CROSS-BORDER TRANSFER OF COMPANY'S SEAT AND EXIT TAXATION IN THE EUROPEAN UNION

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ABSTRACT

Company's cross-border transfer of seat represents a controversial issue in the EU because of the differences in Member States' national legislation on conflict-of-laws and substantive issues. Therefore, the ECJ has dealt with the problem of company's cross-border transfer of real seat in its judgments. ECJ's case law distinguishes cases of immigration from the cases of companies' emigration. EU secondary legislation regulates cross-border transfer of registered seat of supranational companies and cross-border mergers of companies. Further obstacle to corporate mobility originates from the application of exit taxes in some Member States, which induces significant costs for cross-border mobility of companies. While exit taxation is regarded as a tool for protection of fiscal sovereignty of home Member States, a question arises as to whether exit taxes are compatible with the freedom of establishment in EU internal market. The ECJ dealt with this problem in the famous National Grid Indus case (C-371/10). It held that the imposition of the exit tax was justified by the overriding reasons of public policy (preservation of the allocation of taxing powers between Member States). On the other hand, it also held that a Member State should offer corporate taxpayers a choice between immediate taxation and tax deferral, whereby it is necessary to take into account subsequent decreases in value. Main aim of this paper is to analyse the limitations that primary and secondary EU legislation place upon Member States' domestic provisions regulating cross-border transfer of seat, including relevant tax provisions. Particular attention is also given to the legal framework in the Republic of Croatia, newest EU Member State.

Keywords: *company law, cross-border transfer of seat, EU law, exit taxes*

1. INTRODUCTION

The Treaty on the Functioning of the EU (TFEU) provides freedom of establishment as one of fundamental freedoms of the EU. Its realization enables functioning of the internal market of the EU. The freedom of establishment is defined by Articles 49 and 54 of the TFEU. It includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms, within the internal market. Primary establishment means the right to set up a new company in another Member State[1] or to transfer the seat of already established company in another Member State. Secondary establishment means the right to set up agencies, branches or subsidiaries by already established companies in other Member States.[2] Beneficiaries of the freedom of establishment are natural persons who

[1] This is the case of launching the economic activities of a company from beginning.

[2] This is the right to maintain more than one place of business within the EU.

are nationals of Member States and legal persons (companies or firms) formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the EU. While the registered office of the company signifies the place of its registration, determined by its articles of association, head office of the company denotes the place where it has its central administration or principal place of business. The registered and head office of the company do not need to be located in same place, unless this is prescribed by the law of the Member State where the company is incorporated.
Companies are faced with obstacles in their cross-border transfers of seat in the internal market of the EU because of the differences in national conflict and substantive rules of the EU Member States. National conflict rules determine the nationality of company and applicable national law for company (company statute). Member States apply incorporation theory or real seat theory in determination of the company statute, which may result in difficulties in cross-border transfer of registered and/or head office of the company. National substantive rules regulate the procedure for transfer of company's seat abroad and the continuity of the legal identity of the company in such case (de Sousa, 2009, pp. 3-4, Mucciarelli, 2008, pp. 273-274). Furthermore, tax obstacles to cross-border seat transfers may arise, since some states may impose the so-called exit taxes (see below, chapter 6).

2. IMPACT OF NATIONAL CONFLICT AND SUBSTANTIAL RULES OF MEMBER STATES ON CROSS-BORDER TRANSFER OF COMPANY'S SEAT

Key issues arising in the cross-border transfer of registered and/or head office of the company are: a) whether the company which transfers its seat abroad is regarded as having been wound up by the country of incorporation and b) whether the transfer of the company's seat abroad results in change of its company statute. The first issue is answered by the national substantial rules of the country of incorporation and of the country to which the company transfers its seat. Therefore, the company maintains its legal identity only if it is allowed by the substantial rules of both countries, no matter what conflict rules are applied. The second issue is answered by the national conflict rules of the country of incorporation and country whereto the company transfers its seat. Therefore, the company statute is changed only if the company transfers the connecting factor according to national conflict rules of both countries (Mucciarelli, 2008, pp. 273-274).
Seat of the company is important for determination of nationality of the company and its company statute. This is regulated by national conflict rules of each country. The applicable national law governs legal position of the company since its establishment and until its dissolution.[3] As already mentioned above, Member States apply the incorporation theory or the real seat theory, which brings about differences in determination of the applicable national law and creates obstacles for the transfer of company's seat from one Member State to another (Werlauff, 2003, p. 4).
In Member States which apply the incorporation theory, applicable national law for the company is the law of country where the company is incorporated and where it has its registered office.[4] These Member States enable transfer of company's head office to another Member State applying the incorporation theory. Such transfer does not change the applicable national law for the company and it is allowed to keep its legal identity. On the other hand, if the company intends to transfer its head office to Member State which applies the real seat theory, this is not possible because that Member State requires incorporation of a new company according to its national law. If the company intends to transfer its registered office to another Member State,

[3] For example its legal personality, form and internal organization, rights, duties and liabilities of its organs and shareholders, representation of the company, its dissolution etc.
[4] This theory is accepted in the UK, Denmark, the Netherlands, Sweden, Czech Republic, Slovakia, Finland, Hungary, Bulgaria, Croatia, Ireland, Malta and Cyprus.

applicable national law is changed. This is possible only with winding-up of the company in the country of its incorporation and incorporation of a new company in the country in which the registered office is transferred. The incorporation theory takes into account the will of founders of a company who choose applicable national law. Accordingly, this theory promotes cross-border business activities of companies and regulatory competition between Member States. On the other hand, its main deficiency is incorporation of letterbox companies which cannot be effectively supervised by the country of incorporation, because they perform their business activities abroad (Barbić, 2008, p. 378, Commission of the EC, 2007, p. 9, Mucciarelli, 2008, pp. 283-284., Ballester, del Monte, 2012, p. 12-13).
In Member States which apply the real seat theory, the applicable national law for the company is the law of country where the company has its head office. These Member States demand that registered and head office of the company must be in same Member State.[5] Accordingly, founders of the company are disabled in choosing the applicable national law. In these Member States transfer of the head office of the company is legally impossible or it is limited by conditions set by the country of incorporation. The transfer of the registered seat is forbidden, except if the company simultaneously transfers registered and head office in another country. This leads to winding-up of the company in the country of its incorporation and incorporation of a new company in the country in which registered and real seat is transferred (Barbić, 2008, p. 378, Commission of the EC, 2007, p. 9, Mucciarelli, 2008, p. 283). While the real seat theory guarantees the application of national substantive rules of the country of incorporation related to the protection of minority shareholders, creditors and employees of the company, it creates an obstacle for corporate mobility and involves practical difficulties in determining the head office of multinational companies. Under the influence of the ECJ judgements some Member States introduced a mixed system, which combines incorporation and real seat theory (de Sousa, 2009, pp. 10-11, Mucciarelli, 2008, pp. 286-287, Ballester, del Monte, 2012, p. 12).[6]

3. CASE LAW OF THE ECJ ON THE FREEDOM OF ESTABLISHMENT

Considering the above-mentioned differences between Member States' domestic rules, the ECJ's case law has dealt with the cross-border transfer of company's head office. The ECJ has held that the company validly incorporated in one Member State (home Member State) must be recognised in another Member State (host Member State) to which it transfers its head office. Case law of the ECJ tries to fill legal gaps that appear because of legislative inactivity of EU organs. Its judgements solve problems on a case-by-case basis and indicate the need for secondary legislation on regulation of the cross-border transfer of seat with preservation of company's legal identity (Ballester, del Monte, 2012, pp. 18-19, Commission of the EC, 2007, p. 10). It is important to acknowledge that the jurisprudence of the ECJ makes the difference between immigration and emigration of companies.
In immigration cases the ECJ takes a more liberal approach. In cases *Centros*,[7] *Überseering*[8] and *Inspire Art*[9] the ECJ deals with certain restrictions which may be imposed by host Member State to which the company transfers its head office without changing of the company statute. The ECJ's judgements concern following issues: a) original distinction between the registered and head office of the company in home Member State in cases *Centros* and *Inspire Art* and b)

[5] This theory is accepted in Belgium, France, Germany, Spain, Luxembourg, Portugal, Greece, Lithuania, Poland, Estonia, Norway, Austria, Slovenia, Romania and Latvia.
[6] Mixed system is introduced in Portugal, Spain and Italy.
[7] Case C-212/97, Centros Ltd v Erhvervs- og Selskabsstyrelsen [1999], ECLI:EU:C:1999:126.
[8] Case C-208/00, Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC) [2002], ECLI:EU:C:2002:632.
[9] Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd [2003], ECLI:EU:C:2003:512.

transfer of the head office in host Member State after incorporation of company without changing of the company statute in case *Überseering* (Mucciarelli, 2008, p. 277). In these judgements the ECJ takes position that company may transfer its head office in host Member State without cross-border conversion if the company does not transfer the connecting factor according to national conflict rules of the home Member State. The host Member State must recognise its legal identity without imposing further restrictions. However, it may impose additional requirements only if they are proportionate and justified on grounds of the public order (Ballester, del Monte, 2012, p. 18, Mucciarelli, 2008, p. 277, de Sousa, 2009, pp 19-22). The freedom of establishment requires that host Member State must accept distinction between the registered and head office of the company validly incorporated in home Member State.
The ECJ takes different approach in emigration cases (cases *Daily Mail*,[10] *Cartesio*[11] and *Vale*[12]). In such cases the ECJ does not prevent home Member State to place certain restrictions on the cross-border transfer of company's head office. In these judgements the ECJ takes the view that companies are creatures of national law and Member States independently determine connecting factor that points to the company statute which governs its incorporation and retention of its legal identity. Member States may apply the incorporation theory or the real seat theory. Therefore, home Member State may condition cross-border transfer of head office of company by obtaining previous approval or may forbid such transfer if the company wishes to retain its legal identity according to national law of that Member State. On the other hand company may transfer its seat abroad through cross-border conversion while retaining its legal identity. In such case both Member States must not discriminate between domestic and cross-border conversions. A company that wishes to transfer its seat abroad must be brought into line with national law of host Member State (Ballester, del Monte, 2012, pp. 20-21, Mucciarelli, 2008, p. 277, de Sousa, 2009, pp. 34-38).

4. SECONDARY LEGISLATION OF THE EU ON CROSS-BORDER TRANSFER OF COMPANY'S REGISTERED OFFICE

TFEU and case law of the ECJ guarantee to companies only the right to transfer head office in another Member State with preservation of legal identity, while national rules of Member States regulate transfer of registered office of company. Transfer of registered office causes winding-up of company in the country of its incorporation and incorporation of a new company in the country in which the registered office is transferred. Because of this the European Commission proposed the Fourteenth Directive on the cross-border transfer of registered office in 1997 (Werlauff, 2003, p. 94). Aim of this Proposal was to enable cross-border transfer of registered office with preservation of company's legal identity. This should be beneficial to companies for easier adjustment of place of business activities and internal organization according to market changes and selection of the most favourable applicable law for companies. Member States should allow to domestic companies cross-border transfer of registered office in accordance with national provisions on amending the articles of association. Decision of the general meeting on transfer of the registered office and its consequences should be published. A company should convert its legal form according to national law of host Member State. The Proposal do not interfere with national conflict rules of Member States. If national law of host Member State require that the company's registered office and head office must be in same place, the decision to transfer the registered office should also cover the transfer of the head office. Host Member State could not refuse to register the company which satisfies the essential

[10] Case C-81/87, The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc [1988], ECLI:EU:C:1988:456.
[11] Case C-210/06, CARTESIO Oktató és Szolgáltató bt [2008], ECLI:EU:C:2008:723.
[12] Case C-378/10, VALE Építési kft [2012], ECLI:EU:C:2012:440.

substantive and formal requirements for the registration of national companies. Member States should cooperate in supervision of the cross-border transfer of registered office of the company. Registration in host Member State should result in losing company's legal identity and being removed from the register in home Member State. Transfer of the registered office should not result in the company being wound up and it should not affect the company's legal relationships with third parties. Home Member State could ensure special protection of rights of minority shareholders and creditors, in accordance with the principle of proportionality laid down by the ECJ. Employee participation rights should be governed by the national law of host Member State. If those rights are more favourable for employees by the national law of home Member State, they should be maintained or negotiated (Werlauff, 2003, pp. 94-95). In 2007 the European Commission decided to withdraw the Proposal because of lack of interest of Member States. On the other hand, business community still emphasize the need for regulation of the cross-border transfer of registered office on the EU level. Finally, the Proposal affected the provisions on cross-border transfer of registered and head office of supranational legal entities in relevant EU regulations (Ballester, del Monte, 2012, p. 9). EU law enables indirect cross-border transfer of company's registered office with preservation of legal identity through incorporation of supranational legal entities (EEIG, SE and SCE) or through cross-border mergers of companies from different Member States (Ballester, del Monte, 2012, pp. 13-14, Mucciarelli, 2008, pp. 275-276). National company may converted itself into an SE in home Member State if for at least two years it has had a subsidiary governed by the law of another Member State. The SE then transfers its registered and head office to host Member State. Finally, the SE may be converted into a national company according to national law of host Member State. No decision on conversion may be taken before two years have elapsed since its registration or before the first two sets of annual accounts have been approved (Ballester, del Monte, 2012, pp. 24-25). Procedure for cross-border transfer of registered office of an SE is governed by Article 8 of the Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE). A Member State may adopt provisions designed to ensure appropriate protection for minority shareholders who oppose a transfer and SE's creditors. The registered office of an SE must be in the same Member State as its head office. The SE shall be liquidated if it's registered and head office are placed in different Member States. Therefore, it is necessary to transfer the registered and head office of the SE together. This avoids the incorporation of letterbox companies but also endangers the corporate mobility. An SE may be formed by limited number of companies which must perform cross-border business activities. Cross-border mergers of companies are possible by the Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. National company may merge with already incorporated subsidiary in host Member State or may incorporate a new subsidiary in host Member State for cross-border merger (Ballester, del Monte, 2012, pp. 26-28). This mechanism offers a wider possibility for cross-border mobility of companies in the EU internal market, especially for SMEs. These mechanisms for indirect cross-border transfer of company's registered office are time-consuming and complicated. They impose additional costs for companies wishing to transfer their registered office abroad (Ballester and del Monte, 2012, p. 26).

5. CROSS-BORDER TRANSFER OF COMPANY'S SEAT IN CROATIAN LAW

Croatian law applies the incorporation theory for determination of the company statute. A company may change its seat in the manner defined in the articles of association. If this procedure is not defined in the articles of association, company's general meeting brings decision on transfer of seat in accordance with national provisions on amending the articles of association. According to the Croatian Companies Act (CCA), registered and head office of company may be settled in different places. In such case registered office shall be regarded as the seat of company. On the basis of an application submitted by a company, the transfer of the seat shall be entered into the court register. The transfer of the seat of the company abroad shall be subject to the prior approval of the Ministry of Finance because of the change of tax residence. The CCA does not provide special protection of rights of minority shareholders and creditors of a company which transfers its seat abroad. If a company intends to transfer its registered office abroad, this changes the applicable national law. This is possible only by winding-up of a company and its deletion from the court register in Croatia (Barbić, 2008., pp. 371-375). Croatian law provides mechanisms for indirect cross-border transfer of company's registered office through incorporation of an SE or through cross-border mergers of companies.

6. EXIT TAXATION OF COMPANY'S SEAT TRANSFERS: EU LAW PERSPECTIVE

It is well established that corporate mobility within the EU internal market may be hindered by the tax implications of the envisaged transactions (Pistone, Szábo, Sørensen, 2014, p. 1). When it comes to the transfer of the company's seat, biggest tax-related issue is the possibility that the home Member State imposes the so-called "exit tax" on the company in question. In the context of seat transfers, exit tax takes the form of a tax on capital gains accrued, but not yet realized, by the company before the moment of transfer. Since the state of emigration will normally not be allowed, under the current rules of international tax law, to tax such gains upon realization, this state may extend a "final" tax claim towards the emigrating company, in respect of a variety of items that have enjoyed the benefit of tax deferral in previous periods (Panayi, 2011, pp. 246-247; Terra, Wattel, 2012, p. 955). Before proceeding with the analysis of exit taxation from the EU law perspective, it is important to note how exit taxes are tied to the very foundations of international tax system. More specifically, such state practice is a natural corollary of the territoriality principle, which provides legal underpinning for the imposition of income tax by sovereign states (Schön, 2010, p. 554). Corporate taxpayers are encompassed by this paradigm in such a way that states reserve the right to tax their income either with reference to their "tax residence" – i.e. the place where economic life of a company is centred (Couzin, 2002, p. 41) – or with reference to different places in which their business activities take place, i.e. to "territorial sources" of pertinent income. Against this backdrop, exit taxation of transfer of company's seat is essentially a corollary of the fact that the territorial link between the state of emigration and the company, taking the form of tax residence, will be terminated upon the seat transfer, consequently placing pertinent income outside the ambits of that state's tax jurisdiction. Whereas states usually make sovereign decision not to tax unrealized capital gains – and rightly so, from the policy perspective – even if international tax law permits them to do so, they are also at liberty to impose tax on this taxable object at the moment it "leaves" their territory. Imposition of exit tax is not only lawful from purely public international law perspective, but also *prima faciae* reasonable since it ensures fiscal coherence, at least from the viewpoint of tax system of the state of emigration (Terra, Wattel, 2012, p. 955-956). Moreover, it tackles potential corporate tax schemes, aimed at exploiting low or no-tax regimes in states of immigration (Panayi, 2011, p. 246; Sendetska, 2014, p. 230). On the other hand, it is apparent – and also confirmed in the ECJ's case law (see below) – that exit taxes constitute restriction of free movement of companies guaranteed by the TFEU, because they make intra-EU corporate mobility less attractive.

6.1. Brief summary of ECJ jurisprudence on exit taxation of corporate migrations

Having in mind the company law essentials explored in previous sections of this paper, it is useful to take a step back and acknowledge that the position of EU Member States wishing to impose exit tax on transfers of company's seat fundamentally differs depending on whether they apply incorporation theory or real seat theory in their national company law. Real seat Member States are generally allowed under the EU law – subject only to *Cartesio*-like scenarios

– to act in a manner extremely unfavourable for the internal market and demand dissolution of a company if it transfers its real seat in another Member State; subsequently these countries are allowed to tax all previously unrealised capital gains, now in the hands of company shareholders (Terra, Wattel, 2012, p. 964; Sendetska, 2014, p. 230). Conversely, exit tax imposed on seat transfers, in its pure form, constitutes an EU law problem only in cases of companies emigrating from Member States applying the incorporation theory. These countries, as already noted above (section 2), allow companies incorporated under their company law to retain legal personality when they transfer their head office – i.e. „place of effective management", in the language of international tax law – to another Member State (Kok, 2011, p. 63). Accordingly, the question arises as to whether incorporation Member States are allowed under EU law to impose an exit tax on such transactions, under the aforementioned rationale of tax base integrity protection and/or tax avoidance prevention. The ECJ had the chance to settle the matter already in *Daily Mail* since, from a factual perspective, this was essentially a "tax case" (Terra, Wattel, 2012, pp. 962-963). However, the Court therein decided to give primacy to the question of company's entitlement to freedom of establishment, which was a matter of national company law, and not to address the issue of permissibility of the imposition of capital gains tax triggered by the event of transfer of company's real seat from a Member State applying the incorporation theory (Weber, 2003, pp. 350-352). Subsequent ECJ's case law concerning exit taxation of individuals changing tax residence from one Member State to another provoked speculations as to analogous application of its main findings to the cases of corporate mobility. The matter was finally settled in 2011, when ECJ delivered its landmark decision in *National Grid Indus* case[13]. Main findings of the Court may be summarized as follows (Terra, Wattel, 2012, pp. 968-973; Világi, 2012, pp. 353-354): (i) imposition of exit tax in cases of companies transferring their place of effective management constitute a restriction that is in principle prohibited by the Treaty provisions on freedom of establishment, in the light of different tax treatment between cross-border and internal company relocations; (ii) however, such tax measure is justified on the grounds of overriding reasons in the public interest, namely by the objective of ensuring the balanced allocation of powers of taxation between the Member States, in accordance with the principle of territoriality linked to a temporal component; (iii) in assessing the proportionality of exit tax regime, a distinction must be drawn between the establishment of the amount of tax (tax assessment) and the recovery of the tax (tax enforcement); (iv) from the viewpoint of tax assessment, it is proportionate to definitively determine the tax due on unrealized gains at the moment of seat transfer; (v) from the viewpoint of tax recovery, immediate taxation of unrealized capital gains is not allowed, if the taxpayer is not presented with alternatives, such as the option to defer the payment until realisation of capital gains; (vi) it is proportionate for Member States to provide tax deferral option under the condition of imposing additional administrative burdens on companies in relation to asset tracing, as well as requiring security for later payment. Proportionality of other tax collection aspects of Member States' exit tax regimes was further clarified in later ECJ case law. Notably, in its *DMC* decision[14] the Court confirmed that it is compatible with fundamental freedoms to make tax deferral benefit conditional upon the requirement that due payment is spread over the period of five years prior to realization event (Sendetska, 2014, p. 234). The ECJ further explained that the requirement of providing bank guarantee as a security for later payments is disproportionate on a general basis – thus reiterating its position laid out in previous case law concerning intra-EU migration of individuals – but may be imposed in relation to the actual risk of non-recovery of taxes due in every individual case (Sendetska, 2014, p. 236).

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[13] Case C-371/10, National Grid Indus [2011] ECLI:EU:C:2011:785.

[14] Case C-164/12, DMC Beteiligungsgesellschaft mbH v Finanzamt Hamburg-Mitte [2014] ECLI:EU:C:2014:20.

6.2. Desirability of exit taxes in the light of the global fight against multinational companies' tax avoidance: European Commission raises the stakes

It is beyond the scope of this paper to delve into a deeper analysis of the promises and pitfalls that ECJ's jurisprudence on exit taxation of companies has on the tax policy in EU. It is important, however, to draw parallels between the reasoning of the Court and current state of play in international tax arena, instigating a new initiative of the European Commission with regard to exit taxes. On the one hand, it was explicitly recognized by the ECJ that unrestrained corporate mobility within internal market may incentivize taxpayers to relocate their assets and liabilities in a way that minimizes overall tax burden. Accordingly, measures intended to protect the tax base that is – or at least was, at one moment – within the jurisdictional reach of a Member State, such as exit tax, can be justified against the background of "balanced allocation of taxing powers", which in itself is in no way a revolutionary concept but merely a recognition of the architecture of international tax law (Schön, 2015, p. 285). On the other hand, this line of ECJ's reasoning perfectly fits the ongoing debate on the future of international tax system, led primarily by the G20 and the OECD, and known simply as the "base erosion and profit shifting (BEPS) project" (OECD, 2013). Namely, justification of Member States' tax measures that are otherwise discriminatory or restrictive on the basis that they pursue the goal of "balanced allocation of taxing rights" is well attuned to the main aim of the BEPS project – prevention of practices that artificially segregate places where income is reported for tax purposes from the locations of real economic activities, thus eroding the tax base of a number of states. In this regard an exit tax regime may be regarded as a measure that prevents tax base erosion in the state from which a company is emigrating or moving its assets from (European Commission, 2016, pp. 7-8). This line of thinking was apparently picked up by the European Commission in its new anti-tax avoidance agenda. Namely, the newly drafted Proposal for a Directive (hereinafter: the Proposal) aimed at uniform implementation of BEPS-related instruments across the EU also contains detailed rules on exit taxation of corporate taxpayers. Providing that the Proposal is met with unanimous approval in the Council, every Member State would have to implement these rules in its national tax law, which is of particular importance to those countries that haven't had experience with exit tax thus far. Objective scope of the exit tax regime proposed by the Commission is prescribed in Art. 5(1) of the Proposal, laying down three main scenarios in which a Member State may tax the difference between the market value and the book value of the transferred assets (Navarro, Parada, Schwarz, 2016, p. 120): (i) cross-border transfer of assets between taxpayer's head office and its permanent establishment (PE); (ii) cross-border transfer of assets between taxpayer's PEs located in different countries; (iii) transfer of taxpayer's tax residence or a PE out of a Member State. Other provisions deal with the technical issues of exit tax collection, essentially incorporating main findings of ECJ's jurisprudence in this area. Accordingly, the issues of tax deferral, charging of interest on deferred payments, provision of security of payment are regulated. The Proposal shows more ambition in addressing the problem of potential double taxation, obliging the "Member State of destination" to step up the basis of the transferred assets (Art. 5(5) of the Proposal). It is interesting to note that the rules on exit tax regime envisaged in Art. 5 of the Proposal diverge from the general *de minimis* character of the Proposal, explicitly referred to in Art. 3. Put simply, while Member States are generally at liberty to adopt stricter rules in their domestic legislation in comparison to those contained in the Proposal, adoption of a more stringent exit tax regime would, as evidenced by the previous case law of the ECJ, in all likelihood run afoul of the EU law (Navarro, Parada, Schwarz, 2016, p. 121).

7. CROATIAN TAX LAW PERSPECTIVE

Croatia does not impose exit tax on emigration of corporate taxpayers to other Member States or third countries, i.e. in cases where taxpayers lose their Croatian tax residency status under relevant domestic and/or tax treaty provisions. This is a natural consequence of the unfriendly approach of Croatian company law to outbound transfers of company's seat, as explored above (section 5). In other words, if a company incorporated under Croatian law is *de facto* prevented to transfer its real seat to another country – due to the fallacies of current regulatory framework (Akšamović, 2014, p. 103) – rationale for the imposition of exit tax is clearly missing (Klemenčić, 2016, p. 551). Therefore, even the adoption of an exit tax regime in the line with European Commission's Proposal would have very limited impact unless the company law framework is previously upgraded.

8. CONCLUDING REMARKS

Company law and tax law aspects of cross border transfers of company's seat within the European Union provoke many controversies and dilemmas, particularly in the light of Article 49 of the TFEU, which guarantees the freedom of establishment in the internal market. While the gaps arising as a consequence of the legislative inactivity at the EU level are often filled by the ECJ's case law, there is a marked need for further secondary legislation in this area.
In Member States which apply the incorporation theory, applicable national law for the company is the law of the country where the company is incorporated and where it has its registered office. These Member States enable transfer of company's head office to another Member State applying the incorporation theory. Such transfer of the seat does not change the applicable national law for the company and it keeps its legal identity. On the other hand, if the company intends to transfer its head office to a "real seat Member State", this is not possible because that Member State requires incorporation of a new company according to its national law. If the company intends to transfer its registered office to another Member State, this changes the applicable national law. Against the backdrop of the differences between Member States' domestic rules, the ECJ dealt with the cross-border transfer of company's head office and has held that the company validly incorporated in home Member State must be recognised in the host Member State. Biggest tax-related issue in this context is the risk of exit tax imposition. While exit taxation of seat transfers is lawful from a public international law perspective, it constitutes an EU law problem in cases of companies emigrating from Member States applying the incorporation theory. Compatibility of exit taxes with the UFEU was settled in 2011, when the ECJ lastly delivered a landmark decision in *National Grid Indus* case.
It seems that the new developments in this area are linked with the pursuit for a politically more desirable system of multinational companies' taxation. Namely, exit tax is perceived as an important instrument in the light of the global and European fight against large-scale tax avoidance of multinational companies. Thus, one can note the occurrence of "new waves" in the EU tax law. Finally, exit taxation of seat transfers does not seem to be a particularly important issue for Croatia. As a consequence of its domestic company law rules, Croatia does not impose exit tax on emigration of corporate taxpayers to other Member States or third countries. Accordingly, adoption of an exit tax regime in the line with the above-mentioned "new waves" in the EU would have severely limited impact.

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