Fiscal Consequences of Cross-border Residence and Company Seat Transfers within the EU[1]

JUDr. Peter Pecho[2] *and*
professor Arnaud Van Waeyenberge[3]

[2] *General Court of the European Union*
[3] *HEC Paris, visiting professor at the College of Europe (Bruges) and Université Libre de Bruxelles (ULB)*

Abstract
The European Union Treaties foresee the creation of an internal market that benefits not only companies, but also individuals. One of the main rights offered by the free movement of citizens, workers, services, capital and by the freedom of establishment is the possibility for natural and legal persons to move from one Member State to another. However, these freedoms are not absolute. Not only does the Treaty on the Functioning of the European Union provide for several exceptions, but the jurisprudence of the Court of Justice of the European Union (CJEU) allows that, under certain conditions, overriding reasons in public interest can justify restrictions on them. One of these overriding reasons is the need to safeguard the balanced allocation of powers to impose taxes between Member States, in accordance with the principle of territoriality. In fact, in the absence of any unifying or harmonising measures of the European Union (EU), the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation. In many cases, these internal legislations assimilate the expatriation of taxpayers to the realisation of profits or the sale of property, or they impose similar fiscal charges, commonly called exit taxes. This can lead to a paradoxical result, that despite the conferral of the freedoms of circulation on the taxpayers, the effective use of these freedoms is accompanied by a less favourable treatment compared to the one they would be subject

[1] We warmly thank N. Gaoua and K. Gallet, for their thoughtful and constructive comments. This contribution takes into account the law as it stood on June 30 2021.
[2] Opinions expressed in this paper are strictly personal.
[3] Opinions expressed in this paper are strictly personal.

to had they remained in their Member State of origin. In the absence of any unification or harmonisation at the EU level, the conciliation of the internal market freedoms and the fiscal competence of the Member States was ensured by the CJEU. Its initially internal market-oriented case-law has in the meantime become more focused on the Member States' fiscal competence. Later on, by adopting the Anti-Tax Avoidance Directive, the EU legislator has defined, in the field of companies, harmonised rules on exit taxation, which are inspired by the later CJEU's jurisprudence, but do not constitute a simple codification of it. However, in the light of the potential impact of exit taxes on the freedoms of movement, and hence on the possibility of individuals and companies to move and pursue their activities freely within the EU, the question remains whether a certain sacrifice from the Member States' fiscal competence in favour of a less restrictive cross-border regime could allow for a hidden potential of the European integration to mobilise and thus, to enhance economic activity, with the result of even higher fiscal revenues for the Member States, than under the present state of law.

Introduction

This contribution is dedicated to Professor Ján Klučka, the first Slovak judge at the Court of Justice of the European Union (CJEU or the Court) and a keen promoter of the European Union Law in Slovakia. He also acted as judge rapporteur in one of the cases of the exit taxes saga. The authors of this contribution were members of his chambers and would like to express their gratitude for the opportunity they were given and the experience they could acquire during this time. On the day when judge Klučka took his oath of office in Luxembourg, Professor Ján Mazák, President of the Slovak Constitutional Court and future Advocate General at the Court of Justice declared that Ján Klučka is not only a brilliant lawyer, but foremost a human with a capital "H". He could not be more true.

The European Union Treaties foresee the creation of an internal market that benefits not only companies, but also individuals. One of the main rights offered by the free movement of citizens, workers, services, capital and by the freedom of establishment is the possibility for natural and legal

persons to move from one Member State to another. However, these freedoms are not absolute. Not only does the Treaty on the Functioning of the European Union (TFEU) provide for several exceptions, but the jurisprudence of the Court of Justice of the European Union allows that, under certain conditions, overriding reasons in public interest can justify restrictions on them[4]. One of these overriding reasons is the necessity of safeguarding the balanced allocation of powers to impose taxes between Member States, in accordance with the principle of territoriality[5]. In fact, in the absence of any unifying or harmonising measures of the EU, the Member States retained the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation[6].

In many cases, these internal legislations assimilate the expatriation of taxpayers to the realisation of profits or sale of property, or they impose similar fiscal charges, commonly called exit taxes[7]. While the absence of obligatory cooperation mechanisms between fiscal authorities internationally ensures that these rules respect the principle of territoriality in taxation, its application to intra-EU expatriations could be considered controversial[8], because an intra-EU cross-border transfer must always be compared to a domestic transfer in a given Member State. Taking into account that the EU was supposed to complete its internal market by 1992 – and that it is still striving to do so today through a step-by-step approach

---

[4] Case C-657/13, *Verder LabTec*, EU:C:2015:331, paragraph 40 ; Case C-503/14, *Commission/Portugal,* EU:C:2016:979, paragraph 48 ; Case C-292/16, A Oy, EU:C:2017:888, paragraph 28.

[5] Case C-292/16, *A*, EU:C:2017:888, paragraph 30.

[6] Case C-371/10, *National Grid Indus*, EU:C:2011:785, paragraph 45; Case C-591/13, *Commission v. Germany*, EU:C:2015:230, paragraph 64.

[7] See on this topic: C. Panayi "Corporate Mobility in the EU and exit taxes" 63 Bulletin of International Taxation 459 (2009). According to a research by Deloitte in cooperation with Radbound University Nijmegen (Netherlands), conducted in 2012 by Dr. Harm van den Broek, out of twenty eight EU Member States at that time and two additional EEA Member States (Iceland and Norway), sixteen States applied a type of exit taxation (http://www2.deloitte.com/nl/nl/pages/tax/articles/exit-taxes-infringe-eu-law.html). See as well A. Uceda and S. Dechsakulthorn, "In wake of ECJ ruling, EU Member States amend exit tax regimes", Insights Publications, Global Tax News, DLA Piper.

[8] See i.a. D Jervis, "Exit taxes and Europe – where are we now?" *Publications, Eversheds International (2012)* http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Chemicals/Exit_taxes_and_Europe

– it is not evident to justify a tax triggered by a mere expatriation due to the change of residence of a natural person, or a company seat transfer within the EU, when no such tax is levied in an analogous situation within a Member State.

However, the competence of Member States in this field is also not exclusive. They are required to respect the fundamental freedoms of the EU internal market[9], as well as the general principles of non-discrimination on the grounds of nationality and those of equivalence and effectiveness in the protection of rights derived from EU law[10]. In the absence of any unification or harmonisation at the EU level, the conciliation of the internal market freedoms and the fiscal competence of the Member States was ensured by the CJEU.

Its initially internal market-oriented case-law (I) has in the meantime become more focused on the Member States' fiscal competence (II). Later on, by adopting the Anti-Tax Avoidance Directive[11], the EU legislator has, in the field of companies, defined harmonised rules on exit taxation, which are inspired by the later CJEU's jurisprudence, but do not constitute a simple codification of it (III). However, in the light of the potential consequences of exit taxes on the freedom of movement, and hence on the possibility of individuals and companies to move and pursue their activities freely within the EU, the question remains whether a certain sacrifice from the Member States' fiscal competence in favour of a less restrictive cross-border regime, could allow for a hidden potential of the European integration to mobilise and thus, to enhance economic activity, with the result of higher fiscal revenues for the Member States, than under the present state of law (IV).

---

[9] Case C-279/93, *Schumacker*, EU:C:1995:31 paragraph 21.

[10] Case C-40/08, *Asturcom Telecomunicaciones*, EU:C:2009:615 paragraph 38.

[11] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ 2016 L 193, p. 1).

1 Initial case-law considerably restricting exit taxes with respect to natural persons

In *de Lasteyrie du Saillant*[12], the CJEU held that if a taxpayer wishing to transfer his tax residence outside a Member State's territory, in exercise of his right guaranteed by Article 49 TFEU, has to pay an exit tax on latent increases in the value of his securities, the taxpayer is subjected to a disadvantageous treatment in comparison with a person who maintains his residence in that State. That taxpayer becomes liable, simply by reason of such a transfer, for tax on income that has not yet been realised, and that he will only potentially receive. Whereas, if he remained in that Member State, increases in value would become taxable only if, and to the extent that, they were actually realised. That difference in treatment is capable of having considerable repercussions on the assets of a taxpayer wishing to transfer his tax residence outside such a Member State, and is likely to discourage him from actually carrying out such a transfer.

The restrictive character of such legislation is, according to the Court in this case, further enhanced if the suspension of payment is not automatic, but subject to strict conditions such as the setting up of guarantees, which have an inherent additional restrictive effect, in that they deprive the taxpayer of the enjoyment of the assets given as a guarantee.[13]

In terms of the possible justifications of such a measure by overriding reasons in public interest, the CJEU firstly held that Member States could not validly invoke the objective of preventing tax avoidance, as an exit tax is not even considered suitable to pursue such a goal.[14] Secondly, the Court also dismissed a justification based on the objective to prevent fiscal erosion as the "diminution of tax receipts cannot be regarded as a matter of overriding general interest, which may be relied upon in order to

[12] Case C-9/02, *de Lasteyrie du Saillant,* EU:C:2004:138, paragraph 46.
[13] Case C-9/02, *de Lasteyrie du Saillant*, paragraph 47.
[14] Case C-9/02, *de Lasteyrie du Saillant*, paragraphs 50-58.

justify a measure, which is, in principle, contrary to a fundamental freedom".[15]

Another objective aiming to justify exit taxes was raised in *N.*[16] Although the Court considered the scrutinised Dutch exit tax legislation as being able to fulfil the legitimate objective of ensuring a balanced allocation of tax competence between the Member States in accordance with the principle of territoriality,[17] it found it to be disproportionate with respect to two particular features of the system in question.

Firstly, unless the taxpayer guaranteed payment of the tax after the realisation of his assets, the tax was to be collected upon the taxpayer's departure from the territory of the relevant Member State. The Court held that even though such a measure facilitated the collection of tax from a departing resident, it went beyond what was strictly necessary to ensure the effectiveness of a tax system based on the principle of fiscal territoriality, because EU legislation already offered less restrictive methods of achieving this result. These methods include i.a. requests from the competent authorities of another Member State for all the information enabling the authorities of the Member State of origin to ascertain the correct amount of income tax as provided in Directive 77/799/EEC[18], as amended by Directive 2004/106/EC, or requests for assistance of another Member State in the recovery of debts relating to certain taxes, including those on income and capital, foreseen in Directive 76/308/EEC[19], as amended by Directive 2001/44/EC.[20]

[15] Case C-9/02, *de Lasteyrie du Saillant,* paragraphs 59-60; See as well case C-380/11, *DI VI Finanziaria SAPA di Diego della Valle,* EU:C:2012:552, paragraph 50.

[16] Case C-470/04, *N*, EU:C:2006:525.

[17] Case C-470/04, *N*, paragraphs 41-47.

[18] Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, certain excise duties and taxes on insurance premiums (OJ 1977 L 336, p. 15).

[19] Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties (OJ 1976 L 73, p. 18).

[20] Case C-470/04, *N*, paragraphs 52-53.

Secondly, losses in value occurring after the transfer of residence were not taken into account in order to reduce the tax debt. This was also considered unnecessary to fulfil the abovementioned objective[21]. According to the laws under scrutiny in *de Lasteyrie du Saillant* and *N*, the taxpayer would be required to pay tax based on the difference between the purchase price and the stock value at the moment of the residence transfer. All this could occur without any sale of stock at the moment of his expatriation. To put it simply, if the stock value drops during the taxpayer's stay in the host Member State and he decides to sell, while none of the Member States offers a tax credit for the loss following the residence transfer, the taxpayer is penalised simply for exercising a fundamental right granted by the EU treaties.

As a result of this initial case-law that concerned the taxation of natural persons, exit taxes were considered a restriction on the freedom of establishment, which could be justified by the overriding reason in public interest consisting in the necessity of safeguarding the balanced allocation of powers to impose taxes between Member States, in accordance with the principle of territoriality, only if the taxpayer was warranted a deferral of the payment of the tax without having to set up guarantees, and if eventual losses in value occurring after the transfer of residence could be taken into account in order to reduce the tax debt.

2 Subsequent case law shifting the balance towards the fiscal sovereignty of Member States

In the following years, the Court reconsidered, against the background of cases concerning the transfers of seat of legal persons, the solutions adopted in *de Lasteyrie du Saillant and N* and transposed its new approach back into the domain of natural persons.

In *National Grid Indus*[22], the main question was whether Article 49 TFEU was opposed to Member State legislation that sought to tax

[21] Case C-470/04, *N*, paragraph 54.

[22] Case C-371/10, *National Grid Indus*, EU:C:2011:785, paragraph 36. See A. Autenne "Arrêt 'National Grid Indus': les taxes à l'épreuve de la liberté d'étalissement ", Journal de droit européen 109

unrealised capital gains on the assets of a company incorporated under the laws of that Member State upon the transfer of the company's effective management to another Member State without providing for a tax deferral until gains were actually realised and without taking into account possible decreases in value after the transfer of management.[23]

At the outset, the CJEU confirmed the analysis performed in its previous exit tax cases with respect to the existence of a restriction on the freedom of establishment. It held that a company incorporated under Dutch law seeking to transfer its place of effective management outside Dutch territory in exercise of its rights under Article 49 TFEU is put at a disadvantage compared to a similar company retaining its place of effective management in the Netherlands. In accordance with the national legislation in question, the Dutch company's transfer of management to another Member State prompted an immediate tax on the unrealised capital gains relating to the assets transferred, whereas such gains would not be taxed if the company transferred its place of management within the Netherlands. Capital gains on the assets of a company transferring its place of management within the Netherlands were not subject to tax until their actual realisation. This discriminatory treatment might therefore deter a company incorporated in the Netherlands from transferring its place of management to another Member State. Consequently, it was constitutive of a restriction on the TFEU provisions on the freedom of establishment.[24]

In the second step of its analysis, the Court examined possible justifications for such a restriction and, in particular, the objective of ensuring a balanced allocation of tax competence between the Member States in accordance with the principle of territoriality. It held that such an exit tax was intended to prevent situations capable of jeopardising the right of the Member State of origin to exercise its powers of taxation in relation to

---

(2012) and C. Panayi "National Grid Indus BV v. Inspecteur Van De Belastingdienst Rijnmond/Kantoor Rotterdam: Exit Taxes in the European Union Revisited" 1 British Tax Review 41 (2012).

[23] Case C-371/10, *National Grid Indus*, EU:C:2011:785, paragraph 34.

[24] Exit taxes can constitute also a restriction on the free movement of capital, if this regime is applicable. Case C-164/12, *DMC*, EU:C:2014:20, paragraphs 38-43.

activities carried out within its territory, and might therefore be justifiable.[25]

According to Article 54 TFEU, companies or firms formed in accordance with the laws of a Member State are to be treated, for the purposes of the rules of the TFEU on freedom of establishment, in the same way as natural persons who are nationals of Member States. Nevertheless, concerning the definitive establishment of the amount of tax at the time when the company ceases to be a tax resident of the Member State of origin, and consequently, the possibility of taking into account losses of value encountered following this expatriation, the CJEU, reacting to the arguments presented by the Danish, Spanish and Finnish governments[26], explained in paragraphs 56 and 58 of *National Grid Indus* that the situation of a company in respect of an exit tax law was not necessarily the same as that of a private individual, who might own a substantial stake in commercial companies. Specifically, "the assets of a company are assigned directly to economic activities that are intended to produce a profit… [and] the extent of a company's taxable profits is partly influenced by the valuation of its assets in the balance sheet, insofar as depreciation reduces the basis of taxation".[27] Furthermore, the CJEU held that eventual decreases in value were being unnecessarily accounted for by the Member State of origin, as they should be normally taken into account by the host Member State. But, even if the latter did not do so, the Court stated that the Member State of origin should not be obliged to take account of the depreciation, as the Treaty offers no guarantees that a transfer of a company's place of management to another Member State will be a

[25] Case C-371/10, *National Grid Indus*, EU:C:2011:785, paragraphs 42-48.
[26] Opinion of Advocate General Kokott in *National Grid Indus* (EU:C:2011:563), paragraph 61.
[27] Case C-371/10, *National Grid Indus*, EU:C:2011:785, paragraph 57. See p. 8 of the communication from the Commission to the Council, the European Parliament and the European economic and Social Committee on exit taxation and the need for co-ordination of Member States' tax policies (COM(2006) 825 final) where the Commission indicates as well "that certain types of assets used in or created by companies are, by their nature, not meant to be disposed of, but are used up by the company or expire over time (e.g. certain intangibles)".

tax-neutral event.[28] Given the absence of EU harmonisation and the differences in tax legislation among the Member States, such a transfer might or might not be advantageous to a company for tax purposes. According to the Court, it is left up to each economic operator to plan his economic activities according to the freedoms guaranteed by the EU treaties and foresee any consequences.

Concerning the assessment of the proportionality of the contested measure regarding the immediate collection of the exit tax due, the CJEU made a count of all the administrative burdens that a company might bear under possible suspension regimes.[29] The CJEU concluded that the measure would be proportionate if a Member State's legislation offered expatriating companies an option to either directly pay the exit tax and eliminate the administrative burden, or obtain a suspension until the gains were realised and pay eventual interests on the due sum. Here, the Court took a more proactive stance, offering alternative solutions for contemplation by the Member States. If it is unusual, from the perspective of the national civil and commercial courts, to adopt such a proactive position, this role being traditionally reserved to the respective legislators, it is welcome at the EU level as it might open new avenues for further discussion.

National Grid Indus has been confirmed and further developed.

As concerns the existence of *restrictions* on the internal market freedoms, the Court has reiterated that *exit taxes on unrealised income* fall within this qualification[30]. This solution was applied also in the field of application of the Agreement between the European Community and the Swiss Confederation on the free movement of persons[31]. However, the

---

[28] Case C-371/10, *National Grid Indus*, EU:C:2011:785, paragraph 62.

[29] i.e. periodically informing the Member State of origin of the state of its assets.

[30] Case C-38/10, *Commission v. Portugal*, EU:C:2012:521, paragraph 28; Case C-301/11, *Commission v. Netherlands*, EU:C:2013:47, paragraphs 14-22 ; Case C-64/11, *Commission v. Spain*, EU:C:2013:264, paragraph 27 ; Case C-261/11, *Commission v. Denmark*, EU:C:2013:480, paragraphs 29-30 ; Case C-164/12, *DMC*, EU:C:2014:20, paragraphs 38-43 ; Case C-657/13, *Verder LabTec*, EU:C:2015:331, paragraph 37 ; Case C-503/14, *Commission/Portugal*, EU:C:2016:979, paragraphs 41-47 ; Case C-646/15, *Trustees of the P Panayi Accumulation & Maintenance Settlements*, EU:C:2017:682, paragraph 45.

[31] Case C-581/17, *Wächtler*, EU:C:2019:138, paragraphs 56-57.

CJEU has extended the notion of restriction to disadvantageous conditions on taxation of *realised income*[32], for granting a *reduction in capital tax*[33], or for *transfer of assets*[34]. The Court has recently held that a restriction on the freedom of establishment exists even when the host Member State excludes from the deduction from taxable profits a loss incurred by a company resident in its territory, but incorporated in another Member State under the latter's law during the tax year in which that company was resident in the Member State of incorporation, whereas the possibility of such a deduction would be granted to a company resident in the Member State of residence, which incurred a loss in the same tax year[35].

In the field of *justification* of these measures, the first question to be answered is which *objectives* the Member States can validly invoke. One should bear in mind that, according to settled case-law, the mere fact that a natural or a legal person transfers its residence or its place of management to another Member State cannot set up a general presumption of tax evasion and justify a measure that compromises the exercise of a fundamental freedom guaranteed by the TFEU[36]. Consequently, already in *de Lasteyrie du Saillant*[37], and in *National Grid Indus*[38], the examined exit taxes could not be justified by the *objective to prevent tax avoidance*. Being of a purely economic nature, such as the desire to increase the national tax revenue, the *objectives to prevent fiscal erosion of the tax base* or of *reinvestment in the Member State of origin* were equally considered as not capable of justifying an exit tax[39].

[32] C-269/09, *Commission v. Spain*, EU:C:2012:439, paragraph 57; Case C-591/13, *Commission v. Germany*, EU:C:2015:230, paragraphs 57-61.

[33] Case C-380/11, *DI VI Finanziaria SAPA di Diego della Valle*, EU:C:2012:552, paragraph 40.

[34] Case C-292/16, *A Oy*, EU:C:2017:888, paragraph 26 ; Joined cases C-327/16 and C-421/16, *Jacob and Lassus*, EU:C:2018:210, paragraphs 75-76.

[35] Case C-405/18, *AURES Holdings*, EU:C:2020:127 paragraph 35.

[36] Case C-9/02, *de Lasteyrie du Saillant*, EU:C:2004:138, paragraph 51, Case C-371/10, *National Grid Indus*, EU:C:2011:785, paragraph 84.

[37] Case C-9/02, *de Lasteyrie du Saillant*, EU:C:2004:138, paragraphs 51-57.

[38] Case C-371/10, *National Grid Indus*, EU:C:2011:785, paragraphs 83-84.

[39] Case C-9/02, *de Lasteyrie du Saillant*, EU:C:2004:138, paragraphs 59 ; Case C-380/11, *DI VI Finanziaria SAPA di Diego della Valle*, EU:C:2012:552, paragraph 50 ; Case C-591/13, *Commission v. Germany*, EU:C:2015:230, paragraphs 76-78.

However, the Court agrees to examine exit taxes and their particular features in the light of the overriding reasons of *cohesion of a national tax system*[40], *guaranteeing the effective collection of the tax* in order to prevent the loss of tax revenue[41] and the necessity to *safeguard the balanced allocation of powers to impose taxes between Member States, in accordance with the principle of territoriality*.

Even though the Court has, in *de Lasteyrie du Saillant,* rejected, in the light of the circumstances of that case, a justification on the ground of *cohesion of a national tax system*[42]*,* in *Commission v. Germany,* the Court has explained that, in order for an argument based on such a justification to succeed, the existence of a direct link has to be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy[43]. In any case, it follows already from *National Grid Indus*[44] that this overriding reason coincides with the necessity to safeguard the balanced allocation of powers to impose taxes between Member States, in accordance with the principle of territoriality, and it does not offer a broader possibility of justification than the latter reason.

The necessity to safeguard the balanced allocation of powers to impose taxes between Member States in accordance with the principle of territoriality constitutes by far the predominant objective in the Court's case-law[45]. The CJEU has indicated in *DMC*[46] that this objective can justify an exit tax only where, in particular, the Member State in whose territory the income was generated is actually *prevented* from exercising its

[40] Case C-591/13, *Commission v. Germany*, EU:C:2015:230, paragraph 74 ; Case C-503/14, *Commission/Portugal,* EU:C:2016:979, paragraph 62.
[41] Case C-581/17, *Wächtler*, EU:C:2019:138, paragraph 67.
[42] Case C-9/02, *de Lasteyrie du Saillant*, EU:C:2004:138, paragraphs 61-67.
[43] Case C-591/13, *Commission v. Germany*, EU:C:2015:230, paragraph 74 ; Case C-503/14, *Commission/Portugal*, EU:C:2016:979, paragraph 62. It is to be noted, that this justification has not been accepted in neither of these judgments.
[44] Case C-371/10, *National Grid Indus*, EU:C:2011:785, paragraphs 80-82.
[45] Case C-269/09, *Commission v. Spain*, EU:C:2012:439, paragraph 76 ; Case C-64/11, *Commission v. Spain,* EU:C:2013:264, paragraph 31; Case C-261/11, *Commission v. Denmark*, EU:C:2013:480, paragraph 32 ; Case C-164/12, *DMC*, EU:C:2014:20, paragraph 45; Case C-657/13, *Verder LabTec*, EU:C:2015:331, paragraphs 42 and 45.
[46] Case C-164/12, *DMC*, EU:C:2014:20, paragraph 56; Case C-657/13, *Verder LabTec*, paragraph 47; See in the field of transfer of assets case C-292/16, *A*, EU:C:2017:888, paragraph 33.

power of taxation in respect of such income. That is why, in a situation where a subsequent transfer of securities received in exchange does not fall within the fiscal competence of that Member State, national legislation provides for the taxation of the capital gains that are subject to tax deferral upon that transfer, without taking into account any capital losses occurring at that time, whereas account is taken of such a capital loss when the taxpayer holding the securities is resident for tax purposes in that Member State on the date of that transfer could not be justified by this overriding reason, as the Member State in question does not lose its fiscal competence in respect of that capital gain at the time when the capital loss at issue arises. In fact, the consequence of the deferral of taxation of the capital gain at issue in the main proceedings until the subsequent transfer of the securities received in exchange is that that capital gain, although it was established at the time of the exchange of securities, is taxed (not simply collected) [47]. As Advocate General Wathelet explained in *Jacob and Lassus*[48], the concepts of "suspended" or "deferred taxation" must be distinguished from deferred recovery, which implies that all the detailed rules for taxation (determination of the basis of assessment of the capital gain and the tax rate) are determined on the date of the exchange of the shares or securities, with only payment of the tax thus determined being deferred to the subsequent transfer of those shares or securities.

Nevertheless, in the particular field of trusts[49], and the change of residence of its trustees, the Court has extended the *DMC* jurisprudence to a situation, where capital gains made by non-resident trustees and attributed to resident beneficiaries in the form of capital payments, could still be taxed as gains accruing to those beneficiaries. The CJEU considered that the national legislation, in so far as it causes the powers of taxation retained by the Member State concerned to be entirely dependent on the

[47] Joined cases C-327/16 and C-421/16, *Jacob and Lassus*, EU:C:2018:210, paragraphs 80-85.

[48] Opinion of Avocate General Wathelet in joined cases *Jacob and Lassus*, C-327/16 et C-421/16, EU:C:2017:865, paragraph 6.

[49] Case C-646/15, *Trustees of the P Panayi Accumulation & Maintenance Settlements*, EU:C:2017:682, paragraphs 53-56.

discretion of the trustees and the beneficiaries, cannot be regarded as sufficient to preserve the powers of that Member State to tax capital gains accruing within its territory. Consequently, this legislation, which provides for the taxation of unrealised gains in the value of assets held in trust on the occasion of the transfer of the place of management of that trust to another Member State, notwithstanding the fact that the former Member State has the possibility of retaining some power to tax those capital gains, was considered a suitable means of ensuring the preservation of the allocation of powers of taxation between the Member States, since the former Member State loses its power to tax those capital gains following that transfer.

Secondly, the Court has examined, under the *test of proportionality*, the concrete elements shaping the various exit taxes in question.

To start with, according to settled case-law, it is proportionate for a Member State, for the purpose of safeguarding the exercise of its powers of taxation, to determine the amount of tax due on the unrealised capital gains that have been generated in its territory pertaining to the assets transferred outside its territory, at the time when its powers of taxation in respect of the assets concerned cease to exist[50]. That right to determine the amount of tax due on the unrealised capital gains that have been generated in its territory means, in other words, that the Member State of origin is not obliged to take into account any *losses in value* that might occur between the loss of the statute of tax resident and the actual realisation of the capital gains. This solution applies since *National Grid Indus* to cross-border transfers of legal persons[51], while it could be deduced from paragraphs 56 and 57 of this judgment, that expatriation of natural persons is governed by the principles set out in de *Lasteyrie du Saillant* and in *N*, i.e. that taxation of unrealised capital gains at the moment of residence transfer to another Member State is disproportionate if it does not take into account losses of value, which can incur until the moment

[50] Case C-64/11, *Commission v. Spain*, EU:C:2013:264, paragraph 31, Case C-164/12, *DMC*, EU:C:2014:20, paragraph 60; Case C-657/13, *Verder LabTec*, EU:C:2015:331, paragraph 48.

[51] See for trusts Case C-646/15, *Trustees of the P Panayi Accumulation & Maintenance Settlements*, EU:C:2017:682, paragraph 58.

of the effective realisation of these assets. In fact, the Court based itself in *National Grid Indus* on the distinction between these two types of persons in order to exclude the transposition of the principles adopted in respect of natural persons to legal persons. Yet, in *Commission v. Portugal*[52] the Court went one step further and *abolished this distinction between natural and legal persons*. In particular, it explained that it has already in *Commission v. Spain*[53] and in *Commision v. Germany*[54] transposed the principles laid down in *National Grid Indus* also to the taxation on capital gains of natural persons, and that it stated in paragraph 61 of *National Grid Indus* that a possible omission by the host Member State to take account of decreases in value does not impose any obligation on the Member State of origin to revalue, at the time of the definitive disposal of the new shares, a tax debt which was definitively determined at the time when the taxable person, because of the transfer of its residence, ceased to be subject to tax in the Member State of origin.[55]

Next, it follows from paragraph 73 of *National Grid Indus*, that national legislation offering a company transferring its place of effective management[56] to another Member State the choice between, first, immediate payment of the amount of tax, which creates a disadvantage for that company in terms of cash flow but frees it from subsequent administrative burdens, and, secondly, deferred payment of the amount of tax, possibly together with interest in accordance with the applicable national legislation, which necessarily involves an administrative burden for the company in connection with tracing the transferred assets, would constitute a measure which, while being appropriate for ensuring the balanced allocation of powers of taxation between the Member States, would be less harmful to the freedom of establishment than a immediate collection of tax at the moment of expatriation. If a company were to consider that the

[52] Case C-503/14, *Commission v. Portugal*, EU:C:2016:979, paragraphs 53-56.
[53] Case C-269/09, *Commission v. Spain*, EU:C:2012:439, paragraphs 75-78.
[54] Case C-591/13, *Commission v. Germany,* EU:C:2015:230, paragraphs 65-67.
[55] See as well Case C-581/17, *Wächtler*, paragraph 64.
[56] This applies now, in the light of case C-503/14, *Commission v. Portugal*, EU:C:2016:979, paragraphs 53-56, also to natural persons.

administrative burden in connection with deferred recovery was excessive, it could opt for immediate payment of the tax[57]. It has been clarified in *Commission v. Spain*[58], that this option which is to be offered to the taxpayer must comprise a *possibility of an automatic deferral of recovery* of the tax. But, later on, the Court of justice accepted that a staggered (not a deferred) recovery of the amount of tax at issue by ten annual or even five annual instalments may be a proportionate measure to attain the objective of preserving the allocation of taxation powers between the Member States[59]. This might be interesting in particular in order to achieve a proportionate collection of tax on assets, which are not meant to be realised.

In fact, in *Commission v. Danemark*[60], the Court has been confronted with an argument, according to which the solution adopted in paragraph 73 of National Grid Indus supposes that the assets in question are indeed realised, because a deferred collection of tax does not work well in respect of assets, which are not meant to be realised. The Court replied, however, that the Member States being entitled to tax the capital gains which were generated while the assets in question were in their territory, they have the power to provide, for this taxation, a chargeable event other than the actual transfer, in order to guarantee the taxation of assets which are not intended to be sold, and less infringing on the freedom of establishment than the withdrawal at the time of the transfer. Since the amount of tax on unrealised capital gains relating to assets is definitively determined when a company transfers these assets to another Member State, the circumstance that some of said assets may not be sold after their transfer to

[57] See as well Judgements in *Commission v. Portugal* (C-38/10, EU:C:2012:521, paragraph 32) ; C-591/13, *Commission v. Germany*, EU:C:2015:230, paragraph 73; Case C-657/13, *Verder LabTec*, EU:C:2015:331, paragraph 49; Case C-503/14, *Commission v. Portugal*, EU:C:2016:979, paragraph 60 ; Case C-646/15, *Trustees of the P Panayi Accumulation & Maintenance Settlements*, EU:C:2017:682, paragraph 57;

[58] Case C-64/11, *Commission v. Spain*, EU:C:2013:264, paragraph 37.

[59] Case C-164/12, *DMC*, EU:C:2014:20, paragraphs 61-64 ; Case C-657/13, *Verder LabTec*, EU:C:2015:331, paragraphs 49-52.

[60] Case C-261/11, *Commission v. Denmark*, EU:C:2013:480, paragraphs 33-37.

another Member State does not in itself have the effect of depriving the State of origin of the possibility of recovering the said amount[61].

Last, but not least, the Court has judged in paragraph 74 of *National Grid Indus* that account should also be taken of the risk of non-recovery of the tax, which increases with the passage of time. That risk may be taken into account by the Member State in question, in its national legislation applicable to deferred payments of tax debts, by measures such as the provision of a bank *guarantee*. In *DMC*[62], after having recalled that it has been already judged that such guarantees in themselves constitute a restrictive effect, in that they deprive the taxpayer of the enjoyment of the assets given as guarantee[63], it explained that such a requirement cannot, as a matter of principle, be imposed without prior assessment of the risk of non-recovery.

3 The exit tax in the post ATAD environment

The European legislature took up this issue and passed a directive that laid down rules against tax avoidance practices that directly affect the functioning of the internal market, according to the recitals of that directive, Directive (EU) 2016/1164 (hereafter the "Directive" or "ATAD"). As the legal basis for the Directive is Article 115 TFEU, the adoption of this Directive was not certain given that unanimity in the Council was needed. The philosophy of this approach is "to lay down rules against the erosion of tax bases in the internal market and the shifting of profits out of the internal market"[64]. As such, it can be considered an important milestone in the fight against the erosion of the tax base[65]. More precisely, the Directive contains the following five legally-binding anti-abuse measures: limitations on the deductibility of interest and exit

[61] See as well case C-164/12, *DMC*, EU:C:2014:20, paragraph 53 ; Case C-657/13, *Verder LabTec*, EU:C:2015:331, paragraph 45.

[62] Case C-164/12, *DMC*, EU:C:2014:20, paragraphs 65-67.

[63] Case C-9/02, *de Lasteyrie du Saillant*, EU:C:2004:138, paragraph 47 ; Case C-470/04, *N*, EU:C:2006:525, paragraph 36.

[64] *Recital (5) of the Directive.*

[65] *In particular, since the Directive has been adopted one year after the OECD 13 final BEPS reports.*

taxation, a general anti-abuse rule, controlled foreign company rules and rules to tackle hybrid mismatches. Since the 1st of January 2019, all Member States should have transposed and applied these new anti-abuse measures against several forms of aggressive tax planning[66]. However, those Member States already applying stricter rules to one of those five areas covered by the Directive were not requested to amend their pre-existing legislation.

In the context of this contribution, our analysis will be limited to the Directive's framework for exit taxation[67]. First, the Directive provides a definition of what "exit taxes" are, and secondly, it indicates a list of scenarios to consider when applying those exit taxes. The Directive then provides details on the evaluation of the assets targeted these exit taxes target, in addition to providing the possibility to opt for deferred taxation in the case of a migration or movement within the European Union.

First, according to Article 5 of the Directive, exit taxes "have the function of ensuring that where a taxpayer moves assets or its tax residence out of the tax jurisdiction of a State, that State taxes the economic value of any capital gain created in its territory even though that gain has not

[66] By way of derogation, Member States shall, by 31 December 2019, adopt and publish, the laws, regulations and administrative provisions necessary to comply with Article 5 - Article 11 (5) of the Directive – the additional year would be granted in the light of the administrative burden for Member States that currently do not have an exit taxation regime - S. Peeters "Exit Taxation: From an Internal Market Barrier to a Tax Avoidance Prevention Tool", 26 EC Tax Review 3, 2017, p.132.

[67] For a more general analysis, see C. Brokelind "The Anti-Tax Avoidance Directive under Scrutiny: A Matter of Competence?" *International Taxation in a Changing Landscape – Liber Amicorum in Honour of Bertil Wiman,* J. Monsenego & J. Bjuvberg eds., Wolters Kluwer 2019, p. 45-56; A. de Graff & K. Visser, "ATA-Directive: Some Observations Regarding Formal Aspects", 25 EC *Tax Review* 4, 2016, p. 199-210; P. Koerver Schmidt, "The Role of the Anti-Tax Avoidance Directive in Restoring Fairness – A Proper Step towards Ensuring Sustainability of the International Tax Framework?" *Tax Sustainability in an EU and International Context*, C. Brokelind, S. van Thiel eds., IBFD 2020., Copenhagen Business School, CBS LAW Research Paper No. 1939, Available at SSRN: https://ssrn.com/abstract=3492643

yet been realised at the time of the exit."[68] Then, Article 5 (1) of the Directive specifies—as indicated below—the cases in which taxpayers are subject to these exit tax rules[69]:

"A taxpayer shall be subject to tax at an amount equal to the market value of the transferred assets, at the time of exit of the assets, less their value for tax purposes, in any of the following circumstances:

a) a taxpayer transfers assets from its head office to its permanent establishment in another Member State or in a third country in so far as the Member State of the head office no longer has the right to tax the transferred assets due to the transfer;
b) a taxpayer transfers assets from its permanent establishment in a Member State to its head office or another permanent establishment in another Member State or in a third country in so far as the Member State of the permanent establishment no longer has the right to tax the transferred assets due to the transfer;
c) a taxpayer transfers its tax residence to another Member State or to a third country, except for those assets which remain effectively connected with a permanent establishment in the first Member State;
d) a taxpayer transfers the business carried on by its permanent establishment from a Member State to another Member State or to a third country in so far as the Member State of the permanent establishment no longer has the right to tax the transferred assets due to the transfer."

Regarding the computing and tabulation of the amounts, the ATAD dictates assigning a fixed market value for the transferred assets at the time of those assets' exit based on the "arm's length" principle. The right to tax is defined by the Member State of departure, yet the receiving State

[68] Recital (10) of the Directive; D. Smit "The Anti-Tax-Avoidance Directive (ATAD)", *European Tax Law*, P. Wattel et al. eds., Wolters Kluwer 2018, p. 489.

[69] Please note that transfers of assets, including cash, between a parent company and its subsidiaries fall outside the scope of the envisaged rule on exit taxation.

may dispute the value of the transferred assets established by the exit State when the receiving State feels it does not reflect the market value. If there is no consensus, Member States could resort to the existing dispute resolution mechanisms[70].

In addition, it must be stressed that if the destination State is an EU Member State (or an EEA Member State), the taxpayer has the possibility of deferring the payment of the exit tax by paying it in installments over a five year period.[71] However, it must be noted that transfers to a non-Member State are subject to immediate taxation nonetheless.

The transposition of Article 5 of the Directive has led to a theoretically harmonized environment within the EU, at least when it comes to exit tax measures. This situation also seems to have taken into consideration, the case law of the CJEU on exit taxation[72]. Such a legislative intervention was desirable and necessary in order to standardize and generalize the case law solutions, which are essentially limited to very specific cases. However, in the authors' opinion, some points could raise questions.

Regarding the form it has taken, one could wonder why the regulation of an act in line with the logic of the internal market would result in a text on "Anti-Tax Avoidance". Indeed, according to case-law cited above, it is not illegitimate for a company to decide to move within the "area without internal frontiers", that is to say, the single market, without furthering a suspicion of tax fraud[73].

Regarding the substance of the text, one could wonder if the solution chosen takes sufficient account of the interests of taxpayers as the adopted

[70] Recital (10) and Article 5 (5-6) of the Directive.

[71] See Article 5 (2-4) of the Directive.

[72] S. Peeters "Exit Taxation: From an Internal Market Barrier to a Tax Avoidance Prevention Tool", 26 EC Tax Review 3, 2017 – the author argues convincingly that the approach is slightly different as the case-law concerns "when and under which conditions a Member State is *allowed to levy* exit taxes in the light of the fundamental freedoms, that protects the rights of the enterprises that engage in cross-border relocations. The ATAD, on the contrary, prescribes when a Member State *has to subject* unrealized capital gains to such exit taxes. This fits within the overall aim of ATAD, which is to ensure that companies are taxed where they generate profits and value, and to avoid erosion of tax bases and shifting of profits." – p. 128.

[73] Case C-9/02, *de Lasteyrie du Saillant*, EU:C:2004:138, paragraph 57 ; Case C-371/10, *National Grid Indus*, EU:C:2011:785, paragraph 84 and cited case-law.

system might create legal and financial uncertainty. Establishing and determining market value is a difficult exercise as it is, especially in terms of assessing intellectual property, for example. Therefore, the system for calculating tax often risks being the subject of disagreement between two Member States[74]. However, the Directive does not seem to provide nor envision a clear, definitive and rapid system for settling this central question, opting instead to refer to "existing dispute resolution mechanisms" namely "tax dispute resolution mechanisms"[75]. This procedure is long and complicated and puts the tax payer for a considerable time in the uncertainty.

Finally, it is regrettable that the Member States do not seem to cooperate fully. Since the transposition of the Directive, all Member States must now have adopted an exit tax measure in their domestic legislation. However, certain Member States have not transposed this legislation into their domestic law in accordance with the Directive. For example, there is Belgium for which the deferral of taxation for transfers to Liechtenstein is not available. Besides, it must be stressed that in the French tax Code, there is both a specific exit tax regime for natural persons[76] (enshrined in Article 167bis) and a specific exit tax regime for legal persons transposing the Directive. As such, as per Article 221, 2, of the French Tax code, the relocation of head offices (or a permanent establishment transfer) to a European Union Member State, including the transfer of certain portions of its assets, triggers the taxation of unrealised and deferred capital gains. Further, in line with the option provided for by the Directive, each country must transpose stricter rules with France electing to remove from its domestic legislation the possibility to defer the payment of the exit tax by paying it in instalments over five years instead of the immediate payment of the exit taxes. At last, Germany provides a different exit tax rule given the deferral of taxation is not available for transfers to third countries that

---

[74] See P. Koerver Schmidt, op.cit., p.14 and D. Smit, op. cit., 505-511.

[75] Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, OJ L 265, 14.10.2017, p. 1–14.

[76] A. Mallaret, "French Tax News for 2019: Game-Changing Developments Regarding the Taxpayer/Tax Administration Relationship", *European Taxation*, 2019 (Volume 59), No 5.

are parties to the EEA agreement. For this reason, on January 29th 2019 the European Commission addressed a reasoned opinion to Germany in order for its legislation to comply with the reasoned opinion. In December 2019, the German Ministry of Finance published a draft bill for the transposition of EU-ATAD, yet the legislative process has not begun to date.

In conclusion, the adoption of the ATAD constitutes an important step forward for accomplishing the internal market and represents an added value in comparison with the Member States' unilateral legislations, which fragmented the single market. However—and as provided for in Article 10 of the Directive—it would presumably be necessary to review the system in order to improve it. The period for this is relatively favourable insofar as, in the area of taxation, some prominent political leaders have indicated a desire for reforming the system.[77]

4 *De lege ferenda* : Can exit taxes be eliminated and Member States granted direct taxation rights according to the principle of territoriality?

Although such a proposition might appear as a contradiction in terms, a compromise solution, which the CJEU could propose to Member States and to the EU legislator as an option compatible with EU law, might eventually be possible. For example, to the extent a company owns assets with unrealized gains at the time of migration, the Luxembourgish Law 6556 from 13 May 2014 allows a company to use any capital losses realized on those assets after the migration from its territory for Luxembourg tax purposes, provided the losses are not used in the other EU or EEA Member State.[78] Besides this unilateral solution of the problem of value decrease

---

[77] See, for a recent example, the statements of the German Foreign Minister who wishes to abolish the possibility for vetoes available to each of the Member States in cases such as tax matters or foreign policy issues so that Europe is no longer 'held hostage' in its capacity to act – La Libre Belgique, 7 June 2021 - https://www.lalibre.be/international/europe/2021/06/07/berlin-appelle-lue-a-supprimer-la-possibilite-de-veto-des-etats-membres-nous-ne-pouvons-plus-nous-laisser-prendre-en-otage-I3B5CFSAB5C5ZM74HAI6BMOVBQ/

[78] Law 6556 from 13 May 2014. B Sigurdardottir, R Ifrim, C Egermann, "New Luxembourg law allows companies to defer exit taxes when moving to another EEA country" Tax insights from Inter-

after the expatriation, the Commission has already proposed in its 2006 Communication to divide the taxing rights on the gains, e.g. by splitting up the taxing rights proportionally to the period that the shareholder was resident in the respective Member States[79].

Another way to achieve this objective could consist of Member States not taxing more than the specific portion of the unrealised capital gains reported in their territory. That portion would correspond to the percentage of the net overall increase in the capital value against the sum of all individual net increases reported in the Member States where the stock or company's capital value had an overall positive valuation.

As an example, a taxpayer[80] purchases stock in Member State A for the price of 1X per unit, or, in the case of a company, 1X represents its valuation[81]. At the moment of his expatriation or cross-border transfer to Member State B, the share price rises to 1.5X. Later, the taxpayer moves to Member State C, but at the moment of the cross-border transfer, the share is worth only 1.25X. At the end of the taxpayer's stay in Member State C, the share price rises to 2X. The taxpayer subsequently moves to Member State D, and the share rises further to 2.2X. At this moment, the taxpayer decides to sell. The question is how the taxation rights of the four Member States should be distributed. In Member State A, the stock posted a rise of 0.5X. In Member State C, it was 0.75X, and in Member State D, the rise was 0.2X. Added together, the stock had individual rises worth 1.45X. However, due to the fact that the stock fell 0.25X during the taxpayer's stay in Member State B, the net overall increase of the stock value was only 1.2X.[82]

---

national tax services, PWC, 28 May 2014. See more on http://www.pwc.com/en_US/us/tax-services/publications/insights/assets/pwc-luxembourg-allows-exit-tax-deferral-when-moving-elsewhere-eea.pdf (last visited 1st November 2015).

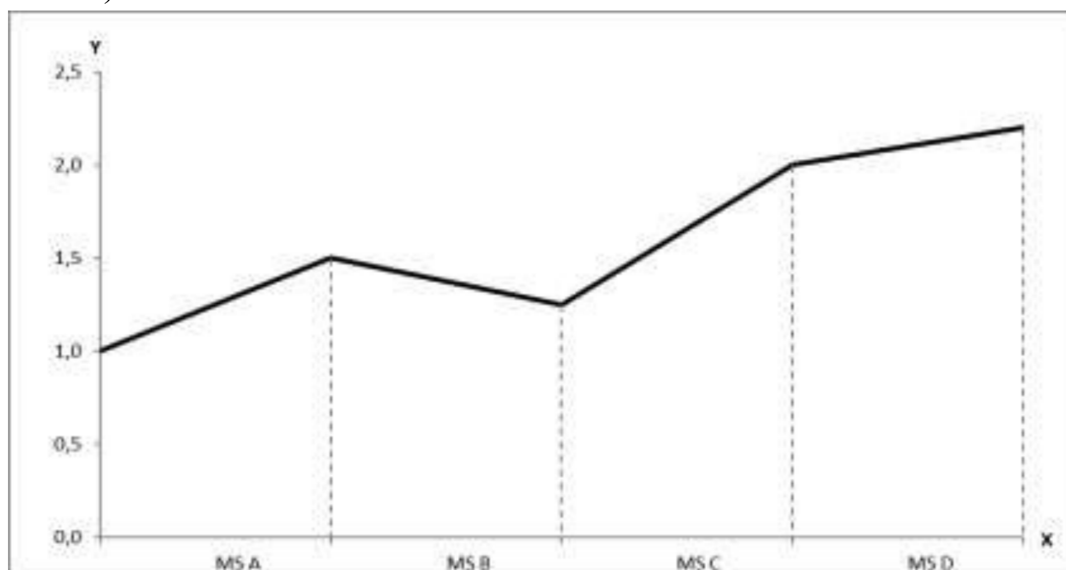
[79] See as well Opinion of Advocate General Niilo Jääskinen in *Verder LabTec*, EU:C:2015:132, paragraph 26.

[80] A natural or a legal person.

[81] For simplicity, we will further refer only to shares and not to the company's valuation.

[82] 1,45X – 0,25X

Evolution of the share price (vertical) during the relevant period (horizontal).[83]



According to the authors, the ideal case scenario would be if the taxation rights of Member States could take due account of the "internal market imperative". Consequently, the conditions for levying capital gains in the EU internal market could be modelled as closely as possible after the ones applicable within the Member States. As such, the basis of taxation in Member States A, C and D should not be the net value increase that the previously mentioned stock posted in the respective territories without accounting for the losses that occurred in Member State B.

In order to tax in accordance with the principle of territoriality while respecting the imperatives and policies underlying the EU internal market, the net rise reported in a given Member State (let us say A) should be multiplied by a coefficient (c) obtained by dividing the overall net rise (here, 1.2X) by the sum of individual value increases reported in Member States where the stock appreciated (here, 1.45X). In this example, 1.2X would be divided by 1.45X to get 0.8276. This number would be multiplied by 0.5X (the net value increase in Member State A), equalling 0.4138X. This figure, and not 0.5X, would be the maximum taxable base

[83] 0: Purchase of the shares; 1: Departure from Member State A; 2: Departure from Member State B; 3: Departure from Member State C; 4: Resale of the shares in Member State D.

for Member State A in order to reconcile the territorial tax distribution with the internal market imperative. In these circumstances, a stockholder would not be placed at a disadvantage just because of a cross-border transfer. Moreover, this solution seems to be in line with paragraph 56 of *DMC*, according to which exit taxes are justified only if the concerned Member State *completely* loses its taxation rights. Here, the expatriation has no effect as to *who* is allowed to tax the increases that transpired in a Member State's territory. It only tempers the taxable basis if the stock or the company's valuation posted a decline in one of the *previous* or *future* Member States.

Such an option might, however, encounter resistance from Member States, as some of them could lose a part of their taxable bases. In the example given, Member State A would lose around 17% of its taxable base. On the other hand, the minimization of fiscal barriers between Member States and the reinforcement of the EU freedoms of circulation could significantly foster intra-European commerce and generate growth that might largely compensate any lost revenues from exit taxes. In the current "COVID pandemic" context where business expansion is not as robust as necessary, the EU needs new structural growth incentives.

In practical terms, stockholders would have a legal obligation to keep stock depositors up-to-date about their tax residences. These depositors would be required to inform the relevant Member States about taxable increases in stock value upon sale, while accounting for net decreases during the taxpayer's stay in other Member States. When it comes to capital gains relating to assets other than a company's shares, chartered accountants could keep the records, being required to periodically inform the fiscal administrations of the Member States where the company resided before. Finally, the Member States' administrations would have to cooperate accordingly in order to exchange the necessary information and enable the taxpayers to provide relevant documentary evidence to show, clearly and precisely, that they are not attempting to avoid or evade the payment of taxes.[84] It is true that such filing and tracking might involve

[84] Case C-101/05, *A*, EU:C:2007:804, paragraph 59.

costs, but this is not unfamiliar to the professional world. It is arguable, that this system could be proposed to the taxpayer as another alternative to the basic option of immediate determination of the due tax, with a possibility of tax deferral or staggered recovery of taxes upon fiscal expatriation.

Conclusion

As D. Jervis has reminded, "for many international groups, flexibility to move businesses, personnel, and assets cross border can be important to react to commercial changes and new opportunities. However, many jurisdictions impose corporate migration or exit charges when valuable assets or businesses are transferred out of their jurisdiction".[85] In this respect, and taking into account the cases discussed, it should be noted that corporate and tax law within the European Union has made progress in terms of company seat transfers. The transposition of Article 5 of the ATAD leads to a partially harmonized environment within the EU at least on the exit tax measure. Until 2020 (the first year of application of the harmonized exit tax legislation), the lack of genuine *positive integration* with clarification about the legal and fiscal aspects allowed Member States to exercise their competence in this area in a manner that precludes many cross-border operations because of the lack of legal certainty. In addition, this lack of harmonisation enhanced competition amongst the legal systems. The new exit tax regime applicable in the EU should, in theory, reduce this kind of competition.

[85] See D. Jervis, Op. Cit.

Bibliography

A. Autenne ”Arrêt ‘National Grid Indus’: les taxes à l’épreuve de la liberté d’étalissement ”, Journal de droit européen 109 (2012)

A. de Graff & K. Visser, “ATA-Directive: Some Observations Regarding Formal Aspects”, 25 EC Tax Review 4, 2016, p. 199-210;

A. Mallaret, “French Tax News for 2019: Game-Changing Developments Regarding the Taxpayer/Tax Administration Relationship”, European Taxation, 2019 (Volume 59), No 5.

A. Uceda and S. Dechsakulthorn, “In wake of ECJ ruling, EU Member States amend exit tax regimes”, Insights Publications, Global Tax News, DLA Piper.

C. Brokelind “The Anti-Tax Avoidance Directive under Scrutiny: A Matter of Competence?” International Taxation in a Changing Landscape – Liber Amicorum in Honour of Bertil Wiman, J. Monsenego & J. Bjuvberg eds., Wolters Kluwer 2019, p. 45-56;

C. Panayi “Corporate Mobility in the EU and exit taxes” 63 Bulletin of International Taxation 459 (2009). (http://www2.deloitte.com/nl/nl/pages/tax/articles/exit-taxes-infringe-eu-law.html).

C. Panayi “National Grid Indus BV v. Inspecteur Van De Belastingdienst Rijnmond/Kantoor Rotterdam: Exit Taxes in the European Union Revisited” 1 British Tax Review 41 (2012).

D. Jervis, “Exit taxes and Europe – where are we now?” Publications, Eversheds International (2012) http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Chemicals/Exit_taxes_and_Europe

D. Smit “The Anti-Tax-Avoidance Directive (ATAD)”, European Tax Law, P. Wattel et al. eds., Wolters Kluwer 2018, p. 489.

Law 6556 from 13 May 2014. B Sigurdardottir, R Ifrim, C Egermann, “New Luxembourg law allows companies to defer exit taxes when moving to another EEA country” Tax insights from International tax services, PWC, 28 May 2014. See more on http://www.pwc.com/en_US/us/tax-services/publications/insights/assets/pwc-luxembourg-allows-exit-tax-deferral-when-moving-elsewhere-eea.pdf (last visited 1st November 2015).

P. Koerver Schmidt, “The Role of the Anti-Tax Avoidance Directive in Restoring Fairness – A Proper Step towards Ensuring Sustainability of the International Tax Framework?” Tax Sustainability in an EU and International Context, C. Brokelind, S. van Thiel eds., IBFD 2020., Copenhagen Business School, CBS LAW Research Paper No. 1939, Available at SSRN: https://ssrn.com/abstract=3492643

S. Peeters “Exit Taxation: From an Internal Market Barrier to a Tax Avoidance Prevention Tool”, 26 EC Tax Review 3, 2017.

The statements of the German Foreign Minister – La Libre Belgique, 7 June 2021 - https://www.lalibre.be/international/europe/2021/06/07/berlin-appelle-lue-

a-supprimer-la-possibilite-de-veto-des-etats-membres-nous-ne-pouvons-plus-nous-laisser-prendre-en-otage-I3B5CFSAB5C5ZM74HAI6BMOVBQ/
Communication from the Commission to the Council, the European Parliament and the European economic and Social Committee on exit taxation and the need for co-ordination of Member States' tax policies (COM(2006) 825 final)
Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties (OJ 1976 L 73, p. 18).
Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, certain excise duties and taxes on insurance premiums (OJ 1977 L 336, p. 15).
Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ 2016 L 193, p. 1).
Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, OJ L 265, 14.10.2017, p. 1–14.
Case C-279/93, Schumacker, EU:C:1995:31.
Case C-9/02, de Lasteyrie du Saillant, EU:C:2004:138.
Case C-470/04, N, EU:C:2006:525.
Case C-101/05, A, EU:C:2007:804.
Case C-40/08, Asturcom Telecomunicaciones, EU:C:2009:615.
Case C-269/09, Commission v. Spain, EU:C:2012:439.
Case C-38/10, Commission v. Portugal, EU:C:2012:521.
Case C-371/10, National Grid Indus, EU:C:2011:785.
Case C-64/11, Commission v. Spain, EU:C:2013:264.
Case C-261/11, Commission v. Denmark, EU:C:2013:480.
Case C-301/11, Commission v. Netherlands, EU:C:2013:47.
Case C-380/11, DI VI Finanziaria SAPA di Diego della Valle, EU:C:2012:552.
Case C-164/12, DMC, EU:C:2014:20..
Case C-591/13, Commission v. Germany, EU:C:2015:230.
Case C-657/13, Verder LabTec, EU:C:2015:331.
Case C-503/14, Commission/Portugal, EU:C:2016:979.
Case C-646/15, Trustees of the P Panayi Accumulation & Maintenance Settlements, EU:C:2017:682.
Case C-292/16, A Oy, EU:C:2017:888.
Joined cases C-327/16 and C-421/16, Jacob and Lassus, EU:C:2018:210.
Case C-581/17, Wächtler, EU:C:2019:138.
Case C-405/18, AURES Holdings, EU:C:2020:127 paragraph 35.
Opinion of Avocate General Wathelet in joined cases Jacob and Lassus, C-327/16 et C-421/16, EU:C:2017:865.
Opinion of Advocate General Niilo Jääskinen in Verder LabTec, EU:C:2015:132.
Opinion of Advocate General Kokott in National Grid Indus, EU:C:2011:563.