Tax mobility within the EU: the quest for a new European *Nomos*

Marco Greggi[1]

1. The roots of the issue: a lost *Nomos*

It is universally known that the approach towards tax law has always been characterized by strong differences between indirect and direct taxation.

The need for harmonization concerning the system of value added tax, for the uniformity regarding customs law and for a similar framework in the field of excise duties, still cope with a secondary Community legislation in the field of direct taxation that is fragmented, incomplete and episodic.

This is the result of a necessary compromise imposed by a decision-making model which is no longer compatible with the zeitgeist of the new millennium.

From this point of view neither the Charter of Nice nor the new European Constitution in Rome (even the abridged version that has prevailed at the latest meeting in Berlin) appear to be adequate to change this approach.

Interventions in the field of direct taxation, both for individuals and for certain businesses, such as trading companies and permanent establishments, are focused on areas in which bilateral treaties did not provide an adequate protection to the taxpayer, or where the contractual nature of the instrument clearly demonstrates an intrinsic inadequacy.

Thus, the 1990/435/EEC[2], 2003/48/EC[3], 2003/49/EC[4] and, of most interest here, the 1990/434/CEE[5] directives came to light, among others.

Leaving aside the crucial role played by the European Court of Justice on the progressive removal of barriers to a common market and, indirectly, the

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[1] The author is Senior lecturer at the University of Ferrara and researcher fellow at the Department of Business Law and Taxation, Monash University.
[2] Directive 1990/435/EEC.
[3] Directive 2003/48/EC.
[4] Directive 2003/49/EC.

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approximation of laws in those areas that clash with a more effective harmonization, it remains that all the above-mentioned instruments still show an unmistakable common characteristic: they are all oriented to minimize the occurrence of double taxation on passive income.

Dividends, interest and royalties now benefit from an EU framework intended to apportion the taxing powers amongst the different States potentially interested (State of residence of the payee and the payer, for instance). The only exception in this respect is the one related to the regime of capital gains.

If arguably practical reasons have excluded such a need in the case of realization of capital gains determined by the sale of securities or other property, the EU legislator was concerned with this issue only when taxation of capital gains do not guarantee the neutrality imposed by the Treaty (in general) and the fundamental freedoms laid down and protected by it.

In this context, reference was made to specific extraordinary corporate operations (mergers, divisions and transfers of assets, for example) suitable to generate capital gains taxable in two European states at least, considering as such the States where the companies involved are placed, or where the assets are dislocated.

With the last mentioned Directive, 1990/434/CEE (so called "Parent – Subsidiary), the EU lawmaker has confirmed this need for tax neutrality for the above-mentioned corporate operations, giving the full fiscal neutrality to extraordinary corporate reorganization that could generate potentially taxable gains.

This is true especially in cases where a company was, for example, merged with another resident in another European country, ending up with the former which had to leave its residence in the State of origin (even in this case would be more appropriate to conclude that it was actually winded up to all relevant effects).

Among the cases classified as "extraordinary" in the Directive, the simple transfer of registered office of the company is never mentioned despite it could be considered an extraordinary corporate operation from the point of view of many legal systems, including the Italian one, where it is not entirely prohibited (such is the case for the Netherlands).

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[5] Directive 1990/434/EEC.

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Even if we ignore for now the taxation of individuals, a tax loophole seems already to emerge. In recent years doctrine, jurisprudence and the European Commission have tried to provide an adequate response to it.

This is the problem of the so-called "Exit taxes" as introduced by the scientific literature with respect to its possible incompatibility with EC law, and confronted by the EU Commission in a quite original way.

The problem that we raise in this short survey, apart from the comment of the ECJ case law which was discussed elsewhere, is the mobility within the EU and the relevance of such income transfers, whether they involve individuals or corporate entities, or both.

In this perspective the question is undoubtedly peculiar: it pertains not only to a case of income transfer, but rather to a sort of "trans-nationality" involving, on the one hand, the status of the taxpayer (who belongs at the beginning to a State and subsequently to another within the EU, and on the other hand, whether one or both States attach importance to the transfer of residence abroad, up to what amount of his/her taxable base can be taxed in the former or in the latter, perhaps in a later time.

The transfer of registered office or residence from one State to another is still, under many circumstances, comparable to the realization of unrealized capital gains on specific assets, according to the State in question.

The taxation of capital gains is sometimes carried out (especially following the case law cited above) in a subsequent moment (maybe in a different tax period and in coincidence with the effective realization of the asset on the market) while other times, as still happens in the Italian system, it even coincides with the transfer of headquarters abroad, at least for corporations.

In brief, what seems to emerge from this partial reconstruction is a framework in which every European country makes its own tax claim potentially different from those of other countries with respect to the same situation.

The absence (or apparent absence) of specific rules to regulate mobility within the Union in terms of taxes emphasises the potential conflict between States, and therefore international double taxation within the EU, as mentioned above.

From this array of mutually-conflicting claims, there are two certainties: first, that in a system such as the current one, corporate and personal mobility is still strongly affected, in terms and conditions, and arguably not consistently with the provisions

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of the Treaty, and secondly, that something has been lost (or perhaps never acquired by the Union, namely what in taxation could be revised as *Nomos* of tax territoriality.
This study represents a partial contribution to his research.

2. The free movement of European citizens, the taxation of accrued but not yet realized capital gains. Fundamental freedoms at the test of time and space

In a pure EU perspective, the problem of taxation on the mobility of people and companies was recently introduced by the European Commission in a communication.
Many of the problems outlined above were pinpointed there, all of them involving the so-called "Exit taxes", namely all the taxes which often are direct, on the assumption of transfer of residence, domicile or headquarters of the company (or the residence of an individual) from one country to another.
The doctrine has found that virtually all Exit taxes currently applied within the European Union are not levied in the form of specific tax on the accrued capital gains, even if they might not be applied on specific assets at the time of the transfer abroad.
The identification of hidden assets in the event of a transfer abroad is generally subject to the likely difficulties in collection.
For this reason, for example, the French legislation at issue in the *De Lasteyrie* case considered as taxable the accrued but not yet realized capital gains on shares, but not on immovable properties which remained in France.
The Italian solution, conversely, seems even more expansive in this regard, with art. 166 of the Income Tax Act that does not discriminate between different types of assets.
In short, the Commission mapped Exit taxes in the light not only of different approaches, but also (and especially) according to the various purposes which the legislators intended to pursue with their implementation.

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In the first of the cited cases, the ECJ tested the proportionality between the need for security of the instruments for the protection of the tax credit, against the transfer abroad of a taxpayer.

It has not assessed the compatibility of the instrument with the law *tout court*. For this reason, among other things, doctrine is still in doubt on the possibility to plainly extend the case law to the transfer of headquarters abroad for legal persons.

However, beyond all these clarifications and distinctions, a fact must nevertheless remain incontestable: mobility in the European market of both companies and individuals is framed from a fiscal point of view in a way that is still unsuitable and unsatisfactory to ensure full freedom of establishment, or still limiting the free movement of capital. All of this happens regardless of the configuration of Exit taxes in a way or another (basically as different, special taxes or an extraordinary case of application of an ordinary income tax).

Especially in the case of companies, mobility within the common market involves the alignment of the evaluation of the various tax assets from one State to another (particularly for what concerns their book value and the possibility to consider the book value for tax purposes as well), and if the law has focused on cases in which fiscal imbalances could even lead to cases of double taxation; on the other hand it is indisputable that in many circumstances this can also result in double non-taxation.

At this regard, the implementation of IAS within the Community through the Regulation, even though it is far from being a definitive answer to the problem (both for their limited subjective applicability and the irrelevance of their application in purely tax matters), is however the correct approach to the problem.

Several proposals by the EU Commission have also moved in the same direction.

The approach taken by the Commission starts from the possibility to extend the case law which has formed in recent years, although referring to individuals.

The lesson that we draw is that the law does not preclude the Member State to consider as fiscally relevant the transfer abroad within a possible realization of capital gains. It rather prevents the possibility to levy a tax in the same fiscal year in which the transfer occurs, if the sale did not physically place, merely as a consequence imposed by the Law.

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The picture emerging with particular clarity is that the law does not preclude the taxation of outbound transfers: namely, it does not deny the power of taxation of the State of origin of the individual (or, ultimately, the company), but it denies taxation at the time of transfer; and in this perspective that its collection at the time of the transfer is incompatible with Community law and freedom of establishment of corporate entities.

The fairness of this position does not seem, at least in a first approach, easily criticisable to the extent that the European Court attributes to each state the ability to tax capital gains accrued "ratione temporis" until the asset has been maintained on territory of the outbound state.

This is not just a hypothesis in the traditional sense of transnational income, in respect of which two States are about to present a tax claim, but a situation in which the law must take a position on the actualization of a future tax claim.

Under a closer analysis, however, the solution based on reasonable and equitable basis as set out by the Court, and then endorsed by the Commission in the above-mentioned document, shows many vulnerabilities.

First of all, until now, the Commission has always developed its thinking by assuming, on the basis of the laws of different States, a linear and progressive increase of the value of the assets existing at the time of the outbound movement of the person or company from a State and their entry in the territory of another. It never explained what could happen (nor can the result of case law be automatically extended) if the accrual of capital gains takes different -non progressive -values, at the time of seat transfer and at the (theoretically subsequent)time of its realization, respectively.

Let us say for example that the assessed capital gain (for which, however, the tax is not payable in accordance with the case law as in the N.[6] and De Lasteyrie[7] judgements) would decrease at the time of sale the following year. It would be difficult in this case to apportion the taxing power of the two States.

The survey on Exit taxes has then developed in consideration of two other elements which are equally important for an overview of the issue: the possibility of extending the Court's findings to companies and the relations with third countries, in the first case showing an orientation of the extension to De Lasteyrie, which is

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[6] C-470/04, case N v. Inspecteur van de Belastingdienst Oost/kantoor Almelo.

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reflected in a subsequent opinion, while the second shows a more cautious approach for obvious reasons.

In the Commission's view clearly the more extensive approach, or in other words the most extensive interpretation of the De Lasteyrie approach, should be accepted and implemented not only for individuals, but also for companies. An indirect confirmation of this reasoning could be found also in a more recent Directive (Directive 2005/19/EC[8]), which expressly provides for cases of mobility of the SE within the European market. Even if the last-mentioned provision is applicable only to Societas Europea, under the Commission view the principles expressed there implicitly confirm the need for extension of the mechanism.

Apart from this, it is unclear how the Commission could support the extension - through analogy - of such a principle also to those companies that do not take the form prescribed by the Directive. This would not be the first time in which the Commission supports a reading of the Treaty and its fundamental freedoms beyond the requirements of EC legislation: in essence, whenever the European integration is better and more thoroughly supported by the adequate interpretation of the Treaty than by a directive or regulation.

For this reason, drawing contrary arguments on the basis of the provisions of Community measures is not always easy.

Beyond considerations of methodology, however, the fact remains that there seems to be a clear intention by the Commission to promote an interpretation of the Court's jurisprudence to extend its benefits to a wider audience of potential players.

This approach seems to inspire the response to the second of the questions being raised: the discipline of Exit taxes with respect to third countries, whether they are part of the European Economic Area or not. In this case the interpretation of the Commission is to deal with the more than probable absence of legal instruments to ensure an adequate exchange of information.

The absence of adequate means for the exchange of information, also for the Commission, would become a determining factor of the admissibility of the above-mentioned instrument which appears to be capable of safeguarding the State credit.

Again, however, uncertainties remain.

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[7] ECJ 11 March 2004, C-9/02, case Hughes de Lasteyrie du Saillant.

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On the one hand, the Commission does not clarify whether the only information considered appropriate in this context is just the one provided by Community instruments and arrangements, or it might be a even different one, on the basis of experience in this sense by the OECD Model Convention, its Commentary, and of course from all the conventions which have been inspired by it.
From this point of view it should not be forgotten that in much of the jurisprudence to which we rely on, Exit taxes have developed not only and not so much on forms of taxation on capital gain experience, but also on obligations to provide warranties for future claims. These kinds of tax-originated warranties could be easily considered as an infringement of the free movement of capital.
In this case we have different profiles that should find different responses, or at least different articulations.

3. Variables involved in the tax regime concerning European mobility: the taxation of inbound and outbound movements and possible extension to corporate entities. The applicability to relations with countries outside the EU

The problem of mobility, concerning individuals or entities, both within the Union, and to (or from) outside the Union, cannot be reduced to Exit taxes, or even to their compatibility with some freedoms of the Treaty.
The transfer of the registered office or residence must always be seen in their ineluctable symmetry: as, on the one hand, a person leaves a State, possibly raising the problem of recovery of the capital gains at short or long term, just as well, his/her entry into an internal system poses another problem concerning the attribution of a value for tax purposes to owned assets. In the final analysis, the symmetry should ideally lead to the determination of the output value of the assets and its collimation with the input value.
From a purely legal perspective, then, the matter would consist in understanding what kind of effect equivalent to the realization takes place at the time when a

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[8] Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990.

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person leaves the territory of a State, especially for operators of a business concern.
This is primarily to understand whether, in other words, the realization may be regarded as a distinct phenomenon of full tax liability, or whether in such cases it could be thought otherwise.
In brief: If you consider the transfer of the seat like a wind up, then it is obvious that we cannot tax the assumed realization of goodwill as the national activity will terminate with the transfer, thus no goodwill is transferred abroad or elsewhere.
If on the other hand, the realization is accepted by adopting a different approach, then there is scope to make a tax claim on (higher) value from increased wealth understood as economically measurable as still produced in constancy of business in the territory of the State, and therefore to be valued in terms of tax before the transfer abroad of the registered office and the (potential) loss of any claim to that effect by the State.

4. Subjective variable in the European mobility: comparing individuals and legal entities

We have already argued, commenting the ECJ case law, that the case studies available to date about the RC consequences of the transfer of domicile, seat or residence for tax purposes, concern mostly individuals.
If for these the problem is largely resolved, so that several States have already taken the necessary countermeasures to avoid incurring the same violations as France and the Netherlands, however nothing has been said regarding corporate entities.
As for the latter the evaluation is more complex. According to the interpretation developed by doctrine, the case law has in fact implicitly acknowledged the possibility of applying Exit taxes with a certainly appealing argument: as the companies are fictitious creations of the legal system, and so to speak come to life because of it, then the tax system may impose greater restrictions on their mobility, so that even from a civil law in many countries, such as the Netherlands, the transfer of headquarters abroad is not permitted.

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If in general such a conclusion can also be shared, it remains to clarify what kind of exit tax that would be, or better if you have to deal with taxation of capital gains in output following a case of realization by liquidation.
As already mentioned in the previous paragraph, the distinction is not neutral for tax purposes.
If however a different type of interpretation is entered, then the relevance of these emerge quite significantly, even for a realization in terms of taxation and expenditure.
In any case, even if this point of view is shared, a sort of principle of symmetry should be applied.
In other words, if under a tax point of view the choice is for a solution of winding up (by assimilating the transfer abroad to the liquidation of the company), then a tax should be provided for that.
If however the civil rule recognizes the continuity of legal subjectivity, then a realizable value of the company's assets is still eligible in terms of tax, but only under the justification of the protection of legitimate tax power exercised on produced wealth, accrued but not yet realised.
Whenever this line of reasoning to the case law is enough to save the Exit taxes, *nulla quaestio*.
It has also been recalled at the start, that the doctrine has not taken a unanimous position on the possible extension of the above-mentioned case law to corporate entities.

5. "Outbound" taxes: taxing capital gains and the identification of relevant assets

The absence of the model, namely a Directive or a systematic case-law consolidated and developed over time through a homogeneous reading of the freedoms of the Treaty, is justified by the difficulty found by different states not only to reach shared tax solutions, but also by deep, irreconcilable differences that distinguishes the civil law across Europe.
Even the taxation of capital gains at the time of the transfer of headquarters to another country is essentially left to national legislation of each member State,

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especially since their focus on direct taxation would leave little margin for action of secondary Community law.

That does not preclude an analysis at least based on general outlines of the operation, its being assimilated to other taxes and provided with a particular focus on asset gains in output.

Not only in Italian tax law, but also in many other national systems the company (or the individual) from the national territory (or rather their transfer of domicile, residence or headquarters abroad) is associated with a manifestation of power of taxation by the Revenue service of the country from which the transfer has taken place.

This event may directly affect the taxpayer, obliged to pay the tax at the time of the transfer, or, as is often the case, to determine the amount of the tax at that time but, so to speak, deferring the enforceability at the time of future sale.

Until now the doctrine has focused on these two declinations of the Exit tax at times pointing at its conflicting with the law, and at other time at its conditioned compatibility.

The nature of the realization, however, has never been analysed in the EU, nor in the Italian context.

Art. 166 Income Tax Act seems to refer to a concept such as "components of the enterprise or entity" that for its vagueness lends itself to multiple keys of interpretation.

First of all, it must be understood what is the event which determines taxation: that is, whether it is the deemed liquidation of the subject (outbound) company or if it is only one way to recover the value produced by the company, thus taking the value of income (at least in Italy).

It is difficult to think at a liquidation of the company, even in the limited sphere of taxation.

The realizable value of goodwill, regardless of its actual registration of the property business and its tax relief (e.g. following the purchase of a business or an extraordinary corporate transaction), should be imposed by the fact that it consists only in a larger value of assets held in the form of enterprise, which was obtained in the territory of the country, thus assuring a perspective of higher return.

Community law, stating that we can consider Exit taxes as compatible with the freedom of establishment for those companies (without postponing the need to

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guarantee the effective realization abroad of the transferred assets, or the entire company), would derive its conclusions in terms of determining the tax base in a suitable substrate with the commercial law that regulates the transfer, as it was recognized in the past in Daily Mail case[9].

This is entirely logical and in conformity with the conditions taken into consideration.

On the other hand, imposing a liquidation value to the transfer of the seat would not have any sense, considering the whole business as a going concern in the country inbound, and probably it would have exposed the law providing it to a profile of illegality with respect to EC regulations on the basis of irrationality and inconsistency of the legal system. In fact, while recognizing the survival of the subject company abroad, the tax system would end up by treating the transfer as a termination of the company's business.

6. Concluding remarks: a *Nomos* found?

Schmitt wrote, while closing the preface to his 1950 work that "It is to the peaceful people that the kingdom of the earth is promised. Even the idea of a new *nomos* of the Earth will be revealed only to them".

Unfortunately, the purity with which the author refers to does not belong to the logic of taxation, even in a European dimension.

The lack of an ethical approach to taxation in an international framework imposes on scholars and practitioners to find answers to the inevitable problems and dichotomies that still characterize the membership of nations to the Union - in the narrow perspective of their fiscal sovereignty.

In this sense, even in tax law, a sort of schizophrenia is evident that seems to characterize the common European house, and that other authors have analysed in its general traits.

If it is true that the etymological root of the word *nomos* in Greek refers to pasture land, and the distribution of pasture, the law then, on the one hand the European and international tax, against which the problems outlined by the above-mentioned

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[9] Judgment 27th September 1988, C–81/87, case *Daily Mail.*

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authors are perfectly set, in its being a valid criterion of apportionment of power to the sovereign states in, and on the other facing the economic mobility as "*nomas*" (shepherd, the one inhabiting the law) would lead the scholar to the limits of the paradox.

These pages have suggested a *nomos* that may regulate the movement, the transfer of offices, and the tax consequences pertaining to the *nomas* moving from one pasture to another, which is the application of a law in place of another.

The EC freedoms and law take this ambitious goal, finding a *nomos* valid for the entire continent.

If from a philosophical point of view the search outcome seems promising, from a positive perspective, one can only note the inadequacy of the appropriate and useful references to give the operator a clear and unambiguous framework.

For this reason, the mobility within the Union has yet to be rewritten in a way more consistent with the need for legal certainties of the businesses involved and for corporate necessities.

The innovative aspect in this perspective concerns the nature of the difficulties produced by Exit taxes: both for the symmetries they highlight and their time frame to be complied with. The law in this case would seem to highlight aspects of the neutrality of the transfer without jeopardizing the tax authority of the source State.

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