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Taxation effects to consider when conducting a cross-border EC acquisition -tax evasion through acquisition

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Contents

Summary

This thesis aims at presenting a comprehensive assessment of the situation surrounding a cross-border EC acquisition with merging reconstructural features.
It reviews the shifting business structures of entities within the Union and through the eyes of a fictive case, involving a Swedish legal entity acquiring a German cooperation discussing possible scenarios that will have to be confronted by the entity due to the acquisition.
A presentation of the fictive case initiate after the introductory chapter holding the introductory observation that even though it may not receive a clear and decisive answer will constitute the binding element of the thesis.

Subsequent to this conducts, legislation and legislative dilemmas are assessed in turn.
First the civil law aspect of mergers and acquisitions is swiftly presented, the main objective being focused on how to conduct a merger in terms of what practical issues that ought to be considered precedent, pendent and subsequent to the transaction takes place.

Then a presentation of legislation affecting the procedure is delivered, mainly with the focus on EC law, the Merger directives enactment and underlying incentives for this.
At this point in the thesis we have arrived at the real assessment to the question at issue instigate, covering in turn the relevant merging options accounted for by the directive.
Continuing with a revision of regulations on how the said acquisition should be taxed in accordance to Swedish, German and EC legislation.
General tax problems due to the ascribed circumstances have also been revised. My incentive in this part has been to present a versatile exposition of the thesis covering both direct and long-term effects of the transaction as well as company and shareholder taxation dilemmas, offsetting of losses, the risk of double taxation and other relevant situations due to the cross border restructuring.

Evaluating the accepted precaution measures imposed by the member states, in proportionality to upholding a level playing field of fiscal cohesion throughout the Union. One may through a concluding with a theoretical analysis of the tempting frontier between the generally accepted taxation avoidance and illegal evasion situations that might arise in association with cross border activity.

Abbreviations

ABL	Aktiebolagslagen (Swedish company act)
AG	Advocate General
AL	Anslutningslag (Swedish Annexation law)
CFC	Controlled foreign company (cooperation)
EC	European community
EEC	European Economic Community
ECJ	European court of justice
EC MC	Model tax conventions of the European community
EU	European Union
GATT	General Agreement on tariffs and trade
HST	Home state taxation
IL	Inkomstskattelagen (Swedish income tax act)
OECD	Organisation for economic cooperation and development
P	page
Para	paragraph
PE	Permanent establishment
Prop	Proposition (Swedish government bill)
PS	Partnership
RF	Regeringsformen
RÅ	Regeringsrättens årsbok (Sweden)
SE	European company (Societas Europeaea)
SOU	Statens offentliga utredningar (The Swedish government official report)
Union	European Union
Vol	Volume

1 Introduction

In the last decade, the way that companies operate has changed dramatically. Globalisation in its different forms has changed the way we think. An evolution in communication and travel has led us to feel that the world has grown much smaller and more reachable. We have also seen a shift towards more international co-operations and companies manoeuvre with the entire world as their operating field.

The work of the European Union has furthermore increased both the distance and the divergence dividing the countries within the Union.
One field where the change has seen its major effects is in the evolving structures of large enterprises. “Hence the modern way to expand your operation is to make long term investments”[1]. Instead of working hard, striving to grow on your own, companies tend to expand operating activities through mergers and acquisitions with parties in possession of interesting techniques or other advantages. It is therefore important to draw the line between expanding ones business in order to evolve and prosper and using a merger to expand improperly causing detriment in the general market.

Benefits are often greater when collaborating not with the geographically closest rival firm, but collaborations and takeovers now often occur between companies situated in different countries. This gives rise to another set of questions than the once faced with in national acquisitions, namely tax issues where the first question to ask is which rules to apply.
Another factor that needs to be taken into consideration is the change that has arisen with the growth and concerted practises of the European Union. If an acquisition is to take place, where the parties both are companies domiciled within states in the EC there are some rules that simplify the proceedings, still everything must be done in compatibility with the treaties pended by the European Council.

1.1 Subject and purpose

Thus is the aspiration of my paper to assess the tax issues arising when an acquisition is being realized between parties domiciled in different EC States.

I have decided to view a specific case where a Swedish company proceeds to take over and incorporate into their cooperation a company domiciled in Germany. This situation is additionally more interesting since the tax laws in Germany recently was amended to suit their changing business climate[2]. The purpose is thus to examine what issues may arise in a situation like this.

[1] Leif Johansson 07-07-20 ekonominyheterna tv4.
[2] (JStG2007), (SEStG).

Contemplating problems in need of assessment when facing a cross-border EU acquisition with company restructuring as a direct effect.

The analysis will be conducted continuously through the thesis and holding the perspective given in the fictive case that will be presented in the subsequent chapter.
In order to execute this thesis my incentive is further to evaluate the options reviewed. Thus as the objective is to present a primarily theoretical thesis, I will not present a thorough solution, but an assessment of the consequences derived by the different choices faced by the parties in the fictive case.

1.2 Delimitation

This thesis will cover both company and taxation quandaries emerging from the cross-border business activity of mergers and acquisitions. As a general assessment, EC law takes precedence over national law. Further will the legislation primarily discussed be EC law. Although as national law and EC law interacts in the field of taxation, national aspects will also be considered when needed.
Further, will the discussion to a great extent cover when EC law should be applied and when the measures imposed nationally hold relevance and sufficiently uphold designated Union harmonization efforts.

As this thesis, embrace a rather limited scope I have decided not to look into the issue of the merger imposing claims on improper competition advantages, due to the creation of a larger and perhaps intrusive company structure. An assumption has therefore been made that the parties examined in the case will not be subject to such dilemmas.

In this thesis I will not narrate scenarios involving countries outside the European Union, even though there might be scenarios holding great advantages in such a conduct. I will not either account for any illegal conducts in more than a descriptive manner concerning differences in between avoidance and evasion.

1.3 Method and material

I will in order to attain sufficient knowledge on this subject study the Merger Directive and other significant regulations and directives to outline what the European Council has stated in order to clarify the arising situations of cross-border merging situations. Swedish and German legislation on the subject will be analysed to present a comprehensive assessment of the legal situation.

As this field is subject to constant evolution I will not only asses present, but also prior legislation in order to attain a better approach on how far the harmonizing measures has reached, and intend to reach. I will further assimilate important case law into the analysis as a complementation to legislation and an receive comprehension on how judgements in practical cases has transformed as well as given substantiating support to legislation within the Union.
This will further be a theoretical study based on literature and articles unified to answer the quandaries at issue.

2 Fictive case

2.1 Presentation of the fictive case

In order to put into practice what I have discovered by examining the circumstantia surrounding a transaction emerging into a restructuring acquisition I have decided to present a fictive case through which relevant theoretical quandaries will be analysed.

The original parties I have chosen for this case involves chiefly a Swedish medium sized company upholding the legal entity of a limited liability company. Hence will it subside under the regulations issued through both the Merger directive [3]as well as the Parent Subsidiary directive[4]. Therefore, I have decided principally to focus on aspects involving the Merger directive.
The case will analyze a situation where the entity wishes to acquire and incorporate into their operation another company of similar size and field of activity thus holding German domiciliation. The purpose the company wishes to achieve through the operation is primarily to evolve and expand its business activity. It is therefore of great importance to the company that the activity currently in progress in the transferring company remains in Germany.
The case will hold the objective of the Swedish company (hence the acquirer).
As the main objective will be to ascertain most favourable line of conduct in regard of taxation, improper competition will not be taken into consideration in this case.
Hence are we to assume that the acquisition is to be granted by the competition courts, both in Sweden and Germany

2.2 Possible acquisition scenarios

Without having presented any theoretical facts on how to accomplish a cross-border, acquisition between a Swedish and a German entity there is a few assumptions that can be made. I will therefore as early as in this chapter present a few possible scenarios for how the company may alter its structure due to said transaction.
The first possible scenario is that the Swedish company (A) acquires the German company (B) and incorporates it fully into their company structure. If principal place of business remains in state (A) the state of residence will remain in Sweden, thus transferring taxability for the now German branch (B) to Swedish soil. Another quite similar approach is that (B) is incorporated as a part of (A) remaining in Germany as a subsidiary to (A) and through this uphold individual taxability in Germany.

[3] Directive 90/434/EEC.
[4] Directive 90/435/EEC.

Furthermore, there is the option of, as (A) acquires (B) and incorporates it fully. The registered seat due to i.e. prevalent business activity or other determining factors[5] will be transferred to Germany. Hence will the previously Swedish company ultimately hold German taxability.
Finally one may conduct the acquisition in an entirely diverse manner. Not placing the registered seat in either of the foresaid countries. An option placed at the company's disposal due to the Union is that of establishing a company (C) in another country than the ones involved. If this company then acquires both (A) and (B) in a way that (C) gains the position of registered seat taxability will be held here[6]. The last option I will consider is the possibility for the company to re-establish as a SE and through this act cross-border.

All relevant alternatives will be scrutinized thoroughly.
Throughout the thesis, the case will emerge as a recurring, uniting force giving all theoretical chapters a practical assessment. The conclusions reached through all theoretical facts will then lead to a conclusion in the last chapter of this thesis where a recomendation on how to realize the acquisition will be delivered.

[5] Perquisites to support these assumptions will be presented throughout the subsequent chapters of this thesis.
[6] This is a scenario often applied in tax evasion procedures but depending on how and with what country it is put into practice it can be a perfectly legal and an excellent conduct.

3 Mergers and acquisitions as a civil law quandary

The proceedings surrounding a merger originate from regulations and conducts in the United States. This comes as a natural stage of development since the phenomenon to evolve through takeover begun here and thereafter spread to Europe. Hence is it due to the influence that the United States has had on the European corporate law one of the legal areas where regulations and conduct are most harmonized.
This chapter holds relevance to the practical case as it describes from a company law and a more practical perspective how to construct the acquisition.

3.1 How to conduct a merger

When proposing a business merger like the one in our case, one has in addition to the questions regarding taxation and competition a number of practical issues to attend. The procedure of the merger can be achieved through several diverse proceedings.
Issues that at an early stage need to be taken into consideration are factors such as;

- What impact will the deal have on the buyer's future?
- How will the acquisition affect the buyer's stock price?
- Which is the most favourable structure for the acquisition?
- In what form will the payment be (cash, stock etc)
- Which are the taxation effects?
- Which are the differences in financial performance between the negotiating parities?[7]

The most common way to go about an acquisition is to conduct the transaction designed as a project, where preparation, realization, follow- up and relevant feedback are all necessities for the acquisitions success[8].
The main incentives to initiate merger proceedings can be divided into three groupings. First, there are the obvious business motives, e.g. incentives to expand geographically, gain new expertise or technology, shell advantages and so forth. Then one might merger to improve property rights or there could be managerial advantages to gain[9].
There thus exists a concluding incentive that all the diverse parts of a company have to be in on and satisfied with the merger in order for a successful merger to arise. If the procedure is not thoroughly established

[7] Kip A Wiessman, Rick L Childs *"nine months before your merger- planning for a healthy merger baby"* Community banker Aug 2006 p 1.
[8] Robert Sevenius "Företagsförvärv – en introduktion s 15.
[9] Robert Sevenius "Företagsförvärv – en introduktion s 44.

with both owners, management and operational parts of the company it is bound to fail in the long run. [10]

As mergers and acquisitions withhold both the opportunity for grand advantages as well as possible risks is it of outmost necessity that the question of what it is exactly, that the company wishes to achieve through its actions is answered at this stage in the proceedings. Is it a long-term investment or solely a short hand economic transaction? Hence, an acquisition ought to be preceded with an analysis both of one's own needs and an evaluation of conceivable candidates[11]. This analysis is divided into three parts, initiating with the strategic phase, where first a strategic analysis is conducted to clarify what the company actually wishes to achieve. Then follows the search for an appropriate candidate to obtain what the strategic analysis reviled. The last part of this phase is the evaluation of the merger candidate. [12]Through assumptions made in the case we assume that the main objective here is a long term commitment to expand activity but we cannot deny that if other advantages are to be made through the acquisition those are of great interest as well

When this is completed, one must enter into the more concrete transaction phase. This begins with a further inspection of the chosen company, in this part the buying company receives due-diligence material to gain further knowledge of the company it wishes to purchase, and through this further establish that it lives up to expectations.

After this has been established, the structure of the acquisition is thoroughly drafted.

At this point in the procedure, the acquisition has been planned and approved of, but still not accomplished. That is left to the final phase where integration is the key issue. In order for an acquisition to be successful the companies involved need to coordinate their structure to achieve the best possible way to work together as one.[13]

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[10] Kip A Wiessman, Rick L Childs *"nine months before your merger- planning for a healthy merger baby"* Community banker Aug 2006 p 214.

[11] Kip A Wiessman, Rick L Childs *"nine months before your merger- planning for a healthy merger baby"* Community banker Aug 2006 p 4.

[12] Robert Sevenius "Företagsförvärv – en introduktion s 14

[13] Robert Sevenius "Företagsförvärv – en introduktion s 15.

4 EU tax system

This chapter presents an historical background and some theoretical dilemmas faced within the Union. It does not have a direct involvement in the ascribed case thou it presents surrounding preliminaries and important developments that might be of future relevance to the case and must therefore be taken into consideration.

The European Union has since its establishment strived towards the goal of a common economic system[14]. One of the objectives for this EU tax system is a coordination of the different countries tax systems. Nevertheless, this is not an easy subject to solve since tax is one of the strongest politically established issues the Union has to face. Hence, progress concerning tax harmonization has been slow compared to other treaty harmonisations'[15]. This is especially true in the field of direct taxation such as the one faced in company acquisition[16].

Thus, the debate surrounding tax harmonization has escalated and an incentive for further coordination has been proposed[17]. The principal argument for this, being that if fiscal harmony is to be achieved the term business profit must have the same significance throughout the Union[18]. One of the means to achieve sufficient harmonization is by scrutinizing the principle of home state taxation, another is to achieve a consolidated tax base and the last most intrusive measure that could be taken is to implement a single and compulsory harmonization of the entire tax base in the area of company taxation[19].

A further and more far-reaching harmonization of the member states views on takeover and merger transactions has always been asked for as a harmonization would strongly both facilitate and greatly accelerate the European integration process in the business field[20].

When the first merger directive was drafted in 1990, the general view was that without harmonization in the taxation field, border-crossing takeovers accomplished as freely as domestic ones were considered to be practically impossible.

The creation of a "level playing field[21]" is an important steppingstone since before its enactment situations could occur where companies registered in one country could easily acquire business shares in another country while companies in the target state could not do the same in return, hence creating

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[14] Cnossen 1987 "*tax coordination in the European community" Series* published in International taxation no 7 1987 Kluwer law international 3-5.

[15] Gloria Teixeira *Taxing corporate profits in the EU* kluwer law international 1997 s17.

[16] Kristina Ståhl fusionsdirektivet – svensk beskattning I EG rättslig belysning iustus förlag Uppsala 2005 p 30.

[17] Dr Sanchez, J Fluxa problems and options in calculating the tax base of companies in the European Union under home state taxation European taxation may 2006.

[18] H.O Ruding " the past ant the future of EU corporate tax" EC tax review 2005/1 pp 2-3.

[19] Dr Sanchez, J Fluxa problems and options in calculating the tax base of companies in the European Union under home state taxation European taxation may 2006 p 198.

[20] European Takeovers *law and practice* Klaus Hopt Eddy Wymeersch Butterworth 1992.

[21] As in the takeover of Plessey by General electric and Siemens.

intra-Union discrimination.[22]. Still, to this day a total harmonization and equality between states affairs are in the future[23].

4.1 Effectiveness of implemented directives

The principal starting point concerning EC law is that according to the ECJ its rulings are to be held superior to national legislation.[24].
The specific areas that the merger directive regulates regarding company taxation and capital gains taxation are areas distinguished by a rather complex nature[25]. Nations within the Union have due to political, ideological or simply diverse thinking formulated original legislation in several different ways.
Still the regulations given in the merger directive are drafted in rather general terms. Often the articles state if or when the directive is applicable and that certain transactions may be accomplished without direct taxation by application of the principle of basis carry over continuity method[26]. The immediate problem is that it does not propose any concrete solutions for the member states to follow. As a consequence of this the member countries left without any direct guidelines to apply. Not even the ECJ has contributed with much clarity in the issue since rulings on the matter of interpretation of the merger directive are few.

[22] M Aurelio *An analysis of the 2005 amendments to the merger directive.*
[23] Visions of the tax systems of the XXIst century 21d Geneva.
[24] Case 6/64 Costa v E.N.E.L. 1964 ECR 585.
[25] Kristina Ståhl fusionsdirektivet – svensk beskattning I EG rättslig belysning iustus förlag Uppsala 2005 p 50.
[26] the principle of basis carry over in Swedish taxation Roger P. Österman Nordstedts 1994.

5 The merger directive

Directive 90/434/EEC was first adopted by the European council on the 23 July 1990.[27].
The directive, which regulates taxation on mergers, divisions, transfers of assets and exchanges of shares between companies situated in different member states, was on the 17 February 2005[28] amended to also include partial fusions. The amendment opened up for regulations regarding another type of international companies referred to as Societas Europeaea or SE companies[29], a more thorough presentation of this cooperation will be given further on as it holds relevance as one of the options assessed in the case.
The principal purpose of the directive is to facilitate cross-border restructuring of companies whether it is mergers, acquisitions or just inter-company restructuring[30] .
The directive is an indispensable measure since without it to regulate the growing amount of inter EU mergers, the situation would take an unfavourable turn. If the area would not be regulated by the Union, the merging countries different tax laws would most definitely either lead to double taxation or no taxation whatsoever.[31]
Neither of the situations is preferable since they lead to unjust treatment of companies wishing to carry out cross-border mergers or acquisitions[32]. It could also open up for deliberate tax planning mergers, consequently - merger to evade taxation.[33]
The situations covered in the directive also predestinate for a non-discrimination clause where elution of the possibility of unfavourable tax consequences might not cause unfavourable distortions in comparison to a similar transaction achieved domestically[34].
Still the directive has a rather limited range. It regulates solely the taxation issues as the merger is being realized, [35]hence with this short-term regulating power it is able to fairly regulate the issue, without tampering into the taxation jurisdiction of the involved member states.

[27] Case C-8/97 the European commission v Greece.
[28] Council directive 2005/19/EC of February 2005.
[29] Skattenytt 2005 p 434-447 and SOU 2005:19.
[30] Kristina Ståhl fusionsdirektivet – svensk beskattning I EG rättslig belysning.
[31] J Barenfeld taxation of cross-border partnerships JIBS 2005 p 84.
[32] Jan Wouters " the principle of non discrimination in the European community law" EC tax review 1999-2 p 98.
[33] European tax law B. Terra P Wattel third edition kluwer law international 2001 p373.
[34] Internationell beskattning – en lärobok M Dahlberg Studentlitteratur 2005.
[35] R Russo Partnerships and other hybrid entities and the EC corporate direct tax directives European taxation October 2006 p 481.

5.1 Mergers and acquisitions covered by the directive

When first initiating a merger proposal like the one analyses through our case one must observe whether or not the companies involved and the projected situation is compatible within the directive and through this entitled to be regulated by the directive. [36]

Article 3 defines what ultimately qualifies companies for entitlement of merger treaty benefits. This article holds several similarities to the parent subsidiary directive as its article 2 has the equivalent wording as to when a company is to be considered a " company in an member state"[37].
The prerequisites for application may be divided into different subcategories.[38] The first one being that the *legal form* of the entity must be listed in the directives annex. After the amendments, several national legal entities have been ascribed to the list, as well as the much talked about SE company-structure.
Then one must further consider the aspect of *fiscal residence*. As stipulated above the company must be a resident for tax purposes in the member state. Thus, only residing due to taxation benefits is not acceptable. Some business activity or interest must also validate the choice of residency. Further, there is an objection stipulated against having residency outside the Union due to tax treaty benefits given thereof.
Important to acknowledge is that a company will be permitted to establish as a dual resident company[39] with one of the residencies outside of the Union provided that the states where one resides does not hold a double taxation agreement proclaiming that in accordance to this the company is in fact considered to be situated outside the Union.[40]
Ultimately, one must establish that the company in question is subject to national corporate taxation in the country where it wishes to reside. An evaluation must be made establishing that the company does not hold any unauthorized tax exemptions but is in fact unlimitedly taxed in the country holding domiciliation[41] . Important to notice is further that since this directive is an intra- Union regulation it places equality on whether these prerequisites are met in one tax jurisdiction or within different ones, as long as they are all met within the European Union.
Moreover, there is an exception made regarding a mere exchange of shares or an acquisition holding the form of a legal merger. Concerning these entities there are no specified requirements.[42]

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[36] R Russo Partnerships and other hybrid entities and the EC corporate direct tax directives European taxation October 2006 p 481.
[37] 90/435 EEC Council directive 1990 23 July on the common system of taxation applicable in the case of parent companies and subsidiaries in different EU states art 2.
[38] European taxation Terra Wattel edition Four p 526.
[39] Exept if, the company holds the legal form of an SE.
[40] European taxation Terra Wattel edition Four p 527.
[41] 90/435 EEC art 4 (2) and 8 (3) separately.
[42] European taxation Terra Wattel edition Four p 527.

5.2 Influence granted by the merger directive on SE companies

The merger directive in its original form made questions regarding mergers in member states compatible with the EC principles on equal treatment disregarding of domiciliation. Still it did not regulate every situation that may occur. Due to the changing business climate, an amendment was sought after to accommodate reoccurring situations. The major amendment[43] being an increase of the directives range to also include European Companies and their proposed migrations and restructuring.

These companies are commonly entitled Societas Europaea [44]and they form a public company. The SE constitute a company form that may hold severe relevance to our case.

The principal difference between an "ordinary" national company and an SE present itself through the simplifying procedures made possible through this legal entity. For companies wishing to operate in more than one member state this is an immense progress in European business activity. Through this an opportunity evolves for companies to operate in several countries and at the same time maintain the establishment as a single company subordinate to company law in the chosen state of registration. By maintaining one set of rules, procedures are simplified both for the company and for the states where they operate.[45]

Another diversity applied by SE companies, given in the merger directive article 2(j) is the possibility to transfer its registered seat to another member state without first liquidating the previous structure.[46]. However must the SE have its registered seat and principal place of operation within the same state. Hence, if principal management change place of registration has to change.

If a Swedish SE wishes to change its registered seat, the first thing to do is to apply for permission in accordance with the Swedish law on limited companies[47]

Hence, as long as both places of management are in fact placed within the same borders there is nothing to hinder such an organizational structure.

5.3 Operations not covered by the directive

[43] European taxation Terra Wattel edition Four p 536.
[44] Council regulation (EU) No 2157/2001 on the statute European company.
[45] Pelin. L Internationell skatterätt – i ett svenskt perspektiv fjärde omarbetade upplagan 2006 p 397.
[46] Pelin. L Internationell skatterätt – i ett svenskt perspektiv fjärde omarbetade upplagan 2006 p 398.
[47] ABL 14 kapitlet.

Although there has been an immense improvement, during subsequent years in the field of cross-border reorganizations there is still a long way until the field is thoroughly regulated.[48] Until other measures have been imposed to harmonize Union taxation, the Merger directive has limits to its effectiveness. One example where it is not sufficiently imposed is in the area of legal cross-border mergers, without transformation into an SE but remaining as an ordinary limited company. For some time there has been talks about issuing a new "company law merger directive" to regulate situations like this[49] the proposal did nonetheless contain regulative measures for how to regulate company law issues in transferring companies resulting in a new domiciliation of the registered seat[50]
Therefore we could only assume that the EC relies in this field just like when dealing with offsetting of losses on further establishing practice rulings from the ECJ.
There has thus in recent judgements been a slight change into harder more intrusive standpoints from the ECJ versus national legislation
As the company in the practical case assessed does not originally uphold the structure of an SE how to realize this transformation will be reviewed further along in this thesis.

[48] European tax law Terra, Wattel fourth edition kluwer law international 2005 chapter 10.4.4.
[49] Implementation for the 14 th company law directive was intended for June 2007 No IP 04/1405 the directive is currently revised for future enactment.
[50] G Burwitz " tax consequences of the migrating companies: a practitioners perspective" European business organization law review 7 2006 p 601.

6 Merger situations

As stated above the merger directive does not cover situations occurring after the transaction has been completed. Thus still, there are numerous ways to realize a company merger.
The merger directive as it is formulated covers several different operating conceivabilities[51]. These are presented in different articles of the merger directive.
I have in consequence decided to narrow the accounting, solely presenting those holding significance to the case study presented in this thesis.

6.1 Legal merger

The first situation in article 2 (a) [52] is what may be referred to as a "legal merger[53]". When the merger directive was first implemented, this form of merger was not possible in between companies domiciled in different EU states. This was made possible after the amendments in had been imposed[54].
The first step in a legal merger is that one or several different companies transfer all their assets and liabilities into another company. Then the emptied companies dissolve, this is accomplished without them having to go through the procedure of liquidation[55]. The advantages with this type of conduct is that once the companies are dissolved they no longer exist and hence can the newly formed company succeed by issuing new shares for the dissolved companies shareholders as compensation for their old, now worthless shares.
A legal merger may be accomplished to suit our case in two different ways, either the dissolving companies merge into an already existing company. Both companies may also reorganize in a company established especially for this purpose[56].

6.2 Partial division

Regulates situations when a company transfers one or several of its branches into one or more, either new or already existing company. [57]. This so called split off[58] is conditioned by that at least one branch or other activity remains

[51] European tax law B. Terra P Wattel third edition kluwer law international 2001 p 377.
[52] Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States.
[53] European tax law B. Terra P Wattel third edition kluwer law international 2001 p 377.
[54] 2005/19/EC.
[55] EC tax law Paul Farmer & Richard Lyal 2005 p 283.
[56] European tax law B. Terra P Wattel third edition kluwer law international 2001 p 377.
[57] 2005/19/EC art 2 (ba) implemented January 2007.
[58] European tax law B. Terra P Wattel fourth edition kluwer law international 2005 p 54.

in the former company. The requirement for part of the operation to remain constitutes a measure taken to defer abuse, accomplished through feigned purchases with tax evasive incentives[59].Further shall the transaction be financed through shares in the "new" entity, and if needed a cash balancing settlement not exceeding 10% of the given nominal value[60]
Then, could this procedure be considered optional in our case? It is most commonly applied in situations where just as the name insinuates, only part of a company is involved.[61] Hence, not the total company acquisition sought after and therefore not preferable if not the transferring company wishes to remain in operation partly as a separate entity.
Further it could be questioned whether it would be optional for the company to finance the transaction via shares in the new company structure.

6.3 Transfer of assets

Article 2 (c) of the merger directive deals with the situation where a company transfers one or several of its branches into another company. The company could either be newly formed solely for this purpose, or an already existing one. As compensation, the company receiving the branch issues some sort of security to the branch owners. In accordance with this procedure, the transferring company resumes its operation as a subsidiary[62]in the new company. The incentive in partial division for part of the original operation to resume does not subsist since this transaction does not provide measures to evade taxation through segregation of assets.[63]
This may be a preferable scenario if the German company holds important expertise and competence that would be lost via a total incorporation into the Swedish entity.

6.4 Exchange of shares

In this situation regulated by article 2 (d) the company proceeds by acquiring a holding in the capital of another company to the extent that it obtains a majority control over the company. Hence, it has to obtain a major part of the shares and thus the voting rights[64]. Similar to the exchanging of asset, it is of outmost importance that exchange is accomplished with the

[59] M Aurelio an analysis of the 2005 amendments to the merger directive International tax review p 2.
[60] 2005/19/EC art 2 (ba) implemented January 2007.
[61] M Aurelio an analysis of the 2005 amendments to the merger directive International tax review p 2.
[62] European tax law B. Terra P Wattel third edition kluwer law international 2001 p 378.
[63] M Aurelio an analysis of the 2005 amendments to the merger directive International tax review p 3.
[64] Article 2 (d) 90/434/EEC.

transferring company issuing shares to the receiving company as a security and compensation for the merger. Customary in this case is also if the rules for exchanging of shares are to be applicable that the receiving company is granted a balancing cash payment of a maximum 10% of the transferring shares nominal value[65].The origin of this is the fact that often it is most difficult to issue the exact compensation through shares. With cash, one receives the opportunity to adjust arisen differences in value on a direct basis.

6.5 Transfer of the registered office of an SE

As stipulated previously SE companies have been given more space in the amended directive. The situation differs from the others since it does not constitute an actual merger, demerger, split or other incorporation where an activity is transferred from one company to another. Here the entire company transfers, or in other words emigrates to set up its operation in another member state[66].
In this thesis, the SE Company becomes highly relevant since one cannot just form a SE, the original premise must be existing legal entities[67]. It is therefore possibly a suitable arrangement for the company in our case to realize the acquisition of the German company.

- The first manner available in which one forms an SE is by conducting a merger of two companies domiciled in different member states. [68]
- Another way to go about is that two entities first establishes a holding company in the form of an SE hereby transferring the primary ownership of both companies to the holding company submitting to the laws instated by the country where the holding has domiciliation.[69]
- Third there is the option of two different companies creating a joint subsidiary. As a result for this option to be permitted the original companies have to either submit to different legislation or they have to have had subsidiaries or a branch in another member state for at least two years previous of the proposed transaction[70]
- Another option is to convert a national entity into an SE if the company has had part of its operation subject to tax in another member state for a minimum of two years prior.[71]

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[65] European tax law B. Terra P Wattel third edition kluwer law international 2001 381.
[66] Article 2 (j) 90/434/EEC 2005/19/EC.
[67] Pelin. L Internationell skatterätt – i ett svenskt perspektiv fjärde omarbetade upplagan 2006 p 398.
[68] M Aurelio an analysis of the 2005 amendments to the merger directive International tax review p 13.
[69] Pelin. L Internationell skatterätt – i ett svenskt perspektiv fjärde omarbetade upplagan 2006 p 398.
[70] Art 2.3 statute for European Company.
[71] Art 3.2 statute for European Company.

- The last way to go about this procedure is for an SE to establish subsidiaries in other countries in the form of an SE.

According to the prerequisites for how to establish an SE it hold great similarity to the options referred in the case presentation. Hence may the scenario of conducting the transaction, first reforming as an SE not be disregarded.
According to Swedish law an SE, holding its registered seat in Sweden is to hold the legal entity of a Swedish limited company[72]. Hence, it is to be subject to unlimited taxation in Sweden[73]. If the registered seat is transferred, and the company no longer holds Swedish domiciliation its taxability shifts and hereinafter proceeds as that of a foreign legal person with limited taxability[74]
There are no exclusions for SE companies wishing to establish business activity within another country. If they wish to do this, they must establish a branch in the country in question, before starting to operate there.[75]
There is also a possibility for companies domiciled outside of the Union to participate in an establishment of an SE although for this to be possible the company is obliged to follow procedures for this regulated by a state within the Union. Furthermore the company's registered seat must be within this state and there must also be a significantly severe continuous economic interest binding the company to this very state[76].

6.6 Transparent hybrid entities

Alongside these in article 2[77] regulated conducts I also would like to present an occurrence recently implemented into the directive.
A hybrid entity is an entity considered to be opaque by the state where it holds residence and transparent by other member states[78]

Sweden further complicates this matter by abiding the similarity approach, upholding that a foreign entity must hold legal capacity under general law in order to qualify for as a foreign legal entity. [79]An assessment to the case is therefore that if the German entity does not constitute a legal person it will not be considered opaque in accordance to Swedish law.

[72] IL § 2 Kapitel 4.
[73] IL §6 Kapitel 3.
[74] Pelin. L Internationell skatterätt – i ett svenskt perspektiv fjärde omarbetade upplagan 2006 p 401.
[75] Lag 1992/160 om utländska filialer mm.
[76] Pelin. L Internationell skatterätt – i ett svenskt perspektiv fjärde omarbetade upplagan 2006 p 399.
[77] 90/434/EEC.
[78] J Barenfeld Taxation of cross-border partnerships JIBS 2005 p 120.
[79] J Barenfeld Taxation of cross-border partnerships JIBS 2005 p 275.

Hybrid situations are embodied into the directive first in art 4(2). Continuing with further limitations in art 10a.
Originally, this occurrence emerges, as countries do not recognise foreign tax law characteristics.[80] If an organisational structure is established, placing the registered seat in another member state, a situation could arise where the acquiring company is considered transparent. An exemption from obliging to article 8 is granted, hence giving the state of residence the right to impose taxation on the entity.[81]
The rollover system provided through article 8 attains cohesion, still the transparency of entities is a recurrent dilemma within the Union. Until a common definition has been established, there will be loopholes in cross-border reconstructions opening up for tax avoiding measures, deliberate as well as fortunate.

6.7 Involving a PE

Permanent establishments (PE) has been regulated through article 10.
If the entity being transferred i.e. the German company, holds a permanent establishment in another state within the Union. Germany (B) immediately forfeits the right of taxation.[82] Another scenario that might arise is if the transferring entity holds a PE in Sweden. If this were the case, the directive shall be applied to the PE as the PE was situated in the transferring country and not the receiving[83]. Hence offsetting application of article 4[84].
Carry over is granted the receiving company, as well as the takeover of accumulated losses emerging from the PE. Computation of gains and losses derived shall be made in the same way as if the PE were situated within Swedish territory[85].
If the PE is a part of a company holding the legal entity of an SE, it is guaranteed to be exempted from taxation of the provisions and reserves that have been properly constituted by the company previous to the transformation[86]
If a SE upholding a PE involved in the transfer is situated in a third state it is instead regulated by article 10 (b).

[80] J Barenfeld Taxation of cross-border partnerships JIBS 2005 p 92.
[81] R Russo Partnerships and other hybrid entities and the EC corporate direct tax directives European taxation October 2006 p 484.
[82] 90/434/EEC 10 1 para.
[83] M Aurelio an analysis of the 2005 amendments to the merger directive International tax review p 11.
[84] 90/434/EEC 4 (1)b.
[85] 90/434/EEC 4 (3).
[86] 90/434/EEC 5.

7 Taxation of mergers and acquisitions

Parts of this might be a slight repetition of what has been written earlier in this thesis but this is something found necessary in order to complete the dissection of the given situation.
The reason that I open this chapter by explaining the relationship of national law versus EC law has to do with that depending on whoever has the sovereign legislative power decides how a cross-border restructuring is to be dealt with.

7.1 According to the EC

As a primary statement there are in the EC treaty no regulations establishing the relation between EC law and national law[87]. Still the courts have proclaimed that EC law must take precedence over national law. Nevertheless there is something that gives the member states a slight advantage and that is their sovereign right to adjust to the treaty in accordance with their own individual policies[88].
To uphold the legislative framework needed to reach the aimed at objectives of the European Union relevant secondary legislation on the subject besides the EC treaty has been adopted. The most important frames when it comes to mergers and acquisitions are the OECD convention directive, as well as the merger directive.
In addition, most states within the Union have also concluded taxation treaties amongst one another to elude loopholes as well as misfortunes that could arise due to diverseities between EC law and national law. Without these measures, the different states would be forced to go about in a more uncertain manner, never knowing exactly what standards to follow and if the state with whom they wish to execute a transaction has recently changed its legislation surrounding the issue.
Besides all these frameworks, there are also a number of principles that must be observed. One of the most important is the principle of *proportionality*[89]. Hence, legislative and treaty obligations are a necessity for a Union built on the standards that it is, with several individually sovereign states working with their own ideas on political value. The basic four freedoms of the Union encompass the right for cross-border circulation as well as the prohibition of discrimination based on nationality or origin[90] .

[87] Lars Pelin Internationell Skatterätt – I ett svenskt perspektiv 4e omarbetade upplagan 2006 p 325.
[88] Gilly case C- 336/96.
[89] D Weber tax avoidance and the EC treaty freedoms Kluwer law 2005p 209ff
[90] European tax law B. Terra P Wattel third edition kluwer law international 2001 p31.

In order to evaluate the statutory authority granted by the Union one must interpret all treaties in accordance with three principles. These principles were created through the *Cassis de Dijon* [91]case in 1979 as an intermediary path between state and Union. The judgement of the case proclaimed that waivers from Union treaties are possible under certain circumstances[92]. Together the principles unite under the *Rule of reason.* [93]

7.1.1 Rule of reason

The rule of reason was originally designated for transactions in connection with the basic four freedoms of the Union.[94] Business activity of the type this thesis analyses has features similar to those described through the freedoms, as a company restructuring through an acquisition like the one analysed in the case strongly advocate cross-border movement of both capital, goods, services and persons.
The principles is referred to as basic logic created in order to preserve the cohesion of the Union[95].Without some logic view upon legislation parties would most defiantly collide more drastically than they do.
The first principal incentive is the question whether or not the transaction one wishes to exempt in fact already subsides under a public interest and therefore already has been harmonized at an EC level. Then the member states may not impose their own regulations regarding the issue. Further one must consider that nationally imposed measures that distinguish between domestic and cross-border affairs cannot be upheld if exemption is not granted through article 30 of the EC treaty. Proclaiming exceptions due to public interest is not to be regarded as arbitrary discrimination, nor is veiled cross-border limitation of business activity to be accepted[96]. Once again, the dividing line between lawful and intrusive measures surrounding cross-border transactions is thin.[97]
Finally must it be assessed whether the effectiveness of the fiscal supervision is sufficient[98], if the integrity of every involved tax system is taken into account and valued against fiscal coherence and is the ultimate need to prevent abuse of EC law fulfilled.[99]
The Gebhart case has narrowed the prerequisites extensively into what may be referred to as the *Gebhart test*[100]. Here four direct statements must be answered and met.;

- National legislation must be applied in a non discriminatory manner

[91] C-120/78.
[92] C 120/78 Rewe Zentrale AG v Bundesmonopolverwaltung fur Branntwein 1979 t.
[93] European tax law B. Terra P Wattel third edition kluwer law international 2001 p 32.
[94] M Dahlberg direct taxation in relation to the freedom of establishment and the free movement of capital Kluwer law international 2005 p 114.
[95] M Dahlberg direct taxation in relation to the freedom of establishment and the free movement of capital Kluwer law international 2005 p 115.
[96] ECC art 30.
[97] This issue will also be dealt with in the chapter reviewing tax evasion.
[98] C-250/95 Futura Participations.
[99]D Weber tax avoidance and the EC treaty freedoms Kluwer law 2005p 162.
[100] M Hilling Free movement and tax treaties in the internal market JIBS 2005.

- It shall be justified by imperative requirement of the general interest
- The measure shall be suitable for securing the very attainment of the objective it wishes to pursue
- It must not go further than necessary to attain this.[101]

7.2 In Sweden

Sweden has transferred its sovereign right to decide in matters where the Union must take precedence to subsist. Through the enactment of the " Anslutningslag" Sweden has relinquished judicial power to the EC proclaiming that all treaties mentioned in this very law are to be applied in Sweden along with the effect obtained as Swedish supreme legislation. [102] Hence, EC law advocates a right raised above national Swedish law disregarding of what subject this law might cover[103].
Still the absolute power of taxation matters has not been tampered with and therefore are regulations in this field in the form of directives.
Legal entities are according to Swedish legislation subject to unlimited taxation if they are worded in accordance with the standards established by Swedish law and registered as one by Swedish public authority. Even if there has been no registration of the company, as Sweden follows the directives of the European Union the placement of the registered seat as well as the principal place of operation may also determine the company to uphold Swedish legitimacy, if one or two of these are situated within our borders[104]. According to IL 2:4 SE companies are on an equality with limited companies in this concern and hence submit to unlimited taxation from Swedish tax authority[105].

As this is clarified, the obvious assumption is that a merger or an acquisition proclaimed by a company subject to unlimited taxation jurisdiction as well as company laws in Sweden, like the company assessed in the practical case must during this transaction follow the legislation established by Sweden. Matters concerning taxation are as mentioned previously given, revised through "Inkomstskattelagen"[106]. Specific legislation concerning fusions is to be found in chapter 37[107]. The legislation does not decisively stipulate that assets and liabilities should be in connection to the permanent establishment. Instead as the actual business transaction has been realized, taxability is directly transferred to the entity that emerges as Parent-company its place of resident seat being the determinant on taxation jurisdiction. Hence will all taxable revenue, due to the transaction, be taxed

[101] M Dahlberg Direct taxation in relation to the freedom of establishment and the freedom of capital vol 9 2005 Kluwer law international p330.
[102] AL 2§ prop 1993/1994:114 s 18.
[103] Costa ENEL C-6/64.
[104] 6:3 IL.
[105] Lars Pelin Internationell Skatterätt – I ett svenskt perspektiv 4e omarbetade upplagan 2006 p 97.
[106] Inkomstskattelag (1999:1299) (IL).
[107] Inkomstskattelag (1999:1299) (IL).

accordingly[108]. Therefore adherence must be placed on whether or not the company wishes to remain holding Swedish taxability or if they find it more favourable being domiciled elsewhere.

Difficulties will arise if the entities involved for some reason hold exemption from taxation in Sweden and because of the transaction thereinafter falls under another taxation jurisdiction. There are in conformity with the merger treaty no benefits to derive from this. If domiciliation transfers, the company will invariably adhere to the new legislation on this matter.
In order to balance divergence in taxation benefits and overall terms IL 22:5 will be brought up to force when assets and liabilities retrieve from the Swedish taxation jurisdiction but only then, as exit taxation cannot be imposed if the assets are linked to a permanent establishment[109] .

7.3 In Germany

What distinguishes Germany from other Union member states is its case law, which to some part opposes the general assumption that EC law should always take precedence over national law. Sweden did opposed this principle as it first started to take effect, but has then come to accept the terms over the years. Germany on the other hand has its *Solange*[110] rulings where the German constitutional court reached the conclusion that even though EC law should be applied in most cases the assignment of legal competence should be applied with certain limitations. The EC should not either be able to grant itself additional competencies in excess over the ones already in use. Furthermore, did the *Solange* rulings in *Solange II* clarify that Germany retained the right to inquire EC regulations compatibility with national legislation. Still the court stated that EC law concerning the basic four freedoms was in fact compatible with national standards[111]. Hence, as long as EC law does not infringe community law in this field Germany does not oppose it.
The *Solange* statements have to some extent transformed the view upon EC legislation throughout the Union and the general idea seams to be that if Germany can hold this approach so can Sweden[112]

In April 2006 Germany issued new legislation in the field of taxation that amount changes in the Germany Reorganization tax act[113] holding importance to our practical case scenario. The new regulations present a tougher approach to cross-border taxation. These amendments have been

[108] IL 37:12 38:14.
[109] Kristina Ståhl fusionsdirektivet – svensk beskattning I EG rättslig belysning iustus förlag Uppsala 2005 p 239.
[110] BverfGE 37, 271.
[111] Lars Pelin Internationell Skatterätt – I ett svenskt perspektiv 4e omarbetade upplagan 2006 p 326.
[112] Förarbetena till RF 10:5 prop 1993/1994:114 s 17.
[113] Jaressteuergezetz 2007 (JStG 2007) and (SEStG) (se reference list for full wording).

considered for some time and mirror an adjustment to EC law concerning SE companies,[114] as there has until recently not existed adequate German legislation governing cross-border transfers and restructuring situations. [115] Under the new legislation a transfer of assets from a German entity to a foreign branch will be taxed to its full extent, with direct effect on the value between the actual price and what could be considered to be fair market value. Nevertheless may conduct like this be regarded to oppose EC principles established in rulings such as *Lasteryier de Saillant*[116] .

If adhering to our case one may conclude that if by the transaction domiciliation of the German entity changes, the migration will not under German law be considered as a liquidation of the company since Sweden, being the other party in the transaction is also member of the EU. The transaction may thus, since Germany due to double taxation agreements existing between the countries[117] loses it's right to taxation when registered seat is transferred, be taxed in accordance with the general outbound rule.[118]

7.4 Shareholder taxation

Although the principal focus of this thesis holds a company angle, since the entity analyzed in our case uphold the entity of a limited company, based on issued shares I find it relevant to add something about how the shareholders would be taxed through the evaluated merger options assessed in chapter 3. This as the shareholders ultimately is the ones that must be satisfied with the outcome of the transaction.
Effects of a partial division show that the tax base containing assets and liabilities will after a division be "rolled over" to the receiving company. Ultimately, taxation of shareholders due to a partial division must be avoided.[119] Taxation is only to be imposed if the value of the new and old shares received is not estimated to be higher than the value of the original shares in the transferring company previous to the transactions realization[120] If tax treaties exist, the capital gains received through a shares sale is to be taxable, only in the shareholders state of residence. [121]Sweden has adopted such a treaty retaining them the right to impose taxation on capital gains

[114] H-M Eckerstein et al Germany:2007 tax bills journal of international taxation February 2007.
[115] T Eckhart L Kahl Reorganizations would cost more under new German law Journal of international taxation august 2006 p33.
[116] C-9/02 reaching the conclusion that art 43 EEC constitutes an obstacle for member states to tax unrealised capital when an entity subject to tax transfers it registered seat.
[117] Lag 10 December 1992 (no 1193) förordning 22 September 1994 (no 1300).
[118](JStG 2007)
[119] Article 8 (5) 90/434/EEC.
[120] M Aurelio an analysis of the 2005 amendments to the merger directive International tax review p 3.
[121] Art 13 (5) OECD model Convention.

received via alienated shares in domestic companies.[122] Hence, this is what will be applicable if this procedure is chosen as the most preferable one. Regarding transparent hybrid entities, the situation has been assessed in article, 4 as well as 10a.[123]

The article address the member state where a shareholder of a hybrid entity resides, urging them to defer taxation resulting from a restructuring transaction. Thus, article 10a further regulated transparent entities holding that if the company is considered transparent, the member state has the right of not applying the directive, when taxing a resident shareholder[124]. Further shall the member state give relief from taxation in the same way as if the tax would have been paid. Therefore shareholder taxation is not entirely prevented due to company transparency. Leaving shareholders subject to taxation on the same premises as shareholders in other company structures obtain.[125]

Although when it comes to a transparent restructuring through exchanges of shares, article 8 is the one to apply. The significant difference being that it prohibit the member state of the transferring company to impose taxation on involved shareholders on the newly issued shares whereas the company does not escape taxation[126]

[122] M Aurelio an analysis of the 2005 amendments to the merger directive International tax review p 3 f 13.
[123] 90/434/EEC.
[124] 90/434/EEC art 10 a (1).
[125] M Aurelio an analysis of the 2005 amendments to the merger directive International tax review p 14.
[126] 90/434/EEC art 8 a (1).

8 Tax problems arising out of a merger

8.1 Direct /short term tax issues

The merger directive regulates issues arising due to instant taxation on matters surrounding a merger with a one-time only frequency[127].
This because the EC does not wish to tamper with member states individual tax systems until a full tax harmonization has been accomplished[128].
One of the prime directly applicable issues to deal with in a merger situation that we have to take into consideration in the practical case, is the realization of capital gains emerging into the company as a direct result of the transaction[129]. Then there are levied losses and accumulated profits to take into consideration. Taxation through the merger directive is postponed until the assets are later realized. Accordingly in order to receive this advantage there is a demand for the assets in question to remain effectively connected to a PE in the receiving company, situated in its state of origin. [130]
Hence ought this structure to be taken into consideration in our case in order to obtain taxation advantages

8.2 Over time

Even if the EC merger directives primary focus is short-range, there are several issues and tax consequences originated form a merger that needs to be dealt with.
Most of the taxation situations that occur after a cross-border restructuring result from possible tax loss and other administrative burdens imposed upon companies due to the crossing over borders of dividend. As different countries still impose diversee rules for this procedure, they emerge as an indirect effect of the direct taxation.
In cases ascertaining whether a national tax measures should be considered compatible with prerequisites for both freedom of establishment and the free movement of capital, the court has had difficulties producing a straight answer. On the capital aspect, to the verge that if a breach is affirmed concerning establishment, they seldom revive if there is also a breach in the free movement of capital[131]

[127] European tax law B. Terra P Wattel fourth edition kluwer law international 2005 p 539.
[128] European tax law B. Terra P Wattel third edition kluwer law international 2001 s374.
[129] European tax law B. Terra P Wattel fourth edition kluwer law international 2005 p 538.
[130] R Russo Partnerships and other hybrid entities and the EC corporate direct tax directives European taxation October 2006 p 481.
[131] M Dahlberg Direct taxation in relation to the freedom of establishment and the freedom of capital vol 9 2005 Kluwer law international p 289.

Seemingly does the ECJ in its rulings impose a policy where by adhering the EC freedoms and prohibiting tax incentives they limit cross-border transactions imposed by member states onto companies. [132]

8.3 Taxation on a company level

As this thesis in accordance with the presented case, has its primary focus on a company level and not secondary developments. Taxation quandaries will hold a limitation to those results emerging from the direct taxation of the involved business entities and potential direct effects via taxation of shareholders within the company. Prospective proprietary constellations emerging as a secondary dilemma will not be taken into consideration more than what is deemed to be a necessity for the case to be properly elucidated. Notwithstanding should it be mentioned that an entity is in most cases subject to corporate taxation levied on earnings whereas owners hold assessment for dividend taxation[133]

Initially one could assert that direct taxation on the entities involved in the acquisitions transaction should be taxed in accordance with part II of the merger directive.[134]

Taxation will arise as a result of a merger, a demerger or as a result of some sort of business assignment. Transfers or exchanges of assets are not affected as a taxable event, except when this set of affairs has a supplementary element of offsetting accumulated losses, as would be affected by the obtaining of new company ownership.[135]

The procedure of offsetting of losses has been vastly controversial throughout the Union during the previous years. The question was dissected through the Marks & Spencer case[136] and will be partly attended to further on in this chapter.

Regulations has been imposed proclaiming that there must be a continuity present in the taxation surrounding the entire company transformation/ acquisition/ merger procedure if not so a disparity would arise offsetting the balance of business activity[137] .

According to Swedish legislation the pursuit for continuity is far reaching[138].

Art 4[139] of the amended merger directive impose that transactions emerging cross-border restructuring, where tax sovereignty is transferred into another jurisdiction will not lead to any excessive taxation on the surplus value obtained in the transaction. Hence, if there is a difference between the estimated value for tax purposes and the actual market rate this surplus

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[132] European tax law B. Terra P Wattel fourth edition kluwer law international 2005 p 541.
[133] J Barenfeld taxation on cross-border partnerships JIBS 2005.
[134] G. Rabe EU skatt direkt beskattning p 868.
[135] Il 40 cap.
[136] C- 446/03.
[137] Kristina Ståhl fusionsdirektivet – svensk beskattning I EG rättslig belysning iustus förlag Uppsala 2005 p 233.
[138] RÅ 2000 ref 18.
[139] 90/434/EEC amended by 2005/19/EC.

might be transferred into the absorbing company.[140] Thus maintaining continuity between the entities involved, both regarding terms of current taxation emerging from the transferred estate, as well as the subsequent right to levy tax at a time that is more appropriate. [141]
What might at first glance seem like exemption from taxation is therefore not a total exemption, merely a deferral of taxation in order to await taxation under terms in accordance with Union standards and away from the possibility of discrimination. By deferring taxation, one also ensures continuity to the entire transaction.[142]
There has through the amendments, been issued that in the case of SE companies, there should not occur instant taxation on assets that remain in connection to a branch or subsidiary of the SE.

If the acquiring company in our case was to either hold the legal entity of an investment company, or transform into a company like this the taxation scenario tends to differ. Investment companies submit to a standard tax rate. Instead of being subject to taxation continuously on profits at assignment, they are obliged to on a once a year basis enter a standardise revenue into their accounts. The assessment of this sum ought to be calculated upon the total value of the company's partnership fractions[143] . In accordance to this form of taxation, continuity would not subsist as this form of taxation in no aspect correspond to the prerequisites thereof, continuity must therefore depend on if the investment company were to emerge from the transaction as entirely incorporated into a limited company, previously holding the entity of a, by the investment company owned subsidiary[144].

8.4 Offsetting of losses

In the practical case assessed in this thesis the aspect in focus is a transaction upholding business continuity.
Contemporary with the first draft of the merger directive it also emerged proposals for a specific directive, regulating cross-border offsetting of losses on an individual basis[145]. This proposal had the incentive of removing obstacles on cross-border entireties implementing necessary harmonizing elements into the issue, as national law often contravenes the EC treaty on the offsetting of internationally based losses.[146] Since this directive has not to this date been adopted, one could perhaps assume that case law in

[140] R Russo Partnerships and other hybrid entities and the EC corporate direct tax directives European taxation October 2006 p 482.
[141] European tax law B. Terra P Wattel fourth edition kluwer law international 2005 s529.
[142] Kristina Ståhl fusionsdirektivet – svensk beskattning I EG rättslig belysning iustus förlag Uppsala 2005 p 259.
[143] IL 39:14.
[144] Kristina Ståhl fusionsdirektivet – svensk beskattning I EG rättslig belysning iustus förlag Uppsala 2005 p 259.
[145] COM (90) 595.
[146] M Dahlberg Direct taxation in relation to the freedom of establishment and the free movement of capital vol 9 2005 Kluwer law international p 59.

collaboration with existing directives has been found to be sufficient in this area. Still if this directive had been implemented it would have presented about the same solution to this problem as did the ECJ in the Marks & Spencer case in 2006.
As a consequence has it now been generally assessed that a company acquiring another company also gains control over accumulated losses appertained by the transferred company, provided that losses have not been exempted beforehand, solely for tax purposes.[147]
Furthermore does this also work the other way around. Article 10(1) expressly forbids member states to recapture losses incurred in PE that have previously been set of against taxable profits in the head office [148].

The verdict of the Marks & Spencer case severely improved the situation for the company in the practical case once they have accomplished the transaction if they chose to establish as a cross-border intra-group. According to this groundbreaking judgement delivered by the ECJ the UK group relief legislation seriously discourage companies upholding a group entity into establishing and hence expanding into other EU member states. In accordance with UK Income and Tax law,[149] UK resident companies are allowed to offset their domestic based group profits and losses amongst other entities within the group but they were not permitted to offset accumulated losses in the same way with established subsidiaries or branches originated elsewhere within the Union.
According to some authors was the disadvantage given to Marks & Spencer by their cross-border structure not a breach against treaty freedoms, but a situation arising since national tax systems has not yet been fully harmonized.[150] Still when the verdict was finally delivered the judgement exclaimed that, setting apart foreign based and national subsidiaries in this way, strongly contravenes the assessed right to freedom of establishment as ratified in art 43 and 48 of the EC treaty. This since different tax treatment of foreign based subsidiary's due to domiciliation, contravenes the freedom of establishment and none of the by EC granted exceptions[151] were met. Still the court reached the assumption that member states have to have some legislative power to ascertain that losses are only levied once as well as for the right purposes. Hence did they make an exemption for cases where one could assume that the sole purpose of the transaction would be to prelude from taxation through wholly artificial arrangements.[152]

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[147] R Russo Partnerships and other hybrid entities and the EC corporate direct tax directives European taxation October 2006 p 481.
[148] R Russo Partnerships and other hybrid entities and the EC corporate direct tax directives European taxation October 2006 p 483.
[149] Income and taxes act 1988.
[150] M Dahlberg Direct taxation in relation to the freedom of establishment and the free movement of capital vol 9 2005 Kluwer law international p 215.
[151] exemptions from this principle may be made, these have been covered earlier in this thesis.
[152] C-446/03 para 47-49.

What has emerged is that by this verdict, the ECJ established a practice in the situation of cross-border intra groups that reflect on cross-border acquisitions and mergers to a great extent.
The verdict immensely simplified cross-border taxation rules on conducting intra group affairs. The Marks & Spencer case left behind a playing field where cross-border acquisitions with the purpose of continuously operating as an intra group similar to the practical case, now hold the advantage of competing at the same level as those operating nationally. Therefore, prospering cross-border companies are now fully allowed to expand without borders to where they hold greatest advantage for their business activity.[153]

8.5 Taxation issues resulting from the transfer of an SE

A transfer of an SE might occur due to various prerequisites that the company faces in their operation. It can be a well-planed affair in order to expand ones business activities. It could also be made in order to achieve logistic advantages, as well as a simple strategic move for tax and labour reasons.
Alternatively could it be something happening over time as the operation expands in areas that beforehand did not have such great importance and as more and more managerial decisions are suddenly taken elsewhere and the company might find that their real seat is suddenly not where it started out. Hence, causing an unintentional shift in the company's real seat.[154]
Even though several important rulings on the matter of freedom of establishment such as *Centros*[155] and *de Lasteryier du Saillant*[156] has arrived recently, it is not a clear path.

If operating through an SE the issue of creating a new legal person in order to shift domiciliation or ownership structure is not present[157]. If this procedure is chosen, the only thing to orchestrate is a mere transfer of the companies registered office to another member state.
There are further regulations regarding SE companies in the SE regulation[158]
An important perquisite that further simplifies transactions concerning acquisitions when the subsequent company's legal form holds that of an SE is the fact that the amendments in the directive clearly states that no exit tax may be imposed on a SE company wishing to migrate its primary operation abroad.[159]

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[153] M. Lang The marks & Spencer case – the open issues following the ECJ final word European taxation February 2006 p2.
[154] G Burwitz " tax consequences of the migrating companies: a practitioners perspective" European business organization law review 7 2006 s 590.
[155] C-212/97.
[156] C-9/02.
[157] European tax law B. Terra P Wattel fourth edition kluwer law international 2005 p 544.
[158] No 2157.
[159] Art 10b council directive 90/434/EEC.

Therefore, not only does one have to complicate matters by first liquidating the transferring company structure, in addition will there be no problems with potential taxation of hidden reserves and losses that might otherwise arise.
The only complicating factor, if we decide to assess this procedure to the case, arises as the transfer of the registered office of an SE does not automatically constitute a transfer of the fiscal residence. [160]A situation could then take place where the real seat of the company and the registered office of the company reside in diverse countries. This is not a possible scenario for an SE, as they are not allowed to run their operations dual resident.[161] Therefore, one must discuss whether the theory of real seat in itself is consistent with European law. The question evolves since the theory denies a company residing in a foreign country to uphold a legal personality in that country if they only transfer their place of management and not their legal entity there as well[162]. This would withhold the company from utilizing public authorities and other facilities such as courts, the company's existence in the country would be immensely obstructed by such measures. Further does this rule oppose the general terms for freedom of establishment brought forward by the Union. [163]
Since the core of the European Union is based on the intra-activity between countries and companies as well as people should be able to use the entire Union as their level playing field, there is clearly a problem if this is not the practical reality that companies face.
In an early case commonly referred to as " *Daily Mail*[164]" the European court made a statement that the basic freedom of establishment did at that stage in the progress towards a joint system of legislation not yet comprise business cooperation's activity. Through this ruling, the court in theory legalised the discrimination of companies with foreign principal state of residence, or real seat. Although, later judgements has been cast claiming that a company upholding a legal persona registered in another member state is, under no circumstances to be treated any differently that those with national domiciliation.[165]
Hence, will this conclude that the theory of real seat must be a violation against European law? We must assume that this issue is one that the European-Court find a most troubling dilemma, arising from a key question in European company law, otherwise it would not be so immensely dissected.

Under the assumption that the company in question is resident in a state in accordance with the prerequisites, i.e. that it, has been incorporated in the state and therefore respond to laws concerning issues of real seat. Moreover,

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[160] An analysis of the 2005 amendments to the merger directive M. Aurelio International tax review 2006 p 15.
[161] Art 7 council regulation no: 2157/2001 on the statue of European company.
[162] G Burwitz " tax consequences of the migrating companies: a practitioners perspective" European business organization law review 7 2006 s 591.
[163] Article 43 EEC.
[164] C-81/87 1988.
[165] Based on cases such as *Inspire art* and *Centros.*

that the company not only has its real seat but also is to the greater extent managed and controlled in Sweden. Then the company is subject to something called unlimited tax liability in Sweden.[166]
Along with an unlimited tax liability, there are certain obligations and advantages that are not to be disputed. If thus the company does not qualify for unlimited tax, as it assumingly neglect to fulfil both prerequisites. It will fall under a category of taxation, where the taxation sovereignty of the country upholding real seat, as well as the country harbouring the principal place of management, both hold the company accountable for the limited taxation on income generated in the permanent establishment.[167] Still an unlimited taxability is set on the income originating from the operations in the registered seat where the official state of residence is situated.
This would not necessarily create problems but since taxation within the Union is not harmonized diversities will occur in the taxation of the company's operations dependent on factors such as countries enacting individual politically established taxation laws.
This raises the risk of double taxation if legislation in the country holding the registered seat and those in the country of the principal operation overlap.
Double taxation will be discusses more further along in the subsequent chapter.

8.5.1 Exit taxation

The merger directive state that all assets and liabilities must remain connected to the place of the permanent establishment at all times[168], as the primary right to tax in accordance with this, remains in the old state of residence[169]. Exit taxation is then imposed as a safety measure by countries within the Union, if accumulated taxation on a company is at risk of transferring to another country and hence disappearing out of their jurisdiction[170]. It is often regarded as the last possibility for a state to impose tax on unrealised and potentially hidden reserves held by the transferring company[171]. In Sweden, this is covered in IL chapter 22[172].
5§ aims to expose a set of situations where legislation has to cut in to the European Union directives in order to uphold and protect Swedish interests regarding taxation. [173]
There is one obstacle hindering the raising of revenue through exit taxation. That is the fact that as the principle was worded it did not intend to apply to

[166] M. Dahlberg internationell beskattning – en lärobok p 39.
[167] 3 cap 18§ IL.
[168] Lars Pelin internationell skatterätt p401.
[169] Art 7 (2) OECD model Convention.
[170] J Barenfeld Taxation of Cross border partnerships JIBS 2005 p 88.
[171] G Burwitz " tax consequences of the migrating companies: a practitioners perspective" European business organization law review 7 2006 p 593.
[172] Inkomstskattelag (1999:1229).
[173] Lars Pelin internationell skatterätt p 146.

cross-border transfers of assets.[174]. If assets are not liquidated during the transaction, taxation is based on a conjured sum representing the proposed value of the assets.
Consequently, even if the assets are not realised and there is no future design for this, exit tax must still be paid by the limited company, and this could be a heavy burden for a company wishing to restructure their organisation[175].
In addition, if the company still holds a permanent establishment in the country they will be forced to pay exit tax when transferring their registered seat, yet are they still held accountable in the old state for the revenue generated through the PE. [176] Exit taxation does in some cases inflict as a hindering obstacle for companies wishing to move their principal operation, or expand in other states through acquisitions.[177] This is not in line with the EC directives principle of freedom of establishment.[178]
Something holding relevant to the assessed case is the amendments concerning German exit taxation, according to this no exit taxation will be imposed on a company migrating or as in the case is subject to cross- border acquisition if after the reorganization the company's assets still remain in a PE in Germany[179]. Thus, if assets are at a later occasion transferred cross border they will be subject to instant taxation in the receiving country.[180]

The established prevention of exit taxation could be considered as a tax deferral existing merely until the hidden reserves in the company are to be legally realised[181]. Although it raises concerns regarding double taxation and possible tax evasion, the option is considered to be favourable if a company upholds the classification of an unlimited one but not so much if it is a limited entity.

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8.6 Double taxation / double non-taxation

Methods used in order to combat discriminating mistreatment of companies operating cross-border have an important role in the company acquisition as well. If these standards were not established company transfers and restructuring through acquisition, within the Union would be immensely

[174] G Burwitz " tax consequences of the migrating companies: a practitioners perspective" European business organization law review 7 2006 s 593.
[175] C-436/00.
[176]M. Dahlberg internationell beskattning – en lärobok p98.
[177] M Dahlberg direct taxation in relation to the freedom of establishment and the free movement of capital Kluwer law 2005 p 204.
[178] C-9/02.
[179] Corporate tax code section 12 (amended January 2007).
[180] G Burwitz " tax consequences of the migrating companies: a practitioners perspective" European business organization law review 7 2006 p 594.
[181] G Burwitz " tax consequences of the migrating companies: a practitioners perspective" European business organization law review 7 2006.

more complicated to administer both from the practitioners as well as the authorities aspect.[182]
The merger situation established through this case would also be faced with much more complicating dilemmas as the proposed cross border acquisition without these regulative measures, most definitley would place the company in a situation forcing them to compete on the same preliminaries as domestic legal entities, while at the same time submitting to different terms of taxation. [183]
Therefore, states are obliged to uphold harmonized taxation, not discriminative against neither foreign investors, nor national companies wishing to run their operations abroad. As a result, there is a limit in between this and applying the principle of home state neutrality[184].

Article 293 of the EC treaty[185] strongly oblige member states to cooperate with each other in order to eliminate the risk of double taxation, as well as complete taxation evasion.[186]
Although this article does not have direct effect towards the participating nations, it is viewed upon as a primary goal established by the Union to encourage that it is obliged[187].
The OECD has also decided to take action when it comes to this issue and in their report on how to treat taxation derived from income and capital across national borders they establish certain policy imposed methods to combat the problem[188]. The OECD considers single taxation to be the standard procedure. Deviations from this should be avoided[189]
The methods commonly used for calculation in these situations are the *Tax-exempt* method[190] and the *tax credit* method[191]. What needs to be acknowledged is that despite their differences both these principles may be in use under the same cross-border taxation agreement, when applied by different states for diverse types of income[192]

8.6.1 Tax exempt method

Tax exempt method is also known as capital import neutrality[193], in accordance to this the principal focus should be on that income generated from a foreign source state, shall be exempt from taxation as it is to be

[182] M Hilling free movement and tax treaties in the international market p 18.
[183] Van Raad Non-discrimination in international tax law 1986 p 73.
[184] J Barenfeld Taxation of cross-border partnerships JIBS 2005 p285.
[185] EC treaty 325/33.
[186] M Dahlberg direct taxation in relation to the freedom of establishment and the free movement of capital kluwer law 2005 p 44.
[187] ECJ case C-137/84 *Mutsch.*
[188] OECD Model convention with respect of income and taxes 15-07-05.
[189] Merks. Tax evasion, tax avoidance and tax planning Intertax vol 34 issue 5 2006 p 275.
[190] Article 23 A OECD Model convention with respect of income and taxes 15-07-05.
[191] European tax law Terra, Wattel third edition kluwer law international 2001 p153.
[192] Article 23 A OECD Model convention with respect of income and taxes 15-07-05.
[193] European tax law Terra, Wattel third edition kluwer law international 2001 p155.

assumed that this revenue already has been subject to taxation once in its source state[194]. Therefore, independent of where the legal entity may reside, tax levied from its foreign interests should be taxed at the rate levied in the foreign state. Hence is taxation in the home state only to be calculated on income levied within domestic borders. [195] This makes it possible for all investors to compete on the same market, without intrusive measures taken upon them, dependent on domiciliation of its registered seat. Within this method there is thus several more or less intrusive variations.
The variation most applicable on company transactions is *exemption in progress* where foreign revenue is calculated together with inland income. The income is fixed and taxation is then imposed on the part of the total income derived from national income.[196]
Then there is the *matching exemption,* rarely used except for when foreign income derived from dividend is exempt of taxation. Hence, it is the method most commonly applied upon situations similar to the case considered throughout this thesis. According to this, if the source state has not imposed the in Sweden, prescribed company taxation due to i.e. investment supporting measures taken by the foreign state, the taxation authority are to examine the taken measures in relation to the tax that would have been levied had the measures not been granted freedom from taxation.[197]
This extra precaution is taken primarily in order to avoid exploitation of potential tax havens and other illegitimate conducts.

8.6.2 Credit method

The credit method is applied by countries that adhere to the principle of capital export neutrality. In accordance to this method, the state imposes taxation on income and other revenue gained by residents within their country, originating from a source in a foreign state. [198]
It is of outmost importance according to this that taxation is imposed in such a way that resident legal entities are neither encouraged nor discouraged to invest and do business abroad. Any infringement of this would be regarded as discrimination against foreign investment.[199]
By applying this procedure the state sometimes, due to diverseities in states tax policies has to regulate the paid amount and allow deductions to harmonize taxation. [200]
Hence does the principle impose that irrespective of what the tax might be in the other state, one is obliged to pay in accordance with the level given in the state where once domiciliation lies, on the total worldwide generated income[201]. Still he may credit against the tariff given by the foreign state in

[194] Article 23 A OECD Model convention with respect of income and taxes 15-07-05.
[195] M. Hilling free movement and tax treaties in the internal market JIBS 2005 p 54.
[196] Ibid.
[197] Lars Pelin Internationell Skatterätt – I ett svenskt perspektiv 4e omarbetade upplagan 2006 p 267.
[198] Dennis Weber tax avoidance and the EC treaty freedoms Kluwer law 2005 p 116.
[199] Dennis Weber tax avoidance and the EC treaty freedoms Kluwer law 2005 p 84.
[200] European tax law Terra Wattel third edition kluwer law international 2001 p154.
[201] Article 23 B OECD Model convention with respect of income and taxes 15-07-05.

the home state, hence levying the divergent as a deduction, in return some time afterwards.[202]
There are two different ways to put this method into practice. The most common one is the *ordinary credit*[203] calculation. A reduction on calculated worldwide tax due to foreign income, is accorded to an amount not exceeding the amount in proportion to the total income.[204] Then there is the *Matching credit* originating from an incentive to encourage cross-border investments.[205] If tax mitigation is granted a state the ordinary credit would neutralize these advantages hence is deduction allowed to the extent that would have been imposed if the mitigation were not to exist, just like in the case of the exemption method[206]
As a general assessment, even though the credit method is the method most frequently practiced on overall taxation. Company taxation due to revenue from cross-border subsidiaries is one area where the Union Nations apply *exemption method* we may therefore assume that this is the most favourable mode to beset the case.[207]
To prevent double taxation on foreign-based subsidiaries most double taxation agreements contain some sort of affiliation privileges calculated in accordance with the exemption method.[208] Hence is this a perquisite to take into the consideration when aspiring to expand or reorganise through cross-border acquisitions or mergers. I.e. Germany has a granting of participation exemptions for qualifying foreign originated dividend, as well as there being an exemption for active business profits conceding the possibility of transferring assets derived from foreign-based subsidiaries, without the risk of double taxation.

8.6.3 Double taxation agreement

An issue that ought to be taken into consideration when discussing the case is the existence of double taxation agreements in between the countries involved regulating how the transactions are to be taxed.
If an agreement exists between two countries these countries must always cooperate in the formulation of new laws regarding company taxation[209]
If i.e. an exemption is to be created for a specific issue, this must according to treaties, become known to the other country. The other county is then given the option of also offering the same exemption and if they do not wish to impose this, they may not tax on this specific income as the income is later transferred into the country. [210]

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[202] J Barenfeld Taxation of cross-border partnerships JIBS 2005 p 86.
[203] Lars Pelin Internationell Skatterätt – I ett svenskt perspektiv 4e omarbetade upplagan 2006 p 268.
[204] M. Hilling free movement and tax treaties in the internal market JIBS 2005 p 55.
[205] Swedish regulations for this procedure are to be found in IL 37:30.
[206] Lars Pelin Internationell Skatterätt – I ett svenskt perspektiv 4e omarbetade upplagan 2006 p 269.
[207] M. Hilling free movement and tax treaties in the internal market JIBS 2005 p 56.
[208] European tax law terra Wattel third edition kluwer law international 2001 p157.
[209] Lodin Lindencrona, Melz, Silfverberg inkomstskatt 10 edition p 513.
[210] J Barenfeld Taxation of cross-border partnerships JIBS 2005 p285.

Therefore to implement this into our practical case one may conclude that there does exist agreements between Sweden and Germany[211] and hence must these be abided by in an acquisition with organisational restructuring as a consequence.[212]
By doing this, one eliminates both total tax evasion and the risk of a company being held accountable to taxation on the same income more than once.

[211] Lag 10 december 1992 (nr1193) om skatteavlat mellan Sverige och tyskland . förordning 22 september 1994 (1300) om skatteavtal mellan Sverige och tyskland.
[212] J Barenfeld Taxation of cross-border partnerships JIBS 2005 p283.

9 Tax avoidance / evasion

Since tax evasion is an ever-present element in cross border restructuring I have decided also include this into the thesis as a secondary quandary. Therefore is the incentive not to implement the practical case into this part but to deliver an objective report on the issue.

9.1 Tax evasion through mergers

Crossing the line in between legal tax planning or avoidance and illegal tax evasion is something that might be a severely expensive mistake for a cross-border restructuring company[213]. Still it is a border were most international operators linger. The definition of what actually do cross the line is a predicament.[214].
Abuse through cross-border restructuring has been regulated in article 11[215]. It concludes that benefits may be denied if the operations principal incentive is avoidance or evasion[216].
Tax avoidance may be defined as tax planning with the main purpose of avoiding tax both be it in the home as well as the host state. Avoidance is generally tolerated. [217]. Tax evasion is thus an illegal activity that will impose sanctions[218]
Tax evasion is according to the OECD a procedure that involves one of the following prerequisites[219]. There is invariably some artificial element present in the business procedure of the transaction,[220] as the procedure has parts subsisting due to taxation advantages. In addition, there might be a severe amount of secrecy surrounding the planning of, and the operations resulting from, the procedure. Finally, what needs to be focused on is how well and frequently the companies tend to make use of existing legal loopholes. [221]

[213] Merks. Tax evasion, tax avoidance and tax planning Intertax vol 34 issue 5 2006.
[214]M Dahlberg direct taxation in relation to the freedom of establishment and the free movement of capital kluwer law 2005 p233.
[215] 90/434/EEC.
[216] C-28/95.
[217] M Dahlberg direct taxation in relation to the freedom of establishment and the free movement of capital kluwer law 2005 p234.
[218] Merks. Tax evasion, tax avoidance and tax planning Intertax vol 34 issue 5 p 272
[219] OECD committee on fiscal affairs of the OECD international tax avoidance and evasion four related studies " double taxation conventions and the use of conduit companies" international tax series Paris 1987.
[220] C-201/01.
[221] Dennis Weber tax avoidance and the EC treaty freedoms Kluwer law 2005 p 161.

9.1.1 Anti abuse

As a measure to combat the possible abuse of cross-border tax treaties there is the principal of "abuse by anti-abuse[222]". By writing clauses into the tax treaties limiting the benefits exchanged through the treaties the countries protect themselves from exploitation.
OECD has submitted guidelines on formulation of the limitations.[223]

- *The look through provision*. I.e. denying favourable treatment emerging as a result of the treaty if the company in question is owned or controlled by foreign investors, eliminating third party benefits.
- The *exclusion provision* denying treaty benefits to companies whom are already tax exempt. Still this does not deal with the more advanced ways to misuse tax treaties
- *The subject to tax provision* gives out benefits only if income generated by the company is subject to tax in the same state as the one holding the title state of residency
- *The channel approach,* tax treaty will not apply if more than 50% of generated revenue is in the hands of non-residents.
- *Abstinence approach* simply not entering into treaties with countries that are to be considered as low tax countries.
- *Tax harmonization approach,* ultimately the OECD recommends that countries within the Union try to harmonize their tax systems so that they hold a greater similarity with one another.

Are those political standpoints then to be considered unjust against the other participants of the Union? Then there is also the question of good faith. As one participant enters into negotiations for i.e. an acquisition of a foreign subsidiary with the principal purpose of the transaction being tax evasive the other party might participate pure heartedly as they se the business transaction as a potential successful development for the business.[224]
The OECD made a statement in the tax treaty report, saying that application regulations is to be "achieved through domestic legislation but the state concerned should first ensure that there is a broad consensus that the intended legislation does no injure international taxation[225]". This makes domestic tax law one of the strongest holdings in competition with EC legislation.

To clarify the situation, Community law has afforded the member states with preliminaries for when avoidance measures may be imposed.

- The legislation preventing abuse must be in conformity with EC law
- The imposed anti-avoidance measures shall be applied by the member state without distinction

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[222] Obermair & Weininger. Treaty shopping and domestic GAARs in the light of a recent Austrian decision on Irish IFS companies Intertax vol 33 issue 10 2005.
[223] www.oecd.org.
[224] Intertax vol 32 issue 11 2004 Petkova. Treaty shopping the perspective of national regulators p 547.
[225] OECD committee on fiscal affairs of the OECD tax treaty override Paris 1989.

- Consistency, same risk of avoidance must be treated equally and objectively
- An element of advantage must be present in order for the measure to constitute avoidance
- Both subjective and objective criterions must be assessed.[226]

Furthermore, one must consider the fact that just because a procedure is highly successful in decreasing a company's taxation it does not necessarily equal that there has been abusive force in work, and just the opposite is also applicable. A company might execute tax avoidance procedures that when put in reality they do not result in any tax avoidance[227]. Tax avoidance may not either be based on the mere fact that an entity restructuring cross-border receives advantageous tax benefits- transferring tax jurisdiction is not in itself tax-avoidance[228]
Holding greater importance in the evaluation is the *sole purpose* of the transaction and the primary incentive for disapproval of tax avoidance is not the decrease of funds given by tax revenue. These procedures offend the existence of laws granting tax relief to companies possessing a genuine and within the limits, business interests in cross-border activity. [229]
As the international business climate has changed drastically during the last decade the door has opened for a vast amount of tax planning opportunities.

As a final analysis, it may be held that prevention of tax evasion could justify imposing national legislation in some cases[230]examination on whether intrusive tax avoidance is present must thus be evaluated on an individual basis in every case. [231]
Further must the measures taken have a sublime direct purpose, hence eliminating wide and vaguely formulated legislation.
By exemplifying this, fiscal cohesion is deemed to be an acceptable justification for intrusive legislation[232] whereas loss of revenue and erosion of the tax base is considered to be to general and not acceptable[233]

9.2 Treaty shopping

Companies operating cross-border could exploit the existence of double taxation agreements in order to gain advantages for their cooperation. This can be attained though the establishment of a part of ones company in a country that through negotiations has attained more preferably terms of

[226]Dennis Weber tax avoidance and the EC treaty freedoms Kluwer law 2005 p p185.
[227] Merks. Tax evasion, tax avoidance and tax planning Intertax vol 34 issue 5 2006 p 274.
[228] Dennis Weber tax avoidance and the EC treaty freedoms Kluwer law 2005 p 249.
[229] OECD committee on fiscal affairs of the OECD international tax avoidance and evasion four related studies " double taxation conventions and the use of conduit companies" international tax series Paris 1987 p 11.
[230] C-264/96.
[231] C- 28/95.
[232] Dennis Weber tax avoidance and the EC treaty freedoms Kluwer law 2005 p 246
[233] M Dahlberg direct taxation in relation to the freedom of establishment and the free movement of capital kluwer law 2005 p273.

taxation. If the sole purpose of the establishing is to gain tax advantages and hence avoid excess taxation on gained income the transaction will be considered as treaty shopping[234] .
Treaty shopping is quite frequently perpetrated as it could be considered a somewhat legalised tax planning measure in order to defer taxation[235]. It might be deemed improper but is in no way illegal[236].

There are two separate ways of orchestrating treaty shopping. Either one can use the *Direct conduit strategy* in accordance with this, a treaty between country A and B will grant companies full applicability to terms agreed upon in the taxation agreements to domiciled entities. To company C, that at this point not has access to the terms granted entities in A and B. To also submit to the terms he may by establishing the company, or a part of his company in one of the contracting states i.e. A and then do business under the terms of the taxation agreement between A and B in state B. Hence is company C free to transfer income generated in state A, to the parent company as a loan between companies in a conciliated group.
The other way to handle this situation is by something called the *stepping stone strategy*. By applying the same procedure as in the former case C is fully liable to taxation in state A. Consequently is he still granted to pay interest, service fees and other governmental fees in state C. By doing this income is gradually transferred to state C at almost no cost whatsoever due to the abovementioned treaty existing between A and B. [237]

To limit the extent of these treaties there is the OECD report on conduit companies[238].
The report exclaim that the procedure of treaty shopping clearly oppose the principle of reciprocity, passing the terms negotiated between two parties forward to third parties. There might further be a risk that the considered income will be exempt from tax altogether. Ultimately could a negative effect on reciprocal trust emerge since terms negotiated are passed forward when the conditions originally are based upon the exchange of advantages.[239]
There are several procedures discussed in order to prevent abusive actions through treaty shopping, the mere fact that there is such an immense interest regarding this issue indicate[240] that it is one of great importance to the governments within he Union.

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[234]Obermair & Weininger. Treaty shopping and domestic GAARs in the light of a recent Austrian decision on Irish IFS companies Intertax vol 33 issue 10 2005.
[235] Dennis Weber tax avoidance and the EC treaty freedoms Kluwer law 2005 p 203.
[236] OECD committee on fiscal affairs of the OECD international tax avoidance and evasion four related studies " double taxation conventions and the use of conduit companies" international tax series Paris 1987
[237] 2004 S Petkova. Treaty shopping the perspective of national regulators Intertax vol 32 issue 11.
[238] OECD committee on fiscal affairs of the OECD international tax avoidance and evasion four related studies " double taxation conventions and the use of conduit companies" international tax series Paris 1987.
[239] S Petkova. Treaty shopping the perspective of national regulators Intertax vol 32 issue 11 2004p 545.
[240] I.e. following the D case C376/03.

Invasive treaty shopping actions can be sanctioned by something called judicial interpretation, where legislators evaluate transactions in accordance with the principle " Substance over form" to ascertain whether or not the transaction has had legitimate origin or the sole purpose of eluding taxation.[241]
Thus does this conduct lack consistency, since the principles appliance is based on the different states willingness to submit to it. [242] States upholding a political system based on a low tax base, but not low enough to be listed as an official tax haven[243] might benefit from tax planning, as companies seek to establish within their borders and hence increase their revenue from tax.

9.3 Transfer of assets below cost price

Exit taxation is not the only measure available to regulate transactions of this sort. There is also the rule of correction,[244] established through Swedish legislation in IL 14:19§ as an ascertained complementation of the more general legislation in the 14 chapter where the principal consideration is the calculation of the results of a business activity. This occurrence emerges as in a potential company acquisition situation, a fictions much lower price than the market value is estimated to be is set on the vendor company[245].

14:19§ IL focus on the possibility that there might be a difference between the buying price and the actual value of the transferred assets.

The purpose of the regulation is therefore to "adjust" inadequacies so that even if the price and value of the given transaction are not in accordance with one another, the parties pay tax on estimated market value. If a rule like this would not exist one might end up with situations were companies make fictitious transactions merely for the purpose of tax evasion. [246]
Hence will in accordance to this transactions effected between companies acting in privity, hold the same disparity as those conducted by independent entities, thus upholding what must be considered to be business like ethics[247]. The enclosing of this objective means to show that when companies enter into a privity agreement such as a merger or an acquisition holding the cross-border sort inflicted in our fictive case, they shall as long as they hold separate entity, still abide by regulations upholding a competitive market. According to Swedish law, a comprehensive evaluation must be made of the situation exclaiming its validation to override market

[241] Petkova. Treaty shopping the perspective of national regulators p 545 Intertax vol 32 issue 11 2004.
[242] Dennis Weber tax avoidance and the EC treaty freedoms Kluwer law 2005 p 250.
[243] M Dahlberg tax competition – a Swedish national report.
[244] Lodin Lindencrona, Melz, Silfverberg inkomstskatt 10 edition p 545.
[245] Robert Sevenius "Företagsförvärv – en introduktion s 126.
[246] Lars Pelin Internationell Skatterätt – I ett svenskt perspektiv 4e omarbetade upplagan 2006 p 139.
[247] Lodin Lindencrona, Melz, Silfverberg Inkomstskatt en läro och handbok i skatterätt 10 edition p 545.

interest. Through circumstances discussed in this thesis, this results in a hindrance of tax deferral by selling below cost price, to reconstruct and gain market advantages as well as taxation benefits[248]. One must always pay regard to existing market value.[249] After the acquisition has been thoroughly accomplished, the company is at last entitled to act as a single unit throughout the Union with all deduction possibilities it entail[250] .

[248] Lodin Lindencrona, Melz, Silfverberg Inkomstskatt en läro och handbok i skatterätt 10 edition p 546
[249] 53 Cap § 6-7 IL
[250] The ruling in Marks & Spencer further extended this right for cross-border entities

10 Concluding discussion

After having accounted for all the circumstantia presented above we may asses that cross-border mergers still are to be found in the field of taxation that can only be described as highly relevant but not fully evolved as a phenomenon. In several of the areas reviewed is the conclusion to be drawn that although recent year's development has signified great improvement there is still a long way to go until companies may compete with the same ease cross-border as attained through domestically single market cooperation. However, several states still consider the transfer of registered office cross-border as a taxable event.
Thus as this thesis not attempts to primarily elude solely discrimination but imply a taxation angle I will as a conclusion attempt to present a summation on the issues and options presented throughout the thesis with primary focus on the practical case involved.

10.1 How could the Fictive case be realized

Concerning the different choices on how to realize a cross-border acquisition the first conclusion arrived at is that the amendments made in the Merger directive during recent years has provided several new ways to proceed.
Following the introduction of both the SE company, and the legal mergers applicability to cross-border scenarios, and the introduction of an improvement concerning hybrid entities in share transfer situations, a shift can be observed. The EC now acknowledges that the neutral situation where cross-border transactions do not trigger company or tax measures allegedly imposed is not a reality.
It may further be concluded that the advantages granted by the merger directive include; "rollover relief" the merger shall not give rise to any taxation on capital gains accumulated through the difference between real asset value and the value transferred for later disposal when the assets are realised.
Therefore must the assets remain effectively connected to a PE in the acquiring company established in the transferring state. The receiving company is also entitled to take over losses accumulated by the acquired company.
After having taken all the different scenarios and taxation obstacles, a few possible scenarios seem to me more advantageous than others do.
I will therefore make my assessment on the issue, presenting those situations I consider most favourable applied in the practical case scenario not in any way implying that it is the only correct way to proceed.

10.1.1 Recommended organisation structure of

the cross-border acquisition;

As the legislation surrounding SE now facilitate tax deferral on capital gains in a cross-border transaction as long as the SE principal assets remain in connection to a PE in the originating state. This scenario is one that our practical case may favour from applying.
The enactment of the 14th company law directive further predicts improvements in the field of transfers of registered offices in limited companies. This will gain SE companies as well.
As originally the company did not hold the form of an SE, it ought to first transform its entity in accordance with the prerequisites for this. Several diverse procedures for transforming into an SE is available and therefore must the first assessment, before accomplishing this be how the company wishes the final organizational structure to look after the acquisition.
So, shall registered seat be situated in Germany Sweden or somewhere else altogether? This depends on where operational advantages is to be found as that could be a determinant on place of registration, although if operation is not dependent on factors tied to a certain geographical place the factor of legislation (i.e. tax, employment) could impose as a dominant element. If the Swedish company were to, as a way of acquiring the German company, merge both legal entities into an SE. Holding the domiciliation in another Union country (i.e. Estonia). Then they could proceed with transferring the primary ownership to this company and as a result submit to the legislation imposed in that country remaining as PE in Germany and Sweden. An absolute requirement for this is nevertheless that both registered seat and principal place of operation is to be found in this third country for it to be possible. Further could this procedure cross the line into improper tax avoidance or if it does not, constitute a transparent entity and thus will be subject to taxation in Sweden and Germany regardless.

If activity in the companies hold a type where place of registered seat and headquarters are geographically restricted another scenario must be applied. The procedure could still be realized in the form of an SE, merging the companies into an SE domiciled in either Germany or Sweden and hence receiving all advantages of this company form.

Therefore after having revised all aspects surrounding a restructuring acquisition I have reached the conclusion that the enactment of the SE company is although it currently hold several defying obstacles until perfect, the future for cross-border business activities within the European Union. It is the structure that mostly encourages cross-border interaction in a way that I deem essential for the progress towards fiscal cohesion and a harmonized economic-activity system within the European Union.

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