

New Swedish Emigration Taxes on Business Income

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1. Introduction

The recent European Court of Justice's (ECJ) decision in *National Grid Indus* illustrates the Member States' difficulty adopting rules on notional taxes due upon exit of legal persons, that remain compatible with the fundamental freedoms². The purpose of the current article is to assess Swedish rules in the light of the requirements set by EU law.

Before the *National Grid Indus* case was rendered, and over the past five years - nine out of ten Swedish emigration tax rules³ have changed. These changes have been made based on the assumption that the rules were not in compliance with EU law. The exit tax rules for companies were the last ones to be changed. Two of these rules (which came into force on January 1st 2010) will be presented and commented on in this article, i.e. the withdrawal taxation on business income and the claw-back on tax allocation reserves (periodization reserves).⁴ A description of the rules is presented in Section 3. However, even the new rules may be questioned to some extent in relation to the freedoms guaranteed in the TFEU. An analysis regarding this question will be presented in Section 4 below. Before this is done, a background regarding the Swedish company law is presented (Section 2.1). The point of departure is taken in the article written by Professor Emeritus Leif Mutén in *Studi Tributari Europei* 1/2009,⁵ the so-called

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² European Court of Justice, 29 November 2011, case C-371/10, *National Grid Indus*.

³ In this context the term Emigration Tax refers to an income tax rule that is applicable for individuals or companies transferring tax residence from a State and thereby becomes a resident of another State. Both exit taxes as well as rules regarding extended income tax liability are concerned.

⁴ See Mutén, L., 'Exit Taxes in Sweden', *Studi Tributari Europei (STE)* 1/2009 p. 7-17.

⁵ See Mutén, L., *STE* 1/2009 p.10 ff. See also Mutén, L., 'Advance Rulings Board Issues Decision on Corporate Emigration', *TNI October 9, 2006* p. 113-114 and 'Will Case Law Do?' p. 658-660 in A

Malta Case as well as in the Commission's request for Sweden to change its rules in these matters (Section 2.2 below). In Section 5 some concluding remarks are made. The article refers to legislation and materials updated on 1st December 2011.

2. Background

2.1 The incorporation principle

Swedish company law has adopted the Incorporation Principle, instead of the Seat Principle. A Swedish company remains a legal entity as long as it remains registered.⁶ Further it can be noted that the board of directors is required to have its seat in Sweden.⁷ The provisions in question do not, however, require that the effective management must be kept in Sweden in order to be recognized as a Swedish legal entity. However, several double tax agreements (DTAs) do regard the effective management as the tiebreaker for determining of the residence of the company.⁸ Should the effective management of a Swedish company be transferred to another State, applying the real seat principle in company law, then it would be possible for a Swedish company to be recognized under the commercial law of both States.⁹ According to the ITA¹⁰ 6:3-4 the company would remain unlimited liable to tax in Sweden after transferring its residence abroad. After transferring its effective management abroad the company would however still exist in Sweden and there would be a case for applying the freedom of establishment. In the Case *National Grid Indus* the Court states "As a company incorporated under the legislation of a Member State and having its registered office and central management within the European Union, it benefits, in accordance with Article 54 TFEU, from the Treaty provisions on freedom of establishment, and can thus rely on its rights under Article 49 TFEU, in particular

Vision of Taxes within and outside European Borders, Festschrift in honor of Prof. Dr. Frans Vanistendael, ed. Hinnekens, L. & Hinnekens, P., Kluwer 2008.

⁶ Company Act 2:24-25.

⁷ Company Act 3:1. This requirement has rightfully been questioned from an EU law perspective by Mutén, see Mutén, L., *STE 1/2009* p. 8.

⁸ Mutén, L., *STE 1/2009* p. 7.

⁹ See Nelson, M., 'Beskattning av aktiebolags hemvistbyte', *SvSKT 2006/9* p. 622 Footnote 37 and 48 with references, regarding the question whether effective management and real seat has the same meaning.

¹⁰ Income Tax Act.

for challenging the lawfulness of a tax imposed on it by that Member State on the occasion of the transfer of its place of effective management to another Member State.”¹¹

2.2 Background of the Exit Tax Rules and The *Malta Case*

Sweden has had rules on withdrawal taxation since 1928. A withdrawal occurs when a taxpayer transfers an asset without consideration as to whether the transfer is not justified commercially (or for a consideration below the market value of the asset). The asset is considered to be sold for a consideration equal to the market value on the basis of which taxation is based (ITA 22:7). The purpose of these rules is to uphold taxation of business income by ensuring that untaxed values of a business activity will not be taken out of the business sector untaxed. This could occur when tax liability in Sweden for business activity ceases (ITA 22:5 p. 4), for instance when the effective management of a company is transferred to another State and the tax residence according to the DTA is considered to be in the host State. Withdrawal taxation leads to an exit tax on the untaxed values on the business assets/assets that are transferred from Sweden. Furthermore, the rules also ensure that the gains that have arisen in Sweden will be taxed here.¹²

A rule with a similar purpose was the rules in ITA 30:8 regarding claw-backs on periodization reserves. According to the rules in Chapter 30 ITA, a company could elect to postpone taxation of 25 percent of taxable annual profits placed in a periodization reserve. This reserve could be added back to taxation at any moment, but no later than six years after its constitution. This provision allows taxpayers to equalize their tax liability between different fiscal years in a business. However, as mentioned above, the reserve is to be taxed earlier if the

¹¹ See case C-371/10 *National Grid Indus* para 32. For a discussion whether a company in a State which applies the real seat principle may rely on the freedom of establishment, see for instance Nelson, M., *SvSkT 2006/9* p. 618 ff. The point made is that the transfer of seat would lead to an automatic liquidation of the company moving, implying that there is no company left that can rely on the freedom of establishment. However, from the Case C-210/06 *Cartesio* it may be held that the rules of the host State may affect this situation (para. 110-112).

¹² Governmental Bill, Prop. 2009/10:30 p. 13.

company's income was not be taxable in Sweden any longer due to a DTA (ITA 30:8).

The Board for Advanced Tax Rulings (the Board) found these two exit tax rules incompatible with the freedom of establishment already in 2006.¹³ The case (also known as the *Malta* Case) was submitted to the Supreme Administrative Court, confirming the Board's ruling.¹⁴ Both exit tax rules were considered to be in breach of the freedom of establishment, and justified due to the need to preserve the coherence of the fiscal systems and the principle of territoriality, but they did not meet the proportionality test. Indeed some less burdensome tax measures could achieve the same result.¹⁵ It can be noted that the Supreme Administrative Court did not refer the case to the ECJ, which may be criticized, because the case would have been of great interest for several Member States, with similar rules. However, the ECJ would most likely have reached the same outcome – i.e. the rules were not in compliance with EU law. On the other hand – the ECJ would perhaps have elaborated some of the questions further, which would have been of great interest.

After the ruling by the Supreme Administrative Court, the tax authority did not apply the restrictive rules any longer.¹⁶ One year after the ruling the legislator passed a new legislation.¹⁷ In the mean time the Commission formally requested Sweden to change its exit tax provisions.¹⁸ However, the request never passed the second step of the infringement procedure, as Sweden had amended the

¹³ See Mutén, L., *STE 1/2009* p.10 ff. See also Mutén, L., 'Advance Rulings Board Issues Decision on Corporate Emigration', *TNI October 9, 2006* p. 113-114 and 'Will Case Law Do?' p. 658-660 (footnote 5 above) for the background of the case.

¹⁴ RÅ 2008 ref. 30. For a commentary in English see Dahlberg, M., 'Supreme Administrative Courts Finds Fault With Exit Tax Regime', *TNI July 14, 2008* p. 167-169. For a commentary in Swedish see Cejje, K., 'Regeringsrättens tolkning och tillämpning av svenska utflyttningskatteregler', *SN 2008/9* p. 532-543.

¹⁵ For an analysis on how to act when a rule is considered a prohibited restriction – and cannot be applied – see Cejje, K., *SN 2008/9* p. 539-542 and Ståhl, K., Hur ska svenska domstolar hantera fördragsstridiga skatteregler, *ERT 2008: Jubileumsnummer* p. 123-132.

¹⁶ See the Standpoint by the Tax Authority, Skatteverkets ställningstagande dnr 131 674664-08/111 'Uttagsbeskattning och återföring av periodiseringsfond när näringsverksamhet inte längre ska beskattas i Sverige', November 20, 2008. This Standpoint has now been evoked, found to be unnecessary because of the new legislation (dnr. 131288529/11-11, May 3rd 2011.)

¹⁷ (Government Bill) Prop. 2009/10:39 Anstånd med inbetalning av skatt i samband med uttagsbeskattning mm.

¹⁸ IP/08/1362, 'Direct taxation: Commission requests Sweden to change restrictive exit tax provision for companies', September 18, 2008. The request took the form of a reasoned opinion. See also Brokelind, C., 'Commission's reasoned opinion against Sweden 18 September 2008 (2007/2327)', *Highlights and Insights in European Taxation*, Kluwer 2008 p. 10-21.

legislation.¹⁹ The new legislation entered into force on January 1, 2010. However, the new legislation can also be questioned from an EU law perspective (see Section 4 below). This is at least true if one considers the case law of the ECJ ruled on until mid-November 2011. The Case C-371/10 *National Grid Indus* has however shed new light on this situation²⁰.

3. The New Legislation

According to the new legislation, the withdrawal taxation (exit taxation) on business income according to Chapter 22 ITA still remains. However a possibility of deferring the payment of the tax has been introduced. The payment of the tax is deferred until the assets are sold. A deferral can, after application, be granted one year at the time. The new deferral can be of a similar amount as that previously deferred, but can also be reduced if the taxpayer has sold or otherwise disposed of assets on the basis of which the deferral was granted. For some assets (tangible and intangible assets) a successive reduction of the deferral is mandatory over a five or ten-year period, after which the right to defer entirely ceases.

As a main rule, the deferral will cease when the assets are sold, which means that tax is triggered then. A deferral may be granted provided that: 1) the taxpayer after the transfer of assets/residence is still unlimitedly liable to tax in Sweden, 2) the withdrawal taxation is based on ITA 22:5 p. 4-5, 3) the transfer is carried out within the EEA area and 4) the assets are included in a taxable business activity within the EEA area. A decrease in value on the assets in between the exit taxation and the payment of the tax on the deferral will not be taken into consideration in Sweden, according to the new rules.

The second exit tax, i.e. the claw-back on periodization reserves²¹ has been amended in relation to companies transferring their residence to a State within the EEA-area, with which Sweden has signed and applies a DTA. In this situation,

¹⁹ IP/10/299, 'Direct taxation: The European Commission requests Belgium, Denmark and the Netherlands to change restrictive exit tax provisions for companies and closes a similar case against Sweden'.

²⁰ European Court of Justice, 29 November 2011, case C-371/10, *National Grid Indus*.

²¹ The same goes for other type of reserves, such as replacement reserves (Chapter 31 ITA) and reserves on funds retained in the business (Chapter 34 ITA).

the periodization reserve may be clawed back at any time within six years from the time of allocation. This means that the same rule applies in these cross-border situations as in domestic situations.

4. Is the new legislation in compliance with EU law?

4.1 Introduction

This section analyzes briefly the compatibility of the currently applicable Swedish rules with the case law of the ECJ.²² The rule regarding periodization reserves that was considered a prohibited restriction in the *Malta* Case no longer applies. Instead the same rule on claw-back applies in domestic as well as cross-border situations. The new rule can therefore probably not be considered a restriction. The following analysis therefore focuses on some aspects of the exit tax on withdrawal and the deferral method used in this context.

The analysis in this section is primarily based on the case law of the ECJ.²³ Both scholars and the Commission maintain that the case law regarding exit taxes on individuals (Case C-9/02 *Lasteyrie* and Case C-470/04 *N*) applies to company taxation as well.²⁴ However, the Case C-371/10 *National Grid Indus* was delivered by the Grand Chamber on November 29, 2011. *National Grid Indus* deals with exit taxation of companies. Several interesting differences can be noticed in the different positions taken by the Court in the *Lasteyrie*- and *N*-cases and in the *National Grid Indus* case. Some of these will be mentioned below. Unfortunately, there is no room in this article to give the background to the *National Grid Indus* case and to analyze it in depth.²⁵ In the *National Grid*

²² For a more in-depth analysis see Cejje, K., Uflyttningsbeskattning av bolag, *SvSKT 2012*.

²³ Primarily on Case C-9/02 *Lasteyrie*, Case C-470/04 *N* and Case C-371/10 *National Grid Indus*.

²⁴ COM(2006)825 final p. 5; See also for instance Dourado, A. P. & Pistone, P., Looking Beyond *Cartesio*: Reconciliatory Interpretation as a Tool to Remove Tax Obstacles on the Exercise of the Primary Right of Establishment by Companies and Other Legal Entities, *Intertax 2009 6/7* p. 343; Schneeweiss, H., Exit Taxation after *Cartesio*: The European Fundamental Freedom's Impact on Taxing Migrating Companies, *Intertax 2009 6/7* p. 371; CFE, Opinion Statement of the CFE ECJ Task Force on the Judgment in the Case of *CARTESIO Oktató és Szolgáltató bt* (Case C-210/06) Judgment of 16 December 2008, *ET 2009* p. 380; van Daele, J., Tax Residence and the Mobility of Companies: Borderline Cases under Private International Law and Tax Law, *ET May 2011* p. 195; Panayi, C.H.J.I., Corporate Mobility in the European Union and Exit Taxes, *BFIT October 2009* p. 471 and Smit, D., European Commission challenges Danish, Dutch and Spanish business exit taxes before the European Court, *STE 1/2009*.

²⁵ For an analysis of the background etc see Kemmeren, E., The Netherlands: Pending Cases Filed by the Netherlands Courts: The *National Grid Indus* (C-371/10) and *Feyenoord* (C-498/10(X.))

Indus case several connecting factors in relation to the new Swedish rules can be found. The analysis is therefore also performed against background of that case.

4.2 Exit Taxation Contra an Extended Income Tax Liability

The Swedish legislator decided to maintain the exit tax rules regarding withdrawal taxation. In order to make the rules compatible with the fundamental freedoms of the TFEU, a possibility to defer the payment of the tax upon withdrawal, until the assets were sold, was introduced. The method described is referred to as the *deferral method*, whereas the taxable event is still at the time of the withdrawal (exit). The withdrawal will therefore affect the taxable income the year when the effective management is transferred.

An alternative method, also used in relation to emigration taxation, is to make the alienation of the asset the taxable event and to provide for an extended income tax liability in the emigration state until that time. By using this alternative method the withdrawal will not affect the taxable income for the year when the withdrawal takes place. This method has for instance been used in Sweden in relation to capital gains on shares for an individual transferring his/her residency abroad.²⁶ Using an extended income tax liability would in most cases result in a situation where the exiting taxpayer would be treated the same way as a taxpayer not moving.²⁷ Using the deferral method (as chosen by the Swedish legislator) may result in different tax treatment of the two taxpayers.²⁸ Using an exit tax in combination with a deferral instead of an extended income tax liability may result in the fact that the income is taxed earlier in the exit situation than in the domestic situation.

The choice of method has an impact, as mentioned, on the taxable income of the business activity. Sweden allows the carrying forward of losses (ITA 40:2). A loss incurred Year 1 can thus be used to offset gains the following year (Year 2). If a

Cases p. 157-176 in Lang, M. (ed.), *ECJ - Recent Developments in Direct Taxation 2010*, Kluwer, 2011.

²⁶ See ITA 3:19, also known as the ten-year rule.

²⁷ See for an analysis in Swedish in comparison with the German exit tax rules, Thim, J., En kritisk analys av svenska uttagsbeskattningsregler vid gränsöverskridande transaktioner, *SN 2010/11* p. 778-792.

²⁸ The comparison is made between a company which transfers its effective management to another State and the company not transferring its effective management across borders.

withdrawal takes place Year 1 and the deferral method is used, the withdrawal may be offset against the losses Year 1 which means that the losses will not be carried forward. Furthermore, this may lead to the situation where no deferral of the payment of the tax is granted, as there is no tax to base the calculation on, i.e. there will be no deferral. This may of course not necessarily be a disadvantage for the taxpayer. It may be noticed that this is not a very strong argument because the losses are offset against the fictitious income (the exit tax).

On the other hand, should an extended income tax liability be used, then the withdrawal will not affect the result until the assets are sold (and the possibility to use losses will remain unrestricted). When using an extended income tax liability, a cross-border and domestic situation would probably be treated more equally than by using the deferral method.²⁹ This was also the method suggested by the Supreme Administrative Court in the *Malta* Case. However, several issues would arise in relation to tax treaties using an extended income tax liability.

The Swedish government has chosen the deferral method and was of the opinion that the method was accepted by the Commission.³⁰ At that time (year 2009), I would have made a different interpretation. Even though the Commission did accept a deferral of the payment of the tax it did not accept that an earlier (at exit) or higher tax charge applied in a cross-border situation in comparison with a domestic situation. I interpret the communication from the Commission in a different way than the Swedish government. My interpretation is also supported by the cases pending at the ECJ, in which the Commission has requested several Member States to change their legislation.³¹ I would say that it seemed to be in conflict with EU law to tax the withdrawal at an earlier time (i.e. at exit) than in a domestic situation. However, nowadays the *National Grid Indus* Case can support the opinion that the taxable event at exit may be in compliance with EU law. The

²⁹ See for instance Cejje, K., *Utflyttningsbeskattning av kapitalökningar*, Edita Västra Aros 2010 Chapter 8 and 10, for an analysis in Swedish regarding the different methods used in relation to capital gains.

³⁰ See COM(2006)825 final. Communication from the Commission to the Council, the European Parliament and the European Economic and social committee, Exit taxation and the need for co-ordination of Member States' tax policies.

³¹ See for instance Case C-38/10 *Commission vs. Portugal*; Case C-301/11 *Commission vs. the Netherlands*; Case C-261/11 *Commission vs. Denmark*; Case C-64/11 *Commission vs. Spain* and IP/11/78 Commission requests Ireland to amend restrictive exit tax provisions for companies.

ECJ states:³² "It is in accordance with the principle of fiscal territoriality linked to a temporal component, namely residence for tax purposes in national territory during the period in which the taxable gain appeared, that the capital gain generated in the Member State of origin is taxed *at the time of the transfer* of the place of effective management of the company in question."

4.3 The Deferral Method

The deferral method used by Sweden requires several administrative conditions to apply. These conditions may very well be questioned from an EU law perspective.³³ First of all, according to the new rules the taxpayer has to *apply* for the deferral of payment of tax.³⁴ According to the case law of the ECJ (*Lasteyrie* and the *N-cases*) a deferral has to be granted automatically. Considering the outcome of both these cases, the requirement of an application is a (prohibited) restriction. The Swedish legislator motivated the introduction of the rule by the possibility for the taxpayer to *choose* whether he will use the deferral method or whether he is taxed upon exit.³⁵ This was also the opinion of the Commission in its communication.³⁶ This is also the position taken by the ECJ in the *National Grid Indus* Case.³⁷ However, this position might be questioned from previous case law of the Court. From the Case C-440/08 *Gielen* it can be held that a regulation that is regarded a prohibited restriction³⁸ cannot be

³² See Case C-371/10 *National Grid Indus* para 60 second sentence [emphasis added by KC].

³³ The Commission states [emphasis added by KC]: "A MS wishing to exercise its taxing rights on the difference between the book value and the market value of the asset at the moment of transfer, may establish the amount of income on which it wishes to preserve its tax jurisdiction, provided this does not give rise to an immediate charge to tax and that there are *no further conditions attached to the deferral*." COM(2006)825 final p.6.

³⁴ It can be noted that this even has to be done every year as long as the deferral is at hand. A less burdensome alternative would have been for the taxpayer to either inform the tax authority that the conditions for the deferral still are at hand or, even better, inform the tax authorities when the conditions are changed.

³⁵ Prop. 2009/10:39 p. 19.

³⁶ See COM(2006)825 final p. 6 and Kovács, L., European Commission Policy on Exit Taxation, *STE 1/2009* p. 13. The Commission states that it is possible for a member state to minimize the administrative burden by offering its taxpayers the option to renounce the deferred collection of tax and to make it possible to choose to pay the tax at the moment of transfer.

³⁷ Case C-371/10 *National Grid Indus* para 73. To introduce a choice for the taxpayer seems to be a less burdensome and more appropriate rule.

³⁸ The former Swedish legislation regarding withdrawal taxation (exit tax) has been considered a prohibited restriction. See Section 2.2 above.

neutralized by the choice offered to apply another (non-restrictive) legislation³⁹.⁴⁰ If this is correct, the method used by Sweden – to keep the prohibited exit tax rules and complement them with a possibility of deferred payment of the tax – is not in compliance with EU law.⁴¹

A second problem with the deferral method is that the application must be filed every year in order to keep on benefitting from the deferral. This situation was not discussed in the *National Grid Indus* Case. From previous case law it can be held that the obligation to *file an income tax return* may be considered a justified restriction according to the case law of the ECJ.⁴² However, this was allowed in respect of a one-time tax return and not for a year-after-year requirement. To that respect it is enough to refer to the ECJ's case law stating that the directives on mutual assistance and on exchange of information usually prevent Member States legislation from passing the proportionality test in these matters.⁴³

A third problem with the deferral method used by Sweden is the mandatory obligation of a *successive reduction* of the deferral on tangible and intangible assets. This reduction is based on the fact that some assets are, by their nature not meant to be disposed of, but are used up by the company or expire over time. An alternative method, discussed in the governmental bills preceding the legislation, could have been to let the deferral apply during the economic life of the assets/tangibles.⁴⁴ However, the Swedish legislator is of the opinion that by using such alternative method the administrative burden would be too heavy for the taxpayers as well as the tax authorities.

The *National Grid Indus* Case may be interpreted as follows: The payment of the tax may be done immediately at exit or when the assets are sold.⁴⁵ According to the Swedish method the tax is either paid at exit or successive over five or ten

³⁹ The exit tax regime in combination with a deferral of payment of tax.

⁴⁰ See for instance Case C-440/08 *Gielen* and *Cejje, K.*, Ny dom av EU-domstolen – återigen dags att ändra SINK och A-SINK?, *SN 2010* p. 557-560.

⁴¹ It may be noted that the *Gielen* Case concerned the choice to be treated as resident in the Netherlands for income tax purposes, i.e. the choice to use a complete different system of rules. However, the possibility to opt for a different (non-discriminating) system of rules did not make the discriminating character of the first rules disappear. In the Swedish situation the option is not regarding a 'complete system of rules' which may or may not affect the outcome in this regard.

⁴² Case C-470/04 *N* para. 49-50.

⁴³ See the Directive 2008/55/EC and Directive 2011/16/EU, see also Case C-371/10 *National Grid Indus* para 78.

⁴⁴ Prop. 2009/10:39 p. 30f; Franck, L, Finansdepartementets förslag till EG-förenliga regler vid utflyttning av bolag mm, *SvSkT 2009/5* s. 515 and Kovács, L., *STE 1/2009* p. 9.

⁴⁵ Case C-371/10 *National Grid Indus* para. 73.

years (in these cases). There is a timing mismatch in the Swedish method compared to the 'less burdensome rule' discussed by the Court. This difference must however be understood in the context of the nature of the assets (which is not meant to be sold).

A fourth problem is that the taxpayer must be regarded unlimited liable to tax in Sweden after the transfer of residence. This may also be questioned, based on the different directives mentioned above and the possibility for the Member States to cooperate in this field.

4.4 Decreases in value of the assets after the transfer of residency

In the deferral method, the tax is determined in respect of the withdrawal. This means that the deferral of the payment of tax corresponds to the difference between the tax calculated when the withdrawal is included in the taxable base (during the 'exit year') and when it is not included.⁴⁶ This fixed amount is not recalculated at the time when, for instance, the assets are sold. Later decreases in value on the assets are not taken into consideration in Sweden. According to ECJ's case law on individuals the decreases in value (on shares) have to be taken into consideration in one of the states. If this is not done by the immigration State the emigration State is obliged to do this.⁴⁷ According to the *National Grid Indus* Case, on the other hand, decreases in value do not have to be taken into account.⁴⁸ The Court has explained the difference in relation to the *N*-case.⁴⁹ This explanation can be interpreted as the principle of territoriality is a much more established principle in relation to business income than in relation to income of capital gains.⁵⁰ It may also be understood as the difference may be recalled on the differences of taxable persons (companies vs. individuals). Either way, the Swedish rules are in compliance with EU law in this regard.

⁴⁶ For an individual who realizes business income this affects the progressive tax rate at the moment when the deferred amount is calculated.

⁴⁷ See Case C-470/04 *N*. The Swedish legislator claims indirectly that this question has not been dealt with in the case law of the ECJ, which can be interpreted as it does not find the case law on individuals applicable in this situation. Prop. 2009/10:39 p. 27 ff.

⁴⁸ Case C-371/10 *National Grid Indus* para 64.

⁴⁹ Case C-371/10 *National Grid Indus* para 54-60.

⁵⁰ See for instance Article 7 compared to Article 13 in the OECD Model Tax Convention.

4.5 Elimination of double taxation

The Commission and the Council share the opinion that juridical double taxation should be eliminated when exit taxes are being used.⁵¹ Even though juridical double taxation *per se* can be said to be restrictive, according to established case law of the ECJ it is not a prohibited restriction.⁵² Rather, it can be said to be a result of two states exercising their fiscal sovereignty in parallel. However, the Court has repeatedly stated that it is up to the Member States to take any measures necessary to prevent double taxation by applying the criteria that follow in international tax practice. The Court does not (and in the future will probably not) point out one of the states to solve the problem of double taxation.⁵³ Sweden has a large DTA network and should juridical double taxation not be relieved applying these treaties, then there is always a possibility for the competent authorities to endeavour by mutual agreement procedure (MAP), which of course is not a very satisfactory solution. However, juridical double taxation is still not considered a prohibited restriction to the freedoms guaranteed in the TFEU and must therefore not be eliminated.

5. Final remarks

The analysis in the article shows that even though the Commission did drop its infringement procedure against Sweden, the Swedish exit tax rules on withdrawal taxation could very well be questioned from an EU law perspective, at least until the *National Grid Indus* Case was delivered. However, even though the *National Grid Indus* Case has shed some light on the situation and the Swedish exit tax rules seems in compliance in several aspects with that ruling, there are still aspects of the Swedish rules that may be in conflict with EU law. One of these aspects is the requirements attached to the deferral another is the

⁵¹ COM(2006)825 final and Council Resolution on coordinating exit taxation (2 December 2008).

⁵² Case C-513/04 *Kerckhaert* para 22; Case C-128/08 *Damseaux* para 34, Case C-67/08 *Block* para 30. See also COM(2011)712 final on Double Taxation in the Single Market.

⁵³ Sweden uses a step-up as a basis in relation to other EU member states, if there has been an exit taxation, ITA 20a:7. See also the Council Resolution on coordinating exit taxation (December 2, 2008), where the Council recommends the host state to use the step-up method (para. C).

successive reduction of the deferral. The author does not argue that the rules are in conflict with EU law, only that they may be so.

It may however be noted that there are several other situations where exit taxes may be invoked, which the legislator decided not to consider when changing the now-current rules. One of these situations deals with withdrawal taxation when a taxpayer changes status from unlimited liable to tax to limited liable to tax. The legislators' argument in their defence is that the changes are only made in relation to the *Malta* Case, which I find a bit inefficient. Why do we have to wait for another infringement procedure and re-draft the legislation once again, when this could have been done last year?