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

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CHAPTER 1

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 taxes[1] 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 freedoms[10] while a coordination measure issued by the EC[11] 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 cooperation[13] and assistance in the collection of taxes[14] 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 taxes[15] 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 law[21] 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/EU[26] and 2017/1852/EU[27] 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. L.84/1.

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

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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).