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Exchanges of shares and Sweden's right to tax

An examination of the Swedish exchange of share mechanism for individuals, and its compliance with the Tax Merger Directive

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Summary

This thesis examines the Swedish implementation of the exchange of shares mechanism for individuals, found in article 8 of the Tax Merger Directive, henceforth TMD, and how Sweden has chosen to safeguard its taxation right when the shareholder holding exchanged shares emigrates to another EU MS. The purpose behind this is to examine if the Swedish implementation, given the more recent case-law from the CJEU *Jacob/Lassus* and *AQ/DN*, is in line with the TMD. In order examine this, five different cross border scenarios are used to illustrate the movement of shares.

Whilst the TMD harmonize the immediate tax treatment of a restructuring it does not harmonize the allocation of taxing powers, the treatment for emigrating shareholders is therefore not governed by article 8. Whilst the MS is given some leeway concerning this it can not chose an order that goes against the purpose of the TMD. The CJEU have in two cases, C-503/14 *Commission v. Portugal*, and the joined cases *Jacob/Lassus*, brought clarification on how exchanged share are allowed to be treated for exit taxation purposes.

The Swedish implementation of article 8 offers, concerning cash payments and ISK-regimes, tax treatment that can be more beneficial than that found in article 8, it can however in some situations be to the shareholders detriment. Seeing as the shareholder quite easily can chose what best benefits him in each situation this implementation is in line with the TMD.

However, the joined cases *AQ/DN*, makes the Swedish rules concerning what rules apply at the moment of later transfer questionable. Both the preparatory works for Swedish implementation and the case HFD 2021 ref.15 from the Swedish court confirm that the applicable rules, for Swedish taxation, are the once at the moment of exchange. *AQ/DN* read together with *Jacob/Lassus* however state that the applicable rules are the once in force at the chargeable moment and that the moment of exchange is not the chargeable moment. The moment of later transfer should therefore dictate the applicable tax rules.

The Swedish approach to exit taxation is the same for both exchanged shares and original shares and works as a trailing tax. The case-law from the CJEU seems to indicate that the MS implementation of article 8(6) becomes the deciding factor for what exit taxation regime that is available to it. If the MS loses its taxing right upon emigration an *NGI* form of taxation is allowed, *Jacob/Lassus* allows for such a trailing tax to be applied to the unrealised gain stemming from an exchange of shares.

When exchanged shares are involved in emigrations three different unrealised gains are created. (a) the unrealised gain from the moment of acquisition to the exchange, (b) the unrealised gain between the moment of exchange and the moment of emigration, and (c) the unrealised gain between the moment

of emigration and later transfer. The case-law from the CJEU seem to indicate that gains (a) and (b) are allowed to be treated the same for exit tax purposes, but that the same regime must apply to both.

Sweden treats all the unrealised gains in the same way via a trailing tax, the later chargeable event is therefore that found in the realisation of (c). The rules applicable at that moment should therefore govern the taxation of all the realised gains. Given HFD 2021 ref 15, Sweden does not follow this order, leading to the possibility of a tax rule to the detriment of the taxpayer in a way not allowed by the TMD.

Aside from the problem of applicable rules the Swedish exit taxation regime is in compliance with the TMD. It is however beyond the scope of this thesis if the Swedish trailing tax also conforms to the rules for trailing taxes established in *Van Hilten.*

Sammanfattning

Den här uppsatsen undersöker den svenska implementeringen av andelsbytesmekanismen för privatpersoner, som återfinns i artikel 8 i Fusions-Direktivet, hädanefter FD. Uppsatsen undersöker även hur Sverige har valt att skydda sin beskattningsrätt när aktieägaren emigrerar till en annan EU MS medan hen äger aktier erhållna via ett andelsbyte. Syftet bakom undersökningen är att utreda huruvida om den svenska implementeringen, givet de nyare rättsfallen från CJEU *Jacob/Lassus* och *AQ/DN*, är i linje med FD. Undersökningen utgår ifrån fem olika illustrerade scenarion med gränsöverskridande transaktioner.

FD harmoniserar de omedelbara beskattningskonsekvenserna av en omstrukturering, hur MS allokerar sina beskattningsregler harmoniseras dock inte av direktivet. Behandlingen av emigrerande aktieägare regleras således inte av artikel 8. Medans MS har ett visst handlingsutrymme när de själva reglerar detta så får de inte välja en ordning som går emot FD:s underliggande syfte. CJEU har i två fall. C-503/14 *Commissionen v. Portugal* och *Jacob/Lassus*, förtydligat hur aktier som genomgått ett andelsbyte får utflyttningsbeskattas.

Den svenska implementationen av artikel 8 erbjuder, via regler om kontant betalning och ISK-systemet, en beskattning som kan vara mer gynnsam för aktieägaren än den som är tvingande i FD. Dessa regler kan dock i vissa fall vara mindre gynnsamma än de tvingande reglerna i FD. Då aktieägaren relativt enkelt kan välja mellan vilken regel som gynnar hen bäst så är implementeringen dock i linje med FD.

Rättsfallet AQ/DN gör det dock osäkert om de svenska reglerna om vilka regler som ska appliceras på den slutgiltiga realiserade vinsten är i linje med direktivet. Både förarbetena till den svenska implementeringen samt rättsfallet HFD 2021 ref 15 från den svenska Högsta Förvaltningsdomstolen klargör att det är reglerna som är gällande vid andelsbytet som ska gälla för den senare realiserade vinsten. En gemensam läsning av *AQ/DN* och *Jacob/Lassus* förtydligar dock att det är de regler som är i bruk vid det beskattningsutlösande momentet som styr beskattningen och att andelsbytet i sig själv inte utgör det beskattningsutlösande momentet. Tidpunkten för den slutgiltiga realiseringen borde därför diktera vilka beskattningsregler som är applicerbara.

Den svenska metoden av utflyttningsbeskattning är samma för aktier som genomgått ett andelsbyte eller inte, och utgörs av en utökad skattskyldighet. Praxis från CJEU indikerar att det är MS implementering av artikel 8(6) som blir den avgörande faktorn för vilket utflyttningsbeskattningssystem som får användas. Om MS förlorar sin beskattningsrätt när aktieägaren emigrerar så är utflyttningsbeskattningen från *NGI* applicerbar. *Jacob/Lassus* tillåter dock även att MS använder sig av en utökad skattskyldighet för den orealiserade vinsten.

När aktier som genomgått ett andelsbyte är inblandade i en emigration så uppstår tre olika orealiserade vinster. (a) är den orealiserade vinsten mellan införskaffandet och andelsbytet, (b) är den orealiserade vinsten mellan andelsbytet och emigrationen, och (c) är den orealiserade vinsten mellan emigrationen och den slutgiltiga försäljningen. Praxis från CJEU verkar indikera att (a) och (b) får behandlas lika gällande utflyttningsbeskattning men att samma regler måste appliceras på båda.

Sverige behandlar alla tre orealiserade vinster på samma sätt via den utökade beskattningen, det beskattningsutlösande momentet är därför realiseringen av (c). Reglerna som är i bruk vid den tidpunkten borde därför användas för beskattningen av alla de orealiserade vinsterna. Givet HFD 2021 ref 15 så verkar Sverige inte följa denna ordning vilket leder till möjligheten att aktieägare får en mindre gynnsam behandling än de tvingande reglerna i FD.

Bortsätt från problemet med vilka regler som är applicerbara vid den slutgiltiga realiseringen så är den svenska utflyttningsbeskattningen i linje med FD. Det är dock bortom syftet med denna uppsats att undersöka om den utökade beskattningen som Sverige använder sig av är i linje med de regler, utsatta av CJEU i *Van Hilten*, som reglerar sådan beskattning.

Preface

With this thesis my time at Lund University comes to an end, luckily new beginnings are in my future. I'd like to extend a special thanks to my supervisor Richard Croneberg and all those that had the patience to discuss and listen to my ramblings.

- Sam Lincoln, Lund 2024.

Abbreviations

DTT	Double Tax Treaty
EU	European Union
MS	Member State
NGI	National Grid Indus
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TMD	Tax Merger Directive
IL	Inkomstskattelag – The Swedish Tax Code

1 Introduction

1.1 Background

The Tax Merger Directive[1], henceforth TMD, which enables restructurings without immediate tax consequences is one of the most meaningful EU directives on the subject of Direct Taxation. The importance of the directive is increased further by Member states, henceforth MS, such as Sweden, extending its applicability to apply its provisions on wholly domestic transactions as well as cross border situations.[2] The TMD aims for minimum harmonization, and leaves many smaller aspects in the hands of the implementing MS. This implementation by the MS is made difficult given the often short and general provisions given in the Directive.[3]

In recent years the CJEU have clarified some of the provisions applicable to individuals that have engaged in the exchange of shares mechanism provided by the Directive. In the joined cases C-327/16 *Jacob* and C-421/16 *Lassus,*[4] as well as the joined cases C-662/18 *AQ* and C-672/18 *DN*,[5] the court have challenged some previous beliefs voiced by some prominent scholars in the field and established that other implementations of taxation techniques for exchanges of shares are possible.[6] The Swedish implementation of the exchange of shares mechanism in the TMD was finalised long before these new judgements from the CJEU, with the last change to the Swedish implementation being in 2010.[7] It is therefore of interest to see how the Swedish implementation stand up to a more clarified exchange of shares mechanism.

Before the joint cases of *Jacob/Lassus,* Case C-503/14 *Commission v. Portugal* was the only case from the CJEU that dealt with the how exchanged shares interacted with exit taxation regimes. [8] *Jacob/Lassus* has now brought further clarification on the subject by explaining why the situation of a taxpayer holding shares might be different from a taxpayer holding exchanged shares. Given these new clarifications it is of interest to examine how

[1] Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States.

[2] Ståhl K, (2005), page 376.

[3] Ståhl K, (2005), page 376.

[4] Joined Cases C-327/16 *Marc Jacob v. Ministre des Finances et des Comptes publics* and C-421/16 *Marc Lassus v. Ministre des Finances et des Comptes publics* EU:C: 2018:210.

[5] Joined Cases C-662/18, C-672/18 *AQ* and *DN v. Ministre de l'Action and des Comptes publics* EU:C:2019:750.

[6] See chapter 5.

[7] Prop 2009/10:24 page 1.

[8] Case C-503/14, *European Commission v. Portuguese Republic*, EU:C:2016:979.

Sweden taxes these two different situations for emigrating shareholders and if this taxation is in line with the case law of the CJEU and the TMD.

1.2 Purpose and Research Questions

This thesis is examining if the Swedish exchange of shares mechanism is compliant with the exchange of shares mechanism provided for in the TMD. This examination will focus on the tax treatment of Individuals.

Later case law from the CJEU has offered guidance on the how the exchange of shares mechanism in the TMD intersects with the exit taxation regimes developed by the CJEU. This intersection is analysed in order to establish what exit taxation regime is applicable to exchanged shares.

This thesis therefore also examines how Sweden treats unrealised capital gains when individuals emigrate to another EU MS whilst holding either exchanged or regular shares. This treatment will then be compared to exit taxation case law developed by the CJEU in order to examine if Swedish exit taxation is compliant with the TMD.

The research questions this thesis is answering is therefore:

Given the case-law of *Jacob/Lassus* and *AQ/DN*

- Is the Swedish implementation of article 8 of the TMD, for exchange of shares, compliant with the TMD?

- How does Sweden protect its powers of taxation over the unrealised gain created by article 8 of the TMD when the shareholder emigrates to another EU MS, and is this form of exit taxation on exchanged shares compliant with the TMD?

In order to help answer these question five different scenarios concerning cross border movement of shares will be used.

1.3 Method and Material

In order to answer the research questions, this thesis applies the legal dogmatic method as well as the EU legal method. Whilst it is debated what the legal dogmatic method contains, it can in its essence be described as a way to analyse the applicable law by interpreting the sources of law that have authority. *Hjertstedt* calls this the “mapping” legal dogmatic method, since it aims to map out what the law is and contains.[9]

[9] Hjertstedt, M. (2019), pages 166–167.

Even if the applicable law often serves as the starting point, the legal dogmatic method can be used beyond what the applicable law is.[10] For example, *Jareborg* argues that it is fully legitimate that through the legal dogmatic method try to identify ideal solutions and situations. He argues this because the purpose of science to find new answers and better solutions.[11] The approach of highlighting flaws in the applicable law, also known as “critical”[12] legal dogmatic method will be utilised in the analysis part of the thesis.

The Swedish approach to legal dogmatic method is often intended to help the one who must apply the law, for example judges and lawyers. The goal being to find an authoritative definition of the applicable law.[13] The legal dogmatic method is thus suitable for a wide target audience.[14] The commonly considered authoritative sources of law are the law, preparatory works praxis stemming from case law and doctrine.[15] Given this stated purpose, older iterations of law could be considered not as useful when applying the legal dogmatic method, since it in itself does not describe what the current applicable law is. However, older iterations of law can sometime be useful for the examination of current applicable law.[16]

When it comes to the EU legal method the sources of EU law are divided into primary and secondary law. The core of EU primary law comprises of the Treaty on the European Union (TEU) alongside the Treaty on the Functioning of the European Union (TFEU).

Secondary law is comprised of legal acts created through primary law. These are regulations, directives and decisions. These are considered legally binding. Recommendations, opinions, resolutions and programs, while still considered secondary law are non-binding.[17] For the topic of this thesis the primary law found in the TFEU and secondary law in the form of directives is used.

In EU law, case law from the CJEU have a wider scope and carry more weight than case law from the corresponding highest instance in Sweden. Whilst case law from the highest instance in Sweden is highly valued as a source of law, EU case law stands out in its ability, similar to the common law system, to create law through praxis. This result in that some areas of EU law being governed in most part through case law.[18] Exit taxation, as will be shown in

[10] Sandgren, C, (2005), page 650.
[11]Jareborg, N, (2004), page 4.
[12] Hjertstedt, M. (2019), page 170.
[13] Olsen, L, (2004), pages 107 +111–112.
[14] Jareborg, N, (2004), page 5.
[15] Kleineman, 2013, s. 26 (not 8).
[16] Olsen, L, (2004), pages 116–117.
[17] Hettne J, Eriksson I, (2011), page 42.
[18] Hettne J, Eriksson I, (2011), pages 40–41.

chapter 4, is one of these areas. Case law will therefore be used in order to answer the question of Swedish compliance with exit taxation rules.

Lastly doctrine is used as a guiding instrument, some of the doctrine used in this thesis is older and therefore does not account for all the recent changes in case law and is therefore read with care.

1.4 Delimitation

Whilst article 8 affects mergers and divisions as well as exchange of shares,[19] this thesis will focus solely on the exchange of shares mechanism. Therefore, no space is allocated to article 8(2) concerning partial divisions.[20] Since this thesis only concerns the tax treatment of shareholders that are individuals, article 8(3) concerning fiscally transparent entities is not given any attention.[21] In line with the above stated delimitations article 8(5)[22] is also not covered since this only affects partial divisions and transparent entities.

As stated in the purpose of the thesis, focus will only be given to emigration from Sweden to another EU MS. Furthermore, focus is on the taxation of realised and unrealised capital gains. How the TMD and exit tax case law view losses will be brought up where necessary in order to describe the bigger picture, the examination of Sweden's tax regime will however centre on capital gains.

The special Swedish regime of qualified shares in regard to small businesses and its compliance with the TMD will not be covered in this thesis. The interplay between the Tax Merger Directive and the Parent-Subsidiary Directive,[23] is also not given any attention in this thesis.

Double Tax Treaties, henceforth DTTs, create a new legal order for States to take into consideration. This thesis however focuses on the underlying legal order, meaning how taxation of shares, due to emigration, would function if no DTT was applicable. When examining Sweden's tax regime, the focus will be on the regimes formed by the Swedish implementation of the TMD and exit tax case-law.

1.5 Previously Conducted Research

Ståhl has written extensively on the Swedish implementation of the TMD.[24] This was however written in 2005 and the Swedish implementation has

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[19] Council Directive 2009/133/EC, Article 8(1).
[20] Council Directive 2009/133/EC, Article 8(2).
[21] Council Directive 2009/133/EC, Article 8(3).
[22] Council Directive 2009/133/EC, Article 8(5).
[23] Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

[24] Ståhl, Kristina, (2005), Fusionsdirektivet - Svensk beskattning i EG-rättslig belysning.

since changed. Regarding the exchange of shares mechanism prescribed in the TMD prominent scholars such as *Broek* have provided for a breakdown on the TMD,[25] *Boulogne* is another prominent scholar having covered the TMD in his book concerning flaws in and possible improvements of the TMD.[26] *Terra* and *Wattel* have also covered the topic in their book *EU Tax Law,* however it is Boulogne that has updated the chapter on exchange of shares in that book as well.[27]

Regarding both EU and Swedish Exit taxation of individuals. *Cejies* doctoral thesis from 2010 have been the most prominent research done on the topic.[28] Since her thesis new case law from both the CJEU and Swedish courts have since clarified what rules apply to exchanged shares in emigration situations. The CJEU have established quite a catalogue of case-law on the topic of exit taxation, all of which is not relevant for this thesis.

Concerning the intersection between exit taxation and exchange of shares, not much is written, exit taxes is covered in the doctrine, mentioned above, but is held very short. It is not until quite recently that exchanged share for individuals in emigration scenarios have been covered by the CJEU in C-503/14 *Commission v. Portugal*, with more nuance added in the joined cases *Jacob/Lassus*.

The addition of *AQ/DN*, which establishes clarity for applicable tax rules, has been incorporated into the doctrine as seen in *Helminen* and *Panayi.[29]* The case has otherwise not received much attention, there is here room for a deeper breakdown of how the newer case law from the CJEU affect the exit taxation of exchanged shares.

1.6 Outline

The second chapter of this thesis aims to introduce the reader to the TMD and the exchange of shares mechanism. With this background the research problem will here be expanded upon, five different scenarios are here also presented. These scenarios are later used in the other chapters as a benchmark to test the Swedish implementation of the exchange of shares mechanism as well as the Swedish approach to exit taxation.

The third chapter accounts for the history of the Swedish implementation of the exchange of shares mechanism as well as the current mechanism in effect

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[25] Broek, Harm Van den, (2012), Cross-Border Mergers within the EU.

[26] Boulogne, Frederik, (2016), Shortcomings in the EU Merger Directive

[27] Terrra, Wattel (2019), EU Tax Law.

[28] Cejie, Katia, (2010) Utflyttningsbeskattning av kapitalökningar – en skattevetenskaplig studie i Internationell personbeskattning med fokus på skatteavtals- och EU-rättsliga problem.

[29] See, Helminen, Marjaana, (2023), EU Tax Law – Direct Taxation – 2023. See also Panayi, Christiana Hji, (Second edition 2021), European Union Corporate Tax Law.

today when faced with scenarios 1.1 and 1.2. Chapter four accounts for exit taxation under EU-law. Here the most relevant case-law for exit taxation on individuals is presented. This is followed by how Sweden treats the individual presented in scenario 2 and 3 for exit tax purposes.

As chapter three and four presents the law as it was understood before the introduction of *Jacob/Lassus* and *AQ/DN* the fifth chapter presents this more recent case-law. With this structure it can be better understood how the two joined cases affected the underlying understanding. How Sweden maintains taxing rights over the unrealised gain in Scenario 4, will also be covered in this chapter. The sixth and final chapter presents the discussion and analysis concerning the research questions and the final conclusions.

2 Framing the Research problem – The TMD in Light of Five Cross Border Scenarios

2.1 Introduction

Business restructurings or reorganisations can be viewed as a way of maximising synergies and economies of scale, streamlining the management of business lines, and improving their efficiency.[30] This is true for both domestic and cross border situations. Whilst all restructurings involve some tax related issues this aspect is made more cumbersome in cross border situations.[31]

These tax related issues involve, but are not limited to, taxation of unrealised gains and reserves due to winding up of some of the companies involved resulting in tax consequences for shareholders and an overall more expensive merger-process. There is also the problem of loss-carryover, non-deductibility of financing costs, Thin-capitalisation rules as well as valuation and indirect taxes.[32] The national rules and interests of MS may here collide resulting in less favourable treatment than what would have been the result if the restructuring had been a domestic affair. In certain situations, this results in, as stated by the CJEU in *SEVIC*, a conflict with the fundamental freedoms of the European Union.[33]

Therefore, the TMD aims to establish a harmonized system. The sentiment being that restructurings should not be hampered by restrictions, disadvantages or distortions caused by differences in tax provisions between Member States. Tax rules that are neutral from the point of view of Member state tax competition are intended to foster the internal market of the EU.[34] This harmonized system is built on the concept of deferral of taxation, not tax exemption.[35]

This chapter will account for a brief historic overview of the TMD, it´s goal for harmonization and it´s possible direct effect. Then the exchange of shares mechanism of article 8 from the TMD will be accounted for. Article 8 and its relation to allocation of taxing rights will then be presented in order to showcase the research problems this thesis intends to answer. Lastly the five different cross border scenarios that will be used to test Sweden's implementation of the article 8 of the TMD, will be presented.

[30] OECD Transfer pricing guidelines, Ch IX, para 9.4.
[31] Panayi, C, (2021), page.249.
[32] Panayi, C, (2021), pages 249-250.
[33] Case C-411/03 *SEVIC*, EU:C:2005:762, para 19.
[34] Preamble to Council Directive 2009/133/EC.
[35] Panayi, C, (2021), page 253.

2.2 Brief Historic Overview of the TMD

This thesis focuses on Council Directive 2009/133/EC[36] also referred to as the "Tax Merger Directive"[37]. Mergers have however been the subject of many directives, and changes of said directives, throughout the history of the EU. Therefore, for the reader to more easily understand the laws that regulate Mergers in the European Union a small summary of the different directives will first be made.

In 1978 the Third Council Directive 78/8557EC, also referred to as "the third directive"[38], was passed.[39] This Directive, although it only applied to domestic situations[40], provided for the first harmonization surrounding laws governing mergers of public limited liability companies.[41] When it comes to cross border mergers Council Directive 2005/56/EC, also referred to as "the Tenth Directive"[42] was passed on the 26th of October 2005.[43] However this directive, as well as the third company law directive on the protection of stakeholders in domestic mergers,[44] does not provide any rules on taxation. Taxation on restructurings is therefore governed solely by the Tax Merger Directive.[45]

Before the implementation of the Tax Merger Directive, it was not uncommon for Member States to grant tax relief for domestic restructurings, usually tax relief did not extend for cross border mergers. The reasons for this were, as mentioned above, no harmonised corporate framework existed before Council Directive 2005/56/EC but also Member states feared that tax relief would result in the losing of taxing rights since assets and liabilities would escape the taxing jurisdiction of the state.[46]

The Commission had been calling for harmonized tax laws connected to cross border mergers since 1969, the differences in opinion between member states were however too great and common ground could not be reached. The Commission tried again in 1980 but it would take until 1990 for a reworked proposal to be voted through. [47]

[36] Council Directive 2009/133/EC.
[37] Terra, Wattel, (2019), page 279.
[38] Broek H, (2012), page 2.
[39] Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies.
[40] Ibid article 2.
[41] Broek H, (2012), page 2.
[42] Broek H (2012), page 2.
[43] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.
[44] Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies.
[45] Terra, Wattel, (2019), page 280.
[46] Boulogne F, (2016), pages 1-2.
[47] Boulogne F, (2016) page 3. + Ståhl K, 2005), page 33.

The TMD stipulated that it was necessary for the effective functioning of the common market that cross border restructurings are not hampered by restrictions, disadvantages or distortions caused by the tax provisions of Member states.[48] It is worth mentioning that this directive coincided with adoption of the parent subsidiary directive[49].[50] In the *Punch Graphix* decision the ECJ explained the complementary effect the two directives had on one another due to their temporal connection as well as their similar objectives.[51]

In 2005 the TMD was amended,[52] this clarified certain issues and increased the personal scope of the directive. To name a few substantial changes SE and SCE were added on the list of eligible entities, partial division of companies became covered by the directive as well as the incorporation of a foreign branch into a local subsidiary.[53] The current version of the TMD, Council Directive 2009/133/EC, is an attempt to clarify the directive by codifying it, such a codification was considered rational given the many previous amendments.[54] The codification repealed the original version of the TMD.[55]

There have been amendments to the TMD a further 3 times because of the accession of additional Member states to the European Union, 10 new Member states in 2004[56] and 2 more in 2007[57]. These amendments didn't bring any material changes other than additions of those Member states corporate taxes and designated legal forms.[58] A similar amendment was made in 2013 following the accession of Croatia.[59]

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[48] Preamble to Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States.

[49] Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

[50] Boulogne F, (2016), pages 2-3.

[51] Case C-371/11, *Punsch Graphix*, EU:C:2012:647, para. 35.

[52] Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States.

[53] Terra, Wattel (2019), pages 281- 282.

[54] Preamble to Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States.

[55] Ibid article 17.

[56] Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded.

[57] Council Directive 2006/98/EC of 20 November 2006 adapting certain Directives in the field of taxation, by reason of the accession of Bulgaria and Romania, Annex Taxation, p.6.

[58] Terra, Wattel, (2019) page 281.

[59] Council Directive 2013/13/EU of 13 May 2013 adapting certain directives in the field of taxation, by reason of the accession of the Republic of Croatia, p.4 Annex.

2.2.1 Minimum harmonization

The TMD as a directive strives for a minimum amount of harmonization.[60] The rules found in the directive are not well defined and are held quite general. In principle the directive demands no immediate taxation on certain restructurings and *Ståhl* argues that this must be done via tax continuity. There however lacks any closer description of technical solutions in order to obtain this objective.[61]

Due to the lack of guidance from the CJEU, *Ståhl* in her doctoral thesis from 2005, expressed the opinion that it was uncertain to what extent MS were allowed to obtain the objectives of the Directive. *Ståhl* was however of the opinion that the objective envisioned in the TMD is the important factor, and not the technique chosen in order to obtain said objective. It is however according to *Ståhl* not possible for the MS to disregard the TMD where the directive offers clear guidance.[62]

Boulogne argues, given the *Leur-bloem* case,[63] that the objectives of the TMD are 1) the removal of tax disadvantages associated with cross border restructurings and 2) to safeguard the financial interests of the MS. According to a teleological approach these objectives should be kept in mind when interpreting the TMD.[64]

Whilst the TMD establishes a certain set of rules it is possible for its scope to be extended by a MS implementing laws, for domestic situations, that are more beneficial than the ones offered by the Directive. If such a scenario where to transpire the Fundamental Freedoms would act as a safety net if these rules were considered discriminatory, such rules could only be justified by the rule of reason doctrine. More beneficial rules for domestic exchange of shares procedures could therefore be extended to also apply to cross border situations.[65]

It is however fully possible for the MS, due to the TMD being a minimum harmonization directive, to offer more favourable tax rules than the ones prescribe by the Directive. The MS could provide less extensive taxation either via national legislation or by DTTs.[66] For the areas which the TMD has not

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[60] Terra, Wattel (2019) page 280.
[61] Ståhl K, (2005), page 50.
[62] Ståhl K (2005), page 50.
[63] Case C-28/95 *A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, EU:C:1997:369.
[64] Boulogne F, (2016), page 8 + Case C-28/95 *A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2,* EU:C:1997:369.
[65] Hofstätter M, Hohenwarter-Mayr D, (2018), Page 189 note 551.
[66] Ståhl K, (2005), page 56.

harmonized the MS retain their sovereignty but must exercise it in conformity with Primary EU law.[67]

2.2.2 Direct effect

Direct effect can be seen as a safeguard for individuals regarding the rights afforded to them by EU law. In order to ensure the correct implementation of EU law individuals can in certain situation call upon EU-law in national courts, even if said EU law is not implemented into national law.[68] For Directives this effect is only vertical, meaning that the individual only can rely on the EU law provisions against the MS.[69]

Direct effect can only come into question if the MS has not transposed the Directive in time, or at all, or if it has transposed it incorrectly. Direct effect is however also contingent on the subject matter of the Directive being unconditional and sufficiently precise.[70]

The subject matter being sufficiently precise focuses on the wording of provisions, clear and precise provisions fulfil this requirement. Ambiguous provisions can however also achieve direct effect if they can be clarified by interpretation from the courts. The defining factor for a provision being sufficiently precise is dependent on if a national court can use it to deal with the problem at hand.[71]

The subject matter being unconditional focuses on if the provision is subject to reservations due to the fact that the MS is left some discretion in its implementation of the provision. If the MS is given too much discretion in its implementation direct effect cannot be achieved.[72]

Scholars are divided concerning the direct effect of the TMD, it can be considered that the TMD leaves to much discretion for the MS resulting in that direct effect cannot be achieved. On the flipside it is argued that whilst the TMD offer leeway for the MS while implementing the directive, the minimum requirements are sufficiently clear in order for direct effect to be achieved.[73]

Ståhl is of the opinion that the provisions offered by the TMD are sufficiently precise, the provisions are in her view clear on what transactions that are to be subject to tax deferral and this creates a clear right for the taxpayer. On the subject of unconditionality *Ståhl* argues that whilst the MS are given leeway in its implementation some minimum-rights are clearly defined in the

[67] Boulogne F, (2016) page 11.
[68] Hettne J, Eriksson I, (2011), page 172.
[69] Chalmers D, Davies G, Monti G, (2019), pages 305-306.
[70] Prechal S, (2005), pages 242-243.
[71] Prechal S, (2005), page 244.
[72] Prechal S, (2005), pages 245-249.
[73] Broek H (2012), page 145.

Directive. She is therefore of the opinion that it is likely that the TMD has direct effect.[74]

Broek argues that the given the case law established by the CJEU regarding the TMD, that it has direct effect and therefore is able to be relied on by taxpayers in the case of a faulty implementation.[75]

2.3 Art. 8 of the TMD

Article 2 (e) of the TMD defines exchange of shares as[76]:

> *an operation whereby a company acquires a holding in the capital of another company such that it* ***obtains a majority of the voting rights in that company****, or,* ***holding such a majority, acquires a further holding****, in exchange for the issue to the shareholders of the latter company****, in exchange for their securities, of securities representing the capital of the former company****, and, if applicable,* ***a cash payment not exceeding 10 % of the nominal value****, in the absence of a nominal value, of the accounting par value of the securities issued in exchange;*[77]

An exchange of shares can be described as a situation where Company Y (The Acquiring company) acquires a holding in Company X (The Acquired company) that leads to or extends an already existing voting majority. The payment[78] used for the acquisition is shares in company Y which Company Y gives to the shareholders of X in exchange for shares in Company X.[79]

As mentioned in chapter 2.1 the TMD requires the taxation to be deferred. Deferral regarding exchange of shares is covered in article 8 (1) of the TMD.[80]

Article 8 (1) of the TMD reads:[81]

> *On a merger, division or* ***exchange of shares****, the allotment of securities representing the capital of the receiving or acquiring company to a shareholder of the transferring or acquired*

[74] Ståhl K, (2005), pages 59-61 + 63.
[75] Broek H, (2012), page 145.
[76] Council Directive 2009/133/EC, article 2 (e).
[77] Highlight added by the author.
[78] One could liken this to more of a trade than a payment in the traditional sense.
[79] Terra, Wattel (2019), page 286. See also scenario 1 in chapter 2.4 for an illustration of the transaction.
[80] An eventual cash payment does not have to be deferred and can be taxed immediately, see article 8(9) TMD. This taxation is not governed by the TMD. Different ideas have however been proposed in doctrine such as taxation of the entire cash payment, taxation proportionate to the unrealised gain see and Broek (2012) page 259. Some consider that the taxpayer cannot be burdened with a higher tax than if he had just sold the shares in a conventional fashion, see Ståhl (2005) page 331.
[81] Council Directive 2009/133/EC, article 8 (1).

> *company in exchange for securities representing the capital of the latter company* ***shall not,*** *of itself,* ***give rise to any taxation of the income, profits or capital gains of that shareholder.***[82]

This deferral covers the entire exchange,[83] it also covers a series of exchanges concerning the same shares from different shareholders if the acquiring company achieves the majority voting rights.[84] A series of exchanges must be looked at in the same context, it is unclear what connective factors are requires, *Ståhl* however argues that this is left to the MS but its implementation cannot go against the purpose of the TMD.[85]An exchange of shares leading to an increase in an already existing voting majority is also allowed deferral.[86]

As can be seen in article 8(4) of the TMD, deferral is dependent on the shareholder attributing the received share at the same value as the old ones.

Article 8(4) of the TMD reads:[87]

> *Paragraphs 1 and 3 shall apply only if the shareholder does not attribute to the securities received a value for tax purposes higher than the value the securities exchanged had immediately before the merger, division or exchange of shares.*

According to *Broek* it is the package of shares received that needs to have the same value for tax purposes as the exchanged package. If Shareholder B exchanges 10 shares totalling a value of 100 but receives 5 shares with a total valued of 100 in return, then the transaction is compliant with article 8(4).[88]. Rules enforcing a specific valuation for the acquiring company, in order for the shareholder to gain deferral, has been found to be incompatible with the TMD.[89]

The provisions in TMD call for deferred taxation not tax exemption. Therefore, the MS is allowed to tax the shareholder when they later dispose of the received shares, the capital gain is calculated as if the restructuring never happened.[90] This form of taxation is referred to, by *Broek*, as “Roll over relief”

[82] Highlight added by the author.
[83] As opposed to just the shares that constitute the tipping point for majority voting rights.
[84] Terra, Wattel, (2019) page 286.
[85] Ståhl, K, (2005), pages 169-171.
[86] Terra, Wattel (2019), page 287.
[87] Council Directive 2009/133/EC, article 8(4).
[88] Broek, H, (2012), page 260 footnote 710.
[89] See Case C-285/07 A.T. AG v Finanzamt Stuttgart-Körperschaften, EU:C:2008:705.
[90] Broek H, (2012) page 262.

since the unrealised gain from the exchange of shares is simply rolled over to a later taxable transaction.[91]

Article 8(6) of the TMD reads:[92]

> *The application of paragraphs 1, 2 and 3 shall not prevent the Member States from taxing the gain arising out of the* ***subsequent transfer*** *of securities received* ***in the same way as*** *the gain arising out of the transfer of* ***securities existing before the acquisition****.*[93]

Ståhl argues that article 8(1) should be read in connection to 8(6), taxing the exchange of shares a few weeks after the transaction fulfils the requirements of 8(1) but would completely disregard the overall purpose behind the TMD. Taxation should therefore not be allowed to take place until after a later transfer.[94]

Article 8(8) however give the MS the option to allow the shareholder different valuation than mandated by article 8(4), in those cases article 8(1) does not apply.[95] Article 15 also enables the MS to deny the benefits of article 8 if the transaction has as its principle objective tax evasion or tax avoidance.[96]

2.4 The research problem – The Swedish Implementation post the Lassus case.

If not for the TMD it would be up to the MS to tax the "realisation" of the asset when an exchange of shares takes place. However, given the TMD this gain, although in theory "realised", will be deferred. Even if the TMD harmonizes the immediate tax treatment of an exchange of shares agreement it does not harmonize the balanced allocation of taxing powers between MS.[97]

Actions taken by the shareholder after the exchange of shares can therefore result in the MS losing its right to tax the unrealised gain. Such an action could be the emigration of the shareholder. As will be further discussed in chapter 4 of this thesis, the TMD does not contain any rules relating to exit taxation, this has been left in the purview of the MS.

This problem of taxing rights between MS was one of the aspects dealt with by the CJEU in the joined cases *Jacob/Lassus.* These cases brought nuance and clarification on several issues relating to the TMD. It dealt with an

[91] Broek H (2012) page 255.
[92] Council Directive 2009/133/EC, article 8(6).
[93] Highlights added by the author. For a discussion on how "in the same way" should be interpreted see *Kondej M, Wicher M (2023).*
[94] Ståhl K, (2005) page 327.
[95] Council Directive 2009/133/EC, article 8(8).
[96] Council Directive 2009/133/EC, article 15.
[97] Joined cases C-327/16 Marc Jacob and C-421/16 Marc Lassus, EU:C: 2018:210, para 60.

exchange of shares agreement involving more than two MS, the assessment of the unrealised gain resulting from such an agreement, as well as the MS ability to extend its taxation power over the unrealised gain created by the exchange of shares agreement.

Given these clarifications it is of interest to see how Swedish taxation over the unrealised gain, deferred by the exchange of shares mechanism, is protected, both when the shareholder is a resident of Sweden and where they are not. It is here also of interest to compare how Sweden protects its powers of taxation over unrealised gains regarding shares not affected by an exchange of shares agreement. Does Sweden treat these two kinds of shares differently?

The joined cases *AQ/DN*[98] have also brought clarification on what rules are applicable on the unrealised gain deferred by article 8(1) when the later transfer and taxation according to article 8(6) occurs. Seeing as both *AQ/DN* and *Jacob/Lassus* have come out after the last amendment to the Swedish tax code governing these transactions it is of interest to see if the Swedish regime is in line with this case law.

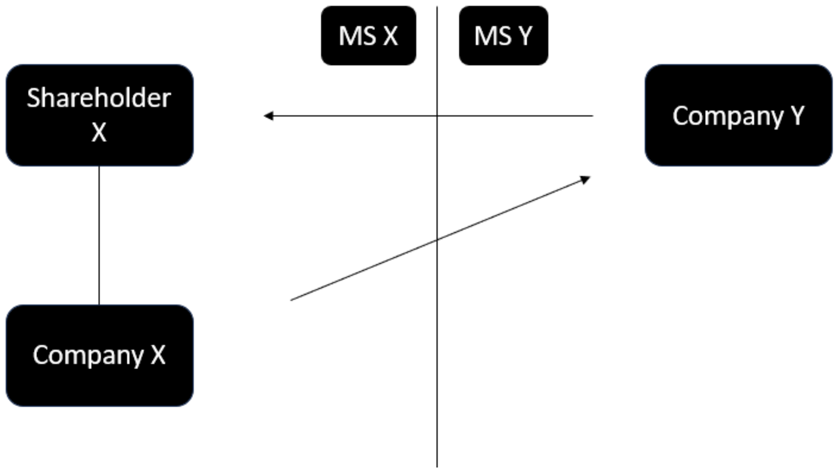
The questions regarding Sweden's allocation of taxing rights for unrealised gains stemming from an exchange of shares agreement is closely connected with Sweden's implementation of the TMD. Therefore, the Swedish implementation of the exchange of shares mechanism in the TMD will be analysed first.

2.5 Illustrating five Cross Border Transactions

Sweden's implementation of article 8 of the TMD and Sweden's allocation of taxing rights will be examined in five different scenarios. These scenarios cover when the taxable asset, the shareholding, leaves the MS as seen in scenario 1.1 and 1.2. Scenarios 2 and 3 cover when both the taxable person, the shareholder, and the taxable asset leaves the MS. Scenario 4 looks at taxation when neither the taxable person nor the taxable asset leave the MS, but the MS nonetheless is involved in an exchange of shares agreement.

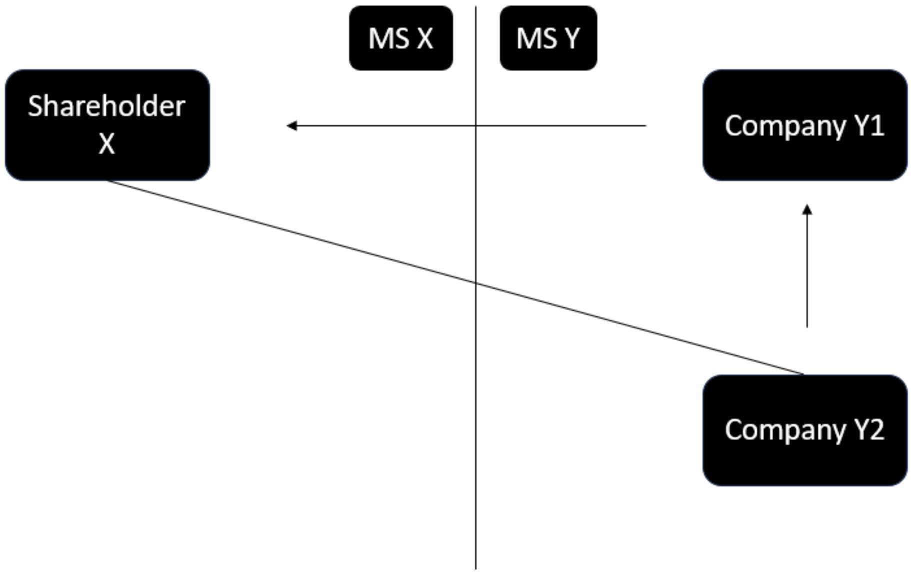
98 Joined Cases C-662/18, C-672/18 *AQ and DN v. Ministre de l'Action and des Comptes public*, EU:C:2019:750.

i. Scenario 1.1 – An exchange of shares agreement as envisioned by the TMD (The Textbook example)



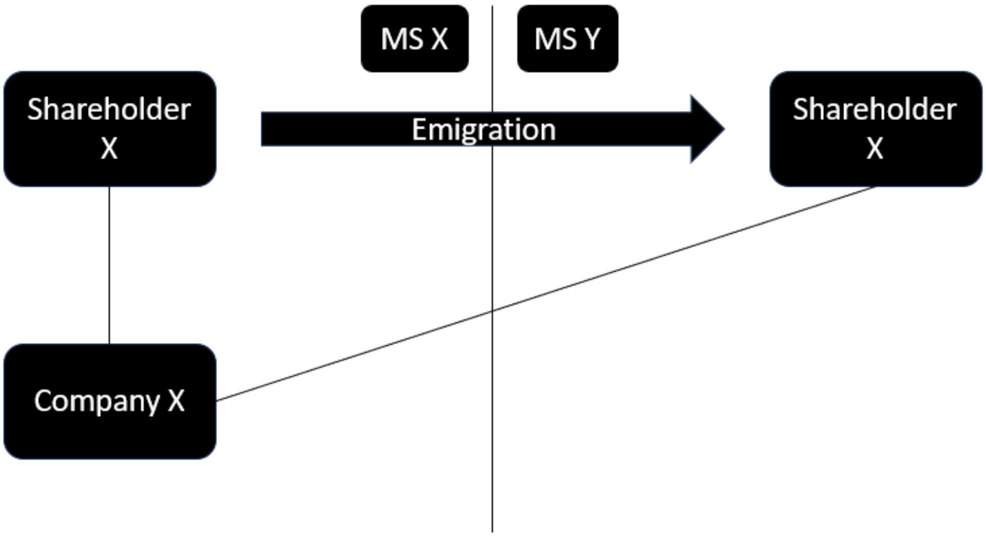
Here Shareholder X, holding domestic shares in Company X, exchanges his shares for shares in Company Y. After this transaction Shareholder X will hold shares in Company Y, whilst Company Y will hold shares in Company X. The taxable asset, shares in Company X, leaves MS X whilst the taxable person, Shareholder X, remains.

A similar situation is scenario 1.2.



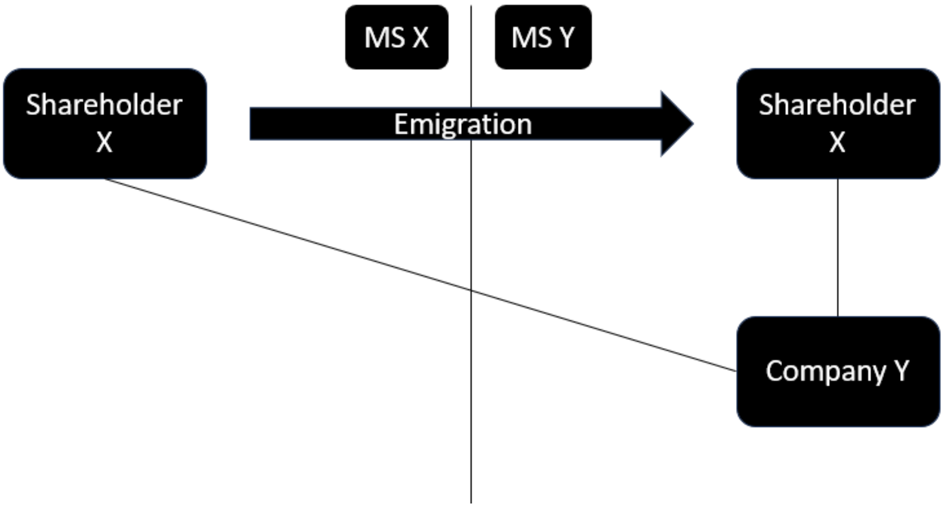
Here Shareholder X, holding foreign shares in company Y2 exchanges his shares for shares in Y1. Company Y1 will after the exchange hold shares in company Y2. Once again, the taxable asset leaves MS X whilst the taxable person, Shareholder X, remains.

ii. Scenario 2 – Emigrating Shareholder holding Domestic Shares



Here shareholder X, holding shares in Company X, emigrates to MS Y. After this emigration shareholder X will be a resident of MS Y, Shareholder X however still holds shares in Company X

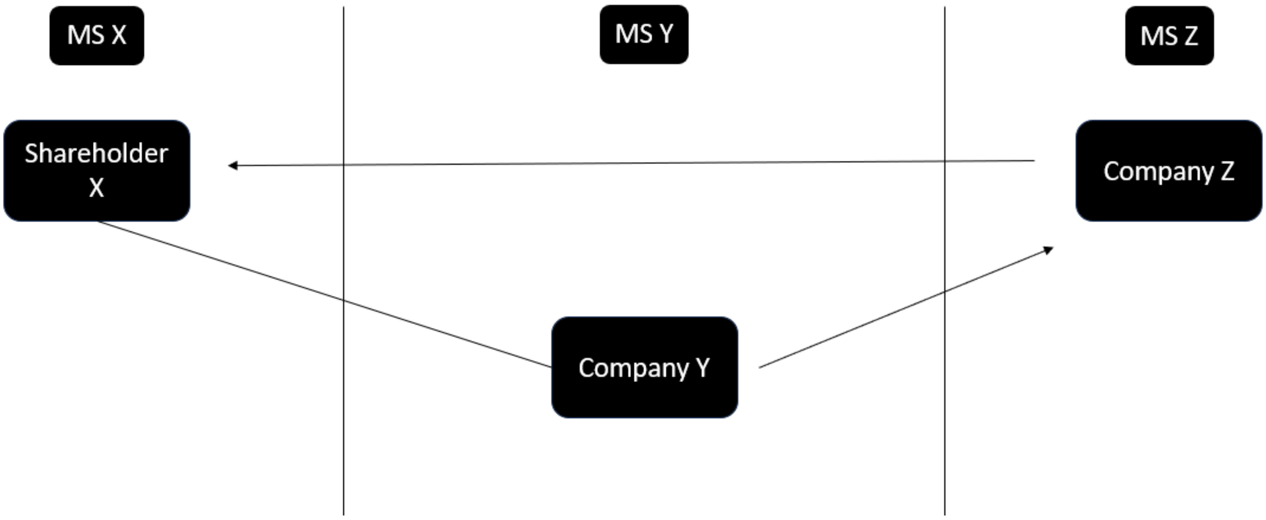
iii. Scenario 3 – Emigrating Shareholder holding Foreign Shares



Here Shareholder X, holding shares in the foreign company Y, emigrates to MS Y. After the emigration Shareholder X will now be a resident in MS Y but remains holding shares in Company Y.

For scenarios 2 and 3 the domestic or foreign shares can come into Shareholder X possession either by normal acquisition or by an exchange of shares agreement.

iv. Scenario 4 – Shareholder in one MS, Exchange of Shares Between Two other MS – “The Lassus case”



Here Shareholder X is resident of MS X whilst holding foreign shares in Company Y. Via an Exchange of Shares Agreement Shareholder X receives shares in Company Z, Company Z in return receive shares in Company Y. This was the situation in the *Lassus* case which will be further described in chapter 5.3.

2.6 Summary

The exchange of shares mechanism in the TMD ensures tax deferral of the unrealised gain, up until the later transfer of the received shares. This right of tax deferral when entering into an exchange of shares agreement is sufficiently clear and unconditional that, even if the MS is given some leeway in its implementation, it is likely that it is subject to direct effect.

Whilst the deferral is harmonized the allocation of taxing rights is not, a subsequent emigration from the shareholder can therefore result in the MS losing its right to tax the unrealised gain. This is possible even though the exchange of shares took place when the MS in question had a right to tax. The joined cases *Jacob/Lassus* has clarified the rights of the MS to retain its taxing power over the unrealised deferred gain.

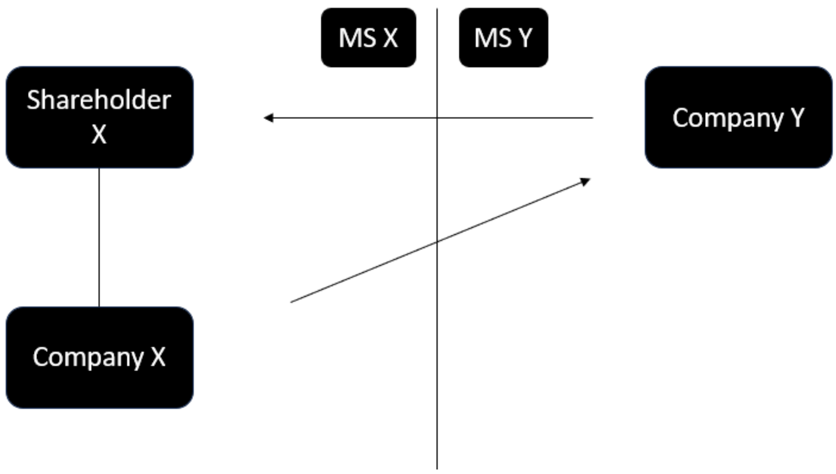
The joined cases *Jacob/Lassus* as well as *AQ/DN* have also clarified other aspects of the taxation techniques allowed under the exchange of shares mechanism. These developments warrant an examination on if the Swedish taxation technique is compliant with the TMD.

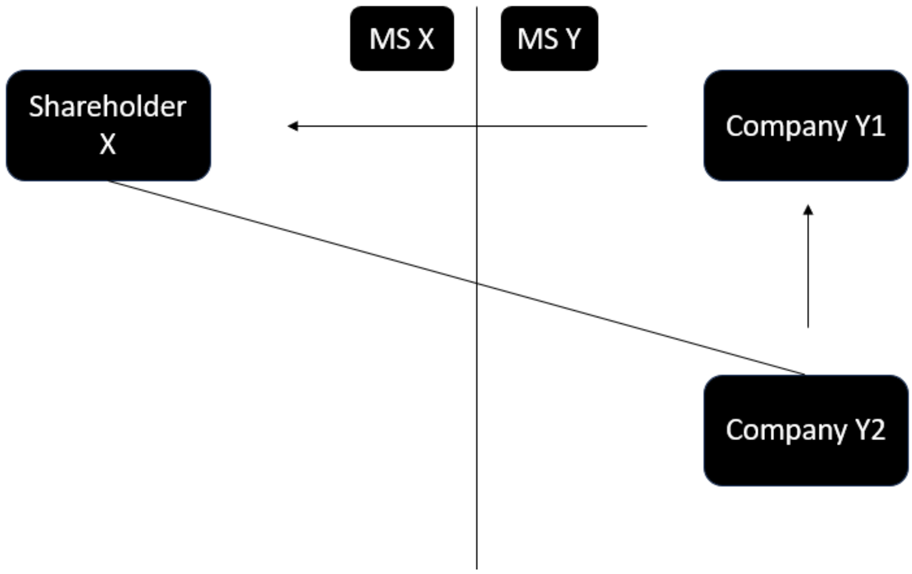
Via five different cross border scenarios this thesis is examining Sweden’s implementation of the exchange of shares mechanism and its compliance with the TMD as well as examining how Sweden has chosen to protect its taxing rights over the unrealised deferred gain.

3 Setting the Scene – The TMD and the Swedish Implementation

3.1 Introduction

This chapter will account for a brief historic overview of the Swedish implementation process. After this the Swedish implementation will be accounted for and tested against the "Textbook" examples for an exchange of shares covered by the TMD, Scenario 1.1 and 1.2. When examining these Scenarios Sweden will take the roll of MS X whilst MS Y is any other EU MS.





3.2 The Swedish Implementation Process

The TMD was first implemented into Swedish law through Lag (1994:1854) om inkomstbeskattningen vid gränsöverskridande omstruktureringar inom EG,[99] henceforth IGOL.[100] However Sweden already had similar legislation on exchange of shares through the now revoked law: Lag (1947:576) om statlig inkomstskatt, henceforth SIL.[101] The provisions in the above mentioned law didn't set any requirements on influence of the acquiring company, meaning that it in this regard was more beneficial for the tax payer than required by the TMD. In other aspect the provisions provided by SIL conflicted with the TMD and IGOL was therefore introduced as complement to SIL in order to create compliance with the directive.[102]

A few years later a new law, Lag (1998:1601) om uppskov med beskattning vid andelsbyte,[103] was proposed. The purpose of this new law was to combine the two different exchange of shares systems into one combined system.[104] The reason behind this was that the creation of IGOL was made with haste due to the Swedish entry into what is now the European Union, and that due to this a full investigation of how the requirements of the TMD could be combined with the Swedish rules was not able to be made in time. This resulted in two similar but in some cases different systems leading to drawbacks on both a principal and practical level.[105]

This combined system was later changed through an amendment to the tax code,[106] and divided back into two different tracks, one concerning exchange of shares conducted by private persons and the other for legal persons.[107] The goal was to create a simpler system for private persons, similar to the one used before in SIL.[108] This simplified system would however only apply to share in company noted on a stock exchange, resulting in qualified shares not being included in the system.[109]

This was however amended quite rapidly, [110] the simplified system for private persons were now to also include share not noted on a stock exchange as well as qualified shares.[111] The last amendment,[112] aimed to extend the scope of

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99 Lag (1994:1854) om inkomstbeskattningen vid gränsöverskridande omstruktureringar inom EG.
100 Prop. 1994/95:52, page 1.
101 Lag (1947:576) om statlig inkomstskatt.
102 Prop. 1994/95:52, page 36.
103 Lag (1998:1601) om uppskov med beskattningen vid andelsbyte.
104 Prop. 1998/99:15, page 1.
105 Prop. 1998/99:15, pages 177–178.
106 Lag om ändring i Inkomstskattelagen (1999:1229) SFS 2001:1176.
107 Prop. 2001/02:46, page 2.
108 Prop. 2001/02:46, page 61.
109 Prop. 2001/02:46, pages 62–64.
110 Lag om ändring i inkomstskattelagen (1999:1229) SFS 2002:1143.
111 Prop. 2002/03:15, page 1.
112 Lag om ändring i inkomstskattelagen (1999:1229) SFS 2009:1229.

the simplified system to all individuals resident within the EEA, as well as to ensure that the deferred taxation was not ended just because the private person emigrated from Sweden. The deferral was now only to end if the private person emigrated out from the EEA.[113] These changes were prompted by complaints from the European Commission, arguing that the old Swedish rules could constitute a hindrance to the free movement of both persons and capital, now article 21 TFEU[114] and article 63 TFEU[115].[116]

3.3 Swedish implementation of article 8 in Light of Scenario 1.1 and 1.2

3.3.1 Chapter 48a IL

The current iteration of the Swedish tax rules for exchange of shares has existed since 2002.[117] As explained above the Swedish exchange of shares tax-regime is divided into two different tracks, one for the taxation of private persons and one for legal persons.[118] The rules covering private persons can be found in the chapter 48a of the Swedish tax code, Inkomstskattelag (1999:1229) henceforth IL.[119] Given the purpose of this thesis the Swedish tax-rules governing exchange of shares for legal persons, found in chapter 49 of the Swedish tax code,[120] will not be discussed further.

3.3.2 General Requirements for Deferral

The rules in chapter 48a offer deferred taxation to an exchange of share if an individual, the shareholder, exchange shares in a company, the acquired company, for shares in another company, the acquiring company. There is no requirement that the acquiring company issues new shares for the exchange, if a company owns its own shares, it is allowed to use them in the transaction.[121] Deferral is also granted when exchanges of shares take place in succession, share A is exchanged for share B which is later exchanged for share C. In such a case share C is still considered to have same original acquisition cost as share A.[122]

The compensation for the shares must be appropriate given current market conditions and must reflect its market value, meaning that the value of the shares exchanged cannot be greater than the value of the shares received. If

[113] Prop. 2009/10:24, page 1.
[114] Article 21 TFEU
[115] Article 63 TFEU
[116] Prop. 2009/10:24, page 9.
[117] Prop. 2001/02:46, page 64.
[118] Prop. 2001/02:46, page 68.
[119] Inkomstskattelag (1999:1229), chapter 48a.
[120] Inkomstskattelag (1999:1229), chapter 49.
[121] Andersson M, Dahlberg M, Tivéus U, (2023-10-04, Juno), Comment on chapter 48a 2§ Inkomstskattelag (1999:1229).
[122] Prop. 2002/03:15, pages 30 and 41.

for example the shareholder exchanged shares at a value of 100 but only receives shares at a value of 60, only 60 is considered a part of the share exchange. The remaining 40 is, depending on the context, considered to be given as a gift or dividend from the shareholder.[123]

Part of the compensation is allowed to be in cash,[124] more on this in chapter 3.3.5. Shares in the acquiring company must however also be transferred to the shareholder, here all the factors leading up to the transaction can be looked at in a common context to see if the shareholder received any shares in return. If the shareholder receives only cash the transaction is not covered by the exchange of shares mechanism.[125]

The seller must also either be a resident of a state in the EEA or regularly live in an EEA state.[126] The buyer, as well as the acquired company, can be either a Swedish or an EU entity.[127]

If the conditions for the deferral are met then the deferral stipulated in chapter 48a IL applies automatically, the taxpayer is not afforded the choice of immediate taxation and is not required to declare the exchange.[128]

3.3.3 The Voting Rights Requirement

The Swedish implementation, like the TMD, requires a majority shareholding to be reached in order to benefit from the deferral. The Swedish rules abide by a year-to-year basis, the acquiring company must hold voting rights accounting for more than 50% of the voting rights by the end of the same calendar, not fiscal, year that the exchange took place. There is an exception to this rule, if special reasons exist, the deferral might still be allowed even if the acquiring company does not hold more than 50% of the voting rights at the end of the year. This however requires that the company in question has held more than 50% at some point of the year, after the exchange.[129]

These special circumstances have been described in the preparatory works as a situation where the acquiring company is forced to sell the shares to its own subsidiary in order to force out minority shareholders.[130] A company that would be subject to negative tax-consequences if the shares were not

[123] Chapter 48a 2§ Inkomstskattelag (1999:1229) and Andersson M, Dahlberg M, Tivéus U, (2023-10-04, Juno), Comment on chapter 48a 2§ Inkomstskattelag (1999:1229).
[124] Chapter 48a 2§ Inkomstskattelag (1999:1229).
[125] See HFD 2013 not 2, see also Melbi I, (2014) page 376.
[126] Chapter 48a 5§ Inkomstskattelag (1999:1229).
[127] Chapter 48a 6–7§§ Inkomstskattelag (1999:1229).
[128] Prop 2001/02:46 page 63 and Ståhl K, (2005), page 375.
[129] Chapter 48a 8§ Inkomstskattelag (1999:1229).
[130] SOU 1998:1, page 196.

transferred within the same concern has also been viewed as a special circumstance.[131]

The structure of this rule results in that the deferral for the seller lies in the hands of the acquirer. The seller therefore does not always know if the deferral will be allowed until after the end of the year.[132] A way around this problem has been the possibility to add a clause in the exchange of shares agreement stating that the exchange only takes place if the acquiring company manages to achieve this 50% threshold.[133] Swedish courts have confirmed in RÅ 2002 ref 19 that deferral is granted if a binding agreement on exchange of shares has taken place before the end of the year. Factors outside the parties' control, such as permission from state authorities, is not the determining factor for deferral.[134]

However, Skatterättsnämnden, a Swedish organ that delivers preliminary opinions in taxation related questions, considers that since the TMD does not have a similar limitation on time as the Swedish implementation the deferral can only be denied for not complying with the time limitation if the transaction has the purpose of tax evasion.[135] The Swedish tax authority shares this view, the practical effect of the time limit is therefore lessened compared to what is envisioned in the preparatory works.[136]

The Swedish rules also allows deferral for an increase in shareholding, example being and increase in shareholding from a 80% to a 90% shareholding.[137]

3.3.4 Bundling transactions

The Swedish court has dealt with the question of whether a simultaneous exchange of shares from multiple companies, all owned by the same person, in exchange for shares in one company, is allowed under the exchange of shares mechanism.[138]

The Swedish court considers that deferral due to exchange of shares is an exception to the normal order of immediate taxation, and that the rules in chapter 48a IL should be interpreted in the light of this. The court concludes that chapter 48a 2§ IL provides for an order where the shares of one

[131] Andersson M, Dahlberg M, Tivéus U, (2023-10-04, Juno), Comment on chapter 48a 8§ Inkomstskattelag (1999:1229).
[132] Andersson M, Dahlberg M, Tivéus U, (2023-10-04, Juno), Comment on chapter 48a 8§ Inkomstskattelag (1999:1229).
[133] Ståhl K (2005), pages 168-169.
[134] RÅ 2002 ref 19.
[135] Ståhl have from the Swedish perspective written on how the Swedish voting majority rules conform with the TMD, this will therefore not be dealt with in the analysis of this thesis. See Ståhl K (2005), page 225 ff.
[136] See SRN 2003-10-23. Uppskov har erhållits trots att röstvillkoret inte uppfyllts vid kalenderårets utgång då andelsbytet inte använts otillbörligt (RSV:s rättsfallsprot. 32/03).
[137] Ståhl K (2005), page 170.
[138] HFD 2018 ref 62.

company is exchange for the shares of another, both IL and the article 2 (e) of the TMD lack rules governing deferral when more than one company is involved.[139]

The court point out that a special order exists for fusions and partial fission when more than one company is acquired. Given that the preparatory works for both the Swedish implementation as well as for the TMD do not argue for allowing a situation such as one in the present case, the court finds that it should fall out of the scope of chapter 48a IL. The court puts emphasis on the fact that if it was the intention of the lawmaker to allow such a transaction in the scope of chapter 48a IL, this would have been clearly stated since it would affect the application of the rules concerning qualified shares in small businesses.[140] Each transaction would therefore have to be separate in order to fall within the scope of chapter 48a IL.

Skatterättsnämnden was however of a different opinion. They argue that there is nothing in the Swedish implementation of the tax-code that explicitly forbids that such a transaction can be subject to deferred taxation. Furthermore, Swedish courts have previously concluded that an exchange of shares that involved two different kinds of shares in one company is to be considered one transaction.[141] Skatterättsnämnden argues that, although this is different from the situation in the present case, the court in that case clarifies how the cost of acquisition of the two different share types should be transferred to the newly received shares. Swedish courts have therefore previously allowed different shares to be traded for new ones.[142]

Skatterättsnämden also argues that the CJEU has dealt with a similar situation in the *Leur-Bloem* case. In that case an individual wanted to exchange shares she held in two different companies for shares in a holding company, also owned by her.[143] Whilst the court in that case did not deal with if the structure of the transaction was allowed under the TMD, Skatterättsnämnden still argues that court in that case must have taken the structure into consideration and refers to paragraph 37 of the judgment.[144] In paragraph 37 the CJEU clarifies that "Similarly, it is not necessary, in order for the operation to be treated as an exchange of shares within the meaning of that provision, for there to be a permanent **merger of the business of two companies into a single unit**." [145]

[139] HFD 2018 ref 62.
[140] HFD 2018 ref 62.
[141] RÅ 2000 ref 23
[142] HFD 2018 ref 62.
[143] Case C-28/95 A. Leur-Bloem, EU:C:1997/369 para. 3.
[144] HFD 2018 ref 62.
[145] Case C-28/95 A. Leur-Bloem, EU:C:1997/369, para 37. Highlight added by the author.

The Swedish court was however of the opinion that none of the cases supported the view of Skatterättsnämnden.[146]

3.3.5 Cash Payment

In restructurings there is often the problem of precisely matching the values of securities in the transferring company with the acquiring company. Therefor the Merger directive offers, as mentioned above in article 2 (e), a possibility for a cash payment in order to iron out rounding differences. This payment is not allowed to exceed 10 % of the nominal value of the shares issued to the individual shareholder. While this created more flexibility for the parties involved, the cash payment is itself not subject to deferred taxation and is therefore allowed to be taxed immediately.[147]

Sweden used to enforce the 10% threshold provided by the TMD, this limitation has however now been fully removed. Deferral is therefore now granted irrespective of the amount of cash given in the exchange of shares transaction. The reasons behind this were twofold.[148]

The first reason behind the change was a judgement in Swedish court case RÅ 2002 ref 27[149] concerning a person transferring half their shares in one company in exchange of share in the acquiring company whilst also transferring the other half of shares for cash to the same acquirer. One of the questions for the court was whether such a transaction was allowed under the deferral rules.[150]

The decisive factor was if the rule governing deferral should be applied in respect of each exchanged share or if all the shares transferred at the point of the sale should be judged together. In the present case the entire transfer was governed by one contract that clearly stated that half of the shares were to be exchanged and the other half sold for cash. The court found that there was no reason to not apply the deferral rules for the shares that were subject to a share exchange.[151]

The second reason behind the removal of the 10% limit was a change in Swedish company law, which removed the concept of nominal value of shares.[152] Since the 10% limit was calculated on the nominal value of share it was deemed reasonable to remove the limit entirely.[153]

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146 HFD 2018 ref 62.
147 Terra, Wattel (2019), page 293.
148 Holstad P, Inkomstskattelag (1999:1229) chapter 48a 2§, Karnov, (JUNO) (visited 2023-12-29).
149 RÅ 2002 ref 27.
150 RÅ 2002 ref 27.
151 RÅ 2002 ref 27.
152 Prop. 2005/06:39, page 1.
153 Prop. 2005/06:39, page 27.

The cash payment is taxed as a capital gain in the same year that the exchange of share takes place.[154] The entirety of the cash payment is taxed, the original cost of the exchange shares is not allowed to be deducted. The gain is not required to be greater than the cash payment.[155] Instead the original cost of the exchanged shares is added on to the shares received in exchange, and can be deducted at a later transfer of shares.[156] If one wants to avoid this form of taxation it is possible to write two contracts, on for the sale of shares for cash, and one for exchange of shares.[157] The cash payment from the sale of shares for cash will then be taxed as a capital gain and allowed deductions for the original cost.[158]

3.3.6 Valuation of the Shares Received

The shares received in exchange are considered to have the same original cost of acquisition that the old shares had.[159] A later loss or gain will only affect the taxation at moment of subsequent transfer.[160] If the original cost of the shares exchanged was 50 and the shares received in return had a market value of 100, they would still for tax purposes be valued at 50 until the moment of later transfer.

The acquiring company is allowed to value its newly received shares at market value. The Swedish tax code provide no rules that conditions the shareholders deferral upon the valuation the acquiring company puts on the exchanges shares it receives. [161]

There is a special exception to the rules mentioned above. Sweden has introduced a special, optional, method for capital gains taxation for individuals. This method is the ISK-system created by Lag (2011:1268) om investeringssparkonto. The ISK-system was adopted as a method to simplify investing for private persons. When using an ISK-account the private person does not have to declare transactions done on the account. Instead, the taxation is standardised in a way that results in that the total value, including the unrealised gains, of the ISK-account is tax recurringly.[162]

Therefore, if the exchanged shares were stored in an ISK-account and the shares received in return also become placed in an ISK-account special

[154] Chapter 48a 9§ Inkomstskattelag (1999:1229).
[155] Andersson M, Dahlberg M, Tivéus U, (2023-10-04, JUNO), Comment on chapter 48a 9§ Inkomstskattelag (1999:1229).
[156] Andersson M, Dahlberg M, Tivéus U, (2023-10-04, JUNO), Comment on chapter 48a 2§ Inkomstskattelag (1999:1229).
[157] RÅ 2002 ref 27.
[158] Chapter 48 Inkomstskattelag (1999:1229).
[159] Chapter 48a 10§ Inkomstskattelag (1999:1229).
[160] Holstad P, Inkomstskattelag (1999:1229) chapter 48a 10§, Karnov, (JUNO) (visited 2023-12-29).
[161] Ståhl K, (2005), page 332.
[162] Sjöstedt E, Lag (2011:1268) om investeringssparkonto, first comment, Karnov, (JUNO), (visited 2023-12-29).

valuation rules apply. In this case the shares received in return are valued at the fair market price for the shares at the moment of exchange.[163] It is often possible for the shareholder to choose to place the received shares in the ISK-account, if the shareholder elects not to do this, the regular rule on valuation mentioned above applies.[164]

3.3.7 End of Deferral

Deferral according to chapter 48a IL is intended to simply transfer the original acquisition cost for the old shares over to the new shares received in exchange, thus creating tax-continuity. This means that no tax debt is established at the moment of exchange, instead, the later transfer of shares is the chargeable event that triggers taxation.[165]

According to the Swedish tax code the shares are considered transferred if the underlying company is liquidated or declared bankrupt.[166] This is also the case for exchanged shares, shares are also considered transferred when a buy-back or redemption of shares takes place.[167]

Whilst, as argued for above, a beneficial transaction is considered a transfer, the general rules are that such a transaction does not create tax consequences for the giver, this also applies to exchanged shares. Therefore, if exchanges shares are given as a gift, neither the giver nor the receiver is taxed. The new owner of the shares is instead taxed at a later transfer, tax-continuity ensures that the original values of the shares travel over to the new shareholder so that he is taxed in the same way that the previous shareholder would have been if the transfer had not been an onerous transaction. This does however not apply if the shares are gifted to a legal person.[168] These rules apply even if the receiver is not subject to tax in Sweden, even if this results in the shares never becoming taxed in Sweden.[169]

According to the preparatory works the tax-rules applicable for the later transfer of shares is the same as the rules that would have been applied at the moment of exchange, if deferral had not taken place.[170]

3.4 Conclusions

The Swedish implementation of the Exchange of shares mechanism does not differentiate between if the shareholder holds domestic or original shares as

[163] Chapter 48a 10a§, Inkomstskattelag (1999:1229).
[164] Holstad P, Inkomstskattelag (1999:1229) chapter 48a 10a§, Karnov, (JUNO) (visited 2023-12-29).
[165] Ståhl K, (2005), page 303.
[166] Chapter 44 7-8§§ Inkomstskattelag (1999:1229).
[167] Ståhl K, (2005), page 321.
[168] Ståhl K, (2005), page 322.
[169] Ståhl K, (2005), pages 322-323.
[170] Prop 2002/03:15, page 41.

it only requires that acquired and acquiring companies are located within the EU. For the exchange of shares to result in deferral of the unrealised gain shares actually have to be exchanged, there is however no limit on any cash payment. Cash payments related to the exchange of shares are however taxed in a harsher way, the shareholder can however avoid this by contractually splitting the transactions.

For deferral to occur the acquiring company must achieve more than 50% of the voting rights of the acquired company before the end of the calendar year. This has however been found to only apply if the purpose behind the exchange of shares was tax evasion. The Swedish system does not allow a bundling of exchange of shares transactions when more than one acquired company is bought by the same acquiring company, each transaction must here be regarded separately.

The Swedish system allows for two different valuation techniques. The value of the old shares continuous to apply to the received shares, or if the shareholder uses the ISK-regime the received shares are valued at their market price. When using the ISK-regime the shareholder is not taxed at the moment of later transfer as the shares have been taxed recurringly during the time they were kept in the ISK-account.

If the shareholder is unable to or elects not to use the ISK-regime the later transfer is taxed, the rules applicable to this taxation are the once that were in place when the exchange of shares took place.

The Swedish implementation enables Scenarios 1.1 and 1.2 to be performed without immediate tax consequences by allowing for "Roll over relief". Sweden protects it taxing right over the unrealised gain either by taxing the later transfer or the recurringly taxing the ISK-account. This applies as long as the Shareholder remains a resident of Sweden, in the next chapter the taxation that applies when the shareholder emigrates is examined.

4 Emigration of the Shareholder

4.1 Introduction

As seen in chapter 2.3, article 8 of the TMD does not cover how the deferral is affected by the emigration of the shareholder. In order to find clarity for such a situation this chapter accounts for concept of exit taxation and what has been written in doctrine concerning its interaction with the TMD. Relevant case law from the CJEU concerning exit taxation of individuals will be accounted for, along with doctrine on the subject. Lastly, the Swedish method of exit taxation, for both shareholders holding regular and exchanged shares, will be accounted for.

4.2 The Dividing Factor - Exit Taxation

Exit taxation refers to taxation on private or legal persons who are taxed as a result of them leaving the territory of a MS. Exit taxation therefore becomes a contentious method of taxation since it creates a clash between the interest of the taxpayers exercising their fundamental freedoms under the TFEU and the interest of the MS its taxation powers. So, whilst justifications for exit taxation can be made, a balance between these interests is required in order for compliance with EU law.[171]

Due to an emigration the taxpayer might benefit from a mismatch between that state where an unrealised gain was accrued and where the gain was later realised. Such a benefit could be the result of the Host state not taxing the later realisation or by offering a step-up[172] in value whilst the emigration state not taxing at the moment of emigration.[173]

The emigration state wants to preserve its taxing rights over unrealised gains that have been accrued whilst the taxpayer has been residing within its borders. If the emigration state took no unilateral measures in order to achieve such taxation the state would risk losing said taxing rights due to the OECD MC, since under DTT moveable assets tend to be taxed in the state of the state of the alienator.[174]

The practice and methods of exit taxation differ from state to state, with some state not applying it at all. No matter the practice, exit taxation constitute a restriction to the Fundamental Freedoms. Taxation of unrealised gains only

[171] Helminen M (2003) chapter 2.2.1.
[172] The host state values the assets at their market price at the time of emigration, setting the "new original cost of acquisition" for said assets.
[173] Terra Wattel, (2002), page 404.
[174] Panayi C, (2021), pages 269-270 and OECD MD article 13 (5).

target those taxpayers choosing to exercise their freedoms A taxpayer remaining a resident will be taxed when realisation occurs.[175]

When testing if exit taxation rules are compliant with EU-law the CJEU uses the "rule of reason-test" in order to determine if a restriction to the fundamental freedoms can be justified. This test, originating in *Cassis de Dijon*[176] and further clarified by *Gebhard,*[177] has four criteria that must be met in order for the rule to be justified.[178]

These criteria are: The rule has to be applied in a non-discriminatory way, The rule has to be motivated by an overriding reason in the public interest, the rule must be suitable for securing the objective of the which it aims to pursue and lastly, it may not go beyond what is necessary in order to attain this objective, meaning that it has to be proportionate.[179]

Cejie has found that the CJEU does not look at the first requirement, the rule being applied in a non-discriminatory fashion, in cases concerning Exit taxation. This is because Exit taxation is not openly discrimination in nature since it does not focus on nationality.[180]

The overriding reasons in the public interest have been found to be, effectiveness of fiscal supervision, the risk of tax avoidance, coherence of the tax system and the allocation of taxing rights between states. More than one of these grounds can be used to justify the same rule.[181]

4.2.1 Exit Taxation and the TMD

Broek argues that the TMD neither requires nor precludes MS to implement Exit taxes. The TMD also does not have the purpose of preventing double taxation. Instead, the objective of the TMD is the prevention of immediate taxation on restructuring and the safeguarding of the MS financial interest. He therefore theorizes that the TMD, implicitly, has the purpose of allocation that taxation rights of the MS in line with the principle of territoriality.[182]

As explained in chapter 2.3 even though a restructuring is covered by the TMD, and the MS according to article 8(6) is allowed to tax the later transfer, this right to tax might be lost due to an emigration by the shareholder post the exchange. Since the purpose of the TMD is not that shareholders should be

[175] Panayi C, (2021), pages 270–271.
[176] C-120/78 Cassis de Dijon, EU:C:1979:42.
[177] Case C-55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, EU:C:1995:411.
[178] Cejie book page 348-349.
[179]Case C-55/94 *Gebhard*, EU:C:1995:411, para 37 and Cejie K, (2010) page 349.
[180] Cejie K (2010), page 350.
[181] Cejie K, (2010), page 429.
[182] Broek H, (2012), page 361.

able to escape taxation certain forms of exit taxes are compatible with the TMD.[183]

Ståhl argues that whilst article 8(1) and 8(6) should be read in conjunction, meaning that taxation should not be allowed until a later transfer of the shares, taxation on the exchanged shares might still be allowed if it doesn't go against the purpose of the directive. *Ståhl* argues that if the taxable event is unrelated to the exchange of shares, taxation should be allowed. Exit taxation could be such an unrelated event if taxation of shares not affected by an exchange of shares agreement also would have been taxed.[184]

Van Thiel has argued that a difference should be made between exit taxation where the taxable moment has already transpired, a collection on exit, and where the taxable moment is the moment of emigration. *Van Thiel,* is of the opinion that the MS upon the exit of the taxpayer be allowed to collect a gain that was previously deferred on a voluntary basis.[185]

Broek also argues that a way around the problem of exit taxation for mergers would be the annual taxation of all latent gains. This would function by a revaluation of assets taking place every year and the unrealised gains would be taxed. This means that the tax burden would be increased in both foreign and domestic situations, but no exit taxation would have to be made when assets crossed the border.[186]

4.2.2 Exit Taxation Case Law from the CJEU

Here follows an accounting of the most relevant case-law from the CJEU concerning exit taxation for individuals. The joined cases *Jacob/Lassus* whilst partly also concerning the same topic will instead be covered in chapter 5, where it will be discussed in more detail.

4.2.2.1 Case C-9/02 Lasteyrie du Saillant

Mr Saillant, a French national and resident, held securities in companies subject to French corporation tax. When he decided to emigrate to Belgium the French tax authorities, in accordance with national law, taxed the unrealised gain stemming from his securities. This taxation was immediate, Mr Saillant could however apply for a suspension of this payment, and if he had yet to sell the securities within five years from the emigration the tax debt would be voided. In order to apply for this suspension a guarantee sufficient to ensure recovery of the tax debt was required. Mr Saillant, deeming that such taxation was contrary to union law, challenged this decision.[187]

[183] Ståhl K (2005), page 365.
[184] Ståhl K, (2005), page 365.
[185] Van Thiel (2002), pages 243 ff.
[186] Broek H, (2012), page 654.
[187] Case C-9/02 Hughes de Lasteyrie du Saillant, EU:C:2004:138, paras 12–18.

The CJEU found that a taxpayer emigrating outside a MS territory, exercising the right of freedom of establishment[188], is disadvantaged in comparison with a resident not exercising the same freedom given the method of taxation in question. Since the gain is unrealised, a resident remaining in France would not have been taxed until such a gain was realised. Such treatment is capable of causing considerable repercussions on the assets transferred abroad, which in turn could discourage the taxpayer from emigrating.[189]

Whilst a deferral was available, this was not automatic and also subject to strict conditions. The taxpayer giving up other assets as a guarantee, as mandated by the conditions for suspension, causes a restrictive effect since it deprive the taxpayer of the enjoyment of the assets. The French system of taxation was therefore liable to hinder the freedom of establishment.[190]

The CJEU found that the French rules in place could not be justified on the grounds of preventing tax avoidance since they were not designed to target only artificial arrangement. Emigration does not imply tax avoidance, rules aimed to target tax avoidance can therefore not apply to all emigrating residents. The purpose behind the French rules being the prevention of French national from temporarily moving and realizing their assets and benefitting from more favourable taxation only to then move back to France, could be achieved via less restrictive methods.[191]

4.2.2.2 Case C-513/03 Van Hilten

This case concerned the Dutch Exit taxation regime in the form of a trailing tax connected to inheritance. According to the Dutch rules if a Dutch citizen died within 10 years of emigrating from the Netherlands they would be considered, for tax purposes, to have been a resident of the Netherlands at the time of death.[192]

The CJEU considered that an inheritance is a capital movement and is therefore protected under what is now article 63 TFEU free movement of capital.[193] This is because the transfer of the estate takes place cross border.[194] The CJEU clarifies that emigration in and of itself does not constitute a capital movement under article 63 TFEU.[195]

The CJEU found that the Dutch legislation did not constitute a restriction on the free movement of capital since it accounted for and deducted the taxes levied on the inheritance in the host state. The taxation was here identical to

[188] Article 49 TFEU.
[189] Case C-9/02 Hughes de Lasteyrie du Saillant, EU:C:2004:138, para 46.
[190] Ibid, paras 47–48.
[191] Ibid, paras 50–58.
[192] Case C-513/03 Van Hilten, EU:C:2006:131. paras 6–7.
[193] Article 63 TFEU.
[194] Case C-513/03 Van Hilten, EU:C:2006:131, paras 41–42.
[195] Ibid, para 49.

if the national would have remained a resident of the Netherlands, also it did not diminish the value of the estate. Also, the rule only targeted Dutch nationals which the court found in line with the allocation of taxing powers between states and the rule was in compliance with the OECD MC.[196] The rule was therefore found to be allowed under EU law.[197]

4.2.2.3 Case C-470/04 N v. Inspecteur

N, an individual resident of the Netherlands, held share in three Dutch companies. In 1997 N emigrated to the U.K, as a result of this emigration N was taxed on unrealised gain of his shareholding. This tax was deferred in accordance with national law by N depositing a guarantee.[198]

The CJEU refers back to its previous case law in *Lasteyrie* and concludes that an individual being subject to taxation of unrealised gains, and therefore income that he is yet to receive, only affects an emigrating taxpayer. The Dutch system was likely to restrict the exercise of the fundamental freedoms.[199] The CJEU confirmed its finding in *Lasteyrie* that a guarantee has an inherent restrictive effect since it deprives the taxpayer of the asset.[200]

In the Dutch exit-tax system the emigrating taxpayer also had to fill out a tax declaration at the time of transfer of residence. The CJEU found that whilst this was a formality likely to hinder the exercise of the taxpayers' fundamental freedoms it was not disproportionate as it regarded the objective of allocation of taxing powers between states and the elimination of double taxation. If no declaration of the taxpayer was made before the departure similar administrative burdens in the form of documentary evidence to prove the value of the shares at the time of emigration would have had to be levied instead.[201]

The Dutch system also did not take account of a decrease in value of the shares after emigration, a resident not exercising his fundamental freedoms would however been able to account for such decreases at the time of later transfer. The CJEU clarified that a decrease in value of the shareholding after the emigration has to be take into account somewhere. If the new host state does not account for it, then the emigrating state must do so in order for the system to be proportionate.[202]

4.2.2.4 Case C-371/10 National Grid Indus

National Grid Indus, henceforth *NGI*, was a Dutch company with its place of effective management in the Netherlands. *NGI* had a claim against a company

[196] Case C-513/03 Van Hilten, EU:C:2006:131, paras 45–48.
[197] Ibid, para 51.
[198] Case C-470/04 N v. Inspecteur, EU:C:2006:525, paras 11-13.
[199] Ibid, paras 33–35.
[200] Ibid, para 36.
[201] Ibid, paras 49–50.
[202] Ibid paras 37 and 54.

established in the U.K, following some currency fluctuations this claim increased in value, creating an unrealised gain. At the same time *NGI* transferred its place of effective management to the U.K. The loss of future taxing rights for the Netherlands resulting from this transfer prompted the taxation of unrealised gains that had been created whilst NGI was still established in the Netherlands.[203] This taxation was immediate, no possibility of deferral, and no subsequent decrease in values was taken into account.[204]

The CJEU referred to both *Lasteryie* and the *N-case* when pointing out that the cash-flow disadvantage due to the immediacy of the taxation only affects companies exercising their fundamental freedoms. This difference in treatment is therefore likely to deter domestic companies from exercising its fundamental freedoms. This difference in treatment could not be explained by an objective difference in situation.[205]

The CJEU explains that the purpose of allocation of taxing rights can justify a restriction on the fundamental freedoms.[206] The Dutch exit tax system aimed to protect the allocation of taxing rights by taxing the gain created on its territory, whilst not taxing the later gain created by *NGI* while established in the U.K. The taxation of unrealised gains is therefore also justifiable.[207]

The CJEU however makes a distinction between the establishment of the amount of tax, tax assessment, and the recovery of tax. It is proportionate for a MS, in order to safeguard its powers of taxation, before its powers of taxation ceases to exit to determine the tax due on unrealised capital gains that have arisen in its territory.[208]

When it came to the question concerning treatment of losses after the emigration AG *Kokott* argued that a more nuanced approached might be needed for the treatment of losses of undertakings as opposed to private persons as in the N-case. If a step-up in value is offered by the host state, the presumption can be made that future losses will be taken into account by the host state. However, the emigration state has no automatic responsibility for the losses if the host state fails to account for them. Accounting of losses is a central issue for the balanced allocation of taxing rights between MS, the MS remain competent to decide on this area in the absence of harmonisation measures. Therefore, a general answer to the question of accounting of losses in emigration situations cannot be given.[209]

[203] Case C-371/10 National Grid Indus, EU:C:2011:785, paras 10–14.
[204] Ibid, para 19.
[205] Ibid, paras 37–38.
[206] Ibid, paras 45–46.
[207] Ibid, paras 47–49.
[208] Ibid, paras 51–52.
[209] AG Kokott in, Case C-371/10 National Grid Indus, EU:C:2011:785, paras 76–78.

The CJEU explains that in contrast to the position in the N-case in the proceedings of the case at hand a failure by the emigration state to take future losses into account is not disproportionate to the objective pursued by the Dutch national legislation. In the case at hand the profits of the emigrating company, after the emigration, are exclusively taxed in the host state. Therefore, the emigration MS due to fiscal territoriality and the symmetry between the right to tax profits and deduction of losses, does not need to take account of losses established after the emigration.[210]

The TFEU does not guarantee that a transfer of effective management to another MS will be neutral as regards taxation. Disparities between the MS tax laws might both be to the detriment or benefit of a taxpayer. Freedom of establishment does not mean that a MS is required to write its tax laws in a way to complement the tax laws of another MS in such a way that no disparities exist.[211]

When dealing with the proportionality of an immediate payment the CJEU explains that the cash-flow disadvantage could be dealt with by extending the tax retrieval until realisation of the assets. This deferral might however bring an administrative burden for the company since it would have to keep track and report its, often in the case of a transfer of establishment, numerous assets back to the tax authorities of the emigration state. The CJEU therefore finds its appropriate if the national legislation grants the company a choice between immediate payment of the tax or a deferral connected with an interest and the provision of a guarantee.[212] The prohibition on immediate taxation on unrealised gains has subsequently also been upheld in several actions brought by the Commission.[213]

The guidelines established in *NGI* was expanded on in *DMC*[214] and *Verder LabTec*[215]. Deferral in the form of yearly payments over 10 years was concluded to be a proportionate measure even if the gain had not been realised.[216] Guarantees, whilst still allowed, given their restrictive effect were now only allowed if an assessment on the risk of non-recovery had been made beforehand, this assessment should take into account the underlying assets of the unrealised gain.[217]*DMC* also clarifies that the exit taxation envisioned by the case law of *NGI* requires that the emigration MS loses its taxing rights over

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[210] Case C-371/10 National Grid Indus, EU:C:2011:785, paras 56–58.
[211] Ibid, para 62.
[212] Ibid, para 68 – 74.
[213] See Cases C-38/10 European Commission v. Portuguese republic, EU:C:2012:521, C-64/11 European Commission v. The Kingdom of Spain, EU:C:2013:264, C-301/11 European Commission v. The Netherlands, EU:C:2013:47, and C-261/11 European Commission v. The Kingdom of Denmark, EU:C:2013:480.
[214] Case C-164/12 *DMC Beteiligungsgesellschaft mbH v Finanzamt Hamburg-Mitte,* EU:C:2014:20.
[215] Case C-657/13 *Verder LabTec GmbH & Co. KG v Finanzamt Hilden,* EU:C:2015:331.
[216] Case C-657/13 Verder LabTec, EU:C:2015:331. para 52.
[217] Case C-164/12 *DMC*, EU:C:2014:20, paras 65–69.

the unrealised gains when the taxpayer emigrates. If this is not the case, exit taxation is not allowed.[218]

4.2.2.5 Commission v. Portugal C-503/14

Portugal had special exit taxation rules in place for private persons that emigrated after benefiting from the exchange of shares mechanism. An emigrating private person would therefore be taxed on the unrealised gain stemming from the exchange of shares. A Portuguese resident would however not be subject to taxation until the later transfer of the shares.[219]

The Commission argued that the applicable case law at hand was *Lasteyrie* and the *N-case* since these cases concerned exit taxation of individuals. *NGI* was according to the Commission not applicable since it only concerned legal persons.[220]

The CJEU point out that the difference in treatment in the Portuguese system results in cash-flow disadvantages, here the court references its judgment in *Lasteriye*.[221] The CJEU however contends that whilst it is true that *NGI* was adopted in the context of the taxation of capital gains on companies, the court later transposed the principles laid down in that judgment to the taxation on capital gains for private persons. Here the CJEU references Commission v. Spain C-269/09,[222] and Commission v. Germany C-591/13[223]. That those cases pertain to the taxation of realised gains as opposed to unrealised gains is, according to the CJEU, not relevant.[224]

The CJEU also argues that it has previously held in *NGI* that a possible omission for the host state to account for future losses, does not impose an obligation of the emigration state to account for the loss.[225] With regards to the discussion on its previous case law the CJEU states that: "*Accordingly, there is no objective reason for distinguishing, for the purposes of the justification deriving from the objective of ensuring a balanced distribution of the power to impose taxes between Member States, between the exit taxation of natural persons and that of legal persons in respect of unrealised capital gains*."[226]

[218] Case C-164/12 DMC, EU:C:2014:20, paras 56–58.
[219] Case C-503/14 European Commission v. Portuguese republic, EU:C:2016:979, paras 21 and 24.
[220] Ibid, para 26.
[221] Ibid, paras 44-45.
[222] Case C-269/09 European Commission v. the Kingdom of Spain, EU:C:2012:439.
[223] Case C-591/13 European Commission v. German Republic, EU:C:2015:230.
[224] Case C-503/14 European Commission v. Portuguese republic, EU:C:2016:979, paras 53-54.
[225] Ibid, para 55.
[226] Ibid, para 56.

For the system at hand in Portugal the CJEU declares that it is disproportionate since it mandates immediate taxation of the unrealised gain and does not offer the taxpayer the option of deferral in line with *NGI*.[227]

4.2.2.6 Doctrine and Further Developments in the case law

The CJEU is in its case law consistent that immediate taxation of unrealised gains is a disproportionate measure since it creates cash-flow disadvantages between different taxpayers in objectively similar situations. Even a realised gain is not allowed to be taxed before a similar realised gain would have been taxed.[228]

Van Hilten offers a different form of exit tax than the others, this form of taxation is referred to by *Cejie* as extended tax liability.[229] Such taxes are also called “trailing taxes” as they “follow” the taxpayer. Some authors however do not consider such trailing taxes to be “real exit taxation” like those established in *NGI* and the subsequent case law.[230]

Cejie proposes that two kinds of trailing taxes exist, trailing taxes on latent, unrealised, gains TL- rules, and trailing taxes on realised gains, TR-rules. [231] TR-rules tax the later transfer even if the gain at the moment of transfer is realised. Such a situation could be where an asset has been traded for another asset, creating a gain that has been deferred for tax purposes. When *Cejie* discussed TR-rules in her doctoral thesis, no such rules had been tested by the CJEU.[232]

When dealing with Exit taxation there is indication that the CJEU only considers a gain to be realised when cash has been received. As seen in C-503/14 the exchange of shares is considered an unrealised gain for exit tax purposes.[233]

Commission v. Portugal C-503/14 was the first case after *NGI* concerning Exit taxation of unrealised gains for private person. Since the Portuguese rules only offered immediate payment the CJEU rehashed its previous case law stating that such an order was disproportionate. The CJEU however also connected its ruling in NGI to the case at hand, as a clarification that the findings in that case also extended to individuals.

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[227] Case C-503/14 European Commission v. Portuguese republic, EU:C:2016:979, paras-59-60.
[228] See Case C-269/09 European Commission v. the Kingdom of Spain, EU:C:2012:439.
[229] Ceije K (2010), page 39.
[230] Hernández González-Barreda, Pablo A, (2019), page 199-200.
[231] Cejie K, (2012), page 383.
[232] Cejie K (2010) pages 53-54 and 505.
[233] European Union - Opinion Statement ECJ-TF 1/2023 on the ECJ Decision of 16 February 2023 in Gallaher Limited (Case C-707/20), on the Taxation of Capital Gains in Intra-Group Transfers, section 4.

Van Thiel however questions that C-503/14 can be interpreted to mean that *NGI* case law applies to all individuals. The case concerned exchanged shares such a holding could be considered an undertaking since its connected to professional activity or a business. *Van Thiel* lays out the argument that the case could be interpreted as meaning that the case law of *NGI* should be applied to undertakings, incorporated or not.[234] Whilst C-503/14 clarifies that the *NGI* is applicable to exchange shares,[235] it remains uncertain if it applies to all individuals.[236]

4.3 Swedish Exit Taxation on Exchanged and Original Shares

The shareholding in scenarios 2 and 3 can be achieved either by the shareholder acquiring the shares in a normal fashion or the shareholder can receive the shareholding due to an exchange of shares as shown by scenarios 1.1 and 1.2. A Swedish shareholder receiving Swedish shares in an exchange is possible due to the fact that internal exchanges of shares is covered by the Swedish implementation.[237]This section examines the exit taxation regime applicable to both exchanged shares and regularly acquired shares.

For exchanged shares taxation is not levied simply because the shareholder emigrates to another EEA State.[238] As stated in chapter 3.2 such an order was not always the case. The rules were changed hastily in order to comply with the fundamental freedoms.[239] The Swedish court dealt with the old Swedish emigration rule and its compatibility with the fundamental freedoms in case RÅ 2008 not 71.[240]

RÅ 2008 not 71 concerned a private person having exchanges share and later wanting to emigrate to another EU MS, the exchange of shares took place in 2001 meaning that the current simplified system for private persons in chapter 48a IL was not yet implemented. The older rules, just like the simplified

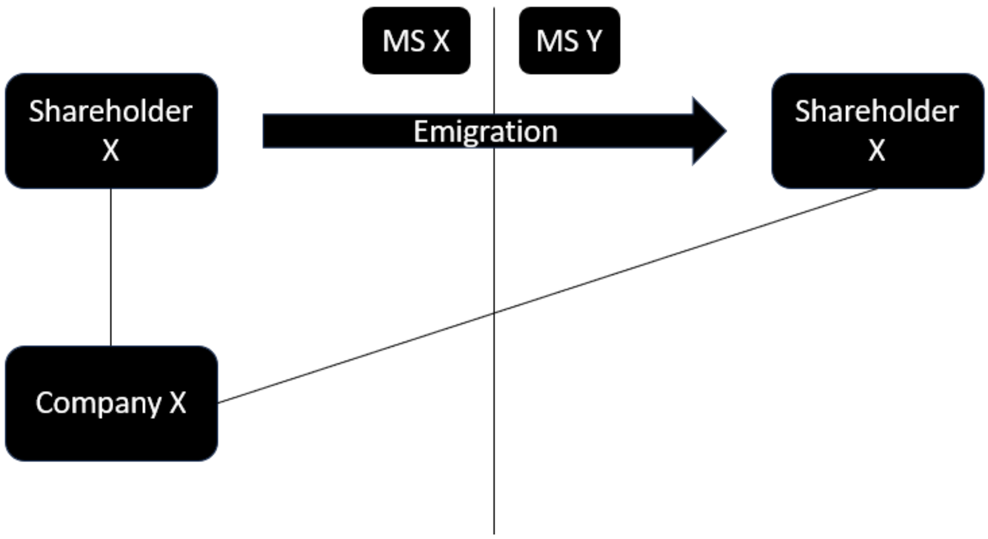
[234] Terra, Wattel (2019), page 848.
[235] Terra, Wattel (2019), page 849.
[236] See here CFE - Opinion Statement ECJ-TF 3/2014 of the CFE on the decision of the European Court of Justice of 23 January 2014 in DMC (Case C-164/12), concerning taxation of unrealized gains upon a reorganization within the European Union. Para 21. See also European Union - Opinion Statement ECJ-TF 1/2023 on the ECJ Decision of 16 February 2023 in Gallaher Limited (Case C-707/20), on the Taxation of Capital Gains in Intra-Group Transfers. Note 82. See Thomas Kollruss. European Union - Why Exit Taxation of Natural Persons Regarding Unrealized Capital Gains in Company Shares is Contrary to EU Tax Law
[237] Ståhl K, (2005), page 376.
[238] Andersson M, Dahlberg M, Tivéus U, (2023-10-04, JUNO), Comment on chapter 48a 5§ Inkomstskattelag (1999:1229).
[239] Prop 2009/10:24, page 11.
[240] RÅ 2008 not 71.

system in chapter 48a IL up until 2010, contained rules for immediate taxation of the unrealised deferred gain if the shareholder emigrated from Sweden.[241]

The Court found that this violated the Fundamental freedoms of free movement of persons and capital, whilst it was possible to justify this infringement it was possible to achieve the same goal via less infringing measures. This conclusion was reached with the guidance of case C-470/04 N.[242]

Therefore, exchanged shares are now taxed according to the same method as regular shares when the shareholder emigrates to another EEA state.[243] This method will now be accounted for by examining Swedish exit taxation in light of scenarios 2 and 3 where Sweden is MS X, and MS Y is any other EU MS.

4.3.1 Swedish implementation of Art. 8 of the TMD in Light of Scenario 2



Swedish taxation is grounded on both the source state principle and the domicile principle. This means that Sweden taxes gains that originate within its territory as well as gains made by individuals' resident within its territory.[244]

Swedish income taxation for private persons is divided into two categories, Unlimited tax-liability and Limited tax-liability.[245] If a private person is determined to have unlimited tax-liability that person is subject to Swedish taxation on all their income, sourced both from Sweden and abroad.[246] One can be determined to have unlimited tax-liability on three grounds, the

[241] RÅ 2008 not 71.
[242] RÅ 2008 not 71.
[243] Prop 2009/10:24, Skatteverkets ställningstagande Dnr:131 86227-14/111, RÅ 2010 not 84 and Lindencrona G (2011) page 381.
[244] Ceije K (2010), page 23.
[245] Chapter 3 1§ Inkomstskattelag (1999:1229).
[246] Chapter 3 8§ Inkomstskattelag (1999:1229).

person is a resident of Sweden, the person has lived in Sweden for a consecutive period of six months or more, and the person has previously been a resident of Sweden and still has substantial connection to Sweden.[247]

In order to prevent sham relocations for tax purposes chapter 3 7§ IL contains a rule that presumes unlimited tax liability for private persons, that either are Swedish citizens or have been Swedish residents for more than 10 years. This presumption states that the private persons, for a period of 5 years after migration, have unlimited tax-liability unless they can prove that they lack a substantial connection to Sweden.[248] For a full list of the factors that determine substantial connection, see chapter 3 7§ IL.

If a private person is deemed to not have unlimited tax-liability, then they by default have limited tax-liability.[249] For these individuals' chapter 3 19§ IL becomes relevant. This provision state that the private persons is liable for Swedish taxation of capital gains on co-ownership if the shareholder during the 10 years preceding the transfer had been a resident of Sweden or lived there for consecutive period of six months or more.[250] This applies to both foreign and domestic shares.[251] For the purpose of this thesis, shares are listed as a form of co-ownership.[252]

If the shareholder retains a substantial connection to Sweden whilst residing abroad then he is considered to have unlimited tax liability for the entire period that this substantial connection is maintained. A substantial connection does not mean that the unlimited liability rules in chapter 3 19§ is pushed forwards. Chapter 3 19§ IL focuses on tax liability 10 years after the shareholder was a resident of or lived in Sweden. Therefore, if a substantial connection is maintained for 10 years after the emigration, when this substantial connection ends and the shareholder disposes of his shares chapter 3 19§ IL is no longer applicable and the later transfer will not be taxed.[253]

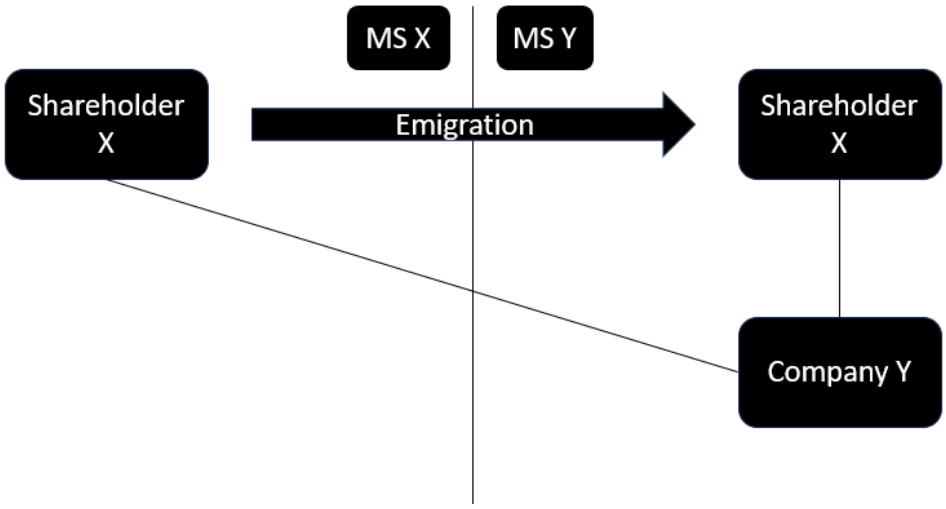
For exchanges taken place before the implementation of chapter 48a IL, the case HFD 2021 ref. 15 is of interest. This case concerned a private person having entered into an exchange of shares agreement before the implementation of chapter 48a IL.[254] The Swedish court found that the exchange was the

[247] Chapter 3 3§ Inkomstskattelag (1999:1229), and Carneborn C, Inkomstskattelag (1999:1229),chapter 3 3§, Karnov, (JUNO), (Visited 2023-12-29).
[248] Chapter 3 7§ paragraph 2 Inkomstskattelag (1999:1229) and. Carneborn C, Inkomstskattelag (1999:1229), chapter 3 7§, Karnov, (JUNO), (Visited 2023-12-29).
[249] Chapter 3 17§ Point 1, Inkomstskattelag (1999:1229).
[250] Chapter 3 19§, Inkomstskattelag (1999:1229).
[251] Andersson M, Dahlberg M, Tivéus U, (2023-10-04, JUNO), Comment on chapter 3 19§ Inkomstskattelag (1999:1229).
[252] Chapter 48 2§, Inkomstskattelag (1999:1229).
[253] Andersson M, Dahlberg M, Tivéus U, (2023-10-04, JUNO), Comment on chapter 3 19§ Inkomstskattelag (1999:1229).
[254] HFD 2021 ref. 15, paras 4 and 10.

chargeable event,[255] and that under the old exchange of shares rules that the shareholder could be taxed even if the transaction took place after the 10 years stated by chapter 3 19§ IL.[256] Sweden's right to tax the unrealised gain created under the old exchange of share rule is therefore unlimited in time. The change made to chapter 48a 11§ in 2009 now limits the temporal aspect of Swedish taxation to the 10 years prescribed in chapter 3 19§ IL.[257]

As covered before both exchanged shares and regular shares can be held on ISK-accounts. Shares held on an ISK-account are however not subject to the trailing tax in chapter 3 19§ IL.[258] When a taxpayer no longer has unlimited tax liability no more taxation is performed on the ISK-account, realised capital gains on shares stored on the account are also exempt from Swedish taxation. The continues taxation of the unrealised gain is done instead of regular capital gains taxation. Due to this there is not considered to be an unrealised capital gain left for Sweden to tax when the taxpayer loses unlimited tax liability.[259]

4.3.2 Swedish implementation of Art. 8 of the TMD in Light of Scenario 3



There are some exceptions made for taxation of foreign shares. Shares in foreign companies will only be taxed in accordance with chapter 3 19§ IL if they were acquired whilst the private person had unlimited tax-liability in Sweden. This rule is connected to an exception that states that the shares

[255] Nilsson P, (2022) page 241.
[256] HFD 2021 ref 15, para 17.
[257] Nilsson P, (2022) page 241. Note also that the Joined case *AQ/DN* is not mentioned either by the Swedish court or Skatterättsnämned, see HFD 2021 ref.15.
[258] Chapter 3 19§ section 2 Point 2, Inkomstskattelag (1999:1229).
[259] Andersson M, Dahlberg M, Tivéus U, (2023-10-04, JUNO), Comment on chapter 3 19§ Inkomstskattelag (1999:1229).

that have been acquired from an exchange of shares agreement are considered to have the same date of acquisition as the original shares.[260]

In recent years these exceptions have been clarified. The case HFD 2015 ref. 66 concerned a Danish citizen, B.J, resident in Sweden. B.J acquired shares in a company before moving to Sweden, whilst being a resident in Sweden he wanted to enter into an exchange of shares agreement in order to restructure his companies. The question for the Swedish court was if B.J would be liable to Swedish tax on the new shares, or if he would be covered by the exception.[261]

The Court points out that the preparatory works behind the exception take aim to counter the situation where foreign shares, that have been acquired whilst the private person was subject to unlimited tax liability, are exchange for other foreign share whilst the private persons is subject to limited tax liability. Section four of chapter 3 19§ IL is therefore designed to retain Swedish Tax competence for such transaction.[262]

The case at hand did not concern such a transaction, instead the transaction B.J intended would take place whilst he was subject to unlimited tax-liability. The court explained that the exception in chapter 3 19§ section 4 only applies if the foreign shares were acquired when the taxpayer was subject to unlimited tax liability during the original acquisition. B.J who was not subject to unlimited tax-liability during his original acquisition would therefore not be covered by the exception and would be liable to taxation on the exchanged shares in line with chapter 3 19§ IL.[263]

To summarise, this decision meant that the shares received in an exchange of shares agreement will be subject to Swedish taxation in line with chapter 3 19§ IL, even if the original shares were acquired when the taxpayer, was not subject to unlimited tax-liability.[264]

Taxation of foreign shares are therefore the same as taxation of domestic shares as long as the shareholder did not acquire the foreign shares when he was subject to unlimited tax liability. If the shareholder acquires foreign shares via an exchange of shares agreement whilst being subject to unlimited tax liability those shares will be taxed according to chapter 3 19§ IL.

4.4 Conclusions

[260] Chapter 3 19§ section 4, Inkomstskattelag (1999:1229).
[261] HFD 2015 ref 66.
[262] Prop 2007/08:12, pages 19 and 28 f.
[263] HFD 2015 ref 66.
[264] Carneborn C, Inkomstskattelag (1999:1229), chapter 3 19§, Karnov, (JUNO), (Visited 2023-12-29).

The CJEU have dealt with a number of exit taxation cases and seemed to first create two alternative regimes, one for individuals, with more beneficial rules for the shareholder, and one for companies, more beneficial for MS.

Whilst case C-503/14 Commission v Portugal have clarified that exchange shares are allowed the same exit tax treatment as companies; it is still unclear if *NGI* and its subsequent case-law is applicable to all individuals. Sweden has however elected a different order entirely by choosing to implement a trailing tax, similar to that found in the *Van Hilten* case. This trailing tax covers both regular as well as exchanged shares. For exchanges made before the amendment Sweden maintains indefinite axing right, and not the 10 years that are in effect today.

For exit taxation purposes foreign and domestic shares are treated the same, unless the foreign shares were bought before the shareholder held unlimited tax liability. Taxation is however dependent on the shareholder having unlimited tax liability or having resided in Sweden. Sweden also maintains its right to tax an unrealised gain if the exchange of shares takes place whilst the shareholder has unlimited tax liability.

5 The Swedish Implementation Post *Jacob/Lassus* and *AQ/DN*

5.1 Introduction

In chapter 3 the Swedish implementation of article 8 was accounted for in regard to the more "Textbook"[265] examples of an exchange of shares situation and in chapter 4 it was examined how Sweden maintains its taxing rights both over exchanged and regular shares when the shareholder emigrates. Two more recent cases from the CJEU have clarified how article 8 is to function in regard to both the "textbook" example but also for scenario 4. One of the cases also clarify the ability for the MS to retain its tax rights over the unrealised gain via article 8(6) of the TMD.

This chapter will therefore account for the contents and findings in these two joined cases. How Sweden maintains its right to tax the unrealised gain in scenario 4 will be accounted for as well.

5.2 Applicable rules for taxation – *Jacob* and *AQ/DN*

The joined cases *Jacob/Lassus* and *AQ/DN* have as mentioned before clarified aspects of the exchange of shares mechanism. In this section the first question from the *Jacob* case and the entirety of the *AQ/DN* case is examined on how they relate to the tax rules for the unrealised gain created by exchange of shares Scenario 1.1 and 1.2. The two remaining questions from the *Jacob/Lassus* case is examined in chapter 5.3. This order is chosen to highlight the implication of *Jacob/Lassus* to both the structure of the exchange of share mechanism and the safeguarding of MS taxing rights. This is simply an editorial choice, and the full context of the case is presented in the end.

5.2.1 Case C-327/16 Jacob

This case concerns Jacob a French resident that exchanged shares he owned in one French company in exchange for shares in another French company. The unrealised gain resulting from this was deferred according to French law. Jacob later moved his residence for tax purposes to Belgium, while in Belgium he later transferred his shares and was taxed in France on the deferred amount.[266]

According to French law the tax was assessed at the time of restructuring but collected at the later transfer. Jacob considered, in line with *Broeks* view of "roll over relief", that this was an infringement of article 8(1). Jacob instead

[265] See scenario 1.1 and 1.2.

[266] Joined cases C-327/16 Marc Jacob and C-421/16 Marc Lassus, EU:C: 2018:210, paras 14-16.

argued that the tax assessment and collection should take place when the gain had been realised, I.E on the later transfer of the securities. This view would entail that France did not have taxing jurisdiction during the chargeable event, since at that time Jacob would be a resident of Belgium.[267]

Whilst the TMD only applies to cross border situations this case concerned a wholly domestic situation, at least when it came to the exchange of shares. The CJEU however found the case admissible due to its previous case law where it had been decided that preliminary rulings could be admissible even if the fact in the proceeding were outside the direct scope of EU law. For this to be the case the MS in its national legislation must have chosen to treat a wholly domestic situation in the same manner and approach as provided by EU law. In this case France had chosen to treat domestic situations in same manners as cross border situations governed by the Tax Merger Directive. The criteria for admissibility were therefore in this case reached.[268]

The first question concerned whether article 8 allowed for the assessment of the unrealised gain at the moment of restructuring as long as the unrealised gain was deferred?[269] The Court points out that its clear from the preamble that the directive aims to protect the financial interest of the state of the acquired company, this includes the power to tax the capital gain from securities existing before the exchange. Article 8(2), now 8(6), is the safeguarding article for MS taxing rights in this regard.[270]

The court goes on to explain that the purpose of fiscal neutrality is not to avoid a capital gain from being taxed by the member state with fiscal competence, it only prohibits them from viewing the exchange as the chargeable event. Article 8, or the TMD at large, does not provide what the appropriate fiscal measure is for its implementation. States therefore have a certain degree of latitude, within the confines of EU law, when implementing article 8.[271]

In the present case the chargeable event is the later transfer of securities, this ensures that the exchange of shares in itself does not give rise to any taxation of the unrealised capital gain. In the courts view this satisfies the principle of fiscal neutrality as set out by article 8(1). This is not affected by the fact that the gain is established at the moment of exchange, since this is simply a technique intended to safeguard the taxing rights for the MS which had fiscal competence in respect of the securities existing before the exchange. Such a measure is in accordance with article 8(2), now 8(6).[272]

[267] Joined cases C-327/16 Marc Jacob and C-421/16 Marc Lassus, EU:C: 2018:210, para 18.
[268] Ibid, paras 32–37.
[269] Ibid, para 44.
[270] Ibid, paras 48–49.
[271] Ibid, para 50–52.
[272] Ibid, para 53–56.

To summarise, assessing the unrealised gain at the moment of restructuring and collecting the tax at the later moment of transfer is a technique compliant with article 8.[273]

5.2.2 Case C-662/18 AQ and Case C- 672/18 DN.

These joint cases concern transaction taking place during both the current Tax Merger Directive 2009/133 and the earlier Directive 90/434. The court non the less joined the cases and answered the questions together. The court does this since the two directives have the same objective and the relevant provisions of the directives correspond with each other. The case law relating to one of those two Directives also applies to the other.[274]

It is therefore for the subject of this thesis possible to draw conclusions on the inner workings of the TMD based on case law from its different iterations.

The cases once again concern the French implementation of the TMD. The situation concerned a wholly domestic situation where AQ exchange shares in one French company for share in another French company, no majority voting rights were however achieved from this transaction. In accordance with French national law the unrealised gain resulting from the restructuring was deferred until AQ later transferred the securities. The French rules however had held the taxation of the deferred amount and the later realised amount to different standards.

The deferred taxation was taxed with the rate applicable at the time of the exchange, whilst the later gain was taxed with the rate applicable for the later transfer of securities. The French rules also included an allowance, which was introduced after the exchange of shares that took place in this case, based on the length of time the shareholder had held the securities, here the rules dictated that the date of exchange and not original acquisition was the relevant time to start counting.[275]

The Questions for the court in this case was in essence:

Should articles 8(1) and 8(2) of the Tax Merger Directive be interpreted as meaning that the same tax treatment, in an exchange of shares scenario, must be applied to the deferred capital gain, from the exchange, and the realised capital gain resulting from the later transfer of shares?[276]

[273] This has been described by Terra and Wattel as a departure from the “roll over relief” envisioned by the TMD, see Terra/Wattel (2019) page 295.
[274] Joined Cases C-662/18, C-672/18 AQ and DN, EU:C:2019:750, paras 33-34.
[275] Ibid, paras 18–19.
[276] Ibid, para 36.

The CJEU starts off with confirming its previous conclusion in *Jacob/Lassus* that the assessment of the deferred gain is allowed.[277] The CJEU then explained that deferral of the chargeable event, necessarily imply that the chargeable event becomes subject to the tax rule in force on the date that the chargeable event occurs. Any other order could lead to disadvantageous tax consequences which would be contrary to the fiscal neutrality referred to in article 8 (1).[278]

For the capital gain relating to the securities received in exchange, article 8(6) is clear in its wording that those shares are simply substituted for the shares existing before the exchange. Therefore, it is appropriate to apply the same tax treatment to both the unrealised gain and the later realised gain. The safeguarding of financial interest for the MS is restricted to levying a tax that equal to that to which they would have been entitle if the exchange of securities had not taken place.[279]

For an exchange of shares situation, the deferred capital gain and the later realised gain must be subject to the same tax treatment, both concerning rate and in this case tax allowance. The tax treatment is decided given the tax rules in force at the time of the chargeable event.[280]

5.3 Triangular exchange of shares and the allocation of taxing rights – Case C-421/16 Lassus

Lassus, a UK resident, held securities in a French company, he later exchanges his share in the French company for securities in a company situated in Luxembourg. The unrealised gain resulting from this exchange was deferred in accordance with the French law. Lassus later transferred 45% of his holding in the Luxembourg company, as a result the French tax authorities decided to tax a corresponding amount of his deferred gain.[281]

Lassus questioned the legitimacy of such a decision by the French tax authorities. Lassus, just like Jacob, did not consider the French law to be compliant with article 8 of the Tax Merger directive. In his mind the taxable event took place at the moment of the later transfer, at this time he was a resident of the UK, France would therefore have no fiscal competence over the gain. Lassus also criticised France for not letting him deduct the losses resulting from his later transfer of securities. Since French national legislation allowed such

[277] Joined Cases C-662/18, C-672/18 AQ and DN, EU:C:2019:750, para 42. So, whilst the decision in Jacob/Lassus is not uncontroversial, see Kondej M, Wicher M (2023), page 8, it has now been further cemented.
[278] Joined Cases C-662/18, C-672/18 AQ and DN, EU:C:2019:750, paras 43-44.
[279] Ibid, paras 45–46.
[280] Ibid, para 47.
[281] Joined cases C-327/16 Marc Jacob and C-421/16 Marc Lassus, EU:C: 2018:210, paras 21-23.

deductions for resident taxpayer, but denied him such relief, Lassus argued that this constituted an obstacle to the freedom of establishment.[282]

The Austrian Government argued that the TMD didn't apply to the situation of Lassus since he was not a resident of neither the MS of the acquiring company nor the MS of the acquired company. The CJEU clarified that the Tax Merger directive contains no such limitation to its applicability. As long as the exchange of shares is made between two or more companies from different MS, and the formal conditions as set out by article 3[283] are fulfilled, the Tax Merger Directive is applicable. As this was the case in this situation, the case was admissible for preliminary ruling.[284]

The second question, which was relevant for both *Jacob* and *Lassus,* in essence relates to if it is allowed for a MS to tax the deferred unrealised gain when the later transfer of the securities don't fall within the fiscal competence of the MS.[285] The courts states, in accordance with the AG, that the TMD does not harmonise the criteria for allocating fiscal competence between MS, it therefore does not regulate the allocation of power of taxation. MS because of this retain the power to define, by treaty or unilaterally, the allocation of their power of taxation.[286]

The fact that later transfer of securities falls within the fiscal competence of another MS than the MS that had fiscal competence over the exchange of shares does not mean that latter MS have to forsake its taxing rights over the gain. This is in line with the principle of fiscal territoriality linked to a temporal component recognised by the court in *NGI* which seeks to allocate power of taxation between member states. The MS with fiscal competence over the exchange of shares therefore retains its taxing rights in a later transfer of securities.[287]

The last questions for the CJEU pertain to the offsetting of losses derived from the later transfer of securities. Does the MS with fiscal competence over the exchange of shares have to take account of said losses?[288]

The Court begins by explaining how the Tax Merger Directive does not govern the offset of losses nor how they are to be calculated, therefore these questions must be examined in the light of freedom of establishment[289]. Measures

[282] Ibid, paras 28-29.
[283] Council Directive 2009/133/EC article 3.
[284] Joined cases C-327/16 Marc Jacob and C-421/16 Marc Lassus, EU:C: 2018:210, paras 38-43.
[285] Ibid, para 57.
[286] Ibid, paras 60–61.
[287] Ibid, para 64–66.
[288] Ibid, pars para 30 (3)-(5).
[289] Article 49 TFEU.

that prohibit, impede or render this freedom less attractive are to be considered as restrictions of the freedom of establishment.[290]

In this case not being able to deduct losses that a resident would have been able to deduct is likely to impede restructurings covered by the Tax Merger Directive and make these less to non-resident shareholder. This is only allowed if the situations are not objectively comparable, or if it can be justified by the overriding reasons in the public interest recognised by EU law, whilst obeying the principle of proportionality.[291]

The court concluded that a resident and non-resident shareholder is objectively comparable. Furthermore, whilst preserving the allocation of fiscal competence is a justification recognised by the CJEU, this cannot be argued when it is only the fiscal competence of one MS is at risk.[292]

The CJEU here takes the AGs reasoning to heart. The French government refers to NGI and the Courts decision that the MS of Origin did not have to take losses realised in the new host MS into account.[293] The AG considers the situation posed in NGI to be different from the situation in Lassus. In NGI the MS or origin had fully exercised its right to tax the unrealised income and given the taxpayer a right to defer the tax burden. However, in Lassus the MS, France, had no entitlement to tax the unrealised gain from the exchange of shares. This is clearly stated in article 8(1), the point of full exercise of Frances taxing right do not occur until the later transfer of securities.[294]

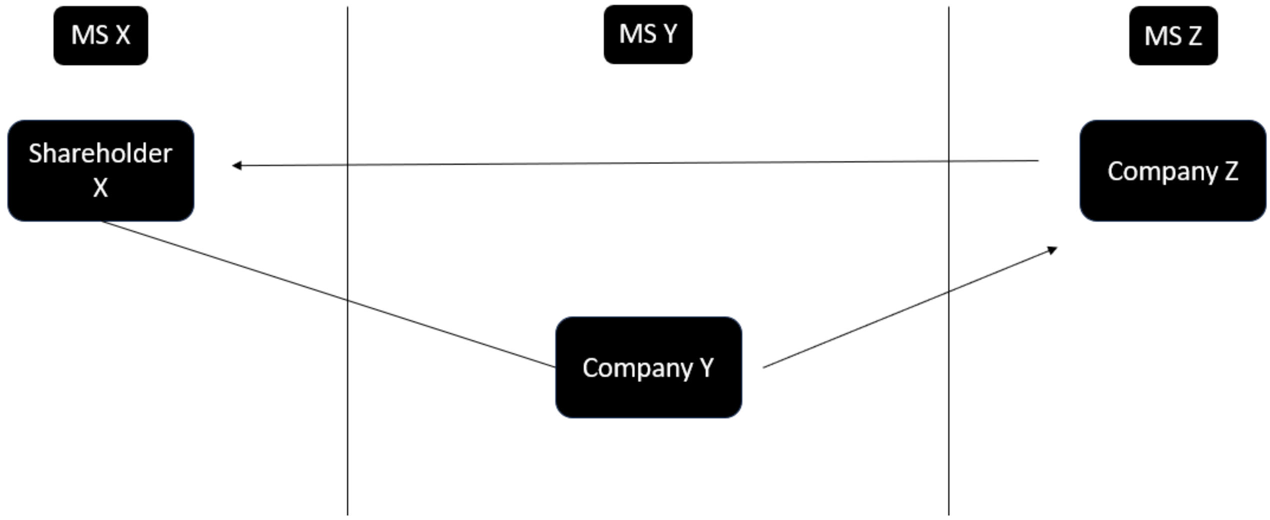
This means that when the loss arose, France still had fiscal competence. Taking account of the loss forms part of the obligation of the MS seeking to exercise its fiscal competence. It is therefore a violation of article 49 TFEU, freedom of establishment, for France to not take the loss incurred by Lassus into account.[295]

5.4 The Swedish implementation of article 8 of the TMD in Light of Scenario 4

The *Lassus* case has clarified that the exchange of shares mechanism in the TMD is applicable to triangular exchange, i.e. when all three parties are located in different EU-states. As covered in chapter 3.3 for the Swedish

[290]Joined cases C-327/16 Marc Jacob and C-421/16 Marc Lassus, EU:C: 2018:210, paras 72-74.
[291] Joined cases C-327/16 Marc Jacob and C-421/16 Marc Lassus, EU:C: 2018:210, paras 75-76.
[292] Ibid, paras 78–81.
[293] AG Wathelet in, Joined cases C-327/16 Marc Jacob and C-421/16 Marc Lassus, EU:C: 2018:210, para 77.
[294] Ibid, para 90.
[295] Joined cases C-327/16 Marc Jacob and C-421/16 Marc Lassus, EU:C: 2018:210, para 77. paras 83-86.

exchange of shares mechanism the shareholder must be resident in an EEA State whilst the companies involved must be residents of EU-state.[296] A situation such as in *Lassus* would therefore be allowed. An examination will now be made of how Sweden protects it taxing right under Scenario 4.[297]



5.4.1 Sweden as MS X

In a situation where Sweden is MS X the taxation will be the same as described in scenarios 1.2 and 3 in chapters 3.3 and 4.3.2. A Swedish resident will here be holding foreign shares both before and after the exchange of shares. The taxing rights over the unrealised gain is maintained either until a later transfer or by the rules in chapter 3 19§ IL if the shareholder emigrates.

5.4.2 Sweden as MS Y

The situation where Sweden is MS Y is not included in any of the other scenarios seeing as neither the taxable person nor the taxable asset is within its borders. The previous behaviour and status of the shareholder is therefore of importance. Sweden is allowed to tax the later gain if the shareholder has unlimited tax liability as covered in chapter 4.3.1.

Also, if shareholder X had unlimited tax liability when first acquiring shares in the Swedish company and exchanged them for foreign shares when he was subject to limited tax liability the 10-year rule in chapter 3 19§ applies.[298]

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[296] See chapter 48a 3§ +5-7§§ Inkomstskattelag (1999:1229).

[297] Sweden as MS Z is here not examined since Sweden in that case would not have any relation to the shareholder before the exchange took place. For Sweden there would therefore not be any unrealised gain to protect taxing rights for.

[298] See chapter 3 19§ paragraph 5, Inkomstskattelag (1999:1229) and Andersson M, Dahlberg M, Tivéus U, (2023-10-04, JUNO), Comment on chapter 3 19§ Inkomstskattelag (1999:1229).

Shareholder X is therefore liable to tax the later transfer if this takes place within 10 years from his emigration from Sweden.

5.5 Conclusions and findings from the case-law

The CJEU in *Jacob/Lassus* have, contrary to the opinion previously held by prominent scholars, confirmed that MS have a lot more leeway than previously envisioned when implementing the TMD. Assessing the unrealised gain created by the exchange is therefore allowed, as long as taxation does not take place until the moment of later transfer, meaning that the moment of exchange cannot be the chargeable event.

This leeway for the MS is however somewhat restricted by the *AQ/DN* case. Here the CJEU clarify that the unrealised gain stemming from the exchange is not allowed to be treated by different tax rules than the later realised gain. The shares received in exchange shall according to the CJEU be seen simply as a substitution of the old shares. It is therefore appropriate to treat the unrealised gain and the later realised gain in the same way. Tax neutrality as ordered by article 8 requires therefore more than a deferral of taxation.

Sweden's implementation of article 8 encompasses scenario 4, the situation in Lassus. When Sweden takes the place of MS Y taxation of the unrealised gain created from the transaction is however limited to the behaviour of the shareholder prior to the exchange, concerning if and when the shareholder held unlimited tax liability in Sweden.

6 Final Conclusions

6.1 Introduction

In this chapter the research questions accounted for in chapter 1.2 will be answered. These questions were:

Given the case-law of *Jacob/Lassus* and *AQ/DN*

- Is the Swedish implementation of article 8 of the TMD, for exchange of shares, compliant with the TMD?

- How does Sweden protect its powers of taxation over the unrealised gain created by article 8 of the TMD when the shareholder emigrates to another EU MS, and is this form of exit taxation on exchanged shares compliant with the TMD?

6.2 Is the Swedish Implementation of Art. 8 of the TMD Compliant with EU Law?

6.2.1 Discussion and analysis – implementation of article 8

Sweden applies a form of deferral in line with the "roll over relief" that *Broek* and others like *Terra/Wattel* argue is the envisioned mechanism for deferral according to the TMD. So, whilst *Jacob/Lassus* clarified that other mechanism for deferral are possible it has not made the mechanism that is used by Sweden unallowed. The Swedish "roll over relief" remains compliant, there is however now a possibility for the Swedish government to change its deferral mechanism and still be compliant with the TMD.

The *Jacob/Lassus* case also clarified that the TMD applies even if the shareholder is a resident of a different MS than that of the acquired or acquiring company. The Swedish rules also allow this, as long as the shareholder, acquired company and acquiring company are all residents within the EEA, deferral is granted.

A big deviation from the order prescribed in the TMD is that Sweden removed the limit on cash payments. This change ensures a greater deal of flexibility for restructurings. As the TMD aims for a minimum degree of harmonization, provisions more beneficial for the taxpayer is therefore allowed. There is therefore no problem in principle with this change.

What is more interesting however is how the Swedish system has chosen to tax the cash payments. The TMD does not clarify how cash payments are supposed to taxed, as shown in chapter 2.3 some different ideas exist in doctrine. Sweden has chosen a different approach by giving the taxpayer two choices.

If the cash payment is included in the exchange of shares transaction, the entire cash payment is taxed with no deduction for the original cost of acquisition. That cost instead transfers over to the shares and can be accounted for at the moment of later transfer. If the cash payment is separate from the exchange of shares the cash payment is taxed in its entirety and the original cost of acquisition can be deducted.

The taxation of the cash payment without deduction of original cost of acquisition could be to the detriment of the shareholder. It is however perfectly possible for the taxpayer to plan around this by writing two different agreements if this is more beneficial for the taxpayer.

Also given how under the Swedish system deferral automatically applies this system of taxation gives the taxpayer the possibility of choosing to pay a part of the unrealised capital gain at the moment of restructuring and pay less at the moment of later transfer. This is closely related to what is offered under article 8 (8) TMD.

The Swedish valuation rules line up with those provided for in article 8(4) of the TMD. However, the Swedish ISK-regime becomes quite interesting from the perspective of the TMD. The TMD imagine an exchange of shares in the following: A has shares that he purchased for 50. B, a company, want to acquire these shares and offers A shares at the value of 150, B offers 150 since that is what it considers to be the market value of A´s shares. When A received the new shares, he will have made a gain of 100. This is however an unrealised gain since no share has been sold. Article 8(1) of the TMD wants this unrealised gain to be deferred to not hinder restructurings.

The ISK never actually offer a deferral of taxation since the exchanged shares will be taxed continuously based on their market value. The gain is still technically unrealised but will still be taxed. However, one of the selling points with the ISK-regime is that when A sells his shares in B and takes the money out the ISK-account, the now realised gain is not taxed. Taxation has instead taken place during the entire time A held the shares.

However, as stated in article 8(8) and 8(4) of the TMD, if the shareholder attributes another value than the original value to the shares received no deferral is required. This is essentially what takes place when the shareholder places the received shares in an ISK-account. The ISK-regime is also optional, and it is intended to benefit the taxpayer in certain situations. The taxpayer is free to choose conventional taxation, which as stated above is in line with the article 8 of the TMD, if this would benefit them more.

Multiple simultaneous transaction where shares in companies owned by the same person is exchange for share in one other company is not covered under the Swedish deferral rules. As pointed out by Skatterättsnämnden in HFD 2018 ref 62 there are some reasons for why this interpretation can be criticised.

Given the case law cited by Skatterättsnämnden, as well as the overall purpose of the TMD it seems counterintuitive to not allow transactions of this kind to be part of the same transaction as long as each individual transaction fulfilled the requirements of deferral. However, it does seem that due to the Swedish implementation of automatic deferral that the shareholder would not be punished tax-wise or be subject to more administrative work towards the tax authority by having to separate the transactions. So, whilst the decision can be criticised on a theoretical level, the purpose of the TMD is still achieved.

However, that case concerned qualified share*s*, such shares are subject to its own valuation rules and are the result of the Swedish system surrounding small businesses, it is therefore unclear if HFD 2018 ref 62 extend to non-qualified shares as well. If the courts would refuse a bundling of non-qualified shares as well it should be remembered that, by splitting the transactions the purpose of TMD could still be achieved. As has been further clarified by the CJEU in *Jacob/Lassus* the MS has a great deal of leeway in designing its exchange of shares mechanisms, as long as the restructuring is subject to deferral of taxation. Therefore, if it is allowed to burden the shareholder with the administrative work of assessing the gain at the moment of exchange it does not seem too farfetched to force the shareholder to have separate contracts for separate transactions.

The *AQ/DN* case clarified that the applicable tax rules for the deferral and the later gain had to be the same, and that the taxable moment, the moment of later transfer would be the deciding factor for what rules should apply. The conclusions made in the *AQ/DN* case was reached with a prior assessment of the unrealised gain in mind. Sweden however does not assess the unrealised gain at the moment of exchange. It is therefore uncertain just how much guidance the *AQ/DN* gives a deferral technique such as Sweden.

However, the CJEU explain that the shares received in exchange simply substitute the original shares and that it is therefore appropriate to treat the taxation of the received shares in the same way as the original shares would have been taxed if no exchange had taken place. The tax treatment could here be symbolised as an unbroken chain. The exchange of shares does not break the chain, since the new shares simply substitute the old once. Such an argumentation would apply both to a situation where the unrealised gain is assessed, like France, and where it is not, like Sweden. The rules in force during the chargeable event should therefore be the applicable rules for the entire unrealised gain.

On this ground the Swedish implementation seems to be in conflict with the *AQ/DN* case, as stated in chapter 3.3.7 the preparatory works for the Swedish exchange of shares mechanism determine that the applicable rules are the ones that were applicable at the moment of exchange.

There is also therefore reason to criticise the Swedish court's decision in HFD 2021 ref. 15. In this case, an exchange of shares having taken place during the older implementation of the Swedish exchange of shares mechanism was considered to be taxable indefinitely even though the Swedish mechanism in force at the time of the later transfer had a time limit for taxation if the shareholder held limited tax liability. As clarified in *AQ/DN*, article 8(6) only safeguards taxation equal to that to which they would have been entitled if the exchange of securities had not taken place. If no exchange had taken place in that case chapter 3 19§ IL rules would have applied for the shares and the shareholder would not have been taxed, as she had been residing abroad for more than 10 years at the moment of later transfer.

The changing rules in the *AQ/DN* case related to general rules applicable to shares such as rate and an allowance, in the Swedish case the changed rules related specifically to exchanged shares. Despite this the CJEU in that case was clear that the received shares are a substitution for the exchanged ones and that the rules applicable at the chargeable moment dictate taxation rules. In HFD 2021 ref 15 the Swedish court recognised the exchange as the chargeable event, such an interpretation is according to the CJEUs findings in *Jacob/Lassus* not allowed.

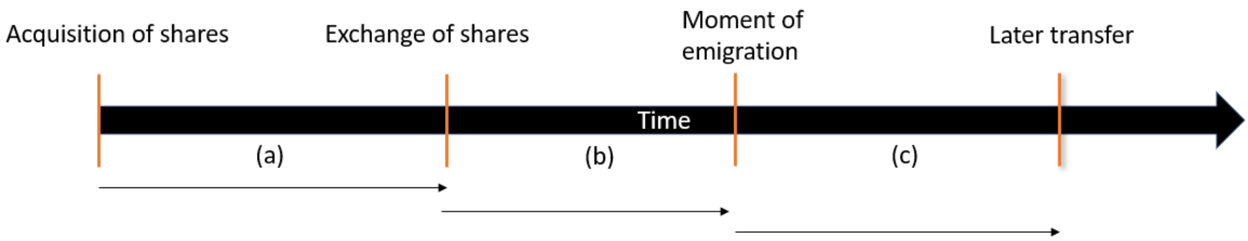
To employ the older rules for tax liability in HFD 2021 ref. 15 therefore seem to be in conflict with the *AQ/DN* case seeing as it burdens the shareholder. Given the finding in the *AQ/DN* case that different iterations of the TMD could be joined, the finding above should still stand even if the exchange in question took place during an older version of the TMD. Unfortunately, neither Skatterättsnämnden nor the Swedish court, although it was available, mentioned the *AQ/DN* case in HFD 2021 ref. 15.

6.2.2 Discussion and analysis – exit taxation

The unrealised gain dealt with in article 8 of the TMD is the unrealised gain created by the exchange of shares. However, the unrealised gain dealt with in the exit taxation case law, except for in *Van Hilten*, is any unrealised gain at the moment of emigration. When a private person emigrates holding exchanged shares there therefore exists two unrealised gains.

The first unrealised gain (a) is the unrealised gain at the moment of exchange. The second unrealised gain (b) is the unrealised gain of the shareholder created in the time between the acquisition of the shares, exchanged or otherwise, and the emigration. In theory this means that emigration whilst holding exchanged shares contain, one part "realised" gains which is (a) and one-part unrealised gains (b).

When the shareholder disposes of the shares received in return, that realised gain is a combination of 3 different unrealised gains. The later transfer contains the unrealised gain created from the exchange, (a), the unrealised gain created between the acquisition and emigration, (b) and the unrealised gain between the moment of emigration and the later transfer, (c).[299]



Case C-503/14 *Commission v. Portugal,*[300] as well as *Jacob/Lassus* only dealt with the unrealised gain described in (a). Portugal, wanted to claw back the deferral given on the unrealised gain created by the exchange of shares. France, instead, held on to the unrealised deferred gain via a trailing tax.

The CJEU found in C-503/14 *Commission v. Portugal* that the case law of *NGI* could be applied to unrealised gain (a). In *Jacob/Lassus* the CJEU explains that since France still held taxing rights over unrealised gain (a), the situation was therefore different than that in *NGI*, and that France had to account for losses.

It is not expressly stated by the court, since it was not one of the questions asked, if the maintaining of taxing right would affect any other aspect of *NGI* and its subsequent case-law. However, given the clarification in *DMC*, that exit taxation in the form of the exit tax case law is only allowed when the MS loses its taxing rights, it seems clear that in *Jacob/Lassus* the *NGI* case law could not be applied at all, at least not on unrealised gain (a).

Whilst C-503/14 does not mention article 8(6), *Jacob/Lassus*, clarifies article 8(6) is allowed to work as a trailing tax, clarifying that TR-rules are permitted.

[299] In an emigration of a shareholder holding only regular shares (b) would stretch from acquisition to emigration. In a wholly domestic scenario with no emigration (c) would stretch from the moment of exchange to the later transfer.
[300] C-503/14 para 42.

Here it was applied to a gain that was assessed beforehand. However, given the arguments by the CJEU earlier in that same case of how much leeway the MS has when implementing the TMD it seems in line with both the purpose of the TMD and the literal interpretation of article 8(6) to tax the gain that took place due to the exchange even if no assessment was made at that time.

The MS is not required to lose taxation rights as a part of it fulfilling its requirements of deferral according to the TMD. Given this and a literal interpretation of article 8(6) it seems reasonable that the MS should retain its right to tax scenario (b) as well.

Given C-503/14 *Commission v. Portugal* it seems clear that unrealised gain (a) is allowed to be treated, for exit tax purposes, in the same way as unrealised gain (b) when no exchange has been made. Due to this the entire unrealised gain (b) when an exchange had been made would be allowed to be subject to the exit tax regime in *NGI.* Exchanged shares are here treated as any other asset.

What these two cases from the CJEU seem to imply is that the allowed exit taxation regime becomes dependent on the how the MS has chosen to implement the TMD, or more precisely how the MS has chosen to implement article 8(6). If a MS chooses not to extend its taxation power with article 8(6) the exit tax case law starting from *NGI* is allowed to apply. However, if the MS instead implement article 8(6) as a trailing tax, no other exit taxation can take place on the deferred unrealised gain. These cases also prove *Van Thiel* wrong, immediately payment is not allowed simply because the exchanged shares in theory are “realised”.

What remains unclear, is if unrealised gain (b) in *Jacob/Lassus* also would be covered by the extended taxing right. An implementation of 8(6) that only safeguarded unrealised gain (a) could have the effect that unrealised gain (b) would be subject to *NGI* exit taxation, whilst unrealised gain (a) remained deferred until the later transfer.

The Case *AQ/DN* however seem to rule out differing tax treatments for unrealised gain (a) and (b). The CJEU is here clear that it is appropriate to apply the same tax treatment for both unrealised gain (a) and the later realised gain. The chargeable moment is the deciding factor for the applicable tax rules and the deferred gain from the exchange is not allowed to be treated differently than the later realised gain.

In an exit tax situation, where the MS loses the right to tax after the emigration, the gain is not realised upon emigration. Emigration here however becomes the chargeable moment, in my opinion the principles from *AQ/DN* should therefore apply also for exit taxation purposes. Unrealised gains (a) and (b) should therefore be treated the same when the shareholder emigrates.

Sweden by extending its taxation right via a trailing tax on all the unrealised gains (a, b, and c) therefore also treat all the unrealised gains the same. However, regarding the applicable tax rules at the moment of later transfer, seeing as Sweden does not lose taxing rights when the shareholder emigrates, the emigration does not become the chargeable moment. Therefore, in line with *AQ/DN* the tax rules applicable for all the unrealised gains should be those in force at the moment of later transfer (c). As covered in chapter 6.2.1 Sweden does not seem to follow the rules in place at the time of later transfer.

Sweden's current implementation of article 8 (6) for when the shareholder emigrates to another MS is dependent, as shown in chapter 4, on the shareholder having unlimited tax liability or having been living in Sweden a maximum of 10 years before the later transfer. There is therefore a temporal limit on the safeguarding effect of the Swedish implementation of article 8(6).

As shown in HFD 2021 ref. 15 the older Swedish implementation does not have a temporal limit, resulting in indefinite taxing right for Sweden. It is fully possible that a such an absolute taxing right in itself is permissible under the TMD. It is however questionable, given *AQ/DN*, if it can be used when it is no longer in force.

Concerning the Swedish taxation of (c), seeing as the CJEU does not differentiate between regular unrealised gains and unrealised gains stemming from an exchange of shares, exit taxation case law should be applicable to exchanged shares as well. The trailing tax on (c) employed by Sweden is similar to those allowed by the CJEU in *Van Hilten*. Sweden must therefore comply with the rules established in that case. It is however beyond the scope of this thesis to examine if Swedish taxation complies with said rules.

Regarding the ISK-system, this is closely related to the system of yearly taxing all latent gains as a way to avoid exit taxation, proposed by *Broek*. As no tax is levied on the ISK when the shareholder emigrates this cannot be said to be in conflict with the TMD.

6.2.3 Conclusions

Given the findings above, the answer to the first research question of this thesis is that the Swedish implementation of article 8 of the TMD in many ways is compliant with the TMD. Whilst the ISK-system and the taxation of cash payment in some situations can be to the detriment of the shareholder in a way that conflicts with the TMD, there is always the option for the shareholder to choose an alternative route in compliance with the TMD. Not being able to bundle transactions can be criticised for being more burdensome than it needs to be, however seeing as the deferral is automatic no greater burden is laid on the shareholder in this case than was found allowed in *Jacob/Lassus*. The purpose behind the TMD and article 8 is not hindered by not bundling transactions.

However, regarding the applicable rules for the later transfer of shares, in both domestic and foreign situations the findings in the *AQ/DN* case seem in stark contrast with what applies in Sweden. Although *AQ/DN* was established with the background of a system that clearly divided unrealised gains (a) from the later realised gain it is clear that it is the chargeable moment that is the deciding factor for the applicable tax rules, and that the exchange is not in itself the chargeable moment.

Sweden, whilst not as clearly as France, divides unrealised gain (a) and the later realised gain by stating that the rules applicable for the later gain are the ones that were applicable during (a). This order seems incompatible with the findings in *AQ/DN* and therefore with the TMD. The Swedish implementation therefore seems in this respect to be non-compliant with the TMD.

Regarding the exit tax regime employed by Sweden this complies with both *Jacob/Lassus,* as it uses a trailing tax to retain taxation rights, and *AQ/DN* as it treats unrealised gain (a) and (b) in the same way. The Swedish exit taxation rules also apply to both regular and exchanged shares, shareholder holding exchanged shares are therefore not put in a less favourable position than shareholder holding regular shares. Since no exit taxation takes place in the ISK-system, this cannot be in conflict with the TMD.

Jacob/Lassus has confirmed that a trailing tax on the unrealised gains stemming from the exchange is permitted, taxation of gains established after emigration has to comply with EU-law and the Fundamental freedoms. Whilst it is beyond the scope of this thesis if the Swedish exit taxation regime for exchanged shares is compliant with the rules set out in *Van Hilten,* it is more certain that Swedish exit taxation rules are compliant with the TMD.

6.3 Recommendations For Future Research

As discussed in 6.2 the ISK mechanism offered by Sweden is compliant with the TMD since it is optional, and the shareholder can achieve a "proper" deferral as provided by the TMD if this is to the benefit of the shareholder. It is however more questionable if the ISK mechanism, or something similar, would be compliant with the TMD if it was the only course of action offered by the MS. For example, if a MS, as *Broek* proposed, would tax all latent gains annually, would this fall under the leeway for the implementation of article 8 offered to the MS, or would this be too far from what is envisioned by article 8?

It is here also interesting to examine how much flexibility that needs to be offered to the shareholder when choosing between "roll over relief" as offered by the TMD and recurring taxation of unrealised gains. Are final decisions allowed or are the MS required to allow the shareholder the opportunity to change regimes?

Also given the *AQ/DN* case it would be interesting to see if the findings in that case are restricted to changes in applicable regime by the MS, such as a change in rate and allowance. One could envision a situation where the choices of the shareholder, after an exchange would trigger a new regime to be applicable, would the taxation then be required to be in line with this new regime? An example of this can be found in the rules for qualified shares in Sweden.

Qualified-shares remain qualified for 5 years after the criteria is no longer met however when *qualified-shares* are exchanged they will be taxed as qualified-shares at a later transfer regardless of the amount of time between the transactions. This order was chosen because of a fear that shareholders otherwise would use the exchange of share mechanism to avoid the 3:12 rules entirely.[301] A share being *qualified* or not is a variable subject to change dependent on factors both within and outside the shareholders' control. The Swedish system changes this variable to a constant.

It is therefore of interest if such a system is allowed as it removes the possibility for the shares to become non-qualified. Since article 8(6) only safeguards taxation equal to that to which they would have been entitled if the exchange of securities had not taken place. If the exchange had not taken place and the shares would have been, at the moment of disposal due to the behaviour of the shareholder, non-qualified. Would it then be allowed to still tax the disposal of exchanged shares as qualified shares, if the behaviour of the shareholder would have been the same?

[301] Prop. 2002/03:15, pages 41–42.

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