1 Introduction

Work against harmful tax competition has for some years been the difficult task of both the EU and the OECD. In this field the two organisations have a common goal, preventing harmful tax competition, but target somewhat different areas by different means. The report has the following outline.\(^1\)

Section 2 is intended to give a brief introduction to the meaning of “harmful tax competition” as defined by on the one hand the EU and on the other hand the OECD. The extent of the Swedish discussion on the subject is also presented. General aspects of Swedish tax law are described in section 3. Pieces of Swedish tax legislation of specific interest as regards harmful tax competition are discussed in section 4. I concentrate on those measures considered in the Primarolo report. It should be noted already here that there seems to be few aspects of Swedish tax law that could constitute harmful tax competition. There is also a discussion on other pieces of Swedish legislation that could be considered in relation to the question of harmful tax competition.

Furthermore, an important factor for states trying to prevent the use by their residents of foreign low tax regimes is the collection and exchange of

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\(^1\) I would like to thank Professor Emeritus Leif Mutén for valuable comments on this report.
information. This factor is discussed in section 5. Transparency in relation to administrative practices is the subject of section 6. Legislative anti-avoidance measures at national Swedish level are discussed in section 7. These measures include i.a. general anti-avoidance rules and CFC legislation. Section 8 covers measures against harmful tax competition in Swedish tax treaties. Final remarks are given in section 9.

2 Background to the work against harmful tax competition

2.1 The OECD definition of harmful tax competition

In order to separate between different forms of tax competition the OECD makes the following characterization of three broad situations. In all situations tax is levied in the first state on income from geographically mobile activities, such as financial and other service activities, and that tax is lower than the one that would have been levied on the same income in the second state.

(i) The first state is a tax haven and, as such, generally imposes no or only nominal tax on the income in question.

(ii) The first state collects significant revenues from tax imposed on income at the individual or company level but its tax system has preferential features that allow the relevant income to be subject to low or no taxation.

(iii) The first state collects significant revenues from tax imposed on income at the individual or company level but the effective tax rate that is generally applicable at that level in that state is lower than that levied in the second state.

The first category would include what the OECD identifies as “tax havens” and the second category would include “harmful preferential tax regimes”. The third category would constitute “acceptable” tax competition. The second category includes states that have “parallel” tax regimes: one regime with “normal” tax rules and another, separate tax regime, which has the traditional characteristics of a “tax haven”.

The OECD uses the following key factors for identifying “tax havens”:

a) No or only nominal taxes.

b) Lack of effective exchange of information.

3 In my view, it is this second category of states that poses the most complex problem of harmful tax competition. For example, an old tax treaty with a state harbouring a recently introduced harmful preferential tax regime may act as a “Trojan horse” opening up for tax avoidance schemes since the treaty once was concluded between states with “normal” – or at least comparable – tax systems.
4 The 1998 OECD report, Box I, p. 23.
c) Lack of transparency.

d) No substantial activities.

According to the OECD, the necessary starting point to identify a tax haven is whether a jurisdiction imposes no or only nominal taxes, or is perceived to offer itself as a place to be used by non-residents to escape tax in their state of residence.\(^5\) The other factors are only to confirm the existence of a tax haven.\(^6\)

The key factors\(^7\) in identifying and assessing “harmful preferential tax regimes” are:

a) *No or low effective tax rates.* A harmful preferential tax regime will, according to the report, be characterized by a combination of a low or zero effective tax rate and one or more of the following factors.

b) “Ring fencing” of regimes. Hereby is meant that the potential harmful tax regime is partly or fully insulated from the domestic markets of the state providing the regime.

c) Lack of transparency. This includes i.a. favourable application of laws and regulations, negotiable tax provisions, and a failure to make administrative practices widely available.

d) Lack of effective exchange of information.

It is expressly clarified in the report that a harmful preferential tax regime will be characterized by a combination of a low or zero effective tax rate and one or more other factors.\(^8\)

### 2.2 The EU definition of harmful tax competition

A tax measure in an EU member state shall according to the Code of Conduct be regarded as potentially harmful and therefore covered by the Code if it provides for a significantly lower level of taxation, including zero taxation, than those levels that generally apply in the member state.\(^9\)

According to the EU Code of Conduct for business taxation the following factors\(^10\) should *inter alia* be considered when assessing if tax measures are harmful:

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\(^5\) The 1998 OECD report, para. 52.
\(^6\) Ibidem.
\(^7\) The 1998 OECD report, Box II, p. 27.
\(^8\) The 1998 OECD report para. 61.
\(^9\) Furthermore it is noted in the Code of Conduct that such a low level of taxation may operate by virtue of the nominal tax rate, the tax base or any other relevant factor (Sec. B).
\(^10\) Code of Conduct, paragraph B.
1. whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or

2. whether advantages are ring-fenced from the domestic market, so that they do not affect the national tax base, or

3. whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages, or

4. whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD, or

5. whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way.

The interpretation of these criteria has been discussed within the Primarolo group. The group considered that a literal interpretation of the criteria as set out in the Code of Conduct could make some of them of little or of no significance. It was agreed that, in addition to a literal interpretation, the group should also take account of a wider interpretation of some of the criteria. Four delegations are said to have stated that the manner in which the wider interpretation was applied to small and open economies was not acceptable. Sweden is generally considered as a small and open economy, but it is not known to the reporter whether Sweden actually was among those four delegations.

The Primarolo report could be said to distinguish between seven groups of measures that may constitute harmful measures according to the Code of Conduct. Those groups are: (i) Financial services, group financing and royalty payments, (ii) Insurance, reinsurance and captive insurance, (iii) Intra-group services, (iv) Holding companies, (v) Exempt and Offshore Companies, (vi) Miscellaneous measures, and (vii) Other.

2.3 Basic similarities and differences between the OECD and EU initiatives against harmful tax competition

There are both similarities and differences between the OECD and EU initiatives against harmful tax competition. The OECD concept of harmful tax competition

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12 Ibidem.
13 The Ecofin Council has declared that all harmful tax practices in EU member states in principle shall be abolished by the end of 2005. The OECD has declared that member states’ harmful tax practices shall be abolished no later than the end of 2005. Cf. on this matter Fernlund, *Arbetet med skattefrågor inom EU under Sveriges ordförandeskap*, SST 2000 pp. 997 – 998. On differences between the EU and OECD
deals with tax havens, which is not covered by the EU initiative. The reason for the EU not to deal with tax havens is of course that no member state constitutes such a general low tax regime as a tax haven. The OECD term “harmful preferential tax regime” equals more or less the EU concept of harmful tax competition. There are similarities as regards the ring fencing requirement, the artificial definition of the tax base and the absence of economic activity or economic presence.  

An apparent difference between the OECD concept and the EU concept is that OECD focuses on income from “mobile activity” such as financial services. The EU, however, is concentrated on income from all activities including traditional trade and industry. The tax rate criteria for what constitutes harmful tax competition are also differently defined in the two projects. The OECD deals with “no or low effective tax rates”. The EU concept targets a tax rate that is low in relation to the general tax rate of the member state in question. As regards transparency, the EU is concentrated on administrative practices that grant hidden tax privileges. The OECD could be said, however, to focus on exchange of information between jurisdictions.

2.4 “Harmful tax competition” in the Swedish discussion

Tax competition has been discussed in Swedish literature in both law and economics, however, mainly in relation to recent projects presented by the EU and OECD. Tax competition was the subject of Lindencrona’s thesis in 1972. With the abolishment of restrictions on cross-border capital movements Lindencrona anticipated a forthcoming “race to the bottom”. 

It is no understatement that the Swedish government has taken the question of tax competition seriously. Sweden has been a driving force both within the EU and the OECD work against international tax competition. However, Sweden could be described as hesitant to further substantial tax harmonization within the EU. Measures against harmful tax competition have been taken both at the national and international level, which will be discussed further below.

A distinction between “fair” and “unfair” tax competition has been made in the Swedish discussion. Fair tax competition would relate to such trends in taxation as lower tax rates in combination with a broadened tax base and limited opportunities to tax deferral. The Swedish tax reform of 1990/1991 bore the hallmarks of this fair tax competition. “Unfair” tax competition would relate to such measures as defined in the EU Code of Conduct and the OECD Report on Harmful Tax Competition.

concepts of harmful tax competition cf. Vanistendael, Janus with two faces, or the many faces of taxation, pp. 294 – 295. 

14 Cf. Vanistendael, Janus with two faces, or the many faces of taxation, p. 294. 

15 Lindencrona, Skatter och kapitalflykt, pp. 15 – 16. For recent Swedish discussion (with further references) cf. Dahlberg, Svensk skatteavtalspolitik och utländska basbolag, chapter 2. Tax competition has furthermore been dealt with by Bruzelius in Svensk juridisk nationalrapport, pp. 161 – 174.
Within the framework of a special project Information from local Swedish tax authorities on transactions with tax havens by Swedish residents have been collected, analysed and assessed by a special group with the National Tax Board (Riksskatteverket). In a part study covering the period autumn 1997 to April 1998 information on a large number of transactions was collected. Almost 50 per cent of the transactions were, according to the National Tax Board, made with the Channel Islands (i.e. in the referred study Jersey, Guernsey and finally the Isle of Man, albeit located in the Irish Sea, reporter’s remark) and Gibraltar. The other half of the transactions was made with a limited number of 15 jurisdictions. The special group estimated that the transactions with these foreign jurisdictions decreased the Swedish tax base with about SEK 1.1 billion (about € 1.1 billion). The special group of the National Tax Board estimates that actual loss of tax base to low tax jurisdictions may be up to five times as high. It is furthermore well known that many Swedish residents hold foreign savings, but to what extent is unclear.

I am somewhat hesitant whether any decisive inductive conclusions can be made from the empirical material presented by the special group of the National Tax Board. Still, it is an interesting contribution to the otherwise apparent, and maybe even striking, lack of statistics.

3  General aspects of Swedish tax law

3.1  Unlimited tax liability

Companies resident in Sweden are liable to tax in Sweden on their worldwide income and residence for companies is governed by registration in Sweden, chapter 6, section 3 of the Income Tax Act. Companies are subject to the ordinary company tax rate, presently 28 per cent. The definition of business income is broad and comprises, according to chapter 15, section 1 of the Income Tax Act, all income of a company including capital gains.

16 On the work of this group with the National Tax Board cf. Bäckström, Riksskatteverkets pågående undersökning av transaktioner riktade mot jurisdiktioner med låg skattenivå – “Paradisprojektet”, SST 2000 pp. 431 – 442.

17 Mutén refers to estimates that Swedish residents keep about SEK 350 – 400 billion (€ 35– 40 billion) in foreign bank accounts etc., of which only a fraction is reported to Swedish tax authorities (cf. section 5 below). On this matter see Mutén, Skattekonkurrens i perspektiv, pp. 191– 202.

18 Here should also be mentioned an estimate made by a public inquiry in 1999 on royalty payments to low tax jurisdictions (SOU 1999:79 Källskatt på utdelning och royalty till begränsats skattskyldiga, especially pp. 202 – 203). The estimate was based on reports filed to the Swedish Central Bank (Riksbanken). Only transfers on more than SEK 75,000 (about € 7,500). In 1998, a total of SEK 7.5 billion was paid in royalties to receivers resident in other states than Sweden. The tax authority of Stockholm did in 1998 register outbound royalty payments with SEK 6.2 billion. Of that amount more than 93 per cent was paid to receivers resident in industrialized states. Royalty receivers in the Unites States accounted for 40 per cent of SEK 6.2 billion in royalty payments in 1998. As regards royalty payments to residents in states with which Sweden does not have any tax treaty (such as Gibraltar, Hong Kong, Liechtenstein and Portugal) the total amount for 1998 was SEK 50 million.

19 Inkomstskattelag (1999:1229).
Sweden applies in princip the classical system of company taxation: company profits are taxed both at company level, as business profits, and at shareholder level as dividends. At the individual level dividends are taxed as capital income with a 30 per cent tax rate. Thus the combined tax rate for company profits is schematically \(28\% + (0.72 \times 30\%)\) = 49.6%. Intercorporate dividends, however, are tax exempt in order to eliminate multiple taxation.\(^{20}\)

According to domestic tax law, interest is fully deductible when computing business income.\(^{21}\)

Wages and salaries of individuals are taxed as employment income. From the gross income deductions are allowed for all necessary expenses incurred in earning or preserving that income. The net income is subject to tax. The tax rate is progressive with the lowest rate about 30 per cent in municipal tax\(^{22}\) (up to an income of SEK 252,000 about € 25,000) and over that amount another 20 per cent tax is added. Finally, a 5 per cent national tax is added on income above SEK 390,400 (about € 39,000). Accordingly, the highest marginal tax rate on salaries would be about 55 per cent. Individuals’ business income is taxed at the same rate as applies for salaries.

Income from capital realized by individuals is taxed at a rate of 30 per cent. Dividends, interest and capital gains are examples of capital income. Royalty is normally taxed as business income.

Individuals resident in Sweden are subject to a net wealth tax (förmögenhetsskatt). Foreign residents on a temporary stay in Sweden are not liable to the net wealth tax if they do not stay longer than three years. Net wealth tax is levied on the worldwide capital of the taxpayer. The capital of husband and wife\(^{23}\) is added together. Liabilities related to a taxable asset are deductible when computing the taxable amount. Tax is levied on amounts exceeding SEK 1,000,000 (sole individuals) and SEK 1,500,000 for couples. Assets used in business are exempt, as well as non-quoted or O-listed shares. It could be mentioned that a small group of individuals holding considerable parts (25 per cent of the voting rights) of a company listed on the stock exchange are exempt from net wealth tax on their holding. Even if it is not explicitly declared in the preparatory works, it can be assumed that there was a fear that the industrialist

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\(^{20}\) Chapter 24, sections 15 to 22 of the Income Tax Act. As regards intercorporate cross-border dividends, tax exemption (in Sweden) is also provided according to Swedish tax treaties, either through specific provisions or through a reference to domestic Swedish law. Specific treaty provisions providing tax exemption in Sweden for intercorporate dividends are found in e.g. Art. 24 (3) of the 1986 Irish-Swedish tax treaty (as amended through later protocols), Art. 24 (3) d) of the 1991 Netherlands-Sweden tax treaty (with protocol), and Art. 23 (2c) of the US-Swedish tax treaty of 1994. Treaty provisions only referring to domestic Swedish legislation on tax exemption (in Sweden) for intercorporate dividends are found in e.g. Art. 22 (2c) of the 1995 Canadian-Swedish tax treaty, Art. 22 (2c), and Art. 23 (2c) of the 1997 India-Sweden tax treaty.

\(^{21}\) Chapter 16, section 1 of the Income Tax Act.

\(^{22}\) The tax rate varies somewhat between different municipalities.

\(^{23}\) Also included are children under 18 years of age living in the household.
families in question would emigrate in order to elude the net wealth tax on their holdings.\textsuperscript{24}

Although the company tax rate (28 per cent) is low in an international comparison, an inquiry by Andersson/Fall\textsuperscript{25} shows that Sweden has the highest company taxation in the EU if an aggregation is made of the company tax rate, taxation on dividends, capital gains tax and net wealth tax.\textsuperscript{26}

3.2 Limited tax liability

Non-resident companies are subject to limited tax liability in Sweden.\textsuperscript{27} Non-resident companies are liable to income tax in Sweden in respect of income attributable to i.a. permanent establishments and real property.\textsuperscript{28} Foreign entities receiving dividends from Sweden are liable to pay withholding tax. The Swedish withholding tax on outbound dividends is 30 per cent, according to Swedish tax treaties, however, reduced by half or even more for instance in cases governed by the parent/subsidiary directive.\textsuperscript{29}

Furthermore, royalties paid to non-resident companies are normally regarded as income derived by the non-resident company from a permanent establishment in Sweden, and accordingly subject to income tax (28 per cent) by assessment, chapter 6, section 11 of the Income Tax Act. When considering the tax allocation reserve\textsuperscript{30}, the effective company tax rate is even a few percentage units lower than 28 per cent.

There is no withholding tax or other Swedish tax on interest paid from Sweden to non-residents, except where the interest is attributable to a permanent establishment in Sweden.

\textsuperscript{24} The government is rather referring to reasons of tax neutrality and the wish to facilitate the acquisition of capital by registering a former private company on a qualified list on a stock exchange. Holdings in companies not registered on a qualified list of a stock exchange are not fully considered when computing net-wealth. Cf. government bill prop. 1996/97:117, esp. pp. 58 – 59.

\textsuperscript{25} With the Confederation of Swedish Enterprises (Svenskt näringsliv).

\textsuperscript{26} The inquiry deals with the situation in 1999. The EU average aggregate company taxation was given an index of 100 and the inquiry gave the following results (index within brackets): Sweden (197), Ireland (135), the Netherlands (132), Denmark (128), Spain (112), Finland (106), Belgium (95), Italy (92), Austria (87), Portugal (84), the United Kingdom of Great Britain and Northern Ireland (83), France (80), Luxembourg (72), Greece (61) and Germany (37). Andersson, Bolagsbeskattningen inom EU – Blir det EG-domstolen och statsstödsreglerna som avgör den framtida utformningen?, SST 2001 p. 720, at 722.

\textsuperscript{27} Chapter 6, section 7 of the Income Tax Act.

\textsuperscript{28} Chapter 6, section 11 of the Income Tax Act.

\textsuperscript{29} Kupongskattelag (1970:624), the Withholding Tax Act.

\textsuperscript{30} Cf. sub-section 4.1.2.
4 Swedish tax legislation of special interest

4.1 Tax legislation considered in the Primarolo report

4.1.1 Investment companies

The term “investment company” is defined in chapter 39, section 15 of the Income Tax Act. An investment company is either a company limited by shares or an economic association (ekonomisk förening). An investment company shall exclusively, or almost exclusively, hold shares, bonds and other forms of securities. Furthermore, the purpose of an investment company shall principally be to provide risk sharing through a diversified holding of stocks, bonds and securities etc.\(^{31}\) Finally, an investment company shall have a large number of individual shareholders.

An investment company is not subject to ordinary company taxation and the 28 per cent company tax rate. Instead, tax is levied with 1.5 per cent of the net capital holding of the investment company.\(^{32}\) Capital gains on the sale of shares etc. held by the investment company are tax exempt.

Dividends distributed by the investment company are tax deductible. A precondition, however, is that the deduction does not cause a negative result. Received dividends are subject to taxation. It is important to notice that an investment company may make full deductions for interest paid on loans. The right to make full interest deduction opens the possibility to minimize the taxable income of the investment company.\(^{33}\)

The underlying reason for the special tax treatment of investment companies is for the legislator to provide a tool for the effective ownership and control of major Swedish companies. Ownership through investment companies has been considered a more effective way than e.g. crosswise ownership. In 1988 a public inquiry considered investment companies as important for the effective corporate governance of Swedish industry and business.\(^{34}\) This opinion seems to be prevailing.

The Swedish tax system also contains another form of intermediary ownership: investment funds (värdepappersfonder). Investment funds were once introduced as an alternative way of holding shares. Originally, investment funds dealt with shares but may today hold a variety of financial instruments. An investment fund is not a legal entity but a taxable entity. It shall be created by capital contributions from the general public and owned by the contributors. Returns

\(^{31}\) Investment companies have recently been in the focus of the Swedish tax debate. The question has been what constitutes a “diversified” holding of shares etc. It is possible for an investment company to have large holdings in other companies. It is, however, a prerequisite that an investment company also holds shares in a diversified number of other companies. The meaning of “diversified” holding has been considered by Swedish courts. The question is, in my view, not yet finally answered.


\(^{33}\) Cf. Lodin et al., *Inkomstskatt*, p. 459.

\(^{34}\) SOU 1988:38 *Ägande och inflytande i svenskt näringsliv*. 
from an investment fund are for tax matters considered as dividends. In contradiction to investment companies, there is a limit on the maximum holding for an investment fund. An investment fund may not hold more than 5 per cent of the voting rights of an individual company. The taxation of investment funds corresponds with the taxation of investment companies, described above.\(^{35}\)

In my view the Swedish legislation on investment companies and investment funds does not constitute harmful tax competition according to either the EU concept or the OECD concept. The following factors should be stressed. Investment companies are taxed at a low tax rate in comparison to the ordinary company tax rate, that is unquestionable. There is, however, no apparent risk for the avoidance of the prevailing economic double taxation of company profits in Sweden. In principle, the investment company is only an intermediary between other companies (in which the investment company has made its investments) subject to ordinary taxation and the shareholders equally liable to tax on received dividends. There is furthermore no ring-fencing. The same reasons apply for investment funds.

4.1.2 Tax allocation reserve

The Swedish tax reform of 1990 included lower tax rates and a broader tax base. As an effect, the reform meant that several forms of tax allocation reserves were abolished.\(^{36}\) A reminiscence of the old tax system is that a company may according to chapter 30, section 5 of the Income Tax Act allocate 25 per cent (presently) of net profits to a tax allocation reserve (periodiseringsfond).\(^{37}\) Such an allocation is only a tax measure. As regards a company, four reasons may be advocated in favour of the existence of the tax allocation reserve:

a) Financial improvement since the company pays less tax.

b) Consolidation. According to Swedish company law dividends may not consist of profits that are bound in e.g. a tax allocation reserve. This means that the company may reach a higher degree of consolidation.

c) Profit neutralization over time. A present loss can be neutralized through dissolution of the tax allocation reserve: a form of “carry-back”.\(^{38}\)

d) The company tax rate of 28 per cent is in fact lower when the tax allocation reserve is considered.

However, the reserve must be dissolved within six years after the allocation of the profit.\(^{39}\) It should be noted that whereas a dissolved reserve is included in the


\(^{36}\) Lodin et al., *Inkomstskatt*, p. 308.

\(^{37}\) Sole proprietors may allocate 30 per cent of the net profits to a periodization reserve (chapter 30, section 6 of the Income Tax Act).

\(^{38}\) It should furthermore be noted that chapter 10, section 16 of the Income Tax Act permits an indefinite carry forward of losses.
taxable income new allocations to a periodization reserve may be made. As regards self-employed taxpayers the allocation is presently 30 per cent annually.

In my view the Swedish legislation on tax allocation cost does not constitute harmful tax competition according to either the EU concept or the OECD concept. On the one hand the tax allocation reserve means a reduction of the tax base. The reduction is on the other hand comparably small, which in my view means that the factor “low taxation” is not met.

4.1.3 Foreign non-life insurance companies

Past legislation. A distinction was made between domestic non-life insurance companies and foreign non-life insurance companies. Domestic non-life insurance companies were subject to the normal company tax rules. The income of such a company was subject to the ordinary company tax rate of 28 per cent. Besides normal rules on company taxation a domestic non-life insurance company could according to chapter 39, section 6 of the Income Tax Act, make deductions for:

- fees or contributions paid to municipalities or organizations that provide support for activities to prevent damages that fall within the scope of the insurance area of the insurance company in question;
- the increase of funds of the insurance company necessary in order to be able to pay anticipated compensation amounts;
- the increase of special security funds intended to cover insurance losses that are governed by mere chance or in other ways are unpredictable; and
- some forms of refunds.

Foreign non-life insurance companies were subject to tax under a simplified method, and had been so since 1928. Such companies were subject to tax on a net profit computed at 2 per cent of the total gross insurance premium income from insurance policies sold in Sweden.

The purpose of the special taxation of foreign insurance companies was to equalize the net profits in relation to Swedish insurance companies. That has motivated a different tax rate vis-à-vis foreign insurance companies.

A Swedish court case should be referred. In the case RÅ 1999 ref. 58 the Supreme Administrative Court (Regeringsrätten) dealt with the question whether

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40 SOU 2001:11 p. 263.
a foreign (i.e. Norwegian) non-life insurance company could be taxed according to the normal rules applicable for Swedish domestic non-life insurance companies. The Supreme Administrative Court found that according to Art. 7 (3) of the 1996 Nordic treaty, the permanent establishment in Sweden was entitled to the same taxation as Swedish insurance companies.41

The taxation of foreign non-life insurance companies was also subject to consideration in the Primarolo report. The Primarolo group did not consider the former Swedish taxation of foreign non-life insurance companies as constituting harmful tax competition.42 In 1999, there were 22 foreign non-life insurance companies conducting business in Sweden.43 The Commission did, however, declare that the tax regime applicable for foreign non-life insurance companies constitutes state aid according to Art. 88 of the EC treaty.44 It should furthermore be noted that the OECD considered the past system for taxation of foreign non-life insurance companies as a regime being “potentially harmful”.45

Accordingly, from January 1, 2002, Sweden applies a uniform system for the taxation of domestic and foreign non-life insurance companies. The present taxation of foreign non-life insurance companies is made according to general rules on company taxation.46 This legislation has previously been described in this sub-section.

4.2 Other parts of Swedish tax legislation of special interest

4.2.1 Special tax regime for foreign experts

From 1 January 2001 there is a special tax relief for foreign experts and foreign key personnel.47 This tax regime also includes foreign researchers, but this category has already been subject to preferential taxation for many years.48

According to chapter 11, section 22 of the Income Tax Act tax relief is granted foreign experts, researchers and other key personnel if the employment includes the following categories.49

41 It could be noted that the also the tax treaty article on non-discrimination and the right to free establishment (according to the EES-treaty as Norway is not a member of the EU) was advocated by the Norwegian company in favour of equal treatment with Swedish insurance companies.
46 Government bill prop. 2001/02:42.
47 The new legislation has been discussed by i.a. Sundgren, Ny lagstiftning om särskilda skatteprivilegier för utländska experter och nyckelpersoner, Skattenytt 2001 pp. 180 – 193.
49 Chapter 11, section 22, subsection 1 of the Income Tax Act. The terms “experts”, “researchers” and “managers and other persons with key positions in an enterprise” are not contained in the Income Tax Act, but are quite adequate terms introduced by Lindencrona (New Swedish Tax Rules for Foreign
• “Experts”. Includes individuals that have such specialist knowledge or competence as would be difficult to recruit in Sweden. This category would include specialists in areas such as rationalization, administration, logistics, marketing, production, engineering, business economics, information and communications technology.\textsuperscript{50}

• “Researchers”. Includes individuals who would undertake such qualified research or development that it would be considerably difficult to recruit in Sweden. Researchers may be employed either by state-owned institutions such as universities, or by privately funded institutions.

• “Managers and other persons with key positions in an enterprise”. This is quite a broad concept. This category would include managers of e.g. subsidiary companies in Sweden.\textsuperscript{51}

There are furthermore four conditions that all have to be fulfilled in order for the tax relief to apply.\textsuperscript{52} (i) The employer is resident in Sweden or is a foreign enterprise with a permanent establishment in Sweden. (ii) The employee is not a Swedish resident. (iii) The employee has neither been resident nor has he had habitual abode in Sweden in the five calendar years preceding the year when the employment in question begins in Sweden. (iv) The stay in Sweden is intended to last no more than five years. It should be noted that the tax relief is only granted for three years of the stay in Sweden.\textsuperscript{53}

The tax consequences of this incentive legislation includes that 25 per cent of the individual’s salary, remuneration or other form of compensation is tax-exempt.\textsuperscript{54} The tax relief includes both exemption from income tax for the employee and exemption from social security contributions for the employer as regards the above-mentioned share of the employee’s salary. Furthermore, compensation payments from the employer due to the transfer to Sweden are, with some limitations, tax exempt. Exempt compensations are (i) costs for moving to and from Sweden, (ii) costs for two home journeys every calendar year for the taxpayer with family, (iii) costs for schooling of children of the employee (through high-school level).

The matter whether an individual may fulfil the conditions for the tax relief to apply (according to chapter 11, section 22 of the Income Tax Act) is decided by

\textsuperscript{50} Government bill prop. 2000/01:12 p. 22.
\textsuperscript{51} Government bill prop. 2000/01:12 p. 22.
\textsuperscript{52} Chapter 11, section 22, subsection 2 of the Income Tax Act.
\textsuperscript{53} Chapter 11, section 22, subsection 3 of the Income Tax Act.
\textsuperscript{54} Chapter 11, section 22 of the Income Tax Act.
the Special Tax Council for Researchers (*Forskarskattenämnden*). There are still few court cases, but there could be a tendency of restrictive interpretation by the Special Council.56

Does the tax relief granted according to the special tax regime for foreign experts constitute harmful tax competition according to the Code of Conduct? An initial answer would be no. The Code of Conduct does not cover tax arrangements for employees.57 Indirectly, however, foreign companies that wish to establish subsidiaries in Sweden would benefit from the preferential taxation of foreign (i.e. from a Swedish perspective) experts. It should be noted that the Primarolo report did not cover any similar tax arrangements in other EU member states. The OECD concept of harmful tax competition, likewise, does not seem to include this measure.

4.2.2 Relief from economic double taxation of small and medium sized companies

Since January 1, 1997 Sweden has a relief from economic double taxation applied to small and medium sized companies. The underlying motive is to increase investment in such companies and to stimulate the national economy. The tax relief is only granted residents in Sweden.58

Individual shareholders of unlisted companies and non-resident companies are exempt from tax on dividends received. The tax relief is granted up to an amount corresponding to 70 per cent of the interest rate on government borrowing, multiplied by the acquisition value of the shares, plus, under specific circumstances, part of the payroll amount.59

A further important condition is that the dividend distributing company must not have held, directly or indirectly, 25 per cent or more of the voting power or the capital of a listed Swedish or non-resident company at any time during the preceding five years.60

This part-exemption from the second tier of the economic double taxation of company profits does in my view not constitute harmful tax competition either

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55 Chapter 11, section 23a of the Income Tax Act. The decisions of the Special Council for Tax Researchers may be appealed in the administrative court system by the employer, the employee or the National Tax Board.
56 The Administrative Court of the Stockholm County (*Länsråten i Stockholms län*) decided one case 1 November 2001 (case no. 14596-01).
57 The Ecofin Council concluded: “Certain Member States and the Commission consider that special tax arrangements for employees could come within the range of problems covered by the code. They accordingly consider that this question needs to be discussed within the Taxation Policy Group with a view to a possible extension of the code under the review procedure laid down in paragraph N.” Conclusions of the Ecofin council meeting on 1 December 1997 concerning taxation policy (98/C 2/01).
according to the EU concept or the OECD concept. It should be stressed that the measure is not ring-fenced and that the first tier of the economic double taxation is maintained.

4.2.3 Taxation of sailors on foreign ships

Sailors resident in Sweden and employed on foreign ships in oceanic trade are not liable to tax in Sweden on income derived from that employment.\textsuperscript{61} There are, however, two preconditions that must be fulfilled: (i) the stay abroad shall last at least 183 days in a twelve month period, and (ii) the employer must be resident in Sweden and accordingly subject to a world-wide taxation. The ships in question are probably registered with foreign ship-registries, perhaps i.a. for tax reasons.\textsuperscript{62} This piece of legislation is presumably intended to minimize the risk that the few remaining Swedish shipping companies would leave Sweden.

I do not consider the taxation of Swedish sailors on foreign ships to constitute harmful tax competition according either to the EU concept or the OECD concept, cf. the discussion in sub-section 4.1.2.

4.2.4 Proposed legislation on tax exemption for capital gains on intercorporate holdings

A public inquiry has proposed that Sweden introduce tax exemption on capital gains from the alienation of intercorporate share holdings.\textsuperscript{63} As fore-mentioned, Sweden generally upholds economic double taxation on company profits: taxation both at the company level and the shareholder level. As regards intercorporate dividends, Sweden has for a long period of time tried to limit the risk for multiple taxation by granting tax exemption, both at the national level and at the international level. But company profits can also be realized through the alienation of shares since the price of the shares, at least partly, is related to accumulated profits. As regards capital gains from the alienation of intercorporate shareholdings multiple taxation still applies. The referred public inquiry here proposes tax exemption for intercorporate capital gains on shares etc.

An intercorporate holding of shares is proposed to have the following definition:

- Shares that are not quoted on a stock exchange.

\textsuperscript{62} The term ”oceanic trade” is geographically specified in chapter 3, section 12, and subsection 3 of the Income Tax Act.
\textsuperscript{63} SOU 2001:11 \textit{Utdelningar och kapitalvinster påföretagsägda andelar}. 
• Shares where the owner holds more than 10 per cent of the company, or where it is made probable that the holding is dependent on the business activity conducted by the company holding the shares.

As regards shares in foreign companies, the proposal does not contain any condition that the foreign company has been subject to any minimum taxation. As a counterweight, to prevent tax avoidance, the inquiry proposes a sharpened CFC legislation.

The proposed legislation is, in my view at least, to some extent the result of tax competition. It has not been uncommon that Swedish multinational companies have established holding companies in other states to take advantage of legislation granting tax exemption on capital gains from the alienation of intercorporate holdings.

The tax situation in neighbouring Denmark has traditionally, in this respect, been the opposite to the Swedish situation: intercorporate dividends have been subject to taxation and intercorporate capital gains from the alienation of shares have been tax exempt. Recently, Denmark made intercorporate dividends tax exempt. In a narrow perspective, the proposed Swedish legislation could be part of a “Nordic” tax competition. It is, however, a completely different question whether the proposed Swedish legislation could be considered “harmful”. The question was dealt with by the inquiry and, perhaps not surprisingly, the proposal was not considered as a measure of harmful tax competition according to the EU Code of Conduct. The inquiry quotes parts of the Primarolo report on the concept of “Holding companies”. It was the view of the Swedish inquiry that it was difficult to evaluate whether the proposed changes to Swedish tax law would constitute harmful tax competition. That is in my view a correct consideration.

The statement by the Primarolo group that would be relevant is contained in para. 50:

“The Group considered whether or not a positive evaluation should be given to measures that exempt capital gains. Some Member States felt that such an evaluation should be given, as they considered that measures of this kind affect the location of holding companies within the Community. Some other Member States felt that the evaluation of such measures was outside the scope of the Code.”

It should furthermore be stressed that the proposal also contains a sharpened CFC legislation, which is intended to counter the suspicion, that foreign untaxed or low taxed profits are received tax exempt in Sweden.

Since companies acting as holding companies using the tax exemption on intercorporate profits, are subject to the ordinary company tax rate (28 per cent), it is my view that the tax exemption would not constitute harmful tax competition according to either EU or OECD concepts.

65 The Primarolo report sections 47 to 51.
5 Collection and exchange of tax information

5.1 Domestic law

In order to prevent the negative effects of harmful tax competition at the domestic level it is important to acquire information from resident tax subjects as well as from foreign tax authorities.

Swedish banks, financial institutions and similar entities are obliged to deliver information returns to the tax authorities. Such entities undertaking activities in Sweden are also obliged to deliver information returns to the tax authorities. The number of foreign banks actually fulfilling the obligation to file information returns is limited.

The obligation to provide Swedish tax authorities with information on payments to and from other states has been sharpened since 1 January 2002. According to chapter 12, section 1 of the Act on tax returns and tax information\(^{66}\) shall be filed on direct or indirect payments to or from other countries if the payment exceeds SEK 100,000 (€ 10,000) or is part of payments exceeding that amount. The information shall be filed in respect of both resident individuals and resident legal entities by the bank or other institution that has made the transmit. Information shall also be provided in the same way in respect of non-residents that are subject to limited tax liability in Sweden.\(^{67}\) If a Swedish resident has provided a foreign insurance, that resident is also liable to file information on that matter to Swedish tax authorities.\(^{68}\) Foreign enterprises active in banking, insurance etc., that are not established in Sweden but are conducting business here, are also liable to file tax information according to the Act on tax returns and tax information.\(^{69}\)

5.2 International obligations

Sweden has an extensive tax treaty network. With two exceptions all Swedish tax treaties contain an exchange of information article. The first exception is the treaty of 1965 with Switzerland, which does not contain any article regarding the exchange of information. The second exception is the multilateral Nordic tax treaty. The reason for the absence of such an article in the Nordic tax treaty is the existence of the more far-reaching Nordic Multilateral Treaty on Mutual Assistance on Tax Matters of 1990.

It is Swedish tax treaty policy to apply the exchange of information-article contained in the OECD Model Tax Convention. Article 26 of the present OECD Model Tax Convention consists both of the ‘minor information clause’ and the

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\(^{66}\) Lag (2001:1227) om självdeklarationer och kontrolluppgifter.

\(^{67}\) Chapter 12, section 2 of the Act on tax returns and tax information

\(^{68}\) Chapter 12, section 4 of the Act on tax returns and tax information.

\(^{69}\) Chapter 13 of the Act on tax returns and tax information.
‘major information clause’. The ‘minor information clause’ provides for the exchange of information carrying out the Convention. The ‘major information clause’ also covers the exchange of information for implementing the domestic laws of the contracting States. The ‘competent authority’ taking part in the exchange of information on behalf of Sweden, is normally the National Tax Board. According to paragraph 9 of the Commentary on Article 26 of the OECD Model Tax Convention, the exchange of information may be a) on request, b) automatic, and c) spontaneous.

Sweden has signed the Council of Europe and OECD Convention on Mutual Administrative Assistance in Tax Matters, which came into force on April 1, 1995. Denmark, Finland, Iceland, the Netherlands, Norway, Poland and the United States have furthermore signed this Convention. Naturally, Sweden has implemented the Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation.

Sweden has agreements with the Nordic states, Estonia, France, Italy, Japan, Lithuania, New Zealand, Spain and the United Kingdom on automatic exchange of information.

### 5.3 Conclusions

The effective exchange of information is an important factor according to the OECD.\(^{70}\) Beginning with the collection of information on transactions within Sweden it must be concluded that in an international comparison the Swedish tax authorities have an effective system including automatic information from i.a. employers, banks and other financial institutions.

Collection of information from other states the situation is generally poor. The bright exception is the collection of information from other Nordic states, alas no tax havens.

Further agreements with other states on automatic exchanges of information could improve the situation.

### 6 Transparency in relation to administrative practices

In 1951 Sweden introduced one of the first advance ruling systems in the world.\(^{71}\) The ruling system has expanded over the years. Today, the Council for Advance Tax Rulings provides rulings. The Council is an independent body from the tax

\(^{70}\) The 1998 OECD report para. 64 to 67.

authorities. Binding statements are given on the request of both individuals and of the National Tax Board (Riksskatteverket). An advance ruling is binding on the tax authorities and courts if the taxpayer refers to it in respect to tax authorities and courts. The advance ruling system has evolved as an important instrument for providing precedents since rulings may be appealed to the Supreme Administrative Court (Regeringsrätten). Rulings are provided on many matters such as company taxation, the Tax Avoidance Act, transfer pricing and tax treaties. Rulings are given on questions of law, but must relate to real situations.

Advance rulings may be requested by both residents (including individuals) and non-resident companies.

Rulings by the Council are currently published in Swedish tax law periodicals. Decisions by the Supreme Administrative Court are also published, nowadays also accessible electronically. In my view, it is obvious that the above-mentioned “tax measures” are transparent in relation to the factors set out in the Code of Conduct.

7 Measures against harmful tax competition in Swedish tax law

7.1 General anti-avoidance rules

Swedish law contains a general anti tax avoidance act, the Anti Tax Avoidance Act of 1995. To my knowledge it has not been used in order to curb international tax avoidance. The purpose of the law is to secure the Swedish tax base as regards municipal income tax, national income tax and wealth tax.

7.2 CFC legislation

Swedish CFC legislation came into force 1 January 1990. It was a response to the abolishment of restrictions on cross-border capital movements beginning in 1989. Present CFC legislation is based on the distinction between “foreign companies” and “other foreign legal entities” than foreign companies. CFC taxation of Swedish residents is only possible in respect of income of “other foreign legal entities” than “foreign companies”. Accordingly, a “foreign company” is a foreign legal entity that meets minimum tax requirements.

The term “foreign legal entity” is defined in chapter 6, section 8 of the Income Tax Act. A “foreign legal entity” is a foreign legal association, if, under the laws of the state where it is resident:

- it can acquire rights and undertake obligations;
• it can plead its case before courts and other public authorities; and

• the individual owners cannot freely dispose over the assets of the association.

The narrower term “foreign company” has two alternative definitions: one stipulates a minimum tax requirement and the other is linked to the Swedish tax treaty network.

The minimum tax requirement is stipulated in chapter 6, section 9 of the Income Tax Act. A “foreign company” is a foreign entity, which has been subject to taxation in the state where it is resident, and where the taxation is “similar” to the taxation of Swedish companies (aktiebolag). What constitutes “similar” taxation has been the subject of discussion. The following can be read from the preparatory works of the CFC rule. It must be a direct tax on income. The effective taxation must be similar to that in Sweden. It is not acceptable for the foreign entity to be exempt from taxation for several years under foreign investment incentives. In tax literature it has been argued with some force that an effective company tax level about 10 to 12 per cent would fulfil the criterion “similar” taxation.

As mentioned, a government inquiry has proposed a revision of the CFC legislation. After some public criticism, the proposal is presently being revised and a governmental bill may be put forward later spring 2002. As it is unknown what the new proposal will contain I refrain from a detailed analysis of the originally proposed new CFC legislation. A revised CFC legislation would better meet the OECD recommendation on such legislation, that states that have such rules ensure that they apply in a fashion consistent with the desirability of curbing harmful tax practices.

7.3 Transfer pricing

Sweden has rules on transfer pricing. As a general rule, profit shifting through intercorporate pricing is not allowed. Transfers shall be made at market value. As regards international transactions the following rules apply. First, assume that an agreement is made that deviates from what would have been agreed between independent persons. Second, assume that according to that agreement profits of a company resident in Sweden are transferred to a person that is not resident in Sweden. In that case the income of the company in Sweden is computed as the amount that it would have been if the agreement did not exist. Two further conditions have to be fulfilled. First, there are reasonable grounds to believe that an economic relationship exists between the persons concerned. Second, the

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74 SOU 2001:11.
75 The 1998 OECD report, recommendation no. 1 concerning domestic legislation and practices.
existing circumstances do not suggest that the deviating conditions have been agreed upon for reasons other than the economic relationship.

The transfer pricing legislation has rarely been applied as regards international transactions.

### 7.4 Restrictions of deduction of payments to tax haven entities

There are no rules restricting the deduction of payments to entities resident in tax havens. Still, tax authorities have from time to time advocated such rules, but it has not ended in any legislative results.

### 8 Measures in Swedish tax treaties against harmful tax competition

It is Swedish tax treaty policy not to conclude tax treaties with tax havens, i.e. states with no tax or with generally very low tax rates.

*Exclusion provisions (category 1).* It is Swedish tax treaty policy to insert exclusion provisions in tax treaties with states that have a low tax regime at the time of the conclusion of the treaty. Such exclusion provisions are contained in e.g. the 1985 treaty with Jamaica (Art. 28), the 1991 treaty with Barbados (Art. 24 (2)) and the protocol to the 1996 treaty with Luxembourg.

Exclusion provisions (category 2). Furthermore, it is Swedish tax treaty policy to insert exclusion provisions in tax treaties with states that did not have low tax regimes at the time of the conclusion of the treaty. This policy has evolved since the 1993 treaties with Estonia and Latvia.

The main purpose of the exclusion provisions of categories two and three is two-fold. First and foremost, it is a political marking that Sweden does not approve of low-tax regimes and accordingly does not want to grant entities subject to such treatment any tax benefits. Secondly, the exclusion provisions are part of the Swedish CFC legislation. It could generally be said that in relation to entities resident in tax treaty states the Swedish CFC legislation is only applicable as regards entities explicitly excluded from the benefits of the tax treaties.

Limitation on benefits provisions. There are two Swedish tax treaties that contain limitation on benefits provisions of the type contained in all modern US treaties. Sweden’s 1994 treaty with the US (Art. 17) and the 1991 treaty with Barbados (Art. 24 sections 1, 2 and 4).
It is my view that Swedish tax treaty policy as regards tax treaty exclusion provisions fulfils recommendation no. 9 of the 1998 OECD report.\footnote{Recommendation no. 9 of the 1998 OECD report reads partly: “Recommendation concerning the entitlement to treaty benefits: that countries consider including in their tax conventions provisions aimed at restricting the entitlement to treaty benefits for entities and income covered by measures constituting harmful tax practices …”}

The Swedish Government upholds a generally restrictive interpretation of Art. 4 on residence contained in a large number of Swedish tax treaties. The Government usually states in the bills to the laws implementing tax treaties with domestic law that the term “resident of a Contracting State” only includes persons that are subject to worldwide taxation in that state, and are in fact subject to taxation in their state of residence. The Supreme Administrative Court, however, has taken the opposite view in the “Luxembourg-case”, RÅ 1996 ref. 84.

9 Final remarks

Sweden is unquestionably a high tax state: to a large extent a mirror image of the welfare state. The abolishment of restrictions on cross-border capital movements has meant increased pressure on Sweden to harmonize its taxes with those of other states. In the tax policy discussion, tax competition has been regarded as a challenge for maintaining public welfare. The Swedish tax reform of 1990 with reduced tax rates and a broadened tax base was the result of what could be called “fair” tax competition. The flat tax rate on capital income (e.g. dividends and interest) is imposed with 30 percent for Swedish residents. It is not unlikely that in a foreseeable future this rate will lowered.

To prevent erosion of the tax base and tax avoidance, Sweden has taken legislative measures. Such measures include CFC legislation, rules on transfer pricing, a tax treaty “abstinence approach” vis-à-vis tax havens and exclusion provisions in tax treaties with states harbouring preferential tax regimes. The effectiveness of some of these measures, however, has been discussed in this report.

An important purpose of the 1990 tax reform was to create tax neutrality between different alternatives of economic investment. Tax consequences were not intended to be the decisive factor where to invest once services or capital. Partly as a result of this striving for tax neutrality, the Swedish tax system contains, in my view, no pieces of legislation that could constitute harmful tax competition according to either the EU or OECD concepts.
10 Bibliography

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10.2.2 OECD documents


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