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Mayday—Brexit

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MAYDAY—BREXIT

by

*Bertil Wiman**

ABSTRACT

On 31 January 2020, the United Kingdom left the European Union—Brexit. A number of tax consequences both in the United Kingdom as well as in other member States will follow from leaving as a member of the European Union and the European Economic Area. This Article analyzes some of the income tax consequences, from a Swedish perspective, that follow from Brexit.

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I. INTRODUCTION

It is with great pleasure that I received the invitation to contribute to the special issue of the *Florida Tax Review* honoring Professor Mike Friel. Professor Friel has made an outstanding contribution to the international tax community being the director for the University of Florida Graduate Tax Program. All over the world graduates from the program

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* Professor of Fiscal Law, Uppsala University.

remember the excellent education they received at University of Florida, for which they are grateful to Professor Friel.

I have taught courses on European taxation at this program. I therefore thought it would be relevant to discuss some aspects of European taxation. Considering that the conference dedicated to Professor Friel took place the day after one of the predicted days of the United Kingdom leaving the European Union, Brexit, I thought it would be suitable to devote this Essay to some issues regarding Brexit, focusing on the Swedish perspective.

Of course, I took some risks in choosing this topic. The date had already been postponed once, from the March 29 to October 31, 2019. The political situation in the United Kingdom when I completed writing this contribution was such that it was not even certain there would be a Brexit. However, the very idea of getting out of the European Union raised so many tax issues that I dared to take the risk, as those issues provided a nice background for discussing more general income tax issues. This contribution was therefore written in a style assuming that Brexit would take place, which it did on January 31, 2020.

The United Kingdom would be the first (and in my opinion hopefully the last) member of the European Union to leave. When it leaves, it will no longer be a country within the European Union and will not even be a part of the European Economic Area (EEA). The latter is also important from a tax perspective as the fundamental freedoms apply also to Iceland, Liechtenstein, and Norway as members of the European Free Trade Association, which together with the European Union has entered into the Agreement on the European Economic Area.[1]

This contribution focuses on income tax issues.[2] The agreement between the European Union and the United Kingdom on Brexit does not contain any specific provisions on income tax. The income tax consequences will therefore most likely be the same whether it will be a hard or soft Brexit.

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1. *See* Ana Paula Dourado & Peter Wattel, *Third States and External Tax Relations*, *in* Terra/Wattel: European Tax Law: Volume 1: General Topics and Direct Taxation, at ch. 5.4. (Peter J. Wattel et al. eds., 7th ed. 2019). This book provides an extensive description and analysis of European tax law.

2. As the European Union is an internal market without borders, leaving the European Union will have severe effects on value-added tax, other indirect taxes, and customs. None of these consequences will be dealt with in this Article.

II. The EU Context

A number of rights and obligations in many fields, including tax law, follow from being a Member State of the European Union. Those rights and obligations can follow from primary or secondary E.U. law.

Primary law consists of the different relevant treaties, most importantly the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).[3] With respect to income tax, the most relevant articles having so-called direct effect[4] concern the so-called four freedoms (free movement of persons, including the right to establish a business in another Member State, goods, services, and capital), and the articles on state aid.[5]

There are numerous cases from the Court of Justice of the European Union (CJEU), on these articles, where national tax provisions on income tax have been tested to see whether they conform to primary law. The CJEU has stated, that even if each Member State in principle is free to design their income tax laws as they like, nevertheless, they may not discriminate against nationals of another Member State, nor connote a restriction to the free movement.[6] As the same kind of articles exist in the Agreement on the European Economic Area (EEAA), Member States must also make sure that their income tax laws conform to the EEAA as well.

Secondary law consists primarily of directives and regulations;[7] however, only directives are relevant in the income tax field. The Council of the European Union shall "issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as *directly affect the establishment or functioning of the internal market*."[8] In order to adopt a directive in the fiscal field,

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3. Consolidated Version of the Treaty on European Union, May 9, 2008, 2008 O.J. (C 115) 13; Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

4. Direct effect means that a provision in a European treaty of directive can be applied directly if it is sufficiently precise, clear, and unconditional. *See* Terra/Wattel, *supra* note 1, pt. 3.5.1.

5. *See* TFEU, *supra* note 3, arts. 20 & 26; tit. II; tit. IV; arts. 107–09.

6. *See* Ruth Mason & Michael S. Knoll, *What Is Tax Discrimination?*, 121 Yale L.J. 1014, 1023–33 (2012).

7. *See* TFEU, *supra* note 3, art. 288.

8. *Id.* art. 115 (emphasis added).

unanimous voting is required.[9] Thus, every single Member State can prevent the adoption of a tax directive. Despite this restriction, quite a few tax directives have been issued. One can note that secondary legislation does not apply to EEA-countries outside the E.U. area (i.e., Iceland, Lichtenstein, and Norway). Importantly, a directive must be implemented into national tax legislation and therefore requires legislative action.

The Parent-Subsidiary Directive[10] deals with the tax treatment of cross-border dividends between related companies, purporting to safeguard that corporate profits are not double taxed within the corporate sector. It now also covers dividends received by permanent establishments. Briefly stated, the source state may not levy withholding taxes on cross-border dividends, and the residence state of the parent may not effectively tax cross-border dividends received.[11]

Reorganizations are the target of the Tax Merger Directive,[12] including cross-border mergers, divisions, partial divisions, transfer of assets, and exchanges of shares concerning companies of different Member States and the transfer of the registered office of a European company (Societas Europaea or SE) or European Cooperative Society (SCE). This directive provides that no immediate tax effects shall occur in these kinds of transactions cross-border, thus providing for tax deferral.[13] The directive covers many types of transactions.

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9. *See Decision Making on EU Tax Policy*, EUR. COMM'N, https://ec.europa.eu/taxation_customs/taxation/decision-making-eu-tax-policy_en (last visited June 7, 2020); *Unanimity*, EUR. COUNCIL, https://www.consilium.europa.eu/en/council-eu/voting-system/unanimity/ (last reviewed Jan. 28, 2020).

10. 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, 2011 O.J. (L 345) 8 (as amended).

11. *Id.* arts. 4–5.

12. 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, 2009 O.J. (L 310) 34 [hereinafter Tax Merger Directive].

13. *See, e.g.*, *id.* arts. 4, 7–9.

Intra-group cross-border interest and royalty payments are dealt with in the Interest and Royalty Directive.[14] Its main function is to prevent the source state from taxing outbound payments, whether through a withholding tax or by assessment.[15]

Of course, BEPS is ever present and is largely the reason why the European Union adopted the Anti Tax Avoidance Directive (ATAD) in 2016.[16] It was amended in 2017. ATAD applies to all taxpayers subject to corporate tax, and it covers interest limitation rules (primarily an EBITDA solution), exit taxation for companies, a general anti-abuse rule, controlled foreign company (CFC) provisions, and different kinds of hybrid mismatches.

The corporate tax directives for the most part describe which type of national tax they shall be applied to and also which type of company. For instance, Article 3 of the Tax Merger Directive states that for the purposes of the directive, a company from a Member State shall mean a company that:

> (a) takes one of the forms listed in Annex I, Part A;
>
> (b) according to the tax laws of a Member State is considered to be resident in that Member State for tax purposes and, under the terms of a double taxation agreement concluded with a third country, is not considered to be resident for tax purposes outside the Community; and
>
> (c) is subject to one of the taxes listed in Annex I, Part B, without the possibility of an option or of being

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14. Council Directive 2003/49/EC of 3 June 2003 on a Common System of Taxation Applicable to Interest and Royalty Payments made Between Associated Companies of Different Member States, 2003 O.J. (L 157) 49.

15. *Id.* art. 1.

16. Council Directive (EU) 2016/1164 of 12 July 2016 Laying Down Rules Against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, 2016 O.J. (L 193) 1, *amended by* Council Directive (EU) 2017/952 of 29 May 2017 Amending Directive (EU) 2016/1164 as Regards Hybrid Mismatches with Third Countries, 2017 O.J. (L 144) 1.

exempt, or to any other tax which may be substituted for any of those taxes.[17]

In the case of Sweden, companies known as "aktiebolag, bankaktiebolag, försäkringsaktiebolag, ekonomiska föreningar, sparbanker and ömsesidiga försäkringsbolag" are listed in Annex I, Part A, and with respect to the United Kingdom, the Annex states that "companies incorporated under the law of the United Kingdom" are covered.[18]

With respect to taxes referred to in Annex I, Part B of the Tax Merger Directive, the Swedish Income Tax Act (ITA)[19] is covered with respect to Sweden, and the corporation tax with respect to the United Kingdom.

A general observation with respect to all corporate tax directives is that even though Member States are only obliged to implement them with respect to cross-border situations, Sweden as well as some other countries have found it efficient to extend the rules provided for by the directives also to purely domestic situations. That is for instance the case with the Tax Merger Directive, whose provisions Sweden has chosen to apply also to domestic reorganizations. Actually, the opposite situation may also occur, namely that the national tax laws are extended to cover also taxpayers in third countries. Sweden, for instance, has extended the tax provisions on mergers and divisions to cover not only companies resident within the European Union but to any foreign company (as defined).

Another observation is that the directives may provide minimum rules. For instance, Article 3 of the Parent-Subsidiary Directive states that to be a parent company it must hold at least 10% of another company, which is then regarded as a subsidiary for purposes of exempting dividends from tax. However, Sweden has gone further and is normally not taxing intra-corporate dividends at all, even if the holding is only one share.

III. Some National Effects

A first observation concerns the United Kingdom. The United Kingdom has implemented the E.U. tax directives into national law. Leaving the

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17. Tax Merger Directive, *supra* note 12, art. 3.

18. *Id.* annex 1, pt. A (aa)–(ab).

19. Inkomstskattelag (Svensk författningssamling [SFS] 1999:1229), as amended (referred to as ITA in footnote citations that follow).

European Union does not in itself make the existing tax legislation based on directives void. For that to happen, the national tax laws implementing the directives must be amended by new legislation. That may not necessarily take place. For instance, if the United Kingdom, as is provided for by the Parent-Subsidiary Directive, has national tax rules that de facto exempt U.K. companies from being taxed on dividends received from subsidiaries in a Member State of the European Union, that provision will continue to apply. It is up to the United Kingdom to decide which rules, having an origin in a tax directive, will continue to apply. Of course, its legislative body is free to change the rule, but it may well decide not to if it finds the rule well-motivated and functioning.

Turning to Sweden, Brexit will affect both individual and corporate taxpayers. Some effects are such that they may result in immediate taxation of deferred taxes; others may have more long-term effects. One should also note that a negative tax effect because of Brexit may be alleviated because Sweden and the United Kingdom have concluded a tax treaty, containing, for instance, a nondiscrimination article.[20]

A. Individual Taxpayers

I will start with some situations where individuals may be affected by Brexit. It follows from the free movement of natural persons that a Member State may, as a starting point, not have national provisions containing a restriction on individuals migrating (e.g., through an exit tax, unless justified; there are many cases on exit taxation from the CJEU[21]).

Sweden does not have a general exit tax on individuals (other than on business assets).[22] However, an exit provision does exist in one specific case. If there has been an exchange of shares, the gain on the shares is realized at the time of the exchange. Sweden has long allowed

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20. Convention Between the United Kingdom of Great Britain and the Northern Ireland and the Kingdom of Sweden for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, U.K.-Swed., art. 22, Mar. 26, 2015.

21. *See, e.g.*, Marjaana Helminen, EU Tax Law: Direct Taxation 72–75 (2018).

22. There exists a trailing tax provision, which means that sale of shares within ten years after emigrating can be taxed provided that a tax treaty does not prevent such a taxation, chapter 3, § 19 ITA (termination of residence rules).

for a deferral in such case, since before Sweden became a member of the European Union and the Tax Merger Directive became applicable. Sweden used to tax deferred gains after an exchange of shares if the individual no longer was a tax resident of Sweden.

In 2008 Sweden's Supreme Administrative Court decided that this exit rule was contrary to the TFEU.[23] Consequently, the relevant tax provision, chapter 48a, § 11 ITA, was amended. Now the requirement for continued deferral is that the individual be resident in a country within the European Economic Area. The United Kingdom is, as of January 31, 2020, no longer a member of the European Economic Area. This means that former Swedish residents, having participated in an exchange of shares, that have migrated to the United Kingdom and taken up residence there, on February 1, 2020, no longer are residents in an EEA-country. The tax deferral should therefore be recaptured as of that date according to the wording of the statute.

Another situation likely to occur on emigration is that the individual sells his or her private home in Sweden and buys a new home in the new residence country. Sweden allows for a tax deferral also in this situation. The general idea is to promote mobility in the housing market, and as the individual selling a home only reinvests the capital gain in another house or condominium, the gain should be deferred until the acquired home is sold. Of course, if the individual purchases yet another permanent home, a renewed tax deferral is obtained.

Originally, the deferral applied only to sales of permanent homes in Sweden when the new home also was located in Sweden. As a result of CJEU case law, the provisions were extended. Now, acquisitions of permanent homes in another EEA-country also qualify, chapter 47, § 5 ITA. This situation is not uncommon (e.g., Swedish residents moving to a southern country in Europe for retirement or to London to work. And, when the permanent home acquired in another EEA-country once is sold, a new deferral may be obtained).

In this case, the tax consequences of Brexit are not as clear as in the case of exchange of shares. Normally, the important issue was whether the new home was located in the EEA at the time it was acquired. At that time, the United Kingdom was a member. Brexit itself will therefore not automatically trigger recapture of the deferral. But if for instance an individual after Brexit moves back to Sweden and gets tax residence in Sweden, sells their permanent home in the United

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23. Regeringsrättens årsbok [RÅ] 2008 not. 71.

Kingdom, and acquires a home in Sweden, then a deferral of the capital gain is not allowed. If the sale in that situation would have been of a home located within the EEA, it would have qualified for deferral. This situation is more complex, but it is in any case clear that Brexit will lead to negative consequences when selling permanent homes both for individuals emigrating to the United Kingdom as well as for individuals moving in the other direction.

B. Corporate Taxpayers

Now, turning to corporate taxpayers, there will be many consequences. I will first just briefly say something on the classification and treatment of foreign entities in the Swedish Income Tax Act. There are a number of tax provisions in the Swedish tax law, primarily the Income Tax Act, where the tax effects depend on what kind of foreign legal entity it is and in what kind of jurisdiction it is located. For instance, a foreign legal entity can take part in a Swedish reorganization without immediate tax effects (e.g., incorporate a permanent establishment in Sweden, be a surviving company in a merger, be part of a group of companies without affecting the possibilities to offset Swedish source income and losses within the group).

First of all, foreign legal persons cannot be tax residents in Sweden, as Sweden only applies incorporation as the criterion for corporate residence. A *foreign legal person* (utländsk juridisk person) is defined in chapter 6, § 8 ITA. A foreign legal person is a foreign association that (1) can acquire rights and assume obligations, (2) can be a party before courts and authorities, and (3) whose owners may not freely dispose of the assets of the association.

Thus, one has to determine whether the foreign association meets those criteria in that other country. One way to put this is to say that Sweden, in determining whether the foreign association is a legal person, applies in a relatively crude way its own domestic standards for determining legal personality (i.e., the three criteria).

A *foreign company* is defined in chapter 2, § 5a ITA as a foreign legal person (as defined) that in its country of residence is subject to a taxation that is similar to that of a Swedish company (aktiebolag). This means that one has to compare the effective taxation of the foreign legal person with that of a Swedish company. There is no set statutory level, but a level of around 10–15% effective tax rate should be sufficient. Alternatively, the provision states that a foreign legal person resident in a treaty country is subject to income tax in that country and

also qualifies as a foreign company. In conclusion, a foreign company, as defined, is subject to a reasonable level of taxation.

These are the basic definitions. However, for different purposes, the definition of which foreign companies qualify under a specific tax provision may vary. The reasons vary, but sometimes it is the effect of E.U. primary or secondary law. For instance, in order for a tax provision to conform to the Treaty on the Functioning of the European Union and to the EEA-agreement, a foreign company must be resident in a Member State of the European Union or in a country that is a party to the EEA-agreement. In other provisions, the definition of which foreign legal persons qualify depends on the effect of E.U. secondary law (i.e., the implementation of the corporate tax directives that forces Sweden to cover certain foreign legal persons).

I will now describe a few situations where the criteria in the Swedish Income Tax Act for including different types of foreign companies may lead to companies resident in the United Kingdom being directly affected by Brexit or may lead to Swedish companies being affected because there are U.K. companies in the group.

IV. Reorganizations

In many cases, it is fair to say that there will be no effect of Brexit. The reason is that the Swedish legislator has used the general criteria *foreign company* in describing which entities can be part of a reorganization. As long as British companies fulfill the requisites for being a foreign company, as they most likely will, they qualify.

For instance, chapter 23 ITA provides the rules establishing when it is acceptable to sell assets at below market prices between (related) enterprises subject to Swedish income tax. For purposes of that chapter the term enterprise (företag) is defined to cover, in addition to certain Swedish entities (such as a Swedish limited liability company, "svenska aktiebolag"), also foreign companies.

If certain other conditions are met, these types of associations can sell assets at below market value between each other. The acquiring company will get the sales price as the cost basis, so there is carry over of the cost basis. Among the conditions to be met is that the acquiring entity must be subject to Swedish business tax on the acquired assets. From this follows, for instance, that a foreign company can sell the assets of its Swedish permanent establishment to a subsidiary at a cost basis, which could be a way of incorporating the permanent establishment. Conversely, a subsidiary could sell its assets to the U.K. parent also at cost

basis, establishing a Swedish permanent establishment. These types of reorganizations can therefore take place without immediate tax consequences.

Sweden has also in many other cases included foreign companies in the definition of which entities qualify for a certain type of reorganization. For instance, when it comes to implementing the Tax Merger Directive, foreign companies are covered by the definition of those enterprises that can merge or divide under the provisions in chapter 37 ITA. The surviving company takes over all tax attributes from the surrendering company. British companies qualifying as foreign companies can therefore participate in such reorganizations (provided that company law allows for a merger or division). For tax deferral, the assets must be linked to a permanent establishment in Sweden.

Somewhat surprisingly, there is one situation that is not covered. For instance, if a Swedish company merges into another company resident in the EEA, with the effect that a permanent establishment in another Member State will change ownership, a provision in the Tax Merger Directive states that Sweden in this case shall provide for a tax credit for a fictitious tax (i.e., the tax that would have been paid in the other country had it not been for the Tax Merger Directive). This provision is implemented in such a way as not to cover mergers affecting permanent establishments in countries outside the EEA. Permanent establishments in the United Kingdom will thus not be covered by this foreign tax credit provision.[24] So in such cases of fictitious credit, there will be a disadvantage after Brexit. Similar effects arise in some cases (e.g., transfer of assets, chapter 38, § 19 ITA, and partial divisions, chapter 38a, § 21 ITA).

As regarding exit taxation for business assets, general provisions in chapter 22 ITA provide for taxation at market value. Because of the freedom of establishment in the TFEU, there are provisions providing for tax deferral. They will soon be amended as a result of the exit provisions in the ATAD. However, in those cases where deferral is provided, it requires that the other state is a country within the EEA, thus normally excluding the United Kingdom.[25]

The Swedish group taxation rules provide for offsetting of losses and profits through so-called group contributions, deductible for the

24. Ch. 37, § 30 ITA.

25. Ch. 63, § 14 Skatteförfarandelagen (Svensk författningssamling [SFS]: 2011:1244), as amended.

paying company and taxable to the receiving company. In order to qualify, the companies must normally be wholly owned by a Swedish parent company. However, according to chapter 35, § 2a, ITA, in applying the provisions in the chapter on group contributions, also foreign companies resident within the EEA qualify as Swedish companies, provided that the recipient of the group contribution is taxed on the contribution in Sweden.

One consequence is that such a foreign company can be a parent company having two Swedish subsidiaries, using the group contribution provisions. Furthermore, Swedish permanent establishments of a qualifying foreign company can pay and receive group contributions. There are also other positive effects of the provision in chapter 35, § 2a ITA. For instance, a Swedish parent can give group contributions to its second-tier Swedish subsidiary, even if there is a foreign intermediary. Group contributions can in this case also go in the other direction.

Thus, it is normally not important if there are EEA-companies somewhere in the group structure. To corporate taxpayers, it has therefore not been of particular importance where EEA-companies, including U.K. companies, are located in the structure. This will now change. Of course, the non-discrimination article in the tax treaty between Sweden and the United Kingdom may provide relief, but it will not cover all situations.[26] So there will now be instances where groups need to reorganize to be able to continue applying the group contribution rules.

Sweden also introduced group relief rules on cross-border losses following the outcome of *Marks & Spencer* and other cases.[27] However, the possibility of deducting foreign losses are restricted to losses in subsidiaries resident within the EEA.[28] After Brexit, Swedish parent companies will not be able to deduct final losses of subsidiaries in the United Kingdom.

Another more indirect effect of Brexit can be found in the provisions on how to compute the amount of dividends from a closely held company an individual can receive subject to only 20% tax.[29] The more

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26. *See, e.g.*, Regeringsrättens årsbok [RÅ] 1993 ref. 91 II.

27. C-446/03 Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes), 2005 E.C.R. I-10837.

28. Ch. 35a, § 3 ITA.

29. These rules found in chapter 57 of the ITA are very complex. Dividends from a closely held company can be taxed within a range from 20% up to around 57%.

salaries that are paid by the company, the more dividends can be distributed at this low tax rate. If the salary paid is 100, then the shareholder can receive dividends of 50 taxed at 20%. Not only salaries paid by the distributing company are counted, but also those of its subsidiaries. And, also subsidiaries located within the EEA count.[30] This provision is there to safeguard that the rules conform to the freedom of establishment provisions in the TFEU and the EEA Agreement. One effect of the United Kingdom leaving is that closely held Swedish parent companies may be less inclined to invest in subsidiaries in the United Kingdom.

Sweden has made the necessary implementation of the Interest–Royalty Directive in chapter 6a ITA, concerning royalty payments. It covers payments to legal persons resident in the European Union. U.K. companies will therefore not be covered anymore. Of course, Article 12 of the Sweden–U.K. tax treaty (2015) states that the residence state has the sole right to tax royalties, therefore excluding Swedish source taxation. But there are two situations that will be complicated. If the recipient is a company within the European Union and a dual resident, and under the tax treaty between that E.U.-state and the United Kingdom is considered a resident of the United Kingdom, then Sweden will not exempt the royalty from source taxation.[31] The Sweden-U.K. tax treaty will probably not provide for relief in that situation. Secondly, if the recipient is a company within the European Union, but the intangible is linked to a permanent establishment outside the European Union, the exemption from source taxation does not apply either.[32] Also in this case it is doubtful whether the treaty with the United Kingdom can provide any relief.

A final example on intra-corporate dividend distributions—Swedish companies are, with some exceptions, exempt from tax on any dividends on non-listed shares, regardless of holding.[33] Also, dividends on a single share will be exempt.[34] That exemption also applies to foreign companies resident within the European Union, if the shares are held through a permanent establishment in Sweden. Before Brexit, a company resident in the United Kingdom with a permanent establishment in Sweden would not be taxed in Sweden on qualifying shares. After Brexit, that exemption does not apply.

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30. Ch. 57, § 17 ITA.
31. Ch. 6a, § 4 ITA.
32. Ch. 6a, § 5 ITA.
33. Ch. 24, §§ 31–35 ITA.
34. Ch. 24, § 31 ITA.

The Withholding Tax Act (Kupongskattelagen) does not save the permanent establishment either. That act states that Swedish companies shall levy a 30% withholding tax on cross-border dividends.[35] However, there is no withholding tax if the recipient is a foreign company that would have qualified under the abovementioned provisions in chapter 24. So a U.K. company qualifies, and no withholding tax is normally levied.

Sadly, the Withholding Tax Act does not apply if the dividend is properly allocated to a permanent establishment in Sweden.[36] We are then kicked back to the Income Tax Act, which prescribes that in order for the permanent establishment not to be taxed on the dividends, it must be a permanent establishment of a foreign company resident in the European Union. These is no exemption, and therefore corporate tax must be paid (21.4% for 2019–2020, thereafter 20.6%). To make the situation complete, no relief from that corporate tax is provided for by the U.K.-Sweden tax treaty, as it is income of a permanent establishment and therefore kicked out of Article 10.[37]

V. Concluding Remarks

It is obvious that Brexit will lead to many income tax consequences. That is true whether it is a so called soft or hard Brexit. The main issue is that the United Kingdom will not be a member of the European Union, nor a member of the EFTA and thus party to the EEA-agreement. The criteria often used in the Swedish tax provisions for beneficial tax treatment, that the taxpayer is resident within the European Union or the EEA, are not fulfilled whether the Brexit is soft or hard.

I have only been able to make a short overview of some of the issues. One could have thought that the general discussion of the consequences would have been more intense. At least in Sweden, it has been virtually nonexistent. There has been much more focus on indirect tax issues. That is understandable, as there will be a concrete border over which goods and services must be handled for value-added tax purposes and with respect to excise taxes. There is no more intra-community sale, and the United Kingdom will be a third country.

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35. §§ 4-5 Kupongskattelag (Svensk författningssamling [SFS] 1970:624), as amended.

36. *Id.* § 4.

37. U.K.-Swed. Tax Treaty, *supra* note 20, art. 10, ¶ 4.

Still, I think there are measures that a national tax legislator can do, whether it is Sweden, another E.U. Member State, or the United Kingdom. Sweden is not obliged to exclude individuals or companies resident in the United Kingdom from being covered by different Swedish tax provisions. As far as I can understand, nothing prevents, for instance, Sweden from accepting that an individual that has obtained tax residence in the United Kingdom can continue to have a tax deferral on capital gains after an exchange of shares.

This is even truer when it comes to corporate taxpayers. Here there already exist many situations where the Swedish legislator accepts that a foreign company, as defined, irrespective of its tax residence, can obtain the same tax treatment as Swedish companies. In my opinion, there are often no reasons to exclude foreign companies resident outside the European Union, or the European Economic Area. This is especially true after BEPS, when transparence has increased and exchange of information has become more efficient with countries that fulfill the Swedish criteria for hosting foreign companies.

If the legislator would like a more limited approach, there are other options that would specifically be aimed at making the consequences of Brexit less hard. An example can be found in chapter 2, § 2a ITA. That provision deals with the reverse situation, namely that a country becomes a member of the European Economic Area. Irrespective of which date of the calendar year that occurs, when applying the provisions in the Income Tax Act, that country will be regarded as being a member the entire taxable year.

That entry provision solves a number of timing issues where tax provisions contain a reference to the taxpayer being in a certain position during the taxable year. For instance, in the provisions on group contributions, there is a requirement that the parent company normally must own the subsidiary during the entire taxable year in order for the group to qualify. If that provision were not there, a group with, for example, the parent from the country entering the EEA, would have to wait until the following taxable year to qualify.

A similar provision for exiting members of the European Economic Area would alleviate the situation. The statute could state that, in applying the Income Tax Act, a country will be regarded as a member the entire taxable year. Using the group contribution example, that would mean a group with a U.K. parent and Swedish subsidiaries could, without having to resort to the nondiscrimination article of the tax treaty, give each other group contributions for the taxable year 2020. And, former Swedish residents that have immigrated to the United Kingdom

would find themselves resident within the EEA at least until the January 31, 2020.

Of course, it would only be a temporary relief to extend the application of the Income Tax Act until the end of 2020. One could have a more permanent solution as well. It would be possible to state that a former member of the EEA will still be regarded as a member of the EEA when provisions of the Income Tax Act is applied, unless the applied provision states otherwise. If the Swedish legislator would do so, the tax effects would be minimized. Groups would not have to reorganize. Individuals would still be able to get a tax deferral if selling a Swedish permanent home and buying a new home in the United Kingdom.

There are counterarguments. One argument could be that the directive on exchange of information is no longer applied to the United Kingdom. However, there is an exchange of information article in the tax treaty; that normally should suffice. Another, more relevant argument is that of reciprocity. Why should Sweden unilaterally continue to apply its income tax provisions as if the United Kingdom is a member of the EEA if the United Kingdom does not? I think it is hard to give a general answer to that question. One would have to analyze each tax provision to see if it is justified to do so even without reciprocity. Many times it would probably only make Sweden attractive for investments, if for instance corporate taxpayers would not have to conform the group structure with the income tax rules. In other instances, one could require reciprocal arrangements.

My description and analysis have shown that even with the limited approach I have had in this contribution, the Swedish income tax issues from Brexit are numerous and sometimes serious. I have no doubt that other remaining E.U. Member States and, to a lesser extent, EEA countries, have similar issues. The United Kingdom also must have many tax issues to deal with, and this is just a scratch on the surface. How will national courts deal with established case law, where the TFEU has had an impact on the interpretation, when similar situations arise but the United Kingdom is no longer a member? And, one could go on with other areas that over the years have been harmonized (e.g., corporate law). I am convinced that the legislator will be busy also in those areas.