Excerpt from Skatteförfarandepraktikan – e-book by Björn Forssén
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10.4 CERTAIN QUESTIONS ABOUT SWEDISH TAX AND CRIMINAL RULES IN RELATION TO THE EUROPEAN LAW

Competence etc.

In short the relationship between on the one hand the Swedish constitutional law and its statutes of the Constitution of Sweden – here *regeringsformen (1974:152)*, RF, the 1974 Instrument of Government – and on the other hand the European law with the European Convention of Human Rights (ECHR) and the EU-law respectively can be described as follows. The ECHR and inter alia its additional protocols no. 1 and no. 7 were introduced in 1995 into the Swedish legislation as one act – although not as constitutional law. According to Ch. 10 sec. 6 of the RF (previously Ch. 10 sec. 5 of the RF), and the principle of conferred competence (the principle of legality) in articles 4(2) and 5(2) of the Treaty of European Union (TEU), the institutions of the European Union (EU) were conferred competence in certain fields by the Swedish Parliament (Sw., *Sveriges Riksdag*), when Sweden accessed the EU, i.e. became a Member State, in 1995, by virtue of the EU-act (the accession act) [*lagen (1994:1500) med anledning av Sveriges anslutning till Europeiska unionen*].

> A draft of a Constitutional Treaty (the draft 18 July 2003 of a Constitution for Europe) was adopted on the summit in Brussels 17-18 June 2004 and signed 29 October 2004, but was not ratified by all Member States. Instead a reform treaty was accomplished, i.e. the Lisbon Treaty. The Lisbon Treaty meant that the EC Treaty (i.e. the Rome Treaty from 1957) was replaced by the Functional Treaty of EU (the Functional Treaty) and that the TEU (i.e. the Maastricht Treaty of 1992) was reformed and that the Charter of Fundamental Rights of EU (the Charter) was equalized with the treaties, i.e. with the TEU and the Functional Treaty. The Lisbon Treaty was decided and signed, respectively, 19 October 2007 and 13 December 2007 and had been ratified by all the then EU27-countries 3 November 2009. A constitutional treaty has although never entered into force. The Lisbon Treaty with the TEU, the Functional Treaty and the Charter was introduced as an ordinary act into the Swedish legislation 1 December 2009, by SFS 2009:1110 [SFS stands for *svensk författningssamling*, Swedish Code of Statutes].

- Concerning criminal law and tax law the following apply concerning the question of competence between Sweden and the EU.

- Criminal law: exclusive national competence.[1]

- Tax law: competence conferred to the EU's institutions in general regarding

    - value added tax (VAT;[2] *but*
    - only with respect of certain issues regarding income tax.[3]

[1] See *Regeringens proposition (prop.)* – the Government bill – *1994/95:19 Part 1 pp. (429), 472 and (524).*
[2] Compare the EU's VAT Directive (2006/112/EC), article 288 third paragraph of the Functional Treaty (which means that e.g. the EU's VAT Directive is a binding legislation and that Sweden may only determine form and methods for the implementation), article 4(3) of the TEU and article 291(1) the Funcional Treaty (which stipulate the so called solidarity principle meaning that Sweden as a Member State shall take all necessary measures of legislation to implement the EU's VAT Directive into the Swedish VAT act – *mervärdesskattelagen (1994:200)*, ML) and article 113 of the Functional Treaty (which stipulates a harmonisation demand regarding the Member States' legislations on indirect taxation, e.g. VAT).
[3] The EU's Council has issued only four directives regarding certain issues of income tax, namely: the Council's directive 2009/133/EC, the Merger Directive; the Council's directive 2011/96/EU, the mother/daughtercompany

The principle of legality etc.

- Criminal law: the principle of legality with the *lex scripta*-demand [i.e. *nullum crimen sine lege* (no crime without support in law) and *nulla poena sine lege* (no punishment without support in law)] according to Ch. 1 sec. 1 of *brottsbalken (1962:700)*, i.e. the Swedish Penal Code 1962, and the prohibition of retroactive criminal law legislation in Ch. 2 sec. 10 first paragraph of the RF.

- Tax law: the principle of legality for taxation measures with the *lex scripta*-demand (i.e. *nullum tributumj sine lege* – no tax without support in law) according to Ch. 8 sec. 2 first paragraph number 2 of the RF and the prohibition of retroactive tax legislation in Ch. 2 sec. 10 second paragraph of the RF.

Although the competence regarding VAT has been conferred to the EU's institutions, can an EU conform interpretation of a rule in the ML be limited – with respect of the rule's wording – by the constitutional law and the principle of legality for taxation measures in Ch. 8 sec. 2 first paragraph number 2 of the RF.[4]

The ne bis in idem-principle

- The *ne bis in idem*-principle (i.e. prohibition of two separate sets of proceedings to punish the same wrongful conduct) applies to both VAT and income tax according to a case by the Swedish Supreme Court, i.e. *Högsta domstolen* (HD), NJA p. 502 (NJA stands for *Nytt juridiskt arkiv,* section I (the HD's yearbook), but the question is whether it is possible to refer to article 50 of the Charter also as support for it comprising tax surcharge (Sw., *skattetillägg*) and punishment concerning income tax, when the Swedish Parliament has not generally conferred the EU's institutions competence in that field?

- The HD overlooks the problem concerning whether the EU has so called *implied powers – Kompetenz-Kompetenz* (Ger.) – when the HD in para. 59 of NJA 2013 p. 502 refers to inter alia article 6(3) of the TEU to support that article 4 of additional protocil no. 7 of the ECHR shall not be interpreted so that the individual is given a less exstencive protection than would be the case according to article 50 of the Charter where the *ne bis in idem*-question is concerned. The question whether the EU has so called *Kompetenz-Kompetenz* has been subject to discussions regarding article 352 of the Functional Treaty (and the predecessor article 308 of the EC Treaty).[5] Of interest here is therefore also the following concerning article 6(2) of the TEU.

- According to the Lisbon Treaty *shall* the EU access to the ECHR, but since article 6(2), which states that, has not been ratified yet the fundamental rights of the ECHR are only comprised by the EU law as general principles, according to article 6(3) of

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directive; the Councul's directive 2003/48/EC, the savings directive; and the Council's directive 2003/49/EC, the interest/royalty directive. Compare also inter alia article 115 of the Functional Treaty on so called approximation of Member States' legislations on e.g. income tax – thus no harmonisation demand).

[4] Compare para. 110 of the case of the Court of Justice of the EU (CJEU) Adeneler et al. (C-212/04).

[5] See examples of literature about the issue mentioned, in note 420 on p. 88 of Tax and payment liability to VAT in joint ventures and shipping partnerships : Fourth edition, by Björn Forssén (cit. Forssén 2018).

the TEU.[6] On page 35 in *De europeiska domstolarna och det svenska äganderättsskyddet* by Joakim Nergelius (cit. Nergelius 2012) it is stated: ”EMRK är som bekant en del av EU-rätten”, which I translate *the ECHR is known to form part of the EU law*. Regarding what the HD states in para. 59 of its case NJA 2013 p. 502 it is however noted here that the ECHR – and its additional protocols – are only comprised by the EU law as general principles [article 6(3) of the TEU]. To give the individual the same protection also in the field of income tax under the *ne bis in idem*-principle as according to article 50 of the Charter article 6(2) of the TEU should be ratified. A better solution with respect of legal certainty would however be to codify (in the TEU and the Functional Treaty) the principle which is deemed to follow by the CJEU's case Costa (6-64), i.e. the EU law's primacy to national law is considered fundamental for the EU law's impact in the Member States, and if so so that also income tax – according to the principle of conferred competence – would be comprised by the EU law.

In the draft of the EU constitution which was adopted but never ratified by all Member States (see above) it was suggested that the principle of the EU law's primacy to national law would be codified in the EU law [see article I-10(1) of the draft of a constitution for the EU], but that was not the case in the Lisbon Treaty.

- By the way double taxation treaties often apply for international issues on income tax, where a clause on prohibition of discrimination in pursuance of the model treaty for avoidance of double taxation by the Organization for Economic Co-operation and Development (OECD) applies besides the national rules on legal certainty. The OECD's Model Treaty (originally from 1963) is a model for bilateral agreements to avoid double taxation between OECD-countries (Sweden et al.).[7]

The Principle of Neutrality etc.

- It has been clarified by the Lisbon Treaty and article 113 of the Functional Treaty that the harmonisation demand regarding the Member States' legislations on indirect taxes, e.g. VAT, also means that competition distortion shall be avoided and not only ensure the establishment and functioning of the internal market. The principle of a neutral VAT follows by secondary EU law by the fourth, fifth and seventh paragraphs of the preamble to the VAT Directive and by article 1(2) of the VAT directive, but by the clarification in article 113 of the Functional Treaty it is also – opposite to the wording of the predecessor article 93 of the EC Treaty – clear that the principle of a neutral VAT also applies where primary law is concerned. This means that with regard of primary EU law there is a demand on *a level playing field* for the indirect taxes to be harmonised.

- The question is whether a distinction between on the one hand sole proprietorships (Sw., *enskilda firmor*) and on the other hand – above all – one-man limited companies (Sw., *enmansaktiebolag*) concerning the scope of the *ne bis in idem*-principle ragrding tax surcharge and punishment entails to the law political aim with neutrality for tax

[6] Compare p. 52 of Forssén 2018 and also the first paragraph of para. 2 of the CJEU's case Åkerberg Fransson (C-617/10).

[7] The OECD is an international organization of its own, formed 14 December 1960, and it deals also with such matters as inspections of the length of periods of dentention in the OECD-countries, which can be of interest concerning tax fraud etc.

purposes between various forms of enterprises being disregarded. That question is of a particular importance for the VAT, since the competence in that field is coferred to the EU and a competition distortion effect of such a distinction would be against the EU law not only regarding the secondary law, but nowadays also clearly regarding the primary law.

- Of interest in this context is also that even if the Charter nowadays is equal to the treaties (i.e. to the TEU and the Functional Treaty) shall it, according to article 6(1) first paragraph of the TEU, neither expand the EU's competence [article 6(1)second paragraph of the TEU and article 51(2) of the Charter] nor alter the competence and assignments for the EU established in the treaties [article 51(2) of the Charter]. The HD overlooks in its case NJA 2013 p. 502 the problem meaning that a distinction between various forms of enterprises concerning the scope of the *ne bis in idem*-principle in article 50 of the Charter obviously jeopardizes the purpose of the harmonisation demand in article 113 of the Functional Treaty, where that demand is supposed to lead to avoidance of competition distortion, and thereby probably also works contratry to the purpose of the demand ensuring the estavblishment and functioning of the internal market. There is an obvious risk of these effects occuring as a consequence of the HD constraining in NJA 2013 p. 502 the *ne bis in idem*-principle about tax surcharge and punishment to apply only to sole proprietorships.[8] The reference cases [Sw., *referatmål (ref.)*] which so far have been tried thereafter by the Swedish Supreme Administrative Court, i.e. *Högsta förvaltningsdomstolen* (HFD), have also only concerned sole proprietorships.[9] There two notice cases [Sw., *notismål (not.)*] from the HFD, where the *ne bis in idem*-question concerning two separate sets of proceedings regarding tax surcharge and tax fraud (Sw., *skattebrott*) is dealt with about legal persons, namely limited companies (Sw., *aktiebolag*) where the representativ is sentenced for tax fraud for having issued erroneous information in the company's returns. However, the HFD has then – based on NJA 2013 p. 502 – only expressed that it is not the same wrongful conduct that causes, respectively, tax fraud and tax surcharge, when the representative is charged with tax surcharge based on erroneous information relating to a documentation of the representative's own taxation.[10] That was not a surprise and thus those two notice cases are not giving any further guidance concerning the *ne bis in idem*-question, where a representative is sentenced for tax fraud regarding the same erroneous information that has led to a tax surcharge for the legal person.

- If a competition distortion arises due to different treatment of sole proprietorships and legal persons, e.g. limited companies, where the prohibition of two separate sets of proceedings regarding tax surcharge and punishment is concerned, it may lead to limitation of the freedom of enterprise (Sw., *näringsfriheten*). According to article 16 of the Charter the freedom of enterprise shall be recognized in accordance with the EU law (and national law and practice). Thus, the freedom of enterprise according to the EU law is determined with respect of e.g. the principle of a neutral VAT in article 113 of the Functional Treaty. However, according to Ch. 2 sec. 17 of the RF the freedom of enterprise is only determined insofar as it is only allowed to be limited to protect important public interests. It should be expressly stated that the constitutional freedom

[8] See also these (subsequent) HD-verdicts on the *ne bis in idem*-question regarding tax surcharge and tax fraud: NJA 2013 p. 746, NJA 2013 p. 1076, NJA 2014 p. 371 and NJA 2014 p. 377.
[9] See HFD 2013 ref. 71, HFD 2014 ref. 35, HFD 2014 ref. 43 and HFD 2014 ref. 65.
[10] See HFD 2013 not. 81 and HFD 2014 not. 7 (where a reference is made to inter alia HFD 2013 not. 81).

of entreprise shall not comprise less than what is stated in that respect in article 16 of the Charter. Although the competence in the field of VAT is conferred to the EU's institutions, it is namely not established whether the national courts are obliged to apply the EU law *ex officio* (i.e. without the individual having to invoke it). If a rule in e.g. the VAT Directive has the so called direct effect, i.e. is clear, precise and unconditional and the time of implemenation has run out,[11] the individual is entitled to invoke the directive rule to protect his or her interests, but that right is sometimes said to be merely a kind of procedural right.[12]Therefore, it should be stated in Ch. 2 sec. 17 of the RF that the freedom of entreprise according to the RF shall not be of a less scope than what follows by the EU law.

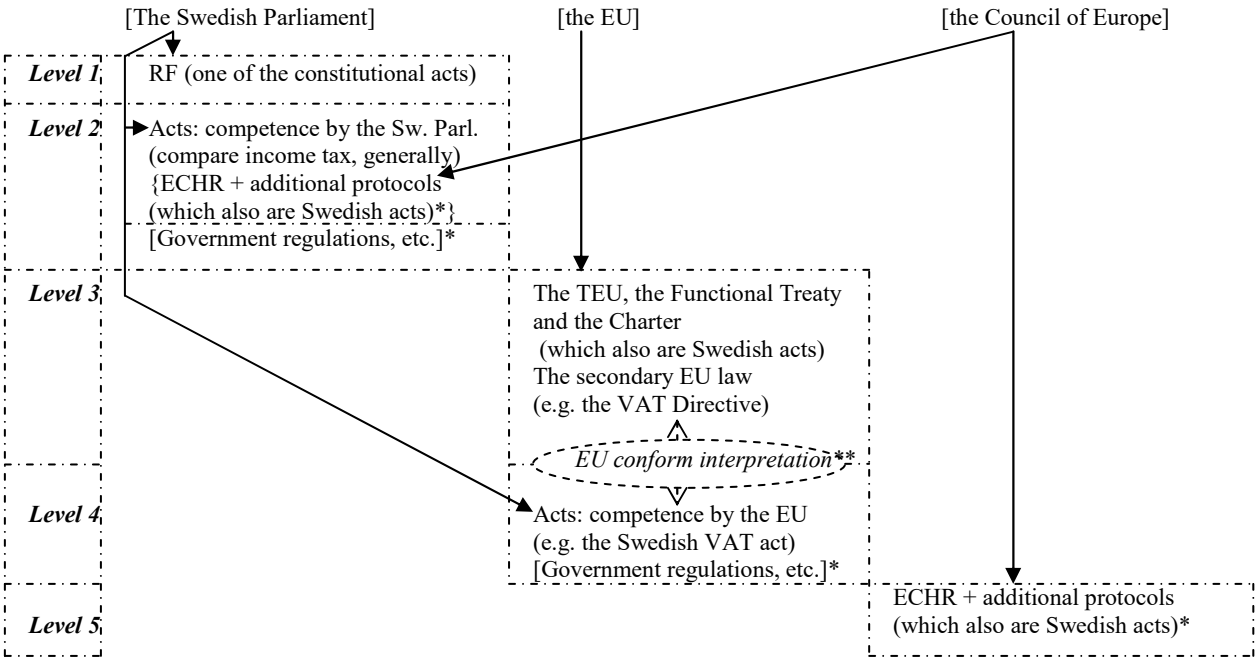
- Another solution would be – as above-mentioned – to codify (in the TEU or in the Functional Treaty) the principle of the EU law's primacy before national law. By the way, it would not lead to any alteration of that an EU conform interpretaion of a rule in the ML can be limited by the principle of legality for taxation measures in Ch. 8 sec. 2 first paragraph number 2 of the RF. Also the CJEU considers namely, which also has been mentioned above, that an EU conform interpretation does not mean a liability for the Member States to interpret the national law in conflict with its wording (*contra legem*).[13]

Summary of constitutional/procedural questions and suggestions for research

All power is derived from the people. It is exercised under the laws, which are decided by the Swedish Parliament (Ch. 1 sec:s 1 and 4 of the RF). The Swedish Parliament does not decide the rules of the european law: the EU law and the Convention law, respectively, constitute legal systems of their own (*sui generis*). The TEU, the Functional Treaty and the Charter and the ECHR with its additional protocols of inter alia no. 1 and no. 7 are introduced into the Swedish legislation, but as ordinary acts – not as constitutional law. At a conflict between laws constitutional law precedes ordinary law, according to Ch. 11 sec. 14 and Ch. 12 sec. 10 of the RF. Although the Swedish Parliament has conferred competence to the EU's institutions in certain fields (Ch. 10 sec. 6 of the RF), the RF is here put higher than primary EU law (the TEU, the Funcional Treaty and the Charter), since an EU constitution, as above-mentioned, has never come into force. Within the EU law the primary law precedes the secondary law. Article 6(2) of the TEU about the EU's accession to the ECHR has not been ratified yet; rights according to the ECHR are only comprised by the EU law as general principles [article 6(3) of the TEU]. In fields where the EU has been conferred competence the EU law is here put above the ECHR. The relationship between the Swedish legislations and european legislations can – for norm hierarchy purposes – be illustrated as a stepladder, where rules decided by the Swedish Parliament, the EU and the Council of Europe are ranked and given their internal relationship in ***five levels*** (where 1 is the highest and 5 is the lowest) according to the following:

[11] Compare the CJEU's case van Gend en Loos (26/62).
[12] See Forssén 2018 p. 45.
[13] Compare para. 110 in the CJEU's case Adeneler et al. (C-212/04). See also Forssén 2018 p. 39.

”The European stepladder (staircase) – Sw., *Europatrappan*”



*In Nergelius 2012 (p. 34) it is stated that ”vid lagkonflikt finns en svag presumtion för att EMRK ska ha företräde framför andra lagar”, which I traslate *at a conflict between acts there is a weak presumption that the ECHR is preceding other acts*. Instead the question is procedural: Will a national court take into consideration in the present case a hypothetical trial by the European Court of Human Rights (ECtHR)? However, here is the ECHR (along with inter alia its additional protocols no. 1 and no. 7) as an act put before the Government’s regulations, etc. (see Ch. 8 of the RF), except in fields where the Swedish Parliament has conferred competence to the EU – compare the Swedish VAT regulation [*mervärdesskatteförordningen (1994:223)*].

***EU conform interpretation* (alternative interpretation results etc.)
- *Alt. 1*: An EU conform interpretation means an interpretation in two steps. If the present question concerns the application of e.g. a rule in the ML, the corresponding rule in the VAT Directive that shall be implemented in the ML is interpreted first. Thereafter is the rule in the ML interpreted to judge i fits meaning fits within the frames that follow by the interpretation made of the directive rule. If that is the interpretation result, the individual can invoke the directive rule to his or her benefit, if it has direct effect. However, it is not clear if the national authorities and courts are *ex officio* obliged to apply the EU law before the rule stated in the national act. [Is this circumstance in line with the investigation responsibility by the tax authority (*Skatteverket*, SKV) and the administrative courts [according to Ch. 40 sec. 1 of the Taxation Procedure Act (*skatteförfarandelagen (2011:1244)*, SFL - the Taxation Procedure Act and sec. 8 first paragraph of the Administration Procedural Act (*förvaltningsprocesslagen (1971:291)*, FPL)] and with the principle *jura nova curia* (i.e. ’the court knows the law’)? Hardly.]
- *Alt. 2*: An EU conform interpretation of a national rule can be limited by the principle of legality for taxation measures in the RF, by the wording of the rule (which is also the CJEU’s standpoint). Then the directive rule cannot be enforced against the individual’s will.
- *Alt. 3*: Another situation, which above all concerns the right of deduction of input tax (VAT), raises the question whether the State is protected against a rule in the ML whose wording expands the individual’s rights besides the result which is supposed to be achieved with the VAT Directive: the rule is not even EU conform (article 288 third paragraph of the Functional Treaty), but constitutes a national creation which lacks an equivalent in the directive rules. The State should be protected like that, if the interpretation result is so extreme that the rule of the act is giving *the consumer* a right to deduct input tax. That interpretation result may be considered lacking a protection motive for the individual by the RF. Instead the national courts should *de sententia ferenda*[14] redefine the legal facts, so that the legal consequence means that the right of deduction according to the rule of the act cannot be exercised. The State should be protected against abusive practice

[14] De sententia ferenda: *Om den dom som bör göras* (about the verdict that should be issued), i.e. statements on the law such as it is desired to be construed in future case law. See *Juridikens termer, åttonde upplagan*, p. 35, by Bergström et al. (1997).

leading to a right of deduction being possible to exercise in conflict with the basic idea with the VAT meaning that the consumer shall be distinguished from the entrepreneur [compare article 1(2) of the VAT Directive), where the determination of who is comprised by the VAT's obligations *and* right is concerned. Since the situation means a transgression of the VAT Directive, the EU Commission or another Member State may furthermore make a motion to open a case at the CJEU against Sweden on breach of the EU law.[15]

- That the *ne bis in idem*-principle according to article 50 of the Charter would apply not only to the VAT, a field where competence is generally conferred to the EU's institutions, but also in general to the income tax, may be considered an incorrect reasoning by the HD in its case NJA 2013 p. 502. For that it is namely required that article 6(2) of the TEU will be ratified *or* that the EU law's primacy before national law will be codified (in the TEU or the Funcional Treaty) so that also income tax – according to the principle of conferred competence – will be generally comprised by the EU law.

- A problem with the VAT is that the scope of the freedom of enterprise in Ch. 2 sec. 17 of the RF may have to be competed so that it is stated therein that the freedom of enterprise according to the RF shall not comprise less than according to the EU law. According to article 16 of the Charter the freedom of enterprise shall be recognized in pursuance of the EU law, i.e. with regard of e.g. the principle of a neutral VAT in article 113 of the Functional Treaty. The principle of avoidance of competition distortion regarding the VAT shall benefit the individual entrepreneur as well as the collective of entrepreneurs and consumers. However, the following schematic comparison of the protection of peaceful enjoyment of possessions (protection of possessions – Sw., *äganderätten*) and the freedom of enterprise shows that the individual may have procedural limitations to fully exercise under the EU law the freedom of enterprise:

Protection of possessions	The individual can invoke Ch. 2 sec. 15 RF and article 1 in add. prot no. 1 to the ECHR and article 17 of the Charter.	'Double right protection' can be exercised by the individual in his or her errand or case, and the individual can (under certain conditions) make an application by the ECtHR.
Freedom of Enterpise	The individual can invoke Ch. 2 sec. 17 RF and article 16 of the Charter.	The EU law protection of rights besides the RF cannot be exercised by the individual himself/herself procedurally, since the individual cannot sue by the CJEU concerning e.g. a breach of the EU law, which instead the EU Commission or another Member State than the one Making the breach of the EU law may do. It is not established whether national authorities/courts are obliged to *ex officio* apply the EU law.

With regard of the constitutional dimension of the concept democracy a democratic deficit exists concerning the freedom of enterprise compared to the protection of peaceful enjoment of possessions: He or she who has possessions can exercise a 'double right protection' based on the RF and the European law, whereas he or she who has no possessions but is striving to make his or her fortune cannot himself/herslef exercise 'double right protection' regarding the freedom of enterprise.

- On page 110 in Nergelius 2012 it is noted that protection of possessions argument has not yet been invoked in cases regarding the *ne bis in idem*-question concerning tax surcharge and tax fraud. That is important, but here may also be mentioned that also the freedom of enterprise must be regarded. The obvious risk of the current procedural situation leading to the regard of e.g. the principle of a neutral VAT in article 113 of the Functional Treaty being suppressed at the trial of the scope of the principle *ne bis in idem* in the field of VAT contributes to the conclusion that the principle of the EU law's primacy before national law should be codified (in the TEU or the Functional Treaty) also in a way so that the national authorities and courts will be obliged to *ex officio* apply the EU law.

- Even if that will be the case, may however the Swedish system with a demand for leave to appeal (Sw., *prövningstillstånd*) in the highest instances lead to the development of a Swedish case law – and actual practice – differing from the EU law, by preliminary rulings not being obtained from the CJEU, e.g. regarding whether a rule leads to a competition distortion in conflict with article 113 of the Functional Treaty and to a limitation of the freedom of enterprise. On page 110 in Nergelius 2012 it is also noted, regarding a decision on leave to appeal (NJA 2011 p. 444), that the decision, which meant that due

[15] See inter alia pp. 85, 86, 87, 88 and 92 in Forssén 2018.

cause was not considered to apply to obtain a preliminary ruling from the CJEU on the question of *ne bis in idem* concerning tax surcharge and tax fraud, may be perceived as the legal situation being clear. Such a conception may be to the detriment of a full trial of the *ne bis in idem*-principle in fields where the competence is already conferred to the EU, and thus demanding also a review of the institute of leave of appeal.[16]

- The far too blunt case NJA 2013 p. 502 may not suppress trial or research of these questions.

In The Constutional Dilemma of the European Union (p. 17), by Joakim Nergelius (2009) it is stated that the democracy problem for the EU probably is requiring *institutional reforms at the EU level*. It is a good tart, whereby the suggestion here is to codify the EU law's primacy (in the TEU or the Functional Treaty), but also that the democracy problem leads to *research* by *sociology of law studies* of the entrepreneur's situation regarding e.g. constitutional and procedural questions on tax – rather than to just more law dogmatic studies on tax.[17]

[16] However, this aspect regarding the institute of leave to appeal is not mentioned in SOU 2014:62 (SOU, *statens offentliga utredningar* – i.e. the Government's official reports/investigations). Compare the Danish government's criticism, on the topic that the Swedish system with a demand for leave to appeal in the highest instances is risking to lead to a domestic practice differing from the CJEU's, in para. 11 of the CJEU's case Lyckeskog (C-99/00). See about that also *EG-rättskonformitet mellan vissa begrepp i ML och den nationella svenska inkomstskatterätten*, p. 94, by Björn Forssén (2008).

[17] See regarding suggestions of research about the subject *fiscal sociology*: The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law: Third edition, by Björn Forssén (2017).