

Exit Taxes and the European Community Law in the light of Spanish Law

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1. Preliminary remarks

The object of this work is the study - from the European Community point of view - of matters raised by so-called exit taxes that EU Member States impose as a consequence of a transfer of residence or domicile by a natural or legal person to the territory of another Member State. As it is known, the European Court of Justice has issued on this type of obligations twice (the cases of *Lasteyrie du Saillant* and *N²*), and indirectly in another series of pronouncements (notably the cases *Van Hilten*³ and *Daily Mail*⁴). Likewise, the European Commission has taken position in this matter by underlining the criteria that should be observed by Member States when they are configuring and applying their exit taxes in connection with transfers of residence to another Member State by natural people and entities (as well as the transfer of assets between a parent company and its permanent establishment in another Member State), through a Communication of 2006, Exit Taxation and the need

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² ECJ, sent. 2004, March 11, C-9/02 and ECJ, sent. 2006, September 7, C-470/04.

³ ECJ, sent. 2006, February 23, C-513/03.

⁴ ECJ, sent. 1988, September 27, C-81/87.

for Co-ordination of Member States' tax policies (COM (2006) 825 final)⁵. The third element to keep in mind to approach the study of this matter refers to the jurisprudence that ECJ has elaborated from Commercial or Corporate Law point of view in connection with the Community compatibility of Member States' internal Law concerning the nationality and legal status of companies in the field of community cross-borders situations; particularly, we analyze the impact on this sector of the ECJ pronouncements in the cases *Daily Mail*⁶, *Centros*⁷, *Überseering*⁸, *Sevic*⁹ and *Inspire Art*¹⁰.

Being a work focused on a national perspective, the analysis is fundamentally centred on the questions raised by Spanish tax legislation in connection with transfer of residence or domicile by natural people and entities to the territory of other Member States. On this respect, our study is structured in two separate parts. On the one hand, we will examine the problem referred to natural people, by stressing that, although the Spanish Law does not generally contemplate exit taxes in a strict sense, there are elements in the legislation of the Impuesto sobre la Renta de las Personas Físicas (IRPF, from now on - personal income tax¹¹) that has restrictive effects similar to the application of exit taxes and, as such, we think that doubts can be raised about compatibility of those taxes with Community Law. On the other hand, we try to analyze the questions that are raised concerning the transfer of the registered office or the actual centre of administration of a company with Spanish residence to another Member State, in cases when the Spanish fiscal legislation establishes an exit tax as a consequence of the transfer of residence by a legal entity to another

⁵ 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", 2006, December 19, COM (2006) 825 final.

⁶ ECJ, sent. 1988, September 27, C-81/87.

⁷ ECJ, sent. 1999, March 9, C-212/97.

⁸ ECJ, sent. 2002, November 5, C-208/00.

⁹ ECJ, sent. 2005, December 13, C-411/05.

¹⁰ ECJ, sent. 2003, September 30, C-167/01.

¹¹ Note by translators.

State. This tax liability is also required in the cases of transfer abroad of goods assigned to a permanent establishment located in Spain.

The main conclusion that may be drawn from this study resides in the verification of the existence of several friction points between Community Law and Spanish tax legislation, as regards taxation on natural as well as legal personalities. In this sense, we understand that Spanish legislation is not aligned with the Community case-law on exit taxes, neither it observes the guidelines elaborated by the Commission in this matter correctly.

2. Exit taxes on individuals in Spanish law

First of all it should be observed that the legislation does not envisage exit taxes per se on the transfer of fiscal residence of individuals to the territory of another State (either member of the European Union or not). Which means that current regulation of the Spanish *Impuesto sobre la renta de las personas físicas* (Law 35/2006, of November 28)¹² does not establish an exit tax generally applicable in connection with the transfer abroad of the (fiscal) residence of individuals.

In fact, Spanish legislation does not expressly regulate the matter of the loss of fiscal residence for transfer of the taxpayer's domicile to the territory of another Member State (except when referring to the deduction of withholding taxes referring to the period when the subject was still a resident in compliance with art.52 RDLeg.5/2004, of March 5, on non-residents' income tax¹³). Therefore, such matters should be solved through the (in negative) application of the criteria linking the fiscal residence to Spain. The transfer of

¹² Ley 35/2006, de 28 de noviembre, del impuesto sobre la renta de las personas físicas y de modificación parcial de las leyes de los impuestos sobre sociedades, sobre la renta de no residentes y sobre el patrimonio.

¹³ Real Decreto legislativo 5/2004, de 5 de marzo, por el que se aprueba el texto refundido de la Ley del Impuesto sobre la renta de no residentes.

the fiscal residence to Spanish territory instead is the object of a regulation which in its general configuration aimed to facilitate tax management of such a new fiscal status (see, on the practice of withholding tax, art.99.8 Law 35/2006), and in its special character to facilitate workers' transfer in Spanish territory (special regime for home-coming subjects, as article 93 Law 35/2006). In this sense, it is not possible to find here any point of substantive friction between the Community Law (and ECJ sentences *Lasteyrie du Saillant*¹⁴ and *N*¹⁵) and the Spanish legislation on IRPF regulating fiscal residence.

However, it should be pointed out that the Spanish legislation on IRPF establishes three measures that could have restrictive effects on changes of fiscal residence by a taxpayer to another EC Member State, although without really articulating any provision on exit taxation.

In the first place, art. 14 of the Law 35/2006¹⁶ contains the regulation on the temporary allocation of revenues, by establishing in section 3 a special rule specifically referred to the changes of residence:

"In the supposition that the taxpayer changes his residence status, all pending incomes relating to a given tax period will have to be integrated in the taxable base of the last tax period, in compliance with conditions to be indicated through regulations, in which case a recalculated reverse charge may be applied, without sanction, delay interest or supplement."

Regulated by art. 14.3 of Law 35/2006 the case presents certain similarities with an exit tax which is not configured as an anti-abuse clause, as it happened for the Dutch case object of ECJ sentence in the case *N*¹⁷. In this respect, denying that the specific attribution norm linked to the change of fiscal residence can have restrictive effects from a fiscal point of view, seems difficult, due to the fact that without the change of residence the income would not be integrated in the taxable base nor subject to taxation until the

¹⁴ ECJ, sent. 2004 March 11, C-9/02.

¹⁵ ECJ, sent. 2006 September 7, C-470/04.

¹⁶ Ley 35/2006.

¹⁷ ECJ, sent. 2006 September 7, C-470/04.

supposition of the corresponding attribution norms converged; thus, the application of the norm generates an anticipation of tax payment motivated by a residence change, which can discourage or restrict the exercise of a fundamental Community freedom, in case of transfer to an EU Member State or also a Country which is part of the European Economic Space, in both cases regardless of the qualification of such State as a tax haven. The Community case-law in the case N could be applied in this hypothesis, so that the above-mentioned norm of special attribution motivated by the residence change would not be valid and replaced by the general rule of article 14 of the Law 35/2006, without prejudice for the taxpayer's obligation to settle tax on unrealised incomes. Needless to say, such non-application should be limited to the cases of residence changes to EU Members States.

In the second place, on IRPF matters the law establishes a regime of "extension of the fiscal residence" internationally known as "extend unlimited tax liability" or "trailing taxes". In short, article 8.2 of the law 35/2006 of IRPF established that:

"Individuals of Spanish nationality who have established their place of residence in a Country or territory considered a tax haven will not lose their condition of taxpayers. This measure will be applied in the tax period when the residence change has taken place and for the following four tax periods".

The above does constitute an anti-abuse clause that penalizes residence changes from Spain to a country or territory qualified as tax haven by the Spanish legislation. In this respect, it should be remarked that the Spanish list of tax havens (*Real Decreto* 1080/1991¹⁸) includes EU Members States (as Cyprus) and States part of the European Free Trade Association (EFTA) (as Liechtenstein), which could raise doubts about its compatibility with the Community Law, as we shall see.

¹⁸ Real Decreto 1080/1991, de 5 de julio.

Returning to the above-mentioned anti-abuse clause, it should be highlighted that its assumption refers to a situation where an individual with Spanish nationality and who is fiscally resident in Spain in the tax period where he made a residence change to a country or territory qualified as tax haven calls for a change of fiscal status with respect to the Spanish (fiscal) legislation and administration, by making reference to his condition of non resident, deriving precisely from the transfer of (fiscal) residence to another country or territory. The Spanish norm does not allow the taxpayer to demonstrate that the residence change is real and effective or that it responds to economically sound reasons. Instead, there is an absolute presumption of tax avoidance that does not admit evidence to the contrary. It follows that such an individual continues to be considered as a fiscal resident in Spain, for IRPF (but without further consequences in matters of *Tax on property* and *Tax on Successions and Donations*), for the tax period when the residence change is made and for the four remaining tax periods. In this regard, it should be remarked that the Spanish anti-abuse clause is not configured to avoid purely abusive or completely artificial constructions like *U-turns*, but rather it is applied to all operation of residence change to a tax haven regardless of its avoidance or legitimate reasons (namely, in good faith that implies a real and effective change of the residence and domicile by the individual for non merely fiscal reasons, such as work or professional reasons). In fact, it is this configuration of the Spanish anti-abuse clause that raises serious doubts of compatibility with the ECJ case law on national fiscal anti-avoidance measures (e.g, *Cadbury Schweppes* C-196/04¹⁹, *de Lasteyrie du Saillant*²⁰, *Test Claimants in the Thin Cap Group Litigation*, C-524/04²¹), when applied in connection with the residence change to the territory of an EU Member State (Gibraltar, Cyprus) or

¹⁹ ECJ, sent. 2006, September 12, C-196/04.

²⁰ ECJ, sent. 2004, March 11, C-9/02.

²¹ ECJ, sent. 2007, March 13, C-524/04.

also to an EFTA State (Liechtenstein)²². It should also be observed that the Spanish norm does not envisage an exit tax in a strict sense, since the resulting consequence of the realization of norm does not imply tax liability on the increase of the value of unrealised assets (taxation on unrealised capital gains). The Spanish anti-abuse clause establishes instead that in these cases the taxpayer continues to be considered fiscally resident in Spain for four years (whether he presents or not the linking elements which, on fiscal terms, established the habitual residence in Spanish territory).

However, in our opinion, the application of the Spanish anti-abuse norm is susceptible of generating restrictions to the exercise of ECT fundamental freedoms (for instance, of establishment, free movement of workers and freedom to provide services), and its compatibility with the ECJ case law as regards national anti-avoidance fiscal measures is more than doubtful as long as it is applied in connection with transfers of residence to territories of EU Member States or to States part of EFTA (qualified as tax haven).

It is certain, however, that the Court of Justice in the judgement of February 23rd 2006 (case *Van Hilten-van der Heijden*²³) validated the Dutch norm on the *Tax on successions and donations* which considers Dutch citizens who resided in the Netherlands and died or made a donation in the ten years following the abandonment of their domicile in the country, as resident in Netherlands at the time of death or donation. Such a declaration of compatibility with Community Law was based on a peculiar understanding of the clause in connection with a specific circumstance of domicile transfer from a Member State (the

²² Such a position can be grounded on ECJ sentences October 26th 2006 C-345/05, *Commission/Portugal*, and January 18th 2007, C-104/06, *Commission/Sweden*. However, it is true that grounds that can be evoked against EFTA member States can be different to those evoked against EC Member States; particularly, EFTA members do not implement mutual assistance on exchange of information and tax collection, then, if there is no administrative cooperation measures similar to those envisaged in Community Law, Member States can adopt justified measures addressed to fiscal control or fiscal avoidance prevention, if they are grounded on proportionality, regarding the specific target of the measure. In similar terms, *Exit Taxation and the need for co-ordination of Member States' tax policies*, COM(2006)825 final, pages 8-9.

²³ ECJ, 2006, February 23, C-513/03.

Netherlands) to a third country (Switzerland) (although through an intermediate Community destination). Specifically, the Court of Justice considered that: a) inheritances constitute capital movement under art.73 B TCE, but the rule of the extension of fiscal residence of Dutch citizens moving to another countries does not generate any fiscal restriction (which is quite debatable); b) the fact that the national legislation discourages a national wanting to transfer his domicile to another State from doing so, and therefore, blocks his right to freedom of movement, cannot be qualified only for that reason, as a restriction to capital movements under art.73 B TCE²⁴; and c) the fact that the Dutch norm constitutes a fiscal anti-avoidance clause was considered irrelevant.

In this sense, we consider that a general conclusion cannot be extracted from the *Van Hilten* case²⁵ in favour of the Community compatibility of these clauses of extension of the fiscal residence, especially when they are configured as anti-avoidance measures and are applicable in connection with transfers of the residence or domicile from a Member State to another (as other fundamental freedoms, different from the free movement of capitals, do apply). From academic point of view²⁶, the *Van Hilten* judgement has been criticized considering that the criterion of fiscal liability used by the Netherlands to attribute to itself the "fiscal jurisdiction" of the taxpayer did not constitute a criterion based in the internationally consolidated fiscal principles (e.g., the model of OECD Agreement on double taxation). In this sense, the *Van Hilten* case (and the recent judgement *Kerckhaert-Morres*²⁷) could be interpreted as a decision that reinforces the autonomy or exclusive competence that Member States have to the effects of determining the reach of their fiscal jurisdiction, thus outlining a sort of *carte blanche* on this matter. However, in our opinion,

²⁴ Treaty establishing the European Community, Consolidated version, G.U. Unione Europea , 29/12/2006, C 321 E.

²⁵ ECJ, 2006 February 23, C-513/03.

²⁶ DOUMA (2006); and MARTÍN/CALDERÓN (2007).

²⁷ ECJ, 2006 February 23, C-513/03.

the norms specifying fiscal jurisdiction continue to be subjected to the control of Community compatibility and should be defined and based according to the consolidated principles of international taxation (notably OECD model), especially when such approaches of fiscal subjection engender authentic anti-abuse measures.

The third norm that affects IRPF and can generate restrictive effects similar to those deriving from exit taxation is represented by article 88.3 TRLIS (Single Text of the Law on Corporate Tax). This measure regulates the substantial regime of shareholders' taxation in cases of mergers, mergers through incorporation, as well as partial or complete division. The main rule contained in art.88 TRLIS consists in the deferral of the taxation of the resultant gains that a shareholder (natural person) could obtain as a consequence of an operation of corporate restructuring (merger, acquisition and division) aided by the special regime of Chapter VIII of the Title VII of TRLIS, that is, the so-called special regime of "Mergers"²⁸.

Doubts of compatibility with Community Law arise here in connection with the specific sub-rule established in section 3 of article 88 TRLIS²⁹; with reference to cases when the shareholder loses the status of resident in Spanish territory, in which case he must integrate, in the taxable amount for the tax period when the transfer takes place, the difference between the fair market value, at the time of the residence change, of the stocks or bonds received in the operation of corporate restructuring and their fiscal value, also considering the fiscally deductible loss of value³⁰; the application of the tax deferral provision does not apply in these cases, on the basis that with the loss of Spanish residence, the

²⁸ The rule of taxation delay established by art. 88 TRLIS is the result of transposing art. 8 of Directive 90/434/EEC. About this Directive, see.: LOPEZ-SANTACRUZ (2000, pp.192-192) and CALDERON/MARTIN (2007), including its bibliography.

²⁹ Section 4th of art. 87 TRLIS establishes a "twin" clause that concerns to issuing of securities operations. Our opinions about art. 88.3 TRLIS can be recalled here.

³⁰ Commercial Law reform and adaptation in accounting matters to its international harmonisation following EU Law Act, enacted by the Chamber of Deputies on June 21 2007, contains a technical modification of section 3rd art. 87 and section 4th art 88 TRLIS, establishing that stocks and equities value for tax purposes is corrected, where appropriate, "in the amount of loss of value that has been deductible for tax purposes".

capacity to tax income, otherwise subjected to differed taxation, would be lost. It must be noticed, nevertheless, that the rule of art.88.3 TRLIS does not only entail the integration of the taxable amount differed by virtue of the regime of mergers (as reported at the time of the corporate restructuring), but also of the gain generated after such an operation insofar as equities or shareholdings have experienced an increase in market value.

Regarding the general scope of IS (corporate tax), the matter, under art.88.3 TRLIS, is regulated in the general regime (art.17 and 26 TRLIS), insofar as the residence change abroad determines the conclusion of the taxation period, resulting on the integration in the taxable amount of the difference between the fair market value and the net book value of elements owned by an entity transferring its residence outside of the Spanish territory. As for IRPF, art.14.3 LIRPF (Law 35/2006), as already remarked, establishes that all incomes still pending for a tax period, should be integrated in the taxable amount of the last tax period for which tax return for LIRPF should be filed, comprising those capital gains that were differed by application of the substantive specific rules of so-called "mergers" regime³¹. Nevertheless, it is clear that in these cases the shareholding natural person that loses his fiscal residence in Spain may postpone the payment of the tax liability, regarding the income generated as capital gains, until the moment when shareholder transfers the values received in the operation of corporate restructuring. Such a deferral, although apparently not requiring administrative procedures to be recognised or authorized, it requires from the taxpayer a guarantee endorsing the payment of the tax liability, under RD.939/2005 (art.48) with also the application of interests on arrears (art.65.5 LGT)³².

³¹ However, art. 88.3 TRLIS is binding for the incorporation in tax base of IRPF taxpayer that changes his fiscal residence both with respect to deferred income and income generated by corporate restructuring operation, as a result of a value increment of stocks, with reference to 14.3 LIRPF.

³² To this respect, influential authors, such as J.A.López-Santacruz, think that TRLIS has a very liberal position in this matter, due to the difficulty for Tax authorities to see in practice if such equities have been transferred or not, especially when representing equities in a non Spanish

Focusing now on doubts of compatibility with Community Law that can be raised by art.88.3 TRLIS in connection with changes of residence by individuals, it is clear that the substantial rule of taxation could well constitute a provision quite close to an exit taxation, as found in the French and Dutch exit taxes that were the object of ECJ sentences on the cases *Lasteyrie*³³ and *N*³⁴, with restrictive effects for the practical exercise of Community freedoms (transfer of residence to an EU Member State or also to an EFTA country).

In the one hand, the taxation is demanded on the occasion of a taxpayer's residence change abroad, and we do not find any further justification a part from those presented in *Lasteyrie*³⁵ and *N*³⁶ cases, that is, loss of tax revenues, fiscal control and combating tax avoidance, which were disregarded by ECJ.

On the other hand, trying to ground the taxation under art.88.3 TRLIS on the Community Directive on Mergers³⁷ presents two problems, namely: a) the rule on tax deferral under art.8 of the Mergers Directive establishes that the attribution, on the occasion of a corporate restructuring operation within the scope of application of the Directive, of securities representing the company's capital, "should not imply as a consequence per se any taxation of the income, profits or capital gains of that shareholder", until the transfer of said securities has taken place; however, a similar provision (differed taxation on unrealised capital gain) is not envisaged in case of transfer of the shareholder's residence; the only case where such a taxation (and the non application of the deferral rule) would be admitted is in cases when art. 11 of the Mergers Directive was applicable, that is its anti-abuse clause. However, we understand that the reason behind the provision is configured to contrast cases of rule

resident entity. Notwithstanding, we can see that Spanish authorities still hold the power to execute such a guarantee if the partnership does not prove that securities have not been transferred when required by Spanish tax administration (*vid* LOPEZ SANTACRUZ 2000, p.193).

³³ ECJ, sent. 2004, March 11, C-9/02, Hughes de Lasteyrie du Saillant, mentioned.

³⁴ ECJ, sent. 2006, September 7, C-470/04, N.

³⁵ ECJ, sent. 2004, March 11, C-9/02, Hughes de Lasteyrie du Saillant, mentioned.

³⁶ ECJ, sent. 2006, September 7, C-470/04, N.

³⁷ Directive 90/434/CEE.

shopping, that is, cases where the only purpose of the corporate restructuring operation is to obtain tax savings or fiscal advantage. Consequently the mere fact that a shareholder changes his fiscal residence within the framework of a corporate restructuring operation (with a valid economic reason) should not imply the non application of the substantial rule within the special regime for mergers (Art. 8 of the Mergers Directive), since such a transfer of fiscal residence neither constitutes an abusive situation by itself, nor produces a substantial effect on the valid economic reason of the corporate restructuring; and b) that the rule of art. 88.3 TRLIS, as already indicated above, does not only affect the deferred capital gain, but also the one generated later by the value increase of securities following the corporate restructuring operation.

In short, it does not seem that the exit tax under art. 88.3 TRLIS would be compatible with the Community Law, in case when a community freedom is applicable (e.g., freedom of establishment). This means that ECJ jurisprudence in the *N* case should be applied, so the taxation would be deferred automatically without having to require guarantees on tax collection. According to ECJ, in fact, Directive on mutual assistance for tax collection³⁸ guarantees the collection of credit to the Spanish State, when such a transfer takes place to the territory of another Member State.³⁹ The same would be applicable to countries members of EFTA (Norway, Iceland and Liechtenstein), provided that Spain has concluded with them an agreement of administrative assistance as regards the exchange of information and tax collection.

³⁸ Directive 76/308/CEE.

³⁹ However, it is compatible with Community Law a formal liability (e.g., submission of tax return) as a result of a fiscal residence change, in order to control and collect income tax by the State concerning revenues generated in its territory, when stocks are transferred after the residence change. Regarding rules from *N* case, see. CALDERON (2007).

3. Exit taxes and legal entities in EU and Spanish law

3.1 Introduction

In the case of companies or entities with legal personality, the study of the contrast between national tax legislation and Community Law calls for a preliminary analysis of rights and freedoms that the latter attribute companies. We start therefore with an analysis on how we understand the ECJ jurisprudence regarding Corporate Law as a preliminary step for the determination of when and in which circumstances exit taxes may harm the fundamental freedoms recognized by the EC Treaty. Once defined the relationship between ECJ jurisprudence on Company Law and the sentences regarding exit taxes, we will then approach the matter of exit taxes in Spanish legislation as regards Corporate Tax, and point out possible harms or disagreements with the primary Community Law.

3.2 Community Corporate Law and Companies Migration: the interpretation of ECJ sentences *Daily Mail*, *Centros*, *Überseering* and *Inspire Art*

We are not referring here to legislation bills regarding companies migration in the European Union⁴⁰, but, rather, to ECJ case-law, not so much from a descriptive point of view, but mostly to determine rights attributed by Community Law in the field of companies migration. It is well-known that in *Daily Mail* case, C-81/87⁴¹, ECJ was asked whether the freedom of establishment covered the transfer to Holland of the actual centre of administration (not the registered office) of a company incorporated in the United Kingdom with an eminently fiscal purpose (the sale of some shares

⁴⁰ About this matter, *vid.* WYMEERSCH (2006).

⁴¹ ECJ, sent. 1988, September 27, C-81/87.

avoiding taxation in the United Kingdom). Due to the refusal of said migration by British authorities, *Daily Mail* appealed the decision and the case arrived to ECJ whose sentence is also well-known: "the Treaty regards the differences in national legislation concerning the required connecting factor and the question whether - and if so how - the registered office or actual centre of administration of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions", consequently, for ECJ, when emitting its sentence on *Daily Mail*, the right of establishment recognized in EC Treaty did not include the possibility to transfer the formal or actual centre of administration (registered seat or headquarters) to another Member State if this transfer determines the loss of the legal personality in the State of origin of the company. In fact, the position of ECJ in *Daily Mail* was erroneous or disproportionate. The case was purely fiscal and not mercantile. Since the United Kingdom adopted an incorporation system, the transfer abroad of the company headquarters, regardless of tax consequences and possible penalties, if it was not authorized by British tax authorities, had not determined for *Daily Mail* the loss of the legal personality⁴². However, probably in the attempt to avoid bigger problems with the Trade Law, ECJ gave to the *a quo* judge an answer to a query that the latter had presented (the judge was interested in tax, not mercantile, matters, as approached by *Daily Mail* ECJS).

The case considered by ECJ in *Centros*⁴³, C-212/97⁴⁴, was radically different, because an act of registration denied in Denmark for a branch of a UK company constituted by two Danish natural persons was declared incompatible with the freedom of establishment, when such a company exercised its activity

⁴² In the same sense, *vid.* WEBER (2003), GONZÁLEZ SÁNCHEZ / FLUXÁ (2005), p. 223, and our criticism to *Daily Mail* in MARTÍN JIMÉNEZ (1999), chapter 6.

⁴³ ECJ, 1999, March 9, C-212/97.

⁴⁴ An excellent study about this sentence and its effects to Corporate and Private International Law can be found in GARCIMARTÍN ALFÉREZ (1999).

only in Denmark and had been constituted with the purpose of avoiding the rigidity of Danish Corporate Law and benefiting from the biggest flexibility of Corporate Law in the United Kingdom. However, the company had its registered office in United Kingdom, although, as it may be inferred from facts, the actual centre of administration was in Denmark. Although the matter here is not companies migration, the fact that the entity's actual centre of administration was in Denmark, as well as its main activity seat, has a direct influence on the systems of Corporate Law that follow the theory of the real seat, since, after this sentence, it is utterly clear that the State where the activity is exercised must recognize a company constituted in another Member State (although the adoption of certain measures is admitted as overriding requirements of general interest to prevent fraud to third parties) and not impose its own norms. It is quite clear that Centros constitutes an attack (see comments to *Überseering*⁴⁵ below) to the "waterline" of corporate systems based on real seats⁴⁶, but we must also underline that, in itself, ECJS Centros is not a case on companies migration or the link between a company with its applicable Law, but on the recognition of (validly) constituted companies in other Member States. Hence, it would not be correct to argue that Centros represents a radical change with respect to Daily Mail's jurisprudence (likewise we cannot say that the latter sentence supposed a case-law change of jurisprudence with respect to *Segers*⁴⁷, C-70/85, in which facts similar to Centros were studied, with the difference that there existed a double level of companies, the parent company, resident in the United Kingdom, was inactive, and a Dutch subsidiary company. Both of them were controlled by a resident in Holland that developed the activity personally exercised before by Mr. Segers; ECJ, in *Segers*, issued a very similar pronouncement to the Centros pronouncement). Notwithstanding this, a deeper reading of Centros necessarily

⁴⁵ ECJ, 2002, November 5, C-208/00.

⁴⁶ See, for instance, GARCIMARTÍN ALFÉREZ (2001) and (1999), from the many studies on this matter.

⁴⁷ ECJ, 1986, July 10, C-70/85.

leads to the conclusion of recognizing, at least, the right to the transfer of the company's actual centre of administration in the framework of the freedom of establishment, although the State of "origin" of the company maintains, in light of *Daily Mail*, a wide margin of control, and the right to decide whether or not a company that has been constituted according with its legislation and transfers its actual centre of administration or statutory seat, continues to be a company legally controlled by its legal system⁴⁸. And, certainly, the indirect effect of this decision is the doubtful compatibility with Community Law of theories of the real seat, but not for purposes of attribution of legal personality to a company, but, rather, as a criterion to decide whether a company of another Member State is validly constituted in its original Law or should be recognised as a foreign company⁴⁹.

Following the line of *Centros* (within formal and not substantial questions of Corporate Law), ECJS *Überseering*, C-208/00, considered as compatible with the freedom of establishment a German measure entailing with penalty effects and, quite surprisingly, the non-recognition for a foreign company with real seat in Germany of the active legitimation to procedural effects (unless it constituted itself in Germany). In these cases instead passive legitimation was

⁴⁸ This is the sense followed by GA Ruiz-Jarabo in his opinion in *Überseering*, C-208/00. He thinks that *Daily Mail* must be interpreted as a sentence allowing that the State under which Law the company was constituted should exercise a control on it, due to the fact that when a company is constituted according to the Law of this State, the company is a legal fiction created by this State. Notwithstanding, and according to current case-law, but clarified by Community regulation, *Centros* come closer to recognize a right to transfer companies' actual centre of administration from a State to another.

⁴⁹ From the perspective of the theory of the real seat, a company constituted according to a State Law, but with its real seat in a State that follows this theory, will not be recognized as validly constituted, because the company's legal regime is not determined by the State where it was established, but by the State where it has its real seat. As a result, in such systems, the change of real seat entails modifications of *lex societatis* and, usually, the necessity of dissolution. See GARCÍMARTÍN ALFÉREZ (1999), p. 649-651. In fact, the matter of *Centros* was not the transfer of the real seat to another State, but the recognition of a company constituted in a State that follows the theory of company constitution (and, consequently, in which the transfer of the real seat does not necessarily entail the dissolution and liquidation of the company) by a State that applies the theory of real seat. As GARCÍMARTÍN ALFÉREZ (1999), p. 654, explains, "cuando Estado de incorporación y Estado de sede real no coinciden, para el modelo de la sede real la sociedad no se considera válidamente constituida, para el de constitución, sí".

recognised and, certainly the possibility of owning a real estate property (as was the case for *Überseering*, a company incorporated in Holland, with its actual centre of administration in Germany and owner of a property in Germany). ECJ decision could have been formed taking this speciality into account, as shown in GA Opinion, § 46. The General Advocate avoided linking the speciality of German Law with the theory of companies' real seat, and carried out his examination of the controversial measure by considering it not a corollary of the mentioned theory, but a special case of restriction of procedural capacity. To this end, we must underline that the GA (§ 50) considered that the reasons inspiring the theory of the real seat, namely the protection of creditors, minority shareholders and subsidiary companies, workers and the Treasury, should be considered overriding requirements of general interest, worthy of protection, but, in any case, the controversial measure could have been judged as proportioned or appropriate for the protection of such interests.

Indeed, ECJS started its reasoning from the compliance with *Daily Mail*, considering that the determination of the connection of a company with a legal system (the determination of the *lex societatis*) is a question that concerns this legal system according to criteria of art. 48 ECT. Once the company is recognised by a member State, and, under art. 48 ECT, has its registered office, central administration or principal place of business within the Community, the remaining EU States should recognize the company as validly constituted and entitled to the freedom of establishment. In essence, *Überseering*⁵⁰ and *Centros*⁵¹ solve a question not approached in *Daily Mail*⁵² which is the mutual recognition of companies between Member States. The corollary of this idea, extracted by ECJ in *Überseering* (and previously in *Centros*) is that those Member States applying the theory of the real seat are

⁵⁰ ECJ, 2002, November 5, C-208/00.

⁵¹ ECJ, 1999, March 9, C-212/97.

⁵² ECJ, sent. 1988, September 27, C-81/87.

required to recognize as valid the companies constituted in other Member States. If a company's original legal system allows for the company to continue to be regulated by its legislation (and, in consequence, the *lex socialis* will not change), the national legislation of the State where the company exercises its activity (which can also be its main activity, and from that the State where the actual centre of administration is located may be inferred) is required to recognize the company and its personality, without legal constraints, regardless of whether or not that State where the activity is performed follows the real seat theory. However, ECJS *Überseering* admits that the State where the foreign company develops its activity can impose restrictions based on criteria from the theory of the real seat (e.g. the protection of creditors, minority shareholders, workers, or tax Administration's interests).

From these considerations, and contrary to the interpretation from influential scholars, from *Überseering* or *Centros*, we believe that it may be inferred that the theory of the real seat is not necessarily contrary to EC Treaty, neither from the perspective of its application as a measure governing the company, its life and legal personality (*Daily Mail*), nor as a criterion of evaluation of foreign companies (some of the consequences of real seat theory are admitted for overriding requirements of general interest)⁵³. However, it would be subject to severe limitations, which can even make it impracticable in some cases⁵⁴, insofar as real seat theory is less compatible with companies' mobility typical of the Single Market, and more probably it would present important points of contrast with fundamental freedoms, especially, when recognizing foreign companies, and in particular those coming from legal systems adopting the theory of the constitution (assuring a wider international mobility, inherent

⁵³ GARCIMARTÍN (1999) y (2001) and PAZ-ARES (1999) think that ECJS *Centros* makes the theory of real seat non applicable in EU. The interpretation of *Daily Mail* y *Überseering* delivered by VOSSESTEIN (2006), p. 872-873 is closer to our position, because he thinks that if the requirements of the original Law (for instance, real or registered seat in the territory of the state of origin) are not complied with, the company "loses its nationality" and, probably, its right to claim the freedom of establishment.

⁵⁴ This is the opinion of LOWRY (2004), p. 343.

feature of these systems, in which, for instance, the transfer of the real seat or central headquarters does not usually imply consequences from the point of view of the Corporate Law of the State of constitution).

If in *Centros* and *Überseering* ECJ focussed on the recognition of the legal personality of companies constituted in another member State, ECJS *Inspire Art*⁵⁵ analysed the possibility of establishing substantive conditions involving companies recognized in other States whose personality is not questioned in the State where they exercise their activity. This means that *Inspire Art* starts from the assumption that the foreign company is recognized, but the compliance with certain requirements of substantial nature is demanded, in order to allow such a company to validly operate in the territory of the State, when such requirements are demanded by the juridical system of origin. Specifically, the compatibility of Dutch legislation was discussed with respect to freedom of establishment. Dutch legislation required foreign companies to register in the Dutch Register of companies, with an express mention of their foreign character, to comply with certain formal obligations in the Dutch Register of companies, and with requisites for Dutch companies on minimum company's capital and administrators' responsibility. ECJ, in its decision on *Inspire Art*⁵⁶, used *Centros* and *Überseering*⁵⁷ case-law to conclude that freedom of establishment does not only demand the recognition of the personality of the company constituted in another Member State, but it also prevents that requests of substantial nature (e.g., minimum capital and administrators' responsibility) are imposed when the Law of the State of origin of the company does not apply these measures, even if the foreign company develops all its activity in the other State. The measure, as it happened for *Centros*, was shown to be unjustified even by the overriding requirements of general interest, although it may be inferred from sentences that ECJ

⁵⁵ ECJ, sent. 2003, September 30, C-167/01.

⁵⁶ ECJ, sent. 2003, September 30, C-167/01.

⁵⁷ ECJ, 1999, March 9, C-212/97; ECJ, 2002, November 5, C-208/00.

emphasized the fact that nothing was of impediment for the State where the company operates to adopt concrete (not general) anti-abuse measures opposing cases of abuse or actions against abusive exercise of freedom of establishment, and allowing for the protection of creditors' interest, and the effectiveness of tax inspections and fairness in business dealings (§ 132), without neglecting that for the nationals of that State constituting a company in another Member State for the precise reason to profit from the lower rigidity of the latter's corporate law, this is an inherent behaviour constituting freedom of establishment⁵⁸.

At this point, we think that some relevant conclusions may be already drawn from these sentences for our study on exit tax:

- The recognition of companies' legal personality still depends on national Law which are called upon to decide, in conformity with *Daily Mai*⁵⁹, how and when a company recognized as national will lose its legal personality. If, due to market reasons, an entity lost its legal personality in conformity with Law of the State of origin, the fact that the dissolution or the liquidation also entail tax consequences will not be contrary to Community Law, since it is a question that falls outside of the field of application of the freedom of establishment⁶⁰.
- Corporate Law is beginning to be considered from the perspective of Internal Market principles. These must be incorporated within national systems

⁵⁸ According to it, also LOWRY (2004), p. 342, la STJCE *Inspire Art.*

⁵⁹ ECJ, sent. 1988, September 27, C-81/87.

⁶⁰ At the time this work was proofread, Opinion of GA Póitares delivered on 2008, May 22 in case C-210/06, *Cartesio* was published. GA defends a change respect to ECJS *Daily Mail*, in such a way that national rules (in the specific case, Hungarian Law) that imposes liquidation to companies that change their real seat abroad are contrary to freedom of establishment. Logically, if ECJ follows this opinion, conclusions that we express here must be modified and, consequently, any national norm that imposes a company's "death" as a consequence of changing its actual centre of administration or registered seat to another member State will be contrary to Community Law. Notwithstanding, as GA points out, original State of the company can impose some justified conditions or restrictions (overriding requirements of general interest or public order) to such a change.

⁶¹ Note by redactor: ECJ sentence in C-210/06, on 2008, December 28, takes a different position from General Advocate, so following *Daily Mail* case law.

through the recognition of formal and substantial aspects of companies constituted in other Member States, regardless of the reasons making shareholders create the company in another State (and among these reasons the possibility to look for more flexible market solutions than the ones found in national legislations). In some way, this idea is just a variant of the mutual recognition principle derived from case-law concerning the free circulation of goods (Cassis de Dijon⁶²).

- Control of abusive behaviours cannot be developed on the basis of the national corporate law. The matter must be analysed case by case, without putting at risk the idea of mutual recognition of companies, for reasons of overriding requirements of general interest, which should be proportional to pursued goals. The national criteria, like real seat theory, which in trying to protect certain interests (creditors, shareholders etc.) strongly limit companies' recognition and free movement, present, logically, bigger frictions with Community freedom of establishment, in such a way that an important part of their postulates fall with the recognition of the right of establishment according to the ECJ interpretation. On the contrary, the incorporation system is susceptible of presenting less problems than a system of Corporate Law based on the mutual recognition of companies, because it allows for a bigger mobility and, mainly, recognition of foreign companies.
- In strictly tax terms, Daily Mail, Centros, Überseering and Inspire Art⁶³ do not define in their pronouncements what are the criteria of territorial connection that a State can use to consider a company resident for fiscal purposes in its territory, which does not mean that this case-law (especially "market" ECJS, Centros, Überseering and Inspire Art) does not have any tax effect. In all of them, ECJ affirms that the protection of fiscal rights is a key

⁶² ECJ, 1979 February 20, C-120/78.

⁶³ ECJ, sent. 1988, September 27, C-81/87; ECJ, 1999, March 9, C-212/97; ECJ, 2002, November 5, C-208/00; ECJ, sent. 2003, September 30, C-167/01.

factor which can constitute an exception to "mercantile" principles or a justification of measures that can be considered restrictive. As such, restrictive tax measures, to be compatible with the EC Treaty, must be justified and proportioned to targets they seek to achieve, without evidently denying the essential content of the freedom of establishment. However, these tax consequences or effects of Centros, Überseering and Inspire Art are not relevant from the perspective of the State of the company's incorporation, but in connection with the State where the company has its real seat or carries out most of its activity (logically when State of constitution and the State of real seat location do not coincide, legally or in fact). Said State can apply measures to impede the abuse or fraud in connection with its Tax Law. Namely, this case-law does not impede the State of seat or incorporation to consider resident in its territory any company when suitable; nor impedes the application of anti-abuse measures in connection with companies constituted in other States having their real seat or operating mainly in its territory⁶⁴.

On the other hand, we cannot forget the important ECJS Sevic Systems AG⁶⁵, that, in an indirect way, can have a certain impact (restrictive) on the Daily Mail case-law. As is well known, in Sevic, ECJ declared contrary to the freedom of establishment the German legislation that impedes cross-border mergers, in the concrete case of a German company with another company from Luxembourg, without liquidation of the German company. Principles applied by ECJ in Sevic are very similar to the ones established in Centros, Überseering and Inspire Art⁶⁶: cross-border merger is the corollary of the freedom of establishment, although certain overriding requirements of general interest can limit this kind of operations (creditors' protection, workers or even tax

⁶⁴ However, GONZÁLEZ SÁNCHEZ / FLUXÀ (2005) have a different opinion. They think that this case-law has a direct effect on connecting criteria or factors used in corporate Tax by all the member States.

⁶⁵ ECJ, 2005, December 13, C-411/03.

⁶⁶ ECJ, 1999, March 9, C-212/97; ECJ, 2002, November 5, C-208/00; ECJ, sent. 2003, September 30, C-167/01.

administration or fairness in business dealings). It is known that a cross-border merger is banned in large part of Corporate legal systems due to causes linked to the domestic Corporate legal system and the recognition of the legal personality of companies. In this sense, ECJS *Sevic* could be correcting some of the conclusions of *Daily Mail*⁶⁷ (interpreted in the light of *Centros*, *Überseering* and *Inspire Art*) in the sense that the State of origin of a company, that is the one attributing its legal personality and determining the formal and substantive conditions of operation of company's life, cannot impose as legal consequence the requirement to dissolve and liquidate a constituted company according to its Corporate Law as a consequence of a cross-border merger with another company of a different Member State (in *Sevic* Luxembourg did not present opposition to the cross-border merger, the restriction had its origin in Germany). In our opinion, ECJS *Sevic* is really the decision that reduces, although in a limited way, the scope of *Daily Mail* sentence, since through operations of transnational merger it will be possible to avoid the liquidation of the society imposed by a Member State when, for instance, the real or statutory seat of the company resulting from the merger is transferred to another Member State⁶⁸. However, we must wait for the ECJ sentence on *Cartesio* to know if finally ECJ corrects definitively its jurisprudence referring to *Daily Mail*, recognising that the freedom of establishment is harmed when a corporate legal system imposes the dissolution and liquidation of a company as a consequence of the transfer to another Member State of its actual centre of administration or registered seat⁶⁹.

⁶⁷ ECJ, sent. 1988, September 27, C-81/87.

⁶⁸ It must be considered that a few days before ECJS *Sevic* was also approved the Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310, 25.11.2005, p. 1. This norm, coming in force 15 December 2007, has very similar principles to these expressed by sentence *Sevic*, because it admits that the State where merged companies were constituted implements controls justified by overriding requirements of general interest.

⁶⁹ This is the conclusion obtained by GA Poiares Maduro in his opinion delivered on 22 May 2008 in *Cartesio*, C-210/06.

3.3 *Daily Mail, Centros, Überseering and Inspire Art* case-law and companies' exit taxes: their connection with ECJS *Lasteyrie, Van Hilten* and *N.* and the Communication from the Commission on "exit taxes" and the need for co-ordination of Member States' tax policies

The Communication 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, 2006 December, 19⁷¹ proposes to extend to companies the considerations carried out by ECJ in *Lasteyrie* on grounds of two arguments, the fact that *Lasteyrie* is written in general terms referring to "taxpayers" and the fact that this sentence is mentioned in *Sevic*. However, Communication, does not examine the consequences of this statement and it considers only two cases, the transfer by an European company of its registered seat from a State to another one, and the transfer of assets from the head office to a permanent establishment.

The non consideration of other cases in the Communication of the Commission is significant, in our opinion. Exit taxes matter and their connection in the Member States with company migration cannot be detached from *Daily Mail, Centers, Überseering* and *Inspire Art*⁷² case law. Or, in other terms, when ECJS *Lasteyrie, Van Hilten* and *N*⁷³ are applied to companies, they must necessarily be interpreted in their context, drawn by ECJS *Daily Mail, Centers, Überseering*

⁷⁰ Note by editor: ECJ sentence in C-210/06, on 2008, December 28, takes a different position from General Advocate, so following *Daily Mail* case-law.

⁷¹ 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", 2006, December 19, COM (2006) 825 final.

⁷² ECJ, sent. 1988, September 27, C-81/87; ECJ, 1999, March 9, C-212/97; ECJ, 2002, November 5, C-208/00; ECJ, sent. 2003, September 30, C-167/01.

⁷³ ECJ, sent. 2004, March 11, C-9/02, *Hughes de Lasteyrie du Saillant*; ECJ, 2006 February 23, C-513/03; ECJ, sent. 2006, September 7, C-470/04, *N.*

and *Inspire Art*. In this sense, it is convenient to remember § 70 of ECJS *Überseering*:

"In so doing [it is referred to *Daily Mail*], the Court confined itself to holding that the question whether a company formed in accordance with the legislation of one Member State could transfer its registered office or its actual centre of administration to another Member State without losing its legal personality under the law of the Member State of incorporation and, in certain circumstances, the rules relating to that transfer were determined by the national law in accordance with which the company had been incorporated. It concluded that a Member State was able, in the case of a company incorporated under its law, to make the company's right to retain its legal personality under the law of that State subject to restrictions on the transfer of the company's actual centre of administration to a foreign country".

The corollary of these ideas should be that when the transfer of the actual centre of administration determines the loss of legal personality in the Law of origin, no problem will arise from the taxation of this operation as if it were a dissolution or a liquidation, due to the fact that in this case this is not an exit tax, but the inherent consequence to the change of *lex societatis* and the loss for the company's statute of conformity with the Law of constitution, which will disable the call for the freedom of establishment. Although a "restrictive consequence of the freedom of establishment", the recognition of the *Daily Mail* case-law (reinterpreted according to the later case-law) and its maintenance, with respect to corporate tax, imposes this conclusion. Except for a later decision that better defines or changes ECJS *Daily Mail*, no inconvenience will exist on the fact that a Member State imposes tax consequences to the loss of legal personality that necessarily involves the dissolution and liquidation of a company⁷⁴ (once admitted the cross-border merger, probably, the application of tax consequences to any kind of merger

⁷⁴ *Vid.*, a similar opinion, in WEBER (2003), specially, p. 352.

involving dissolution but no liquidation will be banned by Community Law, especially but not exclusively due to the application of Directive 90/434/CE⁷⁵⁷⁶). In this sense, we do not believe that *Daily Mail* is no less applicable after *Lasteyrie* or *N.* sentences which only produce effects in connection with systems of Corporate Law admitting the transfer of the central seat or even of the registered seat without the loss of the personality of the company for the State that regulates the company's statute. If in *Cartesio*, C-210/06, ECJ follows the opinion of AG and amends *Daily Mail case*, certainly the imposition of the company dissolution when it transfers its registered seat to another State would be contrary to the freedom of establishment, and, starting from that moment, the consequences in terms of exit imposition would be the same in both systems that follow the real seat theory and those that do not follow it⁷⁷.

Then, until now, paradoxically, the effects of the *Lasteyrie* and *N.* case-law are wider, when concerning the States that follows an incorporation system in which the transfer of the (actual or not) seat to another State does not have any consequence on the legal personality of the constituted company according to its legal order, than when they concern States linking the retaining of the legal personality to the fact that the actual centre of administration (headquarters) or the registered office continue to be in its territory. Undoubtedly, this is a paradoxical, but necessary, result of a system of mutual recognition of companies that admits, since *Daily Mail*, the criterion of the State of origin of the company as an inevitable point of reference or an element defining the legal personality. And, at the same time, it is a result that corrects ECJS *Daily Mail* in an indirect way: if the same facts originating the case were to occur now, when ECJ has laid down a consolidated theory on

⁷⁵ Directive 90/434/CEE.

⁷⁶ In this sense, as it was said concerning natural people, art. 87.4 and 88.3 TRLIS can be asked about its compatibility with Community Law.

⁷⁷ Note by editor: ECJ sentence in C-210/06, on 2008, December 28, takes a different position from General Advocate, so following *Daily Mail case law*.

Corporate Law, probably the solution would have been otherwise; in the sense that the exit tax in the United Kingdom could have outlined problems in terms of freedom of establishment if, as it seems, the *Daily Mail* company did not lose its status of English company when transferring its actual centre of administrations to Holland⁷⁸. We cannot forget that, in connection with incorporation systems, the transfer of the real or statutory seat abroad does not necessarily implies the loss of tax jurisdiction on a certain company. States use different approaches as connecting factor in their Corporate Taxation systems. As a result, it may perfectly happen that the transfer of the real or statutory seat from the State where the company was constituted to another State does not determine the loss of tax jurisdiction for the State of constitution, in which the company will be able to continue to be considered a resident for tax purposes (and, consequently, it will have a double residence, in the constitution State and in the one where its seat is located)⁷⁹. Only the existence of a Convention Agreement for the avoidance of double taxation between the State of constitution and the state where the new company's seat is located, following art. 4.3 CM OECD, may determine the loss of tax jurisdiction on all those elements or incomes on which the Convention attributes jurisdiction to the State where the company seat is located. In this case, an exit tax that follows the parameters of *Lasteyrie* and *N.* could be justified if adopting the concept of territoriality as per ECJ in *Marks & Spencer*⁸⁰.

⁷⁸ In this sense, WEBER (2003), p. 152-153 was requiring a revision for *Daily Mail* (C-81/87), doctrine, due to the fact that ECJ has admitted tax consequences from company regimes based on real seat, as it did in a case where, in fact, an incorporation system was applied. In our opinion, this is *Lasteyrie* (C-9/02) y *N.* (C-470/04) effect on corporate matter. Since those sentences, States who follow incorporation system and, as a result, have exit tax on real or registered seat transfer to another member State must meet ECJ case-law, notwithstanding such sentences this does not mean a review over trade or coeporate theory.

⁷⁹ See, in a similar meaning, VAN DEN HURK y KORVING (2007), p. 157.

⁸⁰ ECJ, 2005, December 18, C-446/03.

3.4 Spanish Commercial Law and the transfers of registered office or administrative centre / real seat

The Spanish Corporate Law model has been discussed by scholars from different points of view: Civil, Commercial and International Private Law. (A matter of discussion that, as we will see, will have a decisive influence in connection with the collection of exit taxes). Most common opinion among Civil and Commercial Law jurisprudence argues that both Spanish Civil (art. 28⁸¹) and Commercial Codes (art. 15⁸²) embrace the theory or model of incorporation or constitution (the reference to domicile in art. 28 Civil Code is interpreted as a requirement about constitution, and, in any case, linked to the statutory seat and not to the actual centre of administration)⁸³.

The determination of the corporate model is more complex in Commercial Law than in Civil Law. From a purely commercial perspective or from an international private Law perspective, most of the doctrine has argued that art. 5 Ley de Sociedades Anónimas (General companies Act)⁸⁴ and 6 Ley de Sociedades de Responsabilidad Limitada (Limited liability companies Act)⁸⁵

⁸¹ Art. 28 C.C.: "Corporations, foundations and associations recognized by Law as addressed in Spain will have Spanish nationality, while they would be legal persons according to this Code rules. Associations addressed abroad will have in Spain rights and consideration conceded by Treaties or special Acts".

⁸² Art. 15 CdC.: "Foreign people and companies constituted abroad can trade in Spain, abided to the Law of their country concerning contract capacity and and the provisions of this rule, everything concerning creating establishments in Spanish territory, trade operations and Spanish courts competence".

⁸³ See, to this respect, PAZ-ARES (1999), p. 539, who asserts that "El art. 28 del Código Civil, correctamente interpretado, conduce, en efecto, a estimar que la sujeción a la ley española viene determinada por la constitución de la sociedad 'con arreglo' a las normas españolas, quedando reducida la exigencia de la domiciliación en España a una exigencia material de validez o regularidad en la constitución", interpretation that will be confirmed by art. 15 CdC in this author's opinion.

⁸⁴ Art. 5 Real Decreto Legislativo 1564/1989, December, 22, which passes Texto Refundido de la Ley de Sociedades Anónimas: "1. All companies having their residence in Spanish territory will be Spanish companies, regardless of their place of constitution. 2. Companies whose main establishment or activity is in Spanish territory must have their address in Spain".

⁸⁵ Art. 6 Ley 2/1995, March, 23, on sociedades de responsabilidad limitada: "1. All Limited Liability companies will be considered Spanish and will be regulated by this Act when having their address in Spanish territory, regardless of their place of constitution. 2. Limited Liability

follow the theory of the real seat. If the theory of real seat is eventually incorporated in the regulation of both kinds of companies, it has been essentially drawn more from the recognition of foreign companies than from the definition of what takes place in cases of change of company's real seat from Spain to another State. That is, most of the jurisprudence argues that the presence of the real seat in Spain of a constituted company according to foreign Law determines that such a company should be considered Spanish and to be constituted as Spanish companies do (their constitution is not recognized according to foreign Law). However, both more qualified Commercial Law and Private Law scholars⁸⁶ have carried out a revision of the interpretation of art. 5 LSA⁸⁷ and 6 LSRL⁸⁸, with a double aim: adapting them to Community criteria (fundamentally to SECJ *Centros*) and making them more coherent with General Law (art. 28 C.C. and 15 CdC.). Then, it has been remarked that the reference to domicile in art. 5.1 LSA and 6.1 LSRL should be interpreted in the sense of "registered seat", not of real seat, allowing with it a harmonic interpretation of these precepts, mainly, with art. 28 C.C. The reference to having the company's domicile necessarily in Spain, with its main establishment in Spain, has been considered, in fact, a kind of anti-abuse clause, applicable only to "*pseudo-foreign corporations*" lacking international elements, except their constitution⁸⁹.

In case of the transfer abroad of the formal (registered) seat from Spain by a company established in Spain; in connection with both joint-stock and limited

companies whose main establishment or activity is in Spanish territory must have their address in Spain".

⁸⁶ See., for instance, PAZ-ARES (1999), p. 538 and ff., GARCIMARTIN ALFEREZ (1999) y (2001).

⁸⁷ Real Decreto Legislativo 1564/1989.

⁸⁸ Ley 2/1995, del 23 de marzo.

⁸⁹ In spite of the interpretation of art. 5.2. LSA y 6.2 LSRL defended by PAZ-ARES (1999), p. 542, or GARCIMARTIN (2001), p. 125, we have the impression that those authors did not keep in mind that from ECJS *Centros* (C-212/97) it is obtained that so-called "pseudo-foreign corporations" can perfectly operate in Community field and that, if these articles are anti-abuse clauses, they will be probably considered contrary to freedom of establishment due to a non-correct proportionality, in general terms. In other words, the fact that the main activity centre of the foreign company is in Spain cannot automatically imply that the Spanish legislator will not recognise it.

companies, in view of the lack of a clear regulation and as consequence of the influence of predominant theories on real seat when interpreting art. 5 LSA and 6 LSRL, traditional jurisprudence has considered that the loss of Spanish legal personality has taken place, as an inherent consequence of the dissolution and liquidation of the concerned company⁹⁰. Such an opinion has been based, fundamentally, on art. 149.2 LSA and 72.2 LSRL (as well as in art. 160.2 Reglamento del Registro Mercantil), precepts demanding that the decision to transfer the registered seat abroad can be adopted only when there is an International Treaty in force in Spain allowing for the maintenance of legal personality. If no conventions are in place to this end, the transfer abroad of the registered (formal) seat will determine that the company should be dissolved in Spain and constitute again abroad⁹¹. Along this interpretation line, it is not clear what will happen if what is moved abroad is the headquarters or real seat, but not the registered seat. Insofar as the real seat theory is applied, the consequence of such a transfer may be expected to be also the dissolution and liquidation of Spanish company, without continuity of the legal personality. However, recent jurisprudence, as well as the Resolutions of Dirección General de Tributos (which we will refer to, below) have stated an absolutely different interpretation of art. 5 LSA and LSRL 6, in a more aligned position with characteristic postulates of systems based on incorporation. For an important scholarly sector⁹², there are well-grounded reasons to interpret that art. 5 LSA and 6 LSRL do not impede the transfer abroad of the real seat of a company constituted in Spain without loss of legal personality, because such a transfer would never cause dissolution and liquidation of a Spanish company⁹³. Bigger problems would arise in the cases of transfer abroad of the registered seat,

⁹⁰ See., for instance, CHECA MARTÍNEZ (1989) and (1990).

⁹¹ See. CHECA MARTÍNEZ (1990), p. 307.

⁹² See., for instance, GARCIMARTÍN (2001), p. 125 and ss., and PAZ-ARES (1999), p. 539 and ss.

⁹³ GARCIMARTÍN (2001), p. 126. They would not be, as explained by the author, problems about this interpretation art. 6.1. LSA and 7.1 LSRL (rules linking registered seat to Spanish territory), due to the fact that they are referred to main establishment of the company in Spain, not to the real seat.

when art. 149.2 LSA and 72.2 LSRL demand an international agreement to keep legal personality of a company constituted in Spain. Nevertheless, referred jurisprudence interprets that the field of application of these precepts should be limited to those unusual or exceptional cases where the seat transfer abroad does not imply a change in the Law regulating the company (change of registered seat takes place, but the company continues to be under Spanish law)⁹⁴. When the transfer abroad of registered seat from Spain entails the change of the legislation that governs the company's operation and performance, an international agreement which recognizes such a possibility would not be necessary (it is perfectly possible between two legal orders that admit "the exit" and the "entrance" of companies without necessity of international agreement)⁹⁵. It is interesting to underline that the Resolution of Dirección General de Tributos of 2005, February 9⁹⁶ admits, without complications, the possibility that a Spanish company transfers its registered seat to Italy; in reality, from the answer received it has been inferred that there are no doubts from the perspective of commercial Law ⁹⁷.

3.5 Applicable tax regime to transfers abroad of the registered seat or headquarters/ real seat of Spanish companies (or, in general, entities)

According to art. 26.2 of Texto Refundido de la Ley de Sociedades Anónimas⁹⁸ (from now on, "TRLIS"), the transfer abroad of the residence of a company fiscally resident in Spain entails the conclusion of the tax period. In these

⁹⁴ GARCIMARTÍN (2001), p. 129.

⁹⁵ GARCIMARTÍN (2001), p. 130.

⁹⁶ Resolution n. V0188-05, published in web www.aeat.es.

⁹⁷ Resolution by DGT 1991, July 8 (Normacef NFC000638) is more restrictive, defending that a company whose main exploitation is in Spain must, as a general rule, have its registered seat in Spanish territory, but admitting that possibility, under a Treaty to this purpose, as regulated by art. 149.2 LSA.

⁹⁸ Real Decreto Legislativo 4/2004, de 5 de marzo, *por el que se aprueba el texto refundido de la Ley del Impuesto sobre Sociedades*. (B.O.E. 11-03-2004).

cases, art. 17.1.a) TRLIS establishes that the difference between the normal market value and the accounting value of the assets of the company transferring its residence outside the Spanish territory should be integrated in the taxable base, with the exception that such company's assets are affected to a permanent establishment which remains in Spanish territory, in which case art. 85 TRLIS will be applied (substantially, this reference has the effect of impeding the revaluation of goods linked to company's assets in Spain as a consequence of the transfer of residence).

A combined reading of art. 26 and 17 TRLIS could lead to assert that in Spanish tax Law there is an exit imposition for companies, which could raise problems of conformity with Community Law and Lasteyrie and N⁹⁹ case-law. Nevertheless, a mere reading of these two measures may lead to incorrect conclusions, as these should be connected to what we have analysed above. At the same time, it is necessary to clarify when an entity can be considered as residing in Spain in terms of its personal liability to corporate tax contribution (basically, all legal persons, except for common law companies with legal personality, and other entities that, although without legal personality, have a corporate tax liability, like, for instance, mutual funds or pension funds). An issue made reference to by art. 8.1. TRLIS, which established several criteria for the determination of residence in Spain of an entity:

«The entities in which converge some of the following requirements will be considered as residents in Spanish territory:

- a) They have been constituted according to Spanish laws.
- b) They have their registered seat in Spanish territory.
- c) They have their actual centre of administrations in Spanish territory.

To these effects, it will be supposed that a entity has its actual centre of administration in Spanish territory when having there the control and management of the whole of its activities.

⁹⁹ ECJ, sent. 2004, March 11, C-9/02, Hughes de Lasteyrie du Saillant ; ECJ, sent. 2006, September 7, C-470/04, N.

Tax Administration may presume that an entity, established in a country or territory with a null taxation regime, under section 2 of first additional measure of Ley de Medidas de Prevención del Fraude Fiscal¹⁰⁰, namely considered as tax haven, is a resident of Spain when its main assets consist in, directly or indirectly, goods located in Spanish territory or in rights that are completed or exercised in Spanish territory, or when its main activity is developed in Spain, unless the entity demonstrates that its headquarters and actual management take place in that country or territory, as well as that the entity's constitution and operations respond to valid economic reasons and sound management reasons, and not to the mere management of values or other assets".

A combined interpretation of art. 8, 17 and 26 TRLIS has produced as a result that only when fiscal residence in Spain is lost and assets of the entity are not affected to a permanent establishment (PE) in Spain, taxation of "fictitious capital gains" can be required, under art. 17 TRLIS (it establishes a difference between accounting value and market value) and corporate tax year will be closed, for corporate tax reasons, according to art. 26 TRLIS. Not all changes in the corporate life have as consequence the tax liability and the application of art. 17 TRLIS. In this way, for instance, the transfer to another State from Spain of the "actual centre of administration" would only determine that the company could be considered as doubly resident, in Spain and in the State where the actual centre of administration is located after the transfer. Logically, there are doubts raised on what would happen if there is a Treaty on Double Taxation between Spain and the new State where the actual centre of administration is located, that follows the Model Convention of OECD¹⁰¹ (MC OECD, from now on) and, in consequence, it contains a measure similar to art. 4.3 MC OCDE for the solution of the conflict of double residence¹⁰². In these cases, surprisingly, and in spite of the fact that the entity can be considered

¹⁰⁰ LEY 36/2006, de 29 de noviembre, de medidas para la prevención del fraude fiscal.

¹⁰¹ Model Convention with respect to taxes on income and on capital.

¹⁰² Spain has signed Treaties on double taxation with all European Union States, but Cyprus.

residing in the State where it has its actual centre of administration to the effects of the application of DTT between that State and Spain, its condition as doubly resident entity or company will not lead to the application of art. 17.1.a) and 26 TRLIS, although Spain could be losing its fiscal jurisdiction on certain incomes and, especially, capital gains in cases when an exit tax can be motivated¹⁰³. Certainly it could be interpreted that the "residence" under art. 17.1.a) TRLIS is also linked to those cases where Spain does not consider resident an entity as a consequence of the application of the conflict rule of a DTT following art. 4.3 MC OECD, but it is true that the latter is a conflict rule starting from the assumption of double residence, and creates the fiction of single residence, in the State of the actual centre of administration¹⁰⁴, because it will not be a "residence transfer" in the sense of art. 17.1.a) TRLIS, no matter how much the entity can be considered as not residing in Spain to the purposes of the application of DTT with the State where the actual centre of administration is located (or even to the purposes of domestic Spanish Law¹⁰⁵). The application of art. 17.1.a) TRLIS is no less problematic, when it concerns a case in which a company or entity constituted in Spain transfers its registered seat to another member State. If the most traditional opinion among Trade Law scholars is followed, in the sense that such an option has as consequence the dissolution and liquidation of the company, art. 17.1.a) TRLIS would not be

¹⁰³ A similar opinion has been expressed by GARCÍA PRATS (2006) regarding to transfer of actual centre of administration of a *Societas Europea* constituted in Spain. Also see. author's study as the one by VEGA BORREGO (2004), p. 255, on the meaning of the concept of "actual centre of administration" in art. 4.3 TM OECD, usually interpreted by Spanish Administration in the sense of taking corporate decisions necessary for its functions and operations in Spain (Resolution of DGT 2001, June 6, V0043-01, or 2004, September 23, V0128-04), without regarding criteria established by Comments to art. 4.3 MT OECD criteria (Resolution DGT 2002, May 7, V0011-02).

¹⁰⁴ This one is the criteria of Resolution of DGT 2002, May, 7 V0011-02: application of art 4.3. of Treaty on double taxation Spain-Ireland "requires a previous condition, double residence, which implies at the same time, as we have seen, double taxation of the entity to a personal tax covering its world incomes".

¹⁰⁵ It is indicated in this way by Resolution of DGT 2002, May 7, V011-02, concerning a constituted in Spain entity, with its actual centre of administration in Ireland, and that obtains interest from a Spain source, applying to it a exemption from LIRNR as earned by residents in other EU States interest.

applicable, although taxation of eventual incomes at the moment of the transfer would not raise any problem of compatibility with the Community Law, as we saw, considering that it is an inherent consequence of the configuration of the right of establishment, following ECJS *Daily Mail*¹⁰⁶ (if at lat ECJ in the sentence *Cartesio* decided to revise this jurisprudence, some incompatibilities would take place with the freedom of establishment, as we point out below¹⁰⁷). However, if the approach we consider more correct were to be adopted, namely that the transfer of registered seat does not necessarily determine the dissolution and liquidation of the company and that it is perfectly possible in spite of the fact that no international agreement exists on this sense, art. 17.1.a) TRLIS would be applicable in connection with all those elements of the entity's assets that are not affected to a PE in Spain (when the company loses its status of "constituted entity" according to Spanish Law). In this case, the rule of art. 17.1.a) TRLIS could outline problems of compatibility with *Lasteyrie* and N¹⁰⁸ case law, when taxing unrealised "fictitious incomes", at the moment of transfer of the residence¹⁰⁹. However, it is necessary to recognize that if the transfer abroad of the registered seat (with the consequent modification of the "lex societatis") is not carried out together with the transfer of the actual centre of administration, the company will not lose the condition of Spanish resident and, as consequence, art. 17.1.a) TRLIS will not apply¹¹⁰.

In such a case, it is also necessary to keep in mind the rules of art. 87.4 and 88.3 TRLIS which impose that, in the case of exchange of marketable securities or operations of merger, merger by incorporation and divisions, regulated by special regime of Chapter VIII of Title VII, the loss of the status

¹⁰⁶ ECJ, sent. 1988, September 27, C-81/87.

¹⁰⁷ Note by redactor: ECJ sentence in C-210/06, on 2008, December 28, takes a different position from General Advocate, following *Daily Mail* case law.

¹⁰⁸ ECJ, sent. 2004, March 11, C-9/02, *Hughes de Lasteyrie du Saillant*; ECJ, sent. 2006, September 7, C-470/04, N.

¹⁰⁹ It must be pointed that, in such cases, exemption regime of art. TRLIS is not applicable to equities in foreign companies held by the entity transferring its residence, because connected to the binding application of the equity "transfer" in the non resident entity, also in consideration that in reality no transfer is taking place, but only a change of residence.

¹¹⁰ GARCIMARTÍN (2001), p. 134.

of resident in Spain, to CT purposes, supposes that the difference between the normal market value of stocks or company's shares and the accounting value of marketable securities under the special regime, will be integrated in the taxable amount, unless the taxation of the capital gain is deferred, with a guarantee on tax liability, until the moment when the securities are transferred. It is true that linking the interpretation of the above to art. 17.1.a) TRLIS is not easy. It could be thought that art. 87.4 and 88.3 TRLIS do not have great consequences in connection with art. 17.1.a) TRLIS, because in the latter the residence loss will determine the integration in the taxable amount of the capital earning corresponding to securities benefiting from special regime. However, probably art. 87.4 and 88.3 TRLIS allow for the deferral of tax payment, when giving corresponding guarantees, with respect to art. 17.1.a) TRLIS. Consequently, in our opinion, art. 87.4 and 88.3 TRLIS are special rules in connection with the art. 17.1.a) TRLIS, as they enable to avoid consequences entailed by said rule (the integration in the taxable amount of the difference between the normal market value and the accounting value of securities) as well as the deferral of taxation until the moment of security transmission, if providing for related guarantee. As we already commented above in the part dedicated to natural people, art. 87.4 and 88.3 TRLIS regulate an exit tax whose compatibility with Community (primary or secondary) Law is not sufficiently assured by allowing tax deferral with related guarantees. So, also in cases that allow for tax deferral there is probably a harm of the CE Treaty or the Directive 90/434/CEE.

It is necessary to imagine a third hypothesis raising problems from the perspective of Community Law, regarding companies constituted abroad (or in a more general way, entities) but having in Spanish territory their actual centre of administration¹¹¹ (or even when the transfer of the actual centre of

¹¹¹ This is a case hardly usual and it has been raised in certain resolutions of DGT to have access to ETVEs regime (and, in some cases, to implement fiscal planning based on entity with double tax residence). See., for instance, Resolution of DGT 2001, June 6 (V0043-01) about a case in

administration is carried out together with the change of registered seat to Spanish territory¹¹²). Also in this case art. 17.1.a) TRLIS will be applicable when the transfer of the actual centre of administration (and, possibly, the registered seat) implies that the entity will stop being resident in Spain. Then, the problem is not focused only in the taxing of unrealised capital gains according to art. 17.1.a) TRLIS, but rather it will be necessary to connect the "exit" of the company from Spain with its previous "entrance". From the point of view of TRLIS, at the moment of the entrance of the company or entity in Spain (following the transfer of the actual centre of administration, with or without transferring the registered seat) generally none of the booked assets in the company's statement will be re-evaluated; consequently, there are no technical obstacles for the capital gains generated during the period of residence outside Spain to emerge for tax purposes, under art. 17.1.a) TRLIS, when transferring again the actual centre of administration to another State from Spain. This will be a case of double taxation if, as usual, the State of origin of the company has required the payment of the corresponding "exit tax" and ascertained that there is a tax liability, with respect to unrealised capital gains, at the moment of the transfer of the actual centre of administration (and, possibly, the registered seat) to Spain. The lack of "step-up" or revaluation in Spain could outline problems with Community Law, insofar as it would restrict companies' transfer of residence to Spain from other Member States¹¹³ or the later transfer of residence from Spain to another Member State, and double taxation is not eliminated (according to criterion of ECJ in Van Hilten¹¹⁴). However, curiously, ECJS Lasteyrie¹¹⁵ admits, in its

which a company constituted and addressed in United Kingdom transferred its actual centre of administration to Spain; Resolution of DGT 2000, September 4 (V0076-00), concerning a case in which two entities constituted according Irish Law, also addressed in this country, but with the real head office in Spain.

¹¹² See., for instance, Resolution of DGT 2000, October 9, V0085-00, determining that transfer to Spain of registered seat and actual centre of administration by two Luxembourg companies does not have tax consequences in Spain.

¹¹³ This is the opinion also defended by VAN DEN HURK AND KORVING (2007), p. 155.

¹¹⁴ ECJ, 2006 February 23, C-513/03.

paragraph 66, that the State where the residence of a taxpayer has been moved can ask for the corresponding tax without revaluation of purchase value, with the effect that capital gains generated in the previous State of residence are tax liable.

Nevertheless, it is necessary to keep in mind that the differences in accounting for good can have their origin in the application of different accounting rules (e.g. depreciation of goods, goodwill, etc.), so, probably problems caused by these differences can only be solved if the "exit tax" is deferred until the moment of assets transfer to a third party, as suggested by ECJS N¹¹⁶ (regarding Member States)¹¹⁷ and, even, in some cases, differences in domestic accounting/fiscal rules can cause a double taxation that cannot be solved with the resort to the freedom of establishment. Regarding individuals, Communication of the Commission, section 2.2., suggests that in such cases (double taxation as a consequence to the fact that the new State of residence demands the corresponding tax without considering "the portion" of capital gain attributable to the previous State of residence) elimination of double taxation must be guaranteed, because this position is implicit in ECJS N. After ECJS Kerckhaert¹¹⁸, in our opinion, the elimination of the double taxation must be guaranteed through coordination, without having to state that it intrinsically constitutes a limitation of the freedom of establishment.

In short, keeping in mind that from SECJ N. we can conclude that if there is no transfer of goods and rights to a third party when changing residence, an exit taxes cannot be required until the moment of the effective realization of capital gains by transmission; we can easily understand that art. 17 TRLIS, as well as art. 87.4 and 88.3 TRLIS, can generate problems of compatibility with the freedom of establishment regulated by art. 43 EC Treaty, since it implies a taxation of unrealised capital gains without deferring taxation to the time of

¹¹⁵ ECJ, sent. 2004, March 11, C-9/02.

¹¹⁶ ECJ, sent. 2006, September 7, C-470/04, N.

¹¹⁷ In the same sense, VAN DEN HURK AND KORVING (2007), p. 155.

¹¹⁸ ECJ, 2006, November 14, C-513/04.

transfer of the good or right to a third party and without considering possible losses taking place in a later moment to the date of relinquishment of residence in Spain. In short, they are two situations in which an infringement of the Community freedom of establishment can take place:

- If we interpret, correctly in our opinion, that a Spanish company can transfer its registered seat to another Member State without necessity of being dissolved and liquidated, the application of art. 17 TRLIS¹¹⁹ (or of art. 87.4 and 88.3 TRLIS) will have as consequence the corporate taxation on unrealised capital gains (provided related goods and rights are not concerned with a PE in Spain and such a transfer of the registered seat is made together with a transfer of the fiscal residence under article 8 TRLIS). If the consequence of the transfer is considered to be the dissolution and liquidation of the company, what takes place is not a residence change, but the intrinsic consequence of the dissolution and liquidation, that Daily Mail¹²⁰ case law protects and recognizes, so, paradoxically, in this case no infringement of the Community Law would exist.
- The application of art. 17 TRLIS to transfers of the actual centre of administration from Spain to another Member States by companies or entities constituted in other legal systems, insofar as they imply the loss of fiscal residence in Spain, and the taxation of unrealised capital gains (regarding goods and rights not concerned with a PE in Spain) can harm in the same way art. 43 of the EC Treaty. It must be observed that in these cases Spanish Law will tax both capital gains generated before to the transfer of the actual centre of administration to Spain and the capital gains related to the time of residence in Spanish territory, with the result of making possible a double taxation as a consequence of the overlapping of Spanish taxation and the taxation of the State where the company is incorporated, when the actual centre of administration is transferred to

¹¹⁹ Real Decreto Legislativo 4/2004, de 5 de marzo.

¹²⁰ ECJ, sent. 1988, September 27, C-81/87.

Spain. However, such a double taxation can be probably solved through Community legislative process or, if Spanish legislator wants it, through a change of TRLIS regarding these cases. Likewise, we should consider that ECJ, in its sentence N¹²¹, articulated a Community rule referred to the treatment of capital loss or loss of value possibly incurred by the company between the time of transfer of residence and the actual date of transfer or transmission of such assets¹²².

However, it is paradoxical that Spanish capital gains taxation is not guaranteed with respect to possible transfers of the actual centre of administration to other States that have signed agreements on double taxation with Spain containing a clause similar to art. 4.3 MC OECD¹²³ rule, since Spanish Revenue can lose the collection of incomes generated during the years of residence in Spain and on that presumption operations of fiscal planning can be implemented.

3.6 Exit taxes and the transfer abroad of goods and rights from the parent company in Spain

According to the Communication of the Commission on exit taxes, the collection or expiration of taxation from the assets transfer from the parent company to PEs abroad could be assimilated to "exit taxes" (it is curious that inverse situation or transfer of goods or assets between two PEs located in different Member States is not considered). In these cases, in the Commission's opinion, discriminatory or restrictive situations of Community freedoms could take place as the capital gain on transferred goods or rights would be taxed in the State of the parent company at the time when the good or right "exit" from its tax jurisdiction without having realised such a capital gain (it is possible that it will never be realised or the transfer to a third party

¹²¹ ECJ, sent. 2006, September 7, C-470/04, N.

¹²² *Vid.* CALDERON (2007), p.117.

¹²³ Model Convention with respect to taxes on income and on capital.

takes place at a later moment). From case law in *Lasteyrie and N*¹²⁴, the Commission deduced that such a taxation can raise problems similar to exit taxes which have been considered until now, and, as a consequence, the liable taxation in the State of the parent company should be deferred until the moment of the transmission of the good or right to a third party (regardless of the possibility requirement that the liable taxpayer executes disclosure obligations concerning to annual confirmation that the good or right still remain in the PE's assets. Which is odd, because this should already be ascertained from the company's accounting which is accessible by the Administration of the parent company's State, whether the company can carry out the payment at the time of the transfer or defer it until to a later moment). It is odd that the Commission keeps silence on transfers of goods-assets between the parent company and a PE, probably because it is aware that it will be difficult to defer the corporate taxation in the parent company's State to the moment when goods/assets leave the PE to be transferred to clients.

Regardless of whether the taxation we are referring to responds to the internationally accepted principle of separate company, established by art. 7.2 MC OECD¹²⁵ and apart from different solutions given by States to this kind of situations¹²⁶, it is true that regulation of this matter in the Spanish Law could raise problems in view of approaches adopted by the Commission. Indeed, according to art. 16.3.j) TRLIS¹²⁷ (in its wording given by Law 36/2006, de Medidas para la Prevención del Fraude Fiscal¹²⁸) operations carried out between an entity resident in Spain and its permanent establishments are considered as transactions between associated companies, with the consequence that the transmission of goods or rights from the parent company to a permanent establishment located abroad, generates the obligation of

¹²⁴ ECJ, sent. 2004, March 11, C-9/02, *Hughes de Lasteyrie du Saillant*; ECJ, sent. 2006, September 7, C-470/04, N.

¹²⁵ Model Convention with respect to taxes on income and on capital.

¹²⁶ *Vid.* considerations by GARCÍA PRATS (1996), p. 365-366 on German and Holland doctrine.

¹²⁷ Real Decreto Legislativo 4/2004, de 5 de marzo.

¹²⁸ LEY 36/2006, de 29 de noviembre, de medidas para la prevención del fraude fiscal.

valuing these goods and rights according to market price and, possibly, including the difference between the purchase cost and the market value in the taxable amount of the corporate tax in the year of the transfer¹²⁹. We can accept Commission's opinion that asserts that taxation on transfer of parent company's assets to a PE can be disproportionate in States, as Spain, that apply the attribution method as a way to eliminate double taxation since, in these cases, the transfer of the good or right from the parent company to a PE would not determine for Spain the loss of tax. Such a transfer taxation is more justified in the Spanish case when the transfer of assets causes for them the loss of Spanish tax jurisdiction as a consequence of the exemption concerning PE's incomes, according to a treaty or domestic Law (art. 22 TRLIS). In these cases, the inclusion of the difference between the market value of transferred goods or right and its acquisition for the parent company is, in our opinion justified, although, as the Commission indicates, the taxation should probably be differed to the time of transfer to a third party¹³⁰.

It is obvious that, at the time when the assets transferred abroad from the parent company in Spain are taxed, problems of double taxation may be raised, as indicated by the Commission in its Communication, especially when the State of PE location does not assign to the value of good or right transferred to PE the same value which the parent company's State has considered at the time of transfer. Again, in our opinion, these are problems to be solved only by legislative procedures, although the mutual recognition of values, as the Commission proposes, could be an adequate way. In any case, we ought to keep in mind that the equalisation made by the Commission between the transfer of assets from the parent company to its PE, and transfer

¹²⁹ Art. 17.b) and c) TRLIS are only concerning with transfer of patrimonial goods to a permanent establishment that ends its activity in Spain and transfers abroad of goods to a PE.

¹³⁰ Academic studies have proposed diverse answers to this situation: (1) tax deferral on capital gains in parent company's State until effective realization of capital gains due to transfer to a third party; (2) capital gain imputation to parent company in proportion to the rest of operating life of the asset, except for transfer made before the end of operating life. See. GARCÍA PRATS (1996), p. 366-367.

of residence or domicile of a natural person or entity from a Member State to another, is doubtful, insofar as these "operations" do not seem fully comparable from the point of view of the exercise of the fundamental Community freedoms. In this sense, a mere comparison between transmission of goods carried out by the parent company to their PE in another Member State and the same operation between two entities of the same group located in different Member States can make us think again on the Commission's approach, especially if compared with a transfer operation of address or residence from an entity to another Member State.

3.7 Issues referring to European Company and exit taxes¹³¹

According to Spanish legislation implementing the Directive 2005/19/CE¹³², that modified the Directive 90/434/CEE, regarding European Company or European Cooperative Company, both types of companies will be able to change their registered office to another EU Member State, profiting from the deferral regime that is characteristic of Directive 90/434/CEE (Chapter VIII, Title VII of TRLIS) regarding assets and rights located in Spanish territory that are affected to a permanent establishment located in its territory (art. 83.7 TRLIS).

In fact, the problems of SE or of ECS are not very different to those that other companies have, saving their mercantile regime in which is clear that (1) the transfer of the registered seat to another State does not imply the loss of legal personality¹³³; (2) a correspondence of the registered office and the central administration should be found in the same State (art. 312-313 LSA¹³⁴). In taxation terms, the loss of fiscal residence of SE or ECS in Spain or the transfer

¹³¹ On tax regime of SE, especially see. GARCÍA PRATS (2006) and mentioned references.

¹³² 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.

¹³³ On SE address transfer from a trade law perspective, vid. PALAO MORENO (2006).

¹³⁴ Real Decreto Legislativo 1564/1989.

of assets to their PEs abroad will determine the application either of art. 17 TRLIS¹³⁵ (with the obligation of including in the taxable amount the difference between the cost of the asset and the market value) or art. 16 TRLIS (with the obligation of market valuing the asset or right transferred to EP). In this sense, it can be said that the special regulation of the transfer of address of SE or ECS in the art. 83.7 TRLIS is redundant and it does not add new aspects to them, as established in art. 17.1.a) TRLIS. So, we do not see the advantage from including SE and ECS into the special regime under art. 83.7 TRLIS. As the Communication of the Commission on the exit taxes indicates, the Directive 90/434/CEE does not indicate anything about legal tax regime of the assets of an SE or an ECS changing their registered seat to another Member State, according to which the principles of SECJ Lasteyrie and N¹³⁶ should be applied, as for the rest of entities. The consequence will be that, when the company's change of domicile, according to art. 17 TRLIS or art. 83.7 TRLIS, entails the corporate tax integration on the taxable amount for the year in which the transfer took place, of incomes related to assets which have not been transferred to PEs located in Spain, this could infringe the Community primary Law, specifically the freedom of establishment. The same thing will happen when the transfer of assets from SE or ECS to their PEs located in other Member States generates a (fictitious) income that should be included in corporate tax returns in the tax year in which the transfer was carried out.

¹³⁵ Real Decreto Legislativo 4/2004, de 5 de marzo.

¹³⁶ ECJ, sent. 2004, March 11, C-9/02, Hughes de Lasteyrie du Saillant ; ECJ, sent. 2006, September 7, C-470/04, N.

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