Law and language:

Words and context in Swedish and EU tax laws

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PREFACE

Law and language: Words and context in Swedish and EU tax laws is a follow-up to *The Making of Tax Laws – Law and Language issues,* which was an edited offprint of Part D of *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law: Second edition* – both published in 2015.

In this book I go further with the law and language issues concerning tax law by presenting the summary and concluding viewpoints from my suggestion of how research on such issues may be conducted regarding The Making of Tax Laws as a branch within the field of fiscal sociology, namely from *Ord och kontext i EU-skatterätten: En analys av svensk moms i ett law and language-perspektiv* – published in 2016.

Finally I comment in this book those experiences in relationship to some questions in *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law: Second edition*. Thus, this book makes a continuation to that book and its Part D, i.e. it also makes a follow-up to *The Making of Tax Laws – Law and Language issues*. The follow-up by this book means a completion of the previously presented law and language perspective on the process of The Making of Tax Laws by the presentation of the summary and concluding viewpoints concerning examples building an empirical study of that process and the comments in relation thereto of some questions from *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law: Second edition*.

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Björn Forssén

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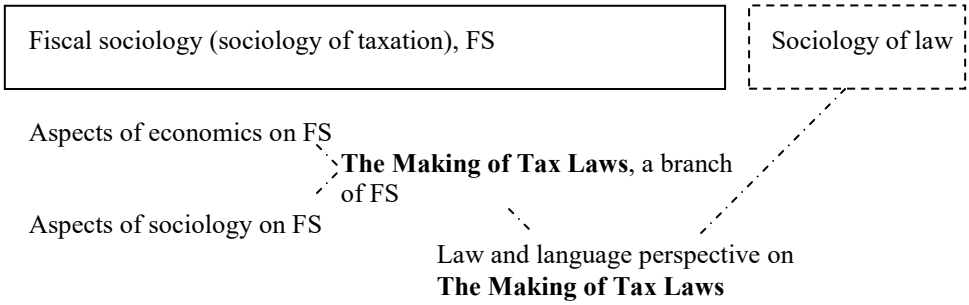
ABBREVIATIONS

Alt., alternative
art., article
B, criminal case (Sw., brottmål)
BEPS, Base Erosion and Profit Shifting
BFL, *bokföringslagen* (1999:1078) – the Swedish Book-keeping Act
C, curia (about the CJEU)
Ch., chapter
Cit., citation, cited
CJEU, Court of Justice of the EU
dnr, *diarienummer* – register number
EC, European Community
ECHR, European Convention of Human Rights
ECLI, European Case Law Identifier
ECR, European Court Reports
ECtHR, European Court of Human Rights
e.g., exempli gratia, for example
EKMR, *Europakonventionen* (ECHR)
Eng., English
et al., and others
EU, (the) European Union (or the Union)
EUCFR, the EU Charter of Fundamental Rights (also the Charter)
FI, *Finansinspektionen* – the Swedish Financial Supervisory Authority
FTT, Financial Transaction Tax
GAAP, Generally Accepted Accounting Principles
GML, *lag (1968:430) om mervärdeskatt* – replaced by the ML
GST, goods and services tax
HD, *Högsta domstolen* – the Supreme Court
HFD, *Högsta förvaltningsdomstolen* – the Supreme Administrative Court (also the HFD's yearbook)
i.e., id est, that is
IL, *inkomstskattelagen* (1999:1229) – the Swedish income tax act
Im, *indirekt skatt mervärdesskatt* (indirect tax VAT)
MF, *mervärdesskatteförordningen* (1994:223) – the Swedish VAT regulation
ML, *mervärdesskattelagen* (1994:200) – the Swedish VAT act
Moms, mervärdesskatt (VAT)
NAFTA, North American Free Trade Agreement
NJA, *Nytt juridiskt arkiv, avdelning I* (the HD's yearbook)
No., number
OECD, Organization for Economic Co-operation and Development
p., page/-s
para., paragraph
prop., *Regeringens proposition* – Government bill
Rec., *Recueil de la Jurisprudence de la Cour*
ref., reference case

RF, *regeringsformen (1974:152)* [one of the Swedish constitutional laws]
RSV, *Riksskatteverket* (nowadays the SKV)
SBL, *skattebetalningslagen* (1997:483) – replaced by the SFL
sec., section
sen., sentence
SFF, *skatteförfarandeförordningen* (2011:1261) – the regulation of taxation procedure
SFL, *skatteförfarandelagen* (2011:1244) – the Code of Taxation Procedure
SFS, svensk författningssamling – Swedish Code of Statutes
SKV, *Skatteverket* – the tax authority
SOU, *statens offentliga utredningar* – Swedish government official reports
SRN, Skatterättsnämnden – the Board of Advance Tax Rulings
Sw., Sweden or Swedish
TEU, Treaty of European Union
TFEU, the Treaty on the Functioning of the EU
TTIP (or T-TIP), The Transatlantic Trade and Investment Partnership
UCC, the Union Customs Code (Sw., *unionstullkodexen*)
UIF, *unionsinternt förvärv* – intra-Union acquisition
USA, United States of America
v., versus
VAT, value added tax (*mervärdesskatt*)
www, world wide web

1. OUTLINE OF THE BOOK

In this book I present in Chapters 2 and 3 the summary and concluding viewpoints from *Ord och kontext i EU-skatterätten: En analys av svensk moms i ett law and language-perspektiv*,[1] where I suggest how research on law and language issues concerning tax law may be conducted regarding The Making of Tax Law**s** – not to be confused with the making of tax law – as a branch within the field of fiscal sociology. In Chapter 4 I comment those conclusions in relation to some questions in *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law: Second edition*.[2] Thereby this book makes a continuation to that book and its Part D, which also has been published as an offprint, *The Making of Tax Laws – Law and Language issues*.[3] This book is together with Forssén 2016 (1) my suggestion of how to do, by an empirical method, a thesis on the topic of the process of The Making of Tax Laws. By the figure below I describe my conception of the position of The Making of Tax Laws in relation to fiscal sociology etc.:[4]



In this Chapter I mention the topic, purpose, method, material and questions of Forssén 2016 (1):[5]

- *The topic* is an investigation of Swedish value added tax (VAT) – *mervärdesskatt* (*moms*) – in a *law and language*-perspective, that consists of the perspective *ord och kontext i EU-skatterätten*, i.e. the perspective words and context in the EU tax law.

[1] Compare Ch. 5 of *Ord och kontext i EU-skatterätten*: *En analys av svensk moms i ett law and language-perspektiv*, av Björn Forssén [Cit. Forssén 2016 (1)].
[2] Cit. Forssén 2015 (1).
[3] Cit. Forssén 2016 (2).
[4] Compare Forssén 2015 (1), INTRODUCTION and Part D, sec:s 2.1 and 4.1 and Forssén 2016 (2), sec. 2.1.
[5] See Forssén 2016 (1), sec. 5.1.1.

- *The purpose* is to analyse examples of a need to change the Swedish legislation procedure where corporate taxation is concerned, in the first place regarding the VAT. Also other rules on taxes and fees are mentioned, but only when influencing the VAT issues mentioned in this book.

- *The method* – i.e. the way of conducting the investigation – is that I by an empirical study based on my experience has gone through a number of examples where something has failed on the legislator's behalf in the process of the making of a tax rule regarding certain material or procedural issues on VAT. I name such failures *communication distortions*.

- *The material* I've collected partly from precedents by the Supreme Administrative Court, *Högsta förvaltningsdomstolen* (HFD), or preliminary rulings from the Court of Justice of the EU (CJEU), which express current law in a true meaning, partly from cases that actually have occurred but where no trial have taken place in the administrative courts. In the latter respect can an actual current law have been developed or risking to be developed by the tax authority's – i.e. *Skatteverket* (SKV) – handbooks on VAT or so-called standpoints (Sw., *ställningstaganden*) on the subject. Then it's a matter of cases of which I'm familiar with the problems that they present. I mention cases that I've brought up in the text- and handbook *Momsrullan Andra upplagan*,[6] where I've made a number of presentations of examples of *communication distortions* regarding tax rules containing lacks concerning language (words) and context. Furthermore I've fetched some examples from *IMPAKT – Avtal och momsavdrag*,[7] and from my theses.[8]

- In Chapter 2 of Forssén 2016 (1) I've given, in sec:s 2.2-2.4, examples of semantic, syntactic and logical interpretation problems that may occur in the VAT legislation, regardless whether they shall be tried on the theme of EU-conformity. The summary in sec. 2.5 of that chapter of Forssén 2016 (1) has to a certain extent formed a comparison for the continuing

[6] Cit. Forssén 2016 (3).
[7] Cit. Forssén 2015 (2).
[8] See my licentiate's dissertation, *Skattskyldighet för mervärdesskatt – en analys av 4 kap. 1 § mervärdesskattelagen* (Cit. Forssén 2011).
See my doctor's thesis, *Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier*, its *third edition* Tax and payment liability to VAT in enkla bolag (approx. joint ventures) and partrederier (shipping partnerships) [Cit. Forssén 2015 (3)].

investigation in that book, by me thereby sometimes making comparisons with those examples of interpretation problems.

- In Chapter 3 and Chapter 4 of Forssén 2016 (1) I've analysed the examples of *communication distortions* regarding material and procedural rules on in the first place VAT that I've mentioned in sec. 1.3.3 of that book. In sec:s 3.1 and 4.1 of Forssén 2016 (1) I've specified the questions that I've analysed in that respect. In the first place it's, as mentioned in sec. 1.3.1 of Forssén 2016 (1), in these instances a matter of the problem of having to regard two sets of rules when determining current law concerning VAT issues: the national, with *mervärdesskattelagen* (1994:200), ML (i.e. the Swedish VAT act) and *skatteförfarandelagen* (2011:1244), SFL (the Code of Taxation Procedure), and from the EU law – in the first place – the EU's VAT Directive (2006/112/EC) [the VAT Directive (2006/112)]. That the legislator in that respect has failed in making a tax rule (words) for the reality (context) of which it's meant to stipulate taxation or exemption from taxation etc. I name *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules* (Sw., *betänkligheter från lagstiftarens sida på temat ord och kontext i samband med tillkomsten av skatteregler*).

In Chapter 2 of this book I refer to the conclusions from Chapters 3 and 4 of Forssén 2016 (1).

In Chapter 3 of this book I refer to the concluding viewpoints of Forssén 2016 (1), where I also have mentioned something about legal certainty and my continuing research project on fiscal sociology and given some general reflections concerning the tax law research.

In Chapter 4 of this book I comment the concluding viewpoints from Forssén 2016 (1) in relationship to some questions in Forssén 2015 (1). In Chapter 4 I also mention more about the continuation of the research project.

2. THE CONCLUSIONS FROM CHAPTERS 3 AND 4 OF FORSSÉN 2016 (1)

2.1 The use of the concept tax liability in the main rule on the right of deduction and the right of deduction's influence on circumstances by the tax liable's counterpart[9]

In Forssén 2011 I mentioned regarding side issue D that the use of the concept tax liability (Sw., *skattskyldighet*) in the main rule for the determination of the right of deduction of input tax, Ch. 8 sec. 3 first para. ML, may lead to a limitation of the emergence of the right of deduction which isn't conform with art. 168(a) of the VAT Directive (2006/112), due to the use of the concept tax liability meaning that the emergence of the right of deduction according to the ML would presuppose that the tax subject first has made taxable transactions. That problem wasn't resolved by the VAT reform of the 1st of July 2013 (SFS 2013:368), since the legislator only focused on what in Forssén 2011 was the main issues A, i.e. that it in Ch. 4 sec. 1 item 1 ML existed a connection to the non-harmonised income tax rules.

The legislator did neither at the VAT reform of the 1st of July 2013 regard that I in Forssén 2011 also raised that the problem of determining the tax subject by a connection to the concept *näringsverksamhet* (Eng., business activity) in Ch. 13 *inkomstskattelagen* (1999:1229), IL (the Swedish income tax act), not only exist concerning the VAT, but also in certain instances in the field of excise duties. By sec. 3.2.2.1 in Forssén 2016 (1) follows that I inter alia in Forssén 2011 refer to that it in the preparatory work to the law on tax on energy, etc. is mentioned as a tradition that excise duties have followed the VAT where the determination of the tax subject by a connection to the IL is concerned. In sec. 3.2.2.1 of Forssén 2011 I mention that the connection to the IL still exists in *lagen (1994:1776) om skatt på energi* (the law on tax on energy) and *lagen (1972:266) om skatt på annonser och reklam* (the law on advertising tax), despite that it was revoked in the ML on the 1st of July 2013.

By ignoring that the connection to the IL for the determination of the tax subject still exists in certain laws on excise duties the legislator also ignores that it may affect the VAT. The legislator has in my opinion thereby not acknowledged the context in which the determination of the right of deduction exists. That can cause the following problems:

[9] See Forssén 2016 (1), sec. 5.1.2.

- An erroneous tax assessment value for VAT concerning a taxable transaction for VAT and excise duties purposes can occur if the levying of an excise duty becomes erroneous because of the connection to the non-harmonised income tax rules concerning certain excise duties, since Ch. 7 sec. 2 first para. second sen. ML stipulates that excise duty in applicable cases shall be included in the tax assessment value for the purpose of calculating the VAT supposed to be accounted for and paid for a taxable transaction of goods or services. The consequence for a buyer is that an erroneous excise duty by the seller in this way can indirectly affect the right of deduction of input tax according to Ch. 8 sec. 3 first para. ML. The input tax can namely become higher due to an enhanced tax assessment value becoming the result by the seller of the charging of excise duties in the ennobling chain, which should not have been charged if the connection to the concept *näringsverksamhet* in Ch. 13 IL would not have existed in the law on tax on energy and in the law on advertising tax for the determination of the tax subject.

Another example of the importance of putting the right of deduction according to Ch. 8 sec. 3 first para. ML in the right context I s that the right of deduction can become lower, by goods having been placed in certain warehouses according to Ch. 9 c ML. In my opinion it's namely so that motives are lacking with respect of the VAT Directive (2006/112) for asserting that the tax assessment value at the withdrawal of goods from a certain warehouse should be determined regardless of a discount for fast payment: There's nothing in the directive that would disqualify that such a discount would be based on a matching of tax free transaction of goods during the time actual goods have been placed in a certain warehouse against a tax free financial service. The legislator has not regarded that the seller and the buyer, by virtue of the special rules in Ch. 9 c, can avoid the case law concerning the general rules of the ML meaning that the tax assessment value for the goods mustn't be lowered by it being matched by a discount for fast payment. That's in my opinion another example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

Yet another example of the importance of putting the right of deduction in the right context concerns on of the special rules in Ch. 8 sec. 4 which expand the right of deduction of input tax in relationship to the main rule in Ch. 8 sec. 3 first para., namely Ch. 8 sec. 4 item 4 ML. That rule concerns right of deduction of input tax at the buyer's purchase of real estate from a building business activity, when the seller of such real estate has accounted for or shall account for output tax on withdrawal from his building business activity in pursuance of Ch. 2 sec. 7 ML. The

analysis of Ch. 8 sec. 4 item 4 ML shows that it's possible to avoid the second indent of Ch. 1 sec. 2 first para. item 4 b, which shall prevent temporary persons being put into a chain of entrepreneurs to avoid the regime with reverse charge within the building sector. By the way I've mentioned that phenomenon in two articles already in 2007.[10]

The analysis in the mentioned respects are examples of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*, where the legislator's ability to put the right of deduction of input tax in the right context partly concerning the rules in the ML taken by itself, partly concerning the rules in the ML in relationship to the rules on excise duties. By the way the legislator should, where the question regarding the special rules in Ch. 9 c ML is concerned, bring up with the EU Commission, the European parliament and the Council to introduce rules in the VAT Directive (2006/112), for the purpose of avoiding the described risk of avoidance of the case law concerning the general rules in the ML meaning that the tax assessment value mustn't be lowered by matching of a discount for fast payment, which thereafter can be implemented in the ML.

2.2 The special rule on tax liability for intermediary services – Ch. 6 sec. 7 ML[11]

In sec:s 3.3-3.3.4 of Forssén 2016 (1) I've treated one of the special rules on tax liability (Sw., *skattskyldighet*) in special cases in Ch. 6, namely the special rule on tax liability for intermediary services in Ch. 6 sec. 7 ML, which doesn't have any precise equivalent in the VAT Directive (2006/112). I've treated Ch. 6 sec. 7 ML as a semantic interpretation problem,[12] and therefore I sometimes use the expression *6:7-cases* to emphasize that the issue here concerns in the first place which situations that rule can comprise.[13]

> A middleman – an intermediary – concerning goods or services is regarded as a vendor according to Ch. 6 sec. 7 ML, if he's acting in his own name and also receive the payment of the goods or services from the customer. Thereby the intermediary is not considered an ordinary agent for VAT purposes. Instead he's deemed to have made an acquisition from his mandator, who's deemed to supplied the goods or services to the intermediary. The intermediary is in his turn deemed to have made the same transaction (supply) to the buyer of the goods or services. The tax assessment value for VAT purposes thereby becomes

[10] See Forssén 2007 (1) and Forssén 2007 (2).
[11] See Forssén 2016 (1), sec. 5.1.3.
[12] See Forssén 2016 (1), sec. 2.2.
[13] Regarding *6:7-cases*, i.e. Ch. 6 sec. 7 ML-cases (Sw., "6:7-fall"), see also item 3 of Part D, sec. 3.3 in Forssén 2015 (1) or item 3 of sec. 3.3 of Forssén 2016 (2).

the price to the customer (buyer), instead of a commission like for an ordinary agent.

The rule in Ch. 6 sec. 7 ML lacks, as mentioned, a precise equivalent in the VAT Directive (2006/112). The closest corresponding rules therein are art. 14(2)(c) and art. 28 of the VAT Directive (2006/112).

I've come to two conclusions regarding Ch. 6 sec. 7 ML:

- In the first place I consider that it exist regarding Ch. 6 sec. 7 ML an actual current law – without support of a true current law (i.e. without support of the case law of the HFD or the CJEU) – insofar that the SKV use to invoke the extreme interpretation result that *6:7-cases* include taxation situations which don't correspond to real business relationships within the business world. In my opinion it lacks in that respect a specific (second) para. in Ch. 6 sec. 7 that would refer to general rules on tax liability in the ML. Thereby wouldn't the concept tax liable be expanded for *6:7-cases* compared with the main rule in Ch. 1 sec. 2 first para. item 1, by Ch. 1 sec. 2 last pa. ML stating that special rules about who's tax liable in certain cases are to be found inter alia in Ch. 6 ML. Such a second para. exists concerning VAT groups in Ch. 6(a) sec. 1 ML, and by the way I've suggested the same regarding the so-called representative rule in Ch. 6 sec. 2 ML.[14]

- I've also found support for the existence of a need of a trial in case law of the scope of Ch. 6 sec. 7 ML regarding whether *6:7-cases* can be deemed to comprise non-taxable persons like ordinary private persons including employees. That such persons would be given the character of tax subjects for VAT purposes doesn't comply with the determination of taxable person in the main rules of Ch. 4 sec. 1 ML and art. 9(1) first para. of the VAT Directive (2006/112).

The expression *6:7-cases* is not a word, but I've treated the rule Ch. 6 sec. 7 ML as a semantic interpretation problem. It's as a concept something that cannot be deemed complying with the VAT Directive (2006/112) in either of the two respects above mentioned, i.e. when the SKV considers that *6:7-cases* includes taxation situations which don't correspond to real business relationships within the business world or if Ch. 6 sec. 7 ML would be deemed giving ordinary private persons (consumers) including employees the status of tax subjects for VAT purposes.

[14] See Forssén 2015 (3), sec. 7.1.3.2.

The described problems with Ch. 6 sec. 7 ML depend in my opinion on the legislator not having regarded, when the rule was transferred to Ch. 6 sec. 7 when the ML on the 1st of July 1994 replaced the former Swedish VAT act of 1969[15] that it originate from another context than that existing since Sweden's EU accession in 1995, namely from the general tax on goods of 1959. That's an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

2.3 Agencies hiring out workers and their VAT status in relationship to the rule on exemption from taxation of social care – Ch. 3 sec. 7 ML[16]

The relationship between the determination of the tax subject and the determination of the tax object is not EU conform for VAT purposes in the field of social care. It depends on the expression *other comparable social care* (Sw., "*annan jämförlig social omsorg*") in Ch. 3 sec. 7 ML making the scope of exemption from taxation according to the ML to vast compared with the VAT Directive (2006/112).

I've come to two conclusions regarding Ch. 3 sec. 7 ML:

- In the first place it should be clearly expressed in Ch. 3 sec. 7 that it's the taxable person's (Sw., *den beskattningsbara personens*) transaction that's up for judgement on the theme taxation or exemption from taxation, not what character a transaction has if it's judged based on the status of the entrepreneur's employees themselves.

  In its standpoint of 2016-03-31 (dnr 131 156230-16/111) the SKV doesn't regard that the CJEU in the case C-594/13 ("go fair" Zeitarbeit) starts its trial of an *Agency hiring out workers* and the exemption from taxation in art. 132(1)(g) of the VAT Directive (2006/112) by excluding the employees in such an enterprise from the concept taxable person already due to their status as employees. By not regarding that part of the EU case C-594/13 ("go fair" Zeitarbeit) the SKV comes to the erroneous conclusion that an *agency hiring out workers* could be comprised by the exemption from taxation in Ch. 3 sec. 5 ML regarding health care, if it's a matter of hiring out licensed health care personnel that shall perform health care services by the mandator within their license. The SKV's conclusion is

[15] *Lag (1968:430) om mervärdeskatt* (GML).
[16] See Forssén 2016 (1), sec. 5.1.4.

erroneous for the following reason: It's not the licensed nurse employed by the agency who's the taxable person – it's the agency. The question of taxation or exemption from taxation shall be tried based on the transaction made by the agency itself, according to the following:

- If the *agency hiring out workers* supply health care, the exemption from taxation according to Ch. 3 sec. 5 ML applies.

- If the agency instead hires out health care personnel, i.e. constitutes an *agency hiring out workers*, it's a matter of taxable hiring out of personnel according to the main rule stating that the supply of goods or services is taxable, i.e. according to Ch. 3 sec. 1 first para. ML, regardless whether the health care personnel are licensed or not.[17]

- Furthermore should Ch. 3 sec. 7 also correspond with the demand in art. 132(1)(g) of the VAT Directive (2006/112) on the services having to be supplied by a taxable person who is *a body recognised by the Member State concerned as being devoted to social wellbeing* (Sw., *ett av medlemsstaten erkänt organ av social karaktär*). In my opinion should therefore the expression *other comparable social care* (Sw., *annan jämförlig social omsorg*) be abolished from Ch. 3 sec. 7 ML, and the rule be altered so that it, for the determination of social care (social wellbeing) for VAT purposes, refers to art. 132(1)(g) and (h) of the VAT Directive (2006/112). Thereby it would be emphasized that the concept social care in Ch. 3 sec. 7 ML has a certain EU law meaning.

The problem is also in the present respects that the legislator has not regarded that Sweden's EU accession in 1995 means that two sets of rules must be regarded at the determination of current law concerning material VAT issues: the national, with the ML, and from the EU law – in the first place – the VAT Directive (2006/112). That the legislator hasn't correctly written the determination of social care in Ch. 3 sec. 7 ML in relation to art. 132(1)(g) and art. 132(1)(h) of the VAT Directive (2006/112) is in my opinion an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*. The two rules art. 132(1)(g) and art. 132(1)(h) of the VAT Directive (2006/112) should have been

[17] Compare also sec. 2.10.

implemented in Ch. 3 sec. 7 ML already when Sweden became an EU Member State in 1995.[18]

By abolishing the expression *other comparable social care* (Sw., *annan jämförlig social omsorg*) from Ch. 3 sec. 7 ML and instead refer in the rule to art. 132(1)(g) and (h) of the VAT Directive (2006/112) it would, as mentioned, be emphasized that the concept social care in Ch. 3 sec. 7 ML has a certain EU law meaning. I propose for the same reason also the same concerning Ch. 3 sec. 4 ML. This means that the expression *health care, dental care or social care and other services* (Sw., *sjukvård, tandvård eller social omsorg samt tjänster av annat slag*) therein would be altered to *health care, dental care or social care* (Sw., *sjukvård, tandvård eller social omsorg*), i.e. that the expression *other services* (Sw., *tjänster av annat slag*) would be abolished from Ch. 3 sec. 4, and that the rule instead would refer to the corresponding rules of the VAT Directive (2006/112) – art. 132(1)(b)-(e) and (g) and (h).[19]

Furthermore should the same technique as I suggest for Ch. 3 sec. 7 be used in certain other rules on exemption from taxation in Ch. 3 ML to avoid uncertainties at a systematic interpretation. Above all should also the concept determinations in Ch. 3 sec. 9 third para. item 1 (trade with securities – Sw. *värdepappershandel*) and Ch. 3 sec. 10 (insurance services – Sw., *försäkringstjänster*) be made by reference to the closest corresponding rules of the VAT Directive (2006/112), i.e. art. 135(1)(f) and art. 135(1)(a).[20] These measures would simplify to maintain on a national basis the CJEU's case law meaning that exemptions from taxation shall be given a restricted interpretation and application. The scope of rules on exemption from taxation in Ch. 3 ML shall namely, as mentioned inter alia in sec. 3.4.2 of Forssén 2016 (1), be interpreted restrictively, since the CJEU's case law states so regarding art. 131-137 of the VAT Directive (2006/112) about exemption from taxation for certain transactions.[21]

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[18] Art. 132(1)(g) and art. 132(1)(h) were corresponded by art. 13 A(1)(g) and art. 13 A(1)(h) of the Sixth Directive (77/388/EEC), where it – although by the use of a somewhat different expression – also were stated that it is who makes the transaction who's presupposed to be one by the Member State recognised body devoted to social wellbeing, for the exemption from taxation to become applicable.

[19] Regarding dental care and Ch. 3 sec. 6 ML: compare also sec. 2.8.

[20] Regarding bank- and financial services or trade with securities and Ch. 3 sec. 9 ML: compare also sec. 2.4.

[21] See e.g. the EU cases 235/85 (Commission v. the Netherlands), para. 7; 348/87 (SUFA), para:s 10 and 13; C-186/89 (W. M. van Tiem), para. 17; C-2/95 (SDC), para. 20; C-358/97 (Commission v. Ireland), para. 52; C-150/99 (Stockholm Lindöpark); para. 25; C-269/00 (Seeling), para. 44; and C-275/01 (Sinclair Collins), para. 23. See also Forssén 2016 (3), 12 210 010 and Forssén 2015 (3), sec. 2.4.1.4.

2.4 The relationship between the determination of the tax subject and the determination of the tax object – i.e. the exemptions from taxations regarding bank- and financial services or trade with securities according to Ch. 3 sec. 9 ML[22]

Concerning the exemptions from taxation regarding bank- and financial services and trade with securities in Ch. 3 sec. 9 ML I've analysed the determination of the tax subject in relation to the determination of the tax object, i.e. the question whether the object is taxable or comprised by exemption according to that rule. I suggest an equilibrium solution to that problem, where in the first place monetary political and finance political considerations are met by the following measures:

1. An amendment should be made in Ch. 3 sec. 9 ML meaning that exemption from taxation for bank- and financial services or trade with securities don't comprise exchange services regarding virtual currencies like *bitcoins*, if not a *report duty* (Sw., *anmälningsplikt*) as financial activity is fulfilled and permit thereby is received from the Swedish Financial Supervisory Authority [Sw., *Finansinspektionen* (FI)]. As a consequence thereof should the concept virtual currency also be inserted in Ch. 3 sec. 23 item 1 ML – beside bills and coins – and with the same determination of what's meant as I suggest for Ch. 3 sec. 9 ML. Thus, the concept *legal* (Sw., *lagligt*) means of payment in Ch. 3 sec. 23 item 1 should continue to be reserved for bills and coins. By those measures the problem that it's not possible for VAT purposes to distinguish between legal or illegal activity with so-called bitcoins will be resolved. However, that presupposes that the legislator brings up with the EU Commission, the European parliament and the Council that corresponding alterations will be made in art. 135(1)(b)-(f) of the VAT Directive (2006/112).

2. To the extent that an activity with bitcoins or a similar virtual currency is carried out without report duty to the FI being fulfilled, it should, like today, not be considered an illegal activity where VAT is concerned. Thereby should instead, which I also deem to be the case already today – despite that *Skatterättsnämnden*, SRN (the Board of Advance Tax Rulings) and the HFD by their simplified view on the topic don't mention it in the advance ruling HFD 2016 ref. 6 – such an activity be comprised by the principle of general taxation of supplies of goods or services according to Ch. 3 sec. 1 first para. ML. The governmental official report SOU 1998:14 [*E-pengar – näringsrättsliga frågor* (Eng., E-money – business law issues) expressed the need of measures for protection against double spending

[22] See Forssén 2016 (1), sec. 5.1.5.

and similar manipulations at the use of e-money (Sw., *e-pengar*).[23] I've described that there's a risk that bitcoins will be used without permit from the FI e.g. for the purpose of hiding barter transactions or exchange of assets (Sw., *byteshandel*) which are taxable. It's not possible to discriminate such an activity by characterizing it as illegal for VAT purposes. However, it's still a phenomenon that should be opposed for monetary political as well as finance political considerations. Therefore should a special VAT rate be introduced for activities concerning bitcoins carried out without permit from the FI and to a substantially higher VAT rate than the general of 25 per cent, e.g. 50 per cent. Such a special enhanced VAT should be constituting an incitement for the consumers to refrain from choosing deliverers of goods or suppliers of which are trying to hide taxable trade 'behind bitcoins' (Sw., '*bakom bitcoins*').

Also the present question should be brought up by the legislator with the EU institutions mentioned. An equilibrium solution that in that case must be made is in the first place against what would be characterized as such an excessiv tax rate that would be in conflict with the principle of protection of property in art. 1 of Protocol No. 1 to the European Convention of Human Rights (ECHR). By the way would a special and enhanced VAT rate not be in conflict with the principle of prohibition of double procedures (*ne bis in idem*), since it taken by itself couldn't be characterized as such a charge similar to a criminal charge as tax surcharge (Sw., *skattetillägg*). If tax surcharge isn't levied, would also a procedure above all about tax fraud (Sw., *skattebrott*) be an actuality for he who hasn't accounted for to the SKV taxable trade 'behind bitcoins'.[24]

To not do anything is not an alternative, since the SRN and the HFD in HFD 2016 ref. 6 have left it open to hide trade taxable for VAT purposes 'behind bitcoins'. That the SRN at all states that bitcoins *is a means of payment* (Sw., *är ett betalningsmedel*) that *shows great similarities with electronic money* (Sw., *visar stora likheter med elektroniska pengar*) seems to have been meant to give the impression of an equilibrium solution and thereby a judgement of legal certainty in the case at hand. However, there's only an illusion of underpinning reasons in HFD 2016 ref. 6. If the suggestions that I present here aren't carried out by the legislator, it's necessary with a new and in that case complete trial of bitcoins where VAT is concerned. I state here what's lacking in HFD 2016 ref. 6 and the thereto belonging preliminary ruling from the CJEU, the case C-264/14 (Hedqvist):

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[23] Compare SOU 1998:14 p. 31.

[24] Compare, regarding *ne bis in idem* etc., also *Skatteförfarandepraktikan – med straff- och europarättsliga aspekter* [Cit. Forssén 2015 (4)], sec:s 8.8.1 and 10.1-10.4.

- The HFD and the CJEU should in the advance ruling HFD 2016 ref. 6 and in the preliminary ruling C-264/14 (Hedqvist) have regarded also the subject issue and not only the object issue.

- The analysis of the question of the treatment of the virtual currency bitcoins according to Ch. 3 sec. 9 and Ch. 3 sec. 23 item 1 ML shows that there's a lack in the underpinning reasons of the decisions in question, since neither the HFD nor the CJEU regard that it's not possible to make bitcoins illegal means of payment due to that also an illegal activity constitutes an economic activity (Sw., *ekonomisk verksamhet*) for VAT purposes and can give a person the character of taxable person (Sw., *beskattningsbar person*).

- By not addressing that aspect is also the fundamental problem with bitcoins subdued, namely that such a to ordinary currency competing currency creates a dilemma where monetary political as well as finance political considerations are concerned. In other words, in my opinion has the question of EU conformity with Ch. 3 sec. 9 ML regarding the relationship between the determination of the tax subject (taxable person – Sw., *beskattningsbar person*) and the determination of the tax object (bank- and financial services or trade with securities – Sw., *bank- och finansieringstjänster eller värdepappershandel*) not yet been thoroughly analysed.

- This is something that both the legislator (in Sweden) and the EU Commission, the European parliament and the EU Council should take into consideration and come back on the theme of words and context in connection with The Making of Tax Laws. In the present case it would namely not have helped if Ch. 3 sec. 9 referred to the corresponding rules in the VAT Directive (2006/112), since the CJEU apparently has not been able to contribute to a – in the broad perspective – reasonable interpretation by the SRN and the HFD.

Despite the CJEU's inability in the latter respect, I consider that the legislator without awaiting a new treatment of bitcoins on the EU level should alter the expression *trade with securities or thereby similar activity* (Sw., *värdepappershandel eller därmed jämförlig verksamhet*) in Ch. 3 sec. 9 first para. into *trade with securities* (Sw., *värdepappershandel*), i.e. the expression *thereby similar activity* (Sw., *därmed jämförlig verksamhet*) should be abolished from the rule, so that the scope of the exemption from taxation is not expanded in relationship to the VAT Directive (2006/112). Instead should – which is also

suggested concerning *trade with securities* (Sw., värdepappershandel) in sec. 2.3 – Ch. 3 sec. 9 ML refer, concerning the determinations of the concepts *bank- and financial services and trade with securities* (Sw., *bank- och finansieringstjänster och värdepappershandel*), to the corresponding rules in the VAT Directive (2006/112) [art. 135(1)(b)-(f)]. Thereby it's emphasized the concepts in questions have a certain EU law meaning, and uncertainties won't arise at a systematic interpretation of them.

> I have by the way for the same reasons as recently mentioned also suggested – in sec. 2.3 – that the same measures that I'm suggesting concerning Ch. 3 sec. 9 should be made regarding the exemption for insurance services in Ch. 3 sec. 10 ML. This means that the expression *insurance brokers or other intermediaries* (Sw., *försäkringsmäklare eller andra förmedlare*) therein should be altered to *insurance brokers/insurance agents* (Sw., *försäkringsmäklare*), i.e. that the expression *other intermediaries* (Sw., *andra förmedlare*) should be abolished from Ch. 3 sec. 10, so that the rule instead refers to the corresponding rule in the VAT Directive (2006/112) – art. 135(1)(a).

As an information may I mention that Ch. 3 sec. 9 third para. item *2* ML, which concerns *management of funds of securities* (Sw., *förvaltning av värdepappersfonder*), doesn't have to refer to the VAT Directive (2006/112), since art. 135(1)(g) of the VAT Directive (2006/112) stipulates exemption from taxation for *the management of special investment funds as defined by Member* States (Sw., *förvaltning av särskilda investeringsfonder såsom dessa definieras av medlemsstaterna*).

Thus, my suggestion is that the legislator changes Ch. 3 sec. 9 and Ch. 3 sec. 10 ML, so that the rules, for the determinations of the concepts *bank- and financial services and trade with securities* (Sw., *bank- och finansieringstjänster och värdepappershandel*) and *insurance brokers/insurance agents* (Sw., *försäkringsmäklare*), refer to the corresponding rules in the VAT Directive (2006/112), i.e. to art. 135(1)(b)-(f) and art. 135(1)(a). Besides should the legislator bring up the question of bitcoins with the EU Commission, the European parliament and the EU Council, so that it will be given an equilibrium solution, where in the first place monetary political and finance political considerations are taken. The ambition should thereby be to avoid that bitcoins are used to hide taxable barter transactions or exchange of assets (Sw., *byteshandel*) where VAT is concerned.

If the suggestions I present here don't lead to measures by the legislator, it's an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*. It would in the first place mean that the legislator doesn't regard the importance of the concepts in the ML having a certain EU law

meaning, i.e. the legislator would thereby not respect that Sweden's EU accession in 1995 means that two sets of rules must be regarded at the determination of current law concerning material VAT issues: the national, with the ML, and from the EU law – in the first place – the VAT Directive (2006/112). Concerning the question on bitcoins would a lack of interest on behalf of the legislator to bring up that problem with the EU commission, the European parliament and the EU Council prove that the legislator is uninterested in making the EU project as a whole to work, i.e. in the present case with regard of how monetary political issues may affect the finance political issues, like concerning the VAT.

Compare also regarding investment gold: sec. 2.8.

2.5 Semantic interpretation problem concerning the word upstream (Sw., *uppströms*) in the rule on exemption from taxation of import of gas – Ch. 3 sec. 30 fifth para. item 1 b) ML[25]

By SFS 2010:1892 was Ch. 3 sec. 30 fifth para. item 1 b) ML introduced on the 1st of January 2011 concerning exemption from taxation regarding import of gas transferred from a ship transporting gas to a nature-gas system or to a system of pipelines *upstream* (Sw., *uppströms*). By (on page 63 of the Government bill – prop. 2010/11:28) referring regarding the word upstream to *trade parlance* (Sw., *branschspråkbruk*) and not commenting what the word means in a true context, the legislator makes a simplification which cause a risk of an interpretaion result that – in relationship to the corresponding EU directive's purpose with the rule – means that the wording of the rule is misguiding, i.e. that what I name *communication distortions* exist.

The described risk for a misguiding interpretation result of the rule in question in the ML in relationship to the purpose with it according to the VAT Directive (2006/112) would have been avoided, if the legislator had regarded the recitals – i.e. the motives – to the rule in question that follows by the preamble to the present directive. By item 3 of the preamble to the Council's directive 2009/162/EU, whereby art. 143(1)(l) of the VAT Directive (2006/112) was altered, follows namely that the exemption from taxation according to Ch. 3 sec. 30 fifth para item 1 b) ML, wherein art. 143(1)(l) shall be implemented, is motivated by neutrality reasons in relation to exemption for gas imported – i.e. importation from a third country (place outside the EU) – by pipelines. By instead referring to trade parlance concerning the meaning of the word *uppströms* (Eng., upstream), the legislator is omitting to describe in the preparatory work that it is the transport of gas by ship to where the re-gas process takes place that must be exempted from taxation at import,

[25] See Forssén 2016 (1), sec. 5.1.6.

so that the equivalent length of transportation that otherwise takes place of gas imported via pipelines won't be favoured for tax purposes.

The legislator's simplified description in the preparatory work of the meaning of the word *uppströms* (Eng., upstream) leads to someone conducting application of the law having to go further to the EU directive 2009/162/EU and the recitals following by item 3 of its preamble where the theme of neutrality is concerned. Otherwise he who's conducting application of the law is risking to make an interpretation of the rule in question in the ML that isn't supported by the relevant motives for the directive rule. Thus, the legislator has created a risk for someone conducting application of the law making a non-EU conform interpretation of the word *uppströms* (Eng., upstream) in Ch. 3 sec. 30 fifth para. item 1 b) ML.

With respect of the loyalty to preparatory work existing in Swedish legal sources theory the legislator has in my opinion, by his simplified description in the Government bill of the meaning of the word *uppströms* (Eng., upstream), caused a semantic interpretation problem insofar that the reference to trade parlance for the interpretation of the word *uppströms* (Eng., upstream) leading to the risk that those conducting application of the law stay by the preparatory work and don't go further to the EU directive. There is the true context of the word *uppströms* (Eng., upstream) to be found. Thus, the legislator's simplified description in the preparatory work mentioned can lead to an erroneous interpretation of the word *uppströms* (Eng. upstream) in Ch. 3 sec. 30 fifth para. item 1 b) ML.

In my opinion the legislator causing the risk of a non-EU conform interpretation result depends rather on lacking knowledge in science and technology than on a lacking respect of two sets of rules having to be regarded at the determination of current law concerning material VAT issues: the national, with the ML, and from the EU law – in the first place – the VAT Directive (2006/112). I thereby make a pendant to the example of a semantic interpretation problem in Forssén 2016 (1), sec. 2.2, where I state that the word *energialstring* (Eng., energy production) existed for some time in the GML: Energy production is not even possible according to the laws of physics , since energy can be changed between different energy forms. Thus, the legislator's lacking knowledge in science and technology constitutes an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

2.6 Import and an assumed gap in the law with respect of two determinations of taxable person (Sw., *beskattningsbar person*) – Ch. 4 sec. 1 and Ch. 5 kap. Sec. 4 ML[26]

Concerning *tullagen (2016:253)* – i.e. the Swedish customs act – I have regarding the rule Ch. 5 sec. 11 a first para. items 1 and 2 notified the Treasury that there's a risk for constructed activities that can give an unjustified right of deduction of input tax. To rectify that risk I've suggested to the Treasury to propose a legislation meaning that Ch. 5 sec. 11 a first para. item 1 and 2 *tullagen* will be altered, so that item 2 will refer to *beskattningsbar person* (Eng., taxable person) according to the ML except in the special meaning the concept is given in Ch. 5 sec. 4 ML (Sw., *utom i den särskilda betydelse begreppet ges i 5 kap. 4 § ML*). That this expression is lacking in Ch. 5 sec. 11 a first para. item 2 *tullagen* is in my opinion meaning that a gap exists in the law, i.e. a gap in *tullagen*. That gap *can* in my opinion give an unjustified right of deduction of input tax on import according to Ch. 8 sec. 3 first para. ML. The interpretation problem here concerns the *subject issue* in the way that there are two relevant determinations of *beskattningsbar person* (Eng., taxable person) in the ML to which the present rule in *tullagen* can be considered referring, namely Ch. 4 sec. 1 and Ch. 5 sec. 4: In Ch. 5 sec. 4 is with *beskattningsbar* (Sw., taxable) meant not only persons which are carrying out economic activity (Sw., *ekonomisk verksamhet*) etc., but also e.g. holding companies and non-profit-making organisations (Sw., *allmännyttiga ideella föreningar och registrerade trossamfund*) which haven't an economic activity (Sw., *ekonomisk verksamhet*) according to Ch. 4 sec. 1 ML.

I sent an e-mail to the Treasury 2014-12-12, where I pointed out for the Treasury the assumed gap in *tullagen*. The Treasury replied 2014-12-16 (Dnr. Fi2014/4452). What's an obscurity in my opinion is that the Government refers to rather awaiting case law than act upon my suggestions of alterations in the present rule in *tullagen*. That the legislator in this way is uninterested of reducing the risk of constructed activities with respect of VAT based on the of me assumed gap in the law is an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*. The egislator had e.g. the chance to easily rectify the gap on the 1st of May 2016 in connection with *tullagen* (2016:253) replacing *tullagen* (2000:1281).

[26] See Forssén 2016 (1), sec. 5.1.7.

2.7 The use of the concept tax liable (Sw., *skattskyldig*) in the main rule on intra-Union acquisitions before the 1st of July 2013 – Ch. 2 a sec. 3 first para. item 3 ML[27]

Concerning the determination of what's constituting an intra-Community acquisition – nowadays intra-Union acquisition [Sw., *unionsinternt förvärv av vara* (UIF)] – it existed an erroneous wording in the main rule Ch. 2 a sec. 3 first para. item 3 and second para. ML, more precisely in first para. item 3. The erroneous wording consisted of that it therein was stated concerning the status of the seller in the other involved EU country that he was presupposed to be *skattskyldig* (Eng., tax liable) there for the transaction to the buyer who made the importation of the goods to Sweden. That was an erroneous wording in relation to art. 2(1)(b)(i) in the VAT Directive (2006/112) [and the predecessor art. 28a(1)(a) first para. of the Sixth Directive (77/388/EEC)], and on the 1st of July 2013 Ch. 2 a sec. 3 first para. item 3 ML was altered, by SFS 2013:368, so that *skattskyldig* (Eng., tax liable) in the mentioned respect was replaced with *beskattningsbar person* (Eng., taxable person). Thus, this means that he who's making a UIF to Sweden nowadays becomes liable to account for calculated output tax on the acquisition, even if the other involved EU country, unlike Sweden, exempts the goods in question from taxation and the seller in that country isn't *skattskyldig* (Eng., tax liable) for supplies there.

The erroneous wording that may be deemed to have existed in Ch. 2 a sec. 3 first para. item 3 ML before the 1st of July 2013, by the use of the word *skattskyldig* (Eng. tax liable) in the rule, is an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*. I state thereby the following:

- On the 1st of July 2013 the legislator took the opportunity to alter *skattskyldig* (Eng. tax liable) to *beskattningsbar person* (Eng., taxable person) in the rule in question, and stated then that it was only a formal matter. According to the legislator it was only a matter of achieving that Ch. 2 a sec. 3 first para. item 3 ML would get an improved *formal* (Sw., *formell*) correspondence with what's stipulated about UIF of goods in art. 2(1)(b) of the VAT Directive (2006/112).[28] However, the legislator didn't mention that the concept *skattskyldig* (Sw., tax liable) in the previous wording of Ch. 2 a sec. 3 first para. item 3 ML had been a decisive matter in a number of tax- and tax fraud cases

[27] See Forssén 2016 (1), sec. 5.1.8.
[28] See prop. 2012/13:124 p. 94.

from the time before the 1st of July 2013. Thus, the description of the alteration in the rule as merely a formal matter is proof of a complete ignorance on behalf of the legislator about the context in which the question regarding the importance of the use of the concept *skattskyldig* (Eng., tax liable) in Ch. 2 a sec. 3 first para. item 3 ML existed. In my opinion the legislator is guilty of a directly erroneous description of reality, i.e. a directly erroneous description of the context that had existed around the rule in the present respect.

- The legislator's attitude is particularly obscure with respect of the legislator himself stating already at the introduction of the ML on the 1st of July 1994 that *skattskyldighet* (Eng., tax liability) only meant the liability to pay tax to the state. However, the legislator disregarded that on the 1st of January 1995 when Ch. 2 a was introduced in the ML. The legislator used *skattskyldig* (Eng., tax liable) about the seller's status in Ch. 2 a sec. 3 first para. item 3 instead of *skattskyldig person* (Eng., taxable person), which was used in the Swedish translation of the Sixth Directive (77/388/EEC) and which in this way should have been used in the rule in question from 1995. The legislator let the concept *skattskyldig* (Eng., tax liable) remain in the rule until the 1st of July 2013, despite that *beskattningsbar person* (Eng., taxable person) in the Swedish language version of the VAT Directive (2006/112) should have been used from 2007 when the VAT Directive (2006/112) replaced inter alia the Sixth Directive (77/388/EEC).

2.8 The determinations of goods and services – Ch. 1 sec. 6 ML[29]

The review in sec:s 3.9.2.1-3.9.2.3 of Forssén 2016 (1), of the examples investment gold, dental care and electronic services, all show that Ch. 1 sec. 6 should, based on the thereby from a systematic viewpoint made comparison of the rule with the VAT Directive (2006/112), be abolished from the ML. The same rule technique – systematics – should consistently be used in the ML as in the VAT Directive (2006/112) for the determination of the tax object or exemptions from taxation, which means the following:

- The determination of the object for taxation or exemption should be made based on what constitutes *omsättning* (Eng., supply/transaction) of goods or services according to Ch. 2 ML and on whether an actual supply is comprised by exemption from taxation according to anyone of the rules in Ch. 3 ML. If the latter

[29] See Forssén 2016 (1), sec. 5.1.9.

isn't the case, the transaction is taxable according to the general principle of transaction of goods or services being taxable according to Ch. 3 sec. 1 first para. ML.

- Such systematics in the ML would comply with the VAT Directive (2006/112): compare the main rule on what's considered *supply of goods* in art. 14(1) and the main rule on what's considered *supply of services* in art. 24(1) of the VAT Directive (2006/112).

By implementing the same systematics in the present respect as in the VAT Directive (2006/112) the determination of the tax object or an exemption from taxation is made in two steps instead of three. The person making an application of the law then won't need to regard Ch. 1 sec. 6 ML, unlike what's the case today. Instead he can – in step 1 – judge the supply issue in Ch. 2 ML and thereafter – in step 2 – go to Ch. ML and the determination there of whether an established *supply* is taxable or exempted from taxation.

Thus, in my opinion the rule with the definitions of goods and services, Ch. 1 sec. 6 ML, is obsolete, since it's adding an extra step to the described trial and constitutes a breach of the systematics in the VAT Directive (2006/112).

Especially concerning electronic services I furthermore argue for the legislator to bring up with the EU Commission, the European parliament and the EU Council about introducing a rule that states that supply of electronic services shall for VAT purposes be treated analogical with what applies for supply of goods or services within other sectors, like consultant services, financial services, health care, social care and education. A method of analogism can namely be used based on what's known within the business world about different products and what's needed in terms of innovations. The casuistry determination that's made now by examples in annex II to the VAT Directive (2006/112) and in art. 7 of the implementing regulation (EU) No. 282/2011 is risking to lead astray due to lacking technical or business world insights in the topic by the legislator and the EU institutions and is risking with respect of the technological development regarding electronic services to soon become out of date.

The legislator should not await the treatment on EU level of suggestions presented there concerning electronic services and VAT. The legislator should already before, in pursuance of what I state regarding investment gold and dental care, abolish Ch. 1 sec. 6 from the ML, so that the same rule technique – systematics – concerning the determination of the tax object or exemptions from taxation will apply in the ML as in the VAT

Directive (2006/112). That measure is necessary in general on the theme of EU conformity.

> The example dental care, more precisely the problem concerning the older wording of Ch. 3 sec. 4 second para. second indent ML, which was expressing that the exemption for dental care also comprises supply of dental-technical products and of services regarding such products, shows in my opinion that risk of waiting with abolishing Ch. 1 sec. 6 ML is that the legislator in the mean time e.g. makes a tax rule in the ML which is breaching the principle that it is the seller's transaction that shall be expressed as taxable or exempted from taxation, whereby the buyer's status lacks importance for the determination of the tax object or the exemption from taxation.

By the way should for systematic reasons, and without awaiting a treatment of the question whether Ch. 1 sec. 6 shall be abolished from the ML, the rules on investment gold be transferred from Ch. 3 sec:s 10 a-10 c to special para:s in the rule regarding inter alia financial services, i.e. Ch. 3 sec. 9 ML.[30] Investment gold belongs in practice with the category of financial services. Thus, it becomes more clear that industry gold is comprised of the general tax liability for supply of goods or services in Ch. 3 sec. 1 first para. ML. However, the rules on reverse charge for investment gold and the definition of investment gold van remain in Ch. 1 sec. 2 first para. item 4 a and Ch. 1 sec. 18 ML.

Already when the ML replaced the GML on the 1st of July 1994 the legislator made an EU adjustment of Ch. 1 sec. 6 ML insofar that it's stipulated in Ch. 1 sec. 6 that real estates also constitute goods. However, the legislator should have followed up with a for systematic reasons more complete EU adjustment at Sweden's EU accession in 1995 and then abolished Ch. 1 sec. 6 from the ML, so that the rule no longer means that the ML determines the tax object or the exemption from taxation in three steps, unlike the Sixth Directive (77/388/EEC) and later on the VAT Directive (2006/112) where the determination is made in only two steps. That the legislator didn't make that measure already when alterations were made in the ML on the 1st of January 1995, by SFS 1994:1798, at Sweden's EU accession, is an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

> By the way was on the 1st of January 2017, by SFS 2016:1208, Ch. 1 sec. 11 ML altered so that that rule for the determination for VAT purposes of the concept *fastighet* (Eng., real estate) nowadays refers to the concept *fast egendom* (Eng., immovable property) according to art. 13(b) of the implementing regulation (EU) No. 282/2011, instead of to *jordabalken* (1970:994) – i.e. instead of to the Swedish Land

[30] Compare sec. 2.4.

Code.[31] I don't mention this again, since I deem that the questions that I raise in connection with the use of the concept *fastighet* (Eng., real estate) in the ML remain also after the alteration mentioned in Ch. 1 sec. 11 ML.[32]

Finally I may in the context of electronic services state the following. Even if Ch. 1 sec. 6 wouldn't be abolished from the ML within foreseeable time, can and should the question whether the VAT rate on papers and periodicals etc. shall continue to be lower for printed rather than electronic such products be treated before. The reasons invoked in the mid 1990's for making a difference between printed and electronic papers are no longer relevant with respect of the technological development since then regarding electronic services. In my opinion the environmental reason is the reason that still is relevant at the trial of whether the VAT is neutral depending on in what form – goods or services – that a downloadable product, e.g. a paper, is supplied. It speaks for that the VAT rate should be lower on an electronic paper than on a printed paper, opposite to what still rules today.

2.9 The limitation of the concept economic activity (Sw., *ekonomisk verksamhet*) for non-profit-making organisations (Sw., *allmännyttiga ideella föreningar och registrerade trossamfund*) – Ch. 4 sec. 8 ML[33]

The value added taxation for non-profit-making organisations (Sw., *allmännyttiga ideella föreningar och registrerade trossamfund*) is limited, by Ch. 4 sec. 8 ML, based on the determination instead of – as in the VAT Directive (2006/112) – with respect of the object, i.e. the supply of goods or services. Thus, this means that Ch. 4 sec. 8 ML constitutes a systematic breach of the VAT Directive (2006/112), and causes a risk for competition distortions emerging regarding the VAT in relationship to other enterprise- and association-forms. This is in conflict with art. 113 of the Treaty on the Functioning of the EU (TFEU) and item 4 of the preamble to the VAT Directive (2006/112), i.e. with respect of both primary and secondary EU law. The rule Ch. 4 sec. 8 ML is furthermore referring for the purpose of limiting the value added taxation to the non-harmonised income tax rules. Thereby there's a risk of an emergence of a meaning of *allmännyttiga ideella föreningar* and *registrerade trossamfund* (non-profit-making organisations) which above all isn't complying with the EU law meaning of the concept *organisationer utan vinstsyfte* (Eng., *non-profit-making organisations*).

The EU Commission made on the 26th of June 2008 a notification about starting a procedure about breach of the EU treaty regarding Ch. 4 sec. 8 ML constituting a breach of the VAT Directive (2006/112): The EU

[31] Compare also prop. 2016/17:14 p. 46. See also Forssén 2016 (1), sec. 3.11.1.
[32] See Forssén 2016 (1), sec. 3.11.1.
[33] See Forssén 2016 (1), sec. 5.1.10.

Commission's formal notification of the 26th of June 2008 on the treatment of *ideella föreningar* and *registrerade trossamfund* in Ch. 4 sec. 8 ML arrived at Sweden's permanent representation in Brussels on the 27th of June 2008[34] Thereby the question is whether a breach of the VAT Directive (2006/112) exists due to the mentioned circumstances concerning Ch. 4 sec. 8 ML, which is a question that eventually will be decided by the CJEU, if the EU Commission would go further with it and sue Sweden at the CJEU. Such a suit has not been filed at the CJEU. After the legislator's (the Government's) exchange of notes with the EU Commission is therefore the question about the eventual breach of the EU treaty an open issue since the end of 2011.

That the legislator is letting the question whether Ch. 4 sec. 8 ML constitutes a breach of the EU law in the field of VAT, i.e. a breach of treaty, remain an open question is an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*. In my opinion can namely the legislator (the Government) in its exchanging of notes with the EU Commission not be deemed to have clarified that there's no risk of a development of a national case law concerning the use of the concepts *allmännyttiga ideella föreningar* and *registrerade trossamfund* in Ch. 4 sec. 8 which isn't EU conform compared with the meaning and the use of the concept *organisationer utan vinstsyfte* (Eng., non-profit-making organisations) in the VAT Directive (2006/112). That follows in my opinion already of the negative determination of *ekonomisk verksamhet* (Eng., economic activity) in Ch. 4 sec. 8 ML for *allmännyttiga ideella föreningar* and *registrerade trossamfund* being made by reference to the non-harmonised income tax rules.

By the way may also be mentioned that in Forssén 2016 (1), sec. 3.10.3 is Ch. 4 sec. 8 ML also mentioned especially concerning the field of sports. Then it's about *allmännyttiga ideella föreningar* (Eng., non-profit associations with a purpose of public benefit), apart from *registrerade trossamfund* (Eng., registered religious communities), being comprised by exemption from taxation for admittance to sport events or to the opportunity to practice sports, according to Ch. 3 sec. 11 a first para. ML. That rule comprises *allmännyttiga ideella föreningar*, the state (Sw., *staten*) and the municipalities (Sw., *kommunerna*). If Ch. 4 sec. 8 would be abolished from the ML, would no longer the determination of exemption and application of the reduced VAT rate of 6 per cent, for the mentioned kinds of supply of services within the field of sports, be tied to the association form *allmännyttig ideell förening* by today's reference in Ch. 3 sec. 11 a to Ch. 4 sec. 8 or the reference in Ch. 7 sec. 1 third para. item 10 to Ch. 3 sec. 11 a.

[34] See 2007/2311 K(2008) 2803.

- If Ch. 4 sec. 8 would be abolished from the ML, would the limitation of the value added taxation with respect of the tax subject for certain legal persons be made in accordance with art. 13 of the VAT Directive (2006/112) also in the field of sports, i.e. only comprise states, regional and local authorities and other public bodies – not *allmännyttiga ideella föreningar* (Eng., non-profit associations with a purpose of public benefit).

- Furthermore may be noted that it is also a lack of support for a special treatment of *allmännyttiga ideella föreningar* (Eng., non-profit associations with a purpose of public benefit) concerning the VAT rate issue. If Ch. 4 sec. 8 would be abolished from the ML, are *allmännyttiga ideella föreningar* comprised, provided that they fulfil the prerequisites for *beskattningsbar person* (Eng., taxable person) in accordance with the main rule in Ch. 4 sec. 1 and in this way can be subject to value added taxation, by the reduced VAT rate of 6 per cent in the field of sports – like e.g. limited companies (Sw., *aktiebolag*) and *registrerade trossamfund* (Eng., registered religious communities) and other associations than those with a purpose of public benefit. It's namely so that item 13 and item 14 of annex III to the VAT Directive (2006/112) don't make any difference between forms of enterprises or associations concerning the application of reduced VAT rate for admittance to sport events and for using installations for the opportunity to practice sports.[35] The VAT rates vary between the different EU Member States. That works actually against the harmonisation demand stipulated in art. 113 TFEU, but that lack of harmonisation is supported by item 7 of the preamble of the VAT Directive (2006/112). However, the EU Member States may not arbitrarily apply the reduced VAT rates on goods and services or make a distinction between different forms of enterprises or associations without support of annex III to the VAT Directive (2006/112).

2.10 The use in the ML of the concept *fastighet* (Eng., real estate) in certain respects[36]

The concept *fastighet* (Eng., real estate) is used in the ML and is contained in Ch. 1 sec. 6, which is treated in sec. 2.8 concerning whether Ch. 1 sec. 6 should be abolished from the ML. Here I also state that regardless whether that would be the case, should the concept fastighet

[35] Annex III to the VAT Directive (2006/112) is: "List of supplies of goods and services to which the reduced rates referred to in article 98 may be applied".
[36] See Forssén 2016 (1), sec. 5.1.11.

itself be abolished from the ML, since the VAT Directive (2006/112) is using the broader concept *fast egendom* (Eng., immovable property). The use of the concept *fastighet* (Eng., real estate) in the ML causes in my opinion the following problems:

- I've concluded that the possibilities of voluntary tax liability for letting of real estate according to Ch. 9 sec:s 1 and 2 ML could be applied also by an ordinary private person (a consumer). If so, it's in conflict with the facultative art. 137(1)(d) of the VAT Directive (2006/112) clearly stipulating that the voluntary taxation of transactions concerning leasing or letting of immovable property is limited to apply for *beskattningsbara personer* (Eng., taxable persons), and thus not for ordinary private persons.

- Besides I've mentioned that the legislator doesn't make own empirical analyses concerning the existence of an actual current law established by the SKV. An example that I've mentioned thereby is the handling of VAT in a bankrupt's estate of building contract works (Sw., *byggnadsentreprenader*) interrupted due to the building entrepreneur (Sw., *byggnadsentreprenören*) being declared in bankruptcy. That an actual current law which can lead to an erroneous application of the rules in e.g. such cases occurring due to the legislator having a tradition of relying on being able to judge current law based on e.g. the SKV's opinion on a government official report.

  That the legislator has a tradition of relying in the preparatory work on the SKV's description of current law concerning a certain taxation issue is thus in my opinion not valid where fields governed by the EU law are concerned. Two sets of rules must be regarded at the determination of current law concerning material VAT issues: the national, with the ML, and from the EU law – in the first place – the VAT Directive (2006/112). That the legislator due to the tradition mentioned can be led to base law proposals on an erroneous perception of current law is risking to lead to *communication distortions*.

- Furthermore I have, concerning real estate constituting capital goods (Sw., *investeringsvaror*), concluded that it should be stated in Ch. 8 a ML that the liability to draw up such a document that shall be issued at transfer of capital goods according to Ch. 8 a sec:s 15-17 ML, so that liability of adjustment of input tax won't emerge, comprise a bankrupt's estate. A bankrupt's estate should be imposed to by the receiver in bankruptcy issuing such a document for the bankrupt's estate

(Sw., *konkursboet*) or for the bankrupt person (Sw., *konkursgäldenären*), i.e. the owner of the real estate (Sw., *fastighetsägaren*), who lacks right of disposition (Sw., *rådighet*) due to the decision of bankruptcy. Otherwise, the risk is that it would be possible for the bankrupt person at a transfer before the decision of bankruptcy to negotiate away the SKV's possibility to impose liability of adjustment of input tax on the person buying the real estate from the bankrupt's estate.

The problems concerning voluntary tax liability for letting of real estate and whether Ch. 9 sec:s 1 and 2 ML are EU conform should have been addressed by the legislator already at Sweden's EU accession in 1995. That the legislator still hasn't treated the question whether those two rules are compatible with art. 137(1)(d) of the VAT Directive (2006/112) is an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*. The legislator thereby disregards that two sets of rules must be regarded at the determination of current law concerning material VAT issues: the national, with the ML, and from the EU law – in the first place – the VAT Directive (2006/112).

The legislator's tradition relying in the preparatory work on the SKV's description of current law concerning a certain taxation issue leads to that an actual current law established by the SKV can become developed. This can in its turn lead to that the legislator may base law proposals on an erroneous perception of current law, so that the purpose with a certain rule in the VAT Directive (2006/112) won't be expressed by the wording of the rule in the ML wherein the directive rule shall be considered implemented. That's an example of what I call *communication distortions* in the process of the making of tax laws. Also by maintaining the tradition mentioned the legislator disregards that two sets of rules must be regarded at the determination of current law concerning material VAT issues: the national, with the ML, and from the EU law – in the first place – the VAT Directive (2006/112). That too is an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

If the legislator doesn't raise the question on the bankrupt's estate's (Sw., *konkursboets*) – and thereby the receiver in bankruptcy's (Sw., *konkursförvaltarens*) – obligation to issue a document on adjustment of input tax at the sale of capital goods constituting real estate, the legislator is accepting that there's a risk of a possibility for the bankrupt person (Sw., *konkursgäldenären*) to negotiate away at the transfer of such a real estate before the decision of bankruptcy the SKV's possibility to impose liability of adjustment of deduction of input tax on

the person buying the real estate from the bankrupt's estate. The legislator should, in the light of similar problems existing concerning the so-called certificate VAT (Sw., *intygsmomsen*) regarding sales of real estate comprised by voluntary tax liability, before a rule alteration was made in that system in connection with the ML replacing the GML on the 1st of July 1994, already have made the measure that I'm suggesting concerning adjustment of deduction of input tax regarding real estate in a bankrupt's estate (Sw., *ett konkursbo*).

> For example could the measure that I'm suggesting have been made by the legislator when the system with certificate VAT was abolished on the 1st of January 2001, by SFS 2000:500, which meant that nowadays only the adjustment system in Ch. 8 a applies in the present situations. In sec. 3.11.4 of Forssén 2016 (1) I state that I have in a book,[37] and also in an article[38] mentioned that similar negative effects for the public treasury (Sw., *statskassan*) that occurred in certain cases in the system with certificate VAT may occur in the existing system with adjustment (correction) of deduction of input tax, if a bankrupt person (Sw., *konkursgäldenär*) shall be able to negotiate away the SKV's possibility to impose liability of adjustment of deduction of input tax on the person buying the real estate from the bankrupt's estate.

That the legislator hasn't made the measure that I'm suggesting concerning adjustment of deduction of input tax regarding real estate in a bankrupt's estate (Sw., *ett konkursbo*) is another example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

2.11 Procedure problems on value added taxation[39]

In sec:s 4.2-4.4 of Forssén 2016 (1) I've analysed certain procedure issues on VAT, namely the following.

In the first place I have in connection with the so-called resulting changes decisions (Sw., *följdändringsbesluten*) according to the SFL analysed the question whether the procedure rules on value added taxation may mean that they limit principles regarding material taxation issues, so that neutrality at the taxation with respect of the choice of legal form doesn't apply because of procedure rules.

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[37] See *EG-rättskonformitet mellan vissa begrepp i ML och den nationella svenska inkomstskatterätten* [Cit. Forssén 2008], sec. 7.1.
[38] See *Gamla momsfrågor som nya – intygsmoms då, korrigeringsmoms nu*, article in Svensk skattetidning 2006 p. 375-377 [Cit. Forssén 2006], p. 377.
[39] See Forssén 2016 (1), sec. 5.1.12.

The question about the resulting changes decisions is whether the papers should have to accept resulting changes decisions meaning that they shall repay a too high deduction of input tax. The question is caused by the SKV's standpoint of 2010-07-09 (dnr 131 355983-10/111) concerning current law regarding applicable VAT rate for printing shops due to the CJEU's verdict of the 11th of February 2010 in the case C-88/09 (*Graphic Procédé*). The CJEU's verdict has led to the printing shops' sales to the papers being considered comprised by the reduced VAT rate of 6 per cent, instead of by the general VAT rate of 25 per cent. This has led to decisions of resulting changes by the customers, the papers, meaning that they shall repay to the state a too high deduction of input tax. The question is then in my opinion whether there's a difference between issues on a change of current law depending on whether a guiding decision is made by the CJEU instead of the HFD.

My opinion is that fundamental principles for the material rules on taxation cannot be limited by the procedure rules like what's recently described regarding the application of the resulting changes institute according to Ch. 66 se, 27 item 4 a) SFL, whereby I disregard cases of abusive practice (Sw., *förfarandemissbruk*). The legislator should in my opinion for legal certainty reasons address that it should be clarified in the SFL that resulting changes decisions cannot be enforced against the individual's will, if he's relying on current law as it's been able to perceive by the wording of the law and eventual precedents from the HFD, and the change of current law only depends on a preliminary ruling being made by the CJEU. Thereby the question is in my opinion whether the papers cannot be deemed having followed current law before the 11th of February 2010, i.e. before the CJEU's verdict in the case C-88/09 (*Graphic Procédé*). If the legislator doesn't address that question, it's in my opinion an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

In the second place I've analysed whether the legislator should contact the EU Commission, the European parliament and the EU Council about starting a work which inter alia clarifies what rules concerning the so-called rest competence (Sw., *restkompetens*) – which is expressed as form and methods (Sw., *form och tillvägagångssätt*) for the implementation of a directive – in art. 288 third para. TFEU. A question that has been mentioned thereby is whether an EU regulation, i.e. a secondary law legislation, should be introduced which contains general procedure rules for VAT.

I've concluded that it's necessary that a secondary law procedure legislation would be introduced for the VAT. It's decisive for the EU project that the internal market is working. Then must, in accordance

with the primary law rule of art. 113 TFEU, harmonisation of the EU Member States' legislations in the field of indirect taxes be accomplished. Therefore it's of great importance that the level within the EU law that corresponds to the constitutional level in national law, i.e. the EU primary law, will have an impact also in the form of secondary law procedure rules about VAT. This should in my opinion be accomplished by an EU regulation on procedure rules for the VAT, since a regulation is directly applicable in the Member States according to art. 288 second st. TFEU.

Thus, the legislator should in my opinion bring up with the EU Commission, the European parliament and the EU Council about starting a work which inter alia clarifies what applies concerning the mentioned rest competence according to art. 288 third para. TFEU, and which shall lead to an EU regulation containing general procedure rules for VAT. That the legislator hasn't taken such measures constitutes in my opinion an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

In the third place I have in the recently mentioned context also treated especially the question whether the implementing regulation (EU) No. 282/2011, which concerns certain material issues in the VAT Directive (2006/112), should be revoked, so that the material VAT rules are mentioned in one set of rules from the EU, i.e. in the VAT Directive (2006/112), instead of in two. Those conducting application of the law should in my opinion not have to regard material VAT rules from the EU law in another set of rules beside the VAT Directive (2006/112), why I argue for the implementing regulation (EU) No. 282/2011 being abolished altogether. If the implementing regulation (EU) No. 282/2011 would be abolished, the risk of the development of a non-EU conform domestic case law regarding the concepts in the ML decreases. If the legislator doesn't bring up that question with the EU Commission, the European parliament and the EU Council, it's in my opinion an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

Finally I have in sec. 4.5 of Forssén 2016 (1), to the procedure rules on VAT, made a couple of connections regarding material and formal rules which have been mentioned in Ch. 3 of Forssén 2016 (1), in sec:s 3.11.2 and 3.11.4, and mentioned for the context something about Ch. 13 sec. 28 a ML and accounting for adjustment of deduction of input tax according to Ch. 8 a ML.

- Here I may in the first respect mentioned on the theme of connections between procedure rules and material rules mention

from sec:s 3.11.2 and 3.11.5 of Forssén 2016 (1) and sec. 2.10 the material VAT rules on voluntary tax liability in Ch. 9 sec:s 1 and 2 ML. Thereby I state in sec. 4.5 of Forssén 2016 (1) that it should have been clearly mentioned by the legislator how the new material rules introduced in Ch. 9 sec. 1 ML by SFS 2013:954 in 2014 relate to the procedure rules in Ch. 7 sec. 4 SFL about obligation to inform regarding altered conditions compared to those existing at the registration to VAT. According to the new rules in Ch. 9 sec. 1 an owner of real estate etc. doesn't need to apply by the SKV for voluntary tax liability, but is comprised by such liability merely by stating output tax in an invoice concerning the letting of real estate. The problem is in my opinion that it isn't clearly expressed in the ML or the SFL whether it e.g. is sufficient for a 'deregistration' from voluntary tax liability that the owner of real estate etc. just ceases to state output tax in the invoice for the letting, and that it thereafter could continue as a from taxation exempted letting according to Ch. 3 sec. 2 ML.

My experience is that procedure issues concerning voluntary tax liability can be very complex. This should appear as clear someone who also has an experience of application issues on VAT. If the legislator doesn't raise the question of a clarification concerning whether the obligation to inform according to Ch. 7 sec. 4 SFL applies also for the case that an owner of real estate etc. wants that voluntary tax liability according to Ch. 9 sec. 1 ML cease, it's thus in my opinion an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

- On the theme of connections between procedure rules and formal rules I may mention from sec:s 3.11.4 and 3.11.5 of Forssén 2016 (1) and sec. 2.10 that therein have been mentioned formal rules in Ch. 8 a ML concerning a special question of adjustment of deduction of input tax in connection with bankruptcy, namely whether the bankrupt's estate (Sw., *konkursboet*) by the receiver in bankruptcy (Sw., *konkursförvaltaren*) should fulfil the formal rules in Ch. 8 a sec:s 15-17 ML to be able to handle a transfer of the bankrupt person's (Sw., *konkursgäldenärens*) rights and obligations regarding adjustment of deduction of input tax for his real estate that constitutes capital goods (Sw., *investeringsvaror*).

  I've stated that such an alteration of rules recently mentioned should be carried out in the formal rules on adjustment of deduction of input tax in Ch. 8 a ML. With respect of procedure

I've thereby mentioned in sec. 4.5 of Forssén 2016 (1) that there's a special rule on liability to register someone who's liable to adjust deduction of input tax regarding capital goods according to Ch. 8 a or Ch. 9 sec:s 9-13 ML, namely *Ch. 7 sec. 1 first para. item 8 SFL*. That rule is deemed necessary, since to be liable to adjust isn't the same as being tax liable.[40]

In sec. 3.11.4 of Forssén 2016 (1) I assumed, for the analysis of the question whether the bankrupt's estate (Sw., *konkursboet*) by the receiver in bankruptcy (Sw., *konkursförvaltaren*) should fulfil the formal rules in Ch. 8 a sec:s 15-17 ML, that the bankrupt's estate can become tax liable according to Ch. 6 sec. 3 ML. In sec. 4.5 of Forssén 2016 (1) I have for that context mentioned something about Ch. 6 sec. 3 ML especially in relationship to Ch. 13 sec. 28 a ML and accounting for (Sw., *redovisning*) of adjustment according to Ch. 8 a ML.

Thus, in my opinion it lacks underpinning reasons by the material rules in Ch. 6 sec. 3 and Ch. 8 a ML for the bankrupt's estate (Sw., *konkursboet*) to be liable to adjust deduction of input tax. To accomplish this I consider, as mentioned, that the formal rules in Ch. 8 a ML must be completed with a rule obligating the bankrupt's estate (Sw., *konkursboet*) to draw up, by the receiver in bankruptcy (Sw., *konkursförvaltaren*), at the bankrupt's estate's sale of real estate constituting capital goods, a document regarding input tax that can be subject to adjustment which fulfil the formal rules of Ch. 8 a sec:s 15-17 ML. In my opinion it's not complying with the principle of legality for taxation measures (Sw., *legalitetsprincipen för beskattningsåtgärder*) in Ch. 8 sec. 2 first para. item 2 *regeringsformen (1974:152)*, RF (one of the Swedish constitutional laws) that the bankrupt's estate is made liable to pay the 'adjustment VAT' (Sw., '*jämkningsmomsen*') by an accounting rule (Sw., *redovisningsregel*), i.e. in this case Ch. 13 sec. 28 a ML. Although the legislator, as mentioned above, considers that the liability to adjust isn't the same as being tax liable, it's in my opinion such a liability that constitutes a taxation measure according to the RF. Thus, in my opinion must the rule alteration that I'm suggesting in the present respect be made and then it should for systematic reasons be inserted into Ch. 8 a ML.

In sec. 4.5 of Forssén 2016 (1) I mention for the present context that the report SOU 2002:74 gave proposals about the connections in Ch. 13 ML to what's considered Generally

[40] Compare prop. 2010/11:165 Part 2 p. 718.

Accepted Accounting Principles (GAAP) – Sw., *god redovisningssed* – according to *bokföringslagen* (1999:1078), BFL (the Swedish Book-keeping Act), concerning when output tax and input tax shall be accounted for, should be revoked.[41] However, it hasn't led to any Government bill yet. The report stated namely that there was no space for an analysis of the material taxation questions in the ML. The focus of the report was instead set on the accounting rules.[42] The rules on tax liability in special cases in Ch. 6 ML have not been analysed in the report SOU 2002:74 or in any other government official report yet.

The review of the special rule in Ch. 6 sec. 3 ML on bankrupt's estates (Sw., *konkursbon*) as tax liable and their relationship to the accounting rule Ch. 13 sec. 28 a ML concerning adjustment regarded in Ch. 8 a ML supports in my opinion that it's urgent to create special and cohesive rules for the bankrupt's estate's tax liability, obligation to adjust deduction of input tax, accounting liability and liability to register for VAT. That the legislator hasn't resumed the proposal in the report SOU 2002:74 of a revision of the accounting rules in Ch. 13 ML has in my opinion also curbed a review of the material rules and the procedure rules on VAT. Thus, that the legislator doesn't make such a holistic review of the VAT rules that I'm suggesting is – in my opinion – an example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

[41] Compare SOU 2002:74 Part 1 p. 20.
[42] Compare SOU 2002:74 Part 1 pp. 17 and 186.

3. THE CONCLUDING VIEWPOINTS OF FORSSÉN 2016 (1)

3.1 Introduction[43]

The present review of various examples of *communication distortions* in the process of The Making of Tax Laws shows that a change should be made in that respect. That review supports my previous suggestion in *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law*: *Second edition* that the process of The Making of Tax Laws should be altered, so that the entrepreneur is placed in the centre of it. By the entrepreneurs and their organizations participating in the process of the making of a corporate taxation rule will also the entrepreneur's concept world become expressed in the finished rule, rather than lawyers and others at the Treasury etc. choosing the words to it. Thereby is the risk minimized that there will emerge distortions between the legislator's purpose with a tax rule and how it can be perceived by anyone conducting application of the law (*communication distortions*), i.e. by the SKV, the courts and the tax subject, i.e. the entrepreneur. The alteration of the process of the making of tax laws that I've suggested presupposes that a second chamber would be installed in the Swedish Parliament, so that the entrepreneurs' organizations will be represented in the second chamber, whereby I inter alia have stated the following:

> "The main objective would nevertheless be to make a new system, where infrastructure and tax issues are handled by the second chamber to begin with so that those issues are guaranteed to be handled by representatives of the professionals and the procedure from initiation – or even instigation – of the issue to the final wording of e.g. the tax rule will be as transparent as possible".[44]

Thus, it's a matter of putting the entrepreneur in the centre of the process of the making of tax laws, and the review of various cases in Forssén 2016 (1) has shown that there's a need of such an alteration, that e.g. can be accomplished by my previous suggestions of alterations concerning systematics. In sec:s 3.2-3.7 I make some concluding viewpoints regarding the examples of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules* that I've referred to in sec:s 2.1-2.11 from Ch:s 3 and 4 of Forssén 2016 (1), namely the following:

[43] See Forssén 2016 (1), sec. 5.2.1.
[44] See Forssén 2015 (1) Part A, sec. 2.4.

- the context question concerning the rules themselves in the ML, their relationship to other rules and lacking EU conformity, sec. 3.2;
- the problem with an actual current law established by the SKV, sec. 3.3;
- the problem that concepts in the ML should be relevant over time despite a dynamic technology development and development of online services, sec. 3.4;
- the problem with gaps in the law and repetitions of historical VAT problems, sec. 3.5;
- the problem that the rules in the ML should correspond with the systematics of the VAT Directive (2006/112), sec. 3.6; and
- the problem with certain procedure questions on VAT, sec. 3.7

In sec:s 3.8-3.8.3 I summarize the concluding viewpoints and mention in connection thereto something about legal certainty and something about the continuation of my research project and give some general reflections regarding the tax law research.[45]

3.2 The context question concerning the rules themselves in the ML, their relationship to other rules and lacking EU conformity[46]

In sec. 2.1 I've reviewed examples of the legislator's lacking ability to put the right of deduction of input tax in the right context partly concerning the rules themselves in the ML, partly concerning the rules in the ML in relationship to rules about excise duties. The legislator hasn't responded about that I've pointed out some of the problems in my licentiate's dissertation (2011)[47] and in two articles in 2007.[48]

In sec. 2.2 I give examples of the legislator not reacting on a rule from the GML being transferred to the ML, and that rule – Ch. 6 sec. 7 ML – emanating form another context than the VAT law, namely from the general tax on goods of 1959. A trial of that rule based on the EU law in the field of VAT has not been done in connection with Sweden's EU accession in 1995. It shows that the legislator doesn't regard Sweden's EU accession in 1995 means that two sets of rules must be regarded at the determination of current law concerning material VAT issues: the national, with the ML, and from the EU law – in the first place – the VAT Directive (2006/112). I've shown the same lack on behalf of the legislator in sec:s 2.3 and 2.4 concerning the concept social care in Ch. 3 sec. 7 ML and concerning the concepts bank- and financial services and trade with securities (Sw., *bank- och finansieringstjänster och*

[45] See Forssén 2016 (1), sec. 1.1.1.
[46] See Forssén 2016 (1), sec. 5.2.2.
[47] See Forssén 2011.
[48] See Forssén 2007 (1) and Forssén 2007 (2).

värdepappershandel) in Ch. 3 sec. 9 and insurance brokers/insurance agents (Sw., *försäkringsmäklare*) in Ch. 3 sec. 10 ML. The same applies concerning one of the questions in sec. 2.10, namely regarding voluntary tax liability for letting of real estate and whether Ch. 9 sec:s 1 and 2 ML are EU conform.

3.3 The problem with an actual current law established by the SKV[49]

In sec. 2.10 I also state that the legislator has a tradition of relying on the SKV's description of current law regarding a certain taxation question. This leads to that an actual current law might be developed by the SKV, which in its turn can lead to the legislator basing law proposals on an erroneous conception of current law, so that the purpose with a rule in the VAT Directive (2006/112) won't be expressed by the rule in the ML in which the directive rule shall be deemed to be implemented. Thus, it's an example of what I call *communication distortions* in the process of the making of tax laws. The risk of such distortions is particularly apparent with respect of the loyalty to preparatory work at law interpretation existing in Swedish legal sources theory.[50] Also by maintaining the mentioned tradition the legislator disregards in my opinion that it is two sets of rules that must be regarded at the determination of current law concerning material VAT issues: the national, with the ML, and from the EU law – in the first place – the VAT Directive (2006/112).

> In the present context I may also mention the importance of research starting in Sweden within the field of *fiscal sociology*, so that empirical studies at least will complete the tradition with law dogmatic studies within the tax law. Thereby can the doctrine, which the legislator also regards, to a certain extent decrease the risk of erroneous conceptions about current law concerning a certain taxation question coming into to the process of the making of tax laws.

3.4 The problem that concepts in the ML should be relevant over time despite a dynamic technology development and development of online services[51]

Concerning financial services in Ch. 3 sec. 9 ML I have in sec. 2.4 furthermore, regarding the virtual currency bitcoins, shown that there's a need for the legislator addressing the question of bitcoins with the EU Commission, the European parliament and the EU Council, so that it will get an equilibrium solution, where in the first place monetary political and finance political considerations are met. Thereby the ambition should

[49] See Forssén 2016 (1), sec. 5.2.3.
[50] Compare Forssén 2016 (1), sec:s 3.6.1 and 3.6.2.
[51] See Forssén 2016 (1), sec. 5.2.4.

be to obstruct that bitcoins are used to hide barter transactions or exchange of assets (Sw., *byteshandel*) which are taxable. To accomplish such an equilibrium solution there's a demand of creating rules on the EU level, so that not just finance political considerations, but also monetary political considerations give the complete solution: That's not possible to achieve only by interpretation of the EU law in the field of VAT. If not the importance of the monetary political issue is raised, there's a risk reoccurring simplifications like in the case HFD 2016 ref. 6, where the SRN stated that bitcoins *is a means of payment* (Sw., *är ett betalningsmedel*) that *shows great similarities with electronic money* (Sw., *visar stora likheter med elektroniska pengar*). That statement only gives an impression of a well-balanced judgement of the case and thereby a judgement based on legal certainty. Bitcoins differ in a decisive way from e-money, since bitcoins, apart from e-money issued by banks etc., is a competing currency to ordinary currencies.

In sec. 2.5 I have, concerning import of gas (transferred from a ship transporting gas to a nature-gas system or to a system of pipelines) and the use in the ML of the word *uppströms* (Eng., upstream), shown that the legislator due to lacking knowledge in science and technology can cause a risk of a non-EU conform interpretation of a rule in the ML. That's a major flaw in the process of the making of tax laws especially with respect of the fast development of online services etc. The only guarantee against such a risk is that the experts participate in the process of the making of tax laws, i.e. that the entrepreneur participates in that process and gives the legislator the right words for the right context.

Especially concerning electronic services I have furthermore in sec. 2.8 shown that legislator should address the EU Commission, the European parliament and the EU Council about the introduction of a rule that states that supply of electronic services should for VAT purposes be treated analogical with what applies for supply of goods or services within other sectors, like consultant services, financial services, health care, social care and education. This should improve the legal certainty concerning determination of supply of electronic services, since a method of analogism can be used based on what's known within the business world about different products and what's needed in terms of innovations. The casuistry determination that's made now by examples in annex II to the VAT Directive (2006/112) and in art. 7 of the implementing regulation (EU) No. 282/2011 is risking to lead astray due to lacking technical or business world insights in the topic by the legislator and the EU institutions. Furthermore is this order causing the concept determinations to soon become out of date, with respect of the technology development regarding electronic services. In that respect I also refer to what's stated above from sec. 2.5 concerning import of gas (transferred from a ship transporting gas to a nature-gas system or to a system of pipelines) and the use in the ML of the word *uppströms* (Eng.,

upstream). Thereby I state that already rather traditional technology seems to cause that the legislator isn't capable of finding the words relevant for the context applying to the tax rules that the legislator is making.

In the latter respect I have in sec. 2.8 shown that there's already a history concerning electronic services proving that the legislator in the field of VAT must be able to adapt to a fast technology development. The reasons invoked in the mid 1990's for making a difference with respect of applicable VAT rate between printed papers and electronic papers is namely no longer relevant with respect of the technology development since then regarding electronic services. A motive for a special treatment of printed papers compared to electronic papers was that *you cannot have a computer in bed or with you on the bus* (Sw., *man kan inte ha en dator i sängen eller på bussen*), where the Pressreport of 1994 (Sw., *Pressutredningen -94*) although mentioned that *small, comfortable 'book-computers' are under development* (Sw., *små, bekväma 'bokdatorer' är under utveckling*).[52] The future is already here and in my opinion is the environmental reason the reason still relevant at the trial of whether the VAT is neutral depending on in what form – goods or services – that a downloadable product, e.g. a paper, is supplied.

Concerning what's especially stated about electronic services regarding sec. 2.8 I may also refer to what's stated above regarding sec. 2.5: The fast development of online services etc. means that the only guarantee against a risk for *communication distortions* concerning the rules in the ML in that field is that experts are participating in the process of the making of tax laws, i.e. that the entrepreneur participates in that process and gives the legislator the right words for the right context. With respect of the electronic services been under a fast development and are probable to be so continuously is such an order important to introduce, so that the VAT rules become suited to so to speak meet a from a technological viewpoint dynamic reality.

3.5 The problem with gaps in the law and repetitions of historical VAT problems[53]

In sec. 2.6 I've shown that there's a surprising lack of interest on behalf of the legislator to take measures about a gap in *tullagen* (2016:253) – i.e. the Swedish customs act – which is risking to lead to constructed activities that can give an unjustified right of deduction of input tax. In an e-mail to the Treasury 2014-12-12 I pointed out for the Treasury the assumed gap in *tullagen*. The Treasury replied 2014-12-16 (Dnr.

[52] See Forssén 2016 (1), sec. 3.9.2.3.
[53] See Forssén 2016 (1), sec. 5.2.5.

Fi2014/4452), and just stated that the Government will await case law rather than acting upon my suggestions of alterations in the present rule in *tullagen*. Thus, in the same way as with the deduction questions in sec. 2.1 it's been proven pointless to inform the legislator of problems with the legislation.

In sec. 2.7 I show that the legislator rather than making a simple investigation of what's existing in practice in the field of VAT motivates changes in the ML by presenting them as merely formal. According to the legislator would the alteration of the word *skattskyldig* (Eng., tax liable) in Ch. 2 a sec. 3 first para. item 3 ML to *beskattningsbar person* (Eng., taxable person) in connection with the reform of the 1st of July 2013 only have been a matter of accomplishing a better formal (Sw., *formell*) correspondence with what's stipulated about intra-Union acquisitions (Sw., *unionsinternt förvärv*, UIF) of goods in art. 2(1)(b) of the VAT Directive (2006/112).[54] That's not fit to strengthen legal certainty, since the concept *skattskyldig* (Eng., tax liable) in the previous wording of Ch. 2 a sec. 3 first para. item 3 ML has been a decisive question in a number of tax- and tax fraud proceedings from the time before the 1st of July 2013. Above all is the legislator's attitude obscure since the legislator himself stated already at the introduction of the ML on the 1st of July 1994 that with *skattskyldighet* (Eng., tax liability) is only meant the liability to pay tax to the state. Thus, a taxation for UIF before the 1st of July 2013 of a purchaser of goods from other EU countries was in conflict with the principle of legality for taxation measures in Ch. 8 sec. 2 first para. item 2 RF, when the seller in the other involved EU Member State wasn't *skattskyldig* (Eng., tax liable) due to the goods in question being exempted from taxation there, unlike what was the case in Sweden according to the ML.

In sec. 2.10 I have – besides what's mentioned in sec:s 3.2 and 3.3 – also proved that the legislator is lacking in regarding historical conditions at the making of new rules in the ML. In connection with the question on changing Ch. 8 a ML, so that a bankrupt's estate (Sw., *konkursbo*) by the receiver in bankruptcy (Sw., *konkursförvaltaren*) is made obligated to issue a document on adjustment of deduction of input tax at a sale of capital goods (Sw., *investeringsvaror*) constituting real estate (Sw., *fastighet*), I've made a comparison with the so-called certificate VAT (Sw., *intygsmomsen*) from older Swedish VAT law. I have in a book,[55] and also in an article[56] mentioned that similar negative effects for the public treasury (Sw., *statskassan*) that occurred in certain

[54] Compare prop. 2012/13:124 p. 94.
[55] See Forssén 2008, sec. 7.1.
[56] See Forssén 2006 p. 377.

cases in the system with certificate VAT may occur in the existing system with adjustment (correction) of deduction of input tax, if a bankrupt person (Sw., *konkursgäldenär*) shall be able to negotiate away the SKV's possibility to impose liability of adjustment of deduction of input tax on the person buying the real estate from the bankrupt's estate. In the same way as with the deduction questions in sec. 2.1 and the question about the gap in tullagen in sec. 2.6 it's been proved pointless to inform the legislator – who's supposed to read periodicals on tax – of problems with the legislation.

3.6 The problem that the rules in the ML should correspond with the systematics of the VAT Directive (2006/112)[57]

In sec. 2.8 I have in the first place, concerning the VAT rules on investment gold, dental care and electronic services, proved that the legislator disregards that the same rule technique – systematics – should be used in the ML as in the VAT Directive (2006/112) for the determination of the tax object or exemption from taxation. From that viewpoint should Ch. 1 sec. 6 ML be abolished from the ML, since that rule contains definitions of the concepts goods and services. Also in the present respect the legislator has disregarded that older Swedish VAT law concerning concepts and systematics may have been non-EU conform already at Sweden's EU accession in 1995, like what's stated above from sec. 2.2 regarding Ch. 6 sec. 7 ML. When the ML replaced the GML on the 1st of July 1994 the legislator made in fact an EU adjustment of Ch. 1 sec. 6 ML insofar as the concept goods was altered so that it's stated in Ch. 1 sec. 6 that real estate also constitutes goods. However, the legislator should have done a from a systematic viewpoint more complete adjustment at Sweden's EU accession in 1995. Already the should Ch. 1 sec. 6 ML have been abolished from the ML, so that that rule no longer means that the ML determines the tax object or exemption from taxation in three steps: In the Sixth Directive (77/388/EEC) and nowadays in the VAT Directive (2006/112) it's made in only two steps.

In sec. 2.9 I have shown that Ch. 4 sec. 8 ML – like with Ch. 1 sec. 6 ML – breaches from a systematic viewpoint against the VAT Directive (2006/112). This causes a risk for competition distortions emerging with respect of the VAT regarding non-profit-making organisations (Sw., *allmännyttiga ideella föreningar och registrerade trossamfund*) compared to other enterprise- and association-forms. Thereby the question is whether a breach of the EU treaty exists. This question was raised by the EU Commission making in 2008 a notification about starting a procedure about breach of the EU treaty regarding Ch. 4 sec. 8

[57] See Forssén 2016 (1), sec. 5.2.6.

ML. After the legislator's (the Government's) exchange of notes with the EU Commission is that question to be described as an open question since the end of 2011. However, it should be clear for the legislator that there's a risk of a development of a domestic case law concerning the use of the concepts *allmännyttiga ideella föreningar* (Eng., non-profit associations with a purpose of public benefit) and *registrerade trossamfund* (Eng., registered religious communities) in Ch. 4 sec. 8 which are non-EU conform compared to the meaning and use of the concept *organisationer utan vinstsyfte* (Eng., *non-profit-making organisations*) in the VAT Directive (2006/112). That follows in my opinion already of the negative determination of *ekonomisk verksamhet* (Eng., economic activity) in Ch. 4 sec. 8 ML for *allmännyttiga ideella föreningar* and *registrerade trossamfund* being made by reference to the non-harmonised income tax rules. However, the legislator does not seem to have any ambition to take measures about the situation by a change of law without awaiting whether the EU Commission will sue Sweden before the CJEU. Thus, the legislator is revealing a weak loyalty to the EU project, and that attitude works against the realization of the aim to create an internal market, which presupposes that the VAT legislations in the Member States don't distort the competition.

3.7 The problem with certain procedure questions on VAT[58]

In sec. 2.11 I have concerning certain procedure questions about the VAT concluded the following:

- For example mustn't the so-called resulting changes decisions (Sw., *följdändringsbesluten*) according to the SFL mean that they limit fundamental principles regarding the material taxation rules, so that e.g. neutrality at the taxation with respect of the choice of legal form doesn't apply as a consequence of procedure rules.

- Furthermore I state that the legislator should contact the EU Commission, the European parliament and the EU Council about starting a work which inter alia clarifies what rules concerning the so-called rest competence (Sw., *restkompetens*) – which is expressed as form and methods (Sw., *form och tillvägagångssätt*) for the implementation of a directive – in art. 288 third para. TFEU. There by I've concluded that it's necessary that a secondary law procedure legislation would be introduced for the VAT. It's decisive for the EU project that the internal market is working, which, in accordance with the primary law rule of art. 113 TFEU presupposes harmonisation of

[58] See Forssén 2016 (1), sec. 5.2.7.

the EU Member States' legislations in the field of indirect taxes. Therefore it's of great importance that the level within the EU law that corresponds to the constitutional level in national law, i.e. the EU primary law, will have an impact also in the form of secondary law procedure rules about VAT. In my opinion should therefore secondary law procedure rules on VAT be introduced, which should be accomplished by an EU regulation, since a regulation is directly applicable in the Member States according to art. 288 second st. TFEU.

- In the recently mentioned context I have also treated especially the question whether the implementing regulation (EU) No. 282/2011, which concerns certain material issues in the VAT Directive (2006/112), should be revoked, so that the material VAT rules are mentioned in one set of rules from the EU, i.e. in the VAT Directive (2006/112), instead of in two. I argue for the implementing regulation (EU) No. 282/2011 being abolished altogether, so that those conducting application of the law won't have to regard material VAT rules from the EU law in another set of rules beside the VAT Directive (2006/112).

In sec. 2.11 I also refer from sec. 4.5 of Forssén 2016 (1) that I, to the procedure rules on VAT, have made a couple of connections regarding material rules and formal rules which have been mentioned in Ch. 3 of Forssén 2016 (1), in sec:s 3.11.2 and 3.11.4, and mentioned for the context something about Ch. 13 sec. 28 a ML and accounting for adjustment of deduction of input tax according regarding Ch. 8 a ML. Thereby I've concluded the following:

- On the theme of connections between procedure rules and material rules mention I mention from sec. 2.10 the material VAT rules on voluntary tax liability in Ch. 9 sec:s 1 and 2 ML. Thereby I state that it should have been clearly mentioned by the legislator how the new material rules introduced in Ch. 9 sec. 1 ML by SFS 2013:954 in 2014 relate to the procedure rules in Ch. 7 sec. 4 SFL about obligation to inform regarding altered conditions compared to those existing at the registration to VAT.

- On the theme of connections between procedure rules and formal rules I have in sec. 2.10 mentioned the need to make an alteration in Ch. 8 a ML, so that a bankrupt's estate (Sw., *konkursboet*) by the receiver in bankruptcy (Sw., *konkursförvaltaren*) would be obligated to issue a document on adjustment of deduction of input tax at a sale of capital goods (Sw., *investeringsvaror*) constituting real estate (Sw., *fastighet*). With respect of procedure I've mentioned in sec. 2.11 that

there's a special rule on liability to register for someone who's liable to adjust deduction of input tax regarding capital goods according to Ch. 8 a or Ch. 9 sec:s 9-13 ML, namely *Ch. 7 sec. 1 first para. item 8 SFL*. That rule is deemed necessary, since to be liable to adjust isn't the same as being tax liable.[59]

In the latter respect I've mentioned something about Ch. 6 sec. 3 ML especially in relation to Ch. 13 sec. 28 a ML and accounting (Sw., *redovisning*) for adjustment regarded in Ch. 8 a ML. Thereby I state that it's not complying with the principle of legality for taxation measures (Sw., *legalitetsprincipen för beskattningsåtgärder*) in Ch. 8 sec. 2 first para. item 2 RF that the bankrupt's estate is made liable to pay the 'adjustment VAT' (Sw., '*jämkningsmomsen*') by an accounting rule (Sw., *redovisningsregel*), i.e. in this case Ch. 13 sec. 28 a ML. Although the legislator, as mentioned above, considers that the liability to adjust isn't the same as being tax liable, it's in my opinion such a liability that constitutes a taxation measure according to the RF. Therefore should the rule I'm suggesting, meaning that the bankrupt's estate would be obligated to adjust if it's not issuing a document on adjustment of deduction of input tax at the sale of capital goods constituting real estate, be inserted for systematic reasons into Ch. 8 a ML, This supports in my opinion that it's urgent to create special and cohesive rules for the bankrupt's estate's tax liability, obligation to adjust deduction of input tax, accounting liability and liability to register for VAT.

In the present context I've mentioned that the report SOU 2002:74 gave proposals meaning that the connections in Ch. 13 ML to what's considered GAAP according to the BFL, concerning when output tax and input tax shall be accounted for, should be revoked.[60] However, it hasn't led to any Government bill yet. The report stated namely that there was no space for an analysis of the material taxation questions in the ML, why its focus instead was set on the accounting rules.[61] The rules on tax liability in special cases in Ch. 6 ML have not been analysed in the report SOU 2002:74 or in any other government official report yet. That the legislator hasn't resumed the proposal in the report SOU 2002:74 of a revision of the accounting rules in Ch. 13 ML has therefore in my opinion also curbed a review of the material rules and the procedure rules on VAT.

[59] Compare prop. 2010/11:165 Part 2 p. 718.
[60] Compare SOU 2002:74 Part 1 p. 20.
[61] Compare SOU 2002:74 Part 1 pp. 17 and 186.

3.8 Summary of concluding viewpoints, something about legal certainty and the continuation of the research project and some general reflections regarding the tax law research[62]

3.8.1 Summary of concluding viewpoints[63]

I deem that the purpose of the book Forssén 2016 (1) according to its sec. 1.2 is fulfilled, namely that I've shown that there's a need to change the Swedish process of The Making of Tax Laws regarding in the first place the VAT and I've given the legislator suggestions to improve that process. I may thereby especially mention the following:

> My analysis of Swedish VAT in a law and language-perspective has shown so vast lacks on the theme words and context in the process of The Making of Tax Laws in the field of VAT that the legislator must be considered disregarding that Sweden's EU accession in 1995 means that two sets of rules must be regarded at the determination of current law concerning material VAT issues: the national, with the ML, and from the EU law – in the first place – the VAT Directive (2006/112). That's the most serious conclusion I'm making concerning *obscurities on behalf of the legislator regarding the theme of words and context in the EU law where the VAT rules are concerned*. [64]

> Thereafter I may mention, as the second most important conclusion supporting there's a need to change the process of the making of tax laws, that the legislator lacks an awareness that there is an actual current law established by the SKV and that that phenomenon causes a risk of *communication distortions* occurring in the process of the making of tax laws.[65] In Forssén 2016 (1) I've used the metaphor of an *iceberg*, to emphasize that I mean the existence of or the risk of development of an *actual current law* beside *current law in a true sense*. By the legislator lacking an awareness of that, the legislator doesn't know whether the description of current law in connection with the process of the making of tax laws is correct in relation to the purpose of a rule in the VAT Directive (2006/112). Thereby the legislator only sees the iceberg's part above the surface, i.e. precedents from the HFD and preliminary rulings from the CJEU, whereas references to the SKV's handbooks etc. are made without the legislator analysing whether the source is expressing an actual current law, and whether it's complying with the EU law in the field, or without the

[62] See Forssén 2016 (1), sec. 5.2.8.
[63] See Forssén 2016 (1), sec. 5.2.8.1.
[64] See sec:s 3.2 and 3.3.
[65] See sec. 3.3.

legislator even regarding that it can exist such an actual current law that lies in the iceberg's part under the surface and which has never even been tried by the administrative courts.

These two conclusions, and the problems that I mention in sec. 3.4 concerning concepts in the ML should be relevant over time despite a dynamic technology development and development of online services, are *sufficient* for me to conclude that there's a need to change the Swedish process of The Making of Tax Laws regarding in the first place the VAT and suggesting that the legislator improves that process, by putting the entrepreneur in the centre of it. That's in my opinion absolutely necessary for legal certainty reasons. *By the way* I'm also referring to what's mentioned in sec:s 3.6 and 3.7 regarding the problem that the rules in the ML should correspond with the systematics of the VAT Directive (2006/112) and regarding the problem with procedure questions on VAT supporting my opinion that there's a need to change the Swedish process of the making of tax laws regarding in the first place the VAT.

In sec. 3.8.2 I make, in connection with the questions on gaps in the law according to sec. 3.5, certain legal certainty reflections especially regarding the institute of relieve of tax in Ch. 60 sec. 1 SFL and the institute of law trial in *lag (2006:304) om rättsprövning av vissa regeringsbeslut* (Eng., the law on law trial of certain Government decisions). Before that I mention in the present sec. something about what the analysis in Forssén 2016 (1) may be deemed to have proven about the role of the Council on Legislation (Sw., *lagrådet*) in the process of The Making of Tax Laws regarding VAT and about the entrepreneur's situation in a perspective of *makt och rätt* (Eng., power and right) thereby and what the entrepreneur and his organizations should do to accomplish an alteration of the process of The Making of Tax Laws:

- Since the Council on Legislation hasn't contributed to minimize the risk of the emergence of those in Forssén 2016 (1) stated *communication distortions*, it's also a consequence of the lacks that the Council on Legislation may be deemed to have played out its role in the process of The making of Tax Laws. The only guarantee to minimize the risk of the emergence of such distortions in the process of The Making of Tax Laws regarding corporate taxation law, like what's stated here concerning the VAT, is to make a change of systematics for that process. Thus, the process of the making of tax laws should be altered so that the entrepreneur is placed in the centre of it. That the tax rules made are functioning is a both for the individual entrepreneur and the development of society more important development

than that the Council on Legislation is making a judgement on whether the principle of legality for taxation measures in Ch. 8 sec. 2 first para. item 2 RF has been regarded, since the Council on Legislation unquestionably cannot treat the VAT questions in the perspective of law and language that I have demonstrated with the examples in Forssén 2016 (1) and in this book. Although the Council on Legislation would improve its ability to identify semantic, syntactic and logical interpretation problems, the analysis in Forssén 2016 (1) shows that the technology development and the development of online services etc. still demands that expert knowledge becomes decisive for the development of concepts in the process of The Making of Tax Laws. Then must entrepreneurs and professionals within all sectors of society, e.g. information technology, care and finance, be placed in the centre of that process. The analysis has, which is shown above, furthermore proven that there are lacks in the process of The Making of Tax Laws in the following situations: to identify historical problems reoccurring in the field of VAT;[66] to identify problems regarding the VAT rules' relationship to other taxes and fees; and – above all – to discover the existence of or risk of development of an *actual current law* beside *current law in a true sense* and to regard that Sweden's EU accession in 1995 means that two sets of rules must be regarded at the determination of current law concerning material, formal and certain procedure questions about VAT: the national, with the ML and the SFL, and from the EU law – in the first place – the VAT Directive (2006/112). Those lacks are in my opinion attached to both the legislator and the Council on Legislation.[67]

- The scope and character of the lacks form in other words already with respect of the analysis in Forssén 2016 (1) a basis for that the entrepreneurs should, from a democracy perspective regarding power and right, demand a radical alteration of the process of The Making of Tax Laws. This alteration should in my opinion mean that the entrepreneurs would get the power over the words and concepts used in rules on VAT. Then must the entrepreneur not only be placed in the centre of the process of The Making of Tax Laws concerning VAT, but also be involved in the actual process, so that representatives of the entrepreneurs' organizations can participate in it. If that then shall be done by such a reform that I'm suggesting for systematic reasons in *Part A* of *The Entrepreneur and the*

[66] See sec. 3.5.
[67] In sec. 3.8.2 I get back to that the Council on Legislation may be deemed to have failed to fulfil its role in the process of The Making of Tax Laws.

Making of Tax Laws – A Swedish Experience of the EU law: *Second edition*, meaning that a second chamber should be installed in the Swedish Parliament for the entrepreneurs' organizations, is only a suggestion regarding form.[68] What's important is that a new system will mean that entrepreneurs and organizations in Sweden won't only be used as references in the process of The Making of Tax Laws. They must have the power over which words and concepts that are used in the tax rules made, and that demands in my opinion that the existing hegemony in the process of The Making of Tax Laws is abolished, so that the forming of concepts is made from below upwards, i.e. from those that shall be comprised by an imperative meaning 'pay tax' (Sw., '*betala skatt*') – the entrepreneurs. That the concepts are coming from the top downwards, i.e. from those who don't have a direct access to trade terms and aren't involved in developing such terms in the business- and organization world, can never guarantee the creation of legal certain VAT rules.

- The main thread in my criticism of the legislator in Forssén 2016 (1) is that the legislator is not just awaiting the development of current law and patch up rather than preventing *communication distortions*, but that the legislator is also lacking ambition to be active on the EU level with suggesting alterations of the VAT law. A legislator who has done his homework should be capable of adding Swedish experiences of VAT to the EU project, instead of passive awaiting and patch up in due time in the VAT legislation. According to my own experience the legislator has not responded on flaws in the legislation in the field that I have described in my theses and articles on the subject and even answered my e-mail about a gap in the law by stating that the Government rather awaits case law than acting upon my suggested alterations. Thereby is the Government also not interested of that it in the mean time may occur constructed activities that may impair the public treasury (Sw., *statskassan*). That's of course not to the benefit of the EU project, but works in my opinion against the realization of the aim to create an internal market. Therefore should the entrepreneurs be active with making demands that their *legal framework* for the activity that they are carrying out or intend to carry out is prioritized by the legislator where the VAT is concerned. Regardless whether the individual is for or against the EU, it's decisive for the entrepreneurs that the rules applying in the field of VAT are effective too, since the competition otherwise is distorted and the

[68] See sec. 3.1 and Forssén 2015 (1) Part A, sec. 2.4.

> internal market ceases to function – which also is to the disadvantage for the consumers. The entrepreneurs cannot wait together with an awaiting legislator for the legislator to create the presuppositions for enterprises in the present respect. If not the Government or the entrepreneur's representative in the Parliament does anything, should the entrepreneur and his organizations make a reference to the EU Commission thereby.

Furthermore I consider that the side purpose of Forssén 2016 (1) according to its sec. 1.2 is fulfilled, namely that the examples of *communication distortions* which have been treated also give practicians ideas to a broader choice of arguments for law questions about tax in court writs or at the writing of verdicts in tax proceedings and in criminal cases where tax is concerned.

Concerning procedural law I may by the way refer to sec. 3.5.4 of Forssén 2016 (1) and what's stated there about the question of the principle *ne bis in idem*, which is also mentioned in connection with the question about bitcoins in sec. 2.4. Regardless whether the legislator brings up at EU level, as Im suggesting in sec. 2.4, the question about activities with bitcoins or similar virtual currency that's carried out without permit from the FI, should – in accordance with what I'm invoking in sec. 3.5.4 of Forssén 2016 (1) – the legislator address the EU Commission, the European parliament and the EU Council about codifying in the Treaty of European Union (TEU) or in the TFEU the principle of the EU law's supremacy over national law. National authorities and courts should be made obligated to *ex officio* apply the EU law, when they, as is the case with the VAT, are bound by the EU law according to art. 288 second and third para:s TFEU.

Concerning the *ne bis in idem*-question current law is without nuances in my opinion concerning questions about tax surcharge (Sw., *skattetillägg*) and tax fraud (Sw., *skattebrott*) regarding the VAT after the case NJA 2013 p. 502, where *Högsta domstolen* (HD) – the Supreme Court – makes a distinction with respect of legal form insofar as the *ne bis in idem*-principle would apply when a natural person (Sw., *fysisk person*) carries out activity under *enskild firma* (Eng., sole proprietorship), but not if he's carrying out his business in a one-man limited company (Sw., *enmansaktiebolag* – one owner/board member and one deputy board member). The HD's standpoint is in my opinion in conflict with one of the fundamental law political aims for the Swedish tax system since the tax reform of 1990, namely the principle of neutrality in the taxation concerning legal form. The ambition was to create rules giving a

reasonable neutrality both in relation to the taxation of natural persons and the taxation of limited companies.[69]

I consider that the current procedural situation after the case NJA 2013 p. 502 means that if the EU law's supremacy over national law isn't codified, so that national authorities and courts are made obligated to *ex officio* apply the EU law in the field of VAT, the risk is that the competition- and consumption neutrality according to art. 113 TFEU and item 5 of the preamble to the VAT Directive (2006/112) is subdued at the trial of the principle of prohibition of double proceedings (*ne bis in idem*) concerning tax surcharge (Sw., skattetillägg) and tax fraud (Sw., *skattebrott*).[70] The following proves in my opinion that the legal certainty demands that it for procedural reasons is established that the EU law is fully regarded in tax proceedings and in criminal cases, when it's a matter of a field where – like concerning the VAT – the EU law governs the contents of the tax rules:

> In the HD's cases NJA 2010 p. 168 I and II, where the HD contrary to in the mentioned NJA 2013 p. 502 considered that the procedures on tax surcharge and on tax fraud wasn't in conflict with the *ne bis in idem*-principle, the Justice of the Supreme Court Stefan Lindskog stated on his part inter alia that *whether the Swedish order with double proceedings of and double sanction systems for an erroneous tax information is acceptable in a perspective of rule of law has in my opinion got an attentiveness that it in a material respect hardly deserves* (Sw., "*huruvida den svenska ordningen med dubbla prövningar av och dubbla påföljdssystem för en oriktig skatteuppgift är godtagbar i ett rättsstatligt perspektiv har efter min mening fått en uppmärksamhet som den i materiellt hänseende knappast förtjänar*"). The case NJA 2013 p. 502 shows that this was hardly a well balanced judgement of the Justice of the Supreme Court Lindskog – who by the way nowadays is the chairman of the HD.[71]

The statement is in my opinion hardly any guarantee for either legal certainty or development of the tax system. It proves that the need mentioned of securing the EU laws position in the court proceeding exists and that it as well exists a need of research being carried out on the theme of words and context in the EU law, which I'll come back to in sec. 3.8.3.

> For the context may be mentioned that after NJA 2013 p. 502 were alterations made in the SFL and *skattebrottslagen (1971:69)* – the Tax Penal

[69] See prop. 1989/90:110 Part 1 p. 517. See also Forssén 2015 (4) pp. 180 and 181.
[70] See also Forssén 2015 (4) pp. 189 and 190.
[71] See Forssén 2016 (3), 12 213 240.

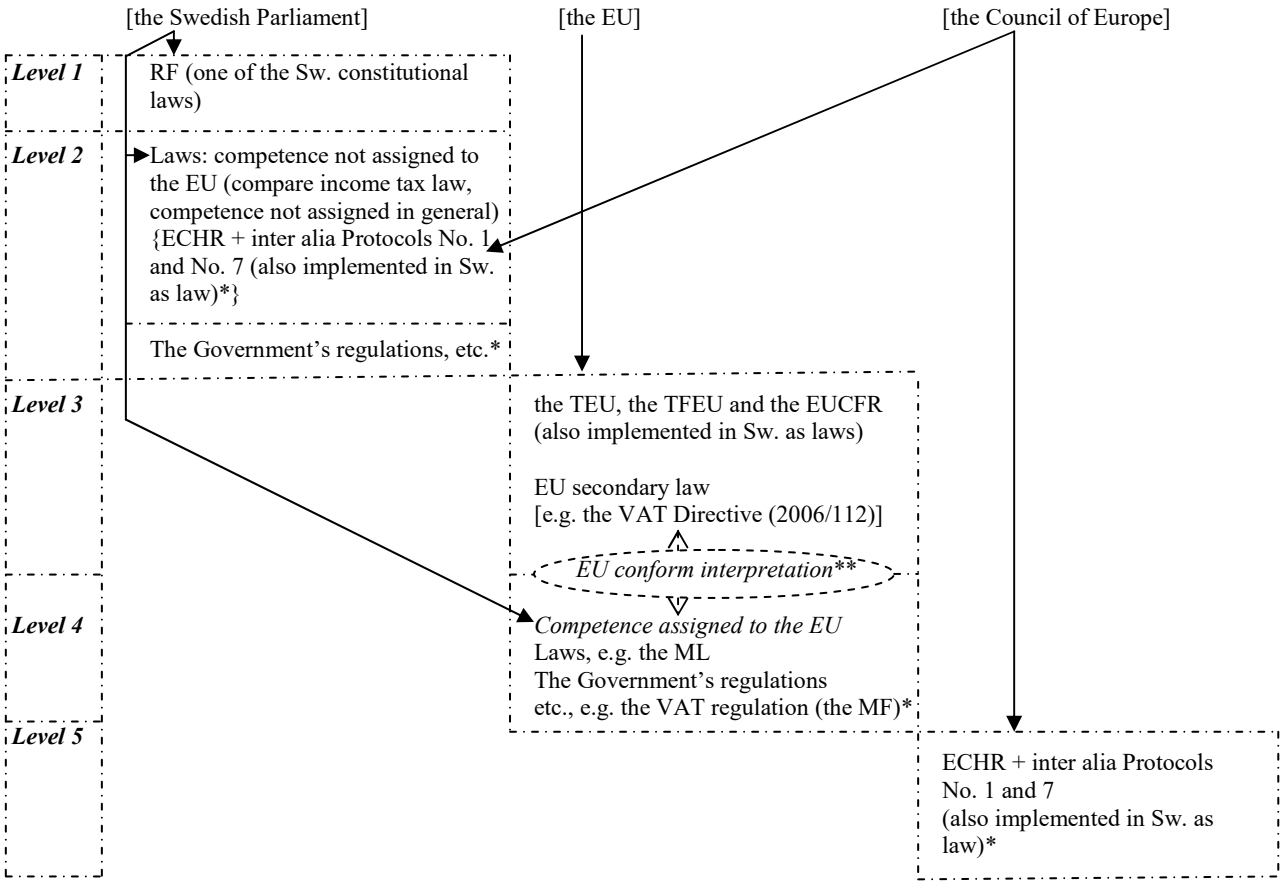
Act – on the 1st of January 2016, by SFS 2015:633 and SFS 2015:634, concerning the principle *ne bis in idem* regarding tax surcharge and tax fraud, but it didn't mean any clarification of the question of the importance of legal form thereby.

Concerning the demand that the legislator brings up on EU level about making national authorities and courts obligated to *ex officio* apply the EU law, when it's binding, I express here from another context something about the complex picture existing concerning the norm hierarchy regarding rules decided by the Swedish Parliament, the EU and the Council of Europe (Sw., *Europarådet*), and which I also here name the European staircase or the European stepladder (Sw., *Europatrappan*):[72]

All power emanates from the people. It's exercised under the laws, which are established the Swedish Parliament (Ch. 1 sec:s 1 and 4 RF). The Swedish Parliament doesn't make the rules in the European law: the EU law and the Convention law forms their own legal orders (*sui generis*). The TEU, the TFEU and the EU Charter of Fundamental Rights (EUCFR – the Charter) and the ECHR with inter alia its Protocols No. 1 and No. 7 are implemented in Sweden, but as ordinary laws – not constitutional laws. [The Lisbon treaty with the TEU and the TFEU – the treaties – and the Charter were implemented as ordinary law in Sweden on the 1st of December 2009, by SFS 2009:1110. By SFS 1994:1219 were the ECHR and inter alia its Protocols No. 1 and No. 7 implemented as law – not constitutional laws – in Sweden on the 1st of January 1995.] At law conflict constitutional law goes before law, according to Ch. 11 sec. 14 and Ch. 12 sec. 10 RF. Although the Swedish Parliament has assigned the EU's institutions competence in certain fields (Ch. 10 se. 6 RF), is the RF placed here higher than EU primary law (the TEU, the TFEU and the EUCFR), since an EU constitution never has come into effect. Within the EU law the primary law is set before the secondary law. Art. 6(2) TEU about that the EU shall join the ECHR has not yet been ratified; rights according to the ECHR are included only as general principles in the EU law [art. 6(3) TEU]. In the fields where the EU has been assigned competence is the EU law here set over the ECHR. The relationship between the Swedish sets of rules and those according to European law can – according to my suggestion – be illustrated as norm hierarchy staircase ("the European staircase"), where the rules decided by the Swedish Parliament, the EU and the Council of Europe are placed in order of preference and given their mutual relationships in ***five levels*** (where 1 is the highest and 5 is the lowest) according to the following:

[72] See Forssén 2015 (4) pp. 187 and 188.

”The European staircase”



*In Nergelius 2012 (p. 34) it's stated that it *at law conflict exists a weak presumption for the ECHR to have supremacy before other laws* (Sw., ”*vid lagkonflikt finns en svag presumtion för att EMRK ska ha företräde framför andra lagar*”). However, at rule competition I consider the question to be procedural: Does then the national court make in the case at hand a hypothecical trial of what judgement the ECtHR would do? However, here's the ECHR placed (together with inter alia its Protocols No. 1 and No. 7) before the Government's regulations, etc. (see Ch. 8 RF), except in the fields where the Swedish Parliament has assigned competence to the EU – compare the MF.

***EU conform interpretation* (various interpretation results)
- *Alt. 1*: EU conform interpretation means an interpretation in two steps. If the actual question concerns the application of e.g. a rule in the ML, the corresponding rule in the VAT Directive (2006/112) that shall be implemented in the ML. Thereafter is the law rule interpreted to judge whether its meaning fits within the frames that follows by the interpretation that's been made of the directive rule. If that's the interpretaion result, the individual can invoke the directive rule to his advantage, if it has direct effect. However, it's, as mentioned, unclear whether national authorities and courts are obligated to *ex officio* apply the EU law before the national law rule. By the way is in my opinion that relationship not complying with the investigation responsibility that rests upon the SKV and the administrative courts according to Ch. 40 sec. 1 SFL and sec. 8 first para. of *förvaltningsprocesslagen (1971:291)* – the Administration Procedural Act.

- *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 rules wording – which, as mentioned in sec. 4.2 of Forssén 2016 (1), is CJEU's opinion too. Thus, in such a case can the directive rule not be enforced against the individual's will.
- *Alt. 3*: Another situation, which above all concerns the right of deduction of input tax, raises the question if the state is protected against a rule in the ML whose wording expands the individual's rights in excess of the result that shall be achieved with the VAT Directive (2006/112): The rule is not even EU conform (art. 288 third para. TFEU), but constitutes a national creation that lacks correspondence in the directive rules. The state should be deemed having the protection mentioned, if the interpretation result e.g. becomes so extreme that the law rule gives *the consumer* right of deduction of input tax. That interpretation result must be considered not being protection worthy for the individual by the RF. Instead should the national courts *de sententia ferenda* redefine legal facts, so that the legal consequence will be that the right of deduction according to the law rule cannot be exercised. The state should be protected against abusive practice (Sw., *förfarandemissbruk*) that leads to right of deduction being exercised in conflict with the basic idea with the VAT mentioned in sec. 3.3.1 of Forssén 2016 (1), namely that the consumer shall be distinguished from the entrepreneur, when it's a matter of determining who's comprised by the VAT's liabilities *and* rights. Since the situation means a breach of the VAT Directive (2006/112), can furthermore the EU Commission or another EU Member State start a procedure on breach of treaty against Sweden at the CJEU.[73]

My point with presenting something in Forssén 2016 (1) about my reasoning regarding *the European staircase* is to show the following. Above all as long as national authorities and courts aren't made obligated to *ex officio* apply the EU law, when it's binding, must a description of the norm hierarchy in the tax field contain the procedural implication that that relationship means to the description. By the way may be mentioned that in the draft of the EU constitution, which was approved in 2004 but never ratified by all the EU Member States, it was suggested that the principle of the EU law's supremacy over national law would be codified.[74] However, this was not done in the reform treaty, i.e. the Lisbon treaty.[75]

3.8.2 Something about legal certainty[76]

On the theme of legal certainty I may concerning the two questions on gaps in the law according to sec. 3.5 mention something about the so-called institute of relieve of tax in Ch. 60 sec. 1 SFL, which is mentioned in sec. 3.8.1, and thereby to a certain extent connect in the following to what I thereby has stated in another context.[77] Based on the gaps in the law regarding *tullagen (2016:253)* – i.e. the Swedish customs act – and regarding the wording before the 1st of July 2013 of

[73] See inter alia pp. 88, 95 and 96 of Forssén 2015 (3) and also e.g. sec. 3.3.1 of Forssén 2016 (1).
[74] See art. I-10.1 of the draft of an EU constitution.
[75] See Forssén 2015 (4) p. 185.
[76] See Forssén 2016 (1), sec. 5.2.8.2.
[77] See Forssén 2016 (3), 12 213 164.

Ch. 2 a sec. 3 first para. item 3 ML I make in this sec. certain legal certainty reflections especially regarding the institute of relieve of tax in Ch. 60 sec. 1 SFL and the institute of law trial in *lag (2006:304) om rättsprövning av vissa regeringsbeslut* (Eng., the law on law trial of certain Government decisions).

Regarding the institute of relieve of tax may be mentioned that it provides an opportunity to get relieve of tax deduction (Sw., *skatteavdrag*), employer's contribution (for national social security purposes) [Sw., *arbetsgivaravgifter*], VAT and excise duties, which follows by Ch. 60 sec. 1 SFL, which reads as follows:

> *If there are pronounced reasons, may the Government or the authority that the Government decides fully or partly grant relieve from*
> 1. *the payment liability according to Ch. 59 sec. 2 for he who has not made tax deduction with the correct amount, and*
> 2. *the liability to pay employer's contribution, VAT or excise duty*.[78]
>
> *If a decision of relieve is made according to the first para. may a corresponding relieve be made from demurrage, tax surcharge and interest*.[79]

Thus, the presupposition for relieve is that pronounced reasons exist. In the rule it's stated that the Government or the authority that the Government decides fully or partly may grant relieve from inter alia the liability to pay VAT, if there are pronounced reasons. It's according to Ch. 13 sec. 12 *skatteförfarandeförordningen* (2011:1261), SFF – i.e. the regulation of taxation procedure – by the SKV (its head office) that such an application shall be filed. The SKV's decisions can then be appealed to the Government, according to Ch. 67 sec. 6 SFL.

According to the wording of Ch. 60 sec. 1 SFL it seems to be output tax that's meant with VAT, since therein is stated an opportunity of relieve from the liability to *pay* VAT etc.[80] Thereby is according to the legislator regarded, as mentioned in sec. 3.5, only the liability to pay tax to the state.

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[78] Sw., "*Om det finns synnerliga skäl, får regeringen eller den myndighet som regeringen bestämmer helt eller delvis medge befrielse från*
1. *betalningsskyldigheten enligt 59 kap. 2 § för den som inte har gjort skatteavdrag med rätt belopp, och*
2. *skyldigheten att betala arbetsgivaravgifter, mervärdesskatt eller punktskatt*."

[79] Sw., "Om beslut om befrielse fattas enligt första stycket får motsvarande befrielse medges från förseningsavgift, skattetillägg och ränta."

[80] See prop. 2010/11:165 Part 2 p. 1012 and SOU 2009:58 Part 3 pp. 1359 and 1360.

That it thus is the seller that according to Ch. 60 sec. 1 SFL can apply for relieve from having to charge and pay output tax on his sale is also clearly confirmed by the preparatory work to the nearest predecessor to Ch. 60 sec. 1 SFL, i.e. the preparatory work to Ch. 13 sec. 1 *skattebetalningslagen* (1997:483), SBL.[81] Therein it's stated that with such a *pronounced reason* (Sw., *synnerligt skäl*) that could lead to *relieve from payment of VAT cannot be meant cases where the tax liable has charged his customers for the tax* (Sw., "*befrielse från betalning av mervärdesskatt kan inte anses fall då den skattskyldige har tagit ut skatten av sina kunder*").[82] A buyer's application for relieve from paying input tax will be rejected by the SKV and the Government.

Of interest concerning the application of the institute of relieve according to Ch. 60 sec. 1 SFL regarding VAT is a comparison with Ch. 2 sec. 20 *tullagen* (2016:253),[83] which reads as follows:

> *If there are pronounced reasons, the Government or the authority that the Government decides grant reduction of or relieve from another tax than customs*.[84]

In connection with the introduction of the SFL on the 1st of January 2012 the phrase that existed in Ch. 13 sec. 1 second para. SBL, meaning that the institute of relieve also applied to VAT that shall be paid to the Customs (Sw., *Tullverket*) at import of goods (and when excise duty shall be paid to the Customs), didn't get an equivalent in Ch. 60 sec. 1 SFL. The legislator referred, regarding the reasons for that, to the investigation's report.[85] There it's stated that the SFL shall not be applied on such a tax, since it's instead *tullagen* that shall be applied and it will be unclear if the SFL and *tullagen* overlap each other. Therefore it was suggested that the SFL wouldn't contain any rule on tax – e.g. VAT – that shall be paid to the Customs.[86]

However has after the SFL was introduced in 2012 an order been inserted on the 1st of January 2015, by SFS 2014:50 and SFS 2014:51,

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[81] The institute of relieve was from the beginning to be found in sec. 76 GML, which was transferred to Ch. 22 sec. 9 ML and was by the introduction on the 1st of November 1997 of the tax account system (Sw., *skattekontosystemet*) transferred to Ch. 13 sec. 1 SBL, and came then to apply to certain taxes and fees beside VAT. By the introduction on the 1st of January 2012 of the SFL, which replaced inter alia the SBL, the institute of relieve was transferred to Ch. 60 sec. 1 SFL.

[82] See prop. 1996/97:100 Part 1 p. 596.

[83] *Tullagen (2016:253)* replaced on the 1st of May 2016 *tullagen* (2000:1281).

[84] Sw., "*Om det finns synnerliga skäl, får regeringen eller den myndighet som regeringen bestämmer medge nedsättning av eller befrielse från annan skatt än tull*."

[85] See prop. 2010/11:165 Part 2 p. 1012, where that reference is made to *the report p. 1359 etc*. (Sw., "*betänkandet s. 1359 f*").

[86] See SOU 2009:58 Part 3 p. 1360.

where *import-VAT* (Sw., ”*importmoms*”) is comprised by the procedure according to the SFL and is taken out by the SKV for those who are VAT-registered here, whereas the Customs (Sw., *Tullverket*) otherwise still is the taxation authority for import and thus also for inter alia *import-VAT* thereby. Thus, there should in my opinion be introduced an equivalent to the second para. of Ch. 13 sec. 1 SBL into Ch. 60 sec. 1 SFL, so that the institute of relieve is applicable on such *import-VAT* that's no longer comprised by tullagen but by the SFL. I thereby refer to *the Union Customs Codex, UCC* (Sw., *unionstullkodexen*) [regulation (EU) No. 952/2013], which since the 1st of May 2016 shall be applied together with *tullagen* (2016:253), and whereof it follows that the customs return shall be filed to the Customs, except in certain special cases, by *a person making a return* (Sw., *deklarant*) established within the Union's customs territory.[87]

In the preparatory work to the SBL it was stated as an example of pronounced reasons for relieve according to Ch. 13 sec. 1, that it would be a question of a foreign entrepreneur, who isn't registered himself to VAT in Sweden, but who has paid *import-VAT* here and later on cannot be compensated for that by his Swedish customer due to the customer having gone bankruptcy.[88] Such a situation should in my opinion belong in the SFL, and Ch. 60 sec. 1 therein. That such a second para. like in Ch. 13 sec. 1 SBL hasn't yet been inserted into Ch. 60 sec. 1 SFL is thus another example of *obscurities on behalf of the legislator on the theme of words and context in connection with the process of the making of tax rules*.

The recently mentioned is however not so surprising with respect of the answer I received from the Treasury as a response to that I on 2014-12-12, as mentioned in sec. 3.5, notified about the gap in tullagen concerning the mentioned altered procedure in 2015 meaning that the SKV then took over the VAT-taxation of a certain kind of import from the Customs (Sw., *Tullverket*. I refer in this sense to the other example of gap in the law mentioned in sec. 3.5, i.e. concerning the law alteration on the 1st of July 2013 in Ch. 2 a sec. 3 first para. item 3 ML, by SFS 2013:368, where the legislator stated that the alteration of the word *skattskyldig* (Eng., tax liable) to *beskattningsbar person* (Eng., taxable person) just should be deemed to have concerned the accomplishment of an improved *formal* (Sw., *formell*) correspondence with what's stipulated about UIF of goods in art. 2(1)(b) of the VAT Directive (2006/112),

[87] Compare regarding art:s 170(2) and 170(3) of the UCC: prop. 2015/16:79 p. 113 and SOU 2015:5 p. 105. Compare also Ch. 1 sec. 2 first para. item 6 and fifth para. ML, their wordings according to SFS 2016:261.

[88] See prop. 1996/97:100 Part 1 p. 596. The described situation for a foreign entrepreneur was also one of few examples of relieve from VAT according to sec. 3 in RSV Im 1982:3.

despite that the concept *skattskyldig* (Eng., tax liable) in the previous wording of Ch. 2 a sec. 3 first para. item 3 ML has been a decisive question in a number of tax- and tax fraud proceedings from the time before the 1st of July 2013. The question is in my opinion whether it first must exist various constructed activities and an arbitrary setting aside of the principle of legality for taxation measures in the RF in proceedings where the state and the prosecutor are getting problems with that principle, for the legislator to thereafter patching up in retrospect with such unrealistic statements as the recently mentioned concerning altered wording of the main rule for UIF.

In the latter context I may furthermore especially mention that there's nothing that would indicate that calculated output tax on a UIF would be disqualified for trial by the SKV, with possibility to appeal to the Government, by application of the institute of relieve in Ch. 60 sec. 1 SFL. In the criminal case that I especially mention in sec. 3.8.1 of Forssén 2016 (1), i.e. the *Svea hovrätts* (Eng., Svea court of appeal) case B 1378/96, the HD refused an appeal for a new trial (Sw., *resningsansökan*) – the HD's case No. Ö 257-99 without finding any *reason to obtain preliminary ruling from the CJEU* (Sw., "*anledning inhämta förhandsavgörande från EG-domstolen*"), when the verdict in the Svea court of appeal meant that the principle of legality was set aside, despite that the asserted tax fraud (Sw., *skattebrottet*) consisted of the liability to account for calculated output tax on UIF was set aside with respect of the wording then of Ch. 2 a sec. 3 first para. item 3 ML and at the time the other involved EU Member State didn't stipulate VAT liability for the goods in question. Although neither the HFD nor the HD are constitutional courts, it's in such a case of interest to regard the possibilities of law trial (Sw., *rättsprövning*) by the HFD. With respect of the examples on *communication distortions* that I've described in Forssén 2016 (1) it's not unfounded to speak of the existence of a number of unrecorded cases (Sw., *mörkertal*) that would be needed to try, but where the demand of review dispensation (Sw., *prövningstillstånd*) in the highest instance, e.g. in the HFD, presents an obstacle for a trial of e.g. erroneous written tax rules, by the HFD issuing a short 'no review dispensation' at an appeal of a verdict in someone of the administrative courts of appeal (Sw., *kammarrätterna*).

The HFD tries applications of law trial, and that applies according to the law on law trial of certain Government decisions [Sw., *lag (2006:304) om rättsprövning av vissa regeringsbeslut*]. That law came into force on the 1st of July 2006, whereby *lagen (1988:205) om rättsprövning av vissa förvaltningsbeslut* was revoked. By that law followed that e.g. law trial could be made of whether an administrative authority's (Sw., *förvaltningsmyndighets*) decision concerning e.g. the principle of legality for taxation measures in the RF was in conflict with any law

rule in such a way that the applicant stated, and there was no other possibility for trial, e.g. by mentioning in the decision that it couldn't be appealed. That possibility is nowadays by and large gone in the field of taxation, since the new law introduced on the 1st of July 2006 only concerns law trial of certain Government decisions. However, the public seeking for legal judgement should have the possibility to refer a question like the one on application of the main rule on UIF according to its wording before the 1st of July 2013 to the HFD, by first trying it in accordance with Ch. 60 sec. 1 SFL via the SKV up to the Government.

That the Council on Legislation (Sw., *lagrådet*) in connection with the introduction of the SFL in 2012 didn't react about those legal certainty questions about the VAT gives me additional confirmation of the conception in sec. 3.8.1 that the Council on Legislation has played out its role in the process of The Making of Tax Laws. The Council on Legislation should, in connection with the law alteration in 2015 meaning that *import-VAT* for VAT-registered shall be comprised by the SFL instead of *tullagen*, have reacted on that the for legal certainty so important rule Ch. 60 sec. 1 SFL lacks an equivalent to the second para. in Ch. 13 sec. 1 SBL. If now the Council on Legislation shall work wit legal certainty questions in the process of The Making of Tax Laws, that work should have become more important when the new law on law trial from 2006 by and large means that the law trial institute is reserved for Government decisions, and the institute of relieve in Ch. 60 sec. 1 is the rule in the SFL that can be comprised by Government decisions. It means in my opinion a major legal uncertainty that neither the legislator nor the Council on Legislation did react on the law alteration in 2015 meaning that the institute of relieve isn't applicable to such an *import-VAT* that no longer is comprised by *tullagen* but by the SFL, as long as Ch. 60 sec. 1 SFL doesn't provide an equivalent to the second para. in Ch. 13 sec. 1 SBL. The legislator's and the Council on Legislation's inadequacy is particularly troublesome since an application for law trial by the HFD can be an alternative to an application by the ECtHR after the possibilities of national remedies are exhausted, but then must the individual first have been able to apply for relieve of the *import-VAT* according to Ch. 60 sec. 1 SFL by the SKV and moved on to the Government.

That the Council on Legislation is no guarantor for upholding the constitutional dimension of the concept democracy I began to suspect in 1998. Then I stated in an article that the Council on Legislation had not done its work thereby in connection with the review of a wealth tax rule in relation to the prohibition of retroactive tax legislation in Ch. 2 sec. 10 second para. RF. The main owners in quoted companies (Sw., *börsbolag*) had an exemption, whereas ordinary shareholders were taxed. The chairman of the Council on Legislation at the time, Stig von

Bahr, answered in an article that I should address my criticism to the design of the RF, not against the Council on Legislation. That main owners in quoted companies were exempted from taxation, when companies on the Stockholm stock exhange (Sw., *Stockholms fondbörs*) were moved from the A-list to the OTC- or O-lists, to avoid wealth tax, was not all commented by the chairman of the Council on Legislation.[89]

The review of the questions in Forssén 2016 (1) has to me meant a confirmation that what I suspected in 1998 was more serious than I could imagine: The lacks that I've mentioned in the process of The Making of Tax Laws should have led to reactions from the Council on Legislation, which in my opinion must be considered having played out its role in that process. The Council on Legislation can at best be expected to give legitimacy to corporativism in parliamentary politics, where the ordinary citizen, e.g. the small business entrepreneur, isn't a player who counts. After the review conducted I cannot find that the Council on Legislation is any guarantor for observing legal certainties in the process of The Making of Tax Laws.

3.8.3 Something about the continuation of the research project and some general reflections regarding the tax law research[90]

In sec. 1.1.1 of Forssén 2016 (1) I mention the research project I'm planning at Örebro University, *Användningen av skattemedel* (Eng. the use of tax revenues).[91] *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law*: *Second edition*[92] can be considered a pre study to it. Forssén 2016 (1) can be seen as a continuation of the second last part therein, i.e. *Part D, Communication Distortions within tax rules and Use of language in law*. That part concerns, as mentioned in sec. 1.1.1 of Forssén 2016 (1), the *law and language*-perspective on the process of the creation of a tax rule.

Forssén 2016 (1) develops that perspective on *The Making of Tax Laws*, and when I continue with analysis models to discover risks for *communication distortions*, which I'm writing about in *Part D* in *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law*: *Second edition*, my thought is to refer to what I'm writing about concerning the various problems regarding words and context in the EU tax law in Forssén 2016 (1). I will probably do so after or during that I've continued with *Användningen av skattemedel* (Eng., the use of

[89] See art:s: Forssén 1998 p. 509-517 and von Bahr 1998 pp. 701-702. See also my commentaries of the phenomenon, with reference to the two art:s, in Forssén 2015 (1) Part A, sec. 2.3 (pp. 31 and 32).
[90] See Forssén 2016 (1), sec. 5.2.8.3.
[91] See www.oru.se.
[92] Forssén 2015 (1).

tax revenues), which will be an extension of the last part of *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law*: *Second edition*, i.e. *Part E, Ideas about fiscal sociology studies by aspects on economics or sociology that may be influenced by the experiences from parts A-D*.

By the way I may refer to sec. 3.8.1 and my conception that there's a need of research being carried out on the theme of words and context in the EU tax law, and mention the following.

If not the tradition with by and large pure law dogmatic studies is interrupted within the tax law research, the legislator's possibilities to discover *communication distortions* won't be improved. However, such a measure doesn't need to mean that the tax law research is dedicated to either such studies or pure empirical studies like in Forssén 2016 (1). One thing doesn't have to rule out the other, but law dogmatic studies to deem current law concerning tax laws can of course be combined with an empirical analysis.[93]

What in my opinion is typically objectionable is analyses of the tax law which are made without or with very limited elements of application questions. That's in my opinion mathematics and not tax law research to any worldly good. However, it's relevant with a mathematical thinking e.g. where it's a matter of dealing with logical interpretation problems, like what follows by the example in sec. 2.4 of Forssén 2016 (1), and, which I mention in my introduction of *The Making of Tax Laws*, to build models for discovering *communication distortions*, which I describe in *Part D* of *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law*: *Second edition* with inter alia the following commentary:

> "Thus, in this chapter I'm trying to make a pedagogy reasoning about models – tools – to function as methods to support a decrease of risks of *communication distortions* occurring in the process of the making of tax laws by detecting such risks".[94]

At least should in my opinion e.g. the VAT be subject to research with respect of not only material taxation rules, but also with regard of inter alia procedure questions, so that words and context are given a true meaning. For example Sonnerby 2010 lacks nothing in particular from a material viewpoint – however I consider that the procedure rules on VAT could have been mentioned more therein on the theme of neutrality. The

[93] See Forssén 2016 (1), sec. 2.5.
[94] See Forssén 2015 (1) Part D, sec. 3.1 (p. 167). See also Forssén 2016 (2), sec. 3.1 (p. 23).

question is e.g. if the procedure rules can be allowed to affect the principle of neutrality in the material rules for the choice of legal form at the corporate taxation.[95] That question is inter alia of interest due to that the HD, which is mentioned in sec. 3.8.1, in NJA 2013 p. 502 makes a distinction concerning in what legal form an entrepreneur is carrying out his business, where the scope of the principle of prohibition of double proceedings (*ne bis in idem*) regarding tax surcharge (Sw., *skattetillägg*) and tax fraud (Sw., *skattebrott*) is concerned.

Henkow 2008 is in my opinion an example of law dogmatic studies of a limited value for the application of the law. In sec. 3.5.3 of Forssén 2016 (1) I mention that the SRN in the case HFD 2016 ref. 6 – which also is mentioned in sec:s 2.4 and 3.4 – didn't find anything therein for the VAT judgement of exchange services and bitcoins, but that Henkow 2008 only has treated the expression *legal* (Sw., *lagligt*) means of payment in connection with bills and coins. In my opinion would Henkow 2008 hardly been of any guidance even if bitcoins had existed when that thesis was written, since it in Henkow 2008 inter alia is made an obscure description of the concept of money (Sw., *pengar*). Therein is money described as a precise concept – with three functions.[96] The report on electronic money SOU 1998:14 states instead that it's an example of a terminology having various meanings concerning what's alternately used to be meant with *pengar* (Eng., money): *kontanter* (Eng., cash), *bokpengar* (Eng., book-money), *räkneenheter* (Eng., arithmetical units), *värdemätare* (Eng., measure of value), *betalkraft* (Eng., payment-power) and *instrument* (Eng., instruments).[97] Henkow 2008 doesn't contain anything about that report. The report SOU 1998:14 and another report that is neither mentioned in Henkow 2008, SOU 1989:35, show that interest (Sw., *ränta*) is a vague (Sw., *vagt*) concept, whereas it's stated in Henkow 2008 that interest is also a precise concept – with three component parts.[98] It's inter alia such lacks in Henkow 2008 that make me deeming that it would probably not have helped the HFD or the SRN in HFD 2016 ref. 6, for the VAT judgement of exchange services and bitcoins, if Henkow 2008 had been written after the invention of bitcoins. To write about financial services and VAT without thoroughly judging concepts like money and interest gives a result of limited use – it will at

[95] See Forssén 2016 (3), 12 213 240.

[96] See Henkow 2008 p. 48, where it's stated that att *money* (Sw., *pengar*) serves three functions: "as a medium of exchange, a unit of account and as a store of value". Compare also sec. 3.5.3 of Forssén 2016 (1) and Forssén 2016 (3), 12 213 153.

[97] See SOU 1998:14 p. 22. Compare also Furberg et al. 2000 p. 25, where the concept *pengar* (Eng., money) is also described as having various meanings (Sw., *mångtydigt*) and being vague (Sw., *vagt*). Compare also sec. 3.5.3 of Forssén 2016 (1) and Forssén 2016 (3), 12 213 153.

[98] See Henkow 2008 p. 54: "…the interest is thus composed of a pure interest payment, a pure risk premium and a fee to the bank." Compare also Forssén 2016 (3), 12 213 240.

the most be a matter of mathematics. The field of VAT and financial service is by the way very vast, and I describe it as by and large being a blank where research is concerned – for example could private law options (Sw., *privaträttsliga optioner*) have been analyzed thereby.[99]

If the research is not made as empirical studies with the approach that I've introduced, by *The Making of Tax Laws* as a branch within *fiscal sociology*, should the tax law research at least be carried out so that also application questions are treated. For the legislator it's a matter of being able to discover and take measures about e.g. such a matter as an imperative *to pay VAT* (Sw., *betala moms*) mustn't be based on accounting rule, like what I'm stating in sec. 3.7 concerning Ch. 13 sec. 28 a ML: It's not in compliance with the principle of legality for taxation measures in Ch. 8 sec. 2 first para. item 2 RF that a bankrupt's estate (Sw., *konkursbo*) is made liable to pay 'adjustment VAT' (Sw., '*jämkningsmoms*') according to Ch. 8 a by support of the accounting rule Ch. 13 sec. 28 a ML.

One use to say that the power of tradition is strong. The statement of the Justice of the Supreme Court in the case NJA 2010 p. 168 I and II, which I'm mentioning in sec. 3.8.1, shows that the legislator cannot count on any dynamics from the HD for the benefit of strengthening the legal certainty for the individual and for the development of the tax system. The same proves what I'm relating in sec. 3.8.2 about the, for such aspects, pointless answer from the Council on Legislation's chairman concerning the exemption from wealth taxation in 1998 of main owners in quoted companies (Sw., *börsbolag*) that I then raised in an article. The same passive attitude are the SRN and the HFD showing in HFD 2016 ref. 6, when their members aren't going further with an own deeper analysis of the question about VAT in connection with exchange services and bitcoins. When Henkow 2008 didn't give any guidance they are skipping over for example Rendahl 2009, which as well as Henkow 2008 could have been of guidance. Why only refer to one example of doctrine on the subject VAT that was close at hand with respect of its aim? Instead does, as mentioned in sec. 3.4, the SRN the simplification that exemption from taxation according to Ch. 3 sec. 9 ML can be motivated due to that bitcoins *is a means of payment* (Sw., *är ett betalningsmedel*) that *shows great similarities with electronic money* (Sw., *visar stora likheter med elektroniska pengar*). The SRN and above all the HFD, after the of little value guiding preliminary ruling from the CJEU in the case C-264/14 (Hedqvist), should have made an own deeper analysis, and they would have, as mentioned in sec:s 2.4 and 3.4 and in sec. 3.5.4 of Forssén 2016 (1), been able to conclude that it's not correct. The SRN's

[99] Compare Forssén 2016 (1), sec. 4.4.

statement is only giving an impression of a well balanced and thereby legally certain judgement in the case.

Thus, in my opinion there is altogether nothing solid for the legislator to lean against, where the description of current law in the field of VAT by the precedent instances, the Council on Legislation and the tax law research is concerned. The tradition with law dogmatic studies within the tax law leads in my opinion to that there – although unconscious – will evolve an unholy hegemony between the academic world and the highest instances of the courts, who use to obtain law investigations from the researchers.[100] Within the corporate taxation this means that small enterprises who aren't any strong lobbyists – and hardly can expect any special treatment by exemption – are at risk to be subjects to a from a corporate taxation law power and right-perspective structural discrimination. Research within the field of *fiscal sociology* would in my opinion in a decisive way contribute to obstruct this.[101] It could be a decisive support for small enterprises that the legislator gets impulses to reforms of the tax rules, for example by my aim of research on *fiscal sociology*, i.e. *The Making of Tax Laws*, so that rules can be created which as far as possible lacks *communication distortions*.[102]

If not the entrepreneurs themselves take their responsibility and try to affect the legislator, as I'm suggesting in sec. 3.8.1, the researchers – whose activity enjoys a freedom protected in accordance with Ch. 2 sec. 18 second para. RF – have in my opinion a responsibility to give impulses of renewal to the legislator. Then the legislator can get impulses to – as I'm stating e.g. in sec. 3.4 concerning the ambition to obstruct that bitcoins are used to hide barter transactions or exchange of assets (Sw., *byteshandel*) which are taxable – bring up on EU level that equilibrium solutions on a need to make rule alterations in the field of VAT can demand that other considerations than finance political are made too. Thereby shows in my opinion the review in Forssén 2016 (1) that *The Making of Tax Laws* can contribute to develop the EU project. A main thread is that it shows that the existing process of the making of tax laws, as mentioned in sec. 3.8.1, above all cannot ensure that Sweden's EU accession in 1995 means that two sets of rules must be regarded at the determination of current law concerning material, formal and certain procedure questions about VAT: the national, with the ML

[100] If the phenomenon was conscious, I would describe it as an unholy alliance. However, I'm not implying any conspiracy theory, so I use the expression unholy hegemony. See also Forssén 2016 (3), 12 213 240.
[101] *Fiscal sociology* may also contain a gender-perspective on small enterprises, whereby I refer to what's stated about structural inequality (Sw., *strukturell ojämlikhet*) in Gunnarsson and Svensson 2009 p. 209. See also Forssén 2016 (3), 12 213 240.
[102] See also Forssén 2016 (3), 12 213 240.

and the SFL, and from the EU law – in the first place – the VAT Directive (2006/112).

Research on *The Making of Tax Laws* concerns the process of the making of tax laws and not in the first place to accomplish a good application of the law (Sw., *god rättstillämpning*).[103] It's instead a matter of creating good technocracy (Sw., *god teknokrati*) in the process of the making of tax laws. In a state based on the rule of law there should not exist any contradiction between the state's interest of that it shall exist monetary political as well as finance political considerations and to ensure the individual's legal certainty in the mentioned respect. By *The Making of Tax Laws* the tax law research is given a in relation to other subjects more open paradigm that previously, so that the legislator can get impulses to tax reforms that he's not getting today from either the mainly law dogmatic research in the field of taxation or from verdicts in the HFD.[104] It's a matter of giving the legislator a tool – models – to be able to discover, as I'm stating in sec. 3.8.1, if there exists or is a risk of an emergence of *communication distortions* as well concerning the visible part of the iceberg, i.e. regarding current law in a true sense, as concerning the iceberg's invisible part, i.e. whether it under the surface exists an actual current law expressed primarily in the SKV's handbooks and so-called standpoints (Sw., *ställningstaganden*) and which has never even been tried by the administrative courts. By such a simple model as the figure in sec. 3.2.1 of Forssén 2016 (1) over how the VAT's liabilities and rights are connecting the legislator could at the reform on the 1st of July 2013 have realized the need of not only inserting the VAT Directive's *beskattningsbar person* (Eng., taxable person) in Ch. 4 sec. 1 ML, but also to replace *skattskyldighet* (Eng., tax liability) in the rules on right of deduction in Ch. 8 ML with the same concept. I reproduce below the same figure from sec. 3.2 of Forssén 2015 (3):

[103] See Forssén 2016 (1), sec. 1.1.2.
[104] Compare Forssén 2015 (1) and Forssén 2016 (2) and Forssén 2016 (3), 12 213 240.

Persons			
(1) *Taxable person* (carries out independently an economic activity)			*Others are consumers/tax carriers*
Supply of goods or services			Not right of deduction/ reimbursement of input tax
(2) *Taxable*	*From taxation qualified exempted*	*From taxation unqualified exempted*	
(3) Right of deduction of input tax	Right of reimbursement of input tax	Not right of deduction/reim-bursement of input tax	
Purchase which is comprised by prohibition of deduction: Not right of deduction/reimbursement of input tax			

Commentary to the figure above:

> The figure gives a very simple illustration of the connection between the right of deduction (3) and the liabilities according to the VAT system. A taxable person (1) who intends to carry out taxable supplies of goods or services (2) with his acquisitions has the right of deduction of input tax on those acquisitions (3). When he makes taxable supplies of goods or services (2) he's liable to account for and pay VAT (output tax) to the state. These are in short the main rules of the VAT system according to the VAT Directive (2006/112), i.e. it's the main components of the VAT according to the EU law.[105] The figure illustrates quite clearly for e.g. the legislator that the concept tax liability (Sw., *skattskyldighet*) as a prerequisite for the emergence of the right of deduction according to the main rule Ch. 8 sec. 3 first para. ML doesn't comply with the VAT Directive (2006/112), since the corresponding rule in the VAT Directive (2006/112), i.e. art 168(a), contains the concept taxable person (Sw., *beskattningsbar person*).

By developing in the tax law research analysis models for the discovery of *communication distortions* the research would be teaching the powers, i.e. the legislator. I make in that respect a comparison with the Swedish Enlightenment's Johan Henric Kellgren (1751-1795), who in the 1700's argued for the abolishment of the guild system (Sw., *skråväsendet*) in favour of freedom of trade (Sw., *näringsfrihet*), and stated that the resistance came from *poorly educated governments* [Sw. (note, old language), *illa uplyste Regeringar*].[106] It took until half a century after Kellgren's death, before this was done. Entrepreneurs and innovators should, in line with what I'm stating in sec. 3.8.1, not have to wait that

[105] Compare also Forssén 2015 (3), sec. 3.3.
[106] Compare Kellgren 1784 p. 10. See also Forssén 2016 (3), 12 213 240.

long to get the power over which words and concepts are used when tax rules are created. That won't benefit the evolvement of the business world and the tax system who jointly shall meet the fast development with bitcoins and other things that we today hardly even van begin to imagine. The research should therefore contribute to a development that interrupts the thus far existing hegemony in the process of the making of tax laws, so that the forming of concepts is made from below upwards, i.e. from those who are making the innovations and also shall be comprised by an imperative meaning 'pay tax' (Sw., '*betala skatt*') – the entrepreneurs.

To meet the development there's in my opinion a need to regard both the indirect taxes' history and future in the research. Then the perspective of the determination of the tax object should be more developed in that respect than what's the case concerning money and interest in Henkow 2008. For comparative studies should also the selection for comparison with countries outside the EU (third countries) give a more interesting effect of contrast than what's the case in Rendahl 2009.[107]

In Rendahl 2009 is VAT on the EU level compared with *goods and services tax* (GST) in Australia and Canada.[108] If two countries outside the EU with the same English law legacy as the two mentioned shall be chosen – if that at all shall be a criterion of selection – could the USA and New Zealand been chosen, since the USA has so-called *sales tax*, a gross tax similar to the general tax on goods in Sweden that was the predecessor to VAT,[109] whereas New Zealand has a simple in principle correct VAT insofar as it's lacking a differentiation of the VAT rate.[110] If Canada still would have been chosen, it could have been combined with the USA, to judge whether the NAFTA-countries, USA, Canada and Mexico, form an internal market with a common VAT system like the EU's.[111] Why not – for the same reason – choose to compare the EU with the USA and Mexico, since Mexico – like the EU Member States – has one single VAT?[112] To not letting the English language govern the choice, could

[107] Compare Forssén 2016 (3), 12 213 153 and 12 213 240.
[108] See Rendahl 2009 p. 10. Compare also Forssén 2016 (3), 12 213 240.
[109] See sec:s 2.2 and 3.2. Compare also Forssén 2016 (3), 12 213 240 and Forssén 2011 pp. 280 and 281.
[110] See Forssén 2011 pp. 280-282, where I'm commenting Rendahl 2009 in the present respect. Compare also Forssén 2016 (3), 12 213 240.
[111] See Forssén 2011 p. 281. Compare also Forssén 2016 (3), 12 213 240.
[112] Compare Forssén 2011 pp. 281, 285 and 286. Compare also Forssén 2016 (3), 12 213 240.

also other combinations of two countries outside the EU, for comparison with the EU's VAT, be made.[113]

In Rendahl 2009 was in fact a perspective of the question of the placement of the supply of services according to the directive 2008/8/EC given before 2010 and until the end of the time of that reform in 2015 (with the rules on the determination of the placement of supply of telecommunication services, radio and TV-broadcasting and electronic services).[114] However should, for the comparison to give an effect of contrast, the EU law in the field of VAT, if two and not more third countries shall be chosen, be compared with one country with VAT or GST and one country without either VAT or GST, but e.g. with *sales tax*. However, that provides that a weighted material for comparison is made on e.g. which OECD countries outside the EU that have a VAT or GST which in a material sense is comparable with the VAT according to the EU law.[115] I made in my licentiate's dissertation such a weighting of the OECD's information that nearly three quarters of the world's countries have VAT.[116] Rendahl 2009 just states that it's only the USA amongst the OECD countries that doesn't have "a form of value added tax".[117] That's, for a comparative analysis of the EU law, an information of questionable value.[118]

The comparison with countries outside the EU that have gross taxes (Sw., *bruttoskatter*), like *sales tax* in the USA, has not only a value for giving an effect of contrast for the analysis of the VAT according to the EU law, but also for the development of an EU tax.[119] The EU project will, in my opinion, demand that the work to introduce some kind of EU tax is resumed. That will probably be a gross tax, since a competing VAT-like tax mustn't exist.[120] The EU Commission recommended already in 2004 the introduction of an EU tax and urged the EU Council to work with the issue, but so far the EU lacks such an own right of

[113] Compare for selection of countries outside the EU pp. 280-287 in Forssén 2011, where both English-language and non-English-language countries outside the EU are mentioned. Compare also Forssén 2016 (3), 12 213 240.
[114] See Rendahl 2009 p. 187. Compare also Forssén 2016 (1), sec. 3.9.2.3 and Forssén 2016 (3), 12 213 240.
[115] See Forssén 2016 (3), 12 213 240. Compare also Forssén 2016 (3), 12 201 031, 12 211 110 and 12 213 164.
[116] See Forssén 2011 pp. 279ff. Compare also Forssén 2016 (3), 12 213 240.
[117] See Rendahl 2009 p. 3. Compare also Forssén 2016 (3), 12 213 240.
[118] Compare also Forssén 2016 (3), 12 213 240.
[119] Compare Forssén 2016 (3), 12 201 010 and 12 213 240.
[120] The latter follows by art. 401 of the VAT Directive (2006/112). Compare also Forssén 2015 (3), sec. 2.4.1.4 and Forssén 2016 (3), 12 213 240.

taxation that an EU tax would mean.[121] What would give a in my opinion negative evolution as well on a national level as on the EU level of above all the corporate taxation, would be the introduction of a Financial Transaction Tax (FTT) which certain other EU countries than Sweden plan to introduce.[122] Such a tax on financial transactions would, insofar as it would be expected to replace or complete the corporate taxation, be counterproductive in relationship to a fundamental idea for the VAT meaning that it shall comprise transactions regarding goods and services. In the same way as it would have a negative influence on monetary policy and finance policy to allow bitcoins without registration by the FI,[123] would, in my opinion, an introduction of FTT rather fast make it impossible to conduct a finance policy that comprises the corporate taxation, since charging of tax and collection of tax regarding FTT only would have an indirect connection to the production of goods and other services than financial services. An economical-political focus should, in accordance with what's mentioned above, instead be set on making both monetary policy and finance policy functioning.[124]

In the field of indirect taxes, i.e. in the first place VAT, excise duties and customs, should also customs law be set high on the agenda for research efforts. That subject should be of interest with respect of a future introduction of the free trade agreement between the USA and the EU, i.e. the TTIP-treaty, although I – on my question what the situation is thereby – got the following answer from the EU Commission on the 28th of April 2016: *It will take years before a TTIP-treaty would come into force* (Sw., *Det dröjer år innan ett TTIP-avtal skulle träda ikraft*).[125]

A research effort in the field of customs should be considered of interest for a more holistic harmonisation in the field of the indirect taxes, since Moëll 1996 may be considered obsolete today and therein was stated that *it would hardly be possible or even meaningful to establish a for all legal fields uniform goods concept. One should instead continue with determining the concept's meaning sector for sector based on the actual legal act* (Sw., "*det torde […] knappast vara möjligt eller ens*

[121] Compare the weekly letter from the EU representation in Brussels week 30 year 2004 (Sw., *Veckobrevet från EU-representationen i Bryssel vecka 30 år 2004*), www.regeringen.se. Compare also Forssén 2011 pp. 269 and 328 and Forssén 2015 (3), sec. 1.2.3 and Forssén 2016 (3), 12 213 240.

[122] Compare Forssén 2016 (3), 12 213 235 and 12 213 240 and Forssén 2015 (1) p. 214.

[123] See Forssén 2016 (1), sec. 3.5.3. Compare also Forssén 2016 (3), 12 213 153 and 12 213 240.

[124] Compare also Forssén 2016 (3), 12 213 240.

[125] Compare also Forssén 2016 (3), 12 201 010. Furthermore has the situation become seemingly more troublesome for a TTIP-treaty being realized due to the new administration in Washington, D.C. after the 2016 presidential election in the USA.

meningsfullt att fastställa ett för alla rättsområden enhetligt varubegrepp. Man bör i stället fortsätta med att bestämma begreppets innebörd områdesvis utifrån den aktuella rättsakten".[126] That attitude by researchers isn't to the benefit of the EU project. I consider that precisely due to a comprehensive work is to be expected regarding the TTIP-treaty should it be combined with efforts meaning that at least within the field of indirect taxes simplifications being made by e.g. an introduction of a common goods concept. That's in my opinion more important than that the vast debate about income tax and the OECD project on BEPS (Base Erosion and Profit Shifting) being further stimulated.[127]

Above all I see the indirect taxes as law fields to further build upon to, in accordance with the above mentioned, prepare an introduction of an EU tax – probably in the form of a gross tax like the excise duties.[128] In fact it's important with an international work against aggressive international tax planning, like what's done in the OECD within the frame of BEPS and within the EU, but I consider in the first place, in accordance with the above mentioned, that the EU project about an introduction of an EU tax should be resumed.[129] Therefore should in my opinion the indirect taxes have priority in the work with the making of tax laws and within the tax law research, so that an introduction of an EU tax can be prepared. It would, in my opinion, mean that it will be a for the EU project favourable priority of the harmonisation of the EU countries' legislations about indirect taxes and fees which, according to art. 113 TEUF, shall guarantee that the internal market is established and functioning and accomplish that competition distortion is avoided. Those aspects have probably, in my opinion, not become less important by the outcome of the referendum in Great Britain on the 23rd of June 2016 meaning a resulting British exit from the EU – the so-called Brexit.[130] Research efforts especially within customs law should be of interest not just due to the work with the TTIP-treaty, but also due to *tullagen (2016:253)* and the UCC, which cane into force on the 1st of May 2016.[131] From Moëll 1996 can an informative review be obtained of linguistic variations regarding the concept goods (Sw., *varor*), whereby I note that Moëll 1996 seems to express, like in my own opinion, that the English for the word *goods* consistently uses the plural form, wheras e.g. *product* or *article* can be used as singular form.[132] There is – to my

[126] See Moëll 1996 p. 41. Compare also Forssén 2016 (3), 12 201 010.
[127] See e.g. Wiman et al. 2016 p. 91. Compare also Forssén 2016 (3), 12 201 010.
[128] Compare also Forssén 2016 (3), 12 201 010 and 12 213 240.
[129] Compare also Forssén 2016 (3), 12 201 010 and 12 213 240.
[130] Compare also Forssén 2016 (3), 12 201 010 and 12 213 240.
[131] Compare sec. 3.8.2 and Forssén 2016 (3), 12 201 010,12 201 024, 12 201 034, 12 213 164 and 21 112 000.
[132] See Moëll 1996 pp. 39 and 40. Regarding the *product* (Eng.) is in Moëll 1996 (p. 39) furthermore a comparison made with *produkt* (Sw.) insofar as that concept like the

knowledge – concerning the noun *goods* no such singular form – "good" – as is used in Henkow 2008.[133]

See more about the continuation of my research project in Ch. 4.

goods concept isn't a uniform concept, whereby a reference inter alia is made to *produktansvarslagen (1992:18)* [Eng., the product liability act] and *produktsäkerhetslagen (1988:1604)* – replaced by *produktsäkerhetslagen (2004:451)* [Eng., the product safety act]. Compare also Forssén 2015 (5) and Forssén 2016 (3), 12 201 010.

[133] See Henkow 2008 pp. 50, 211 and 264. Compare also Forssén 2016 (3), 12 201 010.

4. COMMENTS OF THE CONCLUDING VIEWPOINTS FROM 2016 (1) IN RELATIONSHIP TO SOME QUESTIONS IN FORSSÉN 2015 (1) AND MORE ABOUT THE CONTINUATION OF THE RESEARCH PROJECT

I mention in Ch. 1 that I present in Ch:s 2 and 3 the summary and concluding viewpoints from *Ord och kontext i EU-skatterätten: En analys av svensk moms i ett law and language-perspektiv* [Forssén 2016 (1)]. There I've made suggestions about how research on law and language issues concerning tax law may be conducted regarding The Making of Tax Laws. I also mention in Ch. 1 that I comment in this Chapter those conclusions in relation to some questions in *The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law: Second edition* [Forssén 2015 (1)], which I do as follows.

In sec:s 3.1 and 3.8.1 I refer to Forssén 2015 (1) and that I've suggested alterations concerning systematics regarding the process of The Making of Tax Laws, where corporate taxation is concerned, i.e. taxation that comprise entrepreneurs. The aim is to minimize the risk that there will emerge distortions between the legislator's purpose with a tax rule and how it can be perceived by anyone conducting application of the law (*communication distortions*), i.e. by the SKV, the courts and the tax subject, i.e. the entrepreneur.[134]

Forssén 2016 (1) is, as mentioned in Ch. 1, my suggestion of how to do, by an empirical method, a thesis on the topic of the process of The Making of Tax Laws. Forssén 2016 (1) forms together with the text- and handbook *Momsrullan Andra upplagan* [Forssén 2016 (3)] and *Momsreform i Sverige: Förslag till ändrade mervärdesskatteregler nationellt och på EU-nivå* (Eng., VAT reform in Sweden: Suggestions on altered value added tax rules on a national and an EU level) [Cit. Forssén 2016 (4)]. From Forssén 2016 (3) I've got examples for the analysis in Forssén 2016 (1), and by that analysis I've been able both to present in Forssén 2016 (4) issues suitable for a VAT reform in Sweden and to confirm in this book the assumption in Forssén 2015 (1) that there's a need for systematic alterations of the process of The Making of Tax Laws, where the aim should be to find ways to put the entrepreneur in the centre of the process of The Making of Tax Laws.

[134] See also Forssén 2015 (1) Part A, sec. 2.4.

In the recently mentioned respect I state that I make, in Part D of Forssén 2015 (1), concerning the law and language-perspective on the process of The Making of Tax Laws, the main concluding viewpoint that it's important to open up the topic of the making of tax laws by moving the individual into the centre of that process by the suggestions I make in Part A on systematic changes of the process of the making of tax laws, where in the first place the interest of entrepreneurs is concerned. Thereby I've suggested models etc. to improve that process with regard of legal certainty, i.e. by making the process easier to audit and thereby easier to influence by e.g. the individual entrepreneur concerned by a rule containing the imperative pay tax.[135]

In sec. 3.8.1 I conclude that my analysis in Forssén 2016 (1), of Swedish VAT in a law and language-perspective, has shown so vast lacks on the theme words and context in the process of The Making of Tax Laws that the legislator must be considered disregarding that Sweden's EU accession in 1995 means that two sets of rules must be regarded at the determination of current law concerning material, formal and certain procedure questions about VAT: the national, with the ML and the SFL, and from the EU law – in the first place – the VAT Directive (2006/112). By the review in Forssén 2016 (1) with examples of *obscurities on behalf of the legislator regarding the theme of words and context in the EU law where the VAT rules are concerned*, I consider that I've proven that there are lacks in the process of The Making of Tax Laws in the following situations: to identify historical problems reoccurring in the field of VAT; to identify problems regarding the VAT rules' relationship to other taxes and fees; and – above all – to discover the existence of or risk of development of an *actual current law* – developed or risking to be developed by the SKV's handbooks on VAT or so-called standpoints on the subject – beside *current law in a true sense* and, as mentioned, to regard that Sweden's EU accession in 1995 means that two sets of rules must be regarded at the determination of current law in e.g. the field of VAT. Those lacks are in my opinion attached to both the legislator and the Council on Legislation, which I also mention especially concerning the Council on Legislation in sec. 3.8.2.

In the latter respect I may repeat that one way to put the entrepreneur in the centre of the process of The Making of Tax Laws would be to alter that process along with an installation of a second chamber in the Swedish Parliament, so that the entrepreneurs' organizations will be represented in the second chamber.[136] I've also mentioned that my suggestions about the parliamentary system and how it should work concerning e.g. the tax legislation procedure are only in principle, and

[135] See Forssén 2015 (1) Part D, sec. 4.2. See also Forssén 2016 (2), sec. 4.2.
[136] See Forssén 2015 (1) Part A, sec. 2.4 and also sec:s 3.1 and 3.8.1 in this book.

that there are of course also other more detailed solutions to make where the distribution between the suggested two chambers of the work on taxes is concerned. For instance there could, as mentioned, be a steering committee appointed by the two chambers and with the task to deem whether a certain issue to begin with belongs in the first or the second chamber. However, one conclusion of mine based on the analysis in Forssén 2016 (1) is, as mentioned in sec. 3.8.2, that, due to the Council on Legislation not reacting on the examples of lacks in the process of The Making of Tax Laws that I've reviewed in Forssén 2016 (1), the Council on Legislation isn't any guarantor for observing legal certainties in the process of The Making of Tax Laws, at least not where VAT is concerned. Thus, I also consider that the Council on Legislation will neither be useful as such a steering committee as recently mentioned. In my opinion the Council on Legislation, at least in its present form and practice, should be removed from the process of The Making of Tax Laws concerning corporate taxation altogether, regardless of whether my suggested reform of that process will be made. Thus, I state – like in sec. 3.8.2 – that the Council on Legislation has played out its role in the process of The Making of Tax Laws. If the Council on Legislation cannot – as I've proved – effectively contribute to The Making of functioning tax rules by identifying risks of *communication distortions* in Tax Laws created by the legislator, there's in my opinion neither any idea to have a Council on Legislation trying e.g. the principle of prohibition of retroactive tax legislation in Ch. 2 sec. 10 second para. RF concerning corporate taxation rules – i.e. concerning e.g. VAT rules – proposed by the legislator.

The scope and character of the lacks mentioned form, as mentioned in sec. 3.8.1, in other words already with respect of the analysis in Forssén 2016 (1) a basis for that the entrepreneurs should, from a democracy perspective regarding power and right, demand a radical alteration of the process of The Making of Tax Laws. This alteration should in my opinion mean that the entrepreneurs would get the power over the words and concepts used in rules on VAT. Then must the entrepreneur not only be placed in the centre of the process of The Making of Tax Laws concerning VAT, but also be involved in the actual process, so that representatives of the entrepreneurs' organizations can participate in it.

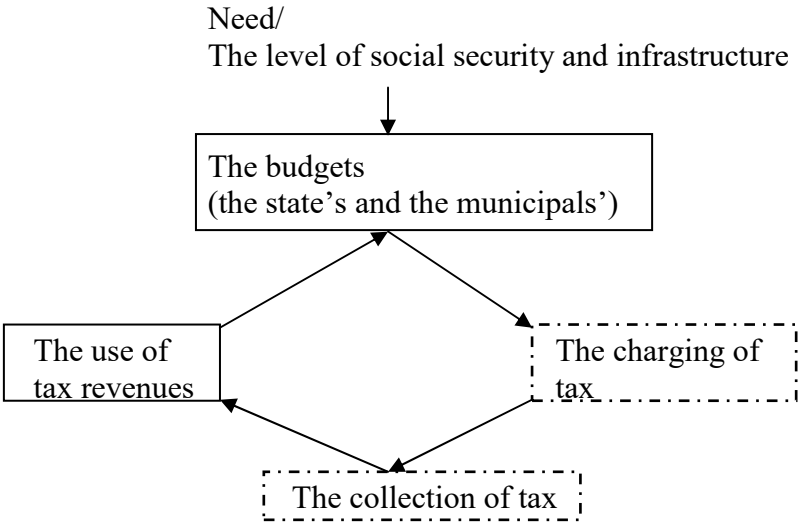
Thus, by the confirmation I make in this book – based on the summary and concluding viewpoints in Forssén 2016 (1) – that the assumption in Forssén 2015 (1) of a need for systematic alterations of the process of The Making of Tax Laws, and that the aim thereby should be to find ways to put the entrepreneur in the centre of the process of the making of tax laws, were justified assumptions, I will probably continue the research project as described in sec. 3.8.3, namely as follows:

- I continue with the law and language-perspective on the process of The Making of Tax Laws by working on ideas about using algorithms for analysis models to discover risks for *communication distortions*, i.e. will further develop Part D of Forssén 2015 (1); and

- I will probably do so after or during that I've continued with *Användningen av skattemedel* (Eng., the use of tax revenues), i.e. after or during developing Part E of Forssén 2015 (1) by an empirical study of in the first place the use of tax revenues within the field of social care.

By those two directions of the further research I'm aiming to tie together in *the big picture of the tax system* (see the figure below) the making of The budgets (for the purpose of the charging of tax) with The use of tax revenues, i.e. with cost analyses by hospitals, schools and other public financed activities – like social care.

The big picture of the tax system[137]



Thus, the project is supposed to continue with an empirical study of The use of tax revenues within tax funded activities – in the first place within social care. Parallel with this Part E or thereafter will probably, to develop Part D, a study follow of method issues based on feedback from that empirical study to the processes of making budgets and tax tables and improving collection, and algorithms are mentioned in Part D of Forssén 2015 (1) to make tools for method development.

[137] The figure is from Forssén 2015 (1) Part E, Ch.2.

My planned study to develop Part E will be made from a Swedish horizon, i.e. the topic of The use of tax revenues will be analysed with regard of its coverage of public expenses for the benefit of the need of social security and investments in infrastructure and similar matters in Sweden. The study in this respect will in a first stage, as mentioned, be limited to issues within the field of care, more precisely care of the elderly in the Swedish population. The purpose is to find out to what extent and how the tax system as a whole could be improved by the results of this study giving tools to evaluate the need of public funding by taxes of the care of the elderly, and thereby also giving feedback to improve other parts of The big picture of the tax system. By in this way tuning the tax system as a whole will efficiency gains are not unlikely to emerge regarding The collection of tax and lead to dynamic effects which can curb an eventual necessity to raise The charging of tax.

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