrag algemene updates op de bepalingen van het model die zijn geënt op de 2017 versie van het OESO Modelverdrag. Het is echter belangrijk om te verduidelijken dat deze wijzigingen zijn opgenomen omwille van de volledigheid, en daarom niet zijn bedoeld om een bepaling van het model of het bijbehorende Commentaar te verbeteren, gelet op de doelstellingen van het model en de elementen van de voorgestelde erf- en schenkbelasting.

In hoofdstuk 7 bespreek ik de voortgang die binnen de EU is geboekt bij het aanpakken van de problemen van grensoverschrijdende nalatenschappen en schenkingen. Hieruit volgt dat hoewel het probleem van dubbele en meervoudige belasting van grensoverschrijdende nalatenschappen en schenkingen een belemmering vormt voor de goede werking van de interne markt, weinig initiatieven zijn ondernomen op het niveau van de EU om dit probleem aan te pakken. Wat dat betreft merk ik op dat de aanbeveling van de EC enkele jaren geleden gedaan werd en door veel EU-lidstaten niet is overwogen. Hoewel de aanbeveling enkele innovatieve bepalingen bevat, zijn er aspecten die verbeterd kunnen worden. Bovendien constateer ik dat het omzetten van de aanbevelingen in een EU Richtlijn één geharmoniseerde heffingsgrondslag vergt, wat mij een disproportionele oplossing lijkt voor het probleem van dubbele en meervoudige belasting en niet-belasting van nalatenschappen. Anderzijds kan een multilateraal verdrag in de vorm van een EU Richtlijn op basis van het geoptimaliseerde OESO-successiemodelverdrag en geïnspireerd door de innovatieve bepalingen van de aanbeveling, potentieel een oplossing bieden voor het probleem van dubbele en meervoudige belasting van nalatenschappen en schenkingen. Hetzelfde geldt voor de uitbreiding van de reikwijdte van de richtlijn van de Raad 2017/1852 tot geschillen over dubbele belastingheffing die voortkomen uit de toepassing van een erf- en schenkbelastingverdrag.

Met betrekking tot het probleem van dubbele of meervoudige niet-belasting, merk ik op dat artikel 4.2 van de aanbeveling van de EC het probleem van dubbele of meervoudige niet-belasting behandelt. Echter, door een gebrek aan een gemeenschappelijke definitie van de begrippen die in de aanbeveling worden gebruikt is dubbele of meervoudige niet-belasting van de grensoverschrijdende nalatenschap of schenking nog steeds denkbaar.

Wat dat betreft constateer ik dat het omzetten van de aanbeveling tot een EU Richtlijn een disproportionele oplossing zou zijn voor de doelstelling van het aanpakken van het probleem van dubbele of meervoudige niet-belasting van nalatenschappen, net als bij dubbele of meervoudige belasting. Dit gezegd hebbend, zou het sluiten van een multilateraal verdrag in mijn ogen een stap in de juiste richting zijn voor de omgang met vraagstukken rondom dubbele of meervoudige niet-belasting.

Met betrekking tot het probleem van discriminatie bij grensoverschrijdende nalatenschappen en schenkingen, constateer ik dat de jurisprudentie van het HvJ EU over erf- en schenkbelasting het meest heeft bijgedragen aan de zogenoemde “negatieve harmonisatie” van de erf- en schenkbelastingstelsels, waarmee sturing wordt gegeven aan de EU-lidstaten over de toepassing van een EU-conform erf- en schenkbelastingstelsel. Wat betreft de afwijzing van de Schumacker doctrine bij erf- en schenkbelasting constateer ik dat het HvJ EU geen onderscheid maakt tussen objectieve en subjectieve belastingvrijstellingen en geen overtuigend antwoord geeft op de vraag waarom belastingvrijstellingen van de inkomstenbelastingstelsels afwijken van de belastingvrijstellingen van de erf- en schenkbelastingstelsels. Hoewel het mijns inziens terecht tot de conclusie komt dat de Schumacker doctrine niet van toepassing is op laatstgenoemde belastingvrijstellingen, lijkt de toelichting van het HvJ EU een aantal punten te bevatten die nadere uitleg behoeven (bijvoorbeeld de doelstelling van subjectieve belastingvrijstellingen van erfbelastingen in vergelijking met de doelstelling van subjectieve vrijstellingen van inkomstenbelastingen). Bovendien constateer ik dat het neutralisatie-argument gelijkelijk van toepassing is, onafhankelijk van het type verdrag (in dit geval een inkomsten- en vermogensbelastingverdrag of een erf- en schenkbelastingverdrag).

Tot slot, met betrekking tot de administratieve problemen van grensoverschrijdende nalatenschappen en schenkingen, constateer ik dat de Richtlijnen 2011/16/EU en 2010/24/EU al van toepassing zijn op erf- en schenkbelastingen. Desalniettemin merk ik op dat deze EU Richtlijnen focussen op het niveau van de belastingautoriteiten en daarom de administratieve problemen op microniveau, als besproken in hoofdstuk 3 van dit onderzoek, niet direct aanpakken. Bovendien stel ik voor dat Richtlijn 2017/1852/EU wordt aangepast zodat deze ook van toepassing is op geschillen die voortkomen uit de toepassing van een erf- en schenkbelastingverdrag.

Uit het bovenstaande volgt dat alle bovengenoemde oplossingen voor de problemen van grensoverschrijdende nalatenschappen en schenkingen op zichzelf staan, aangezien zij maar één probleem aanpakken. Bovendien pakken de afzonderlijke oplossingen niet alle aspecten van een specifiek probleem aan. De EU Richtlijnen 2011/16/EU en 2010/24/EU focussen bijvoorbeeld op het niveau van de belastingautoriteiten en pakken de administratieve problemen op microniveau niet aan. Daarom constateer ik dat onderzocht moet worden of een holistische oplossing voor de problemen van grensoverschrijdende erf- en schenkbelasting mogelijk is op EU-niveau. Hiermee wordt deel II van dit onderzoek afgesloten.

In deel III van dit onderzoek bespreek ik een holistische oplossing voor de problemen van grensoverschrijdende erf- en schenkbelasting. Een dergelijke oplossing is naar mijn mening slechts denkbaar op het niveau van de EU, waar harmonisatie van erf- en schenkbelastingwetgeving mogelijk is. Een holistische oplossing voor de belemmeringen van grensoverschrijdende erfbelasting is reeds in 2015 voorgesteld door de expertgroep van

de EC met het concept “one inheritance – one inheritance tax” (hierna: het concept). In dat verband constateer ik dat het concept twee stappen kent. In de eerste stap moet de gewone verblijfplaats van de overledene gevonden worden aangezien die wordt gebruikt als fiscaal aanknopingspunt bij het bepalen van de EU-lidstaat die de grensoverschrijdende nalatenschap mag belasten. Als tweede stap past de aangewezen EU-lidstaat zijn eigen erfbelastingwetgeving toe op de gehele nalatenschap, waarbij alle andere EU-lidstaten zijn uitgesloten van belastingheffing op bepaalde elementen van de nalatenschap. Het is weliswaar innovatief, en ik constateer dat dit concept een oplossing kan bieden voor de drie grensoverschrijdende erfbelastingproblemen die de expertgroep van de EC heeft geïdentificeerd. Niettegenstaande het bovengenoemde, constateer ik dat het rapport geen juridisch document is en het concept “one inheritance – one inheritance tax” meerdere verduidelijkingen behoeft op het gebied van de subsidiariteit en proportionaliteit van het concept alsook zijn toepassingsbereik en effect op de problemen die in hoofdstuk 3 zijn vastgesteld. Wat dat laatste betreft, is mij opgevallen dat de groep problemen identificeert die enigszins afwijken van de problemen van grensoverschrijdende nalatenschappen die geconstateerd worden in hoofdstuk 3. Evenals de groep constateer ik moeilijkheden met betrekking tot dubbele of meervoudige belasting en administratieve problemen met betrekking tot grensoverschrijdende nalatenschappen als problemen/belemmeringen van grensoverschrijdende nalatenschappen. De aard en het ontwerp van de nationale erfbelastingwetgeving heb ik echter niet als een probleem van grensoverschrijdende nalatenschappen geclassificeerd.

Bovendien geloof ik dat het concept proportioneel is aan de te realiseren doelstellingen, aangezien het uitsluitend die elementen van de erfbelastingwetgeving van EU-lidstaten harmoniseert, die kunnen leiden tot spanningen in grensoverschrijdende situaties. Dit zijn de parallelle toepassing van verschillende persoonlijke nexusregels en de situsbelasting. Integendeel, het concept leidt niet tot harmonisatie van de persoonlijke nexusbegrippen die de EU-lidstaten gebruiken om wereldwijde heffingsbevoegdheid voor erfbelasting vast te stellen, en introduceert geen uniforme, geharmoniseerde belastinggrondslag om zijn doelstellingen te behalen. Bovendien constateer ik dat in bepaalde gevallen het toepassen van het concept kan leiden tot dubbele of meervoudige niet-belasting. In dat verband stel ik voor dat de EU-lidstaat waar sprake is van objectieve nexus zijn heffingsrechten mag uitoefenen indien de EU-lidstaat van gewoonlijk verblijfzijn heffingsrechten niet uitoefent vanwege een specifieke vrijstelling, aftrek, verrekening of faciliteit, of omdat hij geen erfbelasting heft en sprake is van een element van misbruik. Desalniettemin erken ik dat in dat kader nader onderzoek noodzakelijk is, en dan meer specifiek naar de vraag of een element van misbruik altijd aanwezig moet zijn, en ten tweede hoe misbruik beoordeeld moet worden door de EU-lidstaten.

Voorts constateer ik dat het feit dat het concept verder lijkt te gaan dan de fiscale soevereiniteit van EU-lidstaten en de beginselen van het internationaal belastingrecht, niet meebrengt dat het per definitie disproportioneel is. In elk geval erken ik dat nader onderzoek nodig is om vast te stellen of de EU-lidstaten bereid zijn de huidige beginselen van internationale belastingen (zoals vastgelegd in hun nationale erfbelastingwetten) op te geven om zo de problemen van grensoverschrijdende nalatenschappen en schenkingen aan te pakken.

Na enkele belangrijke elementen van het concept te hebben verduidelijkt, bespreek ik of het concept een holistische oplossing kan bieden voor de problemen van grensoverschrijdende nalatenschappen en schenkingen. In dat verband constateer ik dat het concept geschikt is om zowel de problemen van dubbele of meervoudige belasting als de administratieve problemen van grensoverschrijdende nalatenschappen aan te pakken. Aan de andere kant lijkt het concept als zodanig geen oplossing te bieden voor discriminatoire bepalingen van EU-lidstaten, die van toepassing zijn op grensoverschrijdende nalatenschappen en schenkingen. Dit komt doordat de tweede stap van het concept de aangewezen EU-lidstaat toestaat de grensoverschrijdende nalatenschap als geheel te belasten op grond van zijn eigen nationale erfbelastingwetgeving, die echter discriminatoir kan zijn.

In het licht van deze belangrijke bevinding, doe ik een voorstel voor een EU Richtlijn ter implementatie van het concept. De voorgestelde Richtlijn zou op grond van artikel 115 van het Verdrag betreffende de werking van de Europese Unie kunnen worden vastgesteld en van toepassing zijn op grensoverschrijdende nalatenschappen en schenkingen. In dat verband zou een grensoverschrijdende nalatenschap kunnen worden gedefinieerd als een nalatenschap waarbij de overledene ten tijde van zijn overlijden gewoonlijk verbleef in een EU-lidstaat en niet alle wezenlijke bestanddelen van deze nalatenschap beperkt zijn tot die EU-lidstaat. In dezelfde trant zou een grensoverschrijdende schenking kunnen worden gedefinieerd als een schenking waarbij de schenker ten tijde van de schenking gewoonlijk verblijft in een lidstaat en niet alle elementen van deze schenking zijn beperkt tot die EU-lidstaat.

Bovendien zou de voorgestelde Richtlijn van toepassing zijn op een grensoverschrijdende nalatenschap, ongeacht het type erfbelasting dat door de betrokken EU-lidstaten wordt geheven. Eveneens zou de voorgestelde Richtlijn van toepassing zijn op grensoverschrijdende schenkingen, ongeacht het type schenkbelasting dat door de betrokken EU-lidstaten wordt geheven. Bovenal zou de voorgestelde Richtlijn van toepassing zijn op een grensoverschrijdende schenking, ongeacht het feit dat de EU Erfrechtverordening niet op deze schenking van toepassing zou zijn. Wat betreft de vaststelling van de toepasselijke erf- en schenkbelastingwetgeving, stel ik voor dat de voorgestelde Richtlijn voorschrijft dat een grensoverschrijdende nalatenschap en schenking slechts aan de wetgeving van één EU-lidstaat onderworpen wordt. De desbetreffende EU-lidstaat zou zijn de staat van de gewone verblijfplaats van de overledene of schenker. Deze EU-lidstaat zou aldus gerechtigd zijn om de gehele grensoverschrijdende nalatenschap en schenking te belasten op grond van zijn eigen nationale regels voor erf- en schenkbelasting. Elke andere EU-lidstaat zou daarentegen worden uitgesloten van belastingheffing. Hierdoor zou de bovengenoemde twee stappen-benadering zowel het probleem van dubbele of meervoudige belasting als de administratieve problemen van grensoverschrijdende nalatenschappen en schenkingen effectief aanpakken. De bovengenoemde twee stappen-benadering zou ook dubbele of meervoudige niet-belasting aanpakken als de EU-lidstaat waar sprake is van objectieve nexus onder bepaalde voorwaarden zou kunnen heffen.

Desalniettemin constateer ik dat de bovengenoemde twee stappen-benadering op het eerste gezicht het probleem van discriminatie niet lijkt aan te pakken. Dit komt doordat de wetgeving van de EU-lidstaat, die door het criterium van gewone verblijfplaats wordt aangewezen, discriminatoire elementen kan bevatten. Daarom stel ik voor dat de Richtlijn die het concept implementeert een non-discriminatieclausule bevat, die EU-lidstaten

verplicht om hun nationale erf- en schenkbelastingwetgeving op niet-discriminatoire wijze toe te passen. Wellicht is het mogelijk om hiervoor enkele aanknopingspunten te vinden in de jurisprudentie van het HvJ EU met betrekking tot erf- en schenkbelasting, die heeft geleid tot de zogeheten “EU-conforme erf- en schenkbelasting”. Daarnaast stel ik voor dat de juiste toepassing van de non-discriminatieclausule wordt gewaarborgd door een mechanisme dat uit vier opeenvolgende stappen bestaat, te weten: a) het voorbereiden van een onderzoek naar de regels van EU-lidstaten met betrekking tot erf- en schenkbelasting, b) het oprichten van een erf- en schenkbelastingforum voor het beoordelen van de resultaten van het onderzoek, c) het entameren van inbreukprocedures tegen de EU-lidstaten die discriminatoire erf- en schenkbelastingbepalingen handhaven, en d) de totstandkoming van een EU Richtlijn met daarin verplichte regels over het afschaffen van discriminatoire eigenschappen van de nationale erf- en schenkbelastingwetgeving van EU-lidstaten. Een voorstel voor een richtlijn van de Raad om het concept “*one inheritance – one inheritance tax*” te implementeren is als bijlage IV bij dit onderzoek bijgevoegd.

Gezien het bovenstaande ben ik van mening dat dit onderzoek zijn beoogde doeleinden heeft behaald, namelijk het beschrijven en systematiseren van erf- en schenkbelastingwetten als zodanig en het doen van voorstellen voor afzonderlijke en holistische oplossingen voor de problemen van grensoverschrijdende erf- en schenkbelasting onder de huidige mechanismen op OESO en EU niveau. De maatstaf voor het verbeteren van bepaalde bepalingen van het OESO-successiemodelverdrag en het voorstel voor een richtlijn van de Raad om het concept “*one inheritance – one inheritance tax*” te implementeren, zijn twee belangrijke uitkomsten van het juridisch-dogmatische onderzoek dat in dit kader is uitgevoerd.

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TABLE OF CASE LAW

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- Case C-279/93 *Finanzamt Köln-Altstadt v Roland Schumacker* [1995]
- Case C-28/95 *A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam* [1997]
- Case C-307/97 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt* [1999]
- Case C-364/01 *The heirs of H. Barbier v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen* [2003]
- Case C-385/00 *F.W.L. de Groot v Staatssecretaris van Financiën* [2002]
- Case C-55/00 *Elide Gottardo v Istituto nazionale della previdenza sociale (INPS)* [2002]
- Case C-234/01 *Arnoud Gerritse v Finanzamt Neukölln-Nord* [2003]
- Case C-403/03 *Egon Schempp v Finanzamt München V* [2005]
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- Case C-513/03 *Heirs of M. E. A. van Hilten-van der Heijden v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* [2006]
- Case C-170/05 *Denkavit Internationaal BV and Denkavit France SARL v Ministre de l'Économie, des Finances et de l'Industrie* [2006]
- Case C-290/04 *FKP Scorpio Konzertproduktionen GmbH v Finanzamt Hamburg-Eimsbütte* [2006]
- Case C-379/05 *Amurta SGPS v Inspecteur van de Belastingdienst/Amsterdam* [2007]
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- Case C-497/10 *Barbara Mercredi v Richard Chaffe* [2010]
- Case C-510/08 *Vera Mattner v Finanzamt Velbert* [2010]
- Case C-132/10 *Olivier Halley, Julie Halley and Marie Halley v Belgische Staat* [2011]
- Case C-25/10 *Missionswerk Werner Heukelbach eV v Belgian State* [2011]
- Case C-181/12 *Yvon Welte v Finanzamt Velber* [2013]
- Case C-589/10 *Janina Wencel v Zakład Ubezpieczeń Społecznych w Białymstoku* [2013]
- Case C-303/12, *Guido Imfeld, Nathalie Garcet v État belge* [2013]
- Case C-211/13 *European Commission v Federal Republic of Germany* [2014]
- Case C-133/13 *Staatssecretaris van Economische Zaken and Staatssecretaris van Financiën v Q* [2014]
- Case C-127/12 *European Commission v Kingdom of Spain* [2014]
- Joined Cases C-10/14, C-14/14 and C-17/14 *J.B.G.T. Miljoen and Others v Staatssecretaris van Financiën* (C-10/14), X (C-14/14) and C-17/14 (*Société Générale*) [2015]
- Case C-479/14 *Sabine Hünnebeck v Finanzamt Krefeld* [2016]
- Case C-123/15 *Max-Heinz Feilen v Finanzamt Fulda* [2016]
- Case C-244/15 *European Commission v Hellenic Republic* [2016]
- Case C-98/16 *European Commission v Hellenic Republic* [2017]
- Case C-283/15 *X v Staatssecretaris van Financiën* [2017]
- Case C-679/17 *Vlaams Gewest en Vlaams Gewest tegen Johannes Huijbrechts* [2018]
- Case C-289/20 *IB v FA* [pending]

INDEX

(The index refers to paragraphs).

A

- abuse 3.1.1.1.1, 3.1.1.1.2, 3.1.1.5.2,
3.1.2.4, 8.2.1, 8.2.3.2.1, 8.4.2
- administrative difficulties 1.1.2, 3.1.3, 3.2.1.2, 3.3.1, 5.4,
6.4
- arrangements
 - fideicommissum 1.1.1.3, 4.2.3, 5.1.9,
 - foundations 1.1.1.3, 2.1.2, 5.1.4, 5.1.9, 5.2.1,
6.1.4.2, 6.1.4.3
 - trusts 1.1.1.3, 4.2.3, 5.1.8, 5.1.9,
6.1.6.2.3, 6.1.7.3
 - usufruct 1.1.1.3, 2.1.2, 3.1.1.7, 4.2.3,
5.1.7, 5.1.9, 6.1.7.1.2, 8.2.2.2

C

- civil law
 - family law 1.1.1.3, 3.1.1.5.1, 3.1.2.1.3, 4.2.3,
7.3.3.1.1
 - matrimonial property law 1.1.1.3, 3.1.1.5.1, 3.1.2.1.3, 4.2.3
 - law of succession 1.1.1.3, 3.1.1.5, 3.1.2.1.3, 4.2.3,
8.3.1.2.4
- comprehensive treaty 6.1.6.2.2
- consolidated treaty 6.1.6.2.2

D

- death taxes
 - estate and inheritance taxes 2.1.1
 - *mortis causa* capital gains 2.1.2
 - *mortis causa* income taxes 2.1.2
- debts 2.2.1, 3.1.1.8, 3.1.3.2.1, 3.2.1.1,
5.1.10, 5.3.2, 6.1.7.1.3, 6.3.2,
7.1.1, 7.3.1, 7.3.2, 7.3.3.1.4
- discrimination 1.1.2, 3.1.3, 3.2.1.2, 3.3.3.3, 5.3,
5.4, 6.3, 6.4, 7.1.1, 7.3, 8.4.1,
8.4.2, 8.4.3
 - compliance 3.1.3.6, 3.1.3.7, 3.1.3.8, 3.1.3.9

- debts	3.1.3.1
- objective tax exemptions	3.1.3.3
- tax rates	3.1.3.5
- subjective tax exemptions	3.1.3.2
- valuation rules	3.1.3.4
Double or multiple non-taxation	5.2
- jurisdictional double or multiple non-taxation	3.1.2.1
- relief by the state of the personal nexus	3.1.2.2
- abstention of the state of the objective nexus from taxing	3.1.2.3
- tax abuse	3.1.2.4
double or multiple taxation	1.1.1.1, 1.1.2, 3.1.1, 3.3.3.1, 5.1, 6.1, 7.1
- residence vs situs	3.1.1.10
- residence vs residence	3.1.1.1.1, 3.1.1.10
- situs vs situs	3.1.1.10
E	
EU compliant inheritance and gift tax	7.3.1, 7.3.2, 8.4.2, 8.4.3
- escape clause	3.1.1.5.3
- habitual residence	3.1.1.5.3, 8.2., 8.3.1.2
- Regulation (EU) No 650/2012	3.1.1.5.3, 8.2.1, 8.2.2.2, 8.2.4, 8.2.5, 8.3.1, 8.3.2, 8.4.2
EU Social Security Regulation	8.2.1, 8.3.1.2.2, 8.3.1.2.3
F	
fundamental freedoms EU	1.1.2, 3.3.3.1, 3.3.3.3, 7.1.1, 7.3.1, 7.3.2
- disparities	7.1.1
- Directive 88/361	3.3.3.3, 8.2.6, 8.4.2, Appendix IV
- juridical double taxation EU	1.1.2, 7.1.1, 7.1.2.1, 8.2.3.2.1
- negative harmonisation	1.1.2, 3.3.3.3, 7.3.1
- proportionate subjective tax exemptions	7.3.3.1.3
- <i>Schumacker</i> doctrine	3.3.3.3, 7.3.3
fractional taxation	7.3.3.1.3
H	
Harmonisation	
- Article 114 TFEU	8.2.4
- Article 115 TFEU	7.1.3, 8.2.4, 8.4.2
- Article 116 TFEU	8.2.4

I

income tax report 2015	3.2.2
inheritance tax report 2015	1.2.2, 3.1.1.10, 3.1.2.1.4, 3.1.4.1, 3.1.4.2.2, 3.2.2, 5.3.1, 7.1, 7.1.4.1, 8.2.1, 8.2.5,
- enforcement mechanisms against discrimination	8.4.3
- EU Directive	8.4.2, Appendix IV
- habitual residence	8.3.1.2.4
- single taxation	8.2.1, 8.3.2

J

justifications of death and gift taxation	1.1.1.2, 2.4, 4.1
- ability-to-pay-taxes justification	2.4.1
- windfall justification	2.4.2
- tax equality justification	2.4.3
- diffusion-of-wealth justification	2.4.4
- sluice justification	2.4.5
- work stimulating justification/incentive to work justification	2.4.6
- wages-for-work justification	2.4.7
- justification of less pain	2.4.8
- profit justification	2.4.9
- belated fee justification	2.4.10
- financing of the probate costs	2.4.11
- penalty for the deceased's tax evasion (the back- taxes theory)	2.4.12
- the substitution for not imposed taxes justificati- on (apart from tax evasion)	2.4.13
- a means for the abolition of the intestate inheritance	2.4.14

M

MLI	6.1.8.2, 7.1.4.1
multilateral tax convention	5.1.2, 6.1.2.2.2, 7.1.4.1, 8.1, Appendix II
mutual agreement procedure	
- Council Directive 2017/1852/EU	7.1.4.1, 7.1.4.2, 7.4.3, Appendix III
- OECD IHTMTC	3.2.1.1, 5.1.10, 6.1.8
mutual assistance EU	
- Council Directive 2010/24/EU	3.3.3.4, 3.4, 7.4.2, Appendix II
recovery of claims	3.3.3.4
- Council Directive 2011/16/EU	3.3.3.4, 3.4, 7.4.2, Appendix II

N

Neutralisation 7.3.3.2

O

objective nexus 2.2.1.2

objective tax exemptions 2.1.1, 3.1.3.2.3, 3.3.3.3, 7.3.1, 7.3.3.1.4, 8.4.1

OECD ICTMTC 1.2.2, 3.2.1.1, 5.1.3, 5.1.4, 5.2.1, 5.3.2, 6.1.3, 6.1.4., 6.1.7, 6.1.8, 6.2, 6.3.2, 7.1.2.1, Appendix I

OECD Model Tax Convention for the avoidance of double taxation with respect to taxes on inheritance, estates and gifts

- 1966 OECD IHTMTC 3.2.1.1
- 1982 OECD IHTMTC 1.3, 3.2.1.1
- companies holding immovable property 5.1.8, 5.2.2
- conflicts of qualification 5.1.8, 5.2.2, 6.1.7, 6.1.6.2.2, 6.2.2
- distributive rules 3.2.1.1, 3.2.1.2, 5.1.7, 5.1.8, 5.2.2, 6.1.2.2.2, 6.2.1, 6.2.3
- domestic law classifications 6.1.7.3, 6.2.2.3
- factual double non-taxation 3.2.1.2, 6.1.2.2.2
- fiscal domicile 3.2.1.1, 4.2.1, 5.1, 5.2, 6.1.1, 6.1.2, 6.1.3, 6.1.5, 6.1.7, 6.2.1, 6.2.2, 6.2.3
- formalities connected with the taxation 5.4.2, 6.4
- interests in partnerships 5.1.8, 5.2.2, 6.1.7.3
- interpretation of the treaty rules 6.1.7.1, 6.2.2.1
- multiple taxation 5.1.2, 6.1.2
- mutual agreement procedure 5.1.3, 5.1.7, 5.1.9, 5.1.10, 5.4.1, 6.1.3, 6.1.6, 6.1.7, 6.1.8, 6.4
- narrow scope 5.1.1, 5.1.2, 6.1.1, 6.1.1.2, 6.1.2.1, 6.1.2.2.1
- non-discrimination provision 3.2.1.1, 5.3.1, 5.3.2, 5.4.2
- overlaps with the OECD ICTMTC 5.1.4, 5.1.6, 5.2.1, 6.1.4, 6.2.1
- primary taxing rights 5.1.3, 6.1.1.1, 6.1.3.1, 6.1.3.2.1, 6.1.3.2.2
- property held in a trust 5.1.8, 5.2.2
- exemption method 3.2.1, 5.2.2, 5.2.3, 6.2.3
- credit method 5.1.5, 5.1.6, 6.1.1.2, 6.1.5, 6.2.3
- special features of the law of the Contracting States 3.2.1.2, 5.1.9
- termination 5.2.3, 6.2.3

- tiebreaker rule	3.2.1.1, 5.1.3, 6.1.1, 6.1.2, 6.1.3, 7.1.2.3
- treaty application to the facts	6.1.7.2, 6.2.2.2
- undistributed estates	5.1.8, 5.2.2
P	
personal nexus	2.2.1.1
- domicile	2.2.1.1, 3.1.1.1.2
- domicile of choice	2.2.1.1
- domicile of origin	2.2.1.1
- extended domicile rules	3.1.2.1.4, 6.1.1.2.3, 6.1.3.2.1
- extended residence rules	3.1.2.1.4, 3.3.3.3
- residence	2.2.1.1, 3.1.1.1.1
private international law	2.2.1.2, 3.1.1.5.2, 3.1.1.5.3, 8.2.2.2
- connecting factor	3.1.1.5.2, 3.1.1.5.3, 8.2.1, 8.2.2.2, 8.3.1
- lex rei sitae	3.1.1.5.2, 8.2.2.2
proposed inheritance and gift tax	1.3, 1.4.1, 4.1, 4.2, 5, 6, 7.1.1, 7.1.4, 7.3.1
- benchmark	1.3, 1.4.2, 1.4.3, 4.1, 4.2
Q	
qualification	3.1.1.6, 3.1.2.1.4
R	
recommendation 2011/856/EU	1.1.2, 3.3.1, 3.3.2, 7.1, 7.2, 8.1
recovery of claims	3.3.3.4
- Council Directive 2011/16/EU	3.3.3.4, 3.4, 7.4.2, Appendix II
relief double taxation	3.1.1.10
- ordinary credit	3.1.1.10, 7.3.3.2
S	
subjective tax exemptions	2.1.1, 2.1.3, 3.3.3.3, 3.1.3.2.2, 3.3.3.3, 4.2.2, 7.3.1, 7.3.3.1, 7.3.3.2, 7.3.3.3
T	
taxes on gifts	2.1.3
TEU	7.3.2
- sincere cooperation	7.3.2
- subsidiarity	8.2.3.1
- proportionality	8.2.3.2

V

valuation	2.2.1, 3.1.1.7, 3.1.1.10, 3.1.3.2.4, 3.1.4.2, 3.3.3.3, 5.1.7, 5.3.2, 6.1.8.1, 7.3.1, 7.3.3.1.3, 7.4.1
- cadastral value	2.2.1
- market value	2.2.1

W

Working Paper 2011 EC	3.3.3.3
Working Paper 2011 – Impact Assessment	7.1.3, 8.2.3
worldwide inheritance or estate tax jurisdiction	2.2.1.1, 3.1.1.1.3, 3.1.1.2, 3.1.1.5.2, 3.1.4.1, 6.1.1.2, 7.3.3.1.2, 8.2.3.2.1

CURRICULUM VITAE

Mr. Vassilis Dafnomilis (1990) practices as a tax lawyer at PwC Netherlands's Knowledge Centre and the EU Direct Tax Group, with EU tax law as his main field of expertise. He is also a lecturer at the University of Amsterdam and the academic coordinator of the UvA/IBFD Advanced LL.M. in International tax law. Vassilis graduated *cum laude* in law from the Aristotle University of Thessaloniki (Greece) in 2012, followed by the postgraduate programme in EU law at the University of Athens in 2014 and the Advanced LL.M. in European tax law at Leiden University and ITC Leiden in 2015. Since November 2015, he has pursued his doctoral studies at Leiden Law School (Leiden University). Vassilis has published several articles in English, Dutch and Greek journals, including *European Taxation*, *EC Tax Review*, *Weekblad Fiscaal Recht*, *NL Fiscaal* and *Hellenic Review of European Law*. Vassilis lives with Stef and their dog Kenji in Leiden.

