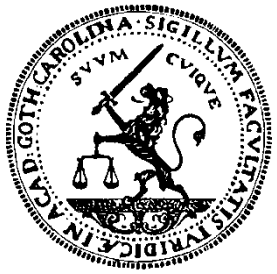

FACULTY OF LAW

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A legal study into the EU's approach towards exit taxation

JAEM03 Master Thesis

European Business Law

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SUMMARY

The purpose of the thesis is to analyse the EU's and CJEU's approach towards exit taxes by finding guidance on how the exit tax rules shall be made to be considered as compatible with the requirements of EU law. The EU law's presumption of establishing an internal market without boundaries at the frontiers prohibits national measures which hinder, inter alia, the market access. Therefore, the EU's Member States tax legislation that influences the taxpayer's behavioural patterns are considered a restriction to the free movement rights. A legitimate objective within the reason of public interest may allow a restrictive national measure. The CJEU strike a balance between the purposes of public interest and the aim of establishing a single internal market within the EU.

The States rationale behind the exit tax regimes is to protect their tax base followed by the right from the international tax law to tax an income accumulated within the tax jurisdiction of that State. Within the States' tax sovereignty, the tax systems are underlined by different principles that, inter alia, determine the subject of taxation. Such mismatches and differences may create double taxation and double non-taxation. It results in a harmful effect but also affects the economic relation between the States. It also creates obstacles to the EU's internal market. The States enter into bilateral tax treaties, that are based on the OECD model tax convention, to divide and define taxing rights between them. A balanced allocation of taxing rights is recognised by the CJEU as a legitimate aim.

The exit taxation triggers at the event of emigration. It affects the mobility of a taxpayer by creating a dissuasive effect and therefore, is regarded as a restriction. The CJEU develops two lines of cases concerning exit taxation on accrued gains. The distinction in the CJEU's reasoning occurs in the assessment of whether the measure at issue is proportionate to the aim pursued. For instance, in case of emigrating individuals, deferral of payment until realisation shall be granted for the measure to be considered compatible with EU law. However, in the case of emigrating companies, it is established, inter alia, that the taxpayer shall have a choice between immediate taxation and deferral of payment as it is regarded as less harmful to the free movement rights. However, the subsequent cases show that the further case law builds on the precedents established in the cases of emigrating companies. Even it may indicate that the CJEU is going towards a single approach.

The ATAD contains a provision on exit taxation in case of taxpayers that are subject to corporate tax followed by the national law. It shows how far the Member States goes in order to co-ordinate, in that matter. Article 5 of the ATAD reflects the established case law on exit taxation in case of emigrating companies.

PREFACE

This challenging yet amazing journey associated with this paper began at the beginning of the *Master's program in European Business Law* at Lund University. The choice of the topic changed after every course I had studied during this program. The turning point to choose a topic in the field of direct taxation was inspired after the privilege to study courses in the field of International and European taxation at the Department of Business law.

The field of direct taxation is very wide and complex. Particularly, the EU law regarding exit taxation is a topic that requires a broad understanding but at the same time, a specific knowledge to assess the subject. In that regard, I would like to express my thank you to my supervisor *Mats Tjernberg*, who inspired me and shared his in-depth knowledge of the topic and showed the right direction to correctly asset the issue.

Another thank you, I would like to address to my *boyfriend* and *my cousin*, for support and understanding they gave me. Without them, the journey would have been much tougher. In particular, I would like to thank my boyfriend, who supported me with love and understanding.

Lund, May 2020

Patricia Zakrzewska

ABBREVIATION LIST

AG	Advocate General
ATAD	Council directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market
CJEU	Court of Justice of the European Union
Commission v Portugal case	Case C-503/14 European Commission v. Portuguese Republic
DMC case	Case C-164/12 DMC Beteiligungsgesellschaft mbH v Finanzamt Hamburg-Mitte
EC	European Commission
EEA	European Economic Area
EEA agreement	Agreement on the European economic area
EU	European Union
Jacob and Lassus case	Joined Cases C-327/16 and C-421/16 Marc Jacob and Ministre des Finances et des Comptes publics v Ministre des Finances et des Comptes publics and Marc Lassus
Lasteyrie case	Case C-9/02 Hughes de Lasteyrie de Saillant
N case	Case C-470/04 N v. Inspecteur
NGI case	Case C-371/10 National Grid Indus BV
OECD	Organization for Economic Cooperation and Development
OECD model tax convention	Model Tax Convention on Income and on Capital: Condensed Version 2017
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Van Hilten der Hejden case	Case C-513/03 Heirs of M. E. A. van Hilten-van der Heijden v Inspecteur van de Belastingdienst/ Particulieren/Ondernemingen buitenland te Heerlen
Veder LabTec case	Case C-657/13 Verder LabTec GmbH & Co. KG v Finanzamt Hilden

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1 INTRODUCTION

1.1 BACKGROUND

The tax systems of the States are underlined by different principles that determine, inter alia, the taxing rights in the respective State, due to the State's tax sovereignty. [1] Those principles determine what is taxed and who is subject to a tax. So, two countries may apply different principles and the income of a taxpayer, the same income, may be subject to a tax in both states, so-called *international juridical double taxation*[2]. One of the most common principles is the resident principle. It gives the right for a country to tax a resident for all the income, regardless of where the income was accumulated. As a result of this principle, a state may lose the taxing right in the event of emigration. Therefore, many states have introduced so-called exit tax in order to protect their tax bases. [3]

An exit tax is a "…*feature of a general… tax*…" [4] that is triggered in the event of emigration, including taxation of unrealised gains.[5] Exit taxation levied by the States may create a double taxation situation. The States enter into bilateral tax treaties[6] which defines and divides the taxing rights between the contracting states, in order to eliminate, inter alia, a double taxation that may arise in a situation such as at issue.[7] Tax treaties can never extend a state's taxing rights but only limit it. As well as, the EU law may also limit the taxing right of a State, whereby the Member States of the EU are obligated to comply with the EU law.[8]

The main aim of the EU is to "…*establish an internal market*…" [9]. Therefore, to "…[ensure] the function of the internal market…" [10], any obstacles at the frontiers shall be abolished.[11] In essence, there should not be any differential treatment of, inter alia, foreign tax bases and taxpayers should be able to choose the taxing jurisdiction within the EU freely. However, the

[1] Michael Lang, *Introduction to the law of double tax conventions* (2nd Revised Edition, Joint publication of IBFD and Linde, 2013) para 1; Katia Cejie, *Utflyttningsbeskattning av kapitalökningar: En skattevetenskaplig studie i internationell personbeskattning med fokus på skatteavtals- och EU-rättsliga problem* (A scientific study on the taxation of 'emigrating' capital gains, Uppsala: Juridiska institutionen, 2010) pages 23–24.
[2]Lang (n 1) paras 1- 20, 39-47; Commentary on the OECD Model Tax Convention on Income and on Capital: Condensed Version 2017 p 9, at <https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en#page10>.
[3]Carla De Pietro, 'Exit Tax: Fiscal Territory and Company Transfer' (2009) 2009 EurTax Stud 265; Andrea Carinci, 'EC Law and Exit Tax: Limits, Future Perspectives and Contradictions' (2009) 2009 Eur Tax Stud 286; Cejie, (n 1) 23-24.
[4]W. Schön, EU Tax Law: An Introduction, (Max Planck Institute for Tax Law and Public Finance 2019-12), p.70. Exported / Printed on 18 Feb. 2020, electronic copy available at <https://ssrn.com/abstract=3432273>.
[5] Schön (n 4) 70; Cejie (n 1) 23-24.
[6] Commentaries on the OECD model tax convention (n 2) p 11.
[7] Lang (n 1) paras 1-2, 4-5,8, 10, 12, 16-20 and 39-44; Commentaries on the OECD model tax convention (n 2) p 11; Cejie (n 1) 23-24; OECD, Glossary of Tax Terms, at <https://www.oecd.org/ctp/glossaryoftaxterms.htm#D>; Peter J. Wattel, Otto Marres & Hein Vermeulen, *European Tax law*, Vol 1 (abridged student edition, 7th ed., Kluwer Law International B.V., 2019) pages 313-314.
[8] Lang (n 1) paras 42-47; Cejie (n 1) 23-24.
[9] Article 3 (3) of the Treaty on European Union (Consolidated Version of the Treaty on European Union) [2008] OJ C115/13 (TEU).
[10] Article 26 of the Treaty on the Functioning of the European Union (Consolidated version of the Treaty on the Functioning of the European Union) [2012] OJ C326/47 (TFEU).
[11]Articles 3(3) TEU and 26 TFEU; M. Helminen, Chapter 1: EU Tax Law as Part of the Legal System in EU Tax Law (IBFD 2019) pages 1-3 and 7. Exported / Printed on 11 Nov. 2019 by Lund University.

EU consist of 27 sovereign States and the field of direct taxation is unharmonised and uncoordinated. In order to "…protect against base erosion and mismatches (fiscal incoherence, misallocation of taxing power, and tax avoidance…. the Member States must define and divide their tax jurisdiction themselves…"[12].[13] The CJEU confirms the Member States' taxing rights to tax an income accumulated in the country concerned, in accordance with the principle of fiscal territoriality[14].[15] Therefore, many countries in the EU apply exit taxation[16]. The exit tax concern a natural person, a legal entity, or the assets are moving abroad. In the situation when it affects the mobility of individuals or companies, it can create obstacles, and hinder, and therefore may conflict with the fundamental freedoms ensured by EU law.[17] However, the CJEU allows a member state to implement measures that are "…*liable to hinder*.." [18] fundamental freedoms, as long as "…*it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest*…"[19]. To strike a balance between the reasons in the public interests, within the Member States' taxing rights to tax an income accumulated in the country concerned, and the internal market without frontiers it is necessary to ascertain whether the measure is necessary and do not go beyond the aim pursued. The CJEU made it clear that such justification "…*must be appropriate to ensuring the attainment of the objective thus pursued and must not go beyond what is necessary to attain it…*"[20].[21]

Back in the day, the EC made an observation, with regard to the different valuation methods the Member States use in cases of cross-border movements of assets, that it creates a risk of

[12] Wattel (n 7) 313.
[13] ibid 313.
[14] Principle of fiscal territoriality will be discussed later.
[15] See e.g Case C-250/95 Futura Participations and Singer v Administration des contributions [1997] ECR I – 2492 para 19- 22; Case C-270/83 Commission v. France [1986] ECR 273 (Avoir Fiscal), para. 24; Case C-279/93 Finanzamt Köln-Altstadt v. Roland Schumacker [1995] ECR I-225, para 21; Case C- 311/97 Royal Bank of Scotland v Elliniko Dimosio [1999] ECR I – 2664, para. 19; Case C-294/97 Eurowings Luftverkehrs AG v. Finanzamt Dortmund-Unna [1999] ECR I - 7463, para. 32; Case C-436/00 X and Y v Riksskatteverket [2002] ECR I -10847, para. 32; Case C-324/00 Lankhorst- Hohorst v Finanzamt Steinfurt [2002] ECR I-11802, para. 26; Case C-9/02 Hughes de Lasteyrie de Saillant, [2004] ECR I-2409, para. 48; Case C-371/10 National Grid Indus BV, [2011] ECR I-0000 (NGI), para.44;C-520/04 Pirkko Marjatta Turpeinen [2006] ECR I - 10704, para. 11; Case C-403/03 Egon Schempp v Finanzamt München [2005] ECR I – 6435 para. 19; Case C-231/05 Oy AA [2007] ECR I - 6393, para. 16; Case C-446/03 Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes) [2005] ECR I-10837 para. 29; Case C-196/04 Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue [2006] ECR I-07995 para. 40; Case C- 374/04 Test Claimants in Class IV of the ACT Group Litigation v Commissioners of Inland Revenue [2006] ECR I - 11718, para. 36; Helminen, Chapter 1 (n 15) pages 1-3 and 7.
[16] According to Wolfgang Schön exit tax: *"…is not a particular kind of tax but rather a feature of general income or capital gains tax… is not levied when companies or assets are transferred within the same jurisdiction…"*, Schön (n 4) 70.
[17] See e.g. Lasteyrie (n 15); Case C-470/04 N v. Inspecteur, [2006] ECR I-7409; Case C-503/14 European Commission v. Portuguese Republic (ECJ, 21 December 2016); Case C-657/13 Verder LabTec GmbH & Co. KG v Finanzamt Hilden (ECJ, 21 May 2015); M. Helminen, Chapter 2: Non-Discrimination and Basic Freedoms in EU Tax Law (IBFD 2019), pages 9-19. Exported / Printed on 11 Nov. 2019 by Lund University. Schön (n 4)70.
[18] Lasteyrie (n 15) [49].
[19] ibid.
[20] ibid.
[21] ibid; and see e.g. cases Futura (n 15) [26]; X and Y (n 15) [49].

both double taxation and double non-taxation.[22] Nowadays, the Member States are required to implement and comply with the ATAD[23] that creates a common legal framework within the aim of prevention of tax avoidance. The ATAD also contain a provision on exit taxes that applies in cases of emigrating companies or business's assets.[24]

1.2 AIM

The aim of the thesis is to analyse the EU and CJEU's approach towards exit taxes by finding guidance on how the exit tax rules shall be made to be considered as compatible with the requirements of EU law. Therefore, the thesis will investigate and examine the legal requirement laid down by the EU treaty interpreted by the CJEU with regard to exit taxes.

Exit taxation is triggered by an event of emigration, as explained above, but subject to this type of tax may be both a company and an individual. Has the above reasoning been considered equally by the CJEU in both circumstances? It is essential to compare the case law concerning the individuals and companies in the exit tax cases, in order to emphasise the understanding behind the CJEU's reasoning and to find the guidance. In addition to the above, an investigation will examine how the article 5 of the ATAD that applies to the taxpayers who are subject to the national corporate tax relates to the established case law regarding companies. It may say something general about the EU's ambition and approach with ATAD but also reveal whether there are legal requirements that generally apply to exit taxes, within the EU law.

1.3 METHOD AND MATERIAL

This paper analyses the EU's and the CJEU's approach towards the exit tax. Therefore, the examination is made primary by analysing the fundamental freedoms, ensured in the TFEU, and the case-law of the CJEU that interprets the Treaty freedoms in that regard. The founding treaties (TEU and TFEU) do not expressly refer to the interrelationship, in the field of direct taxes, between the EU law and the Member States domestic law. The competence belongs to the Member States.[25] Therefore, the harmonisations of the Member States' laws are mostly based on the CJEU's interpretation of the founding treaties, namely through the negative integration.[26] The used case law concerns exit taxation in the emigration of both individuals and companies, in order, to examine whether the approach of the CJEU is the same in both cases. As well as, the ATAD will be examined as it was adopted through the positive integration, allowed by Article 115 of the TFEU, and contains a provision with regard to exit taxation. It also will be examined towards the existent case law.[27]So, article 5 of ATAD is also

[22] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, Exit taxation and the need for co-ordination of Member States' tax policies, Brussels, 19.12.2006 COM(2006) 825 final, pages 4-8.
[23] Council directive(EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L193/1 (ATAD).
[24] Commission (n 22); articles 2 and 5 of the ATAD; EUR-Lex, Summaries of EU legislation: European Union directives, at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14527> accessed 4 May 2020.
[25] See cases Futura (n 15) [19], Schumacher (n 15) [21]-[26]; Case C-80/94 Wielockx v Inspecteur der directe belastingen [1995] ECR I-2493, para 16; Case C-107/94 Asscher v Staatssecretaris van Financiën [1996] ECR I-3089, para 36.
[26]Helminen, Chapter 1 (n 15) 7-8.
[27] See cases Futura (n 15) [19], Schumacher (n 15) [21]-[26]; Wielockx (n 25); Asscher (n 25).

examined to give a perspective of the developments of the law in the field of exit taxation. However, the examination of article 5 of ATAD is limited to the doctrine and what the provision literally says as there is no case law existent yet. [28]

Although the tax treaties are not under review, the tax treaties are part of the Member States' national tax law and are of importance in case of exit taxation, as are connected to the objective of a balanced allocation of taxing rights between Member States.[29] Therefore, the OECD model tax convention[30] has been used, as a starting point, to give an understanding of how the State's tax treaties are designed. Here, it has to be pointed out that the latest version of the OECD model tax convention from 2017 was used.

Beyond the above mention material, a number of articles and books have been used to supplement the objective of this research and clarify the exit taxation approach in an unbiased manner.

1.4 DELIMITATION

The case law of the CJEU is extensive with regard to exit taxation on accrued income. Therefore, in this paper, a delimitation has been made by excluding case law regarding exit taxation on the accrued value of pension reserves. The case law in the event of exit taxation on accrued gains, regarding both the emigrating companies and emigrating individuals, is extensive. Therefore, the cases chosen are the cases that show the developments, the approach of the CJEU, and differences in the reasoning. Furthermore, another factor in the selection was that the cases have also been repeatedly referenced by the CJEU in their later judgments and may be, inter alia, considered as landmark cases in the field of EU exit taxation law.

Additionally, a large selection of articles, journals, and books has been made. In the selection process, the value of each source has been determined based on the strength of each author's argument.

1.5 OUTLINE

This paper is divided into five chapters. The first chapter presents the background and the aim of the research. The second chapter covers the general EU law, the relevant fundamental freedoms that are applicable in the field of direct taxation, to give an understanding of the later analysed case law. Therefore, the reasoning, method of the interpretation of the CJEU, in this field, is also covered here. As well as the relevant fundamental freedoms, with regard to exit taxation, are also illustrated. The third chapter deals with the instrument that the Member States uses to solve the issue of double taxation, namely bilateral tax treaties, and explaining the relation between it and the EU law. As the tax treaties are based on the OECD model tax convention, this chapter explains the structure, function, and methods used in the OECD model tax convention. At this point, it is also discussed with regard to exit taxation on accrued gains.

[28] Article 5 of the ATAD.
[29] Case C-307/97 Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt [1999] ECR I – 6181, para 57.
[30] OECD, Model taxation Convention on Income and on Capital: Consended version 2017 (OECD model tax convention), at < https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en#page1>.

The fourth chapter examines the case law of the CJEU that essentially shall lay down the legal requirements regarding the exit taxation on accrued gains established by the CJEU. As a starting point in this chapter, the phenomena behind the exit tax is explained, and a general overview is given, in the first subchapter. In the second subchapter, the case law concerning exit taxation in the case of emigrating companies and individuals is examined. Here, the case law is investigated and examined to determine the legal requirement laid down by the EU treaty interpreted by the CJEU. As well as, a comparison between cases is made in order to examine how the cases build on each other's precedents. Additionally, an analysis of whether the reasoning of the CJEU is the same regarding individuals and companies. At the end of the subchapter, the concluding remarks are presented, and an illustration of the legal requirements established by the CJEU in both lines of cases by comparing them, case law involving individuals v. case law involving companies. The third subchapter presents two cases that were decided later and looks at how the case law builds on the previously discussed precedents. The last subchapter analyses the requirement regulated in the ATAD in comparison to the precedents established by the CJEU in case of emigrating companies regards exit taxation. The last chapter presents the conclusions developed in the paper.

2 EU LAW AND DIRECT TAXATION: FUNDAMENTAL FREEDOMS

2.1 THE RELATION BETWEEN EU LAW AND DIRECT TAXATION

In the settled case law, the CJEU expresses that "…although direct taxation falls within the competence of the Member States, ….must none the less exercise that competence consistently with [EU] law…"[31].[32] Already in 1966, in the case *Commission v France*[33], the CJEU confirmed the applicability of TFEU.[34] In particular, the most relevance is placed in the rights of the fundamental freedom as they shall ensure the function of the internal market.[35] Hence, the core of the internal market is, among other things, the elimination of trade barriers between the Member States and the free movement of goods, services, persons, and capital within the Union, so-called four freedoms. Therefore, the Member States shall abolish tax obstacles that may prevent or restrict the free movement within the EU.[36] Petter J. Wattel identifies, for instance, "…tax burdens on the cross-border relocation of persons (exit taxes);… differential tax treatment of resident and non-resident;…international juridical double taxation…"[37] as "….the most manifest tax obstacles…."[38].

2.1.1 Positive and Negative integration in the field of direct taxation

The EU integration process, within the aim of the establishment of the internal market, can be realised through positive integration, also called policy integration, and negative integration, so-called market integration. In the field of direct taxation, the harmonisations of the Member States' laws are mostly based on the CJEU's interpretation of the founding treaties, through the negative integration. The positive integration means that the EU institutions adopt legislative instruments in order to approximate the laws of Member States.[39] However, the EU's institution can only act within the limits of the competences confirmed by the Member States in the Treaty, according to the principle of conferred powers ensured in article 5 (2) TEU. The founding treaties (TEU and TFEU) do not expressively reference do the interrelationship, in the field of direct taxes, between the EU law and the Member States' domestic law. Therefore, the harmonisation of the Member States' national law is limited, as a consequence of shared competence[40].[41] So, the approximation of laws is only possible by adopting a directive by the

[31] Futura (n 15) [19].
[32] See e.g. Schumacher (n 15) [21]-[26]; Wielockx (25) [16]; Asscher (n 25) [36].
[33] Avoir fiscal (n 15).
[34] ibid.
[35] Article 3 (3) TEU; Paul Craig& Grainne De Burca, EU law: Text, Cases, and Materials (6th ed, Oxford University Press 2015) page 86.
[36] Articles 18, 21, 45, 49, 56 and 63 TFEU; and Helminen, Chapter 1 (n 15) page 7.
[37] Wattel (n 7) 3.
[38] ibid 3.
[39] Wattel (n 7) pages 23-26; Helminen, Chapter 1 (n 15) 7-8;
[40] See arts.3 -6 TFEU and especially 2(2) and 4 (2)(a) and 5 for the competence; and the Protocol of the Treaty of Lisbon on the exercise of shared competence; Helminen, Chapter 1 (n 11) pages 9-10.
[41] Articles 2(2), 4 (2) 114 (2) and 115 TFEU; Fredric Korling & Mauro Zamboni, Juridisk Metodlära (Legal Methodology) (1:5 edition, Studentlitteratur AB 2015), page 113; Wattel (n 7) 22; and see e.g. Schumacker (n 11) [21]; Futura (n 15), Lasteyrie (n 15) [44]; Marks & Spencer (n 15) 29, Cadbury Schweppes (n 15) [40] and Test Claimants in Class IV of the ACT Group Litigation (n 15); Helminen, Chapter 1 (n 11) page 1-3.

EU's institutions, according to the article 115 TFEU. The number of directives adopted in this field is limited, as a consequence of the special legislative procedure and the State's tax sovereignty. [42] For instance, the anti-tax avoidance directive [43] has been adopted and has relevance in the field of exit taxation.[44]

2.1.2 Effectiveness of EU law

The Member States have to give "*...full force and effect to EU law*…"[45].[46] Especially in the field of taxation, as the "*taxation affects intra-Union cross-border trade, investment, service provision and employment*"[47]. Therefore, the CJEU makes it clear that the EU law must be respected and takes precedence over Member States' national law, the *primacy* of EU law.[48] The CJEU explains that " ….the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions…"[49] "… [t]he transfer by the States from their domestic legal system to the [EU] legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the [EU] cannot prevail…."[50]. Furthermore, the concept of *direct effect* was developed by the CJEU.[51] The CJEU elaborate that

> "…the [EU] constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, [EU] law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community. …"[52].[53]

As a result, the treaty provisions, as well as the fundamental freedoms, can be directly invoked before a national court and administration.[54] Furthermore, another principle that has importance in ensuring the effectiveness of EU law is the state liability which makes it possible for

[42] Wattel (n 7) 24-25.
[43] ATAD.
[44] Article 5 ATAD.
[45] Helminen, Chapter 1 (n 11).
[46] See e.g. Case 106 /77 Amministrazione delle Finanze dello Stato v Simmenthal SpA (ECJ, 9 March 1978); Case C-453/00 Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren [2004] ECR I- 858; Helminen, Chapter 1 (n 11).
[47] Wattel (n 7) 10.
[48] See cases Simmenthal (n 46); Case 6/64 Flaminio Costa v E.N.E.L. (ECJ, 15 July 1964);Schumacker (n 15) [21], Futura (n 15) [19]; Lasteyrie (n 15) [44]; Marks & Spencer (n 15) [29]; Cadbury Schweppes(n 15) [40]; Test Claimants (n 15) [36]; Helminen, Chapter 1 (n 11).
[49] Costa v ENEL (n 48) 594.
[50] ibid.
[51] Case 26/62 Van Gend en Loos (ECJ, 5 februari 1963).
[52] ibid 12.
[53] ibid.
[54] van Gend & Loos (n 51); Costa v ENEL (n 48); and see also e.g. Saint Gobain (n 29) [34]; Royal Bank of Scotland (n 15) [22]; Wattel (n 7) 69-70; Helminen, Chapter 1 (n 11) pages 11, 24-25, 41 and 48; Schön (n 4) 19.

individuals "…to obtain redress when their rights are infringed by a breach of [EU] law for which a Member State can be held responsible…"[55].[56] However, the directives are not directly applicable as the directives must first be incorporated into national law. As observed above, the purpose of the directive is to harmonise the legislation within the EU. It does not, generally, have a direct effect as the directives aim to achieve certain objectives in the EU Member States. [57] Although, the CJEU held that "…whilst under Article [249 TFEU] regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of measures covered by that article can never produce similar effects…"[58]. Further, the CJEU concluded that the national law that implements the directive should be "…interpret… in the light of the wording and the purpose of the directive..." [59], so-called indirect effect. [60]

The CJEU expressed the importance of "…the preservation of the [EU] character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all states of the [EU]..."[61] The individuals cannot bring a direct action at the CJEU unless it concerns a legality review.[62] However, the national court may refer a question, which concerns the interpretation of EU law, to the CJEU, as the CJEU has the jurisdiction to give preliminary rulings concerning, for instance, the interpretation of the treaties under article 267 TFEU. The national court may refer, but the national courts of the last instance must refer a question unless the answer can be found in the established case law, acte éclairé, or "…so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be solved…"[63], acte clair.[64]

The EC also has the possibility to bring a case to the CJEU when a national measure does not comply with EU law, in the so-called infringement procedure according to article 258 TFEU. The EC can act, e.g. when a Member State did not implement the directive correctly or the time limits to implement a directive have passed and the Member State did not implement the directive within that time, but also when a national provision is not compatible with the provisions of the treaties, for instance, the fundamental freedoms.[65]

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[55] Cases C-6/90 and C-9/90 Andrea Francovich and Danila Bonifaci and others v Italian Republic [1991] ECR I–5403, para 33
[56] Wattel (n 7) 69-70; M. Helminen, Chapter 1 (n 11) pages 11, 24-25, 41 and 48; Schön (n 4) 19.
[57]Eur-Lex 'European Union directives' (n 24); Eur-Lex, Summaries of EU Legislation: The direct effect of European law at < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14547> accessed 4 May 2020.
[58] Case 8/81Ursula Becker v Finanzamt Münster-Innenstadt (ECJ, 19 January 1982), para 21.
[59] Case 14/83 Sabine von Colson och Elisabeth Kamann mot Land Nordrhein-Westfalen (ECJ, 10 april 1984), para 26.
[60] Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-4156, paras 7,8; Case C-397/01 Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV [2004] ECR I – 8878, paras 113, 114, 115, 118; Eur-Lex 'The direct effect of European law' (n 57).
[61] Case 166/73 Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (ECJ, 16 January 1974), para 2.
[62] Schön (n 4) 5-6.
[63] Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health (ECJ, 6 October 1982), para 16.
[64] Schön (n 4) 5-6.
[65] Schön (n 4) 5-6.

2.2 THE FUNDAMENTAL FREEDOMS AND THE CJEU'S METHOD

2.2.1 General Remarks

Articles 18 and 21 TFEU ensures the general right to free movement. A basic principle is that a person has the right to move freely between different Member States and entitled to equal treatment. As well as, all citizens of the Union have a general right to free movement, Article 21 read in conjunction with Article 18. [66] Article 18 TFEU do not allow discrimination based on nationality. Further, Article 21 TFEU provides that all EU citizens "…have the right to move and reside freely within the territory of the Member States…" [67]. However, the CJEU established that the four freedoms are regarded as *lex specialis* and therefore override the articles 18 and 21 TFEU as they constitute *lex generalis.*[68] Namely, in a case where national legislation falls within the scope of several fundamental freedoms, the CJEU "…will in principle examine the measure in relation to only one of those freedoms if it appears, in the circumstances of the case, that the other freedoms are entirely secondary in relation to the first and may be considered together with it…"[69].[70]

Apart from the general right to free movement, Title IV TFEU ensures the free movement of persons[71], services[72] , and capital[73], as observed above, those provisions are regarded as *lex specialis*. In the field of exit taxation on individuals, the free movement of persons and capital has the most relevance.[74] The free movement of persons is divided between two free movement rights, namely "*freedom of movement for workers*" (article 45 TFEU) and "*freedom of establishment*" (article 49 TFEU). The free movement rights encompass two basic rights, namely *market access*[75] and *market equality*[76].[77]

Article 45 TFEU ensures the right of migration as the person has "…the right…. to accept offers of employment..."[78] in another Member state, "…to move freely within the territory of Member States…"[79], "… to stay in a Member State for the purpose of employment…"[80] and "…to remain in the territory of a Member State after having been employed…"[81] and prohibits discrimination "…based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment…"[82]. The workers are also entitled to equal treatment with regard to social and tax advantages, according to article

[66] Schempp (n 15) [15]-[19].
[67] Article 21 TFEU.
[68] N (n 17) [22]-[23].
[69] Case C-580/15 Maria Eugenia Van der Weegen and Others v Belgische Staat (ECJ, 8 June 2017), para 25.
[70] ibid [23]-[25].
[71] Articles 45 TFEU and 49 TFEU.
[72] Article 56 TFEU.
[73] Article 63 TFEU.
[74]Helminen, Chapter 2 (n 17) page 9.
[75]Wattel (n 7) 35; and see article 45 (3) and article 49TFEU.
[76]Wattel (n 7) 35; and see article 45 (2) and article 49TFEU.
[77]Wattel (n 7) 35-37.
[78] Article 45 (3) (a) TFEU.
[79] Article 45 (3) (b) TFEU.
[80] Article 45 (3) (c) TFEU.
[81] Article 45 (3) (d) TFEU.
[82] Article 45 (2) TFEU.

7 (2) of the Regulation 492/2011 on freedom of movement for workers within the Union[83]. This freedom prohibits both source State and home State from hindering the free movement.[84]

The freedom of establishment ensures "…the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms…"[85] and prohibits restriction on freedom of establishment, as well as, prohibits "…restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State…" [86] . Therefore, both the primary establishment and secondary establishment are covered by this freedom.[87]

The CJEU interprets the concept of establishment very broadly and states that the provision allows "… a [EU] national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin…"[88].[89] The CJEU points out that "…the concept of establishment within the meaning of Article [49] et seq. of the Treaty involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period…."[90]. Therefore, "… [a]ny resident of a Member State, whatever his nationality, who has a shareholding in the capital of a company established in another Member State which gives him definite influence over the company's decisions and allows him to determine its activities falls within the scope of Article 49 TFEU…"[91]. Furthermore, legal person, that is established "…in accordance with the laws of a Member State and having their registered office, head office or principal activity within the Union…"[92], is "…treated in the same way as natural persons…"[93].[94] The CJEU held that "….[t]he prohibition of discrimination on grounds of nationality, which is set out in particular, as regards the right of establishment, in Article [49] of the Treaty, is concerned with differences of treatment as between natural persons who are nationals of Member States and as between companies who are treated in the same way as such persons by virtue of Article [54]..."[95]. Furthermore, the CJEU explains that "…the creation and the outright ownership by a natural or legal person established in a Member State of a permanent establishment not having a separate legal personality situated in another Member State falls within the scope of application *ratione materiae* of Article [49TFEU]..."[96].[97]

The free movement of capital provides that transactions, as well as payments, can take place freely between the Member States and between the Member States and non-EU countries

[83] Regulation (EU) No 492/2011of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1.
[84] Wattel (n 7) 44-45.
[85] Article 49 (2) TFEU.
[86]Article 49 (1); see also e.g. Avoir Fiscal (n 15) [13]; Royal Bank of Scotland (n 15) [22].
[87] See e.g N (n 17) [26]-[27]; Case C-143/87 Stanton [1988] ECR 3877, para 12; Wattel (n 7) 45-47.
[88] N (n 17) [26]; see also Case C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, para 25.
[89] N (n 17) [26]; Wattel (n 7) 45-47
[90] Case C-221/89 Factortame [1991] ECR I-3905, para 20.
[91] Case C-87/13 X (ECJ, 18 December 2014) para 21; and see also N (n 17) [27].
[92] Article 54 TFEU.
[93] Article 54 TFEU.
[94] X (n 91).
[95] Factortame (n 90) [28].
[96] Case C-414/06 Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn [2008] ECR I-3601 para 15.
[97] Wattel (n 7) 45-47.

(hereafter third countries). Article 63 TFEU prohibits restrictions on capital movements and payments between the Member States.[98] Capital movements mainly refer to capital transfers to other countries, but also, for instance, covers investment in real estate.[99] The directive on the free movement of capital[100](together with the Nomenclature in Annex I[101]) classifies the type of transactions that fall within the free movement of capital. [102] The CJEU held that "…[a]lthough the concept of 'direct investment' is not defined by the Treaty, it has nevertheless been defined in the nomenclature of the capital movements set out in Annex I…. show, the concept of direct investments concerns investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity…"[103]. Payments refer to cash on purchases of goods across borders as well as rents, salaries, interest, etc.[104] The prohibition applies both to the home State (residency State) and the source State (investment State). The CJEU held that tax rules that treat more favourably domestic investments than foreign investments constitute a restriction, as well as, rules, with regard to taxation of capital gains, that treats more favourably persons resident in that State than foreign residents constitute a restriction. [105]

The free movement of capital and other freedoms are connected to each other. For instance, the ability of establishment in another Member States depends on a cross-border movement of assets. The CJEU held, "…the right to acquire, use or dispose of immovable property on the territory of another Member State, which is the corollary of freedom of establishment, … generates capital movements when it is exercised…"[106]. As well as, the CJEU determines that "…in so far as the national measures at issue entail restrictions on freedom of establishment, such restrictions are a direct consequence of the obstacles to the free movement of capital…., to which they are inextricably linked. …"[107]. Therefore, distinguishment between those two freedoms may be challenging as they are closely connected. However, as explained above, the free movement of capital is the only free movement right that also applies to third countries. The distinction is needed and determined by, so-called, "…definite influence…"[108] test by the

[98] Article 63 (1) TFEU.
[99] Case C-370/05 Festersen [2007] ECR I-1129 paras 22, 23, 24; see also Case C-222/97 Manfred Trummer and Peter Mayer [1999] ECR I-1661, para 21; Case C-464/98 Westdeutsche Landesbank Girozentrale v Friedrich Stefan and Republik Österreich [2001] ECR I-173, para 5;Case C-386/04 Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften [2006] ECR I-0000, para 22.
[100] Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [1988] OJ L 178/5 (directive 88/361).
[101] Annex I to the Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [1988] OJ L 178/5.
[102]Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [1988] OJ L 178/5.
[103] Case C-157/05 Winfried L. Holböck v Finanzamt Salzburg-Land [2007] ECR I-4051 paras 33 and 34.
[104] Wattel (n 7) 48.
[105]See cases e.g. Case C-443/06 Erika Waltraud Ilse Hollmann v Fazenda Pública [2007] ECR I – 8494; Case C-35/08 Grundstücksgemeinschaft Busley and Cibrian Fernandez v Finanzamt Stuttgart-Körperschaften (ECJ, 15 October 2009), para 33.
[106] Fetersten (n 99) [22]
[107] Case C-171/08 Commission v Portugal [2010] ECR I-6817 paras 78, 80; See also Lidl (n 96) [16]; Cadbury Schweppes (n 15) [33]; Case C-524/04 Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue [2007] ECR I-2107, para 34.
[108] Wattel (n 7) 47.

CJEU. The CJEU states that, "…a national of a Member State who has a holding in the capital of a company established in another Member State which gives him definite influence over the company's decisions and allows him to determine its activities is exercising his right of establishment…."[109].[110]

The free movement of capital, with regard to third countries, allows certain restrictions. For instance, article 64 allows restrictions "…involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets…"[111] which already existed on the 31 December 1993, so-called "…standstill or grandfather clause…"[112]. Therefore, restrictive tax measure in respect to the free movement of capital to or from third countries still exist and are allowed. Furthermore, articles 64 (3), 65(4) and 66 TFEU also allow other restrictions. [113]

The rules on, inter alia, free movement of persons and capital also apply in the EEA (EU's Member States and Norway, Iceland and Liechtenstein).[114]

2.2.2 Access to the Treaty Freedoms

A basic principle is to ensure equal treatment (non-discrimination). In other words, the foreign nationals in a host Member State and the nationals of that Member State shall be treated equally in a comparable situation. [115]

2.2.2.1 Standing

The four freedoms apply only in intra-EU cross-border situation, and not in a purely internal situation, as confirmed by the CJEU.[116] In essence, in tax cases, a cross-border situation occurs when a taxpayer is a national of a Member State and uses one or several fundamental freedoms.[117] To clarify, the applicability of the free movement rights requires a capacity and a cross-border economic element. The economic substance is unimportant with regard to individuals as the general rights to free movement may apply.[118] Namely, individuals, for instance, pensioners, that are not economically active enjoy the right of residence which does not necessarily require economic activity. However, a legal person is required to show some commercial activity in order to have the ability to rely on free movement rights.[119]

Exit taxation on individuals is related to the emigration of a person or emigration of assets to another country, in relation to taxation of accrued gains, and therefore may constitute a

[109] Case C-251/98 C. Baars v Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem Baars [2000] ECR I-2787 para 22.
[110] Wattel (n 7) 45-49.
[111] Article 64(1) TFEU.
[112] Wattel (n 7) 49.
[113] However, with regard to Bulgaria, Estonia and Hungary the relevant date is 31 December 1999, according to article 64 (1) TFEU; Wattel (n 7) 47-50. With regard to permitted restrictive tax measures see, for instance, Holböck (n 101).
[114] Articles 29, 31 & 40 Agreement on the European economic area [1994] OJ L 1/3 (EEA agreement); Helminen, chapter 2' (n 17) 11, 14, 21, 28, 32, 43, 48; Wattel (n 7) 119.
[115] See, e.g. Asscher (n 25) [32]; Schempp (n 15) [21]-[26]; Wattel (n 7) 26-27.
[116] See, e.g. Asscher (n 25) [32]; Schempp (n 15) [21]-[26]. Wattel (n 7) 26-27.
[117] See, e.g. Schempp (n 15) [23]-[25].
[118] See Turpeinen (n 15).
[119] Wattel (n 7) 26-27.

restriction within the meaning of, for instance, free movement of establishment or free movement of capital[120]. The CJEU has established that, even if a person is emigrating with a non-economic reason but holds shares in a company established in another Member State, the right of establishment is applicable:

> "28…since the transfer of his residence, has been living in one Member State and holding all the shares of companies established in another. It follows that, since that transfer, N has fallen within the scope of Article [49 TFEU]…"[121].[122]

In cases when the free movement of establishment or free movement of capital is applicable, the wording of the provisions implies the need for an economic element.[123] However, Petter J. Wattel argues that in the case law, for instance in the N case, the CJEU "…is doing its best to give economic and non-economic operators going across intra-EU border access to the Treaty's free movement rights in one way or another…"[124]. This approach can be demonstrated in the N case[125] which considered an individual that emigrated from the Netherlands to the United Kingdom where he did not pursue an economic activity but hold shares in limited liability companies established in the Netherlands. Companies no longer have a permanent establishment in the Netherlands and therefore were not considered as a part of the EU territory as they were managed in Curaçao (Netherlands Antilles).[126]

The CJEU held that to fall within the scope of freedom is only the objective circumstances relevant. So, abuse of a right does not mean that a person will not have standing. As, the subjective intent, for instance, tax avoidance, is not relevant with regard to the treaty access.[127] However, in the settled case law, tax avoidance is considered as a justification ground for a restriction as long as the measure is proportionate to the aim, itwill be discussed later.[128]

2.2.3 The reasoning of the CJEU

In the field of direct taxation, the CJEU apply three steps test. The first step is a comparability analysis (*prima facie comparability test (1a)* and a *teleological comparability test (1b)*). At the first step, the CJEU analysis if the measure distinguishes between cross-border and domestic cases. Further, the CJEU looks if there is an objective difference that explains the different treatments. If discrimination or restriction is established, at the first step, the CJEU goes to the next step (2). The second step is a justification test, where the CJEU look if there are any legitimate grounds. If so, the CJEU goes to the last step (3) to check if the measure is appropriate and necessary (*proportionality stricto sensu*).[129] However, Petter J. Wattel argues that the CJEU

[120] See cases Lasteyrie (n 15); N (n 17), Case C-210/06 Cartesio Oktató és Szolgáltató bt (ECJ, 16 December 2008); Commission v. Portugal (n 17); Verder LabTec (n 17); Helminen, Chapter 2 (n 17) 9; Wattel (n 7) 26-30.
[121] N (n 17) [28].
[122] ibid.
[123] Article 49 and 63 TFEU; Helminen, Chapter 2 (n 17) 9; Wattel (n 7) 26-30.
[124]Wattel (n 7) 30.
[125] N (n 17).
[126] See articles 52 TEU and 355 TFEU; N (n 17) [11]; Wattel (n 7) 29.
[127] Case C-212/97 Centros Ltd v Erhvervs- og Selskabsstyrelsen [1991] ECR I – 1484, paras 24–25.
[128] See Case C-135/17 X-GmbH v Finanzamt Stuttgart – Körperschaften (ECJ, 26 February2019), para 82; Marks & Spencer (n 15).
[129] Wattel (n 7) 41-43.

"…wander between test 1b and test 2, sometimes presenting incomparability as a justification…"[130].[131]

2.2.3.1 Prohibited infringements of the Fundamental freedoms: Discrimination and Restriction

The wording of the freedoms refers either to discrimination based on nationality, for instance, free movement of workers [132], or to a restriction, for instance, right of establishment[133] and free movement of capital[134]. There are two types of discrimination. Firstly, *overt discrimination* concerns discrimination based on nationality. Secondly, *covert discrimination* involves situations where domestic legislation creates a distinction and leads to factual discrimination.[135] In the field of internal taxation, national legislation that distinguishes between resident and non-resident taxpayer by which result in a less advantages rules for the non-resident may constitute covert discrimination, it applies both to natural and legal persons. [136] However, a "…[d]iscrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations…"[137], comparability test used by the CJEU.[138]

So, differential treatment, directly or indirectly, based on origin or nationality, according to free movement rights, is prohibited. Nonetheless, other grounds that *de facto* hinder the free movement may be prohibited unless justified. Likewise, in the Van der Weegen case [139] Belgium's tax exemption was applicable without distinction, in so far as it complies with certain conditions that result in distinction, and therefore may in result be liable to hinder the freedom. The CJEU explained that:

> "… even national legislation which applies without distinction…, is liable to constitute a restriction on the freedom … in so far as it reserves an advantage solely to users of services which comply with certain conditions which are de facto specific to the national market and thus deny that advantage to users of other services which are essentially similar but do not comply with the specific conditions provided for in that legislation. Such legislation affects the situation of users of services as such and is thus liable to discourage them from using the services of certain providers, since the services offered by them do not comply with the conditions laid down in that legislation, thus directly affecting access to the market…"[140].[141]

[130] ibid 322.
[131] ibid 41-43, 50-54 and 322.
[132] Article 45 TFEU.
[133] Article 49 TFEU.
[134] Article 63 TFEU.
[135] Case C-383/05, Raffaele Talotta v Belgian State [2007] ECR I – 2575, para 17; See also Schumacker (n 15) [26]; Case C-440/08 F. Gielen v Staatssecretaris van Financiën [2010] ECR I-2323, para 37.
[136] Avoir fiscal (n 15) [11]; Talotta(n 135) [17]; Case C 385/12 Hervis Sport- és Divatkereskedelmi Kft. v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága (ECJ, 5 February 2014) para 30.
[137] Talotta (n 135) [18].
[138] Schön (n 4) 28-29; Wattel (n7) 35-37, 41-43, 50-54 and 322.
[139] Van der Weegen and others (n 69).
[140] ibid 29.
[141] ibid; Schön (n 4) 28-29; Wattel (n7) 35-37, 41-43 and 50-54.

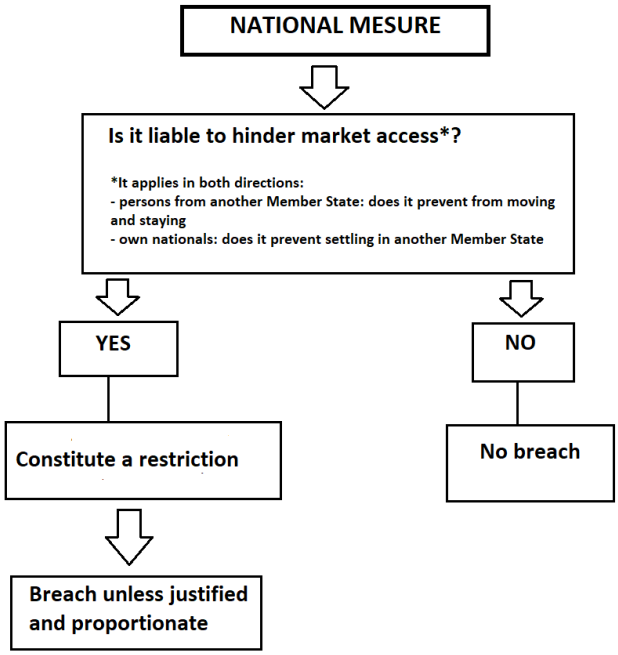

Fig. 1 Restriction: market access approach

Therefore, a measure that affects market access may constitute a restriction. Petter J. Wattel explains that the four freedoms "…encompass two basic rights: a right of cross-border circulation (market access, including the freedom to leave the State of departure unhindered) and a prohibition of discrimination on grounds of nationality or origin on the market (market equality)…"[142]. Due to, the CJEU established that not only discriminatory treatment based on nationality, as the wording of articles, e.g. 45 and 49 of the TFEU provides, is prohibited but generally national rules that are liable to hinder fundamental freedom. Therefore, this reasoning applies not only to national rules which prevent persons from another Member States from moving and staying, to establish or invest in the country but also on restrictions on own nationals which prevent their nationals from settling in another Member State.[143]

Moreover, procedural or administrative requirements may be considered discriminatory as the CJEU states "… [i]t is necessary to consider whether such discrimination also exists at procedural level in so far as the application …. is available only to resident nationals and is withheld from non-resident [EU] nationals…"[144]. Hence, "…all measures which prohibit, impede or render less attractive the exercise …must be regarded as …restrictions…"[145].

[142] Wattel (n 7) 35.
[143] Case 81/87 The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc (ECJ, 27 September 1988), para 16; see also Gebhard (n 88); Baars (n 109) [28]; Cartesio (n 120) [112]-[113]; Turpeinen (n 15) [22].
[144] Schumacker (n 15) [49].
[145] Case C-157/07 Finanzamt für Körperschaften III in Berlin v Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH (ECJ, 23 October 2008), para 30.

2.2.3.1.1 Comparability

Infringement of fundamental freedoms occurs when there is a differential treatment.[146] A differential treatment requires that two taxpayers are in comparable situations.[147] The CJEU holds that a "…discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations…."[148]. However, in the field of direct taxation, it is established that "…the situations of residents and non-residents in a given State are not generally comparable since there are objective differences between them from the point of view of the source of the income and the possibility of taking account of their ability to pay tax or their personal and family circumstances..."[149].[150] The Member States has the taxing powers and are allowed to distinguish between resident taxpayers and non-resident taxpayers by calculating the basis of taxation, namely the resident tax base as worldwide and the non-resident tax base as source income, as long as it conforms to the principle of fiscal territoriality and the EU law.[151]

Therefore, in order to assess whether situations are comparable, the CJEU looks at the objective and purpose of the national measure. So, a prima facie difference (1a) may be present, but it does not mean that the measure is discriminatory in the view of the purpose and objective of the measure (1b) which may lead that the situations are not considered comparable.[152] However, if a measure is considered discriminatory, then the CJEU looks at the next step, justification.[153]

It has to be pointed out, the CJEU admit, in respect to the free movement of capital to or from third countries, "…the taxation by a Member State of economic activities having cross-border aspects which take place within the [EU] is not always comparable to that of economic activities involving relations between the Member States and third countries…"[154]. Hence, the third countries are not obligated to respect EU law and therefore do not have to comply with, for instance, the Council Directive 2011/16/EU on administrative cooperation in the field of taxation[155] and, as a result, there is no obligation to cooperate with EU countries and exchange information in tax matters, as third countries are not part of EU. Therefore, the CJE recognises that the "…movement of capital to or from third countries takes place in a different legal context

[146] Saint-Gobin (n 29) [44].
[147] Schumacker (n 15) [33].
[148] ibid.
[149]Wielockx (n 25) [17]; see also Schumacker (n 15) [31]-[32].
[150] See cases e.g. Wielockx (n 25) [17], [20]-[23]; see also Schumacker (n 15) [30], [36]-[37]; Asscher (n 25) [40]-[49]; Royal Bank of Scotland (n 15) [26].
[151] Futura (n 15) [19]- [22]; See also e.g. avoir fiscal (n 15) [24]; Schumacker (n 15) [21]; Wielockx (n 25) [16], Asscher (n 25) [36]; Royal Bank of Scotland (n 15) [19], Eurowings (n 15) [32], Marks & Spencer (n 15) [29]; Cadbury Schweppes (n 15) [40]; Lasteyrie (n 15) [44]; etc.
[152] Wattel (n 7) 323.
[153] See e.g. Royal Bank of Scotland (n 15) [32]; Wattel (n 7) 326.
[154] Case C-101/05 Skatteverket v A [2007] ECR I – 11568, para 37; see also Case C-446/04 Test Claimants in the FII Group Litigation [2006] ECR I-11753, para 170.
[155] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64/1.

from that which occurs within the [EU]..."[156]. Consequently, in third states situations, the CJEU develops wider justifications scopes.[157]

2.2.3.2 Justifications and Proportionality

It follows from all the forging, that measure that is liable to hinder a freedom is prohibited unless justified. A measure "….must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it…"[158].

The Treaty refers to public policy, public security or public health as justification grounds, articles 45(3), 52(1) and 65. The CJEU is clear that "…a restriction is permissible only if it is justified by overriding reasons in the public interest…"[159]. Therefore, the CJEU accepted justification grounds such as e.g. prevention of tax avoidance [160], ensuring effective (administrative) fiscal supervision [161], the efficiency of tax collection [162], coherence (symmetry) [163], and allocation of taxing rights [164], which falls within the concept of safeguarding tax base integrity. However, reasons within the economic policy were rejected as justification grounds by the CJEU.[165] The CJEU considers that reasons such as "…the intention to promote the economy of the country by encouraging investment by individuals in companies…"[166], "…the protection of the economy of the country…"[167], "reduction in tax revenue"[168], unrelated benefits[169] are "…purely of economic nature…"[170].[171] Furthermore, the CJJEU does not accept justification's arguments as the lack of reciprocity[172], "absence of harmonisation"[173] or optional circumvention of discrimination[174].

Within the proportionality step, the CJEU examines whether the restrictive or discriminatory measure is appropriate and necessary as to the legitimate aim of tax base integrity, in the field

[156] Skatteverket (n 154) [36].
[157] Wattel (n 7) 49-50.
[158] Gebhard (n 88) [37].
[159] Hervis (n 136) [42]; See also NGI (n 15) [42].
[160] See e.g. Cadbury Schweppes (n 15).
[161] See e.g Futura (n 15).
[162] See e.g. Case C-290/04 FKP Scorpio Konzertproduktionen GmbH v Finanzamt Hamburg-Eimsbüttel [2006] ECR I – 9494, para 36.
[163] Case C-204/90 Hanns-Martin Bachmann v Belgian State [1992] ECR I-276, para 21.
[164] See e.g Lidl Belgium (n 96).
[165] See Case C-120/95 Decker v Caisse de Maladie des Employés Privés [1998] ECR I-1831, para 39, and Case C-158/96 Kohll v Union des Caisses de Maladie [1998] ECR I-1931, para 41,with regard to protection against loss of revenue cases, Lankhorst Hohorst (n 15); with regard to unrelated benefits, Saint-Gobain (n 29) , Avoir Fiscal (n 15); with regard to lack of reciprocity, Avoir Fiscal (n 15); with regard to lack of Harmonization, Bachman (n 163); with regard to optional circumvention of discrimination, Gielen (n 135). Wattel (n 7) 326-327.
[166] Case C-35/98 Staatssecretaris van Financiën v B.G.M. Verkooijen [2000] ECR I – 4115, para 47.
[167] Hervis (n 136) [44].
[168]Lankhorst Hohorst (n 15) [36]; Saint-Gobain (n 29) [51].
[169] e.g. Avoir Fiscal (n 15) [22].
[170] Verkooijen (n 166) [48].
[171] Hervis (n 136) [44]; Verkooijen (n 166) [47]-[48].
[172] Avoir Fiscal (n 15) [26]
[173] Bachman (n 163) [10]-[11].
[174] Gilen (n 135) [53].

of direct taxation.[175] The German model of the proportionality principle involves looking at the suitability, with regard to the aim, necessity, and proportionality in a strict sense. The CJEU does not always follow the German model and assets those steps together. Especially in the field of direct taxation, it is clear that the CJEU limits the assessment to only look on the suitability (whether appropriate) and necessity parts, as observed above. [176]

2.2.3.2.1 The relevant justification grounds that have been accepted by the CJEU:

The prevention of tax avoidance is one of the justification grounds that the CJEU accepts. The aim of a measure shall be to "…prevent conduct involving the creation of wholly artificial arrangements,"[177].*[178]* The CJEU explained that:

> "…in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory…."[179].[180]

Secondly, the balanced allocation of taxing rights is also a justification ground that the CJEU considers as a legitimate objective that falls within the ambit of public interest.[181] It is also known as the most successful justification ground in the EU case law regarding fiscal restrictions, also regarding exit taxation.[182] The CJEU explains that because of lack of harmonisation "…the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation…"[183]. It appears that the objective of ensuring a balanced allocation of taxing rights and the fiscal principle of territoriality are connected. In the, inter alia, NGI case, the CJEU states that:

> "46…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…."[184].[185]

[175] Wattel (n 7) 326-327.
[176] Skatteverket (n 154) [56]; Cejie (n 1) 352 and 431.
[177] Cadbury Schweppes (n 15) [52].
[178] Cadbury Schweppes (n 15) [51]-[37].
[179] Cadbury Schweppes (n 15) [55]
[180] ibid.
[181] see e.g. NGI (n 15) [45]; N (n 17) [42].
[182]Wattel (n 7) 358.
[183]NGI (n 15) [45].
[184]NIG (n 15) [46].
[185] Ibid.

3 THE ELIMINATION OF DOUBLE TAXATION

3.1 RELATIONSHIP BETWEEN EU TAX LAW AND DOUBLE TAXATION TREATY

The tax systems of the States are underlined by different principles, inter alia, the territoriality principle-, the nationality principle-, the residence principle- or the source principle of taxation. It increase the risk that a taxpayer may be subject to an international juridical double taxation, as explained before.[186]In order to eliminate double taxation, the States enter into bilateral tax treaties[187] that define and divide the taxing rights between the contracting states. The tax treaties are based on the OECD model tax convention[188].[189] Additionally, as shown above, the CJEU acknowledges the importance of ensuring a balanced allocation of taxing rights to eliminate double taxation. [190] The CJEU observes that:

> "57…in the absence of unifying or harmonising measures adopted in the Community, …… the Member States remain competent to determine the criteria for taxation of income and wealth with a view to eliminating double taxation by means, inter alia, of international agreements. In this context, the Member States are at liberty, in the framework of bilateral agreements concluded in order to prevent double taxation, to determine the connecting factors for the purposes of allocating powers of taxation as between themselves…"[191].[192]

However,

> "58… [a]s far as the exercise of the power of taxation so allocated is concerned, the Member States nevertheless may not disregard [EU] rules. According to the settled case-law of the Court, although direct taxation is a matter for the Member States, they must nevertheless exercise their taxation powers consistently with [EU law] …"[193].

3.2 THE OECD MODEL TAX CONVENTION

The international juridical double taxation has harmful effects and affects the "…the development of economic relation between the countries…"[194]. In the fiscal matters, an "… administrative co-operation…" [195] is needed in order to "… [prevent] tax evasion and avoidance…"[196].[197]As observed before, the tax treaties' purpose is to solve double taxation's situations, by dividing the taxing rights between states and eliminate double taxation through

[186]The definition of those principles can be found in the OECD, Glossary of Tax Terms at <https://www.oecd.org/ctp/glossaryoftaxterms.htm#D>; Lang (n 1) para 1-20 and 37-40.
[187] OECD model tax convention (n 30).
[188] OECD model tax convention (n 30).
[189] Lang (n 1) paras 1-2, 4-5,8, 10, 12, 16-20 and 39-47; OECD model tax convention (n 30); Cejie (n 1) 23-24; OECD, Glossary of Tax Terms at <https://www.oecd.org/ctp/glossaryoftaxterms.htm#D>; Wattel (n 7) 313-314.
[190]NGI (n 15) [45].
[191] Saint-Gobain (n 29) [57].
[192] ibid.
[193] ibid 58.
[194] OECD comments (n 2) 9.
[195] Ibid.
[196] Ibid.
[197] Ibid.

the methods for elimination of double taxation, namely by, for instance, the so-called exemption method[198] and credit method[199]. The first method provides for an exemption of foreign income, that have already been taxed in the source state, in the home state. The second method credit the foreign tax against the national tax on the income from abroad.[200]

The first two Chapters of the OECD double tax convention define the scope and identifies the terms of the convention. Namely, who and what taxes are covered by the convention. Article 3 defines the term person used in the convention and provides that "…the term person includes an individual, a company and any other body of persons…"[201]. Furthermore, a person can be considered a resident in both countries in accordance with the internal tax law of a State, and therefore, article 4 of the OECD model tax convention determines the status of residency, as the tax treaties can limit the taxing right of a state.[202] Article 5 of the OECD determines the permanent establishment, and, inter alia, a place of management is regarded as a permanent establishment. Chapter 3 provides for the distributive rules of the Treaty, articles 6-21 of the OECD. This chapter determines the taxing rights of a state with regard to a specific type of income, namely, whether one or both states have taxing rights. Chapter 4 deals with the taxation of capital with regard to, inter alia, immovable property, and movable property, not income from capital. As both states may have the taxing rights, therefore, chapter V of the OECD provides for the methods for eliminating double taxation, which was explained above. Generally, the residency's country has to provide for relief from double taxation if the source State had the right to tax the income accumulated in that State. Chapter 6 contains special provisions with regard to non-discrimination and administrative corporation between the states that are part of the Treaty.[203]

Chapter 3 article 13 of the OECD model tax convention concerns the taxation of capital gains. The article states that the gains that are covered are:

> " …ARTICLE 13 CAPITAL GAINS
>
> 1. Gains derived …from the alienation of immovable property …
> 2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise)…
> 3. Gains from the alienation of ships or aircraft operated in international traffic, boats engaged in inland waterways transport or movable property pertaining to the operation of such ships, aircraft or boats, ….
> 4. Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property ….

[198] Article 23A OECD Model Tax Convention.
[199] Article 23 B OECD Model Tax Convention.
[200] OECD comments (n 2) 376.
[201] Article 3 (1) (a) OECD model tax convention.
[202] Article 4 OECD model tax convention.
[203]OECD comments (n 2) 14-18.

5. Gains from the alienation of any property, other than that referred to in paragraphs 1, 2, 3 and 4, …"[204].

In accordance with the commentaries, this article does not distinguish between capital gains and business profits. It is left to the contracting States to assess whether the distinction is needed and whether the article 7, that concern taxation of business profits, should instead be applied with regard to the commercial profits. Furthermore, the OECD model tax convention does not have any definition regarding capital gains. This article applies in situations of alienation of profits and "…cover…capital gains resulting from sale or exchange of property and also from a partial alienation, the expropriation, the transfer to a company in exchange for stock, the sale of a right, the gift and even the passing of property on death…"[205]. All the situations mentioned above indicate that the taxation of realised capital gains is covered. However, "…an alienation of [unrealised] capital gain is recognised for tax purposes (e.g. when the alienation proceeds are used for acquiring new assets) …"[206]. This article does not prevent States from "…taxing profits and gains deemed to arise in connection…"[207] to a "…transfer of asset from a permanent establishment or the head office of the same enterprise situated in another State..."[208] in circumstances when the states consider such transfer as alienation of property as long as it is in accordance with article 7 of the OECD model tax convention. Article 7 of the OECD model tax convention provides rules concerning the taxation of business profits with regard to allocation of taxing rights in a situation when an enterprise has a permanent establishment in another state as long as the profits fall under special categories of income and fall within the taxing rights of that other states in accordance with the OECD model tax convention.[209] In circumstances whereby the first four paragraphs of article 13 were not applicable the article 13 para 5 of the OECD model tax convention, the so-called blanket clause[210]applies. This paragraph provides that the capital gains from the alienation of shares or comparable interests shall be taxed in the home state (State of residency), but there is also a possibility of a reservation and that the other contracting State may tax it under certain criteria. It applies if the previous four paragraphs of article 13 were not applicable.[211] It is important to mention that the right to tax by the residence State, within article 13 of the OECD model tax convention, is dependent on article 23 of the OECD model tax convention, which provides for the methods for elimination of double taxation that are applicable.[212]

The commentaries to the model tax convention state that "…[a]s a rule, appropriation in value not associated with the alienation of capital assets are not taxed, since, as long as the owner still holds the assets in question, the capital gains exits only on paper…."[213]. However, the commentaries do not exclude situations that may "...lead to the taxation of the capital

[204] Article 13 OECD model tax convention
[205] OECD comments (n 2) 292.
[206] ibid.
[207] ibid 293.
[208] ibid.
[209] ibid 173 and 292-293.
[210] Lang (n 1) para 315.
[211] OECD model tax convention article 13, p. 5, OECD comments (n 2) 30; Lang (n 1) paras 318.
[212] Lang (n 1) para 315-327.
[213] OECD comments (n 2) 292.

appreciation of an asset that has not been alienated…"[214] as some states tax, for instance, book profits. Likewise, it is not specified to which types of tax this article applies as "..it is left to the domestic law of each contracting State to decide whether capital gains should be taxed and, if they are taxable, how they are to be taxed…"[215]. In the doctrine, it is argued that this article may apply to situations of taxation of the unrealised gains, namely regarding the increase of value that has not yet been realised.[216] On the one hand, it is left to the States which kind of taxes this article applies to, and on the other hand, this article does not explicitly mention exit taxes in case of emigration and the general rule provides for taxation of realised gains. So, the tax treaties apply to a person that is considered resident in both states in accordance with the domestic law of the respective contracting State. Namely, it applies after the event of emigration. Therefore, the issue with regard to the exit taxation in case of emigration is not solved by the tax treaties, at least not by the OECD model tax convention.

Already in 2001, the EC published a "Tax Policy Document" explaining that although the main objective is the elimination of the tax obstacle, it does not mean that a common tax system for the EU is needed. However, the work on tax obstacles must continue as companies still face discriminatory legislation, double taxation, and high administrative costs.[217]

With regard to exit taxation, the EC published a general report in 2006. In this report, the EC explained the situation and the measures Member States usually uses in order to reconcile their internal tax law with the fundamental freedoms.[218] The EC also observed that the OECD model tax convention does not contain rules that would define how to treat individuals in the event of a transfer of residency. However, the EC identifies that the Member States included specific provisions in the tax treaties to secure the gains accumulated in the departure country would be taxed. One of the provisions discussed was a provision that provided for taxation of unrealised gains as the gains would be considered as realised at the very time of the event of a transfer. Such provision may create a situation of double taxation as the actual realisation could later be taxed in the State of residency, at the actual moment of disposal. [219]

Furthermore, there is an increased risk of both double taxation and double non-taxation as a consequence of different valuation methods used by the Member States with regard to the cross-border movement of assets. It has a strong influence on the taxpayer's behavioural patterns. The mismatches in the assessment of the value of assets by the Member States may result in, inter alia, a situation when a taxpayer faces a "…double taxation of part of the gains…"[220].[221] Therefore, the Member States have an obligation to ensure that double taxation is eliminated; the argument is based on N-case; this case will be discussed later.[222] So, the Member States that

[214] ibid.
[215] ibid 291.
[216] Cejie (n 1) 141.
[217] Communication from the Commission to the Council, the European Parliament and the economic and social committee, Tax policy in the European Union Priorities for the years ahead, COM (2001) 260 final [2001] OJ L 284/6, pages 6-8, 15 and 21.
[218] Commission (n 22) 3-4.
[219] ibid 5-7.
[220] Commission (n 22) 7.
[221] ibid 5-7.
[222] ibid 4.

taxes an asset in cases of emigration have the obligation to avoid double taxation, according to the EC. [223]

The EC argues that coordination is needed, and it would benefit the Member States. The EC proposes certain ways by which the mismatches could be solved:

> "…[t]he MSs concerned should, therefore, ensure that measures are taken to avoid such double taxation….
>
> …One way to do this would be for the MS to which the asset is transferred to accept the market value established by the other MS at the moment of transfer as the starting value of the asset for tax purposes. Such an approach based on mutual recognition would be simple to administer for tax administrations and taxpayers. It may however offer scope for tax arbitrage in that taxpayers may seek to exploit differences in valuation practices between MSs to maximise the amount of gains taxed in the MS with the lower corporate tax rate….
>
> …Alternatively, MSs could continue to value the assets according to their own rules, but provide for a procedure to resolve possible differences in valuation, e.g. a binding dispute resolution mechanism such as that provided for in the …or a generalised mechanism to overcome double taxation within the EU ….
>
> …Where an asset is transferred from a MS which allows transfer at book value to a MS which would usually value the transferred asset at market value, MSs should take appropriate measures to avoid double non-taxation of the difference between the book value of the asset and its market value at the moment of transfer. One way to do this would be for the MS to which the asset is transferred to use the other MS's book value as the starting value for tax purposes. In these circumstances, an approach based on mutual recognition would appear the obvious solution…."[224].[225]

[223] ibid 7.
[224] ibid 7-8.
[225] ibid 7-10

4 EU EXIT TAX LAW

4.1 GENERAL REMARKS: THE PHENOMENON BEHIND THE EXIT TAXES

There are various types of exit tax. The connecting factor is the transfer of the tax residency that results in the loss of taxing rights by the State of departure. Therefore, the States rationale behind the exit tax regimes is to protect tax sovereignty due to globalisation, as it creates a fiscal challenge for the States. In other words, in the absence of exit taxes, the departure State, where the gains were accumulated before the emigration, losses the power to tax after the event of emigration. Hence, the event results in a situation in which the taxpayer is no longer considered a resident, no longer within the state tax jurisdiction, and the gains were not realised before the emigration.[226]

The international tax law recognises the departure State's taxing rights in situations when the taxpayer or assets leave the tax jurisdiction, where the gains arose. It is argued that exit tax "…is not a particular kind of tax but rather a feature of general income or capital gains tax…"[227]. However, in accordance with the doctrine's strict interpretation, exit taxation means that a State tax on unrealised gains when a taxpayer or assets move abroad, outside the tax jurisdiction of a state where the gains were accumulated, in comparison to a domestic situation in which the gains are taxed when realised, so-called "…tax deferral until income realised…''[228]. For instance, a State may assume that the deemed disposal occurs immediately before the departure. Namely, in a situation when a taxpayer or asset leaves a tax jurisdiction, a State may consider the transfer of residency as a taxable event. In other words, in a case when the exit taxation applies the taxable income includes income or capital that is not yet realised, so-called *accrued income*.[229]

The exit taxes are triggered at the event of exit (residency transfer/emigration). Therefore, exit' restrictive measures affect the mobility of a taxpayer and therefore are considered "…as *distortive* as *access restrictions*…"[230], argued by the *Servaas van Thiel*. Already in the early case law[231], the CJEU established that measures that hinder market access on, so-called, " ….*inbound economic activity* by the host or destination member state"[232], as well as, so-called, "…exit restrictions on *outbound economic activity* by the home, origin or departure Member State…"[233] are prohibited by the free movement of workers. The same line of reasoning was confirmed with regard to the freedom of establishment of the companies in the case law. [234]

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[226] Carinci (n 3) 286-287; Laszio Kovacs, 'European Commission Policy on Exit Taxtation' (2009) 2009 Eur Tax Stud 4, pages 4 and 12; Réka Világi, "European Union - Exit Taxes on Various Types of Corporate Reorganizations in Light of EU Law" (2012) European Taxation, 2012 (Volume 52), No. 7. Klaus von Brocke & Stefan Müller '*Exit Taxes: The Commission versus Denmark Case Analysed against the Background of the Fundamental Conflict in the EU: Territorial Taxes and an Internal Market without Barriers'* EC TAX REVIEW 2013/6, Kluwer LAW International BV, The Netherlands p. 299.
[227] Schön (n 4) 70.
[228] Wattel (n 7) 432.
[229] ibid 432; Világi (n 226).
[230] Wattel (n 7) 431
[231] See, for instance, Cases 48/75 Jean Noël Royer [1976] ECR-497, paras 28, 30-31; and Case 8/77 Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouche [1977] ECR-1495, para 4.
[232] Wattel (n 7) 431.
[233] Wattel (n 7) 431.
[234] Wattel (n 7) 431; and see e.g. Daily Mail (n 143) [16].

Including, this type of reasoning also affected the tax cases. As a result, a higher tax burden in case of an exit restriction "…on outbound economic activity…"[235] in compression to a domestic situation is established to constitute a differential treatment and is considered as a restriction. The above event produces a restrictive effect and creates an obstacle to the internal market. Therefore, it applies regardless if the higher tax burden results from the differential application of tax rate[236] or differential treatment of tax bases[237]. The differential treatment of tax bases may, inter alia, result from the differential application of exemption- or deduction rules.[238]

4.2 CJEU CASE LAW IN EXIT TAX MATTERS

4.2.1 Lasteyrie case

One of the landmark cases concerning the compatibility of an exit measure in the case of emigrating individuals is the French case, Lasteyrie case. The case concerned a French exit measure on a withholding tax on unrealised gains in securities. Under certain conditions, the taxpayer could be allowed deferral of payment, namely if the taxpayer filed a declaration of the increase in value (latent capital gains declaration), applied for a suspension, appointed a tax representative in France to act on behalf of the taxpayer and provided security for the tax (provided guarantees). At the time of payment, a new calculation was made of the value of the company shares, since the difference between this and the acquisition value was the basis for the final tax payment. The French legislation thus took into account any value reductions during the postponement period. The French legislation also contained a clause that provided for the deduction from the French tax of tax paid abroad. [239] In this case, the dispute was initiated by the fact that Mr de Lasteyrie, taxable for a company domiciled in France, moved to Belgium. Mr Lasteyrie was taxed on its relocation for the unrealised profit that was latent in the company, as its market value was higher than the acquisition value.[240]

In accordance with Article 49 of the TFEU, measures that constitute a restriction, incl. tax restrictions, are prohibited. [241] The CJEU concluded that exit taxes in the case of emigrating natural persons is in comparability to the domestic situation, and in this case, it results in differential treatment. The tax liability arises with the event of emigration, and the taxation concerns a profit that has not yet been realised at the time of the move. In comparison to the domestic situation in which a person that stays in the country is taxed only when the increase in value is realised. So, the event creates a difference in taxation and affects the exercise of the right to free establishment. Therefore, the withholding tax of this type was considered a restriction on the freedom of establishment in this case.[242]

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[235] Wattel (n 7) 431-432.
[236] See e.g. Case C-315/02 Anneliese Lenz v Finanzlandesdirektion für Tirol [2004] ECR I- I - 7081, paras 20 and 21; and Case C-334/02 Commission of the European Communities v French Republic [2004] ECR I-2244, paras 10, 12 and 23-24.
[237] See with regard to exemptions, Verkooijen (n 166) [34] and [35]; and, with regard to deduction, Eurowings (n 15) [36]-[40].
[238] ibid, Wattel (n 7) 431-432.
[239] Lasteyrie (n 15) [3].
[240] ibid 18.
[241] ibid 43.
[242] bid 45-46.

With regard to the conditions for granting a deferral of the payment, the CJEU held that these conditions contribute to creating a regressive effect, since they are strictly sharp demanding, and the deferral is not granted automatically. Furthermore, it was considered as a restriction of the right of establishment, since "…they deprive the taxpayer of the enjoyment of the assets given as a guarantee…"[243]. [244]

The French government argued that the purpose of the withholding tax was the country's need to counter potential tax evasion. However, this argument was not accepted by the CJEU, as the legislation targets all the cross-border transactions. [245] Instead, the CJEU found that the transactions France is trying to prevent, namely that taxpayers temporarily leave the country to sell their securities abroad for the purpose of escaping the French taxation, are not resolved by the provision at issue. Instead, the Court referred to the Advocate General's suggestion on how the problem could be solved in a less restrictive way. [246] The other grounds, as the balance of allocation of taxing rights, were also rejected.[247]

4.2.2 Van Hilten der Hejden case

This case concerned an inheritance tax on an individual that died within ten years after the transfer of residency. According to the Dutch law, a person that died within ten years after emigrating from the Netherlands is considered a resident at the time of death (trailing tax as a result of legal/residence fiction)[248] and, as a result, subject to inheritance tax in the same way as the person had continued to reside in the Member State concerned.[249]

The freedom at issue was the free movement of capital, article 63 of the TFEU. The CJEU initiated the assessment by looking at whether the inheritance tax falls within the scope of article 63 of the TFEU. The CJEU concluded that the inheritance tax falls within the scope of capital movement, by looking at the directive 88/361. However, the legislation at issue did not constitute a restriction to the free movement of capital. The CJEU explained it by stating that "…[n]ational legislation…, which provides that the estate of a national of a Member State who dies within ten years of ceasing to reside in that Member State is to be taxed as if that national had continued to reside in that Member State, while providing for relief in respect of the taxes levied in the State to which the deceased transferred his residence, does not constitute a restriction on the movement of capital….[s]ince it applies only to nationals of the Member State concerned, it cannot constitute a restriction on the movement of capital of nationals of the other Member States…"[250]. Furthermore, the CJEU agreed with the AG's opinion that "…such a

[243] ibid 47.
[244] ibid 46- 47.
[245] ibid 50-52.
[246] ibid 54.
[247] ibid 61-67 and 68.
[248] Wattel (n 7) 432 and 434.
[249] Case C-513/03 Heirs of M. E. A. van Hilten-van der Heijden v Inspecteur van de Belastingdienst/ Particulieren/ Ondernemingen buitenland te Heerlen [2006] ECR I – 1981, paras 6, 8-12, 14, 28 and 45.
[250] ibid 45-46.

transfer of residence does not involve, in itself, financial transactions or transfers of property and does not partake of other characteristics of a capital movement…"[251]. [252]

4.2.3 N case

The N case have similar facts to the Lasteyrie case. In this case, Mr N, the sole owner of three companies, moved his residence from the Netherlands to the United Kingdom. In connection with the transfer, Mr N was subject to withholding tax as the transfer of shares as is regarded as a divestment according to the Dutch law. The payment of tax was deferred on the condition that he provided security for it. The freedoms at issue were articles 18 and 43 of the TFEU.[253]

The CJEU found that the Dutch rules constitute a restriction on freedom of establishment, as Mr N was treated fiscally worse because of his cross-border relocation in comparison to a situation in which he remained in the Netherlands. The event of a cross-border relocation triggered the tax liability on gains that had not yet been realised. The CJEU also took into account that Mr N was not granted automatic suspension of payments and that any value reductions after relocation were not taken into account and at the additional formality of a tax declaration required at the event of the emigration. Therefore, CJEU ruled that it was a restriction and further examined whether that restriction could be justified. [254]

The Dutch court considered that the Dutch provisions were intended to ensure the allocation of taxing rights between the Member States which is in accordance with the principle of territoriality, which the CJEU accepted. [255] The additional formality in the form of a tax declaration was not considered disproportionate.[256] However, the CJEU considered that the requirement of a bank guarantee, in order to grant a deferral of payment, goes beyond what is necessary, as there are less intrusive alternatives the legislation could use. For instance, the Member States may ask for the assistance of another Member States under the Mutual Assistance directive[257].[258] Furthermore, the CJEU points out that in order for it to be considered as proportionate the Member State of departure should take into account the decreases in value between the event of a transfer and the tax becoming due "…unless such reductions have already been taken into account in the host Member State…"[259].[260]

[251] ibid 49.
[252] ibid 36-52
[253] N (n 17) [11], [13], [21]-[23].
[254] ibid 35-39.
[255] ibid 40-47.
[256] ibid 48-49.
[257] Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, certain excise duties and taxes on insurance premiums, [1977] OJ L 336/ 15 (mutual assistance directive); This directive is no longer in force, as it is repealed by the Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64/1.
[258]N (n 17) [51]-[53].
[259]ibid 54.
[260]ibid 51-54.

4.2.4 NGI case

The NGI case is a landmark case with regard to exit taxes in the case of emigrating companies. Before the NGI case, the doctrine discussed the applicability of the principle developed in the *Lasteyrie* case and the *N* case, cases of emigrating individuals, to exit taxes that affect the mobility of companies. [261] This case concerned a Dutch company that transferred its effective management (real seat) from the Netherlands to the United Kingdom (hereafter UK). At the time of the move, NGI held a claim on a British company in the same group. As a result of the transfer, the NGI was taxed for an unrealised exchange rate gain.[262]

The transfer of real seat (management) constitute a cross-border situation. The company is incorporated under the national law of the State concerned and therefore the freedom of establishment was applicable in this case, in accordance with article 49 together with 54 TFEU.[263] The CJEU concluded that the Dutch law results in a difference of treatment in a cross-border situation in comparison to the domestic situation. In this case, the differential treatment results in a cash flow disadvantage. In other words, in the situation of transfer of real seat the company will be taxed on the unrealised increase in value in comparison to domestic companies which are taxed on realised value increases. Therefore, the CJEU concluded that the Dutch's exit rules constitute a restriction. [264]

The justification ground the Netherlands relied on was the allocation of taxing rights, the argument made by reference to the N case. Hence, the legislation in question was intended to ensure the distribution of rights the CJEU has accepted the justification ground. The Netherlands taxed the unrealised value increases at the moment of movement, where the gains were accumulated, and the tax treaty at issue[265], hereafter DTC, between Netherlands and UK gave the taxing rights on the realised value increases to the UK. According to the article 13 (4) together with 4 (3) of the DTC the realised or unrealised gains shall be taxed in the State of residency and in a situation where the company has dual residence the State where the place of effective management is that State has the taxing rights. As a consequence of the Netherlands legislation, the value increases were taxed in the Member State where they were accumulated. The CJEU considered that the legislation in question was appropriate with regard to the objective of the allocation of powers.[266] Before the conclusion, the CJEU explained that:

> "46. The transfer of the place of effective management … 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 … 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

[261] See, inter alia, HJI Panayi, Christiana, Exit Taxation as an Obstacle to Corporate Emigration from the Spectre of EU Tax Law (Cambridge Yearbook of European Legal Studies, Vol. 13, 2010-2011, 2011). Available at SSRN: https://ssrn.com/abstract=1809566; and Commission (n 22) 6.
[262] NGI (n 15) [10]–[21].
[263] ibid 25 and 32-33
[264] ibid 37 and 41.
[265] Convention for the avoidance of double taxation and the prevention of fiscal evasion (DTC); ibid. 3-6.
[266] NGI (n 15) [43], [45]-[48].

> …. 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…"[267].[268]

With regard to the proportionality, the CJEU makes a separate assessment and looks at the determination of the tax amount and the collection of the tax (tax recovery) separately. [187] The determination of the tax amount, at the time of the transfer, does not include the decreases or increases in value, which may occur after the transfer, is proportionate.[269] On the other hand, the CJEU considered that "…. the immediate recovery of tax on unrealised capital gains …at the very time of that transfer is disproportionate…"[270]. However, the CJEU acknowledges the risk of the impossibility of cross-border tracing of the assets after the transfer and until the actual realisation by the tax authorities. At the same time, the CJEU explains that it is not reasonable to put such "…excessive burden for the company ….which would necessarily relate to every asset in respect of which a capital gain was established at the time of the transfer of the place of effective management of the company concerned…"[271]. According to the CJEU, if the taxpayer had a choice between an immediate or deferred payment, it would be less harmful to the free movement of establishment. The CJEU explains that a "…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…."[272]. It should be up to the taxpayer to choose between immediate taxation that results in a cash flow disadvantage and deferred payment that lead to a higher administrative burden for the taxpayer. The CJEU also discussed the risk of non-recovery for the State and suggested that a bank guarantee could be required in a situation if there is an actual risk of non-recovery.[273]

In this case, the CJEU makes a different approach than in the N case with regard to the increases and decreases taken into account. Firstly, The CJEU recalls, in this case, that the N case considered a private individual that held substantial shareholding in a company and was subject to an exit tax on unrealised gains due to the transfer of residency. In the present case, the issue considers a company that transfers the company's place of effective management which triggers exit taxation due to the transfer. Furthermore, the profits after the transfer will be exclusively

[267] ibid 46.
[268] ibid.
[269] ibid 52–64.
[270] ibid 85.
[271] ibid 70-71.
[272] ibid 73.
[273] ibid 70-74, 85.

subject to tax in the host state. Therefore, the CJEU held that the determination of the tax amount at the time of the transfer and not including the decreases or increases in value, which may occur after the transfer, are proportionate. In comparison to the N case, the CJEU established that it should be taken into account as the deferral is granted until the realisation, as in the domestic situation. The CJEU explains that in the domestic situation the tax amount is established at the time of the disposal which may result that it "…could have been less, or even non-existent…"[274] and therefore the same should apply in case of emigrating individuals and take into account the post-emigration increases, "…unless such reductions have already been taken into account in the host Member State…"[275]. Secondly, the different approach of the CJEU, in the NGI case, is explained by the "…the symmetry between the right to tax profits and the possibility of deducting loses…"[276] and "...[t]he taking into account by the Member State of origin either of an exchange rate gain or of an exchange rate loss occurring after the transfer of the place of effective management could not only call into question the balanced allocation of powers of taxation between the Member States but also lead to double taxation or double deduction of losses…."[277].[278]

4.2.5 Post-NGI Cases

4.2.5.1 DMC case

Another important case is the DMC case. This case concerned a transfer of shares (interest) in a limited partnership to a capital company. According to the German law at issue, in a situation when the transfer of interest is considered as a contribution to the capital of a company, it is subject to tax at their increases in value of the assets contributed by investors who are no longer established in Germany and therefore does not have a tax liability in Germany, as a result, that is no longer considered as a resident in Germany. Under German law, such contribution shall be assessed "…at their value as part of a going concern, not at their book value, thus giving rise to the taxation of the unrealised capital gains on the interests…" [279] in a limited partnership.[280] So, the dispute concerns a contribution between a limited partnership, that is no longer resident in Germany, to a capital company, which has a registered office in Germany. Therefore, the CJEU considered the freedom of establishment as secondary in relation to the free movement of capital. As a result, the law at issue was examined in relation to the free movement of capital, article 63 TFEU.[281]

The CJEU found that the German rules constitute a restriction on the free movement of capital. Because the law at issue makes a difference in treatment between a cross-border and domestic situation. Namely, the event of transfer results in taxation of unrealised gains in comparison to situations where the company remains liable to tax in Germany would be taxed at the moment

[274] N (n 17) [37].
[275] N (n 17) [54]
[276] NGI (n 15) [58].
[277] ibid 59
[278] ibid 54-62 cf. N (n 17) [35]-[39] and [51]-[54].
[279] Case C-164/12, DMC Beteiligungsgesellschaft mbH v Finanzamt Hamburg-Mitte (ECJ, 23 January 2014) para 16.
[280] ibid 3-4, 9-16 and 91.
[281] DMC (n 279) [28]-[39].

of disposal, on realized gains. Furthermore, the CJEU concludes that no objective differences of situation could be found to explain the differential treatment, by reference to the NGI case para 38.[282]

The justification ground Germany relied on was the allocation of taxing rights. The CJEU pointed out that the Member States have the right to tax gains accumulated at their territory, by reference to the NGI case para 49. The CJEU also acknowledges the right of Member States to consider other events than the realisation of gains as a chargeable event in order to make sure that the assets would be taxed. Hence, the legislation in question was intended to ensure the allocation of taxing rights between States has the CJEU explained that this purpose might justify the law under review. However, the CJEU left it for the national court to assess.[283]

The CJEU's assessment, whether the measure is proportionate, was influenced by both line of cases, discussed above. Firstly, the CJEU looked at the recovery. The taxpayer had a choice between immediate payment and payment spread over five years (so-called "…exit tax recover in five annual instalments…"[284]). At this point, the CJEU held that "…in the light of the fact that the risk of non-recovery increases with the passing of time, the ability to spread the 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…."[285]. With regard to the necessity of a bank guarantees, the CJEU held that an assessment of the risk of non-recovery has to be made before a bank guarantee could be required. The CJEU points out that it has to be an actual risk, as it was established in the settled case law that the bank guarantees constitute a restrictive effect.[286]

4.2.5.2 Verder LabTec case

This case is another case where the CJEU followed the NGI case reasoning, as well as the DMC case conclusions. The Verder LabTec case concerned taxation of unrealized increases in value of the assets belonging to a company domiciled in Germany in connection with a transfer of these assets to its permanent establishment in the Netherlands. The CJEU found that the situation at issue is comparable to the situation of a company making a transfer to a permanent establishment within that Member State. According to the CJEU, the measure results in a different treatment as it results in immediate taxation of unrealized gains in the event of cross-border transfer in comparison to the domestic situation when a transfer occurs within the territory and is not taxed. Therefore, then CJEU held that the law at issue constitutes a restriction on freedom of establishment in Article 49 TFEU.[287]

In the justification test, the CJEU holds that a Member State, under the fiscal principle of territoriality, is entitled to tax the value increases accumulated in that Member State at the time

[282] ibid 39-43.
[283] ibid 44-58.
[284] Wattel (n 7) 440-441.
[285] DMC (n 279) [62].
[286] ibid 59-69.
[287] Verder LabTec (n 17) [32]-[39].

of transfer of assets to a permanent establishment in another Member State. The CJEU explains that "…[s]uch 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…"[288] and refer to the NGI case. Therefore, the legislation at issue "…is appropriate for ensuring the preservation of the allocation of powers of taxation between the Member States concerned…"[289].[290]

At the last stage, the CJEU looked whether the legislation at issue is proportionate as it provides for a recovery of tax in 10 instalments. At this step, the CJEU pointed out that it was already settled that it is "… appropriate to give the taxable person the choice between, on the one hand, immediate payment of that tax, and, on the other hand, deferred payment of that tax, together with, if appropriate, interest in accordance with the applicable national legislation…"[291]. This reasoning is similar to the reasoning in the DMC case where the CJEU held that exit tax recovery in five annual instalments was proportionate. Furthermore, the CJEU referred to AG reasoning, in the case at issue. The AG explains that the period of recovery has to take into account the "…the economic and legal realities of business life and corporate taxation…"[292]. Therefore, the CJEU found that the recovery of tax (stage recovery) in 10 instalments was proportionate in this case.[293]

4.2.6 Concluding remarks

The CJEU developed two lines of cases with regard to exit taxes on accrued gains. On the one hand, the case law regarding exit taxes on accrued gains in the case of emigrating individuals, Lasteyrie case and N case, and, on the other hand, the case law regarding exit taxes on accrued gains in the case of emigrating companies/business assets, NGI case.[294]

Regarding the hindrance to the free movement, the CJEU has usual reasoning in both lines of cases by concluding that measures that result in a cash flow disadvantage constitute a restriction. The Lasteryrie case establishes that immediate taxation and bank guarantee are considered as a hindrance. It was confirmed in the N case where the CJEU also added that additional formality in the form of a tax declaration as well as not taking into account a decrease in value hinder the free movement. The same type of reasoning was applied in the NGI case.[295]

Similarly, with regard to the justification, in both lines of cases, the CJEU accepts allocation of the taxing rights as a legitimate objective. Preventing tax avoidance is recognized as a justification ground in the case law but shall not target all the cross-border situations, and therefore it was refused as a justification ground in, e.g. the Lasteyrie case.[296]

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[288] ibid 43.
[289] ibid 47.
[290] ibid 40- 47.
[291] ibid 49.
[292] Case C-657/13 Verder LabTec GmbH & Co. KG v Finanzamt Hilden (ECJ, 21 May 2015), Opinion of AG Jääskinen, para 72.
[293] Verder LabTec (n 17) [48]-[52]; AG Jääskinen (n 292) 71-73.
[294] See above the subchapter 4.2, particularly, cf 4.2.1, 4.2.3, 4.2.4 and 4.2.5.
[295] See above the subchapter 4.2, particularly, cf 4.2.1, 4.2.3 and 4.2.4.
[296] See above the subchapter 4.2, particularly, cf 4.2.1, 4.2.3, 4.2.4 and 4.2.5.

	In cases of emigrating individuals	In cases of emigrating companies
Tax declaration	Not disproportionate	Not disproportionate
Establishment of debt	**decrease taken into account:** decrease in value between departure when tax debt is fixed and moment of tax becoming due (see e.g. N case)	**no decrease taken into account** – establishment of debt is final (e.g. NGI case)
Deferral of payment	Until realization (until disposal, actual realization) (see e.g. Lasteyrie case and N case)	Taxpayer's choice: immediate payment or deferral of payment (e.g. NGI case) → payment spread over 5 or 10 years in instalments, with interest (see e.g. DMC case and Veder LabTec case)
- **bank guarantee**	No bank guarantee: *–alternative methods are available that are less restrictive, for instance mutual assistance directives* (see e.g. N case)	Bank guarantee if there is an actual risk of non-recovery (see e.g. NGI case)

Fig.2 Comparison of the case law regarding exit taxation: individuals vs companies

The difference in the assessment arises at the proportionality stage. With regard to individuals, the CJEU, e.g. in the N case, held that the establishment of debt is proportionate, but the payment shall be deferred until realization, and the decrease in value shall be taken into account. Because in the domestic situation, the tax amount is established when actually realized and in the cross-border situation the taxation is deferred until the realization. Therefore, the same factors in the establishment should be taken into account as in the domestic situation, the establishment of debt occurs at the time of realization could result in to be less or even non-existent. However, in the case law regarding companies, the CJEU held that the taxpayer should have a choice between immediate taxation and deferral of payment, and the establishment of debt is final. So, there is no need to take into account the decrease. Additionally, in the latter case law, it was established that the tax recovery is not precluded if the payment is spread over 5 or 10 years in instalments, DMC, and Veder LabTech cases. Furthermore, the deferral, possibly together with interest, expresses the CJEU in the NGI case. However, the interest was no discussed in the N case, so, no interest shall be included regarding the individuals.[297]

About the bank guarantee, the CJEU held that it should not be required as other alternatives would be less restrictive, as mutual assistance directive, in the case of emigrating individuals. Regarding the case law in the case of companies, the CJEU stresses that the bank guarantees could be required if there is a risk of non-recovery. Additional tax declaration was not considered as disproportionate with regard to the individuals, see N case. In the NGI case, the

[297] See above the subchapter 4.2, particularly, cf 4.2.1, 4.2.3, 4.2.4 and 4.2.5.

CJEU further developed it and points out that the taxpayer has a choice between immediate taxation, which results in a cash flow disadvantage, and deferral of payment which also means an administrative burden on a taxpayer. As the taxpayer shall have the choice, the choice also results in a choice between a cash flow disadvantage or an administrative burden, which belongs to the taxpayer.[298]

Consequently, the CJEU developed two different lines of case law with regard to exit taxation on accrued gains. The difference between the individuals and the companies was already mentioned in the NGI case when the CJEU took a different approach than in the N case. It seems as the justification of the different lines of cases may possibly be explained by the possibility of deducting losses v taxation of profits in case of the companies, see to that effect NGI case. It is understood that the factors such as economic and legal realities may possibly justify the difference between individuals and companies, see to that effect the Veder LabTec case.[299]

4.3 FURTHER CASES: HOW THE CASE LAW BUILDS ON PRECEDENTS

4.3.1 Commission v Portugal case

Another case that concerns exit tax taxation of individuals is the case C-503/14 Commission v Portugal. This case was initiated by the EC under the infringement procedure, in accordance with article 258 TFEU. The EC alleged that the Republic of Portugal has failed its obligations under article 21, 45 and 49 TFEU but also under article 28 and 31 of the EEA. This case concerned two provisions. The first provision that was under scrutiny concerns "[t]axation of on capital gains resulting from a share exchange"[300]. The second provision concerned taxation on capital gains "… in the event of a transfer to a company of assets and liabilities by a natural person in exchange for shares…"[301]. The EC argued that the first measure is less favourable because the tax liability arises at the moment of transfer of residency and provides for immediate taxation in comparison to the situation when the shareholder maintains the status of residency the deferral of payment I granted until the disposal of shares. The second rule provides that in a situation when the assets are transferred to a company within Portugal will be taxed at the moment of disposal but in a situation when the assets are moved outside Portugal territory shall the capital gains be taxed immediately. Transfer of assets to a company outside Portugal territory occurred when a company does not have its head office or effective management in Portugal's territory.[302]

The CJEU looked at those provisions separately. [303] In the restriction test, the CJEU found that the Portuguese rules on emigration taxation of unrealized increases in value shall be examined in the light of freedom of establishment, article 49 TFEU, and of the free movement of workers, Article 45 TFEU, as those freedoms also contain the general right of union citizens ensured in

[298] ibid.
[299] See above the subchapter 4.2, particularly, cf 4.2.1, 4.2.3, 4.2.4 and 4.2.5.
[300] Commission v Portugal (n 17) 24.
[301] ibid 74.
[302] ibid 24 and 74.
[303] ibid 23.

Article 21 TFEU.[304] Further, the CJEU assessed the question of whether there was negative discrimination with an analogous reference to para 46 of the Lasteyrie case. The CJEU concluded that the differential times of taxation, in the first provision, constitute a cash-flow disadvantage in a cross-border situation in comparison to the domestic situation. The first situation, consider the taxation of unrealised gains, and the second situation, consider the taxation of realised gains. Therefore, the CJEU concluded that the first provision constitutes a restriction both to the free movement of workers and freedom of establishment. Likewise, the second provision results in a cash-flow disadvantage and the CJEU does not find any grounds that would constitute an objective difference between domestic and cross border situation. Therefore, this provision constituted a restriction to the freedom of establishment.[305]

In the justification test, the CJEU started by analysing the aim of balancing of allocation of the taxing rights between states. The CJEU by referencing to the NGI case state: "…the Court has already held that a possible omission by the host MS to take account of decreases in value does not impose any obligation on the MS of origin to revalue, at the time of the definitive disposal of the new shares, a tax debt which was definitively determined at the time when the taxable person, because of the transfer of its residence, ceased to be subject to tax in the MS of origin…"[306]. Further, the CJEU explained that "…there is no objective reason for distinguishing, […], between the exit taxation of natural persons and that of legal persons in respect of unrealized capital gains…"[307].[206] The CJEU held that the measure at issue had the capacity of ensuring the distribution of taxing rights between states as the measure provides for taxation of value increases at the state they were accumulated and capital gains accumulated after the transfer were taxed in the host State. However, the fact that the measure provided for immediate taxation of unrealised gains goes beyond was is necessary to the aim of the allocation of taxing rights. Therefore, the CJEU, by reference to the NGI-case, concluded that the provision was disproportionate, and the aim could be achieved with a less restrictive measure.[308]

Furthermore, the CJEU did not accept the argument that the provision aims to ensure the cohesion of the national system. It is a justification that falls within the aim of public interest but according to the CJEU Portugal has not shown that there was a direct link between the tax advantage in the form of deferral and the compensation in the form of a certain tax deduction which corresponded to that benefit.[309] Consequently, The CJEU held that those provisions constitute a restriction, and therefore Portugal has failed to fulfil its obligation. The same conclusion made the CJEU with regard to articles 21 and 31 of the EEA as those articles are analogous to articles 45 and 49 TFEU.[310]

[304] ibid 35–36 and 69.
[305] ibid 37-40, 44- 47, 79, 81 and 83-85.
[306] ibid 55.
[307] ibid 56.
[308] ibid 57–61 and 86-88.
[309] ibid 62–65 and 89-90.
[310] ibid 68, 70-73, 91-94

4.3.1.1 Comments

Indeed, this case concerned an individual (natural persons) with a business/professional activity. The CJEU does apply the usual reasoning that the cash flow disadvantage constitutes a restriction. Such restrictions can be justified by reason of the balanced allocation of taxing rights. However, the post-emigration increases or decreases are not required to be taken into account as the establishment of debt s final. This reasoning follows the reasoning established in the case law of emigrating companies (see e. g. NGI case) and not case law of emigrating individuals (e.g. N case). Also, in the line of the case law regarding companies, in this case, have the CJEU concluded that the taxpayer should have a choice between immediate taxation and deferral of the payment, etc. So, even if the case did not concern a legal person, the CJEU applied the NGI case law. The switch of approach, the CJEU explains by arguing that there are no objective reasons to distinguish between natural persons and legal persons.[311]

4.3.2 Jacob and Lassus case

Another important case is Jacob and Lassus case. In the literature, it is held that in this case, the CJEU makes a "…opposite conclusion to the one under [NGI] and Commission v Portugal…"[312]. This case concern two taxpayers that have similar circumstances and therefore, the CJEU answered the questions together. In simple terms, French law taxes capital gains resulting from an exchange of securities that concern companies of different Member States. So, a taxpayer exchanged securities for other securities in a company that is in another Member State. In accordance with the French law and the Merger directive[313], it results in taxation of capital gains with a deferral of the taxation until the final transfer, and in this case until the subsequent transfer of securities received. The review of the French legislation is in relation to the merger directive and Article 49 TFEU. With regard to the merger directive, the CJEU concluded that this French provision is in accordance with the merger directive.[314] As this paper do not examine the merger directive, it will not be further discussed.

The third question that the CJEU answered concerned only Mr Lassus (C-421/16). Mr Lassus, a tax resident in the UK, held securities in France that had exchanged securities to a company in Luxemburg. In accordance with the France-UK tax treaty, he was considered a resident in France. The subsequent exchange resulted that he is no longer considered as a non-resident and therefore could not offset capital losses against the capital gains that have been subject to a tax deferral. The CJEU concluded that if Mr Lassus would continue to be considered a resident, he

[311] See subchapter 4.3.1; and cf. subchapters 4.2.1, 4.2.4 and 4.2.6.
[312] Michael Lang and others, Introduction to European Tax Law on Direct Taxation (5th ed, Linde Verlag GmbH 2018) page 99.
[313] Article 8 of the Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States [1990] OJ L 225/1 (Merger directive). This directive is no longer in force, as it has been repealed by the Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States [2009]OJ L 310/34.
[314] Joined Cases C-327/16 and C-421/16 Marc Jacob and Ministre des Finances et des Comptes publics v Ministre des Finances et des Comptes publics and Marc Lassus (ECJ, 22 March 2018), paras 14-31, 44, 55-57 and 65-66.

would have the right to offset. Therefore, the law at issue is less attractive and constitute an obstacle to article 49 TFEU, freedom to establishment. The transactions are linked as the first transfer is subject to a tax deferral until the subsequent transfer of securities is received. Therefore, the situation compared above are objectively comparable and not permissible.[315]

At the justification test, the CJEU acknowledged that the allocation of fiscal competences is an objective recognised by the case law within the ambit of public interest, by referring to the NGI case. However, the CJEU points out that a distinction has to be made between the NGI case and the case at issue. Because the NGI concerned a deferral of the collection of tax and here it is a deferral of taxation, and it results that the time when it becomes taxable is different. Therefore, the CJEU agrees with the EC that the Member states have the obligation, as a result of the fiscal competence, to offset the losses of the subsequent transfer as it corresponds to the same capital. Therefore, the CJEU concludes at the law at issue is not compatible with article 49 TFEU.[316]

4.3.2.1 Comments

The CJEU explains why, in this case, it is departing from the case law established in the NGI case. This case involved a deferral of taxation until a final transfer (as in this case until the subsequent transfer) which is regulated by the merger directive and the NGI case involved a deferral of payment (collection).[317]

4.4 THE ATAD AND EXIT TAXATION

The ATAD is based on Article 115 of the TFEU, this article was discussed before. The purpose of this directive is to implement coordinated practices in the Member states in order to fight tax avoidance. In the preamble, it is stated that "…[i]t is essential for the good functioning of the internal market that, as a minimum, Member States implement their commitments under BEPS[318] and more broadly, take action to discourage tax avoidance practices and ensure fair and effective taxation in the Union in a sufficiently coherent and coordinated fashion. … there is a need for common strategic approaches and coordinated action, to improve the functioning of the internal market and maximise the positive effects of the initiative against BEPS…."[319].[320]

However, the directive also contains two provisions that do not result from the BEPS, e.g. article 5, which includes rules regarding exit tax duty. As illustrated above, the Member States's aim of the exit taxes is the right for the States to tax profits accumulated in the tax jurisdiction of the state. In the literature, it is argued that the EU "…has… gone one step further than the BEPS-package would require…"[321].[322]

[315] ibid 21, 67, 75-78.
[316] ibid 81-84
[317] See subchapter 4.3.2; and cf. subchapter 4.2.4.
[318] OECD (2013), Action Plan on Base Erosion and Profit Shifting, OECD Publishing; see at <http://www.oecd.org/ctp/beps>. Accessed 28 May 2020.
[319] Recital (2) of the preamble of the ATAD.
[320] Wattel (n 7) 245-246.
[321] Wattel (n 7) 247.
[322] ibid 245-247; recitals (1)– (10) of the preamble of the ATAD.

The taxpayers that fall within the scope of the ATAD are "…taxpayers that are subject to corporate tax in one or more Member States …"[323].[324] The rules that determine the taxpayers who are subject to corporate tax shall be established by the Member States. However, it does not mean that the Member States can extend the scope and cover entities that are not subject to corporate tax. The recital (4) states that "…it is not desirable to extend the scope of this Directive to types of entities which are not subject to corporate tax in a Member State; that is, in particular, transparent entities…."[325].[326] The ATAD shall apply to the taxpayers that are subject to the national corporate tax, and the scope shall not be extended. Therefore, it seems as, to that effect, the directive reflects the difference between companies and individuals as a result of the economic and legal realities, to that effect see the Veder LabTec case.[327]

Article 5 (1) (a-d) specifies four events that shall be subject to the exit tax. Due to the objective pursued, it was necessary.[328] In simple terms, the exit tax applies in cases of emigrating companies and cases of a cross-border transfer of business assets.[329] However, the situations specified in article 5 (1) (a, b, d) states that the exit tax applies "…in so far as the Member State of the permanent establishment no longer has the right to tax the transferred assets due to the transfer…"[330]. So, it applies when the Member States losses the taxing rights due to the transfer. According to the preamble, this exception was necessary "…[i]n order to ensure the compatibility of the rule with the use of the credit method, it is desirable to allow the Member States to refer to the moment when the right to tax the transferred assets is lost…"[331].[332]

As observed before, in the case law, regarding exit taxes in the case of emigrating companies, the CJEU held that losses have to be considered by the departure State, especially the NGI case. This requirement has been incorporated in the ATAD as well. Hence, article 5 (1) states that the "…[a] taxpayer shall be subject to tax at an amount equal to the market value of the transferred assets, at the time of exit of the assets, less their value for tax purposes…". In simple terms, the difference shall be taken into account/considered.[333]

In accordance with Article 5(2) of the ATAD, the taxpayers shall have the right of deferred payment in instalments over five years in an intra-EU situation, incl. EEA as long as there is an agreement "…on the mutual assistance for the recovery of tax claims, equivalent to the mutual assistance provided for in Council Directive 2010/24/EU…"[334]. The deferred payment of the amount of tax may include interest.[335] The right of deferred payment follows from the settled case law, discussed above. In accordance with the judgment of the DMC case and Veder LabTec case, the recovery of tax in five resp ten instalments was proportionate in the light of the

[323] Article 1 of the ATAD.
[324] See also recital 10 of the preamble of the ATAD.
[325] Recital (4) of the preamble of the ATAD.
[326] ibid; see also Wattel (n7) 248.
[327] cf. and see above the subchapter 4.2.5.2.
[328] Recital 10 of the preamble of the ATAD.
[329] Article 2 (6-8) and 5 (1) (a-d) of the ATAD.
[330] Article 5 (1) (a) of the ATAD.
[331] Recital 10 of the preamble of the ATAD.
[332] Recital 10 of the preamble of the ATAD and articles 2 (6-8) and 5 (1) (a, b, d) of the ATAD.
[333] Recital 10 of the preamble of the ATAD and article 5 (1) of the ATAD; Wattel (n 7) 256.
[334] Article 5 (2) of the ATAD.
[335] Recital (10) of the preamble of the ATAD.

objective pursued. The possibility of including interest by the Member States in a situation of deferred payment of tax follows to that effect from the NGI case.[336]

A taxpayer may be requested to include additional information in a tax declaration, such administrative burden was also accepted by the CJEU in the, e.g. NGI case.[337] Additionally, the possibility for the Member States to require a bank guarantee in case of the actual risk of non-recovery, as established in the, e.g. DMC case, was incorporated in the ATAD. The relevant article is article 5 (3) of the ATAD that states "…[i]f there is a demonstrable and actual risk of non-recovery, taxpayers may also be required to provide a guarantee as a condition for deferring the payment…"[338]. However, it does not apply if the Member States give ".." the possibility of recovery of the tax debt through another taxpayer which is member of the same group and is resident for tax purposes in that Member State…"[339].[340]

Furthermore, article 5 (4) of the ATAD states that in situations such as, inter alia, "…transferred assets… are … disposed; the transferred assets are subsequently transferred to a third country… [bankruptcy]… the taxpayer fails to honour its obligations in relation to the instalments…" shall the "…deferral of payment …be immediately discontinued and the tax debt becomes recoverable…"[341].[342]

The EC indicated that one way to eliminate double taxation, which may result from the mismatches between Member States' exit tax measures, is a mutual recognition of the valuation of assets, see chapter 3.2.[343] However, it was not included in the ATAD as the ATAD states:

> "…It is also necessary to allow the receiving State to dispute the value of the transferred assets established by the exit State when it does not reflect such a market value. Member States could resort to this effect to existing dispute resolution mechanisms…"[344].

This provision acknowledges the issue that the different valuations creates and reflects how far the Member States are willing to go. The mutual recognition of the valuation of assets was not something that the Member States wished for, it is concluded on the basis of the special legislative procedure required under article 115 TFEU and therefore was not included. It is argued in the doctrine that it was "…a bridge to far for Member States…"[345].[346]

The ATAD gives a minimum level of protection as article 3 of the ATAD states "…[t]his Directive shall not preclude the application of domestic or agreement-based provisions aimed

[336] Similar reasoning with regard the possibility by the Member States of including the interest can also be seen in case C 292/16 A Oy (ECR, 23 November 2017), para 35; see also above the subchapters 4.2.4 and 4.2.5.
[337] Recital (10) of the preamble of the ATAD.
[338] Article 5 (3) of the ATAD.
[339] Article 5 (3) of the ATAD.
[340] See above the subchapters 3.2; Wattel (n 7) 255-256.
[341] Article 5 (4) o the ATAD.
[342] ibid, see also Wattel n (7) 257-258.
[343] Commission (n 22) 7-8; and see also above the subchapter 3.2.
[344] Recital 10 of the preamble of the ATAD.
[345] Wattel (n 7)256.
[346]See above the subchapters 2.1.1 and 3.2; Wattel (n 7) 256.

at safeguarding a higher level of protection for domestic corporate tax bases…"[347].[348] It means that the Member State is required at least to ensure that the standards provided in the directive are implemented in the national law in order to combat the tax avoidance but can apply a higher level of protection as long as it complies with the, inter alia, the fundamental freedoms.[349]

	ATAD: exit taxation	**Case law:** exit taxation in case of emigrating companies
Territoriality principle	Recital (10): "…*State taxes the economic value of any capital gain created in its territory even though that gain has not yet been realised at the time of the exit…."*	NGI case para 46:"…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…"
No taxing rights	Article 5 (1) (a-b and d): "…no longer has the right to tax the transferred assets due to the transfer…"	NGI case para 46 "…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…"
Establishment of debt	Article 5 (1): "…an amount equal to the market value of the transferred assets, at the time of exit of the assets…"	NGI case para 52: "…establishing the amount of tax at the time of the transfer … complies with the principle of proportionality…"
Deferral of payment	Recital (10): "…*taxpayers should have the right to either immediately pay the amount of exit tax assessed or defer payment of the amount of tax by paying it in instalments over a certain number of years…"* Article 5 (2): "… the right to defer the payment of an exit tax…, by paying it in instalments over five years…	NGI case para 73: "…the choice between, first, immediate payment of the amount of tax, …and, secondly, deferred payment of the amount of tax, possibly together with interest… DMC case para 61: NGI case repeated Para 62 : "…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…" Veder LabTec case para 52: repeated DMC case and concluded that "… A staggered recovery of tax on unrealised capital gains over 10 annual instalments…. can only therefore be considered, …as a proportionate measure to attain that objective…."
➢ **interest**	Recital 10: "…*possibly together with interest…"* *Article 5 (3): "*...interest may be charged …"	NGI case para 73: "…possibly together with interest…" DMC case para 61: repeat NGI case
➢ **Bank guarantee**	Recital (10): "…possibly together with…*a guarantee…"* *Article 5 (3): "*...If there is a demonstrable and actual risk of non-recovery, taxpayers may also be required to provide a guarantee as a condition for deferring the payment…"	NGI case para 74: "…account should also be taken of the risk of non-recovery of the tax, which increases with the passage of time. That risk may be taken into account by the Member State in question, in its national legislation applicable to deferred payments of tax debts, by measures such as the provision of a bank guarantee..." DMC case para 69: "…the requirement to provide a bank guarantee is imposed on the basis of the actual risk of non-recovery of the tax…"
Additional formality: a tax declaration	Recital 10: "…*Member States could request, …to include the necessary information in a declaration…."*	NGI case para 77: "…the declarations…. cannot be regarded as excessive either…"

Fig.3 Comparison of the legal requirement established by the CJEU vs ATAD

It follows from all the forging and as illustrated in the fig.3, that the legal requirements with regard to exit taxation regulated in the ATAD directive reflect the settled case law in case of

[347] Article 3 of the ATAD.
[348] ibid.
[349] Wattel (n 7) 247.

emigrating companies. Even the solution's mechanism, proposed by the EC to solve the mismatches that result in double taxation and double non-taxation, were not implemented and only the need to resolve the issue was reflected. In other words, the case law has been codified, and it reflects how far the Member States were willing to go in order to co-ordinate in that field, as the ATAD is based on Article 115 TFEU that requires a special legislative procedure.[350]

[350] See above the subchapter 4.4 and cf. subchapter 4.2.

5 CONCLUDING REMARKS

The establishment of the internal market constitutes the main aim of the EU. Obstacles, incl. tax obstacles, shall be abolished. In the logic of the internal market, a legal person and natural person shall move freely within the EU in the same way as they would move within a jurisdiction of a Member State. Not only direct and indirect discrimination on the ground of nationality or origin is prohibited but also a national measure that prevents persons to move from a Member State to another Member State or that prevents a person from another Member State to settle in a Member State, market access. So, the Member States do not have full tax sovereignty as different aspect has to be taken into consideration, such as the EU law when making the national tax legislation. As well as, the State's compromises and divide taxing right between them in order to, inter alia, avoid double taxation by concluding bilateral tax treaties, based on the OECD model tax convention.[351]

In the field of direct taxation, the CJEU applies the rule of reason doctrine, three steps test. In order for a fiscal measure to be considered as a restriction, it has to result in differential treatment. Therefore, when a measure that as a consequence differently treats a situation that is comparable to another situation, and there are no objective reasons to different them constitute a restriction. Treaty standing requires a cross-border situation, and it is the case with exit taxation. However, within the ambit of public interest, the Member States may have a restrictive measure, but it must pursue legitimate objectives and cannot go beyond what is necessary. The justification grounds that have been accepted by the CJEU, relevant with regard to the aim of the paper, are the prevention of tax avoidance and balanced allocation of taxing rights between States, linked to the principle of fiscal territoriality.[352]

As the States' tax systems are underlined by different principles, there is, inter alia, a risk of juridical double taxation. Therefore, the States conclude bilateral tax treaties, based on the OECD model tax convention, too, inter alia, divide the taxing rights between themselves. The CJEU acknowledges the importance of ensuring a balanced allocation of taxing rights to eliminate double taxation because the EU does not have unifying measures with that regard. Therefore, the CJEU holds that the Member States are competent to ensure the balanced allocation of taxing rights by concluding tax treaties as long as it respects EU law.[353]

The OECD model tax convention divides taxing rights between the contracting States to solve, inter alia, the issue of double taxation but also double non-taxation. It determines which contracting states have the taxing rights by determining the residency of a taxpayer or in which country an establishment of a company should be considered as permanent establishment, as both contracting States' internal laws may consider a taxpayer as a resident and result in taxation of the same income in both countries. Additionally, the distributive rules determine the taxing rights of a state with regard to a specific type of income. Additionally, the OECD model tax convention contains two methods (the exemption method and the credit method) that shall apply to eliminate double taxation. In simple terms, a state credit or exempt an income that was taxed

[351] see above the chapters 1-3, particularly 1.1, 2.1, 2.2.3 and 3.1.
[352] see above the chapters 2 and 3, particularly 2.2.2, 2.2.3 and 3.1.
[353] See above the chapter 3, particularly 3.1.

in the other State. Article 13 of the model tax convention provides rules with regard to capital gains, but the issue regarding exit taxation on accrued gains in case of emigration is not solved by the OECD model tax convention. It is also argued by the EC. As a consequence, the Member States are trying to solve it, in order to protect their tax base, but it results in the different solution applied by the States and mismatches as the OECD model tax convention do not provide solutions. So, it is not solved, and the risk of double taxation or double non-taxation, tax avoidance, exists. Consequently, it affects the behaviour of taxpayers, market access, and therefore may constitute a restriction to the free movement rights ensured by the EU law.[354]

The exit tax concept covers different kinds of taxes that are triggered at the event of a transfer. A transfer of, for instance, a person or asset may be a result of an artificial arrangement, to move to another state which, inter alia, do not tax capital gains, in order to avoid taxation. Due to this, it will no longer be within the tax jurisdiction of a State, and the State loses taxing rights. So, in a situation when a State does not levy an exit tax the right to tax an income accumulated in the territory is lost.[355]

The international tax law recognizes the right of a State to tax an income accumulated within the tax jurisdiction of that State. Therefore, some States levy an exit tax, in order to protect their tax base and in accordance with the principle of fiscal territoriality. However, as the exit taxes are triggered at the event of a transfer, such a national measure may constitute a restriction to the free movement rights, ensured by the EU law, as it affects the mobility and market access.[356]

The reasoning of the CJEU has already in early case law considered a national measure that affects market access as prohibited. With regard to the fiscal measures, the CJEU applies the same reasoning. It produces a restrictive effect and create obstacles at the frontiers, as it is triggered in the event of a transfer. The issue with exit taxation is when the subject of taxation is accrued gains which are not taxed in a comparable situation (domestic situation) as the taxation occurs when it is actually realized (at the moment of disposal). As a result, the taxpayer loses the enjoyment of the assets. Such differential treatment constitutes a restriction to the free movement rights, as it creates a cash flow disadvantage.[357]

The case law discussed, identify several factors that constitute a hindrance to the free movement, such as e.g. immediate taxation, bank guarantee, and additional tax declaration. The CJEU applies usual reasoning that measures that result in a cash flow disadvantage constitute a restriction, c.f. e.g. Lasteryrie case, N case, NGI case. It follows from the subchapter 4.2, that there are two lines of cases with regard to exit taxes on accrued gains. On one hand, the case law regarding exit taxes on accrued gains in the case of emigrating individuals, Lasteyrie case and N case, and, on the other hand, the case law regarding exit taxes on accrued gains in the case of emigrating companies/business assets, NGI case.[358]

Consequently, the CJEU developed two different lines of case law with regard to exit taxation on accrued gains. The difference between the individuals and the companies were mentioned

[354] See above the chapter 3, particularly 3.2.
[355] See above the chapter 4, particularly, 4.1.
[356] ibid.
[357] ibid.
[358] See above the subchapter 4.2, particularly 4.2.1, 4.2.3, 4.2.4 and 4.2.6.

in the e.g. NGI case when the CJEU took a different approach than in N case. It seems, as the justification may possibly be, of the different lines of cases, as indicated in the NGI case, the factors such as economic and legal realities, see to that effect the Veder LabTech case.[359]

It seems that the reasoning applied in case of emigrating individuals is similar to the reasoning with regard to legal/residence fiction applied in the Van Hilten der Hejden case where the CJEU held that national measures that extend residency and consider that a taxpayer continues to reside are not a restriction to the free movement rights. Similarly, in the Lasteyrie and N case law the CJEU establishes that exit taxation is compatible with the EU law if deferral of payment is granted until realization and decreases and increases are taken into account as in the domestic situations.[360]

However, it takes a new turn in the Commission v Portugal case when the CJEU applies the precedents established in the NGI case in a case concerning a natural person. This reasoning of the CJEU is based on an argument that there are no objective reasons to distinguish between natural persons and legal persons. It is not clear whether the CJEU is now going toward and single approach. However, it is clear that the case law established in the NGI case is the precedents followed by the CJEU in the latter case law and that the Member States shall follow it to comply with the EU law. Additionally, the indication that the single approach should be applied is not reflected in the ATAD. Hence, the ATAD shall apply to the taxpayers that are subject to the national corporate tax, and the scope shall not be extended.[361]

The legal requirements established by the CJEU, regarding companies, are now codified in the ATAD. The ATAD reflects the settled case law in the case of emigrating companies. It also reflects how far the Member States were willing to go in order to co-ordinate in that field. It also reflects the need for tax base protection which complies with the established international tax law that gives the States the right to tax an income accumulated in the tax jurisdiction.[362]

In the case law, the CJEU tries to strike a balance between the rights given to the States by the international tax law and the internal market without frontiers. In the ATAD such a balance is not present as, in accordance to the ATAD, exit taxation, in principle, do not constitute a restriction in comparison to the case law in which it was clear that such measures do constitute a restriction, especially to the free movement of establishment, but allowed if it was proportionate and pursued the objective of public interest. Another remark has to be made, even if the ATAD constitutes the minimum level of protection, it does not give the Member States any margin as it codifies the restrictive case law.[363]

[359] ibid; see, particularly, above the subchapter 4.2.5.
[360] See and cf. subchapters 4.2.1 and 4.2.2.
[361] See above the subchapters 4.3 and 4.4, particularly, 4.3.1, 4.3.1.1 and 4.4.
[362] See above the subchapter 4.4.
[363] See above the subchapters 4.2-4.4.

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