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**To What Extent Can Member States Have
Anti-Avoidance Rules Limiting Interest
Deduction? – an Analysis From a Swedish
Perspective**

by

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Contents

Contents	I
Summary	II
Abbreviation list	III
1. Introduction	1
1.1 Background	1
1.2 Aim	2
1.3 Method and material	2
1.4 Delimitations	3
1.5 Outline	4
2. The Swedish interest deduction limitation rules	5
2.1 Companies covered by the rules	5
2.2 The first main rule and exceptions	6
2.2.1 The first main rule	6
2.2.2 The 10 %-rule	7
2.2.3 The pension fund rule	8
2.2.4 The exception to the 10 %-rule	8
2.2.5 The business purpose rule	10
2.3 The second main rule and exceptions	12
3. Compatibility with the fundamental freedoms of EU law	13
3.1 Introduction	13
3.2 Applicable freedom(s)	13
3.3 Discrimination and restriction	18
3.4 Justifications by overriding reasons in the public interest	22
3.4.1 Introduction	22
3.4.2 The safeguarding of effectiveness of fiscal supervision and the need to ensure recovery of a tax debt	22
3.4.3 The cohesion of the tax system	23
3.4.4 The safeguarding of the balanced allocation of taxing rights between Member States	24
3.4.5 The need to prevent the double use of losses	26
3.4.6 The prevention of tax avoidance	26
3.4.7 The territoriality principle	28
3.5 Proportionality	28
4. Conclusion	34
List of references	IV

Summary

The Swedish Government introduced the Swedish interest deduction limitation rules as it was identified that the preferential tax treatment of debt in comparison to equity had been used by Multi-National Enterprises for tax planning purposes. The Swedish rules have, however, been under investigation of the European Commission, which, in a letter of formal notice to the Swedish Government, has stated that the rules are incompatible with the fundamental freedoms of EU law. The purpose of the thesis is, thus, to analyse to what extent Member States can have anti-avoidance rules limiting interest deduction and more specifically whether the Swedish rules are compatible with the fundamental freedoms of EU law. Other international obligations of Sweden such as State aid, secondary EU law and tax treaties have not been regarded.

Applying the legal dogmatic research method it has been shown that the Swedish interest deduction limitation rules apply to affiliated companies i.e. where a company has substantial influence in another company or if the companies are mainly under the same management. The main rules are that interest expenses are not deductible between affiliated companies or for back-to-back loans, which are used for the acquisition of shares in an affiliated company or a company that will become affiliated after the acquisition. There are some exceptions to this, according to which deduction of interest expenses is allowed if the beneficial owner of the interest income would have been taxed with at least a 10 % tax rate, following the hypothetical test. Deduction of interest expenses, however, can be denied, even though the interest income is taxed with at least 10 %, if the main reason for the debt arrangement is that the affiliated companies are to obtain a substantial tax advantage. Deduction is, further, allowed, even though the interest income is taxed with a tax rate below 10 %, if the transaction is mainly business motivated. There are specific rules for pension funds.

The Swedish interest deduction limitation rules are to be examined with the freedom of establishment as definite influence is a prerequisite for the application of the rules. Even though the Swedish interest deduction limitation rules apply regardless of nationality and residency of the taxpayer are the rules to be considered indirectly discriminatory. The Swedish rules are more likely to apply to cross-border situations than to Swedish wholly internal situations, as the Swedish tax rate is 22 %. It is also, in the preworks, stated that the aim of the rules is to prevent evasion of the Swedish tax base. The Swedish rules cannot be justified by the cohesion of the tax system or the safeguarding of the balanced allocation of taxing rights between Member States due to lack of symmetry but the prevention of tax avoidance can justify the rules since wholly artificial arrangements are restricted. The Swedish rules are, however, not proportionate since the rules have a wider scope of application than to only wholly artificial arrangements, have a presumption of tax avoidance and are not in line with the principle of legal certainty. The Swedish interest deduction limitation rules are, thus, incompatible with the freedom of establishment.

Abbreviation list

Art.	Article
CFC	Controlled Foreign Company
Ch.	Chapter
ECJ	European Court of Justice
EU	European Union
MNE	Multi-National Enterprise
N	Footnote
No.	Number
OECD	Organisation for Economic Co- operation and Development
P.	Page
Para.	Paragraph
Paras.	Paragraphs
Prop.	Proposition
SITA	Swedish Income Tax Act
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
V	Versus
Vol.	Volume

1. Introduction

1.1 Background

There are general differences in tax treatment between debt and equity on a national and an international level, creating a lack of neutrality between the financing forms. Return on equity i.e. dividends are generally not deductible for the distributor and, as a relief of economic double taxation, not taxed in the hands of the receiver. Return on debt i.e. interest, however, is generally deductible for the borrower and taxed in the hands of the lender. On an international level are dividends often taxed in the source State of the investment while interest is often taxed in the resident State of the lender. Withholding taxes are, in addition, often lower for interest than for dividends. This lack of neutrality between dividends and interest for tax purposes has created an incentive for businesses to use debt as financing form, instead of equity.¹

The preferential tax treatment of interest has been used by Multi-National Enterprises (MNEs) to shift profits from high-tax jurisdictions to low-tax jurisdictions through debt financing and subsequent interest payments, as pointed out by the Organisation for Economic Co-operation and Development (OECD) in the base erosion and profit shifting (BEPS) discussion.² The BEPS issue with the use of interest was identified in Sweden in the so-called “industrivärden-målen” where the Swedish Supreme Administrative Court ruled that the Swedish General Anti Avoidance Rule (GAAR) is not applicable on structures where interest payments and group contribution payments are combined in order to achieve low or non-taxation in international groups.³ Sweden, subsequently, introduced Specific Anti Avoidance Rules (SAARs) in the form of interest deduction limitation rules in order to prevent the loss of tax revenue through such and similar structures.⁴

The hierarchical solution to the legal pluralism of European Union (EU) law and the national laws of the Member States creates an obligation on the Member States to comply with EU law, even though direct taxation is part

¹ Organisation for Economic Co-operation and Development (OECD) (2014), *Public Discussion Draft: BEPS Action 4: Interest Deductions and Other Financial Payments*, OECD Publishing, page (p.) 6; OECD (2013), *Addressing Base Erosion and Profit Shifting*, OECD Publishing, p. 43; Storck, A., *The Financing of Multinational Companies and Taxes: An Overview of the Issues and Suggestions for Solutions and Improvements*, Bulletin for International Taxation, Volume (Vol.) 65 number (no.) 1, 2011, p. 27 et seq.; and van Dongen, T.J.C., *Thin Capitalization Legislation and the EU Corporate Tax Directives*, European Taxation, Vol. 52 no. 1, 2012, p. 20.

² OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, p. 16 et seq.; OECD (n 1), 2014, p. 6; OECD (n 1), 2013, p. 43; Vleggeert, J., *Interest Deductions Based on the Allocation of Worldwide Debt*, Bulletin for International Taxation, Vol. 68 no. 2, 2014, p. 103 et seq.; Storck (n 1), 2011, p. 27 et seq.; and van Dongen (n 1), 2012, p. 20.

³ RÅ 2007 ref. 84; and RÅ 2007 ref. 85. The cases were decided on the basis of the judgment in RÅ 2001 ref. 79, which had similar circumstances.

⁴ Chapter (ch). 24, article (art.) 10a-f, Swedish Income Tax Act (1999:1229) (SITA).

of their national sovereignty.⁵ Consequently, even though it may be tempting for Member States to draft national anti-avoidance rules in order to hinder the loss of tax revenue, the rules cannot constitute an unjustified restriction on the free movements within the EU.⁶ The Swedish interest deduction limitation rules must, thus, be in line with the rule-of-reason doctrine created by the ECJ.⁷ The ECJ case law regarding national anti-avoidance rules include national thin capitalization rules and interest deduction limitation rules where conditions have been set up for such rules to be compatible with EU law.⁸

The Swedish interest deduction limitation rules have been subject to the European Commission's investigation since the beginning of 2013 and several letters have been exchanged between the European Commission and the Swedish Government.⁹ The European Commission sent a letter of formal notice to the Swedish Government in late 2014 where it was stated that the Swedish rules are incompatible with the fundamental freedoms of EU law.¹⁰ The Swedish Government has responded to the letter of formal notice and presented its view, contrary to the European Commissions, that the rules are compatible with the fundamental freedoms of EU law.¹¹ It can be expected that the European Commission will send a reasoned opinion to the Swedish Government with a time period in which the Swedish interest deduction limitation rules must comply with EU law and, if this is not successfully accomplished, the European Commission will, most likely, refer the case to the ECJ.¹²

1.2 Aim

The aim of the thesis is to analyse to what extent Member States of the EU can have anti-avoidance rules limiting interest deduction. The focus of the thesis is on the Swedish interest deduction limitation rules and whether the named rules are compatible with the fundamental freedoms of EU law. The analysis consists of a determination of the applicable fundamental freedom and whether the Swedish rules are discriminatory, restrictive, justified by an overriding reason in the public interest and proportionate.

1.3 Method and material

The leading question of the thesis is legal dogmatic as it is to be analysed whether there is a conflict between two different legal sources. It is, therefore, logical to use the legal dogmatic research method for the purposes of the thesis. The legal dogmatic research method means that research is

⁵ C-26/62 Van Gend en Loos; C-6/64 Costa v E.N.E.L; C-35/98 Verkooijen, paragraph (para.) 32; C-319/02 Manninen, para. 19; and C-190/12 Emerging Markets Series, para. 38.

⁶ See for example 270/83 Commission v France (Avoir Fiscal).

⁷ C-55/94 Gebhard, para. 37.

⁸ See for example C-324/00 Lankhorst-Hohorst; C-524/04 Test Claimants in the Thin Cap Group Litigation; and C-282/12 Itelcar.

⁹ EU Pilot 4437/13/TAXU – Sweden, 09/01/2013.

¹⁰ SG-Greffe (2014) D/17633, case no. 2013/4206, 24 November 2014.

¹¹ Answers by the Swedish Government to the European Commission, dnr. Fi2013/153; and dnr. Fi2014/4205.

¹² See Art. 258 Treaty on the Functioning of the European Union (TFEU).

conducted of the current law as it is laid down in written and unwritten sources of law.¹³ This is conducted in a two-part process where the sources of law are identified and then interpreted, analysed, systemised and confronted with each other.¹⁴

For the purposes of explaining the Swedish rules are Swedish legislation, Swedish preworks, Swedish case law (including rulings by the Swedish Council of Advance Tax Rulings) and literature in the form of opinions of the Swedish Tax Agency, books and articles used. The sources of law are used in a hierarchy as listed. The explanation is given for the purpose of making the reader aware of the Swedish rules as they stand and prepare the reader for the upcoming analysis. As the Swedish rules are explained in English there is a risk of language discrepancies. Key words are, therefore, followed by a Swedish translation in order to limit the possible negative effects of the translation.

When analysing whether the Swedish interest deduction limitation rules are compatible with the fundamental freedoms of EU law are the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), ECJ case law, official publications by the European Commission, opinions by the Swedish Government, Swedish case law and Dutch case law used. The TEU, TFEU and ECJ case law are used when identifying the relevant EU law on the matter and in the compatibility analysis. The official publications by the European Commission, opinions by the Swedish Government, Swedish case law and Dutch case law are used for the purpose of informing the reader and give the reader perspective as to what the European Commission and the Swedish Government have for opinion and how national Courts have ruled on the matter.

1.4 Delimitations

Only the Swedish interest deduction limitation rules will be explained and analysed in the thesis. Other thin capitalization rules or interest deduction limitation rules in other jurisdictions will not be covered. The thesis is limited to the Swedish rules since the rules in question are subject to investigation by the European Commission.

The thesis is, further, limited to the fundamental freedoms of EU law. The thesis will not cover other aspects of EU law such as State aid¹⁵, the Parent-Subsidiary Directive¹⁶ or the Interest-Royalty Directive¹⁷. An analysis of the compatibility of a domestic rule with EU law is, logically, initialled with primary law and then, if compatibility is found, continued with secondary

¹³ Vranken, J., *Exciting times for Legal Scholarship*, Bju Tijdschriften, February 2012, p. 43. Source found via Douma, S., *Legal Research in International and EU Tax Law*, Kluwer, 2014, p. 18.

¹⁴ Douma (n 15), 2014, p. 20.

¹⁵ Art. 107-109 TFEU.

¹⁶ 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, Official Journal of the European Union, L 345/8, 29 December 2011.

¹⁷ 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, Official Journal of the European Union, L 157/49, 26 June 2003.

law. State aid is part of EU primary law but, as the European Commission has limited its investigation of the Swedish interest deduction limitation rules to the fundamental freedoms of EU law, it will not be part of the thesis. The Parent-Subsidiary Directive and the Interest-Royalty Directive are considered as secondary law and are to be examined after primary law, e.g. the fundamental freedoms. The Directives are, therefore, not part of the analysis for the purposes of the thesis.

Sweden has an international legal commitment to follow double tax treaties concluded with other States and it is, therefore, possible for a conflict to arise between on one hand the treaties and on the other hand Swedish national law. A conflict can arise since the relationship between the Swedish double tax treaties and Swedish national law is an unresolved issue.¹⁸ Since, however, double tax treaties are not part of EU law, it is not relevant for the achievement of the aim of the thesis and it is not covered.

The thesis is based on research until 10 May 2015 and consideration is, thus, only taken to published material up to that date.

1.5 Outline

Following the introduction are the Swedish interest deduction limitation rules presented (2), the purpose of which is to inform the reader about which companies are covered by the rules (2.1), the first main rule with exceptions (2.2) and the second main rule with exceptions (2.3). The thesis proceeds with an analysis of whether the Swedish interest deduction limitation rules are compatible with the fundamental freedoms of EU law (3). The analysis is initiated with a short introduction (3.1) and proceeds with an investigation of which fundamental freedom is applicable on the Swedish rules (3.2), whether the rules are discriminatory or restrictive (3.3), justified by overriding reasons in the public interest (3.4) and proportionate (3.5). The analysis is followed by concluding remarks (4).

¹⁸ RÅ 2008 ref. 24 and RÅ 2008 ref. 61 compared to RÅ 2010 ref. 112. The issue is explained in Dahlberg, M., *Ränta eller kapitalvinst: Grundproblem i kapitalinkomstbeskattningen – särskilt vad gäller finansiella instrument i gränslandet mellan lånekapital och eget kapital*, Iustus förlag AB, Uppsala, 2011, p. 144 et seq..

2 The Swedish interest deduction limitation rules

2.1 Companies covered by the rules

The general rule in the Swedish tax system is that interest is fully deductible for businesses.¹⁹ The general rule, however, has some exceptions since Sweden has introduced anti-avoidance rules with the purpose of combating tax avoidance with the use of interest. The present Swedish interest deduction limitation rules came into force 1 January 2013 and the legal consequence is that deduction of interest expenses related to debt between affiliated companies is not allowed under certain circumstances.²⁰

The Swedish interest deduction limitation rules are applicable on affiliated companies (“intressegemenskap” in Swedish) and the term has, therefore, a central role in the application of the rules. Companies covered by the rules are legal persons and Swedish partnerships.²¹ This means that the Government, municipalities and country councils are included in the definition.²² Further, foreign companies that correspond to Swedish companies are also covered by the rules.²³ The same applies to European Economic Interest Groupings, European Cooperative Societies and European Groupings of Territorial Cooperations.²⁴

There are two alternative definitions of when companies are considered as being affiliated. According to the first definition are companies affiliated if a company, directly or indirectly, has substantial influence in another company through ownership or in other ways.²⁵ Parent companies and subsidiaries are covered by this definition and the formulation “directly or indirectly” means that companies that are owned by the parent company through its subsidiaries also can be part of the affiliation.²⁶ The meaning of substantial influence is not stated in the law but the Swedish Government has, in the preworks (“förarbeten” in Swedish) to the rules, explained the term to some extent. It is explained that the term substantial influence is a customary term that is used in several other tax related contexts in Swedish tax law and means that ownership is not the only factor to be considered but that an ownership of just below 50 % is covered.²⁷ It can be noted that the term substantial influence is, in the preworks to the SITA, explained as 40 % ownership or more, which can imply that an ownership of as low as 40 % can be enough for companies to be considered as affiliated.²⁸ The Swedish Tax Agency, however, is of the opinion that factors such as the relationship

¹⁹ Ch. 16, art. 1, SITA.

²⁰ An overview of the rules can be found in a commentary by the Swedish Tax Agency ”Handledning för beskattning av inkomst vid 2014 års taxering”, del 2, Skatteverket, Stockholm, 2014, p. 1417-1433.

²¹ Ch. 24, art. 10a para. 2, SITA.

²² Borg, E.P., *Kommentarer till Inkomstskattelagen (1999:1229)*, Karnov Internet, 24 Kapitel 10a§.

²³ Ch. 2, art. 2, SITA.

²⁴ See ch. 5, art. 2, SITA; ch. 2, art. 4a, SITA; and Dahlberg (n 20), 2011, p. 369.

²⁵ Ch. 24, art. 10a para. 1 1p, SITA.

²⁶ Proposition (prop.) 2012/13:1 p. 239 with reference to prop. 2008/09:65 p. 83.

²⁷ Prop. 2012/13:1 p. 239.

²⁸ Prop. 1999/2000:2 part 1 p. 502 ff; and Borg (n 24), 24 Kapitel 10a§.

between the owners and formal and informal ownership agreements are to be considered and that an ownership far below 40 %, therefore, can be considered as substantial influence.²⁹ The Swedish Tax Agency has in a response (“dialogsvar” in Swedish) to a MNE stated that an ownership of 10 % was enough to be considered as substantial influence in those specific circumstances.³⁰ This has been highly criticised in legal articles and the detailed percentage of ownership needed in relation to other circumstances in a specific case will be unclear until the legislator or the Swedish Supreme Administrative Court explains it further.³¹

According to the second definition are companies considered affiliated if the companies are mainly under the same management.³² The legal text does not give further explanation of the meaning of the definition but guidance can be found in various preworks. It is stated that the definition targets groups of minority-owned associated companies (“oäkta koncerner” in Swedish) where for example two unrelated parties are under control of a third party or where a parent company has control of its subsidiary (the definition overlaps with the previously explained definition).³³ It is the actual influence and not the formal influence that is decisive.³⁴ Regarding the term “mainly” it is stated that it is a quantitative requirement of at least 75 %.³⁵ An example is if the companies have the same board of directors.³⁶ As with the requirement of substantial influence will the requirement of companies mainly under the same management continue to be unclear until the legislator or the Swedish Supreme Administrative Court explains it further.

2.2 The first main rule and exceptions

2.2.1 The first main rule

The Swedish interest deduction limitation rules are divided into main rules, supplementing rules and exceptions.³⁷ According to the first main rule are interest expenses not deductible when they are related to debt between affiliated companies.³⁸ All interest expenses related to debt between affiliated companies are covered by the rule. This is, thus, a deviation from the general rule that interest expenses are deductible for businesses.³⁹

²⁹ Swedish Tax Agency, *Skatteverkets ställningstaganden: Några frågor vid tillämpningen av ränteavdragsbegränsningsreglerna gällande väsentligt inflytande, undantaget från 10%-regeln och ventilen*, dnr 131-117306-13/11, 25 February 2013, ch. 4.2.

³⁰ Swedish Tax Agency, Response, *Dialogfråga angående avdragsrätten för räntekostnader enligt 24§ 10a-f§ Inkomstskattelagen*, 9 April 2013.

³¹ See for example Jilkén, D. and Jilkén, C., *Väsentligt inflytande och under huvudsak gemensam ledning – luddiga begrepp på drift?*, Svensk Skattetidning, 2013, nr. 6/7, p. 498 et seq. and 516; and Jilkén, C., *Skatteverkets dialogsvar om ränteavdrag*, Svensk Skattetidning, 2014, nr. 3, p. 193.

³² Ch. 24, art. 10a para. 1 2p, SITA.

³³ Prop. 2008/09:65 p. 46.

³⁴ Prop. 2008/09:65 p. 48 f..

³⁵ Prop. 2008/09:65 p. 68, 72 and 87 et seq.: and prop. 2012/13:1 p. 217 with reference to prop. 1999/2000:2 p. 502 et seq..

³⁶ Jilkén and Jilkén (n 33), 2013, p. 510.

³⁷ See ch. 24, art. 10b-f, SITA.

³⁸ Ch. 24, art. 10b, SITA.

³⁹ See ch. 16, art. 1, SITA.

2.2.2 The 10 %-rule

The first exception is the so called 10 %-rule, according to which deduction of interest expenses is allowed if the beneficial owner of the interest income would have been taxed with at least 10 % in its State of residence, if the interest income was the only income of the beneficial owner.⁴⁰ The beneficial owner is the company, which is the actual and rightful owner of the interest income and receives the income for its own use and enjoys the economical benefits from it.⁴¹ The purpose of the beneficial ownership concept in the 10 %-rule is to avoid situations where an intermediary company located in a jurisdiction with a corporate tax rate of at least 10 % is used to circumvent the Swedish interest deduction limitation rules.

The beneficial ownership concept was subject to a judgment by the Swedish Supreme Administrative Court where interest was paid from a Swedish company to a Dutch company. The Dutch company decided to make corresponding dividend payments to another Dutch company, which, subsequently, made corresponding interest payments to a US company. The US company was benefitting from the so-called “check-the-box” rules, which left the interest income untaxed. The Court concluded that the US company was the beneficial owner of the interest income, even though the Dutch company had to make a decision to pay dividends to the other Dutch company.⁴² The Swedish Supreme Administrative Court showed that the fact that a decision of dividend payments must be taken in the chain of transactions does not hinder a later company in the chain to be considered as the beneficial owner of the income. However, every situation where there is an onward-lending situation is not hindered by the rules. The situation where an intragroup bank borrows capital from an external bank and, subsequently, lends the capital to one of the companies within the group is not hindered by the beneficial ownership concept in the rule (but might be hindered by other conditions in the 10 %-rule).⁴³ The Swedish Tax Agency has expressed its opinion on the matter but the beneficial ownership concept remains vague and is to be decided on case-by-case basis.⁴⁴

The 10 %-rule contains a hypothetical test to determine the level of taxation of the interest income. The interest income is to be treated as is it was the only income of the beneficial owner and consideration is, thus, not to be taken to loss or income derived from normal business operations or to other deductible expenses.⁴⁵ The requirement of a certain level of taxation is fulfilled if the interest income, then, is deemed to be taxed with at least 10 %. This applies regardless of the method of taxation.⁴⁶ The consequence is that the 10 %-rule is not fulfilled if the interest income is neutralised by a

⁴⁰ Ch. 24, art. 10d para. 1, SITA.

⁴¹ Prop. 2012/13:1 p. 254 with reference to prop. 2008/09:65 p. 61.

⁴² HFD 2012 not. 24.

⁴³ Prop. 2008/09:65 p. 61 et seq..

⁴⁴ See Swedish Tax Agency, *Skatteverkets ställningstaganden: Avdragsrätt för räntor vid tillämpningen av ränteavdragsbegränsningsreglerna i 24 kap. 10 a – 10 f §§ 1L i fall där räntot slussas genom ett eller flera svenska företag till ”det företag som faktiskt har rätt till inkomsten” och som inte beskattats eller beskattas under 10 % för inkomsten*, dnr 131-8239-13/111, 22 January 2013.

⁴⁵ Prop. 2008/09:65 p. 59.

⁴⁶ Prop. 2008/09:65 p. 60 and 63.

ground allowance or other similar deductions.⁴⁷ For example, the Dutch Notional Interest Deduction (NID) was, in two judgments by the Swedish Supreme Administrative Court, considered as a deduction that needs to be taken into account when determining the applicable tax rate.⁴⁸

The abovementioned is applicable on permanent establishments as well. Deduction is not allowed if a permanent establishment is the beneficial owner of an interest income where the host State taxes the income with less than 10 % while the home State does not tax the income as a result of, for example, the exempt method.⁴⁹

2.2.3 The pension fund rule

The pension fund rule applies to e.g. assurance companies (“livförsäkringsbolag in Swedish) and pension funds (“pensionsstiftelser” in Swedish).⁵⁰ Deduction of interest expenses is allowed if the affiliated beneficial owner is liable to tax on yield of pension capital. Deduction is, regarding transactions involving foreign companies, allowed if the foreign company, although not liable to tax on yield on pension capital, is taxed in a similar way and at least equivalent to the Swedish tax on yield of pension capital.⁵¹ An additional requirement for deduction for both the Swedish and foreign companies is that the interest rate do not exceed 250 % of the average Swedish government borrowing rate (“statslåneränta” in Swedish) applied in the calendar year before the income year for tax purposes (“beskattningsår” in Swedish).⁵²

2.2.4 The exception to the 10 %-rule

Deduction of interest expenses can be denied even though the conditions in the 10 %-rule and the pension fund rule are fulfilled. According to the exception to the 10 %-rule are interest expenses not deductible if the main reason for the debt arrangement is that the affiliated companies are to obtain a substantial tax advantage.⁵³ The rule was introduced because it was shown that companies arranged their business virtually exclusively for tax purposes so they were taxed with a tax rate just above 10 %. The Swedish Tax Agency has the burden of proof for the application of the rule.⁵⁴

The rule is vague and hard to apply but some guidance can be found in the preworks to the rule. The determination of whether the main reason for the debt arrangement is to obtain tax advantages is to be made from the perspective of both the lender and the borrower. All relevant circumstances are to be considered.⁵⁵ It is further stated that the term “mainly” is to be interpreted as 75 %, as mentioned above regarding affiliated companies

⁴⁷ Prop. 2008/09:65 p. 60.

⁴⁸ HFD 2011 ref. 90 II and V.

⁴⁹ Ibid.

⁵⁰ Ch. 24, art. 10d para. 2 1p, SITA with reference to art. 2 1-3p, Act (1990:661) on Tax on Yield on Pension Capital. See also Samuelsson, L., *Regeringens slutliga förslag om effektivare räntebegränsningar*, Skattenytt, 2012, p. 822.

⁵¹ Ch. 24, art. 10d para. 2 1p, SITA.

⁵² Ch. 24, art. 10d para. 2 2p, SITA.

⁵³ Ch. 24, art. 10d para. 3, SITA.

⁵⁴ Prop. 2012/13:1 p. 247 et seq..

⁵⁵ Ibid.

under mainly the same management (2.2.1).⁵⁶ It is, regarding the term “substantial tax advantage”, stated that the purpose is not to cover small amounts but that consideration should be taken to whether the arrangement results in tax advantages in more than one income year for tax purposes.⁵⁷

Some, but in no way exhaustive, examples to consider in the determination are mentioned in the preworks. Structures that are not allowed deduction of interest expenses are, for example, structures where a company with comprehensive shortfalls and no liquid assets acts, for tax purposes, as a lender to an affiliated company where the lent liquid assets have been borrowed from another affiliated company. The purpose can be to take advantage of a shortfall in a specific jurisdiction or to avoid the Swedish group contribution rules. The origin of the capital has significance in the way that self-generated capital may, from a perspective of the lender, indicate that the transaction is not mainly made for tax purposes. Also, the level of taxation of the borrower is a factor to take into consideration. Another situation where deduction is not allowed is where an affiliation in connection with an acquisition of shares creates new companies with the main purpose of having a debt claim.⁵⁸

The Swedish Council on Advance Tax Rulings has given two advanced rulings (“förhandsbesked” in Swedish) regarding the exception to the 10 %-rule. The beneficial owner of the interest income was, in the first case, taxed with a tax rate of 22 % when the Belgian NID was not used at all and with a tax rate of 13,3 % if it was used to its maximum. The Swedish Council of Advance Tax Rulings stated that the interest expenses were deductible when the interest income was taxed with 22 % but not when it was taxed with 13,3 %. The affiliated companies were considered to obtain a substantial tax advantage in the later case.⁵⁹ The other case concerned a structure where the interest income was neutralised by losses at the beneficial owner. The Swedish Council of Advance Rulings considered that the structure resulted in a substantial tax advantage for the affiliated companies and denied deduction for the interest expenses.⁶⁰ Both advanced rulings were appealed to the Swedish Supreme Administrative Court, which decided not to rule on the matter. The Court stated that the Swedish interest deduction limitation rules require extensive investigation and evidence from different parties and are, thus, not suitable for advanced rulings.⁶¹

Academic writers and the Swedish Tax Agency have tried to interpret the exception to the 10 %-rule but it has been concluded that any certainty cannot be given to the interpretations since the rule is vague and the preworks do not give detailed guidance.⁶² It is, however, stated in the

⁵⁶ Prop. 2012/13:1 p. 251 with reference to prop. 1999/2000:2 del 1 p. 505.

⁵⁷ Prop. 2012/13:1 p. 252.

⁵⁸ Prop. 2012/13:1 p. 253 et seq..

⁵⁹ Advanced ruling, 2014-04-29, dnr 80/13/D.

⁶⁰ Advanced ruling, 2014-07-10, dnr 92-13/D.

⁶¹ HFD mål nr. 2674-14; and HFD mål nr. 4217-14.

⁶² Carneborn, C., *Nya tioprocentregeln – En ren beräkningsregel?*, Skattenytt, 2013, p. 46-51; and Swedish Tax Agency, *Skatteverkets ställningstaganden – Några frågor vid tillämpningen av ränteavdragsbegränsningsreglerna gällande väsentligt inflytande, undantaget från 10 %-regeln och ventilen*, dnr 131-117306-13/11, 25 February 2013, ch. 4.3-4.

preworks that guidance for the application of the rule can be taken from the so-called business purpose rule, which will be explained below.

2.2.5 The business purpose rule

Another exception to the first main rule is the so-called business purpose rule (“ventilen” in Swedish) and allows deduction for interest expenses if the transaction is mainly business motivated (“huvudsakligen affärsmässigt motiverad” in Swedish), regardless of the 10 %-rule.⁶³ The business purpose rule intends to cover structures, which are taxed with a low tax rate but where the transactions are mainly business motivated and, thus, do not constitute such structures that the rules are meant to hinder.⁶⁴ The rule is only applicable if the affiliated beneficial owner of the interest income is resident in a State within the EU or in a State with whom Sweden has a relevant double tax treaty.⁶⁵

The exception from the 10 %-rule and the business purpose rule have different areas of application. Deduction of interest expenses is denied under the exception to the 10 %-rule if the interest income is taxed with at least a 10 % tax rate in the State of the beneficial owner and if at least 75 % of the reasons for the transaction are tax reasons (deduction is, thus, allowed if the transaction is more than 25 % business motivated). Deduction is allowed under the business purpose rule if the interest income is taxed with a tax rate lower than 10 % in the State of the beneficial owner and if at least 75 % of the transaction is business motivated (deduction is, thus, denied if the transaction is more than 25 % tax motivated).

The Swedish Government has stated that it is not possible to describe in detail all the situations, which entails deduction of the interest expenses as a result of the business purpose rule, but that an overall assessment is to be made with all relevant circumstances related to the debt arrangement. All specific circumstances in the specific case are of relevance.⁶⁶ Even though a tax, nevertheless, is a cost for a company and that companies, therefore, might argue that decisions taken on the basis of tax purposes are business motivated, this is not part of the determination whether a transaction is mainly business motivated. The determination is to be made without consideration to tax effects. The business purpose rule is already applicable when a transaction is partially motivated by tax reasons (25 % or less).⁶⁷

Some indications that a transaction is mainly business motivated are that the beneficial owner of the interest income conducts a real economic activity in its State of residence and that the interest expenses are not remarkably large in comparison to interest expenses in connection with debt to a company located in a high-tax jurisdiction. Short-term debt (for example cash-pool business) is, as stated by the Swedish Government, considered as being mainly business motivated in most cases. A transaction is, to the contrary, most likely not mainly business motivated if the interest income is not taxed

⁶³ Ch. 24, art. 10e para. 1, SITA.

⁶⁴ Prop. 2012/13:1 p. 255 with reference to prop. 2008/09:65 p. 67 and 87.

⁶⁵ Ch. 24, art. 10e para. 1, SITA.

⁶⁶ Prop. 2012/13:1 p. 256 et seq..

⁶⁷ Prop. 2012/13:1 p. 257. See also HFD 2011 ref. 90 I-V.

in the State of residence of the beneficial owner or if the interest income can be neutralised by further distribution with a right to deduction. Another example is if hybrid financial instruments or hybrid entities are used in order to obtain tax advantages.⁶⁸ Unlike the exception to the 10 %-rule, it is the taxpayer who wants to deduct the interest expenses that has the burden of proof and, thus, has to show that the transaction is mainly business motivated.⁶⁹

When determining whether a debt arrangement is business motivated shall particular regard be taken to if finance, instead, could have been made in the form of equity from the lender, another affiliated company or a company higher in the organisation.⁷⁰ Regard shall be taken to if another finance legally could have been given, the degree of influence the financing company has in the borrowing company (for example through shares) and to what extent commercial considerations would be affected negatively by an alternative finance through equity (“kapitaltillskott” in Swedish) and what the consequences would be.⁷¹

The origin of the capital is a factor to consider in the determination. A transaction is, most likely, not mainly business motivated if the lender has received finance in order to be able to give a loan to the borrower or if the lender, subsequently, transfers the debt claim to another company in the affiliation. The company financing the lender could, in this situation, just as well have financed the borrower directly. The same applies to the company receiving the debt claim.⁷²

The fact that the possibility to finance through equity instead of debt and that the origin of the capital are factors to consider when determining whether a transaction is mainly business motivated was first explained by the Swedish Supreme Administrative Court in several judgments given in late 2011.⁷³ This was partially implemented in the rules and explained in the preworks to the rules when they were revised in 2013.⁷⁴ The Court concluded that a difference between business reasons and organisational reasons should be made when determining whether a transaction is mainly business motivated.⁷⁵ The Court, further, stated that the business purpose rule is applicable and a transaction is, thus, mainly business motivated if an external acquisition of shares was followed by an internal acquisition of the shares and the internal transaction, with regard to time and other circumstances, is considered a mere step of inserting the company into the affiliation.⁷⁶ The legal value of the judgments in 2011 is a debated subject. It is on one hand argued that the difference between business- and organisational reasons is not applicable on the basis that it is contradictory

⁶⁸ Prop. 2012/13:1 p. 257.

⁶⁹ Prop. 2012/13:1 p. 256.

⁷⁰ Ch. 24, art. 10e para. 3, SITA; and prop. 2012/13:1 p. 262 et seq..

⁷¹ Prop. 2012/13:1 p. 263.

⁷² Prop. 2012/13:1 p. 257 and 261.

⁷³ HFD 2011 ref. 90 I-V.

⁷⁴ One difference is that the judgments concern wholly owned companies while the present rules apply to affiliated companies.

⁷⁵ See especially HFD 2011 ref. 90 II.

⁷⁶ See especially HFD 2011 ref. 90 I. The statement was confirmed in cases HFD 2012 not. 3; and HFD 2012 not. 23.

to the preworks and the fact that the Swedish Government has explicitly denied that there is a difference.⁷⁷ It is on the other hand argued that the judgments still have value but are to have an extended application to comply with the present rules. External acquisitions of shares are, thus, also covered by the rules.⁷⁸

2.3 The second main rule and exceptions

The first main rule applies to affiliated companies but interest expenses can be denied deduction if the expenses are related to a debt to a non-affiliated company as well. According to the second main rule are interest expenses not deductible if a company has a debt to another company, which is not affiliated to it, if an affiliated company to the first-mentioned company has a debt claim on the second-mentioned company or a company, which is affiliated to it (so-called back-to-back loans). This, however, only applies if the debt has a connection to the debt claim and the debt concerns an acquisition of shares from a company, which is affiliated to it, or from a company, which will be affiliated to it after the acquisition.⁷⁹

The purpose of the denial of deduction is to avoid situations where an external company is used as an intermediary in a transaction of an acquisition of a company.⁸⁰ In order to determine whether deduction of the interest expenses is allowed shall regard be taken to all circumstances in the specific case.⁸¹ The term “shares” has a wide definition and includes convertibles, subscription rights, parts in co-operative economic associations, net current assets and similar parts of ownership or rights.⁸² The Swedish Supreme Administrative Court has determined that acquisitions by new share issues (“nyemission” in Swedish) are covered by the rule.⁸³

There are two alternative exceptions to the second main rule. According to the first exception are interest expenses deductible if the 10 %-rule, the pension fund rule or the exception to the 10 %-rule are applicable on the case. The rules are to be interpreted in the same way as explained above.⁸⁴ According to the second exception are interest expenses deductible if the transaction is mainly business motivated. The same definition is to be applied with the same limitations of companies covered by the rule.⁸⁵

⁷⁷ Kal, M.K., *En säkerhetsventil utan säkerhet – en analys av rekvisitet ”affärsmässigt motiverat” i 24 kap. 10 E § IL*, Juridisk Publikation, 2013, p. 241.

⁷⁸ Samuelsson (n 52), 2012, p. 829.

⁷⁹ Ch. 24, art. 10c, SITA.

⁸⁰ Prop. 2008/09:65 p. 54 et seq.; and prop. 2012/13:1 p. 266.

⁸¹ prop. 2008/09:65 p. 50.

⁸² Ch. 48, art. 2, SITA; and prop. 2008/09:65 p. 49 et seq..

⁸³ HFD 2011 ref. 90 V.

⁸⁴ Ch. 24, art. 10f 1p, SITA.

⁸⁵ Ch. 24, art. 10f 2p, SITA.

3 Compatibility with the fundamental freedoms of EU law

3.1 Introduction

In this section it is analysed whether the Swedish interest deduction rules are compatible with the fundamental freedoms of EU law. The opinions of the European Commission, the Swedish Government and national Courts will be presented but the analysis in the thesis is separate from the opinions of the parties. The applicable freedom or freedoms on the Swedish rules are initially determined. Which fundamental freedom that is applicable is an important aspect since they have e.g. temporal and territorial differences that might have an impact on the analysis.⁸⁶ An analysis is, subsequently, conducted of whether the interest deduction limitation rules are discriminatory or restrictive. If it is found that the rules are discriminatory or restrictive, it is analysed whether the rules are justified by an overriding reason in the public interest. Lastly, if the rules are justified, it is examined whether the rules are proportionate.⁸⁷

3.2 Applicable freedom(s)

Within the EU there are several fundamental freedoms, namely the free movement of persons⁸⁸, free movement of goods⁸⁹, free movement of workers⁹⁰, freedom of establishment⁹¹, freedom to provide services⁹² and the free movement of capital⁹³, all of which are part of the aim to establish an internal market.⁹⁴ It can be concluded that the free movement of persons, the free movement of goods and the movement of workers are not relevant for the analysis since the Swedish interest deduction limitation rules only apply for companies and does not concern goods. It is, therefore, to be determined whether the freedom of establishment, the freedom to provide services or the free movement of capital is applicable on the Swedish rules.

The European Commission has, in its letter of formal notice to the Swedish Government, stated that the freedom of establishment is applicable on the Swedish rules and has conducted a compatibility analysis on the basis of that particular fundamental freedom alone.⁹⁵ The Swedish Government is also of the opinion that the freedom of establishment is applicable on the

⁸⁶ Smit, D.D., *The relationship between the free movement of capital and the other EC Treaty freedoms in third country relationships in the field of direct taxation: a question of exclusivity, parallelism or causality?*, EC Tax Review, 2007/6, p. 257.

⁸⁷ C-55/94 Gebhard, para. 37. See also Wattel, P.J., *Forum: Interaction of State Aid, Free movement, Policy Competition and Abuse Control in Direct Tax Matters*, World Tax Journal, Vol. 5 nr. 1, 2013, p. 129 et seq..

⁸⁸ Art. 21 TFEU.

⁸⁹ Art. 34-36 TFEU.

⁹⁰ Art. 45 TFEU.

⁹¹ Art. 49-54 TFEU.

⁹² Art. 56-62 TFEU.

⁹³ Art. 63 TFEU.

⁹⁴ Art. 2 (3) TEU. See also M. Helminen, *EU Tax Law – Direct Taxation – 2013*, IBFD, 2013, chapter 2.2.1.

⁹⁵ SG-Greffe (2014) D/17633, case no. 2013/4206, 24 November 2014.

rules. This has been stated in the preworks to the rules and in the answer to the letter of formal notice from the European Commission.⁹⁶ The EU law compatibility of the Swedish rules has been ruled upon by the Swedish Supreme Administrative Court and the Court conducted the compatibility analysis on the basis of the freedom of establishment and, thus, shares the opinion with the European Commission and the Swedish Government.⁹⁷

It is, however, in the author's opinion, not a certainty that the compatibility analysis is to be made on the basis of the freedom of establishment, as other freedoms also might be relevant. The freedom of establishment gives EU nationals the right to establish in another Member State as a self-employed person or through an undertaking. It also gives the right to establish and pursue activities in another Member State through agencies, branches and subsidiaries.⁹⁸ The registered office for companies serves as nationality for individuals, making the freedom in question useful for companies as well.⁹⁹ The Swedish interest deduction limitation rules falls within the scope of the freedom of establishment since the freedom applies to investments and holdings of equity and debt in a company in another Member State.¹⁰⁰

The freedom to provide services gives EU nationals who are established or resides within the EU the right to provide services in another Member State and to be treated the same way as the nationals of that State.¹⁰¹ Even though the freedom only refers to the right to provide services it includes a corresponding right to receive services as well.¹⁰² The Swedish interest deduction limitation rules are covered by the freedom to provide services since the rules apply to interest related to debt between affiliated companies. The issue of a loan is covered by the term "services" in the freedom.¹⁰³

The free movement of capital applies to capital movements and payments and covers the Swedish interest deduction limitation rules since the freedom, as with the freedom of establishment, applies to investments and holdings of equity and debt investments in a company in another Member State.¹⁰⁴

Since the freedom of establishment, the freedom to provide services and the free movement of capital can be applied on the Swedish rules it is necessary to determine the relationship between the freedoms and, thus, how the

⁹⁶ Prop. 2012/13:1 p. 269; and the answers by the Swedish Government to the European Commission, dnr. Fi2013/153; and dnr. Fi2014/4205.

⁹⁷ HFD 2011 ref. 90 II-V.

⁹⁸ Art. 49-54 TFEU.

⁹⁹ See for example 270/83 *Commission v France (Avoir Fiscal)*, para. 18; C-446/03 *Marks & Spencer*, para. 30; and C-231/05 *Oy AA*, para. 29.

¹⁰⁰ C-324/00 *Lankhorst-Hohorst*, paragraphs (paras.) 27-32; C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas*, para. 32; C-446/04 *Test Claimants in the FII Group Litigation*, para. 118; C-524/04 *Test Claimants in the Thin Cap Group Litigation*, para. 33; and joined cases C-39/13, C-40/13 and C-41/13 *SCA Group Holdings and Others*, para. 23.

¹⁰¹ Art. 56-62 TFEU.

¹⁰² C-484/93 *Svensson and Gustavsson*, para. 12; and C-294/97 *Eurowings*, para. 34.

¹⁰³ Art. 57 TFEU; C-484/93 *Svensson and Gustavsson*, para. 11; C-222/95 *Parodi*, para.17; and C-452/04 *Fidium Finanz*, para. 40.

¹⁰⁴ C-484/93 *Svensson and Gustavsson*, para. 7; C-242/03 *Weidert-Paulus*, para. 15; C-265/04 *Bouanich*, para. 29; C-452/04 *Fidium Finanz*, paras. 42-43; C-190/12 *Emerging Markets Series*, para. 25; and C-282/12 *Itelcar*, para. 14.

compatibility analysis is to be conducted. The ECJ did not, in early cases, apply a priority between the different freedoms and, therefore, interpreted the compatibility of the national rules with the fundamental freedoms, which were included in the referred questions by the national courts.¹⁰⁵ The ECJ did not, in subsequent cases, address all fundamental freedoms included in the referred questions but neither did the Court explain its preference for one freedom over the other.¹⁰⁶ The ECJ stated, in 2002, that where a national measure restricts both the free movement of goods and the freedom to provide services, the predominant freedoms gets priority over the other, creating what academic writers refers to as the dominance rule.¹⁰⁷ This rule was later used in relation to the freedom of establishment, the freedom to provide services and the free movement of capital where the ECJ concluded that an independent examination of the freedoms was not motivated if a restriction on the freedom to provide services and the free movement of capital were an unavoidable consequence of a restriction on the freedom of establishment.¹⁰⁸ The ECJ, thus, concluded that the freedom of establishment had priority over other freedoms if the freedom of establishment was the predominant freedom in the case.¹⁰⁹

Establishing the dominance rule, questions still remain on how to determine which fundamental freedom is predominant. The ECJ has, regarding the relationship between the freedom to provide services and the free movement of capital, stated that the purpose of the national rule is to govern which fundamental freedom that is applicable on the rule.¹¹⁰ The ECJ has, on the other hand, regarding the relationship between the freedom of establishment and the free movement of capital, created the so-called definite-influence rule. This means that the freedom of establishment applies where a shareholding confer definite influence over a company's decisions and allows the shareholder to determine its activities while the free movement of capital applies where a shareholder does not have such influence.¹¹¹

The ECJ has been inconsistent in its case law regarding how to determine whether definite influence is established. On one hand are the facts of the case to be used to determine whether definite influence exists, also referred to as the facts-of-the-case rule. This means that the facts in a specific case are to be regarded and if a shareholding gives definite influence in another company is the freedom of establishment to be applied on the rule, regardless of the characteristics of the applicable national legislation.¹¹² The consequence of the facts-of-the-case rule is that one freedom will always

¹⁰⁵ See C-204/90 Bachmann.

¹⁰⁶ C-302/97 Konle, para. 22; and C-200/98 X AB and Y AB, paras. 4, 24, 28 and 30.

¹⁰⁷ C-390/99 Canal Satélite Digital, para. 31.

¹⁰⁸ C-196/04 Cadbury Schweppes and Cadbury Schweppes Overseas, para. 33.

¹⁰⁹ See also C-452/04 Fidium Finanz, para. 49 where the ECJ stated that the freedom to provide services was the predominant freedom in the specific case.

¹¹⁰ C-452/04 Fidium Finanz, paragraphs 45 and 49.

¹¹¹ C-251/98 C. Baars, para. 22; C-208/00 Uberseering BV, para. 77; C-436/00 X and Y, para. 37 and 66-68; C-196/04 Cadbury Schweppes and Cadbury Schweppes Overseas, para. 31; and C-492/04 Lasertec, paras. 20-24.

¹¹² C-436/00 X and Y, paras. 37, 65 and 68; C-196/04 Cadbury Schweppes and Cadbury Schweppes Overseas, para. 31; C-284/06 Burda, paras. 69 and 70; and C-303/07 Aberdeen Property Fininvest Alpha Oy, paras. 31-36.

have priority in relation to the other freedoms. On the other hand, however, is the purpose of the national rule to determine whether definite influence is established, also known as the applicable-legislation rule. This means that if a national rule is considered specific, meaning that the rule applies only in cases where a company either has definite influence in another company or does not have such influence, is the freedom of establishment to be applied where definite influence is required and the free movement of capital when definite influence is not required. If a national rule, however, is considered generic, meaning that the rule applies regardless of if definite influence exists in another company, are both the freedom of establishment and the free movement of capital to be applied and examined in the case.¹¹³ It is not clear when an investment gives a decisive influence but a shareholding of 25 % has been accepted by the ECJ.¹¹⁴

The inconsistency of the ECJ on the matter is also shown in the fact that the ECJ, after the introduction of the dominance rule, the definite-influence rule, the facts-of-the-case rule and the applicable-legislation rule, has, in some cases, abandoned the dominance rule and made implications that other factors than definite influence can be taken in consideration when determining the predominant freedom, such as whether the rule aims to hinder companies from obtaining an undue tax advantage.¹¹⁵ It can, however, be concluded that there is always a dominant freedom (except for generic rules when applying the applicable-legislation rule) but that the ECJ has not been consistent in how to determine this dominant freedom in a specific case.¹¹⁶

When determining the applicable freedom on the Swedish interest deduction limitation rules it can be concluded that the freedom of establishment and the free movement of capital have more relevance than the freedom to provide services. The purpose of the Swedish rules is to hinder the movement of profits to low-tax jurisdictions using interest related to debt between affiliated companies. The focus is not on the service per se but, instead, on the fact that companies are taking advantage of ownership in other companies and as a result can shift profits to low-tax jurisdictions.

Regarding the freedom of establishment and the free movement of capital it is not clear whether the purpose of the Swedish rules is that they are to apply where definite influence exists. The rules can be applicable on the basis on ownership but any detailed amount of ownership has not been given, as explained above (2.1). It can from the wording and the preworks to the rules be concluded that the Swedish rules are applicable on an ownership

¹¹³ C-492/04 *Lasertec*, paras. 19-23; C-524/04 *Test Claimants in the Thin Cap Group Litigation*, paras. 26-33; C-157/05 *Winfried L. Holböck*, paras. 22-24; C-318/07 *Hein Persche*, para. 28; C-35/11 *Test Claimants in the FII Group Litigation*, paras. 90-92 and 99; C-168/11 *Beker*, para. 30; and C-282/12 *Itelcar*, paras. 22-25.

¹¹⁴ C-31/11 *Scheunemann*, paras. 25 and 29.

¹¹⁵ See C-298/05 *Columbus Container Services*, paras. 32 and 55-56; and C-105/07 *NV Lammers & Van Cleeff NV*, paras. 16,17 and 35 for the abandonment of the dominance rule and C-182/08 *Glaxo Wellcome*, para. 50 for the alternative rule to the definite-influence rule.

¹¹⁶ Hemels, S. et. al., *Freedom of Establishment or Free Movement of Capital: Is There an Order of Priority? Conflicting Visions of National Courts and the ECJ*, *EC Tax Review*, 2010-1, p. 28.

of at least 40-50 %. Even though the Swedish rules do not require ownership for the rules to be applicable, it can be argued that definite influence cannot only be achieved through ownership but also if the companies are mainly under the same management. This can, following the applicable-legislation rule, imply that the Swedish interest deduction limitation rules are specific and apply where there is a definite influence in another company and that the freedom of establishment is applicable on the rules. The facts-of-the-case rule cannot apply in the present compatibility analysis since the analysis is not based on a specific case. The national rules are the only factor to be regarded, which is also the case in the European Commission's investigation of the Swedish rules and in judgments where the European Commission has brought an infringement procedure before the ECJ.¹¹⁷

A different result is given if the opinion of the Swedish Tax Authority is followed since it has held that a 10 % ownership is enough for the Swedish interest deduction limitation rules to be applicable.¹¹⁸ The rules would on that basis be considered generic and, following the applicable-legislation rule, both the freedom of establishment and the free movement of capital would be examined in the analysis. It is, however, to be considered that the Swedish interest deduction limitation rules apply to shareholdings giving definite influence and the compatibility analysis is, thus, to be made on the basis of the freedom of establishment. The reasoning in the response by the Swedish Tax Agency has low legal value and is not convincing as it is partially based on rules and judgments regarding the taxation of individuals. The Swedish Tax Agency refers to cases regarding whether an individual has an unlimited tax liability in Sweden through substantial ownership in a business.¹¹⁹ It is in the preworks to the rules stated that the term substantial influence is to be interpreted as throughout the Swedish tax system when determining whether *companies* (italics added) are affiliated and the Swedish rules concerning trade investments ("näringsbetingade andelar" in Swedish) are explicitly mentioned.¹²⁰ The definition by the Swedish Tax Agency is not in line with the preworks and The Swedish Supreme Administrative Court would, most likely, not accept such a definition for the application of the Swedish interest deduction limitation rules. Further, as the Swedish Supreme Administrative Court has used the freedom of establishment when determining whether the Swedish rules are compatible with EU law, that might imply that the Court, implicitly, has stated that the rules apply where there is definite influence. The abovementioned shows that even though the freedom of establishment is the applicable freedom for the purposes of the thesis, it is not *acte éclairé* or *acte clair* and the Swedish Supreme Administrative Court should have referred the issue to the ECJ for a preliminary ruling.

¹¹⁷ See for example C-531/06 *Commission v Italy*, para. 40; C-207/07 *Commission v Spain*, paras. 35-36; and C-326/07 *Commission v Italy*, para. 36.

¹¹⁸ Swedish Tax Agency, Response, *Dialogfråga angående avdragsrätten för räntekostnader enligt 24§ 10a-f§ Inkomstskattelagen*, 9 April 2013.

¹¹⁹ See ch. 3, art. 3 and 7, SITA; and cases RÅ 2001 not. 1; RÅ 2004 not. 215; and RÅ 2006 ref. 67.

¹²⁰ Prop. 2012/13:1 p. 239.

3.3 Discrimination and restriction

For a national rule to be incompatible with the freedom of establishment it must be either discriminatory or restrictive. The discriminatory test can be divided into direct discrimination and indirect discrimination and precludes national legislation which treat two nationals of different Member States in comparable situations differently or legislation which treat two nationals of different Member States in different situations alike.¹²¹ A national legislation is considered directly discriminatory if the rule discriminates on the basis of nationality while it is indirectly discriminatory if, even though the legislation in its application is neutral regarding nationality, cross-border situations particularly come under the scope of application of the legislation and thus, indirectly discriminates on the basis of nationality.¹²² Even though a national rule is not discriminatory it can be precluded by the freedom of establishment if it is considered restrictive or as a non-discriminatory restriction, as it is also called. A national rule is restrictive for the purposes of the freedom of establishment if it prohibits, impede or render less attractive the exercise of the named freedom.¹²³

The European Commission has, in its letter of formal notice to the Swedish Government, stated that the Swedish interest deduction limitation rules are indirectly discriminatory. It is the 10 %-rule that is the focus of the analysis. The European Commission reasons that the 10 %-rule does not differentiate between residents and non-residents but is indirectly discriminatory since it is unlikely that domestic loans between affiliated companies will ever be considered as being made in order to obtain a substantial tax advantage as the Swedish corporate tax rate is 22 %. The Swedish rules, thus, affects in practice only cross-border loans between affiliated companies and forms a hinder to the freedom of establishment.¹²⁴

The Swedish Government and the Swedish Courts have, however, in the preworks to the rules, the answer to the letter of formal notice from the European Commission and several judgments, stated that the rules are compatible with the freedom of establishment.¹²⁵ The Government and the Swedish Courts reason that the rules are not directly discriminatory since they are neutral regarding nationality. The rules, or more specifically the 10 %-rule, are, further, not indirectly discriminatory or restrictive on the basis that the ECJ has stated that it is not discriminatory to require a certain level

¹²¹ See for example C-279/93 Schumacker, para. 30; C-80/94 Wielockx, para. 17; C-107/94 Asscher, paras. 32 and 42; C-250/95 Futura, para. 24; and C-311/97 Royal Bank of Scotland, para. 27.

¹²² See C-330/91 Commerzbank, para. 14; C-294/97 Eurowings, paras. 35-40; C-324/00 Lankhorst-Hohorst, paras. 27-32; C-383/05 Talotta, para. 32; and C-385/12 Hervis Sport, para. 41. See also Wouters, J., *The Principle of Non-discrimination in European Community Law*, EC Tax Review, 1999, p. 103 et seq.; Farmer, P., *EC law and Direct Taxation – Some Thoughts on Recent Issues*, EC Tax Journal, 1995/96, p. 93; and Dahlberg, M., *Direct Taxation in Relation to the Freedom of Establishment and the Free Movement of Capital*, Kluwer Law International, The Netherlands, The Hague, 2005, p. 95.

¹²³ C-415/93 Bosman, para. 96; C-55/94 Gebhard, para. 37; C-157/07 Krankenheim, para. 30; and C-326/12 van Caster, paras. 34-37.

¹²⁴ SG-Greffe (2014) D/17633, case no. 2013/4206, 24 November 2014.

¹²⁵ HFD 2011 ref. 90 II-V; Advanced rulings 2014-04-16, dnr. 71-13/D and 2014-04-29, dnr. 80-13/D; prop. 2012/13:1 s. 268-270; and dnr. Fi2014/4205.

of taxation in the State of the beneficial owner and that differences in tax treatment as a result of differences between the legislation of the Member States are not discriminatory if the rules apply objectively and without consideration to nationality. The requirement of a specific level of taxation of the interest income in the 10 %-rule is, thus, not indirectly discriminatory or restrictive.¹²⁶

There are, clearly, different views on whether the 10 %-rule is discriminatory or restrictive. A national rule is directly discriminatory if, as mentioned above, it treats two nationals of different Member States in comparable situations differently or if it treats two nationals of different Member States in different situations alike. The discrimination test can be made with a vertical or horizontal approach. The vertical approach means that a cross-border situation and a domestic situation are examined.¹²⁷ The comparator to a Swedish wholly internal situation where a Swedish company is giving a loan to an affiliated Swedish company is, using the vertical approach, a cross-border situation where a company resident in a Member State with a corporate tax rate below 10 % (according to the hypothetical test in the rule) gives an identical loan to an affiliated Swedish company.

Whether the situations are comparable can be decided on the basis of a per-country approach or an overall approach, whereas the per-country approach means that the legal situation in Sweden is considered while the overall approach means that the legal situation in the other Member State also is considered.¹²⁸ The ECJ has applied the methods inconsistently in its case law in order to determine whether the situations are comparable or not.¹²⁹ It is evident that, regardless of whether the per-country approach or overall approach is used, the Swedish wholly internal situation and the cross-border situation are comparable since an identical loan is given in both situations. The only difference is that the residence of the lender in the cross-border situation is in another Member State than Sweden.

Different results are given in the situations as the interest expenses are deductible in the Swedish wholly internal situation but not in the cross-border situation (assuming that the business purpose rule is not applicable). The difference in results, however, do not depend on differences in treatment on the basis of nationality but, instead, on the level of taxation of the interest income in the State of the beneficial owner. The 10 %-rule is, using the vertical approach, thus, not directly discriminatory.

¹²⁶ The Swedish Government and the Swedish Courts refer especially to C-403/03 Schempp, para. 34; C-231/05 Oy AA, para. 37; and C-371/10 National Grid Indus, para. 62.

¹²⁷ Carrero, J.M.C. et. al., *The Columbus Container Services ECJ Case and Its Consequences: A Lost Opportunity to Shed Light on the Scope of the Non-discrimination Principle*, Intertax, Vol. 37 issue 4, 2009, p. 213 et seq..

¹²⁸ Lang, M., *ECJ case law on cross-border dividend taxation – recent developments*, EC Tax Review, 2008/2, p. 72; and Bizioli, G., *Balancing the Fundamental Freedoms and Tax Sovereignty: Some Thoughts on Recent ECJ Case Law on Direct Taxation*, IBFD, European Taxation, Mar 2008, p. 135 et seq..

¹²⁹ For the per-country approach see C-324/00 Lankhorst-Hohorst, paras. 27 and 29; and C-347/04 Rewe Zentralfinanz, para. 34; and for the overall approach see C-446/03 Marks & Spencer, paras. 36-40; and C-524/04 Test Claimants in the Thin Cap Group Litigation, paras. 39, 40, 59 and 60.

The horizontal approach means that two cross-border situations are examined. The comparator to a cross-border situation where a company resident in a Member State with a corporate tax rate of at least 10 % (according to the hypothetical test) gives a loan to an affiliated Swedish company is another cross-border situation where a company resident in a Member State with a corporate tax rate below 10 % (according to the hypothetical test) gives an identical loan to an affiliated Swedish company.

The situations are comparable, regardless of whether the per-country approach or overall approach is used, since, as when using the vertical approach, the companies are giving an identical loan to an affiliated Swedish company. The only difference is the level of taxation in the State of the lender. Different results are given when applying the 10 %-rule but the differences are not based on nationality. The differences are, instead, based on the level of taxation in the State of the beneficial owner of the interest income (the lender). The 10 %-rule is, as agreed between the European Commission, the Swedish Government, the Swedish Courts and several academic authors and regardless of whether the vertical or horizontal approach is used, not directly discriminatory.

Even though the 10 %-rule is not directly discriminatory it can be considered indirectly discriminatory if cross-border situations particularly come under the scope of the application of the rule and the difference in treatment, thus, indirectly, is based on nationality. Some examples of conditions for national legislation to be indirectly discriminatory are if foreign nationals are treated differently from nationals, foreign nationals are more likely to receive such treatment and if the foreign national is in the same or substantially the same tax position as a national.¹³⁰ The fact that the 10 %-rule is applicable depending on the level of tax in the State of the beneficial owner of the interest income and that the foreign national taxpayer and the Swedish taxpayer are in, at least, a substantially the same tax position have been shown above. The question is, thus, whether the 10 %-rule is more likely to apply to foreign nationals than for Swedish nationals.

It is clearly stated in the preworks to the Swedish interest deduction limitation rules that the aim is to prevent evasion of the Swedish tax base.¹³¹ This shows that the rules aim to hinder excessive interest payments to foreign companies as interest payments to Swedish companies does not affect the Swedish tax base (the beneficial owner will be taxed in Sweden for the interest income). It is, further, rare that the 10 %-rule is applicable in a Swedish wholly internal situation since the corporate tax rate is 22 %. The 10 %-rule might be applicable in Swedish wholly internal situations when municipalities and investment companies are involved since municipalities are not subject to tax in Sweden and investment companies have right to deductions, which might lower the effective tax rate to below 10 %.¹³² The similar question was ruled upon in a judgment by the Supreme Court of the

¹³⁰ Farmer (n 124), 1995/96, p. 93 via Dahlberg (n 124), 2005, p. 95.

¹³¹ Prop. 2012/13:1 s. 229.

¹³² Regarding municipalities see ch. 7, art. 2 2p, SITA and regarding investment companies see ch. 39, art. 14-24a, SITA.

Netherlands (Hoge Raad) where the Court concluded that the Dutch interest deduction limitation rules are indirectly discriminatory on the basis of the freedom of establishment.¹³³ The judgment is of relevance since the Swedish interest deduction limitation rules are based on the Dutch rules.¹³⁴ The Supreme Court of the Netherlands stated that the 10 %-rule was indirectly discriminatory since it, even though neutral in relation to nationality, was more likely to apply to cross-border situations than to wholly internal situations.¹³⁵ The ECJ has, in addition, regarding the German thin capitalization rules, which were also neutral in relation to nationality, stated that the rules were more likely to apply to cross-border situations than to German domestic situations and concluded that the rules were indirectly discriminatory.¹³⁶ The Swedish interest deduction limitation rules are on the basis of the abovementioned to be considered as indirectly discriminatory.

The 10 %-rule is also to be considered as restrictive since the rule renders less attractive transactions where a Swedish company takes a loan from a foreign affiliated company or where a foreign company gives a loan to a Swedish affiliated company (there are two perspectives to the same situation). There is, thus, an increased insecurity with foreign loans than with domestic loans and vice versa (dependent on the perspective).¹³⁷ The Swedish Government and the Swedish Supreme Administrative Court have, as mentioned above, stated that the 10 %-rule is not discriminatory or restrictive since the ECJ has concluded that EU law does not preclude a requirement of a certain level of taxation in the hands of the receiver. The ECJ has, however, in a more recent judgment, stated that the requirement of a certain level of taxation of the receiver is to be considered as a restriction.¹³⁸ The argument by the Swedish Government and the Swedish Supreme Administrative Court, thus, cannot be upheld and the 10 %-rule is to be considered a restriction on the freedom of establishment.¹³⁹

As it has been concluded that the Swedish interest deduction limitation rules are indirectly discriminatory and constitutes a restriction on the freedom of establishment, the analysis proceeds with an investigation of whether the Swedish rules can be justified by an overriding reason in the public interest.

¹³³ See case Hoge Raad 1 maart 2013, 11/00675, LJN BV1426, ECLI:NL:HR:2013:BV1426. The judgment can be downloaded in its original language at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2013:BV1426>.

¹³⁴ Prop. 2008/09:65 p. 59; and prop. 2012/13:1 p. 236.

¹³⁵ See Ohlsson, F., *Dags för HFD att begära ett förhandsavgörande om ränteavdragsbegränsningarna?*, Skattenytt, 2014, p. 652 et seq. regarding the impact of the judgment by the Supreme Court of the Netherlands on the Swedish interest deduction limitation rules.

¹³⁶ C-324/00 Lankhorst-Hohorst, paras. 28 and 32.

¹³⁷ Ohlsson (n 137), 2014, p. 655; and Dahlberg (n 20), 2011, p. 419.

¹³⁸ C-318/10 SIAT, paras. 25-29.

¹³⁹ Dahlberg (n 20), 2011, p. 419-433; and Andersson, T. and Carneborn, C., *HFD:s domar den 30 november 2011 avseende ränteavdragsbegränsningsreglerna – en kommentar*, Svensk Skattetidning, 2012, p. 68-72.

3.4 Justifications by overriding reasons in the public interest

3.4.1 Introduction

A discriminatory and restrictive measure can, in accordance with the rule of reason doctrine, be justified by an overriding reason in the public interest.¹⁴⁰ The ECJ has in its case law accepted various justification grounds, namely the safeguarding of the effectiveness of fiscal supervision, the need to ensure recovery of a tax debt, the safeguarding of the fiscal cohesion of the national tax system, the safeguarding of the balanced allocation of taxing rights between Member States, the need to prevent double use of losses, the prevention of tax avoidance and, lastly, the territoriality principle.¹⁴¹ The analysis in the thesis, thus, proceeds with an investigation whether the abovementioned justification grounds can justify the indirectly discriminatory and restrictive Swedish interest deduction limitation rules.

3.4.2 The safeguarding of effectiveness of fiscal supervision and the need to ensure recovery of a tax debt

The need for an effective tax control and, thus, rules with the purpose of the effective collection of taxes in cross-border situations, can justify discriminatory and restrictive measures.¹⁴² This particular justification ground applies to administrative measures such as a requirement that the amount of expenditure a taxpayer intends to deduct as a business expense can be ascertained clearly and precisely.¹⁴³ The ECJ has been reluctant with the justification of discriminatory and restrictive measures with the safeguarding of effectiveness of fiscal supervision since there are often other, less restrictive, means available to achieve such supervision, such as with the Mutual Assistance Directive¹⁴⁴ or by simply asking the taxpayer.¹⁴⁵ Also the need to ensure recovery of a tax debt may provide for an acceptable justification.¹⁴⁶

The safeguarding of effectiveness of fiscal supervision and the need to ensure recovery of a tax debt are not capable of justifying the Swedish interest deduction limitation rules, as the Swedish rules do not concern neither the fiscal supervision of taxpayers, the collection of taxes in cross-border situations nor the recovery of tax debts. The Swedish rules in

¹⁴⁰ 120/78 Cassis de Dijon, para. 8.

¹⁴¹ Helminen (n 96), 2013, chapter 2.3.1.

¹⁴² 120/78 Cassis de Dijon, para. 8; C-250/95 Futura Participations, para. 31; C-254/97 Société Baxter, para. 18; C-55/98 Vestergaard, para. 25; C-324/00 Lankhorst-Hohorst, para. 44; joined cases C-155/08 and C-157/08 Passenheim-van Schoot, para. 45; and C-498/10 X NV, para. 39. See also Dahlberg (n 124) 2005, p. 124 et seq..

¹⁴³ C-318/10 SIAT, para. 44.

¹⁴⁴ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, Official Journal of the European Union, L 64/1, 11 March 2011.

¹⁴⁵ C-204/90 Bachmann, paras. 18 and 20; C-254/97 Société Baxter, paras. 17, 19 and 20; C-55/98 Vestergaard, para. 26; C-136/00 Danner, paras. 49 and 52; C-422/01 Skandia and Ramstedt, paras. 42-45; C-39/04 Laboratoires Fournier, para. 25; C-150/04 Commission v Denmark, paras. 52 and 54; C-520/04 Turpeinen, paras. 36 and 37; C-101/05 A, paras. 58 and 59; C-383/05 Talotta, para. 36; C-451/05 ELISA, paras. 92-96; C-318/07 Persche, paras. 53 and 54; C-267/09 Commission v Portugal, paras. 38-46; and C-132/10 Halley, para. 36.

¹⁴⁶ C-290/04 Scorpio, para. 35.

question aims, instead, to hinder erosion of the Swedish tax base with the use of interest.

3.4.3 The cohesion of the tax system

The cohesion of the tax system has by the ECJ been accepted as capable of justifying a discriminatory and restrictive measure.¹⁴⁷ The cohesion of the tax system means, in essence, that the positive and negative aspects of the taxation of income are inseparable parts of a national tax system.¹⁴⁸ In other words is the cohesion of the tax system based on symmetry in the taxation where a tax advantage given in a tax jurisdiction is conditional upon a later taxation of an income with a direct link to that tax advantage in the same tax jurisdiction.¹⁴⁹ The justification ground in question is, however, rarely accepted by the ECJ since its application is limited to certain situations.¹⁵⁰ The tax advantage and the taxation of income must, for a direct link to exist, relate to the same taxpayer and the same income.¹⁵¹ For example, the taxation of profits of a company and the taxation of dividends received by the shareholder of the same company are not considered to have a direct link while the tax treatment of a company and its permanent establishment in another Member State may have a direct link since the permanent establishment is not an independent legal person.¹⁵² An exception from the requirement of the same taxpayer is if the tax burden and the tax advantage relate to the same economic process within a group of companies.¹⁵³

Academic writers have different opinions as to whether the cohesion of the tax system still can justify a discriminatory or restrictive measure. It has, on one hand, been argued that the cohesion of the tax system only can be applicable in exceptional situations as it has a strict application and is, therefore, useless in practice.¹⁵⁴ It has, on the other hand, been argued that the cohesion of the tax system recently has grown to be more important.¹⁵⁵ An alternative argument is that the cohesion of the tax system has re-emerged in the safeguarding of the balanced allocation of taxing rights

¹⁴⁷ C-204/90 *Bachmann*, paras. 21-28; and C-300/90 *Commission v Belgium*, para. 21.

¹⁴⁸ Verdoner, L., *The Coherence Principle under EC Tax Law*, European Taxation, Vol. 49 no. 5, 2009, p. 274.

¹⁴⁹ C-107/94 *Asscher*, paras. 58 and 59; C-136/00 *Danner*, paras. 36 and 37; C-422/01 *Skandia and Ramstedt*, paras. 32-36; C-250/08 *Commission v Belgium*, paras. 70-82; and C-253/09 *Commission v Hungary*, paras. 70-85. See also van Thiel, S., *Justifications in Community Law for Income Tax Restrictions on Free movement: Acte Clair Rules That Can Be Readily Applied by National Courts – Part I*, European Taxation, 6/2008, p. 280 et seq.; and Helminen (n 96), 2013, chapter 2.3.6.

¹⁵⁰ C-251/98 *Baars*, paras. 38-40; C-80/94 *Wielockx*, para. 25; C-35/98 *Verkooijen*, paras. 56-58; C-168/01 *Bosal Holding*, paras. 31-34; and C-319/02 *Manninen*, para. 45.

¹⁵¹ C-35/98 *Verkooijen*, para. 57; C-251/98 *Baars*, para. 40; C-168/01 *Bosal Holding*, paras. 29-35; and C-9/02 *de Lasteyrie du Saillant*, paras. 61-67. See also Verdoner (n 150), 2009, p. 281; and Martin, P., *The day after tomorrow: The UK system after Marks & Spencer*, 13 Tax Management Transfer Pricing Report 3, 2014.

¹⁵² See cases C-484/93 *Svensson and Gustavsson*, para. 18; C-168/01 *Bosal Holding*, para. 31; C-315/02 *Lenz*, paras. 36-39; and C-319/02 *Manninen*, paras. 44-46; compared to C-157/07 *Krankenheim*, para. 44.

¹⁵³ C-446/03 *Marks & Spencer*, paras. 43, 49, 51 and 57. See also Helminen (n 96), 2013, chapter 2.3.6.

¹⁵⁴ van Thiel (n 151), 6/2008, p. 281.

¹⁵⁵ Dahlberg, M., *Internationell Beskattning*, 3 ed., Studentlitteratur, Lund, 2012, p. 361.

between Member States.¹⁵⁶ It is, however, clear that the cohesion of the tax system still is capable of justifying a discriminatory and restrictive measure since the ECJ has, in recent cases, used the justification ground in question to justify such a national measure.¹⁵⁷

Either way it must be concluded that the cohesion of the tax system cannot justify the Swedish interest deduction limitation rules. The justification ground in question has a narrow scope and the ECJ has concluded that there is no direct link between denied deductions for parent companies and the taxations of profits of the subsidiaries, as the parent companies and their subsidiaries are different tax subjects.¹⁵⁸ There is, thus, no direct link between the deduction of interest expenses in the Swedish company (the borrower) and the taxation of interest income in the foreign affiliated company (the lender), as required for the Swedish rules to be justified.¹⁵⁹

3.4.4 The safeguarding of the balanced allocation of taxing rights between Member States

The safeguarding of the balanced allocation rights between Member States was first accepted as a justification ground by the ECJ in 2005 and has been invoked by Member States since.¹⁶⁰ Member States may, according to this justification ground, impose measures to prevent situations, which put its taxing rights at risk concerning activities carried on within the Member State.¹⁶¹ A Member State may, thus, have tax measures, which restricts the taxpayer from moving profits from the Member State if the Member State has a reasonable connection to the taxpayer or the tax object. The justification ground permits Member States to restrict taxpayers from being able to choose where to tax its profits.¹⁶² Worth mentioning is that as with the cohesion of the tax system is the safeguarding of the balanced allocation of taxing rights between Member States designed to safeguard the symmetry between the right to tax profits and the entitlement to deduct losses.¹⁶³

It is not clear whether the safeguarding of the balanced allocation of taxing rights between Member States can justify a discriminatory and restrictive measure on its own, as the ECJ has been inconsistent on the matter. The ECJ has, on one hand, in its case law, held that the justification ground in

¹⁵⁶ Terra, B., & Wattel, P., *European Tax Law*, 5th ed., Kluwer Law International, 2008, p. 756.

¹⁵⁷ See C-157/07 *Krankenheim*, paras. 42 and 43; and C-322/11 *K*, para. 71.

¹⁵⁸ C-168/01 *Bosal Holding*, paras. 35 and 36; and C-471/04 *Keller Holding*, paras. 42 and 43.

¹⁵⁹ See for this reason C-324/00 *Lankhorst-Hohorst*, para. 42.

¹⁶⁰ It was first accepted in C-446/03 *Marks & Spencer*, paras. 45 and 51. See also C-231/05 *Oy AA*, para. 51; C-414/06 *Lidl Belgium*, para. 33; C-182/08 *Glaxo Wellcome*, para. 87; C-311/08 *SGL*, para. 60; and C-337/08 *X Holding*, para. 33.

¹⁶¹ C-347/04 *Rewe Zentralfinanz*, para. 42; C-231/05 *Oy AA*, para. 54; C-311/08 *SGL*, para. 60; and C-318/10 *SIAT*, para. 45.

¹⁶² C-231/05 *Oy AA*, para. 55; C-414/06 *Lidl Belgium*, para. 34; and C-337/08 *X Holding*, para. 31. See also Poulsen, M., *Freedom of Establishment and the Balanced Allocation of Tax Jurisdiction*, *Intertax*, Vol. 40 issue 3, 2012, p. 203 et seq.; and Hilling, M., *Är det möjligt att utforma EU-förenliga skatteflyktsregler? – En analys med särskilt fokus på rättfärdigandegrunden att upprätthålla den väl avvägda fördelningen av beskattningsrätten*, *Svensk Skattetidning*, 2012:9, p. 763 et seq.

¹⁶³ C-231/05 *Oy AA*, para. 56; C-414/06 *Lidl Belgium*, para. 34; C-371/10 *National Grid Indus*, para. 80; and C-350/11 *Argenta Spaarbank*, para. 54.

question cannot, alone, justify such a measure and, therefore, needs to be applied in conjunction with another justification ground such as the prevention of tax avoidance, the need to prevent the double use of losses or others.¹⁶⁴ The ECJ has, on the other hand, in recent judgments, justified a discriminatory and restrictive measure with the justification ground in question alone.¹⁶⁵

Regardless of the uncertainty as to whether the safeguarding of the balanced allocation of taxing rights between Member States can justify the Swedish rules alone have the European Commission and the Swedish Government agreed that the safeguarding of the balanced allocation of taxing rights between Member States and the prevention of tax avoidance (which will be explained and analysed in relation to the Swedish rules below) can justify the Swedish interest deduction limitation rules.¹⁶⁶ Academic writers have also confirmed this, as the aim of the Swedish rules is to hinder erosion of the Swedish tax base through interest deductions.¹⁶⁷

It is not obvious that the safeguarding of the balanced allocation of taxing rights between Member States can justify the Swedish interest deduction limitation rules. It is true that interest expenses can be used by MNEs to shift profits to other tax jurisdictions even though the activities of the MNE, which gave rise to the profits in question, were performed in Sweden. The safeguarding of the balanced allocation of taxing rights between Member States as a justification ground requires, however, as mentioned above, that the discriminatory and restrictive national measure has a symmetry in a sense that profits and losses are regarded within the same tax jurisdiction. The general principle in all (or at least many) tax jurisdictions that costs are deductible insofar as they have incurred for the purpose of acquiring or maintaining taxable income is an expression of symmetry regarding the relationship between deductible costs and taxable income. This principle is generally applicable in the Swedish tax system as well.¹⁶⁸ The principle, however, does not apply to the relationship between the deduction of interest expenses and the taxation of income in the Swedish tax system. Interest expenses are, thus, deductible regardless of if the expenses have occurred for the purpose of acquiring or maintaining income.¹⁶⁹ It can be concluded that the Swedish interest deduction limitation rules are not based on such a symmetry required by the safeguarding of the balanced allocation of taxing rights between Member States and can, therefore, not be justified on such a basis.

¹⁶⁴ C-446/03 Marks & Spencer, para. 46; C-196/04 Cadbury Schweppes and Cadbury Schweppes Overseas, para. 56; C-347/04 Rewe Zentralfinanz, paras. 42 and 44; and C-231/05 Oy AA, para. 56.

¹⁶⁵ C-337/08 X Holding, para. 33; C-371/10 National Grid Indus, para. 48; and C-164/12 DMC, para. 46.

¹⁶⁶ See SG-Greffe (2014) D/17633, case no. 2013/4206, 24 November 2014, p. 7; and dnr. Fi2014/4205, p. 11-13.

¹⁶⁷ Hilling, M., *Är det möjligt att utforma EU-förenliga skatteflyktsregler? – En analys med särskilt fokus på EU-domstolen proportionalitetsbedömning*, Svensk Skattetidning, 2012:10, p. 824 et seq..

¹⁶⁸ Ch. 16, art. 1 1st sentence, SITA.

¹⁶⁹ Ch. 16, art. 1 2nd sentence, SITA.

3.4.5 The need to prevent the double use of losses

The need to prevent double use of losses is a justification ground also introduced by the ECJ in 2005 and has been invoked by Member States in various subsequent cases.¹⁷⁰ This means that a discriminatory and restrictive measure can be justified if there is a risk that losses or deductions can be used twice in two different tax jurisdictions. Worth mentioning is that the ECJ has not clarified whether the need to prevent double use of losses can justify a discriminatory and restrictive measure on its own, without other justification grounds.¹⁷¹ It is, however, unlikely that the need to prevent double use of losses can justify the Swedish interest deduction limitation rules since the interest expenses cannot be deducted in another tax jurisdiction. It is the Swedish company that has the interest expenses and there is not a risk that they will be deducted in another jurisdiction as well.

3.4.6 The prevention of tax avoidance

Taking advantage of the differences in tax systems of Member States is an acceptable form of tax planning, to a certain extent. The ECJ has clearly stated that direct taxation is not harmonized within the EU and that EU nationals, therefore, have the right to choose the most beneficial tax system within the EU to perform its activities.¹⁷² Member States are, thus, not allowed to create measures that are discriminatory or restrictive on the basis that the State loses tax revenue or that the tax is lower in other tax jurisdictions within the EU.¹⁷³

The ECJ has been reluctant to accept the prevention of tax avoidance as a justification ground for restrictions on the fundamental freedoms but has, lately, been more understanding towards the Member States.¹⁷⁴ The ECJ has stated that discriminatory and restrictive measures that apply specifically to wholly artificial arrangements which do not reflect economic reality, the objective of which is to escape the normally tax due, are justified by the prevention of tax avoidance.¹⁷⁵

The European Commission and the Swedish Government agree that the prevention of tax avoidance can justify the Swedish interest deduction limitation rules. The motivation, however, is different between the parties. The European Commission has based its opinion on the fact that the

¹⁷⁰ C-446/03 Marks & Spencer, para. 47. See also cases C-293/06 Deutsche Shell, para. 51; C-414/06 Lidl Belgium, para. 36; and C-18/11 Philips Electronics UK, para. 28.

¹⁷¹ Ibid.

¹⁷² C-264/96 ICI, para. 26; C-212/97 Centros, para. 27; C-167/01 Inspire Art, paras. 95 and 96; and C-364/01 Barbier, paras. 66 and 67.

¹⁷³ C-120/95 Nicolas Decker, para. 39; C-158/96 Raymond Kohll, para. 41; C-264/96 Imperial Chemical Industries, para. 28; C-294/97 Eurowings, para. 44; C-307/97 Saint-Gobain, para. 51; C-35/98 Verkooijen, para. 48; joined cases C-397/98 and C-410/98 Merallgesellschaft, para. 59; C-136/00 Danner, para. 56; C-324/00 Lankhorst-Hohorst, para. 36; C-436/00 X and Y, para. 50; C-315/02 Lenz, paras. 40 and 41; and C-196/04 Cadbury Schweppes and Cadbury Schweppes Overseas, paras. 36-38.

¹⁷⁴ Helminen (n 96), 2013, chapter 2.3.3.1.

¹⁷⁵ See for example C-264/96 ICI, para. 26; C-324/00 Lankhorst-Hohorst, para. 37; C-9/02 de Lasteyrie du Saillant, para. 50; C-196/04 Cadbury Schweppes and Cadbury Schweppes Overseas, para. 55; C-524/04 Thin Capitalization Group Litigation Order, para. 74; and C-282/12 Itecar, para. 34. See also C-110/99 Emsland and Stärke, paras. 52 and 53; and C-255/02 Halifax, paras. 74 and 75.

Swedish rules actually hinder artificial arrangements, without consideration taken as to whether other situations also are within the scope of the Swedish rules. Such consideration is taken by the European Commission in the proportionality analysis.¹⁷⁶ The Swedish Government has based its opinion on the fact that the Swedish rules do not need to be limited to wholly artificial arrangements, as ECJ case law has shown that whenever the prevention of tax avoidance and the safeguarding of the balanced allocation of taxing rights between Member States are applicable together, there is no need to limit the justification of the discriminatory and restrictive measure to wholly artificial arrangements.¹⁷⁷ The Swedish interest deduction limitation rules do not have the prevention of tax avoidance as a sole purpose and, therefore, do not have such a limitation.¹⁷⁸ The Swedish Government seems to have based its arguments on Swedish academic articles.¹⁷⁹

It must be determined, first, whether the Swedish interest deduction limitation rules are covered by the requirement of limitation of applicability to wholly artificial arrangements and, second, when such an analysis is to be conducted if it is shown that the requirement is applicable on the rules. Non-applicability of the requirement presupposes, according to the Swedish Government, that the safeguarding of the balanced allocation of taxing rights between Member States is applicable and can justify the Swedish rules. As has been shown above is this not the case as the safeguarding of the balanced allocation of taxing rights between Member States cannot justify the Swedish rules. The requirement that national anti-avoidance measures must be limited to wholly artificial arrangements can only be disregarded in exceptional cases which concludes that the Swedish interest deduction limitation rules are covered by the requirement.¹⁸⁰

It must for these reasons be determined when the analysis, whether the Swedish interest deduction limitation rules are covered by the requirement of a limitation of applicability to wholly artificial arrangements, is to be conducted. The ECJ has stated that “in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory...”.¹⁸¹ The statement do imply that there should be some level of concern regarding whether the national measure is limited to wholly artificial arrangements but

¹⁷⁶ SG-Greffe (2014) D/17633, case no. 2013/4206, 24 November 2014, p. 7.

¹⁷⁷ Dnr. Fi2014/4205, p. 11-13.

¹⁷⁸ The Swedish Government refers to C-446/03 Marks & Spencer, paras. 44-51; C-524/04 Test Claimants in the Thin Cap Group Litigation, para. 75; C-414/06 Lidl Belgium, para. 41; and C-311/08 SGI, paras. 61-63.

¹⁷⁹ See Hilling (n 164), 2012:9, p. 754-772; and Hilling (n 169), 2012:10, p. 814-827. The opinion of the Swedish Government has been confirmed in Hilling, M., *Utgångspunkter i juridisk argumentation – en replik*, Skattenytt, 2015, p. 58-63.

¹⁸⁰ Lang, M., *The Marks & Spencer case – the Open Issues Following the ECJ's Final Word*, European Taxation, 2006, p. 66; and Helminen, M., *EU Tax Law – Direct Taxation*, IBFD, 2011, p. 125.

¹⁸¹ C-524/04 Test Claimants in the Thin Cap Group Litigation, para. 74.

the ECJ has, in most of its case law, only determined whether wholly artificial arrangements are covered by the national measure and later, in the proportionality analysis, determined whether also other situations are restricted.¹⁸²

The proceeding analysis will, thus, determine whether wholly artificial arrangements are covered by the Swedish interest deduction limitation rules. Whether also other situations are covered by the Swedish rules will be determined in the proportionality analysis. The analysis cannot be limited to the 10 %-rule only as that would not give a proper result. The effect of the Swedish interest deduction limitations rules applied together is to be analysed.¹⁸³ The exception to the 10 %-rule and the business purpose rule are specifically of interest when determining whether the Swedish interest deduction limitation rules cover wholly artificial arrangements. The rules hinder arrangements with the purpose of obtaining a substantial tax advantage and transactions that are not mainly business motivated. It can, therefore, be concluded that the Swedish rules do restrict wholly artificial arrangements since the rules hinder MNEs who use interest expenses for the purpose of lowering the taxable base in Sweden and increase profit in low-tax jurisdictions. The Swedish interest deduction limitation rules are, thus, justified by the prevention of tax avoidance.

3.4.7 The territoriality principle

The territoriality principle has been accepted as a justification ground in some cases by the ECJ.¹⁸⁴ The justification grounds means, in essence, that a discriminatory and restrictive measure can be justified if the State, as a principle and in symmetry, only taxes income with a sufficient connection to the State in question. Also if a State allows deductions only in relation to costs having a purpose of acquiring or maintaining income within the State.¹⁸⁵ The motivation of a justification of the Swedish rules with the territoriality principle would be that profits earned in Sweden also should be taxed in Sweden. Sweden, as has previously been concluded, however, does not apply a symmetrical taxation regarding interest, as interest expenses are deductible without a requirement of a purpose of acquiring or maintaining income (3.4.3 and 3.4.4). The Swedish interest deduction limitation rules, thus, cannot be justified by the territoriality principle.

3.5 Proportionality

A national discriminatory and restrictive measure, which has been justified by an overriding reason in the public interest, must be proportionate to be

¹⁸² See the judgment in C-324/00 Lankhorst-Hohorst, para. 37 where the ECJ analysed whether the national measure were limited to wholly artificial arrangements in the justification analysis. This is also argued for in Dahlberg (n 20), 2011, p. 416. See, however, C-524/04 Test Claimants in the Thin Cap Group Litigation, paras. 76 and 77; and C-282/12 Itelcar, paras. 34 and 35 for such an analysis in the proportionality analysis.

¹⁸³ Dahlberg (n 20), 2011, p. 448.

¹⁸⁴ C-250/95 Futura Participations, paras. 20-22; C-168/01 Bosal Holding, paras. 38-40; C-319/02 Manninen, paras. 31-39; C-446/03 Marks & Spencer, para. 39; C-470/04 N, para. 41; and C-471/04 Keller Holding, para. 44.

¹⁸⁵ Helminen (n 96), 2013, chapter 2.3.7.

compatible with the freedom of establishment.¹⁸⁶ The ECJ has not applied an uniform proportionality test in its case law since two different tests have been used. On one hand has the ECJ used a three-step test in which it is investigated whether the discriminatory and restrictive, although justified, national measure is appropriate to ensure the attainment of its objective, the measure is necessary in a sense that no other, less restrictive, measure is available and, lastly, if the measure is proportionate to its objective (proportionality in a more narrower sense). On the other hand has the ECJ used a two-fold test in which it is tested whether the national measure is necessary and proportionate, as with the three-step test but without the appropriate part of the test. The two-fold test has prevailed in recent case law and is applied for the purposes of the proportionality analysis.¹⁸⁷

The proportionality of national measures with the purpose of hindering tax avoidance has been the subject of several cases before the ECJ. It is to be investigated whether the national measure cover other situations than wholly artificial arrangements. The ECJ has stated that this is to be made with consideration to both subjective and objective elements where the intention of the taxpayer must be to obtain a tax advantage and the lack of physical existence of the subsidiary in terms of premises, staff and equipment must be ascertainable by third parties.¹⁸⁸ The ECJ has also stated that there is a wholly artificial arrangement where the interest paid between dependent parties, on the basis of objective and verifiable evidence, exceeds what would have been agreed upon on an arm's length basis i.e. the commercial terms, which would have been accepted if the parties were independent. The national legislation must, thus, be limited to hinder cross-border interest payments exceeding arm's length and only deny deduction of the exceeding part of the interest expenses to be proportionate.¹⁸⁹

The ECJ has, further, stated that a national measure is proportionate only if the taxpayer, without an excessive administrative burden, is given the opportunity to show that there are commercial reasons to the transaction other than tax reasons.¹⁹⁰ Also that a national measure with the purpose of the prevention of tax avoidance must meet the requirements of legal certainty in a sense that the rule must be clear, precise and predictable

¹⁸⁶ 8/74 Dassonville; 120/78 Cassis de Dijon; C-55/94 Gebhard, para. 37; C-250/95 Futura Participations, para. 26; C-35/98 Verkooijen, para. 43; C-324/00 Lankhorst-Hohorst, para. 33; C-436/00 X and Y, para. 49; C-9/02 de Lasteyrie du Saillant, para. 49; C-446/03 Marks & Spencer, para. 35; C-196/04 Cadbury Schweppes and Cadbury Schweppes Overseas, para. 47; C-524/04 Test Claimants in the Thin Cap Group Litigation, para. 64; C-231/05 Oy AA, para. 44; C-414/06 Lidl Belgium, para. 27; and C-157/07 Krankenheim, para. 40.

¹⁸⁷ Zalasinski, A., *Proportionality of Anti-Avoidance and Anti-Abuse Measures in the ECJ's Direct Tax Case Law*, Intertax, Vol. 35 issue 5, 2007, p. 311 et seq..

¹⁸⁸ C-196/04 Cadbury Schweppes and Cadbury Schweppes Overseas, para. 62-67.

¹⁸⁹ C-524/04 Test Claimants in the Thin Cap Group Litigation, paras. 80, 81 and 83; C-105/07 Lammers & Van Cleeff NV, paras. 29 and 33; C-311/08 SGI, para. 72; C-318/10 SIAT, para. 52; and C-282/12 Itelcar, para. 38.

¹⁹⁰ C-524/04 Test Claimants in the Thin Cap Group Litigation, para. 82; C-201/05 Test Claimants in the CFC and Dividend Group Litigation, para. 84; C-311/08 SGI, para. 71; C-318/10 SIAT, para. 50; and C-282/12 Itelcar, para. 37.

regarding its effects. The rule must make it possible to determine its scope and applicability with sufficient precision and certainty.¹⁹¹

Since the European Commission is of the opinion that the Swedish interest deduction limitation rules can be justified, it has also analysed whether the Swedish rules are proportionate. The European Commission has concluded that the Swedish rules are not proportionate and, therefore, incompatible with the freedom of establishment. The conclusion is based on the fact that the business purpose rule is not limited to wholly artificial arrangements and that there is a presumption of tax avoidance on the basis of the level of taxation in another Member State in the exception to the 10 %-rule. The European Commission, also, relies on the fact that the scope of the Swedish rules is not limited to terms and conditions exceeding arm's length and that the rules are not in line with legal certainty. The European Commission argues that the denial of deduction of interest expenses in the Swedish rules is not dependent on the arm's length principle and that there is not enough information as to how a transaction is to be considered mainly business motivated in the business purpose rule, thus, stating that the rules are not certain as required. The European Commission argues, in addition, that the Swedish rules are not proportionate since the burden of proof of whether a transaction is mainly business motivated is with the taxpayer without the need of any proof of a suspicion of tax avoidance from the Swedish Tax Agency.¹⁹²

The Swedish Government, on the other hand, has the opinion that the Swedish rules are proportionate and, therefore, compatible with the freedom of establishment. The Swedish Government argues that it is proportionate to require a specific level of taxation in the State of the receiver as this has been accepted by the ECJ regarding the Finnish group contribution rules.¹⁹³ It is further stated, as has been stated above, that the requirement that anti-avoidance rules are limited to cover wholly artificial arrangements is not applicable on the Swedish rules since it does not apply when the safeguarding of the balanced allocation of taxing rights between Member States and the prevention of tax avoidance, in conjunction, can justify a national measure. This is also the basis for why the burden of proof does not have an effect on the compatibility analysis and why Swedish rules are not covered by the requirement of legal certainty as stated by the ECJ. The Swedish Government, however, states that if the burden of proof in the business purpose rule and the legal certainty aspect still are of relevance, it is a general principle in the Swedish tax system that the State has the burden of proof regarding taxation of income while the taxpayer has the burden of proof regarding deductions and that the Swedish preworks contain guidelines as to how the Swedish interest deduction limitation rules, and especially the exception to the 10 %-rule and the business purpose rule, are to be interpreted.¹⁹⁴

¹⁹¹ C-17/03 VEMW and Others, para. 80; joined cases C-72/10 and C-77/10 Costa & Cifone, para. 74 and case law cited; C-318/10 SIAT, paras. 57-59; and C-282/12 Itelcar, para. 44.

¹⁹² SG-Greffe (2014) D/17633, case no. 2013/4206, 24 November 2014, p. 7-9.

¹⁹³ The Swedish Government refers to C-231/05 Oy AA, paras. 62-64.

¹⁹⁴ Dnr. Fi2014/4205, p. 12-20.

The European Commission and the Swedish Government clearly have different opinions as to whether the Swedish interest deduction limitation rules are proportionate and compatible with the freedom of establishment. As it has been shown that the safeguarding of the balanced allocation of taxing rights between Member States cannot justify the Swedish rules will the analysis proceed with an investigation of whether the Swedish rules are limited to wholly artificial arrangements, if the taxpayer, without an excessive administrative burden, is given an opportunity to show that there are commercial reasons to the transaction and if the rules are in line with legal certainty.

For a national rule with the purpose of prevention tax avoidance to be limited to wholly artificial arrangements it must apply to transactions where the interest payments are not at arm's length and the denial of deduction of the interest payment must be limited to that part of the interest payments. The Swedish rules, however, apply without consideration to whether the commercial terms between the affiliated companies are such that independent parties would also accept the terms. Consideration is, instead, taken to for example the level of tax in the State of the beneficial owner, if financing could have been made with equity and the origin of the capital. Although the terms and conditions of the transaction are of relevance are those factors not decisive for deduction of the interest expenses. The requirement that interest deduction limitation rules are only to apply to interest exceeding arm's length is, thus, not fulfilled.¹⁹⁵

Also, according to the business purpose rule are interest expenses deductible if the transaction is mainly business motivated. Sweden changed its controlled foreign company (CFC) rules when the ECJ stated that measures that allow activities that reflect economic reality are considered as limited to wholly artificial arrangements. Sweden changed the rules so they would not cover business motivated ("affärsmässigt motiverat" in Swedish) establishments. It is a direct translation of the wording of the ECJ (the wording is different in English because of language discrepancies). As the business purpose rule applies to *mainly* business motivated transactions (italics added) are the Swedish rules not limited to genuine economic activities or activities that reflects economic reality. The Swedish interest deduction limitation rules are, thus, with consideration to the wording of the rules and the fact that the rules apply regardless of the arm's length of the transaction, not limited to wholly artificial arrangements.¹⁹⁶

For a national measure with the purpose of hindering tax avoidance to be considered proportionate must the taxpayer be given, without excessive administrative burden, the opportunity to prove that there are commercial

¹⁹⁵ This has been confirmed in Ohlsson, F., *Några tankar kring en replik*, Skattenytt, 2015, p. 68-71; and Våljemark, C., *EU-kommissionens formella underrättelse: De svenska ränteavdragsbegränsningsreglerna och EU-rätten – var står vi nu?*, Skattenytt, 2015, p. 209 et seq..

¹⁹⁶ This has also been concluded in Ohlsson, F., *Även solen har sina fläckar – EU-rättsliga frågetecken kring flera svenska skatteregler*, Skattenytt, 2013, p. 109; Dahlberg (n 20), 2011, p.448 et seq.; and the dissenting opinion of Dahlberg, M. in advanced rulings 2014-07-10, dnr. 82-13/D and 2014-12-09, dnr. 108-13/D. See also SG-Greffe (2014) D/17633, case no. 2013/4206, 24 November 2014, p. 7 et seq..

reasons to the transaction under investigation. As it is presumed, in the Swedish interest deduction limitation rules and more specifically the 10 %-rule, that the taxpayer is avoiding tax based on the level of taxation in the State of the beneficial owner, is the Swedish Tax Agency relieved from showing that the taxpayer is avoiding tax and the burden of proof falls, instead, on the taxpayer. The taxpayer is, within a reasonable time period, given an opportunity to show that there are commercial reasons to the transaction. The ECJ has, however, stated that it is not proportionate to have a presumption of tax avoidance, which also covers economically real transactions, resulting in that the burden of proof is entirely on the taxpayer.¹⁹⁷ The Swedish rules have such a presumption and bona fide transactions i.e. transactions with a genuine economic purpose are also included in the presumption. It can, thus, be concluded that the Swedish interest deduction limitation rules do give the taxpayer the opportunity to show that the transaction reflects economic reality but that the rules are disproportionate since the taxpayer has the burden of proof for deduction and that bona fide transactions are covered by the presumption of tax avoidance.¹⁹⁸

Lastly, for a national measure to be proportionate it must be in line with the principle of legal certainty. The national rule must be certain in a sense that it is clear, precise and predictable and that it is possible to determine the scope and applicability with sufficient precision. The Swedish interest deduction limitation rules contain several aspects to be considered when determining whether the interest expenses in a transaction are deductible. It must, for example, be determined whether the companies are affiliated (substantial influence or mainly the same management), who the beneficial owner is, the hypothetical level of tax in the State of the beneficial owner, how shortfalls of the lender affects the analysis, when and how the origin of the lendable capital has relevance, what a substantial tax advantage is, whether the transaction is mainly business motivated with the considerations therein such as the comparison between debt in different jurisdictions and if finance instead could have been done with equity. The list of considerations can be made longer and the Swedish Government uses terms such as “may be considered” and “should be considered”, leaving the taxpayer unknowing as to which factors are to be considered for a specific transaction and the weight of the factors in the analysis.¹⁹⁹ Something that has been identified as unclear is the fact that the Swedish rules, further, contain quantitative requirements to measure qualitative factors.²⁰⁰ That the Swedish interest deduction limitation rules are uncertain can be concluded on the basis of the abovementioned and is confirmed by the fact that the Swedish Supreme Administrative Court has stated that the Swedish rules in question require such extensive investigation and evidence from different parties that the rules are not suitable for advanced rulings from the Swedish Council on Advance Tax Rulings (see 2.2.4).

¹⁹⁷ C-282/12 *Itelcar*, para. 42.

¹⁹⁸ This has also been concluded in *Väljemark* (n 197), 2015, p. 210.

¹⁹⁹ For more considerations see n 41 in *Ohlsson* (n 197), 2015, p. 64-76.

²⁰⁰ Dissenting opinion of Dahlberg, M. in advanced rulings 2014-07-10, dnr. 82-13/D and 2014-12-09, dnr. 108-13/D.

The question is, however, what degree of uncertainty that is acceptable. The ECJ has stated that a Belgian rule, which denied deductions of interest expenses related to a loan to a foreign company resident in a State with a tax rate appreciably more advantageous than the tax applicable in Belgium, unless the taxpayer proved that the transactions were genuine and proper, was sufficiently unclear to be considered disproportionate with regard to the principle of legal certainty.²⁰¹ The Swedish interest deduction limitation rules resemble the Belgian rule as both rules presume tax avoidance on the basis of the level of tax in the foreign State. The Swedish exception to the 10 %-rule denies deduction of interest expenses if the taxpayer has received a substantial tax advantage in the foreign State while the Belgian rule denied deduction of interest expenses if the taxpayer had received an appreciably more advantageous tax treatment in the foreign State. Both rules, further, gives the taxpayer the burden of proof as to whether the transaction is genuine/proper/mainly business motivated. Even though it did not exist guidance to how the Belgian rule was to be interpreted and such guidance do exists for the Swedish rules in the preworks, it does not make a decisive difference since the preworks to the Swedish rules does not actually give useful guidance to the taxpayer, as has been stated above.²⁰² The Swedish interest deduction limitation rules are on the basis of the abovementioned not in line with the principle of legal certainty.

It has been argued that a national measure should be considered proportionate as long as the taxpayer has the opportunity to prove that there are commercial reasons to the transactions, uncertainty is needed for the rule to achieve its purpose and the legislature has made everything in its powers to make the rule certain without jeopardising the purpose of the rule. It is argued that the ECJ, in such a case, should be understanding regarding the problems with requirements of genuine economic transactions.²⁰³ That argument cannot be upheld. The principle of legal certainty would be undermined and the uncertainty of the Swedish rules would be justified by the fact that the effect of the rules are achieved and that the taxpayer has the opportunity to prove that there are commercial reasons to the transaction. The fact that the taxpayer is given the opportunity to prove that there are commercial reasons to the transaction does not exclude the requirement of certainty to the rule as it is a separate requirement. The requirements are separate in a sense that the one does not affect the other. A national measure is still just as uncertain and accompanied with the negative effects thereof independently of whether the taxpayer is given the opportunity to provide the Member State with evidence or not.

The Swedish interest deduction limitation rules are, thus, not proportionate even though the taxpayer is given the opportunity to show that there are commercial reasons to the transaction. This is a result of the fact that it has been concluded that the Swedish rules are not limited to wholly artificial arrangements in their applicability, there is a presumption of tax avoidance and the fact that the rules are not in line with the principle of legal certainty.

²⁰¹ C-318/10 SIAT, paras. 6, 27 and 57-59.

²⁰² See Ibid., para. 26.

²⁰³ Hilling (n 169), 2012:10, p. 820 et seq.; and Hilling (n 181), 2015, p. 59.

4 Conclusion

The aim of the thesis has been to analyse to what extent Member States can have anti-avoidance rules limiting interest deduction and more specifically whether the Swedish interest deduction limitation rules are compatible with the fundamental freedoms of EU law. The Swedish rules fall within the scope of application of several fundamental freedoms but the analysis is to be made in relation to the freedom of establishment. Further, as it has been shown that the Swedish rules are indirectly discriminatory and restrictive, justified by the prevention of tax avoidance but not proportionate, it can be concluded that the Swedish interest deduction limitation rules are incompatible with the freedom of establishment. The investigation of the European Commission is, thus, well founded and it will be difficult for the Swedish Government to prove that the Swedish interest deduction limitation rules are compatible with EU law. It is time for Swedish companies, which have been denied interest deductions under the current Swedish interest deduction limitation rules, to review their options in terms of judicial remedy.

The Swedish Government has three alternatives for EU law compliance. The Government can remove the Swedish interest deduction limitation rules and, thus, make interest expenses deductible without limitations. This is unlikely as it would result in an increased difference in treatment between debt and equity and increase tax planning opportunities as seen in the “industrivärden-målen” mentioned above (1.1). The Government can change the already existing interest deduction limitation rules so the rules are limited to wholly artificial arrangements, do not have a presumption of tax avoidance and are in line with the principle of legal certainty. This requires that the applicability of the business purpose rule is narrowed to business motivated transactions and that regard is taken to the arm’s length principle when determining whether interest expenses are deductible. The rules must also be made clearer in a sense that it is, before a transaction, possible to determine whether the interest expenses will be deductible or not. This is a reasonable alternative for the Swedish Government. The last alternative is that the Swedish Government introduces a new solution to the tax avoidance issue in question. There is a proposal for legislation according to which interest expenses are deductible with a standard deduction on the net financial income per year but it is unlikely that the proposal will be adopted by the Swedish Parliament (“Riksdagen” in Swedish).²⁰⁴ As there are no other concrete changes proposed it can be expected that there will not be any changes of the rules in the near future, why it is reasonable to believe that the European Commission will proceed with the infringement procedure and eventually bring the matter before the ECJ.

²⁰⁴ Statens Offentliga Utredningar (SOU) 2014:40.

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