

Editorial

Tackling Cross-Border Inheritance Tax Obstacles within the EU

Prof. Dr Bruno Peeters, Faculty of Law, Research Group Business & Law, University of Antwerp;
Lawyer-Tiberghien Lawyers

In its Communication of 20 December 2010 on *Removing cross-border tax obstacles for EU citizens*,¹ the European Commission examined the most pressing tax problems that citizens face when they conduct transactions active across borders within the EU. One of the problem areas the Commission identified was cross-border inheritances.

In order to tackle these problems, on 15 December 2011, the Commission issued a Communication² together with a Recommendation and a Staff Working Paper.³

Given the increasing number of EU citizens that reside in Member States other than their Member State of origin⁴, the increase in cross-border real-estate ownership in the EU (up 50% between 2002 and 2010) and the massive growth in cross-border portfolio investments, it is likely that in the (near) future more assets may be inherited across borders.⁵ At present, the number of potential cross-border inheritance cases is estimated at between 290,000 and 360,000 per year. Inheritance tax problems are among the twenty top problems faced by citizens and small- and medium-sized businesses active across borders.⁶

The identified problems consist mainly of (1) double taxation and (2) discriminatory tax treatment.

1 DOUBLE TAXATION

Inheritance tax is not harmonized at the EU level. At present, the Member States' rules on the taxation of inheritances vary considerably. Eighteen Member States levy specific taxes on the death of a property owner, while nine⁷ do not do so.⁸

Member States levy the tax on the basis of a personal link of the heir to the deceased. This personal link is usually defined by the place of residence, domicile or nationality of the deceased or of the heir. Some Member States use more than one of these definitions. The different Member States also define these terms differently.

Most Member States levy inheritance tax on assets located in their jurisdictions, even if neither the deceased nor the heir has a personal link with the jurisdiction. Unlike income and capital taxes, Member States have few national or international arrangements⁹ in place to avoid double or multiple taxation of inheritances.

All these elements can give rise to situations where two or more Member States claim the right to levy taxes on the same inheritance. Such situations of unrelieved double or multiple taxation are therefore problematic.

Two decisions by the CJEU are relevant to these problems.

In the *Van Hilten-Van der Heijden* case¹⁰ the CJEU decided that the freedom of movement of capital did not forbid the estate of a citizen of a Member State who died within ten years of ceasing to reside in that Member State from being taxed as if he had continued to reside in that Member State. The rules at issue were not considered discriminatory because they did not distinguish between taxpayers according to their residence. Rather, they provided for identical treatment of the estates of citizens who transferred their residence abroad and those who remained in the Member State concerned. According to the CJEU, in the absence of harmonization, Member States are authorized to define the criteria for allocation their powers of taxation and for

¹ COM (2010) 769 and Staff Working Paper SEC (2010) 1576.

² COM (2011), 864, 4.

³ Recommendation and Commission Staff Working Paper C/2011/8819. The Recommendation also applies by analogy to gifts taxed under the same or similar rules as inheritances.

⁴ This number was estimated at 12.3 million in 2010, an increase of 3 million compared to 2005.

⁵ COM (2011), 864, 4 with references to Eurostat Data and the Copenhagen Economics Study on Inheritance Taxes in EU Member States and Possible Mechanisms to Resolve Problems of Double Inheritance Taxation in the EU, August 2010.

⁶ COM (2011), 864, 4 with reference to the Impact Assessment on solutions to cross-border inheritance tax problems SEC (2011) 1489.

⁷ Austria, Cyprus, Estonia, Latvia, Malta, Portugal, Romania, Slovakia and Sweden.

⁸ COM (2011), 864, 3. However, some of them are tax inheritances under other headings such as income tax.

⁹ For an overview of the few existing double tax treaties on inheritances, see COM (2011) 864, Annex II.

¹⁰ CJEU 23 Feb. 2006, C-513/03, *Van Hilten-Van der Heijden*.

the exercise of their competence. Member States may take international practice and, in particular, the OECD Model Convention on the avoidance of double taxation with respect to inheritance and gift tax as guidelines.¹¹ The CJEU observed that, from the commentaries on the Model Convention, the Dutch legislation at issue was justified by a desire to prevent tax evasion by citizens changing their State of residence to a State with lower tax rates before their deaths. The commentaries state that such transfers would only be valid if the citizens died shortly (i.e., within ten years) after the transfer of residence. In the *Van Hilten-Van der Heijden* case, double taxation was not the problem, since Dutch law offers exemption from tax levied by the State to which the deceased had transferred her residence (Switzerland).¹²

Double taxation was the issue in the *Block* case,¹³ where the CJEU was asked to rule on the compatibility with the freedom of movement of capital of national legislation that did not allow for inheritance tax paid in Spain to be credited against inheritance tax due by Ms Block in Germany, where she lived. The CJEU ruled that a Member State is not obliged to avoid double taxation on an inheritance that arises from the exercise in parallel by Member States of fiscal sovereignty, for example, by crediting inheritance tax paid abroad against its own inheritance tax.

In its Communication of 15 December 2011, the European Commission observed that cross-border inheritance tax problems could be resolved without any harmonization of Member States' inheritance tax rules, which thus would remain a matter of policy choice for each Member State. *It may be sufficient simply to ensure that Member States' rules interact more coherently with each other so as to reduce the potential for double or even multiple, taxation of inheritances.*¹⁴

Hence, the Commission in its Recommendation (point 4) focuses on improving Member States' existing national legislation to relieve the double taxation of inheritances. When levying inheritance tax, Member States should grant tax relief for inheritance tax already levied by another Member State either on immovable property situated in the other Member State or on movable property belonging to a permanent establishment of a business situated in the other Member State. For non-business movable property, a Member State with which neither the deceased nor the heir has a personal link should refrain from levying inheritance tax provided if it has already been levied by

the other Member State based on the personal link of the deceased and/or the heir to the other Member State. In cases where more than one Member State could tax an inheritance (e.g., where the deceased had personal links with one Member State and the heir has personal links with another Member State), then the second Member State should give tax relief for the inheritance tax paid in the first Member State. In cases where, on the basis of rules in different Member States, a person is deemed to have personal links with more than one Member State, then the competent authorities of the Member States concerned should determine through mutual agreement the Member State that should levy the inheritance tax and the Member State(s) that should grant relief on this tax. The Recommendation contains guidelines for determining which Member State has the closest personal link to the individual concerned (e.g., the person's permanent residence or centre of vital interest). For businesses or charities, the closest personal link could be deemed to be with the Member State in which its place of effective management is situated.

According to the European Commission, Member States should also allow tax relief for a reasonable period of time (e.g., ten years) after the deadline for paying inheritance tax.

The ultimate aim is to ensure that the overall tax burden on cross-border inheritances is no higher than that which would apply if only the Member State with the highest rate of tax among the Member States involved had taxed the inheritance (point 3 of the Recommendation). While the European Commission is not proposing any new legislation at this time in relation to double taxation, it does not exclude it at a later stage if this proves necessary. The Commission will carefully monitor Member States' laws and practices in taxing inheritances and will prepare an evaluation report in three years.

2 DISCRIMINATORY TAX TREATMENT

As regards tax discrimination the CJEU, which had never dealt with inheritance tax before 2003, has ruled on this subject in ten cases since.¹⁵ In eight of these ten cases, the CJEU ruled that aspects of Member States' inheritance tax laws were discriminatory.¹⁶ The Commission Staff Working Paper accompanying the Communication of 15 December 2011 gives a very interesting overview of the EU principles for

¹¹ CJEU 23 Feb. 2006, C-513/03, *Van Hilten-Van der Heijden*, para. 48.

¹² CJEU 23 Feb. 2006, C-513/03, *Van Hilten-Van der Heijden*, para. 45.

¹³ CJEU 12 Feb. 2009, C-67/08, *Block*.

¹⁴ COM (2011), 864, 6.

¹⁵ The following case is pending: Case C-31/11, *Scheunemann*.

¹⁶ CJEU 11 Dec. 2003, C-364/01, *Barbier*; CJEU 25 Oct. 2007, C-464/05, *Geurts-Vogten*; CJEU 17 Jan. 2008, C-256/06, *Jäger*; CJEU,

11 Sep. 2008, C-11/07, *Eckelkamp a.o.*; CJEU, 11 Sep. 2008, C-43/07, *Arens-Sikken*; CJEU 22 Apr. 2010, C-510/08, *Mattner*; CJEU 10 Feb. 2011, C-25/10, *Missionswerk Werner Heukelbach*, CJEU 15 Sep. 2011, C-132/10, *Halley*. In the following two cases, which were already mentioned before, the CJEU did not find the Member States' inheritance tax laws incompatible with EU law: CJEU 23 Feb. 2006, C-513/03, *Van Hilten-Van der Heijden* and CJEU 12 Feb. 2009, C-67/08, *Block*.

non-discriminatory inheritance taxation that can be identified from the relevant ECJ case law. Amongst others, the following general guidelines were identified by the Commission:¹⁷

- (1) Member States' inheritance tax laws are in breach of the freedom of movement of capital if they require different tax treatment of assets that are part of an inheritance, depending on whether or not they have a link to the national territory, notably depending on whether or not they are located there. This means *inter alia* that valuation methods cannot be less favourable for assets located abroad.
- (2) Member States' inheritance tax provisions are contrary to EU law if they provide higher tax-free allowances for residents than for non-residents in relation to gifts or inheritances, where the residents and non-residents are in comparable situations.
- (3) Regarding the determination of the value of inherited assets, it is contrary to EU law to allow tax deductions only if the deceased resided in the taxing Member State.
- (4) More generally, Member States' provisions are, in the absence of objective justifications, incompatible with the freedom of movement of capital if they impose less favourable inheritance tax treatment for non-resident heirs or deceased persons.

- (5) Member States are prohibited from offering preferential tax treatment to the inheritance of a business that is conditional on the business being continuing to operate within the Member State.
- (6) Member States cannot offer less-favourable tax treatment of an inherited business merely because its employees are located abroad.
- (7) Inheritance tax relief for businesses must be provided in the same way for heirs who are non-residents in the Member State as for heirs who are residents in the Member State.
- (8) A less favourable inheritance tax treatment for legacies made to a charity on the sole basis that the charity is established in another Member State rather than in the taxing Member State, is prohibited.

Those guidelines aim to assist Member States to bring their inheritance tax provisions into line with EU law and to inform EU citizens about the rules that Member States must respect when taxing cross-border inheritances. These guidelines not only emphasise the great significance CJEU jurisprudence has already had on this issue but also feed the hope that soft forms of positive EU tax integration, instigated by the European Commission, might be successful.

¹⁷ Commission Staff Working Paper C/2011/8819, sub-point 3.