Transfer of residence in Austrian commercial and tax law

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1. Introduction

More than fifteen years ago, Austria introduced an exit tax regime[2]; later amendments were introduced in order to adopt a system compatible with Community law.[3] The Austrian Individual Income Tax Act (IITA) contains two major provisions dealing with the exit of taxpayers: sec 31 no 2 [4] (for individual taxpayers) and sec 6 no 6 IITA (for legal entities). This contribution scrutinizes both regimes and examines their compatibility with Community law.

2. Individual Taxpayers

2.1 Exit Taxation

As a reflection of the *de Lasteyrie du Saillant* decision of the European Court of Justice[5] Austria's exit taxation regime was revised within the framework of the

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[2] Umgründungssteuergesetz (UmgrStG), BGBl 1991/699.
[3] Primarily Abgabenänderungsgesetz 2004 (AbgÄG 2004), BGBl I 2004/180.
[4] § 31 (2) nr. 2 EStG 1988.
[5] ECJ 11 March 2004,C-9/02 *Hughes de Lasteyrie du Saillant* [2004] ECR I-2409.

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Tax Amendment Act 2004[6]. This amendment brought considerable changes, as claimed in legal writing already prior to the *de Lasteyrie du Saillant* judgment.[7]

The Austrian exit taxation regime is ruled in sec 31 no 2 IITA[8]: In case an Austrian individual who owns shares of a company in the amount of at least 1 % of the share capital, transfers his residence for tax purposes outside of Austria, the capital gain is determined in the amount of the difference between the acquisition costs and the fair market value of shares of that kind, at the time of transfer of residence[9]. Pursuant to ECJ case law, taxation of these capital gains shall be deferred if the individual moves either to an EU member state or to an eligible EEA member state.[10] This system of deferral is the main achievement in comparison to the regulation in force prior to the Tax Amendment Act 2004[11] as under the previous legal framework, all actions of a taxpayer leading to the loss of Austria's right to tax to the benefit of another state regarding shares immediately triggered liability to tax.[12]

Upon actual disposal of the shares as well as upon transfer of the individual's residence for tax purposes to a state other than an EU member state or an eli-

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[6] Abgabenänderungsgesetz 2004 (AbgÄG 2004), BGBl I 2004/180; Atzmüller/Herzog/Mayr, AbgÄG 2004: Wichtiges aus der Einkommensteuer, *RdW* 2004, 621 (623).

[7] See, for example, Novacek, Verlust des inländischen Besteuerungsrechtes gem. § 31 EStG 1988 bzw. Wegzugsbesteuerung – verfassungs- und EG-rechtliche Bedenken, *Finanz-Journal* 1998, 124 (126 et seq); Staringer/Tumpel, Kapitalverkehrsfreiheit und steuerrecht – Veranstaltungsbericht, *ÖStZ* 1999, 229 (231 et seq).

[8] § 31 Abs 2 Z 2 Einkommensteuergesetz 1988 (EStG 1988), BGBl I 1988/400.

[9] § 31 (3), primo periodo EStG 1988.

[10] See Kofler, Hughes de Lasteyrie du Saillant: Wegzugsbesteuerung verstößt gegen die Niederlassungsfreiheit, *ÖStZ* 2003, 262 (265); Stangl, Schlussanträge des Generalanwalts zur französischen Wegzugsbesteuerung, *SWI* 2003, 283 (286); Kofler, Hughes de Lasteyrie du Saillant: Französische „Wegzugsbesteuerung" verstößt gegen die Niederlassungsfreiheit, ÖStZ 2004, 195 (199); Schindler, Die EuGH-Entscheidung „Hughes de Lasteyrie du Saillant" und ihre Auswirkungen auf die österreichische Wegzugsbesteuerung, GeS 2004, 184 (188 et seq); Marschner, Wegzugsbesteuerung widerspricht dem Gemeinschaftsrecht, *GeS* 2004, 180 (181); D. Aigner/Tissot, Rs. Hughes de Lasteyrie du Saillant – Gemeinschaftsrechtswidrigkeit von Wegzugsbesteuerungen innerhalb der EU, *SWI* 2004, 293 (295); Beiser, Die Wegzugsbesteuerung und das arm's length-Prinzip im Licht der Rechtsprechung „Hughes de Lasteyrie du Saillant", *ÖStZ* 2004, 282 (284).

[11] Abgabenänderungsgesetz 2004 (AbgÄG 2004).

[12] Umgründungssteuergesetz (UmgrStG), BGBl 1991/699; in force until 31.12.2004. See 2. Parte (Änderung von Bundesgesetzen), 3. Capo principale (Einkommensteuergesetz 1988), n. 3 su pag. 2904.

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gible EEA member state, the deferred tax shall be levied. It must be pointed out that the taxable capital gain is limited to the capital gain inherent in the shares upon transfer of residence outside Austria, which is based on the goal of this regulation to tax only capital gains earned during an individual's unlimited tax liability in Austria. Decreases in value occurred in the period between the transfer of residence and the disposal of the shares are deductible, though not exceeding the taxable base at the time of the transfer of the residence for tax purposes.

2.1.1 Term "Shares"

The Austrian exit taxation regime refers to the concept of shares of sec 31 no 1 of the Individual Income Tax Act[13], where taxation of disposal of shares is ruled. This regulation requires holding shares of a company in the amount of at least 1 % of the share capital. Hence the loss of Austria's right to tax is only covered, if the taxing right regarding shares fulfilling this condition is getting lost. Therefore tax liability only arises in cases the physical person was holding shares in the amount of at least 1 % of the share capital.[14]

This underlying rule defining shares does not distinguish between shares in domestic and foreign companies. Hence the Austrian exit tax covers shares in domestic companies as well as shares in foreign companies.[15] In course of transferring the residence for tax purposes shares in domestic companies are covered, insofar Austria looses its right to tax due to a Tax Treaty.[16] However shares in foreign companies are always covered, as all transfers of residence lead to originating tax liability according to sec 31 of the Individual Income Tax Act[17], not

[13] § 31 (1) EStG 1988.
[14] Doralt, *Einkommensteuergesetz Kommentar*, sec 31 m.no. 114; see also Einkommensteuerrichtlinien 2000 (Guidelines of the Federal Ministry of Finance on the IITA), m.no. 6677.
[15] Atzmüller/Herzog/Mayr, *RdW* 2004, 622; Doralt, *Einkommensteuergesetz Kommentar*, sec 31 m.no. 114/1.
[16] Limited tax liability, see sec 98 no 8 of the Individual Income Tax Act (§ 98(1) n. 8 EStG 1988).
[17] § 31 EStG 1988.

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only transfers to DTC-states. In these cases entry into limited tax liability causes the loss of Austrian taxing right of future earnings from disposals of shares already according to domestic law.[18]

2.1.2 Loss of Austria's taxing right opposite to other state

The inclusion of the loss of Austria's taxing right opposite to other states is an extension of the element of the rule regarding the sale of share holdings. The addition "opposite to other states" provides a clarification of this regime.[19] The tax liability covers the transfer of residence for tax purposes of an individual, as well as the gratuitous transfer of shares to a foreign taxpayer and furthermore the contribution to foreign trusts, provided that the Austrian right to tax gets lost on the basis of the Individual Income Tax Act[20] in connection with the respective Double Tax Treaty in all these cases.[21] The common term "exit tax" does not meet the scope of this rule, as on the one hand cases without departure are covered; on the other hand departure (abandoning the domicile and the habitual abode) does not cause tax liability mandatory.[22]

2.1.3 "Action of the taxpayer" changed to "circumstances"

The loss of Austria's taxing right is only covered in cases underlying an action of the taxpayer. According to the prevailing opinion active actions of taxpayers, as

[18] See Einkommensteuerrichtlinien 2000 (Guidelines of the Federal Ministry of Finance on the IITA), m.no. 6679; for the scope of limited tax liability see sec 98 IITA; for the application for Non-Determination of the occurred tax liability in cases of transferring residence to EU member states or eligible EEA member states, see 2.1.4.
[19] German wording: „Verlust des Besteuerungsrechtes der Republik Österreich im Verhältnis zu anderen Staaten"; Quantschnigg/Schuch, *Einkommensteuer-Handbuch*, § 31 Tz 16a 1; Tumpel, Wegzugsbesteuerung für Beteiligungen im Sinne des § 31 EStG, *SWI* 1992 (67) 68; in detail Toifl, *Die Wegzugsbesteuerung § 31 Abs 2 Z 2* (1996) 28 et seq.
[20] EStG 1988.
[21] Atzmüller/Herzog/Mayr, RdW 2004, 622; Einkommensteuerrichtlinien 2000 (Guidelines of the Federal Ministry of Finance on the IITA), m.no. 6677.
[22] Doralt, *Einkommensteuergesetz Kommentar*, sec 31 m.no. 103.

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transfer of residence or transfer of shares to a foreign taxpayer, can anyway be subsumed under the wording of this rule.[23] Following this argumentation leads to problems in the field of dispositions on death. Beside donations also testamentary dispositions would be covered, other than intestate succession, in default of an active action of a taxpayer, as death can not be considered as an action. A distinction in this vein can not be justified.[24] Anyway the loss of Austria's taxing right caused by concluding a DTC can not at all be regarded as an action of taxpayer.[25]

Middle of April 2007 this long lasting discussion was concluded by the legislator by amending the law. The wording "action of the taxpayer" will be replaced by "circumstances".[26] This amendment shall clarify that this rule covers all cases of loss of the domestic right to tax (e.g. the death of the taxpayer). The use of the term "circumstances" straightens out that an active action of the taxpayer is not required.

2.1.4 Application for Non-Determination of the occurred tax liability

Since 1.1.2005 the Austrian Individual Income Tax Act[27] offers the possibility to file an application within the tax return for Non-Determination of the occurred

[23] Einkommensteuerrichtlinien 2000 (Guidelines of the Federal Ministry of Finance on the IITA), m.no. 6677; Tumpel, *SWI* 1992, 69; Doralt, *Einkommensteuergesetz Kommentar*, sec 31 m.no. 106.

[24] Toifl, *Die Wegzugsbesteuerung § 31 Abs 2 Z 2* (1996) 84 et seq; Gröhs/Staringer, Österreichische und Liechtensteinische Stiftung in rechtsvergleichender Sicht, in Csoklich et al (eds) *Handbuch zum Privatstiftungsgesetz* (1994) 293 (300); Quantschnigg/Schuch, *Einkommensteuer-Handbuch*, § 31 Tz 16a 2; on the distinction between death and suicide see Novacek, Verlust des inländischen Besteuerungsrechtes gem. § 31 EStG 1988 bzw. Wegzugsbesteuerung – verfassungs- und EG-rechtliche Bedenken, *Finanz-Journal* 1998, 124 (126 et seq).

[25] EAS 2003 of 1 March 2002, Wohnsitzverlegung nach Mexiko durch den Geschäftsführer einer österreichischen GmbH, *ÖStZ* 2002, 281.

[26] Art. 3 n. 13 lett. a) Budgetbegleitgesetz 2007/Abgabenänderungsgesetz 2007, Regierungsvorlage, 43 der Beilagen XXIII. GP (pag. 9); Espressione tedesca: „Umstände" invece di „Maßnahmen des Steuerpflichtigen"; Mayr, Wegzug, Zuzug und Maßnahmen gemäß § 31 EStG, *SWI* 2007, 107.

[27] EStG 1988.

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tax liability in cases of transferring the residence[28] either to EU member states or EEA member states provided comprehensive administrative assistance and enforcement assistance. Presently Austria maintains cooperation of this kind with Norway[29], but not with the other countries of the EEA (Iceland and Liechtenstein). Switzerland is not a member state of the EEA and furthermore Austria does not maintain an extensive mutual assistance with Switzerland, what causes doubts on interpretation in such cases.[30]

The arisen tax due shall be fixed but deferred and shall be levied upon actual disposal of the shares as well as transfer of the residence for tax purposes to a state other than an EU member state or an EEA member states provided comprehensive administrative assistance and enforcement assistance. Assuming the taxpayer is holding different shares, he is permitted to file applications for the single shares independently.[31]

An example may illustrate the effect of this regime (including situations of decrease in value)[32]:

[28] Tax liability covers the transfer of residence for tax purposes of an individual, as well as the gratuitous transfer of shares to a foreign taxpayer and furthermore the contribution to foreign trusts, provided that the Austrian right to tax gets lost on the basis of the Individual Income Tax Act in connection with the respective Double Tax Treaty in all these cases; see 2.1.2.

[29] See Art 27 (exchange of information) and Art 28 (recovery of tax claims) of the DTC Austria-Norway; Lang, Die Neuregelung der beschränkten Steuerpflicht nach dem Abgabenänderungsgesetz 2004, *SWI* 2005, 156 (158).

[30] See for example EAS 2741 of 20 July 2006, Auswirkung der Wegzugsbesteuerungsregelungen auf österreichisch-schweizerische Anteilsübergänge von Todes wegen, *SWI* 2006, 394; Lang, Zweifelsfragen der Wegzugsbesteuerung, *SWI* 2006, 565; H. Loukota, Wegzugsbesteuerung und EAS 2741, *SWI* 2007, 12; Mayr, *SWI* 2007, 107.

[31] Atzmüller/Herzog/Mayr, *RdW* 2004, 621 (622); Einkommensteuerrichtlinien 2000 (Guidelines of the Federal Ministry of Finance on the IITA), m.no. 6683a.

[32] Decreases in value occurred in the period between the transfer of residence and the disposal of the shares are deductible, though not exceeding the taxable base at the time of the transfer of the residence for tax purposes (see 2.1.); Einkommensteuerrichtlinien 2000 (Guidelines of the Federal Ministry of Finance on the IITA), m.no. 6683g.

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	Case 1	Case 2	Case 3
Acquisition Cost (2004)	500	500	500
Fair Market Value at the time of departure (2008)	800	800	800
Revenue of Sale of Share holdings after departure (2012)	700	900	400
Taxable Income (2008) in case of Application for Non-Determination (2008)	200	300	0
Taxable Income (2008) in case of taxation 2008 (no Application for Non-Determination)	300	300	300

2.1.5 Taking up residence – Entering Austria's right to tax

In cases of entering Austria's right to tax opposite to other states, the fair market value is determined as assessment basis instead of the acquisition cost, at the time of taking up residence in Austria.[33] The intended purpose of this regime is to only tax the increase of value earned during periods, while these shares were assigned to Austrian taxation right, to avoid double taxation. In the event of a deferral according to sec 31 no 2 of the Individual Income Tax Act (IITA)[34] followed by re-entering Austria's right to tax the acquisition costs are applicable. Otherwise an untaxed step-up to the fair market value could be the outcome.[35]

[33] Sec 31 no 3 IITA (§ 31 (3) EStG 1988).
[34] § 31 (2) EStG 1988.
[35] Achatz/Kofler, GeS 2005, 122; see sec 31 no 3 IITA (§ 31 (3) EStG).

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2.2 Compliance with Community Law

After the amendment of the Austrian exit taxation regime within the framework of the Tax Amendment Act 2004[36], as response to the *Lasteyrie du Saillant* decision of the European Court of Justice[37], Austria has currently a regime in force, which seems to be compatible with Community law, as well as ECJ case-law. This fast reaction of the legislator acted as an international "example".[38]

Whereas the past regime infringed the freedom of establishment,[39] the present exit taxation in the field of individuals[40] also seems to be in accordance with the latest communication of the commission, as there is no difference in treatment any more, which could constitute an obstacle to free movement, based on taxing residents at the time of realisation contrary to taxing departing residents on an accruals basis.[41] Furthermore the Commission affirms – as the ECJ ruled in *Lasteyrie du Saillant*[42] and confirmed in *N*[43] – that the member state from which a resident of this member state departs, is not prevented by EC law from assessing the amount of income on which it wants to preserve its tax jurisdiction, provide this causes an immediate charge to tax and that there are no further conditions attached to the deferral[44]. Recapitulating it can be summarized that the Austrian exit taxation regime is in line with the principle of fiscal territory and therefore compatible with Community law.

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[36] Abgabenänderungsgesetz 2004 (AbgÄG 2004).
[37] See ECJ 11 March 2004, C-9/02 de Lasteyrie du Saillant [2004] ECR I-2409.
[38] Mayr, *SWI* 2007, 110; Schindler, Neuregelung der österreichischen Wegzugsbesteuerung – Ein Vorbild für andere Mitgliedstaaten?, *IStR* 2004 (711) 715; Achatz/Kofler in Achatz et al (eds) *Internationale Umgründungen* (23) 42.
[39] See Kofler, *ÖStZ* 2003, 265; Stangl, *SWI* 2003, 286; Kofler, *ÖStZ* 2004, 199; Schindler, *GeS* 2004, 188 et seq; Marschner, *GeS* 2004, 181; D. Aigner/Tissot, *SWI* 2004, 295; Beiser, *ÖStZ* 2004, 284.
[40] See in detail 2.1.
[41] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *Exit taxation and the need for co-ordination of Member States' tax policies",* 19 December 2006, COM (2006) 825 final.
[42] See ECJ 11 March 2004, C-9/02 de Lasteyrie du Saillant [2004] ECR I-2409.
[43] See ECJ 07 September 2006, C-470/04 *N* [2006] , ECR I-7409.
[44] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *Exit taxation and the need for co-ordination of Member States' tax policies",* 19 December 2006, COM (2006) 825 final.

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3 Legal Entities

3.1 Transfer of a company's seat under Austrian corporate law

A corporation's possibility of transferring its seat to another country depends, as a preliminary question, on a country's provisions on the conflict of laws. After a transfer is admissible under private international law, the decisive question is whether, under corporate law, a company may transfer its seat to another country and, by doing so, maintain its legal form. Does the transfer determine the winding up of the company?

The relevant provisions for an Austrian *Aktiengesellschaft* (AG) and an Austrian *Gesellschaft mit beschränkter Haftung* (GmbH) are laid down in the Stock Corporations Act (SCA)[45] and in the Limited Liability Companies Act (LLCA)[46] respectively. In the wake of the Handelsrechts-Änderungsgesetz[47], the provisions regarding a company's seat are now the same for both stock corporations and limited liability companies. Prior to this 2007 amendment of the LLCA, a differentiation between a company's administrative and statutory seat was demanded when dealing with limited liability companies. While a transfer of the statutory seat abroad was impossible[48], the situation was considered different with respect to the administrative seat.[49] According to the former wording of sec 5 LLCA[50], a company's statutory seat could only be chosen within the Austrian territory. A

[45] Aktiengesetz 1965, BGBl 1965/98, as amended.
[46] GmbH-Gesetz (present version), RGBI 1906/58 (1906 version).
[47] Handelsrechts-Änderungsgesetz (HaRÄG), BGBI I 2005/120.
[48] So Knobbe-Keuk, Umzug von Kapitalgesellschaften in Europa, *ZHR* 1990, 325 (325 et seq) and with respect to the similar German provisions Triebel/von Hase, Wegzug und grenzüberschreitende Umwandlungen deutscher Gesellschaften nach „Überseering" und „Inspire Art", *BB* 2003, 2409 (2413 et seq).
[49] See, for example, Adensamer/Eckert, Umzug von Gesellschaften in Europa, insbesondere Wegzug österreichischer Gesellschaften ins Ausland, *GeS* 2004, 52 (59 et seq); Hochedlinger/Hochedlinger-Scheidleder, Grenzüberschreitende Sitzverlegungen in Europa, *ecolex* 2006, 130 (132).
[50] § 5 (4) GmbHG.

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transfer of this seat determined the winding up of the company concerned.[51] Under the condition that the company's statutory seat remained within the country, Austrian corporate law did not, however, prohibit the transfer to another country of a company's administrative seat by sanctioning it with its winding up.[52]

The legal situation was different when a stock corporation was concerned. Ever since the SCA came into force[53], the seat of a stock corporation was determined in terms of its administrative seat. Sec 5 SCA[54] provides for a number of alternative criteria defining a company's seat (such as the place of the company's business, the place of its management, or administration). As a consequence, as soon as one of these connecting factors is maintained in Austria, a company may transfer its statutory seat to another country without winding up and losing its legal identity.[55] While for stock corporations, the decisive rule came into force more than 40 years ago, exactly the same provision applies to limited liability companies from 1 January 2007 (sec 5 para 2 LLCA)[56]. Even though the LLCA now provides for a link between a company's statutory seat and its actual activities, an unhindered transfer is possible. It follows that, in this regard, the identical provisions of the SCA and the LLCA are in compliance with the fundamental freedoms of the EC Treaty.

3.2 Transfer of a company's seat under Austrian tax law

3.2.1 The regime applicable

[51] Hämmerle/Wünsch, *Handelsrecht* II, 3rd ed (1978) 246; Kastner/Doralt/Nowotny, *Gesellschaftsrecht*, 3rd ed (1990) 190; Jabornegg, in Schiemer/Jabornegg/Strasser, AktG, 3rd ed (1993) § 5 m.no. 35; Staringer, *Besteuerung doppelt ansässiger Kapitalgesellschaften* (1999) 58 ff.
[52] Koppensteiner, GmbH-Gesetz Kommentar, 2nd ed (1999) § 4 m.no. 4; Staringer, *Kapitalgesellschaften* 62 et seq; Adensamer/Eckert, *GeS* 2004, 59.
[53] Entry into force: 1 January 1966; § 262 (1) Aktiengesetz 1965 (AktG), BGBl 1965/98.
[54] § 5 AktG 1965.
[55] Adensamer/Eckert, *GeS* 2004, 60 et seq.
[56] § 5 (2) GmbHG.

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Austria does not maintain a specific exit tax regime for corporations and companies transferring their seat to another country in its Corporate Income Tax Act (CITA)[57].[58] However, applicability of sec 6 no 6 of the Individual Income Tax Act (IITA)[59] – providing for an immediate taxation of unrealised gains where a domestic establishment transfers assets, or the entire establishment, to another country – has been widely accepted.[60] This recourse to the provisions of the Individual Income Tax Act was also envisaged by the Austrian legislator back in 1988. Upon adoption of the Einkommensteuergesetz 1988, the travaux préparatoires indicate[61], not explicitly though[62], that sec 6 no 6 IITA[63] is to be applied to a corporation's transfer of seat and/or place of management. The purpose of this regime is to assure Austria's taxing right with respect to unrealised gains generated during a corporation's unlimited tax liability in Austria.[64] The respective provision enables the Austrian treasury to tax the hidden reserves already accrued upon emigration; no taxing rights beyond this threshold are conceded.[65]

Sec 6 no 6 IITA[66] explicitly covers the following types of transfer: The transfer of assets from an establishment to another establishment, from a PE to an establishment and vice versa, from one PE of an establishment to another PE of the same establishment, and the transfer of entire establishments of parts thereof to another country. It further covers cases where the taxpayer is a partner of the foreign and/or domestic establishment, or where he holds more than 25 % (di-

[57] Körperschaftsteuergesetz 1988 (KStG), BGBI 1988/401 (1988 version) , as amended.
[58] See also D. Aigner/Kofler/Tumpel, *Zuzug und Wegzug von Kapitalgesellschaften im Steuerrecht – Ein Überblick zu den steuerlichen Folgen von Daily Mail, Centros, Überseering und Inspire Art* (2004) 97.
[59] § 6, n. 6 EStG 1988.
[60] See Schindler, *Die Europäische Aktiengesellschaft* (2002) 112; Staringer, Grenzüberschreitende Verschmelzung, Umwandlung und Sitzverlegung nach dem Abgabenänderungsgesetz 2004, *SWI* 2005, 213 (222 et seq); Hochedlinger/Hochedlinger-Scheidleder, *ecolex* 2006, 133.
[61] Toifl, Steuerliche Folgen der Verlegung des Sitzes und des Ortes der Geschäftsleitung einer Kapitalgesellschaft ins Ausland, *SWI* 1997, 248 (254 et seq); ErlRV 621 BlgNR XVII. GP 69.
[62] Staringer, *SWI* 2005, 223 (footnote 62); Hochedlinger/Hochedlinger-Scheidleder, *ecolex* 2006, 133.
[63] § 6, n. 6 EStG 1988.
[64] See also Einkommensteuerrichtlinien 2000 (Guidelines of the Federal Ministry of Finance on the IITA), m.no. 2505.
[65] Staringer, *Kapitalgesellschaften* 186 et seq; Staringer, *SWI* 2005, 223.
[66] § 6, n. 6 EStG 1988.

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rectly of indirectly[67]) of the shares in a foreign corporation or the foreign corporation in a domestic corporation, or where the same persons exercise management or control of both establishments.[68] Sec 6 no 6 IITA[69] is applicable to both individuals and corporations; short term-transfers, however, are outside the scope of this regime. The Austrian Federal Ministry of Finance acknowledges periods below twelve months.[70]

At the time any of these transfers is performed and, at the same time, Austria's taxing right dwindles away, as a general rule, all unrealised capital gains are taxed in Austria. In accordance with the purpose of the provision, taxation of the unrealised gains should be surrendered where the profits of the foreign PE are subject to Austrian income tax; applicability of sec 6 no 6 IITA[71], however, is compulsory.[72]

This regime's incompatibility with Community law, in particular the freedom of establishment as provided for in Art 43 EC[73], has long been identified in legal writing.[74] Where, in contrast to a cross-border transfer, the transfer was performed within Austria, no taxation was triggered. After the Court's judgment in *Hughes de Lasteyrie du Saillant*[75], however, the Austrian legislator not only changed the exit tax regime until then applicable for individual taxpayers (sec 31 para 2 no 2 IITA[76], see above) but also the substance of the regime contained in

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[67] Doralt, *Einkommensteuergesetz Kommentar*, sec 6 m.no. 385; see also Einkommensteuerrichtlinien 2000 (Guidelines of the Federal Ministry of Finance on the IITA), m.no. 2515.
[68] Einkommensteuerrichtlinien 2000 (Guidelines of the Federal Ministry of Finance on the IITA), m.no. 2506.
[69] § 6, n. 6 EStG 1988.
[70] Einkommensteuerrichtlinien 2000 (Guidelines of the Federal Ministry of Finance on the IITA), m.no. 2510.
[71] § 6, n. 6 EStG 1988.
[72] Doralt, *Einkommensteuergesetz Kommentar*, sec 6 m.no. 318.
[73] EC Treaty.
[74] See, for example, Tumpel, *Harmonisierung der direkten Unternehmensbesteuerungen der EU* (1994); W. Loukota, § 6 Z 6 EStG und die Niederlassungsfreiheit, *SWI* 2001, 67; H.-J. Aigner, Gemeinschaftsrechtliche Fragen der Überführung von Wirtschaftsgütern und der Wegzugsbesteuerung, *ÖStZ* 2002, 398 (401 et seq.); H.-J. Aigner, „Wegzugsbesteuerung" verstößt gegen Grundfreiheiten, *GeS* aktuell 2003, 254 (257); D. Aigner/Kofler/Tumpel, *Zuzug* 102.
[75] See ECJ 11 March 2004, C-9/02 de Lasteyrie du Saillant [2004] ECR I-2409.
[76] § 31 (2) EStG 1988.

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sec 6 no 6 IITA.[77] Even though the said case concerned the exit of a physical person, the conclusions drawn by the Court are equally applicable to situations such as those covered by sec 6 no 6 IITA. As the ratio behind both sets of facts is the same, the Court's judgment is willingly conferred to this latter case by Austrian legal literature.[78] Again, also the Austrian legislator chose a comprehensive solution.

The most decisive change in sec 6 no 6 IITA[79], in the light of Community law, was the insertion of what is now indent b of this provision. The principal regime, now contained in indent a of sec 6 no 6 IITA[80], was supplemented by a special rule for intra-Community transfers and transfers to countries of the European Economic Area (EEA): Where assets are transferred within one establishment of a taxpayer, or where an establishment or a PE is transferred, and this transfer is to a Member State of the European Union, or to a Member State of the European Economic Area Austria maintains an extensive mutual assistance with[81], assessment of the tax liability on the unrealised capital gains is not effected until the actual act of disposal or other type of release from business property (withdrawal of asset, transfer of the asset to a different business property, termination of the establishment, extinction – in the last case, the tax base amounts to zero[82]). Consistently, a later transfer from one of the "approved" States to a country outside the scope of sec 6 no 6 IITA[83] is deemed a disposal taxable in Austria.[84]

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[77] § 6, n. 6 EStG 1988. Done so by means of the Abgabenänderungsgesetz 2004 (AbgÄG 2004), BGBl I 2004/180.
[78] See also W. Loukota, *SWI* 2001, 67 et seq, Kofler, *ÖStZ* 2003, 266; Lechner, Steuerentstrickung gemäß § 6 Z 6 EStG nach dem AbgÄG 2004, in Lang/Jirousek (eds) *Praxis des Internationalen Steuerrechts*, liber amicorum H. Loukota (2005) 289 (292); D. Aigner/Kofler, Änderungen in § 6 Z 6 durch das AbgÄG 2004 – Anpassung der österreichischen Wegzugsbesteuerung an die Rechtsprechung des EuGH in der Rs Hughes de Lasteyrie du Saillant, *taxlex* 2005, 6 (7 et seq).
[79] § 6, n. 6 EStG 1988.
[80] § 6, n. 6 EStG 1988.
[81] Note that Austria only maintains such cooperation with Norway; see Art 27 (Exchange of information) and Art 28 (Recovery of tax claims) of the DTC Austria-Norway. The other countries of the EEA (Iceland and Liechtenstein) are, therefore, outside the scope of this regime. With respect to Liechtenstein see also the confirmative decision of the Austrian Senate of second instance in tax matters (Unabhängiger Finanzsenat; UFS) of 2 May 2005, GZ RV/0108-F/04.
[82] See Lechner in Lang/Jirousek (eds) *Praxis des Internationalen Steuerrechts*, 305 et seq.
[83] § 6, n. 6 EStG 1988.

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As applicability of sec 205 of the Federal Fiscal Code[85] (FFC)[86] is explicitly excluded, no interest is charged on that amount for the period between the act of transfer and the act of disposal. The taxpayer merely needs to file an application[87] in order to benefit from the deferral of taxation. After a period of 10 years from the act of transfer, the right to tax the unrealised capital gain becomes time-barred (sec 209 para 3 FFC).

The amount of the unrealised capital gain is determined by the difference between the book value and an arm's length price (or market value[88]). A decrease in value occurring after the transfer reduces the tax base (down to maximum of zero) – this provision assures that only effectively realised gains are subject to tax in Austria.[89]

A short example may illustrate this approach:

Book value on day of transfer	100		
Arm's length price/market value on day of transfer	150		
Unrealized capital gain on day of transfer	50		
Disposal in country of destination	160	130	90
Taxable amount in Austria	50	30	0

[84] The respective procedural framework is provided for in sec 295a of the Federal Fiscal Code (Bundesabgabenordnung).
[85] § 205 BAO.
[86] Bundesabgabenordnung (BAO), BGBl 1961/194, as amended.
[87] A later amendment to sec 6 no 6 indent b IITA determines that this application has to happen in the taxpayer's tax return; BGBl I 2005/34.
[88] Both criteria have emerged in literature; see D. Aigner/Kofler/Tumpel, *Zuzug* 98 with further references.
[89] See also Beiser, *Steuern*, 5th ed (2007) 126; Lechner in Lang/Jirousek (eds) *Praxis des Internationalen Steuerrechts*, 306; Atzmüller/Herzog/Mayr, *RdW* 2004, 623; D. Aigner/Kofler, *taxlex* 2005, 8.

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Whereas the situation with respect to Member States of the European Union and also with respect to those of the European Economic Area is rather clear, the relationship between Austria and Switzerland deserves emphasis. Switzerland is neither a member of the EU nor the EEA; by means of bilateral agreements, however, a number of special relationships are maintained to the European Community. The agreement on the free movement of persons[90], for example, creates the right of establishment as between Switzerland and the territory of the European Community – it primarily does so with respect to individuals, however.[91] The opinion of the Austrian Federal Ministry, i.e. the denial of the non-assessment with respect to Switzerland,[92] therefore, has to be supported. Switzerland is outside the scope of this benefit where non-individuals[93] are involved.

As has been mentioned above, the regime created by sec 6 no 6 IITA[94] is also applicable with respect to the transfer of a corporation's seat.[95] As a general rule, a corporation is subject to unlimited tax liability where it maintains either its seat or place of management within the Austrian territory (sec 1 para 2 CITA).[96] Where none of these connecting factors exists, or where both of them vanish upon a transfer of seat, the corporation is not subject to unlimited tax liability in Austria anymore (rather, it is subject to limited tax liability). As soon as assets, establishments, or PEs are transferred to another country, sec 6 no 6 IITA[97] develops its full impact. Where such transfer is effected simultaneously with a transfer of seat (and no place of management remains or has existed in Austria),

[90] OJ 30.04.2002, L 114/6. Note that this bilateral agreement is a mixed agreement between Switzerland, of the one part, and the European Community and its Member States, of the other part.
[91] For an in-depth discussion of this agreement refer to Heidenbauer/Metzler, National Report Austria, in Lang/Schuch/Staringer (eds) *EU and Third Countries: Direct Taxation* (2007) forthcoming.
[92] Einkommensteuerrichtlinien 2000 (Guidelines of the Federal Ministry of Finance on the IITA), m.no. 2517b.
[93] In Beiser, Die österreichische Wegzugsbesteuerung beim Wegzug in die Schweiz, in Lang/Jirousek (eds) *Praxis des Internationalen Steuerrechts*, 15 (42 et seq) this detail remains unmentioned.
[94] § 6, n. 6 EStG 1988.
[95] This view is also supported in literature; see, for example, Toifl, *SWI* 1997, 254 et seq; Staringer, *SWI* 2005, 223; Hochedlinger/Hochedlinger-Scheidler, *ecolex* 2006, 133.
[96] § 1 (2) KStG 1988 See, for example, Doralt/Ruppe, *Grundriss des österreichischen Steuerrechts* I, 8th ed (2003) m.no. 934; Beiser, *Steuern* 167.
[97] § 6, n. 6 EStG 1988.

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unrealised capital gains would escape taxation in Austria, and sec 6 no 6 IITA[98] stands in to prevent this effect – this, however, is primarily a consequence of the transfer of assets etc.[99]

The question remains whether sec 6 no 6 IITA also applies where no other assets etc are transferred abroad at the time the company's seat is transferred. Such interpretation could be derived from sec 29 para 2 indent a)[100] of the Austrian Federal Fiscal Code. According to this provision, the place of management – which is one of the connecting factors of a company's unlimited tax liability in Austria – is considered a PE, the transfer of which would trigger all consequences provided for by sec 6 no IITA[101]. It follows that the transfer of a company's seat as such, i.e. without a concurrent transfer of assets etc or place of management, does not come under sec 6 no 6 IITA.

3.2.2 Transfer of seat under the Austrian participation exemption regime

Another aspect of a transfer of seat emerges under the Austrian participation exemption regime. Exemption is available where an Austrian company holds a minimum of 10 % of the shares of a foreign company for a minimum period of one year. Where an international participation is created by the subsidiary's transfer of seat (i.e., initially, the subsidiary's seat was located in Austria; after the transfer, it is located abroad), capital gains derived from this participation that accrued until the point of transfer remain subject to Austrian corporate income tax (sec 10 para 3 no 5 CITA[102]). Actual taxation occurs at the time the

[98] § 6, n. 6 EStG 1988.
[99] See also Toifl, *SWI* 1997, 254 et seq.
[100] § 29 (2) Bundesabgabenordnung (BAO).
[101] § 6, n. 6 EStG 1988.
[102] § 10 (3), quarto periodo, n. 5 KStG 1988.

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participation is sold abroad. All increases in value occurring after the transfer are covered by the international participation exemption regime.[103]

Prior to the Abgabenänderungsgesetz 2005[104], Austria's CITA accommodated a loophole with respect to such a transfer of seat.[105] Avoidance of taxation of all capital gains accrued until the transfer of the subsidiary's seat was possible because the regime of sec 10 para 3 CITA[106] (optional tax neutrality of profits and losses and other changes in value of international participations) applied without restriction. As neither sec 6 no 6[107] nor sec 31 para 2 IITA[108] applied and also no general idea of taxation upon transfer of tax substrate to another country is enshrined in Austrian tax law[109], taxation in Austria was precluded.[110] However, this loophole was closed by the introduction of no 5 to sec 10 para 3 CITA[111].

3.2.3 Compliance with Community (case) law

Having regard to the regime as described above in section 3.2.1, for the majority of cases, Austria now has a regime in force that seems to be compatible with Community law.[112] A case raising concerns, however, is the case of a transfer of assets from a domestic establishment to a foreign establishment of the same taxpayer. Under such circumstances, i.e. where two different establishments of the taxpayer are concerned, the possibility of benefiting from a deferral of tax is

[103] Beiser, *Steuern* 184 et seq.
[104] Abgabenänderungsgesetz 2005 (AbgÄG 2005), BGBl I 2005/161.
[105] See, for example, Schindler, Steuerliche Folgen der Sitzverlegung einer Europäischen Aktiengesellschaft, *ecolex* 2004, 770 (773); Staringer, *SWI* 2005, 224; Kauba et al, Von verlegten Sitzen, entgangener Nachversteuerung und entstrickten Schachteln: Einige Probleme bei der Sitzverlegung einer Europäischen Gesellschaft, *taxlex* 2005, 323 (323); Kofler/Schindler, Grenzüberschreitende Umgründungen: Änderungen der steuerlichen Fusionsrichtlinie und Anpassungsbedarf in Österreich (Teil I), *taxlex* 2005, 496 (505).
[106] AbgÄG 2005.
[107] § 6, n. 6 EStG 1988.
[108] § 31 (2) EStG 1988.
[109] Staringer, *Kapitalgesellschaften* 182; Staringer, *SWI* 2005, 224; Kauba et al, *taxlex* 2005, 324.
[110] Kauba et al, *taxlex* 2005, 323 et seq.
[111] § 10 (3), n. 5 KStG 1988.
[112] See, for example, D. Aigner/Kofler, *taxlex* 2005, 7; Lechner in Lang/Jirousek (eds) *Praxis des Internationalen Steuerrechts*, 303 et seq and 312.

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denied. The immediate realisation of actually unrealised capital gains seems contrary to Community law as the amount taxed is determined by paying regard to an arm's length price. Where the same asset was transferred from one domestic establishment to another domestic establishment of the same taxpayer, on the contrary, the relevant benchmark was the going concern value which lies, in most cases, below the arm's length price.[113]

It also has to be mentioned that the Merger Directive[114] does not apply to a transfer of seat of a company other than a Societas europaea (SE) or a Societas cooperativa europaea (SCE). Even though the 2005 amendment[115] of the Directive determines the tax treatment of a transfer of seat of an SE or an SCE, a transfer of seat of other types of companies is not covered.[116]

4 Summary

The Austrian exit tax regime is based on the following system: Upon exit, capital gains of both individuals and legal entities are not subject to tax immediately. Rather, the capital gain is assessed; however, taxation is deferred until the actual act of disposal. As a consequence, unrealized capital gains are not taxed. Where, on the other hand, a taxpayer enters Austria's taxing sphere, a step-up to the fair market value is granted. In the case of re-entering Austria's right to tax, the acquisition costs are drawn upon. In any case, Austria refrains from taxing capital gains accrued outside Austria.

[113] Lechner in Lang/Jirousek (eds) *Praxis des Internationalen Steuerrechts*, 303 et seq. See also Rédei, Grenzüberschreitende Leistungsbeziehungen zwischen Betrieben, *RdW* 2005, 247.
[114] Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (Merger Directive), OJ 20.08.1990, L 225/1, as amended.
[115] Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States; OJ 04.03.2005, L 58/19.
[116] Terra/Wattel, *European Tax Law*, 4th ed (2005) 537; Kofler/Schindler, *taxlex* 2005, 502.

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