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

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PART IV: SUMMARY AND CONCLUSIONS

CHAPTER 9

Summary and conclusions

In the first chapter of this study, I explained why I am of the view that it was necessary to write a book on the problems of cross-border death and gift taxation. A research work concerning death taxes and taxes on gifts in a cross-border setting would seem, at first sight, incongruous with the ongoing academic research that primarily focuses on income taxes. To a certain extent, this seems reasonable given the clear interest from states and international organisations (in particular, the Organisation for Economic Cooperation and Development: the OECD, and the European Union: the EU) in cross-border income tax issues relating to base erosion and profit shifting (BEPS), the relatively low contribution of death taxes and taxes on gifts to the revenue inflow and the abolition of death taxation by some states. Cross-border death and gift taxation, therefore, seems to be a neglected area of law by states, international organisations and academia: to date, limited progress has been made towards addressing the problems of death and gift taxation in cross-border situations at the national, the OECD and the EU level, and the current academic literature seems to be lagging behind in discussing the problems due to a lack of international developments. As a result, the problems remain unsolved in many instances, thereby nowadays making the need for separate and holistic solutions even more imperative. The term "separate solution" means a solution that deals with (aspects of) only one problem of cross-border death and gift taxation and is distinguished from the term "holistic solution", which means a solution which deals with all problems of cross-border death and gift taxation altogether.

Before presenting these problems, in chapter 2 I provided an overview of death taxes and taxes on gifts. This overview is in line with the first objective of the study, i.e. the description and systemisation of death and gift tax laws as such. More specifically, I observed that death is an event that can trigger a variety of taxes in a cross-border setting: inheritance taxes, estate taxes, *mortis causa* income and capital gains taxes, land or registration taxes, property transfer taxes or even indirect taxes on business successions. Elements such as taxable event, personal and objective nexus rules, tax rates and available objective and subjective exemptions differ from one type of death tax and tax on gifts to another. In addition, I noted in this chapter that the death tax revenue rates in most OECD member countries are declining. The revenue from these taxes represents less than 1% of the total revenue of the states, and one can question whether states (should) attach major importance to death taxes in general. However, in the course of my research, it became clear that the *justifications* for death taxes are considered more important than their revenue-raising capacity. More specifically, I found a total of fourteen justifications of death taxation as discussed in the academic literature or the recent work of the OECD or invoked by the states when introducing a death tax (in particular, an inheritance and estate tax). Most of those justifications seem to have a social background, which confirms, in my view, that revenue raising is not the primary objective of death taxes. However, not all justifications

can be considered to be primary justifications of death taxation. Moreover, there is a degree of overlap between certain justifications.

In my view, the justifications of death taxation can be classified in four categories. The first category refers to justifications which are explained from the perspective of the beneficiary. This category included most of the justifications, i.e. the ability-to-pay-taxes justification, the tax equality justification, the diffusion-of-wealth justification, the work stimulating justification, the wages-for-work justification and the justification of less pain. The second category included justifications, which are explained from the perspective of the deceased, i.e. the penalty for the deceased's tax evasion justification, the belated fee justification and the substitution for not imposed income taxes justification. The third category included justifications, which are explained from the perspective of both the deceased and the beneficiary, i.e. the windfall justification and the profit justification. Finally, the fourth category included justifications explained from the public good perspective, namely the financing of the probate costs and a means for the abolition of useless intestate inheritance justification.

In my view, the windfall justification seems to be the most convincing, complete and unique justification of death taxation (and, by analogy, gift taxation) as it explains why states consider it fair to tax incidental and unexpected receipts of wealth ("*why* to tax") and at the same time to protect the family property when received by family members ("*how* to tax"). Therefore, this justification can explain progressivity based both on the size of the *mortis causa* transferred property (taxation of accidental transfers of property) and the degree of kinship between the parties involved (protection of family property). However, the OECD Model Tax Convention for the avoidance of double taxation with respect to taxes on inheritances, estates and gifts (OECD IHTMTC) seems to recognise both the windfall justification and the ability-to-pay-taxes justification as primary justifications of death taxation.

In chapter 3, I discussed the problems of cross-border death and gift taxation. These problems, in my view, are a) double and multiple taxation, b) double or multiple non-taxation, c) discriminatory treatment of cross-border inheritances and donations, and d) administrative difficulties. In brief, the parallel application of death taxes and taxes on gifts by two or more states may often result in double or even multiple taxation of a cross-border inheritance and donation. The national laws differ substantially (e.g. in terms of the personal nexus concepts, the assessment of the personal nexus at a different person) and do not always consider the international dimension of an inheritance and donation. As a result, a unilateral double taxation relief should not always be taken for granted.

In the same vein, due to the differences in national laws, double or multiple non-taxation is conceivable. Moreover, double or multiple non-taxation can arise in situations where the state of the personal nexus provides a unilateral double taxation relief by means of an exemption but the property is not actually taxed in the state of the objective nexus (e.g. because the property does not fall within the definition of "domestic assets"). In addition, double or multiple non-taxation can arise in situations where the state of the objective nexus abstains from levying death taxes and taxes on gifts while the state of the personal nexus does not levy death taxes and taxes on gifts or provides for an allowance/exemption/deduction/credit. Finally, double or multiple non-taxation can arise in the case of tax abuse.

Moreover, states may discriminate a cross-border inheritance and donation. In particular, they may pose additional requirements or simply deny granting benefits such as tax exemptions and allowances to inheritances and donations with a cross-border element. Finally, administrative difficulties may arise in the event of a cross-border inheritance and donation for both taxpayers and tax authorities. The applicable administrative tax procedures of a state may be discriminatory against a cross-border inheritance and may fail to coordinate with administrative tax procedures of another state.

I am of the opinion that the OECD IHTMTC and the 2015 report of the European Commission (EC) expert group "Ways to tackle inheritance cross-border tax obstacles facing individuals within the EU" (hereinafter referred to as "the 2015 inheritance tax report" or "the report") confirm the above problems. This also indicates, in my view, the appropriate levels at which the problems can be most effectively resolved by means of separate and holistic solutions: the OECD and the EU level. This is possible because both levels provide mechanisms that can guarantee a coordinating approach to address the problems.

First, at the OECD level, the OECD IHTMTC is a valuable tool for dealing with the problems at hand. The model has arguably contributed to addressing the double taxation problem associated with death and taxes on gifts and, in particular, taxes levied on inheritances, estates, and gifts. Moreover, the Commentary of the OECD IHTMTC provides useful guidelines to states wishing to conclude an inheritance and gift tax treaty drafted along the lines of the OECD IHTMTC ("the inheritance and gift tax treaty"). It also permits the states to deviate from the Articles of the model and often suggests alternative language in that regard. It could be argued, however, that certain provisions of the OECD IHTMTC and its Commentary can be improved, having regard to the objectives of the inheritance tax model and the principles reflected in its Commentary. In my view, a model that is in line with (some of) these principles seems to address the problems of cross-border inheritances and donations in a more comprehensible manner (considering the objectives of the OECD IHTMTC) than a model that is not in line with (some of) these principles.

At the EU level, I observe that the issuance of EU legislation for the smooth operation of the internal market is possible and for this reason, this level seems to be appropriate to address the problems of cross-border inheritances and donations. I observed, however, that no harmonisation measure had been proposed to date to address these problems. Only the EC's recommendation of 15 December 2011 regarding relief for double taxation of inheritances (the recommendation) has attempted to coordinate the EU Member States' unilateral double tax relief provisions, but it seems to have failed to achieve this objective. Furthermore, the case law of the Court has contributed to the so-called "negative harmonisation" of death taxes and taxes on gifts within the EU. However, in my view, the Court's case law has two aspects that can be further discussed and explained. Finally, the EU Directives 2011/16/EU and 2010/24/EU do not deal with administrative problems of cross-border inheritances and donations at the micro-level.

Part II deals with the separate solutions, which the OECD and EU mechanisms can provide for the problems of cross-border death and gift taxation. More specifically, the reaction of the OECD to these problems was the suggestion of the OECD IHTMTC in 1966, which was subsequently updated in 1982. However, as mentioned above, it could be argued that certain provisions of the OECD IHTMTC and its Commentary can be improved, having regard to the objectives of the inheritance tax model and the principles reflected in the

Commentary. Therefore, in dealing with the suggested improvements to certain provisions of the model for addressing the problems of cross-border inheritances and donations, I designed a benchmark. In that regard, I observe that the OECD IHTMTC does not have a concrete benchmark. However, if one reads between the lines of OECD IHTMTC and its Commentary, it could be argued that certain principles of death and gift tax laws can be identified. More specifically, as the OECD IHTMTC reflects the principles of death and gift tax laws of the majority of the OECD member countries, I argue that such a benchmark can be found only within the system that the OECD has introduced, namely the OECD IHTMTC and its Commentary. This is the reason why the justifications of death and gift taxation – as presented in chapter 2 of this study – cannot operate *as a whole* as a benchmark; they are *exogenous* to the system which the OECD IHTMTC has introduced. More specifically, they refer to existing inheritance and gift tax laws whereas the model applies, in my view, to one concept of an inheritance and gift tax. I decided to call this concept "the proposed inheritance and gift tax" which is the result of compromises among the OECD member countries. It is also important to note that the fact that a model does not meet (some of) the elements of the benchmark does not automatically mean that it becomes ineffective or a "bad model". However, a model that is in line with (some of) the elements of this benchmark seems to address, in my view, the problems of cross-border inheritances and donations in a more comprehensible manner (considering the objectives of the OECD IHTMTC) than a model that is not in line with (some of) these elements.

The first element of the proposed inheritance and gift tax is its *mortis causa* or *inter vivos* imposition. More specifically, the proposed inheritance and gift tax is levied by reason (of the event) of death or a donation to the exclusion of other events that may trigger taxation. On the contrary, the taxable event, the taxable property, the taxable person and the starting point of taxation seem to be immaterial as derived from Articles 2 and 9B (1) of the model. Nevertheless, I note that donor-based taxes seem to take priority over donee-based taxes. In the same vein, starting points of taxation that reflect a degree of integration of a person with the community of a state seem to take priority over starting points of taxation that do not reflect such a degree of integration. The levying of the tax on *mortis causa* or *inter vivos* windfalls serves as the second element of the benchmark. More specifically, the proposed inheritance and gift tax is levied on the unearned advantage, the windfall that the recipient receives without contributing to it. This can be derived from Articles 2(2) and Commentary on Article 9A of the model. The third element of the benchmark of the proposed inheritance and gift tax is the definition of some critical terms for its imposition in accordance with civil law (family law, matrimonial property law and the law of succession). The Commentary on Articles 1 and 4 of the OECD IHTMTC already acknowledges the connection of the existing inheritance and gift tax laws with the applicable civil laws in several sections. Finally, the fourth element of the proposed inheritance and gift tax benchmark is the ability-to-pay-taxes justification. The *mortis causa* or *inter vivos* transfer of property increases the beneficiaries' financial capacity and, thus, their ability-to-pay-taxes. The recognition of the ability-to-pay taxes justification as the fourth element of the proposed inheritance and gift tax can mainly be derived from the Commentary on Article 9A of the OECD IHTMTC, which refers to the application of the progression with exemption method.

In chapter 5 of this study, I discussed the provisions of the OECD IHTMTC that, in my view, can be improved having regard to the objectives of the OECD IHTMTC and the proposed inheritance and gift tax. More specifically, the discussion of these provisions takes place in relation to each problem of cross-border inheritances and donations. Furthermore, I noted that all the above-mentioned problems seem to severely affect the application of the proposed inheritance and gift tax. More specifically, when the cross-border inheritance or donation is taxed in more than one state/is not taxed anywhere/is discriminated against/ subject to many administrative difficulties, the application of the ability-to-pay-taxes and the windfall justifications – two elements of the proposed inheritance and gift tax – seems to be severely hindered. The above justifications ***over-apply*** or ***under-apply*** in a cross-border setting and thus death and gift taxation seems to fail to achieve its objectives. Such over-application or under-application does not, however, seem to take place in the event of a domestic inheritance and donation. Arguably, death and gift taxation also seems to fail to achieve its objectives even if the model solves the problem but in a manner that does not seem to take into account (some of) the elements of proposed inheritance and gift tax. As a result, the OECD member countries may not easily endorse the model that in certain instances seems to contradict their death and gift tax laws as well as the elements of the proposed inheritance and gift tax.

More specifically, in relation to the double or multiple taxation problem, I observed that the ten-year limitation period for the exercise of the subsidiary taxing right provision and the underlying tax-abusive motive could be revisited having regard to the objective of the OECD IHTMTC of addressing double taxation and the proposed inheritance and gift tax. Furthermore, I noted that the model does not seem to deal with common cases of multiple taxation, which is addressed only if the state of the deceased's fiscal domicile has concluded a treaty with all the other states. This situation can be improved, in my view, by an extension of the scope of the term "fiscal domicile" or a suggestion of a multilateral convention. Moreover, the tiebreaker rule for individuals seems to disregard the deceased's or the donor's intention to fiscally domicile in a Contracting State and does not require a minimum period of presence in a Contracting State. The tie-breaker rule, therefore, may be viewed as being counter to a) the manner in which some states determine the connection of the deceased or the beneficiary with their territory, and b) the third element of the proposed inheritance and gift tax (connection with civil law). In addition, I observed that overlaps between an inheritance and gift tax treaty and an income and capital tax treaty are conceivable. These overlaps can, in certain situations, give rise to double taxation of the cross-border inheritance and donation. Such an outcome, however, seems to contradict the objective of the OECD IHTMTC of avoiding double taxation. Furthermore, the double taxation relief of Article 9B (credit method) does not seem to be broadly described in the OECD IHTMTC Commentary. As a result, the interaction between a) estate and inheritance taxes, and b) the different types of death and gift taxes becomes, in my view, a challenging issue. In my view, the wording of the Commentary to Article 9B of the OECD IHTMTC can be improved having regard to the objective of the OECD IHTMTC of addressing double taxation and the elements of the proposed inheritance and gift tax. In addition, I observed that the lack of common valuation rules could often give rise to double taxation. Nevertheless, the non-application of the model to property valuation rules does not seem to contradict the objectives of the model as the model does not aim at harmonising the Contracting States'

legislation. What's more, conflicts of qualification due to the differences in domestic law classifications, the differences in treaty application to the facts at hand and the interpretation of the treaty rules are conceivable. This type of conflicts, however, seems to counter the objective of the OECD IHTMTC of addressing double taxation and the proposed inheritance and gift tax. Moreover, I observed that double taxation can arise concerning the special features of the Contracting State, namely civil or common law arrangements such as trusts, usufruct, fideicommissum, and foundations. Nevertheless, I argued that the deliberate non-inclusion of a general rule applicable for situations involving transfers to and from the above legal arrangements does not seem to counter the objectives of the model and the elements of the proposed inheritance and gift tax. This is because the model does not aim at harmonising the Contracting States' legislations. Finally, I observed that the mutual agreement procedure can be improved having regard to the objective of the model of addressing double taxation.

With regard to the double or multiple non-taxation problem, I observed that the model deals in a few sections with cases of double non-taxation. Therefore, one could argue that the model aims at the avoidance of double non-taxation as well. However, I observed that overlaps between OECD IHTMTC and the OECD Model Convention on Income and Capital (referred hereinafter, the OECD ICTMTC) could give rise to double non-taxation in certain situations. This situation seems, however, to counter the objective of the OECD IHTMTC of avoiding double non-taxation and can be addressed by improving the wording of Article 2 of the model. In addition, certain conflicts of qualification may give rise to double non-taxation. This situation, however, seems again to contradict the objective of the model of addressing double non-taxation. Finally, I noted that double non-taxation due to the compulsory application of the inheritance and gift tax treaty by each Contracting State – even following the abolition of the inheritance and/or gift tax laws by a Contracting State – also seems to contradict the above-mentioned objective of the model.

Concerning the discrimination problem, I observed that the OECD IHTMTC's nationality non-discrimination provision is centred on the persons eligible to invoke the non-discrimination provision and not the estates to which the model applies. Furthermore, the wording of the provision gives the impression that the discriminatory element of the legislation of a Contracting State shall only refer to the nationals of each Contracting State. It is therefore unclear, in my view, whether the provision can be invoked in the case of discriminatory property valuation and debt deduction rules. As a result, the provision seems to fail to address the discrimination problem of cross-border inheritances and donations in certain instances. As a result, it can be improved having regard to the objective of the OECD IHTMTC of addressing certain cases of discrimination of cross-border inheritances and donations, and the elements of the proposed inheritance and gift tax.

Finally, concerning the administrative difficulties of the cross-border inheritances and donations, I observed that Articles 11 and 12 of the OECD IHTMTC does not seem to address the administrative difficulties that beneficiaries may encounter in the state of the objective nexus or the state of the personal nexus. Therefore, this study did not discuss the mutual agreement procedure and the exchange of information frameworks from this perspective. Nevertheless, I reasoned that the proposed improvements to the wording of the scope of the nationality non-discrimination provision can arguably improve the application

of the non-discrimination provision by offering treaty protection against discriminatory procedural tax provisions of the Contracting States.

Consequently, in chapter 6, I suggested separate solutions to address the above-mentioned provisions of the model. I divided the update work into four parts, which corresponded to the problems of cross-border death and gift taxation. Concerning the double or multiple taxation, I observed that the subsidiary taxing right provision seems to counterbalance the narrow scope of the model. However, the ten-year limitation period for the exercise of these rights and the underlying notion that these rights are exercised for anti-abuse reasons should apply in my view only if the other Contracting State seeks to apply its extended domicile rules and not in the other cases. Furthermore, I suggested that the inclusion of the deceased's or donor's nationality as a subsidiary criterion for the establishment of fiscal domicile as well as the conclusion of a multilateral tax treaty seem to address the problem of multiple taxation of cross-border inheritances and donations. Moreover, I suggested the inclusion of a specific but optional tiebreaker rule and/or the update of the current one with elements, which would be more in line with the manner in which certain states establish the lifelong attachment of a person with their territory and the proposed inheritance and gift tax. Concerning the overlaps between the two OECD models, I addressed the issue of the parallel application of the two types of treaties to a single transfer or property by i) suggesting a transition from an exhaustive list of Article 2(3) of the OECD IHTMTC to an indicative list, and ii) underlining the need for a definition of the term "substantially similar" to an existing tax on estates and inheritances and on gifts. In addition, I suggested that the double taxation relief of Article 9B (credit method) broadly apply and not be limited to taxes that are levied based on the same taxable event or paid by the same person. This is true for the connection between the estate and inheritance taxes as well as death and gift taxes with *mortis causa* and *inter vivos* income and capital gain taxes. Moreover, I discussed how the OECD IHTMTC could more effectively deal with conflicts of qualification that result in double taxation. Finally, yet nonetheless important, I suggested the inclusion of an arbitration clause to the mutual agreement procedure of Article 11 of the OECD IHTMTC.

Concerning the double or multiple non-taxation problem, I suggested that i) a transition from an exhaustive list of Article 2(3) of the OECD IHTMTC to an indicative list, and ii) the definition of the term "substantially similar" to an existing tax on estates and inheritances and on gifts can also address cases of double non-taxation due to the application of two different types of treaties to a single transfer of property. Moreover, I discussed how the OECD IHTMTC could more effectively deal with conflicts of qualification that result in double non-taxation. Finally, I suggested updates to Article 16 of the OECD IHTMTC to address the double non-taxation issue arising from the termination of an inheritance and gift tax treaty before the minimum application period.

Concerning the discrimination problem, I suggested updated language for the OECD IHTMTC's nationality non-discrimination provision that arguably broadens the scope of the provision. Finally, concerning the administrative difficulties of cross-border inheritances and donations, I observed that the update of the OECD IHTMTC's nationality non-discrimination provision would increase the effectiveness of the provision in dealing with discriminatory procedural tax legislation of the Contracting States.

A new version of the OECD IHTMTC is included in appendix I of this study. This version incorporates the suggested improvements to the provisions of the model having regard to the objectives of the model and the elements of the proposed inheritance and gift tax. Moreover, the suggested version of the OECD IHTMTC includes general updates to the provisions of the model that have been inspired by the 2017 version of the ICTMTC. It is important, however, to clarify that these amendments were incorporated for the sake of completeness and therefore, do not aim at improving a provision of the model or its Commentary having regard to the objectives of the model and the elements of the proposed inheritance and gift tax.

In chapter 7, I reviewed the progress made in the EU towards addressing the problems of cross-border inheritances and donations. It follows that, although the double and multiple taxation problem of cross-border inheritances and donations is an obstacle to the smooth operation of the internal market, very few initiatives have been taken at the EU level to address this issue. In that regard, I noted that the EC's recommendation was issued some years ago and has not been considered by many EU Member States. Although it contains some innovative provisions, it does have some aspects that can be improved. In addition, I observed that the conversion of the recommendation to an EU Directive prerequisites a harmonised single tax base, which, in my view, seems to be a disproportionate solution to the problem of double and multiple taxation and non-taxation of inheritances. On the other hand, a multilateral convention taking the form of an EU Directive based on the optimised OECD IHTMTC and inspired by the innovative provisions of the recommendation has the potential to address the problem of double and multiple taxation of inheritances and donations. The same applies to the extension of the scope of the Council Directive 2017/1852 to double taxation disputes arising from the application of an inheritance and gift tax treaty.

Concerning the double or multiple non-taxation problem, I observed that Article 4.2. of the EC's recommendation deals with double or multiple non-taxation issues. However, due to the lack of a common definition of the terms used in the recommendation, double or multiple non-taxation of the cross-border inheritance and donation is still conceivable. In that regard, I noted that the conversion of the recommendation to an EU Directive would be a disproportionate solution to the objective of addressing the double or multiple non-taxation problem of inheritances and donations, such as in the case of double or multiple taxation. However, the conclusion of a multilateral convention would, in my view, be a step in the right direction when dealing with double or multiple non-taxation issues.

Regarding the discrimination problem of cross-border inheritances and donations, I observed that the Court's case law on EU inheritance and gift taxation has contributed the most to the so-called "negative harmonisation" of the EU Member States' inheritance and gift tax systems, thereby providing guidance to the EU Member State on how to apply an EU compliant inheritance and gift tax system. Concerning the rejection of the *Schumacker* doctrine in EU inheritance and gift taxation, I observed that the Court did not distinguish between objective and subjective tax exemptions and it did not provide a convincing answer as to why the tax exemptions of the income tax systems differ from the tax exemptions of the inheritance and gift tax systems. Although, in my view, it arrived at the correct conclusion that the *Schumacker* doctrine shall not apply to the latter tax exemptions, the explanation of the Court seems to have some points that require additional explanation

(e.g. the objective of subjective tax exemptions of death tax laws as compared to the objective of subjective tax exemptions of income tax laws). Furthermore, I observed that the neutralisation argument applies in the same way, regardless of the type of the treaty concerned (i.e. an income and capital tax treaty or an inheritance and gift tax treaty).

Finally, concerning administrative difficulties of cross-border inheritances and donations, I observed that the Directives 2011/16/EU and 2010/24/EU apply to death and gift taxes. Nevertheless, I noted that these EU Directives focus on the tax authorities' level and therefore, do not deal directly with administrative difficulties at the micro level as discussed in chapter 3 of this study. I also suggested that the Directive 2017/1852/EU be amended to apply to disputes arising from the application of an inheritance and gift tax treaty.

It follows that all the solutions mentioned above to the problems of cross-border inheritances and donations are separate as they only deal with one problem. Furthermore, the separate solutions do not deal with all the aspects of a particular problem. For example, the EU Directives 2011/16/EU and 2010/24/EU focus on the tax authorities' level and do not deal with administrative difficulties at the micro level. Therefore, I observed that it must be explored whether a holistic solution to the problems of cross-border inheritance and gift taxation could apply at the EU level. This concludes part II of this study.

In part III of this study, I discussed a holistic solution to the problems of cross-border death and gift taxation. Such a solution, in my view, is conceivable only at the EU level, where harmonisation of death and gift tax laws is possible. A holistic solution for dealing with cross-border inheritance tax obstacles has already been suggested by the EC's expert group under the concept of "one inheritance – one inheritance tax" in 2015. In that regard, I observed that the concept applies in two steps. At the first step, the deceased's habitual residence has to be found given that it is used as a connecting tax criterion for the determination of the EU Member State which is allowed to tax the cross-border inheritance. At the second step, the indicated EU Member State applies its own inheritance tax laws on the whole inheritance whereas any other EU Member State is precluded from taxing elements of the inheritance. Albeit innovative, I observed that the concept could resolve the three cross-border inheritance tax obstacles that the EC's expert group identified. Notwithstanding the above, I observed that the report is not a legal document and the "one inheritance – one inheritance tax" concept requires several clarifications on the subsidiarity and the proportionality of the concept as well as its scope of application and its effect on the problems identified in chapter 3. Regarding the last point, I noted that the group identified slightly different problems of cross-border inheritances from those identified in chapter 3. Both the group and I have identified double or multiple taxation and administrative difficulties relating to cross-border inheritances as problems/obstacles of cross-border inheritances. On the other hand, I did not classify the nature and design of national inheritance taxes as problems of cross-border inheritances.

In addition, I believe the concept is proportionate to the objectives to be achieved as it harmonises only those elements of EU Member States' inheritance tax laws, which can give rise to tensions in cross-border situations: the parallel application of different personal nexus rules in combination with situs taxation. On the contrary, the concept does not harmonise the personal nexus concepts, which the EU Member States use to establish worldwide inheritance tax jurisdiction nor does it introduce a single harmonised basis of taxation to achieve its objectives. Furthermore, I observed that in certain situations

the application of the concept might give rise to double or multiple non-taxation. In that regard, I suggested that the EU Member State of the objective nexus may still be allowed to exercise its taxing rights if the EU Member State of habitual residence does not exercise its taxing rights, either because of a specific exemption, deduction, credit or allowance or because it does not levy death taxes and an abusive element is present. Nevertheless, I acknowledged that more research is required in that regard and, more specifically, as to whether an abusive element must always be present, and secondly, how abuse needs to be assessed by the EU Member States.

Furthermore, I noted that the fact that the concept seems to go beyond EU Member States' fiscal sovereignty and international tax law principles does not mean that it automatically becomes disproportionate. In all events, I acknowledged that more research is required to assess whether the EU Member States are willing to abandon the current international tax principles (as embedded in their national inheritance tax laws) to address the problems of cross-border inheritances and donations.

After clarifying some important elements of the concept, I discussed whether the concept could provide a holistic solution to the problems of cross-border inheritances and donations. In that regard, I noted that the concept could address the double or multiple taxation problem as well as administrative difficulties of cross-border inheritances. On the other hand, the concept does not seem to provide, by itself, a solution to the EU Member States' discriminatory provisions applicable to cross-border inheritances and donations. This is because at the second step of the concept the indicated EU Member State is allowed to tax the cross-border inheritance as a whole under its domestic inheritance tax law that, however, can be discriminatory.

Having considered this important finding, I put forward a proposal for an EU Directive implementing the concept. The proposed Directive could be issued under Article 115 of the Treaty on the Functioning of the European Union and apply to cross-border inheritances and donations. In that regard, a cross-border inheritance could be termed as an inheritance where the deceased has been habitually resident at the time of his death in an EU Member State and not all constituent elements of such an inheritance are confined within that EU Member State. In the same vein, a cross-border donation could be termed as a donation when the donor has been habitually resident at the time of the donation in a Member State and not all constituent elements of such a donation are confined within that EU Member State.

Furthermore, the proposed Directive would apply to a cross-border inheritance regardless of the type of death tax levied by the EU Member States concerned. Likewise, the proposed Directive would also apply to a cross-border donation irrespective of the type of tax on gifts levied by the EU Member States concerned. Most importantly, the proposed Directive would apply to a cross-border donation irrespective of the fact that the EU Succession Regulation would not apply to such a donation. In terms of the determination of the applicable inheritance and gift tax legislation, I suggested that the proposed Directive prescribe that a cross-border inheritance and donation would be subject to the legislation of only one EU Member State. The EU Member State concerned would be that of the deceased's or the donor's habitual residence. This EU Member State would thus be entitled to tax the whole cross-border inheritance and donation under its domestic inheritance and gift tax rules. On the contrary, any other EU Member State would be precluded from doing so. Consequently,

the above two-step approach would effectively address the double or multiple taxation problem as well as administrative difficulties of cross-border inheritances and donations. The two-step approach can also address double or multiple non-taxation if the Member States of situs would be allowed to tax under certain conditions.

Nevertheless, I noted that the above two-step approach does not seem to address, at first sight, the discrimination problem. This is because the legislation of the EU Member State, which the connecting tax criterion of the habitual residence would indicate, might contain discriminatory elements. Therefore, I suggested that the Directive implementing the concept include a non-discrimination clause that would oblige the EU Member States to apply their domestic inheritance and gift tax legislations in a non-discriminatory manner. In that regard, guidance could be found in the Court's case law on EU inheritance and gift taxation that has shaped the so-called "EU compliant inheritance and gift tax". Furthermore, I suggested that the proper application of the non-discrimination clause be safeguarded by a mechanism which could consist of four successive steps: a) the preparation of a survey on the EU Member States' rules on death taxes and taxes on gifts, b) the creation of an inheritance and gift tax forum for the review of the results of the survey, c) the initiation of infringement procedures against the EU Member States that maintain discriminatory inheritance and gift tax provisions, and d) the issuance of an EU Directive containing compulsory rules on abolishing of discriminatory features of EU Member States' domestic inheritance and gift tax legislation. A proposal for Council Directive implementing the "one inheritance – one inheritance tax" concept is included in appendix IV of this study.

Considering the above, I am of the opinion that this study has achieved its purpose, namely to describe and systemise the death and gift tax laws as such and to propose separate and holistic solutions to the problems of cross-border death and gift taxation under the current mechanisms at the OECD and EU level. The benchmark for improving certain provisions of the OECD IHTMTC and the proposal for Council Directive implementing the "one inheritance – one inheritance tax" concept are two important outcomes of the legal-dogmatic research performed in the context of this study.