Lund University

School of Economics and Management
Department of Business Law

Does the deferred payment method of Art. 5 ATAD provide for a technique proportionate to mitigate liquidity disadvantages of exit taxes?

by

Sven Uetermeyer

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Supervisor: Sigrid Hemels

Examiner: Cécile Brokelind

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Author's contact information:

svenuetermeyer@me.com

+49 1575 30 62 014

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Summary

This thesis analyses the deferred payment method of Art. 5 para. 2 ATAD. It asks whether or not it is proportionate to mitigate liquidity disadvantages stemming from exit taxes. Such disadvantages are a general pattern of the Court of Justices case law on exit taxation.

The analysis is therefore based on that respective case law. The thesis examines the roots of the deferred payment method, elaborates on the relevant domestic legislation with its preparatory works underlying the referred cases and shows, how it resulted in a directive aiming at tackling tax avoidance. It highlights the different objectives given in the case law on the one hand and the ATAD on the other hand. It assesses that the currently enacted five-year period for a payment in instalments is random.

A comparative analysis will consider the economic outcomes of the current mechanism. This economic perspective provides the basis for a review of the challenges that have risen from an unreflective implementation of the case law. It was neither intended nor feasible to be directly applied for the objective of anti-tax avoidance.

Ultimately, a proposal for an alternative solution is presented. This alternative is less restrictive and equally efficient. Thus, it proves that the current mechanism is disproportionate. Art. 5 para. 2 ATAD in its current design does not mitigate the liquidity disadvantages of exit taxes in a way that is in line with the EU fundamental freedoms and the objectives pursued.

Preface

A common feature of many master theses is that they mark the end of an academic journey.

This academic year was characterised by unprecedented circumstances. It is remarkable how the university managed to transform the education to a digital platform while maintaining the academic spirit. I would therefore like to express my gratitude to the faculty at the Department of Business Law and all lecturers involved. A special thanks to Cécile Brokelind and Sigrid Hemels for sharing their passion about (tax) law with us students.

Thanks to my fellow classmates, friends and families in Germany, Sweden and Europe. It was a pleasure to pursue this quest with you.

Sven Ustermeyer

Abbreviation list

AG	Advocate General
ATAD	Anti-Tax Avoidance Directive
BEPS	Base Erosion and Profit Shifting
CJEU	Court of Justice of the European Union
EC	European Community
Edn.	Edition
Eds.	Editors
EEA	European Economic Area
E.g.	*Exempli gratia* (Latin for 'in example')
Et al	*Et alii* (Latin for 'and others')
Et seq.	*Et sequentes* (Latin for 'and the following')
EU	European Union
FFC	Federal Finance Court
GCITA	German Corporate Income Tax Act
GFTA	German Foreign Tax Act
GITA	German Income Tax Act
GRTA	German Reorganization Tax Act
GmbH	*Gesellschaft mit beschränkter Haftung* (German for a company with limited liability)
KG	*Kommanditgesellschaft* (German for a company with General and Limited Partners)
p./pp.	Page/pages
para./paras.	Paragraph/paragraphs
R&D	Research and Development
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

The Court of Justice of the European Union (CJEU or the Court) operates under the premise of removing obstacles to the internal market. The internal market stands at the core of the European idea and the values enshrined in the treaties of the European Union (EU). Personal and corporate mobility, guaranteed by the fundamental freedoms, are the foundation for a prosperous internal market in the EU.[1] According to Art. 26 para. 2 TFEU it '*shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured*.'

In a paper from 2016*, de la Feria* and *Fuest* conducted an analysis of the economic effects of the Courts jurisprudence on domestic tax systems. They elaborated on tax neutrality and the creation of a level playing field as parts of the instrumental chain on which the Court's non-discriminatory approach is bound. This characterizes the Court's constitutional mandate of ensuring the internal market.[2] The aim of their paper is to bring these constitutional issues and economic consequences together.[3] From that perspective, the internal market operates simultaneously as the main objective and instrument.[4]

For this thesis, the starting point is similar. Exit taxes are an expression of the states' sovereignty and the symmetry of their respective tax systems.[5] States are providing the economic and social infrastructure (public goods) for both individuals and businesses to create values.[6] They provide, e.g., incentives for research and development to facilitate innovation.[7] By that they sacrifice present tax revenue in favour of a potentially higher one in the future. Irrespective of the motivation for an individual or company to move their assets or businesses cross-border, they all rely on a, to a certain extent Pareto-optimal, framework.[8] In modern states taxes have developed as an

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[1] Åsa Hansson, 'Free factor mobility and fiscal competition: can the national welfare state survive in a 'United Europe'?', in: Krister Andersson et al (Eds), National Tax Policy in Europe, Berlin Heidelberg, Springer 2007, chapter 3.1, p.1.

[2] Rita de la Feria and Clemens Fuest, 'The economic effects of EU tax jurisprudence', European Law Review 2016, Vol. 41 (1), p. 44 (45).

[3] Ibid.

[4] Ibid.

[5] Maria T S Roch, 'Exit Tax: A fair balance?', in: Heike Jochum et al (Eds), Practical Problems in European and International Tax Law – Essays in honour of Manfred Mössner, IBFD October 2016, chapter 27, p. 483 (487); Olga Sendetska, 'ECJ Case Law on Corporate Exit Taxation: From National Grid Indus to DMC: What Is the Current State of Law?', EC Tax Review 2014 Vol. 4, p. 230.

[6] George J. Stigler, 'The Tenable Range of Functions of Local Government', in: Edmund S. Phelps, Private Wants and Public Needs, Yale University, N.Y., W.W. Norton 1962, page. 137 (142); Gianluigi Bizioli, 'Taking EU Fundamental Freedoms seriously: Does the Anti-Tax Avoidance Directive Take Precedence over the Single Market?', EC Tax Review 2017, Vol. 3, p. 167.

[7] Johanna Hey, 'Taxation of business in the EU: Special problems of crossborder losses and exit taxation', in: Christiana HJI Panayi et al (Eds), Research Handbook on European Union Taxation Law, chapter 10 sec. 3.1.

[8] Mark Anderson, 'Entity Exit: Right, Remedies and Bounded Rationality', Vol 17. Hous. Bus. & Tax L.J., 2016, p. 1; Edmund S Phelps, 'Fiscal neutrality toward economic growth', Yale University, McGraw-Hill 1965, chapter 1, p. 16; Russel S Sobel, 'Welfare Economics

irreplaceable pillar for that.[9] Hence, they are generally justified by this need of public financing.[10] On a global scale, double tax treaties operate as instruments to safeguard these interests. They delineate sovereignty and symmetry because '*borders matter in the context of international tax law*.'[11] However, such a protection of the own tax base might be contrary to the internal market. *Terra* and *Wattel* therefore differentiate between '*international-tax-thinking*' and '*internal-market-tax-thinking*'.[12]

A characteristic of most exit taxes is that they tax a value which has not yet been realized.[13] The aim is to catch unrealised capital gains, also referred to as hidden or undisclosed reserves.[14] They consist of profits which are not displayed in the books and are therefore generally not (yet) included in the taxpayer's tax base.[15] They usually derive from an increase in value, e.g., an accumulation of good will, or from tax rules which allow for a greater depreciation of an asset than its real value based on wear and tear is.[16] Logically, it is likely that a taxpayer refrains from enacting respective operations in the first place if no marketable value is created yet. Hence, the mobility guaranteed by the internal market is probably hindered.

In addition to this already complex interaction of constitutional and economic circumstances comes the global fight against harmful tax practices and tax avoidance.[17] The European Union addressed this with its action plan against tax avoidance.[18] Based on that, in January 2016, the European Union released the Directive (EU) 2016/1164 to tackle tax avoidance practices with direct consequences for the internal market, known as the Anti-Tax Avoidance Directive (ATAD). The directive entails a number of anti-avoidance provisions which the Member States had to implement or adjust in their domestic tax systems. One of these measures is the exit tax provision in Art. 5 ATAD. According to recital 10 ATAD exit taxes shall ensure that

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and Public Finance', in: Jürgen G Backhaus and Richard E Wagner, Handbook of Public Finance, Kluwer Academic Publishers 2004, chapter 2, p. 20.

[9] Peter Mieszkowski, 'Taxes, Public Goods and Urban Economics: The selected essays of Peter Mieszkowski', published by Edward Elgar, Northampton, MA, USA, 1999; David Bell, Willem Sas and John Houston, 'Starting from the scratch? A new approach to subnational public finance', Regional Studies 2021 Vol. 55 No. 4, p. 617 (618).

[10] Gianluigi Bizioli, 'Taking EU Fundamental Freedoms seriously: Does the Anti-Tax Avoidance Directive Take Precedence over the Single Market?', EC Tax Review 2017 Vol. 3, p. 167 (168).

[11] Wolfgang Schön, 'Playing different games? Regulatory competition in Tax and Company Law compared', Common Market Law Review 2005 Vol. 42, p. 360.

[12] Ben Terra and Peter Wattel, European Tax Law, Volume 1 Studentedition 2018, ch. 14.4.2.

[13] Sriram Govind and Stephanie Zolles, 'The Anti-Tax Avoidance Directive', in: Lang et al (Eds), Introduction to European Tax Law on Direct Taxation, Vienna, Linde 2020, chapter 8 mn. 604.

[14] Klaus von Brocke and Stefan Müller, 'Exit Taxes', EC Tax Review 2013 Vol. 6, p. 299.

[15] CJEU, Opinion AG Jääskinen, 26 February 2015, Case C-657/13, Verder LabTec, EU:C:2015:132, para. 19.

[16] Supra note 14.

[17] OECD/G20 Base Erosion and Profit Shifting Project, 2015 Final Reports, Explanatory Statement, p. 4; Stefanos A Tsikas, 'Enforce taxes, but cautiously: societal implications of the slippery slope framework' (2020), European J. Law and Econ, Springer, Vol 50, p. 149 (150).

[18] EU Commission, 17 June 2015, 'A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action', COM (2015) 302 final.

where a taxpayer moves assets, businesses or residence to another member state (immigrating state), the member state on which territory the value of any capital gain has been created (emigrating state) and not been realised yet, keeps the right to tax these respective gains. The commentary on the OECD Model Tax Convention 2017 also acknowledges that exit taxes are able to prevent the avoidance of capital gains taxes.[19] In its proposal from January 2016 the European Commission stated that the '*application of exit taxation shall be in line with the case law of the CJEU.*' It further stated that '[*t]he envisaged measures do not go beyond ensuring the minimum necessary level of protection for the internal market.'*[20] This statement will be examined throughout the thesis. For the CJEU, the examination of fundamental freedoms and abusive tax practices has been and still is a complex and extensive journey.[21] Especially combined with the need for stability and certainty.[22] With its judgments in the so-called Danish-cases the Court declared the abuse of (tax) law as a general principle of EU law.[23]

1.2 Research question and outline

This thesis operates at the intersections introduced above. The difficulty lays in the balancing of different motivations for a cross-border activity and the objectives pursued with exit taxes. An attempt for this balance is reflected in the deferred payment method of Art. 5 of the ATAD.[24] Art. 5 para. 2 ATAD provides the taxpayer with the option to defer the payment of the tax to be levied under Art. 5 para. 1 ATAD, by paying it in instalments over five years.

The research question is whether this mechanism is proportionate to mitigate liquidity disadvantages coming along with exit taxes. It takes a both legal and economic point of view and outlines benchmarks which should be considered.

The thesis starts in chapter 2 with an examination of the structure and genesis of Art. 5 ATAD. It goes back to the roots of the payment in instalment and its time frame. When elaborating on the respective case law, a special focus will be on the German legislation concerned in some of the cases. Its historical development is crucial for a comprehensive understanding of the assembly of the deferred payment method. The economic consequences of the current

[19] OECD Income and Capital Model Tax Convention 2017, Commentary on Art. 1, paragraph on 'specific legislative anti-abuse rules.'
[20] European Commission, 28 January 2016, Proposal for a Council Directive laying down rules against tax avoidance practices and that directly affect the functioning of the internal market, COM (2016) 26 final.
[21] Ivan Lazarov, 'The Relevance of the Fundamental Freedoms for Direct Taxation', in Lang et al (Eds), Introduction to European Tax Law on Direct Taxation, Vienna, Linde 2020, chapter 3 mn. 268.
[22] Ieva Freija-Peccati, 'Value of Precedents in EU Direct Tax Law', in: Werner Haslehner et al (Eds), Time and Tax, EUCOTAX Series Vol. 62, chapter 6, p. 93.
[23] Ivan Lazarov, 'The Relevance of the Fundamental Freedoms for Direct Taxation', in Lang et al (Eds), Introduction to European Tax Law on Direct Taxation, Vienna, Linde 2020, chapter 3 mn. 269.
[24] Karoline Spies, 'Tax Deferral and Fundamental Freedoms: Exit Tax, Foreign Losses, and Withholding Tax', in: Werner Haslehner et al (Eds), Time and Tax, EUCOTAX Series Vol. 62, chapter 8, p. 154, 155.

mechanism are then demonstrated in chapter 3. In legal scholars the trade-off between tax implications and liquidity is often not sufficiently addressed.[25]

The thesis ends with an attempt for reconciliation. It looks at the impacts on the EU's judicial architecture and case law rendered after the adoption of the ATAD. Chapter 4 ends with a proposal for an alternative technique.

1.3 Method and material

The research for this thesis took place between March and May 2021. It will delineate the materials accessible until 26 May 2021.

The thesis is subject to a non-positivist understanding of law.[26] Contrary to classic positivist scholars[27] this approach is open to other sources for the interpretation of law such as modern concepts and conventions of moral and behaviour.[28] This is in particular relevant when conducting an analysis in the field of anti-tax avoidance. This field is influenced by political developments and the respective institutions such as the Organisation for Economic Cooperation and Development (OECD).[29] The main materials used are Primary and Secondary EU law, case law of the CJEU, documents published by the European Institutions and further documents on legislative procedures on both the EU level and the level of the member states. They will be used by applying a legal-dogmatic research, hermeneutic and a comparative analysis.[30]

As regards the economic understanding underlying this thesis, the fields of Law and Economics and the Economic Analysis of Law have been in focus. Since the 1960's these fields were mainly influenced by American scholars, e.g., of *Guido Calabresi*, *Gary Becker* and *Ronald Coase*.[31] In essence, any legal assessment is depended on its outcome. In the field of tax law, this outcome is determined by its economic consequences.[32] This thesis does not apply advanced economic methodology as it would exceed its pre-determined limits.[33] It does, however, apply two approaches derived from the mentioned

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[25] Cf. Yair Listokin, 'Taxation and Liquidity', The Yale Law Journal, May 2011, Vol. 120, No. 7, p. 1682 (1685).
[26] David Hume, 'Treatise of Human Nature' (1737), republished Prometheus book (1992), pp. 484 - 501; Bruno Leoni, 'Freedom and the law' (1961), Princeton, N.J., van Nostrand.
[27] John Austin, 'The province of jurisprudence' (1832), edited by Wilfried E Rumble, Cambridge University Press (1995); Herbert L A Hart, 'The concept of law' (1994), edited by Penelope A Bulloch and Joseph Raz, 3rd Edn., Oxford University Press (2012); Thomas Hobbes, 'A dialogue between a philosopher and a student of the common laws of England' (1681), edited by Joseph Cropsey, Univ. of Chicago Press (1971).
[28] Keith N Hylton, 'Law and economics versus economic analysis of law' (2019) 48 Eur J Law Econ, p. 77 (80).
[29] Cf. Wolgang Schön, 'Interpreting European Law in the Light of the OECD/G20 Base Erosion and Profit Shifting Action Plan', Bulletin for International Taxation, April/May 2020, pp. 286 – 302.
[30] Sjoerd Douma, 'Legal Research in International and EU Tax Law' (2014), Kluwer Deventer, p. 18.
[31] Richard A Posner and Gary Becker, 'The Future of Law and Economics' (2014) 10 Rev L and Econ, p. 235.
[32] Werner Haslehner, 'Time and Tax: Constitutional Versus Economic Perspectives', in: Werner Haslehner et al (Eds), Time and Tax, EUCOTAX Series Vol. 62, chapter 14, p. 271.
[33] Cf. Mario Massari, Gianfranco Gianfrate and Laura Zanetti, 'Corporate Valuation' (2016), Hoboken, N.J., John Wiley, ch. 1.2.

scholars. First, a normative analysis-approach, aiming at reforming the law under consideration of economic effects. And second, a positivist analysis-approach for a better understanding of it.[34]

1.4 Delimitation

The thesis focuses on issues of EU law. The understanding of the term exit tax in this paper is limited to an EU-wide context. Issues of international tax law beyond that are not covered as such. This applies in particular for exit taxation and double tax treaties, e.g., those concluded on the basis of the OECD Model Convention.[35] The thesis focuses on the deferral of tax payments. It therefore will not address closely related issues like later losses or decreases in value as well as disputes arising in context of a step-up in value. Not dealt with either is the assessment of a notional gain. It is depended on the member states accounting standards and business valuation methods applied and applicable. It will not analyse the approach of harmonizing exit taxes through positive integration via the ATAD as such, although its role is of interest when dealing with the reconciliation between the related case law and the directive.[36] The thesis only covers direct taxes on income. Wealth, inheritance and gift taxes as well as indirect taxes are not covered. The objectives of the ATAD might interfere to a certain extent with those of the directives 2009/133/EC (Merger Directive) and EU/2019/1023 (Restructuring Directive). This competitive relation shall not be analysed in this paper. The only exception is the description and analysis of the case *DMC* in chapter 2. The objectives of the directive EU/2017/1132 (Law Aspects of Company Law) and its amending directive EU/2019/2121 provide for new rules tackling abusive or fraudulent cross-border operations aimed at circumventing EU law (cf. recitals 33, 34 and 35). Although partly sharing the same objectives, too, it shall not be dealt with.

1.5 Societal relevance

In his work '*A Theory of Justice*', first published in 1971, John Rawls stated that '[a] *theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust*.'[37] Thirty years later, in 2001, he published the book '*Justice as Fairness: A Restatement*'. With this he fulfilled his own confession by rectifying shortcomings in his

[34] Keith N Hylton, 'Law and economics versus economic analysis of law' (2019) 48 Eur J Law Econ, p. 77,

[35] Cf. Fernando de Man and Tiiu Albin, 'Contradicting Views of Exit Taxation under OECD MC and TFEU: Are Exit Taxes Still Allowed in Europe?', Intertax 2011, Volume 39, Issue 12, p. 613 (622); cf. Decision of the Supreme Court of Appeal of South Africa in the case C:SARS v. Tradehold Limited, 8 May 2012, regarding the tax treatment of capital gains arising from a deemed disposal of shares under the Luxembourg-South Africa Tax Treaty, commented by Markus Seiler, 'Exit Taxation Arising from a Deemed Disposal of Shares', in: Bulletin for International Taxation, November 2013, p. 580 ff.

[36] Cf. for approaches in that regard: Johanna Hey, 'Taxation of business in the EU: Special problems of crossborder losses and exit taxation', in: Christiana HJI Panayi et al (Eds), Research Handbook on European Union Taxation Law, chapter 10 sec. 3.3 and 3.4 (with further references).

[37] John Rawls, 'A Theory of Justice' (1971), Cambridge, Mass., chapter 1, sec. 1, p. 3.

previous work that might have obscured his '*main ideas of justice as fairness*.'[38]

The value of this thesis lies in its attempt to identify the inconsistencies of the deferred payment method, especially its five year-period for the payment of instalments, and the economic consequences coming along with it. It reflects on the interests of both preventing tax avoidance and a balanced allocation of taxing rights. It aspires to contribute to a revision of the current mechanism and a potential rectification of present inconsistencies.

2 The CJEU and the deferred payment method

2.1 Aims of the Anti-Tax Avoidance Directive

Recital 3 of the ATAD states that it is intended '*to strengthen the average level of protection against aggressive tax planning in the internal market*.' Moreover, due to its nature as an EU directive, it is also intended to contribute to the development of a level playing field within the European Union.[39]

In its recommendation from December 2012, the European Commission stated that a '*key characteristic'* of tax planning practices addressed by that recommendation is the reduction of '*tax liability through strictly legal arrangements which however contradict the intent of the law'*.[40] In literature this definition has been adjusted to '*the misuse of provisions or rules either of the domestic or international systems to achieve improper benefits*'.[41] For the purposes of this thesis the protection against tax base erosion shall be applied and understood as one concept covering these characteristics, which are often referred to under the terms 'aggressive tax planning', 'abusive practices', 'tax avoidance' or 'tax abuse.[42] The limit being criminal tax practices, here referred to as 'evasion' or 'fraud'.

Combating tax avoidance regularly causes, directly or indirectly, intentionally or accidently, financial disadvantages for the taxpayer. These side-effects may vary in nature and scope depending on the jurisdiction.[43] Therefore an analysis of the underlaying economic activities is required. They are often linked to an exhaustive number of criteria indicating a possible abuse.[44] Widely known from the Courts judgement in *Cadburry-Schweppes* is the '*wholly artificial arrangement*' criterion connected with an economic

[38] John Rawls, 'Justice as Fairness - A Restatement' (2001), edited by Erin Kelly, Cambridge, Mass., Preface.
[39] Rita de la Feria, 'Editorial: Harmonizing Anti-Tax Avoidance Rules', EC Tax Review 2017, Issue 3, p. 110.
[40] EU Commission, Recommendation of 6 December 2012 on aggressive tax planning, (2012/772/EU), recital (1).
[41] Gianluigi Bizioli, 'Taking EU Fundamental Freedoms seriously: Does the Anti-Tax Avoidance Directive Take Precedence over the Single Market?' EC Tax Review 2017 Issue 3, p. 167 (170).
[42] Cécile Brokelind, 'The Anti-Tax Avoidance Directive under Scrutiny: A Matter of Competence?' (2019), International Taxation in a Changing Landscape - Liber Amicorum in Honour of Bertil Wiman, chapter 4 p. 45 (55).
[43] Eduardo Traversa and Pierre M. Sabbadini, 'Anti-avoidance Measures and State Aid in a Post-BEPS Context: An Attempt at Reconciliation', in: Isabelle Richelle et al (Eds.), State Aid Law and Business Taxation, MPI Studies Volume 6, Berlin Springer 2016, p. 85 (95).
[44] Ibid.

substance test.[45] Other examples listed by *Traversa* and *Sabbadini* are '*valid commercial reasons*' or '*arm's length value*'. They follow that these concepts require '*a higher degree of scrutiny and a wider margin for discretion by tax authorities*'.[46] The Swedish Income Tax Act (*Inkomstskattelagen*) for example uses a test whether the underlying activity is motivated primarily on commercial grounds ('*huvudsakligen affärsmässig motiverad'*).[47] It also requires a consideration of all circumstances of the individual case.[48] Admittedly the rule was subject to the case *Lexel AB*.[49] Legislative proposals to the version applicable in that case show a discussion about the EU law-compatibility of the 75% threshold for that motivation, especially regarding the proportionality.[50]

2.2 The deferred payment method of Art. 5 para. 2 ATAD

The exit tax provision of Art. 5 ATAD is structured in seven paragraphs. According to Art. 5 para. 1 ATAD, the enumerated transfers in lit. (a) to (d) shall '*be subject to a tax at an amount equ*al' to the difference between the market value and the value for tax purpose, which in most cases is represented by the book value.

Important to note is the wording of each letter which prerequisites that the respective member state loses its taxing right due to the transfer. This assumption is essential as unilateral or bilateral measures may provide otherwise.

Instead of an immediate payment, Art. 5 para. 2 ATAD provides the taxpayer with the right to a deferral '*by paying it in instalments over five years (...)*'. The subsequently listed situations are identical to those of Art. 5 para. 1 ATAD. Worth noting here that the last sentence of recital 10 of the ATAD uses the formulation '*instalments over a* ***certain number*** *of years*' [emphasis added].

Art. 5 para. 3 sentence 1 ATAD states that interests may be charged in any case. Art. 5 para. 3 sentence 2 ATAD provides for the Member States' right to require a guarantee as condition for the deferral. To enact that requirement the respective member state has the obligation to show '*a demonstrable and actual risk of non-recovery* (…)'.

2.3 The CJEU's doctrine on liquidity disadvantages and deferral

2.3.1 Fundamental freedoms and cross-border mobility

The Court's case law on the fundamental freedoms and direct taxation deals with two basic rights aimed at eliminating distortions of the internal market.

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[45] CJEU, Judgement, 12 September 2006, Case C-196/04, Cadburry-Schweppes, EU:C:2006:544, paras. 51 and 55.
[46] Supra note 43.
[47] Inkomstskattelagen (1999:1229), 24 kap. 10e §.
[48] Regeringens proposition 2008/09:65, p. 48 (*'med beaktande av omständigheterna i det enskilda fallet'*).
[49] CJEU, Judgement, 20 January 2021, Case C-484/19, Lexel AB, EU:C:2021:34.
[50] Regeringens proposition 2008/09:65, p. 67 ('*kravet på att företagna transaktioner inom koncerner ska vara affärsmässiga till 75 procent är oproportionerligt högt'*) and p. 70 ('*75% står i uppenbart och direkt strid med de EG-rättsliga kraven*').

These are market access and market equality.[51] When dealing with the fundamental freedoms and direct taxation the Court is predominantly using a non-discriminatory approach in order to assess the compatibility of potentially restrictive measures.[52] The approach prohibits discrimination based on nationality or origin and characterizes the Court's case law especially on exit taxation. It stems from the Court's lead role of harmonising the Member State's tax laws through negative integration.[53] Crucial element of the discriminatory approach is the determination of an object of comparison (*tertium comparationis)*.[54] It is a necessary step for the rule of reason test. The Court, according to that test, consistently acknowledged that a measure, which is liable to hinder the freedom of establishment or make it less attractive, is allowed only if it pursues a legitimate objective in the public interest, is appropriate to ensure the attainment of the objective and does not go beyond what is necessary to attain it. The first case to deal with cross-border corporate mobility in a broad sense was *Commission v. France*[55], often referred to as '*Avoir Fiscal'*, the French national provision under scrutiny. Here the Court acknowledged that the fundamental freedoms do affect the member state's direct tax systems.[56] The first case than to deal with exit taxation and avoidance was *Daily Mail.*[57] It concerned the taxation of capital gains in a cross-border situation. It exemplifies the basic mechanism of tax planning through the application of a non-existing exit tax regime. However, the Court did not directly address the underlying tax issues but instead focussed on company law.[58] As such it is often discussed in line with other cases on company law such as *Centros*[59], *Metallgesellschaft*[60], *X and Y*[61], dealing with the issues coming along with the real seat principle and incorporation principle. As the interests and objectives behind these

[51] Ben Terra and Peter J. Wattel, European Tax Law, Volume 1 Studentedition 2018, ch. 3.2.1.1.

[52] Gianluigi Bizioli, 'Taking EU Fundamental Freedoms seriously: Does the Anti-Tax Avoidance Directive Take Precedence over the Single Market?', EC Tax Review 2017 Vol. 3, p. 167 (168 and 169); Ivan Lazarov, 'The Relevance of the Fundamental Freedoms for Direct Taxation', in Lang et al (Eds), Introduction to European Tax Law on Direct Taxation, Vienna Linde 2020, chapter 3 mn. 221.

[53] Rita de la Feria/Clemens Fuest, 'The economic effects of EU tax jurisprudence', European Law Review 2016, 41 (1), p. 44 (53); Ben Terra and Peter J. Wattel, European Tax Law, Volume 1 Studentedition 2018, ch. 2.2.2.1.

[54] Gianluigi Bizioli, 'Taking EU Fundamental Freedoms seriously: Does the Anti-Tax Avoidance Directive Take Precedence over the Single Market?', EC Tax Review 2017 Vol. 3, p. 167 (168).

[55] CJEU, Judgement, 28 January 1986, Case C-270/83, Commission v. France, EU:C:1986:37.

[56] Ieva Freija-Peccati, 'Value of Precedents in EU Direct Tax Law', in: Werner Haslehner et al (Eds), 'Time and Tax', EUCOTAX Series Vol. 62, chapter 6, p. 77/78; Werner Haslehner, Avoir Fiscale and its legacy after thirty years of direct tax jurisprudence of the Court of Justice, Intertax 2016 Vol 44, p. 374 et seq.

[57] CJEU, Judgement, 27 September 1988, Case C-81/87, Daily Mail, EU:C:1988:456.

[58] Johanna Hey, 'Taxation of business in the EU: Special problems of crossborder losses and exit taxation', in: Christiana HJI Panayi et al (Eds) Research Handbook on European Union Taxation Law, chapter 10 sec. 3.2.1.1.

[59] CJEU, Judgement, 9 March 1999, Case C-212/97, Centros, EU:C:1999:126.

[60] CJEU, Judgement, 8 March 2001, Joined Cases C-397/98 and C-410/98, Metallgesellschaft and Others, EU:C:2001:134.

[61] CJEU, Judgement, 18 November 1999, Case C-200/98, X AB and Y AB, EU:C:1999:566.

principles differ substantially from those of taxing rights on (hidden) capital gains, their influence on tax law is questionable.[62] But, the Court established that a cash-flow disadvantage, even if it is of limited scope or minor importance, would constitute a restriction.[63]

2.3.2 Individual exit taxation

The first cases concerned with exit taxes levied on the movement of individuals from one member state to another were rendered on 11 March 2004 in *de Lasteyrie du Saillant*[64] and on 7 September 2006 in *N v. Inspecteur*.[65] Although concerned with exit taxation of individuals they are of importance here as later cases on corporate exit taxation built-up on them.

In the case *de Lasteyrie du Saillant* the Court had to deal with a French exit tax provision on hidden reserves of participations in French corporations. Tax subject in that case was Mr. Lasteyrie du Saillant, a French citizen who intended to move to from France to Belgium and who held securities in a French company.

At the core of the case was the question of whether a member state may tax hidden reserves in other (substitute) situations than actual realisation by disposal or a *de jure* equivalent event when an asset (here: participation in a corporation) is transferred to another Member State with the consequence that the departure state loses its respective taxing right. The Court did, however, not answer that question.

Instead, it pursued analysing the French legislation which, although not preventing an individual from moving its tax residence, clearly had a restricting, '*dissuasive effect*' on them.[66] A taxpayer wishing to transfer his tax residence to another Member State is confronted with a disadvantageous treatment compared to a person who maintains its residence in France.[67] He must pay a tax on income which he simply does not generate.[68]

Worth to note at that point is that contrary to its decisions in *Centros* and *X and Y*, the Court considered the mere obligation to set up guarantees constitutes a restrictive effect.[69] It keeps the taxpayer from using these assets for other business purposes.[70]

With regard to the justification of such a restriction the Court dealt first with the aim of preventing tax avoidance. It rejected it in this case as the French provision under scrutiny was not specifically designed to tackle tax

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[62] Cf. Johanna Hey, 'Taxation of business in the EU: Special problems of crossborder losses and exit taxation', in: Christiana HJI Panayi et al (Eds) Research Handbook on European Union Taxation Law, chapter 10 sec. 3.2.1.1 (with further references

[63] CJEU, Judgement, 17 September 2015, Case C-589/13, Familienstiftung Eisenstadt, EU:C:2015:612, para. 51 (with further references).

[64] CJEU, Judgement, 11 March 2004, Case C-9/02, Hughes de Lasteyrie du Saillant, EU:C:2004:138.

[65] CJEU, Judgement, 7 September 2006, Case C-470/04, N. v Inspecteur, EU:C:2006:525.

[66] CJEU, Judgement, 11 March 2004, Case C-9/02, Hughes de Lasteyrie du Saillant, EU:C:2004:138, para. 45.

[67] Ibid, para. 46.

[68] Ibid, para. 45.

[69] Ibid, para. 47.

[70] Ibid, para. 47.

avoidance.[71] The Court stated that '[*t]ax avoidance and evasion cannot be inferred generally from the fact that the tax residence of a physical person has been transferred to another Member State and cannot justify a fiscal measure which compromises the exercise of the fundamental Freedom[s]*'.[72] It further addressed that it was especially the strict combination of conditions (declaration within prescribed period, designation of a representative, set up of guarantees) for the suspension of the tax payment which raised concerns.[73] The diminution of tax receipts as such cannot be regarded as being of overriding interest or importance to justify such a level of restriction on the right of establishment.[74] The same standard applies for the coherence of the tax system as ground for justification and was thus rejected, too.[75]

The Case *N. v. Inspecteur*[76] is linked to the proceedings in the Case *de Lasteyrie du Saillant*. It concerned a Dutch citizen who provided a guarantee as a security for exit taxes due in the Netherlands. The taxes were levied because of his transfer of residence to the United Kingdom. The security consisted of one of his three sole shareholdings in Dutch corporations. After the Court rendered its judgement in *de Lasteyrie du Saillant* the security had been released. The Court had to deal with the question whether this release would retrospectively annul the caused restriction.

Beside that the case brought up the issue whether the obligation to file a tax return when migrating would constitute another hindrance. While the Court rejected the filing obligation as not being disproportionate with regard to the legitimate objective of safeguarding the allocation of taxing powers[77], it considered the necessity to provide a guarantee as being too restrictive.[78] The possibilities provided for via administrative cooperation within the EU would constitute a less restrictive instrument.[79]

In her opinion from 30 March 2006 Advocate General (AG) Kokott held, in accordance with the judgement in *de Lasteyrie du Saillant*, that '*it would be disproportionate if the tax were assessed on emigration solely in order to counter the risk of tax evasion*.'[80] This would imply a general presumption of tax evasion or fraud when a physical person is transferring his or her tax residence to another Member State.

The line established in these two cases is considered as a quite restrictive proportionality test. The Court established for the first time that an immediate

[71] Ibid, para. 50.
[72] Ibid, para. 51.
[73] Ibid, para. 56.
[74] Ibid, para. 60.
[75] Ibid, paras. 61, 67.
[76] CJEU, Judgement, 7 September 2006, Case C-470/04, N. v Inspecteur, EU:C:2006:525.
[77] Ibid, para. 49.
[78] Ibid, para. 51.
[79] Ibid, para. 52.
[80] CJEU, Opinion AG Kokott, 30 March 2006, Case C-470/04, N. v. Inspecteur, EU:C:2006:217, para. 117.

payment of exit taxes is not compatible with the fundamental freedoms.[81] Both cases did not pass the rule of reason test in that regard.

2.3.3 Case C-371/10 - National Grid Indus

The case *National Grid Indus*[82] concerned a company incorporated under Netherlands law which intended to transfer its place of effective management outside the Netherlands territory. In its judgement of 29 November 2011, the Court held that the immediate taxation of unrealized gains on migration violates the freedom of establishment. The levied tax placed the company at a '*disadvantage in terms of cash flow compared to a similar company retaining its place of effective management.*'[83]

The Court elaborated, with reference to the case law on group taxation[84], on the basic principle that a member state is entitled, '*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', 'to charge tax on those gains at the time when the taxpayer leaves the country.*'[85] Consequently, the Court rejected the argument put forward by National Grid Indus BV that the tax is charged on unrealized capital gains and not on capital gains as the Member States would tax the economic value generated on their territory although it has not been realized yet.[86]

By that the Court, in general, accepted the member states' right to tax based on the principle of fiscal territoriality and balanced allocation of taxing rights as a grounds for justification.

It then turned to the question if the measure at hand (immediate taxation) would go beyond what is necessary to attain the objective(s) pursued.[87] The Court held that it would be appropriate and less harmful if the national legislation would offer the taxpayer the choice between immediate taxation and deferral. An immediate taxation would create '*a disadvantage for that company in terms of cash flow but frees it from subsequent administrative burdens*' while a deferred payment would '*necessarily*' involve '*an administrative burden for the company in connection with tracing the transferred assets*.'[88] If a company would consider that administrative burdens coming along with a deferral as too excessive, it could opt for an immediate payment.[89] The Court did not specify any period for the deferral

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[81] Karoline Spies, 'Tax Deferral and Fundamental Freedoms: Exit Tax, Foreign Losses, and Withholding Tax', in: Werner Haslehner et al (Eds), Time and Tax, EUCOTAX Series Vol. 62, chapter 8, p. 151.
[82] CJEU, Judgement, 29 November 2011, Case C-371/10, National Grid Indus, EU:C:2011:785.
[83] Ibid, para. 37.
[84] CJEU, Judgement, 13 December 2005, Case C-446/03, Marks & Spencer, EU:C:2005:763, para. 45; 18 July 2007, Case C-231/05, Oy AA, EU:C:2007:439, para. 51; 15 May 2008, Case C-414/06 Lidl Belgium, EU:C:2018:257, para. 31.
[85] Supra note 82, para. 46.
[86] Ibid, para. 49.
[87] Ibid, para. 50.
[88] Ibid, para. 73.
[89] Ibid.

nor any gauge for the administrative burden.[90] The Court also stated that a combination with interest would be possible.[91]

Moreover, it considered the risk of non-recovery which would '*increase with the passage of time*' and thus permitted the member states to require a bank guarantee.[92]

Lastly, it rejected the argument of a too excessive burden for the member states' tax authorities to trace the transferred assets for which a deferral has been granted.[93]

With reference to the argument put forward by the German and Italian governments, which submitted that the legislation would be justified by the need to maintain the coherence of the domestic tax system, the Court stated, in line with the AG, that this ground would coincide with the balanced allocation of the power to tax.[94] However, the Court stressed that '*only the determination of the amount of tax at the time of the transfer of a company's place of effective management, and not the immediate recovery of the tax, should be regarded as not going beyond what is necessary (…)*.'[95] A '*deferred recovery of the tax would not call [that] into question*.'[96]

With regard to the risk of tax avoidance the Court stated, that '*the mere fact that a company transfers its place of management to another member state cannot set up a general presumption of tax evasion*.'[97]

2.3.4 Infringement procedures against Portugal and Denmark

Following the decisions in *de Lasteyrie* and *N. v. Inspecteur* the Commission initiated infringement procedures against several member states. While some replied by changing their respective exit tax legislation[98] some other went further on to the Court of Justice.

In the cases *Commission v. Portugal*[99] and *Commission v. Denmark*[100] the Court held that a tax on the transfer of assets between EU Member States within the same legal entity would violate the freedom of establishment.

The case *Commission v. Portugal* concerned provisions of the Portuguese Corporation Tax Code. They were, amongst others, applicable to the transfer

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[90] Karoline Spies, 'Tax Deferral and Fundamental Freedoms: Exit Tax, Foreign Losses, and Withholding Tax', in: Werner Haslehner et al (Eds), Time and Tax, EUCOTAX Series Vol. 62, chapter 8, p. 152.
[91] Supra note 82, para. 73.
[92] Ibid, para. 74.
[93] Ibid, paras. 75 and 76.
[94] Ibid, para. 79, 81.
[95] Ibid, para. 81.
[96] Ibid, para. 82.
[97] Ibid, para. 83, 84.
[98] EU Com, IP/08/1362, 18 September 2008, Direct Taxation: Commission requests Sweden to change restrictive exit tax provisions for companies; EU Com, IP/10/299, 18 March 2010, Direct Taxation: The European Commission requests Belgium, Denmark and the Netherlands to change restrictive exit tax provisions for companies and closes a similar case against Sweden.
[99] CJEU, Judgement, 6 September 2012, Case C-38/10, Commission v. Portugal, EU:C:2012:521.
[100] CJEU, Judgement, 18 July 2013, Case C-261/11, Commission v. Denmark, EU:C:2013:480.

of the registered office and the effective management of a Portuguese company to another member state. As a consequence, the provisions provided for the taxation of all unrealised capital gains except those resulting from purely national transactions. Moreover, the shareholders of such a company which transferred its registered office and its effective management outside Portuguese territory were also subject to a tax on the difference between net asset value and acquiring costs of the shares.

With reference to the AG's opinion in that case, the Court held that the freedom of establishment (Art. 49 TFEU) applies irrespectively of whether the transfer of activities of the company consists in the transfer of its office and effective management or in the transfer of assets between permanent establishments (PE).

The rules under scrutiny did not provide the taxpayer with the option to choose between the immediate payment and a deferred payment. Hence, the Portuguese measure failed the necessity test.

In the Case *Commission v. Denmark*, the Court had to deal with the relationship between realized and unrealized gains. It concerned the reallocation of assets to a PE in another Member State. In its judgement, delivered on 18 July 2013, it held that the Danish exit tax regime infringed the freedom of establishment guaranteed by Art. 49 TFEU. Finding themselves in a comparable situation, a company transferring its assets outside Danish territory would be taxed on unrealized gains while a company transferring assets within Danish territory would not be taxed on respective assets. Under para. 37 it stated that a member state has the right to charge tax on an event other than realization.[101] One might interpret this as a stricter or wider approach.[102] In any case it shows that the court accepts the taxation of unrealized gains, although it remains a restriction of the fundamental freedoms. The court later confirmed this view in the Case C-164/12 *DMC* when referring to the judgement in *Commission v. Denmark*.[103]

Commenting on this judgement, *Michael Tell* stated that the question of proportionality of a deferred payment in annual instalments for exit taxes should be evaluated on three aspects: the cash-flow problems for the taxpayer, the Member State's need to ensure actual taxation of the assets and whether or not instalments are less restrictive on than immediate payment.[104] He argues, that annual instalments appear to be compatible as they ensure actual taxation of assets, are less restrictive and would only carry a minimal

[101] Ibid, para. 37 (Document only available in French and Danish; *'Medlemsstaterne – som har ret til at beskatte de kapitalgevinster, der er opstået, mens de omhandlede aktiver befandt sig på deres område – er således berettigede til at foreskrive et andet udøsende kriterium for denne beskatning end den faktiske afståelse for at sikre beskatningen af aktiver, som ikke er bestemt til at blive realiseret og som er mindre indgribende i etableringsfriheden end beskatning på tidspunktet for overførslen*.').
[102] Giulia Letizia, 'The Recent Restrictive ECJ Approach to Exit Tax and the ATAD Implementation', in: EC Tax Review 2020, Vol. 1, p. 33 (35).
[103] CJEU, Judgement, 23 January 2014, Case C-164/12, DMC Beteiligungsgesellschaft v. Finanzamt Hamburg-Mitte, EU:C:2014:20, para. 53.
[104] Michael Tell, 'Exit Taxation within the European Union/European Economic Area – After Commission v. Denmark (C-261/11)', IBFD European Taxation, February/March 2014, p. 47 (50).

administrative burden.[105] Worth to note is the emphasize on '*minimal*'. In *National Grid Indus* the Court did not specify burden. It only put up the assumption that it would free the taxpayer from '*subsequent administrative burdens*' which would '*necessarily*' arise from '*tracing the transferred assets*.'[106]

For the purposes of exit taxation, Denmark extended its seven-year instalment period of depreciation tailored for intangibles to all types of assets.[107] The idea behind that approach is that the asset would generate a cash flow during its economic lifecycle which could pay off the deferred tax debt. A similar idea would underlie the respective UK tax provisions. The assumption that a cash flow would actually be generated remains, however, doubtful especially as every asset transferred is different.[108] *Michael Tell* concluded his observations on depreciation schemes as instrument for determining the period for deferral with a view on the – at that time pending – case *DMC*. He was concerned that without a proper balancing, the cash problems would not be sufficiently taken care of.[109]

2.3.5 Case C-164/12 – DMC

On 26 January 2012 the Financial Court Hamburg (*Finanzgericht*) sent a request for a preliminary ruling to the CJEU concerning the EU law compatibility of provisions of the German Reorganisation Tax Act (GRTA), applicable in the version of 11 October 1995. The dispute at hand arose between the local tax authority and the DMC Design for Media and Communication GmbH & Co. KG (DMC KG). It concerned a reorganisation of the DMC KG, a German limited partnership. A necessary capital increase was carried out via a non-cash-contribution. Actual 'liquid' assets weren't involved at any time. The transfer of shares between its Limited and General Partners, established under Austrian law, resulted in the DMC KG's dissolution. As a consequence, the German PE ceased to exist. Under the GRTA 1995 this was considered as a deemed realisation of its assets. The remaining Austrian General Partner, the DMC GmbH, however, assessed the contributed business assets of the dissolved DMC KG at their book value. The local tax authorities did not accept the kept book value. Instead, they assessed them with their going concern-value (*Teilwert*)[110] according to provisions of the GRTA 1995. The applicable provisions from 1995 are quite similar to the design from 2016 of Art. 5 ATAD and its deferred payment method. The third to sixth sentences of sec. 21 para. 2 GRTA 1995 provided as follows: '*In the cases (...), the income tax or corporation tax due in respect of a capital gain may be paid in annual instalments, each of at least one fifth of the tax due, on condition that the payment of the instalments is secured. No interest shall be charged where payment is deferred. Any disposal of shares during the deferral period shall put an immediate end to that arrangement*.'

[105] Ibid.
[106] Supra note 83, para. 73.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] Cf. sec. 6 para. 1 German Income Tax Act (*Einkommensteuergesetz*); the going concern-value is to be distinguished from the fair market value.

Due to this similarity a deeper look into the legislative history of the GRTA is of interest. On 8 October 2001 the Societas Europaea (SE) was introduced through Council Regulation EC/2157/2001 and a supplementing Directive 2001/86/EC. Roughly four years later the Directive 2005/19/EC amending the Merger Directive 90/434/EEC was adopted. Art. 11 para. 1 lit a) of the amended directive provided that if one of the enumerated operations was '*not carried out for valid commercial reasons*' it '*may constitute the presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its objectives*.' In 2006 the German legislator drafted the Law on accompanying tax measures with a view to the introduction of the European Company (SE) and amending further tax provisions.[111] Art. 6 of that draft provided for changes of the GRTA 1995. The provision under scrutiny in the case *DMC (Sec. 21 GRTA 1995)* would now be dealt with by sec. 22 GRTA 2006.[112] It changed its previous systematic of taxing the accrued hidden reserves to a system containing a lock-up-period. During this period the taxpayer is blocked from selling the transferred assets. An infringement would cause the immediate taxation of their amount at the moment of the initial transfer. The period is seven years. The amount of hidden reserves to be taxed immediately decreases linear by one seventh per year. The reason for the introduction of this lock-up-mechanism is the tax avoidance-presumption of Art. 11 of the amended directive 90/434/EEC. The presumption would decline with an increasing passage of time.[113] The taxpayer is obliged to demonstrate each year to whom the respective transferred shares belong. The new system is intended to simplify the tax system and to avoid systematic inconsistencies.[114]

In its request from January 2012, the *Finanzgericht* Hamburg referred to the Court's judgement in *National Grid Indus.*[115] There the Court held that both the interests of the emigrating and of the immigrating state would be sufficiently dealt with, if the first mentioned state would give the taxpayer the right to defer the payment. But the *Finanzgericht* Hamburg was questioning whether the staggered payment in five parts provided for in the GRTA 1995 would be sufficient. Despite the staggered payment it would still be a taxation of unrealized accrued gains. The caused liquidity problem would not be dissolved but merely mitigated.[116] According to the Finance Court Hamburg

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[111] BT-Drucks. 16/2710, 25. September 2006, Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes über steuerliche Begleitmaßnahmen zur Einführung der Europäische Gesellschaft und zur Änderung weiterer steuerlicher Vorschriften (SEStEG).

[112] Ibid, p. 46 *('§ 22 UmwStG entspricht dem bisherigen § 21 UmwStG*').

[113] Ibid, p. 46 ('*Da die Vermutung eines Missbrauchs im Sinne des Art. 11 Abs. 1 Buchstabe a FusionsRL mit zunehmendem Abstand zum Einbringungszeitpunkt abnimmt, werden die nachträglich zu versteuernden stillen Reserven jährlich linear um ein Siebtel abgebaut*.').

[114] Ibid, p. 27 ('*Das neue Konzept stellt einen wesentlichen Beitrag zur Vereinfachung des Steuerrechts dar und vermeidet systematische Unstimmigkeiten des bisherigen Systems der einbringungsgeborenen Anteile*.').

[115] Finanzgericht Hamburg, Vorlagebeschluss, 26. Januar 2012, 2 K 224/10, IStR 2012, p. 305 (308).

[116] Ibid, p. 309 ('*Trotz der mit dieser Regelung ermöglichten ratierlichen Stundung bleibt es aber bei der Besteuerung nicht realisierter Wertzuwächse. Das hierdurch ausgelöste Liquiditätsproblem wird nicht beseitigt, sondern lediglich abgemildert. Zu bezweifeln ist daher, ob der Zahlungsaufschub von nur fünf Jahren ausreichend ist, um den Eingriff in die Niederlassungsfreiheit noch als verhältnismäßig ansehen zu können.*').

it is doubtful if five years would be sufficient to be considered as proportionate to justify a restriction on the freedom of establishment.

In its judgement, delivered on 23 January 2014[117], the CJEU held, first, that the (Austrian) investor holding the shares in a German Limited Partnership which is about to be dissolved, would be placed at a disadvantage in terms of cashflow compared to a (German) investor holding such shares who remains liable to tax in that respective jurisdiction.[118]

As regards the justification, the Court accepted the balanced allocation of the power to impose taxes as a valid ground, as the German legislation at issue pursues this objective.[119] The member state in which the interests in a limited partnership were originated and the value accrued does not have to relinquish its right to tax that capital gain when the interests are contributed to a company established in another member state.[120] With reference to the case *N. v. Inspecteur* it held that '*in the context of the transfer of a company's place of effective management from one Member State to another Member State, that the former State is - in accordance with the principle of fiscal territoriality, connected with a temporal component, namely the fact that the taxable person is resident for tax purposes within national territory during the period in which the capital gains arise – entitled to tax those gains at the time the tax payer leaves the country*.'[121] Further referencing the cases *Marks & Spencer*[122], *Oy AA*[123], *National Grid Indus*[124], the Court stated that *'[s]uch a measure is intended to avoid 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 balanced allocation of powers to impose taxes between the Member States*.'[125]

Turning to the proportionality the Court first confirmed its view taken in previous judgements that offering the taxpayer a choice between immediate payment and deferral would be sufficient.[126] It then repeated that, considering the increasing risk of non-recovery with the passage of time, a period of five years would constitute a satisfactory and proportionate measure. Hereby, the Court named a specific period, which it would accept for the objective of preserving the balanced allocation of taxing rights between the member states.[127] Moreover, the wording of sec. 21 para. 2 GRTA 1995 clearly said that the payment in annual instalments shall consist of '*at least one fifth of the tax due*.' From the word '*at least*' follows that this should be the maximum amount. Higher instalment rates, e.g., one third, would be admissible.

[117] C-164/12, DMC Beteiligungsgesellschaft v. Finanzamt Hamburg-Mitte, EU:C:2014:20.
[118] Ibid, para. 40.
[119] Ibid, para. 45.
[120] Ibid, para. 48.
[121] Ibid, para. 49.
[122] Supra note 84, para. 46.
[123] Supra note 84, para. 54.
[124] Supra note 82, para. 46.
[125] Ibid, para. 49.
[126] Ibid, para. 61.
[127] Ibid, paras. 62 and 64.

The Court also stressed that this would be possible without paying interest.[128] Lastly, the Court accepted the requirement to provide a bank guarantee, as the member state may take account of the risk of non-recovery, but only if a prior assessment of that risk would take place.[129]

In combination with the brief excursus into the German legislative history the randomness of the five years accepted by the Court in *DMC* becomes evident. While Germany updated its GRTA from a method of staggered payments over a period of five years to a new system with seven years and a real anti-abuse mechanism, the system accepted uses the old version from 1995. If the underlying reorganisation would have been carried out a few years later, the Court would probably have had to decide on seven years.[130] It just happened to be five years.

2.3.6 Case C-591/13 – Commission v. Germany

The case *Commission v. Germany*[131] is of importance here as it sensitizes for the consequences of an accurate determination of the object of comparison. It concerned sec. 6b of the German Income Tax Act (*Einkommensteuergesetz* (GITA)). The provision allows the taxpayer to carry over hidden reserves in case of a disposal of certain fixed assets if the profits are reinvested in the acquisition or production of new fixed assets. The aim of that provision is to '*improve the cash flow of undertakings and to facilitate restructuring operations by encouraging reinvestments in the undertaking itself. Such reinvestments are necessary to enable previous levels of production to be achieved, by coping with the wear and tear of production assets or with technical progress. Opting out of the immediate taxation of the capital gains realised on the sale of the replaced asset allows the undertaking concerned to adapt, in economic terms, to the structural changes linked to production techniques and to distribution, or to changes of a regional nature. The reinvestment of those capital gains will facilitate the major restructuring of undertakings and also avoid the taxation of the particularly high capital gains which are realised on the sale of the asset concerned.*'[132]

The Court stated that this technique is '*liable to give rise to a cash flow disadvantage*' for those who intend to invest such capital (gains) in replacement assets outside Germany's territory and therefore constitutes a restriction on Art. 49 TFEU.[133]

The difference to the other cases described hitherto is that it deals with an actual realisation of capital gains. Important to note from para. 71 of the judgement is that the Court found the fact whether unrealised or realised capital gains were concerned, irrelevant. The Court instead considered as relevant the fact that a purely domestic situation wouldn't result in immediate taxation of those gains while a cross-border situation would.[134] It then referred

[128] Ibid, para. 63.
[129] Ibid, paras. 65, 66 and 67.
[130] Admittedly, under the new system the transaction as such would not have been subject to any taxation at all.
[131] CJEU, Judgement, 16 April 2015, Case C-591/13, Commission v. Germany, EU:C:2015:230.
[132] Ibid, para. 40.
[133] Ibid, paras. 58 and 61.
[134] Ibid, para. 71.

to its decisions in *National Grid Indus* and *DMC* and recalled that the taxation of unrealised capital gains which arose on a member state's territory is a proportionate measure to safeguard the right of taxation.[135] But, it drew the line at the requirement of immediate recovery of the tax due in respect of such unrealised capital gains. Such a measure has to be considered as disproportionate if it does not give the taxpayer '*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*.'[136]

At first sight the situations in *DMC* and *Commission v. Germany* were different. It concerned unrealised gains on the one hand and realised gains on the other hand. However, the *tertium comparationis* applied by the Court is the same. It based its assessment on the vertical comparison of how the MS treats the purely domestic and the cross-border situation. But the comparison is crooked. In *DMC* the Court made this comparison already between the restriction and the justification. In *Commission v. Germany* it made the comparison only within the proportionality analysis.

2.3.7 Case C-657/13 – Verder LabTec

On 5 December 2013, the *Finanzgericht* Düsseldorf asked the CJEU if a domestic regime which provided, upon transfer of an asset from a domestic to a foreign PE, for a disclosure of unrealized capital gains and the option to spread the respective profit in equal proportions of five or ten financial years, would infringe Art. 49 TFEU.[137] The provision would trigger an immediate taxation of the unrealized capital gains at the moment of the transfer of the assets. According to the CJEU's case law this would be disproportionate. This finding would not be changed by reasons of equity according to the applicable German administrative guidelines which provided for a deferral of the payment of a period up to ten years.[138]

The applicant in the proceedings was Verder LabTec, a limited partnership established in Germany, which exclusively dealt with its own intellectual property (IP) rights. IP rights are defined as giving the creator an exclusive right over the use for a certain period of time.[139] IP rights are characterized by high mobility, usually licensed and create a constant cash-flow through royalty payments, hence are able to increase a company's liquidity.[140]

In May 2005, *Verder LabTec* transferred those rights to its PE located in the Netherlands. Following a tax audit in 2009, the German local tax authority, instead of levying an immediate taxation, applied a mechanism which neutralised the amount of the hidden reserves accrued by a nominal figure (compensatory item). This compensatory item was to be amortised with a profit increase on a straight-line basis over the remaining period of an asset's

[135] Ibid, paras. 62 to 67.
[136] Ibid, para. 67 (reference made to the cases *National Grid Indus*, paras. 73 and 85; *DMC*, para. 61).
[137] FG Düsseldorf, Vorlagebeschluss, 5. Dezember 2013, 8 K 3664/11 F.
[138] Ibid.
[139] Cécile Brokelind, 'Intellectual Property, Taxation and State Aid Law', in: Isabelle Richelle et al (Eds), State Aid Law and Business Taxation, MPI Studies Volume 6, Berlin, Springer 2016, p. 221 (223).
[140] Ibid, p. 224.

useful life or at the latest ten years after the withdrawal at issue, in that case the transfer. Legal basis for this determination was sec. 4 para. 1 sentence 2 GITA in connection with reasons of equity to be applied according to a circular from December 1999 issued by the German Federal Ministry of Finance.[141]

At this point, the draft legislation from 2006. mentioned under chapter 2.3.5 is, again, of relevance. Beside the changes in the GRTA it introduced a codification of an exit tax provision in the German Income and Corporate Tax Acts (GCITA), changing the legal basis that has been applied for the financial years concerned in *Verder LabTec*. The changes became necessary as the Federal Finance Court (*Bundesfinanzhof*) changed its respective jurisprudence. In 1969 the *Bundesfinanzhof* developed the theory of final withdrawal (*Theorie der finalen Entnahme*). This theory caused an immediate taxation of hidden reserves. The circular from December 1999 (often referred to as *Dezembererlass*) intended to mitigate these effects by reasons of equity.[142] Mn. 2.6.1 provided for a system of staggered payment through application of the compensatory item presented above. In two later judgements the *Bundesfinanzhof* deviated from its settled case law.[143] It substantiated the deviation from precedent with the ability-to-pay-principle and principle of taxation at the moment of realization.[144]

The initiated changes in the legislative process from 2006 were influenced by the Courts judgement in *de Lasteyrie du Saillant*. In its early stages no option for a deferral of any kind was intended. The first draft bill issued on 11 August 2006 stated that the immediate taxation juxtaposed to a deferral would lead to liquidity effects which would be neutralised during the asset's economic lifecycle.[145] This view apparently changed during the course of the procedure. In the end, Germany introduced a new provision offering taxpayers the option to create a neutralising position in their balance sheets leading effectively to the result of a deferred payment in instalments of five years.[146] But even this introduced neutralisation raised concerns as it would cause an additional

[141] Bundesministerium der Finanzen, 24. Dezember 1999, IV B 4 - S 1300 - 111/99.
[142] Ibid.
[143] FG Düsseldorf, Vorlagebeschluss, 5. Dezember 2013, 8 K 3664/11 F ('*Der BFH habe in zwei Urteilen (v. 17.7.2008, I R 77/06, BStbl. II 2009, 464, IStR 2008, 814; v. 28.10.2009, I R 99/08, BStBl. II 2011, 1019, IStR 2010, 98 m. Anm. Benecke) an seiner früheren Rechtsprechung, der zufolge die Überführung von Einzelwirtschaftsgütern aus einem inländischen Stammhaus in eine ausländische Betriebsstätte zu einer gewinnverwirklichenden Entnahme i.S. von § 4 Abs. 1 S. 2 EStG führte, wenn die ausländischen Betriebsstättengewinne aufgrund eines DBA von der Besteuerung im Inland freigestellt waren (Theorie der finalen Entnahme), nicht mehr festgehalten*.').
[144] Ibid ('*Ein schützenwertes Vertrauen in die überholte Rechtsprechung zur Theorie der finalen Entnahme gebe es nicht. Die neue Rechtsprechung des BFH sei vielmehr ein weiterer Schritt in Richtung des übergeordneten Grundsatzes einer Besteuerung nach der Leistungsfähigkeit und Ausflusses des Realisationsprinzips*.').
[145] BR-Drucks. 542/06, Entwurf eines Gesetzes über steuerliche Begleitmaßnahmen zur Einführung der Europäischen Gesellschaft und zur Änderung weiterer steuerlicher Vorschriften, p. 39 (‚*Die Sofortversteuerung führt im Vergleich zur Stundungslösung lediglich zu Liquiditätseffekten, die sich auf die Lebensdauer des Wirtschaftsgutes wieder ausgleichen*.').
[146] BT-Drucks. 16/3369, Bericht des Finanzausschusses vom 09.11.2006, p. 2.

burden on the companies.[147] More precise information about the additional burden were not given in the preparatory works.

Further interesting in the accessible documents about this legislative process is the reasoning for the neutralisation over a period of five years. It referrers back to the aforementioned administrative circular and the need for an EU-law compliant solution. The neutralising position should have been applied to every kind of assets irrespective of whether they are depreciable or not, tangible or intangible and how long their remaining useful lifetime actually is. The reduction of five years is based on a proposal of the *Bundesrat,* the upper house of the German parliamentary system*,* and was intended to simplify the administrative procedure.[148]

This mechanism hinders any consideration of economic factors like the useful lifecycle of an asset. In hindsight, based on the materials accessible, it appears that liquidity disadvantages were not seriously considered, and the five-year period established by reason of simplification was not intended to consider any economic circumstances.

Both the AG Jääskinen, in his Opinion of 26 February 2015, and the CJEU, in its judgement of 21 May 2015, after having established that a restriction was given in this case which might be justified by the balanced allocation of taxing powers between member states, referred to previous case law, especially *National Grid Indus* and *DMC*. Under paragraphs 70 to 73 AG Jääskinen raised the question of proportionality of the ten-year period for a staggered payment and recovery, provided for by reasons of equity in the German administrative guidelines. He first outlined that one possible option would be to set a period of recovery for each transferred asset individually, taking into account the (useful) economic lifecycle of it.[149] He argued against this option as it could entail considerable difficulties and inconveniences for both the taxpayer and the State. Referencing *National Grid Indus* he recalled that these difficulties were the reason for the Court to reject this option.[150] Yet, the AG did not specify the difficulties that could arise. Instead, he simply followed that setting a period of payment and recovery schematically would not infringe the principle of proportionality. As the rejection of the immediate recovery was based on the cash-flow disadvantages suffered by the taxable person, he stated that a ten-year period is sufficiently long to mitigate this problem.[151] He added that this period would have to be adapted concerning

[147] BT-Drucks. 16/3369, Bericht des Finanzausschusses vom 09.11.2006, p. 4 (‚*Namentlich die bei Entstrickungsfällen über den Ausgleichsposten vorgeschlagene Lösung sei unzureichend und führe zu Mehrbelastungen des Unternehmens*.).

[148] BT-Drucks. 16/3369, Bericht des Finanzausschusses vom 09.11.2006, p. 5 (‚*Der Ausgleichsposten wird in 5 Jahren mit jährlich einem Fünftel erfolgswirksam aufgelöst. Dies gilt sowohl für materielle wie auch für immaterielle Wirtschaftsgüter unabhängig davon, wie lange deren tatsächliche Nutzungsdauer noch ist. Die Verkürzung der Frist auf 5 Jahre folgt der Anregung des Bundesrates und dient der Verfahrensvereinfachung*.‘)

[149] CJEU, Opinion AG Jääskinen, 26 February 2015, Case C-657/13, Verder LabTec, EU:C:2015:132, para. 71.

[150] Ibid.

[151] Ibid, para. 72.

the assets useful life under consideration of the economic and legal realities of business life and corporate taxation.[152]

In essence, the Court followed the AG's opinion. It held that, if a recovery spread over five annual instalments was considered to be proportionate to attain the objective of a balanced allocation of taxing rights, the same must be true for a period of ten years. For the reasoning, the Court referred to paragraphs 72 and 73 of the AG's opinion.[153] The Court did not provide for further considerations.

2.4 Interim result: A random assembly

The preceding sections allow for the following interim conclusions. Firstly, the general pattern of pre-ATAD case law[154] repeats. It is clear from the case law that the Court accepts other events than the actual realisation as chargeable events triggering taxation.[155] Exit taxation on unrealised capital gains causes liquidity disadvantages. They are, *prima facie*[156], liable to restrict a cross-border movement. The *tertium comparationis*, which determination is a necessary component of the Court's non-discriminatory approach, is the treatment of those being subject to tax who are moving cross-border and those who remain in the respective country. The result is an objective comparability. The only ground for justification accepted in the given cases was the balanced allocation of taxing rights between the member states.[157]

For the proportionality analysis, the Court developed the pattern that an immediate payment of the tax is disproportionate if the member state does not offer an option to defer the payment. A deferral would be appropriate to attain the objective of a balanced allocation of taxing rights, not go beyond what is necessary and proportionate in a narrow sense (*strictu sensu*). When establishing this in *National Grid Indus*, the Court did not specify the deferral it demanded. It then happened to be in the case *DMC* where it accepted a deferral with payment in instalments over a period of five years (based on the GRTA 1995 and unrealised gains). In *Verder LabTec* it then, again, happened to be a dispute about five respectively ten years. The ten years accepted were stemming from administrative guidelines which are not *a priori* legally binding and that were initiated on grounds of equity. There, the ten years were set as a maximum period for the instalments. The regular case was intended to be the asset's remaining economic lifecycle. The later updated legislation,

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[152] Ibid.

[153] CJEU, Judgement, 21 May 2015, Case C-657/13, Verder LabTec, EU:C:2015:331, para. 52.

[154] Case law rendered until the adoption of the ATAD on 12 July 2016.

[155] CJEU, Opinion AG Jääskinen, 26 February 2015, Case C-657/13, Verder LabTec, EU:C:2015:132, para. 68.

[156] This thesis operates with a two-step approach for the determination of a possible restriction before turning to the justification analysis (cf. Ivan Lazarov, 'The Relevance of the Fundamental Freedoms for Direct Taxation', in Lang et al (Eds), Introduction to European Tax Law on Direct Taxation, Vienna, Linde 2016, chapter 3 mn. 233).

[157] Cf. Maria T S Roch, 'Exit Tax: A fair balance?', in: Heike Jochum et al (Eds), Practical Problems in European and International Tax Law – Essays in honour of Manfred Mössner, IBFD October 2016, chapter 27, p. 483 (485).

providing for five years as standard, did no longer had this intention but was created purely for reasons of simplification.

A case which could support the finding that the deferral simply happened to become one to be paid in instalments is *Trustees of the P Panayi Accumulation & Maintenance Settlements* (Panayi).[158] The fifth of the questions referred to the Court, concerning the proportionality analysis, asked about a legislation which made '*no provision for an option to defer the payment of tax or for payment in instalments*'.[159] One might assume that the referring First-tier Tribunal (Tax Chamber) used this differentiated wording on purpose to trigger a statement on the interpretation of the legal term '*deferral'*. It made the application to the CJEU on 3 December 2015, a couple of months after the judgements in *DMC* and *Verder LabTec* were delivered.[160] Unfortunately, in its judgement in the Panayi-case the Court did not comment on this.

Regardless of whether this was the case, it does (once again) raise the question of the randomness of the methodology chosen. In *National Grid Indus* the Court didn't specify the deferral. In Civil Law jurisdictions a deferral is, usually, defined as the postponement of the settlement date while the possibility to fulfil the obligation is maintained. The usage of the term deferral in English common law literature does not provide for a clear distinction.[161] The provision at hand in *DMC* happened to be one providing for both a deferral and payment in instalments.

Overall, both the time period as well as the fact that the deferred payment became such to be paid in instalments, instead of a 'pure' deferral, were coincidental.

The second conclusion is that the background to each situation is different and that the Court addressed its concerns on possible consequences in that regard on many occasions. The ATAD, however, does not address this.[162] The motives for a cross-border movement vary from an individual with significant shareholdings moving its tax residency, over a corporate reorganization, which aims itself may vary from increasing the profitability to a restructuring in order to be able to continue the business at all, up to tax avoidance migrations. It is often a combination of many motives leading to an exit taxation.[163] *National Grid Indus* for example concerned a case of transfer of management, not of assets. Art. 5 para. 1 and 2 ATAD provides for the same treatment of three different types of transfers. It does not take into account the differences between assets that are subject to wear and tear and those that are participations in businesses. The former have an economic lifecycle

[158] CJEU, Judgement, 14 September 2017, C-646/15, Trustees of the P Panayi Accumulation & Maintenance Settlements, EU:C:2017:682.
[159] Ibid, para. 21.
[160] Reference for a preliminary ruling from the First-tier Tribunal (tax chamber) (United Kindom), 3 December 2015, registered 22 January 2016.
[161] Cf., e.g., Kyle B Lamothe, 'Bill 5: The Cottage Property Tax Increase Deferral Act: A Case Study in the making of Useless Law', (2012) Vol. 35 Manitoba L. J., p. 205 (207).
[162] Laszlo Kovics, 'European Commission Policy on Exit Taxation', in: European Tax Studies 2009 Vol. 1, Hein Online, para. 2.1.
[163] Mark Anderson, 'Entity Exit: Right, Remedies and Bounded Rationality', (2016) Vol 17. Hous. Bus. & Tax L.J., p. 1.

determining their usability for business purposes and the latter are usually only subject to revaluation at the end of a business year.[164] It does not consider corporate structures and the way assets are held, especially if they, e.g., create a constant cash-flow or if it is possible to freely dispose of them. Contrary to that observation the Court, in 2016, in *Commission v Portugal* stated that there would be no need to distinguish between assets held by natural persons and those held by legal persons.[165]

The third interim conclusion builds the bridge to the embeddedness of the deferred payment method in the ATAD and its objectives. The design of the method is based on the case law presented.[166] Yet, in none of these cases did the Court accept the prevention of tax avoidance as a valid ground for justification. Admittedly, in some cases only because the member states haven't provided (any) supporting arguments and was therefore, in accordance with the CJEU's rules of procedure, rejected.

It is in the nature of the proportionality analysis that its execution changes in dependence of the respective chosen ground for justification. The domestic measure under scrutiny must be appropriate for ensuring the attainment of the objective that it pursues and that it does not go beyond what is necessary to attain it.[167] As part of the ATAD, Art. 5 pursues the objective of anti-tax avoidance. At the latest since the Court's decision in *Cadburry Schweppes*[168] the doctrine that a national measure restricting the fundamental freedoms may be justified if it tackles wholly artificial arrangements aimed at circumventing the respective domestic tax treatment, is established.[169] Naturally, the same tax measure can address different objectives.[170] This observation is supported by the case *SGI*[171]. Under para. 66 the Court stated that even if national legislation is not specifically targeted on tax avoidance it '*may nevertheless be regarded as justified by the objective of preventing tax avoidance, taken together with that of preserving the balanced allocation of the power to impose taxes (...)*.' Likewise, there are cases where, although different objectives pursued, the result would still be proportionality.

Subject to the analysis conducted by *de la Feria* and *Fuest* were Thin Capitalisation Rules, especially the Court's judgement in *Lankhorst-*

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[164] Richard K. Gordon, 'Depreciation, Amortization, and Depletion', in: Victor Thuronyi, Tax Law Design and Drafting, Vol. 2 IMF 1998, chapter 17 p. 1.
[165] CJEU, Judgement, 21 December 2016, Case C-503/14, Commission v. Portugal, EU:C:2016:979, para. 55.
[166] Karoline Spies, 'Tax Deferral and Fundamental Freedoms: Exit Tax, Foreign Losses, and Withholding Tax', in: Werner Haslehner et al (Eds), Time and Tax, EUCOTAX Series Vol. 62, chapter 8, p. 152.
[167] CJEU, Judgement, 14 September 2017, C-646/15, Trustees of the P Panayi Accumulation & Maintenance Settlements, EU:C:2017:682, para. 48 (with reference to CJEU, Judgement, 17 December 2015, Case C-388/14, Timac Agro Deutschland, EU:C:2915:829, paras. 26 and 29, and the case law cited).
[168] Supra note 45.
[169] Cf. Katja Cejie, 'Emigration Taxes – Several Questions, few answers: From Lasteyrie to National Grid and beyond', Intertax 2012, Volume 40, Issue 6/7, p. 382.
[170] Eduardo Traversa and Pierre M. Sabbadini, 'Anti-avoidance Measures and State Aid in a Post-BEPS Context: An Attempt at Reconciliation', in: Isabelle Richelle et al (Eds), State Aid Law and Business Taxation, MPI Studies Volume 6, Springer Berlin 2016, p. 85 (105).
[171] CJEU, Judgement, 21 January 2010, Case C-311/08, Société de Gestion Industrielle SA (SGI) v. État belge, EU:C:2010:26, para. 66.

Hohorst[172] and the member states' subsequent (legislative) reactions. They found that the Court's case law entails inconsistency and unpredictability which could cause serious consequences for legal certainty.[173] A view on the economic consequences of it was therefore of interest. The consequences for Art. 5 ATAD are likely to be even more severe. It applies the opposite logic than the one given in *SGI*. The codified provision is now designed with the aim of anti-tax avoidance. The result is a reversed codification. By implementing case law rendered under a different objective than the aim of the directive itself, it effectively deprives the member states of the possibility to take into account the real economic circumstances. The starting point of the Courts proportionality analysis were liquidity disadvantages. The following chapter will therefore take an economic point of view to conduct a comparative analysis of possible scenarios.

3 The economic value of deferred payments

3.1 Economic scholars on time value of money and taxes

Karoline Spies observed with regard to the importance of the timing of tax payments: '*the later, the better for the taxpayer; the sooner, the better for the state*.'[174] The legal instrument of deferral by instalments mirrors this. A deferral pushes in favour of the taxpayer towards a later point in time. The instalment pulls partially back towards a sooner point in time.

Economic scholars would address such operations under the doctrines on time value of money.[175] Taxes influence investment decisions, e.g., by reducing the net operating cash flow, and change their respective relative desirability.[176] It reduces the possibilities to add value and increase liquidity by, e.g., trading.[177] Liquidity describes an assets ability to be realised in money.[178] Future capital contains an uncertainty of that ability.[179] Hence, the effect of an immediate taxation is dependent on the tax rate applicable to

[172] CJEU, Judgement, 12 December 2002, Case C-324/00, Lankhorst-Hohorst, EU:C:2002:749.
[173] Rita de la Feria and Clemens Fuest, 'The economic effects of EU tax jurisprudence', European Law Review 2016, 41 (1), p. 44 (53).
[174] Karoline Spies, 'Tax Deferral and Fundamental Freedoms: Exit Tax, Foreign Losses, and Withholding Tax', in: Werner Haslehner et al (Eds), Time and Tax, EUCOTAX Series Vol. 62, chapter 8, p. 145.
[175] Armen A Alchian, 'The rate of interest, Fisher's rate of return over costs and Keynes' internal rate of return' (1955), American Economic Review, pp. 938 - 943; Mario Massari, Gianfranco Gianfrate and Laura Zanetti, 'Corporate Valuation' (2016) Hoboken, N.J., John Wiley, ch. 1.3.
[176] Alnoor Bhimani et al (Eds), 'Management & Cost Accounting' (2019) Pearson Harlow, UK, ch. 13 p. 403; Deborah Schanz and Sebastian Schanz, Business Taxation and Financial Decisions, Berlin, Springer 2011, p. 3; although some capitalistic economic theories discuss the governments' ability to influence investment decisions (cf. Edmund S Phelps, 'Fiscal neutrality toward economic growth', Yale University, McGraw-Hill 1965, chapter 1, p.1.).
[177] Lawrence Benveniste, Dennis R Capozza and Paul J Seguin, 'The Value of Liquidity' (2001), Real Estate Economics, Vol. 29, p. 633 (649); Yair Listokin, 'Taxation and Liquidity', The Yale Law Journal, May 2011, Vol. 120, No. 7, p. 1682 (1689); Harvey Rosen and Ted Gayer, 'Public Finance', N.Y., McGraw-Hill 2014, Chapter 14, Taxation and Income Distribution, p. 304 (309)
[178] John M Keynes, 'The general theory of employment, interest and money' (1935), edited by Paul Krugman and Robert Skidelsky, Cambridge, Palgrave MacMillan 2018, p. 136; Joan Robinson, 'The rate of interest and other essays' (1952), London, MacMillan, p. 6.
[179] Ibid, Joan Robinson.

unrealized gains at present time and a tax applicable to realized profits in the future.[180] A timing disadvantages arises where the taxpayer compared to the object of comparison (*tertium comparationis*) has to pay the same tax at an earlier point in time. This applies beside in exit tax scenarios, e.g., withholding taxes at source compared to a taxation following a regular assessment.[181]

Under the impression of the previous chapter and the objectives pursued by the ATAD, it is questionable if its legislator saw this overlap of legal and economic perspectives when implementing the CJEU's case law.[182]

3.2 Comparison with a debt-financed immediate payment

An example highlighting the economic inconsistencies coming along with exit taxation has been provided by *Thömmes* and *Linn*. They compared the immediate payment of the exit tax financed via a loan with the deferred payment and interests charged by the tax authorities.[183] Their analysis is based on the CJEU's judgement in *National Grid Indus* and assumes a low-interest rate environment and the non-deductibility of interests on tax recovery claims.[184] They conclude that a deferral can only avoid the cash-flow problems if it were interest-free. Otherwise, it would be more advantageous for the taxpayer to finance the immediate payment via a bank loan. Being a debt-instrument interests on that loan would be deductible and provide for more flexibility in terms of period and rates.[185]

The inconsistency that would arise from the charging of interests becomes even more apparent by looking at the balance sheet of the migrating company. There is basically no difference if the company has to pay the exit tax immediately and finances the payment via a bank loan or opt for a deferral of the exit tax with interest accruing on the amount of tax chargeable. In either case, the taxpayer would have to show a liability in its balance sheet and interest expense will accrue and be shown in the profit and loss statement.[186]

This conclusion is supported by the above-mentioned economic scholars on the time value of money. Taxes, interest rates and borrowing costs are able to influence the demand of money, liquidity and hence investment decisions.[187] This correlation cannot be disregarded. An immediate payment is especially helpful where the assets are intended to be sold short after its transfer.[188] A deductible payment could equalize the timing disadvantages stemming from

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[180] Ulrich Schreiber and Gregor Führich, 'European group taxation – the role of exit taxes' (2009), Eur J Law and Econ Vol. 27, p. 257 (265).
[181] Niels Bammens, 'Timing Disadvantages and Tax Treaty Non-discrimination', in: Werner Haslehner et al (Eds), Time and Tax, EUCOTAX Series Vol. 62, chapter 5, p. 60.
[182] Werner Haslehner, 'Time and Tax: Constitutional Versus Economic Perspectives', in: Werner Haslehner et al (Eds), Time and Tax, EUCOTAX Series Vol. 62, chapter 14, p. 271.
[183] Otmar Thömmes and Alexander Linn, 'Deferment of Exit Taxes after National Grid Indus: Is the Requirement to Provide a Bank Guarantee and the Charge of Interest Proportionate?', Intertax 2012, Volume 40, Issue 8/9, p. 485 (491).
[184] Ibid.
[185] Ibid, pp. 491 - 492.
[186] Ibid.
[187] Edmund S Phelps, 'Fiscal neutrality toward economic growth', Yale University, McGraw-Hill 1965, chapter 1, p. 3.
[188] Laszlo Kovics, 'European Commission Policy on Exit Taxation', European Tax Studies, Hein Online 1/2009, para. 2.1.

a different treatment in temporal terms, e.g., an earlier taxation, between the taxpayer and the object of comparison.[189]

3.3 Administrative burden

A repeating pattern in the Court's case law is that an immediate payment would free from subsequent administrative burdens in tracing the assets.[190] Yet, the Court did never specify this burden either.

The example of the German system applicable after the changes in sec. 4 GITA show that the administrative efforts are low. Sec. 4g GITA requires a simple accounting operation. It is part of the general bookkeeping and does as such relatively not require an immersive amount of workload. A yearly revision of the assets in the balance sheet is any way conducted in accordance with domestic or international bookkeeping standards.[191] In addition to that, monitoring the company's assets is part of the due diligence obligations of a prudent businessman. An infringement of these obligations would not only cause tax issues. Sec. 22 GRTA in its new version applicable after the presented changes provides for the taxpayer the obligation to monitor and prove over a period of seven years that the transferred assets are still business assets and not have been disposed of.

Hence, the administrative burden of a deferral cannot outweigh the liquidity disadvantages.

3.4 Costs for guarantees

Already in *de Lasteyrie du Saillant* the Court considered the mere requirement to provide a guarantee as a restriction itself.[192] The option in Art. 5 para. 3 sec. 2 ATAD to require a guarantee is designed for cases in which a demonstrable and actual risk of non-recovery is given. In literature opposing views on the proportionality of a guarantee requirement arose especially pointing out inconsistencies between the decisions rendered by the CJEU.[193] Providing a guarantee is likely to bind more resources. If a guarantee is not provided through available assets or equity instruments but through a third party-agreement, e.g., a bank guarantee, it will trigger additional costs. Although these costs are, depending on the applicable tax system, deductible, they are first and foremost affecting the liquidity of a company. The current design of Art. 5 para. 3 sec. 2 ATAD shows that the legislator has seen these cash-flow disadvantages stemming from it. Considering that the requirement itself constitutes a restriction and thus should be treated equally with the exit tax as such, it is not compelling that the former provides for an onus to show-obligation for the member state while

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[189] Niels Bammens, 'Timing Disadvantages and Tax Treaty Non-discrimination', in: Werner Haslehner et al (Eds), Time and Tax, EUCOTAX Series Vol. 62, chapter 5 pp. 59 and 65.

[190] Cf. case National Grid Indus, supra note 82.

[191] Cf. IAS 16 Property, Plant and Equipment; Frank P G Pötgens et al, 'The Compatibility of Exit Tax Legistlation Applicable to Corporate Taxpayers in France, Germany, Italy, The Netherlands, Portugal, Spain and The United Kingdom with the EU Freedom of Establishment – Part 2'. Intextax Vol. 44 Issue 2 (2016), p. 163 (167).

[192] CJEU, Judgement, C-9/02, 11 March 2004, de Lasteyrie du Saillant, EU:C:2004, 138, para. 47.

[193] Cf. Otmar Thömmes and Alexander Linn, supra note 183, p. 492; Tell, supra note 104, p. 51 et seq; Karoline Spies, supra note 24, p.148.

the latter operates with a general presumption. The economically less harmful measure has a higher threshold than the more burdensome measure.

3.5 Comparison with accelerated depreciation

Following up on the preceding examples a comparison with depreciation schemes shall show benchmarks for an optional range of deferral periods. In *Verder LabTec* the Court accepted ten years for a staggered payment of taxes.

Economically a depreciation delays the deductibility of business expenses, therefore does not reduce the tax base as an immediate and full deduction would do and eventually more (liquid) capital is tied up.[194] The opposite logic applies for the payment of taxes. Stretching the payment of non-deductible expenses is beneficial in terms of liquidity as it frees the capital for other investments and eventually a pulled forward return.

Drawing a comparison between accelerated depreciation and deferral of tax payments is of interest due to three considerations. Firstly, both depreciation schemes and tax payments have in common that their economic effects rely heavily on the factor time. Secondly, a deferral until the actual moment of realization might be considered as subsidy.[195] *David Shizer* observed this in a research published in 1998. It regards the U.S. congress' adoption of a reduction in the capital gains tax rate. It is obvious that once granted a tax subsidy the respective State is not willing to give it up due to the taxpayer's emigration.[196] Thirdly, anti-avoidance provisions are not immune from constituting state aid.[197]

In the EU subsidies are subject to the state aid control mechanism of Artt. 107, 108 TFEU. Under chapter 5.4 of the European Commission notice on the notion of state aid specific issues of tax measures concerning selectivity are dealt with. Chapter 5.4.5 concerns the depreciation and amortisation rules. Under section 177 is stated that tax measures of purely technical nature such as depreciation/amortisation rules do not constitute State aid.

On 23 December 1996, however, the European Commission started proceedings against the Netherlands. Background were partially accelerated depreciation allowances for R&D laboratories allegedly breaching the European Communities state aid provisions. It was the first case of its kind and highlighted a few general issues. It has to be distinguished between state aid measures and general economic support measures. One criterion for that purpose being the accessibility to the measure for all parts of the economy, certain sectors or certain companies within one sector. The decision rendered on 11 May 1999 held that it did not contain state aid from a selectivity point of view. However, it shows that an accelerated depreciation rate might be

[194] Yair Listokin, 'Taxation and Liquidity', The Yale Law Journal, May 2011, Vol. 120, No. 7, p. 1682 (1702).
[195] David Shizer, 'Realization as Subsidy', New York Tax Law Review, 1998, Vol. 73 No. 5, p. 1549.
[196] Johanna Hey, 'Taxation of business in the EU: Special problems of crossborder losses and exit taxation', in: Christiana HJI Panayi et al (Eds) Research Handbook on European Union Taxation Law, chapter 10 sec. 3.1.
[197] Eduardo Traversa and Pierre M. Sabbadini, 'Anti-avoidance Measures and State Aid in a Post-BEPS Context: An Attempt at Reconciliation', in: Isabelle Richelle et al (Eds), State Aid Law and Business Taxation', MPI Studies Volume 6, Berlin, Springer 2016, p. 85 (89).

considered as incompatible with the internal market for various reasons. Sec. 179 therefore states that depreciation incentives like a shorter term of depreciation may give rise to the existence of state aid. Sec. 178 then points to the main problem: the difficulty of establishing a benchmark for an acceptable depreciation rate.

Although a more specific time period cannot be retrieved from that example, it shows a potential bottom limit. It could therefore be argued that, in order to achieve a consistent (direct) tax system, an accelerated depreciation scheme which would be considered as inacceptable for state aid purposes sets the minimum level for a tax deferral.

This would add-up to the opinion of v*an den Broek* and *Meussen.* They argue that the tax should be collected in accordance with the applicable domestic depreciation schedule, e.g., payment in three equal annual instalments.[198] For non-depreciable assets account should be taken of the risk that no actual realisation will ever take place. In that case yearly instalments over a period of ten years are suggested.[199] This would be the logical outcome for an equal treatment as pursued by the Court's non-discrimination approach.

3.6 Interim result

The provided examples show that the attempt of a deferral made in Art. 5 para. 2 ATAD is not sufficient to mitigate the liquidity disadvantages. Moreover, it does also not fulfil the ATAD's objective of setting a minimum level of protection (Art. 3 ATAD). The examples have shown that it is dependent on the assets transferred and the economic environment whether or not a taxpayer really has a choice to elect between immediate payment or payment in instalments.[200] Not every taxpayer has equal access to the capital markets. Consequently, the costs may vary. This is especially true in times of a pandemic in which many business models are under severe pressure while others thrive.[201] Furthermore does not every asset generate a constant income. Especially due to the option to levy interests and their non-deductibility a deferral is only granted partially with decreasing value over a set period of five years. The administrative burden can be left aside.[202] Admittedly, any deferral is better than no deferral.[203] But, Art. 5 para. 2 ATAD is rather

[198] Harm van den Broek and Gerard Meussen, 'National Grid Indus: Re-Thinking Exit Taxation', IBFD European Taxation, April 2012, p. 190 (194).
[199] Ibid.
[200] Cf. Steven Peeters, 'Exit Taxation: From an Internal Market Barrier to a Tax Avoidance Prevention Tool', EC Tax Review, 2017 Vol. 3, p. 122 (130).
[201] Stefan Weber, 'Tax and Fiscal Policy Measures in Response to the Covid-19 Crisis – Overview and Economic Analysis for Germany', Bulletin for International Taxation, June 2020, p. 346 (352).
[202] Contra: Karoline Spies, 'Tax Deferral and Fundamental Freedoms: Exit Tax, Foreign Losses, and Withholding Tax', in: Werner Haslehner et al (Eds), Time and Tax, EUCOTAX Series Vol. 62, chapter 8, p. 155 (Although coming to the same conclusion that five annual instalments would be too general and restrictive).
[203] Ricky Kanabar and Peter Simmons, 'To defer or not to defer? UK state pension and work decisions in a lifecycle model', Applied Economics (2016), Vol. 48, no. 58., p. 5711.

causing more economic inconsistencies than it is able to manage the intended mitigation of liquidity disadvantages.[204]

4 Reconciliation through an alternate technique?

4.1 The EU judicial architecture under pressure

The previous chapters 2 and 3 have shown two main considerations. Firstly, that the deferred payment method of Art. 5 ATAD is built on case law of the Court of Justice and that this foundation comes along with some at least questionable assumptions. Secondly, that the chosen approach deprives of convincing economic considerations and leads to opposing results. The result is an inflexible approach which is incapable of considering the real underlying motives – irrespective of them being abusive or not.

Since the adoption of the ATAD in July 2016 both the domestic tax systems regarding individual and corporate exit taxation as well as the CJEU's case law have further developed. This raises issues of the relationship between Primary and Secondary law. In the case *Euro Park Service*[205] the Court applied the instrument of '*exhaustive harmonization*' holding that the anti-abuse provision encompassed in the Merger Directive[206] is not exhaustive. Hence, the Member States had a remaining discretion for the adoption of modalities.[207] Art. 5 para. 2 ATAD now causes the opposite effect. It hinders the Member States of implementing domestic mechanisms which would consider real economic circumstances. Because of this unreflective transposition the EU legislator missed a chance to further integrate the domestic tax systems through harmonization.[208]

Irrespective of whether applying the ATAD via its direct effect[209] or domestic measures transposing the ATAD provisions, they (still) have to comply with the fundamental freedoms. This is essentially the Court's mission since its establishment (Art. 19 (1) TEU).[210] The interpretation of law(s) naturally changes during the course of time. This adaptability is essential for reliable judicial system.[211] It is likely that the Court will be put in a position where it has to rule on a measure transposing Art. 5 para. 2 ATAD but where an overruling of its previous judgements is possible. This will put the Court's case law as a guarantee for stability, coherence and legal certainty to the

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[204] Johanna Hey, 'Taxation of business in the EU: Special problems of crossborder losses and exit taxation', in: Christiana HJI Panayi et al (Eds) Research Handbook on European Union Taxation Law, chapter 10 sec. 3.4.2.
[205] CJEU, Judgement, 8 March 2017, Case C-14/16, Euro Park Service, EU:C:2017:177, paras. 22 and 24.
[206] Council Directive 90/434/EEC.
[207] Sriram Govind and Stephanie Zolles, 'The Anti-Tax Avoidance Directive', in: Lang et al (Eds) Introduction to European Tax Law on Direct Taxation, Vienna, Linde 2020, chapter 8 mn. 647.
[208] Johanna Hey, 'Taxation of business in the EU: Special problems of crossborder losses and exit taxation', in: Christiana HJI Panayi et al (Eds), Research Handbook on European Union Taxation Law, chapter 10 sec. 3.4.2.
[209] CJEU, Judgement, 5 February 1963, Case C-26/62, Van Gend & Loos, EU:C:1963:1.
[210] Ieva Freija-Peccati, 'Value of Precedents in EU Direct Tax Law', in: Werner Haslehner et al (Eds) Time and Tax, EUCOTAX Series Vol. 62, chapter 6, p. 77.
[211] Ibid, p. 81.

test.[212] Whether or not the legal doctrine of precedent[213] applies for the CJEU[214], it might cause serious problems for the EU's judicial architecture and the CJEU's role as supreme authority in the interpretation of EU law.[215] On the one hand, this situation binds the Court's possibilities to deviate from the prior decisions as it would also deviate from secondary EU law. On the other hand, it has also been shown that the decisions on the time periods in *DMC* and *Verder LabTec* were random. The problem therefore might be reduced to a conflict of Primary v. Secondary EU law which would simply be solved by application of the *lex superior*-rule.

4.2 The case C-581/17 *Wächtler* – Setting a new standard?

On 26 February 2019 the Court delivered its judgement in the case *Wächtler*.[216] It concerned a German national who has been the managing director of company established in Switzerland. He also owned 50% of the company's share capital.[217] Despite, firstly, dealing with a taxpayer not being subject to a corporate tax and, hence, outside the scope of ATAD, and, secondly, not dealing with the EU fundamental freedoms, the Court made a statement perhaps capable of changing the current standard.

In 2011 Mr. Wächtler transferred its domicile from Germany to Switzerland. The competent German tax authority levied income tax on the unrealised capital gains accrued in his shareholding. Legal basis was Sec. 6 of the German Foreign Tax Act (*Außensteuergesetz*) in connection with Sec. 17 GITA. Sec. 17 GITA sets the threshold for substantial shareholdings of individuals with the legal consequence that profits stemming from its alienation are classified as business income taxed at a progressive rate.[218] Sec. 6 GFTA is only applicable to natural persons with substantial shareholdings.

The European Union and the Swiss Confederation have concluded a number of agreements aiming at strengthening their economic ties.[219] The rights conferred in them are in many aspects similar to those conferred by the EU Treaties. The Agreement between the Swiss Confederation and the Federal Republic of Germany (AFMP) provides, e.g., for the free movement of persons and the right of establishment (Art. 4 and 6 AFMP). The version of Sec. 6 GFTA applicable in the case at hand provides under para. 5 for an interest-free deferral of the tax in case of a transfer to an EU/EEA member state. A guarantee was only required when no assistance and support in tax recovery were provided for by the immigrating country. For the transfer of residence to countries outside that area, such as Switzerland, the tax would also be deferred but had to be paid in instalments over a maximum period of

[212] Ibid.
[213] UK House of Lords, Young v. Bristol Aeroplan; 1944, KB 718 (729 – 730).
[214] Cf. CJEU, Opinion AG Poiares Maduro, 1 February 2006, Case C-94/04, Cipolla and Others, EU:C.2006:76, para. 28; cf. supra note 210, p. 81.
[215] Supra note 210, p. 81.
[216] CJEU, Judgement, 26 February 2019, Case C-581/17, Wächtler, EU:C:2019:138.
[217] Ibid, para. 26.
[218] Shareholdings below the threshold of 1% established by sec. 17 GITA are taxed at a flat rate of 25%.
[219] CJEU, Judgement, 26 February 2019, Case C-581/17, Wächtler, EU:C:2019:138, para. 36.

five years plus provision of a bank guarantee (Sec. 6 para. 4 *Außensteuergesetz*).

Within the paragraphs 54 to 57 of its judgement, the Court, in essence, establishes the applicability of its case law on exit taxation for the relation with the Swiss Confederation. Especially the principle of equal treatment as concept of EU law and important component of the discrimination analysis.[220] The Court stated that a difference in treatment existed which caused a '***tax***-*flow disadvantage*' *[emphasis added]*.[221] Of particular importance is paragraph 68 of the judgement: '*That conclusion is not called into question by the fact that, in a situation where the immediate collection of the tax payable would have consequences that would be difficult for the taxpayer to bear, that tax regime provides for the possibility of payment of that tax in instalments. Leaving aside the fact that the instalment-payment measure is possible only in that specific situation, it is incapable of eliminating, in such a situation, the cash-flow disadvantage inherent in the obligation on the taxpayer to pay, at the time of the transfer of his domicile to Switzerland, a proportion of the tax payable on the unrealised capital gains with respect to the shares concerned. Moreover, that measure remains more onerous, for the taxpayer, than a measure that permits the deferral, until the disposal of those shares, of payment of the tax payable*.' By that, the Court established a clear hierarchy of measures. A payment in instalments shall be possible only in a situation in which the taxpayer would suffer difficulties from the immediate (full) payment of the taxes. This is in line with the pre-ATAD case law and Art. 5 ATAD. But, even in such a situation the cash-flow disadvantage would not be eliminated by the payment in instalments. Based on that, the Court concluded for situations in which the natural person continues to pursue an economic activity in the immigrating state, that levying a tax, although payable in instalments, must be precluded. It would place the person in a disadvantageous position compared to a person who stays in the respective country. The latter would only have to pay taxes in the moment of actual realisation (e.g., disposal of the assets).

4.3 Proposal for changes

Considering the findings from the presented points of view the most suitable option appears to be an extension of the current method. The current system containing the option between immediate payment and a deferral with instalment payments over a period of five years could remain.

In addition, the taxpayer should get the option for a deferral in the classical sense, meaning without instalments. It should contain a right for the taxpayer to demonstrate that the payment in instalments would cause severe liquidity disadvantages or that sound economic business reasons are given for the transfer.

The wording for this right should apply the word '*may'*. If the taxpayer fulfils the criteria the tax authority should be bound to grant the deferral. For that purpose, the word '*shall'* could be applied.[222] Such a wording would

[220] CJEU, Judgement, 26 February 2019, Case C-581/17, Wächtler, EU:C:2019:138, paras. 54 and 55.
[221] Ibid, para. 57.
[222] Cf. Victor Thuronyi, 'Drafting Tax Legislation', ch. 3, p. 9.

appropriately address the taxpayer's disadvantages suffered under the current mechanism.

The first reason which a taxpayer could demonstrate would suffice to consider the liquidity disadvantages demonstrated in chapter 3. The use of an indefinite legal term like 'severe' would leave room for the Member States to define more precise criteria in line with national peculiarities when transposing the provision into their domestic tax systems. It could be the case when the shareholding is the only asset or if the economic lifecycle is much longer than five years.

The second reason would be in line with both the Court's case law on other anti-avoidance measures and the respective measures entailed in the ATAD. For example, in the cases *K*[223]*, Equiom*[224] and *Deister- and Juhler- Holding*[225] the Court confirmed its case law that in order to justify a measure by the prevention of tax avoidance it has to specifically target '*wholly artificial arrangements'*. This proposal would suffice to it. General criteria as provided for in the current mechanism which are pre-classifying certain transactions as abusive are most probably insufficient if there is no room for an individual assessment of the arrangement under scrutiny.[226] In a similar vein argued AG Kokott in her opinion in the case *Polbud*.[227] It concerned a general obligation to carry out a liquidation procedure in case of a cross-border conversion of a business. AG Kokott stated this would be '*effectively tantamount to an impermissible general presumption of abuse*'. Hence, she considered the obligation as disproportionate.[228]

Considering the need of public financing, a maximum time for the deferral should be introduced, e.g., ten years. Another option would be to grant the member state the option to counter-argue the demonstrated purposes. In that case a higher threshold should be applied. For example, the onus to show an abusive intention. A model for this could be the Merger Directive and its principal objective requirement[229] or the Swedish commercial motives test in its current design.[230]

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[223] CJEU, Judgement, 7 November 2013, Case C-322/11, K, EU:C:2013:716, para. 62.
[224] CJEU, Judgement, 7 September 2017, Caes C-6/16, Equiom and Enka, EU:C:2017, 641.
[225] CJEU, Judgement, 20 December 2017, Case C-504/16, Deister Holding and Juhler Holding, EU:C:2017:1009, para. 62.
[226] Sriram Govind and Stephanie Zolles, 'The Anti-Tax Avoidance Directive', in: Lang et al (Eds), Introduction to European Tax Law on Direct Taxation, Vienna Linde 2020, ch. 8 mn. 648; Frank P G Pötgens et al (Eds), 'The Compatibility of Exit Tax Legistlation Applicable to Corporate Taxpayers in France, Germany, Italy, The Netherlands, Portugal, Spain and The United Kingdom with the EU Freedom of Establishment – Part 2'. Intertax 2016 Vol. 44 Issue 2, p. 163 (168).
[227] CJEU, Opinion AG Kokott, 4 May 2017, Case-C-106/16, Polbud, EU:C:2017:351.
[228] Ibid, paras. 55 and 66.
[229] Eduardo Traversa and Pierre M. Sabbadini, 'Anti-avoidance Measures and State Aid in a Post-BEPS Context: An Attempt at Reconciliation', in: Isabelle Richelle et al (Eds.) State Aid Law and Business Taxation, MPI Studies Vol. 6, Berlin, Springer 2016, p. 85 (90).
[230] Cf. Supra note 47.

By maintaining the Member State's right to require a guarantee combined with the obligation to demonstrate a risk of non-recovery, both interests will be sufficiently balanced.[231]

The presented proposal is less restrictive but equally efficient. Thus, it supports the finding that the current method is disproportionate.

5 Conclusion

The research question analysed in this thesis, was whether the deferred payment method of Art. 5 ATAD would provide for a proportionate technique to mitigate liquidity disadvantages of exit taxes The answer to it is negative. No, it does not because it, firstly, cannot and, secondly, never intended to do so. But it also does not provide for a proportionate mechanism to attain the ATAD's primary objective of the prevention of tax avoidance. It did not consider that the tools used for the assembly of the deferred payment method of Art. 5 para. 2 ATAD, mainly the CJEU's case law on corporate exit taxation, are not suitable for it. The time period for the instalments just happened to be five years. Accidentally.

The consequences are ominous. With the current mechanism, the provision leads to a general presumption that the situations covered by it are driven by tax avoidance motives. It thereby disregards the different motivations and economic circumstances of each transaction. This is the opposite of what other general or special anti-avoidance provisions do. They usually contain, for instance, an economic substance test or the test of valid business motives.

The Court probably already identified this risk in *de Lasteyrie du Saillaint*, one of its first cases on exit taxation. There, under para. 24 it held that '*a provision designed to thwart what is really an evasion of tax law may be regarded as complying with that freedom [of establishment]*'. This should have been the guideline. That way, a mechanism which has the ability to identify what is really a potential abuse could have been implemented.

In the end, it shows that Bruno Leoni's concerns on the destiny of the individual freedom, written in 1961, would hold true. It will '*be mainly defended by economists rather than by lawyers or political scientists.*'[232] A system, however contemporary it might aspire to be, is only acceptable if it provides for enough flexibility to adapt to the challenges of the present.

[231] Karoline Spies, 'Tax Deferral and Fundamental Freedoms: Exit Tax, Foreign Losses, and Withholding Tax', in: Werner Haslehner et al (Eds), Time and Tax, EUCOTAX Series Vol. 62, chapter 8, p. 154 (155).

[232] Bruno Leoni, 'Freedom and the law' (1961), Princeton, N.J., van Nostrand, Introduction, p. 1.

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