Movement of Persons and Tax Mobility in the EU: Changing Winds

Editor: Ana Paula Dourado

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Why this book?
The winds of change are blowing in the European Union (EU). While the development of the internal market has been a progressive but unfinished work, the financial crisis in 2008 and the subsequent euro crisis in the European and Monetary Union have brought new challenges to the EU and to the role it plays in the world.

This book is the result of the 6th GREIT Conference and discusses the mobility of persons in the EU and the existing obstacles to this mobility, including tax obstacles, and recent progress. Further, it discusses the existing contradictions in the process of EU integration: the EU agenda since 2010, which focuses on overcoming the euro and the fiscal debt crises; the EU reaction to the so-called Base Erosion and Profit Shifting (BEPS) action plan; and how the discussion has now moved to address double non-taxation rather than double taxation. It challenges the reader to think about the EU project in various interrelated angles and as a whole.

The book is divided into six parts. The first and last parts contain legal and tax policy critical analyses. Part I discusses the current trends and challenges for tax mobility in the EU, and Part VI focuses on the taxation of groups and the policy options for the world and the EU. Parts II-V analyse the current regimes regarding mobility of companies and individuals. Mobility in the EU is discussed from the viewpoint of company law, international private law, insolvency law, EU law, public finance and tax law. Comparative law is considered in the two chapters dealing with formulary apportionment and transfer pricing.

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Current times present challenges to the European Union (EU) project. While the setting up of the internal market has been a progressive but unfinished work, in which the European Court of Justice (ECJ) has played a crucial role in the mobility of persons, the financial crisis in 2008 and the subsequent euro crisis in the European and Monetary Union (EMU) have brought new challenges to the European Union and to the role the latter plays in the world.

Since 2010, the EU agenda has focused on overcoming the euro and the fiscal debt crisis, where the absence of a federal budget has finally revealed the weakness of the EMU legal (constitutional) structure. The crisis has led to the creation of a stability mechanism and to a more interventionist role of the European Central Bank, neither of which had been foreseen in the Lisbon Treaty (they were even prohibited under articles 123 and 125 of the Treaty on the Functioning of the European Union (TFEU)).[1] The ECJ case law on the prohibition of national discriminatory measures with respect to the fundamental freedoms suddenly became unpopular, because of perceived insensitivity to the need of national tax revenues and to national budgetary deficit problems, or at least of being incapable of dealing with the big picture that involves the public revenue and expenses sides. Reactions to the crises by national governments and European citizens have been passionate and nationalist, and cast a shadow on further construction of the internal market and to the required mobility of persons.

Also as a result of the 2008 financial crisis, the G20, the OECD and the global forum agendas intensified the work on tax transparency and declared it to be an international standard, and, recently, mainstream media have published news on global aggressive tax planning behaviours by multinationals. Following a G20 mandate, the OECD is addressing what is known as so-called BEPS (base erosion and profit shifting by multinationals)[2] and the European Union is looking for an adequate response to the phenomenon.[3]

1. *See* F. Vanistendael, *EU at the Crossroads in 2011: EMU and/or Internal Market?* ch. 2, sec. 2.4.2., pp. in this volume.
2. OECD, *Addressing Base Erosion and Profit Shifting – Report: 2013* (OECD 2013), International Organizations' Documentation IBFD, p. 13.
3. A.P. Dourado, *Tax Mobility in the European Union: Present and Future Trends* ch. 1, secs. 1.12.-1.16., pp. in this volume.

The discussion now focuses on how to address double non-taxation and not on how to address double taxation. BEPS, and the reactions to it, may further contribute to postponing the internal market and mobility.[4]

As discussed in this book, mobility in the European Union is a constitutional (Treaty) right, entitling European citizens to move freely without obstacles, which is indispensable for the internal market and for the economic and political position of the European Union on the global scenario. Many of the existing tax and non-tax national obstacles to movement of companies (discussed in this book), the inadequate group taxation rules and the absence of tax harmonization encourage BEPS in Europe. Addressing BEPS in Europe will only be efficient if further integration occurs.[5]

This book aims to foster debate in a multidisciplinary and interdisciplinary perspective on the mobility of persons in the European Union. It is divided into six parts. The first and last (parts I and VI) contain legal (hermeneutical) and tax policy critical analysis; part I discusses the current trends and challenges for tax mobility in the European Union and part VI focuses on the taxation of groups and the policy options for the world and the European Union. A comparative legal analysis of formulary apportionment (between the United States and the European Union) and an economic analysis of the effects of consolidated taxation in the European Union are put side-by-side in part VI and the current problems resulting from transfer pricing are discussed.

Parts II-IV analyse the current regimes regarding mobility of companies and individuals. Except for part I, all other parts are an interaction between tax lawyers and academics from fields with which tax law interacts. Mobility in the European Union is discussed from the viewpoint of company law, international private law, insolvency law, EU law, public finance and tax law. Comparative law is also present in the two chapters that discuss formulary apportionment and transfer pricing in the eyes of US academics.

In more detail: Part I discusses the tax policy for the European Union. The anti-BEPS agenda and the current challenges to EU tax mobility in the global scenario are discussed by this writer in chapter 1. Frans Vanistendael reflects on the euro crisis and the paradoxes of the system of spending and taxing in the European Union. He recalls that an Economic and Monetary Union presupposes a common financial and fiscal policy, and proposes a

4. Id., at secs. 1.2.1.-1.2.2., 1.8. and 1.14., pp. in this volume.
5. Id., at secs. 1.14., 1.16 et seq., pp. in this volume.

deeper level of integration for the EMU, but discards as unrealistic the solution of full-fledged federalism. He instead proposes a temporary emergency federalism, aimed at supporting the common currency and only involving Member States of the euro zone.[6] Vanistendael also discusses how the EMU interacts with the internal market, the existing tax obstacles to mobility and the self-limits introduced by the ECJ in its assessment of direct tax discriminatory measures. He identifies the obstacles and what measures should be taken to overcome tax obstacles not recognized as such by the ECJ (the "missing links").[7]

Subsequent parts II, III and IV explore the debate on the transfer of corporate residence, how can creditors be protected in the case of forum shopping by the companies for the most attractive insolvency proceedings regime (transfer of corporate residence "in bad times"); the tax obstacles to the transfer of corporate residence, namely exit taxes, and the effect that merger directives have on mobility of companies (transfer of corporate residence "in good times"). In part II (Transfer of Corporate Residence & Insolvency Procedures), António Frada de Sousa elaborates on the cross-border obstacles to the transfer of company seat, which result from the fact that private international law rules on companies diverge strongly among Member States (Member States can adopt the real seat theory, the incorporation theories or varieties of these two theories) and are incompatible with each other.[8] Frada de Sousa regrets that the EU legislator has been unable to solve the existing conflicts of laws and that the ECJ (as it demonstrated in *Cartesio* (Case C-210/06)) is unwilling to protect companies' mobility through the interpretation of the TFEU.[9] Companies in the European Union move not only in "good times", for example, to improve their competitive position, but also in "bad times". Andreas Piekenbrok and Michael Veder discuss mobility of companies in "bad times", i.e. when companies look for the most attractive solution either to find solvent schemes without a shift of the "centre of main interests" (COMI) and avoid insolvency; or to find insolvency restructuring regimes to rescue their financially troubled business, in particular within the framework of formal insolvency proceedings. Piekenbrok highlights that insolvency forum shopping is fully legal within the internal market, protected by primary legislation, and very appealing to companies, and therefore the mere possibility of insolvency mobility puts the national legislator

6. Vanistendael, *supra* n. 1, at sec. 2.6.3., pp.
7. Id., at secs. 2.7. and 2.8., pp.
8. A. Frada de Sousa, *Cross-Border Transfer of Seat and Companies' Freedom of Establishment in the EU – Where Are We Now?* ch. 3, sec. 3.1., pp. in this volume.
9. Id., at sec. 3.1., p.

under pressure to provide the most effective remedies.[10] Forum shopping of companies in "bad times" for the most attractive national regime is possible as long as no creditor has requested the opening of insolvency proceedings. In insolvency proceedings, or what he calls "funeral cases", the nomination of foreign liquidators can be sufficient to transfer the COMI.[11]

In turn, Michael Veder addresses the question where a company is located for the purposes of opening insolvency proceedings in respect of that company under the European Insolvency Regulation.[12] He analyses the conflicting decisions of the ECJ in interpreting the Regulation, namely the meaning of article 3(1), according to which the company's centre of main interests is located in the place of its registered office, and concludes that it can only be rebutted by factors that are objective and ascertainable by third parties, in particular creditors.[13]

Part III discusses the tax obstacles to the transfer of corporate and shareholders residence.

Pasquale Pistone, Daniel G. Szabó and Karsten E. Sorensen build the bridge between company law and tax law with the purpose of elaborating the framework for tax mobility.[14] They focus on the interpretation of company law issues, and especially on the ECJ case law up to *VALE* (Case C-378/10). They contend that corporate reorganizations have contributed to tax mobility of companies and that the recent case law of the ECJ acknowledges that tax mobility may be a separate issue from national company law.[15] Both Otto Marres and Richard Lyal provide their viewpoints on exit taxes and on how the allocation of taxing rights can be guaranteed without, at the same time, creating obstacles to the movement of a company. Their views on the topic are rather coincident: Marres analyses exit taxes following the methodology normally adopted by the ECJ (personal and material scope of the freedom of establishment; the existence of discrimination or a restriction; justifications; proportionality).[16] He concludes that exit taxes constitute restrictions

10. A. Piekenbrock, *Cross-border Transfer of Seat and Companies' Freedom of Establishment in the EU – Where Are We Now?* ch. 4, sec. 4.3., pp. in this volume.
11. Id., at sec. 4.6.1., p.
12. M. Veder, *The Localization of Companies from the Perspective of Insolvency Law: The Concept of COMI* ch. 5, sec. 5.1., pp. in this volume.
13. Id., at sec. 5.3., p.
14. P. Pistone, D.G. Szabó & K. E. Sorensen, *Mobility of Companies in the European Union: A Jigsaw of Company Law and Tax Law, Case Law and Secondary Law Falls into Place?* ch. 6, pp. in this volume.
15. Id., at secs. 6.2. and 6.3., pp.
16. O. Marres, *Exit Taxes on Companies* ch. 7, pp. in this volume.

to the freedom of establishment and immediate taxation of capital gains is a disproportionate restriction, even if justified by the balanced allocation of taxing rights. He contends that a proportionate measure would be a deferral of taxation until realization and that post-emigration reductions in value need not be taken into account.[17] Lyal justifies exit taxes on "latent gains" on the need for tax authorities in one Member State to "protect the public purse from possible loss of revenue".[18] He discusses the meaning of gains and realization, the problems that an exit tax can create for a company – an exit tax can not only cause cash-flow disadvantages but may also constitute a serious liquidity problem for the company.[19] He then analyses exit taxes in the light of freedom of establishment and contends that as it is indisputable that exit taxes constitute restrictions to the freedom of establishment, it must be ascertained whether an exit tax is proportionate: exit taxes are an expression of the principle of territoriality and the allocation of taxing rights is a valid justification for them. Proportionality will imply that there is no need for immediate payment of the tax if the right to tax can be assured by a less restrictive measure: this has to be assessed on a case-by-case basis.[20]

In part IV, the Merger Directives are analysed. Federico Mucciarelli focuses on cross-border mergers and reincorporations from the perspective of company law in the European Union.[21] After referring to the role of the ECJ, he analyses the 2005 directive on cross-border mergers and compares its regime to the US regime. The EU directive does not harmonize the corporate choice-of-law criteria of Member States; the procedure of a cross-border merger is burdensome and time-consuming; and the fact that many Member States protect creditors of the merging companies by allowing them a right to oppose the transaction judicially makes the whole procedure more time-consuming and expensive.[22] Mucciarelli further contends that Member States' freedom to design creditor-protection mechanisms bears the risk of over-regulation and proposes the test formulated in *Gebhard* (Case C-55/94) in order to determine whether there is need for those mechanisms.[23] Joachim Englisch and Jan van der Streek selected some topics under the Merger Tax Directive: Englisch discusses national

17. Id., at secs. 7.5.-7.6., pp.
18. R. Lyal, *Taxation of Unrealized Profits on the Occasion of a Transfer of Company Seat or Assets*, ch. 8, sec. 8.1., pp. in this volume.
19. Id., at secs. 8.2. and 8.3., pp.
20. Id., at secs. 8.4. and 8.5., pp.
21. F.M. Mucciarelli, *Cross-Border Mergers and Corporate Mobility in the European Union: A Difficult Balance* ch. 9, pp. in this volume.
22. Id., at secs. 9.3. and 9.4., pp.
23. Id., at sec. 9.4., pp.

anti-abuse measures in light of the Merger Tax Directive.[24] He examines the relationship between purposive construction and anti-avoidance rules within the meaning of article 15(1) of the Merger Tax Directive[25]; he discusses the EU principles that should have an impact in the interpretation of the article 15(1),[26] and then analyses article 15(1) and the transposition of that article into national laws.[27] He concludes by recommending some amendments to article 15(1); for example, the abolition of the subjective test of taxpayers' intentions and that presumption of tax avoidance should go beyond scenarios of a lack of "valid commercial reasons".[28]

Jan van der Streek discusses the Dutch viewpoint that tax deferral may be a form of tax evasion.[29] He starts by discussing two landmark Dutch cases, then analyses article 75 of the CCCTB Directive; and finally the question of how to deal with a case involving both article 75 of the CCCTB Directive and article 15(1)(a) of the Merger Tax Directive. He contends that article 75 of the CCCTB Directive is *lex specialis* over article 15(1)(a) of the Merger Tax Directive.[30]

Part V is dedicated to workers' mobility and to the obstacles that still exist in this area. Iris Goldner Lang discusses the topic from the perspective of European citizenship rights, while Cécile Brokelind focuses on frontier workers and their situation both under social security and under tax rules. Lang's analysis offers new insights into obstacles to "internal situations" by discussing the application of EU citizenship rules to what she calls "static" EU citizens – EU citizens within the EU territory as a whole, independently of there being a movement from one Member State to another, or not – their family reunification rights and their third-country national relatives.[31] She discusses recent case law and the unresolved situations, and criticizes the fact that residence-related issues in the European Union still encounter many national barriers contrary to the EU internal market rules.[32] She claims that cases such as *Zambrano* (Case C-34/09), *McCarthy* (Case

24. J. Englisch, *National Measures to Counter Tax Avoidance under the Merger Directive* ch. 10, pp. in this volume.
25 Id., at sec. 10.2., pp.
26. Id., at secs. 10.2., 10.4. and 10.5., pp.
27. Id., at sec. 10.6., pp.
28. Id., at sec. 10.7., pp.
29. J. Van der Streek, *"Packaging" in the Light of the Netherlands Supreme Court's Case Law, the Merger Directive and the Proposed CCCTB Directive* ch. 11, pp. in this volume.
30. Id., at sec. 11.5., pp.
31. I.G. Lang, *The Reach of EU Citizenship Rights for "Static" EU Citizens: Time to Move On?* ch. 12, sec. 12.1., pp. in this volume.
32. Id., at secs. 12.2.-12.5., pp.

C-434/09) and *Dereci* (Case C-256/11) should have been considered within the scope of EU law, even though restrictions could be justified on the basis of "unreasonable burden" on the public finances of the host Member State.[33]

In her contribution, Cécile Brokelind aims to identify some of the rules in social security and taxation that either prevent or stimulate the cross-border mobility of workers,[34] focusing on cross-border pensions and contributions. She takes the example of commuters between Denmark and Sweden to illustrate the lack of coordination of social security and tax rules and the restrictions deriving therefrom.[35] She proposes, for instance, unifying tax and social security choice-of-law rules as a starting point. In contrast, in her view, it is not feasible to achieve the same level playing field in respect of benefits available in EU Member States. The solutions under bilateral tax treaties on outgoing pensions and deductions for foreign pension schemes should be monitored and better coordinated; she also recommends encouraging supplementary pension funding through occupational pensions in each EU Member State, provided funds are easily transferable from one Member State to another in the case of cross-border retirement.[36]

And last but certainly not least, part VI focuses on the taxation of groups. Guglielmo Maisto introduces this part by recalling and analysing the various possible approaches to looking at tax mobility and groups within the European Union.[37] He begins with the CCCTB proposal (presenting the key features of group consolidation envisaged in the proposal) and considers it a far-reaching proposal, even though some Member States were not seduced by it; he then refers to the principle of mutual recognition and describes the Italian "European Attraction Regime", which he claims to be very close to the principle of mutual recognition; a third approach to group taxation consists in the approval of common rules on worldwide tax consolidation; and the fourth approach results from the ECJ case law on cross-border losses – Maisto revisiting the ECJ case law on this topic.[38]

From this, chapter 15 follows with an empirical study on the consequences in theory that would result from the implementation of a CCCTB on the overall volume and distribution of tax revenue (Koch, Oesterreicher,

33. Id., at sec. 12.6., pp.
34. C. Brokelind, *Social Security Issues and Taxation of Frontier Workers – The Case of Pensions* ch. 13, pp. in this volume.
35. Id., at sec. 13.4., pp.
36. Id., at secs. 13.4.2. and 13.4.3.-13.5., pp.
37. G. Maisto, *Taxation of Groups and the CCCTB* ch. 14, secs. 14.2.-14.5, pp.
38. Id.

Vorndamme and Hohls).[39] The authors present a forward-looking micro-simulation model intended to overcome the shortcomings of previous empirical studies that made use of backward-looking simulation approaches (these empirical studies did not take into account future firm development, changes to tax account regulations and behavioural responses – although behavioural responses still have to be included in the forward-looking model presented by the authors here).[40]

Some first results of their model conclude that the proposed harmonization of tax accounting regulations may increase tax revenue, whereas consolidation and formula apportionment would reverse the overall revenue effect.[41]

Two US perspectives on formulary apportionment and transfer pricing are given by Yariv Brauner and Walter Hellerstein. Brauner focuses on the pros and cons of the choice between the current arm's length-based transfer pricing regime and a formula-based transfer pricing regime.[42] He does not address the broader question of replacing the US source-based international tax regime for taxing business income with a formula-based regime. Brauner contends that reform of the current transfer pricing regime in the United States and the world is under pressure due to globalization and the necessity of fighting abusive tax planning.[43] He discusses the main arguments in the debate between proponents of formulary apportionment and transfer pricing proponents: economic-based versus arbitrary taxation; the three factor formula; simplicity, compliance and enforcement.[44] He also discusses the design of a formula-based transfer pricing regime and analyses the US states' formulary business taxation.[45]

Hellerstein's paper examines the CCCTB's base-sharing mechanism in light of the analogous mechanism used in the United States.[46] He thoroughly presents and discusses the tax avoidance possibilities that the proposed CCCTB mechanism offers, namely under each of the factors foreseen in the cor-

39. R. Koch et al., *Possible Effects of a Common Consolidated Corporate Tax Base on EU Tax Budget* ch. 15, pp.
40. Id., at sec. 15.3.2., pp.
41. Id., at sec. 15.4., pp.
42. Y. Brauner, *Formulary Taxation and Transfer Pricing: The Good, the Bad, and the Misguided*, ch. 16, pp. in this volume.
43. Id., at sec. 18.1., pp.
44 Id., at sec. 16.2.2., pp.
45. Id., at sec. 16.3., pp.
46. W. Hellerstein, *Formulary Apportionment in the EU and the US: A Comparative Perspective on the Sharing Mechanism of the Proposed Common Consolidated Corporate Tax Base* ch. 17, pp. in this volume.

responding sharing mechanism (and normally characterized by tax-motivated factor shifting). The author then discusses the possible anti-abuse reactions (caused by the CCCTB anti-abuse, safeguard and rule-making provisions) to the previously described avoidance behaviour,[47] concluding that the apportionment mechanism in the CCCTB proposal is in general coherent in theory, practical in design and resistant to abuse (tax-motivated factor shifting). It remains to be seen how effective the anti-abuse rules will be in practice.[48]

As the above remarks have shown, this book has a broadly multidisciplinary scope and offers in-depth thoughts on the current challenges to the European Union, the current obstacles to the internal market and the policy options that are open to the European decision-making instances and Member States. We hope it provides arguments for further steps in EU integration and that it is useful for further research on the topic.

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47. Id., at secs. 17.2.2. and 17.3.-17.6., pp.
48. Id., at sec. 17.7., pp.

Notes

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