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Blurring the separation of powers – a legal and political study of the phenomenon of tax administrations moving from the executive branch towards the legislative branch

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Abstract

This article elucidates the more recent developments concerning the role and mandate of tax administrations and the consequential contemporary challenges that these events pose to democracy, in particular the separation of powers. In some jurisdictions, there has been a noticeable evolution whereby tax administrations have moved from being the executive branch, stated differently, enforcing tax laws, and collecting tax revenues, towards being part of the legislative branch. The Covid-19 pandemic and the emergency mandates that were enacted amidst it facilitated various governmental agencies, such as the tax administration, to gain greater numbers of mandates and to operate without boundaries due to the ongoing crisis. However, the extension of the mandate given to tax administrations was already noticeable in some jurisdictions before the pandemic with Sweden being one good example, a pre-existing process that the author argues has been enabled and exacerbated by the last three decades of international tax developments at the OECD and EU levels in connection to the regulation of international tax competition and harmful tax practices. Sweden is used as a case study, but the findings are applicable to a multitude of jurisdictions given the nature of the topic and subsequent discussions.

Keywords: international tax, BEPS project, rule of law, separation of powers, comparative tax, Sweden, tax harmonisation

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1. INTRODUCTION AND RESEARCH APPROACH

The 15th ATAX conference employed the theme of *Tax Administration: Evolution or Revolution.* In this article, the theme is explored through the lens of the Swedish tax administration but the findings in the article are of relevance to many jurisdictions around the globe given ongoing global developments taking place.

Consequently, the objective of this article is to identify and analyse the role and mandate of tax administrations in the context of international tax developments, most prominently those taking place at the Organisation for Economic Co-operation and Development (OECD) and European Union (EU) levels over the last three decades. The introduction of a toolbox of minimum substance rules via the OECD Base Erosion and Profit Shifting (BEPS) actions and the two-pillar structure have arguably had an impact on the law-making process in many countries, not least EU Member States.[1] In this context, these countries are no longer making tax laws in accordance with their retained tax sovereignty and individual needs as they are implementing them as prescribed by the EU and the OECD.

It should be noted that this article does not focus on federalism and the tax sovereignty issues that have been linked to EU Member States. These areas have already been successfully researched by scholars within tax law and EU law. Instead, the emphasis of this article is on how international tax developments have, once more, impacted tax sovereignty and the making of taxes.

This article argues that the above-described global developments make the law-making process generally more of an administrative process rather than a political one and that this poses new challenges to democracy. As a result, the article attempts to discern whether the Swedish tax administration has evolved over time or whether it has become actively revolutionary when considering its role in the Swedish law-making process in the light of these global developments.

Two recent Swedish legislative processes involving exit taxes and mandatory reporting arrangements make the foundation for this study. There have been other similar movements in connection to, for instance, the Swedish implementation of controlled foreign companies (CFC) rules,[2] the enhanced cooperation procedure[3] and the

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[1] Tax scholarship has debated whether the implementation of the minimum substance rules prescribed by the EU tax directives erodes tax sovereignty and the legitimacy of domestic tax systems as the EU has managed to 'bypass' traditional law-making processes involving the parliaments of the individual countries. This is naturally interlinked to the topic of this article yet not the focus of it and, as such, is omitted in further discussions.

[2] Skatteverket (Swedish Tax Agency), '*Skatteverkets Promemoria Genomförandet av CFC-regler i EU:s direktiv mot skatteundandraganden*', Dnr 202 94868-18/112 (9 April 2018), available at: https://www.skatteverket.se/download/18.41f1c61d16193087d7fe266/1523606459426/Fi2018-00823-S3.pdf (accessed 25 February 2023). Also see Lars Samuelson and Christian Karlsson, '*Skatteverkets förslag till ändringar I CFC-lagstiftningen*' [2010] (7-8) *Skattenytt* 530.

[3] Robert Påhlsson, '*SKV:s projekt fördjupad samverkan I svensk offentligrättslig miljö*' [2012] (12) *Skattenytt* 831; Robert Påhlsson, '*Skatteverket vill ha lagändringar och nya samverkansformer*' [2022] (6) *Skattenytt* 693; Anna-Maria Hambre, *Fördjupad Dialog – En studie av Skatteverkets arbetsform fördjupad dialog ur ett svenskt offentligrättsligt perspektiv* (Iustus, 2018); Lotta Björklund Larsen and Lynne Oats, 'Taxing Large Businesses: Cooperative Compliance in Action' (2019) 54(3) *Intereconomics* 165; Ulf Bernitz and Jane Reichel, '*Effektivitet eller legalitet? En bedömning av Skatteverkets nya samarbetsformer, s.k. fördjupad dialog*' [2015] (7-9) *Skattenytt* 508; Ann-Sophie Sallander, '*Fördjuoad samverkan mellan*

settlement of foreign tax.[4] However, the article has chosen to focus specifically on the implementation of the exit tax and mandatory reporting arrangements as these are among the most debated taxes. In this context, they provide beneficial case studies when extracting the evolution of the tax administration from the studied material (legislative and governmental sources, legal scholarship and media coverage).

The two case studies enable a concrete framing of the arguably ongoing phenomenon of tax administrations moving from the executive branch towards the legislative branch. The case studies are naturally limited by their focus on a specific national context and two specific taxes yet, given the nature of the selected legislative examples, the findings are still relevant to most jurisdictions involved in the OECD BEPS Project and/or EU Member States.

The article applies a research approach consisting of traditional legal methodology infused with political philosophy when: (1) identifying the existence and extent of this blurring of the separation of powers, and (2) analysing the challenges it poses to democracy, most prominently democratic legitimacy and legal certainty. With traditional legal methodology, the article refers to the commonly applied doctrinal approach often ascertained within tax scholarship, especially in Europe.[5] The application of a doctrinal approach in tax scholarship generally indicates an emphasis on tax technicalities derived from legal sources such as legislative acts and case law.[6] This doctrinal approach is, as is often the case with the author's research, supplemented with policy considerations extracted from legislative preparatory works and other reports of governmental and political nature. Moreover, there are some comparative elements, primarily theoretical considerations linked to legal culture and legal traditions, embedded in the descriptive and analytical parts of the study.

2. THEORETICAL FOUNDATION

2.1 Rule of law and the separation of powers

Separation of powers as a theory originates from 18th century philosopher Montesquieu and provides a model that divides the government into separate branches, each of which has distinct and independent powers.[7] By having multiple branches of government, this model aims to ensure that no branch is more powerful than another. Characteristically, the theory divides the government into three branches: the legislative branch, the

Skatteverket och Sveriges största koncerner. Konsekvenser av HFD:s dom rörande sekretess' [2013] (11) *Skattenytt* 771.

[4] SFS (Swedish Collection of Statutes) 2009:195, *Lag om ändring i lagen (1986:468) om avrökning av utländsk skatt*. For a description of the proposal from the Swedish Tax Agency, see Martin Berglund, '*Ändringar i systemet för – avräkning av utländsk skatt – en kommentar*' [2009] (1-2) *Skattenytt* 8.

[5] For a more comprehensive discussion on this, see Wolfgang Schön, 'Tax Law Scholarship in Germany and the United States' (Max Planck Institute for Tax Law and Public Finance Working Paper No. 2016-7, 2016).

[6] For a more comprehensive discussion on doctrinal research within legal scholarship, see Mátyás Bódig, *Legal Doctrinal Scholarship: Legal Theory and the Inner Workings of a Doctrinal Discipline* (Edward Elgar, 2021).

[7] Charles De Montesquieu, *Montesquieu: The Spirit of the Laws*, tr and ed Anne M Cohler, Basia C Miller and Harold Stone (Cambridge University Press, 1989 [1748]). For a nuanced discussion on the promise and failings of the theory, see Jeremy Waldron, 'Separation of Powers in Thought and Practice?' (2013) 54(2) *Boston College Law Review* 433.

executive branch, and the judicial branch. These will be discussed more closely below when describing the Swedish context.

Consequently, the theory provides a rationale of checks and balances for dispersing power in a constitutional system. It is therefore natural to link the theory to that of rule of law. The rule of law theory can be interpreted as a principle of constitutionalism that assumes a division of governmental powers that ultimately inhibits the use of arbitrary state power. Such a prohibition entails a fundamental separation of powers between the legislature or law-maker and those governmental institutions that execute or administer the laws.[8]

This separation of powers can be described as follows:

> Law is the result of a pluralistic political programme characterized by the Habermasian 'discourse principle', courts solve conflicts based on legislation and try to achieve legal certainty and justice as an impartial party on the basis of legal argumentation and democratically enacted and accepted fair procedures, and the administration implements legislation that is not selfexecuting.[9]

Issues associated with the separation of powers are general to all legal areas in jurisdictions where legislative competence lies with the parliament but is often shifted to the governments and/or the courts. In fiscal matters, there is an additional layer of complexity as the tax administration must consider the application and interpretation of vague concepts and ambiguous laws. To what extent the tax administrations and the courts are awarded discretion and authorisation to do so will naturally differ depending on the jurisdiction. Legal cultures and legal traditions jointly with the constitutional provisions of the state in question will consequently determine what role the tax administration and the courts play and what mandates they have when considering the possibilities to create, interpret and apply (tax) laws.

2.2 The role and impact of the tax administration in a rule of law context

As the executive, the tax administration's main task is to interact with the taxpayers and collect the taxes on the behalf of the state. The Swedish Tax Agency is responsible, among other things, for matters concerning taxes, social security contributions, civil registration and certain creditor information. The Swedish government assigns the Swedish Tax Agency with certain tasks such as those mentioned above. But it could also be assigned with other tasks dependent on the needs of the government. For instance, the government gave the Swedish Tax Agency the task of developing and delivering information technology (IT) services to the Swedish Payment Authority and assisting in the prevention of welfare benefit fraud in March 2023.[10]

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[8] TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2003) ch 2.

[9] Ana Paula Dourado, 'General Report – In Search of Validity in Tax Law: The Boundaries Between Creation and Application in a Rule-of-Law State' in Ana Paula Dourado (ed), *Separation of Powers in Tax Law* (IBFD Publications, 2010) 27, section 1.1 ('Introduction: Identifying the Problem Using a Two-Fold Approach').

[10] Swedish Department of Finance, '*Skatteverket får i uppdrag att leverera it-tjönster till Utbetalningsmyndigheten*' (press release, 16 March 2023).

In the context of separation of powers and the law-making process it is essential to clarify what mandate the executive, the tax administration, has when considering discretion and de facto law-making. There is an extensive body of literature on this discretion as it will vary between differing jurisdictions. This study emphasises the contemporary challenges that currently stress the traditional separation of powers between the legislature, the executive and the judiciary. Consequently, contemporary theories on rule of law and tax administration are of particular interest.

Heath makes a compelling claim when discussing an expansive conception of the rule of law in the context of public administration.[11] This implies a pragmatic approach to the rule of law theory where the two extremes of written rules, on the one hand, and perfect justice on the other are contrasted. A tax code that fails to achieve the redistribution that an ideal conception of justice recommends can still be applied in a way that satisfies the rule of law. Equally so, a tax provision can be applied in a manner that is satisfactory to its exact wording yet, at the same time, fail to respect the rule of law and subsequently result in an arbitrary, capricious, discriminatory, unaccountable or secretive outcome.[12] He consequently promotes a pragmatic interpretation and application by the tax administrations as a way of overcoming these potential hurdles.

Such an approach requires the tax administration to take initiatives, at least to some extent. Therefore, it is important to consider whether the constitutional constraints and legal traditions of the state in question allow such initiatives or alternatively provide opportunities for such discretion or de facto law-making. It is important to acknowledge that the rule of law not only concerns legal constraints but also norms and fundamental principles. An account follows below of the Swedish system and the norms and principles that provide the structure for the Swedish tax administration.

3. Introduction to the Swedish tax system and legal tradition[13]

Traditionally, comparative law scholars classify and consequently analyse jurisdictions in accordance with the traditional division between common law and civil law.[14] This classification is less relevant when considering the Nordic countries as their scholars and practitioners rarely relate to or identify the features of common law or civil law.[15] Consequently, these scholars do not classify their legal systems in accordance with this simplified dichotomy. Instead, there is a mixture of civil law and common law elements

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[11] Joseph Heath, *The Machinery of Government: Public Administration and the Liberal State* (Oxford University Press, 2020).

[12] Ibid 254-255.

[13] Legal culture and legal tradition are often used synonymously, and scholars such as Patrick Glenn have claimed that 'legal culture' should be used as an epistemological tool in comparative study of law. The separation between and use of these two concepts are not elaborated on in this article as the outcome of the study does not rely on such a separation or distinction. Instead, legal tradition is explicitly used as it generally embodies the ideas of and expectations for law, and particularly the idea that the factual shaping of law according to these ideas and expectations is done in institutions, or at least institution-like structures. For an in-depth discussion on legal culture vs legal tradition, see Jaakko Husa, 'Legal Culture vs Legal Tradition – Different Epistemologies?' (Maastricht European Private Law Institute Working Paper, 2012) 18.

[14] Konrad Zweigert and Heinz Kötz, *An Introduction to Comparative Law*, tr Tony Weir (Oxford University Press, 3rd ed, 1998).

[15] Justice Clement Endresen, 'Exciting Times, but Business as Usual for the Judges' (2019) 73(8) *Bulletin for International Taxation* 408.

among the individual Nordic countries. This mixture noticeably contributes to the divergences between the systems as will become evident in this study.

Norwegian Professor and Justice Peter Lødrup argued the following in 1961:

> Here in the United States there is a widespread tendency to classify legal systems as either common law or civil law. By 'civil law' is meant law which derives from the Roman law; to a Scandinavian jurist, this division of legal systems into two parts is a surprising over simplification. And if Norwegian law is classified as 'civil law' and thereby declared to be based on Roman law, the labeling is simply incorrect.[16]

Sweden is often referred to as a civil law state, yet this should be perceived as a modified truth. Its legal system is indeed based on the civil law tradition; however, it differs from the French and Germanic legal systems as it is not built around codification but instead around statutory law.[17] The Swedish system is highly formalistic by nature.[18] This entails that only the legislature (the Parliament) may enact laws with strong support from the constitutionally regulated *legalitetsprincipen* (the Principle of Legality),[19] and the role of the judiciary is that of an overseer of the law rather than a participant of law-making. Consequently, the Swedish system could be described as being governed by the non-delegation doctrine similar to the case of the United States.

Additionally, the Swedish Constitution of 1974 does not identify the judiciary as part of the state power, and thus the legislature is considered superior. Subsequently, it would be beyond the constitutional authority of the courts to create judicial doctrines although this sentiment has slowly begun to erode recently when considering other areas of law. The Swedish Supreme Administrative Court is arguably very strict in its interpretation of legislative acts and very rarely deviates from the central wording that has been provided by the legislature.[20] The deficient role of the Swedish judiciary clarifies why the Swedish system, unlike other civil law states, is not built on codification.

The Swedish administrative model contains features that distinguish it from most other comparable jurisdictions with Finland being the exception. Specifically, there is an organisational division of responsibilities between the government and the administration. This division rests mainly on two principles. The first principle

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[16] Peter Lødrup, 'Norwegian Law: A Comparison with Common Law' (1961) 6(4) *Saint Louis University Law Journal* 520.

[17] Codification is the process of converting and consolidating judge-made law or uncodified statutes enacted by the legislature into statute law.

[18] Swedish Instrument of Government (*Regeringsformen*) Chapter 2, 10§ para 2. Also see tax scholarship: Anders Hultqvist, *Legalitetsprincipen vid inkomstbeskattningen* (Norstedts Juridik, 1995); Yvette Lind, ***Crossing a Border – a*** *Comparative Tax Law Study on Consequences of Cross-Border Work in the Öresund- and the Meuse-Rhine Regions* (Jure, 2017) ch 19.

[19] It should be noted that the Nordic concept of the Principle of Legality distinguishes itself regarding how it is considered in the British legal system and, most likely, the Australian legal system. In the Nordic context, the principle entails that statutory law takes precedence and that the judiciary, as a rule, cannot be contrary to the will of the legislature or the expressed intention of the law in question. Therefore, an extensive amount of preparatory work is generally attached to the legislation and acts as a primary legal source when the judiciary interprets and applies the law. Naturally, the judiciary may need to fill in gaps or situations not elaborated on in the preparatory works, but the allowance for the judiciary to do so varies between the Nordic countries, and the tax area is often considered in a more conservative fashion than other areas of law in this respect.

[20] Mats Tjernberg, '*Regeringsrättens strikta lagtolkning*' [2003] (1-2) *Skattenytt* 14.

embodies the ban on ministerial rule[21] that entails that the administrative authorities are subordinate to the government as a collective and not the executive minister. The second principle clarifies that the administrative authorities have a certain discretion for independent decision-making and that no one, not the government, the Parliament, or any other institution, may intervene in this decision-making.[22] This dualism has its origins in the development in the Swedish system in the period 1720 to 1770 and was introduced as a response to the past management of the administration during periods of absolute monarchy.[23] Although the administrations at the present time function in a very different context, there are still traces of these historical considerations within the Swedish system.[24]

As a result, the Principle of Legality is central to the understanding of the independent position of the Swedish administrative authorities. The principle clarifies that all exercising of public power requires constitutional support.[25] Bernitz and Reichel explain the essence of the principle as:

> *Lagarna får sin demokratiska legitimitet genom att de antas av folkets representanter och förvaltningsmyndigheterna kommer genom att följa lagarna att agera i enlighet med folkets vilja.*[26]
>
> (English translation by author:
>
> The laws gain their democratic legitimacy through their adoption by the people's representatives, and the administrative authorities will, by following the laws, act in accordance with the will of the people.[27])

The actual relationship between the administration and the Parliament can be described as asymmetrical.[28] Since the introduction of parliamentarism in Sweden, the Swedish state has been based on the principle of distribution of functions. This entails that the Parliament, as the people's main representative, is the legitimate exerciser of public power and that special functions are then distributed to other governmental bodies.[29] Consequently, the Swedish Constitution stipulates that the government is to govern the state under the condition that it is responsible under the jurisdiction of the Parliament. Note that the Parliament only controls the government while the latter controls the administration.

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[21] *Regeringsformen*, above n 18, Chapter 7 §3 and Chapter 12 §1.
[22] Ibid Chapter 12 §2.
[23] Catrin Andersson, *Tudelad trots allt: dualismens överlevnad i den svenska staten 1718–1987* (Statsvetenskapliga institutionen Stockholms universitet, 2004) 38ff.
[24] Anna Jonsson, '*Förvaltningens självständighet och förbudet mot ministerstyre: en analys av konstitutionsutskottets betänkanden från 2000 till 2005*' in Lena Marcusson (ed), *God förvaltning – ideal och praktik, De lege Juridiska fakulteten i Uppsala årsbok* (Iustus, 2006) 174f.
[25] There is an extensive literature by Swedish tax scholars on the importance of the principle of legality. One of the most central publications is Hultqvist, above n 18.
[26] Ulf Bernitz and Jane Reichel, *Effektivitet eller legalitet? En bedömning av Skatteverkets nya samarbetsformer* (Svenskt Näringsliv, June 2015), available at: https://www.svensktnaringsliv.se/sakomraden/rattssakerhet/effektivitet-eller-legalitet-en-bedomning-av-skatteverkets-nya-sa_1098649.html (accessed 25 February 2023).
[27] Ibid.
[28] Ibid.
[29] For a more comprehensive introduction to the Swedish system, see Wiweka Warnling Conradson, Hedvig Bernitz, Lena Sandström and Karin Åhman, *Statsrättens grunder* (Norstedts Förlag, 2022).

In the context of globalisation and increased global cooperation through, for instance, the below described developments at the OECD and EU levels, some concerns have been raised. It has been argued that the internationalisation of the administrative authorities' activities may result in the authorities becoming increasingly detached from their national governments.[30] With the Swedish administrative model in which the authorities are organisationally separated from the government, such a development can become particularly noticeable.[31] Within Swedish tax scholarship, a good example of this disconnection can be found in the introduction of the enhanced cooperation procedure that stems from ongoing developments at the OECD level.[32] Below is an outline of these and the subsequent changes that are currently occurring at the EU level.

4. International tax developments as stressors to the old paradigm

4.1 Developments at the OECD level

The need for a reformation of international corporate taxation became increasingly noticeable over the past three decades. Individual countries had historically engaged in tax competition between themselves and mimicked the behaviour of strategic actors,[33] and this development instigated the fears of a race to the bottom when considering levels of taxation. The competition between countries ultimately led to a situation where large multinational enterprises (MNEs) were not only able to minimise their global tax burdens but also exercise influence over national tax administrations and legislatures. The European Commissions state aid investigations involving favourable tax rulings awarded to MNEs such as Starbucks and McDonalds elucidated how tax administrations, most noticeably in Luxembourg and the Netherlands, awarded MNEs selective tax treatments when compared to other corporations. Furthermore, some MNEs began a practice of publicly pressuring national law-makers to accommodate the formers' needs, most often financially through fiscal requests, as the host countries otherwise risked an exodus of MNEs.

After decades of harmful tax competition, it was recognised that intricate tax schemes combining domestic laws and tax treaties in cross-border situations enabled corporate entities to exploit disparities between differing legal frameworks and consequently have their corporate profits untaxed or taxed at very low levels. It became evident that existing tax frameworks originating from the intense tax competition provided multiple opportunities for tax avoidance.

This effectuated a paradigm shift as it was believed that the cure for the ongoing tax base erosion executed through profit shifting was to be found in international cooperation focused on the prevention of (aggressive) tax planning and tax avoidance. This shift from tax competition towards global tax cooperation was to profoundly

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[30] Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17(1) *European Journal of International Law* 187.

[31] SOU (Swedish Public Investigations/Reports) 2008:118, *Styra och ställa – förslag till en effektivare statsförvaltning*, 82ff.

[32] For references on this debate, see n 3 above.

[33] For a more detailed description of this development, see Tsilly Dagan, *International Tax Policy: Between Competition and Cooperation* (Cambridge University Press, 2018). Before Dagan, Cedric Sandford had shed light on the fact that individual tax decisions of individual countries were tied to those of competitor countries. See Cedric Sandford, *Successful Tax Reform: Lessons from an Analysis of Tax Reform in Six Countries* (Fiscal Publications, 1993).

change the international tax landscape, and the idea of the OECD Base Erosion and Profit Shifting (BEPS) Project began to slowly evolve.

The OECD published its initial report on the use of financial instruments in tax schemes in 1994.[34] This was the first major study on (hybrid) financial instruments and shed new light on how contemporary developments had facilitated what was later often described as aggressive tax planning and tax avoidance:

> Financial markets have been deregulated; exchange controls have been liberalised and in most countries completely removed; communications have improved and computer and information technology has revolutionised financial dealing.[35]

In 1998, the OECD published a report on harmful tax competition and, by doing so, initiated the first step towards legislation aimed at preventing the growing problem of aggressive tax planning and, as such, provided the foundation for the forthcoming OECD BEPS Project along with its BEPS Actions.[36]

At this time, the EU initiated similar mappings of what was commonly referred to as aggressive tax planning activities. For instance, the European Commission was mandated with the task 'to ensure that EU company tax systems cater for the increased cross-border activity and modern organizational structures of companies'.[37] This parallel development signalled a transition from the EU considering double taxation as an undesired problem to the functioning of the internal market towards the perception of double non-taxation as a threat to the tax bases of the EU Member States. This development is more comprehensively described in the following section of this article.

The same argumentation, ie, double non-taxation being the main threat to tax bases, was also promoted at the OECD level:

> …fundamental changes are needed to effectively prevent double non-taxation, as well as cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it.[38]

The BEPS Project was conceptualised from the findings of the initial OECD reports and provides substantive rules through 15 concrete BEPS Actions (Action Plans). These Actions address differing identified gaps and challenges within international corporate taxation, including different issues regarding the global economy and taxation. They encompass: Action 1, 'Tax Challenges Arising from Digitalisation'; Action 2, 'Neutralising the Effects of Hybrid Mismatch Arrangements'; Action 3, 'Controlled Foreign Company'; Action 4, 'Limitation on Interest Deductions'; Action 5, 'Harmful Tax Practices'; Action 6, 'Prevention of Tax Treaty Abuse'; Action 7, 'Permanent Establishment Status'; Actions 8-10, 'Transfer Pricing'; Action 11, 'BEPS Data Analysis'; Action 12, 'Mandatory Disclosure Rules'; Action 13, 'Country-by-Country

[34] OECD, *Taxation of New Financial Instruments* (OECD Publications, 1994).
[35] Ibid 7.
[36] OECD, *Harmful Tax Competition: An Emerging Issue* (OECD Publications, 1998).
[37] European Commission, Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, *Tax Policy in the European Union – Priorities for the Years Ahead*, COM(2001) 260 final (10 October 2001).
[38] OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publications, 2013) 13.

Reporting'; Action 14, 'Mutual Agreement Procedure', and Action 15, 'Multilateral Instrument'.

The above-listed BEPS Actions are often referred to as BEPS 1.0. However, there were arguably limitations with the tools offered by these Actions as they did not address digital transactions and the developments of the digital economy in a satisfactory manner. The limitations of the tools offered by this phase of the BEPS Project subsequently instigated BEPS 2.0.

BEPS 2.0 expanded the framework and introduced the two-pillar design which jointly aimed at addressing the global action plan. Pillar 1 focuses on rules for taxing rights and profits linked to the digital economy while Pillar 2 provides a global minimum tax. Briefly after the introduction of BEPS 2.0 came the introduction of the inclusive framework (agreed on in July 2021) and the minimum income tax rules (published December 2021).

In November 2022, the United Nations General Assembly adopted a resolution with unanimous consensus that mandates the UN to strive for global tax leadership.[39] This marks a historic turning point as the OECD has reigned as the leading rule-maker in global tax matters for the last sixty years. This was announced merely a month after Pascal Saint-Amans, the Director of the OECD's Centre for Tax Policy and Administration, announced his retirement.[40] Evidently, these are tumultuous times in the global tax environment, and it will be interesting to follow future developments. The EU has already introduced their ambition to enforce a global minimum tax among the EU Member States. Additionally, there are ongoing discussions on the taxation of the digital economy through concrete tax measures such as digital service taxes.[41] The latter has already been introduced by some individual EU Member States.[42]

4.2 Developments at the EU level

Taxation in the EU consists of the two main components of direct and indirect taxation. The EU is mandated to harmonise certain areas of law within the Member States to ensure free movement of the internal market.[43] Some EU directives applicable to direct taxation, primarily corporate taxation, have been enacted. Consequently, the EU has established a number of harmonised standards for company and personal taxation in addition to measures aimed at preventing tax avoidance and double taxation.[44] Yet,

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[39] United Nations, *Concluding Its Session, Second Committee Approves 11 Draft Resolutions, Including Texts on Women´s Development, Global Tax Cooperation, Entrepreneurship*, Meetings Coverage and Press Releases, GA/EF/3579 (23 November 2022).

[40] OECD, 'Statement by the Secretary-General on the Centre for Tax Policy and Administration' (5 September 2022).

[41] European Commission, *Proposal for a Council Directive on the common system of a digital service tax on revenues resulting from the provision of certain digital services*, COM(2018) 148 Final (21 August 2018).

[42] As at early 2023 the following EU Member States have implemented a digital services tax: Poland, Hungary, and Portugal. The following EU Member States have repealed their planned digital services taxes contingent on Pillar 1 implementation: France, Spain, Italy and Austria.

[43] *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2012] OJ C 326/47 (entered into force 1 November 1993), Arts 110-113 and 115 ('*TFEU*').

[44] European Council, *Directive 2011/96/EU of 30 November 2011 on the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries of Different Member States* [2011] OJ L 345/8 ('*Parent-Subsidiary Directive*'); European Council, *Directive 2009/133/EC of 19 October 2009 on the Common System of Taxation Applicable to Mergers, Divisions, Partial Divisions, Transfers of Assets*

overall, tax sovereignty over direct taxation remains with the individual Member States as these taxes have not been positively harmonised within the EU. Therefore, the relationship between the EU and its Member States concerning direct taxes has resulted in negative harmonisation that is highly dependent on the (dynamic) case law established by the Court of Justice of the European Union (CJEU).

Indirect taxes, on the other hand, have been harmonised as the EU coordinates value added taxation (VAT) and excise duties as a result of the tangible impact that indirect taxes have on the free movement of goods and the freedom to provide services in the single market.[45] This harmonisation ensures that competition in the internal market is not distorted by variations in indirect tax rates and tax systems giving businesses in one state an unfair advantage compared to others.

As a result, direct taxes are, at least in principle, a matter of the Member States' national sovereignty; however, it is noticeably limited by EU law aspects of which the free movement and state aid rules are essential. Historically, the upholding of the internal market through free movement law has dominated EU tax law. Over time, this has changed as other areas of law, such as state aid rules, are more frequently being applied to tax matters.

The intervention through state resources in the market competition is, as a rule, prohibited by EU competition law jointly with adjacent EU state aid law if the intervention is of a selective nature, ie, benefits a specific sector of undertakings or production.[46] This prohibition aims to make the situation between enterprises fairer and more balanced. Aid awarded through state resources differs and takes various forms, eg, direct contributions, sale of public property on non-market terms, a purchase of goods or services for which there is no factual need, or reduced public fees. The aid can

and Exchanges of Shares Concerning Companies of Different Member States and to the Transfer of the Registered Office of an SE or SCE between Member States [2009] OJ L 310/34 ('*Merger Directive*'); European Council, *Directive 2003/49/EC of 3 June 2003 on a Common System of Taxation Applicable to Interest and Royalty Payments Made Between Associated Companies of Different Member States* [2003] OJ L 157/49 ('*Interest and Royalty Directive*'); European Council, *Directive 2003/48/EC of 3 June 2003 on Taxation of Savings Income in the Form of Interest Payments* [2003] OJ L 157/38 ('*Savings Directive*'), repealed on 10 November 2015 on introduction of European Council, *Directive 2014/107/EU of 9 December 2014 Amending Directive 2011/16/EU As Regards Mandatory Automatic Exchange of Information in the Field of Taxation* [2014] OJ L 359/1 ('*Directive on Mandatory Exchange*'); European Council, *Directive 2011/16/EU of 15 February 2011 on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC* [2011] OJ L 64/1 ('*Administrative Cooperation Directive*'); European Council, *Directive (EU) 2018/822 of 25 May 2018 Amending Directive 2011/16/EU As Regards Mandatory Automatic Exchange of Information in the Field of Taxation in Relation to Reportable Cross-Border Arrangements* [2018] OJ L 139/1 ('*Automatic Exchange of Information/DAC 6 Directive*'); European Council, *Directive (EU) 2016/1164 of 12 July 2016 Laying Down Rules Against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market* [2016] OJ L 193/1 ('*Anti-Tax Avoidance Directive/ATAD*'), etc.

[45] European Parliament and European Council, *Directive 2011/76/EU of 27 September 2011 Amending Directive 1999/62/EC on the Charging of Heavy Goods Vehicles for the Use of Certain Infrastructures* [2011] OJ L 269/1; European Council, *Directive 2003/96/EC of 27 October 2003 Restructuring the Community Framework for the Taxation of Energy Products and Electricity* [2003] OJ L 283/51.

[46] *TFEU*, above n 43, Arts 107-109 contain the primary EU state aid law provisions of which Article 107 comprises the main prohibition. Article 107(1) *TFEU* prohibits state aid as a rule and is supplemented by Article 107(2) which conditions what state aid *shall* be allowed and Article 107(3) which conditions state aid that *may* be allowed.

therefore be provided either directly, eg, direct cash grants, or indirectly, eg, tax incentives.[47]

The prohibition against state aid includes taxes as they may also distort competition neutrality and the trade between Member States.[48] A tax that results in a favourable tax treatment on a selective basis constitutes what is known as fiscal state aid. The form of the measure is not important in the context of state aid; instead, it is the factual economic effect of the measure that is considered.[49] Fiscal state aid therefore comes in many forms, eg, tax subsidies, tax incentives, tax exemptions, alternatively as taxes that apply different tax rates to equivalent tax subjects/tax objects. Direct taxes, tax relief and tax exemptions are regarded as a loss in tax revenue compared to the outcome if the tax had been collected which is considered a loss in state resources and consequently state aid.[50]

Subsequently, EU state aid rules ensure that individual Member States do not favour undertakings or certain production as a part of ongoing (harmful) tax competition between Member States through a more favourable tax treatment aimed at attracting foreign companies.[51] EU state aid rules may be considered as a safeguard to those situations when free movement law and the principle of non-discrimination do not apply. This line of reasoning has been actively pursued by the European Commission through numerous state aid investigations. They target potential preferential tax treatments awarded by EU Member States either through their tax legislation or alternatively through their tax administrations when considering compliance control and/or tax rulings. Several high-profile cases involving multinational enterprises such as Apple, Starbucks and Amazon have been dealt with over the last decade by the European Commission and later by the CJEU. Unfortunately, there were often unpredictable and debated outcomes that subsequently instigated criticism towards the actions of the European Commission and the introduction of alternative legal instruments through new EU corporate tax directives.[52]

To summarise, EU tax law consists of three main components:

- *negative harmonisation* through the CJEU's enforcement of free movement and the functioning of the internal market in its case law;
- *positive harmonisation* through secondary law, ie, EU directives;

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[47] For more extensive description of fiscal state aid and EU Law, see Wolfgang Schön, 'Taxation and State Aid Law in the European Union' (1999) 36(5) *Common Market Law Review* 911 ('Taxation and State Aid Law in the European Union'); Yvette Lind, 'Designing Aviation Taxes Within the EU – Chartering Ongoing Challenges and Proposing Future Solutions' (2021) 24(1) *Florida Tax Review* 784; Wolfgang Schön, 'State Aid in the Area of Taxation' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot, *EU State Aids* (Sweet and Maxwell, 5th ed, 2016); Yvette Lind, 'The Fundamentals of Tax Incentives' (2023) 42(1) *Skatterett* 15.
[48] See for instance *Italy v Commission* (C-173/73, EU:C:1974:71, 2 July 1974).
[49] Ibid.
[50] See, for instance *Chronopost SA, La Poste and French Republic v Union Française de L'Express (Ufex) and Others* (Joined Cases C-83/01 P, C-93/01 P and C-94/01 P, EU:*C*:2003:388, 3 July 2003).
[51] Schön, 'Taxation and State Aid Law in the European Union', above n 47; Yvette Lind, 'Attracting Multinational Tech-Companies Through Environmental Tax Incentives' (2021) 49(11) *Intertax* 885.
[52] Some of this criticism has, for instance, been dealt with in Ruth Mason and Stephen Daly, 'State Aid: The General Court Decision in *Apple*' (2020) 99(10) *Tax Notes International* 1317; Stephen Daly, 'The Constitutional Implications of an EU Arm's Length Principle' (2020) 60(2/3) *European Taxation* 70.

- application of adjacent legal areas when upholding the functioning of the internal market, more specifically EU competition law and subsequent EU *state aid provisions.*

The impact and importance of these individual components have arguably wavered over time which contributes to a general legal uncertainty within the area of direct taxes. There is currently an unprecedented number of new EU corporate tax directives being introduced. This development may be interpreted as the EU taking a more proactive stance in protecting the tax bases of its Member States which is noteworthy when considering how the CJEU has historically ruled in direct tax cases and the protection of national tax bases.

The upholding of the free movement law and the internal market have for long taken precedence over the attempts of individual Member States to protect their tax bases. This case law is now, in some parts, revised as new corporate tax directives are introduced and enforced in a more rapid fashion than ever before. Tax provisions such as the below-described exit taxes in addition to controlled foreign company (CFC) rules are favourable examples of such change. The CJEU has historically ruled against such tax measures when applied domestically by EU Member States. Thus, this historical approach is in stark contrast to the contemporary approach where the same tax measures are presently being enforced at EU Member State level through the Anti-Tax Avoidance Directive (ATAD).

This drastic change is most likely associated with the above-described advancements currently taking place at the OECD/G20 level in which several EU Member States have been, and still are, directly involved. Germany, among others, has noticeably been a driving force. In fact, several of the EU tax tools that have been introduced over the last years, for instance, exit taxes that are now mandated by the ATAD, were initially modelled after the German rules.

It could also be argued that the EU has taken a pragmatic response to the OECD BEPS Project developments. The EU Anti-Tax Avoidance Package is factually an implementation of the OECD BEPS Action toolbox as it contains interest limitation rules (Article 4, ATAD[53] and OECD BEPS Action 4), a general anti-avoidance rule (GAAR) (Article 6, ATAD and OECD BEPS Action 6), CFC rules (Articles 7-8, ATAD and OECD BEPS Action 3), hybrid mismatch rules (Article 9, ATAD and OECD BEPS Action 9), country-by-country reporting standards (DAC4[54] and OECD BEPS Action 13) and mandatory disclosure rules (DAC6[55] and OECD BEPS Action 12).[56] In connection to the EU implementation of the BEPS toolbox, the EU also introduced its own tools with the most notable being exit tax provisions (Article 5, ATAD). Exit taxes are not unique for EU Member States, yet they are clearly an addition to the BEPS toolbox as no BEPS Action specifically details exit tax rules. Moreover, the EU is, as

[53] *Anti-Tax Avoidance Directive/ATAD*, above n 44.
[54] European Council, *Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU As Regards Mandatory Automatic Exchange of Information in the Field of Taxation* [2016] OJ L 146/8 ('*Rules on Country-By-Country Reporting/DAC4*').
[55] *Automatic Exchange of Information/DAC6 Directive*, above n 44.
[56] For a more comprehensive analysis of this, see Pasquale Pistone and Dennis Weber (eds), *The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study* (IBFD Publications, 2018).

mentioned above, contemplating the introduction of BEPS 2.0 (the taxation of the digital economy and the global minimum tax) through EU corporate tax directives.

Of importance to this article is that these EU tax directives prescribe tax measures that are mandatory for the EU Member States to implement domestically. The tax directives offer minimum substance rules, and it is at the discretion of the individual states to decide if they wish to only implement the minimum standards or introduce substance rules that are more far-reaching. There is a broad variety among the individual EU Member States on how they have chosen to do so thereby adding to the complexity of corporate taxation within the EU despite the efforts toward its increased harmonisation.

Moreover, these minimum substance rules have arguably had an impact on the law-making process in the EU Member States.[57] In this context, these EU countries are no longer making tax laws in accordance with their retained tax sovereignty and individual needs. Instead, they are merely implementing them as prescribed by the EU and the OECD as they originate from the discussions surrounding the OECD BEPS Actions. This makes the law-making process generally more of an administrative process rather than a political one. Additionally, in this administrative process, the tax administrations of the individual countries have gained a more noticeable role. They provide the guidance from the experience and insight of being the executive institution in charge of overseeing and applying these tax measures once implemented in the domestic tax system.

Sweden has introduced several OECD and EU legal instruments combating tax avoidance and tax evasion with its involvement in the OECD community in combination with its EU membership. This article argues, as will become evident in the following sections, that this introduction of the OECD/EU toolbox has facilitated a paradigm shift in the Swedish law-making process. Below are two case studies on how Sweden has introduced two of these tools: data exchange through mandatory reporting for tax advisors and exit taxes.

5. THE DAWN OF THE NEW PARADIGM

5.1 The Swedish implementation of mandatory reporting through DAC6

In April 2017, the Swedish government delegated a special investigator with the task to oversee the possibilities for introducing mandatory reporting for tax advisors.[58] The investigator was specifically tasked with considering how ongoing developments at both the OECD (Action 12) and EU (the future introduction of DAC6) levels would impact the Swedish system.

In May 2018, the EU's Economic and Financial Affairs Council (ECOFIN) adopted the amendments to the Directive on administrative cooperation in the field of taxation (DAC6) as regards the mandatory automatic exchange of information in relation to reportable cross-border arrangements.[59] The reporting obligations apply to cross-border

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[57] As noted previously (see n 1, above), tax scholarship has debated that the implementation of the minimum substance rules prescribed by the EU tax directives erodes tax sovereignty and the legitimacy of domestic tax systems as the EU has managed to 'bypass' traditional law-making processes involving the parliaments of the individual countries. This is naturally interlinked to the topic of this article yet not the focus of it and, as such, is omitted in further discussions.

[58] Dir: 2017:38 *Informationsskyldighet för skatterådgivare*.

[59] *Automatic Exchange of Information/DAC 6 Directive*, above n 44.

arrangements if they display one or more characteristics, so called hallmarks, that are provided in the directive. Consequently, the directive targets tax arrangements presumed to be in a higher risk of tax avoidance and the hallmarks assist in identifying these arrangements. In June 2018, DAC6 was published in the Official Journal of the European Union.[60] As described above, Sweden and the other EU Member States are now mandated to implement these rules into their domestic tax systems. The initial deadline for this implementation was initially set to July 2020 yet there was a six-month extension due to the Covid-19 pandemic.

There was a wide range of differing DAC6 implementations among the Member States due to the directive merely providing minimum standards. Member States such as Italy, France and the Netherlands implemented the directive strictly with the minimum framework that was provided while other states such as Germany and Poland went further and introduced more far-reaching standards such as increased penalty fees, application to a wider range of taxes, and application to purely domestic arrangements in addition to cross-border arrangements.

The most fundamental discussion of the implementation was whether the directive would apply only to cross-border transactions or, alternatively, also to purely domestic arrangements. The latter would entail far-reaching domestic legislation and became highly debated among law-makers, taxpayers, and tax advisors across the EU. The Swedish proposal initially contained an inclusion of domestic tax arrangements, yet this was removed at a later stage. However, it should be noted that the Swedish government has stressed that there may be future legislative changes where domestic arrangements could be included as well.[61] There were additional functions of DAC6 that also became subject to heated discussions.

For instance, there is a variation between Member States when considering what intermediaries the mandatory reporting standards should apply to due to the broad scope set forth by the directive. As a result, the term intermediary can include lawyers, accountants and tax advisors and individual Member States can have regulated exemptions. For instance, Sweden introduced an exemption for tax-advising lawyers due to the attorney-client privilege under the exemption provided by DAC6.[62] As a result, the mandatory reporting responsibility falls on the client, the taxpayer, in such situations. For cases where the tax advisor is an employee of a limited company (tax-advising firm for instance), the corporate entity is responsible and not the individual tax advisor.

Figure 1 below illustrates a simplified understanding of the reporting process.[63]

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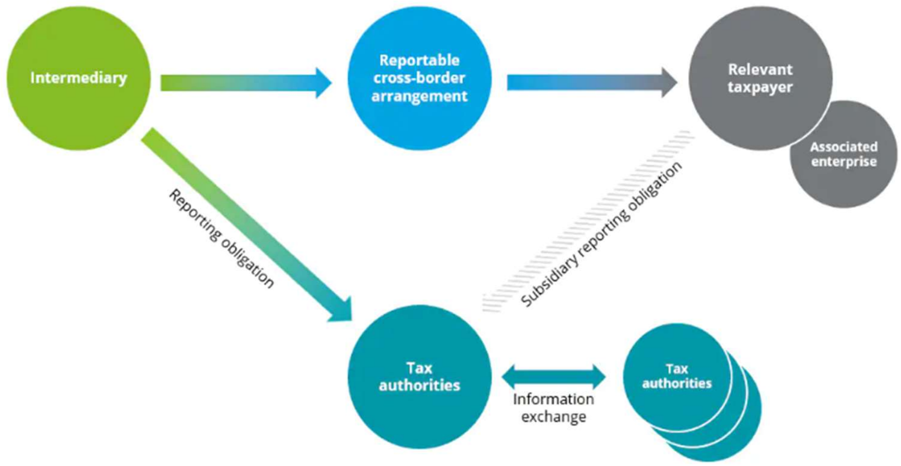
[60] [2018] OJ L 129/1 (5 June 2018).

[61] Prop. 2019/20:74 *Genomförande av EU:s direktiv om automatiskt utbyte av upplysningar som rör rapporteringspliktiga gränsöverskridande arrangemang*, 40.

[62] Article 8ab(5) of DAC6 allows Member States to take the necessary measures to exclude legal advisors from the obligation where it would breach legal professional privilege under the national law of the Member State. Of interest is that on 8 December 2022, the CJEU ruled that article 8ab(5) of DAC6 violates article 7 of the Charter of Fundamental Rights of the European Union due to the confidentiality of all correspondence between individuals, and in particular with their lawyers, and is therefore invalid. See *Orde van Vlaamse Balies and Others v Vlaamse Regering* (Case C-694/20, EU:C:2022:963, 8 December 2022).

[63] Deloitte Luxembourg, 'Understanding DAC 6', https://www2.deloitte.com/lu/en/pages/tax/articles/dac-6-directive.html (accessed 27 February 2023).

Fig. 1: Simplified DAC6 Reporting Process



Source: Deloitte Luxembourg, 'Understanding DAC 6', https://www2.deloitte.com/lu/en/pages/tax/articles/dac-6-directive.html (accessed 27 February 2023).

Furthermore, the directive does not prescribe specific sanctions but requires that effective, proportionate and dissuasive penalties shall apply. The levels of such penalty fees vary widely between the EU Member States. For instance, they reach between EUR 1,300 in Estonia (where the cap was also set to EUR 3,200)[64] up towards EUR 830,000 (the Netherlands).[65] Sweden implemented penalty fees at three differing levels and for differing actions: (1) in the case of reporting that contains incorrect or incomplete data, there is a fee of EUR 1,500 for tax advisors and EUR 750 for taxpayers reporting themselves due to their tax advisors being exempted from mandatory reporting; (2) in the case where reporting has not been done on time a second penalty fee is applicable, corresponding to EUR 5,000 for tax advisors and EUR 2,500 for taxpayers reporting themselves, and (3) in the case where the reporting has been delayed and it concerns business activity the fees are higher and determined in accordance with the company's annual turnover. Consequently, the highest penalty fee is EUR 50,000 for tax advisors and EUR 25,000 for taxpayers.

The implementation of DAC6 was subject to an unusually intensive debate when compared to the introduction of previous EU tax directives.[66] Some of the sensitive issues have already been addressed above. The main arguments concerned the administrative burden placed on the taxpayer, legal certainty and legality; in other

[64] Estonian Tax Information Exchange Act passed 18 December 2014.
[65] Jasper Korving, 'A Guide to the Netherlands DAC6 Guidelines' (2021) 61(1) *European Taxation* 12.
[66] For an in-depth discussion of the Swedish implementation of EU law in tax matters, see Stig von Bahr, '*Svensk anpassning till unionsrätten*' in Anders Hultqvist, Peter Melz and Robert Påhlsson (eds), *Skattelagstuftning. Att lagstifta om skatt* (Norstedts Juridik, 2014) 147.

words, the role of the Swedish Tax Agency and the constitutional principle that only the Parliament is able to enact taxes.

One example of how the boundary between the executive and the legislature was at risk of becoming blurred in this context was the broadly defined and often unclear requirements attached to the mandatory reporting. The tax administration would be able to determine which domestic tax arrangements that could potentially fall under the mandatory reporting standards when given the mandate to define the hallmarks.[67] Conversely, the tax administration would be in the position to exclude individual taxpayers from mandatory tax reporting depending on how it interpreted and applied the hallmarks. In other words, the Tax Agency would have the discretion to decide if a tax arrangement displays any of the characteristics of the hallmarks embedded in the directive. And dependent to that assessment the Tax Agency will ultimately decide if a taxpayer is to be subject to the mandatory reporting arrangement or not.[68] As previously described in section 3 of this article, the Swedish Constitution states that a law may not be amended or repealed without legislative support. In other words, it falls on the Parliament to make such decisions and not the executive institution.

The same argument can be applied to the expressed ambition of the Swedish Tax Agency to propose new legislative tax measures once new (aggressive) tax planning schemes have been identified through the mandatory reporting process. There is no constitutional support for the tax administration to take on this law-making role. This is discussed further below.

5.2 The Swedish exit tax and the aftermath of ATAD

An exit tax is paid when a person or an asset moves across national borders. The objective of a tax measure such as this is to tax the economic value of the profit created within the territory of the state being moved from even if it has not been realised at the time of crossing the border. Consequently, an exit tax aims to protect the national tax base and acts as a safeguard or defensive tax measure. Exit taxes are controversial to some extent as they act as a disincentive for cross-border movements on the one hand and protect the domestic tax base of the country in which the asset has been nurtured on the other.

The former has long been held by the EU, and there is an extensive amount of CJEU case law upholding the free movement within the internal market through judgments ruling against the application of domestic exit taxes. However, the CJEU became less stringent over time and ultimately allowed Member States to legislate exit taxes if the domestic tax measures did not result in discriminatory treatment. For instance, the CJEU concluded in the *National Grid Indus* case[69] that exit taxes on latent gains restrict the freedom of establishment. Nevertheless, the Court further argued that such taxes may be justified by the need to preserve the allocation of taxing powers between Member States. The CJEU additionally developed outlines for a proportionate exit tax doctrine

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[67] David Kleist discusses this in length in '*Reglering om rapporteringspliktiga arrangemang från ett rättssäkerhetsperspektiv*' [2019] (8) *Svensk Skattetidning* 521.
[68] The taxpayer will still need to file annual taxes; the question is whether the taxpayer needs to submit all additional information surrounding the tax arrangement. The latter is sensitive as corporate taxpayers often regard this information as a part of business strategy and therefore may wish to keep it from being disclosed.
[69] *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam* (Case C-371/10, EU:C:2011:785, 29 November 2011) ('*National Grid Indus*').

as the Court argued that immediate recovery on unrealised gains at the time of transfer would be considered excessive. This exit tax doctrine was later optimised through other cases such as *DMC*[70] and *Verder LabTec*.[71]

The introduction of ATAD with its exit tax provision finally overturned the idea of exit taxes being harmful to the functioning of the internal market. Instead, the EU is signalling that, while exit taxes may inherently stifle cross-border movement and act in a discriminatory way, they have become necessary when protecting the domestic tax bases of the Member States. Therefore, the ATAD mandates all Member States to implement the exit tax minimum standard as prescribed by Article 5, ATAD and furthermore allows Member States to enforce exit taxes going beyond that of the minimum standards. The way in which the CJEU will determine how such exit taxes relate to the already existing case law and exit tax doctrine continues to be uncertain.

As far as exit taxation of corporate assets is concerned, Sweden already had legislation coordinated with the case law from the CJEU that must now be synchronised to the tax provisions provided by ATAD. However, the implementation of the ATAD naturally also incited discussions on whether Sweden should introduce an exit tax and, if so, how it would be designed. Before discussing that, some historical context will be provided.

Sweden has developed several different methods over time for ensuring such taxation to avoid or circumvent assets exiting without being taxed. Sweden taxes corporate income at two stages, ie, initially at a corporate level when profits arise and then at the shareholder level when they either receive a dividend or divest shares. Individual taxpayers (shareholders) are subsequently taxed with a 30 per cent flat rate in the income category of capital (the Swedish tax system utilises three income categories: employment income, business income, and capital income).

Sweden does not currently levy any explicit exit tax but has instead applied what is referred to as a 10-year rule for the last four decades to secure the taxation of capital gains on shares.[72] The rule was explicitly introduced with the ambition to prevent tax evasion.[73] The rule conditions the shareholder to remain liable for Swedish taxation when divesting their shares within a 10-year period after exiting Sweden. This defensive tax rule is motivated by the idea of the profit having been generated by a company based in Sweden and thus under the protection of Swedish laws.

The 10-year rule has managed to survive over the past four decades due to a strong political consensus over the need for it. However, it is arguably ineffective in some respects as it is often applied in a limited capacity, ie, the tax is applied with a time period below the prescribed 10 years. This is due to tax treaty negotiations with the other contracting state in addition to the possibility of the rule being circumvented via letterbox companies located in low-tax jurisdictions within the EU. The CJEU dealt with the latter in the Swedish *X and Y case* from 2020 which also instigated a legislative change in the Swedish Income Tax Act.[74] Consequently, in reality the rule is only

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[70] *DMC Beteiligungsgesellschaft mbH v Finanzamt Hamburg-Mitte* (Case C-164/12, EU:C:2014:20, 23 January 2014).
[71] *Verder LabTec GmbH & Co KG v Finanzamt Hilden* (Case C-657/13, EU:C:2015:331, 21 May 2015) ('*Verder LabTec*').
[72] Swedish Income Act/*Inkomstskattelag* (1999:1229) Chapter 3 §19.
[73] Prop. 1982/83:144 *om utvidgning av skattskyldigheten i Sverige för aktievinster, m.m*., 1.
[74] *X and Y v Riksskatteverket* (Case C-436/00, EU:C:2002:704, 21 November 2002).

applicable for 5 years due to limitation of tax treaties entered into by Sweden. One of the most noticeable exemptions would be in relation to Portugal as Sweden recently terminated the tax treaty between Sweden and Portugal. In the absence of a tax treaty the 10-year rule is, once more, applied for a full 10 years.

The numerous exit tax proposals that have been brought forward during this four-decade period have not been as politically resilient as the 10-year rule. Several Swedish governments have explored the possibility of legislating a more general and effective exit tax regime on capital gains. One of the most recent legislative initiatives was in 2017 in connection to the implementation of the ATAD and in the aftermath of CJEU cases such as the *National Grid Indus*,[75] *Verder LabTec*,[76] *Oy*,[77] and *Commission v Portugal*.[78]

In November 2017, the Swedish Tax Agency published a memorandum[79] which contained a concrete legislative proposal for a new type of tax applicable to capital assets belonging to individual taxpayers. This new rule was argued to replace the existing 10-year rule. The tax agency proposed that the new rule had the potential to yield an additional SEK 1 billion (approximately USD 97 million) on an annual basis while the existing 10-year rule was rarely applied and consequently raised no substantial tax revenues. This author would, jointly with the critiques of the proposal, argue that it is unlikely that the proposed exit tax would have the potential to yield such a substantive revenue stream and, as such, is questionable as the primary motive of introducing an exit tax. It is of interest that there was no mention of the prevention of tax evasion as was the case with the introduction of the 10-year rule and the main ambition with the EU directive. It would have been politically strategic to emphasise the prevention of tax base erosion and tax evasion instead of relying on exaggerated tax revenue figures since there were pre-existing expectations for Sweden to introduce an exit tax in accordance with the provisions outlined in the ATAD.[80]

The tax agency's legislative proposal became increasingly controversial when it was later referred to by the Swedish government when presenting the official legislative proposal for a Swedish exit tax. The media response was harsh, and the influential interest organisation Swedish Business (*Svenskt Näringsliv*[81]) also demonstrated its discontent over the executive branch and consequently the counterpart in tax matters thereby taking on the role of a law-maker. Most importantly, nearly all consulting bodies (*remissinstanser*) involved in the legislative process strongly critiqued the proposal.[82]

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[75] *National Grid Indus*, above n 69.
[76] *Verder LabTec*, above n 71.
[77] *Oy v Commission* (Case C-816/18 P, EU:C:2019:486, 12 June 2019).
[78] *Commission v Portugal* (Case C-503/14, EU:C:2016:979, 21 December 2016).
[79] Dnr. 202 467348-17/113 *Skatteverkets Promemoria: Exitbeskattning för fysiska personer - Beskattning av orealiserade kapitalvinster som upparbetats i Sverige*, available at: https://www.skatteverket.se/omoss/varverksamhet/rapporterremissvarochskrivelser/skrivelser/arkiv/ar/2017/skrivelser2017/20246734817113.5.b1014b415f3321c0de40a2.html (accessed 21 February 2023).
[80] For support of Sweden being among the more compliant EU Member States in this context, see von Bahr, above n 66.
[81] For more information in English about this organisation, see their webpage in English: https://www.svensktnaringsliv.se/english/ (accessed 24 February 2023).
[82] Fi2017/04529/S1 *Remiss av Skatteverkets promemoria Exitbeskattning för fysiska personer*.

The attempt to introduce an exit tax was ultimately abandoned in the spring of 2018.[83] The Swedish government did not dare to risk pursuing an introduction of the proposed exit tax partially due to the above-described extensive critique aimed against it and partially due to political disagreement with only months left to the next general election.

In May 2022, the new government, via the Ministry of Finance, appointed a special investigator to submit a proposal for a new exit tax. As was expressed, it was proposed as a tax rule capable of ensuring effective capital taxation of natural persons who move out of Sweden and consequently cease to be liable for full taxation. Alternatively, it could also apply to a natural person who, according to a tax treaty, becomes domiciled in another contracting state.[84] It is of interest that the instructions to the special investigator expressed a clear desire to protect the Swedish tax base and ensure that the Swedish tax system was fully compliant with EU law. The latter entails compliance with the ATAD and the exit tax provision.[85] The special investigation was initially expected to report on 15 February 2024; however, the investigation was closed in December 2022. Unlike the failed attempt in 2017 when the Swedish Minister of Finance publicly announced the repealed proposal, there was no public announcement that time. This came as less of a surprise as the investigation had been initiated by the social democratic government that was replaced a few months later (October 2022) by the new conservative government. The new conservative government does not pursue the same agenda as the former social democratic one. Instead of finding new revenue streams, there is an emphasis on making the Swedish tax system internationally competitive and to promote the situation of Swedish business life when attempting to compete internationally.

6. Concluding remarks and proposals for future research

To conclude, international tax developments in the OECD and EU have trickled down to a domestic level, and it is evident from the Swedish case study that the Swedish law-making practice is subject to a paradigm shift.

This author would argue that in the case of Sweden the Swedish tax administration has to some extent been coerced into participating in the legislative process rather than actively seeking to be a part of it. The article will come back to the importance in this separation further below. However, before that, some discussion ensues on whether this evolution has been successful.

It is evident that the Swedish Tax Agency's recent movement between the roles of executive and legislature has been unsuccessful thus far in the sense that it entails that the legislative proposals that have been proposed have not been legislated or significantly revised. A logical reason for why the legislative initiatives that have been proposed by the tax administration have been unsuccessful is the very fact that it is thinking like the executive role for which it has been trained.

The exit tax attempt is a prime example of this behaviour. As argued, it would have been strategic to emphasise the protection of the Swedish tax base and the need to comply with the ATAD and EU directives rather than emphasising the potential tax

[83] Magdalena Andersson, '*Vi skrotar Exitskatten*', *Dagens Industri* (28 March 2018).
[84] Dir. 2022:45 *En effektiv beskattning när fysiska personer med orealiserade kapitalvinster som upparbetats i Sverige flyttar ut. 22 May 2022*.
[85] Ibid 4.

revenues.[86] The latter only sparked antagonism from Swedish taxpayers and larger corporations while the former line of argumentation would have been considered less controversial as Sweden generally implements EU directives without issues.[87] However, it is an understandable argumentation as the role of the Swedish Tax Agency is to collect taxes and maximise tax compliance rather than to politically strategise. This sentiment can be supported by other circumstances; for instance, the tax agency had not included any consequence analyses on how the proposed exit tax would impact business life in Sweden. This is generally considered common practice in the legislative process when administered by the government and Parliament.[88] The break with the norms of making Swedish taxes was corrected in the 2022 initiative as the government did not delegate the task of investigating a new exit tax to the Swedish Tax Agency nor did the government put forward a proposal initially drafted by the tax administration. Furthermore, the government clearly expressed in its instructions that the potential introduction of an exit tax would be done with the intent to protect the Swedish tax base and ensure EU law compliance. These are two common and, as such, safer political justifications for new tax instruments.[89]

Furthermore, the Swedish implementation of DAC6 and mandatory reporting for tax advisors proved uncharacteristically controversial when compared to past implementations of EU tax directives. Admittedly, there were similar controversies in other EU Member States, but this author would argue that the involvement of the Swedish Tax Agency intensified the debate and the amount of critique brought forward. For instance, there were tax administrative statements on how mandatory reporting of big data could be used for the identification of future tax planning schemes and the subsequent possibility for the tax administration to introduce new legislative proposals for eliminating exploited legislative gaps.[90] Such a development would risk eroding legal certainty and democratic legitimacy and ultimately induce fears over arbitrary administrative practices underpinned by political agendas.

However, why then is the Swedish Tax Agency becoming increasingly active in providing legislative proposals for new tax measures? As initially proposed as a hypothesis, it is possible that the tax administrations have become more actively involved because of the increase in global collaboration and harmonisation. These OECD and EU tax measures have already, to a large extent, been designed by others

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[86] It is possible to contend that the premise of securing tax revenues is interchangeable with the argument of protecting the tax base. However, the author would argue in this case that securing tax revenues was expressed in a more aggressive fashion as the proposal included an expansion of the tax base through, for instance, the introduction of thresholds that would effectuate exit taxation at very low income levels (compared to exit taxes in other countries). Consequently, protecting the tax base would imply a defensive tax measure in this context while the tax administration's sentiment was to gain additional tax revenues which can be supported by the inflated estimate of potential tax revenues.

[87] For support of Sweden being among the more compliant EU Member States in this context, see von Bahr, above n 66.

[88] See, for instance, Anders Hultqvist, '*Beredning av skattelag*' in Anders Hultqvist, Peter Melz and Robert Påhlsson (eds), *Skattelagstuftning. Att lagstifta om skatt* (Norstedts Juridik, 2014) 61.

[89] For an in-depth discussion of the Swedish implementation of EU law in tax matters, see von Bahr, above n 66.

[90] This function has been voiced by tax administrators in differing context during the implementation talks in Sweden and is also mentioned in David Kleist, 'DAC6 Implementation in Sweden' (2021) 61(1) *European Taxation* 21. This may be contrasted to the need for the Swedish Tax Agency to express itself in an objective and neutral fashion which has also been discussed in Swedish tax scholarship: see for instance Mats Höglund, '*Ska Skatteverket vara opartiskt I skatteärenden?*' [2012] (1) *Skattenytt* 29.

rather than the national legislature. As such, the act of implementation becomes more of a tax technical act handled by the tax administration (and later Parliament when officially enacted as domestic law) rather than a political act managed by the government and Parliament.

Moreover, the Swedish Ministry of Finance has voiced the view that a reduction in the funding for its overall functions has driven the need to outsource parts of the legislative process to other parties, such as the tax administration. The tax administration can certainly add valuable points of input to the design of tax measures through its unique technical expertise from enforcement and interaction with taxpayers, and scholars such as Waldron have emphasised the benefits of such an involvement in the legislative processes.[91] Moreover, the tax administrations are privy to large data sets which also have the potential to assist in the technical implementation of new tax legislations. However, there is still a significant need to separate the roles of the differing institutions as they otherwise cause erosion of both legal certainty and democratic legitimacy. From the Swedish case, it is also evident that the tax administrations may be less familiar with domestic law-making norms and, as such, fail to provide a satisfactory legislative investigation when drafting a legislative proposal.

However, it should be underlined that the exit tax proposal that was proposed by the Swedish Tax Agency in 2017 was not instigated by the Swedish government via the Ministry of Finance. The memorandum was initiated by the tax administration itself which implies a desire for a more active role in the law-making process. The previous statement of how the identification of new tax schemes would instigate new proposals from the tax administration also accentuates this ambition. A long-term plan of the Swedish Tax Agency wanting to take an active law-making role could possibly be discerned and, as such, that it could become a revolutionary actor over time.

Another potential reason for the change in the Swedish tax administration could be the strong influence from stakeholders such as Swedish Business. Swedish Business holds an exceedingly influential lobbying position,[92] and it could be that the evolution of the tax administration has been effectuated by a need for counterbalancing.

In conclusion, tax developments at the OECD and EU levels create new challenges, yet the one presented in this article has been given only minimal attention thus far. The evolution of the tax administration in legislative matters has been explored to some extent, for instance, in the report from the 2009 Congress of the European Association of Tax Law Professors (EATLP)[93] and the IBFD edited conference volume from 2011.[94] However, the impact of the BEPS era has so far remained relatively unexplored by tax scholarship despite its potential impact across the globe.[95] It is reasonable to expect that the shift in the global tax climate, going from tax sovereign states competing with each

[91] Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999).
[92] One concrete example of this influencing is the extent of Swedish Business influencing at the OECD and EU levels through, for instance, Krister Andersson and Jesper Barenfeld.
[93] Ana Paula Dourado (ed), *Separation of Powers in Tax Law* (IBFD Publications, 2010).
[94] Chris Evans, Judith Freedman and Richard Krever (eds), *The Delicate Balance: Tax, Discretion and the Rule of Law* (IBFD Publications, 2009).
[95] Admittingly, the practice of tax rulings exercised under the discretion of tax administrations has been explored in connection to BEPS developments, yet as a larger phenomenon and in particular in connection to the law-making process, there is still much work to be done. For work on tax discretion and tax rulings, see, for instance, Stephen Daly, *Tax Authority Advice and the Public* (Hart Publishing, 2020).

other towards global cooperation and tax harmonisation, will require tax administrations to be more active in the law-making process as the implementation of the toolboxes provided by the OECD and EU becomes more of a tax technical implementation unlike past practices where the domestic legislatures have taken their own initiatives based on the needs and traditions of respective individual nations.

The tax administrations have an inherent technical expertise, competence, as well as taxpayer data suitable for this development and their potential new role. However, the constitutions of individual states, such as Sweden in this study, do not provide the necessary discretion or mandate for such actions. Therefore, it is evident that many jurisdictions around the global may need to consider adapting their constitutional restraints in the light of the fundamental change in the global tax climate. This is indeed a contemporary tax challenge that requires further research by tax scholars from various disciplines such as law, anthropology and political economics.