

**REAL ESTATE INVESTMENT TRUSTs (REITs) –
EUROPEANIZING TAX REGIMES**

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Paper presented for the ERES 2011 Conference,
Eindhoven, Netherland, 15-18 June, 2011

Abstract

The development of REITs in the European Union (EU) has created a common understanding on core features but a “EuroREIT” does not exist yet. Member States’ (MS) national tax regimes generally provide for beneficial tax treatment to domestic REITs only. Although direct taxation is not one of the EU competences the Freedoms have unlimited priority and MS’ must exercise their direct taxation powers in accordance with the Treaty. This separate treatment of non-domestic REITs is an infringement of the Freedom of movement of capital. Applying the relevant case law of the European Court Justice (ECJ), non-domestic REITs should legally benefit from tax treatments for domestic REITs, even though the foreign REIT does not comply with domestic REIT regulations. Implied powers of movement beside the Treaty may be seen where MS’ (e.g. Netherlands, Bulgaria and Spain) provide domestic tax treatment to non-domestic REITs. This effect of the ECJ can be shown by counterfactual reasoning using political mechanisms, e.g. “Europeanization” (used within political sciences to explain the process towards “Europe” and explore to the future of MS’ tax sovereignty).

Introduction

Besides classical direct investment in real estate, indirect investment either listed or private, in trusts and funds has been very successful. REITs have been part of this development, being a favourite vehicle in real estate markets.¹ REITs are pooling arrangements for investments in real estate limited to passive real estate activities which i.e. distribute its profits almost in full to its shareholders annually. A complicated and lengthy evaluation process and the illiquidity of real estate often deter individual investment, but REITs have since the 1960s securitized real estate into tradable assets to broaden the investment spectrum for investors.² The global success of REITs and the competition from this development has emerged 11MS in the EU to introduce this vehicle especially in the last decade.³ This has already given way for the emergence of a European REIT (EuroREIT) which, however, does not exist yet,

The perception of the success of REITs is highly catalysed by its beneficial tax related treatment at the level of the REIT as a consequence of the profits being passed through to and taxed at shareholders level only.⁴ Beside similarities in structure and its requirements and conditions the varieties of the REIT regimes

¹ John A. Mullaney, "REITs: Building profits with Real Estate Investment Trusts", John Wiley, New York, 1989; Fraser Hughes / Gareth Lewis, "The "Ideal European REIT" – What does it look like?", in: Stanley Mc Greal / Ramón Sotelo (Eds.), "The introduction of REITs in Europe – A Global Perspective", ComEtenE Circle Service GmbH / EPRA, 2008), p.88

² Steven Wechsler, „The REIT Approach to Real Estate Investments: A growing, Global Investment Choice“ in: Stanley Mc Greal / Ramón Sotelo (Eds.), "The introduction of REITs in Europe – A Global Perspective", ComEtenE Circle Service GmbH / EPRA, 2008), p.49

³ Member States providing for a REIT regime are Netherland (Fiscale Beleggingsinstelling, FBI), Belgium (Société d'Investissement à Capitale Fixe Immobilière, SICAFI), Greece (Real Estate Investment Company, REIC), France (Société d'Investissement Immobilier Cotée, SIIC), Bulgaria (Joint Stock Special Purpose Investment Company, JSSPIC), United Kingdom (UK-REIT), Germany, (G-REIT), Italy (Società di Investimento Immobiliare Quotate, SIIQ), Lithuania (L-REIT), Finland (F-REIT) and Spain (Sociedades Cotizadas de Inversión en el Mercado Inmobiliario, SOCIMI) whereas Turkey, Austria, and Portugal are having established REIT-like regimes only that are more fund typed regimes and not meeting the requirements for a (classical) REIT i.e. in terms of distribution of profits).

⁴ S.H. Chan, J. Erickson, K. Wang, "Real Estate Investment Trusts - Structure, Performance and Investment Opportunities", Oxford University Press, Oxford, 2003, p.58

extant in MS are with its different tax regimes in general and their application to their domestic REIT regimes though. Since governments have learned about many of the requirements for benefiting from given REIT regimes are motivated by governments' fear of abuse and their concerns about loss of tax base.⁵ Thus, generally MS REIT regimes favour domestically registered REITs only where non-domestic REITs either investing domestically directly or being shareholder of a domestic REIT is treated less favourable i.e. withholding tax will apply to any distributions. Therefore, fields of conflicts are obvious since the EU Treaty (Treaty) Freedoms provide for i.e. the Freedom of Movement of Capital that does include i.e. financial cross border investments.⁶ The taxation of non-domestic EU REITs and shareholders in domestic REITs create a hindrance to the free flow of capital in the EU.⁷

The Treaty does not provide for any competence on direct taxation to the EU nor any of its elements i.e. the Commission. In fact the competence is of MS' sovereignty and, therefore, the EU seems excluded to challenge MS' tax regimes on the grounds of the Treaty.⁸ Although, the lack of competency is valid for the ECJ as well it had opportunities to analyse and decide on national tax regimes in light of its compliance with EU Law. Here, a growing trend was seen where national tax policies and parts of regimes have been overruled by the ECJ and found discriminatory to the fundamental freedoms. As the number of decisions is growing where certain tax

⁵ Simon Stevenson, „The Development of Real Estate Investment Trusts“ in: Stanley Mc Greal / Ramón Sotelo (Eds.), „The introduction of REITs in Europe – A Global Perspective“, ComEtenE Circle Service GmbH / EPRA, 2008), p.34

⁶ Jürgen Schwarze, „Europäisches Wirtschaftsrecht“, NOMOS, Baden Baden, 2007, p. 25

⁷ Jörg Gundel, „Die Mobilität der Unternehmen im Binnenmarkt – der Beitrag der Grundfreiheiten“, in: Armin Hatje / Jörg Ph. Terhechte (Eds.), „Unternehmen und Steuern in Europa“, Europarecht, Beiheft 2/2006, p. 13ff.

⁸ Jürgen Schwarze, „Europäisches Wirtschaftsrecht“, NOMOS, Baden Baden, 2007, p. 155/156

measures of MS are considered to be an infringement of Treaty freedoms it gives pressure to MS to adopt appropriate policies and styles to comply with EU law.⁹

The causal effects are already subject to research on its political mechanisms behind that development. Here, the process of “Europeanization” in political science and European Studies is a model to explain the processes of what is called “harmonisation”.¹⁰ This explanation will enhance the understanding of de facto political mechanisms in the EU as well as give a prognosis on the possibility of future limitations to MS’ tax sovereignty in favour of the development of the EuroREIT as being part of an EU tax harmonisation.

Methodology

The type of research that will be used in this study is of qualitative research. The qualitative researcher’s aim is to gather an in-depth understanding of REITs and its core features. By researching domestic politics and legal environments information was used to evaluate the conditions to be eligible for REIT status. The information gathered was focused on whether a company is to be incorporated under domestic law and to be a tax resident according to the applicable domestic legislation. The Research, therefore, is of comparative design and cross-sectional including all MS which provide for a domestic REIT regime.

Since the research aimed to identify the political mechanisms and drivers for “harmonisation” in the EU focus is given on REIT regimes extant in MS only. Furthermore, the comparative analysis comprise of REIT regimes following the

⁹ N. Wunderlich / L. Albath, „Der Europäische Gerichtshof und die direkten Steuern“, DStZ 2005, 547 (552)

¹⁰ C.M. Radaelli, “The Europeanization of Public Policy”, in: K. Featherstone / C.M. Radaelli, eds., „The Politics of Europeanization”, OUP, Oxford, 2003

classic US-REIT model. Therefore, regimes which do not feature the core criteria of the classic US REIT and being of REIT-like only are out of focus for the research though. Core criteria include the legal structure and related requirements as well as operational activities and the distribution policy. However, the success of REITs and the US-REIT model is based especially on its beneficial tax treatment for qualifying income. Where distributed almost in full to the investors the REIT benefits from tax transparency at its level. Such a typed REIT regime in the EU was first established in the Netherlands in 1969. But it took almost 30 years to be followed by Belgium in 1995 with other 9 regimes established by MS in the last decade only.¹¹

By establishing a comparative analysis congruencies and variations in between extant MS regimes are identified providing for an insight to the existence for a common understanding of an EU-typed REIT regime. Hereto, special focus by the research is given to its tax treatments offered for both the domestic investment case and in the cross-border investor situation. Where a regime provide its benefits in a domestic case only in order to protect its domestic market i.e. tax revenues, the MS is creating an economic disadvantage in a cross-boarder situation. Therefore, the comparative analysis of the regimes in general is extended for the cross-border case and its tax treatments by MS applicable. Through this analysis protectionist treatment is identified and tested under extant EU law to reveal the constitution of prohibited infringements of the free movement of capital. It was, therefore, to isolate the factors which have impact as being protectionist within REIT regimes in the field of taxation which are hindrances to the Freedoms and, therefore, infringe EU law.

¹¹ Today 11 MS have established REIT regimes which are. Netherlands 1969, Belgium 1995, France 2003, Bulgaria 2004, UK, Germany and Italy 2007, Lithuania 2008 and Finland and Spain 2010.

This can be done by establishing a conceptual, theoretical and practical link between, financial integration¹², harmonisation in the field of company law and national tax regimes by taking into account extant research on harmonisation as well as jurisprudential findings as results of the ECJ's decisions. Where extant case review and academics focus on tax cases mainly decisions on other legal topics have to be taken into account and to be analysed. The Cases coming to the ECJ are predominantly on tax treatments and being of discriminating nature. However, cases of corporate law origin i.e. from the corporate law or even consumer product law should be of interest. Taking the whole field of decisions by the ECJ a picture can be drawn of national governments behaviour that clearly infringes EU law. By tracing the processes that have begun after the evaluated ECJ cases explanations will be possibly to be given. The answers will enable to assess and to give a prognosis, more likely to be a Thesis, not only on the question of how the EU matters but than to what extent had it mattered. By the comparison of the earlier absence of that case law and the processes of the influence of such on the MS alternative explanations can be given in this context.

This is illustrated by the investment made of a non-domestic REIT investor in a MS that provide for a domestic REIT regime by three case studies. Therefore, extant case law by the ECJ will be set in comparison of the case studies findings. The case studies are based on country cases where the MS' provide for a different domestic approach to their REIT regime. The case studies comprise of the Netherland REIT regime, the "*fiscale beleggingsinstelling*" (FBI), the Bulgarian "*joint stock special purpose investment company*" (JSSPIC) and the Spanish "*sociedades cotizadas de inversión en el mercado inmobiliario*" (SOCIMI). The Dutch case of one core MS

¹² J. Story / I. Walter, "Political Economy of Financial integration in Europe", Manchester UP, 1997

provide for interesting insights to the development of REIT regimes considering EU law compliancy while being exposed for long already and having experienced the ECJ activities. The question will be answered whether the legislator has granted domestic tax treatment to REITs and shareholders resident in other MS as well. Different approach is shown by the Bulgarian government. The JSSPIC regime is providing for the case of a new MS that has established its REIT regime before being admitted to become a MS. Therefore, compliancy to what is called EU law was focused primarily rather domestic policies. The Spanish SOCIMI regime builds the third case of a MS that can be seen within the group of “core” EU MS but established its REIT regime just recently in 2009. Consequently, the Spanish government established a regime providing for a compliant treatment in a cross-border situation from the beginning taking the ECJ’s case law into consideration though.

The study proofs the causal effect by counterfactual reasoning using other political mechanisms such as Europeanization on future limitations to MS’ tax sovereignty and developments for the EuroREIT as being part of an EU tax harmonisation process. Thus, it documents the conditions and circumstances within which the emergence for the creation of the EuroREIT takes place and evaluates the effects for this development. Focus is given to the consequences given to MS to adjust their national tax regimes and by having to accept a prejudice of its tax sovereignty being a basis of today’s EU’s political order. By taking account of the EU’s imperatives by the Treaty the research suggests ways by which adverse MS separation will be mitigated through the pressure to adopt appropriate policies and styles.

The study, therefore, link jurisprudential findings as results of the ECJ's decisions with other research to this in fields of political science and economics and enhance understanding of de facto political mechanisms in the EU as well as give a prognosis to the MS' tax sovereignty in favour of the establishment of the EuroREIT.

Conclusion

Where the general focus of foreign direct capital is on identifying the most beneficial tax treatment that was resulting in the development for Double Tax "Treaty shopping" already that phenomenon can now be seen for REIT regimes globally but more specific in the EU too. Here, not only double tax treaties play a significant role for decisions by Investors but the REIT related taxation treatment as well. One can describe this as now being "REIT-Shopping". REIT-Shopping by international Investors, however, has developed the global real estate markets as well as the European ones.¹³ The attractiveness of investments in REIT shares, beside other features, is mainly fuelled by its design being of a tax efficient real estate listing structure.

The comparative analysis showed that even though the existing regimes follow in its structure and core criteria the "classic" US-REIT regime, they vary in its details and there is no common structure existing yet. Therefore, REIT-Shopping has its justification. But at the same time, the analysis identified coherent structures including legal and tax requirements which can be viewed as being consistent.¹⁴ Thus, creating a "least common understanding" for REITs in the EU building a

¹³ See i.e. Knoflach, Barbara / Körfgen, Thomas (Schäfer 2007), „Grundkonzeption und Verbreitung der Real Estate Investment Trusts“, in: Schäfer, Jürgen Dr., (Ed.), „REITs Real Estate Investment Trusts“, München, 2007, p. 4

¹⁴ See i.e. Andreas Pfnür / Michael G. Müller, „Kompetitive Eigenschaften der REIT-Regime in der EU“, Immobilien & Finanzierung, Issue 19, October 2010, Helmut Richardi, Frankfurt/Main, 2010, p. 698-700

theoretical framework for a EuroREIT that is an integral part of MS REIT regimes.¹⁵ Hereby, the ground is set for a “reit europaea” what the leading lobbyists of the European Real Estate markets demand already.¹⁶

However, where there is no competency with the EU on direct taxes there is no ground for building up a REIT taxation policy by the EU itself. Therefore, there is “common understanding” as to the beneficiaries for these regimes which are generally domestic REIT regimes only. Consequently, “transparent” taxation is limited for “inbound cases” of a domestic REIT and its tax treatment at REIT level as well as the treatment of the domestic shareholder. Whereas, it follows a risk of double taxation in “outbound cases” for foreign shareholders in a domestic REIT and foreign REITs investing directly in domestic real estate though.¹⁷ Here, REIT-shopping according to the applicability of Double Tax Treaties and its recognition by domestic REIT regimes becomes more important for investors, whereas, it fuels governments fear of abuse of its beneficial tax regimes and loss of tax base as well as their sovereignty at the same time.

Taking the specific context of existing MS REIT regimes under the conditions of the EU law and by isolating the factors which have impact as being protectionist within REIT regimes in the field of taxation that are hindrances to the Freedoms the infringement of EU law becomes obvious.¹⁸ Indeed, the EU Commission (the Commission) has no competence in the field of direct taxes (Art 95 II Treaty) but

¹⁵ See i.e. Fraser Hughes / Gareth Lewis, “The “Ideal European REIT” – What does it look like?”, in: Stanley Mc Greal / Ramón Sotelo (Eds.), “The introduction of REITs in Europe – A Global Perspective”, ComEtenE Circle Service GmbH / EPRA, 2008), p.88

¹⁶ EPRA, Global REIT Survey, 2010

¹⁷ See i.e. Rob Cornelisse / Dennis Weber / Ronald Wijs / Gerard Blokland, “Proposal for a Uniform EU REIT Regime – Part 2”, European Taxation, February 2006, p. 68ff.

¹⁸ See i.e. Rob Cornelisse / Dennis Weber / Ronald Wijs / Gerard Blokland, “Proposal for a Uniform EU REIT Regime – Part 1”, European Taxation, January 2006, p. 3ff.

even though direct taxes are not included in Art 93 Treaty and are subject to the sovereignty of the MS it appears that direct taxation remains the prerogative of MS their national sovereignty by the fundamental freedoms as they prevail over domestic law.¹⁹ Hereto, the Treaty provide for the aim of "...an internal market characterised by the abolition, as between MS, of obstacles to free movement of ... capital..." (Art 3 I lit. c)). This is guaranteed by the equality to the market through the prohibition of discrimination as well as free access to the Market by granting the right of cross-border economic commerce. From this point of view a different treatment of the foreign REIT and/or Investors compared to domestic ones infringes Treaty freedoms i.e. the free movement of capital.

In the absence of any (direct) competence with the Commission MS already facing limitations to their sovereignty through (indirect) competence with another Institution of the EU. Hereto, Art. 220 Treaty states the responsibility of the ECJ that is "... to ensure that the laws are observed in the interpretation and application of the Treaties...". Even though, the competence used by the ECJ may be questioned²⁰ it is acknowledged that the ECJ is the "Guardian to the Treaty", though. The basis under which the ECJ considers potential harmful tax regulations in MS tax regimes are the fundamental freedoms.²¹ This is being constant case law by the ECJ held in 5 decisions before 1990th but have emerged to around 40 in the course of the 90th and more than 35 since 2000. According to the leading case "Avoir fiscal"²² the four freedoms have nearly unlimited priority without the need of tax regulations being

¹⁹ See i.e. Jürgen Schwarze, "Europäisches Wirtschaftsrecht", NOMOS, Baden Baden, 2007, p. 156ff

²⁰ Thorsten Stein, „Richterrecht wie anderswo auch? Der Europäische Gerichtshof als „Integrationsmotor“, in Festschrift für die Juristische Fakultät Heidelberg, 1994, p. 619 (624ff.)

²¹ See Heike Jochum, „Die Zukunft der Unternehmensbesteuerung in Europa – zugleich eine Analyse der Grenzen europäischen „Richter-Steuerrechts“- in: Armin Hatje / Jörg Ph. Terhechte (Eds.), „Unternehmen und Steuern in Europa“, Europarecht, Beiheft 2/2006, p. 33ff.

²² Case C-270/83, "Commission v France"

harmonised. Further, the ECJ has outlined in “Colmer”²³ that “...although direct taxation is a matter for the MS, they must nevertheless exercise their direct taxation powers consistently with community law...”.²⁴

Therefore, the ECJ follows this jurisdiction i.e. outside the scope of tax law consequently. Namely with the prominent decision known as the “Cassis de Dijon” case. The ECJ stated to the fungibility of goods within the EU that “... products once legally marketed / registered in one MS have to be respected in other MS as well...” which is known as the so-called Cassis-de-Dijon principle²⁵. This principle was confirmed and transferred expressively for the case of entities by the ECJ with its decisions made in the cases of “Centros”²⁶ in 1997 and again “Überseering”²⁷ in 2000 with the statement that “... corporations if and as long as they are duly established and registered in one MS have to be accepted in other MS as well...”. Hereby, the ECJ in “Centros” affirmed the principle of validity of a “law shopping” by corporations between MS. It can, therefore, be followed from the ECJ that once a REIT has been registered under the laws of a MS it can legally benefit from the tax treatment for domestic REITs even where the foreign REIT does not comply with the domestic REIT regulations. This conclusion that REITs going cross-border join the freedoms and thus not being subject to taxation in the country they invest²⁸ was confirmed by the ECJ in 2006 with its decision in case “Stauffer”. Here, the ECJ stated that “... where a foundation recognised as having charitable status in one MS also satisfies the requirements imposed for that purpose by the law of another MS ... the

²³ Case C-264/96, “Colmer”

²⁴ See as well Case C-279/93 „Schumacker”

²⁵ Case C-120/78, “Cassis des Dijon”

²⁶ Case C-212/97, “Centros”

²⁷ Case C-208/00, “Überseering”

²⁸ See i.e. Ramon Sotelo, „The Economics of REITs”, in: Stanley Mc Greal / Ramón Sotelo (Eds.), “The introduction of REITs in Europe – A Global Perspective”, ComEtenE Circle Service GmbH / EPRA, 2008), p. 24

authorities of that MS cannot deny that foundation the right to equal treatment...”.²⁹ Thus, non-domestic REITs must not “wait” for MS to allow for opting or registering like a domestic REIT rather have to be acknowledged under another MS` regimes as such meaning as a legally established REIT eligible under the other MS regime.

Some are of the opinion that a common European REIT industry is not only a fruit of competition between the European governments but a result of the harmonising influence of EU law.³⁰ Therefore, the perceptions of the existing rulings still hold true by considering recent decisions by the ECJ and the implied power of movements and processes that build up some regulatory power of the factual. The consequences given to MS formally shall clearly be to adjust their national tax regimes as well as that the EU may has to accept a prejudice of MS` tax sovereignty being a basis of today`s EU`s political order.

These implied powers of movement are demonstrated in Netherlands with its FBI regime that provide for an interesting example. Having established the regime in 1969 already the government included various limitations i.e. with respect to the obligatory residency of the entity in the Netherlands, the restriction for maximum shareholding threshold towards foreign investors and the possibility to claim for a tax credit for foreign withholding paid. These rules of the regime, however, have changed³¹ clearly as a consequence of the ECJ case law especially in the late 90th and the beginning of the last decade and, therefore, becoming more and more EU law compliant.

²⁹ Case C--386/04, „Stauffer“

³⁰ See i.e. Ronald Wijs, “What would an “ideal REIT” look like?”, in: Global REIT Survey 2010 - Supplement, Amsterdam, September 2010

³¹ See i.e. Dutch legislation of 25 April 2006 amending the Dutch Corporate Income Tax Act

Whereas, the Bulgarian government with its JSSPIC regime provided a compliant regime from its beginning with the introduction of an equal tax treatment for domestic and non-domestic REITs as well. Even though, the eligibility for the regime benefits is limited to those (foreign) REITs complying with the domestic regime, the impact of the ECJ case law in the year 2004 is seen. The JSSPIC at that time was clearly a leading case in opening its regimes for non-domestic but foreign MS registered REITs. Thus, the implied powers of movement within the EU became a driver for the Bulgarian government to comply with its regime as to its domestic corporate and tax law but as well for promoting the state itself for being a valid choice of becoming a new MS.

Different approach was used by the Spanish government with its recently introduced SOCIMI regime. In an attempt not to establish its regime in conflict with EU law the SOCIMI regime provide generally for taxation on REIT level either being a domestic or non-domestic corporation. Obviously, this solution puts the SOCIMI regime at the borderline to those regimes being of REIT-like type only. However, where the holistic view to this regime results to categorise the SOCIMI a REIT regime along the lines of the “classic” US-REIT it may be challenged considering the economic success of the regime since REITs are favourable vehicle for its beneficial tax treatment at REIT level, though.

Generally, the acceptance and acknowledgement of EU law as the driver for a compliant REIT regime is rare while ECJ decisions being viewed and applied as to its specific case and in between its parties still. However, the increase number of cases brought before the ECJ is evidence for an emergence by EU Persons perception of its rights under the Treaty. Thus the case law having in turn a strong impact to i.e.

MS' tax regimes. The reaction by MS is not only be seen in adjusting its tax regimes but assisted discussions in between MS on EU level and promoted by the Commission that has led to activities in the field of direct taxation already. Here, further steps towards "harmonisation" are taken with Directives and Conventions i.e. with the Parent-Subsidiary Directive (amended 2004/2005), the Merger Directive (1990/1992), the Interest and Royalty Directive (2003/2004) and the Taxation on Savings Income Directive (2004/2005) though.

The question arises whether there may be other factors and "pressures" (i) on the domestic level to MS to change its regimes and/or (ii) to the EU to enhance activities to take actions in the field of direct taxation i.e. to establish or even promote for a common regime on a EuroREIT. Hereto, approach is given in the fields of political science in order to enhance the understanding of de facto political mechanisms in the EU and to give prognosis to MS' tax sovereignty in favour of the establishment of the EuroREIT.³² Starting with the competition between MS to attract investors by means of low tax rates and a beneficial tax treatment the jurisprudence by the ECJ strikes down the barriers to the market and negative integration is engaged.³³ Where negative integration has an impact on domestic level this may be firstly called the "EU-ization" of national legal systems. However, there is interdependence, an interaction between MS' on domestic level and at the same time negative integration by the ECJ brought to the domestic level influencing domestic policy. What matter here is change at home, a system of interaction at the domestic level of the type that can be captured by using the bottom-up research design and careful process-tracing. There is a process that starts and finishes at the

³² See i.e. K.E. Howell, "Europeanization, European Integration and Financial Services", Macmillan, London, 2004

³³ See F. Scharpf, „Governing in Europe: Effective and Democratic?“, Oxford University Press, Oxford, 1999

level of domestic actors that can be explained with the process of Europeanization.³⁴ Europeanization is a model to “explain” the processes towards “Europe” and describes how domestic changes are processed that is what is going on inside the process. Thereby, Europeanization proves the impact of Europe not its “reaction”.³⁵

Starting point is a system of interaction at the domestic level. The bottom-up approach checks if, when and how the EU provides a change in any of the system of interaction.³⁶ Developments at domestic level being captured by the EU and its integration policy is set and emerged in order to gain integration to provide for a “gap”-policy to be brought down to the MS. As a consequence it can be seen an “impact” of the EU on domestic level on MS tax and REIT regimes already. However, in order to answer the question of the emergence for a EuroREIT the question left for the “reaction” by the EU. The activities on the domestic level emerges action by the EU who is “pressured” to introduce a harmonized system of a REIT Regime for the EU, the EuroREIT. This may not be the effect of negative integration but a pressure of time and the urge for fulfilling the single market aim. Where negative integration must be seen as a condition for cases being brought to the ECJ and its outcome of one certain ruling is open but not predictable and therefore its potential impact time is concerned. Time, however, is the “product” that is used by governments on this playing field strategically for its purposes of domestic tax policy to maximize tax revenue. In this context it makes all sense for the governments to “wait” for the Plaintiff rather than complying with its tax regime by means of EU-Discipline even positive integration does not exists. Moreover, even in cases where the infringement

³⁴ See C.M. Radaelli, „Europeanization: Solution or Problem?“, in. M. Cini / A.K. Bourne, eds. „European Union Studies“, Palgrave Macmillan, Houndmills; Basingstoke, 2006, p.56ff.

³⁵ See K. Götz, “Four Words of Europeanization”, Paper prepared for the ECPR Joint Session of Workshops, Turin, Italy, 22-27 March 2002

³⁶ See K. Goetz, „Four World of Europeanization“, Paper presented fort he ECPR Joint Session Workshop, Turin, Italy, 22-27 March, 2002

of national tax law with EU law is kind of obvious it can be experienced nowadays that to wait for someone filing a law suit and waiting for the walk through the instances of the judicial court system is in term of time that has been gained by that government had secured large amounts of tax revenue otherwise lost for the national public policies. Therefore, it holds true as one say: “Where there is no plaintiff, there is no Judge”. Governments still use this situation strategically to organize their tax regimes the most efficient way to keep tax revenues at the most maximum level unless otherwise forced to act different. This can be seen in fields of positive integration i.e. in the field of indirect taxation. In negative integration the effects may be well enforceable but toothless because of (i) the fact that there is no benefit beyond the single case but only on the subject issue and “*inter partes*” and (ii) the means for the Commission to react on a wider playing field is not existing in direct taxation where MS still hold sovereignty.³⁷ However, the Commission is able to mediate and start discussion meaning to implement ideas that the MS may work together to achieve harmonisation within their tax systems or more indirect to establish a common legal form for corporations to be used uniformly in all MS and benefiting from all countries tax systems as it was seen with the “*Societas Europaea*”³⁸ and more specifically with the acceptance of some Directives in the field of taxation which started with the Parent-Subsidiary Directive³⁹. This may be the model for the EuroREIT as well to be established.

By doing this the EU provides the context, cognitive and normative “frame”, the terms of reference, or opportunities for the socialization of domestic actors, who then produce “exchanges”. This does not necessarily need the EuroREIT becoming

³⁷ Jürgen Schwarze, “Europäisches Wirtschaftsrecht”, NOMOS, Baden Baden, 2007, p. 163

³⁸ See Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company, Official Journal L 294 of 10.11.2001, entered into force on 8 October 2004

³⁹ Directive 90/435/EWG, 1990

the sole vehicle for investors investing through or in REITs but providing a “frame” by introducing the vehicle that would comply with EU law and, therefore, would be accepted by MS tax Regime at the domestic level. However, it still builds part of a bottom-up design rather than a top-down one and, therefore, cannot be seen as downloading since the “frame” is not an obligatory one but an alternative given on the compliance level. The developments that may take place have to be expected as vertical (by means of the ECJ jurisprudence) and horizontal (by means of tax competition between the MS) interaction.⁴⁰ As a final test the findings will build a counterfactual analysis that refers to the explicit formulation of rival alternative hypothesis i.e. the effects of globalization. Using the explanation of the process of Europeanization⁴¹ it can be assessed that as a result, and beside the question of a harmonisation of REIT-Regimes in the EU, Europeanization will have an impact to further development of REIT Regimes and a EuroREIT regime in the EU as well as to the tax regimes in the MS that may lead to a de facto transfer of tax sovereignty to the EU in the long term.

⁴⁰ See C.M. Radaelli, “The Europeanization of Public Policy”, in: K. Featherstone / C.M. Radaelli, eds., „The Politics of Europeanization”, OUP, Oxford, 2003

⁴¹ See K. Goetz, „Four World of Europeanization“, Paper presented for the ECPR Joint Session Workshop, Turin, Italy, 22-27 March, 2002