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Transfer of European Companies

Does the Swedish exit taxation comply with EC
law and the transfer provisions of the *Societas
Europaea*?

Master's thesis within EC tax law

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Abstract

On October 8, 2004 a new form of incorporation is introduced in the EU: *Societas Europaea*, abbreviated SE. The idea behind these companies is to create a uniform limited-liability company for the whole Union, to facilitate for cross-border economic activity. The Council Regulation which constitutes the framework for the SEs – the SE Statute – does, however, contain a number of provisions that refer to national legislation, which means that an SE registered in one Member State will not be identical with one registered in another Member State.

In order to achieve the goal of an efficient internal market, the European Commission has pointed out a number of tax obstacles that need to be removed. It regards issues such as dividend taxation, taxation of cross-border business re-organisations etc. The original aim was to introduce a common tax regime for the SEs, but that could not be achieved. The preamble of the SE Statute states that as regards taxation of SEs, that is a matter of national legislation. Thus, SEs registered in Sweden will be subject to Swedish corporate tax.

One of the features of the SE Statute is that SEs are allowed to transfer their registered office from one Member State to another. This phenomenon is unknown to Swedish law, and such a transfer will therefore be considered as if the company would cease to exist, which triggers a final taxation of all of the company's assets. This so-called "exit taxation" is analysed in this thesis, the question being if it is acceptable under the EC Treaty provisions on freedom of establishment (article 43 EC).

Article 43 explicitly prohibits restrictions to freedom of establishment for nationals of one Member State in another Member State. The European Court of Justice has established that those provisions also apply for nationals wanting to leave their country. In a number of cases, the Court has held that EC law on principle does not accept national measures that are liable to render less attractive the exercise of those Treaty freedoms. Such measures can be justified if they comply with certain criteria. Given the explicit transfer provisions of the SE Statute, however, it appears unlikely that the Court will consider the Swedish exit taxation justifiable.

Table of Contents

1	Introduction	1
1.1	Background	1
1.2	Purpose	1
1.3	Delimitations	1
1.4	Method	2
1.5	Outline	2
1.6	Definitions	2
2	Societas Europaea – a legal introduction	4
2.1	The SE Statute	4
2.2	Some basic provisions	4
2.2.1	The formation of SEs	4
2.2.2	Capital, accounting and administration	4
2.2.3	Transfer provisions	5
2.2.4	Taxation	6
2.3	Some remarks	6
2.4	Summary	7
3	Tax obstacles in the internal market	8
3.1	Introduction	8
3.1.1	The Ruding Report and its aftermath	8
3.2	Remaining tax obstacles in the internal market	9
3.2.1	Dividend taxation	9
3.2.2	Cross-border loss compensation	10
3.2.3	Transfer pricing	11
3.2.4	Taxation of cross-border business re-organisations	11
3.3	Summary	12
4	The SE Statute’s transfer provisions	13
4.1	Introduction	13
4.2	Cross-border moving	13
4.2.1	Provisions for the transfer of the registered office – article 8	13
4.2.2	Change of residence	14
4.3	Summary	15
5	The Swedish exit tax legislation	16
5.1	Introduction	16
5.2	Tax liability	16
5.3	Exit taxation	16
5.4	Summary	17
6	EC legislation on freedom of establishment	18
6.1	Introduction	18
6.2	The scope of the freedom of establishment	19
6.2.1	Cross-border transfers	19
6.3	Discrimination and restrictions	21
6.4	Can restrictions be justified?	23
6.4.1	Justification under the Treaty	23

6.4.2	Justification under the “rule of reason”	24
6.4.2.1	Imperative requirements?	25
6.5	Summary.....	26
7	Does the Swedish exit taxation infringe EC law?	27
7.1	Introduction	27
7.2	Is the Swedish exit taxation discriminatory?	27
7.3	Is the Swedish exit taxation a restriction?	27
7.4	Can the Swedish exit taxation be justified?	28
7.4.1	Treaty justification.....	28
7.4.2	The “rule of reason” test.....	28
7.4.2.1	Non-discriminatory?	28
7.4.2.2	Imperative requirements in the general interest?	28
7.4.2.3	Suitable and not too far-reaching?	30
7.4.3	Other remarks	31
7.5	Summary.....	31
8	Conclusions	33
8.1	Final remarks.....	34
	Table of references	36

Abbreviations

cf.	compare
EC	the European Communities
ECJ	European Court of Justice
<i>e.g.</i>	<i>exempli gratia</i> ; for example
<i>et seq.</i>	<i>et sequentia</i> ; the following pages
EU	the European Union
<i>i.a.</i>	<i>inter alia</i> ; among other things
<i>i.e.</i>	<i>id est</i> ; that is to say
<i>op. cit.</i>	<i>opus citatum</i> ; from the source just mentioned
p.	page
para.	paragraph
pp.	pages
SE	Societas Europaea

1 Introduction

1.1 Background

The idea of establishing a common form of European company stretches back as long as to the late 1950s. The intentions have always been to facilitate for companies to do business on a pan-European level. In the mid-1960s, the Commission set up a working group with the purpose to draft a proposal for a uniform type of limited-liability company which could be used in all Member States without being subject to national law.¹

The draft led to a proposal by the Commission, which was issued in 1970, and in 1975, after the Parliament had had its say on the matter, an amended proposal was submitted to the Council. However, the proposal was complex and extensive, and no consensus could be reached. The discussions were abandoned in 1982.²

Nevertheless; towards the end of the 1980s, the issue was brought back on the table. The Commission issued a revised proposal in 1991. After some political procrastination, during which a committee had to be appointed to break the deadlock, the Council resumed negotiations in 1997. The most difficult issue to solve seemed to be the level of worker participation in the European Companies. However, an agreement could eventually be reached during the Nice summit in December 2000. The Regulation and Directive, which were adopted in October 2001, are the Council Regulation (EC) no. 2157/2001 on the statute for a European Company (henceforth: the SE Statute) and the Council Directive 2001/86/EC, regarding involvement of employees. On 8 October 2004 these regulations will enter into force.³ The European Companies will be recognised by the ending “SE”, which is the (neutral) Latin abbreviation for *Societas Europaea*.

1.2 Purpose

The purpose of this thesis is to provide a *de lege lata* analysis on whether the Swedish provisions on “exit taxation”, *i.e.* tax effects on SEs transferring their registered offices abroad, comply with the Community law provisions on freedom of establishment and the SE Statute provisions on transferability of SEs.

1.3 Delimitations

Although taxation is not a core feature of the European Community, the impact of EC law on national tax provisions keep growing, and the field is now vast. Certain delimitations must therefore be made. The analysis of the compliance with EC law of the Swedish tax legislation is limited to the exit taxation rules. The impact of various Directives on cross-border business operations, such as the merger directive, has not been studied for the purpose of this thesis. Moreover, this thesis will not analyse the impact of double taxation conventions, although they may be mentioned if it is relevant for the context.

¹ *Werlauff, Erik* SE – the law of the European company p. 1-2; *Edwards, Vanessa* The European Company – essential tool or eviscerated dream? pp. 443-444.

² *Edwards, Vanessa, op. cit.* pp. 443-444.

³ Council Regulation no. 2157/2001, article 70; Directive 2001/86/EC, article 14.

1.4 Method

The chapter describing the tax obstacles in the internal market is based mainly on the Commission Study entitled “Company taxation in the internal market”. The chapter describing the legal framework of the *Societas Europaea* departs from the SE Statute and is complemented by commentaries from the literature, in order to provide an accurate picture of *de lege lata*. The same goes for the chapter on the Swedish legislation on exit taxation, where I have also, in accordance with the teleological method, tried to find motivations to the taxation rules in the Swedish preparatory legislation (Official Government Reports and Government Bills).⁴

As regards the EC legislation, issues of direct taxation are generally not a part of primary legislation (the Treaties). Instead, the progress in that area is mainly derived from secondary legislation (Regulations, Directives etc.) and the ECJ’s case-law.⁵ According to settled case-law, EC legislation shall be interpreted in the light of the provisions of Community law as a whole, having regard to the objectives of the provisions;⁶ thus, a teleological method is to be applied. Given that the Court *de facto* is an important player in the legislative process of the Community, much emphasis has been put to find cases relevant for the problems, and to find interesting statements that can provide an indication on how the Court will tackle future problems arising. The Swedish exit taxation rules have been compared to and analysed in the light of Treaty provisions and settled case-law.

The selection of cases does by no means attempt to be exhaustive. I have chosen cases where important principles are established or clarified, and cases where the Court indicates its position with regard to national provisions that, for one reason or another, do not comply with EC law and the objectives of the free market.

1.5 Outline

In chapter 2, a brief legal overview over the European Companies is given, in order to provide the reader with a relevant context for further reading. Chapter 3 describes a number of tax obstacles in today’s internal market as identified by the Commission. Those obstacles are of a general character *i.e.* they are relevant for all European enterprises – and, hence, also SEs. One of the tax obstacles constitutes the background for chapter 4, which discusses the SE Statute provisions on mobility. The Swedish legislation, and the tax effects of the transfer of seat of an SE is introduced in chapter 5, and chapter 6 outlines the EC legislation, including case-law. Chapter 7 analyses the compatibility of the Swedish legislation with EC law. Finally, chapter 8 gives my conclusions, based on what has previously been said, on the compatibility of the Swedish exit taxation rules with EC law.

1.6 Definitions

Some terms that are used throughout this thesis may need some clarification, in order not to confuse the reader. When I refer to companies formed in accordance with the SE Statute, I use the term *SE*. A *pan-European business* shall only be understood as an enterprise conducting business in several Member States of the European Union.

As regards Swedish legislation etc., the translations used are the following:

⁴ *Kellgren*, *Jan Mål och metoder vid tolkning av skattelag* p. 168 *et seq.*

⁵ *Steiner, Josephine & Woods, Lorna* Textbook on EC law pp. 42-43.

⁶ Case 283/81 *CILFIT*, ECR 1982 p. 3415, para. 20.

Introduction

Annual Accounts Act	årsredovisningslagen (SFS 1995:1554)
Book-keeping Act	bokföringslagen (SFS 1999:1078)
Companies Act	aktiebolagslagen (SFS 1975:1385)
Government bill	proposition
Official Gazette	Post- och Inrikes Tidningar
the Swedish Government Official Report	Statens offentliga utredningar, SOU

2 Societas Europaea – a legal introduction

2.1 The SE Statute

The Council regulation containing the SE Statute was adapted on October 8, 2001 and enters into force on October 8, 2004.⁷ The Statute is divided into seven titles, namely: *General provisions, Formation, Structure of the SE, Annual accounts and consolidated accounts, Winding up, liquidation, insolvency and cessation of payments, Additional and transitional provisions* and *Final provisions*.

This chapter aims at providing an overview of a number of legal aspects of SEs that are relevant for the further discussion of taxation issues regarding SEs. Some references, which can be of relevance for the analysis, are made to Swedish law.

2.2 Some basic provisions

2.2.1 The formation of SEs

According to the Regulation, an SE can be formed in five different ways:

- Through a merger of two public limited-liability companies in two different Member States.⁸
- Two or more private and public limited-liability companies may form a holding SE, provided that each of at least two of them is governed by the law of a different member state, or has for at least two years had a subsidiary company or a branch situated in another Member State.⁹
- Two or more companies may form a subsidiary SE, if each of at least two of them is governed by the law of a different Member State, or has for at least two years had a subsidiary or a branch in another member state.¹⁰
- A public limited-liability company, which for at least two years has had a subsidiary in another Member State, may be transformed into an SE.¹¹
- Finally, SEs may set up subsidiaries in the form of SEs.¹²

2.2.2 Capital, accounting and administration

SEs are public limited-liability companies¹³, whose share capital – which is to be expressed in euros¹⁴ – may not be less than 120,000¹⁵. However, SEs registered in Member States that

⁷ Council Regulation no. 2157/2001, article 70.

⁸ Council Regulation no. 2157/2001, article 2(1).

⁹ Council Regulation no. 2157/2001, article 2(2).

¹⁰ Council Regulation no. 2157/2001, article 2(3).

¹¹ Council Regulation no. 2157/2001, article 2(4).

¹² Council Regulation no. 2157/2001, article 3(2).

¹³ Council Regulation no. 2157/2001, article 1(1).

¹⁴ Council Regulation no. 2157/2001, article 4(1).

¹⁵ Council Regulation no. 2157/2001, article 4(2).

still use their national currencies do not have to express their capital in euros¹⁶. SEs registered in Sweden have a choice; Swedish legislation allows the currency of accounting for limited-liability companies to be euros as well as Swedish kronor.¹⁷

As regards changes in the capital (share issues etc.), the Statute only refers to national provisions of the Member State in which the SE is registered¹⁸. Thus, rules for the protection of minorities will be those of the Member States. A motivation for this is found in recital no. 15 of the preamble of the Regulation.

According to article 61 of the Regulation, an SE is subject to national rules “as regards the preparation of its annual and, where appropriate, consolidated accounts including the accompanying annual report and the auditing and publication of those accounts.” For SEs registered in Sweden, that implies that they are bound to comply with the Swedish Book-keeping Act and the Swedish Annual Accounts Act.

An administrative advantage will be that SEs are able to operate on the basis of a single set of rules and a unified management and reporting system.¹⁹ Thus, they will be able to avoid having to set up an expensive and complex network of subsidiaries that are governed by the laws of different Member States.²⁰

2.2.3 Transfer provisions

One of the main goals of the Statute was to achieve complete freedom of movement of European Companies within the internal market.²¹ According to article 293 EC, Member States were urged to negotiate with each other *i.a.* in order to secure the right of companies to retain “legal personality in the event of transfer of their seat from one country to another”. Through the Statute this goal has been achieved, giving SEs a unique position in European company law²² – at least from a private law point of view.

According to article 8 of the SE Statute, the registered office – which, according to article 7, shall be located in the same Member State as the head office – may be transferred to another Member State without resulting in the winding up of the SE; the legal person continues to be the same. Before the transfer can be carried out, the management of the SE has certain obligations to fulfil; according to article 8(2) of the Statute, a transfer proposal shall be drawn up and publicised; in Sweden presumably in the Official Gazette.²³ However, SEs may not move if proceedings for winding up, liquidation, insolvency etc. have been brought against it.²⁴ Moreover, the transfer of an SE’s registered office may, under certain circumstances and on the grounds of public interest only, be opposed by the Member State.²⁵

The provisions of the SE on mobility will be further analysed in chapter 4.

¹⁶ Council Regulation no. 2157/2001, article 67.

¹⁷ The Swedish Annual Accounts Act, chapter 4, article 6; cf. the Companies Act, chapter 1, article 3.

¹⁸ Council Regulation no. 2157/2001, article 5.

¹⁹ Council Regulation no. 2157/2001, article 61.

²⁰ *The European Company – an optional vehicle for transnational co-operation.*

²¹ *Soler Roch, María Teresa* Tax Residence of the SE p. 13.

²² *Thömmes, Otmar* EC law aspects of the transfer of seat of an SE p. 22.

²³ Cf. articles 8(2) and 13 of the Regulation with the Swedish Companies Act, chapter 18, article 2.

²⁴ Council Regulation no. 2157/2001, article 15.

²⁵ Council Regulation no. 2157/2001, article 14.

2.2.4 Taxation

As regards taxation, those issues are left out in the Statute:

“This Regulation does not cover other areas of law such as *taxation*, competition, intellectual property or insolvency. The provisions of the Member States’ law and of Community law are therefore applicable in the above areas and in other areas not covered by this Regulation.”²⁶

As will be described in chapter 3, taxation issues are considered one of the most crucial features for the establishment of a well-functioning internal market. The fact that the taxation issues are not solved by the Statute can be considered as a setback and is, most likely, the result of the Member States not being able to find a common standpoint.

2.3 Some remarks

As just mentioned, recital 20 of the preamble of the Statute explicitly states that the provisions of the Member States’ law and of Community law are applicable in the areas not covered by the SE Statute. Moreover, in many cases the Statute refers directly to the provisions of national legislation or other, for example regarding changes in share capital and, to some extent, formation of the SE.²⁷ The fact that many decisions are left to national law has met criticism²⁸; “there will be as many forms of European Companies as there are Member States”²⁹ is one comment. Werlauff argues that this means that the SE is far from the original idea of a form of incorporation that is identical across all Europe.³⁰ However, he also says that such objections should not be given too much weight, since quite a lot of harmonisation in the field of corporate law – *e.g.* as regards mergers and the protection of capital – has already been accomplished through Community legislation.³¹

Since the Statute does not provide a solution to the taxation issues, it will still be difficult for SEs to carry out mergers, dismergers or reorganisations without risking high tax costs.³² One might think that a primary focus when drafting the statute for the SEs would have been to try to find a solution to the tax problems – in fact, scholars have suggested that the efforts to solve other problems concerning the SEs would be “in vain if the European Company, once realised, must contend with 15 different tax regimes”³³.

Thus, in terms of taxation, SEs are still subject to national law.³⁴ The lack of tax conformity for the SEs has caused some persons to question the whole idea of a common European company statute; a German Member of the European Parliament asks in a debate:

“[W]hat are the advantages? Why should we create a European limited liability company? What are the fiscal advantages, for example? I, for one, cannot see any.”³⁵

²⁶ Council Regulation no. 2167/2001, recital no. 20; italics added.

²⁷ Council Regulation 2001/2157, paras 5 and 15.

²⁸ *Edwards, Vanessa* The European Company – essential tool or eviscerated dream? p. 463.

²⁹ *Skog, Rolf* Europabolag kan bildas nästa år; my translation.

³⁰ *Werlauff, Erik* SE – the law of the European Company p. 15.

³¹ *Werlauff, Erik* EU-selskabsret p. 135.

³² *Lodin, Sven-Olof & Gammie, Malcolm* The taxation of the European Company p. 286.

³³ *Lodin, Sven-Olof & Gammie, Malcolm, op. cit.* p. 286.

³⁴ For example, according to a memorandum from the Swedish Ministry of Finance (Fi 2004/721), the European Company Statute will require no substantial changes in Swedish corporate tax legislation.

³⁵ Willi Rothley in the parliamentary debate on the European Company Statute on Monday, 3 September 2001.

2.4 Summary

This chapter has provided a brief overview over some legal aspects concerning the *Societas Europaea*. It has been established that SEs will not be identical throughout Europe, since the Statute leaves many decisions to national law. The most important finding of this chapter is that taxation issues are not dealt with in the SE Statute. This has met heavy criticism from scholars and might decrease the attractiveness of the form of incorporation. As will be demonstrated in the next chapters, the lack of tax provisions may cause conflicts between Community law and national tax law. Chapter 3 will provide an overview over a number of taxation issues that prevail in the internal market, and one of those issues will be subject of further study in the following chapters.

3 Tax obstacles in the internal market

3.1 Introduction

In its study “Company taxation in the internal market”, the Commission has identified a number of tax obstacles that affect companies conducting business across Europe.³⁶ The Study concluded that companies conducting business across Europe today face a virtual forest of tax regulations, as they have to deal with fifteen different tax regimes. Despite the launch of the single currency and various other measures aiming at facilitating for pan-European businesses,³⁷ the internal market remains imperfect, partly because of the tax obstacles to cross-border activities.³⁸ These obstacles will also be of relevance to SEs. While the effect of the obstacles will, in some cases, be reduced with the new type of company, some will still constitute obstacles for SEs. That regards in particular tax issues, since the SE Statute does not contain any provisions on taxation.

This chapter aims at introducing the obstacles which were identified in the Commission Study and are particularly relevant to highlight as regards SEs. One of the obstacles is subject to further analysis in this thesis.

3.1.1 The Ruding Report and its aftermath

The Commission Study partly departs from the outcome of a report that was published in 1992.³⁹ The report, which was entitled “Report of the Committee of independent experts on company taxation” but became commonly known as “the Ruding Report” after the committee’s chairman, identified a number of measures necessary to be taken in order to ensure the proper functioning of the internal market. The Ruding Report urged the EC to prioritise *i.a.* the removal of discriminatory features of countries’ tax arrangements that impede cross-border business investment, the setting of a minimum level for statutory corporation tax rates and the encouraging of maximum transparency of national tax incentives to promote investment.⁴⁰

Since the release of the Ruding Report, the European Community has gone through considerable change. The internal market was created in 1992-93, the common currency was launched in 1999-2002 and the cross-border activities in Europe continue to increase.⁴¹ Add to that the emergence of electronic commerce – which, at a glance, might seem intrinsically borderless – and the fact that many large EU companies today consider the whole Union to be their “home market”.⁴² However, the Ruding Report made little impact, and many of its findings remain unattended.⁴³ Considering the substantial challenges the Euro-

³⁶ *European Commission* Company taxation in the internal market, pp. 295-382.

³⁷ Such as the Parent-Subsidiary Directive (90/435/EEC), the Arbitration Convention (90/436/EEC) and the Merger Directive (90/434/EEC).

³⁸ *Ruding, Onno* The long way to removing obstacles in company taxation in Europe p. 3.

³⁹ *European Commission, op. cit.* p. 56.

⁴⁰ *Report of the Committee of independent experts on company taxation*, 1992, pp. 197, 209 and 199; cf. *European Parliament Working Paper* Tax co-ordination in the European Union pp. 5-6.

⁴¹ *Ruding, Onno* The long way to removing obstacles in company taxation in Europe p. 3.

⁴² *European Parliament Working paper* Tax co-ordination in the European Union pp. 4-5.

⁴³ *European Parliament Working paper, op. cit.* pp. 4-5; cf. *European Commission* Company taxation in the internal market p. 61.

pean Union faces due to the 2004 enlargement, the issue of tax harmonisation in the EU seems as relevant as ever before. And, still today the words of the Ruding Report are valid: “a key question that arises is the extent to which independent action by national governments can be relied upon to reduce the existing tax differences between Member States”.⁴⁴

3.2 Remaining tax obstacles in the internal market

According to the EC Treaty,⁴⁵ the internal market is characterised as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured”. Several trade barriers were removed as the internal market emerged in the beginning of the 1990s. However, following the Commission Study, much remains to be done in the area of taxation.

The Commission has established that there is a huge gap between effective tax rates in different Member States,⁴⁶ and that these differentials may have an impact on the international competitiveness of the European Union; companies may attach too great importance to tax regimes when choosing their location, instead of focusing on other crucial aspects, something that could lead to inefficiency in resource allocation and, thus, welfare costs.⁴⁷

As mentioned,⁴⁸ pan-European companies have to deal with fifteen tax regimes in their “home market”. This leads to loss of efficiency and increases the administrative costs for the companies.⁴⁹ Moreover: after the enlargement of the Union in 2004, the internal market will consist of no less than 25 different tax administrations, each of these having its own set of rules in terms of financial accounting, calculating taxable profit, administering tax collection and so forth. The Commission has, in its study on company taxation in the internal market, identified a number of consequences of the multiplicity of separate tax systems, for example the reluctance of Member States to allow relief for losses incurred in subsidiaries or parent companies abroad and the risk that cross-border re-organisations give rise to capital gains taxation and other charges.⁵⁰

The Commission Study suggests that companies of European origin may even be in a competitively disadvantageous situation compared to third-country businesses. The latter can, as they enter the European market for the first time, freely choose locations that are optimised for tax purposes.⁵¹ Still, once they are established, foreign businesses tend to be complaining about the inconvenience in having to deal with 15 different tax systems.⁵²

3.2.1 Dividend taxation

With the Parent-Subsidiary Directive, a big leap forward was taken to prevent double-taxation of dividends. The Directive was amended through Directive 2003/123/EC, mainly to broaden its scope to the benefit of smaller companies and SEs; the SE Statute

⁴⁴ *Report of the Committee of independent experts on company taxation* p. 199.

⁴⁵ Article 14 EC.

⁴⁶ *European Commission* Towards an internal market without tax obstacles p. 7.

⁴⁷ *European Commission* Towards an internal market without tax obstacles p. 8; cf. *European Parliament Working Paper, op.cit.* p. 2.

⁴⁸ See section 3.1.

⁴⁹ *Lodin, Sven-Olof & Gammie, Malcolm* Home state taxation: Tax treaty aspects p. 286.

⁵⁰ *European Commission* Company taxation in the internal market p. 295.

⁵¹ *European Commission* Company taxation in the internal market p. 295.

⁵² *European Commission, op. cit.* p. 295.

does not have an own set of provisions on dividends.⁵³ The core of the Directive is that where dividends are distributed within groups of companies, Member States shall either refrain from taxing or allow deduction of the given dividend.⁵⁴

However, this provision is limited to parent companies holding at least 25 per cent (20 per cent as from 1 January 2005, decreasing to 10 per cent as from 1 January 2009) of their subsidiaries.⁵⁵ Accordingly, there is a wide range of dividends that do not fall under the scope of the Parent-Subsidiary Directive and thus have to be dealt with at another level. Furthermore, dividends paid to *individuals* are not covered at all by the Directive. The Commission suggests that such payments cannot be ignored as the “tax treatment [of individuals] might influence business behaviour.”⁵⁶ There are certain systems to ease the tax burden for companies that receive dividends that are not covered by the Parent-Subsidiary Directive, but inconsistencies between different Member States still exist and the internal market remains imperfect in this respect.⁵⁷ Since the SE Statute contains no particular provisions on dividend taxation, also SEs will be subject to the current (imperfect) tax situation in the internal market.

3.2.2 Cross-border loss compensation

Normally, national corporate tax systems allow companies to set off losses against profits in order to establish the taxable profit.⁵⁸ Most Member States also allow such set offs within groups of companies, at least for companies within their tax jurisdiction.⁵⁹ However, if a well-functioning internal market is to be achieved, the possibility to compensate for losses, even for losses that have occurred in subsidiaries or permanent establishments in other Member States, must be considered an important feature.⁶⁰ In today’s EU, these possibilities are limited as to what has been agreed upon in bi- our multilateral tax conventions. The internal market thus lacks uniformity, which, according to the Commission Study, might hamper the ambitions of companies that want to expand their businesses.⁶¹

This argumentation of the Commission is underpinned by a survey conducted by the Federation of Swedish Industries, which revealed that 13 per cent of the companies with activities abroad had, due to cross-border loss problems, chosen tax-motivated rather than a business-motivated structures for their businesses abroad.⁶² The Commission Study concludes that national company tax legislation is generally biased in favour of domestic investment, thus hampering cross-border economic activities,⁶³ and that the effects of such an order can violate the basic right of free establishment.⁶⁴ The SE Statute leaves out the issues of cross-border loss compensation, but as the analysis of the Swedish exit taxation rules will show, Community law may offer a remedy for provisions that can be considered as violating the right of free establishment.

⁵³ *Brokelind, Cécile* The amendments to the parent-subsidiary directive p. 12.

⁵⁴ Directive 90/435/EEC, article 4(1).

⁵⁵ Directive 90/435/EEC, article 3(1)(a).

⁵⁶ *European Commission, op. cit.* p. 297.

⁵⁷ *European Commission, op. cit.* p. 299 *et seq.*

⁵⁸ *European Commission, op. cit.* p. 317

⁵⁹ *European Commission, op. cit.* p. 317.

⁶⁰ *European Commission, op. cit.* p. 317 *et seq.* and p. 323.

⁶¹ *European Commission* Company taxation in the internal market p. 317 *et seq.* and pp. 325-326.

⁶² *Lodin, Sven-Olof & Gammie, Malcolm* Home State Taxation p. 75.

⁶³ *European Commission, op. cit.* p. 329.

⁶⁴ *European Commission, op. cit.* p. 330.

3.2.3 Transfer pricing

Another highly relevant issue in the field of company taxation is that of transfer pricing. In order to come to terms with companies selling goods to affiliated companies at a price that differs from the market price, *e.g.* in order to reduce the taxable income,⁶⁵ the so called “arm’s length principle” has been established. According to this principle, transactions – between, for example, a parent company and a subsidiary – where the price differs from the market price can, for taxation purposes, be considered as if they were made between independent enterprises (“at arm’s length”; *i.e.* at market prices).⁶⁶

In order to facilitate for tax administrations to supervise transfer pricing practices, companies are required to provide documentation on such transactions. These requirements have caused businesses to complain that they have to meet “unduly high compliance costs”.⁶⁷ Moreover, companies complain about uncertainty; there is a risk that business structures may be weakened by tax authorities who will not accept them for transfer pricing reasons.⁶⁸

Apparently, transfer pricing is a major issue in the internal market. The maintenance of the foundation for resolving transfer pricing practices, the arm’s length principle, keeps demanding ever-increasing auditing resources as intra-community trade accelerates; meanwhile, Member States’ regulations differ significantly, which enhances the risk of double taxation and escalates companies’ burden of documentation. Transfer pricing remains a serious obstacle for the internal market.⁶⁹ As regards SEs, the Statute does not introduce any particular rules for transfer pricing issues between SEs.

3.2.4 Taxation of cross-border business re-organisations

Companies preparing restructuring operations want to be able to pursue those plans with as small tax costs as possible, and it is important for the functioning of the internal market that these requirements are met. In the preamble of the Merger Directive, the Council acknowledges that feasible mergers are necessary to create an internal market and to ensure its effective functioning. The Council states that cross-border business re-organisations ought not to be hampered by restrictions arising from tax provisions of the Member States.⁷⁰

The Merger Directive has improved the situation, but problems remain to be solved; for example, the Directive does not apply to all forms of companies liable to corporate tax.⁷¹ Moreover, the Directive seems to have been doubtfully implemented in some Member States, leading to tax effects that are not fully in line with the intentions of the Directive.⁷²

One example of how national tax legislation can constitute an obstacle to cross-border re-organisations is the so-called exit taxation rules that most Member States have. The basic principle of such rules is that a company that moves abroad will be subject to a final taxation, a burden that can be so heavy that the intended re-organisation turns impossible. As regards SEs, the Statute regulating them contains provisions which entitle SEs to such

⁶⁵ *European Commission, op. cit.* p. 336.

⁶⁶ OECD Model Tax Convention, article 9.

⁶⁷ *The EU joint transfer pricing forum* Issues for debate p. 3.

⁶⁸ *European Commission, op. cit.* p. 335.

⁶⁹ *European Commission* Company taxation in the internal market p. 359.

⁷⁰ Directive 90/434/EEC.

⁷¹ *European Commission, op. cit.* p. 308.

⁷² Cf. *European Commission, op. cit.* p. 310 *et seq.*

cross-border transfers. Still, as the SE Statute contains no provisions on taxation, there is a risk that these problems will remain.

3.3 Summary

This chapter has demonstrated that the EU's internal market of today is characterised by a number of tax obstacles that constitute impediments on companies' possibilities to conduct cross-border activities. The taxation of cross-border re-organisations is one of those obstacles, and one aspect thereof, namely the Swedish "exit taxation" rules, will be closer looked upon in the following chapters. Chapter 4 analyses the SE Statute's transfer provisions, and chapter 5 analyses the Swedish exit taxation rules and the effects they have on SEs wanting to move cross-border.

4 The SE Statute's transfer provisions

4.1 Introduction

The provisions on mobility of SEs were briefly discussed in chapter 2, and they will receive further attention in this chapter, which aims at providing an analysis of the Statute provisions regarding transfer of the registered office. Since the ECJ takes into account the objectives of the legislation it interprets,⁷³ the Statute's provisions on mobility are highly relevant for the upcoming analysis of the Swedish exit taxation rules.

In that context it is important to note that the Council has acknowledged that it is “essential that [pan-European companies] should be able to plan and carry out the reorganisation of their business on a Community scale.”⁷⁴

According to the preamble of the Statute on SEs,

“[t]he completion of the internal market ... mean[s] not only that barriers to trade must be removed, but also that the structures of production must be adapted to the Community dimension.”⁷⁵

As shown in chapter 3, on today's internal market, this is far from reality. Today's internal market contains a number of barriers, not least tax obstacles.

4.2 Cross-border moving

An important feature of the European Company Statute is article 8(1), which allows the registered office of an SE to be transferred to another Member State without resulting in the winding up of the company or in the creation of a new legal person. As mentioned above,⁷⁶ the transfer is subject to certain conditions, but the regulation is nevertheless a big leap forward for the functionality of the internal market.

However, the prospects of moving will still look dire if the move is connected with a heavy taxation burden. Since the Statute does not deal with taxation issues, it may well be the tax legislations of the Member States that will determine the *de facto* usefulness of article 8. These issues are discussed in this section.

4.2.1 Provisions for the transfer of the registered office – article 8

The framework for transferring the registered office of an SE was introduced above.⁷⁷ The provisions are found in articles 8(2)-8(13) of the Statute.⁷⁸ Article 8(2) requires the management of the SE to draw up and publicise a transfer proposal, the contents of which are enumerated in the article, and according to indent (e), “any rights provided for the protection of shareholders and/or creditors” shall be covered. The term “creditors” is also used in paragraphs (3), (4) and (7) of article 8, paragraph (7) being particularly interesting:

⁷³ See section 1.4.

⁷⁴ Council Regulation no. 2157/2001, recital no. 1.

⁷⁵ Council Regulation no. 2157/2001, recital no. 1.

⁷⁶ See section 2.2.3.

⁷⁷ See section 2.2.3.

⁷⁸ Council Regulation no. 2157/2001, article 8(1).

The SE Statute's transfer provisions

“the SE shall satisfy [the competent authority] that, in respect of any liabilities arising prior to the publication of the transfer proposal, the interests of creditors and holders of other rights in respect of the SE (*including those of public bodies*) have been adequately protected *in accordance with requirements laid down by the Member State* where the SE has its registered office prior to the transfer.” (italics added)

One question that naturally arises is, whether the intention of the Statute is to consider a national tax administration as a “creditor” and, if so, what does that imply as regards exit taxation?⁷⁹ Soler Roch predicts that “the most common rule will be to consider the position of the tax administration as a creditor only when the tax debt has been formally assessed and notified to the taxpayer”⁸⁰, an assumption that seems to suggest that the Statute does not necessarily support exit taxation, since those taxes are not assessed before the time of transfer.

Noteworthy in this context is, however, paragraph (16) of article 8, according to which an SE that has changed its residence shall still be considered a resident of the previous state in respect of legal cases regarding its actions in that state; that rule is applicable even if the company is sued *after* the transfer. As the paragraph uses the wording “any cause of action arising prior to the transfer” it can be considered whether that refers only to judicial action or also tax claims before the tax authorities.⁸¹

Another possibility for Member States wanting to prevent the transfer of an SE is enshrined in article 8(14): the laws of a Member State may provide that the transfer of an SE which would result in a change of the law applicable can be declined if it is opposed by a competent authority of the Member State.⁸² However, such opposition may only be based on grounds of public interest. It is not unlikely that Member States will try to claim that tax concerns constitute grounds of public interest. However, given the ECJ's strictness in cases where similar arguments have been used,⁸³ it will probably be very restrictive when interpreting this provision.

4.2.2 Change of residence

One of the more substantial advantages of the SEs is the possibility to move the registered office without being wound up. Since the SE Statute has the legal status of a Regulation, it is directly applicable in all Member States,⁸⁴ thus, issues regarding the legal consequences of a transfer are less likely to arise. However, as the Statute does not say anything about taxation, that area remains a national affair.

Only two of the EU's Member States (France and Luxembourg) allow a company to relocate its registered office, the others would either simply disregard a decision to move the seat or consider it as a winding up or liquidation.⁸⁵ Thus, a company's move of its registered office might trigger additional taxation like, for example, capital gains taxes.⁸⁶ The idea behind this kind of taxation is that it should be the privilege of the state, in which *e.g.* “undisclosed reserves” have accumulated, to tax such assets.⁸⁷ However, since the Regula-

⁷⁹ Soler Roch, *María Teresa* Tax residence of the SE p. 13.

⁸⁰ Soler Roch, *María Teresa*, *op. cit.* p. 13.

⁸¹ Soler Roch, *María Teresa*, *op. cit.* p. 14.

⁸² Soler Roch, *María Teresa*, *op. cit.* p. 14.

⁸³ See section 6.4.1.

⁸⁴ Article 249 of the EC Treaty.

⁸⁵ *Thömmes, Otmar* EC law aspects of the transfer of seat of an SE p. 23.

⁸⁶ Soler Roch, *María Teresa* Tax residence of the SE p. 14.

⁸⁷ *Mutén, Leif* Skatteprinciper och kollisionssnormer p. 53.

tion explicitly states that the transfer of the seat of an SE from one Member State to another shall not require the winding up or liquidation of the company, the logical consequence thereof would be that the company shall not be taxed as if such proceedings had taken place.⁸⁸

4.3 Summary

This chapter has shown that the question on mobility of companies is vital for the completion of the internal market. The SE Statute contains provisions on the opportunities to transfer an SE from one Member State to another; however, those opportunities may be of little worth if the transfer is connected with a heavy tax burden.

The next chapter will, through analysing the Swedish exit taxation rules, exemplify the tax consequences of an SE exercising its Statute-given right to move its seat from one Member State to another.

⁸⁸ *Thömmes, Otmar* EC law aspects of the transfer of seat of an SE, p. 23.

5 The Swedish exit tax legislation

5.1 Introduction

This chapter introduces the Swedish legislation regarding taxation of companies, and the Swedish exit taxation provisions. To understand the mechanisms of exit taxation is relevant for the analysis in chapter 7. The SE Statute is clear as regards the transfer of the registered office: an SE may transfer its registered office to another Member State, without being wound up.⁸⁹ The question is if, according to Swedish tax legislation, such a transfer will give rise to an extra taxation burden and, if so: do the Swedish provisions constitute an infringement on EC law?

5.2 Tax liability

According to the Income Tax Act, a legal person obtains unlimited tax liability whereas it is registered in Sweden, whereas its board of directors is seated in Sweden or whereas it, due to other circumstances, is to be considered a Swedish legal person.⁹⁰ Such companies are liable to tax on all their income, from Sweden and abroad.⁹¹

Limited tax liability applies to foreign legal persons,⁹² and implies that the company is liable to tax for income from *i.a.* permanent establishments or premises in Sweden.⁹³

Apparently, an SE which, in accordance with the SE Statute, is registered and has its head office in Sweden acquires unlimited tax liability and will thus be considered as a Swedish limited-liability company for tax purposes.

Nevertheless, it can be worthwhile mentioning that the SE Statute and the Swedish Income Tax Act do not use exactly the same definition of the SE's state of residence. The SE Statute requires that the registered office of the SE shall be located in the same Member State as its head office while in Swedish, given the wording of the relevant tax provisions, a company could possibly be deemed to full tax liability if the company's board is located in Sweden.⁹⁴ The question of whether this slight discrepancy might give rise to double-taxation situations will, however, not be discussed further since it is beyond the scope of this thesis.

5.3 Exit taxation

Exit taxation can occur in the case where a company is transferred to another state. In the EU, most Member States' tax legislations, irrespective of company law, impose taxes on companies that are moving cross-border; according to a survey conducted by the International Bureau of Fiscal Documentation, the only country that does not apply exit taxes is Portugal.⁹⁵ Several Member States (Austria, Greece, Ireland, Italy, Luxembourg, the Netherlands, Spain and the United Kingdom) do not apply exit taxes if a permanent establishment remains in the country, while others (Belgium, Denmark, Finland, France,

⁸⁹ Council Regulation No. 2157/2001, article 8(1).

⁹⁰ Income Tax Act, chapter 6, article 3.

⁹¹ Income Tax Act, chapter 6, article 4.

⁹² Income Tax Act, chapter 6, article 7.

⁹³ Income Tax Act, chapter 6, article 11.

⁹⁴ Income Tax Act, chapter 6, article 3.

⁹⁵ Survey of the Societas Europaea p. 37.

ment remains in the country, while others (Belgium, Denmark, Finland, France, Germany and Sweden) tax irrespective of whether a part of the business remains or not.⁹⁶

The Swedish provisions on exit taxation are found in chapter 22 of the Income Tax Act. They do not explicitly deal with the case where a company transfers its registered office abroad, since such a manoeuvre is unknown to Swedish legislation; the Companies Act does not, for example, contain provisions on companies transferring abroad. Since the Companies Act lacks exit provisions, consequently the Income Tax Act has no corresponding tax provisions to cover such cases. However, according to articles 2 and 7 of chapter 22, the transfer of assets from one business to another is considered a realisation of the assets.⁹⁷ Such a realisation is liable to tax as if the assets had been sold at market price. According to article 5, the same procedure applies when a business ceases to exist.

Therefore it can be assumed that if the seat of a Swedish SE is transferred to another Member State, that transfer is, for tax purposes, considered as a sale of the company's assets at market price, and taxed accordingly. Hence, the transfer of an SE's seat, in accordance with the provisions of the Regulation, from Sweden to another Member State, will most probably result in a heavy taxation burden that would not have occurred if the company had stayed in Sweden.⁹⁸

The motivation for the exit taxation appears to be the preservation of the tax base.⁹⁹ The preparatory works do not provide much information, which is not surprising given that the transfer of a company has not previously been legally recognised.¹⁰⁰

5.4 Summary

This chapter has established that Swedish SEs acquire unlimited tax liability in Sweden, and are thus taxed as other Swedish limited-liability companies. Consequently, if an SE wants to exercise its right to move to another Member State, Swedish tax legislation will consider the action as a realisation of the company's assets at market price, and the SE will be taxed accordingly.

⁹⁶ Survey of the Societas Europaea, p. 37.

⁹⁷ Cf. *Brandt, Peter* Sweden: ... pp. 80-81.

⁹⁸ See also *Ståhl, Kristina & Persson Österman, Roger* EG-skatterätt p. 110.

⁹⁹ *Riksskatteverket* Handledning för internationell beskattning p. 140.

¹⁰⁰ See for example Government Bills 1994/95:91, p. 47 *et seq.* and 1999/2000:2, part II, p. 296 *et seq.*

6 EC legislation on freedom of establishment

6.1 Introduction

In chapter 5, the consequences of the Swedish exit taxation rules for an SE transferring its registered office abroad were discussed. Since chapter 7 analyses whether those rules comply with Community law, it is necessary first to provide an overview of the relevant provisions of EC law. In order to find out which effect EC law will have on the Swedish exit taxation rules, this chapter aims at establishing the ECJ's current stance on similar issues.

According to the purposes of the European Community, as established by the EC Treaty, the Community "shall have as its task ... to promote throughout the Community a harmonious, balanced and sustainable development of economic activities ...".¹⁰¹

One of the most important means to achieve the common market and the "sustainable development" is *the four freedoms*, namely the free movement of goods, persons, services and capital. The four freedoms are enshrined in the EC Treaty, at the very beginning. Following article 3(1)(c), the activities of the Community shall include "an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital". These fundamental provisions shall be borne in mind, given that the ECJ interprets EC legislation in the light of the provisions of Community law as a whole (see above section 1.4).

The four freedoms are defined further in the Treaty. From the SEs' point of view, a particularly relevant freedom is the right of establishment. This freedom of movement is enshrined in article 43 EC:

"Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. 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." (italics added)

The emphasised lines indicate that the wording of the article provides that a Member State may not restrict a national from another Member State from establishing him-/herself in that Member State. As will be demonstrated below, a Member State may also not restrict a national from establishing him-/herself in another Member State. However, does article 43 also cover a situation where a national – say, a company – wants to *leave* the Member State in which it is resident? According to the wording of the article, the answer is not self-evident. Given the prevalence of exit taxation rules in Europe,¹⁰² and considering the transfer provisions of the SE Statute, it appears as if the matter sooner or later will be brought to a head in the ECJ. The issue will be discussed further in section 6.2.1 below.

It is also worth mentioning that, according to article 48 EC, 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 Community shall be treated in the same way as natural persons who are nationals of Member States. The second paragraph of article 43 EC relates the freedom of establishment to the conditions laid down for the Member State's own nationals. It could thus be assumed that, according to article 43, the

¹⁰¹ EC Treaty, article 2.

¹⁰² See section 5.3.

freedom of establishment is not infringed inasmuch as the person exercising the right of establishment is treated in the same way as a national.¹⁰³ However, as section 6.2.1 will show, the freedom of establishment is not that easily circumvented.

Since article 43 EC mentions “restrictions”, it must be established what a restriction is. Section 6.3 seeks to illustrate what kind of provisions the Court will consider as restrictions.

The abovementioned provisions constitute the legal framework for this thesis, as regards EC law.

6.2 The scope of the freedom of establishment

As indicated above (section 6.1), the freedom of establishment also applies to companies. A company that is registered in one Member State shall not be prohibited to, for example, set up a permanent establishment or a subsidiary in another Member State.

This can be illustrated by the 1997 *Centros*¹⁰⁴ case where the Court, it seems, applied a quite generous interpretation of article 43 EC. *Centros* concerned a Danish couple who had set up a private limited company in the United Kingdom, but was refused registering a branch of the company in Denmark. The motivation from the Danish authorities was that the company was not conducting any business in the United Kingdom, and that the establishment in Denmark was in fact a principal establishment. The arrangement with a UK-based parent company had as its only purpose to circumvent the Danish capital requirements for private limited companies (the capital requirement was much lower in the UK than in Denmark).¹⁰⁵ The Danish couple did not deny those allegations. Still, the Court held that “that does not, however, mean that the formation by that British company of a branch in Denmark is not covered by freedom of establishment”.¹⁰⁶ The Court ruled that while Member States are not precluded from adopting measures for preventing or penalising fraud, they may not refuse to register a branch of a company registered in another Member State.¹⁰⁷ The *Centros* case confirmed the ECJ’s stance in the mid-1980s *Segers*¹⁰⁸ case (“the fact that the company conducts its business through an agency, branch or subsidiary solely in another Member State is immaterial”¹⁰⁹), and it must thus be clear that as long as a company is registered in one Member State, Community law does not allow any restrictions on its freedom of establishment, irrespective of the location of its principal place of business.¹¹⁰

6.2.1 Cross-border transfers

While the Court has given the freedom of establishment a broad scope as regards individuals and companies *entering* a market, it is less obvious whether article 43 EC can be relied upon by persons *leaving* a market.

The question was raised in the *Daily Mail* case, which regarded a company that wanted to move its seat from one Member State to another for tax purposes. The ECJ had to decide

¹⁰³ *Craig, Paul & de Búrca, Gráinne* EU law p. 772.

¹⁰⁴ Case C-212/97 *Centros*, ECR 1999 p. I-1459.

¹⁰⁵ Case C-212/97 *Centros*, paras 3-7.

¹⁰⁶ Case C-212/97 *Centros*, para. 18.

¹⁰⁷ Case C-212/97 *Centros*, para. 39.

¹⁰⁸ Case 79/85 *Segers*, ECR 1986 p. 2375.

¹⁰⁹ Case 79/85 *Segers*, para 16.

¹¹⁰ Cf. *Craig, Paul & de Búrca, Gráinne op.cit.* p. 793.

whether articles 43 and 48 EC¹¹¹ preclude a Member State from prohibiting a company resident in that Member State from transferring its seat to another Member State, in order to avoid tax evasion.¹¹²

The Court also had to decide whether Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community should be applicable also on legal persons. According to the Directive, the Member States shall abolish restrictions on the movement and residence of nationals of a Member State who wish to establish themselves in another Member State.¹¹³ Furthermore, “Member States shall grant the persons referred to in Article 1 the right to leave their territory”.¹¹⁴

The *Daily Mail* case provides a number of interesting statements from the ECJ. The Court pointed out that the freedom of establishment secures the right for companies to establish themselves in another Member State,¹¹⁵ and that the provisions of article 43, although mainly directed to ensuring that foreign companies receive the same treatment as nationals, also prohibit the Member State of origin from hindering its companies to establish themselves in another Member State.¹¹⁶ The Court even said that “the rights guaranteed by Articles [43] et seq. would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State.”¹¹⁷

Still, the Court concluded that Directive 73/148/EEC is *not* applicable on legal persons, and that a right for companies to move their registered seat without restrictions (for example the settlement of tax claims) from the Member State in which they are registered cannot be derived from article 43 EC.¹¹⁸ The main reason for this conclusion seems to have been the lack of harmonised company law in Europe.¹¹⁹ Since the Court held that the question of whether a company is allowed to transfer its registered office from one Member State to another is a question that is “not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions”,¹²⁰ it did not directly deal with the question of whether a Member State is permitted to require settlement of a company’s tax position before leaving.

An indication was, however, provided in the *ICI*¹²¹ case, which was actually about the British legislation on consortium relief:

”It should also be pointed out that ... the provisions concerning freedom of establishment ... also prohibit the Member State of origin from hindering the establishment in another Member State of ... a company incorporated under its legislation ...”¹²²

¹¹¹ Actually articles 52 and 58 EEC; the new numbers are used for the sake of simplicity.

¹¹² Case 81/87 *Daily Mail*, ECR 1988 p. 5483, para. 9.

¹¹³ Directive 73/148/EEC, article 1(1).

¹¹⁴ Directive 73/148/EEC, article 2(1).

¹¹⁵ Case 81/87 *Daily Mail*, para. 15.

¹¹⁶ Case 81/87 *Daily Mail*, para. 16.

¹¹⁷ Case 81/87 *Daily Mail*, paras 15 and 16.

¹¹⁸ Case 81/87 *Daily Mail*, para. 25; cf. *Craig, Paul & de Búrca, Gráinne* EU law p. 795 and *Terra, Ben & Wattel, Peter* European Tax Law p. 41.

¹¹⁹ Case 81/87 *Daily Mail*, para. 23; cf. *Craig, Paul & de Búrca, Gráinne, op. cit.* p. 796.

¹²⁰ Case 81/87 *Daily Mail*, para. 23.

¹²¹ Case C-264/96 *ICI*, ECR 1998 p. I-4695.

¹²² Case C-264/96 *ICI*, p. 21.

Given the Court's statement in *Daily Mail* on "future legislation" and its position in the *ICI* case, it does not seem far-fetched to assume that the introduction of the SE Statute which, in fact, changes much of the legal context and takes the harmonisation of company law in Europe a leap forward, will put the *Daily Mail* case in a new light. Thus, it remains to be solved whether (a) the introduction of the SE Statute will lead to a change in the interpretation of the scope of article 43 EC, and (b) if so, whether exit taxation is such a restriction that can be prohibited according to that article.

6.3 Discrimination and restrictions

One of the fundamentals EC law is the principle of non-discrimination. The general anti-discrimination provision in this respect is article 12 EC, and article 43 EC is the special provision regarding freedom of establishment.

Discrimination usually occurs when non-residents do not receive the same treatment as nationals. Provisions that are discriminatory are generally not tolerated, and can only be justified with reference to article 46 EC, *i.e.* on grounds of public policy, public security or public health.¹²³

Although the difference is not clear-cut, there is a discrepancy between *discrimination* and *restriction*, discrimination generally referring to measures that result in the different treatment of nationals and non-nationals and restrictions referring to measures of equivalent effect. However, the Court's practice being somewhat confusing on the matter,¹²⁴ for the purpose of this thesis it should be sufficient to establish that the freedom of establishment does not only prohibit discrimination, but also restrictions on the free market, which will be demonstrated below.¹²⁵

While the wording of article 43 seems to suggest that it only prohibits restrictions based on nationality (*i.e.* discrimination), the ECJ has in its judgements extended the scope also to cover other impediments to the freedom of movement (and establishment), for example tax provisions that are not discriminatory *per se*, but still affect non-nationals or cross-border business relations and transactions negatively. Another example may be tax provisions that are constructed in a way that they deter nationals from establishing themselves in other Member States.¹²⁶ Those other impediments are referred to as restrictions, and the ECJ has proven hard to convince that such restrictions are motivated.

One example of this is the *Lankhorst-Hoborst*¹²⁷ case, in which the ECJ scrutinised a German tax provision, which treated the payment of interest from a subsidiary to a parent company differently depending on whether the parent company had its seat in Germany or abroad. An important conclusion of the Court was that "[t]he tax measure in question ... makes it less attractive for companies established in other Member States to exercise freedom of establishment and they may, in consequence, refrain from acquiring, creating or maintaining a subsidiary in the State which adopts that measure."¹²⁸

¹²³ *Terra, Ben & Wattel, Peter* European Tax Law p. 43.

¹²⁴ See section 6.4.

¹²⁵ *Terra, Ben & Wattel, Peter, op. cit.* pp. 41-42.

¹²⁶ *Ståhl, Kristina & Persson Österman, Roger* EG-skatterätt p. 85.

¹²⁷ Case C-324/00 *Lankhorst-Hoborst*, ECR 2002 p. I-11779.

¹²⁸ Case C-324/00 *Lankhorst-Hoborst*, para. 32.

In the *Lankhorst-Hoborst* case, the Court follows its reasoning from the *Kraus*¹²⁹ case of 1992. In that case, in which German national was refused by German authorities to use the academic title he had achieved in the United Kingdom, the Court ruled that articles 39 and 43 EC (ex articles 48 and 52 EEC)

“preclude any national measure ... where that measure, *even though it is applicable without discrimination on grounds of nationality*, is liable to hamper or to *render less attractive* the exercise by Community nationals ... of fundamental freedoms guaranteed by the Treaty.”¹³⁰

The expression “less attractive” appears to be rather vague, thus facilitating for relatively far-reaching interventions in the Member States’ tax legislation. The fact that the Court repeated the phrase in the *Lankhorst-Hoborst* case could probably be interpreted as an indication of the importance the Court attaches to safeguarding the freedom of establishment.

These cases clearly demonstrate two things, namely (a) that a national measure does not have to be *discriminatory* (i.e. to treat nationals and non-nationals differently) to be prohibited, and (b) that it is sufficient for a national measure to render the Treaty freedoms *less attractive* for the Court to consider it in breach of EC law.¹³¹

As mentioned above,¹³² exit taxation rules are not uncommon among the EU Member States. They apply on individuals as well as companies. In the *de Lasteyrie*¹³³ case, the Court had to rule on French exit tax rules concerning nationals moving abroad. Such persons were taxable on the (latent) increases in value of company securities in their possession, irrespective of whether they were realised or not. If the taxpayer had remained in France, he/she would have been taxed after the increases in value had actually been realised. The Court held that even though the French tax provisions did not prevent the taxpayer from moving abroad, they were nevertheless restricting the exercise of the right of establishment, “having at the very least a dissuasive effect on taxpayers wishing to establish themselves in another Member State”.¹³⁴ Furthermore, the Court said that the tax liability arises simply by reason of the transfer, and applies to income which has not been realised.¹³⁵ The Court found the French provision a restriction to the freedom of establishment and, after having applied the “rule of reason” arguments, did not find it justifiable and ruled that mechanisms “for taxing latent increases in value ... where a taxpayer transfers his tax residence outside [the Member State]” are precluded.¹³⁶

This case is interesting for the purpose of this thesis since it deals with exit taxation, even though the taxpayer in question is not a company but an individual. In my opinion, it seems as though the Court has further clarified what constitutes a restriction; in the abovementioned *Kraus* and *Lankhorst-Hoborst* cases the Court used the phrase “less attractive”, and in *de Lasteyrie* the Court disregarded tax provisions that had a “dissuasive” effect on taxpayers wanting to establish themselves abroad. The definition of a restriction indeed appears to be very wide.

Finally, an interesting statement of the Court in the *Lankhorst-Hoborst* case can be highlighted:

¹²⁹ Case C-19/92 *Kraus*, ECR 1993 p. I-1663.

¹³⁰ Case C-19/92 *Kraus*, para. 32; italics added.

¹³¹ Cf. *Terra, Ben & Wattel*, *Peter European Tax Law* p. 44.

¹³² See section 5.3.

¹³³ Case C-9/02 *de Lasteyrie*, ECR 2004.

¹³⁴ Case C-9/02 *de Lasteyrie*, para. 45.

¹³⁵ Case C-9/02 *de Lasteyrie*, para. 46.

¹³⁶ Case C-9/02 *de Lasteyrie*, para. 69.

“It should be remembered that, according to settled case-law, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law ...”¹³⁷

This statement, which has been reiterated time and again,¹³⁸ indicates that the Court will not hesitate to overrule national tax provisions if they are considered impediments to the free market. Furthermore, it is a reminder that Community law prevails over incompatible domestic law.¹³⁹

6.4 Can restrictions be justified?

While discriminatory provisions in general are not tolerated, Community law also admits that there are situations in which such provisions must be accepted. Article 46 EC provides justification grounds based on public policy etc., and the ECJ has developed a method called the “rule of reason”. These methods are described below.

It should be noted here that even though the “rule of reason” appears to aim primarily at measures that are indirectly discriminatory, the Court’s case-law is not satisfactorily clear.¹⁴⁰ Since I do not consider the distinction to be of major significance for this thesis, the “rule of reason” doctrine is henceforth considered as connected to indirect discrimination/restrictions.

6.4.1 Justification under the Treaty

According to the Treaty, there is one way to justify measures that do not comply with article 43, namely through article 46, which provides that national provisions, according to which nationals and non-nationals are treated differently, can be accepted in so far as they are motivated “on grounds of public policy, public security or public health”. This exception has, however, been given a very narrow interpretation by the Court.

The Court has, for example, in the *Bond van Adverteerders*¹⁴¹ case said that “economic aims ... cannot constitute grounds of public policy”.¹⁴² That case regarded the freedom to provide services, but a similar stance was taken in the *ICI*¹⁴³ case, where the Court held that “diminution of tax revenue ... is not one of the grounds listed in Article [46] of the Treaty and cannot be regarded as a matter of overriding general interest which may be relied upon in order to justify unequal treatment that is, in principle, incompatible with Article [43] of the Treaty.”¹⁴⁴

In the case *R v Bouchereau*,¹⁴⁵ the Court held that exceptions based on public policy etc. must constitute a “genuine and sufficiently serious threat to the requirements of public policy af-

¹³⁷ Case C-324/00 *Lankhorst-Hoborst*, para. 26.

¹³⁸ See for example cases C-246/89 *Commission v United Kingdom*, ECR 1991 p. I-4585, para. 12; C-279/93 *Schumacker*, ECR 1995 p. I-225, para. 21; C-80/94 *Wielockx*, ECR 1995 p. I-2493, para. 16; C-250/95 *Futura*, ECR 1997 p. I-2471, para. 19 and C-391/97 *Gschwind*, ECR 1999 p. I-5451, para. 20.

¹³⁹ *Terra, Ben & Wattel, Peter* European Tax Law p. 29.

¹⁴⁰ See the opinion of the Advocate-General in case C-136/00, paras 34-41, particularly para. 37.

¹⁴¹ Case 352/85 *Bond van Adverteerders*, ECR 1988 p. 2085.

¹⁴² Case 352/85 *Bond van Adverteerders*, para. 34.

¹⁴³ Case C-264/96 *ICI*, ECR 1998 p. I-4695.

¹⁴⁴ Case C-264/96 *ICI*, para. 28.

¹⁴⁵ Case 30/77 *R v Bouchereau*, ECR 1977 p. 1999.

fecting one of the fundamental interests of society”.¹⁴⁶ However, even though the Court has set up high demands for a national provision to be justified according to article 46, uncertainty remains. How shall, for example, “fundamental interests of society” be defined? Apparently, and unfortunately, there is still some room for manoeuvre and the matter has to be decided from case to case.

6.4.2 Justification under the “rule of reason”

In parallel with article 46, the Court has developed another method to determine whether a restrictive measure can be justified, probably because the grounds of justification offered by the Treaty are too narrow to prohibit restrictions in the public interest that are not mentioned therein.¹⁴⁷ This judge-made method is called “rule of reason” and was introduced in the *Cassis de Dijon*¹⁴⁸ case of 1978, which regarded the free movement of goods. In *Cassis de Dijon* the Court established that restrictions to movement within the Community can be accepted if they are necessary “to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer”.¹⁴⁹

Thereafter, the “rule of reason” test has been modified so as to apply to all Treaty freedoms. In the *Gebhard*¹⁵⁰ case, which concerned a German national who was working as a lawyer in Italy although his formal and practical qualifications were not recognised in Italy, the Court ruled that “national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions:

- they must be applied in a non-discriminatory manner;
- they must be justified by imperative requirements in the general interest;
- they must be suitable for securing the attainment of the objective which they pursue; and
- they must not go beyond what is necessary in order to attain [the objective]...”¹⁵¹

Thus, the Court set up certain requirements that must be met if a national provision shall be accepted. What is worth emphasising is that the Court did not only disregard provisions that are discriminatory, but also provisions that make the exercise of the fundamental freedoms “less attractive” or have a “dissuasive effect” on taxpayers wishing to establish themselves abroad (see above section 6.4 and below section 7.3). It appears, at least in the light of the cases referred to above, that the Court is prepared to go far to secure the freedom of establishment.

Both of the cases *Kraus* and *Gebhard* concerned individuals. However, the principles derived from them, as regards discriminatory provisions, can probably, with the support of article 48 EC, apply also on legal persons.

¹⁴⁶ Case 30/77 *R v Bouchereau*, para. 35.

¹⁴⁷ *Terra, Ben & Wattel, Peter*, *op. cit.* p. 31-32.

¹⁴⁸ Case 120/78 *Cassis de Dijon*, ECR 1979 p. 649.

¹⁴⁹ Case 120/78 *Cassis de Dijon*, para. 8.

¹⁵⁰ Case C-55/94 *Gebhard*, ECR 1995 p. 4165.

¹⁵¹ Case C-55/94 *Gebhard*, para. 37; indents added.

6.4.2.1 Imperative requirements?

The second justification ground according to the “rule of reason” requires further attention, since it is far from self-evident what an imperative requirement is. There is no exhaustive list available, but the Court has in its case-law recognised at least three types of so-called imperative requirements.

One is the need to preserve *the cohesion of the tax system*. This principle was established in the *Bachmann*¹⁵² case, which concerned Belgian tax provisions on deductibility of payments of insurance contributions. The tax deductions were only granted to contributions paid to Belgian insurance companies, which undoubtedly was a restriction on the free market. However, the deductibility was connected to tax liability when the insurance money was paid to the insurer, and because of this direct connection, the Court held that the restriction in issue was acceptable “by the need to preserve the cohesion of the applicable tax system”.¹⁵³

However, in the light of the Court’s subsequent judgements, the *Bachmann* ruling seems to have been an isolated case. There are many cases where Member States have sought to justify restrictions on grounds of the cohesion of the tax system, but the Court has been very strict on allowing exceptions on basis of the coherence of the tax system.¹⁵⁴

Another argument the Court has recognised as an imperative requirement is *the effectiveness of fiscal supervision*. In the *Futura*¹⁵⁵ case, the Court held that

“...the effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the exercise of fundamental freedoms guaranteed by the Treaty”¹⁵⁶

Here, the Court used the expression “overriding requirement of general interest”, but it refers to the same thing; fiscal supervision can, on principle, be considered as an imperative requirement and, thus, justify restrictions.

However, the Court has almost on a regular basis dismissed that argument with reference to the Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation. Apparently, while the Court held that effectiveness of fiscal supervision is a reasonable argument *per se*, it also recognises that the Directive should provide a means for Member States to solve such issues without imposing a heavy burden on the individual.”¹⁵⁷

The third type of argument that the Court has accepted is the argument of *preservation of the tax base*. That argument was considered *i.a.* in the *ICI* case, where the Court held that

“diminution of tax revenue ... is not one of the grounds listed in Article [46] of the Treaty and cannot be regarded as a matter of overriding general interest which may be relied upon in order to justify unequal treatment that is, in principle, incompatible with Article [43] of the Treaty”¹⁵⁸

¹⁵² Case C-204/90 *Bachmann*, ECR 1992 p. I-249.

¹⁵³ Case C-204/90 *Bachmann*, para. 35.

¹⁵⁴ See for examples cases C-80/94 *Wielockx*, para. 24; C-294/97 *Eurowings*, para. 42; C-35/98 *Verkooijen*, paras 56-58; C-136/00 *Danner*, ECR 2002 p. I-8147, para. 37 and C-324/00 *Lankhorst-Hoborst*, paragraphs 39-42.

¹⁵⁵ Case C-250/95 *Futura*, ECR 1997 p. I-2471.

¹⁵⁶ Case C-250/95 *Futura*, para. 31.

¹⁵⁷ See for example cases C-250/95 *Futura*, para. 41 and C-136/00 *Danner*, paras. 66 and 75.

¹⁵⁸ Case C-264/96 *ICI*, para 28.

Apparently, the Court prioritises the achievement of a well-functioning internal market before the tax claims of individual Member States.

6.5 Summary

The freedom of establishment is one of the fundamental freedoms enshrined in the EC Treaty in order to achieve the common market. The freedom of establishment is found in article 43 EC and it primarily aims at hindering Member States from discriminating or restricting the establishment of foreign companies. However, the Court's case-law has given article 43 EC an extensive scope. It must be considered settled, that article 43 also prohibits Member States from restricting national companies from establishing themselves abroad. The Court has overruled such restrictions, and established that even a national measure that only makes the exercise of the freedom of establishment less attractive can be overruled. Even in cases where the freedom of establishment has been used to circumvent national provisions, the Court has overruled objections from national authorities.

There are ways to justify restrictive measures. The Treaty justification in article 46 EC is very strict, but the Court has developed the "rule of reason" which gives Member State another option to justify restrictive measures. However, neither under the "rule of reason" are justifications granted generously.

Given the current scope of article 43, there are substantial reasons to question whether exit taxation rules comply with EC law. The next chapter analyses the compliance with EC law of the Swedish exit taxation rules.

7 Does the Swedish exit taxation infringe EC law?

7.1 Introduction

When analysing the consistency of the Swedish exit taxation with EC law, a number of questions must be addressed. Does the exit taxation constitute a restriction to the freedom of establishment? If so, in what way? Can the Swedish tax law be justified? This chapter aims at providing answers to these questions.

7.2 Is the Swedish exit taxation discriminatory?

The easiest way to determine if the Swedish exit taxation infringes EC law would be to find a way to establish that it is directly discriminatory, since such provisions are explicitly prohibited by article 43 of the EC Treaty, and can only be justified on grounds of public policy, public security and public health. However, as demonstrated in chapter 5, the Swedish exit taxation applies to all companies wanting to emigrate from Sweden; thus, discrimination on grounds of nationality can not be the case.¹⁵⁹

7.3 Is the Swedish exit taxation a restriction?

According to the Court's judgement in *Daily Mail*¹⁶⁰, it seems settled that Community law prevents a Member State from hindering the establishment of a company in another Member State, through so-called home-state restrictions. The subsequent question is: does the Swedish exit taxation constitute such a prohibited restriction?

In the *Kraus* and *Lankhorst-Hoborst* cases,¹⁶¹ the Court ruled that measures that make the exercise of Treaty freedoms (*i.a.* the freedom of establishment) *less attractive* constitute restrictions that are, on principle, not allowed in the internal market.

Moreover, in the *de Lasteyrie* case¹⁶² the Court held that one feature of the French exit taxation rules (on individuals) is that taxation arises simply by reason of transfer, and acknowledged that such a circumstance is likely to *dissuade* taxpayers wishing to establish themselves in another Member State. The French exit taxation provisions were considered as a restriction and they could not be justified by the "rule of reason". Although the design of the Swedish exit taxation rules are not identical with the French rules in issue, the principles upon which they build are the same and the effects are similar – the transfer triggers taxation that would not have occurred in a *status quo*, and the taxpayer is discouraged to exercise his/her Treaty freedoms.

Given this background, and considering the conclusions drawn in chapter 5 that the Swedish exit taxation will make the transfer of the seat of an SE to another Member State a project that is extremely burdensome for the company, thus rendering the exercise of the freedom of establishment less attractive, I hold that the ECJ – bearing the provisions of the SE Statute in mind – will consider those tax rules a restriction to the freedom of establishment.

¹⁵⁹ Cf. *Terra, Ben & Wattel, Peter* European Tax Law, p. 33.

¹⁶⁰ See above section 6.2.1.

¹⁶¹ See above section 6.3.

¹⁶² See above section 6.3.

7.4 Can the Swedish exit taxation be justified?

7.4.1 Treaty justification

As mentioned above,¹⁶³ article 46 EC provides an opportunity to justify restrictions on grounds of public policy, public security or public health. As established in section 7.2, the Treaty justification is primarily focusing on directly discriminatory provisions and since the Swedish exit taxation is not directly discriminatory, Treaty justification is probably not applicable.

Still, it may be mentioned that in order to try to justify the exit taxation, one thinkable line of argumentation could be to refer to public policy. It should be sufficient to note that the Court has been very strict on allowing exemptions on grounds of public policy, and has established that economic aims cannot motivate a restriction on public policy. Together with what was said in section 6.4.1 on the Court's strict interpretation of the Treaty justifications, it appears as though the Court would hardly justify exit taxation rules under article 46 EC. What remains then is the "rule of reason" test.

7.4.2 The "rule of reason" test

Section 6.4.2 described the judge-made "rule of reason" test, according to which national measures constituting indirect discrimination and restrictions can be accepted if they comply with a number of criteria. The measures must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.¹⁶⁴ This section will examine the Swedish exit taxation in the light of those criteria, in order to find out if it can be justified.

7.4.2.1 Non-discriminatory?

As a matter of fact, Terra and Wattel submit that "[i]n the direct tax field, a good example of ... non-discriminatory but nonetheless restrictive measures are exit taxes..."¹⁶⁵ The reason for this is that the rules do not primarily work to the detriment of non-nationals; they are applicable to *all* companies wanting to emigrate from Sweden. If they had been directly discriminating, they would have been prohibited according to article 43 EC ("restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited") and could only be justified on the Treaty-given grounds of public policy, public security or public health (article 46 EC).¹⁶⁶ Since the exit taxation rules are non-discriminatory, it appears as if they would pass the first criterion.

7.4.2.2 Imperative requirements in the general interest?

Can the exit taxes be justified on the grounds of being imperative requirements in the general interest? In its defence of the exit taxation, the Swedish government is likely to try the arguments that have been used thus far: fiscal cohesion (as established in *Bachmann*¹⁶⁷), ef-

¹⁶³ See section 6.4.1.

¹⁶⁴ Case C-55/94 *Gebhard*, para. 37.

¹⁶⁵ *Terra, Ben & Wattel*, *Peter European Tax Law* p. 33.

¹⁶⁶ Case C-311/97 *Royal Bank of Scotland*, ECR 1999 p. I-2651, para. 32.

¹⁶⁷ Case C-204/90 *Bachmann*.

fectiveness of fiscal supervision (which was considered in *Futura*¹⁶⁸) and the preservation of the tax base (considered in *ICI*¹⁶⁹).¹⁷⁰

The *Bachmann* case, in which the Court ruled that tax provisions that are discriminatory *per se* can be justified by the need to preserve the cohesion of the tax system, concerned a physical person, but the principle applies also in the field of company taxation. According to Terra and Wattel, the *Bachmann* case is “extremely important because in principle it allows national ... exit taxes upon emigration of the taxpayer and/or of his assets, even where such national measures restrict the exercise of Treaty Freedoms, provided the measure is appropriate and proportionate.”¹⁷¹ Moreover, Terra and Wattel seem to be of the opinion that it can be derived from the *Bachmann* case that such restrictions can be justified on the basis of fiscal cohesion. Although they acknowledge that exit taxes constitute “serious hindrances to the exercise of the Treaty Freedoms, as they require payment of cash which is not there”,¹⁷² they also suggest that “[t]he requirement of final settlement of deferred tax and of uncrystallized capital gains upon emigration ... is not directly or indirectly discriminatory”.¹⁷³

However, the recent *de Lasteyrie* case,¹⁷⁴ where the ECJ disregarded French exit taxation rules because they were considered a restriction, indicates otherwise; the Court held that the rules, that were designed to prevent tax avoidance, could not be justified with the *Bachmann* principle.¹⁷⁵

Furthermore, the Court has repeatedly held that a precondition for justification on the ground of cohesion of the tax system, there is a need for a *direct link* between the grant of a tax advantage and the offsetting of that advantage by a fiscal levy.¹⁷⁶ Since the Swedish exit taxation rules do not contain any references to deferred taxes etc. – they apply irrespective of whether a company has uncrystallised gains or not – that link does not seem to be direct enough. Moreover, as one of the objectives of the SE Statute is, to provide a vehicle for facilitating for pan-European businesses, many arguments speak against the Swedish tax rules.

Another argument that has been brought forward in the “rule of reason” doctrine is the effectiveness of fiscal supervision, with reference to the necessity of preventing tax avoidance.¹⁷⁷ However, the Court has been reluctant to accept that argument since there is a Directive providing for mutual assistance between the Member States as regards information on tax payers. Furthermore, the Court has said that the transfer of a person’s residence does not, in itself, imply tax avoidance, and such a transfer can not justify fiscal measures that restrict the freedom of establishment.¹⁷⁸ It thus seems unlikely that the Court would accept the Swedish exit taxation on those grounds.

¹⁶⁸ Case C-250/95 *Futura*.

¹⁶⁹ Case C-264/96 *ICI*.

¹⁷⁰ See section 6.4.2.1.

¹⁷¹ *Terra, Ben & Wattel*, Peter European Tax Law p. 67.

¹⁷² *Terra, Ben & Wattel*, Peter, *op. cit.* p. 67.

¹⁷³ *Terra & Wattel 2001*, *op. cit.* p. 70.

¹⁷⁴ See section 6.3.

¹⁷⁵ Case C-9/02 *de Lasteyrie*, para. 63.

¹⁷⁶ See cases C-35/98 *Verkooijen*, ECR 2000 p. I-4071, para. 57 and C-168/01 *Bosal*, ECR 2003, para. 29.

¹⁷⁷ See section 6.4.2.1.

¹⁷⁸ See, for example, case C-9/02 *de Lasteyrie*, para. 51.

Does the Swedish exit taxation infringe EC law?

As regards the preservation of the tax base, the Court has repeatedly held that the diminution of tax revenue is not a matter of overriding general interest which may be relied upon to justify restrictions.¹⁷⁹ For the Court it appears sufficient that the taxpayer is liable to tax under some jurisdiction; the Court is not interested in upholding the tax claims of individual Member States.

Thus, the road of justification with reference to preservation of the tax base appears to be closed, although scholars suggest otherwise; according to Mutén's opinion, every state is, on principle "free to decide, that the relocation of an enterprise leads to exit taxation. The idea behind such an order is that the state, in which undisclosed reserves have accumulated, should have the right to tax them."¹⁸⁰

However, Mutén also submits that such provisions are "not compatible with the principles of the common market".¹⁸¹ Ståhl and Persson Österman appear to share Mutén's opinion. Considering the *Bachmann* principle, according to which tax rules aiming at safeguarding that tax credits are dissolved in the same country they have arisen are acceptable, together with the Court's acceptance on principle of the argument of fiscal supervision, Ståhl and Persson Österman assume that also regulations like the Swedish exit taxation provisions can be justified. Their arguments build upon the same idea as Mutén's, namely that the taxation right on undisclosed reserves should be bestowed upon the state in which they have accumulated.¹⁸² Also Terra and Wattel share that opinion: "[t]he tax claim on uncystallized gains attaches to the territory of departure and should therefore be paid in that territory".¹⁸³

Still, it appears that the Court is very restrictive in terms of accepting such tax obstacles and, thus, that it will require a very convincing argumentation for the Court to accept the Swedish exit taxation. I would say that the *de Lasteyrie* case strongly indicates in what direction the Court's case law is heading in the field of exit taxation.

7.4.2.3 *Suitable and not too far-reaching?*

Another step that must be taken in order to determine whether the exit taxation can be justified is to clarify if the rules are suitable for their purpose; in this case, apparently, to make sure that the tax base is not eroded. That the exit taxation serve its purpose seems reasonable; if a company wants to emigrate, its assets are taxed at market value. Thus, a relevant share of the value added due to the company conducting business in Sweden, remains in the country.

However, does the exit taxation go beyond what is necessary to attain its purpose? According to Terra and Wattel, exit taxation should be accepted in so far as it does not go "further than necessary" to realise tax claims that have accrued within the jurisdiction.¹⁸⁴ The question that arises is, naturally, what is "necessary"? This must be settled, presumably through case-law, and, since one aim of exit taxation rules appears to be to prevent tax evasion, a statement made by the Court in the *avoir fiscal* case could provide some guidance:

¹⁷⁹ See section 6.4.2.1.

¹⁸⁰ Mutén, *Leif* Skatteprinciper och kollisionsnormer p. 53; my translation.

¹⁸¹ Mutén, *Leif*, *op. cit.* p. 53; my translation.

¹⁸² Ståhl, *Kristina* & Persson Österman, *Roger* EG-skatterätt, p. 133-134.

¹⁸³ Terra, *Ben* & Wattel, *Peter*, *European Tax Law* p. 70.

¹⁸⁴ Terra, *Ben* & Wattel, *Peter* *European Tax Law*. p. 70.

Does the Swedish exit taxation infringe EC law?

“the risk of tax avoidance cannot be relied upon in this context. Article [43] of the [EC] Treaty does not permit any derogation from the fundamental principle of freedom of establishment on such a ground.”¹⁸⁵

In the *de Lasteyrie* case, the Court held that the French exit taxation rules, designed to prevent a taxpayer from avoiding tax through transferring his/her tax residence, were too coercive; the objective envisaged could be achieved by measures that were less restrictive of the freedom of establishment.¹⁸⁶

Together with the Court’s statement in *avoir fiscal*, it seems reasonable to assume that the Court would consider the tax consequences of a company transferring its seat from Sweden to another Member State to be too far-reaching, and that the exit taxation would, thus, be disregarded.

Parenthetically, it can be pointed out that there could be other solutions to the issue of tax evasion. Terra and Wattel suggest that Member States could lift the burden from individual tax payers, by creating a Community-wide system of transferring exit State claims to influx States and then, through a clearing system, even the tax claims out.¹⁸⁷

7.4.3 Other remarks

The debate on exit taxation reveals a clash between on the one side the almost sacred state sovereignty on taxation, and on the other side the general aim of the EU – to provide an internal market, where capital can flow freely across borders and where enterprises enjoy an unrestricted freedom of establishment.

In the absence of a substantial common tax policy, the European Court of Justice is the self-appointed *de facto* legislator which, through (from time to time) extensive interpretation of treaties and directives, forces European integration to move forward.¹⁸⁸ This has been demonstrated in a number of cases, and with the introduction of the SEs the Court will probably have to deal with exit taxation provisions in many cases.

7.5 Summary

The effect of the Swedish exit taxation is that SEs attempting to exercise the right to move their seat, as granted by the Council Regulation on SEs, will have to face a heavy tax burden which would not have occurred if they had stayed in Sweden. Thus, the Swedish exit taxation rules constitute a restriction to the freedom of establishment. Such restrictions can be justified by means of the ECJ’s “rule of reason” test. While the Swedish exit taxation complies with some of the criteria set up under the “rule of reason”, other criteria are not met. Although many scholars seem to agree that exit taxation is an essential part of every

¹⁸⁵ Case 270/83 *avoir fiscal*, ECR 1986 p. 273, para. 25.

¹⁸⁶ Case C-9/02 *de Lasteyrie*, para. 54.

¹⁸⁷ Terra, Ben & Wattel, Peter, *op. cit.* pp. 70-71.

¹⁸⁸ Ståhl, Kristina & Persson Österman, Roger EG-skatterätt p. 93 *et seq.*

Does the Swedish exit taxation infringe EC law?

Member State's legitimate claim to preserve its tax base, the Court's case-law strongly indicates that exit taxation will not be tolerated.

8 Conclusions

The new form of incorporation that is introduced in Europe in October 2004 will probably not revolutionise the EU's internal market, but it will provide a vehicle for pan-European companies that want to conduct business under a more harmonised corporate framework. This thesis has introduced some of the features of the *Societas Europaea*, with focus on the taxation aspects.

The efficient functioning of the internal market of today is hampered by a number of tax obstacles on cross-border economic activities, for example dividends, loss-compensation and business re-organisations. Since the EU's Member States could not reach an agreement on a common taxation policy for SEs, the SE Statute excludes taxation issues. Thus, the introduction of SEs will not imply a harmonised European taxation scheme for pan-European businesses, and a several tax obstacles will remain.

However, despite the fact that the SE Statute does not cover taxation issues, the SEs will probably enforce tax harmonisation, at least in some areas. This thesis has dealt with the provisions of the SE Statute that gives the SE an opportunity to move its registered office from one Member State to another, with retained legal personality and without being wound up or liquidated. In some countries, those provisions clash with so-called exit taxation rules, *i.e.* national tax provisions which impose taxes on companies transferring abroad that would not have been imposed if the company had stayed in the state.

Sweden is one Member State that imposes such exit taxes. The case of a company moving abroad with retained legal personality – which, given the Statute's status as a Regulation, is now Swedish law – has previously not been recognised by Swedish legislation and such a transfer will, for tax purposes, be considered as a winding up of the company, which triggers taxation. Such measures will, obviously, render SEs less prone to exercise their legal right to transfer their registered office to another Member State.

One of the fundamental objectives of the European Community is the establishment of an internal market in which goods, persons, services and capital can move freely. In order to safeguard those freedoms, the EC Treaty contains a number of provisions that prohibit national measures that restrict the freedoms. As regards the transferability of SEs, article 43 EC is highly relevant. According to that article, a Member State is not entitled to impose restrictions on nationals of other Member States establishing themselves in that state. According to settled case-law, the same goes for restrictions preventing nationals from establishing themselves abroad. Those rules apply on individuals as well as legal persons.

The most central issue for this thesis has been, if the Swedish exit taxation rules constitute an infringement on EC law. In this context it must be remembered that the Court has concluded that even a measure that only makes it *less attractive* for companies to establish themselves in other Member States are prohibited. The Court has repeated this statement a number of times, and it must thus be considered established practice. The analysis of the exit taxation revealed that it most certainly makes the exercise of the freedom of establishment less attractive, and it appears clear that the Court will consider the rules a restriction.

According to the Treaty, national measures restricting the four freedoms can be justified in so far as they are motivated on grounds of public policy etc. The Court has, however, set up very high demands for justifying measures on those grounds. However, the Court has on its own developed another method for justifying restricting national measures, namely

Conclusions

the so-called “rule of reason” principle. According to that principle, measures can be accepted if they comply with a number of criteria set up by the Court.

The analysis of whether the Swedish exit taxation can be justified by the Treaty showed that the demands of the Court are too high for such a justification to seem likely. What then remains is justification according to the rule of reason.

The rule of reason principle consists of four steps: are the measures applied in a non-discriminatory manner?; are they justified by imperative requirements in the general interest?; are they suitable for securing the attainment of the objective which they pursue? and do they go beyond what is necessary to attain the objective?

As regards the first step, it shall be noted that discrimination occurs when nationals and non-nationals are treated differently. The Swedish exit taxation rules do not, and they will therefore pass the first criterion.

A more complex issue is whether the rules constitute an imperative requirement in the general interest. First, it is not very easy to determine what an imperative requirement is. In the taxation field, the Court has acknowledged three types of justifications that can be considered imperative requirements: fiscal cohesion, preservation of the tax base and fiscal supervision. Fiscal cohesion requires an obvious and direct link between one part of the tax system (*e.g.* a tax deferral) and another (*e.g.* the postponed payment of that deferral), and the Court has been very strict on allowing exceptions based on fiscal cohesion. Though fiscal supervision is considered a good argument, much of the ground for that argumentation vanishes due to the existence of a Directive on mutual information exchange between tax administrations. As regards the preservation of the tax base, the Court has stated that diminution of tax revenue is not an overriding general interest.

The third step asks whether the exit taxation is suitable for attaining its objective, and – assuming that the primary objective is to avoid fiscal evasion – the effect of the exit taxation is, undoubtedly, that companies will think twice before exercising their right to transfer their registered office. However, the Swedish measures are very far-reaching, and the Court would probably hold that they go beyond what is necessary to attain their objective.

Conclusively, it seems that strong arguments speak against the Swedish exit taxation rules, and that they – in their current form – will be disregarded if they are scrutinised by the ECJ. The SE Statute, which enters into force on October 8, 2004, is from then Community law, and since it entitles SEs the right to transfer from one Member State to another, exit taxation rules with as heavy implications as the Swedish can hardly be considered consistent with Community law.

8.1 Final remarks

I assume that the introduction of *Societas Europaea* will not revolutionise the European corporate milieu. Due to political compromise, the Statute has been deprived of many features that would render SEs attractive – for example a common tax policy. As was already concluded by the Ruding Report in 1992, tax barriers constitute one of the most serious impediments on intra-Community cross-border activities. However, despite lobbying efforts by the Commission and other actors, the Council has not been able to reach a consensus on taxation. Given the great vision of a well-functioning and efficient internal market, that must be considered a failure.

Conclusions

Nevertheless, the SE Statute also implies some progress; as noted, pan-European businesses now can set up a network of subsidiaries that is a bit more harmonised, and the transfer provisions that have been the topic of this thesis, facilitate intra-community company migration. Perhaps the pressure on the Member States to harmonise their corporate tax systems increases, as companies can move more easily from one country to another. Furthermore, as shown, the case-law of the ECJ seems to point in the same direction. The decisions of the Court has already caught the Member States by surprise in a number of cases, and taking into consideration statements of the Court which indicate a continuing strictness in allowing obstacles in the internal market it can almost be suspected that the Court has more or less decided to force through the internal market.

In a White Paper of 1985 to the European Council, the Commission noted that “[t]he removal of fiscal barriers may well be contentious”.¹⁸⁹ Today, almost twenty years later, that observation appears more true than ever.

¹⁸⁹ Completing the Internal Market, COM (85) 310.
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