Radbound Repository

Radboud University Nijmegen

PDF hosted at the Radboud Repository of the Radboud University Nijmegen

The following full text is a publisher's version.

For additional information about this publication click this link.
http://hdl.handle.net/2066/150628

Please be advised that this information was generated on 2021-06-16 and may be subject to change.

Deloitte.

Radboud University Nijmegen

Report on Exit Taxes

in the EU and EEA

in respect of

Transfers of Seats of Companies

14 November 2014

Dr. Harm van den Broek

© Dr. Harm van den Broek (2014)

h.vandenbroek@jur.ru.nl

Contents

Preface
1 Introduction
1.1 Transfers of Seat and Exit Taxation
1.2 Scope of the Research
1.3 Methodology
2 Access to the Freedom of Establishment: applicable Company Law System
3 Taxation of Unrealized Capital Gains: a Restriction of the Freedom of Establishment that may be justified
3.1 Introduction
3.2 The Comparable Domestic Situation
3.3 A Restriction of the Freedom of Establishment
3.4 Do all Seat Transfers result in a Restriction? Comparison with Domestic Situations
3.5 The Outcome of the Comparative Survey
3.6 Justification of Exit Taxation
4 Collection of Exit Taxes
4.1 Deferral until Realization
4.2 Payment in Fixed Annual Installments
4.2.1 A Lack of Realization
4.2.2 Payment in Fixed Annual Installments
4.2.3 Also in case of Transfers of Seat?
4.2.4 Various Remarks
4.2.5 Double Book Value Carry Over
4.3 The Comparative Survey
5. The Requirement to provide Guaranties
6. Interest Charges
7. Summary and Conclusions

Annexes
A List of Correspondents

Preface

Three years ago, the Court of Justice of the European Union ruled in the *National Grid Indus case* (C-371/10) on exit taxation of companies transferring their real seat to another EU Member State. The Courts' ruling illustrated that exit taxes of many EU Member States infringed the freedom of establishment as enshrined in Articles 49 – 55 of the Treaty on the Functioning of the European Union and in Articles 31 - 35 of the Agreement on the European Economic Area. In later case-law, both the Court of Justice of the EU and the EFTA Court clarified what requirements national tax laws must meet in respect of the transfer of residence of companies to be in line with EU/EEA law.

An important recent ruling in this respect dates from 23 January 2014. In the *DMC case* (C-164/12) the Court of Justice of the European Union ruled on the contribution of a participation in a limited partnership to a limited liability company. Although this case did not regard the transfer of seat of a company, from the wording of the Court it seems to follow that this ruling has impact as well on exit taxation, in particular on the possibilities for Member States to require guarantees and on the possibilities to collect exit taxes in fixed annual installments. The Court of Justice of the European Union did not yet have the opportunity to rule on a case in which a Member State charges interest payments in respect of deferred payment of exit taxes. At present, this seems to be the main element of exit taxation that has not yet been dealt with by the Court.

The European case law on exit taxation has matured. The question is to what extent the EU and EEA Member States have implemented this case-law in their national laws. The Radboud University Nijmegen and Deloitte have cooperated in this study examining to what extent the national tax laws existing as per 1 January 2014 are in line with the case-law of the European Court of Justice and of the EFTA Court. Dr. Harm van den Broek, associate professor at Radboud University Nijmegen and of counsel to the EU Tax Team of Deloitte in the Netherlands, prepared the questionnaire on the basis of which national experts of the Deloitte Member Firms in the EU and EEA Member States have written their country reports. Dr. Harm van den Broek wrote the analyses and conclusions as regards the compatibility of national tax laws on exit taxation with EU/EEA law.

With regard to the outcome of the survey, I consider it striking to see how many Member States (at least 13) still fail to comply with the *National Grid Indus* ruling and continue to apply tax laws that infringe the freedom of establishment. With regard to the requirement to pay interest it seems that the tax laws of many EU Member States are not yet EU proof.

In December 2013, the EFTA Court ruled in case *EFTA Surveillance Authority vs. Iceland* (case E-13/12) that also exit taxation levied in occasion of cross-border mergers infringes the freedom of establishment. This ruling promises to be the first of a new line-up of cases concerning cross-border reorganizations. That (future) case-law concerning cross-border mergers and divisions will require amendment of many national tax laws as well.

Our thanks go to dr. Harm van den Broek and to all Deloitte national reporters, who generously invested their time and efforts to bring this study to a success. Their contact details can be found in the annex to the report.

Rotterdam, November 2014

Prof. dr. P. Kavelaars

1 Introduction

1.1 Transfers of Seat and Exit Taxation

Daily Mail[1] was the first case in which the European Court of Justice ruled on the applicability of the freedom of establishment on transfers of seats of companies. Afterwards, many other cases followed. After this first ruling, for a long time it remained unclear to what extent migrating companies can rely on their freedom of establishment. Subsequent case law, such as *Überseering*[2], made it clear that the host state must recognize the legal capacity of a company that has transferred its real seat to another EU Member State while retaining its status of company established under the laws of its state of origin. *Cartesio*[3], by contrast, pointed out that the existence of a company under its national laws of establishment, is a preliminary condition to be able to rely on the freedom of establishment in case of a transfer of seat. Therefore, in principle, a company which under its law of incorporation does not have the possibility to transfer its real seat to another Member State while maintaining its status of company governed by the law of the state of origin cannot rely on the freedom of establishment. According to *Cartesio*, this may be different if the host state would allow the company transferring its real seat to convert into a company governed by the laws of the host state. In such case, the company can rely on the freedom of establishment as well. And *Vale*[4], finally clarified that if the host state allows domestic conversions of companies, in principle the freedom of establishment requires that also comparable inbound seat transfers plus subsequent conversions of foreign companies into companies governed under the laws of the host state must be allowed. Finally, in *National Grid Indus*[5], the Court of Justice of the European Union took away all remaining doubts and ruled that a company that exercises its freedom of establishment by transferring its real seat abroad may also rely on the freedom of establishment in respect of exit taxation. Exit taxes must be in line with the freedom of establishment.

1.2 Scope of the Research

The present study examines to what extent exit taxation in respect of companies that transfer their real seat to other EU or EEA Member States is in line with the freedom of establishment. The research is limited to issues of Corporate Income Tax levied in respect of legal entities in case of seat transfers. The scope of this survey does not include:

- Migrations of individual shareholders;[6]
- Migrations of individuals who run a non-incorporated business activity;[7]
- The transfer of assets from of permanent establishment to a foreign head office or vice versa;[8]
- Cross-border Mergers or Divisions.[9]

---

[1] ECJ case 81/87 (Daily Mail).
[2] ECJ case C-208/00 (Überseering).
[3] ECJ case C-210/06 (Cartesio).
[4] ECJ case C-378/10 (Vale).
[5] ECJ case C-371/10 (National Grid Indus).
[6] E.g. ECJ case C-9/02 (N).
[7] E.g. ECJ case C-301/11 (Commission vs. the Netherlands).
[8] E.g. ECJ case C-38/10 (Commission vs. Portugal).
[9] E.g. EFTA Court case E-14/13 (EFTA Surveillance Authority vs. Iceland).

1.3 Methodology

This report is based on a country survey with national reports from country experts and reflects the legislation as per 1 January 2014. This report contains the analysis of the national country reports of the 28 EU Member States plus two Member States of the European Economic Area (Norway and Iceland).[10]

The questions of the survey, and consequently the country reports, are aligned with the method in which the European Court of Justice assesses whether national laws are in line with the fundamental freedoms.[11] The Court applies a four-step approach, examining the following questions:

1. Do the persons involved have access to one of the Treaty freedoms?
2. Do the national laws involved discriminate on the basis of nationality or restrict the exercise of the Treaty freedoms?
3. Can the restriction of the Treaty freedoms be justified?
4. Do the national laws go beyond what is necessary and are they adequate to obtain their objective?

These questions are elaborated in the report as follows.

Whether companies that transfer their seat to another EU or EEA Member State can rely on the freedom of establishment depends in part on the national company law system of their state of incorporation. This question is examined in para. 2.

The study continues with an examination in para. 3 of the question to what extent exit taxation restricts the freedom of establishment. To what extent does it result in a more burdensome tax treatment than in comparable domestic situations? Are there any grounds to justify exit taxation?

The questions to what extent exit taxation is proportionate is divided in various sub questions. In the first place, can the collection of exit taxation be deferred until the capital gains are realized or is it possible to pay the exit tax in annual installments (para. 4)? In the second place, do Member States require from taxpayers to provide guarantees as a condition to obtain deferred tax collection (para. 5)? And in the third place, do states charge late payment interest in respect of deferred collection of exit taxes (para 6)?

In the end, para. 7 contains the conclusions and summary of the research.

The List of Correspondents can be found in the Annex.

[10] Since Deloitte does not have an office in Liechtenstein, the third EEA Member State, this report does not contain a country report in respect of Liechtenstein.
[11] ECJ case C-55/94 (Gebhard).

2 Access to the Freedom of Establishment: applicable Company Law System

In order to examine whether national laws on exit taxation infringe the freedom of establishment, an underlying question needs to be addressed: what company law system applies in the Member State at hand, the incorporation system or the real seat system?

After the transfer of the real seat of a company established under the *incorporation system*, the company law of the state of origin generally continues to apply and the company continues to exist as a legal entity under its law of incorporation. Consequently, the company can challenge in court disproportionate forms of exit taxation.

By contrast, after the transfer of the real seat of a company established under the *real seat system*, the company law of the state of origin does not continue to apply. The company loses its status of a company governed by the laws of the state of incorporation. As ultimate consequence, the company must be liquidated. Its assets are sold, its creditors are paid, and remaining cash is distributed to the shareholders. The company ceases to exist as a legal entity and consequently it can no longer rely on the freedom of establishment.[12] The company cannot successfully challenge in court any form of exit taxation.

In practice, the distinction between the incorporation system and the real seat system may be less explicit. *Arcade Drilling*[13] regarded a Norwegian company transferring its seat to the United Kingdom. The Oslo Court was not certain whether Norway applied the real seat system or the incorporation system and whether the migrating company was obliged to liquidate. The EFTA Court found that, in practice, even 10 years after its transfer of seat, the company still existed and had not been forced to liquidate. Under such circumstance, the company could (still) rely on its freedom of establishment.

In its *Cartesio* and *Vale* rulings[14], the EU Court of Justice has further mitigated the consequences of the real seat system in case of the transfer of seat of the company. The freedom of establishment may require that the state of origin and the host state allow the conversion of the migrating company into a company governed by the company laws of the host state.[15] In that case, the company is not obliged to liquidate and to pay its creditors immediately, instead it continues to exist. It will be subject to the company laws of another state (the host state) and receives a new company statute.

In case of a conversion, the company continues to exist as a legal person, even if it will have new articles of incorporation. Therefore, the preliminary requirement for entitlement to the freedom of establishment is met. The company can rely on the freedom of establishment. One of the consequences, not yet dealt with by the EU Court of Justice, would be that in occasion of a cross-border conversion the company can successfully challenge disproportionate forms of exit taxation.

Apart from the possibilities of a conversion, for exit tax purposes it is therefore relevant whether a migrating company is subject to the real seat system or the incorporation system.

---

[12] ECJ case 81/87 (Daily Mail); ECJ case C-210/06 (Cartesio).

[13] EFTA Court case E-15/11 (Arcade Drilling AS).

[14] ECJ case C-210/06 (Cartesio); ECJ case C-378/10 (Vale).

[15] If the host state and the state of origin allow their companies to participate in a domestic conversion of one company type into another company type, then they are obliged to recognize the conversion into or from a similar company type of another Member State.

Table 1 below indicates which company law system the Member States of the EU and of the EEA apply.

Tabel 1 Applicable Company Law System

EU Member State	**Real Seat System**	**Incorporation System**
Austria	x	
Belgium	x	
Bulgaria		x
Croatia		x
Cyprus		x
Czech Republic		x
Denmark		x
Estonia		x
Finland		x
France	x	
Germany		x
Greece	x	
Hungary		x
Ireland		x
Italy		x
Latvia	x	
Lithuania		x
Luxembourg	x	
Malta		x
The Netherlands		x
Poland		x
Portugal		x
Romania		x
Slovakia		x
Slovenia	x	
Spain		x
Sweden		x
United Kingdom		x
EEA Member State		
Iceland		x
Norway	not clear	

From Table 1 it follows that the vast majority of EU and EEA Member States (22 states) applies the incorporation system.

The number of states adhering to the real seat system (7 states) can however not be neglected. According to a traditional interpretation of the real seat system, companies transferring their seat abroad should be liquidated (Austria, Luxembourg). Those companies cease to exist and cannot rely on the freedom of establishment. There is however a tendency in Member States to mitigate the consequences of seat transfers. In the follow-up of the *Cartesio* and *Vale* rulings, several states have introduced provisions on the conversion of companies. Other states, like Germany, have recently shifted from the real seat system to the incorporation system. As a result of these developments less frequently companies from real seat states transferring their actual seat abroad are obliged to liquidate. It occurs more often that such companies can convert and continue to exist. Consequently, they can rely on the freedom of establishment. This means that they can also challenge in court exit taxation.

Finally, sometimes it is unclear which company law system applies (e.g. Norway).[16] In that case there is no relevant case law on seat transfers and the legal doctrine is divided.

[16] Cfr. EFTA Court case E-15/11 (Arcade Drilling AS).

3 Taxation of Unrealized Capital Gains: a Restriction of the Freedom of Establishment that may be Justified

3.1 Introduction

Whereas the freedom of establishment applies, it is infringed in case of discrimination on the basis of nationality or in case of measures which make the establishment in other Member States less attractive compared to purely domestic situations. For this test it is crucial to find the adequate comparable domestic situation. Often this is not easy. States that apply an inadequate comparable may draw incorrect conclusions as to the compatibility of their legislation with the freedom of establishment.

The freedom of establishment appears to be restricted if a cross-border situation is treated more burdensome than purely domestic situations. It is therefore relevant to examine to what extent unrealized capital gains are subject to tax in both situations. The outcomes of this comparison are illustrated in Table 2.

3.2 The Comparable Domestic Situation

In *National Grid Indus*, the European Court of Justice assessed the Dutch exit tax levied from companies transferring their real seat from the Netherlands to another EU Member State. Such companies maintain their status as a company governed by Dutch company law and continue to exist as legal entity.

The Court ruled that a levy on unrealized capital gains of companies that transfer their real seat abroad does not constitute discrimination on the basis of nationality. The exit tax does not discriminate against companies established under the laws of other EU Member States. The exit tax applies irrespective of the nationality of the legal entity involved. In fact, in most cases the companies that are affected by the Dutch exit tax rules are companies established under Dutch law.

The exit tax rather puts companies which are actually located in the Netherlands and which transfer their real seat abroad at a disadvantage compared to situations of resident companies that do not transfer their real seat abroad. The exit tax, therefore, does generally not affect the tax position of foreign taxpayers but instead the tax position of a states' own taxpayers which exercise their freedom of establishment.

The Court of Justice ruled as follows:

> *'37. In the case in the main proceedings, it is clear that a company incorporated under Netherlands law wishing to transfer its place of effective management outside Netherlands territory, in the exercise of its right guaranteed by Article 49 TFEU, is placed at a disadvantage in terms of cash flow* ***compared to a similar company retaining its place of effective management in the Netherlands****. In accordance with the national legislation at issue in the main proceedings, the transfer of the place of effective management of a Netherlands company to another Member State entails the immediate taxation of the unrealised capital gains relating to the assets transferred, whereas such gains are not taxed* ***when such a company transfers its place of management within the Netherlands****. (…)*
>
> *38 That difference of treatment cannot be explained by an objective difference of situation. From the point of view of legislation of a Member State aiming to tax capital*

> *gains generated in its territory,* ***the situation*** *of a company incorporated under the law of that Member State which transfers its place of management to another Member State* ***is similar to that of a company also incorporated under the law of the former Member State which keeps its place of management in that Member State****, as regards the taxation of the capital gains relating to the assets which were generated in the former Member State before the transfer of the place of management.'* [emphasis added].

The Court of Justice has therefore ruled that with regard to exit taxation, a company transferring its seat abroad must be compared with a company which keeps its place of management within the same Member State. In *National Grid Indus*, the Court of Justice has repeated several times what the basis is for the appropriate comparison: a company which retains its place of effective management in the same state of origin.

What does this comparison mean in practice? In *National Grid Indus*, the Court explained the tax treatment of Dutch companies which keep their place of effective management in the Netherlands:

> *'37. (…) The capital gains relating to the assets of a company transferring its place of management within the Netherlands* ***are not taxed*** *until they are actually realised and to the extent that they are realised.*
>
> *40 (…) Such an unrealised capital gain* ***would not have been taxed*** *if National Grid Indus had transferred its place of effective management within Netherlands territory.'* [emphasis added].

The Court of Justice has made clear that transfers of seat must be compared to domestic situations in which a company retains its place of management in the state of origin and in which the company's unrealized capital gains are not taxed. Therefore, any tax treatment of cross-border transfers of seat that is more burdensome in respect of the taxation of unrealized capital gains constitutes in principle a restriction of the freedom of establishment.

3.3 A Restriction of the Freedom of Establishment

Furthermore, the Court indicates in what situations the exercise of the freedom of establishment is restricted.

> *'36 It is also settled case-law that* ***all measures which prohibit, impede or render less attractive*** *the exercise of the freedom of establishment must be regarded as restrictions on that freedom'* [emphasis added].

It is important to notice that the Court of Justice rules not only with regard to certain specific tax measures, but refers to *all measures* which prohibit, impede or render less attractive the exercise of the freedom of establishment: they must be regarded as restrictions on that freedom. The Court refers to its 'settled case-law' in respect of measures which can constitute restrictions.

Therefore, we must conclude that all measures which render less attractive the transfer of the management of the company to another Member State in comparison to companies which retain their real seat in the state of origin constitute restrictions of that freedom. According to settled case-law, a restriction of freedom of establishment is permissible only if it is justified by overriding reasons in the public interest. It is further necessary, in such a

case, that the measure should be appropriate to ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective.[17]

In *National Grid Indus*, only one of the measures which prohibit, impede or render less attractive the transfer of the management of the company to another Member State was at stake:

> *'37 In the case in the main proceedings, it is clear that a company incorporated under Netherlands law wishing to transfer its place of effective management outside Netherlands territory, in the exercise of its right guaranteed by Article 49 TFEU, is placed at* ***a disadvantage in terms of cash flow*** *compared to a similar company retaining its place of effective management in the Netherlands. In accordance with the national legislation at issue in the main proceedings,* ***the transfer of the place of effective management*** *of a Netherlands company to another Member State* ***entails the immediate taxation of the unrealised capital gains*** *relating to the assets transferred, whereas such gains are not taxed when such a company transfers its place of management within the Netherlands. The capital gains relating to the assets of a company transferring its place of management within the Netherlands are not taxed until they are actually realised and to the extent that they are realised. That difference of treatment relating to the taxation of capital gains is liable to deter a company incorporated under Netherlands law from transferring its place of management to another Member State'* [emphasis added].

The Court of Justice ruled that the immediate taxation of unrealized capital gains resulted in a disadvantage in terms of cash flow. This measure is forbidden unless it can be justified by overriding reasons in the public interest.

Other existing Dutch measures connected with the transfer of the seat abroad were not at stake in the specific case of *National Grid Indus*, such as the winding up of tax exempt reserves. However, from the above cited para. 36 of *National Grid Indus* it follows that also the winding up and taxation of reserves constitutes a restriction of the freedom of establishment to the extent that this would not occur in domestic situations.

3.4 Do all Seat Transfers result in a Restriction? Comparison with Domestic Situations

Taxation of unrealized capital gains in occasion of a transfer of seat only constitutes a restriction of the freedom of establishment if, like in the *National Grid Indus* case, there is a different, less favourable treatment and similar unrealized capital gains are not (yet) subject to taxation in domestic situations.

If, by contrast, in a specific state, at the end of each fiscal year the unrealized capital gains of resident companies are also taxed in purely domestic situations, then exit taxation upon a transfer of seat is not a 'measure which prohibits, impedes or renders less attractive the exercise of the freedom of establishment'.

[17] ECJ case C-371/10 (National Grid Indus) para. 42.

The transfer of seat does not result in any disadvantage, because all unrealized capital gains are subject to tax at the end of a fiscal year. In such case, the seat transfer does not result in a cash-flow disadvantage. This was the view that the Italian Government put forward in the *National Grid Indus* case.[18]

> *'64. The Italian Government considers that the Court's case-law relating to exit taxation of natural persons is not applicable to exit taxation of undertakings because natural persons and undertakings are fundamentally subject to different tax regimes. Whereas, in the case of natural persons, in principle only the actual income is taxed,* ***undertakings are taxed on the basis of a balance sheet showing assets and liabilities. Increased values of assets are in principle directly reflected in the balance sheet and are therefore taxable immediately.*** *Only exceptionally can the original value of an asset be maintained in the accounts until the unrealised capital gains are realized (…).'* [emphasis added].

According to the Italian Government, in case of undertakings 'increased values of assets are in principle directly reflected in the balance sheet and are therefore taxable immediately.' Theoretically, if in a specific state the tax system would actually work in such way, then indeed exit taxation would not result in any disadvantage compared to domestic situations.

In this exit tax survey, it is therefore relevant to understand whether and to what extent unrealized capital gains of companies are subject to tax in purely domestic situations and to what extent there is a difference in treatment with cross-border transfers of seat. From the next paragraph it follows that reality differs from what the Italian Government assumes.

3.5 The Outcome of the Comparative Survey

Table 2 demonstrates to what extent unrealized capital gains are subject to tax in domestic situations at the end of the fiscal year and in situations of a cross-border transfer of seat. If unrealized capital gains are subject to tax in case of a transfer of seat whereas they are not (yet) subject to tax in domestic situations, this different tax treatment makes it less attractive to transfer the seat of a company abroad. This qualifies as a restriction and potential infringement of the freedom of establishment.

[18] Referred to by Advocate General Kokott in her Opinion, case C-371/10 (National Grid Indus) para. 64.

Table 2 Taxation of unrealized capital gains in domestic situations and on transfers of seat

EU State	Tax on unrealized gains in domestic situations	Tax on unrealized gains in seat transfer	Potential infringement
Austria	no	in specific cases	yes
Belgium	no	yes	yes
Bulgaria	no	no	no
Croatia	no	no	no
Cyprus	no	no	no
Czech Republic	in specific cases	in specific cases	no
Denmark	in specific cases	yes	yes
Estonia	no	no	no
Finland	no	yes (SEs)	yes
France	in specific cases	yes	yes
Germany	no	yes	yes
Greece	in specific cases	not clear	not clear
Hungary	no	no	no
Ireland	no	yes (exceptions)	yes
Italy	no	yes	yes
Latvia	no	no	no
Lithuania	no	not clear	not clear
Luxembourg	no	yes	yes
Malta	no	no	no
The Netherlands	no	yes	yes
Poland	no	no	no
Portugal	in specific cases	yes	yes
Romania	no	no	no
Slovakia	no	yes	yes
Slovenia	no	no	no
Spain	no	yes	yes
Sweden	in specific cases	yes	yes
United Kingdom	no	yes	yes
EEA States			
Iceland	no	not clear	not clear
Norway	no	yes	yes

Table 2 illustrates that not a single state generally taxes unrealized capital gains of companies in domestic situations at the end of a fiscal year. A few Member States[19] levy tax on very specific unrealized capital gains in domestic situations, e.g. on publicly traded securities or foreign currency. These are, however, exceptions. States do generally not levy tax on unrealized capital gains in domestic situations. The justification put forward by Italy as referred to in paragraph 3.4 is therefore in contrast with the facts.

The second conclusion that can be drawn from Table 2 is that a large number of states (17 states) levies exit taxes after a transfer of seat of companies.[20] Only in the Czech Republic unrealized capital gains on specific assets are taxed both in domestic situations and upon transfers of seat. All other 16 states tax unrealized capital gains upon a seat transfer whereas these unrealized gains would not have been taxed in domestic situations. These 16 states potentially restrict the freedom of establishment.[21] Consequently, their exit taxes are prohibited unless they can be justified. Most of these states have specific exit tax provisions. Some states tax unrealized capital gains on the basis of other tax principles, such as transfer pricing legislation.[22]

As third conclusion, there is a remarkable number of 10 states that does not levy any form of exit tax on unrealized capital gains. Apparently these Member States do not consider it indispensable to charge exit taxes.

Finally, Greece, Lithuania and Iceland do not have specific exit tax legislation and it is not clear whether the general principles of their tax laws would require taxation of unrealized capital gains upon a transfer of seat.

3.6 Justification of Exit Taxation

In *National Grid Indus*, the Court of Justice has ruled that exit taxation may be justified by the need to divide the power to tax between Member States and to preserve the coherence of the national tax system, provided that the legislative measures are proportionate.[23] After the Court's previous rulings in the cases *Lasteyrie du Saillant* and *N*[24] this outcome in not very surprising and does not need much further comments. The next paragraphs examine whether the corporate exit tax provisions of the EU and EEA Member States meet the proportionality requirement.

---

[19] Czech Republic, Denmark, France, Greece, Portugal and Sweden.
[20] Certain states, e.g. Austria, Finland, Ireland and Luxembourg only levy exit taxes in specific situations.
[21] Provided the migrating company involved can rely on the freedom of establishment.
[22] E.g. Slovakia.
[23] ECJ case C-371/10 (National Grid Indus) paras. 73, 80.
[24] ECJ case C-9/02 (Hughes de Lasteyrie du Saillant); ECJ case C-470/04 (N.).

4 Collection of Exit Taxes

4.1 Deferral until Realization

In *National Grid Indus* the Court of Justice had ruled that the Dutch exit taxes infringed the freedom of establishment and could not be justified. In domestic situations, capital gains would not have been taxed until their realization. In general, imposing a tax assessment upon the transfer of seat could be justified in order to divide the power to tax between Member States and in order to maintain the coherence of the tax system. However, immediate tax collection without the option of tax collection at the moment of realization could not be justified. The Court ruled as follows.

> *"46 The transfer of the place of effective management of a company of one Member State to another Member State cannot mean that the Member State of origin has to abandon its right to tax a capital gain which arose within the ambit of its powers of taxation before the transfer (…). The Court has thus held that, in accordance with the principle of fiscal territoriality linked to a temporal component, namely the taxpayer's residence for tax purposes within national territory during the period in which the capital gains arise,* ***a Member State is entitled to charge tax on those gains at the time when the taxpayer leaves the country*** *(…). Such a measure is intended to prevent situations capable of jeopardising the right of the Member State of origin to exercise its powers of taxation in relation to activities carried on in its territory, and may therefore be justified on grounds connected with the preservation of the allocation of powers of taxation between the Member States (…).*
>
> *64 It follows from the foregoing that Article 49 TFEU does not preclude legislation of a Member State under which* ***the amount of tax on unrealised capital gains relating to a company's assets is fixed definitively (…) at the time when the company, because of the transfer of its place of effective management to another Member State****, ceases to obtain profits taxable in the former Member State (…).*
>
> *73 In those circumstances, national* ***legislation offering a company*** *transferring its place of effective management 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 freedom of establishment than the measure at issue in the main proceedings." [emphasis added].*

The Court ruled that exit tax provisions may not go beyond what is necessary to obtain the objectives of maintaining a balanced allocation of taxing powers between Member States and preserving the coherence of the tax system.

These objectives are obtained by fixing definitively the amount of tax on unrealised capital gains at the moment the company transfers its seat abroad. The requirement of immediate tax collection is not necessary in order to obtain these objectives.

The Court qualifies immediate tax collection as 'harmful to freedom of establishment' because it generates a cash-flow disadvantage compared to domestic companies.[25]

> *"37 (…) it is clear that **a company incorporated under Netherlands law wishing to transfer its place of effective management outside Netherlands territory (…) is placed at a disadvantage in terms of cash flow** compared to a similar company retaining its place of effective management in the Netherlands (…) the transfer of the place of effective management of a Netherlands company to another Member State entails the immediate taxation of the unrealised capital gains relating to the assets transferred, whereas such gains are not taxed when such a company transfers its place of management within the Netherlands. The capital gains relating to the assets of a company transferring its place of management within the Netherlands are not taxed until they are actually realised and to the extent that they are realized (…).*
>
> *68 On this point, it must be stated that **recovery of the tax debt at the time of the actual realisation** in the host Member State of the asset in respect of which a capital gain was established by the authorities of the Member State of origin on the occasion of the transfer of a company's place of effective management to the host Member State **may avoid the cash-flow problems** which could be produced by the immediate recovery of the tax due on unrealised capital gains." [emphasis added].*

From these paragraphs it can be inferred what the Court holds about the recovery of exit taxes. The proportionality principle requires in this respect that migrating companies are treated in the same way (or at least not in a more burdensome way) compared to domestic companies which have not (yet) realized their hidden reserves. Member States should grant companies the option to defer the payment of exit taxes until the moment of realization of the capital gains. Table 3 in para. 4.3 indicates to what extent Member States that impose exit taxes grant the possibility to defer the payment of exit taxes until the moment of realization.

In practice, certain types of assets are usually not disposed of. The option of 'deferral until realisation' as offered by the Court of Justice would be of not much use. Para. 4.2 deals with the question whether there can be other proportionate ways and moments to collect exit taxes.

4.2 Payment in Fixed Annual Installments

4.2.1 A Lack of Realization

In the case *Commission vs. Denmark*[26], the question rose at what moment exit taxes may be collected in case of assets other than financial assets, in particular assets which usually are not disposed of and consequently capital gains which are not actually realized.

[25] ECJ case C-371/10 (National Grid Indus) para. 73.
[26] ECJ case C-261/11 (Commission vs. Denmark). Ruling only available in French and Danish.

Under Danish tax law, assets that were transferred from a Danish branch to a foreign branch were deemed to be disposed of at fair market value.[27] The Court of Justice ruled that in respect of assets that generally were not meant to be disposed of, Member States are allowed to establish another criterion in order to determine the moment that the exit tax, which is triggered by a transfer of seat, is collected.

> *´35 At the outset it must be noted that the scope of the principle enunciated in National Grid Indus, supra, is not limited to unrealized capital gains accrued on the territory of a Member State and realized after the transfer of assets to another Member State (see Case National Grid Indus, supra, paras 68 and 70).*
>
> *36 Furthermore, it should be noted that, since the amount of tax on unrealized capital gains relating to the assets is finally determined when a company transfers the assets to another Member State, the fact that some of said assets cannot be sold after their transfer to the receiving State does not, in itself, deprive the State of origin of the possibility of recovering such amount.*
>
> *37 Indeed, the* ***Member States are entitled*** *to tax capital gains that were generated while the assets in question were on their territory and* ***have the power to provide****, for the purpose of such imposition,* ***for a generator other than the actual disposal*** *to ensure the taxation of assets that are not held for sale, and which is less intrusive to the freedom of establishment than the collection at the time of the transfer.´*[28] *[emphasis added]*

Also in *DMC*, the Court held that even if certain assets will not be realized after their transfer abroad, that does not mean that the Member State involved will lose its right to collect the tax.

> *"53 On the other hand, Member States entitled to tax capital gains generated when the assets in question were in their territory have the power, for the purposes of such taxation, to make provision* ***for a chargeable event other than the actual realisation of those gains****, in order ensure that those assets are taxed (see, to that effect, Case 261/11 Commission v Denmark [2013] ECR, paragraph 37)".*[29] *[emphasis added]*

In *Commission vs. Denmark*, the Court does not specify what type of facts, other than the actual realization of the capital gains, could trigger tax collection. In para 38 of that ruling, however, the Court suggests that the solutions which Member States choose may differ and do not necessarily have to be the same as the solutions which will be chosen by Denmark.

As the Court ruled in *Commission vs. Denmark*, par. 37 cited above, such rules containing alternative collection-triggering-facts should have the objective:

> *"37 (….) to ensure the taxation* ***of assets that are not held for sale****" [emphasis added].*[30]

[27] ECJ case C-261/11 (Commission vs. Denmark) para. 3. Ruling only available in French and Danish.
[28] Original text only available in French and Danish. Translation from French by Harm van den Broek.
[29] ECJ case C-164/12 (DMC) para. 53.
[30] Translation from French by Harm van den Broek.

In order to make sure that exit tax can also be collected in respect of assets which do not have a 'realization moment' the Court allows to collect the exit tax in respect of those assets at a different moment. One might wonder whether such alternative collection-triggering-facts may be applied to all assets or only to those assets which, given their nature, are not meant to be disposed of. If we take into account the specific objective for such rules mentioned by the Court in *Commission vs. Denmark*, it would only be necessary to apply these alternative collection-triggering-facts to those assets which are not meant to be disposed of. Tax collection in respect of the other assets, which are meant to be disposed of, could occur in line with the *National Grid Indus* ruling at the moment of realization of the capital gains. The Court does not generally state that for all types of assets Member States may deviate from the rules created in *National Grid Indus* which require that that, as an option, collection should be deferred until the moment of realization. Consequently, the exception laid down in *Commission vs. Denmark*, seems to apply only to 'assets that are not held for sale' and that do not have a 'realization moment'. Under this interpretation, tax in respect of other assets may only be collected when the gains are realized. The second question that arises is how it can be determined whether these rules that provide for alternative tax-collection-generators are proportionate. In this respect the Court fails to provide any indication.

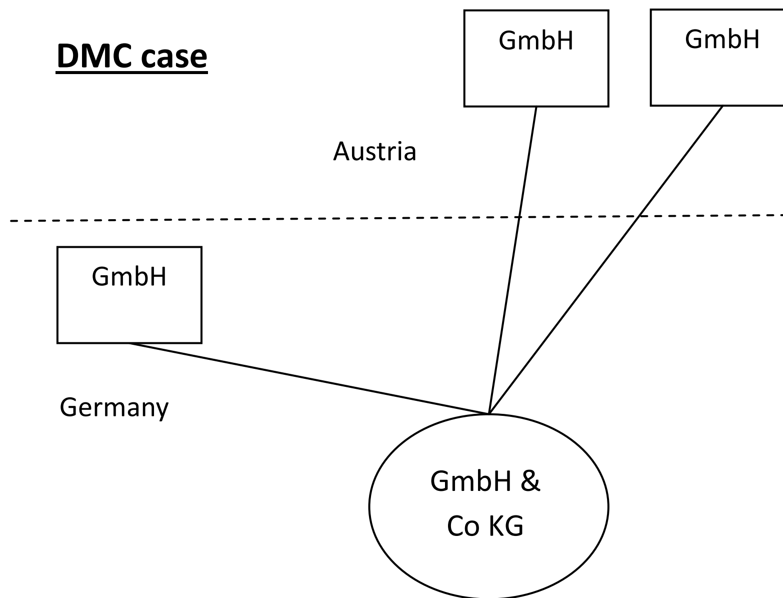
In *DMC*, par. 53, supra, the ECJ cites para. 37 of *Commission vs. Denmark*, in which the Court allowed to apply alternative moments of tax collection instead of the moment of realization. It is remarkable, however, that in this citation the ECJ skips the phrase that such alternative moments of collection should ensure the collection of tax in respect of 'assets that are not held for sale.' Does this indicate that the Member States are in general and in respect of all types of assets allowed to refrain from collecting the exit tax at the moment of realization and are they generally allowed to provide for alternative moments of tax collection? Does they ECJ wish to further liberalize its exit tax case law? Why would the Court make such a step which serves no clear purpose?

4.2.2 Payment in Fixed Annual Installments

After *National Grid Indus*, several Member States have introduced general arrangements providing to collect the entire exit tax in fixed annual installments (see Table 3 in par. 4.3). The question is whether this way of collection of exit taxes is allowed under the freedom of establishment.[31] A similar question was at stake in the *DMC* case.

In 2014, the Court of Justice ruled in the *DMC* case[32] on the collection of German corporate income tax in fixed installments in case of the contribution by two Austrian companies (GmbHs) of their participation (as limited partners) in a German limited partnership (GmbH & Co KG) to a German limited liability company (GmbH).

[31] Since December 2013, there is a case pending for the ECJ in respect of the German exit tax levied after a seat transfer which must be paid in fixed annual installments (ECJ case C-657/13, LabTec).
[32] ECJ case C-164/12 (DMC).



As a result of the contribution of their participations, which for German tax purposes qualified as a German permanent establishment, Germany would lose its tax jurisdiction in respect of these Austrian companies which in exchange received shares in the German GmbH. Under the German-Austrian tax treaty, and in line with Articles 7 and 13 of the OECD Model Tax Convention, before the reorganization the Austrian companies could be subject to tax in Germany in respect of their participations in the German limited partnership (GmbH & Co KG), which for tax purposes qualified as a German permanent establishment. But after the reorganization they could not be taxed in Germany in respect of the shares received in the German limited liability company. While similar domestic German reorganizations would be tax exempt, in this case the reorganization tax benefits did not apply since Germany would lose its power to tax the Austrian participants. In respect of the question whether this different treatment constituted an infringement of the fundamental freedoms, the Court ruled:

> *'60 It should be noted, at the outset, that it is proportionate for a Member State, for the purpose of safeguarding the exercise of its powers of taxation, to determine the tax due on the unrealised capital gains that have arisen in its territory at the time* ***when its powers of taxation in respect of the investor in question cease to exist****, namely, in the present case, at the time when the investor converts his interest in a limited partnership into shares in a capital company (see, to that effect, National Grid Indus, paragraph 52).'*[33] *[emphasis added].*

It was therefore allowed to impose a tax on the unrealized capital gains. Under the German provisions, the tax levied on the cross-border contribution of the partnership interest had to be paid in five annual installments without being required to pay interest. The second preliminary question was whether the collection of this exit tax in five installments infringed the fundamental freedoms.[34] After having referred to the cases *National Grid Indus* and *Commission vs. Portugal* in which the Court had held that regarding 'the collection of the tax due in respect of the unrealised capital gains (…) it is appropriate to give the taxable person

[33] ECJ case C-164/12 (DMC).
[34] In this case the free movement of capital of the participants was at stake.

a choice between, first, immediate payment of the amount of tax due (…) and, second, deferred payment of that tax',[35] the Court ruled:

> *'62 In that context, in the light of the fact that the risk of non-recovery increases with the passing of time, **the ability to spread payment of the tax** owing before the capital gains are actually realised **over a period of five years** constitutes a satisfactory and **proportionate measure** for the attainment of the objective of preserving the balanced allocation of the power to impose taxes between Member States.*
>
> *63 In the present case, the combined provisions of Paragraph 20(6) and the third to sixth sentences of Paragraph 21(2) of the UmwStG 1995 enable a taxable person to spread over a period of five years, **without being required to pay interest**, payment of the tax due in respect of the transfer of the shares which that person holds.*
>
> *64 Accordingly, by giving the tax payer the choice between immediate recovery or recovery spread over a period of five years, the legislation at issue in the main action does not go beyond what is necessary to attain the objective of the preservation of the balanced allocation of the power to impose taxes between Member States." [emphasis added].*

The yearly installments were therefore considered to be proportionate. We can conclude that, although *DMC* does not concern a transfer of seat, from the Courts ruling it follows that the same principles from *National Grid Indus* apply in respect of the loss of jurisdiction caused by a cross-border contribution of a participation in a limited partnership. Consequently, the Court ruled that under the free movement of capital,[36] the establishment of the amount of tax to be paid on the capital gains was justified, provided that Germany would actually lose its jurisdiction to tax the unrealized capital gains.[37] Finally, tax collection in five annual installments without interest charges constitutes a justified and proportionate measure.

4.2.3 Also in case of Transfers of Seat?

The question rises whether payment in 5 installments is also proportionate and justified in case of a transfer of seat. Since the Court applies the same principles to transfers of seat and to cross-border contributions of participations, one might deduct that vice versa the outcome of the *DMC* ruling is also relevant for and can be applied to transfers of seat. That would lead to the conclusion that exit taxes levied on a transfer of seat and which are collected in five annual installments without charging interest are justified. If this conclusion is correct, *DMC* constitutes a major development in the Court's case law on exit taxation.

According to the case *Commission vs. Denmark*, which regards assets that are not meant to be disposed of after a transfer of seat, Member States could apply other collection-triggering-events than the realization of the capital gains. In the *DMC* ruling, the Court of Justice rules

[35] ECJ case C-164/12 (DMC) para. 61. It is remarkable that the Court did not cite its conclusion of National Grid Indus until what moment that deferral should be granted, i.e. until the moment of realization of the capital gains.
[36] The contribution by the limited partners of their participations concerns the exercise of the free movement of capital, see ECJ case C-164/12 (DMC) para. 38.
[37] ECJ case C-164/12 (DMC) para. 55.

that if Germany loses its tax jurisdiction in respect of the assets which after the contribution are fully owned by the German company, then the tax levied from the Austrian participants can be collected in five installments.

The question rises why the ECJ did not simply apply its case law from *National Grid Indus*, and rule in *DMC* that the exit tax at hand could be levied at the moment of the contribution of the partnership participation, whereas the tax may only be collected when the Austrian shareholders dispose of the shares which they have received in exchange. Why did the ECJ deviate from *National Grid Indus* and did it allow Germany to collect the exit tax in five installments even if the Austrian shareholders had not yet actually realized their capital gains? In *DMC*, the ECJ is clearly less strict than in *National Grid Indus.*

It is not crystal clear why tax collection in five installments is allowed in *DMC*. Does *DMC* constitute an application in practice of the doctrine laid down in *Commission vs. Denmark?* In other words, does the Court characterize participations in a limited partnership or shares in a GmbH as 'assets which are not held for sale', allowing Member States to determine an 'alternative collection-triggering-event'?

Or does the ECJ generally consider the collection of exit taxes in five installments without interest payment as a proportionate and justified measure, irrespective of the question whether the assets involved are 'assets which are not held for sale'? And does that apply to transfers of seat as well? In other words, should we consider the ruling in *DMC* as a further liberalization of the exit tax rules compared to *Commission vs. Denmark*?

The Court does not answer these questions. It simply ruled that 'in that context', i.e. the context of an Austrian investor in respect of whom Germany loses its power to tax, and who is taxed 'in respect of the transfer of the shares which that person holds' in the German GmbH & Ko KG, and who is not 'required to pay interest', payment in five installments is proportionate.

This all applies 'in the light of the fact that the risk of non-recovery increases with the passing of time'.[38] It is not clear whether the Court considers the risk of non-recovery particularly high in case of assets which are not meant to be disposed of, such as shares. That would be in contrast with the Courts' case-law in respect of emigrating shareholders.[39]

In par. 64 of *DMC* the Court seems to stipulate the criterion which exit taxes must meet in the case at hand: 'giving the tax payer the choice between immediate recovery or recovery spread over a period of five years'. The Court concludes that the German rules meet that requirement and are proportionate. If payment of exit taxes in five installments without interest is generally a proportionate option, then some of the exit tax regimes recently introduced by Member States, which provide for the recovery of exit taxes in fixed installments after a seat transfer, seem to be justified as well.

4.2.4 Various remarks

Also if we should consider *DMC* as a further liberalization of the exit tax rules, the question remains where the line is between proportionate and disproportionate tax collection schemes. Are, for example, installment schemes of five years *with* interest payments, or tax collection in three or four annual installments proportionate as well? The liberalization of the

[38] ECJ case C-164/12 (DMC) paras 61-63.
[39] ECJ case C-9/02 (Hughes de Lasteyrie du Saillant); ECJ case C-470/04 (N.).

exit tax rules in *Commission vs. Denmark* without providing a playing field with clear and certain rules has potentially opened the gateway to numerous court cases challenging the specific details of the exit tax provisions of the various Member States.

Finally, it should be noted that in the *DMC* case the collection in five installments can only be justified if Germany actually loses its jurisdiction in respect of the capital gains.[40]

> *'56 However, **the objective** of preserving the balanced allocation of the powers to impose taxes between Member States **can justify legislation** such as that at issue in the main proceedings **only where**, in particular, **the Member State** in whose territory the income was generated **is actually prevented from exercising its power of taxation in respect of such income.***
>
> *57 In the present case, it is not unquestionably clear from the facts of the main proceedings that the Federal Republic of Germany **actually loses all power to tax unrealised capital gains** on an interest in a partnership when that interest is exchanged in return for shares in a capital company. Indeed, the possibility would not appear to be precluded that such capital gains relating to the partnership interests contributed to the business assets of the capital company may be taken into account in determining the corporation tax payable in Germany by the acquiring company, namely in the present case DMC GmbH, which is a matter for the national court to establish.' [emphasis added].*

According to the Court, the exit tax at hand is *not* justified if Germany may tax the receiving German GmbH in respect of the capital gains relating to the partnership interests contributed. This is logic, because in that case nor the division of the power to tax between Member States nor the preservation of the coherence of the German national tax system is at stake. In the case at hand, before the contribution of the two participations, the two limited partners were entitled to part of the profits of the activities of the limited partnership, while the receiving GmbH was entitled to the other part of these profits. After the contribution the GmbH will be entitled to 100% of these profits.

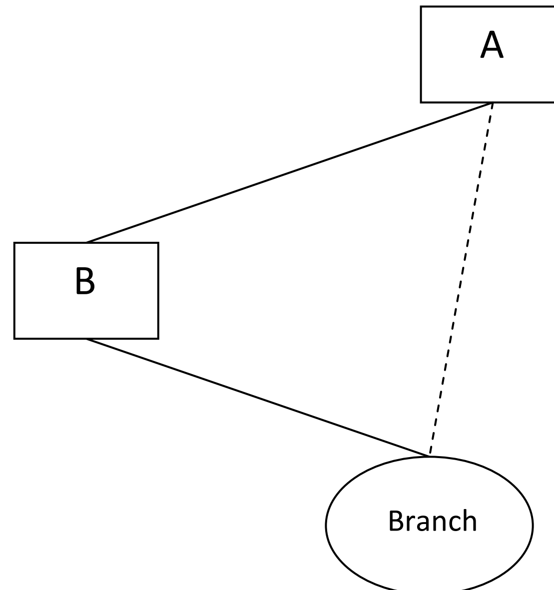
Whether the contribution results in the winding up of the limited partnership[41] seems irrelevant, since also in that case the activities will be 100% for the account of the German GmbH. At first sight there is no reason to assume that Germany would lose its jurisdiction in respect of the assets of the German GmbH and those of the German GmbH & Co KG. Therefore, at first sight it seems that the German exit tax at hand cannot be justified. This is a matter to be decided by the German referring Court.

4.2.5 Double Book Value Carry Over

In fact, the case at hand is governed by Articles 20 and 21 of the German Reorganization Tax Act (*Umwandlungssteuergesetz*, further referred to as RTA). These Articles contain the general tax regime on the contribution of assets, i.e. on the contribution by a legal entity of one or more branches of activities to the receiving company in exchange for shares. This reorganization is generally referred to as an asset merger, or as a transfer of assets under Article 2(d) of the Merger Directive.[42] If company A transfers its branch of activities to

[40] ECJ case C-164/12 (DMC) para. 55.
[41] ECJ case C-164/12 (DMC) para. 13.
[42] Since the GmbH & Co KG is a partnership it is not subject to tax itself in Germany. By contrast, its participants are subject to Income Tax or Corporate Income Tax in respect of their participation. Consequently, the Merger

company B in exchange for shares in company B, then Article 20 RTA provides that the transfer of the activities does not trigger taxation in respect of, among others, the unrealized capital gains of the activity transferred. Article 20 RTA requires, however, that receiving company B adopts the book value of the assets of company A in order to safeguard the tax claim. Furthermore, also company A which receives shares in company B must record those shares at the book value of the assets transferred, even if the market value of these shares is higher.



This system is called the double-book-value-carry-over (*Doppelbuchwertverknüpfung*)[43] and brings about that the tax claim is doubled. After the contribution of assets, company B is taxed in respect of this capital gain if it disposes of the assets, while company A is, in principle, taxed on the same amount of capital gains that it realizes when it sells its shares in company B. Since Germany does not apply a 100% participation exemption in respect of capital gains on participations, this actually results in taxation in the hands of company A. Proposals to amend Article 9 of the Merger Directive with the aim to provide that the company (A) may record at market value the shares which it has received, were not adopted.[44] Therefore, cross-border contributions of assets can result in double taxation.

In *DMC* the Court cited the German tax rules of Article 20 RTA, which illustrates the German double book value carry over:[45]

> *'(1) Where an undertaking, part of an undertaking or a partnership interest is transferred by way of contribution to a capital company subject to unlimited liability to corporation tax (…) and the transferor receives in consideration new shares in the company (…) the assets transferred and the new shares shall be valued in accordance with the following paragraphs (…)*

Directive does not apply to the *DMC* case. The Merger Directive would have applied if an Austrian GmbH transfers a simple German permanent establishment to a German GmbH in exchange for shares.

[43] See also ECJ case C-285/07 (A.T.) para. 13 with regard to the similar German *Doppelbuchwertverknüpfung* after an exchange of shares; see also ECJ case C-207/11 (3D I Srl) of a similar Italian provision on transfers of assets and on share exchanges.

[44] COM(2003)613.

[45] ECJ case C-164/12 (DMC) para. 4.

(2) The capital company may value the business assets contributed at their book value (…)

*(4) The **value** which the capital company assigns to the **business assets** contributed **shall be** deemed for the transferor to be the transfer price and **the acquisition cost of the shares**.'* [emphasis added].

From para. 2 it follows that companies have the option for a tax exempt reorganization. In case of a tax exempt reorganization, paras. 2 and 4 provide that both the assets in the hands of the receiving company (DMC GmbH) and the shares in the hands of the transferring company (the Austrian companies) must be recorded at the original book value of the assets transferred.

In *DMC*, under this German tax system under which the pre-reorganization tax claim is doubled, the post-reorganization tax claim in respect of the transferring (Austrian) companies was at stake, while the post-reorganization tax claim in respect of the German PE is taken over by the GmbH which, as receiving company, is obliged to record the former PE at the book value applied by the Austrian companies. Even if Germany loses its post-reorganization tax claims in respect of the Austrian shareholders, the tax claim in respect of the assets of the PE is actually transferred to the German receiving GmbH. Therefore, in my view, Germany does not 'actually lose all power to tax unrealised capital gains on the interest in the partnership' as required by the Court in order to justify the exit tax. Germany fully maintains a tax claim to that original amount. In my view, in the case at hand, the exit tax can therefore not be justified. It is a pity that the Advocate General did not conclude in this case and that also the Commission did not shed light on the question whether Germany would actually lose any tax claims in this case.

Despite of the fact that in the case at hand the exit tax may not be justified, which is to be determined by the German referring court, the ECJ clearly ruled that if a Member State loses its tax jurisdiction in the case at hand, the exit tax may be collected in five annual installments.

4.3 The Comparative Survey

Table 3 demonstrates whether the 16 EU/EEA Member States that apply exit taxation in case of transfers of seat allow the deferral of tax collection until the moment of realization, in line with *National Grid Indus*, or whether they allow a scheme of tax collection in fixed annual installments. Also the three Member States of which it is unclear whether they apply exit taxation are included in the Table.

In States where none of these two deferred tax collection schemes exists, it is clear that exit taxation constitutes a prohibited restriction of the freedom of establishment. As mentioned in para. 4.2, it is not fully clear yet whether an exit tax is proportionate if only the option of payment in fixed installments is offered as alternative for immediate payment. For the moment we assume that the Court generally allows the option to pay the exit tax in fixed installments (of five or more years) without charging interest.

Table 3 Tax Collection in respect of Unrealized Capital Gains after Transfers of Seat

EU State	Exit Taxation	Deferral until Realization	Payment in installments	Potential Infringement
Austria	yes	not always	no	yes
Belgium	yes	no	no	yes
Denmark	yes	no	7 years	no
Finland	yes	no	no	yes
France	yes	no	5 years	no
Germany	yes	no	5 years	no
Greece	not clear	n.a.	n.a.	not clear
Ireland	yes	yes	6 years	no
Italy	yes	yes	10 years	no
Lithuania	not clear	n.a.	n.a.	not clear
Luxembourg	yes	No	no	yes
The Netherlands	yes	Yes	10 years	no
Portugal	yes	Yes	5 years	no
Slovakia	yes	No	no	yes
Spain	yes	Yes	no	no
Sweden	yes	yes	5/10 years	no
United Kingdom	yes	yes	6 years	no
EEA States				
Iceland	not clear	no	n.a.	not clear
Norway	yes	certain assets	no	yes

N.A. stands for Not Applicable.

Table 3 illustrates that of all 16 EU/EEA Member States that levy exit taxes, per January 1, 2014, 7 States do not grant the option of deferral until realization. Austria and Norway do not always grant deferral until realization, while 7 States as a rule grant the option of deferral until realization.

The option to pay the exit tax in fixed annual installments is offered by 9 States. The installments vary between 5, 6, 7 or 10 years. Under the German regime, depending of the type of assets involved, sometimes the exit tax is levied in 5 installments, and sometimes the exit tax is imposed immediately but collected in 5 installments.

Belgium, Finland, Luxembourg and Slovakia did not offer any form of tax deferral and require exit taxes to be paid immediately. The same applies to Austria and Norway in respect of certain assets. The infringement of the freedom of establishment by these 6 States is not proportionate and can therefore not be justified.

Finally, of 3 States (Greece, Lithuania and Iceland) it is not clear whether they apply exit taxes. These States do not provide for any specific rules on exit tax deferral. Therefore, if in

practice, these States should impose any exit taxes they would probably not grant tax deferral and consequently infringe the freedom of establishment.

In *National Grid Indus*, the ECJ allowed Member States to defer the collection of exit tax until the moment that the capital gains are realized. The ECJ, however, fails to grant a definition of the concept of realization. Many Member States consider the capital gains to be realized in case of the sale or transfer of the assets to another taxpayer or abroad, outside the EU/EEA. Those events trigger the collection of the exit tax. Other States characterize the depreciation of the asset (The Netherlands) or the destruction of the asset (Norway) as a form of realization. To the extent that these events would also trigger the levy and collection of tax on unrealized capital gains in comparable domestic situations, it results in equal treatment and does not hamper the freedom of establishment.

In the cases *Commission vs. Denmark* and *DMC*, the ECJ seems to liberalize its case law in respect of the moment of collection of exit taxes. The Court does no longer refer to an equivalent treatment in comparison to domestic situations. The ECJ allows to apply other criteria than realization and considers the collection in 5 annual installments as proportionate. Whether this results in an identical pace of tax collection as in domestic situations seems not crucial any more under these later rulings.

Further important issues concerning the regime of deferred tax collection are the conditions under which deferral is granted, in particular the question whether taxpayers must provide guarantees and whether they must pay interest in respect of this deferral. These issues are treated in paragraphs 5 and 6.

5 The Requirement to provide Guaranties

In *National Grid Indus*, the only tax obstacle that was at stake regarded the cash-flow disadvantage resulting from the immediate payment of the exit tax. Other obstacles to the freedom of establishment did not exist in the case at hand. Since the Netherlands tax laws did not provide for any tax deferral at all, obviously the taxpayer involved could not complain about any hypothetical conditions to obtain tax deferral. Consequently, in *National Grid Indus*, the referring Amsterdam Court of Appeal did not raise any preliminary questions regarding hypothetical conditions to obtain tax deferral, like guarantees or interest payments.[46]

However, for the purpose of the present report, it should be examined whether, apart from cash flow disadvantages, also the requirement to provide guarantees in order to obtain tax deferral in respect of unrealized capital gains infringes the freedom of establishment. The question is whether exit tax legislation is disproportionate if taxpayers must provide guarantees in order to obtain tax deferral, keeping in mind the following words of the ECJ:

> *'36 It is also settled case-law that **all measures which prohibit, impede or render less attractive** the exercise of the freedom of establishment must be regarded as restrictions on that freedom'.[47] [emphasis added].*

In this respect it is important to remind what the ECJ ruled in *National Grid Indus*:

> *38 That difference of treatment cannot be explained by an objective difference of situation. From the point of view of legislation of a Member State aiming to tax capital gains generated in its territory, **the situation** of a company incorporated under the law of that Member State which transfers its place of management to another Member State **is similar to that of a company also incorporated under the law of the former Member State which keeps its place of management in that Member State**, as regards the taxation of the capital gains relating to the assets which were generated in the former Member State before the transfer of the place of management.' [emphasis added].*

Companies transferring their seat must be compared with companies which do not transfer their seats. On the basis of this general rule, if a State does not require to provide guarantees in respect of unrealized capital gains in domestic situations, it would constitute a restriction of the freedom of establishment if such guarantees are required in respect of unrealized capital gains in occasion of a transfer of seat.

In *National Grid Indus*, in a more specific consideration, the ECJ ruled that Member States should grant the option of a deferred collection of exit taxation and referred to the requirement to provide guarantees.

> *'74 However, 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*

[46] Hans van den Hurk, Harm van den Broek, Jasper Korving, Final settlement taxes for companies: Transfer of seat, interest charges, guarantees and step-ups, *Bulletin for International Taxation*, 2013/4-5, p. 260.
[47] ECJ case C-371/10 (National Grid Indus) para. 36.

payments of tax debts, ***by measures such as the provision of a bank guarantee****.'*[48] *[emphasis added].*

These words of the ECJ raised discussions in literature regarding the question whether this would mean that Member States are generally allowed to require guarantees in respect of the deferred collection of the exit tax.[49]

Also in the later cases *Commission vs. Portugal*[50] and in *Commission vs. Netherlands*[51], the requirement to provide guarantees was not at stake[52] and the European Commission did, at first hand, not explicitly raise any theoretical issues concerning that hypothetical issue. The problems of guarantees and interest resulted, however, in ´vivid discussions´[53] during the hearing in *Commission vs. Portugal*. The Commission agreed with Denmark that, considering that no guarantees are required in domestic cases of unrealized capital gains, such a guarantee in respect of unrealized gains after a transfer of seat would hamper the freedom of establishment and could only be justified where there is a 'genuine and proven risk of the non-recovery of tax'.[54]

According to the Advocate General, in *National Grid Indus* the ECJ did not intend to give the Member States carte blanche to introduce the option of deferred payment together with the general condition to provide a bank guarantee. Also Advocate General Mengozzi held that such a guarantee could only be required if there was a genuine and serious risk of the non-recovery of the tax claim.[55]

In *Arcade Drilling*[56], which regarded Norwegian exit taxation, the EFTA Court recognized that it would constitute a restriction of the freedom of establishment if a Member State would generally require guarantees as a condition to obtain deferred collection of exit taxes connected to a transfer of seat. According to the EFTA Court:

> *'101 (…) the national authorities may take certain measures in order to secure the eventual payment of the amount of tax,* ***provided that there is a genuine and proven risk of non-recovery****.' [emphasis added].*

Therefore, according to the EFTA Court guarantees are only proportionate if there is an actual and proven risk of non-recovery. Guarantees cannot be required as general condition. However, since in none of these earlier cases the requirement to provide guarantees was actually at stake, the ECJ never gave a clear ruling about this issue.

---

[48] ECJ case C-371/10 (National Grid Indus) para. 74.

[49] See a.o. Hans van den Hurk, Harm van den Broek, Jasper Korving, Final settlement taxes for companies: Transfer of seat, interest charges, guarantees and step-ups, *Bulletin for International Taxation*, 2013/4-5, pp. 257-267; Harm van den Broek, Exit Taxation of Cross-Border Mergers after National Grid Indus, *European Tax Studies*, 2012/1, pp. 26-49.

[50] ECJ case C-38/10 (Commission vs. Portugal).

[51] ECJ case C-301/11 (Commission vs. The Netherlands).

[52] According to Advocate General Mengozzi, it is therefore 'not necessary' that the Court rules on the question whether a Member State may require any guarantees, see the Opinion of Advocate General Mengozzi in case C-38/10 (Commission vs. Portugal) para. 70.

[53] Opinion of Advocate General Mengozzi in case C-38/10 (Commission vs. Portugal) para. 70.

[54] Opinion Advocate General Mengozzi, case C-38/10 (Commission vs. Portugal) para. 73, referred to by Hans van den Hurk, Harm van den Broek, Jasper Korving, Final settlement taxes for companies: Transfer of seat, interest charges, guarantees and step-ups, *Bulletin for International Taxation*, 2013/4-5, pp. 260.

[55] Opinion Advocate General Mengozzi, case C-38/10 (Commission vs. Portugal) paras. 78-82.

[56] EFTA Court case E-15/11 (Arcade Drilling AS) para. 101.

Finally, in the *DMC* case, the ECJ had the occasion to rule on a case actually regarding the requirement to provide guarantees. In *DMC* the ECJ ruled that the general requirement in the German tax arrangement to provide guarantees in case of the loss of tax jurisdiction after a cross-border reorganization constitutes a restriction to the freedom of establishment.[57] The Court ruled:

> *'69 The national legislation of a Member State which provides for the immediate taxation of unrealised capital gains generated in its territory does not go beyond what is necessary (…)* ***provided that****, where the taxable person elects for deferred payment,* ***the requirement to provide a bank guarantee is imposed on the basis of the actual risk of non-recovery of the tax****.' [emphasis added].*

Consequently, in *DMC*, the ECJ held that the requirement to provide guarantees in connection with the option of deferral of tax collection in cross-border reorganizations is only proportionate in case of the actual risk of non-recovery. Although the *DMC* case did not regard a transfer of seat but instead a contribution of a participation, from the reasoning of the ECJ, which systematically refers to the *National Grid Indus* ruling, it follows that the principles laid down in *DMC* also apply to transfers of seat. Therefore, it can be concluded that also in case of a transfer of seat, Member States are only allowed to request a guarantee in respect of exit taxes 'on the basis of the actual risk of non-recovery of the tax.' This requires a risk assessment on a case by case basis and precludes to require guarantees in case there is no particular risk of non-recovery.

The question is therefore whether the exit tax rules adopted by the EU/EEA Member States after the *National Grid Indus* ruling in 2011, and taking into account the *DMC* case in 2014, are in line with the case law of the ECJ. Table 4 provides an overview of the rules of the Member States with regard to the requirement to provide guarantees.

[57] ECJ case C-164/12 (DMC) para. 69.

Table 4 The Requirement to provide Guarantees after Transfer of Seat

EU State	Guarantees generally required after a transfer of seat re unrealized capital gains	Guarantees generally required in domestic cases of unrealized capital gains	Potential Infringement
Austria	no	no	no
Belgium	n.a.	no	no
Bulgaria	n.a.	no	no
Croatia	n.a.	n.a.	no
Cyprus	n.a.	n.a.	no
Czech Republic	n.a.	n.a.	no
Denmark	n.a.	no	no
Estonia	n.a.	no	no
Finland	no	no	no
France	n.a.	no	no
Germany	risk assessment	no	no
Greece	n.a.	n.a.	no
Hungary	n.a.	no	no
Ireland	no	no	no
Italy	yes	no	yes
Latvia	n.a.	n.a.	no
Lithuania	n.a.	n.a.	no
Luxembourg	n.a.	no	no
Malta	n.a.	no	no
The Netherlands	risk assessment	no	no
Poland	n.a.	n.a.	no
Portugal	n.a.	n.a.	no
Romania	n.a.	n.a.	no
Slovakia	n.a.	n.a.	no
Slovenia	no	no	no
Spain	yes	no	yes
Sweden	no	no	no
United Kingdom	risk assessment	no	no
EEA State			
Iceland	n.a.	no	no
Norway	No	no	no

N.A. stands for Not Applicable.

From Table 4 it follows that not a single EU/EEA Member State requires from domestic companies which do not exercise their freedom of establishment to provide guarantees in respect of their unrealized capital gains.

From Table 4 it follows that only 2 states systematically require to provide guarantees as a condition to obtain deferred tax collection after a transfer of seat. These States are Italy and Spain. If we assume that the ruling of *DMC* in respect of the obligation to provide guarantees also applies to transfers of seat, then the legislation of these two States is contrary to the freedom of establishment. Unfortunately, on 10 July 2014, the European Commission has withdrawn its infringement procedure against Spain.[58]

Other States assess the risk of non-recovery on a case by case basis. Germany requires guarantees on a case by case basis. In The Netherlands the law allows tax inspectors to require guarantees in all situations and this would as such not be in line with the *DMC* ruling. However, the recently published policy of the Dutch Tax Administration provides that the Tax Administration takes into account the actual risk of non-recovery. In the United Kingdom, guarantees are only required in case of a serious risk of non-recovery. These regimes seem to be in line with the requirements of the ECJ if also in practice the obligation to provide guarantees depends on the actual risk of non-recovery which must be assessed on a case by case basis.

It is to be expected that the Member States which apply exit taxes and which have not yet introduced any tax deferral regime connected to seat transfers will do so in the near future. It would be useful to monitor to what extent these States will require taxpayers to provide guarantees in respect of exit taxes and to what extent these provisions are in line with the *DMC* ruling.

58 http://ec.europa.eu/taxation_customs/common/infringements/infringement_cases/bycountry/index_en.htm#spain.

6 Interest Charges

Another tax obstacle, apart from the above mentioned obstacles which have been characterized by the ECJ as infringements of the freedom of establishment, can be constituted by the obligation to pay interest in respect of the exit tax which is not collected immediately after the transfer of seat.

As mentioned above, restrictions are 'all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment'.[59] Furthermore, a company transferring its seat must be compared with 'a company also incorporated under the law of the former Member State which keeps its place of management in that Member State'.[60]

Usually, companies which keep their place of management in the same Member State are not obliged to pay interest in respect of the unrealized capital gains connected to their assets. Therefore, if a state charges interest in respect of the deferred collection of exit taxes after a transfer of seat, there is a difference in treatment compared to similar domestic situations. Without any doubt the obligation to pay interest regarding the latent tax claim on unrealized capital gains makes it less attractive to transfer the seat to another Member State. If companies do not transfer their seat they must not pay any interest connected to the tax claims in respect of the unrealized capital gains. On the basis of this general rule established by the ECJ one should conclude that interest charges in respect of exit taxes connected to a transfer of seat constitute a prohibited infringement of the freedom of establishment.

Until now, the ECJ did not yet have the opportunity to rule on a case in which such interest charges were actually at stake. In the cases in which the ECJ in general terms referred to the possibility of charging interest in connection with exit taxes, in particular in *National Grid Indus*, the Member States involved did not actually charge interest on the exit tax. The Member States involved did not even offer the possibility of deferred tax collection.

In *National Grid Indus* the ECJ ruled in general terms as follows:

> *'73 In those circumstances, national legislation offering a company transferring its place of effective management 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****, (…) 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 freedom of establishment than the measure at issue in the main proceedings (…).' [emphasis added].*

[59] ECJ case C-371/10 (National Grid Indus) para. 36.
[60] ECJ case C-371/10 (National Grid Indus) para. 38.

As pointed out by Advocate General Mengozzi[61] and as it clearly follows from the *DMC* ruling, in *National Grid Indus* the ECJ 'did not intend to grant Member States carte blanche in respect of the obligation to provide guarantees and the requirement to pay interest charges' in respect of the deferred collection of exit taxes.

The European Commission repeatedly held that charging interest in respect of deferred collection of exit taxes is 'intrinsically discriminatory', for example in *Commission vs. Portugal*:[62]

> *'73. (…) the Commission considers that **charging interest for late payment is intrinsically discriminatory** since resident taxpayers are asked to pay tax only subsequently, without interest (…)' [emphasis added].*

Also in more recent cases, like *Commission vs. Denmark*, the European Commission repeated its view that the charging of interest infringes the freedom of establishment:[63]

> *'19 The Commission considers that it would not comply with the requirement of proportionality to require a bank guarantee **or payment of interest** (…).' [emphasis added].*

Advocate General Mengozzi does not agree with this view. According to the Advocate General[64] in *Commission vs. Portugal*, in respect of interest payments, a company transferring its seat must not be compared with a domestic company that does not transfer its seat:

> *'74. With regard to interest (…) I note that a number of Member States apply interest, sometimes classified as 'interest for late payment', on the amount of the tax claims of their taxpayers, including where deferred payment of the tax debt is authorised. **Although I am not certain**, this is, I think, the situation to which the clarification made by the Court in paragraph 73 of the abovementioned judgment in National Grid Indus relates.*
>
> *75. In my view, **the Commission's criticism** regarding the discriminatory character of such a requirement **cannot be accepted**.*
>
> *76 If, in a domestic situation where a place of management is transferred, such interest is not demanded, this is simply because the amount of the tax debt will be ascertained and therefore payable only upon the effective realisation of the capital gains. (…) By contrast, because, in a cross-border situation, the Member States are authorised, as is confirmed in the abovementioned judgment in National Grid Indus, to fix the amount of the tax debt payable in connection with unrealised capital gains relating to assets of a company transferring its place of management to another Member State at the time of that transfer, but the actual payment is deferred, the interest payable on that amount **may be treated in the same way as interest payable on a loan granted to that company**.*

[61] Opinion Advocate General Mengozzi, case C-38/10 (Commission vs. Portugal) para. 80.
[62] Opinion Advocate General Mengozzi, case C-38/10 (Commission vs. Portugal) para. 73.
[63] ECJ case C-261/11 (Commission vs. Denmark) para. 19. Translation from French by Harm van den Broek.
[64] Opinion Advocate General Mengozzi, case C-38/10 (Commission vs. Portugal) paras. 76-77.

> *77. Consequently, and in accordance with the* ***principle of equivalence****, if, in its national legislation generally applicable to the recovery of tax claims, a Member State provides that the option of deferred payment comes together with interest, there is no objective reason to exclude from it the situation of a company transferring its place of management to a Member State, whose tax debt in the Member State of exit was ascertained at the time of that transfer.' [emphasis added].*

Therefore, where the ECJ has ruled with regard to certain aspects of the exit tax, such as the moment of collection of the exit tax and the requirement to provide guarantees, that a company transferring its seat to another Member State must be compared with a domestic company with unrealized gains, the Advocate General holds that with regard to another aspect of the exit tax, i.e. the payment of interest, seat transfers must by contrast *not* be compared to a domestic company with unrealized capital gains. Apparently, according to the Advocate General, a company transferring its seat must be compared with a domestic company that actually *has realized* its profits and that has received a tax assessment in respect of those profits. In the words of the Advocate General, it must be compared with '*interest payable on a loan granted to that company.'* One may doubt whether this approach is consistent and whether it is in line with the case law of the ECJ. According to the ECJ, the exit tax must be compared with domestic situations in which no tax assessment is imposed on unrealized gains. And the Courts decision in *National Grid Indus* that an exit tax may not be collected until the moment of realization is exactly based on the comparison with domestic situations in which the tax on capital gains is only collected after these gains are realized. The Advocate General therefore denies the fact that the ECJ has established that exit taxation must be compared to domestic situations in which no tax assessment is imposed on unrealized capital gains. The Advocate General, however, admits that he is not certain.

Moreover, even if the company should be compared with a domestic company with realized gains, then still no interest could be charged in most situations of a transfer of seat. We assume that in most Member States interest can only be charged in domestic situations in which the taxpayer can be forced to pay the tax assessment without further deferral, while no interest is due if the assessment has been imposed but the taxpayer cannot yet be forced to pay the tax assessment. Since the ECJ has ruled that the taxpayer cannot be forced to pay the exit tax immediately, this would mean that there can be no interest charge either. So therefore, even under the interpretation of the Advocate General, interest could be charged only from the moment that the capital gains have been realized[65] and the exit tax can be collected.

In order to grasp the relevance of interest charges on exit taxes, we will illustrate this with the example of *National Grid Indus*. The tax claim at issue in *National Grid Indus* regarded the amount of 3.5 million euro to be paid in respect of the unrealized capital gains on a receivable in British pounds.[66] Let us assume that the loan would be paid back by the debtor 10 years after the transfer of the seat. That means that after ten years the capital gain on the receivable is realized and the exit tax must be paid. The Netherlands charges companies (at least) 8% of interest per annum on tax deferral. This means that 10 years after its cross-border transfer of seat, when the loan is paid back, a company like *National Grid Indus* has to pay 3.5 million euro of tax plus a total amount of interest of 2.8 million euro (10 x 8% of 3.5

[65] Or from the moment that the installment payments are actually due.

[66] ECJ case C-371/10 (National Grid Indus) para. 12, indicates that the capital gain amounted up to 22 mln NLG, which is 10 mln EURO, whereas the Dutch Corporate Income Tax rate in 2000 was 35%.

million euro). By contrast, if *National Grid Indus* would not have transferred its seat abroad, the company would only have to pay 3.5 million euro of tax at the moment of realization of the capital gains. This example demonstrates that the charging of interest on deferred exit taxes is a major burden to the exercise of the freedom of establishment.

Finally, there seems to be no justification for the charging of the interest. It infringes the principle of equivalence compared to the treatment of domestic companies. Furthermore, interest payments are certainly not helpful or necessary to obtain the per se justified objective of safeguarding the balanced allocation of taxing rights between Member States or the coherence of the tax system. The Court of Justice has not accepted any other justifications in respect of transfers of seat.

Consequently, we conclude that charging interest in respect of deferred collection of exit taxes constitutes a prohibited infringement of the freedom of establishment that cannot be justified.

As Table 5 indicates, the problem of interest charges occurs in many EU/EEA Member States.

Table 5 The Requirement to pay Interest after a Transfer of Seat

EU State	Interest Charges after Transfer of Seat?	Interest Charges on Domestic Unrealized Capital Gains?	Potential Infringement
Austria	no	no	no
Belgium	n.a.	no	no
Bulgaria	n.a.	no	no
Croatia	n.a.	n.a.	no
Cyprus	n.a.	n.a.	no
Czech Republic	n.a.	n.a.	no
Denmark	yes	no	yes
Estonia	n.a.	no	no
Finland	no	no	no
France	n.a.	no	no
Germany	no	no	no
Greece	n.a.	n.a.	no
Hungary	n.a.	no	no
Ireland	yes	no	yes
Italy	yes (installments)	no	yes (installm)
Latvia	n.a.	n.a.	no
Lithuania	n.a.	n.a.	no
Luxembourg	n.a.	no	no
Malta	n.a.	no	no
The Netherlands	yes	no	yes
Poland	n.a.	n.a.	no
Portugal	yes	n.a.	yes
Romania	n.a.	n.a.	no
Slovakia	n.a.	n.a.	no
Slovenia	no	no	no
Spain	yes	no	yes
Sweden	no	no	no
United Kingdom	yes	no	yes
EEA States			
Iceland	n.a.	no	no
Norway	yes	no	yes

N.A. stands for Not Applicable.

From Table 5 it follows that none of the EU/EEA Member States charges interest in respect of unrealized capital gains in domestic situations.

By contrast, Table 5 illustrates that 7 EU/EEA Member States (Denmark, Ireland, The Netherlands, Portugal, Spain, United Kingdom and Norway) generally charge interest in respect of the deferred collection of exit taxes. Furthermore, Italy charges interest if taxpayers opt for payment of the exit tax in installments, but not if taxpayers opt for payment at the moment of realization.

Therefore, assuming that charging of interest cannot be justified, we must conclude that the interest provisions of at least 8 EU/EEA Member States infringe the freedom of establishment. Unfortunately, on 20 November 2013, the European Commission has withdrawn its infringement procedure against The Netherlands.[67] At this moment, the European Commission does not seem to act against this type of infringement.

As mentioned before, several Member States have not yet introduced any tax deferral regime connected to exit taxes and are still obliged to do so. It would be useful to monitor to what extent these States will oblige taxpayers to pay interest in respect of the deferred collection of exit taxes.

---

67 http://ec.europa.eu/taxation_customs/common/infringements/infringement_cases/bycountry/index_en.htm#spain.

7 Summary and Conclusions

The vast majority of the EU and EEA Member States (22 States) applies the incorporation system. Only 7 states adhere to the real seat system. Companies from the latter 7 states might be obliged to liquidate if they transfer their real seat to another State. In that case, they cannot rely on the freedom of establishment in respect of transfers of seat, unless these companies are converted into companies governed by the company law of the host state.

In practice, not a single state generally taxes unrealized capital gains of companies in domestic situations at the end of a fiscal year. By means of exception, a few Member States levy tax on very specific unrealized capital gains in domestic situations. By contrast, 16 EU/EEA Member States tax unrealized capital gains upon a seat transfer whereas these unrealized gains would not have been taxed in domestic situations. These 16 states potentially restrict the freedom of establishment. Furthermore, a remarkable number of 10 Member States does not levy any form of exit tax on unrealized capital gains in case of a transfer of seat. Finally, in the case of Greece, Lithuania and Iceland it is not clear whether the general principles of their tax laws would result in exit taxation.

Of all 16 EU/EEA Member States that levy exit taxes, per January 1, 2014, not less than 7 States[68] do not grant the option of deferral until realization as required by the ECJ in *National Grid Indus*. Furthermore, 7 States grant the option of deferral until realization. Two States, Austria and Norway offer that option only with regard to certain assets.

The option to pay the exit tax in fixed annual installments is offered by 9 States. The installments vary between 5, 6, 7 or 10 years. In the cases *Commission vs. Denmark* and *DMC*, the ECJ allows to apply other criteria for collection of exit tax than the realization of the actual capital gains. The ECJ generally seems to consider the collection in 5 annual installments as proportionate. It is not completely sure yet whether payment in installments can also be required in respect of assets which are usually disposed of.

Belgium, Finland, Luxembourg and Slovakia did not offer any form of relief and require exit taxes to be paid immediately. The same applies to Austria and Norway in respect of certain assets. The infringement of the freedom of establishment by these 6 States cannot be justified.

With regard to the conditions to obtain deferred tax collection special attention should be given to the requirement to provide guarantees and to interest charged by States in respect of tax deferral.

Only 2 states, Italy and Spain, systematically require to provide guarantees in order to obtain deferred tax collection after a transfer of seat. Assuming that the *DMC* ruling, in which the ECJ ruled that guarantees can only be required in case of an actual and proven risk of non-recovery, also applies to transfers of seat, then these two States infringe the freedom of establishment. Furthermore, Germany, The Netherlands and the United Kingdom require guarantees on the basis of a case by case risk assessment, which seems to be in line with the *DMC* ruling.

[68] Belgium, Denmark, Finland, France, Germany, Luxembourg and Slovakia.

The ECJ has not yet ruled in a case in which a Member State charged interest in respect of the deferred collection of exit tax, but we strongly agree with the view of the European Commission that in general charging interest after a transfer of seat infringes the freedom of establishment.

None of the EU/EEA Member States charges interest in respect of unrealized capital gains in domestic situations. By contrast, 7 EU/EEA Member States (Denmark, Ireland, The Netherlands, Portugal, Spain, United Kingdom and Norway) generally charge interest in respect of the deferred collection of exit taxes. Furthermore, Italy charges interest if taxpayers opt for payment of the exit tax in installments. These states seem to infringe the freedom of establishment.

It is to be expected that the Member States which have not yet introduced any tax deferral regime connected to exit taxes will do so in the near future. It would be useful to monitor to what extent these States will require taxpayers to provide guarantees and whether they charge interest in respect of deferral of exit taxes.

Table 6 contains the conclusions as to whether the exit tax rules of each EU/EEA Member State infringe the freedom of establishment. It illustrates that in 2014 the exit tax laws of at least 13 EU/EEA Member States are still not in line with the freedom of establishment.

Table 6 Conclusions concerning Exit Taxation in the EU/EEA

	Infringement of the Freedom of Establishment by Exit Tax Regimes		
EU State	**Lack of Tax Deferral or Payment in Installments**	**Guarantees are Generally Required**	**Interest is Charged**
Austria	Yes		
Belgium	Yes		
Bulgaria			
Croatia			
Cyprus			
Czech Republic			
Denmark			Yes
Estonia			
Finland	Yes		
France			
Germany			
Greece	Not clear		
Hungary			
Ireland			Yes
Italy		Yes	Yes
Latvia			
Lithuania	Not clear		
Luxembourg	Yes		
Malta			
The Netherlands			Yes
Poland			
Portugal			Yes
Romania			
Slovakia	Yes		
Slovenia			
Spain		Yes	Yes
Sweden			
United Kingdom			Yes
EEA States			
Iceland	Not clear		
Norway	Yes		Yes

ANNEX

List of correspondents

Nr	EU Member State	Name	Email
1	Austria	Michael Weismann	mweismann@deloitte.at
2	Belgium	Brecht Sohier	bsohier@deloitte.com
3	Bulgaria	Ralitsa Viyachka	rviyachka@deloittece.com
4	Croatia	Ivana Vitovski	ivitovski@deloittece.com
5	Cyprus	Antonis Taliotis	ataliotis@deloitte.com
6	Czech Republic	Josef Žaloudek	jzaloudek@deloitteCE.com
7	Denmark	Søren Reinhold Andersen Birgitte Tabbert	soeandersen@deloitte.dk birgitte.tabbert@gmail.com
8	Estonia	Ivo Vanasaun	ivanasaun@deloittece.com
9	Finland	Maria Valkama	maria.valkama@deloitte.fi
10	France	Christophe Le Bon	clebon@taj.fr
11	Germany	Anke Meissner Annekathrin Keller	ameissner@deloitte.de akeller@deloitte.de
12	Greece	Thomas Leventis, Eleftheria Ignatidou	tleventis@deloitte.gr eignatidou@deloitte.gr
13	Hungary	Gábor Kóka	gkoka@deloittece.com
14	Ireland	Declan Butler Olivia Waldron	debutler@deloitte.ie owaldron@deloitte.ie
15	Italy	Luca Bosco	lubosco@sts.deloitte.it
16	Latvia	Janis Čupāns	jcupans@deloittece.com
17	Lithuania	Alina Ulinauskienė	aulinauskiene@deloittece.com
18	Luxembourg	Francois Guilloteau	fguilloteau@deloitte.lu
19	Malta	Rachel Galea	ragalea@deloitte.com.mt
20	The Netherlands	Harm van den Broek	h.vandenbroek@jur.ru.nl
21	Poland	Jan Wasilewski Ewa Grzejszczyk Bartłomiej Suszko	jwasilewski@deloittece.com egrzejszczyk@deloittece.com bsuszko@deloittece.com
22	Portugal	Carlos Loureiro	caloureiro@deloitte.pt
23	Romania	Petre Daniel	dpetre@deloittece.com
24	Slovakia	Pavol Berec	pberec@deloittece.com
25	Slovenia	Alenka Gorencic	agorencic@deloitteCE.com
26	Spain	Julia María Martinez Tapia	jmartineztapia@deloitte.es
27	Sweden	Lars Franck	lfranck@deloitte.se
28	United Kingdom	Daniel Jones	danijones@deloitte.co.uk

	EEA Member State		
1	Iceland	Vala Valtýsdóttir	Vvaltysdottir@deloitte.is
2	Norway	Per Evers Ingrid Anne Kinden Wensing Li	pevers@deloitte.no ikinden@deloitte.no wensli@deloitte.no