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CORPORATE EXIT TAXATION IN FINLAND

Bachelor's Thesis

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I hereby declare that I have compiled the thesis independently
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ABSTRACT

The corporate taxation has been on a surface in Finland lately. Since the beginning of 2016, EU taxation has faced major changes due to OECD’s BEPS-project. The project related EU's Anti-Tax Avoidance Directive (ATAD) and it’s article 5, concerning corporate exit taxation rule, has been applied in Finland since January 2021. This thesis is inteded to clarify the legal grounds and reasonings for corporate exit tax and it also doubts whether the charge levied on corporates while moving intra-EU, is still restricting freedoms provided in TFEU.

The term exit tax may refer to several types of taxes; this thesis, however, is limited to corporate exit taxes. The thesis clarifies the exit taxation rule in Finland in 2021, while discussing its legal grounds and analysis its possible effects in the future. This thesis suggests that the corporate exit taxation rule in ATAD is an eligible method for guaranteeing Member States’ tax revenues and fighting against base erosion and profit shifting but it still creates some uncertainty from legal point – the importance of EU freedoms cannot be dismissed. Problems emerging from the lack of a specific legal framework on intra-EU relocation has been an issue for over a decade.

How much exit taxation can be regulated to protect EU fundamental freedoms but on the other hand to protect the taxation rights of individual Member State? How Finland has impelemented the new ATAD rules for corporate exit taxation?

This thesis is not attempting a comparative approach but it discusses the impact of case laws from different EU MSs.

Keywords: EU tax law, corporate exit taxation, European Union law, corporate law, Freedom of establishment

INTRODUCTION

The single market of the European Union (EU) and freedoms provided by it, is complex in terms of any kind of taxation and especially the cross-border movement of assets and businesses. It is widely known that the Treaty of Functioning of the EU (TFEU) provides plenty of freedoms and rights, but one of the key elements in the EU single market is the free movement of capital. Since it came into force in 1994, all restrictions on capital movements and payments across borders have been prohibited. For companies, it simply means that companies are able to invest and own others EU companies and raise the assets where it is cheapest.[1]

In November 2019, the Finnish Ministry of Finance issued a proposal[2] to implement a corporate exit tax, which was based on the European Union Anti-Tax Avoidance Directive (ATAD). Before that proposal, Finland had national legislation regulating situations where the corporate exit taxation could be possible in principle – but not in a legal way. Despite the tax autonomy of EU Member States (MSs), there emerged issues as the domestic legislation and EU legislation were contradicting and the Finnish legislation could not be applied. Finland was in a situation where was domestic legislation contradicting the prevailing EU law.

The issue rose to the surface in Finland in June 2013, through a case brought to Helsinki Supreme Administrative Court (KHO)[3]. The KHO issued a decision annulling the decision of the Tax Adjustment Board to tax a limited amount of unrealized income of a taxable company when a Finnish permanent establishment ceases. In a domestic situation, the tax liability would arise only when the income is realized on the actual transfer of the shares. In the case law of the European Court of Justice (ECJ), such unequal treatment has been considered a restriction on the freedom of establishment.[4] The domestic Supreme Administrative Court did not grant a right to appeal in

[1] Eg. See EC information on Commision official website www.ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/capital-movements_en

[2] Hallituksen esitys VM/2019/149: HE 76/2019 Hallituksen esitys eduskunnalle laiksi elinkeinotulon verottamisesta annetun lain muuttamisesta ja eräiksi siihen liittyviksi laeiksi

[3] KHO stands for *Korkein hallinto-oikeus,* Finnish Supreme Administrative Court

[4] See eg. C-371/10 National Grid Indus

the matter, which is why The Administrative Court's decision that taxation in accordance with the Finnish Exit Tax Act could not be submitted remained in force. The case was brought to the ECJ.

Referencing the previous explanation of Finnish exit tax case, one can say that the corporate exit taxation has been at a turning point in Finland for several years now. The change from the interpretation of fundamental freedoms to comply with secondary legislation has raised different questions and thoughts among Finnish entrepreneurs. Based on the author's conversations with Finnish and Estonian entrepreneurs and board managements located in Finland, the main questions are reasonably simple: is corporate exit taxation only in Finland, why, and what does the exit taxation mean in practice? Does it mean more taxes and fewer assets? Entities shall be able to move and relocate assets between the MSs freely without any existing restrictions but the exit taxation growls in the ears of the entrepreneurs.

The subject of this thesis is the Finnish so-called exit tax provision[5] on mergers, divisions, and transfer of assets and the provisions overlapping with EU free movement of capital as well as freedom of establishment. Although the exit tax provision is based on a Directive issued by the EU, the thesis seeks to find an answer to the legal grounds for the exit tax being approved and what issues from the point of view of EU fundamental freedoms and concepts there have been and might arise in the future.

Since the topic as such is not self-explanatory nor straightforward, the thesis aims to provide frames that give the reader an overview of legal principles and legislation underlying the corporate exit taxation in the EU and specifically in Finland. This thesis is limited to examine taxes levied on EU based entities, not individuals.

This thesis aims to bridge the gap in the remaining question:
What is the legal ground for corporate exit taxation at the risk of restricting the fundamental freedoms or the principle of proportionality?

Before the research, the author supposes that regulating the corporate exit tax in the EU level might be incompatible in the true meaning of TFEU and against principle of proportionality. The hypothesis is that exit tax might be justified under the principle of proportionality to gain the

[5] Laki elinkeinotulon verottamisesta 24.6.1968/360

general aim to restrict aggressive tax planning but it still infringes the tax autonomy of the Member States as well as fundamental freedoms provided in TEU.

The first chapter of the thesis shall be dedicated to explaining briefly the impact of the European Union for Member States' taxation methods and power. Also case law derived from European Court of Justice (ECJ) is examined here. This examination provides a basis for further deeper analysis.

The second chapter provides comprehensive insight on the legal framework of the exit taxation in the EU and specifically in Finland. The legal framework consists of regulations, directives as well as worldwide anti-tax avoidance project. There are primary and secondary sources of law and in addition, the case law of the ECJ represents a very important source of law as it has the same legal value as the provisions of the TFEU. All EU Member States have recently implemented the exit taxation rule[6] into their tax regimes, but Finland having a recent case from 2016 makes that worth reviewing closer. Therefore, the author provides a complete review of the Finnish case C-262/16 which led to changes in national legislation while implementing the new directive.

In chapter three, before the author's concluding remarks on the topic, this thesis will discuss the possible issues arising from exit taxation and impacts the exit taxation rule might have on Finland. In the same chapter, the author proposes alternative solutions to tackle the research problem and seeks to find balance between arisen issues.

The research methodology used in this thesis is qualitative. Qualitative research method was chosen to gather in-depth insight and to understand legal concepts. The data involves, and is collected from different legal sources, including publications such as books and articles, legislation and judicial decisions as well as other supporting sources relevant to the topic. Other than legal sources are used to support the theories and discussion.

[6] ATAD Article 5

1. BACKGROUND OF CORPORATE EXIT TAXATION

The idea of exit taxation is not novel. According to Swen-Lorenz[7], in taxation circles, ”Germany’s tax scheme is known with the most profound historical tie to the concept of a departure tax and in 1931, Germany enacted the most infamous departure tax”8: the Reich Flight Tax[9] (RFT)”. The RFT was first used to control economic fallout of the Weimar Republic but it ended up being a Nazi measure to seize assets of Jewish families while they departed from Germany.[10]

Nowadays, in 2021, taxation in its all forms is an essential piece of the EU Member States’ government’s actions. It is used to attain various goals concerning public goods[11] and there is widespread consensus that taxation is not levied only to individuals but also to corporates to achieve those common goals. Depending on the country, taxation tackles eg. Environmental issues and health protection and corrects market failures domestically as well as intra-EU.[12] We can assume that taxation has a central role to play in shaping a fair society and a strong economy, and therefore it easily brings forth provocative discussion. Corporate exit taxation is a legitimated concept provided in EU’s Anti-Tax Avoidance Directive[13] but on what grounds? The concept is questionnable from the perspective of the freedoms provided in TFEU.

1.1. Defining exit taxation

Depending on the country, exit tax may be levied on corporates or individuals[14]. It is a charge triggered under different circumstances – these might be a change in one’s tax residency or a intra-

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[7] Swen-Lorenz, Lorenz, Z. (2020, Oct 10) Tax Trap Europe – Get out now or regret later
[8] *Ibid.*
[9] In German *Reichsfluchtsteuer*
[10] Ritschl, A. (2019) Fiscal Destruction: Confiscatory Taxation of Jewish Property and Income in Nazi Germany. *Economic History Working Papers No: 297*
[11] Delmotte, C. (2020). Tax Uniformity as a Requirement of Justice. Canadian Journal of Law & Jurisprudence, 33(1), 59-83.
[12] Stuart Adam et al (2010). Dimensions of Tax Design. Oxford: Oxford University Press.
[13] Directive 2016/1164
[14] Helminen, M., (2018) *EU Tax law: Direct Taxation 2018*, 69-144

group transfer of assets or change in permanent establishmet (PE) from home country to other taxjurisdiction. Nota bene, the author examines only corporate exit taxation. Exit tax enables the home MS to tax economic value of capital gains, even latent, after the assets are shifted elsewhere, out of its tax jurisdiction.[15]

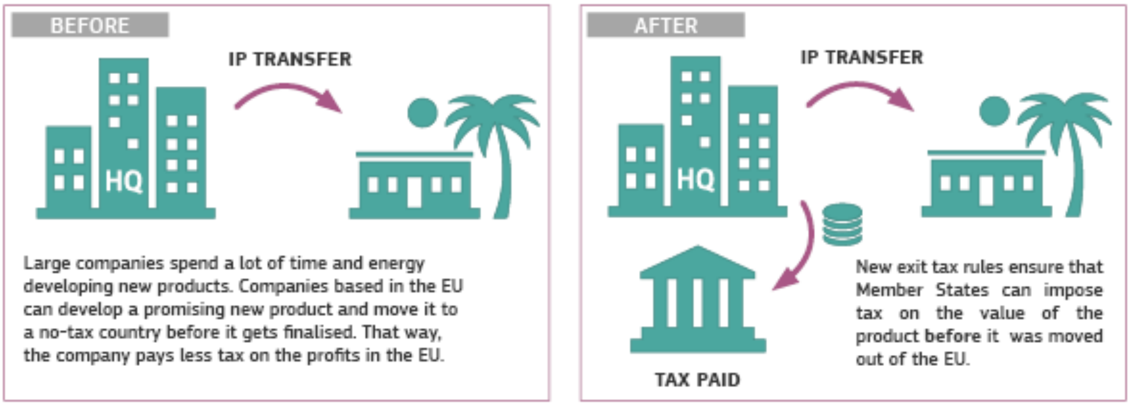

Figure 1: IP transfer before exit taxation and after.
Retrieved from https://ec.europa.eu/taxation_customs/sites/taxation/files/violet_5.png

When exit tax related articles are compared, it comes clear that *a dear child has many names* and the term itself may refer to different situations as there is variety of different names for this type of charge, depending on the contexts. In literature, departure tax is usually used in aviation matters, and it is rarely used in the meaning of this thesis despite the fact that the news articles from the UK uses it plenty. Expatriation tax and emigration tax are used for individuals rather than corporates. The most common way to designate the tax on corporates is simply *corporate exit tax*. In later chapters, the term *exit tax* will be used in the meaning of corporate exit tax.

The current exit tax within the EU is associated with the Comission's Anti-Tax Avoidance Project (ATAP) and its intented to prevent companies from avoiding tax on gains on assets that are moved from a MS's tax territory, typically to a lower tax or territory. The first lines of the Directive Preamble[16] summarises the objective: "The current political priorities in the field of international taxation highlight the need to ensure that taxes are paid where profits and value are generated". The Anti-Tax Avoidance Directive (ATAD) currently regulates exit tax only for corporates so the exit tax of an individual is still to be decided autonomously by MSs. Hence the exit taxation is not

[15] Lomas, U. (2019). *Finland To Implement EU Exit Tax*
[16] Council Directive (EU) 2016/1164, Preamble (1)

regulated to cover all taxpayers, most EU jurisdictions impose exit tax only for corporates since it is regulated.

Bearing in mind that there is generally two type of taxes, direct[17] and indirect[18], it is safe to say that under Finnish legislation, exit tax does not create a separate type of tax and it is treated like an income tax, which in turn is a direct tax.

1.2. Sources for exit tax legislation

As the EU does not have harmonized general tax rules between one book covers for corporates, the EU tax law examines terms and concepts from a number of perspectives. The materials governing the taxation concept are MSs domestic legislation, tax treaties between MSs, OECD interpretative guidelines, TFEU fundamental freedoms and the case law of the ECJ. This makes EU tax law technical and challenging to interpret. The withdrawn Commissions proposal for Common Consolidated Corporate Tax Base (CCCTB) is relaunched but will be mandatory only for large groups with the best ability for tax planning. This will not harmonize the taxation of the smaller multinational corporates not it cannot be guaranteed if its in accordance with true meaning of the principle of proportionality.

The primacy order of different sources of tax law determines the tax consequences for example in a migration situation. To analyse the corporate exit taxation and the issues arising from its legislative perspective and how these affect the cross-border movement and relocating of companies or their assets, one must be able to determine the relation between the EU law and law of an individual MS. The most effective EU level concepts in respect of EU tax law are listed briefly below. Many of following concepts are written in the TFEU and therefore legally binding as a matter of fact. However, some well known concepts are still unwritten, hence called general principles of EU law.[19] Since those general principles are established by ECJ case law and based on ECJ's duty to obtain and ensure the fair fulfilment of EU law, therefore due to the nature of decisions those unwritten general principles are usually binding.[20]

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[17] Eg. charges levied directly from Govenrment to taxpayer, eg. Income tax, capital gains tax and taxes on assets
[18] Eg. charges levied for customers, eg. VAT, GST and custom duties
[19] Turner, C. (2014) EU Law, 30
[20] *Ibid* 31.

1.2.1. Sovereignty of Member States

What comes to direct taxes, the authorities of the European Union as such do not enjoy a right to tax. This means that the legislative authorities of the EU give the framework for national legislative authorities and, for example, the ECJ is able to give preliminary rulings for domestic courts[21] and use its decision power via preliminary ruling.

The right to impose direct taxes is retained to the MSs competence itself.[22] However, due to the nature of the EU law, it may take precedence over national tax rules in some areas, particularly those related to EU business policies. By preceding national legislation, the EU ensures the free flow of goods, services and capital around the EU and in the internal market, and also ensures that businesses in one MS do not have an unfair advantage over competitors in another MS.

1.2.2. Subsidiarity and proportionality

In accordance with the European Union Treaty (TEU) Article 5, the principle of subsidiarity states that the EU cannot act if the aims of proposed action could be sufficiently achieved on national MS level. Also doctrine of proportionality stands for the principle that restricts certain actions of the EU. The principle of proportionality prohibits EU law going beyond what is necessary to achieve the objectives of the treaties. The measures used and the objectives pursued must be in the right proportion to each other.

The principle of subsidiarity and proportionality are in centre role when examining the exit charge levied on companies. The ECJ has ruled multiple MSs domestic exit taxation provisions against the principle of proportionality as the MSs have levied taxes for the exit year and have not granted an option for longer payment period. The author will look further CJEU case from Finland, where the Finnish measure itself was legitimate but the provision making the tax payable immediately and not upon realization was disproportionate, since it gave preference to equivalent intra-national transactions and therefore dicriminated the intra-EU transaction as well as principle pf proportionality.

[21] Article 267 of the TEU
[22] p 8 https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/578989/IPOL_IDA(2016)578989_EN.pdf

According to ECJ case law, the most efficient measure to comply with the principle of subsidiarity and proportionality is to grant taxpayer an option to choose between immeadite payment of taxes or deferrent of payment.[23]

1.2.4. Supremacy and primacy

Nature of EU law is known to be direct. Since 1995, the norms of EU tax law have limited Finland's independent taxing power and also provided a framework for it. EU tax law applies to situations in which the tax object has a connection to another EU country in addition to Finland.[24]

The doctrine of supremacy and principle of primacy stand for the rules that EU law is based on the commonly known idea that it prevents Member States from enacting laws or concluding agreements or applying already enacted laws that are in conflict with EU law. Doctrines determine the highly preceding effect of EU law over domestic legislation. Where a conflict arises between EU law and national law, EU law will prevail.[25] This also means that any national legislation and tax treaties must be applied and interpreted in accordance with EU legal requirements. In practice this means that the national legislation and for example tax treaties of MS, such as Finland, may contain several provisions that are in conflict with EU law. These provisions need to be brought into line with EU law in the event of a conflict. Even if the authorities of a MS do not apply national legislation that is in conflict with EU law, legal certainty requires these provisions to be amended.[26]

These doctrines rely majorly on ECJ rulings[27] *Van Gend en Loos* and *Costa V ENEL*, wherein the Court defined the EU as a separate legal system, emphasizing its *sui generis*[28] nature.
However, the impact of EU tax law on national legislation is limited to that extent necessary for the completion and functioning of the EU internal market.[29] Despite the EU law, the interpretation of tax laws has been based on the premise that a taxpayer has the right to organize its financial transactions according to the cheapest alternative for tax purposes.[30] Thus, a taxable entity can not

[23] National Grid Indus, para 73 and 85
[24] Some limitations are mentioned in TEU 52 and TFEU 349, 355.
[25] Dougan, M. When worlds collide! Competing visions of the relationship between direct effect and supremacy, (2007) pp. 931-963
[26] See eg. C-358/98 Commission v Italy, para 16-17, C-160/99 Commission v France, para 22, C-522-04 Commission v Belgium, para 70
[27] Van Gend en Loos EU:C:1963:1 and EU:C:1964:66 Costa v ENEL
[28] Latin meaning for unique: special interpretation of a case is necessary
[29] Helminen, M.: EU-Vero-oikeus 2016. pp 25-26.
[30] Ossa, J. Tuloverolaki käytännössä, (2013) pp 17-18.

be regarded as evading taxes if it exercises its freedom of choice and completes its tax planning. In Finland, it could be considered that the right of a taxpayer to complete planning would result from the protection of property protected by the Finnish Constitution.[31]

1.3. Case law related to exit taxation

The ECJ is an important institution for the implementation of EU law. It is not merely a passive interpreter of the law, but through its interpretations it is also a significant player in promoting integration of the EU. Example judgments of the ECJ listed below show that there has been room for improvement in MSs' compliance with the EU law. Exit taxes have been on the surface as its nature has been exceptionable in recent ECJ cases. Before ATAD, there was discussions if the immediate tax levied on migrating companies might be against fundamental freedoms provided by TFEU, particularly the Freedom of establishment (Art 49) and Free movement of capital and payments (Art 63).

1.3.1. National Grid Indus C-371/10

The case C-371/10 National Grid Indus is a landmark decision for exit tax situations of cross-border mergers as it was the first time that the ECJ has *specifically addressed the issue of exit taxes arising on a corporate migration of tax residence within the EU.* The ECJ confirmed that exit taxes on unrealized capital gains of companies upon intra-EU emigration constitute a restriction of Freedom of establishment. Although the case related to Dutch tax law, it has wider range as based on this decision, a number of MSs had to change their exit tax regulations concerning the migration of companies (as well as individuals).

1.3.2. Portugal C-38/10[32] and Spain C-64/11[33]

The ECJ has delivered judgments in Portugal (C-38/11) and Spain (C-64/11) concerning restrictions on freedom of *establishment in the event of a bank transfer or otherwise transferring assets to another state.* In both cases, Portugal and Spain immediately taxed latent capital gains if the company's registered office and effective management were transferred to another MS. The ECJ stated that the corporation tax levied on companies under national law constitutes a restriction

[31] Perustuslaki 15.1§
[32] EU:C:2012:521
[33] EU:C:2013:264

on freedom of establishment which is, in principle, prohibited. Furthermore, as in Case C-371/10, cited above, the TEU found that *the levying of an exit tax at the time of the emigration was contrary to the principle of proportionality*.

1.4. Duplicate scope of freedoms

According to Art 49 of TFEU, the freedom of establishmet is restricted and "*Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.*"[34] The Article also refers to Art 54 TFEU which in turn states that "*Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States."*[35] Hereby Art 49 covers individuals as well as legal persons. The freedom of establishment also means that the home MS may not prevent a national or a company incorporated under its jurisdiction from establishing itself in another MS – hence the freedom of establihment also guarantees the right to leave the State.[36]

The Article 63 of TFEU[37] covers the free movement of capital between MSs and third countries. Since Art 49 and 63 have partially overlapping scope, it logically means that the same national provision may be contrary to several fundamental freedoms at the same time. The ECJ has generally applied the Art 49 also to situations in which the Art 63 would apply. If the matter can be resolved through the right of establishment, the use of Art 63 is not needed.[38]

With regard to the free movement of capital, Art 65 of the TFEU states that different taxation must not constitute discrimination or a disguised restriction on the free movement of capital. The free movement of capital is not only the most recent one of the freedoms but, because of its unique third country dimension, also the broadest as it covers territories outside the EU. Restrictions on capital movements and payments, both between MSs and with third countries, have been prohibited since the start of 2004 as a result of the Maastricht Treaty.[39]

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[34] OJC 115, 9.5.2008, 67
[35] OJC 202, 7.6.2016, 69
[36] Case 81/87: Daily Mail
[37] OJC 115, 9.5.2008, 72-73
[38] See eg. C-436/00
[39] Exceptions may exist.

Based on above mentioned ECJ caselaw and variety of literature, the rules and provisions of exit tax are currently justified by the need to ensure a balanced distribution of the power to impose taxes between MSs, since each MS is entitled to tax capital gains which fall within its power to impose taxes. MSs may decide unilaterally on the limits of their taxing powers through national legislation or tax treaties. However, that power to impose taxes must be exercised by the MSs in compliance with EU law - it must be borne in mind that a national provision based on a directive must not infringe fundamental freedoms. Despite the fact that exit tax guarantees the taxing power of departure country, the issue is often the principle of proportionality, according to which it would be possible to proceed by less restrictive means.[40]

[40] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee. Exit taxation and the need for co-ordination of Member States' Tax Policies. 19.12.2006. COM(2006)825.

2. CORPORATE EXIT TAX IN FINLAND

2.1. Case A Oy C-292/16

The case C-292/16, A Oy, is a novel case which concerns the compatibility of Art 52.e3 EVL[41] with EU law, whether the immediate taxation of a cross-border transfer of business seat is contrary to Art 49 TFEU.

Finnish case law has taken a position on whether sec 51e of the EVL concerning the transfer of assets of a PE in Finland is applicable in an intra-EU situation. Pursuant to section 51e EVL, the assets of a foreign company's PE in Finland are deemed to have been transferred to their probable transfer price when the assets cease to belong to the Finnish PE. In other words, the transfer of the assets of a PE out of Finland realizes an increase in the value of the assets for tax purposes, even if the assets have not been transferred for consideration.

In the decision of the Helsinki Administrative Court of 6 June 2013 T 13/0910/4, it has been held that Section 51e of the EVL could not be applied when a company resident in another EU MS ceased to have a PE in Finland. The Supreme Administrative Court did not grant leave to appeal to the Taxpayers' Law Enforcement Unit (KHO 16.6.2015 T 1693), so the decision of the Administrative Court remained final. The decision of the Administrative Court can be considered justified by the case law of the ECJ.

A Finnish limited liability company A Oy had transferred its permanent establishment in Austria to an Austrian company via transfer of business.[42] In exchange, it got shares for that Austrian company. Finnish Tax Authority levied an income tax to A Oy on the increases in value incurred in connection with the arrangement. If the assets would have been transferred within one MSs borders, internally, the principle of continuity would have been applied and the assets would have

[41] Elinkeinoverolaki (EVL, the law relating to the taxation of business income)
[42] Merger Directive

not been taxed. This would have resulted in a different outcome, i.e. the unrealized capital gains would not have been recognised as income until the assets had been transferred. That arose the question to the ECJ if the immediate taxation might be unlawful discrimination as the similar national situation would not cause the taxation for unrealized gains.[43]

It was indisputable that there was a transfer of a business within the meaning of the Merger Directive and that the taxation of capital gains arising from the transaction fell within the scope of that directive. Therefore, and notwithstanding the EU Treaty, Finland had the right to tax the income and capital gains arising from such a business transfer. The Merger Directive, on the other hand, does not provide for the date on which the tax due must be paid. According to the TFEU, such provisions must be adopted by the MS independently, but in compliance with Union law. In that situation, Finnish law did not give the taxpayer a right to choose whether to pay the tax immediately or to postpone the payment of that amount to a later date (with possible interest penalties).

In its judgment, the *ECJ considered that the restriction on the right of establishment was justified because it ensured that the division of taxing powers between the MS*, but the immediate taxation and the fact there was no choices given to a taxpayer, *was contrary to the principle of proportionality*. It can be stated that Art 52 e 3 EVL based on the Merger Directive was problematic in its form and therefore contrary to freedom of establishment and principle of proportionality.

2.2. Pre-ATAD phase

Before ATAD, MSs' governments were fully free to design their tax laws according to their national priorities such as education, healthcare or roads. However, in doing so, they must respect certain fundamental principles covered by EU law. Also certain areas in company taxation require an EU approach in order to ensure fair tax competition and to tackle common challenges, such as corporate tax avoidance.[44] The ECJ has the right to investigate whether national tax provisions comply properly with EU law.

[43] C-292/16

[44] https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/taxation_internal_market_en.pdf

Before the implementation of Directive, as reported in case C-292/16 A Oy, Finnish legislation lack some of the provisions required now by the ATAD, such as the imposition of tax on the transfer of assets of domestic companies as well as the possibility of deferment the payment of tax.

Finland has been part of the EU since 1995, and joining the Union designated new approaches, directives and tax policies alongside national legislation. As a part of joining the EU, Finland got a new section to the field of tax law. "The third party" EU tax law to follow which gave new frames to Finnish tax law. This designated that in addition to the domestic legislation and tax treaties between another countries, Finland had to implement its legislation in line with EU law.

In July 1990, way before Anti-Tax Avoidance Project (ATAP) and before Finland joined the EU, the Council adopted the Merger Directive: *Directive on a common system of taxation applicable to mergers, divisions or "split offs"*[45]*, transfers of assets and exchanges of shares concerning companies of different Member States (the Merger Directive)*[46].

The Merger Directive enabled intra-EU cross-border merger and acquisition transactions to be made in a tax-neutral manner. The Mergers Directive allows a company, on being dissolved without going into liquidation, to transfer all its assets and liabilities to another company in exchange of shares. This led to a situation where some MSs levied taxes on migrating companies and some States did not, which in turn can be assumed to be in conflict with fair internal market and fair competition.

Source for Finnish corporate exit tax was domestically derived from the Merger Directive. Thus, the rules concerning exit taxation, are only partially covered in Merger Directive. The rules were incorporated to domestic Business Income Tax Act.[47] According to the EU Merger Directive, a merger or the transfer of assets does not usually result in immediate taxes for a company. The Merger Directive does, however, allow the taxation of profits or capital gains from a PE resulting from a merger, division, or transfer of assets on certain conditions.

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[45] "Split off ", named in the Directive as partial division (new Article 2(b)(a)). The splitting company is not dissolved and continues to exist.

[46] Council Directive 2009/133/EC of 19 October 2009 on the Common System of Taxation Applicable to Mergers, Divisions, Partial Divisions, Transfers of Assets and Exchanges of Shares Concerning Companies of Different Member States and to the Transfer of the Registered Office of an SE or SCE between Member States (Codified Version), OJ L 310 (2009)

[47] Laki elinkeinotulon verottamisesta 24.6.1968/360 sec. 52

When rules were transposed to The Finnish Business Tax Act, it regulated two events:

1) the transfer of assets of a foreign entity's PE in Finland[48] *and*
2) the transfer of assets as a result of a corporate transaction so that the assets do not actually remain attached to the PE in Finland. [49]

What comes to tax collection, no deferral rules or option were granted. This domestic exit tax rule lead to conflict with EU law in terms of ECJ case law as the immediate collection of taxes in capital gains has been regarded as a prohibited restriction on the right of establishment.[50]

During the public consultation phase of drafting the law in June 2019[51], exceeding the minimum level of protection in certain respects was contemplated. Although the scope of the final rules is not as broad as initially proposed, there is a debate regarding more exhaustive exit tax rules. It is interesting to remark that the Finnish Government (PM Sanna Marin) adopted previous Government's Programme[52] and agreed to continue the task to examine the possibility for exit taxation for individuals as well.[53]

For example, if the exit tax rule would have been in line with EU law in 2016, Nordea would have had to pay an exit tax when it moved from Finland to Sweden. Under the Nordea arrangement, the Finnish subsidiary became a branch of the Swedish parent, leaving no company in Finland.[54]

V. Kananoja[55] states in his article that before the ATAD was implemented, “Finland was the only Nordic country that had not amended its exit tax provisions, regardless of the fact that they were deemed to be disproportionate in light of EU law.”

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[48] Art 4
[49] Income Tax Act [Tuloverolaki], 30.12.1992/1535 sec. 9
[50] See eg. National Grid Indus, Portugal, Spain
[51] HE 76/2019 vp: Hallituksen esitys eduskunnalle laiksi elinkeinotulon verottamisesta annetun lain muuttami- sesta ja eräiksi siihen liittyviksi laeiksi p 190
[52] *'Inclusive and competent Finland – a socially, economically and ecologically sustainable society'* (2019) https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/161662/Osallistava_ja_osaava_Suomi_2019_WEB.pdf
[53] *Ibid, annex 5*.
[54] See eg https://www.nordea.com/fi/tietoa-nordeasta/keita-olemme/nordean-historia/#Uusi-juridinen-rakenne---2017, https://mb.cision.com/wpyfs/00/00/00/00/00/3B/0D/52/wkr0006.pdf
[55] V. Kananoja, Implementation of the EU Anti-Tax Avoidance Directive (2016/1164) Exit Tax Measures in Finland, 60 Eur. Taxn. 2/3 (2020), Journal Articles & Papers IBFD

2.3. Implementation of new corporate exit taxation

Since the EU tax legislation between MSs had not been able to be harmonized fully, it enables the systematic arrangements for tax avoidance, causing erosion to tax bases of MSs. There were not only harm caused to individual MSs but the unharmonized corporate taxation within the Union might negatively affect the goal of the common internal market as some of the MSs - commonly known as tax havens - are competing with other MSs by offering positive tax advantage for migrating companies. Due to the common goal of a fair internal market, the anti-tax avoidance methods and measures are still high on the agenda of the Union as well.[56] To restrict that negative impact of tax competition, The Organisation for Economic Co-operation and Development (OECD), an international organization for better economy[57], adopted an action plan[58] which included recommendations for the revision of national tax laws and treaties.

The European Union implemented the plan as *laying down rules against tax avoidance practices that directly affect the functioning of the internal market* (the ATAD, 2016/1164/EU). Due to the direct effect of the EU law, all Member States were obliged to apply the rules of the ATAD from 1 January 2020 onwards. The rules for exit taxation are in Article 5 of ATAD.

The Art 5 of ATAD Directive safeguards the taxing power of the MSs in the event of a transfer of the corporates tax domicile or assets from the taxing power of a MS without any actual transfer of taxation. The Directive seeks to ensure that corporate profits are taxed where they have accrued.

Exit tax is levied on a taxpayer who transfers assets between its real seat and a permanent establishment located in different Member States. The transfer of a business carried on by a tax domicile and a permanent establishment is also subject to exit tax[59]. The taxpayer may choose to pay the exit tax immediately upon leaving the country or defer payment of the tax for five years.

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56 Helminen, M. Corporate Tax Directives in EU Tax Law – Direct Taxation – 2020 Chapter 3

57 See eg. www.oecd.org

58 Anti-base erosion and profit shifting (BEPS)

59 According to the Finnish tax authority, a permanent establishment means a place of business from which the company operates in whole or in part. A permanent establishment in Finland consists of, for example, a company's head office, office, factory, workshop or independent representative (the list is not complete)

Exit taxation is subject to capital gains leaving the country. The company is liable to pay tax on the amount corresponding to the market value of the transferred assets at the time of its exit. The amount to be considered as taxable income is the *exit value.*

The exit taxation is levied on company in the event of:

(a) The transfer of assets from the real seat to another MS or to a Permanent Establishment (PE)[60] in a third country when the MS of departure is no longer entitled to tax the transferred assets.[61]

(b) Assets are transferred from a PE to its real seat or to another PE in another MS or in a third country, and the MS of the PE is no longer entitled to tax revenue as a result of the transfer.

(c) The tax domicile is transferred to another MS or to a third country (with the exception of assets which remain effectively connected with a PE in the MS of departure).[62]

(d) The business carried on by the PE shall be transferred from one MS to another MS or to the third country and the MS of the PE shall no longer be entitled to tax the assets transferred.

In the case of a transfer of assets to another EU country or to EEA country, the payment of the regulatory tax may be deferred for installments over a period of five years.

Briefly stated, exit tax is levied on unrealised capital gains where companies migrate their tax residency or transfer assets from one MS to another, usually a lower tax territory. This may be also called a cross-border corporate reorganization[63] for economical reason.

Since ATAD impelementation, the current state of Finnish exit tax legislation is finally correctly regulated. The provisions are based on the Government's proposal to Parliament to amend the Business Income Tax Act and certain related laws[64] on the national implementation of the provisions on the exit taxation of companies contained in the ATAD Directive. In that particular Government proposal, the domestic implementation of the provisions on the exit taxation of companies required legislative amendments to already existing exit tax provisions and new

[60] Art 5 of the Model Tax Treaty of the OECD has been used as a standard that governs the definitions of a PE in the tax treaties Finland has made. In Finnish legislation, the definition of a PE is stated in § 13, Income Tax Act.
[61] ATAD Art 2, para 6.
[62] *Ibid.* Para 7.
[63] Világi, R., (2012) Exit Taxes on Various Types of Corporate Reorganizations in Light of EU Law
[64] HE 76/2019

provisions to seven different laws.[65] The rules previously in force[66] were reformed and replaced by the new provisions required by the ATAD. The provisions related to cross-border mergers were clarified and rules were supplemented by an option to defer tax payment. According to the Government's proposal, the provisions on corporate exit taxation apply only to entities, not individuals.

The provisions on corporate exit taxation entered into force on 1 January 2020 and will apply for the first time in the 2020 taxation. The transfer of asset may create taxable income if the value of the assets is higher than its acquisition cost. According to provisions, the exit value of assets transferred outside the Finland's tax jurisdiction is considered to be taxable income and therefore will be taxable for 20% income tax.

When analysing the impact on Finnish tax revenue and impact on smaller businesses, even the Finnish authorities does not have clear research nor result of the impact. According to the Finnish Government's draft proposal[67], it is difficult to estimate the impact of the Directive. Finland implemeted corporate exit tax so that it only covers the minimum requirements of ATAD so the tax revenue might not be remarkable amount nor it may not be applied even annually.[68]

However, the Government underlines that when the individual situation of exit taxation arises, the amount might be significantly large. V. Kananoja remarks that "the main effect of the Directive is therefore that the power to impose taxes will be more clearly divided between the various countries. Usually, acquisitions are carried out legally as a share transaction, in which case the acquired Finnish company remains in operation. For example, the Kotipizza and Ramirent transactions were carried out in this way. Then there will be no exit tax."

[65] The amendments and new provisions were incorporated into the EVL, the TVL, the Farm Income Tax Act (MVL), the Tax Procedure Act (VML), the Tax Addition and Delay Interest Act, the Asset Valuation Act and the Tax Collection Act.
[66] EVL 51 e § before ATAD
[67] HE 76/2019, para 3.2.
[68] *Ibid*.

3. CORPORATE EXIT TAXATION NEEDS REFORMING

The corporate exit tax has been criticized for the part of its problematic nature. The criticizm applies to challenges of admissibility, and is related to the fact that the corporate exit taxation model is still considered to restrict the fundamental freedoms and rights under TFEU even the Directive is in principle in line with EU law and ECJ decisions. Exit taxation rules in Finland are perceived unfair in general but more often unnecessary and only acting as a burden auhtorities.

According to ECJ case law mentioned above, the issues arising from corporate exit tax should not anymore concern restriction of the fundamental freedoms as such, but it is not straightforward yet as the fairness of restrictions might be problematic. Additionally, exit taxation might cause double taxation, increase the interpretation issues, create a new burden of compliance and increase the administrative burden of taxpayers as well as public authorities. It will clearly increase the tax burden on taxpayers in exit tax situations.[69]

According to TEU Art 3, the complete satisfaction of a fair internal market means the removal of possible obstacles which are restricting the fundamental freedoms between Member States.[70]

According to Finnish tax experts[71] the new ATAD exit tax regulation is complex and hinders an efficient internal market and restricts free movement within the EU. The taxpayer has a lot of discretion when to get a deferral or when it can be suspended. The experts also say that this can lead to tax disputes and double taxation which is a relevant problem for businesses operating across borders. As required in ATAD Article 5, the market value is determined by the country of origin and must be agreed by both the countries and the host MS has a possibility to disagree on the exit value of the transferred assets. What comes to double taxation elimination between MSs, the

[69] HE 76/2019 para 3
[70] Consolidated Version of the Treaty on European Union [2008], Art 3
[71] Hertsi, A. (2019) *Yritysten exit-vero on tehoton riesa – Järjestelyt voi toteuttaa niin, että vero ei iske..*

resolving mechanisms are ruled in EU Directive 2017/1852[72] and 90/463/EEC[73]. However, the exit tax situation under ATAD are not covered by the scope of the Directives and therefore the dispute directives cannot be applied in the case of double taxation.[74] Then there will be tax treaties between States to tackle the double-taxation. Above mentioned situations give rise to exit taxation. According to EVL 51e § 1 para 1 the exit value should be considered as taxable income when the company transfers its assets to a PE situated in another MS and Finland no longer has the right to tax those assets as a result of the transfer. In practice this means that under double tax treaties (DTT), double taxation is eliminated by means of an exemption method. Currently Finland only has exemption methods in DTT with France and Egypt. Also, EVL 51e § 3 provides that the exit value would not be considered as a taxable income in the case of temporary transfer of assets.

It shall be taken into account that The Finnish Tax autonomy collects income taxes from companies in advance as a pre-payment.[75] The amount of total tax prepayment is based on estimation. The corporate exit tax on latent gains as such is not a proportiate mean to secure fiscal base.

3.1. Suggestion to reform exit taxation

Applicable exit taxation has been under question before and after ATAD as they might restrict the freedom of establishment or free movement of capital[76.] which both and represetns cornestones of intra-EU cross-border business. The freedom of establishment is usually associated with the situations where the business located in one MS establishes a PE or a subsidiary to another MS, for example because of more favorable legislation. Such activity can, in principle, be regarded as an free movement of economic operators, which the function of the internal market is intended to reflect.[77]

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[72] Council Directive on on tax dispute resolution mechanisms in the European Union
[73] Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises
[74] Ibid HE 76/2019 para 3
[75] See eg. https://www.vero.fi/en/businesses-and-corporations/business-operations/foreign-business-in-finland/taxation-in-finland/ and; *Rajoitetusti verovelvollisen ulkomaisen yhteisön tuloverotus Suomessa − Liiketulo ja muut Suomesta saadut tulot* 1.1.2021 VH/5426/00.01.00/2020
[76] Panayi, C (2009). Corporate Mobility in the European Union and Exit. Bulletin for International Taxation, 459 (63), 459-473.
[77] Lehtonen, Turo, Sijoittautumisvapauden ja pääomien vapaan liikkuvuuden soveltamisalasta unionin tuomioistuimen oikeuskäytännössä (2013), Master's Thesis

With regard to taxation generally, the objectives and premise of EU internal market have been to harmonize particularly indirect, not direct, taxation by removing for example custom duties and other trade barriers. [78] When comparing the objectives of different legal premises[79], we come into a crossroad where we have two contrasting opposites – so called antithesis situation. On the one side of the crossroad the tax collection would be in the interest of MSs fiscal base. On the other side, however, the collection of exit taxes is against fundamental freedoms when interpreted primary law teleologically.[80] Teleological interpretation takes into account the objectives of the Union and its historical context as well as ECJ judgements and builds new approaches on these. The interpretation can be seen dynamic and evolving.

If the interpretations of ECJ judgements are based on the internal market goal, the concept of corporate exit taxation seems to fit in poorly with it. In the case law, the court decisions emphasis seems to rather stregthen the fiscal autonomy, which is also a part of the EU infra structure.

As Schippers, M. and Verhaeren, C.[81] referred in their article, seeking solutions within the current tax systems is insufficient and one would perhaps have to seek solutions outside the current tax systems.[82]

Should we tax the turnover rather than the gained assets of intra-EU? Or should we compromise and exit tax would be imposed only on assets or companies leaving the EU -territory – on that account, the gained assets would stay in the Union and MSs shall continue competition and maintain their own tax autonomy. Maybe blockchain technology could be applied to similar as Estonian business taxation, where the capital gains are not taxed until the gains are distributed and the value is realised.

As Kananoja stated, the proportionality of the means to has proved to be historically challenging for the exit tax provisions.[83]

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[78] Salminen, Janne – Urpilainen, Matti, Eurooppavero-oikeus, s. 339–374. Teoksessa Tuomas Ojanen – Arto Haapea (toim.), EU-oikeuden perusteita II – aineellisen EU-oikeuden aloja ja ulottuvuuksia. Edita 2007 p 340-344

[79] Fiscal autonomy versus fundamental freedoms

[80] Amman, O. (2020) Domestic Courts and the interpretation of international law, ch 2.

[81] Schippers, M.L, Verhaeren, C.E, 2018. Taxation in a digitizing world: Solutions for Corporate Income Tax and Value Added Tax. *EC Tax Review 27*, 61–66.

[82] *Ibid.*

[83] Kananoja, V Maastapoistumisverotus kiinteän toimipaikan lakatessa – elinkeinoverolain kehittämistarpeet Euroopan unionin oikeuden näkökulmasta. Verotus 4/2015, s. 422–440

4. CONCLUSION

The thesis aimed to give frames for corporate exit tax implementation in Finland and strived to answer the questions concerning the risk of restricting the fundamental freedoms and concepts such as principle of proportionality. EU law guarantees the MS's fiscal autonomy and gives freedoms but is it justified to use restrictive measures against fundamental freedoms? How could this issues be balanced? The hypothesis was that the corporate exit taxation might be against the principle of proportionality and contradict the true meaning of fundamental freedoms guaranteed by TFEU.

The main purpose of corporate exit taxation is to safeguard the financial interest of a MS. It is used as a method to restrict tax avoidance on cross-border situations when corporations are re-organizing businesses for economical reasons. During the research, it turned out that the most essential aspect of an acceptable corporate exit tax provision before ATAD was that it allowed the company to choose between either a tax payment at the time of the transfer or a deferral of payment at the time of realization. It is said that it is up to the company to assess which will be more favorable for them.[84] According to mentioned case law and ATAD, a payment period of at least five years is in line with the principle of proportionality.

After all, the question is whether the EU is really working to harmonize the tax bases of all MSs or whether it wants to maintain tax autonomy. The eu tax law shall be coherence between MSs and EU policy makers shall not intervene with any new regulations – there is enormous amount of rules, treaties, directives and principles in the corporate taxation. The administartive burden is enormous and, however, tax treaties between MSs create situations where the exit tax is not appropriate despite ATAD.[85] The author suggested the reform via digitalization, possibly blockchain technology.

Reforming the EU corporate taxation as such into foreseeable and understandable set of rules is necessary in the future. The current exit taxation works in the EU level as a tool to restrict

[84] Opinion of the CFE on the Decision Case C-371/10, National Grid Indus BV
[85] Finland has exemption methods in DTT only with France and Egypt.

aggressive tax planning but reforming must take into account every aspect of EU fundamental concepts. It must take into account all MSs domestic tax bases as corporates are already paying taxes from the assets. The EU tax legislation is really in turning point right now due to BEPS related projects. It is slowly to be seen how harmonised the EU corporate tax base will be and what will be Finland's attraction and competition tool to invite businesses under its tax jurisdiction.

Due to very recent regulation (entered into force on 1 Jan 2020), decent reports are not available about the revenue of corporate exit taxes and its impact in Finnish economy. It will apply for the first time in the 2020 fiscal year. Finnish domestic exit tax legislation is now in line with EU legislation but overall reforming for EU taxation is expected in the future.

It is also interesting if an exit tax for individuals will be introduced in Finland. If yes, Finland would take precedence over the EU in regulation. It is said that it would involve numerous challenges and problems. [86] However, that is only speculation and will be seen in the future.

The innovative solutions shall be made and this thesis shall act as a ricochet for researching blockchain technology for corporate taxation issues. The proper research of economical impact vs legal certainty must be conducted as well as legal tech matter.

[86]Matinen, M. (2020). Selvitys luonnollisten henkilöiden maastapoistumisverosta Suomessa asumisaikana kertyneen omaisuuden realisoitumattoman arvonnousun verotus. *Valtiovarainministeriön julkaisuja 2020:9*.

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