



Report of expert group

# Ways to tackle inheritance cross-border tax obstacles facing individuals within the EU

## About the reports

This report and the report 'Ways to tackle cross-border tax obstacles facing individuals within the EU' represent the conclusions of the work of the European Commission expert group on removing tax problems facing individuals who are active across borders within the EU.

The task of the group was to assist the Commission in identifying and finding practical ways to remove any tax problems faced by individuals who move from one EU country to another to live, study, work or retire, or who invest in other EU countries, or inherit property across borders within the EU. This implied exchanging expertise and experience; identifying good practices in Member States as well as suggesting other feasible and practical ways to address the tax issues that currently arise; assisting the Commission in assessing the progress made by Member States in implementing the principles of the Commission's recommendation regarding relief for double taxation of inheritances and to provide suggestions on how to take the work in the area forward; and identifying any other feasible policy initiatives that might assist in addressing these problems.

The 21 members of the group were representatives of private sector organisations with a demonstrable interest and involvement in the topics to be discussed, such as cross-border associations, non-governmental organisations, trade unions, universities, tax associations and others. They were selected on the basis of responses received to a public call for applications, having regard to the specific tasks of the expert group, the type of expertise required and, as far as possible, to geographical and gender balance. These experts were asked to provide independent advice to the Commission. The group's mandate ran from 12 June 2014 to 30 June 2015.

The group had five meetings at which it studied available reports and other documents on cross-border tax problems, heard oral presentations and held round-table talks. Members also corresponded in writing and the rapporteurs held two drafting sessions. The expert group decided early on to divide the work into two parts: one with a focus on direct taxes in general and the other dealing with inheritance taxes.

Commission staff provided the secretariat for the group but the report is the work of the members of the group. Consequently, the report should not be construed as in any way reflecting the official position of the European Commission and its services. Neither the Commission nor any person acting on behalf of the Commission is responsible for the use which might be made of the information contained herein.

It should be noted also that not all members of the group necessarily agree with every conclusion in this report. In cases of dissent, the report reflects the views of the majority of the group's members.

European Commission

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**Ways to tackle inheritance  
cross-border tax obstacles  
facing individuals  
within the EU**

December 2015

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and Customs Union

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# Executive summary

1. In January 2014 the number of individuals living in Member States other than their home state was estimated at 14 million. The number of people leaving property situated in two or more Member States when they die is growing rapidly. Many of their families will soon discover that tax on inheritance can often be claimed by each of the Member States concerned. It does not take long for multiple taxation, even at low rates, to amount to expropriation.

## Who is affected?

2. Citizens of states which charge tax on inheritance can find themselves subject to double or multiple taxation just as easily as citizens of states which do not charge it. Tax is charged with reference to a large number of criteria, including residence, deemed residence, domicile and location of property. Every Member State is affected by the issue.
3. Individuals who have moved their residence within the EU, whether permanently or temporarily, are affected. So too, are those who have purchased property or invested across borders within the EU. Increasing numbers of people are now realising that multiple taxation may arise simply because their children have moved within the EU to seek employment or further their education. When the children inherit from their families, the state of the deceased, the children's state of residence or citizenship and the state where property is situated may all claim tax.

## How does the problem arise?

4. Double or multiple taxation arises because of the variety of ways in which tax on inheritance may be imposed. In particular, the identity of the taxpayer and the nature of the assets in the estate vary according to national law. The number of double tax conventions between Member States giving relief for double inheritance taxation is a small fraction of the number needed to resolve the problem. Unilateral relief for double taxation is frequently inadequate and sometimes does not exist at all. Relief for tax may be unavailable in cross-border situations by virtue of incompatible administrative rules or as a matter of law.

## EU action essential

5. Action at the level of the EU is essential if the problems are to be resolved. The European Commission drew attention to the problem of double taxation, in the context of small businesses, as long ago as 1994 <sup>(1)</sup>. It issued a recommendation regarding relief for double taxation of inheritances in 2011 <sup>(2)</sup>. The recommendation has not led to very much substantial change by Member States, if any, either in relation to their domestic tax regimes or in relation to the negotiation of relevant bilateral treaties. Meanwhile the numbers of families with cross-border interests is increasing. So too are the numbers of businesses affected.

## A solution

6. Action to help individuals affected by the problems outlined above is clearly essential. Without some action there cannot be full implementation of the aims of the EU and compliance with the obligations of good tax governance. Improvements in administration would certainly be helpful; tax administrations should quickly identify cross-border successions, allow more generous time limits for claiming relief and apply other rules which are appropriate to complex cross-border situations. Improving the administration of systems of multiple taxation will not, however, solve the problem. Only a change in law will do that.

## 'One succession — one tax'

7. The expert group recommends a solution which identifies one taxing system with one succession. This follows a comparable approach taken in relation to social security. The means of identifying the tax system may be based on habitual residence, which is a concept previously used in EU law. This approach does not infringe Member States' or regions' power to determine the nature of the tax system they impose. It does, however, remove from individuals the burden of double or multiple taxation and the spectre of expropriation.

<sup>(1)</sup> Communication from the Commission on the Transfer of Businesses: Actions in Favour of small and medium-sized enterprises (SMEs) (OJ C 204/1 23.7.1994).

<sup>(2)</sup> Commission Recommendation regarding relief for double taxation of inheritances (2011/856/EU: OJ L366/81 20.12.11).

## Alternatives

8. Another solution would be to turn the recommendation of 2011 into law. That would be more complicated than the 'one succession — one tax' solution proposed above. Given Member States' reaction to the recommendation, there is no reason to prefer it to the simpler approach we favour.
9. In theory, a vast increase in the number of bilateral treaties could remove double taxation. Given the large number of treaties needed this is not a practical way forward. What is needed, as the European Commission has previously indicated, is a general solution to what is a general problem.
10. A multilateral treaty may be a possible solution. Such treaties are now more common in international tax than they were. Nevertheless, a multilateral treaty would not solve the problem of multiple taxation as simply or securely as would a 'one succession — one tax' law. It would also require considerable work by the EU institutions. Their efforts would be better spent on legislation.

## Action now

11. The problem of multiple taxation of inheritance has been discussed for very many years. At first the position of cross-border businesses was highlighted. Now we can see many ordinary individuals are affected. Whatever the precise solution adopted by the EU, a solution to the problem is needed urgently.



# Chapter 1

## Introduction

1. The longstanding difficulties caused by the burdens resulting from inheritance tax (IHT) in cross-border situations have been frequently discussed but, so far, no successful attempts have been made to overcome them. In contrast, the problems which arise in succession law have been addressed with some success in the EU with the introduction of the succession regulation<sup>(3)</sup>. Material before the expert group suggests that certain Member States consider that the difficulties in relation to IHT are not significant. In the experience of those members of the expert group who advise on succession and IHT matters, this is not the case. The European Commission is correct to regard the problems which are arising as being of great importance to the proper functioning of the EU and of the internal market.
2. The Court of Justice of the European Union (CJEU) continues to address inconsistencies between IHT and the fundamental freedoms<sup>(4)</sup>, including free movement of capital as it applies in relation to third countries (countries outside the EU and European Economic Area (EEA))<sup>(5)</sup>. The European Commission continues to bring cases before the Court<sup>(6)</sup>. There are, however, many problems that the Court cannot solve because they arise by virtue of the existence of two or more IHT systems rather than a single discriminatory system<sup>(7)</sup>.

### Who is affected?

3. The problems caused by cross-border succession have long been recognised. As long ago as 1994, the European Commission highlighted tax difficulties in the context of small and medium-sized businesses and said 'inheritance tax could be due in two Member States simultaneously'<sup>(8)</sup>. The Waters report relating to the Hague Convention on the Law Applicable to Succession to the Estates Of Deceased Persons of 1989 (not yet in force) also noted problems for cross-border businesses and investment<sup>(9)</sup>. If cross-border problems were common before the EU's internal market was established, they are even more common now. According to the European Commission, in January 2014 more than 14 million EU citizens lived in a Member State which was not their home state<sup>(10)</sup>. In 2010 the figure was 12 million and in 2005 it was 5 million<sup>(11)</sup>. The respected study by Copenhagen Economics estimated the number of cross-border successions in 2011 at between 290 000 and 370 000<sup>(12)</sup>. If the figures of the European Commission are correct that number has now increased significantly. Indeed, the Commission had earlier put the number of cross-border successions at around 450 000<sup>(13)</sup>.
4. Those who are most harshly affected by the problems which arise are frequently families of ordinary means who seek to work, to live (often in retirement) or to buy a holiday home within the internal market outside their home state.

<sup>(3)</sup> Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L201/07 27.7.12).

<sup>(4)</sup> See, e.g. the judgment in Case C-123/15, *Feilen*, lodged 12 March 2015 which concerns limitations on credit for foreign inheritance tax. Other cases include C510/08, *Mattner* EU:C:2010:216; C256/06 *Jäger*, EU:C:2008:20.

<sup>(5)</sup> Case C-181/12 *Welte* ECLI:EU:C:2013:662, the case concerned the reduced allowance given to a Swiss national who inherited land in Germany.

<sup>(6)</sup> See, e.g. Case C-127/12 *Commission v Spain* ECLI:EU:C:2014:2130; C-211/13 *Commission v Germany* ECLI:EU:C:2014:2148. Not all its actions in relation to infringements of the fundamental freedoms result in cases before the CJEU: see the request by the European Commission to Italy to alter its inheritance tax treatment of bequests to non-profit organisations elsewhere in the EU and EEA. The legislation was amended and the proceedings were closed on 26 November 2014. A case against Greece (2012/2091) is going to the CJEU and a case against Germany (2012/2159) is outstanding: see the section on Infringement cases on the website of the Directorate-General for Taxation and Customs Union ([http://ec.europa.eu/taxation\\_customs/common/infringements/infringement\\_cases/bypolicy/index\\_en.htm#personaltax](http://ec.europa.eu/taxation_customs/common/infringements/infringement_cases/bypolicy/index_en.htm#personaltax)). There have also been cases concerning cross-border exemptions for institutions established for charitable, philanthropic or religious purposes: see most recently Case C-25/10 *Missionswerk Werner Heukelbach eV* ECLI:EU:C:2011:65. Institutions may well be able to cope with the difficulties caused by cross-border inheritance tax by employing arrangements not open to individuals.

<sup>(7)</sup> See Case C-67/08 *Block* ECLI:EU:C:2009:92.

<sup>(8)</sup> Communication from the Commission on the Transfer of Businesses: Actions in Favour of SMEs, paragraph 10. (OJ 204/16 23.6.1994).

<sup>(9)</sup> The Report on the Convention on the Law Applicable to Succession to the Estates of Deceased Persons, Prof. Donovan Waters paragraph 15 (<http://www.hcch.net/upload/exp132e.pdf>).

<sup>(10)</sup> Press Release ([http://europa.eu/rapid/press-release\\_IP-14-87\\_en.htm](http://europa.eu/rapid/press-release_IP-14-87_en.htm)) *European Parliament elections: Citizens should be able to stand as candidates in another EU country more easily*.

<sup>(11)</sup> Figures taken from the Commission and reported in *Cross-Border Inheritance Tax in Ireland* N. Anketell and F. O'Hanlon Irish Tax Review, 2012 No 4, p117.

<sup>(12)</sup> Study on inheritance taxes in EU Member States and possible mechanisms to resolve problems of double inheritance taxation in the EU, Copenhagen Economics, page 12, ([http://ec.europa.eu/taxation\\_customs/resources/documents/common/consultations/tax/2010/08/inheritance\\_taxes\\_report\\_2010\\_08\\_26\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/common/consultations/tax/2010/08/inheritance_taxes_report_2010_08_26_en.pdf)), 26 August 2010, corrected 13 May 2011 (the Copenhagen study).

<sup>(13)</sup> See page 4 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2009:0411:FIN:EN:PDF>) Commission staff working document accompanying the proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of successions and on the introduction of a European Certificate of Succession. The proposal has now been adopted — see footnote 3 above.

Also badly affected are small and medium-sized businesses which seek to ensure their survival by growing outside their national boundaries<sup>(14)</sup> and now seek to ensure their succession to the next generation. Such businesses can be rendered unviable by the level of tax imposed on them. Alternatively, their expansion may be constrained. The number of businesses affected is growing fast. As one specialist has noted:

‘Family business succession is not new but it is receiving more and more media attention as the baby boomer generation faces the inevitable challenge of transitioning their business to new managers and owners; it’s not a question of if, it’s only a question of when.’<sup>(15)</sup>

5. The burdens suffered by individuals who must deal with the impact of cross-border successions not only lead to understandable dismay at their circumstances but also frustration with the internal market itself. Their dismay will be exacerbated when they appreciate that the level of taxation which is capable of arising in a cross-border succession is much higher than that which is imposed in a one-state situation. Members of the expert group have pointed out that even in single states, such as Poland, it is possible for the level of tax on inheritances and donations to exceed 100 % of the amount taxed. In a cross-border situation the possibility of expropriatory taxation is even more pronounced. As former commissioner Algirdas Šemeta said:

‘Inheritance taxes can, if applied by several Member States simultaneously, quickly reach a very high level overall, even if no single Member State involved applies a high level.’<sup>(16)</sup>

Furthermore, these difficulties have in most cases to be faced without the assistance of double tax treaties. According to the best figures available to the expert group, the number of treaties in existence is less than 10 % of the number needed to ensure full coverage throughout the EU<sup>(17)</sup>.

6. Member States may note that it is not just their taxpayers who have trouble. Tax officials also find cross-border IHT problems difficult to deal with. One informant in the Commission’s consultation process commented on the tax officials dealing with their case and said: ‘nobody seems to know precisely what the actual situation is’. Difficulties may arise not just when inheritances cross national borders but also when they cross intra-national borders. In Bulgaria, for example, IHT is imposed by municipalities independent of the state. It appears that, because of this, the central state’s knowledge of IHT matters is limited, as is its ability to assist in the resolution of problems which arise. Reports of comparable difficulties in relation to the regions of Spain have also been made. In a number of other countries regions are increasing their powers over taxation and similar difficulties may, therefore, be expected to increase.

## A problem for all Member States

7. Not all Member States impose IHT. Those not imposing inheritance or estate tax, as such, at the time of the Copenhagen report in 2011 were Estonia, Cyprus, Latvia, Malta, Austria, Portugal, Romania, Slovakia and Sweden.<sup>(18)</sup> In 2014 the Czech Republic joined this group. The absence of such taxes does not mean that there is no tax on inheritances. In Portugal, for example, the tax reform in 2004 resulted in a stamp tax of 10 % being chargeable on certain inheritances instead of a formal IHT.
8. A Member State which does not impose IHT has no grounds for complacency in relation to the problems of cross-border IHT and regulation. In the first place, the citizens of a state which does not itself impose IHT may still be subject to double or multiple taxation where they have exercised their rights within the internal market.
9. In the second place, the duty of sincere cooperation, which is imposed by the Treaty on European Union, Article 4.3, requires all Member States to assist each other and the EU institutions in removing obstacles to activity within the

<sup>(14)</sup> The impact of inheritance tax on business is recognised in, e.g. the establishment of the European family business tax monitor (<http://www.kpmgfamilybusiness.com/european-family-business-tax-monitor/>).

<sup>(15)</sup> Succession Re-defined: Family Business Succession in the 21st Century: The European Business Review, Dr R. Shrapnel (<http://www.europeanbusinessreview.com/?p=5459>). The author notes that: ‘By 2020 this generation will be aged between 56 and 74, with the weighting heavily toward the older age’.

<sup>(16)</sup> See ‘EU Commission tackles IHT cross-border obstacles’ by Algirdas Šemeta (<http://www.step.org/eu-commission-tackles-iht-cross-border-obstacles>).

<sup>(17)</sup> The Copenhagen study of 2010/11 concluded that there were 33 treaties in force and 351 would be required to achieve total coverage. The precise number of treaties needed at the moment would need to take into account, amongst other things, the expansion of the EU.

<sup>(18)</sup> The Copenhagen economics study, August, 2010/11 ([http://ec.europa.eu/taxation\\_customs/resources/documents/common/consultations/tax/2010/08/inheritance\\_taxes\\_report\\_2010\\_08\\_26\\_attachment\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/common/consultations/tax/2010/08/inheritance_taxes_report_2010_08_26_attachment_en.pdf)). (the Copenhagen study), Table 2.2. p17.

internal market. Third, tax good governance, to which the EU and all Member States are committed, requires Member States not only to avoid double non-taxation but also double or multiple taxation <sup>(19)</sup>. Finally, as events in Italy in the first decade of this century have shown, taxes on inheritances and gifts may be abolished by one government and reintroduced by another a few years later.

10. At a time when a significant number of states seek to place their public finances on a stronger footing, revenue from inheritance and estate taxes is by no means insignificant. Even where tax on inheritances is not levied there may still be legal formalities with which citizens must comply, such as statutory notification of gifts. These formalities, especially when they give rise to penalties, can produce administrative problems similar to those which tax formalities generate.
11. As noted in relation to Portugal above, even where an IHT does not apply to an inheritance, there are other taxes which may apply <sup>(20)</sup>. Stamp tax or duty, fees for succession certificates, registration duties, tax on capital gains and tax on income may all be imposed on an inheritance or succession, along with taxes on particular assets such as insurance policies or cars. These taxes are potentially particularly onerous because they are not usually taken into account in determining an IHT liability in other Member States <sup>(21)</sup>. Taxes on lifetime gifts may also be linked to taxes on inheritance. This section does not attempt to address these taxes. It concentrates on inheritance and estate taxes, which have been a concern for a long time and in respect of which the European Commission has already carried out some work.

## A history of inaction — time to act

12. As long ago as 1966 the Organisation for Economic Cooperation and Development (OECD) adopted a recommendation concerning a draft convention for the avoidance of double taxation on estates and inheritances. In 1982 it produced the model Double Taxation Convention on Estates and Inheritances and on Gifts. The model has not been updated, its inadequacies have not been addressed and only a few Member States have made use of it.
13. In 1992, the lack of tax treaties in IHT was highlighted in an annex to the Ruding report <sup>(22)</sup>. In 1994, the European Commission addressed the problem of IHT double taxation for small and medium-sized enterprises (SMEs) in a communication <sup>(23)</sup>. It noted then that ‘inheritance tax could be due in two Member States simultaneously’ <sup>(24)</sup>. In 2010, the International fiscal association addressed the issue <sup>(25)</sup>. In 2011, the European Commission returned to the problem and issued a recommendation regarding relief for double taxation of inheritances <sup>(26)</sup>. Nearly 50 years after the OECD first addressed the obstacles and over 20 years since the European Commission first highlighted the problems caused by IHT, they still remain. Indeed, with the expansion of the Community, now a Union, the problems have multiplied in number and increased in significance. In the view of the expert group, the present situation requires the urgent attention of Member States.

<sup>(19)</sup> See most recently Commission Decision of 17.6.2015 establishing the Commission expert group ‘Platform for Tax Good Governance, Aggressive Tax Planning and Double Taxation’ and replacing Decision C(2013)2236 (C(2015) 4095 final). Recital (2) points out that ‘... double non-taxation and double taxation are often linked ...’.

<sup>(20)</sup> See the annex to the Copenhagen study.

<sup>(21)</sup> For example in Belgium, where those taxes are not taken into account for the credit allowed in respect of foreign inheritance taxes.

<sup>(22)</sup> See Annex 6 of the Ruding report.

<sup>(23)</sup> Communication on the Transfer of Businesses: Actions in Favour of SMEs. (OJ 204/16, 23.6. 1994). Such responses as Member States may have made to this communication have not removed the obstacles addressed in this report.

<sup>(24)</sup> See the communication, paragraph 10.

<sup>(25)</sup> IFA *Cahiers de droit fiscal international*, vol. 95b, ‘Death as a taxable event and its international ramifications’.

<sup>(26)</sup> Commission Recommendation regarding relief for double taxation of inheritances (2011/856/EU: OJ L366/81 20.12.11).



# Chapter 2

## The obstacles

1. The expert group has considered income tax obstacles as well as inheritance tax (IHT) obstacles. It has become apparent that although there are some points of similarity between the two kinds of obstacles, the differences between them are frequently very significant. A few of these differences are noted below.
  - (i) Unlike income tax, IHT is often imposed as a result of an unexpected event and dealt with by individuals without the support of well-resourced employers or expert advisers.
  - (ii) Income tax is usually imposed on, or in relation to, a single individual and income stream. Inheritance tax may be imposed in relation to a number of different people such as heirs, estates and representatives. The rules for determining the property on which it is imposed may be adequately understood only by those with knowledge of national property and family law systems that the heirs and representatives do not possess.
  - (iii) The range of rates in IHT, both actual and nominal, may be much wider than in income tax<sup>(27)</sup>. Furthermore, there are many fewer double tax conventions concerned with IHT than with income tax.
2. These differences all tend to make the problems which arise in relation to IHT even more difficult for the individual to address than those which arise in relation to income tax.

### Areas of difficulty summarised

3. Inheritance tax obstacles in a cross-border situation arise in three main areas:
  - the nature and design of national IHTs;
  - the limited availability of relief of double taxation by Member States, whether by means of treaties or by means of unilateral relief;
  - the administration of IHTs.

The obstacles in each of these areas are set out briefly below.

### Obstacles in the nature and design of inheritance taxation

4. The obstacles which can arise are many and various. We identify some examples below<sup>(28)</sup>.
  - (i) A person may be taxed by reference to residence (for example, in Belgium, Denmark, Spain, Luxembourg, and Finland<sup>(29)</sup>); common law domicile (as, for example, in the United Kingdom); tax residence as for example in France<sup>(30)</sup>; nationality (as for example in Bulgaria<sup>(31)</sup>); permanent address, as for example in the Czech Republic up to 1 January 2014<sup>(32)</sup>; deemed residence for nationals as, for example, in the Netherlands<sup>(33)</sup>; or deemed domicile as, for example, in the United Kingdom. The notion of residence is a matter for national law and may differ between countries. In some countries a day count may be used. In others there may be different kinds of rules linked to domicile or the place in which assets are managed. Some states also have special deeming rules for specific groups of people such as diplomats.
  - (ii) There are two results from this. First, one person may be taxed in more than one place if, for example, the residence and deemed residence are in different states. Second, more than one 'person' may be taxed, for example, the estate in the country of the deceased's residence may be subject to estate tax and the heir in the country of his or her citizenship may be subject to IHT.

<sup>(27)</sup> See further the Copenhagen study.

<sup>(28)</sup> Our references to the law of Member States has drawn on the observations of members of the expert group and other sources available to the group. We have attempted to ensure that they are accurate. The references to national law are, however, intended as indications of general problems which may arise across the internal market rather than specific current problems affecting only the particular Member State in question.

<sup>(29)</sup> As the members of the expert group confirmed. See also the annex to the Copenhagen Economics study ([http://ec.europa.eu/taxation\\_customs/resources/documents/common/consultations/tax/2010/08/inheritance\\_taxes\\_report\\_2010\\_08\\_26\\_attachment\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/common/consultations/tax/2010/08/inheritance_taxes_report_2010_08_26_attachment_en.pdf)).

<sup>(30)</sup> As indicated by an expert member of the group. *Code général des impôts*, art. 750 *ter*. See also Art 4B of the *Code*: Criteria to be considered in relation to tax residence in France: (a) having family or home in France, (b) having a professional activity in France, (c) having the centre of economic interests in France.

<sup>(31)</sup> See the annex to the Copenhagen study.

<sup>(32)</sup> The Czech Republic used nationality and permanent address: see the annex to the Copenhagen study.

<sup>(33)</sup> A Dutch national may retain deemed residence in the Netherlands 10 years after leaving the country. See on this Case C513/03 *van Hilten-van der Heijden* [2006] ECR I1957 and the Dutch inheritance tax act 1956 (*Successiewet 1956*), Article 3.

- (iii) Further complications arise when more than one fiscal connecting factor is used by a Member State. As explained by the Polish expert, Poland uses nationality, residence and citizenship depending upon the particular situation in question. Hungary uses nationality and residence<sup>(34)</sup>. Germany uses residence and civil law domicile<sup>(35)</sup>. Greece uses nationality and civil law domicile<sup>(36)</sup>. Belgium uses residence and place of financial interest.
- (iv) There can be disagreement between different countries as a matter of the general law of succession as to who is an heir, or what is an inheritance. Consequently, even if countries appear to agree on who is to be taxed, they may nevertheless impose tax on different persons. This may be a particular problem in relation to the treatment of the proceeds of insurance policies, or when assets are added to, or leave, entities such as foundations, trusts or companies, or where arrangements such as *usufruct* are established. In relation to such matters there may also be anti-abuse provisions to be taken into account.
- (v) States which impose a claim to tax on inheritance by reference to *situs* may ascertain the *situs* of a single asset by conflicting rules. A single asset may be situated according to the law of Member States where it is held, registered, or exploited.
- (vi) The number of different claims Member States may make by reference to assets may be multiplied because states may characterise the same property in different ways. For example, interests in land may be regarded as real property in some jurisdictions and as personal property in others. Where the land is held in an entity with legal personality, such as a real estate company, one state may look through the entity and tax land. Another may tax shares in the company.
- (vii) Claims may be multiplied too because of a state's treatment of vehicles or arrangements under which ownership is, or may be, split such as foundations, *fidei-commissum*, *usufructs* and trusts. The challenges which civil law systems face in accommodating trusts have been extensively documented elsewhere. Members of the expert group noted too, that Member States in the civil law tradition take different approaches amongst themselves over how to treat legal entities and arrangements, such as *usufruct*. One Member State may impose tax on the transfer of bare ownership. Another Member State may impose tax only at the conclusion of the *usufruct*. Others, like Spain, may impose taxes on the transfer of bare ownership and *usufruct*.
- (viii) Differences of characterisation may occur not only where ownership is split but also by virtue of the fact that some Member States, such as France, may treat certain entities as transparent or semi-transparent and others may treat them as opaque. This may result in duplication of tax claims, or double non-taxation, with one state taxing the land and the other, for example, the shares in the entity.
- (ix) There may also be inconsistent bases for valuation of an asset as between Member States. One Member State may use cadastral value. Another Member State may use market value at death or, as may be the case in Ireland, a date after death. The result of these differences may be that tax credits obtained by paying tax in one state may be insufficient to cover the tax payable in one or more other states.
- (x) Different Member States have different rules governing the deductibility of debts from estates. Again, the result may be that the taxable estate assessed in one state is larger than that assessed in another. Consequently, any credit obtained by paying tax in one state may well be inadequate to cover the claims of a second or third state.
- (xi) Other difficulties arise in relation to the reliefs available for business property, the treatment of various kinds of pension provision and life assurance and the treatment of assets devoted to public or cultural benefit. Sometimes the law of the fundamental freedoms can be applied to remove some of the difficulties, for example, by removing a requirement that relief for agricultural property is given only if the property is located in one Member State. On occasions, attempts to broaden reliefs increase the possibility of double taxation. For example, the

<sup>(34)</sup> See the annex to the Copenhagen Economics study, August, 2010 ([http://ec.europa.eu/taxation\\_customs/resources/documents/common/consultations/tax/2010/08/inheritance\\_taxes\\_report\\_2010\\_08\\_26\\_attachment\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/common/consultations/tax/2010/08/inheritance_taxes_report_2010_08_26_attachment_en.pdf)).

<sup>(35)</sup> See the annex to the Copenhagen Economics study, August, 2010 ([http://ec.europa.eu/taxation\\_customs/resources/documents/common/consultations/tax/2010/08/inheritance\\_taxes\\_report\\_2010\\_08\\_26\\_attachment\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/common/consultations/tax/2010/08/inheritance_taxes_report_2010_08_26_attachment_en.pdf)).

<sup>(36)</sup> See the annex to the Copenhagen Economics study, August, 2010 ([http://ec.europa.eu/taxation\\_customs/resources/documents/common/consultations/tax/2010/08/inheritance\\_taxes\\_report\\_2010\\_08\\_26\\_attachment\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/common/consultations/tax/2010/08/inheritance_taxes_report_2010_08_26_attachment_en.pdf)).

Commission took action against the United Kingdom because it limited the exemption for inter-spouse transfers in IHT in certain circumstances. The action was withdrawn when individuals were allowed to elect to be United Kingdom domiciled <sup>(37)</sup>. Making an election, however, may bring earlier transfers into charge. If those transfers had already been charged to tax elsewhere a double charge may result. Where a Member State solves a problem by enlarging its tax net, double taxation is always a possibility.

### Obstacles in relation to relief of juridical double taxation

5. Juridical double taxation is not something that the CJEU has yet been able to combat, but it is not necessarily the case that all double taxation is permitted under EU law. Kokott AG in Case C-464/05 *Geurts and Vogten* <sup>(38)</sup> noted in her opinion <sup>(39)</sup> that unlimited taxation by two states is possible but then added in footnote (37) that:

‘Whether the Court of Justice, ..., would actually accept this consequence, even in the case of a very high burden of inheritance tax, remains to be seen.’

The EU itself cannot tolerate expropriation if it is to comply with fundamental rights <sup>(40)</sup>. Furthermore, one Advocate General has said what many Europeans believe is essential in a Union:

‘... the fact that a taxable event might be taxed twice is the most serious obstacle there can be to people and their capital crossing internal borders.’ <sup>(41)</sup>

That is not, however, the general view of the Court of Justice at the moment so far as the law of the fundamental freedoms is concerned. The problem of double taxation could, however, become less significant if adequate relief for double taxation were available. It is not. Neither unilateral relief nor relief by way of treaty is even close to adequate. We note some difficulties in both reliefs below.

### Unilateral relief

6. So far as unilateral relief is concerned, the following points should be noted.
- (i) The availability of unilateral relief varies greatly between Member States. For example, while unilateral relief has been extended in the Netherlands it is not available at all in Poland.
  - (ii) In some states unilateral relief is available in relation to particular classes of assets e.g. immovable property or ‘foreign assets’: see Case C67/08 *Block* <sup>(42)</sup>. Expert members noted that in some countries there may be relief for immovable property located abroad, for example in Belgium, Germany, France and Luxembourg <sup>(43)</sup>.
  - (iii) In some Member States, such as the United Kingdom, unilateral relief is less effective where the number of states involved exceeds two <sup>(44)</sup>.
  - (iv) Unilateral relief may also depend on the tax being similar in some way to the tax charged in the relieving state, as in France, or chargeable on the same event, or both as in Ireland and the United Kingdom. Given the variety of national, regional and municipal taxes on inheritance which are imposed, and the scope for tax law to define the chargeable event in question, there is a substantial possibility that even where it appears to offer full protection, unilateral relief will be inadequate.

<sup>(37)</sup> See infringement Case No 2009/4131, Memo 12/794, case closed 20.11.2013.

<sup>(38)</sup> [2007] ECR I-9325.

<sup>(39)</sup> See paragraph 60.

<sup>(40)</sup> It is noteworthy that in Case C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957 the Dutch legislation which the Court of Justice found compatible with the fundamental freedoms provided for a credit to be given for tax imposed in the state to which an individual had transferred residence.

<sup>(41)</sup> See also Colomer AG in Case C-376/03 *D v Inspecteur van de Belastingdienst* [2005] ECR I-5821, para 85.

<sup>(42)</sup> [2009] ECR I-883.

<sup>(43)</sup> It should be noted that France applies the principle of territoriality and thus does not tax immovable and movable property located abroad — Code général des impôts, article 784 A.

<sup>(44)</sup> See the Inheritance Tax Act 1984 section 157.

## Double taxation treaties

7. So far as concerns double tax treaties, the following points may be noted:

- (i) The number of IHT double tax treaties entered into by each Member State varies considerably. Ireland has entered into two in total, one with the United Kingdom and one with the United States. Bulgaria has not entered into any with EU Member States. According to the Copenhagen report in 2010, there were fewer than 100 double tax treaties relating to IHT worldwide <sup>(45)</sup> and in the EU there were only 33 treaties in force. Many more would be required to achieve total coverage even if only those countries that currently impose IHT are taken into account. Between 1 January 2000 and 2010, 3 new treaties were established. The expert group is not aware of any IHT treaties entered into after 2011 between parties in the EU which previously had no treaty between them relevant to IHT. Reports of the level of ongoing negotiations demonstrate that, if the problem of IHT multiple taxation is left for resolution by bilateral treaties, it will be a very long time before a solution is in sight.
- (ii) Such treaties as exist may be established on the basis of historical or geographical links rather than economic relations. For example, Belgium has treaties with France and with Sweden from where Queen Astrid, who died in 1935, originated. Poland does not have IHT treaties with Germany or the United Kingdom, although a not insignificant number of its citizens live there. Spain and the United Kingdom do not have a treaty in relation to IHT. Treaties between these countries would be highly desirable given the economic relations between their citizens.
- (iii) Even where they exist, treaties on double taxation of inheritances do not deal with all of the problems referred to above. They cannot deal with situations, for example, where inheritances are subjected to income tax in one state and IHT in another. Neither can they deal with all the problems where two different IHTs are imposed. It is notable that a variety of problems between Ireland and the United Kingdom continue to exist notwithstanding the existence of a double tax treaty between the two Member States, which are divided by a common land border <sup>(46)</sup>.
- (iv) Given the importance of national property and inheritance laws for taxes on inheritance, the general problem of ensuring a common interpretation of terms in treaties concerning IHT is a significant concern. Contracting parties may, for example, interpret 'immovable property' differently. One party may include within it immovable property held in real estate companies. The other party may not do so.
- (v) The mutual agreement procedures established under double tax treaties on IHT suffer from the well-known practical deficiencies, which are also present in the procedures established in treaties on income tax.
- (vi) The OECD model Double Taxation Convention on Estates and Inheritances and on Gifts, 1982, has not been updated like the OECD model tax convention on income and on capital. One author has concluded that it: 'is largely unable to cope with discrepancies between domestic laws and avoidance of international double taxation.' <sup>(47)</sup> Furthermore, it leaves matters for bilateral negotiation in difficult areas like the taxation of foundations, *fidei-commissum*, *usufructs* and trusts: see the OECD commentary on the 1982 model, paragraph 14. It is, therefore, not a satisfactory basis for action by the EU. Just as the model convention has not been updated, so too existing bilateral treaties are sometimes allowed to become outdated.

## Obstacles in the administration of inheritance taxes

8. The administrative obligations which individuals face in relation to inheritance taxes (IHTs) are frequently complicated because they are inextricably bound up with national requirements relating to the application of succession law. Such requirements frequently have to be complied with in a language other than that of the heir, or donee. The administrative difficulties facing individuals in relation to cross-border succession are many and varied.
  - (i) The complexity of IHTs has led to frequent complaints to the Commission by citizens that their national administrations do not understand the problems with which they are faced and are unable to answer their questions as to what they should do.

<sup>(45)</sup> See page 49 of the Copenhagen report.

<sup>(46)</sup> See *Cross-Border Inheritance Tax in Ireland* N. Anketell and F. O'Hanlon, Irish Tax Review, 2012 No 4, p.117.

<sup>(47)</sup> IFA *Cahiers de droit fiscal international* vol. 95b, 'Death as a taxable event and its international ramifications', G. Maisto, General Report, paragraph 5.1.6.



- (ii) In a cross-border situation there is frequently burdensome duplication, or multiplication, of administrative procedures and reporting obligations to be followed by the heirs or other family members for tax purposes. Member States have different time limits for the reporting of IHTs or valuing assets. Each national administration works to its own national time limits and these may require payment of tax within a relatively short period of 6 months. In a cross-border situation, an individual may well be dependent upon action in one Member State to comply with the requirements of another Member State. A Member State working to longer time limits may render an individual incapable of complying with another state's shorter time limits. As a result reliefs may be lost, or the individual may become liable to interest and penalties through no fault of his or her own. By way of example, one member of the expert group noted problems arising in relation to Belgian taxation of foreign immovable property. The value attributed to it in the Belgian return is not permitted to be lower than the taxable value on which the foreign IHT was calculated<sup>(48)</sup>. If the foreign tax return has not been submitted when the Belgian return is required to be submitted serious practical difficulties will arise.
- (iii) Delays by one Member State, sometimes in providing proof of payment of taxes, may also make it impossible for an individual to make claims for reliefs, allowances, exemptions or refunds within the time limits applicable in another Member State. Particular problems in this context have been raised in the European Commission's consultation process in relation to Belgium, France, Italy and Switzerland.
- (iv) The inability of tax administrations to resolve problems reasonably promptly, whether acting alone or in the context of mutual consultations, results in delay in determining the nature and size of a liability and, therefore, taxpayers' interest payments and penalties being higher in cross-border situations than in purely national ones.
- (v) Delays by Member States' administrations also lead on occasions to individuals paying IHT in one Member State on an inheritance in another Member State, which has not been liquidated.

### Concluding remarks

9. This brief survey of the problems which are faced in cross-border situations in relation to taxes on inheritance shows that the problems are to some extent a result of the laws governing the imposition of the taxes, to some extent they concern the rules governing administration and administrative cooperation between Member States and to some extent they reflect underlying differences between the Member States on matters of succession law.
10. Like tax law, succession law is an area of national sensitivity. In the Dörner/Lagarde report<sup>(49)</sup> made prior to the EU succession regulation<sup>(50)</sup> it was noted that '[e]ach EU Member State has its own legal tradition and its own social values concerning marriage and the family'. Multiple succession laws were capable of affecting a single succession just as multiple IHT laws affect a single succession. Yet the problems caused by national succession law in EU cross-border succession law have been addressed with some success by the EU. Now we must address the tax problems.

<sup>(48)</sup> The Inheritance tax code, Art 42.

<sup>(49)</sup> On the website of the Directorate-General for Justice and Consumers ([http://ec.europa.eu/civiljustice/publications/docs/testaments\\_successions\\_fr.pdf](http://ec.europa.eu/civiljustice/publications/docs/testaments_successions_fr.pdf)).

<sup>(50)</sup> Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012: OJ L201/07, 27.7.12.



# Chapter 3

## The solutions

1. At the outset of any consideration of the nature of the solutions to the inheritance tax (IHT) problems we have identified two preliminary matters. The first concerns whether solutions are likely to consist in changes to law or changes to administration. The second concerns whether the search for solutions may be left to Member States or whether the EU institutions ought to be involved. Taken together these two issues concern what kind of solutions should be considered.

### What kind of solutions should be considered?

#### (i) Changes in law or changes in administration?

2. The problems described in the previous section concern both the law imposing IHT and its administration. Both are based on the legal provisions on which the tax is based. Changing either is likely, therefore, to require changes in the applicable IHT laws. It may be that some limited benefits may be obtained from changing purely administrative arrangements. We consider some of these at the end of this section. Changes in administration will, however, at best help individuals cope with complexity. They do not go far to reduce the complexity. If this is to be done, then changes in law will be necessary.

#### (ii) Bilateral action or action at the EU level?

3. As was made clear in the previous section, the existence of IHT problems in the internal market has been well documented for very many years. Member States have not volunteered to solve the problems which arise, although they could have solved at least some of the difficulties by unilateral means. To the extent that some progress in solving the problems has been made at all, it has largely come about as a result of infringement proceedings being taken by the European Commission. Member States have not been moved to action by their duty of sincere cooperation, referred to in Chapter 2. This suggests that action at the level of the EU is appropriate and necessary for further progress to be made.
4. Inaction by the Member States is by no means the only reason for considering that action at the level of the EU is necessary. The need for action by the EU derives also from the extent and importance of the problems which arise in relation to IHT in the internal market.
5. All Member States are affected by the problems in the field of IHT whether or not they impose IHT themselves. Even if attention is focused on the 19 EU Member States which impose IHT, the extent of the problems arising is very considerable. In order to ensure that sufficient IHT double tax conventions exist, Member States would have to commit large scale resources to the negotiation of bilateral IHT treaties. It seems very doubtful that even the most willing Member State would easily find the resources to do this, particularly at a time when other international issues, such as the OECD action plan on base erosion and profit shifting (BEPS), demand so much attention. For those states in which IHT is a regional or municipal matter the availability of resources may give rise to even greater problems.
6. The economic importance of IHT problems can be seen from the figures for cross-border movement of individuals given earlier. It must also be borne in mind that the 19 EU Member States which currently impose IHT include the three Member States with the largest economies in the EU, namely, Germany, France and the United Kingdom. If one turns to consider the economic interests of individuals, as opposed to Member States, then the possibilities of multiple taxation and of taxation becoming expropriation highlight the significance of what is at stake — it is nothing less than the proper functioning of the internal market for businesses and individuals in the EU.
7. Any action at the EU level ought to be supported by Member States, given their duty of sincere cooperation with each other and with the EU institutions as set out in the Treaty on European Union (TEU), Article 4.3. So far as concerns the principle of subsidiarity it appears to be beyond dispute that the conditions for action by the EU are met (see TEU, Article 5.3). Member States cannot sufficiently achieve the objective of removing IHT obstacles from the single market as history shows.
8. In light of the above, the expert group has concluded that the solution to the problems of IHT in the internal market requires action at the level of the EU.
9. It is then necessary to consider what kind of action by the EU is required. Whatever course of action is taken, it must be proportionate (see TEU, Articles 5.3 and 5.4). The expert group has borne this requirement in mind in its deliberations. It has, therefore, not considered harmonisation of EU Member States' systems of IHT. It is clear, at least from a

technical perspective, that IHT obstacles can be removed while retaining many of the distinctive elements of Member States' differing systems of IHT and certainly their different rates of tax.

## What kind of EU action?

10. In the past, some of the problems relating to IHT have been considered in a Communication <sup>(51)</sup>. They have more recently been considered in the recommendation for relief for double taxation of inheritances ('the recommendation') <sup>(52)</sup>. Although a recommendation by the Commission is non-binding <sup>(53)</sup>, it is by no means insignificant. The recommendation was published in the L series of the Official Journal. In Article 1, it made clear that the onus to take action rested on Member States. It said that its aim was to set out:

'... how Member States can apply measures, or improve existing measures, to relieve double or multiple taxation caused by the application of inheritance taxes by two or more Member States...'

The recommendation has not been totally ignored. For example, it was debated in 2011 in the Polish legislature and the Netherlands' finance minister has stated that the Netherlands' unilateral relief will be applied more liberally. The expert group is informed that it may be taken into account judicially in Germany. Nevertheless, it is now clear, well over 3 years after it was made, that the recommendation is not going to lead to any fundamental change in the approach of Member States to the problem of IHT double taxation.

11. Given the failure of the recommendation to generate significant action, the expert group considers that it would be reasonable for the European Commission to propose EU legislation addressing the problems of IHT double taxation. Indeed, not only is it reasonable, it appears that unless this course of action is taken no progress will be made in addressing the fundamental causes of double taxation of inheritances. It is then necessary to consider what any such a proposal should contain.

## What should the proposal for EU legislation contain?

12. Any 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 tax in relation to any one estate, its heirs and personal representatives. Second, it could follow the approach of the recommendation and seek to pass a regulation implementing the terms of the recommendation. Each of these options attracted significant support amongst the members of the expert group and each is considered briefly below.

### One inheritance — one inheritance tax

13. By providing that only one inheritance tax (IHT) should be chargeable in respect of any one estate, its heirs and personal representatives the possibility for multiple or double taxation is removed. The need to negotiate a multitude of bilateral treaties, or a multilateral treaty, for the avoidance of double taxation is avoided. Individuals have only to deal with one tax authority and tax authorities themselves do not have to deal with each other. There are, therefore, many advantages to such a solution both from the point of view of the individuals and from the point of view of Member States.
14. Legislation which identifies one Member State as the relevant state is an approach which has already been adopted in the EU in relation to social security. Regulation (EC) No 883/2004 on the coordination of social security systems <sup>(54)</sup> provides in Article 11.1 that:

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.'

<sup>(51)</sup> Communication from the Commission on the Transfer of Businesses: Actions in Favour of SMEs, paragraph 10. (OJ 204/16, 23.6. 1994).

<sup>(52)</sup> Commission Recommendation regarding relief for double taxation of inheritances (COM/2011/856/EU: OJ L366/81, 20.12.11).

<sup>(53)</sup> TFEU, Article 288. The recommendation regarding double taxation of inheritances was made having regard to TFEU, Article 292.

<sup>(54)</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166/1 30.4.2004).

15. Social security systems are marked by enormous complexity and have an extensive impact on the lives of the vast majority of the citizens of EU Member States. They underpin the operation of many aspects of the modern European state. Although IHT systems are complex and although they affect many millions of people, they do not have as extensive an impact on the affairs of a Member State and its citizens as social security systems. If 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 IHT system.

16. The identity of the applicable IHT system may best be determined by taking the approach adopted in Regulation (EU) No 650/2012 ('the succession regulation')<sup>(55)</sup>. Article 21.1 of the succession regulation sets out the general approach of the legislation in this respect and provides:

'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 following provision then allows for the law of another Member State to be applicable if that other state was one with which the deceased was 'manifestly more closely connected'.

17. Inheritance tax is imposed in many Member States according to rules which seek to recognise a deceased's long term association with the taxing state. Habitual residence and close connection are, therefore, criteria which are well suited to determine the applicability to an inheritance of an IHT system. 'Habitual residence' is also a concept which the EU uses in the context of social security: see Case C-90/97 *Swaddling* ECLI:EU:C:1999:96 and C-372/02 *Adanez-Vega* ECLI:EU:C:2004:705, as well as in the context of child abduction and parental responsibility: see Case C-523/07 A ECLI:EU:C:2009:225, C-497/10 PPU, *Mercredi* ECLI:EU:C:2010:829, C-376/14 C ECLI:EU:C:2014:2268. It should be obvious, but we emphasise, that the succession regulation is but one example of legislation which uses 'habitual residence'. The use of the concept in relation to the avoidance of double taxation would not require the extension of the succession regulation to those Member States in which it does not apply<sup>(56)</sup>.

18. The succession regulation contains provisions which allow an individual to choose the law of his or her nationality to govern the succession to his or her estate. It is not inconceivable that taxation may play some role in making that choice in some circumstances. It may be undesirable in principle that individuals should be able to choose which state's IHT system should apply to an inheritance. It may be, therefore, that there should be no provision for any citizen to choose which IHT system should apply to any particular inheritance. The absence of any such choice would not only ensure that inheritance taxation is not manipulated, it would also ensure that the applicable rules are as simple as is possible. The law of the state of 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.'

19. The 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 IHT system to one inheritance. The Member State in which immovable property of any estate is situated should not, therefore, be able to impose its IHT on that property. If Member States chose 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.

### Making the recommendation binding

20. Although the recommendation has been ignored by Member States, it has not been met with strong expressions of hostility. It would, therefore, be reasonable for the European Commission to propose that the terms of the recommendation be turned into a regulation.

<sup>(55)</sup> Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L201/07 27.7.12).

<sup>(56)</sup> These are Denmark, Ireland and the UK. The relationship of these Member States to measures taken under Title V Part Three of the TFEU is governed by Protocols 21 and 22 annexed to the TFEU.

21. A regulation which contained the terms of the recommendation would go some way to resolving the problem of very high double taxation of inheritances. An individual would still, though, have to deal with more than one Member State. The recommendation describes its general objective as follows.
- ‘The recommended measures aim at resolving cases of double taxation, so that the overall level of tax on a given inheritance is no higher than the level that would apply if only the Member State with the highest tax level among the Member States involved had tax jurisdiction over the inheritance in all its parts.’<sup>(57)</sup>
22. The detailed provisions of the recommendation need not be recited here. It is necessary, though, to outline its general approach. In short, as recital (14) states, it establishes an order of priority for the imposition of tax. Member States which are not given the primary taxing right in respect of assets are to give relief for IHT paid to the state with the primary taxing right.
23. In implementing this approach, the recommendation requires that the Member State in which immovable property or a business establishment are located has the primary right to tax the property in question. Other states are to give relief for the tax paid to the state with the primary taxing right. In respect of moveable property which is not within a business establishment, if tax is imposed by a Member State with which the heir or the deceased has a personal link, then a state with which neither the heir nor the deceased has a personal link is not to impose tax.
24. Approaching the problem of double taxation in this way means that ‘personal link’ has to be defined as it is at point 2(d) of the recommendation. It also means that provisions are needed to deal with further situations. The first is when the deceased and the heir have personal links to different Member States (see point 4.3 of the recommendation). The second is where a single person has multiple personal links (see point 4.4 of the recommendation). Provisions for the determination of the Member State with which a person has the closer personal link are necessary (see point 4.4.1 of the recommendation). The recommendation also proposes that Member States should operate a mutual agreement procedure to deal with disputes (see point 6 of the recommendation).
25. Although it would be reasonable for the Commission to propose that the terms of the recommendation be contained in EU legislation, it will be apparent that the need to accommodate the taxing rights of more than one Member State and the need to determine the existence of ‘personal links’ and ‘closer personal links’ requires a complex set of provisions. Furthermore, it is anticipated that the application of these provisions may result in disputes, which may be resolved by the operation of a mutual agreement procedure. This is unlikely to be a speedy procedure and cannot be attractive in situations where free movement of individuals is fast increasing.
26. Putting the provisions of the recommendation into law would prevent taxation of inheritances from constituting expropriation and would ensure that some of the most serious effects of multiple or double inheritance taxation were avoided. It would not, however, resolve all the difficulties posed by the operation of multiple IHT systems. It would leave the individual to deal with multiple tax administrations. It would require tax administrations to deal with each other. It would not deal with many of the administrative problems arising in relation to inheritance taxation considered in paragraph 17 of the previous section. As noted above, a mutual agreement procedure would be necessary. In the light of all these matters, the expert group prefers the approach of applying one IHT system to one inheritance.

## A treaty-based solution?

27. In theory, bilateral treaties would address the problems of IHT double taxation. The 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. The Commission indicated this as long ago as 1994 in its Communication. It said the following.

‘As double taxation in respect of inheritance tax and related taxes has become increasingly common, some Member States have negotiated specific agreements on this type of double taxation. Ten such agreements currently exist in the Community, most of them concerning

<sup>(57)</sup> Point 3 of the recommendation.

inheritance tax. The question is therefore to find a general solution within the Community (that) will cover all Member States.’<sup>(58)</sup>

The expert group notes that the need to find a general solution which the European Commission correctly identified in 1994 is even more pressing in 2015.

28. The possibility that a multilateral European convention may be concluded in respect of taxes on inheritance was raised as long ago as 1993 at a Symposium in Brussels organised by the Commission. Its proposals are published as an annex to the communication of 1994<sup>(59)</sup>. In the past, the suggestion that a multilateral convention may be the solution to the problem of IHT double taxation may have appeared somewhat optimistic. Some may think it less so now.
29. Multilateral treaties have for some time been a feature of international taxation. For example, very nearly all the EU Member States have ratified the multilateral Convention on Mutual Administrative Assistance in Tax Matters (Council of Europe treaty series (CETS) No 127) although their mutual assistance obligations are now contained in EU regulations. Furthermore, a multilateral treaty is envisaged as realistic by the OECD in achieving the goals of the BEPS action plan. Within the EU, the Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises 1990, known as the arbitration convention<sup>(60)</sup>, has been in operation for some time
30. Were a multilateral treaty to be considered as a solution to IHT 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.
31. Member States may prefer multilateral cooperation for political reasons. It seems unlikely, however, that a multilateral convention would solve the IHT problems as effectively as EU legislation. A solution based on EU law offers the best safeguard against a Member State acting to disadvantage other Member States by adopting some form of subsequent treaty override. Only EU legislation would give all the EU institutions, including the CJEU, their proper role in the solution of what is a serious problem for the EU internal market. In addition, as the activities of the OECD show, multilateral solutions generally need to be promoted by a strong institution. Within the EU that institution is the European Commission. The time and energy it would have to spend promoting a multilateral treaty would be better spent in promoting EU legislation.

### Solutions for problems of inheritance tax administration

32. In the previous section a number of problems relating to the administration of inheritance were identified. One general reason why a variety of problems arise is that Member States treat the administration of an estate which is exclusively national, and therefore likely to be relatively simple, in the same way as one which has cross-border elements and is relatively complex. In other words, they treat different situations similarly. This approach was understandable when international estates and inheritances were unusual. Now that they are not unusual the approach of Member States’ administrations should be adapted.

### Identify cross-border inheritances and estates

33. Member States should recognise that cross-border estates and inheritances frequently present problems which are quite unlike those which are presented in the administration of national estates and inheritances. If they are to do that, then they must first identify cross-border estates and inheritances and establish administrative procedures to enable such identification to take place.

<sup>(58)</sup> Communication from the Commission on the transfer of businesses. Actions in favour of SMEs (OJ C 204/1 23.7.1994) at point 10, p16.

<sup>(59)</sup> See Annex I to the communication: ‘Proposals submitted at the symposium on the transfer of business organized by the European Commission on 29 and 30 January in Brussels’, at ‘III Specific conclusions’, ‘2. Fiscal aspects’ at point 2.1.

<sup>(60)</sup> Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/436/EEC: OJ L 225/10 20.8.1990), as amended. See most recently the Council Decision of 9 December 2014 concerning the accession of Croatia to the convention (OJ L 358/19 13.12.2014).

## Apply time limits and rules which respect complexity

34. Having been identified, estates and inheritances with cross-border elements should be dealt with by groups of officials who are familiar with the kinds of problems which may arise. Such estates and inheritances should be subjected to time limits and rules which recognise that their administration will be more complex and time-consuming than national inheritances and estates. Where they are given the power under national law to do so, officials should be willing to grant extensions of time limits in cross-border matters. Where necessary, national law should be changed so that cross-border inheritances and estates are subjected to rules which acknowledge their more complex nature.

## Specialist officials

35. The proper treatment of cross-border inheritances and estates requires considerable expertise on the part of advisers to heirs, other beneficiaries of inheritances and those representing the estate. The problems of international tax law are often combined with the problems of the private international law of succession. The resulting complexities are frequently poorly understood by clients and even by their advisers. Complex issues may frequently arise in relation to relatively low value estates. In these cases, in particular, officials bear a considerable burden in ensuring the proper application of the law. It is, therefore, essential that national administrations ensure that they have sufficient officials with appropriate expertise who can deal with the estates and inheritances which have been identified.

## Generally

36. At paragraph 4.3 of the section on income tax a number of measures have been identified which may facilitate the cross-border movement of individuals. Many of these can clearly be applied in the context of international estates and inheritances. The translation of forms into the official languages of the EU, the development of specialist units of officials, and a Commission portal dealing with inheritance and gift taxes describing the obligations existing in the different Member States would all be very advantageous in the present context. Any assistance that can be given to individuals in doing their best to cope with the complexity of cross-border estates and inheritances must be welcomed. Coping strategies are not, however, likely to produce a state of affairs which facilitates the proper functioning of the single market. If that is to be facilitated, the level of complexity which the individual faces must be reduced.

## Concluding remarks

37. As we noted earlier in this chapter, mere improvements in administration are unlikely to do anything to solve the basic problem of multiple IHT. No one seeks to improve the administrative efficiency of multiple taxation. It is necessary to remove the fact of multiple taxation in the first place. That will in turn lead to administrative simplicity, which will benefit both individuals and Member States' administrations.
38. The most efficient and timely means of ensuring that multiple taxation is prevented is by action at European Union level. The number of bilateral treaties, which are required to solve the problem of multiple taxation, is so large that Member States are unlikely to have the necessary resources available to devote to their negotiation. There has certainly not been any indication so far that they are able to establish the necessary number of bilateral treaties. A multilateral treaty is a theoretical possibility but significant resources would be required for the establishment of such a treaty. There is no indication that they are available or that a multilateral treaty is a practicable possibility.
39. If action is to be taken at the level of the European Union then the most appropriate approach is to ensure that one succession is subject to one IHT. It is the approach which is fairest both to individuals and to Member States.



# Chapter 4

## Conclusions

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1. The expert group notes that the need for a solution to the problems of multiple taxation of estates and inheritances in the EU has been emphasised by the European Commission and bodies in the private sector for a very considerable length of time. Member States have not shown equivalent interest in solving these problems. Now that cross-border movement of individuals is very common, Member States should change their approach to these issues.
2. Inevitably, given the number of Member States affected, a solution to the problem of multiple taxation of inheritances and estates and related problems, such as those arising in relation to gift tax, can be achieved only by action which is coordinated. The involvement of the European Commission in the application of any solution is, therefore, essential.
3. Given the large number of bilateral treaties required to solve the problems, it is unrealistic to expect that they will provide the basis of any practicable solution. A multilateral treaty, if one could be established, would deal with some of the problems presented by cross-border estates and inheritances. It would not deal with them all. It would continue to require individuals to deal with a multiplicity of tax administrations. It may be vulnerable to treaty overrides in the longer term.
4. By far the better solution to the problems we have identified would be the adoption of an instrument of EU law. The recommendation which the Commission has already made could be made legally binding <sup>(61)</sup>. A much better solution would be for there to be one IHT system applicable to one inheritance. It would be reasonable and practicable to determine the applicable tax system by reference to the concept of the habitual residence of the deceased. This is the approach that the expert group recommends. It is fair to individuals. It ensures that the exercise of the fundamental freedoms does not result in multiple taxation. It is also fair to Member States. It provides them with protection for tax receipts from those within their borders. The expert group urges all concerned to ensure that a solution is finally adopted to deal with the problem of multiple taxation of inheritances. After more than two decades of debate the time for action has arrived.

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<sup>(61)</sup> Commission Recommendation regarding relief for double taxation of inheritances (2011/856/EU: OJ L366/81 20.12.11).

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