EXIT TAXES IN THE EU/EEA – WHERE ARE WE NOW?

Anne Dalheim Jacobsen[1]

Introduction

1.1 Exit taxes and its rationale

The term "exit tax" refers to all types of charges that are imposed on a person (natural or juridical) upon their transfer of tax residence. Exit taxes may also be imposed upon the mere transfer of assets and liabilities. The exit tax is imposed on any unrealised gain over the assets of the person that becomes non-resident, or over the assets that are transferred out of the taxing jurisdiction.

Levying an exit tax is based on the principle that a state is entitled to tax income that arises within its jurisdiction. This may be referred to as the principle of territoriality, which is accepted in EU law and in customary international tax law.[2] The home state (the state that the person emigrates from or where assets are being transferred from), is entitled to levy an exit tax on accrued but not yet realised gains in order to preserve its taxing right. International tax treaty law expressed through the OECD Model Treaty Convention usually allocates taxing rights to the home state of the alienator. If no exit tax is imposed, the home state will lose its taxing right to accrued but not yet realised gains upon exit. Therefore, an exit tax

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1 Anne Dalheim Jacobsen has her juridical masters degree from the University of Oslo 2012, LLM from Queen Mary University of London 2012/2013, and currently works as an associate lawyer at Wiersholm law firm in Oslo. The author may be contacted at:adja@wiersholm.no

2 For EU law, see C-470/4 *N,* [2006] (ECR I-7409) para 46, and C-371/10 *National Grid Indus BV*, [2011] (ECR I-000) para 46 (hereafter referred to as *NGI)*. See also C-250/95 *Futura Participations SA,* [1997] (ECR I-2471), para 22, where the principle was introduced. In international tax law, the OECD Model Convention recognises, with some exceptions, that the home state of the alienator should be allowed to tax capital gains on movable property, see Art. 13(5). For more on the principle of territoriality; Otto Marres, 'The Principle of Territoriality and Cross-border Loss Compensation, (2011) 39 Intertax, 112-125.

preserves the national tax base. The ECJ has also recognised that the principle of territoriality, linked with a temporal component, is able to justify a restriction on the freedom of establishment subject to proportionality.[3]

Relocation of persons, companies and/or assets may be motivated by a reduction in the overall tax burden. A taxpayer could emigrate to a low-tax jurisdiction, sell the assets and realise the gain at a lower or even non-existing tax rate in the host member state. The taxpayer could then re-emigrate to the country of origin. Without exit taxes, taxpayers would be able to decide where the unrealised gain should be taxed, which could facilitate tax avoidance.[4]

Even though both the objective of preventing tax avoidance and the principle of territoriality are strong arguments for having exit tax, it also restricts the exercise of the freedom of movement.[5] Exit tax is a tax on unrealised gain, and the tax has to be paid even though no money has been received. This causes a cash-flow disadvantage for the taxpayer. In comparison, those who do not move are only taxed *if* and *when* the assets are realised. The emigrating taxpayer is therefore subject to an *earlier* taxation.[6] This clearly has a deterrent effect, and as the ECJ stated in C-9/02 *Lasteyrie,* this is "likely to discourage a taxpayer from carrying out such a transfer".[7] Hence, the ECJ has repeatedly held that exit taxes amounts to a restriction on the freedom of establishment as laid down in Art. 49 TFEU.[8]

1.2 Problems caused by exit tax and measures taken on EU-level

As described above in chapter 1.1, exit tax causes a cash-flow disadvantage for emigrating taxpayers, but other problems may also arise.

In particular, exit tax may lead to double taxation. For example, gains accrued after emigration may be subject to double taxation if both home state and host state taxes the full gain on disposal. This may be the case where the home state continues to deem the emigrating taxpayer as resident, or if the underlying asset

3 *N,* para 46, *NGI,* para 46.

4 Van den Hurk, Van den Broek and Korving, 'Final Settlement Taxes for Companies: Transfer of Seats, Interest Charges, Guarantees and Step-Ups in Value', (April/May 2013) Bulletin for International Taxation, 257, footnote 6.

5 Ben Terra and Peter Wattel, *European Tax Law* (1st, Wolters Kluwer, The Netherlands, 2012) 956.

6 *N,* paras 35-37.

7 C-9/02 *Hughes de Lasteyrie du Saillant v. Ministére de l´Economie, des Finances et de I´Industrie* [2004] (ECR I-2409) (hereafter referred to as *Lasteyrie),* para 46.

8 Treaty on the Functioning of the European Union (TFEU) (2007) OJ C83 (2010).

remains in the home state. Also, if the home state imposes an exit tax and the host state tax upon disposal but does not provide a step-up, a double taxation of gain accrued prior to emigration is subject to double taxation. This type of double taxation may be relieved through a credit mechanism where one of the states grants a credit for tax paid in the other state. However the member states are not obliged to grant such a credit. Furthermore, double *non*-taxation may also occur if the home state refrains from taxing, and the host member state allows a step-up. For transfer of assets, differences in valuation methods may also cause double taxation and double non-taxation.

The Commission has been increasingly active in taking action against exit taxes.[9] In addition to infringement cases, the Commission released a Communication in 2006.[10] The Commission stated that member states are entitled to impose exit taxes, if the taxpayer can benefit from an unconditional deferral.[11] It was also recognised that exit taxes cause problems, especially referring to the challenges of mismatches and double taxation/double non-taxation. A number of different solutions were also proposed to these problems,[12] and finally the member states were urged to coordinate their exit tax policies.

Following this Communication, the Council of the European Union adopted a resolution on coordinating exit taxation in December 2008.[13] The resolution was primarily aimed at the prevention of double taxation, urging the host state to grant a step-up in value upon arrival when the home state levied an exit tax.[14] Both the Communication and Resolution focus on cooperation between the home state and the host state to remove the impediments arising from exit taxation. Interestingly, the ECJ approach seems to deviate somewhat from this approach.

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9 For an overview over infringement proceedings, see: <http://ec.europa.eu/taxation_customs/common/infringements/infringement_cases/bycountry/> (accessed 19 July 2013).

10 Communication of 19 December 2006 from the Commission to the Council, the European Parliament and the European Economic and Social Committee on exit taxation and the need for co-ordination of Member States tax policies (COM(2006) 825 final).

11 Ibid, 3-4.

12 Ibid, 4-5, 7-8.

13 Council Resolution on Coordinating Exit Taxation, 2 December 2008.

14 Step-up involves valuating the assets on their market value on the date of arrival in the host member state, rather than using acquisition cost. This may lead to both a step-up, and a step-down.

1.3 Case law and main issues

The member states retain the competence within direct taxation, but the competence has to be exercised "consistently with EU law".[15] The ECJ has discussed exit tax in a number of cases, starting with *Lasteyrie,* and (for now) ending with *Commission v. Denmark*.[16] Although viewed as a restriction to the freedom of establishment, the exit tax may be justified with reference to the balanced allocation of taxing rights, subject to proportionality. Focus is now on proportionality and how exit taxes may be designed so as to both protect and preserve the national tax base in the home state, as well as providing the least restrictive measures for the taxpayer.[17]

In this article, different design aspects of exit taxes are examined; bank guarantees, interest payments, post-emigrational decrease in value and step-up. As the case law reveals, exit taxes is more important now than ever, especially in the times of economic recession as this tax protects the national tax base. Further, exit taxes have a wide scope, as it also encompasses merger situations. The intention is to analyse the ECJ case law with a view to answering the question: where are we now? Further, it will be examined whether the case law reveals that the ECJ is more protective of individuals than companies. Also, although it is established that immediate payment is disproportionate, and that payment must be deferred until realisation, a question is *when* assets are deemed to be realised. This will also be discussed. Finally, an EEA-perspective will be given where relevant.

When discussing exit taxes, attention must also be given to the legal aspects of a migration of a company.[18] There has been an extensive debate in the literature on this matter. On the basis of the more recent judgment in *NGI,* where the ECJ held that the company who relocated to the UK while retaining their legal status in the Netherlands could rely on the freedom of establishment, it has been argued that this is inconsistent with previous ECJ company law jurisprudence,[19] specifically *Daily Mail*[20] and *Cartesio*[21]. This article will also give a brief summary of this debate.

15 C-374/04 *Test Claimants in Class IV of the ACT Group Litigation v. Commissioners of Inland Revenue* [2006] (ECR I-11753), para 36.

16 C-261/11 *Commission v. Denmark* [2013] (ECR I-0000) .

17 Terra and Wattel, (n 7), 955.

18 Reinut Kok, 'Exit Taxes for Companies in the European Union after National Grid Indus', (2012) 4 EC Tax Review, 201.

19 Peter Wattel, 'Exit Taxation in the EU/EEA Before and After National Grid Indus', Tax Notes International, January 30 2012, 371.

20 C-81/87 *The Queen v H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] (ECR 5483) (hereafter referred to as *Daily Mail)*.

This article consists of five chapters. Chapter one has been an introduction. The second chapter gives a presentation of the ECJ case law that are crucial in answering the different questions discussed in chapter three. The questions examined in chapter three are the most important issues arising from ECJ case law. Chapter four provides a brief summary of the company law aspect, and finally chapter five presents some conclusions.

2 ECJ: Exit tax cases[22]

2.1 C-9/02 Hughes de Lasteyrie du Saillant

In the above case, Mr. Hughes de Lasteyrie du Saillant transferred his residence from France to Belgium in 1998, and as a consequence, an exit tax was imposed on an unrealised gain on his shareholding in a French company. The legislation targeted individuals who held, either directly or indirectly with family members, securities conferring entitlement to more than 25% of the profits of a French company. In comparison, French residents who maintained their French tax residency were subject to tax only if and when their shares were realised.[23]

The payment of tax could be deferred until realisation, but only if several conditions were fulfilled. The taxpayer had to apply for a deferral, provide a guarantee to ensure recovery of the tax, declare the amount of unrealised gain, submit annual statements of changes in the unrealised capital gain, and designate a representative established in France.[24] If the taxpayer still owned the shares after five years, the tax would be waived.[25]

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21 C-210/06 *Cartesio* [2008] (ECR I-9641).

22 Case C-380/11 *DI. VI. Finanziaria de Diego della Valle & C. SapA v Administration des contributions en matière d'impôts,* [2012] (ECR I-00000) is not discussed here as this touches upon the merger aspect of exit taxes. Further, case C-269/09 *Commission v. Spain* 2012] (ECR I-00000) is touched upon only briefly as this case concerned the Spanish exit tax rules that required taxpayers who transferred their tax residence out of Spain to include in their tax base for the final year before emigration any income that was *realised*, but not yet charged to tax. The cases discussed in this article concerns *unrealised* income, and the tax at stake in *Commission v. Spain* is therefore not a traditional exit tax. Also, the case does not seem to give any further guidance to the question discussed, and is therefore not in focus. For a commentary, see Panayi (n 1) 321-323, and Tom O'Shea, 'European Commission Challenges Spanish Exit Tax Rules', Tax Notes International, November 26 2012, 841-845.

23 *Lasteyrie*, paras 12-17.

24 *Lasteyrie,* paras 3-11. See also Opinion of AG Mischo, paras 36-38.

25 *Lasteyrie,* para 4.

The ECJ held that the exit tax was a restriction on the freedom of establishment, ref. TFEU Art. 49 (then art. 52 EC Treaty). The less favourable treatment of the taxpayer who moved abroad was of "such a kind as to restrict the exercise of that right, having at the very least a dissuasive effect on taxpayers wishing to establish themselves in another Member State".[26] Further, the requirement of setting up a guarantee was a restriction on its own. The ECJ also indicated that the requirement of declaring the amount of the gain upon exit also contributed to the finding of a restriction.[27]

Although finding that the objective of prevention of tax avoidance was relevant, it was rejected by the ECJ in this case, as tax avoidance could not be inferred generally from a transfer of tax residence to another member state.[28] In that respect, the rule went beyond what was strictly necessary.[29] The argument that the guarantees preserved the coherence in the tax system was also rejected,[30] along with the argument that the restriction was justified on the basis of preserving the allocation of taxing rights between the member states.[31] Accordingly, the restriction could not be justified, and it constituted therefore a breach of freedom of establishment.

2.2 C-470/04 N

In this case, the Dutch rules on emigrating substantial shareholders were examined. Dutch substantial shareholders (meaning shareholders who directly or indirectly held 5 % of a company's capital) were subject to an exit tax upon transfer of residence outside Netherlands. The Dutch resident N transferred his residence from the Netherlands to the UK in 1997, and being the sole shareholder in three Dutch companies, the exit tax was triggered. N achieved a deferral of payment after providing a guarantee.[32] As a result of *Lasteyrie* however, the Dutch authorities cancelled the security requirement, and N's guarantee was released.[33] However, N still challenged the Dutch rules.

26 Ibid., para 45.

27 Ibid., para 47.

28 Ibid., paras 51-52.

29 The same thinking is found in C-264/96 *ICI v. Colmer* [1998] (ECR I-4659), and C-28/95 *Leur-Bloem* [1997] (ECR I-4161).

30 *Lasteyrie,* paras 63-65.

31 Ibid., para 68.

32 The tax would be waived if a disposal of the shares did not take place within 10 years from exit, *N* paras 7-8.

33 *N*, paras 11-14.

The ECJ confirmed that the exit tax was a restriction on the freedom of establishment, because a taxpayer who moves abroad is taxed *earlier* than a taxpayer who maintains his tax residency in the home state. The emigrating taxpayer may also be subject to a *higher* tax liability because the Dutch rules did not take into account post-emigrational reductions in value. Consequently, the exit tax could have exceeded what the taxpayer would have had to pay if no emigration had taken place, and the assets had been disposed in the Netherlands.[34]

The ECJ also repeated that requiring a guarantee is in itself a restriction. Also, the tax declaration required at the time of transfer of residence was an additional formality likely to have a deterrent effect. Accordingly, the Dutch rules constituted a restriction.[35]

The Court then proceeded to examine whether the restriction could be justified. Unlike in *Lasteyrie,* the Court found that the exit tax could be justified on the basis of territoriality, as the rules were designed to allocate the "power to tax increases of value in company holdings".[36] The Court held that the exit tax was "in accordance with that principle of fiscal territoriality, connected with a temporal component, namely residence within the territory during the period in which the taxable profit arises (...)".[37]

When examining the proportionality, the ECJ held that the tax declaration required at the time of the exit was a proportionate measure because the taxpayer otherwise would have had to keep all documentary evidence in order to prove the value at the time of exit. According to the ECJ, that would have involved "obligations no less significant on the part of such a taxpayer".[38]

However, the obligation to provide guarantees went beyond what was strictly necessary as the Netherlands could use the mutual assistance directive[39] and the

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34 Ibid., para 37.

35 Ibid., paras 38-39.

36 *N*, para 41.

37 Ibid., para 46. The concepts of safeguarding a balanced allocation of taxing power and the principle of fiscal territoriality correlates, ref. *Futura,* paras 21-22, and Peter Wattel, Fiscal Cohesion, Fiscal Territoriality and Preservation of the (Balanced) Allocation of Taxing Power; What Is the Difference?, Chapter 6 in: Dennis Weber (ed), The Influence of European Law on Direct Taxation, (Kluwer Law International 2007) 139-156.

38 *N,* para 50.

39 Council Directive 77/799/EEC of 19 December 1977 (now as amended by Council Directive 2011/16/EU of 15 February 2011).

mutual assistance for recovery of taxes directive.[40] As this represented a less restrictive alternative, the Dutch rules were not proportional, and could not be justified.[41] Finally, the ECJ also stressed that the Dutch had to take subsequent decrease in value into account in order to be regarded as proportionate, unless the host member state had done so.[42]

2.3 C-371/10 National Grid Indus

On 29 November 2011, the ECJ delivered its first judgment on exit tax for *companies*. In a landmark decision, the Dutch exit tax rules requiring immediate payment when companies transferred their place of effective management to another EU member state were found to be incompatible with freedom of establishment.

National Grid Indus BV, a Dutch incorporated company, transferred its place of effective management from the Netherlands to United Kingdom in 2010. At the time of exit, the company had only one asset, which was a Great Britain Pounds receivable. Due to currency exchange differences, this claim had resulted in an unrealised gain. Following the tax treaty between the two countries, National Grid Indus was deemed to be resident in United Kingdom, and an exit tax was imposed on this unrealised currency exchange gain. No deferral was given, and the company argued that this was in breach of the freedom of establishment.[43]

After confirming that the company could invoke the freedom of establishment, the ECJ held that the exit tax was a restriction because a company that transfers its place of effective management is placed at a cash-flow disadvantage compared with those who maintain their tax residency in the Netherlands. This difference in treatment was liable to deter a Dutch company from exercising the freedom of establishment.[44]

The restriction was justified on the basis of the need to safeguard the balance in the allocation of taxing rights.[45] ECJ stated that the origin state is *entitled* to impose an

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40 Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims (now as amended by Council Directive 2010/24/EU of 16 March 2010).

41 *N,* para 55.

42 *N*, para 54.

43 *NGI,* paras 10-14.

44 Ibid., paras 37 and 41.

45 *NGI.*, paras 46-51. This justification was held to coincide with the coherence of the national tax system, see paras 80-82.

exit tax, and that the transfer of the place of effective management of a company does not mean "that the origin state has to abandon its right to tax a capital gain which arose within the ambit of its powers of taxation before the transfer."[46]

When examining the proportionality, the ECJ distinguished between the establishment of the amount of tax and the recovery of the tax.[47] The member states were allowed to definitely establish the amount of tax owed at the time of exit, as this was not disproportionate.[48] In contrast to what the ECJ held in *N,* there was no obligation upon the home state to take a post-emigrational decrease in value into account.

However, the immediate recovery of the tax upon exit, without the possibility of a deferral was disproportionate. The ECJ noted that a deferral could involve administrative burdens that weren't necessarily less harmful than the immediate recovery of the tax debt. For example, this would be the case if the company has a large number of assets, as the administrative requirement necessarily relates to every asset that represented a capital gain upon exit.[49] Therefore, domestic legislation should offer the taxpayers a choice between an immediate payment of the amount of tax owed, and deferred payment of the amount of tax.[50]

Furthermore, the ECJ mentioned that a deferral could possibly be combined with interest in accordance with the applicable national legislation.[51] In addition, the ECJ suggested that the risk of non-recovery could be taken into account; "by measures such as the provision of a bank guarantee."[52]

2.4 C-38/10 Commission v. Portugal[53]

The Portuguese exit tax rules at stake in this case were triggered when a Portuguese resident company transferred its registered office and place of effective management to another member state. The rules were also triggered when non-resident companies with a PE in Portugal moved one or more assets to another member state, as well as upon the cessation of a PE.

46 Ibid., para 46.

47 Ibid., para 51.

48 Ibid., para 52.

49 Ibid., para 71.

50 Ibid., para 73.

51 Ibid., para 73.

52 *NGI*, para 74.

53 C-38/10 *Commission v. Portugal*, [2012] (ECR I-0000).

The ECJ held that the rules were financially penalizing those taxpayers who exercised their freedom of establishment compared to those who maintained their activity in Portugal, and therefore amounted to a restriction. However there was no restriction in regards of the cessation situation, because cross-border and purely domestic situations were treated in a similar way.[54]

Further, the ECJ confirmed its approach from *NGI,* and found that the taxpayer had to be given the option to either pay the tax immediately or to benefit from a deferral.[55] The case broadens the scope of application of *NGI* as it also applied to the transfer of *assets* of a PE.[56] Interestingly, only the statement from *NGI* on interest was repeated, and not the statement on guarantees.

2.5 C-301/11 Commission v. Netherlands[57]

Despite the judgment in *NGI,* and despite the Netherlands announcing that they would change their legislation after *NGI,* the infringement procedure in this case was not withdrawn.[58] Therefore, the Dutch exit tax on legal entities and individuals when they relocated their businesses' place of effective management from the Netherlands to another country was examined, and held to be a restriction. The ECJ again confirmed its approach from *NGI,* and held that the taxpayer had to be given the opportunity to choose between immediate payment and deferral. Regrettably, the Court did not discuss its previous statements on interest or guarantees.

Although this case confirms the judgment in *NGI* and *Commission v. Portugal*,[59] it is interesting that is has a wider scope. While those cases concerned only companies, *Commission v. Netherlands* concerned rules that also applied for businesses carried on by individuals.[60]

54 *Commission v. Portugal,* paras 28-30. See also Tom O'Shea, 'Portuguese Exit Taxes Successfully Challenged by European Commission', Tax Notes International, January 28 2013, 371-374.

55 *Commission v. Portugal,* para 32.

56 *Commission v. Portugal, paras 2-6.*

57 C-301/11 *Commission v. Netherlands,* [2013] (ECR I-0000).

58 Van den Hurk, Van den Broek and Korving, (n 6) 259, suggest that this was because the scope of the infringement procedure was broader than the facts at stake in the preliminary hearing in *NGI.*

59 *Commission v. Netherlands*, paras 15-19.

60 Ibid., paras 2-5.

2.6 C-64/11 Commission v. Spain[61]

A fairly recent judgment on exit tax was delivered by the ECJ on 25 April 2013. The Spanish exit tax rules, which imposed an immediate tax on any unrealised capital gain that existed when a Spanish company transferred its tax residency to another member state, or when a Spanish permanent establishment transferred assets out of Spanish territory, was held to be in breach of EU law. Taxation of unrealised gain upon the cessation of a permanent establishment did not however represent a restriction.[62]

Following its previous cases*,* the ECJ confirmed yet again that the restriction may be justified in the need to preserve the balance in the allocation of taxing rights. However, the rules failed the proportionality test, as there were less restrictive means available. According to the ECJ, the amount of tax may be established at the time of the exit, but payment should be postponed until the time that the tax would have been paid if no emigration had taken place. Moreover, the directives governing mutual assistance for recovery of taxes were sufficient to allow control of the accuracy of the information received during the period of deferral.

The ECJ avoided yet again giving any further guidance or clarification neither on the issues of bank guarantees and interest, nor on the issue of when the capital gain is deemed to be realised for the purpose of collecting the tax.[63]

2.7 C-261/11 Commission v. Denmark[64]

The most recent judgment from the ECJ on exit taxes was delivered on 18 July 2013. The ECJ held that the Danish exit tax rules were incompatible with EU and EEA law.

Under Danish tax law, cross-border transfer of assets and liabilities within a Danish company, that has the effect that Danish tax legislation no longer applies to these, is subject to an immediate exit tax with no possibilities for a deferral. Such

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61 C-64/11 *Commission v. Spain*, [2013] (ECR I-0000).

62 Press-release: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/cp130053en.pdf> (accessed 10 July 2013).

63 The judgment only exists in French and Spain (per 29 October 2013). An unofficial translation has therefore been relied on, as well as a newsletter from Ernst & Young: <http://www.ey.com/Publication/vwLUAssets/ECJ_rules_against_Spanish_exit_tax_-Global_Tax_Alert_-_26_April_2013/$FILE/EY_tax_news_2013043003.pdf.> (accessed 10 July 2013).

64 C-261/11 *Commission v. Denmark* – not yet available in English.

loss of taxing rights may take place where a Danish company transfers assets and liabilities to a permanent establishment outside Denmark, or where a permanent establishment in Denmark transfers assets to its foreign head office or to a permanent establishment outside Denmark. Notably, the exit tax is levied even though the company as such remains under Danish tax jurisdiction.[65]

The ECJ held that the Danish rules were a restriction on the freedom of establishment, both with respect to art. 49 TFEU, as well as art. 31 EEA. A domestic transfer of assets is not regarded a taxable event, whereas a cross-border transfer is. Accordingly, cross-border transfers are therefore subject to less favourable treatment. This difference in treatment was likely to prevent taxpayers from transferring assets abroad.[66]

Following its previous judgments, the ECJ held that the restriction in principle could be justified. However, an immediate recovery of the tax is not proportional.[67] The taxpayer has to be given a deferral until a realization event takes place. This applies irrespective of whether or not the assets are realised after the exit or not.

Further, the ECJ commented for the first time on the issue of assets that are not meant to be realised after exit.[68] The court stated that as the member states are entitled to levy an exit tax, they are allowed to apply another taxation trigger in order to secure their taxation right for these types of assets. However, this trigger has to be less restrictive than immediate taxation on the time of exit.[69]

In terms of the EEA agreement, the Court held that the restriction could not be justified with reference to the effective recovery of tax debt, as the Danish company continues to be a Danish tax resident. In that case, the mere transfer of assets does not affect Denmark's possibilities of obtaining information or of recovery of the tax debt. Hence, there is no need to rely on this justification.[70]

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65 C-261/11 *Commission v. Denmark,* paras 1-3.

66 Ibid, para 30.

67 Ibid, para 32.

68 Ibid, paras 33-37.

69 *Commission v. Denmark*, para 37.

70 Ibid, para 47.

2.8 EFTA-court: E-15/11 Arcade Drilling v. The Norwegian State[71]

Arcade Drilling AS was a Norwegian incorporated and registered limited liability company. Initially the board of directors consisted of two Norwegian members and two US members. However, from 2001, all board meetings took place in the UK, and from 2002 all four board members where UK residents. The UK tax authorities decided that Arcade was taxable under UK law with effect from 1 January 2001. Subsequently, the Norwegian tax authorities deemed Arcade to have relocated its head office outside Norway, and pursuant to Norwegian company law Arcade had an obligation to liquidate. This gave rise to liquidation taxation, despite the fact that no liquidation of Arcade actually had taken place.

The company filed a claim against the Norwegian state, claiming that the decision to liquidate was in breach of EEA law.[72]

After confirming that Arcade Drilling As could rely on the freedom of establishment, the EFTA Court held that the rules amounted to a restriction.[73] Following the ECJ, the EFTA Court found that the restriction could be justified in the need to safeguard the balance in the allocation of taxing rights between EEA states.[74] Also, the domestic rules were meant to prevent tax avoidance. When examining the issue of proportionality, the EFTA Court held that the taxpayer had to be given a choice between immediate payment and a deferral.[75] Interestingly, the EFTA Court explained that granting a deferral could involve a risk for the state of origin as they run a risk of non-recovery. In this regard, the EFTA Court noted that the national authorities could take measures to secure payment, provided that this risk was "genuine and proven".[76]

3 After National Grid and beyond: where are we now?

3.1 Immediate recovery of the tax-claim

3.1.1 Immediate recovery is not permitted

The ECJ case law has established that immediate payment is not proportionate.

71 E-15/11 *Arcade Drilling v The Norwegian State,* [2012] (2012 EFTA Court Report, 676)

72 *Arcade*, para 30.

73 Ibid., para 56.

74 *Arcade*, para 91, 93.

75 Ibid., para 97, *NGI*, para 51.

76 *Arcade*, para 101.

Instead, the taxpayer must be given a choice to either pay the tax immediately, or opt for a deferral. This seems like a straightforward solution, but some issues still arise. Firstly, one question is whether this applies for *all types* of assets, or whether there are some exceptions where immediate payment may be required after all. Secondly, when it comes to the question of *when* the tax may be collected, the ECJ refers to the time of realisation in domestic context. However, the question is *when* different assets are deemed to be realised. These questions will be discussed in the following chapter.

3.1.2 Option to require a deferral – does it apply to all types of assets?

It may be argued that for some types of assets, such as intangibles, an obligation to grant a deferral may lead to loss of the taxing right for the home state as these assets are seldom realised. Should the home state then be allowed to require an immediate payment instead of granting a deferral? This issue was not addressed by the ECJ in *NGI*. The Court seems to give a general conclusion, and does not distinguish expressly between different assets.

However, this issue was for the first time addressed by the ECJ in *Commission v. Denmark*. As already mentioned, the Court held that immediate recovery of the exit tax was not proportionate, irrespective of whether or not the assets were realised after the exit.[77] Hence, the member states have to provide a deferral for all types of assets. However, the Court held that the member states are entitled to use a different taxation trigger than realisation, meaning that the taxing right of the member state of origin will be preserved also with respect to assets that are not mean to be realised.[78]

Unfortunately, the court does not address specifically what kind of taxation trigger the member states may use, but merely states that it has to represent a less restrictive measure than immediate taxation.[79] A question is whether yearly instalments could be a solution, and this will be discussed in the following chapter.

3.1.3 Cessation of deferral: when can the tax be collected?

On this issue, the ECJ has referred to the time of realisation in domestic context. There has been some discussion as to *when* different types of assets are considered realised, and the ECJ case law does not give any further guidance. If a domestic transfer of seat had taken place in *NGI,* the capital gain on the receivable would

77 *Commission v. Denmark*, para 35, with reference to *National Grid Indus,* paras. 68 and 70.

78 Ibid., para 37.

79 Ibid.

have been realised when it was paid back or transferred,[80] and as a result this would therefore be the time for collection in a cross-border situation.[81] Van den Broek and Meussen argue that this may lead to a very long period of deferral, for example in the case of a perpetual bond that is sold after 1,000 years. Their point is to show that the thinking from *NGI* may have some shortcomings in certain situations. Accordingly, the authors argue that due to the risk of non-recovery, annual payments of the tax owed may be justified.[82]

This particular problem also occurs in particular for intangibles, as well as for assets that are not depreciated, such as land. These types of assets are seldom realised, and a deferral will leave the tax authorities in the home state with a significant risk of non-recovery.[83]

First of all, it seems clear that to require annual payments of the exit tax is a restriction just as much as immediate payment is.[84] Again, the point is that a taxpayer, who maintains his/hers tax residence in the home state, or who doesn't transfer assets, is only subject to tax upon realisation. By requiring payment annually in instalments, the taxpayer is still subject to an *earlier* taxation compared to a purely domestic situation.[85] It is this difference in treatment that has created a restriction in the first place.[86]

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80 Harm van den Broek and Gerhard Meussen, 'National Grid Indus Case: Re-thinking Exit Taxation', (April 2012) 4 European Taxation, 194.

81 Harm van den Broek and Gerhard Meussen (n 88) 194.

82 Ibid. However, Harm Van den Broek in: 'The 2013 Netherlands Act on Exit Taxation' (2013) 53 European Taxation, 189, seems to argue that the collection must be deferred indefinitely until alienation, even if this takes place 1000 years later.

83 This has to be distinguished from the argument of diminution of tax receipts, as the latter is not a relevant justification for restrictions, see *Lasteyrie* para 60.

84 O'Shea, (n 54), 373.

85 The comparison must be made between an asset/company transferred/moved cross-border and an asset/company transferred/moving within the country, see also Gregor Führich, 'Exit Taxation and ECJ Case Law', (2008) 48 European Taxation, 11. However, different scholars have made some serious objection to this comparison. H. Van Arendonk argues that a domestic and a cross-border situation is not necessarily similar as in the cross-border situation the company emigrating changes its tax jurisdiction, Arendonk, 'Exit Taxes: Separation of Powers?' (2010) 2 EC Tax Review, 61. However, from an origin state perspective, it is clear that the comparison has to be made between to home state nationals: one exercising the freedom, and one who does not, see Tom O'Shea, *'Marks and Spencer v. Halsey (HM Inspector of taxes); restriction, justification and proportionality',* (2006) 2 EC Tax Review, 80.

86 O'Shea, (n. 54) 373; Tom O'Shea, *'European Tax Controversies: A British-Dutch Debate: Back to Basics and Is the ECJ Consistent'*, (February 2013) World Tax Journal, 118. See also the argumentation of the Danish government in *Commission v. Denmark,* para. 15.

However, the analysis continues. When deciding if the member states have complied with its obligations under the treaties, the ECJ follows a standard analysis that may be referred to as the "Gebhard-formula".[87] In order to be justified, the national measure must fulfil four conditions; the rule must be non-discriminatory, it must be justified in an overriding reason in the public interest, it has to be suitable to attain the objective they pursue and it cannot go beyond what is necessary to attain this objective.[88]

It is clear from case law that the restrictive measure can be justified with reference to the principle of fiscal territoriality connected to a temporal component, and it is also clear that the measure is suitable to attain the objective pursued. Hence, the question is therefore whether this measure complies with the principle of proportionality.

When examining the proportionality, it must be taken into consideration that the ECJ has repeatedly held that the home state has a legitimate right to impose an exit tax, and that an emigration does not mean that the home state has to "abandon its right to tax a capital gain which arose within the ambit of its powers of taxation before the transfer (...)."[89]

It may be argued that the cited statement shows that the principle of fiscal territoriality in itself is an argument for annual instalments for *certain assets*. Otherwise, an automatic deferral could mean that the tax claim is lost for the home state. That would have the precise opposite consequence of the cited statement from ECJ. The question then seems to be like Wattel has formulated it, and as mentioned in the beginning of this article: how can the rules be designed to protect the tax claim of the departure State and at the same time be least obstructive to the freedoms?[90] After all, ECJ case law reveals that the EU Treaties do not offer any guarantees that cross-border activity within Union will be neutral as regards to taxation.[91] Also, if the ECJ in *some circumstances* are willing to accept the requirement of a bank guarantee in order to take account of the risk of non-recovery of the tax, why should annual instalments be rejected automatically when

87 C-55/94 *Reinhard Gebhard* [1995] (ECR I-4165), para 37.

88 O'Shea, (n 86) 73.

89 *NGI,* para 46.

90 Terra and Wattel, (n 7) 955.

91 *NGI,* para 62, C-403/03 *Egon Schempp v Finanzamt München V,* [2005] ECR I-6421, para 45.

they pursue the same goal?[92] Moreover, the ECJ has repeatedly held that the effectiveness of fiscal supervision may justify a restriction on the freedom of establishment.[93]

It is interesting that the Commission closed its proceedings against Sweden after Sweden changed its legislation. As of 1 January 2010, the Swedish exit tax is payable in annual instalments, and for intangible assets the tax is to be paid over a 10-year period.[94] The idea behind this solution is that the disadvantage of having to pay the exit tax every year is evened out by the advantage received if the host state provides a step-up to real value. If the annual exit tax in the origin state matches the step-up provided in the host state, which they ideally should, and the number of annual instalments match the depreciation period, then the exit tax and the depreciation will even each other out.[95] Although the Commission is clearly not the ECJ, meaning that the Commissions opinion cannot be regarded as the final word, it is still interesting that they seem to accept this. Also, some authors have argued that the Swedish case show that the Commission will accept deferral which keeps pace with the depreciation period of the tangible fixed asset, as this would entail an equal treatment of domestic and cross-border situations.[96]

Admittedly, there are also some significant shortcomings with this solution. Firstly, annual payments obviously include some administrative burden. However, after *NGI,* it is clear that administrative burden cannot be used as a justification for immediate payment. Hence, this argument should bear little weight when assessing annual instalments. Secondly, the solution presupposes that every country provides a step-up, which is not a given.[97] I.e., Norway, Belgium and UK do not.[98] Thirdly, the system would not work for e.g. shareholdings, as these are not depreciable.[99]

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92 Massimo Mojana and Simone Marchiò, 'The Transfer of a Company's Tax Residence within the European Union: The New Italian Rule on Exit Taxation' (2012) 52 European Taxation, 510, are in favour of annual payments. Van den Broek (n 90) 186, reveals that the new Dutch exit tax offers a third possibility in addition to the two described in *NGI.* This option allows the tax to be paid in ten annual instalments, irrespective of realisation.

93 *Futura,* para 31.

94 Wattel, (n 27) 375-376.

95 Terra and Wattel, (n 7) 966.

96 Réka Világi, 'Exit Taxes on Various Types of Corporate Reorganisations in Light of EU Law', (July 2012) 52 European Taxation, 352; Mojana and Marchiò (n 100) 512, Frederik Zimmer, 'Exit Taxes in Norway', (October 2009) World Tax Journal, 146.

97 See chapter 3.5.

98 Wattel, (n 27) 376.

99 Wattel, (n 27) 375.

Finally, if the tax claim is big enough, even annual instalments will not help with the liquidity. The cash flow disadvantage may be lower compared to immediate payment, but the disadvantage still exits. The strongest argument seems to be that this option safeguards the home state's tax claim, but it remains to be seen whether the ECJ will accept this.[100]

Also, notwithstanding the discussion above, it has been argued that the tax can be collected if and when the recovery of taxes directive or a relevant tax treaty is no longer applicable. For example where assets are moved from an EU member state to a third country where there is no agreement on mutual assistance for the recovery of taxes.[101] The point is that this puts the tax claim in jeopardy.

3.2 The risk of non-recovery: bank guarantee?

3.2.1 Carte blanche for the member states?

In both *Lasteyrie* and *N* the ECJ held that a bank guarantee was a restriction. It was therefore a surprise when the ECJ in *NGI* suggested a bank guarantee in order to take account of the risk of non-recovery. Has the Court taken a different view than in the previous cases,[102] meaning that there is a difference between natural persons and companies? Or should this statement be interpreted more narrowly?[103]

An analysis of the apparent deviation needs to take the "Gebhard-formula" into account. As explained above, the first step is to see whether a restriction exists before proceeding to the question of justification and proportionality. In *Lasteyrie* and *N*, the Court dealt with the issue of bank guarantees at "restriction-level". However, in *NGI,* the issue is discussed at "proportionality-level". Hence, in order to reach this level of the Gebhard-formula, the Court would have had to conclude that the exit tax rule at stake was a restriction. Accordingly, the ECJ's view in all of the three cases seems to be that requiring a bank guarantee amounts to a restriction.

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100 Ibid., 375; Wattel argues that annual payments might be a solution.

101 O'Shea, (n. 54) 374.

102 Wattel, (n 27) 374.

103 Katia Cejie, *'Emigration Taxes – Several Questions, Few Answers: From Lasteyrie to National Grid Indus and beyond',*(2012) 40 Intertax, 395.

What the Court seems to be saying in *NGI* is that a bank guarantee may be allowed in *some*, but not all, cases.[104] It does not appear to be a "carte blanche" for the states to require a bank guarantee.[105] To interpret the statement in that way would be in strong contrast with *N* and *Lasteyrie,* and it seems unlikely that the ECJ would departure from previous cases without giving either a short explanation or at least pointing out this difference. In contrast, they did point out their deviation from *N* on the issue of a post-emigrational decrease in value.[106] Also, the requirement of providing guarantees did not seem to be an issue before the ECJ, as neither the account of the ECJ session nor the AG opinion discusses this.[107] Neither had the referring Court raised any question on this issue.

Further, the ECJ did *not* repeat its statement on bank guarantees in *Commission v. Portugal*, but only referred to interest.[108] This was despite the thorough discussion by AG Mengozzi, who interpreted this statement narrowly, and found that such a guarantee was only allowed if there was a genuine and proven risk of non-recovery.[109] The Commission shares this interpretation.[110] The ECJ silence in *Commission v. Portugal* may indicate that the statement in *NGI* was rather spontaneous and that too much emphasis cannot be placed on it.[111] Accordingly, the statement should not be "over interpreted".[112]

The fact that *Lasteyrie* and *N* applied for natural persons and *NGI* for companies doesn't seem to necessitate a different solution. The directives on exchange of information and mutual assistance on recovery of tax debt both apply for

104 O'Shea, (n 86) 115; 'Opinion Statement of the CFE (Confédération Fiscale Européenne) on the Decision of the European Court of Justice of 29 November 2011 in Case C-371/10, National Grid Indus BV and Business Exit Taxes within the European Union, by the ECJ Task Force of the CFE', (2013) 53 European Taxation, 279.

105 *Commission v. Portugal*, Opinion of AG Mengozzi, paras 78-83. Van den Broek (n 90) 187, agrees.

106 *NGI,* para 56.

107 Van den Hurk, Van den Broek and Korving (n 6) 260.

108 *Commission v. Portugal,* para 32. In the more recent judgment *Commission v. Denmark,* neither bank guarantee nor interest is discussed by the ECJ.

109 *Commission v. Portugal*, Opinion of AG Mengozzi, para 82.

110 Ibid.

111 Although admittedly, the statement on interest may suggest that the ECJ has no objection against guarantees either, see Panayi (n 1) 324.

112 Cejie, (n 111) 395. Van den Hurk, Van den Broek and Korving (n 6) 260, argue that the statement should not be "overstated".

individuals as well as for companies.[113] However, one difference is that a company can cease to exist, and hence escape the deferred tax claim, as there will be no taxable subject left to refer to. A natural person doesn't have the same opportunity. On the other hand, the period of deferral can be longer for companies than for natural persons.[114] Also, contrary to the shares at stake in *N,* the time of realisation of business assets can be far in the future, and this may be what the ECJ had in mind.[115] These differences may explain the apparent difference in the case law, but the ECJ has not yet commented upon this.

It has been argued that the difference may be explained by the ECJ trying to be specific in *N,* while trying to be more general in *NGI.* In *N,* the Dutch rules did not require a bank guarantee for obtaining a deferral in the case of a domestic move, and hence it could not be allowed cross-border. In *NGI*, the Court may merely be saying that bank guarantee cannot be required cross-border if it is not required domestically.[116] Although this makes sense, this doesn't explain why the Court did not refer to bank guarantee in *Commission v. Portugal.*[117] As that was an infringement case, and hence more general in its character, one would at least have expected a repetition of the statement on guarantees.[118]

The ECJ sees exit tax as a restriction because emigrating taxpayers are subject to tax upon exit, while remaining taxpayers are taxed only *if* and *when* the assets are realised. Hence, it does not make sense to argue that ECJ at the same time would unconditionally allow for bank guarantees. In previous cases, bank guarantees was held to be restrictions because they deprived the taxpayer of the enjoyment of the assets provided as guarantees.[119] AG Mengozzi refers to this when he argues that a bank guarantee could be just as restrictive as immediate tax collection.[120] This is especially the case if the bank guarantee corresponds to the deferred tax.[121] If a taxpayer is faced with the option of either paying the tax immediately, meaning

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113 Van den Hurk, Van den Broek and Korving, (n 6) 260.

114 Ibid.

115 Van den Broek and Meussen, (n 88) 195.

116 Kok, (n 26) 204.

117 Van den Hurk, Van den Broek and Korving, (n 6) 259.

118 On the other hand, the silence may be a result of such a requirement not being contemplated by the Portuguese legislation, see Luca Cerioni, 'The "Final Word" on the Free Movement of Companies in Europe following the ECJs VALE ruling and a Further Exit Tax Case?' (2013) 53 European Taxation, 336-337.

119 *Lasteyrie* para 47, *N* para 36.

120 *Commission v. Portugal,* Opinion of AG Mengozzi, para 78.

121 Ibid., para 82.

that he will be deprived of money he doesn't yet have, or to be deprived of the assets that are used as guarantees, then what is the difference?

In this author's opinion, the statement from *NGI* cannot be interpreted as a carte blanche for the member states to require guarantees where deferral is granted. However, in some cases it may be found to be proportionate.

3.2.2 When is the requirement of a guarantee proportionate?

As mentioned, the ECJ refers to the risk of non-recovery.[122] The *risk* of non-recovery is not the same in every situation, but differs depending on the circumstances. As the ECJ itself points to, the passage of time is one variable that will affect the degree of risk present. After a certain time, the risk has become sufficient in order for a guarantee requirement to be proportionate.[123] The statement in *NGI* read in its context indicates that a bank guarantee may be found proportionate if the risk of non-recovery is sufficient.[124] The question which then arises is the following: *when* is the risk sufficient?

Some guidance may be found in *N.* There, the ECJ found that the rule was not proportional *because* the council directives for exchange of information and mutual assistance for recovery of claims was available.[125] Accordingly, the presence of these directives lowers the risk of non-recovery, and the need for a bank guarantee is correspondingly reduced.[126]

Some authors have however argued that this interpretation is inconsistent with the statement in one of the last paragraphs in *NGI.* There, the ECJ states that the existing machinery for mutual assistance is sufficient.[127] Eric C.C.M Kemmeren argues that this statement, together with the statement on guarantees, is

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122 *NGI,* para 74.

123 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?', (2012) 40 Intertax, 485.

124 Thömmes and Linn, (n 131) 492.

125 *N*, paras 52-53.

126 The same thinking is found in *Commission v. Denmark,* where the ECJ held that Denmark in relation to the EEA agreement could not justify its exit tax rules with respect to the effective recovery of tax as the rules applied where the company as such remained under Danish tax jurisdiction. Hence, there was no risk for non-recovery according to the ECJ. This implies that the risk of non-recovery as such is stronger where the company as such emigrates, compared to the situations where there is merely a transfer of assets.

127 *NGI,* para 78.

contradicting *N.* His point is that it indicates that a bank guarantee is allowed and proportionate *even though* the directives are available. In *N* however, the Court found that guarantees was *not* proportional because the directives were available.[128] However, it may be argued that the ECJ is simply stating what has been stressed again in *Commission v. Spain;* that member states should not be able to rely on the possible difficulties in obtaining information in order to justify a restriction.[129] A point should also be made that the two directives have recently been enforced.

Hence, with such enforcement, it should be even lesser reason for the states to have a bank guarantee to rely on.[130]

Although not mentioned by the ECJ, other factors may also be relevant in terms of determining the risk of non-recovery. For example, whether the taxpayer is a natural person or a company could be relevant. As mentioned above, a company may be dissolved and accordingly cease to exist. In that case, it doesn't matter that you can rely on the directives, and hence an argument may be made that despite these directives there still is a risk of non-recovery. Whether this is a sufficient amount of risk to claim a guarantee seems to be uncertain.

In addition, the number of assets that are moved may be relevant. ECJ argues that the more assets moved out of the state of origin, the more complex the assets situation will be, and hence an accurate cross-border tracing of the assets may be correspondingly difficult. The ECJ only uses this argument to show that granting a deferral may also entail an administrative job that may also represent a restriction for the taxpayer, but another point may also be made with regards to the risk. The more assets being moved, the more complex the asset situation becomes, leading to an increasing risk of non-recovery.

Another issue is why the Court chose to mention a bank guarantee and not any other alternative that may serve as security. This author agrees with Thömmes and Linn, who argue that bank guarantee is mentioned merely as one example out of many.[131] However, it is slightly strange, and maybe also inconsistent, that the ECJ choose to refer to a bank guarantee that usually is combined with a bank fee or provision, which will increase the cost for the taxpayer, affecting his/hers liquidity.[132] Both in *NGI* as well as in *Commission v. Portugal,* the ECJ focuses on

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128 Eric C.C.M Kemmeren, 'Recovery of Income Taxes: The ECJ Tends to Allow More Leeway', (2013) 1 EC Tax Review, 7.

129 C-269/09 *Commission v. Spain,* paras 66-72.

130 Van den Hurk, Van den Broek and Korving (n 6) 260.

131 Thömmes and Linn, (n 131) 493.

132 Ibid.

the cash-flow disadvantage caused, so why suggest that the taxpayer should incur more costs?[133]

If bank guarantee is required, another unanswered question is whether the guarantee should cover the future interest charge.[134] As shown, there are different questions that need clarification from the ECJ. On the basis of the current state of ECJ jurisprudence, this author argues that bank guarantee may be allowed if there is a sufficient risk of non-recovery.[135] However, because imposing such a requirement is still seen as a restriction, it will have to satisfy the proportionality requirement in order to be allowed. Accordingly, the Court is not in direct conflict with previous judgments, but rather seems to provide more nuances to the issue. Any difference in the proportionality assessment may be related to the factual difference of a natural person and companies.

3.2.3 EEA-perspective

If emphasis is put on the two directives when assessing the presence of risk, this should put the three EEA countries in a position to demand a guarantee, as they are not bound by these directives. However, these three countries all have a very extensive network of tax treaties, and if the tax treaties are based on the OECD Model Convention, Art. 26 and Art. 27 that should be sufficient to cover the need for both exchange of information and mutual assistance for recovery of tax claims. If such a tax treaty is present, or any other similar agreement, these countries would have a hard time arguing that they could also require a bank guarantee in case of deferral. This also seems to be the view of the EFTA Court in *Arcade:*

> "In this regard, the national authorities may take certain measures in order to secure the eventual payment of the amount of tax, provided that there is a genuine and proven risk of non-recovery.
>
> This risk is essentially dependent upon the nature and extent of the company's tax positions, and the sources of information available to the national authorities regarding these tax positions, *inter alia,* through cooperation with and the exchange of information with the authorities of other EEA States."[136]

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133 Ibid.

134 Terra and Wattel, (n 7) 971, is sceptical to such an interpretation.

135 Thömmes and Linn (n 131) 493 agree.

136 *Arcade*, paras 101-102.

3.3 "Possibly together with interest"

Another surprising part of the judgment in *NGI* was the remark about interest.[137] Interestingly, this statement was repeated in *Commission v. Portugal*, but without any further comments or explanations. Also in *Arcade,* the EFTA court repeated the statement, but without elaborating further.[138] No discussion was provided in *Commission v. Netherlands* either. Notably, the issue was not argued before the Court in *NGI* by any of the parties, and neither did the advocate general comment upon it. It is therefore interesting that this is introduced with such a very brief and not further explained statement.

The phrase "possibly together with interest in accordance with the applicable national legislation" may be, and has been, interpreted in different ways. One alternative may best be explained with reference to the requirement of "national treatment", meaning that interest may be required on a non-discriminatory basis.[139]

The European Union member states are under an obligation not to treat a cross-border situation less favourably than a purely domestic situation. This obligation applies both in a host state situation and in an origin state situation.[140] From an exit tax perspective, the exiting member state are under an obligation as an origin state; this state cannot provide less favourable treatment to a taxpayer who choose to emigrate, compared to a taxpayer who chose not to emigrate or to move within the member state. If the ECJ statement on interest is interpreted on this background, "in accordance with the applicable national legislation" seems to refer to whether or not a tax is due in a comparable domestic situation. However, where a taxpayer moves within the country or does not move at all, no tax is normally due. Tax is only due upon realization of the assets, and an interest is usually only required for late payment of this tax claim, or when the tax assessment is changed. It is this difference in treatment that gives rise to the issue of a restriction when it comes to exit tax in the first place.[141] Hence, it doesn't make sense to interpret the statement from the ECJ as a carte blanche allowance to require interest where an exit tax is due.[142]

137 *NGI*, para 73.

138 *Arcade,* para 103.

139 Tom O'Shea, *EU Tax Law and Double Tax Conventions*, (Avoir Fiscal Limited 2008) 47.

140 Ibid, 34.

141 Thömmes and Linn, (n 131) 490.

142 Ibid, 491; Van den Broek, Van den Hurk and Korving (n 6) 261.

However, by "applicable national law", the ECJ could also be referring to extensions of payment in general.[143] This seems to be how the Netherlands State Secretary has interpreted the statement, and the Dutch now impose late payment interest from when the assessment is imposed and not from the time of realization.[144] However, it seems unlikely that this is the correct interpretation.[145]

Rather, with the controversial statement, the ECJ seems to be referring to whatever national law that exists, which varies from country to country. The Italian argument before the advocate general in *NGI* illustrates this. The Italians apparently taxes annually the capital gains of domestic companies that have accrued in that year, even if these gains are unrealised.[146] Applying the thinking outlined above, comparing the purely domestic situation with a cross-border situation would reveal that an exit tax is not resulting in a less favourable treatment for the emigrating taxpayer. However the Italian statement did not reveal whether the terms were the same also with regards to a deferral of the payment and the interest. It cannot be ruled out that the ECJ was trying to make room for precisely these kinds of differences when formulating their statement on this issue.[147] With this argumentation, the Italians seemed to invite the ECJ to formulate a more general solution, and it may be argued that they succeeded.[148]

The Commission also argues that requiring interest is intrinsically discriminatory.[149] Conversely, AG Mengozzi in *Commission v. Portugal* argued in favour of granting interest. He stated that in a purely domestic situation, if interest is not required upon a move, this is simply because the tax is due only upon realisation. In a cross-border situation however, where the home state may determine the amount of tax owed at the time of the exit, this has to be regarded as a loan to that company. Accordingly, the advocate general accepted the claim for interest.[150] On the other hand, it has been argued that the advocate general uses the wrong comparator, as the ECJ in *NGI* compared a cross-border transfer of seat with a domestic situation involving unrealised capital gains in respect of which no

143 Van den Hurk, Van den Broek and Korving, (n 6) 261.

144 Van den Hurk, Van den Broek and Korving, (n 6) 261. See NL: Decree BLKB 11/2477M (14 Dec. 2011) on deferral of payment for final settlement profits.

145 Van den Broek and Meussen (n 88) 195.

146 *NGI,* Opinion of AG Kokott, para 75.

147 Van den Hurk, Van den Broek and Korving, (n 6) 262.

148 Ibid.

149 *Commission v. Portugal,* Opinion of AG Mengozzi, para 73.

150 *Commission v. Portugal,* Opinion of AG Mengozzi, paras 74-77.

tax assessment has been imposed. The advocate general compared the cross-border situation with a domestic situation where a tax assessment *has been imposed* involving *realised* income.[151] Admittedly, the ECJ repeated its statement on interest in *Commission v. Portugal,* but this doesn't seem to be an approval of the AG thinking.[152]

Moreover, the requirement of interest is of a different character than a bank guarantee. This has to be put in connection with the justification that is found relevant by the ECJ; namely the balance in the allocation of taxing rights, connected with a temporal component. The Court has several times pointed out that the home state has a legitimate claim to tax unrealised gain occurred while the assets were located within its territory.[153] Requiring a guarantee serves as a protection for claim, and by that also serves to secure the balance in the allocation of taxing rights between the member states. However, an interest is different as it represents the prize for borrowing money. It is supposed to make up for the advantage that the taxpayer has had for keeping the money, and for the disadvantage the tax authorities has had due to missing out on the money.[154] If the ECJ statement about interest allows interest to be demanded from the time of exit, this actually implies that the taxpayer is making a payment for *borrowing* the money in the period of deferral. This does not seem logical, as the ECJ has clearly stated that the taxpayer should be given a choice between paying immediately or to have the payment deferred. Accordingly, this must mean that the tax become due upon realisation. Since no tax is due at the time of exit, no interest charge should apply.[155]

Also, if granting a deferral is linked with both bank guarantee and interest, immediate payment may be perceived to be the best alternative. If the deferral is linked with too many conditions, taxpayers may be "forced" to choose immediate payment. If so, it doesn't seem to be a *genuine* choice between two alternatives. It doesn't make sense that the ECJ would first conclude that there should be an option between two alternatives, and then design one of the alternatives to be non-attractive to the taxpayers.[156] However, this argument depends partly on the type of

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151 Van den Hurk, Van den Broek and Korving, (n 6) 262.

152 Ibid.

153 *N*, para 46, *NGI*, para 46.

154 Thömmes and Linn, (n 131) 489-490.

155 Thömmes and Linn, (n 131) 490.

156 Also Panayi, *'National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam: Exit taxes in the European Union revisited',* (2012) 1 British Tax Review, 47-49, seems to argue along these lines.

rate claimed for the interest. If the interest rate for deferral is the same as borrowing money for immediate payment, then the interest should not prevent the taxpayer from choosing deferral. Although, due to the current low-interest rate environment, and the fact that interest on bank loans are deductible while interest on tax claims are usually not, bank loans could be preferred instead of choosing deferral.[157] Another point to make is that the ECJ has focused on the cash-flow disadvantage that exit tax generates, but through requiring interest it is not guaranteed that this disadvantage is avoided by choosing a deferral.[158]

3.4 Post-emigrational decrease in value

In *N*, ECJ held that the Dutch rules would have had to take future decreases in value into account in order to be proportionate, unless the host member state already had done so.[159] Conversely, in *NGI,* the Court held that this was not required.[160] This change in approach seems consistent with the principle of territoriality, but may lead to double taxation and may also cause problem with regards to post-emigrational losses.[161]

The Court explains the difference with reference to the type of assets transferred. The assets of a company are directly linked to the activity that produces income, and this income is taxed in the host state after emigration.[162] From the perspective of the principle of territoriality, this reasoning makes sense. In *N* however, these considerations were not relevant as the case concerned a natural person. In that case, the Netherlands was in breach of the principle of national treatment if the amount of exit tax imposed at the time of exit was greater than the amount that would have been taxed at disposal.[163] The Netherlands therefore had to take decreases into consideration in order grant national treatment.[164]

157 Thömmes and Linn, (n 131) 491.

158 Ibid., 492.

159 *N,* para 54.

160 *NGI,* paras 55-61. Arguably, this applies both in a deferral situation as well as in an immediate payment situation.

161 Opinion Statement of the CFE (n 112) 278.

162 *NGI*, paras 56-57.

163 Tom O'Shea, (n 86) 116; Világi (n 104) 354. De Man and Albin, 'Contradicting Views of Exit Taxation under OECD MC and TFEU: Are Exit Taxes Still Allowed in Europe?' (2011) 39 Intertax, 621, argues that *N* is more in line with the idea of a European Integral Market, as it considers the territory of the EU Member States as a single territory.

164 O'Shea, (n 94) 116.

The explanation of the ECJ in *NGI* is convincing, but it may be criticised for being too general. Not all assets owned by the company are used in the production process, and there are also other factors such as market conditions that may lead to decrease in value.[165] However, the ECJ did not comment upon these nuances.

Further, the ECJ Task Force of the CJE criticises the Court's explanation in *NGI,* and argue that this explanation can equally be said about the capital gain in *N*.[166] Moreover, the Task Force does not understand why the ECJ focuses on the fact that taking such decrease in value into consideration may lead to double taxation and/or double deduction of losses. They argue that such situations arises from the interaction between two tax systems, and that the ECJ later in *NGI* states that the member states does *not* have a guarantee against neutrality.[167]

Another explanation may be found in the development of the relative weight of the principle of territoriality. Looking at *Lasteyrie, N* and *NGI,* this principle has gone from being rejected in *Lasteyrie* to become the most important justification for exit taxes in *NGI*. The principle was accepted for the first time in *N* in respect of exit taxes, but the Dutch rules waived the tax claim after 10 years if no realisation took place. Further, the exit tax Dutch rules in general has been criticised as *not* being in line with the territoriality principle.[168] This may have prevented the ECJ from fully relying on territoriality in *N*. As territoriality implies that any change in value after exit is irrelevant for the home state, fully relying on this principle meant that this had to be the solution in *NGI*. In this author's opinion, this will also be the solution if the ECJ again is faced with an exit tax case on individuals, as the principle of territoriality leaves no other option. Moreover, the Court's approach to this question in *N* necessarily involved a high level of coordination between states.[169] This is however avoided with the approach from *NGI*.

3.5 Step-up in value – a requirement?

The principle of fiscal territoriality raises the question of step-up. As shown, an exit tax preserves the principle of territoriality upon emigration. However, failing

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165 Kok, (n 26) 205.

166 Opinion Statement of the CFE (n 112) 279.

167 Ibid.

168 Christiana HJI Panayi, *Exit Taxation as an Obstacle to Corporate Emigration from the Spectre of EU Tax Law*, Chapter 11: Cambridge Yearbook of European Legal Studies, 13 (2010-2011) 253; Bernt Zuijendorp, *'The N case: the European Court of Justice sheds further light on the admissibility of exit taxes but still leaves some questions unanswered',* (2007) 1 EC Tax Review, 5.

169 Panayi, (n 168) 255.

to grant step-up leads to a tax claim that exceeds the profits accrued in that state, which is clearly not in line with the principle of territoriality.[170] Also, not granting step-up in the state of immigration may lead to double taxation. The question is whether the member states have an *obligation* to provide a step-up in value. The ECJ has not yet commented on this, because the question has not been raised before the Court.[171] It follows from the concept of negative harmonisation that the Court cannot suggest any rules on its own initiative.[172]

Some authors argue that lack of step-up is a restriction on the freedom of establishment. Not granting a step-up is most likely to discourage a company from moving into that member state, because this will result in a latent tax claim over built-in gains that actually accrued outside the territory of that state.[173] Accordingly, Wattel argues that a member state has to grant step-up if they do so in a comparable domestic situation.[174] As an example, Wattel refers to a situation where a former charity or public body become a taxable subject. However, the comparable should rather be the transfer of a company within a country. In that case, no step-up is granted. Hence, there is no less favourable treatment in the domestic and cross-border situation.[175]

Wattel fails to distinguish between a *disparity* and a *restriction*. The lack of step-up is not necessarily a restriction, but may rather be viewed as a disparity.[176] Not granting step-up in the immigration state may cause double taxation unless the home state grants a credit. Hence, double taxation is caused by *two* states. This calls upon previous cases where the ECJ dealt with a “two-state problem”.[177]

In *Kerckhaert-Morres,*[178] the Belgium dividend rules treated Belgium sourced dividends equally to dividends sourced in France, but the dividends were also

170 Van den Hurk, Van den Broek and Korving, (n 6) 264.

171 Kok, (n 26) 206, interprets the *NGI* as not imposing such an obligation on the member states.

172 This is why the court could not suggest a recapture rule to the UK in *Marks & Spencer*; see *Marks & Spencer,* para. 58.

173 Kok, (n 26) 206.

174 Wattel, (n 27) 372.

175 Kok (n 26) 206, argues that this is one alternative comparison out of two. However, he states that this might be the wrong one, as in the cross-border situation, the company starts to become subject to tax in another Member State.

176 O’Shea (n 86) 106.

177 O’Shea (n 86) 106.

178 C-513/04 *Mark Kerckhaert and Bernadette Morres v. Belgische Staat* [2006] ECR I-10967.

taxed in France. No tax relief was granted in Belgium, and the taxpayer argued that this was in breach of free movement of capital. The ECJ disagreed, and held that the Belgium rules were not incompatible with this freedom. If juridical double taxation is caused by two member states, this may have to go without any relief under the current state of EU law, as no harmonised rules exists on EU level.[179] However where double taxation is caused by one member state and that state provides relief in a domestic situation, the state may also have to grant the same relief in a comparable cross-border situation.[180] Applied to the issue of step-up, this would mean that the double taxation must be accepted in lack of harmonised rules at EU level.[181] This also seems to fit with the ECJ statement in *NGI* that home state and host state are viewed independently from each other.[182] Further, the ECJ explicitly stated in *NGI* that the Treaties offer no guarantee that cross-border activity within the EU will be tax neutral, and that the states does not have an obligation to design their tax systems as to fit with other systems.[183] In addition, granting a step-up may involve a difficult valuation assessment. Further, if the step-up leads to a higher market value than acquisition cost, the taxpayer may receive an advantage by way of depreciation on something that doesn't involve an actual cost. Moreover, the statement from *NGI* that the home state didn't have to take post-emigrational decrease in value into consideration, regardless of whether the host state took it into account, appears to be contrary to the step-up suggested by in both the Communication from 2006 and Resolution from 2008.

Another approach to this discussion has been to view the principle of territoriality as something more than just a justification. Some authors argue that the ECJ could (and should) invoke this principle to force a member state to grant a step-up.[184] This involves raising this principle to the level of a general legal principle, something the Court clearly has not yet done. Those in favour of this argue that it would be a major contribution to the prevention of double taxation within European Union.[185] This argumentation does not however seem to distinguish between the "one-state" and "two state" double taxation.

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179 O'Shea (n 86) 106.

180 Tom O'Shea, *'Dutch Rules Challenged in National Grid Indus',* Tax Notes International, January 16 2012, 205.

181 O'Shea, (n 180) 205.

182 *NGI,* para 61.

183 Ibid, para 62.

184 Van den Hurk, Van den Broek and Korving (n. 6) 265.

185 Van den Hurk, Van den Broek and Korving (n 6) 264.

In this author's opinion, simply referring to a breach of the principle of territoriality is not sufficient. Interestingly, the case law on cross-border losses also reveals that the ECJ accepts some derogation to this principle. In *Marks & Spencer,* final losses occurred in the foreign subsidiaries had to be relieved in the UK if these losses was relieved domestically, and if they were final in nature. Hence, the derogation from the principle of territoriality served to strengthen the internal market, as the losses otherwise would go unrelieved.[186] Therefore, if it could be proved that failure to grant step-up serves the internal market that could be an argument for not requiring step-up. However, the lack of step-up may lead to double taxation, something that is clearly not serving the internal market.

Arguably, regardless of the issue of a restriction, not granting a step-up may also cause a problem with using the principle of territoriality as a justification. In *Lasteyrie*, ECJ assessed the restriction against the need to prevent tax avoidance. In *N* however**,** although the rule at stake was almost identical to the one in *Lasteyrie*, the restriction was assessed on the background of the need to safeguard the balance in the allocation of taxing rights. The need to safeguard the balance in the allocation in taxing rights was also argued in *Lasteyrie***,** but it was not found to be relevant by the ECJ due to the French rule having a so-called reverse credit feature.[187] In *N,* the taxpayer could benefit from a step-up, and the advocate general argued that the Dutch rules were "aimed not just at tax evasion".[188] AG Kokott emphasised that the Dutch exit tax rule was "consistent with the principle of territoriality because it takes into account only of the profit that has arisen in during the period of residence within the territory."[189] Hence, the ECJ emphasised that it was in accordance with the principle of fiscal territoriality, "connected with a temporal component, namely residence within the territory during the period in which the taxable profit arises (...)".[190] Accordingly, the ECJ seems to analyse the design of the exit tax when considering if the principle of territoriality is relevant and if the restrictive rule itself is attainable to achieve the objectives pursued. A state that tries to justify its restrictive exit tax rules with reference to this principle could possibly be faced with a negative answer because the restrictive rule itself does not preserve this principle fully. It may seem unreasonable that a state, which does not grant step-up, is allowed to use territoriality as a justification in order to impose an exit tax.[191] If so, then the principle of territoriality does not seem to work in both directions.

186 Van den Hurk, Van den Broek and Korving, (n 6) 265.

187 *Lasteyrie*, para 68.

188 *N,* opinion of AG Kokott, paras 100-101.

189 Ibid.

190 *N*, para 46.

191 Van den Hurk, Van den Broek and Korving (n 6) 263.

However, Zuijendorp argues in his article from 2007 that the Dutch rule in *N* provided for a cancellation of the tax assessment after 10 years, which indicates that the rule is more of an anti-avoidance measure than a measure for safeguarding the principle of territoriality. He also argues that the Dutch rule did not provide for a temporal component that would allow the two states to tax in accordance with the principle of territoriality, and that this did *not* prevent the Court from using the principle as a justification.[192] Hence, a lack of step-up may not be important to the extent argued above. On the other hand, as mentioned, the principle of territoriality has been subject to a development from *Lasteyrie* to *NGI,* and maybe it had not yet found its definitive form in *N*. This may be why the ECJ in *N* stresses that decrease in value should be taken into account by the home state, unless the host state had done so. This indicates that the Court is less concerned about *which* of the two member states involved that should take this into consideration, as long as one of them does.[193] In *NGI* however, no such obligation lies with the home state, which may be seen as a confirmation and strengthening of the nexus of principle of territoriality.

As of now, no obligation to grant step-up exists, and this may cause both double taxation and a higher tax burden for emigrating taxpayers. This is a threat to the mobility of taxpayers, but the current state of EU law doesn't seem to have an effective remedy against this.

4 Company law – a brief summary of the discussion and some thoughts

Actually, before considering the issues of exit taxes, other limitations to a company's ability to migrate also exist.[194] As stated by Panayi; "the interplay of the incorporation and real seat theories constrain the ability of companies to migrate." The main issue is to what extent companies moving out of or into a member state may rely on the freedom of establishment.

In *NGI,* the Dutch company transferred its place of effective management to the UK, but still remained a legal person under Dutch law. Several member states argued that both *Daily Mail* and *Cartesio* meant that the freedom of establishment

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192 Zuijendorp, (n 176) 11.

193 Ibid.

194 However, due to this not being the main focus in the article, it is discussed after exit taxes. Also, due to wording limitations, the discussion is rather brief. For a more thorough discussion, see Christiana HJI Panayi, *'Corporate Mobility in the European Union and Exit Taxes',* (2009) Bulletin for International Taxation, 459-473, and Panayi, (n 176) 259-282.

could not be invoked in this case.[195] The ECJ disagreed, and held that since the transfer of the effective place of management to the UK *did not* affect its status as a company under Dutch law, they could, subject to Art 54 TFEU, rely on the freedom of establishment.

In *Daily Mail,* a UK company wanted to transfer its place of central management and control to the Netherlands, while remaining a legal person under UK law. The proposed transfer was tax driven in order to avoid capital gains tax in the UK. Such transfer was however subject to consent by the Treasury. Recognising the tax motivation, the Treasury required that the shares had to be sold prior to leaving the UK in order to given the consent. Daily Mail argued that this as a breach of freedom of establishment, but the ECJ did not agree.

The ECJ noted that companies are creatures of national law,[196] and that freedom of establishment under the present state of EU law could not be interpreted:

> ”as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State.”[197]

It can be derived from this case that the member states have the power to decide on the conditions concerning the start and the termination of a company’s legal personality, as well as which connecting factors to use.[198] The freedom of establishment did not solve the question of whether and how a registered office or head office already incorporated in one member state could be transferred to another. Instead, *national law* in the absence of relevant legislation or conventions regulated this. The freedom does not show any preference for the incorporation theory or real seat theory. In *Daily Mail,* the UK legislation did not allow companies to transfer *while retaining their legal existence in the UK without treasury consent*.[199] In *NGI* however, this was allowed, and that is why National Grid Indus BV could rely on the freedom of establishment as opposed to Daily Mail. In sum, the company has to be formed in accordance with the national law in the member state and also satisfy the connecting factor required by that state in order to enjoy the freedom of establishment as set out in TFEU Art. 49 and Art. 54.

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195 *NGI,* Opinion of AG Kokott, para 19.

196 *Daily Mail,* para 19.

197 Ibid, para 24.

198 Van den Hurk, Van den Broek and Korving (n 6) 258.

199 This is important to understand the later judgments.

Wattel argues that the ECJ in *Daily Mail* allowed incorporation states to require immediate payment of tax on unrealised gain upon seat transfer, but found this to be disproportionate in *NGI*.[200] Further, he finds that *NGI "sits uneasily with (...) previous company law"*, and that the judgment discriminates against incorporation system states compared to real seat system states.[201] The different outcome in *Daily Mail* and *NGI* may however be explained with the fact that the freedom of establishment was simply not engaged in *Daily Mail*.[202] Hence, as the freedom was not engaged, no restriction was to be found. A basis for some confusion seems to be that the important wording "while retaining their status as companies under the legislation of the first Member State" did not make its way into the operative part of the judgment in *Daily Mail*. However when reading *Daily Mail* in light of *Cartesio* and *NGI,* this confusion is cleared up.[203]

In *Cartesio* a Hungarian limited partnership with seat in Hungary wanted to transfer its seat to Italy, and accordingly applied for an amendment in the Hungarian commercial register. The application was denied, as Hungary did *not* allow for a company to transfer its seat abroad while retaining its status under Hungarian law. The ECJ concluded that in the case where the seat of a company incorporated in a member state was transferred to another member state, but where no change in the law governing that company occurred, EU law did not prevent this. This was in line with previous case law, as the Court again states that the member states retain the competence to define the connecting factors that is needed in order for the companies to enjoy the freedom. If this connecting factor is broken, then the company is not recognised as a legal person under the national law, and cannot enjoy the freedom of establishment.[204]

However, the Court made an exception for the situation where a company moved to another member state, and this included a change in the company law that governed the company. In that case, the power to define the connecting factor could not justify national legislation such as the one at stake in the case. This was a significant development in that it clearly extends freedom of establishment beyond *Daily Mail*.[205] Tom O'Shea argues that if anything, *Cartesio* endorses *Daily Mail,* meaning that if a member state prevents a company from moving its seat to

200 Wattel (n 27) 371.

201 Ibid.

202 O'Shea (n 86) 111.

203 Ibid., 112.

204 Tom O'Shea, *'Cartesio: Moving a Company's Seat Now Easier in the EU',* Tax Notes International, March 23 2009, 1073.

205 O'Shea (n. 205) 1073.

another state while retaining its status as a legal person under that state, then that company is no longer regarded as an EU national, and hence it cannot exercise the freedom of establishment.[206] However, a "*Cartesio*"-exception exists where the host state has conversion rules that involve a change in company law.[207] This author fully agrees with O'Shea's argumentation.

Before *Cartesio,* ECJ judgments in *Centros*,[208] *Überseering*[209] and *Inspire Art*[210] were delivered. On the basis of these cases, it has been argued that the Court is stricter in respect of restrictions imposed by the host state as oppose to restrictions imposed by the origin state. Further, these judgments show that a company that is formed in accordance the requirements of a member state, and that wished to transfer its business to another member state, can rely on the freedom of establishment against the State to which it transfers.[211]

In the more recent *VALE-case,*[212] an Italian company wanted to transfer its seat to Hungary, while terminating its Italian registration. However, Hungary did not accept the registration as the Hungarian conversion rules only applied for domestic conversions.[213] The Court concluded that the Hungarian rules constituted an unjustified restriction, and hence a breach of the freedom of establishment. While in *Cartesio* the rules were viewed from an origin state perspective, this case concerned the rules of the host state. The host state (Hungary) was required to allow the cross-border conversion if this was allowed domestically. This case also widens the scope of freedom of establishment. A similar development is found in *SEVIC*,[214] which concerned German rules that did not recognise a merger between a German and a Luxembourg company, but only if both of the companies were German. The ECJ held that this was a breach of the freedom of establishment, and again widened the scope of freedom of establishment to also apply for in a cross-border merger situation (but not in every case of a cross-border merger, only where this is recognised domestically).

206 O'Shea (n 86) 113.

207 Ibid.

208 C-212/97 *Centros* [1999] (ECR I-1459).

209 C-208/00 *Überseehring* [2000] (ECR I-9919).

210 C-167/01 *Inspire Art* [2003] (ECR I-10155).

211 *NGI,* Opinion of AG Kokott, para 31.

212 C-378/10 *Vale Építési Kft*. [2012] (ECR I-00000). For an in-depth analysis of the *Vale* case, see Tom O'Shea, *"ECJ Says Hungarian Conversion Rules Unacceptable",* Tax Notes International, Sep. 24, 2012, 1215-1219.

213 See O'Shea (n.213).

214 C-411/03 *SEVIC Systems AG* [2005] (ECR I-10805).

As Tom O'Shea argues, the case law seems to be consistent on this issue, revealing a development in the freedom of establishment. Wattel however, firmly argues that the current case law discriminates against incorporation system states, while allowing real seat system states to hide their exit tax behind their company law.[215] Reinut Kok agrees with Wattel, and points out that this allows the incorporation system – which is more internal market "friendly" – to be treated possibly worse than the real seat system. However, Kok refers to *Cartesio*, and points out that there are also limitations for those states applying the real seat system.[216]

5 Conclusions

As shown in this article, the discussion on exit taxes is clearly not final. Many questions remain unanswered and the debate continues. The case law in its present state might even be said to raise *more questions than it answers*.

Even though immediate collection of the exit tax is clearly disproportional, issues like bank guarantee and interest are not clarified. Despite the apparently "clear" statements from the ECJ about this, there seems to be several limitations in this respect. The differences in case law is not necessarily a result of a different attitude towards exit taxes for individuals and companies, but may just as much be a result of the development in justifications as well as the fact that exit taxes are a developing area. It is not ruled out that the Court will allow both interest and bank guarantees if faced with an exit tax on individuals, subject to the same limitations as is applicable for companies. Nevertheless, this uncertainty is clearly damaging, and may be even more damaging than the specific design elements in the rules itself.

Further, beyond the traditional debate on bank guarantees and interest, the issue of whether there is an obligation to provide a step-up has become increasingly discussed. Under current state of EU law, no such obligation exists. However, this may change as the principle of territoriality becomes more important. As of now, this may cause double taxation. Interestingly, ECJ has focused on the cash-flow disadvantage caused by exit taxes, but less on the problem of double taxation. Although criticised by some, this seems to be in line with previous case law in for example *Kerchaert-Morres*.

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215 Wattel (n. 27) 371; Terra and Wattel, (n. 7) 962-965.

216 Kok (n 26) 201.

A coordinated comprehensive European solution should be considered.[217] The recent strengthening of the mutual assistance and exchange of information directives facilitates such a solution. Interestingly, the CCCTB includes some provisions on exit taxes,[218] but it remains very uncertain whether the CCCTB will go forward. Also, despite both a communication from the Commission, as well as a resolution from the Council, no joint effort has been made. This reveals how problematic it will be to achieve a joint solution in this area. The exit taxes strikes at the core between the sovereignty of the member states in direct taxation and its right to preserve its national tax base on one side, and the exercise of the freedoms on the other.

217 Führich, (n 93) 10.

218 Art. 31 and Art. 70 of the Commissions CCCTB proposal, Terra and Wattel (n 7) 973-974.