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

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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

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, and[3]
- 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]

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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 2015[18]) 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 Jolingen, "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 Directive[28] 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 Directive[29] 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 IHTMTC 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 taxes[40] 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 State[48] 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 law[64] 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 allowance[67] 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 internationals* (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 Davì 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]

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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 Davì 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 Regulation[92] 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 Regulation[94] "[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 cho[o]se 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.