



Lund University

School of Economics and Management
Department of Business Law

**The Territorial Limitation of the Swedish
Wage Remuneration Rule for Closely Held
Companies in light of EU- and Domestic Tax
Law on Third Country Inbound Dividends**

by

Joel Dahl

HARN60 Master Thesis

Master's Programme in European and International Tax Law

2016/2017

Spring semester 2017

Date of Submission: 6 June 2017

Tutor: Mats Tjernberg

Examiner: Oskar Henkow

Author's contact information:

joeldahl90@gmail.com

+46739 - 72 08 27

Table of Contents

1	Introduction	1
1.1	Background.....	1
1.2	Purpose	2
1.3	Method and Material.....	3
1.4	Delimitations	3
1.5	Outline	4
2	Swedish Income Taxation	4
2.1	Context of the Swedish Income Tax System	4
2.2	Closely Held Companies	6
2.3	Dividend- and Capital Gains Taxation of Qualified Shares.....	8
2.4	The Tax Mechanism for Qualified Shares	8
2.5	The Wage Remuneration Rule.....	10
2.6	Territorial Limitation of the Wage Remuneration Rule.....	12
2.7	Swedish Tax Policy of World Wide Taxation and Credit of Foreign Taxes	12
3	European Union Law	13
3.1	Primary Law, Direct Effect and Justification.....	13
3.2	The Freedom of Establishment	14
3.3	The Free Movement of Capital	15
3.4	Third Countries and Association Agreements	17
3.5	Exclusivity and Priority of the Fundamental Freedoms.....	19
4	Case-Law of the Swedish Supreme Administrative Court	20
4.1	EU & EEA Expansion - RÅ 2000 ref. 38 & RÅ 2000 ref. 47	20
4.1.1	Facts of the Cases.....	20
4.1.2	Reasoning of the Swedish Tax Board for Advanced Rulings	21
4.1.3	Reasoning and Decision of the Swedish Supreme Administrative Court ..	21
4.2	Territorial Limitation of Third Countries - RÅ 2007 ref. 59	22
4.2.1	Facts of the Case	22
4.2.2	Reasoning of the Swedish Tax Board for Advanced Rulings	22
4.2.3	Dissenting Opinion in the Board.....	23

4.2.4	Referral to the CJEU by the Swedish Supreme Administrative Court.....	24
5	Case-Law of the Court of Justice of the European Union	24
5.1	The Referred Case - C-102/05 Skatteverket v A and B	24
5.2	Origin of the Concept of Freedom Priority	25
5.3	The Definite Influence Criterion.....	26
5.4	Factual- and Purpose Approach.....	27
5.5	The Clarification of When the Freedoms Apply.....	27
5.6	Confirmation of the Purpose Approach – C-464/14 SECIL	29
5.7	The Boundaries of Definite Influence.....	29
5.8	Owners Jointly Fulfilling the Threshold of Definite Influence.....	30
5.9	Applicable Freedom for Dividend Originating in a Third State	31
5.10	The Market Access Third State Case-Law Exception	32
5.11	Restrictions and Justifications – C-464/14 SECIL	32
5.12	Legal Hierarchy of the TFEU and the Association Agreements.....	35
6	Analysis	36
6.1	The Current Approach by the Court of Justice of the European Union	36
6.2	Potential Restrictions and Justifications of the Wage Remuneration Rule	39
6.3	No Remedy in EU Law.....	40
6.4	Domestic Review of the Swedish Wage Remuneration Rule	41
7	Conclusion.....	43
8	Bibliography.....	47

ABSTRACT

The Swedish rules for closely held companies were enacted to combat income conversion abuse in limited liability companies where natural persons acted as both owners and employees. In the Swedish Income Tax Act, employment income is taxed according to a progressive rate while capital income is taxed according to a flat rate. The wage remuneration rule may increase the amount of dividend that the active owner is allowed to tax according to the flat capital tax rate. However, it only allows for the inclusion of wages paid inside the territories of the EU and EEA. Dividends originating in third states will be more heavily taxed.

This contribution provides a review of the territorial limitation of the Swedish wage remuneration rule in light of the settled case-law of the Court of Justice of the European Union on the matter of inbound dividend taxation. Additionally, it provides a review of the territorial limitation with consideration to its domestic context, purpose and effect.

It is concluded that the Court of Justice of the European Union has not substantially changed its disposition regarding domestic legislation exclusively targeting holdings of definite influence. Furthermore, the wage remuneration rule is very likely to exclusively target such holdings. Due to the Court's reluctance of applying the free movement of capital under such circumstances, no EU law remedy is concluded to exist for the different tax treatment created between a domestic holding and a third country holding.

As regards the domestic context, the territorial limitation is considered to not be in line with capital export neutrality. This divergence can only be understood by the need to ensure effective fiscal supervision. Such a justification is in EU law only accepted if it proves untenable to obtain the necessary information. It may, therefore, be prudent for the Swedish legislator to review whether the territorial limitation goes beyond what is necessary to achieve this objective.

ACKNOWLEDGEMENTS

The past year has been the best year of my academic life. Both classmates and teachers far exceeded what I had anticipated.

I would like to extend a thank you to the amazing students of Lund University MEIT 2016/17, for their humour, intelligence and tenacity.

I would also like to extend my sincere and heartfelt thanks to our professors Cécile Brokelind and Oskar Henkow for teaching us tax law with such thoughtfulness, dedication and passion.

In addition, I would like to thank my tutor Mats Tjernberg and all of the great guest lecturers who have come to visit us this year in Lund.

ABBREVIATIONS

AG	Advocate General
Art.	Article
Ch	Chapter
CJEU	Court of Justice of the European Union
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Area
EU	European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
SEK	Swedish Krona (currency)
P	Page
Para	Paragraph

1 Introduction

1.1 Background

The Swedish tax system contains a specific set of rules for limited liability companies controlled by a small number of owners or many owners who are actively working in the company.¹ Such companies are called closely held, as the owners tend to have the ability to influence in what manner their own labour remuneration is delivered.² The special income tax rules governing active owners of these companies mainly serve to ensure that labour income, which is subjected to a relatively high taxation, is not taxed in the capital schedule as more leniently taxed dividend income.³

For owners of closely held companies, it is possible to make use of a portion of the wage remuneration paid to employees of the company when calculating the maximum-amount allowed to be taxed as dividend income. The rule has, in Swedish preparatory works, been labelled with the purposes of promoting the risk-taking of creating businesses as well as incentivizing employment.⁴ Nevertheless, the wage remuneration rule has never been allowed to interfere with the main purpose of the closely held company rules; to prevent income conversion by the owners.⁵

This wage remuneration rule is, however, limited solely to wages paid in countries inside the European Union (EU)- and European Economic Area (EEA) territories.⁶ Historically, this was not always the case. In its infancy, the remuneration rule was even more limited and covered only wage remunerations that had generated social security contributions inside the Swedish system. This limitation was challenged in Swedish courts on the basis of EU law, and the rules were subsequently changed to include EU- and EEA countries.⁷

Remaining was the question of whether this inclusion of EU- and EEA countries was sufficient in order for the Swedish wage remuneration rule to conform to the obligations of EU-law. In the case of *C-102/05 Skatteverket v A and B*, the wage remuneration rule was examined by the Court of Justice of

¹ SFS 1999:1229. *Inkomstskattelag*. ch, 56 & 57

² Sven-Olof Lodin and others, *Inkomstskatt - En Läro- Och Handbok I Skatterätt* (15th edn, Studentlitteratur AB 2015). p, 447

³ Swedish Ministry of Finance, "Utkast Till Lagrådsremiss, Fi2016/03965/S1, Förändrade Skatteregler För Delägare I Fåmansföretag" (2016). p, 12

⁴ Swedish Ministry of Finance, "Proposition, 1993/94:234, Vissa Inkomst- Och Företagsskattefrågor, M.M." (1994). p, 88-90

⁵ Swedish Parliament, "Proposition, 2005/06:40, Reformerade Beskattningsregler För Ägare I Fåmansföretag" (2005). p, 38-42

⁶ SFS 1999:1229. *Inkomstskattelag*. ch, 57 para, 17

⁷ *RÅ 2007 ref 59* [2007] Regeringsrätten, 1543-03 (Regeringsrätten).

the European Union (CJEU) in third country circumstances.⁸ The question in the case was whether Sweden was allowed to exclude wages paid in a non-EU Russian branch, considering that the fundamental freedom of the free movement of capital also extends its prohibition of restrictions on capital movements to non-EU states.

The CJEU only applied the freedom of establishment in the case and saw any potential negative effect that the domestic provision might have had on the free movement of capital as an unavoidable consequence of its infringement on the freedom of establishment.⁹ Any restriction the wage remuneration rule may have caused, would at that time, thus have fallen outside the scope of EU law protection.

The CJEU case law, regarding the freedom of establishment and the free movement of capital and its relation to, and impact on, third country situations, has since then developed. It is in light of this EU law development as well as the domestic context and purpose in Swedish income tax legislation that the territorial limitation of the wage remuneration rule is in need of review.

1.2 Purpose

This thesis intends to review the territorial limitation of the Swedish wage remuneration rule for closely held companies with due regard to the past, recent and current developments in the case-law of the CJEU on the topic of inbound dividends. Additionally, it intends to review the *raison d'être* of the territorial limitation of the wage remuneration rule in light of the Swedish income tax system and policy. To achieve the intended purposes, a number of questions must be answered.

Firstly, how has the CJEU approached the issue of applicable freedom in its case-law of intra-EU and third country inbound dividends preceding the decision of *C-102/05 Skatteverket v A and B*?

Secondly, this settled case-law must be contrasted with the subsequent and more recent developments in the case-law of the CJEU on the same topic. If, and to what extent, has the jurisprudence altered course?

Thirdly, in light of this EU law jurisprudence, what conclusions must be drawn regarding the compatibility of the territorial limitation of the Swedish wage remuneration rule for closely held companies?

Fourthly, is there a possibility of Association Agreements, entered into by the European Union with third states, altering the above-drawn conclusions?

⁸ *C-102/05 Skatteverket v A and B* [2007] Court of Justice of the European Union, EU:C:2007:275 (Court of Justice of the European Union).

⁹ *C-102/05 Skatteverket v A and B* [2007] Court of Justice of the European Union, EU:C:2007:275 (Court of Justice of the European Union). para, 27

Fifthly, is the territorial limitation of the wage remuneration rule, in its current form, proportional, in that it does not go beyond what is necessary to achieve its objective, with due regard to its context, purpose and effect as part of the Swedish income tax law and tax policy?

1.3 Method and Material

In order to investigate and answer the questions posed in the thesis, the traditional legal dogmatic method is used. The law as it stands is clarified and the differing legal values of sources of law and legal documents, are acknowledged and respected.

As regards the information gathered on the Swedish legal system, the relevant information has been obtained using the text of the Swedish Income Tax Act (*Inkomstskattelagen*) as a basis. Further context and background have been sought in the preparatory works of the Swedish legislative process as well as domestically published literature. For the parts of the thesis that involve EU law, the essential material has been found in the decided and published case law of the CJEU, the primary law of the founding treaties and the secondary law directives. For further guidance in the interpretation of these sources, the opinions of the Advocate Generals have been turned to. To supplement this, published literature in renowned tax journals as well as published books on the topic of European and International taxation, have been used.

1.4 Delimitations

This thesis is limited to examining the case of inbound dividends received by a natural person owner of a closely held company, who is fully liable to tax according to the Swedish Income Tax Act. The Swedish rules for closely held companies also apply for capital gains taxation. In similarity to the receipt of dividends, the receipt of capital gains is also a capital movement. However, they are two similar means of achieving a transfer of capital from the post profit assets of the company to the individual owner. Therefore, no separate analysis will be conducted in this thesis specifically regarding capital gains taxation. Regarding the fundamental freedoms, only the freedom of establishment and the free movement of capital will be assessed. No other jurisprudence than that of the CJEU and the Swedish Supreme Administrative Court will be considered. The Treaty on the Functioning of the European Union (TFEU) provisions derogating the free movement of capital (Art. 64 – 66 TFEU) will be presented but will not be part of the focus of the thesis. The analysis will emphasise substantial shareholdings over portfolio shareholdings. As regards the choice of cases for this thesis, the selection was made on the basis that the great importance of the chosen cases, was highlighted in relevant doctrinal debates on the topic. The thesis will only consider domestic- and EU law as it stands as of the 30th of May, 2017. Any proposed changes to the Swedish rules for closely held companies will not be

utilised as they do not appear to substantively impact or alter the analysis undertaken in the thesis.

1.5 Outline

To give the reader historical background as well as context and insight regarding the prerequisites and effects of the Swedish rules for closely held companies, as they exist in Swedish income tax law, a presentation on this topic will be given in chapter 2.

In chapter 3, to contrast this, a chapter is devoted to European Union law. It illustrates the legal backdrop which all the domestic tax law of member states must be assessed against even though direct taxation remains a local competence of the member state. The, for the topic, relevant basic freedoms of the freedom of establishment and the free movement of capital, as laid down in the provision of the TFEU, are then presented. To be able to discern the difference between the two freedoms, their territorial scopes must be understood. Therefore, a brief introduction of the notion of third countries and how the European Union has chosen to interact with them, through the use of different international agreements, is given.

The implementation and interpretation of EU-law are ultimately up to the domestic court system. Therefore, how the Swedish Supreme Administrative Court has interpreted the EU primary law is of great importance to understand the wage remuneration rule from the viewpoint of the Swedish legal system. Chapter 4 is thus devoted to this topic.

Ultimately, the heart of the matter is the jurisprudence of the CJEU and their interpretation of, and response to, the Swedish territorial limitation of the wage remuneration rule as well as their jurisprudence on the issue of applicable freedom protection regarding inbound dividends. To this end, the Swedish wage remuneration case that was referred to the CJEU, *Skatteverket v A and B*¹⁰, will lead into this examination in chapter 5.

The above chapters and the information therein is then analysed in chapter 6 in an attempt to answer the five questions posed for the stated purpose of the thesis.

Finally, the conclusions reached in the thesis are presented in chapter 7.

2 Swedish Income Taxation

2.1 Context of the Swedish Income Tax System

In 1990/91, a ground-breaking reform of the Swedish income tax system was conducted. The reform came to be known as “the tax reform of the century”,

¹⁰ *C-102/05 Skatteverket v A and B* [2007] Court of Justice of the European Union, EU:C:2007:275 (Court of Justice of the European Union).

and it is still in effect today. The reform fundamentally reshaped taxation for both businesses and natural persons.¹¹ Income tax levied in Sweden, for natural persons fully liable to tax according to the Swedish Income Tax Act, is separated into three schedules.

- Employment income
- Business income
- Capital income

Every schedule has its own bundle of rules; however, the general idea of the system is that the net result in each schedule is subjected to tax.¹²

For employment income, a progressive tax rate is applied. It is first subjected to the local municipality tax, which can be said to be around 30% at an average. If the net overflow of employment income, in 2017, amounts to more than 452 100 SEK (ground allowance accounted for), any income earned beyond this, is subjected to both the 30% municipal tax rate as well as a 20% income tax levied by the state. This holds true until you hit the next income step of 651 700 SEK. Any income earned exceeding this amount will not only be subject to the 30% + 20%, but also an additional + 5%. Equalling a total of 55%.¹³ In addition to this, employment income derived from labour effort is also subjected to social security contributions. These contributions amount to 31% of the gross wage withdrawn by the employee and is paid in on behalf of the employee by the employer.¹⁴

However, the income schedule for capital income is subject to a flat general tax rate of 30%.¹⁵ As regards shares, this general rate of 30% is applicable to shares that are traded on an open market. For shares that are privately held, the tax rate is reduced to 25%¹⁶, and for shares that are part of a closely held company, the tax rate is further reduced to 20%.¹⁷ Although no social security contributions are present for capital income, income in the form of dividends is, in contrast to employment income, which is deductible as a business expense, already taxed at the corporate level with a corporate tax rate of 22%.¹⁸

In the tax reform of 1990/91, a divide was created between income generated by labour and income generated by capital assets. Labour, either as an employee or as a self-employed person was to be taxed progressively, and

¹¹ Kjell Sandström and Ulf Bokelund-Svensson, *Fåmansföretag: Skatteregler Och Skatteplanering* (11th edn, Björn Lundén Information AB 2016). p, 14

¹² Christina Gyland and Olof Jakobsson, *Skatterätt: En Introduktion* (11th edn, Studentlitteratur AB 2015). p, 27

¹³ SFS 1999:1229. *Inkomstskattelag*. ch, 65. para, 5. subpara, 4

¹⁴ SFS 2000:980. *Socialavgiftslag*. ch, 2. para, 26 and SFS 1994:1920 *Lag om allmän löneavgift*. para, 3

¹⁵ SFS 1999:1229. *Inkomstskattelag*. ch, 65. para, 7

¹⁶ SFS 1999:1229. *Inkomstskattelag*. ch, 42. para, 15 a

¹⁷ SFS 1999:1229. *Inkomstskattelag*. ch, 57. para, 20

¹⁸ SFS 1999:1229. *Inkomstskattelag*. ch, 65. para 10

capital assets, invested or lent out, was to be taxed at a flat rate. In the design of this tax system, there was a difference created between the tax burden of active income and passive income. This disparity in tax treatment would be liable to create issues if an individual were to be able to choose which schedule to receive the income in. In a limited liability company with few owners, the owners may, by themselves, decide and control the post-corporate tax profits of the company. These companies, called closely held companies, are regular limited liability companies that are, for corporate tax purposes, taxed identically to any other limited liability company. It is in the sphere of the owners, that their status as closely held changes the tax situation. Formally, the owners and the closely held company are separate legal entities. Thereby, the owners and company can enter into acts of law with each other. To ensure that no unjustified advantages were enjoyed by the owners of such closely held companies, a special set of rules had to be enacted.¹⁹

This issue of separating the corporate sphere and the individual sphere, was identified already in the 1970s. A large investigation into the abuse of limited liability companies was performed. It was concluded that an alarmingly number of hollow companies had, for tax purposes, been created in the recent years. This had caused a notable reduction in the income of the state as well as a large administrative burden for the tax authority.²⁰ To combat this divide created in the Swedish tax system, special rules of dividend- and capital gains taxation for shares in closely held companies, were introduced.²¹ These rules have undergone several changes since the 2000s and are now located in the 57th chapter of the Swedish Income Tax Act.²²

2.2 Closely Held Companies

The main rule defining a closely held company is laid down in Chapter 56 of the Swedish Income Tax Act. Companies where fewer owners than five, own more than 50% of the company, put together, will be classed as a closely held company.²³ The intent of the rule is to catch those companies where a few owners may have a substantial influence on the activities of the company. Thereby the scope covers both the number of owners and the percentage of the holding.²⁴

¹⁹ Sven-Olof Lodin and others, *Inkomstskatt - En Läro- Och Handbok I Skatterätt* (15th edn, Studentlitteratur AB 2015). p, 447

²⁰ Kjell Sandström and Ulf Bokelund-Svensson, *Fåmansföretag: Skatteregler Och Skatteplanering* (11th edn, Björn Lundén Information AB 2016). p, 13

²¹ Swedish Ministry of Finance, "Utkast Till Lagrådsremiss, Fi2016/03965/S1, Förändrade Skatteregler För Delägare I Fåmansföretag" (2016). p, 12

²² Sven-Olof Lodin and others, *Inkomstskatt - En Läro- Och Handbok I Skatterätt* (15th edn, Studentlitteratur AB 2015). p, 448

²³ SFS 1999:1229. *Inkomstskattelag*. ch 56. para, 2

²⁴ Urban Rydin, Bertil Båvall and Katarina Bartels, *Beskattnings Av Ägare Till Fåmansföretag* (4th edn, Författarna och Wolters Kluwer Sverige AB 2016). p, 66

Important to note is that if owners of the company are closely related, they will be regarded as a single owner.²⁵ In other words, the main rule aims at four or less nexuses of closely related family members. Even if the company would have a thousand owners who own 49%, but still have four owner groups who hold the remaining 51%, the company would still not escape the category of closely held.²⁶ This concept of family nexus exists to prevent the use of family members as fronts. The concept is rather wide. It extends out from the actual owner in every direction. Upwards, the parents and grandparents are included. Horizontally, the husband/wife of the owner is included. Any sibling, as well as their husband/wife and children are also included. Downwards, the children of the owner and their husband/wife are included, the same applies for grandchildren. A person who is included in one of these family nexuses, cannot be included in any other family nexus. The division is made from the oldest owner. The family nexus of that owner is created first and all valid members are added. Subsequently, the division descends in age amongst the undivided owners until all owners of the closely held company have been divided into a nexus.²⁷

A closely held company is thus not exclusively reserved for companies with only a few total owners. The ownership figure is more of a fabrication. In addition to the family nexus, there is also an expanded definition of what constitutes as a closely held company. This expanded definition is also applied to the rules concerning dividends and capital gains taxation. All owners, regardless of the size of their holding, who have been active in the company to a considerable extent, will be regarded as one single owner.²⁸ Not only is the activity of the owners themselves inside the scope of the provision, but also any activity by any other member of the family nexus. This expanded definition has the purpose of including into the special rules for dividends and capital gains, any company who would not be caught by the main rule but are still considered at risk of converting labour income to capital income. Therefore, companies whose owners are active in the company and run the company jointly are regarded as one single owner and is therefore included within the scope of the special rules on dividends and capital gains taxation pertaining to closely held companies.²⁹

²⁵ SFS 1999:1229. *Inkomstskattelag*.ch, 56. para, 5

²⁶ Although the owners would be excluded from the scope of the special rules on dividend- and capital gains taxation by the external ownership exception due to more than 30% of the shares being owned by external owners.

²⁷ Kjell Sandström and Ulf Bokelund-Svensson, *Fåmansföretag: Skatteregler Och Skatteplanering* (11th edn, Björn Lundén Information AB 2016). p, 50

²⁸ SFS 1999:1229. *Inkomstskattelag*. ch 57. para, 3

²⁹ Kjell Sandström and Ulf Bokelund-Svensson, *Fåmansföretag: Skatteregler Och Skatteplanering* (11th edn, Björn Lundén Information AB 2016). p, 42

Not only Swedish companies can be categorised as closely held companies. The same definitions and rules apply to foreign companies.³⁰

2.3 Dividend- and Capital Gains Taxation of Qualified Shares

Liable to the special rules on dividend- and capital gains taxation for closely held companies, are any owners who, hold shares in a company that has been defined as a closely held company, and who have been active in the company during the tax year in question or the five previous years.³¹ The shares of owners who qualify for the special dividends and capital gains rules are called “*qualified shares*”. For the purposes of the activity prerequisite, any activity in the company, subsidiaries, or other companies participating in similar economic activities, is enough to qualify the shares. Any activity that is regarded to have had a palpable impact on the bottom line of the closely held company, is liable to qualify the shares. The activity prerequisite exists on the basis that only owners who have been active in the closely held company, have accrued economic assets in that company, directly relating to the labour effort of the owner.³²

There is one major exception to the dividend- and capital gains taxation rules for “qualified shares”. If passive external owners own a significant part of the company, no shares will be regarded as qualified shares unless there is special reason to qualify them.³³ The purpose of this exception is that such a major part of the ownership held by someone not active in the company would greatly reduce the risk of conversion of employment income to capital income by the active owners. Any external owner would also receive the post profit dividends. The threshold of a significant external ownership has, in case law, been deemed to be 30%. The five-year hindsight rule also applies to this exception.³⁴

2.4 The Tax Mechanism for Qualified Shares

One or several owners of a closely held company are often actively employed in that company. Any profits made by the company by its business activities is partly due to the labour effort and partly due to the financial capital invested. Due to the difference in tax treatment by the Swedish Income Tax Act of income related to labour and income related to capital assets, a solution

³⁰ Sven-Olof Lodin and others, *Inkomstskatt - En Läro- Och Handbok I Skatterätt* (15th edn, Studentlitteratur AB 2015). p, 630

³¹ SFS 1999:1229. *Inkomstskattelag*. ch 57. para, 4

³² Urban Rydin, Bertil Båvall and Katarina Bartels, *Beskattnings Av Ägare Till Fåmansföretag* (4th edn, Författarna och Wolters Kluwer Sverige AB 2016). p, 77

³³ SFS 1999:1229. *Inkomstskattelag*. ch, 57. para, 5

³⁴ Kjell Sandström and Ulf Bokelund-Svensson, *Fåmansföretag: Skatteregler Och Skatteplanering* (11th edn, Björn Lundén Information AB 2016). p, 69

was needed. The mechanism proposed and enacted was a three-part bracket separation of the potential dividend.³⁵

Firstly, there is a flat-rate amount. This amount is taxed at 20% up to a maximum-amount.³⁶ It is supposed to reflect a normal rate of return on invested capital.³⁷

Secondly, dividend exceeding the maximum-amount is taxed as employment income in the employment income tax schedule.³⁸ Note that no social security contribution is levied, the income is still classified as dividend but is taxed according to the progressive rate.

Thirdly, employment taxation holds true up to a specific ceiling amount, above this ceiling, any remaining dividend income is taxed at the general flat capital tax rate of 30%. The ceiling amount for the progressively taxed part of the dividend was, for the taxable year of 2016, 5 337 000 SEK.³⁹

To determine the yearly maximum-amount of an owner taxed at the rate of 20%, two methods exist. The simplified rule and the main rule.

- The simplified rule: $(2,75 \times 59\,300 \text{ SEK}) + (\text{saved unused maximum-amounts from previous years} \times \text{government bond interest rate increased by three percentage points})$ ⁴⁰

- The main rule: $(\text{purchase value of the share capital} \times \text{government bond interest rate increased by nine percentage points}) + (50\% \text{ of the total wage remuneration divided by the owner's percentage of shares}) + (\text{saved unused maximum-amounts from previous years} \times \text{government bond interest rate increased by three percentage points})$ ⁴¹

Example: A is part owner of a company. The company has 10 owners with equal shares, including A. All of the owners are either active themselves or have family who are active in the company. It is, therefore, a closely held company as the company is regarded to have only one owner.

The shares of the company cost A 1 million SEK. A's wife is active in the closely held company and withdraws a wage exceeding the threshold requirement for the wage remuneration rule. There is no saved maximum-amount carrying over from previous years. The company paid out wages of 3 million SEK in 2015. A receives a dividend of 500 000 SEK for the year of 2016.

³⁵ Sven-Olof Lodin and others, *Inkomstskatt - En Läro- Och Handbok I Skatterätt* (15th edn, Studentlitteratur AB 2015). p. 452

³⁶ SFS 1999:1229. *Inkomstskattelag*. ch, 57. para, 20

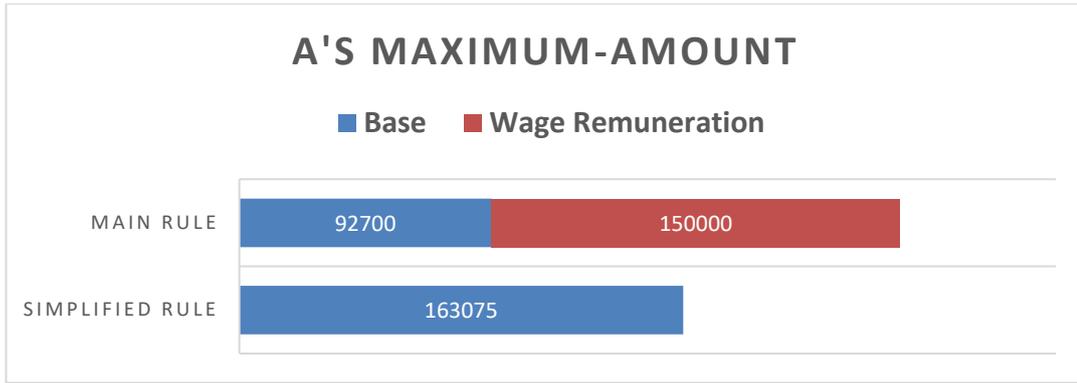
³⁷ Kjell Sandström and Ulf Bokelund-Svensson, *Fåmansföretag: Skatteregler Och Skatteplanering* (11th edn, Björn Lundén Information AB 2016). p. 101

³⁸ SFS 1999:1229. *Inkomstskattelag*. ch, 57. para, 20

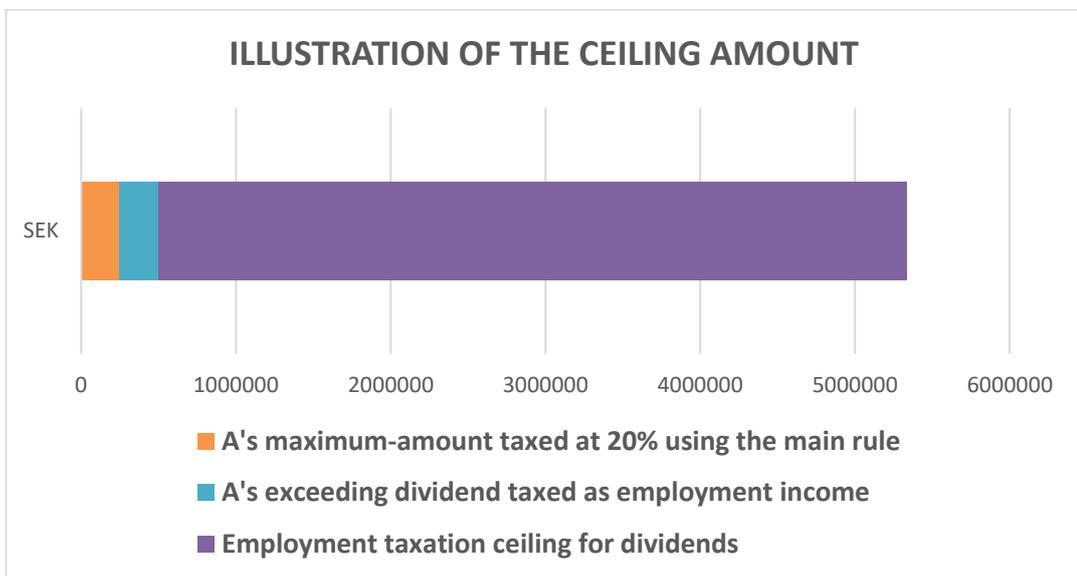
³⁹ SFS 1999:1229. *Inkomstskattelag*. ch, 57. para, 20 a

⁴⁰ SFS 1999:1229. *Inkomstskattelag*. ch, 57. para, 10 and forward

⁴¹ SFS 1999:1229. *Inkomstskattelag*. ch, 57. para, 10 and forward



Graph 1. A's Maximum-Amount⁴²



Graph 2. Illustration of the Ceiling Amount⁴³

Graph 1, illustrates A's maximum-amount using the main rule and the simplified rule.

Graph 2, illustrates A's tax consequence if he would withdraw a dividend of 500 000 SEK and apply the main rule. Around half of the dividend would be taxed at 20%; the remainder would be taxed in the employment schedule. The ceiling amount of the employment taxation is illustrated in purple.

2.5 The Wage Remuneration Rule

The wage remuneration rule allows for a substantial sum of relatively low taxed dividend. Its function is to increase the size of the above-illustrated maximum-amount which is taxed at a 20% tax rate. There are however certain prerequisites for determining who has the possibility of applying the wage

⁴² Own contribution

⁴³ Own contribution

remuneration rule as well as limitations on how much it can increase the size of the maximum-amount.⁴⁴ The added value received and the added risk taken accompanying the hiring of regular employees are part of the owner's return on investment and not part of the owner's labour income.⁴⁵ The owner should, therefore, be allowed to recognise part of the company's wage remunerations in the calculation of his/her maximum-amount. The probability that the profit of the closely held company is comprised of latent employment income linked to the labour effort of the owner decreases the more employees that contribute to the company.

The bracket separation mechanism of the dividend- and capital gains rules for closely held companies allows for a large maximum-amount in companies with a significant number of employees and a large sum of wage remuneration.⁴⁶ Viewed from a macro-perspective, the wage remuneration part of the maximum-amount according to the main rule, constitutes a large portion of the total aggregate maximum-amounts available to Swedish taxpayers. In 2013, 57,6% of the aggregate maximum-amounts available for use by owners of closely held companies in Sweden were made up by the wage remuneration additions.⁴⁷

To be able to apply the wage remuneration rule, the owner must fulfil two prerequisites. Firstly, the owner, or his family nexus, must have, for applying the wage remuneration rule in 2017, withdrawn wages in 2016 of at least either (355 800 SEK + 5% of the company's total wage remuneration) or 569 280 SEK. Secondly, the owner must own at least a 4% share of the company in question.⁴⁸

The total wage remuneration paid out by the company is calculated at the company level. 50% of the remuneration amount is then distributed equally amongst the shares. Thus, unless one owner owns the entirety of the company, the wage remuneration amount will be split up into smaller portions.⁴⁹ An individual owner can never receive a wage remuneration portion exceeding 50 times the wage withdrawn from the company or a subsidiary by the owner or someone within his family nexus.⁵⁰

In order to determine the actual total wage remuneration amount of a company, all cash remuneration paid out by the company is included. The

⁴⁴ Kjell Sandström and Ulf Bokelund-Svensson, *Fåmansföretag: Skatteregler Och Skatteplanering* (11th edn, Björn Lundén Information AB 2016). p, 110

⁴⁵ Sven-Olof Lodin and others, *Inkomstskatt - En Läro- Och Handbok I Skatterätt* (15th edn, Studentlitteratur AB 2015). p, 461

⁴⁶ Urban Rydin, Bertil Båvall and Katarina Bartels, *Beskattnings Av Ägare Till Fåmansföretag* (4th edn, Författarna och Wolters Kluwer Sverige AB 2016). p, 347

⁴⁷ Urban Rydin, Bertil Båvall and Katarina Bartels, *Beskattnings Av Ägare Till Fåmansföretag* (4th edn, Författarna och Wolters Kluwer Sverige AB 2016). p, 346

⁴⁸ SFS 1999:1229. *Inkomstskattelag*. ch, 57. para, 19

⁴⁹ SFS 1999:1229. *Inkomstskattelag*. ch, 57. para, 16

⁵⁰ SFS 1999:1229. *Inkomstskattelag*. ch, 57. para, 16

wage remunerations included are the ones paid out the year prior to the taxable year in question. Due to the specificity of cash remuneration, any non-cash benefits are excluded. The change to only allow for cash remuneration accompanied the territorial expansion of the wage remuneration rule to wages paid in other countries.⁵¹ Benefits were disqualified due to the risk of lengthy valuation processes as well as valuation difficulties concerning abroad employees.⁵²

2.6 Territorial Limitation of the Wage Remuneration Rule

Inclusion is not limited to wage remuneration paid to employees liable to tax in Sweden. The corresponding remuneration paid to employees abroad shall also be included insofar as the company is a resident of a state included in the European Union or European Economic Area.⁵³ It was not always the case that wages paid abroad were included. When the wage remuneration rule was first implemented, only wages that generated Swedish social security contributions were allowed for.⁵⁴ The expansion of the rule to its current scope was triggered by the obligations imposed by the primacy of EU law.⁵⁵ This case-law will be elaborated on in chapter 5. In addition, any wage remuneration paid by a Swedish employer to a limited tax liable (thereby liable to source taxation) foreign resident employee, will also be included, insofar as the employee is resident within the EEA.⁵⁶

The Swedish rules for closely held companies are currently undergoing review. Some proposed adjustments have been drafted. The proposal mainly contains tweaks to the calculations. Most notably relevant to this thesis is the proposed change to remove the 4% threshold prerequisite required in order to be allowed to apply the wage remuneration rule. To counter this, the portion of the total wage remuneration available for use in the maximum-amount has been reduced. Nevertheless, no proposed changes are considered to impact the investigation conducted in this thesis.⁵⁷

2.7 Swedish Tax Policy of World Wide Taxation and Credit of Foreign Taxes

To be able to utilise the wage remuneration rule is of great importance to an owner of a closely held company. If certain wages cannot be included, a

⁵¹ Swedish Parliament, "Proposition, 2005/06:40, Reformerade Beskattningsregler För Ägare I Fåmansföretag" (2005). p, 90-91

⁵² Urban Rydin, Bertil Båvall and Katarina Bartels, *Beskattningsregler För Ägare Till Fåmansföretag* (4th edn, Författarna och Wolters Kluwer Sverige AB 2016). p, 349

⁵³ SFS 1999:1229. *Inkomstskattelag*. ch, 57. para, 17

⁵⁴ *RA 2000 ref 47* [2000] Regeringsrätten, 5134-98 (Regeringsrätten).

⁵⁵ Swedish Parliament, "Proposition, 2005/06:40, Reformerade Beskattningsregler För Ägare I Fåmansföretag" (2005). p, 91

⁵⁶ Urban Rydin, Bertil Båvall and Katarina Bartels, *Beskattningsregler För Ägare Till Fåmansföretag* (4th edn, Författarna och Wolters Kluwer Sverige AB 2016). p, 351

⁵⁷ Swedish Ministry of Finance, "Utkast Till Lagrådsremiss, Fi2016/03965/S1, Förändrade Skatteregler För Delägare I Fåmansföretag" (2016). p, 51

heavier tax burden will be endured as the size maximum-amount will be substantially less. Sweden applies worldwide taxation for its income tax system. Generally, with few exceptions, all income, foreign and domestic, is for a Swedish resident, liable to income tax in Sweden.⁵⁸ To avoid juridical double taxation, Sweden has, in its domestic law, adopted the credit of foreign taxes.⁵⁹ This system reflects a policy of capital export neutrality. Whether a domestic investor would choose to invest capital abroad or domestically should not alter the tax burden of the investor. Only if the foreign tax rate exceeds the domestic tax rate, may capital export neutrality fail to equalise the tax burdens.⁶⁰ Sweden uses the ordinary credit method with an overall limitation.⁶¹ It means that the amount of tax that would have been liable on the foreign income if that income had been domestic income, is calculated and is then allowed to credit the Swedish tax claim on the foreign income. In situations where the foreign tax paid exceeds the amount of credit allowed for, the neutrality fails. In order to alleviate this, Sweden allows for a five-year carry forward of foreign taxes paid exceeding the credit limitation.⁶²

Treating foreign investment with a higher tax burden than domestic investment creates a difference in tax treatment. This different treatment is closely linked to the nationality of the employee. As the Swedish legislation, like the legislation of any other EU member state, does not exist in a vacuum, what obligations are imposed by EU law must be recognised.

3 European Union Law

3.1 Primary Law, Direct Effect and Justification

The founding treaties of the European Union are regarded as primary EU-law. Their main objective is the economic integration of the member states and the creation of the internal market. The provisions laid down in the Treaty of the Functioning of the European Union (TFEU), are meant to enable this objective.⁶³ A taxpayer can invoke the TFEU in front of a domestic court. Due to the primacy of EU law, the obligations imposed override domestic legislation of the member states. Thus, the TFEU shall have direct effect in a domestic court.⁶⁴ Enshrined within the TFEU is a general principle of non-

⁵⁸ SFS 1999:1229. *Inkomstskattelag*. ch. 3. para, 8

⁵⁹ SFS 1986:468 *Lag om avräkning av utländsk skatt*. ch 2. para, 1

⁶⁰ Wolfgang Schön, "International Tax Coordination For A Second-Best World (Part 1)" [2009] *WORLD TAX JOURNAL*. p, 79

⁶¹ Sven-Olof Lodin and others, *Inkomstskatt - En Läro- Och Handbok I Skatterätt* (15th edn, Studentlitteratur AB 2015). p, 636

⁶² SFS 1986:468 *Lag om avräkning av utländsk skatt*. ch 2. para, 17

⁶³ Marjaana Helminen, *EU Tax Law – Direct Taxation – 2016* (1st edn, IBFD 2016). ch, 1.3.1

⁶⁴ Marjaana Helminen, *EU Tax Law – Direct Taxation – 2016* (1st edn, IBFD 2016). ch, 1.2.3 & ch, 1.2.5

discrimination. Any discrimination based on nationality is prohibited.⁶⁵ To confirm this, the TFEU confers upon nationals of the member states, a set of basic freedoms, of which the freedom of establishment and the free movement of capital are part.⁶⁶ Any restriction on the exercise of these freedoms is prohibited.⁶⁷ Derogations of the fundamental freedoms must be interpreted strictly.⁶⁸

The fundamental freedoms are not absolute rights. If a Member State can justify a restriction based on an overriding reason in the public interest, the right to the exercise of a freedom will be limited by this reason. This rule of reason principle has been established by case-law of the CJEU.⁶⁹ To justify restrictive legislation, an assessment of proportionality must also be conducted. The restrictive legislation cannot go beyond what is necessary to achieve the objectives intended by the legislation.⁷⁰

3.2 The Freedom of Establishment

The freedom to establish is enshrined in Articles 49 to 54 of the TFEU.⁷¹ This freedom is fundamental to the ability of an EU national to pursue economic activities in other EU jurisdictions. The freedom entails the right to pursue economic activities, either through self-employment or the formation of an undertaking, without any discriminating tax treatment. Not only is the right to primary establishment protected, but also the right to secondary establishment. Secondary establishment being the pursuit of economic activities through subsidiaries, branches or agencies.⁷²

There must be no restriction of the possibility of an EU national to pursue activities across an EU border. Any such restriction must be seen as potentially harmful to the internal market. Any intra-EU cross-border establishment must be benefitted equally to a comparable domestic establishment. The objective of the freedom of establishment is to ensure that the host member state treats nationals from other member states equally as

⁶⁵ "Consolidated Version Of The Treaty On The Functioning Of The European Union (TFEU)" (2012) OJ C 326. Art. 18

⁶⁶ Marjaana Helminen, *EU Tax Law – Direct Taxation – 2016* (1st edn, IBFD 2016). ch. 2.2.1

⁶⁷ "Consolidated Version Of The Treaty On The Functioning Of The European Union (TFEU)" (2012) OJ C 326. ch. 2.2.1

⁶⁸ *AG Menogozzi opinion on C-560/13 Finanzamt Ulm v Ingeborg Wagner-Raith* [2014] Court of Justice of the European Union, EU:C:2014:2476 (Court of Justice of the European Union). para, 85

⁶⁹ Marjaana Helminen, *EU Tax Law – Direct Taxation – 2016* (1st edn, IBFD 2016). ch. 2.2.5.1

⁷⁰ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 56

⁷¹ "Consolidated Version Of The Treaty On The Functioning Of The European Union (TFEU)" (2012) OJ C 326.

⁷² "Consolidated Version Of The Treaty On The Functioning Of The European Union (TFEU)" (2012) OJ C 326. Art. 49

this is vital to safeguard the internal market.⁷³ In case-law, the CJEU has extended this prohibition to also cover any restriction by the state of origin that would make the establishment in another member state, for a national of that origin state, less attractive than it would be to establish domestically.⁷⁴

This freedom of establishment extends beyond natural persons. Any company or firm formed in accordance with the law of a member state and have their registered office, central administration or principal place of business within the European Union may access this freedom.⁷⁵ There is no differentiation in the access enjoyed by individuals and companies.⁷⁶ No provision in the TFEU can extend the freedom of establishment to situations where an EU national establishes in a non-EU state. Neither is there any provision covering a non-EU national establishing inside the Union.⁷⁷

3.3 The Free Movement of Capital

Article 63 of the TFEU states that, with exception to the derogations relating to this freedom, all restrictions on the movement of capital between member states and between member states and third countries shall be prohibited.⁷⁸ The Articles 63-66 on the free movement of capital in the TFEU may, just as any other freedom provisions, be invoked in a domestic court by a taxpayer with access to the protection of the freedom. Even if the capital movement regards a third state.⁷⁹

Capital movements between member states shall, therefore, be unrestricted to allow for cross-border economic activity. As regards third countries, a restriction would be any measure that would discourage investment either from a third country into the member state, or from the member state into a third country.⁸⁰

The exact definition of what constitutes a capital movement is not given in the TFEU. In case-law, the CJEU has stated that Article 1 of Directive

⁷³ Marjaana Helminen, *EU Tax Law – Direct Taxation – 2016* (1st edn, IBFD 2016). ch, 2.2.5.1

⁷⁴ *C-102/05 Skatteverket v A and B* [2007] Court of Justice of the European Union, EU:C:2007:275 (Court of Justice of the European Union). para, 24

⁷⁵ "Consolidated Version Of The Treaty On The Functioning Of The European Union (TFEU)" (2012) OJ C 326. Art. 54

⁷⁶ Marjaana Helminen, *EU Tax Law – Direct Taxation – 2016* (1st edn, IBFD 2016). ch, 2.2.5.1

⁷⁷ Marjaana Helminen, *EU Tax Law – Direct Taxation – 2016* (1st edn, IBFD 2016). ch, 2.2.5.1

⁷⁸ "Consolidated Version Of The Treaty On The Functioning Of The European Union (TFEU)" (2012) OJ C 326. ch, 5 Art. 63

⁷⁹ Marjaana Helminen, *EU Tax Law – Direct Taxation – 2016* (1st edn, IBFD 2016). ch, 2.2.6.1

⁸⁰ Marjaana Helminen, *EU Tax Law – Direct Taxation – 2016* (1st edn, IBFD 2016). ch, 2.2.6.1

88/361⁸¹ may be used as a guideline to determine a capital movement.⁸² The provisions of the TFEU correspond to Article 1 of this Directive. However, the directive does not completely exhaust the definition of what constitutes a capital movement.⁸³

As the free movement of capital extends to third countries, there are a number of derogations in its chapter relating to this. Article 63 is the main rule that enshrines the free movement of capital. Subsequently, articles 64, 65 and 66 contain primary law derogations that limit the free movement of capital in relation to third countries.

Article 64(1)⁸⁴ is called a “standstill”-clause. The clause protects old restrictive legislation of member states targeting non-EU states as long as the restrictive legislation was in force on the 31 December 1993. A taxpayer can seek no protection from the free movement of capital against such domestic legislation. This derogation only covers non-EU situations and movements of capital in the form of direct investment, investment in real estate, establishment and the provisions of financial services. As opposed to portfolio investment, direct investment involves lasting participating influence and economic ties to the company by a natural or a legal person.⁸⁵

Article 65⁸⁶ enables the member states to keep the right of applying domestic tax legislation that would be restrictive. But only for where the taxpayers are not in a comparable situation regarding their place of residence or location of capital investment. It also introduces a possibility to justify restrictions on the grounds of public policy or public safety. This derogation of Article 65 has no great relevance. The general Rule of Reason-principle that enables justification based on overriding reasons in the public interest has a wider scope and is therefore dominant. Article 65, is a derogation to the main rule and must, therefore, be interpreted strictly.⁸⁷

Article 66⁸⁸, allows the Council of the European Union, in consort with the European Central Bank, to take certain short-term limiting measures if capital

⁸¹ "Council Directive 88/361/EEC Of 24 June 1988 For The Implementation Of Article 67 Of The Treaty, OJ L 178, 8.7.1988" (1988).

⁸² *C-452/04 Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht* [2006] Court of Justice of the European Union, EU:C:2006:631 (Court of Justice of the European Union), para, 41

⁸³ Marjaana Helminen, *EU Tax Law – Direct Taxation – 2016* (1st edn, IBFD 2016). ch, 2.2.6.1

⁸⁴ "Consolidated Version Of The Treaty On The Functioning Of The European Union (TFEU)" (2012) OJ C 326. Art. 64(1)

⁸⁵ Marjaana Helminen, *EU Tax Law – Direct Taxation – 2016* (1st edn, IBFD 2016). ch, 2.2.6.3

⁸⁶ "Consolidated Version Of The Treaty On The Functioning Of The European Union (TFEU)" (2012) OJ C 326. Art. 65

⁸⁷ Marjaana Helminen, *EU Tax Law – Direct Taxation – 2016* (1st edn, IBFD 2016). ch, 2.2.6.2

⁸⁸ "Consolidated Version Of The Treaty On The Functioning Of The European Union (TFEU)" (2012) OJ C 326. Art. 66

movements to or from non-Member States threaten to cause serious difficulties for the operation of the economic and monetary union.⁸⁹

The freedom of the free movement of capital extends to capital movements and payments between EU states as well as non-EU states, third countries. This makes it stand out amongst the fundamental freedoms as it is the only one which applies a third country territorial scope.

3.4 Third Countries and Association Agreements

Third country is a term that describes countries that are not members of the European Union. The treaties do not define what a third country is, but Article 52(1) of the Treaty on European Union (TEU)⁹⁰ lists all current members of the Union, and it can be inferred that any excluded country is a third country.⁹¹ The term can also apply to certain associated and dependent territories of member states. The CJEU has determined the status of these territories on a case by case basis but has in general been unwilling to class them as third countries.⁹² The European Union has the prerogative to enter into international agreements with non-member states. Article 217 of the TFEU states: "*The Union may conclude with one or more third countries or international organisations, agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.*"⁹³

Tax issues are, thus far, not the focus of these international agreements. However, these agreements may still have an impact on tax issues as a consequence of the mirroring of the internal market protection onto countries outside the Union.⁹⁴

The European Partnership Agreements (EPAs) are the main examples of this. They aim to allow the extension of the goals of the internal market to non-members of the Union by the use of directly applicable provisions. The most extensive European partnership is the so-called Euro-Mediterranean partnership which contains Association Agreements between a large number

⁸⁹ Marjaana Helminen, *EU Tax Law – Direct Taxation – 2016* (1st edn, IBFD 2016). ch, 2.2.6.3

⁹⁰ "Consolidated Version Of The Treaty On European Union, OJ C 326, 26.10.2012" (2012). Art. 52(1)

⁹¹ Daniël Smit, *EU Freedoms, Non-EU Countries And Company Taxation* (1st edn, Kluwer Law International 2012). p, 129

⁹² Daniël Smit, *EU Freedoms, Non-EU Countries And Company Taxation* (1st edn, Kluwer Law International 2012). p, 134

⁹³ "Consolidated Version Of The Treaty On The Functioning Of The European Union (TFEU)" (2012) OJ C 326. Art. 217

⁹⁴ Michael Lang and others, *Introduction To European Tax Law On Direct Taxation* (3rd edn, Linde 2013). p, 23

of non-EU Mediterranean countries and the European Union.⁹⁵ Its legal status has recently been dealt with by the CJEU in the case of *C-464/14 SECIL*.⁹⁶

However, there is no need to travel far beyond the centre of Europe to find non-EU states. Switzerland, Norway, Iceland and Lichtenstein are currently not members of the European Union. However, they are part of the European Free Trade Area (EFTA)⁹⁷ which was created in 1960. This free trade area has its own court, the EFTA Court. Its judgements are not binding for the national courts but act as guidance and are usually followed. The free trade area was first founded as an alternative to the European Economic Community (EEC) that eventually turned into the European Union. Therefore, an agreement between the EEC and the EFTA was ratified, called the European Economic Area Agreement (EEA). Not more than a year after ratification, some members of the EFTA, Sweden, Finland and Austria, joined the European Union. Norway, Iceland and Lichtenstein accepted the EEA agreements but declined to enter the Union, and Switzerland remained within the EFTA but declined the EEA agreement.⁹⁸

The EEA agreement⁹⁹ is similar to the TFEU as it contains provisions on the fundamental freedoms. The CJEU interprets the agreement to have the purpose to provide, to the best possible extent, the experience of the internal market to the EEA states through the free movement of goods, persons, services and capital.¹⁰⁰ The freedom of establishment, as laid down in Article 49 of the TFEU, does not extend to third countries. However, Article 31 of the EEA Agreement corresponds to Article 49 of the TFEU.¹⁰¹ In CJEU case law, the EEA agreement has been treated with the same primacy and direct effect that the provisions of the TFEU have received. A taxpayer can, therefore, by the provisions of the EEA agreement, invoke the freedom of

⁹⁵ "Euro-Mediterranean Partnership - Trade - European Commission" (*Ec.europa.eu*, 2017) <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/euro-mediterranean-partnership/>> accessed 25 May 2017.

⁹⁶ Michael Lang and others, *Introduction To European Tax Law On Direct Taxation* (3rd edn, Linde 2013). p, 23

⁹⁷ THE EUROPEAN FREE TRADE ASSOCIATION, "CONVENTION ESTABLISHING THE EUROPEAN FREE TRADE ASSOCIATION, Consolidated Version, Last Amended On 1 July 2013" (2013).

⁹⁸ Michael Lang and others, *Introduction To European Tax Law On Direct Taxation* (3rd edn, Linde 2013). p, 23

⁹⁹ "AGREEMENT ON THE EUROPEAN ECONOMIC AREA, OJ No L 1, 3.1.1994" (1994).

¹⁰⁰ *C-452/01 Ospelt and Schlössle Weissenberg* [2003] Court of Justice of the European Union, EU:C:2003:493 (Court of Justice of the European Union). para, 29

¹⁰¹ Marjaana Helminen, *EU Tax Law – Direct Taxation – 2016* (1st edn, IBFD 2016). ch, 2.2.5

establishment in a matter regarding an EU state and an EEA state.¹⁰² The freedom of establishment is interpreted equally for both agreements.¹⁰³

Other agreements do not have as strong of a standing as the EEA agreement. Many of the Euro-Mediterranean Partnership Agreements contain more vague language in what obligations they encompass. The obligation is to cooperate, not to liberalise transnational investment. However, if the provisions of these agreements are sufficiently precise and unconditional, there is no reason as to why they should not have direct effect and be possible to rely upon in front of national courts.¹⁰⁴ Nevertheless, there is no support in case-law to be found of uniformly interpreting these provisions with the TFEU, as was the case for the EEA-agreement. In fact, the legal relationship between the TFEU and other Association Agreements other than the EEA, has, concerning direct taxation, only recently been dealt with by the CJEU in the case of *SECIL*¹⁰⁵. This will be discussed in chapter 5.

3.5 Exclusivity and Priority of the Fundamental Freedoms

Another legal relationship to highlight that has, to a larger extent, been dealt with by the CJEU, is the legal relationship between the freedom of establishment and the free movement of capital. The activities of a person, natural or legal, covered by the protection of the freedoms, may be such in nature that they fall under the scopes of both freedoms. At the basic level, it is a person, legal or natural, that can establish a business and invest capital. In doing so, the person may invoke both the freedom of establishment and the free movement of capital. There is nothing in the TFEU suggesting that only one fundamental freedom can be exercised at any one time. EU law rather indicates that the provisions of the TFEU assume that more than one freedom can apply to a specific set of circumstances.¹⁰⁶ As we shall see, in the jurisprudence of the CJEU in chapter 5, this legal relationship of parallelism between the freedom of establishment and free movement of capital, does not exclude the possibility of either freedom being furnished with priority over the other.¹⁰⁷ With regard to this myriad of possible interpretations on the applicability of fundamental freedoms laid down in EU primary law; it is no

¹⁰² Daniël Smit, *EU Freedoms, Non-EU Countries And Company Taxation* (1st edn, Kluwer Law International 2012). p, 338

¹⁰³ *C-157/07 Krankenhaus Ruhesitz am Wannsee-Seniorenheimstatt* [2008] Court of Justice of the European Union, EU:C:2008:588 (Court of Justice of the European Union). para, 24

¹⁰⁴ Daniël Smit, *EU Freedoms, Non-EU Countries And Company Taxation* (1st edn, Kluwer Law International 2012). p, 355

¹⁰⁵ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union).

¹⁰⁶ Wolfgang Schön, "Free Movement Of Capital And Freedom Of Establishment" (2016) 17:229–260 *Eur Bus Org Law Rev.* p, 237 - 239

¹⁰⁷ See chapter 5.2, the concept of direct and indirect negative effects attributable to a restriction of a fundamental freedom introduced by AG Alber in his opinion on *C-251/98 Baars*.

easy task for domestic courts to come up with final correct conclusions in their decisions.

4 Case-Law of the Swedish Supreme Administrative Court

4.1 EU & EEA Expansion - RÅ 2000 ref. 38 & RÅ 2000 ref. 47

As the territorial scope of the provisions on the freedom of establishment and free movement of capital are different, it is crucial for the outcome of a case which one is considered to be applicable. This evaluation had to be undertaken by the Swedish legal system to validate the limitations of the wage remuneration rule for closely held companies. The first implementation of the wage remuneration rule applied only to wages that had generated Swedish social security contributions.¹⁰⁸ In other words, wages paid to employees working in Sweden.

This limitation was questioned by Swedish taxpayers in two cases delivered on the same date of 17th August 2000. In RÅ 2000 ref. 38¹⁰⁹ and RÅ 2000 ref. 47¹¹⁰, the Swedish Supreme Administrative Court struggled with the issue of EU compatibility of the wage remuneration rule. In both cases, a preliminary decision had been delivered by the Swedish Tax Board for Advanced Rulings, and in both cases, that preliminary decision was appealed to the Swedish Supreme Administrative Court.

4.1.1 Facts of the Cases

The facts of the cases were as follows:

In RÅ 2000 ref. 38, the taxpayer, A, owned 2 944 shares in the closely held Finnish company of X. The remainder of the company was owned by persons in his family nexus. The company group that X was a part of had many subsidiaries across the world. A himself was not active in the company X, but other family members were. A, therefore, asked whether remunerations paid to employees, that had not generated Swedish social security contributions, were to be included when determining his maximum-amount.

In RÅ 2000 ref. 47 the family nexus of the taxpayers, “A” and “B”, owned the entirety of the Danish company X. X was closely held according to Swedish rules. The group of which X is part of had both Swedish and foreign subsidiaries. A and B owned 52 and 12 percent respectively. A and B asked whether, with regard to the primacy of EU-law, they were allowed to include wage remuneration paid by X and its subsidiaries that had not generated Swedish social security contributions.

¹⁰⁸ RÅ 2000 ref 47 [2000] Regeringsrätten, 5134-98 (Regeringsrätten).

¹⁰⁹ RÅ 2000 ref 38 [2000] Regeringsrätten, 5500-98 (Regeringsrätten).

¹¹⁰ RÅ 2000 ref 47 [2000] Regeringsrätten, 5134-98 (Regeringsrätten).

Thus, in both cases, the issue was whether EU-law would influence the Swedish social security contribution limitation of the wage remuneration rule.

4.1.2 Reasoning of the Swedish Tax Board for Advanced Rulings

The Swedish Tax Board for Advanced Rulings made the same EU-law interpretation in both cases. Their interpretation was that the provisions relating to the freedom of establishment were not applicable. The taxpayers were treated worse due to owning shares in a company that had paid wages abroad and not in Sweden. Any restriction that treated foreign dividend worse than domestic dividend risked making investors less likely to invest in another state. Such restrictions were prohibited by the provisions on the free movement of capital. Nevertheless, the exception found in Article 65 of the TFEU allows member states to apply restrictive domestic tax legislation as regards taxpayers who are not in a comparable situation with regard to their place of residence or location of capital investment. Therefore, the restriction to only allow for the inclusion of remuneration that had generated Swedish social security contributions, was not, according to the opinion of the Tax Board, in conflict with EU-law. The Supreme Administrative Court did not follow this line of reasoning.

4.1.3 Reasoning and Decision of the Swedish Supreme Administrative Court

In *RÅ 2000 ref. 38*, the Swedish Supreme Administrative Court argued instead based on the case of *C-35/98 Verkooijen*¹¹¹, that domestic rules, providing for tax advantages linked to the nationality of the company, fall into the scope of, and constitute a restriction on, the free movement of capital. The Court argued that the circumstances of the case did not allow for the application of the freedom of establishment as A himself had not been active in the company X, only his family members had. Consequently, A had been in a more favourable tax position had X been a Swedish company and paid out wages generating Swedish social security contributions.

The Court then investigated if any justification for this difference in treatment could be found in the preparatory works preceding the wage remuneration rule. No ample justification was found and thereby, to not allow A to include the wages paid within the Union was regarded to constitute a breach of the free movement of capital.

The court did not follow the same approach in *RÅ 2000 ref. 47*. Instead, they there applied the freedom of establishment in light of the case of *C-251/98 Baars*¹¹², where the CJEU had expressed that in situations where the owner exercises a definite influence, the applicable freedom would be the freedom

¹¹¹ *C-35/98 Verkooijen* [2000] Court of Justice of the European Union, ECLI:EU:C:2000:294 (Court of Justice of the European Union).

¹¹² *C-251/98 Baars* [2000] Court of Justice of the European Union, EU:C:2000:205 (Court of Justice of the European Union).

of establishment. Therefore, to not allow for the inclusion of wage remuneration paid in other EU countries, would constitute a restriction on the freedom of establishment.

These two cases triggered a change of the Swedish wage remuneration rule in order to conform the legislation to EU-law.¹¹³ Due to the uniform interpretation of the EEA agreement and the TFEU, the inclusion of wages paid by companies established within the EEA was also required to be recognised to be in the scope of the wage remuneration rule.

4.2 Territorial Limitation of Third Countries - RÅ 2007 ref. 59

Seven years later, in the case of *RÅ 2007 ref. 59*¹¹⁴, the matter of exclusion of foreign paid wages and the wage remuneration rule resurfaced. The case was set apart from the earlier cases because this case concerned a branch, and that branch was located outside the EU.

4.2.1 Facts of the Case

The facts of the case were as follows:

Taxpayers A and B owned roughly 1,7 percent each of the shares in the Swedish company X. X had 59 owners in total. All of the Swedish resident owners had been active in X, and it was thus regarded to be a closely held company. X conducted business in Sweden and in Belgium through a branch. X also fully owned a subsidiary, Y, which conducted business in Russia through a branch there but the company had been formed in accordance with Swedish law. The company X had employees in Sweden, and in Belgium. Y only had employees in Russia.

Seeking answers to whether the wages paid in Belgium and Russia could be included, A and B sought an advanced ruling from the Swedish Tax Board for Advanced Rulings. The Board commenced by confirming that a secondary establishment enjoys the same protection as a subsidiary according to the provisions of the TFEU. The conclusion reached in the previous cases regarding the inclusion of wages paid inside the EU must, therefore, be upheld for the wages paid out by the branch in Belgium.

4.2.2 Reasoning of the Swedish Tax Board for Advanced Rulings

As concerned the branch in Russia, the Board argued that it was outside the territorial scope of the freedom of establishment. The issue, therefore, had to be examined in light of the free movement of capital. After all, the Swedish Supreme Administrative Court had, in *RÅ 2000 ref. 38*, applied this freedom with the same outcome as in *RÅ 2000 ref. 47*, where the freedom of establishment had been applied. The Article 65 TFEU derogation, previously

¹¹³ Swedish Parliament, "Proposition, 2005/06:40, Reformerade Beskattningsregler För Ägare I Fåmansföretag" (2005). p. 90–91

¹¹⁴ *RÅ 2007 ref 59* [2007] Regeringsrätten, 1543-03 (Regeringsrätten).

argued by the board in the two previous cases, was for this case dismissed by the Board. They reasoned that the territorial limitation of the wage remuneration rule most likely came about to combat the risk of situations where there would be a lack of reliable information. Moreover, the Board reasoned that the justification of ensuring the effectiveness of fiscal supervision had, by the CJEU, been rejected in cases where the Mutual Assistance Directive¹¹⁵ applied. Russia was outside the scope of this directive, but the Swedish-Russian tax treaty contained an exchange of information clause. The Board posed the question if this clause could be considered to be enough to warrant a rejection of the justification of ensuring the effectiveness of fiscal supervision. Using the same reasoning supplied by the CJEU in its case-law, the Board concluded this to be the case. The existence of the exchange of information clause made a justification of the exclusion of wages paid by the branch in Russia, untenable.

In support of this conclusion, the Board made an interesting comparison to other parts of the Swedish Income Tax Act. These other provisions had been extended to cover countries with which Sweden had tax treaty including an exchange of information clause. Yet, such a change was never introduced into the Swedish wage remuneration provision, despite it being suggested in a legislative proposal in the early 2000s.¹¹⁶

The Board also concluded that the wage remuneration rule, dating from 1994 and onwards, was not covered by the “standstill”-clause of Article 64(1) TFEU. It only protects legislation for direct investment that was in force on 31 December 1993; the wage remuneration rule was enacted past this date.

4.2.3 Dissenting Opinion in the Board

One of the eight members of the Swedish Tax Board for Advanced Rulings had a dissenting opinion. Instead of applying the free movement of capital, she argued that the applicable freedom would be the freedom of establishment. An indefinite pursuit of economic activity in another state would fall into the freedom of establishment. She drew the conclusion that the free movement of capital would only cover situations where capital transfers, in the form of investments, are made for the purpose of setting up the branch or expanding it. Exercising the economic activity post-investment cannot be seen as a capital movement. Concerning the facts of the case, the branch in Russia was pursuing economic activity and the taxpayers A and B could therefore only be protected by the freedom of establishment. However, this protection does not extend to third countries and therefore the wage remuneration rule limitation, to only extend to EU- and EEA countries, could not be considered to be in breach of EU law.

¹¹⁵ "Council Directive 88/361/EEC Of 24 June 1988 For The Implementation Of Article 67 Of The Treaty, OJ L 178, 8.7.1988" (1988).

¹¹⁶ Swedish Ministry of Finance, "SOU, 2002:52, Beskattning Av Småföretag" (2002). p, 25

4.2.4 Referral to the CJEU by the Swedish Supreme Administrative Court

The advanced ruling was appealed to the Swedish Supreme Administrative Court by the Swedish Tax Authority. They questioned the Boards conclusion concerning the wages paid out in the Russian branch but confirmed the inclusion of the wages paid in Belgium. The inclusion of the wages paid out in Belgium was confirmed by the Court. Regarding the inclusion of wages paid out by the Russian branch, the court decided to stay the proceedings and request clarification on the issue by the CJEU.

5 Case-Law of the Court of Justice of the European Union

5.1 The Referred Case - C-102/05 Skatteverket v A and B

On May 10th, 2007, the CJEU delivered its judgement in the referred case.¹¹⁷ No opinion on the case was delivered by the advocate generals. Sweden had made the addition that the wage remuneration rule had been extended to cover wages paid to any employee resident inside of the EU- and EEA territories.¹¹⁸

On the issue of applicable freedom, the CJEU acknowledged the line of argument made by the dissenting opinion in the Swedish Tax Board; The domestic provision in question, the wage remuneration rule, could only be examined from the angle of freedom of establishment. This had been supported by the Netherlands government and the Commission of the European Communities as well.

The court then stated that any examination of the case in light of the free movement of capital would be superfluous to conduct if the freedom of establishment was to be considered to be the applicable freedom.¹¹⁹ As regarded the freedom of establishment, the Court recognised that it was settled case-law that it prohibits the member state of origin from making it less favourable for one of its nationals to establish itself in another member state. The exclusion of wages paid by the branch in Russia had the principal effect of making an establishment of a branch in a third state less attractive than a domestic establishment. It was less attractive due to the owners being subjected to a less favourable tax treatment, in that their maximum-amount would be significantly less than it would have been had the branch been established domestically.¹²⁰

¹¹⁷ *C-102/05 Skatteverket v A and B* [2007] Court of Justice of the European Union, EU:C:2007:275 (Court of Justice of the European Union).

¹¹⁸ *C-102/05 Skatteverket v A and B* [2007] Court of Justice of the European Union, EU:C:2007:275 (Court of Justice of the European Union), para, 8

¹¹⁹ *C-102/05 Skatteverket v A and B* [2007] Court of Justice of the European Union, EU:C:2007:275 (Court of Justice of the European Union), para, 22

¹²⁰ *C-102/05 Skatteverket v A and B* [2007] Court of Justice of the European Union, EU:C:2007:275 (Court of Justice of the European Union), para, 25

The reasoning of the CJEU, in this case, may seem strange in part due to the fact that the only *prima facie* exercise of a fundamental freedom present in the case, was the establishment of a branch in Russia by the subsidiary Y. The CJEU has held that any measure which makes the exercise of a freedom less attractive must be seen as a restriction.¹²¹ The applicants, A and B, only indirectly receive dividends originating in a third country. The proceeds of the Russian branch of the subsidiary Y eventually ends up in the Swedish parent company of X of which A and B receive dividends from. A and B, as natural persons owning shares in, and receiving dividends from, the Swedish closely held company of X, do not themselves directly exercise any cross-border activity. However, the existence of a restriction makes sense from the perspective of the closely held company exercising the freedom. Attracting owners and capital would be undermined by territorial limitations in the Swedish legislation, and it would, therefore, create a restriction on the exercise of a cross-border activity, in the form of setting up a branch.

In addition, because foreign companies, as was the case in *RÅ 2000 ref. 38 & RÅ 2000 ref. 47*, may also be classified as closely held companies for the tax purposes of an owner liable to tax according to the Swedish Income Tax Act¹²², there is thereby a risk of the Swedish legislation directly restricting a cross-border activity on behalf of an owner of a foreign closely held company. Considering the above, it was oddly enough, not the legal person (the closely held company of Y) who was the applicant in the case of *Skatteverket v A and B*.

Nonetheless, the court then addressed the applicants' argument that the free movement of capital was infringed by the Swedish legislation. The Court responded that any negative effects that would cause a restriction of the free movement of capital must be seen as an unavoidable consequence of the restriction on the freedom of establishment. Due to this, there was no need to examine the case in light of the provisions of the free movement of capital, and because the territorial scope of the freedom of establishment does not extend to third countries, the Swedish rules could not be said to be in breach of EU-law.¹²³

5.2 Origin of the Concept of Freedom Priority

When to apply the provisions of the TFEU regarding the freedom of establishment vis-à-vis the free movement of capital, has been everything but clear in the case-law of the CJEU. It is an area of EU-law that has developed over time. The origin of the concept to apply one freedom with priority is the

¹²¹ *C-157/07 Krankenhaus Ruhesitz am Wannsee-Seniorenheimstatt* [2008] Court of Justice of the European Union, EU:C:2008:588 (Court of Justice of the European Union), para, 30

¹²² Sven-Olof Lodin and others, *Inkomstskatt - En Läro- Och Handbok I Skatterätt* (15th edn, Studentlitteratur AB 2015). p, 630

¹²³ *C-102/05 Skatteverket v A and B* [2007] Court of Justice of the European Union, EU:C:2007:275 (Court of Justice of the European Union). paras, 27-30

opinion of AG Alber in *C-251/98 Baars*.¹²⁴ There he introduced the concept of a direct restriction on a freedom and its indirect effects on another freedom.¹²⁵ He drew this conclusion from earlier CJEU case-law where it had been stated that provisions regarding the free movement of capital, do not prohibit restrictions which result indirectly from the restrictions of other freedoms.¹²⁶ Previous to his opinion, the doctrinal debate had anticipated that multiple freedoms could simultaneously apply. The case of *Baars* only revolved around an intra-EU situation, and this concept thus had little impact on the outcome of that case as the circumstances of the cases were in the scope of both freedoms. But subsequently, this concept carried over into multiple later judgements, of which *Skatteverket v A and B* was one.¹²⁷

5.3 The Definite Influence Criterion

The *Baars* case concerned a Dutch resident who fully owned a company established in Ireland. The Netherlands imposed a wealth tax upon all residents of the country. Owning shares constituted part of the wealth of a taxpayer, but an allowance for assets invested in a substantial holding of a company was given. Any ownership above 30% that had lasted for at least five years constituted a substantial holding.¹²⁸ This allowance could not be received for holdings abroad. The issue was whether this legislation was in conflict with the provisions on the freedom of establishment and the free movement of capital.

In paragraph 22, the CJEU defined the scope of when the freedom of establishment was to be applicable. Article 49 covers the setting up and management of undertakings. Consequently, if a national of a member state would have a holding in a company abroad that confers upon him a definite influence over the decisions of the company and would allow that owner to determine the activities of the company; that national would be exercising his right of establishment.¹²⁹

This notion of definite influence thereby became central to the question of which of the two freedoms was to be applicable. The CJEU applied this criterion in the case itself and reasoned, using the facts of the case, that Mr Baars' holding, as presented to the court to be a 100% ownership, did

¹²⁴ *AG Alber opinion on C-251/98 Baars* [1999] Court of Justice of the European Union, EU:C:1999:502 (Court of Justice of the European Union).

¹²⁵ *AG Alber opinion on C-251/98 Baars* [1999] Court of Justice of the European Union, EU:C:1999:502 (Court of Justice of the European Union). para,

¹²⁶ *C-204/90 Bachmann* [1992] Court of Justice of the European Union, EU:C:1992:35 (Court of Justice of the European Union). para, 34

¹²⁷ Axel Cordewener, Georg W. Kofler and Clemens Philip Schindler, "Free Movement Of Capital And Third Countries: Exploring The Outer Boundaries With Lasertec, A And B And Holböck" (2007) Volume 47 EUROPEAN TAXATION. p, 372

¹²⁸ *C-251/98 Baars* [2000] Court of Justice of the European Union, EU:C:2000:205 (Court of Justice of the European Union). paras, 3 - 12

¹²⁹ *C-251/98 Baars* [2000] Court of Justice of the European Union, EU:C:2000:205 (Court of Justice of the European Union). para, 22

undoubtedly fall into this definite influence category of holdings. The freedom of establishment must, therefore, be the applicable freedom.¹³⁰

5.4 Factual- and Purpose Approach

In *Baars*, the CJEU chose a factual approach to determine whether the owner possessed a definite influence or not. The Court examined the actual ownership situation present in the case. An alternative route was taken in other cases. Instead of evaluating the applicable freedom based on a factual approach, the Court, in these other cases, evaluated applicability based on the purpose of the contested domestic legislation.¹³¹ In the case of *Holböck*¹³², Austria taxed domestic dividends less than dividends received from a Swiss company. To determine which freedom was applicable, the CJEU stated that the purpose of the Austrian legislation needed to be examined.¹³³ Due to the fact that the Austrian legislation, in this case, made no distinction between a majority holding or a minority holding, the domestic legislation was seen to be so broad as to be covered by both the freedom of establishment and the free movement of capital.¹³⁴ But due to the fact that only the free movement of capital may extend to third countries, only that freedom could apply. In the end, the Austrian legislation was found to be protected by the derogation to Article 63 found in Article 64(1), the “standstill”-clause.¹³⁵

The issue that was raised concerning the factual approach was that to rely on the factual situation of the taxpayer, would remove any meaning of this standstill-clause in Art. 64(1) TFEU. After all, it serves to protect domestic legislation that targets direct investment and was in force at the end of 1993. As this derogation provision to the free movement of capital examines the scope of the domestic legislation and whether it targets direct investment or not, it, therefore, would make more sense to look at the purpose of the domestic legislation and not the factual situation of the taxpayer.¹³⁶

5.5 The Clarification of When the Freedoms Apply

To sufficiently determine the purpose of the domestic legislation, the definition of what constitutes a definite influence needed narrowing down.

¹³⁰ *C-251/98 Baars* [2000] Court of Justice of the European Union, EU:C:2000:205 (Court of Justice of the European Union). para, 21

¹³¹ Erwin Nijkeuter and Maarten F. de Wilde, "FII 2 And The Applicable Freedoms Of Movement In Third Country Situations" (2013) 2013/5 EC TAX REVIEW. p, 252

¹³² *C-157/05 Holböck* [2007] Court of Justice of the European Union, EU:C:2007:297 (Court of Justice of the European Union).

¹³³ *C-157/05 Holböck* [2007] Court of Justice of the European Union, EU:C:2007:297 (Court of Justice of the European Union). para, 22

¹³⁴ *C-157/05 Holböck* [2007] Court of Justice of the European Union, EU:C:2007:297 (Court of Justice of the European Union). para, 24

¹³⁵ *C-157/05 Holböck* [2007] Court of Justice of the European Union, EU:C:2007:297 (Court of Justice of the European Union). para. 43

¹³⁶ Axel Cordewener, Georg W. Kofler and Clemens Philip Schindler, "Free Movement Of Capital And Third Countries: Exploring The Outer Boundaries With Lasertec, A And B And Holböck" (2007) Volume 47 EUROPEAN TAXATION. p, 373

The decisions in the cases of *Test Claimants in the FII Group Litigation*¹³⁷ and *Kronos International*¹³⁸ narrowed down the prerequisites as to when the free movement of capital shall apply.¹³⁹

FII Group Litigation concerned the UK corporate tax system which, essentially, applied an economic double taxation effect for foreign dividends that was not present for domestic dividends. In this case, the CJEU mainly used the purpose approach and only relied on the factual where it found it to be necessary.¹⁴⁰ The factual circumstances of the case only concerned fully owned holdings, yet the Court examined the domestic legislation and found it to also apply to holdings that would not confer definite influence.¹⁴¹ The CJEU made clear that the free movement of capital is very likely to apply for any legislation targeting holdings of below 10% of the voting rights.¹⁴² Conversely, the Court also stated that fully owned holdings, such as those in the case, must be examined in the light of the freedom of establishment.¹⁴³

Thus far, the division of applicable freedom was clear. If the legislation targets holdings that can exclusively be seen as portfolio investments, then only the free movement of capital will apply. If the legislation exclusively targets holdings that confer a definite influence, only the freedom of establishment will apply.

In *C-47/12 Kronos International*, the CJEU was faced with domestic legislation that targeted both holdings of definite influence and holdings that could never be seen as conferring definite influence. *Kronos International* had its effective management in Germany and owned subsidiaries both in other member states as well as third states. *Kronos International* owned over 90% of the shares in all of these subsidiaries. The company wanted to credit corporate tax liable in Germany with corporate tax paid by the subsidiaries in other countries. This was denied by Germany as the dividends were exempt under the applicable tax treaties. Had the subsidiaries been domestic subsidiaries, the company would have been able to set off the profits. Regardless, the German legislation made, for this restriction, no distinction of different types of holdings. The Court stated that, if the domestic legislation

¹³⁷ *C-446/04 Test Claimants in the FII Group Litigation* [2006] Court of Justice of the European Union, EU:C:2006:774 (Court of Justice of the European Union).

¹³⁸ *C-47/12 Kronos International* [2014] Court of Justice of the European Union, EU:C:2014:2200 (Court of Justice of the European Union).

¹³⁹ Wolfgang Schön, "Free Movement Of Capital And Freedom Of Establishment" (2016) 17:229–260 *Eur Bus Org Law Rev.* p, 230

¹⁴⁰ Erwin Nijkeuter and Maarten F. de Wilde, "FII 2 And The Applicable Freedoms Of Movement In Third Country Situations" (2013) 2013/5 *EC TAX REVIEW.* p, 252

¹⁴¹ *C-446/04 Test Claimants in the FII Group Litigation* [2006] Court of Justice of the European Union, EU:C:2006:774 (Court of Justice of the European Union). para, 38

¹⁴² *C-446/04 Test Claimants in the FII Group Litigation* [2006] Court of Justice of the European Union, EU:C:2006:774 (Court of Justice of the European Union). para, 61

¹⁴³ *C-446/04 Test Claimants in the FII Group Litigation* [2006] Court of Justice of the European Union, EU:C:2006:774 (Court of Justice of the European Union). para, 37

covers both types of holdings, and the case regards a third country situation, only the free movement of capital can apply. The taxpayer can invoke the free movement of capital regardless of the taxpayer's factual holding.¹⁴⁴ Nevertheless, *Kronos International* was concluded to not be treated worse by Germany as the corporate tax of the subsidiaries was levied by other jurisdictions.¹⁴⁵

5.6 Confirmation of the Purpose Approach – C-464/14 SECIL

The line of reasoning found in *Kronos International*, regarding the applicability of the free movement of capital, was confirmed in the more recently decided case of *C-464/14 SECIL*.¹⁴⁶ The Portuguese company of SECIL had acquired shares in one Tunisian subsidiary and one Lebanese subsidiary. The Tunisian holding was close to a 100%, while the Lebanese holding was close to 51%. SECIL desired to eliminate the economic double taxation that arose when they received dividends from these two third country subsidiaries. However, this elimination was denied due to the Portuguese domestic law which stipulated that no tax refund for economic double taxation regarding dividends could be had if the dividend originated in a third state.¹⁴⁷

The CJEU reasoned that the purpose of the contested legislation needed to be examined in order to determine if the free movement of capital was to be applicable. The Portuguese legislation made no distinction between the ownership required in order to be subject to a less favourable tax treatment. Therefore, the free movement of capital was applicable, and because the dividends originated in a third country, it was the only applicable freedom in the case.¹⁴⁸

5.7 The Boundaries of Definite Influence

The threshold of what percentage of a holding that will confer definite influence has not been clear in the case law of the CJEU. Percentages of between 34% up to a 100%, have all, in different cases, been accepted by the Court as a definite influence holding.¹⁴⁹ In *Kronos International* and *SECIL*, the Court is clear that legislation which excludes holdings above 10 percent, must be seen as legislation that attempts to exclude definite influence

¹⁴⁴ *C-47/12 Kronos International* [2014] Court of Justice of the European Union, EU:C:2014:2200 (Court of Justice of the European Union). paras, 37 - 41

¹⁴⁵ *C-47/12 Kronos International* [2014] Court of Justice of the European Union, EU:C:2014:2200 (Court of Justice of the European Union). para, 85

¹⁴⁶ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 35

¹⁴⁷ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 9

¹⁴⁸ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 39

¹⁴⁹ Daniël Smit, *EU Freedoms, Non-EU Countries And Company Taxation* (1st edn, Kluwer Law International 2012). p, 52

holdings. However, the Court is adamant that only because the percentage of a holding exceeds 10 percent, does not conclusively mean that the legislation only targets definite influence holdings. There is a grey area concerning holdings above 10 percent, as they are not exclusively determined to be definite influence holdings.¹⁵⁰ Despite what the court stated about holdings below 10% in the above decisions, there is a similar grey area for holdings below that threshold as well. There may still be situations in which smaller holdings than 10%, would confer a definite influence. It would be conceivable in situations where there is a large number of owners owning only a very slight holding each.¹⁵¹ The Court has not established a conclusive mathematical threshold, however, as long as the holding allows the owners to influence and determine the activities of the company, the holding will fall into the category of definite influence.¹⁵² The quantitative percentages only serve as supporting evidence to perform this assessment.¹⁵³

Shareholdings are, by the case-law of the CJEU, separated into portfolio holdings and substantial holdings. At some point will a holding transfer from exercising the free movement of capital to exercising the freedom of establishment. In the determination of this point, more factors than the mathematical threshold must be examined. Dividend, as a transfer of financial assets, will always be subject to the free movement of capital. At no ownership percentage will the capital movement of a dividend disappear. Therefore, the question becomes rather, at what point will the freedom of establishment trigger. Article 49 TFEU implies that it triggers when there is such controlling power held by the owner that it goes beyond passive investment and allows the owner to have influence over the economic activities of the company.¹⁵⁴

5.8 Owners Jointly Fulfilling the Threshold of Definite Influence

It is not always only the individual owner in isolation that is regarded for the definition of what constitutes a definite influence holding. If a shareholder associates with other shareholders in such a way that they jointly exercise control, that would also lead to a definite influence.¹⁵⁵ This holds true even if

¹⁵⁰ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 40

¹⁵¹ Daniël Smit, *EU Freedoms, Non-EU Countries And Company Taxation* (1st edn, Kluwer Law International 2012). p, 52

¹⁵² *AG Kokott opinion on C-311/08 SGI* [2009] Court of Justice of the European Union, EU:C:2009:545 (Court of Justice of the European Union). para, 29

¹⁵³ Wolfgang Schön, "Free Movement Of Capital And Freedom Of Establishment" (2016) 17:229–260 *Eur Bus Org Law Rev.* p, 244

¹⁵⁴ Wolfgang Schön, "Free Movement Of Capital And Freedom Of Establishment" (2016) 17:229–260 *Eur Bus Org Law Rev.* p, 242

¹⁵⁵ Wolfgang Schön, "Free Movement Of Capital And Freedom Of Establishment" (2016) 17:229–260 *Eur Bus Org Law Rev.* p, 242

the individual holding, on its own, would not cause definite influence.¹⁵⁶ In the case of *C-298/05 Columbus Container Services*¹⁵⁷, the Court held that owners who were members of one single family pursued the same interests and took decisions concerning the company jointly.¹⁵⁸ AG Mengozzi clarified that Columbus Container Services was held by at least six natural persons who belonged to the same family, each owning a 10% holding in the company. Those persons acted together and were represented by a single person at the annual general meeting. These owners combined were thus able to collectively influence the activities of the company. Due to this, each individual holding, therefore, had to be seen as a holding of definite influence.¹⁵⁹

5.9 Applicable Freedom for Dividend Originating in a Third State

As regards which freedom is applicable in a third country situation, an assessment of the national provision's purpose must be exercised. As case-law has shown, the CJEU applies the freedom of establishment if the domestic legislation is found to exclusively target holdings of definite influence. Conversely, it applies the free movement of capital if the legislation, from its scope, clearly and with margin disqualifies holdings of definite influence. However, if the national provision cannot be sufficiently determined to exclude one or the other type of holding from its scope, the Court will apply both freedoms. But in third country situations, the freedom of establishment is disqualified due to its EU-only territorial scope, only leaving the free movement of capital behind.¹⁶⁰ This development in case-law has been seen as an expansion of the free movement of capital which has taken place over the course of the last decade. National provisions of a general nature that do not sufficiently exclude either portfolio holdings or substantial holdings will be examined in the light of the free movement of capital even when the facts of the case regard dividends received from a substantial holding in a third country. This must be seen against the, by some, previously held view that only the freedom of establishment could be applied to cases concerning a factual substantial holding.¹⁶¹ In contrast to outbound dividends, the CJEU

¹⁵⁶ Urban Rydin, Bertil Båvall and Katarina Bartels, *Beskattning Av Ägare Till Fåmansföretag* (4th edn, Författarna och Wolters Kluwer Sverige AB 2016). p, 53

¹⁵⁷ *C-298/05 Columbus Container Services* [2007] Court of Justice of the European Union, EU:C:2007:754 (Court of Justice of the European Union).

¹⁵⁸ *C-298/05 Columbus Container Services* [2007] Court of Justice of the European Union, EU:C:2007:754 (Court of Justice of the European Union). para, 31

¹⁵⁹ *AG Mengozzi opinion on C-298/05 Columbus Container Services* [2007] Court of Justice of the European Union, EU:C:2007:197 (Court of Justice of the European Union). para, 55

¹⁶⁰ Ana Paula Dourado, "The EU Free Movement Of Capital And Third Countries: Recent Developments" (2017) Volume 45. Issue 3 INTERTAX. p, 197

¹⁶¹ Erwin Nijkeuter and Maarten F. de Wilde, "FII 2 And The Applicable Freedoms Of Movement In Third Country Situations" (2013) 2013/5 EC TAX REVIEW. p, 251

has thus for inbound dividends originating in a third state been willing to apply the free movement of capital more liberally.¹⁶²

5.10 The Market Access Third State Case-Law Exception

This expansion of the jurisprudence was not undertaken without some sort of implemented safeguard in order to make sure that exceptions could be made in certain circumstances.¹⁶³ In *SECIL* the Court includes it but admits that it does not apply in the case at hand. The Court states: “*It must also be borne in mind, that since the Treaty does not extend freedom of establishment to non-member States, it is important to ensure that the interpretation of Article 63 (1) as regards relations with those states does not enable economic operators who do not fall within the territorial scope of freedom of establishment to profit from that freedom.*”¹⁶⁴

There is no such risk in a situation such as that at issue in the main proceedings, inasmuch as the legislation concerned does not cover the conditions of access to the market of a non-member State by a company resident in Portugal or to the market in a member state by a company from a non-member state but only relates to the tax treatment of dividends resulting from investments made by the beneficiary in the distributing company.”¹⁶⁵

This safeguard stems from the case of *C-452/04 Fidium Finanz*¹⁶⁶, where Germany required third country financial service providers to obtain a permit to access the German marketplace. In essence, forcing those providers to establish themselves in Germany. The intent of the safeguard was to ensure that such restrictions to access the market as in *Fidium Finanz*, were not circumvented by the third country economic operators by invoking the free movement of capital to gain access to the internal market.¹⁶⁷

5.11 Restrictions and Justifications – C-464/14 SECIL

For purposes of determining a restriction on a fundamental freedom, which freedom is applicable is of no great importance. What is important is that at least one of the freedoms apply. The freedoms share the same principles, only

¹⁶² Cécile Brokelind, "Anti-Directive Shopping On Outbound Dividends In Light Of The Pending Decision In *Holcim France* (Case C-6/16)" [2016] EUROPEAN TAXATION. p. 398

¹⁶³ Erwin Nijkeuter and Maarten F. de Wilde, "FII 2 And The Applicable Freedoms Of Movement In Third Country Situations" (2013) 2013/5 EC TAX REVIEW. p. 253

¹⁶⁴ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 42

¹⁶⁵ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 43

¹⁶⁶ *C-452/04 Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht* [2006] Court of Justice of the European Union, EU:C:2006:631 (Court of Justice of the European Union).

¹⁶⁷ *AG Villalón opinion on C-47/12 Kronos International* [2013] Court of Justice of the European Union, EU:C:2013:729 (Court of Justice of the European Union). para, 63

the temporal scope (the “standstill”-clause in Art. 64(1)) and the territorial scope (EU-only), distinguish the freedoms.¹⁶⁸

In *SECIL*, however, both scopes became relevant. Firstly, the “standstill”-clause in Article 64(1) was not applicable to the Portuguese legislation due to the Euro-Mediterranean Agreements entering into force after the 31 December 1993 were seen to have such status as to recontextualize the domestic provision. Secondly, the two subsidiaries owned by SECIL were established outside of the territory of the EU.¹⁶⁹

Nevertheless, the Court concluded that the Portuguese legislation in question had the effect of subjecting dividends originating in a third country to economic double taxation, while such double taxation was relieved for a purely domestic situation.¹⁷⁰

This created a restriction of the free movement of capital due to the fact that this difference in treatment may discourage companies resident in Portugal from investing their capital in companies established in third states.¹⁷¹ Such a restriction can only be justified by overriding reasons in the public interest and cannot go beyond what is proportional.¹⁷² It can be said that there is a general clause of justification that protects reasons in the general interest. The result is that the CJEU uses the same set of justification grounds regardless of which freedom applies in the case. However, in what manner the Court applies and accepts justifications may differ. This also extends to cases where there is a restriction of a freedom in a third country situation. The Court does not allow member states to condition the removal of a restriction upon a reciprocal demand made on the legislation of the third state. The justifications available to member states, regarding third country situations, do therefore not differ greatly from the justifications available in an intra-EU situation.¹⁷³

The Court recognises that transactions between member states and member states and third states may not always be fully comparable, so there is some room for added justifications not possible within an intra-EU context. Nevertheless, the width of this derogation should be interpreted narrowly.¹⁷⁴

¹⁶⁸ *AG Kokott opinion on C-231/05 Oy AA* [2006] Court of Justice of the European Union, EU:C:2006:551 (Court of Justice of the European Union). para, 72

¹⁶⁹ Flora Sicard and Olivier Debat, "The EU And Third Countries: Any New Tax Opportunities Under Association Agreements?" (2017) Volume 45. Issue 5. *INTERTAX*. p, 405

¹⁷⁰ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 48

¹⁷¹ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). paras, 50 - 51

¹⁷² *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 56

¹⁷³ Wolfgang Schön, "Free Movement Of Capital And Freedom Of Establishment" (2016) 17:229–260 *Eur Bus Org Law Rev*. p, 236

¹⁷⁴ *C-101/05 Skatteverket v A* [2007] Court of Justice of the European Union, EU:C:2007:804 (Court of Justice of the European Union). para, 37

Up to this date, the only valid justification, that has gone beyond what would have been accepted in an intra-EU context, has been the justification of the need to ensure the effectiveness of fiscal supervision. Uncertainty in the gathering of necessary information from a third country has thus become the only additional possible ground of justification.¹⁷⁵ This justification was claimed in *SECIL* by the Portuguese government supported by the Swedish government, along with the justification of the need to prevent tax evasion. Due to the fact that both Tunisia and Lebanon, along with all other non-member states, exist outside of the scope of Directive 2011/16/EU on *Administrative Cooperation in the Field of Taxation and repealing Directive 77/799/EEC*¹⁷⁶, there is nothing stemming from EU law that obliges the exchange of information with such countries.¹⁷⁷ The directive has a broad scope of information exchange; any information that is foreseeably relevant to the administration and enforcement of another member state's domestic law must be exchanged.¹⁷⁸

The Court rejected the justification of preventing tax evasion on the basis that the domestic legislation did not target wholly artificial arrangements.¹⁷⁹ Nevertheless, the Court accepted the justification of the need to ensure the effectiveness of fiscal supervision. On the issue, it observed that the Portuguese–Tunisian tax convention contained an exchange of information clause. It was therefore up to the national court to examine whether this clause would allow the Portuguese Tax Authority to obtain information from Tunisia on taxes paid there by the subsidiary.¹⁸⁰ The status of such an information exchange clause compared to the obligations imposed by the Administrative Cooperation-directive is not obvious. The Court has consistently left the issue for the national courts to determine.¹⁸¹ Portugal did not have any tax convention with Lebanon; the CJEU still held that the possibility of justification was dependent upon the Portuguese Tax Authorities obtaining the necessary information required from the Lebanese authorities.¹⁸²

¹⁷⁵ Wolfgang Schön, "Free Movement Of Capital And Freedom Of Establishment" (2016) 17:229–260 *Eur Bus Org Law Rev.* p, 236

¹⁷⁶ "Council Directive 2011/16/EU Of 15 February 2011 On Administrative Cooperation In The Field Of Taxation And Repealing Directive 77/799/EEC, OJ L 64, 11.3.2011" (2011).

¹⁷⁷ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 57

¹⁷⁸ Michael Lang and others, *Introduction To European Tax Law On Direct Taxation* (3rd edn, Linde 2013). p, 207

¹⁷⁹ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 61

¹⁸⁰ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 68

¹⁸¹ Ana Paula Dourado, "The EU Free Movement Of Capital And Third Countries: Recent Developments" (2017) Volume 45. Issue 3 *INTERTAX.* p, 201

¹⁸² *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 69

5.12 Legal Hierarchy of the TFEU and the Association Agreements

The *SECIL* case, beyond verifying the applicability of the free movement of capital, was also the first case where the legal status of Association Agreements was dealt with. Prior to this case, it was not clear what the legal hierarchy between the provisions of the TFEU, and the provisions of an Association Agreement, concluded by the EU with a third state, would be. Which legal document would preclude the other?¹⁸³

AG Wathelet argued in his opinion on the case that the Euro-Mediterranean agreements aim to establish conditions for a gradual liberalisation of trade in goods, services and capital between the EU and the third state. These goals are shared with the provisions of the TFEU, and they do not conflict. Further, the *Vienna Convention*¹⁸⁴ gives priority to *lex posterior* over *legi priori* (legislation enacted later has primacy over earlier legislation).¹⁸⁵ The CJEU did not follow this approach in the *SECIL* judgement. This can be interpreted as a veiled confirmation that the founding treaties have a special hierarchical status of primary law and that treaties entered into by the Union form part of secondary law.¹⁸⁶ The CJEU also clarify that the provisions of Association Agreements have direct effect in the national courts of the member states.¹⁸⁷ The provisions of the Association Agreements do not, however, trump the provisions laid down in the founding treaties. Direct effect would also only apply if the provisions of the Association Agreement lays down a precise obligation to produce a specific result without any further implementing measure being required for that purpose.¹⁸⁸ The question of whether Association Agreements would be able to extend the freedom of establishment to third states by the wording of the provisions in those agreements has been raised in the doctrinal debate. It was concluded that the wordings of the existing Association Agreements, even though mentioning a freedom to establish, do not confer the same meaning, purpose and context as

¹⁸³ Ana Paula Dourado, "The EU Free Movement Of Capital And Third Countries: Recent Developments" (2017) Volume 45. Issue 3 INTERTAX. p, 196

¹⁸⁴ United Nations, "Vienna Convention On The Law Of Treaties (With Annex). Concluded At Vienna On 23 May 1969" (1969).

¹⁸⁵ *AG Wathelet opinion on C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:52 (Court of Justice of the European Union). paras 41-57

¹⁸⁶ Flora Sicard and Olivier Debat, "The EU And Third Countries: Any New Tax Opportunities Under Association Agreements?" (2017) Volume 45. Issue 5. INTERTAX. p, 405

¹⁸⁷ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). paras, 109 & 137

¹⁸⁸ Flora Sicard and Olivier Debat, "The EU And Third Countries: Any New Tax Opportunities Under Association Agreements?" (2017) Volume 45. Issue 5. INTERTAX. p, 406

the establishment provisions of the TFEU. Thereby excluding any such possibility to extend the freedom of establishment to third states.¹⁸⁹

6 Analysis

6.1 The Current Approach by the Court of Justice of the European Union

The judgement of *SECIL* makes it clear that there is no real possibility of invoking provisions of an association agreement to expand the protection of the freedom of establishment to cover third country situations. The Court began their reasoning using the provisions of the TFEU and not the provisions of the Association Agreements. This must be seen as a confirmation that the TFEU takes precedent.¹⁹⁰ Associations Agreements will therefore not be liable to impact the determination of which freedom is applicable in a third country situation. The likelihood of the freedom of establishment being extended by any other current Association Agreement is thus extremely farfetched. The Association Agreement would need to be of the same character as the EEA agreement. The provisions of the EEA are equivalent to the TFEU due to possessing substantively equivalent regulations.¹⁹¹

To contest a rule such as the Swedish territorial limitation of the wage remuneration rule, the provisions of the TFEU alone would have to be relied upon. For this purpose, it is vital to discern when the freedom of establishment and the free movement of capital are applicable. In the case of *Skatteverket v A and B*, the same reasoning, as was introduced by AG Alber in his opinion on *Baars*, was used. Namely, any negative consequences on the free movement of capital would have to be seen as an indirect consequence of the restrictions on the freedom of establishment.¹⁹² The question becomes if this line of reasoning has been altered by subsequent case law.

The concept of definite influence has, for the purpose of third country dividend, become the key for determining which national legislation can be challenged by invoking the free movement of capital. National legislation that restricts this basic freedom is prohibited by Article 63 of the TFEU.¹⁹³

¹⁸⁹ João Sérgio Ribeiro, "The Potential Impact Of Euro-Mediterranean Association Agreements On The Taxation Of Inbound Dividends" (2014) Volume 54. No. 12. European Taxation. p, 569

¹⁹⁰ Flora Sicard and Olivier Debat, "The EU And Third Countries: Any New Tax Opportunities Under Association Agreements?" (2017) Volume 45. Issue 5. INTERTAX. p, 405

¹⁹¹ Wolfgang Schön, "Free Movement Of Capital And Freedom Of Establishment" (2016) 17:229–260 Eur Bus Org Law Rev. p, 232

¹⁹² *C-102/05 Skatteverket v A and B* [2007] Court of Justice of the European Union, EU:C:2007:275 (Court of Justice of the European Union). para, 27

¹⁹³ "Consolidated Version Of The Treaty On The Functioning Of The European Union (TFEU)" (2012) OJ C 326. Art. 63

In the case-law of the CJEU, as it has developed, the Court has focused on the purpose of the domestic legislation.¹⁹⁴ If it exclusively targets holdings of definite influence, only the freedom of establishment shall apply, and since it does not extend to cover non-EU states, the member state is free to set up any possible third country restriction they wish. There will thus be no possible protection to invoke from the TFEU regarding a difference in tax treatment for dividend originating in a third state compared to dividend originating domestically.¹⁹⁵

If the legislation of a member state cannot be determined to exclusively target definite influence holdings, it will be examined in light of both freedoms, effectively only the free movement of capital shall apply due to the limited territorial scope of the freedom of establishment.¹⁹⁶

Although not expressly stated, it would seem that the CJEU, regarding domestic legislation exclusively targeting definite influence holdings, still maintains its line of reasoning from older case-law¹⁹⁷. According to that line of reasoning, any negative effects regarding capital movements arising from the restrictive domestic legislation would be regarded as unavoidable consequences of the infringement of the freedom of establishment. The fact that the CJEU may currently apply both freedoms in situations where the scope of the domestic legislation is unclear does not alter that the old reasoning is intact. The recent case law has thus not changed the line of reasoning regarding restriction priority of one freedom over another freedom. Instead, it has merely expanded the possibility to challenge legislation that has a broader scope than exclusively targeting definite influence holdings.

The Swedish Supreme Administrative Court applied the free movement of capital in RÅ 2000 ref. 38.¹⁹⁸ They did so under the assumption that dividend constituted a capital movement as laid down by the provisions on the free movement of capital. What constitutes a capital movement is not defined in the TFEU. But using Directive 88/361 as guidance, the acquisition of shares is included.¹⁹⁹ Dividend, as it directly relates to the acquisition of shares, is therefore also included.

¹⁹⁴ Ana Paula Dourado, "The EU Free Movement Of Capital And Third Countries: Recent Developments" (2017) Volume 45. Issue 3 INTERTAX. p, 196

¹⁹⁵ Ana Paula Dourado, "The EU Free Movement Of Capital And Third Countries: Recent Developments" (2017) Volume 45. Issue 3 INTERTAX. p, 204

¹⁹⁶ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 35

¹⁹⁷ *C-102/05 Skatteverket v A and B* [2007] Court of Justice of the European Union, EU:C:2007:275 (Court of Justice of the European Union). para, 27

¹⁹⁸ *RÅ 2000 ref 38* [2000] Regeringsrätten, 5500-98 (Regeringsrätten).

¹⁹⁹ *AG Alber opinion on C-251/98 Baars* [1999] Court of Justice of the European Union, EU:C:1999:502 (Court of Justice of the European Union). para, 49

The fact that dividend is a protected capital movement according to Article 63 cannot be altered by the size of the ownership.²⁰⁰ Yet despite this fact, the CJEU narrows the protection of Article 63 (The Free Movement of Capital), by giving priority to Article 49 (The Freedom of Establishment) to evaluate domestic legislation exclusively targeting holdings of definite influence. The protections afforded by the two freedoms are effectively identical except for, as AG Kokott puts it, the temporal- and territorial scope.²⁰¹ Only the free movement of capital extends to third countries, but it is also subject to a number of derogation provisions, of which the “standstill”-clause in Article 64(1) is one.²⁰²

Both the free movement of capital and freedom of establishment stem from the primary law provisions of the TFEU. This puts the legal value of both freedoms on an equal footing. Despite this, the CJEU, in a sense, uses the applicability of freedoms as a way to derogate the scope of the free movement of capital, despite the fact that the two freedoms share the same legal value and the fact that derogations, as is tradition in EU-law, should be interpreted strictly.²⁰³ It is obvious that the CJEU is aware of the dangers of giving economic operators of third countries, access to the protections of the internal market “*through the backdoor*” of the free movement of capital.²⁰⁴ It is one of the reasons that the CJEU, in its recent case-law expansion of the applicability of the free movement of capital, also included an exception to prevent any economic operators outside the territorial scope of the freedom of establishment from unduly benefiting.²⁰⁵ Considering the above, as well as the fact that the freedoms are not mutually exclusive²⁰⁶, it would seem that the Court could just as well examine legislation that exclusively targets holdings of definite influence by applying both freedoms and then make sure no unauthorised economic operators outside the Union benefit. However, this is currently not the case. Despite a greater tendency by the court to allow for the free movement of capital to apply in cases of inbound dividends originating in a third state as compared to outbound dividends originating

²⁰⁰ Wolfgang Schön, "Free Movement Of Capital And Freedom Of Establishment" (2016) 17:229–260 *Eur Bus Org Law Rev.* p, 240

²⁰¹ *AG Kokott opinion on C-231/05 Oy AA* [2006] Court of Justice of the European Union, EU:C:2006:551 (Court of Justice of the European Union). para, 72

²⁰² "Consolidated Version Of The Treaty On The Functioning Of The European Union (TFEU)" (2012) OJ C 326. Article 64(1)

²⁰³ *AG Menogozzi opinion on C-560/13 Finanzamt Ulm v Ingeborg Wagner-Raith* [2014] Court of Justice of the European Union, EU:C:2014:2476 (Court of Justice of the European Union). para, 85

²⁰⁴ Erwin Nijkeuter and Maarten F. de Wilde, "FII 2 And The Applicable Freedoms Of Movement In Third Country Situations" (2013) 2013/5 *EC TAX REVIEW.* p, 254

²⁰⁵ *AG Villalón opinion on C-47/12 Kronos International* [2013] Court of Justice of the European Union, EU:C:2013:729 (Court of Justice of the European Union). para, 63

²⁰⁶ *AG Kokott opinion on C-231/05 Oy AA* [2006] Court of Justice of the European Union, EU:C:2006:551 (Court of Justice of the European Union). para, 16

within the Union²⁰⁷; there is evidently still a limitation, concerning such holdings in which the owner may influence the economic activities, the Court is unwilling to cross.

It is clear that the CJEU sees the equal treatment of capital movements, for holdings in which the owner has the potential to influence and dictate the economic activities, as something that should be exclusively left reserved for the internal market of the European Union.

Currently, the purpose and scope of the contested domestic legislation is the ultimate decider of whether any protection from the free movement of capital is to be enjoyed.²⁰⁸ The territorial limitation of the wage remuneration rule to only cover EU- and EEA countries pertains to the Swedish rules for closely held companies.²⁰⁹ To be able to invoke EU-law protection for the elimination of any difference in treatment caused by this territorial limitation, the purpose of the Swedish rules for closely held companies must be examined.

6.2 Potential Restrictions and Justifications of the Wage Remuneration Rule

In denying the inclusion of wages paid to employees resident outside the EU- and EEA territories²¹⁰, the Swedish wage remuneration rule for closely held companies must be seen as greatly reducing the attractiveness of conducting cross-border investment into third states. The wage remuneration rule can, as shown in chapter 2, greatly increase the maximum-amount. It has been determined to make up a substantial percentage of the total aggregate maximum-amounts in circulation amongst Swedish owners of closely held companies.²¹¹ There is no doubt that to not allow for the inclusion of wages paid in a third country may lead to a more burdensome taxation. It may be the difference of a flat tax rate of 20% and a progressive tax rate of up to 57%. Such a difference in treatment has already been held in *Skatteverket v A and B*, to discourage the exercise of the freedom of establishment²¹², and as the same principles of restriction apply for both freedoms, it would also constitute a restriction on the free movement of capital as predicted by the Swedish Supreme Administrative Court in *RÅ 2000 ref. 38*.²¹³

²⁰⁷ Cécile Brokelind, "Anti-Directive Shopping On Outbound Dividends In Light Of The Pending Decision In *Holcim France* (Case C-6/16)" [2016] EUROPEAN TAXATION. p. 398

²⁰⁸ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 34

²⁰⁹ SFS 1999:1229. *Inkomstskattelag*. ch, 57

²¹⁰ SFS 1999:1229. *Inkomstskattelag*. ch, 57. para, 17

²¹¹ Urban Rydin, Bertil Båvall and Katarina Bartels, *Beskatning Av Ägare Till Fåmansföretag* (4th edn, Författarna och Wolters Kluwer Sverige AB 2016). p. 346

²¹² *C-102/05 Skatteverket v A and B* [2007] Court of Justice of the European Union, EU:C:2007:275 (Court of Justice of the European Union). para, 26

²¹³ *AG Kokott opinion on C-265/04 Bouanich* [2005] Court of Justice of the European Union, EU:C:2005:479 (Court of Justice of the European Union). para, 30

A restriction such as that would need to be justified by an overriding reason in the public interest.²¹⁴ It would seem likely that, just as the court applied it in *SECIL*, the need to ensure fiscal supervision would be such a justification.²¹⁵ After all, any non-EU country would be outside the scope of the *Directive on Administrative Cooperation*.²¹⁶ Although not clarified what status an information exchange clause in a tax treaty has in comparison with said directive, a justification based on the impossibility of obtaining the necessary information would be less easy to uphold if such a clause would be part of the relevant tax treaty.²¹⁷ This conclusion was acknowledged in a Swedish legislative proposal from the early 2000s, where it was suggested that the scope of the wage remuneration rule should be expanded to cover all states with which Sweden had a tax treaty including such an exchange of information clause.²¹⁸ Nevertheless, this was never implemented into the legislation, and no such need was determined to exist by reason of the CJEU given guidance in *Skatteverket v A and B*.

6.3 No Remedy in EU Law

Although no such reasoning was expressed in the case of *Skatteverket v A and B*, the CJEU must, in light of recent and current case law, have drawn the conclusion that the Swedish rules for closely held companies, exclusively target holdings of definite influence. Otherwise, they would not have examined the Swedish wage remuneration rule solely on the basis of the freedom of establishment.²¹⁹ It is true that in order to make use of the wage remuneration rule pertaining to the Swedish rules for closely held companies, the only mathematical percentage of ownership required for any isolated owner is the minimum 4% prerequisite.²²⁰ Such a slight percentage would be unlikely to, on its own, produce a definite influence.²²¹ *Skatteverket v A and B* was decided on the 10th of May 2007. Later that year, the reasoning in the case of *C-298/05 Columbus Container Services*, illustrated that the Court might recognise a group of owners who share the same interests as collectively exercising a definite influence.²²² In the case, the owners were

²¹⁴ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 54

²¹⁵ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 57

²¹⁶ "Council Directive 2011/16/EU Of 15 February 2011 On Administrative Cooperation In The Field Of Taxation And Repealing Directive 77/799/EEC, OJ L 64, 11.3.2011" (2011). Art. 2

²¹⁷ Ana Paula Dourado, "The EU Free Movement Of Capital And Third Countries: Recent Developments" (2017) Volume 45. Issue 3 INTERTAX. p, 201

²¹⁸ Swedish Ministry of Finance, "SOU, 2002:52, Beskattning Av Småföretag" (2002). p, 25

²¹⁹ *C-102/05 Skatteverket v A and B* [2007] Court of Justice of the European Union, EU:C:2007:275 (Court of Justice of the European Union). para, 26

²²⁰ SFS 1999:1229. *Inkomstskattelag*. ch, 57. para, 19

²²¹ Daniël Smit, *EU Freedoms, Non-EU Countries And Company Taxation* (1st edn, Kluwer Law International 2012). p, 52

²²² *AG Mengozzi opinion on C-298/05 Columbus Container Services* [2007] Court of Justice of the European Union, EU:C:2007:197 (Court of Justice of the European Union). para, 55

members of the same family. The same criterion is used for purposes of the Swedish rules for closely held companies. That this reasoning would be applied to a group of owners sharing family ties, as laid down in the Swedish rules, must be regarded as likely. The only real dispute of this fact is that the CJEU in the case points to the circumstance that the owners share the same representation for the annual general meeting. This would not necessarily be true for the owners of a closely held company that Swedish rules target.²²³ It is also not clear what “sharing the same interests” means. The main purpose of the Swedish rules for closely held companies is to prevent active shareholders from converting income generated by their labour effort to relatively low-taxed capital income.²²⁴ It is likely but not certain that this interest of income conversion could constitute such a shared interest as intended by the Court in *Columbus Container Services*.

Interpreting this desire of income conversion as sharing the same interests, would make the outcome of *Skatteverket v A and B* make sense. After all, if the individual owners of a closely held company can be viewed in unison when establishing the existence of a definite influence, the Swedish rules for closely held companies would only ever be said to target holdings of above 50%. Such legislation would most definitely be regarded to exclusively target holdings of definite influence. As shown earlier, according to the settled case-law of the CJEU, the freedom of establishment takes priority in such circumstances. This would thus lead to the conclusion that there would be no remedy in EU law that would enforce Sweden to include wages paid outside the territorial scope of the freedom of establishment; the borders of the Union.

6.4 Domestic Review of the Swedish Wage Remuneration Rule

The territorial limitation imposed by the Swedish wage remuneration rule must as well be reviewed with regard to the domestic perspective. The main purpose of the rules for closely held companies, as mentioned in the introduction, is the prevention of the possibility, for an active owner in a closely related company, to convert income derived by the effort of labour to the more leniently taxed capital income schedule.²²⁵ The wage remuneration rule has not intentionally been allowed to conflict with this underlying goal.²²⁶ In that perspective, the wage remuneration rule respects a certain logic; the more wages paid to employees of the company, the less of the generated proceeds of the company will be attributable solely to the labour effort of the

²²³ C-298/05 *Columbus Container Services* [2007] Court of Justice of the European Union, EU:C:2007:754 (Court of Justice of the European Union). para, 31

²²⁴ Swedish Ministry of Finance, "Utkast Till Lagrådsremiss, Fi2016/03965/S1, Förändrade Skatteregler För Delägare I Fåmansföretag" (2016). p, 12

²²⁵ Swedish Ministry of Finance, "Utkast Till Lagrådsremiss, Fi2016/03965/S1, Förändrade Skatteregler För Delägare I Fåmansföretag" (2016). p, 12

²²⁶ Swedish Parliament, "Proposition, 2005/06:40, Reformerade Beskattningsregler För Ägare I Fåmansföretag" (2005). p, 38-42

active owner.²²⁷ By denying the inclusion of wages paid outside of the territories of the EU and EEA, owners of closely held companies are taxed as if those third state wages did not contribute at all to the proceeds of the company. It would seem that the territorial limitation does, in that sense, not reflect the purpose of rules for closely held companies that the wage remuneration rule is a part of. Nevertheless, on the introduction of the wage remuneration rule, public policy arguments such as the promotion of entrepreneurship and promotion of employment were also expressed.²²⁸ In that perspective, the wage remuneration rule can be understood as part of protectionist measures of the domestic and internal market. The question is if such protectionism is well founded, as equality would not discourage economic operators to create business and employ labour domestically.

As already shown, to exclude wages paid outside of the territories of the EU and EEA would be considered a restriction of both the freedom of establishment and the free movement of capital if they were applicable. Sweden treats, for the tax purposes of the owner, differently a holding in a third country compared to a holding in a Sweden. The result is a heavier tax burden on inbound dividend originating in third countries. This restriction targets natural person owners liable to tax according to the Swedish Income Tax Act. A removal of the restriction would not allow any third country economic operators to benefit but would only equalise the tax burden of foreign and domestic investment.

The need to ensure effective fiscal supervision seems more valid as a basis for the restriction than protectionism. However, as the Swedish Tax Board for Advanced Rulings pointed out, the scope of this justification is in EU-law rather narrow.²²⁹ It would be logical that Sweden respects the same interpretation as the CJEU on the possible grounds of justification of a restrictive measure also in situations where no EU law obliges it. Additionally, Sweden applies worldwide taxation and the credit method for eliminating double taxation issues in its domestic law and tax treaties.²³⁰ This method reflects a policy of capital export neutrality, which entails that no matter where capital is invested, it is, for a Swedish resident investor, taxed at the Swedish tax rate with credit given for foreign taxes levied.²³¹ To treat the dividend of a non-EU holding with a higher tax burden than a domestic holding, does not seem to respect capital export neutrality. Sweden already cedes parts of its tax income on the basis of third country establishments as

²²⁷ Urban Rydin, Bertil Båvall and Katarina Bartels, *Beskattnings Av Ägare Till Fåmansföretag* (4th edn, Författarna och Wolters Kluwer Sverige AB 2016). p, 347

²²⁸ Swedish Ministry of Finance, "Proposition, 1993/94:234, Vissa Inkomst- Och Företagsskattefrågor, M.M." (1994). p, 88-90

²²⁹ *RA 2007 ref 59* [2007] Regeringsrätten, 1543-03 (Regeringsrätten).

²³⁰ SFS 1986:468 *Lag om avräkning av utländsk skatt*.

²³¹ Michael Lang, *Introduction To The Law Of Double Taxation Conventions* (2nd edn, IBFD 2013). ch, 10.3.1

laid down in the domestic provisions on the credit of foreign taxes. Whether the tax income is ceded to a foreign state or a domestic taxpayer should have no bearing on the matter. The aim of the policy is to promote a neutral tax treatment of domestic and foreign investments. Only when the foreign tax rate is higher than the domestic tax rate will capital export neutrality be departed from. This would however not be imputable to the Swedish tax system. To steer away from the policy of capital export neutrality concerning the wage remuneration rule would thus only be justifiable in situations where it would be impossible for the Swedish Tax Authority to obtain necessary and reliable information from the third state. Therefore, it would seem prudent to allow for the inclusion of wages paid outside of the territories of the EU and EEA on the basis of the possibility of the Swedish Tax Authority to obtain necessary and reliable information. Perhaps the old suggestion to allow for the inclusion of wages paid in third countries with which Sweden has a tax treaty containing an exchange of information clause should be resurrected, regardless of the fact that there is no EU law obligation for Sweden to do so.

7 Conclusion

The case-law of the CJEU regarding the applicability of Article 63 TFEU (free movement of capital) and Article 49 (freedom of establishment), in cases of inbound dividends, has developed over time. The case-law regarding inbound dividends from the mid-2000s and prior was not considered to be consistent in the doctrinal debate.²³² The fundamental freedoms that did not extend their territorial scope to cover third countries were seen to be favoured by the CJEU. Any negative effects, caused by a restrictive measure, on the free movement of capital, were seen as unfortunate consequences of the infringement of one of the other freedoms.²³³

Priority was, in other words, given to the freedom of establishment over the free movement of capital by the CJEU. This had very little impact on cases that took place inside the EU, as such cases were inside the territorial scope of the other freedoms as well. Moreover, the prohibitions on restrictions came to be identical for all freedoms.²³⁴ However, for third country situations, the free movement of capital was the sole freedom with a territorial scope extending outside the borders of the Union. In preferring to give priority to the other fundamental freedoms over the free movement of capital, the

²³² Cécile Brokelind, "Anti-Directive Shopping On Outbound Dividends In Light Of The Pending Decision In *Holcim France* (Case C-6/16)" [2016] EUROPEAN TAXATION. p. 397

²³³ Wolfgang Schön, "Free Movement Of Capital And Freedom Of Establishment" (2016) 17:229–260 *Eur Bus Org Law Rev.* p. 250

²³⁴ *AG Kokott opinion on C-231/05 Oy AA* [2006] Court of Justice of the European Union, EU:C:2006:551 (Court of Justice of the European Union). para, 72

possibilities of invoking the free movement of capital in third country dividend cases, were seen to be rather narrow and unpredictable.²³⁵

It was in this context and manner that the territorial limitation of the Swedish wage remuneration rule, to only include wages paid out inside the territories of the EU and EEA, was examined by the CJEU.²³⁶ Subsequent case-law did however expand and clarify the issue of when the free movement of capital could be considered to be the applicable freedom in a third country dividend situation.²³⁷ This more recent case-law did not, however, alter the protection afforded by the free movement of capital as regards domestic legislation that exclusively targets definite influence holdings. If the domestic legislation exclusively targets definite holdings, only the freedom of establishment can be invoked and thereby no protection for third country situations can be enjoyed.²³⁸ With account taken of the possibility of exercising a joint definite influence, as was introduced in the case of *Columbus Container Services*²³⁹, although not clearly expressed in *Skatteverket v A and B*, it is most likely that the CJEU regarded and still regard the Swedish rules for closely held companies, of which the wage remuneration rule is part, as such legislation that exclusively targets definite influence holdings.²⁴⁰

This places the territorial limitation of the Swedish wage remuneration rule in a position where it:

- Targets capital movements in the form of dividend originating in a third country.
- Makes cross-border investment less attractive due to a higher tax burden on that dividend.
- Does not enable economic operators of third countries to unduly benefit from access to the internal market as the limitation only affects owners fully liable to tax according to the Swedish Income Tax Act.

Yet is still not in conflict with the free movement of capital due to the current approach adopted by the CJEU; to derogate the protection of the free movement of capital by using the less extensive territorial scope of the freedom of establishment.

²³⁵ Ana Paula Dourado, "The EU Free Movement Of Capital And Third Countries: Recent Developments" (2017) Volume 45. Issue 3 INTERTAX. p, 193

²³⁶ *C-102/05 Skatteverket v A and B* [2007] Court of Justice of the European Union, EU:C:2007:275 (Court of Justice of the European Union). para, 27

²³⁷ *C-35/11 FII Group Litigation II*, paras 90-94, *C-47/12 Kronos International*, paras, 31, 32 & 37, *C-464/14 SECIL*, paras 31-35

²³⁸ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 32

²³⁹ *C-298/05 Columbus Container Services* [2007] Court of Justice of the European Union, EU:C:2007:754 (Court of Justice of the European Union). para, 31

²⁴⁰ See the Court's reasoning in *C-102/05 Skatteverket v A and B* [2007] Court of Justice of the European Union, EU:C:2007:275 (Court of Justice of the European Union).

Recent case-law in the form of *C-464/14 SECIL* has also decisively discarded any possibility of extending that protection by invoking similar establishment provisions of an Association Agreement. Although provisions of an Association Agreement are considered to have direct effect²⁴¹, they are, as secondary law, subject to the primary law provisions of the TFEU.²⁴² It is clear that the CJEU sees the equal treatment of capital movements, where the owner has the potential to influence and dictate the economic activities of the holding, as something that should be exclusively left reserved for the internal market of the European Union.

Regardless of EU law, the territorial limitation of the Swedish wage remuneration rule may still be in need of review in light of its domestic purposes, context and effects. It does not aid in the stated main purpose of the Swedish rules for closely held companies, of which it is part, to prevent the owners of a closely held company of conducting an income conversion of labour income to capital income.²⁴³ Neither does it follow the policy of capital export neutrality, which Sweden can be said to endorse by, in its income tax system, applying a worldwide taxation with an ordinary tax credit given for foreign levied taxes. It exemplifies, on the actions imputable to the Swedish state, a policy of intended tax neutrality between foreign and domestic investment.²⁴⁴

Only from a perspective of justification based on the impossibility to obtain necessary and reliable information, can the territorial limitation of the Swedish wage remuneration rule be understood. This justification is present in EU law as well. In EU law, the proportionality of that justification is made conditional upon the impossibility of obtaining necessary and reliable information.²⁴⁵ Difficulties in obtaining such information from the third country are diminished if the relevant tax treaty contains an exchange of information clause. With regards to the wage remuneration rule, to allow for the inclusion of wages paid in any country with which Sweden has a tax treaty containing such a clause has previously been suggested by a Swedish legislative proposal.²⁴⁶ It was, however, never adopted. Despite no EU law obligation to do so, it may, therefore, in light of the above conclusions, be prudent, for the Swedish legislator, to review the territorial limitation of the

²⁴¹ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). paras, 109 & 137

²⁴² Flora Sicard and Olivier Debat, "The EU And Third Countries: Any New Tax Opportunities Under Association Agreements?" (2017) Volume 45. Issue 5. INTERTAX. p, 405

²⁴³ See section 6.4 of this thesis for the analysis of the domestic legislative purposes.

²⁴⁴ See section 6.4 of this thesis for the analysis of capital export neutrality.

²⁴⁵ *C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union). para, 68

²⁴⁶ Swedish Ministry of Finance, "SOU, 2002:52, Beskattning Av Småföretag" (2002). p, 25

Swedish wage remuneration rule, to ensure it does not go beyond what is necessary to achieve its intended objective.

8 Bibliography

Treaties

United Nations, "Vienna Convention On The Law Of Treaties (With Annex).
Concluded At Vienna On 23 May 1969" (1969)

"AGREEMENT ON THE EUROPEAN ECONOMIC AREA, OJ No L 1,
3.1.1994" (1994)

"Consolidated Version Of The Treaty On European Union, OJ C 326,
26.10.2012" (2012)

"Consolidated Version Of The Treaty On The Functioning Of The European
Union (TFEU)" (2012) OJ C 326, 26.10.2012.

THE EUROPEAN FREE TRADE ASSOCIATION, "CONVENTION
ESTABLISHING THE EUROPEAN FREE TRADE
ASSOCIATION, Consolidated Version, Last Amended On 1 July
2013" (2013)

EU Directives

"Council Directive 88/361/EEC Of 24 June 1988 For The Implementation Of
Article 67 Of The Treaty, OJ L 178, 8.7.1988" (1988)

"Council Directive 2011/16/EU Of 15 February 2011 On Administrative
Cooperation In The Field Of Taxation And Repealing Directive
77/799/EEC, OJ L 64, 11.3.2011" (2011)

Case Law

EU Cases

C-204/90 Bachmann [1992] Court of Justice of the European Union,
EU:C:1992:35 (Court of Justice of the European Union)

C-35/98 Verkooijen [2000] Court of Justice of the European Union,
ECLI:EU:C:2000:294 (Court of Justice of the European Union)

C-251/98 Baars [2000] Court of Justice of the European Union,
EU:C:2000:205 (Court of Justice of the European Union)

C-452/01 Ospelt and Schlössle Weissenberg [2003] Court of Justice of the
European Union, EU:C:2003:493 (Court of Justice of the European
Union)

- C-446/04 Test Claimants in the FII Group Litigation* [2006] Court of Justice of the European Union, EU:C:2006:774 (Court of Justice of the European Union)
- C-452/04 Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht* [2006] Court of Justice of the European Union, EU:C:2006:631 (Court of Justice of the European Union)
- C-101/05 Skatteverket v A* [2007] Court of Justice of the European Union, EU:C:2007:804 (Court of Justice of the European Union)
- C-102/05 Skatteverket v A and B* [2007] Court of Justice of the European Union, EU:C:2007:275 (Court of Justice of the European Union)
- C-157/05 Holböck* [2007] Court of Justice of the European Union, EU:C:2007:297 (Court of Justice of the European Union)
- C-298/05 Columbus Container Services* [2007] Court of Justice of the European Union, EU:C:2007:754 (Court of Justice of the European Union)
- C-157/07 Krankenhaus Ruhesitz am Wannsee-Seniorenheimstatt* [2008] Court of Justice of the European Union, EU:C:2008:588 (Court of Justice of the European Union)
- C-35/11 Test Claimants in the FII Group Litigation II* [2012] Court of Justice of the European Union, EU:C:2012:707 (Court of Justice of the European Union)
- C-47/12 Kronos International* [2014] Court of Justice of the European Union, EU:C:2014:2200 (Court of Justice of the European Union)
- C-464/14 SECIL* [2016] Court of Justice of the European Union, EU:C:2016:896 (Court of Justice of the European Union)

AG Opinions

- AG Alber opinion on C-251/98 Baars* [1999] Court of Justice of the European Union, EU:C:1999:502 (Court of Justice of the European Union)
- AG Kokott opinion on C-265/04 Bouanich* [2005] Court of Justice of the European Union, EU:C:2005:479 (Court of Justice of the European Union)
- AG Kokott opinion on C-231/05 Oy AA* [2006] Court of Justice of the European Union, EU:C:2006:551 (Court of Justice of the European Union)

AG Mengozzi opinion on C-298/05 Columbus Container Services [2007] Court of Justice of the European Union, EU:C:2007:197 (Court of Justice of the European Union)

AG Kokott opinion on C-311/08 SGI [2009] Court of Justice of the European Union, EU:C:2009:545 (Court of Justice of the European Union)

AG Villalón opinion on C-47/12 Kronos International [2013] Court of Justice of the European Union, EU:C:2013:729 (Court of Justice of the European Union)

AG Menogozzi opinion on C-560/13 Finanzamt Ulm v Ingeborg Wagner-Raith [2014] Court of Justice of the European Union, EU:C:2014:2476 (Court of Justice of the European Union)

AG Wathelet opinion on C-464/14 SECIL [2016] Court of Justice of the European Union, EU:C:2016:52 (Court of Justice of the European Union)

Swedish Cases

RÅ 2000 ref 38 [2000] Regeringsrätten, 5500-98 (Regeringsrätten)

RÅ 2000 ref 47 [2000] Regeringsrätten, 5134-98 (Regeringsrätten)

RÅ 2007 ref 59 [2007] Regeringsrätten, 1543-03 (Regeringsrätten)

Swedish Laws

SFS 1986:468. *Lag om avräkning av utländsk skatt.*

SFS 1994:1920. *Lag om allmän löneavgift.*

SFS 1999:1229. *Inkomstskattelag.*

SFS 2000:980. *Socialavgiftslag.*

Swedish Preparatory Works

Swedish Ministry of Finance, "Proposition, 1993/94:234, Vissa Inkomst- Och Företagsskattefrågor, M.M." (1994)

Swedish Ministry of Finance, "SOU, 2002:52, Beskattning Av Småföretag" (2002)

Swedish Parliament, "Proposition, 2005/06:40, Reformerade Beskattningsregler För Ägare I Fåmansföretag" (2005)

Swedish Ministry of Finance, "Utkast Till Lagrådsremiss, Fi2016/03965/S1, Förändrade Skatteregler För Delägare I Fåmansföretag" (2016)

International Books

Helminen M, *EU Tax Law – Direct Taxation – 2016* (1st edn, IBFD 2016)

Lang M and others, *Introduction To European Tax Law On Direct Taxation* (3rd edn, Linde 2013)

Lang M, *Introduction To The Law Of Double Taxation Conventions* (2nd edn, IBFD 2013)

Smit D, *EU Freedoms, Non-EU Countries And Company Taxation* (1st edn, Kluwer Law International 2012)

Swedish Books

Gyland C and Jakobsson O, *Skatterätt: En Introduktion* (11th edn, Studentlitteratur AB 2015)

Lodin S and others, *Inkomstskatt - En Läro- Och Handbok I Skatterätt* (15th edn, Studentlitteratur AB 2015)

Rydin U, Båvall B and Bartels K, *Beskattning Av Ägare Till Fåmansföretag* (4th edn, Författarna och Wolters Kluwer Sverige AB 2016)

Sandström K and Bokelund-Svensson U, *Fåmansföretag: Skatteregler Och Skatteplanering* (11th edn, Björn Lundén Information AB 2016)

Journal Articles

Brokelind C, "Anti-Directive Shopping On Outbound Dividends In Light Of The Pending Decision In Holcim France (Case C-6/16)" [2016] EUROPEAN TAXATION

Cordewener A, Kofler G and Schindler C, "Free Movement Of Capital And Third Countries: Exploring The Outer Boundaries With Lasertec, A And B And Holböck" (2007) Volume 47 EUROPEAN TAXATION

Dourado A, "The EU Free Movement Of Capital And Third Countries: Recent Developments" (2017) Volume 45. Issue 3 INTERTAX

Nijkeuter E and de Wilde M, "FII 2 And The Applicable Freedoms Of Movement In Third Country Situations" (2013) 2013/5 EC TAX REVIEW

Ribeiro J, "The Potential Impact Of Euro-Mediterranean Association Agreements On The Taxation Of Inbound Dividends" (2014) Volume 54. No. 12. European Taxation

Schön W, "Free Movement Of Capital And Freedom Of Establishment" (2016) 17:229–260 Eur Bus Org Law Rev

Schön W, "International Tax Coordination For A Second-Best World (Part 1)" [2009] WORLD TAX JOURNAL

Sicard F and Debat O, "The EU And Third Countries: Any New Tax Opportunities Under Association Agreements?" (2017) Volume 45. Issue 5. INTERTAX

Web Pages

"Euro-Mediterranean Partnership - Trade - European Commission" (*Ec.europa.eu*, 2017) <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/euro-mediterranean-partnership/>> accessed 25 May 2017

Figures

Graph 1. A's Maximum-Amount. Own contribution

Graph 2. Illustration of the Ceiling Amount. Own contribution