Tax and payment liability to VAT in joint ventures and shipping partnerships

Fourth edition

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Abstract

This is the second of two books making a combined doctor's thesis, where part 1, *Skattskyldighet för mervärdesskatt – en analys av 4 kap. 1 § mervärdesskattelagen* (Tax liability to value added tax – an analysis of Chapter 4 section 1 Value Added Tax Act), is my licentiate's dissertation of 2011 and part 2 is this book, *Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier* [Tax and payment liability to VAT in (approx.) joint ventures and shipping partnerships]. There is no specific equivalent in English to *enkla bolag*. The expression derives from the Swiss *einfache Gesellschaften*. In the Swedish civil law an *enkelt bolag* is defined as two or more having agreed to carry on activity in a company without establishing a partnership. A Swedish shipping partnership is similar to an *enkelt bolag*.

The purpose of this book is to analyze the representative rule of the Swedish VAT act concerning *enkla bolag* (approx. joint ventures) and *partrederier* (shipping partnerships) with respect of the VAT's most central purposes, namely a cohesive VAT system, neutrality, EU conformity, efficiency of collection and legal certainty including legality. A survey of foreign law is included, where the Finnish VAT law has been of a certain interest for the sake of comparison.

The issue at hand is a classical one, where *enkla bolag* and *partrederier* are not legal entities and one of the basic questions is if such an entity may be comprised by the concept taxable person of the VAT Directive (2006/112/EC). The representative rule has no equivalent in the VAT Directive. Therefore the analysis mainly concerns whether or not alterations in or amendments to the representative rule should be made in order to make the rule comply with the EU's VAT Directive. The analysis contains a number of questions within the framework of the described purpose, where a key issue to consider is the question whether an ordinary private person can be deemed tax liable (*skattskyldig*) merely because of his role as partner in an *enkelt bolag* or a *partrederi*, which would not be complying with the main rule on who is a taxable person, article 9(1) first paragraph of the VAT Directive (2006/112).

This book is ended with a paper summarizing the questions and conclusions of part 1 and part 2 and which contains a translation into English of its chapters 2–4, i.e. of the overviews of conclusions concerning part 1 and part 2 and of concluding viewpoints concerning both books.

Keywords: *Enkelt bolag*, *partrederi*, representative rule, Chapter 6 section 2 ML, Chapter 5 section 2 SFL, article 9(1) first paragraph, partner, *delägare*, *bolagsman* and *andel*.

Preface

This book, *Tax and payment liability to VAT in joint ventures and shipping partnerships*, is the fourth edition of my doctor's thesis from 2013. The book is about the same topic as in my licentiate's dissertation from 2011, *Skattskyldighet för mervärdesskatt – en analys av 4 kap. 1 § mervärdesskattelagen*, i.e. the determination of the tax subject for VAT purposes. In the licentiate's dissertation the focus was set on the main rule for distinguishing the tax subjects from the consumers. The question was whether that rule is complying with the EU law in the field of VAT, and above all with the main rule on who is a taxable person according to the VAT Directive. That question is in my opinion the most important economically regarding the Value Added Tax Act, since it is about the main rule on who shall belong to the VAT system and account for and pay VAT.

In this book is also the determination of the tax subject investigated, but with regard of one of the special rules in the Value Added Tax Act. That rule is to be found in Chapter 6 section 2 which partly concerns the tax liability for partners in *enkla bolag* and *partrederier*, partly contains a possibility for the partners to let one of them as representative to answer for the accounting and payment liability regarding the VAT in the *bolag* or *rederiet*. By its character of special rule on tax and payment liability is the rule – which I name the representative rule – not of the same economical importance as the main rule to determine the tax subject. However, the representative rule is of a major economical interest, since there are almost 8,000 active *enkla bolag* according to the SCB's enterprise register. Furthermore there are a great number of undetected *enkla bolag*. What is of a particular law scientific interest with the representative rule is in my opinion that the rule concerns a more classic law scientific problem, namely taxation and collection regarding legal figures – *enkla bolag* and *partrederier* – which are not legal entities. Furthermore the tax subjects shall also in this case comply with the main rule for who is a taxable person according the EU's VAT Directive.

On the 1st of July 2013, by SFS 2013:368 the determination of the tax subject according to the main rule in the Value Added Tax Act was disconnected from the Income Tax Act, and the concept *yrkesmässig verksamhet* was replaced by the concept taxable person. However, the use of the concept tax liable instead of taxable person, for the determination of the emergence of the right of deduction according to the Value Added Tax Act, was not mentioned. This book concerns inter alia that but above all that the special problems concerning VAT in *enkla bolag* and *partrederier* still remain.

Stockholm in October 2018
Björn Forssén

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ABBREVIATIONS

ABL, *aktiebolagslagen (2005:551)* [the Companies Act]
AD, *Arbetsdomstolens domar* (the Labour Court's verdicts)
Approx., approximately
art., article
BFL, *bokföringslagen (1999:1078)* [the Book-keeping Act]
BGB, *Bürgerliches Gesetzbuch*
BL, *bolagslagen*, *lag (1980:1102) om handelsbolag och enkla bolag* (the Partnership and Non-registered Partnership Act)
blz., *bladzijde* (page in Netherlands)
Btw, *belasting op de toegevoegde waarde* (VAT in Netherlands)
C, *curia* (court – about the CJEU)
Ch., chapter
cit., citation
CJEU, the Court of Justice of the EU (formerly the European Court of Justice, ECJ)
COM, the Commission
Da., Danish
Dir., directive
dnr, day-book number
Ds, department series
EC, European Community
ECLI, European Case Law Identifier – used in electronic Reports of Cases wherein from 2012 publishing is exclusively made of the CJEU's etc. verdicts. Publishing is no longer made in the printed form ECR/Jur./Rec./REG etc.
ECR, European Court Reports
EEC, European Economic Community
EEIG, European Economic Interest Grouping
e.g., exempli gratia, for example
Eng., English
et al., and others
etc., et cetera
EU, the European Union (or the Union)
Fi., Finnish
FI, Finland
FML, *mervärdesskattelag 30.12.1993/1501* (the Finnish VAT act)
Fr., French
GAAP, Generally Accepted Accounting Principles
GbR, *Gesellschaften des bürgerlichen Rechts* (Germany – Austria, GesnbR)
Ger., German
GML, *lag (1968:430) om mervärdeskatt* (the first Swedish VAT act – replaced by the ML)
GST, Goods and services tax
HD, *Högsta domstolen* (the Supreme Court)
HFD, *Högsta förvaltningsdomstolen* [the Supreme Administrative Court (before 2011 *Regeringsrätten*)] – also about the HFD's yearbook
IL, *inkomstskattelagen (1999:1229)* [the Income Tax Act 1999]
Ice., Icelandic
i.e., id est, that is
IT, Information Technology
Jur., *Jurisprudentie van het Hof van Justitie van de Europese Gemeenschappen*
kap., kapitel
KHO, *Korkein hallinto-oikeus* (the Finnish Supreme Administrative Court)
KL, *kommunalskattelagen (1928:370)* [Municipal Income Tax Act – replaced by the IL]
Kungl. Maj:ts, *Kunglig majestäts* (formerly the Government)
m.fl., *med flera* (and others – et al.)
ML, *mervärdesskattelagen (1994:200)* [the Value Added Tax Act 1994]

Moms, abbreviation of *mervärdesskatt* (VAT)
MVD, *mervärdeskattedeklaration* (VAT return)
NJA, *Nytt juridiskt arkiv, avdelning I* (the HD's yearbook)
Nl., Netherlands
no., number
Norw., Norwegian
not., *notismål* (notice case)
OECD, Organization for Economic Co-operation and Development
p., page; pp., pages
para., paragraph
Prop., *Regeringens proposition* (Government bill)
Rec., *Recueil de la Jurisprudence de la Cour*
ref., *referatmål* (reference case)
REG, *Rättsfallssamling från EU-domstolen, Tribunalen och Personaldomstolen* (the Swedish language version of the ECR)
RF, regeringsformen (1974:152) [the Swedish Constitution]
RSFS, Riksskatteverkets författningssamling (the RSV's code collection)
RSV, *Riksskatteverket* (the National Tax Board – nowadays the SKV)
RÅ, *Regeringsrättens årsbok* (from 2011 the HFD's yearbook)
Saml., *Samling af Afgørelser*
SBL, *skattebetalningslagen (1997:483)* [the Tax Payment Act – replaced by the SFL]
SCB, *Statistiska centralbyrån* (Statistics Sweden)
SE, Sweden
SEK, Swedish kronor
sen., sentence
SFL, *skatteförfarandelagen (2011:1244)* [the Taxation Procedure Act]
SFS, *svensk författningssamling*, Swedish Code of Statutes
SKV, *Skatteverket* (the tax authority)
Slg., *Sammlung des Gerichtshofes der Europäischen Gemeinschaften*
SOU, *statens offentliga utredningar* (the Government's official reports/investigations)
SRN, *skatterättsnämnden* (the Board of Advance Tax Rulings)
Sw., Swedish
TEU, the Treaty on European Union
TFEU, the Treaty on the Functioning of the EU
TVA, *taxe sur la valeur ajoutée* (VAT in French)
uppl., *upplaga* (edition)
URL, *lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk* [the Copyright Act]
US, United States
UStG, *Umsatzsteuergesetz* (VAT act in German)
v., versus
VAT, value added tax
VIES, VAT Information Exchange System
Wet OB, *Wet op de omzetbelasting 1968* (Netherlands VAT act)
www, worldwide web

1. INTRODUCTION

1.1 BACKGROUND, PURPOSE, TOPIC AND QUESTIONS

1.1.1 Background

The topic of this work lies within the value added taxation law. The value added tax (VAT)[1] is important to finance the public expenses. For 2016–2020 the VAT is estimated to constitute more than 1/5 of the state's total tax revenues.[2] The VAT is in principle harmonised within the EU[3] and is of importance not only for the state finances in the Member States, but also constitute the base for the Member State's financing of the European Union's (EU) institutions.[4] It is thus of state financial interest and of interest for the EU to investigate the concept tax liability (*skattskyldighet*) in *mervärdesskattelagen (1994:200)*, ML, i.e. the Value Added Tax Act 1994. Relatively the *enkla bolagen* (approx. joint ventures) constitute a minor share of the enterprise forms according to Statistics Sweden's, *Statistiska centralbyråns* (SCB), enterprise register. In November 2017 there were 7,982 active *enkla bolag* according to the SCB's enterprise register, while there were e.g. 47,597 partnerships (*handelsbolag*) and limited partnerships (*kommanditbolag*).[5] According to those statistics has although the number of *enkla bolag* increased since 2005 with nearly 1,400, i.e. with over 100 per year.[6] Besides can

[1] Value added tax in Swedish, i.e. *mervärdesskatt*, is abbreviated *moms*.

[2] For 2016–2020 is in billions (SEK) the state's VAT revenues/total tax revenues estimated to: 405,7/1.933,8 (21 per cent); 430,9/2.022,3 (21,3 per cent); 450,6/2.097,6 (21,5 per cent); 471,4/2.176,9 (21,7 per cent); and 493,9/2.265,9 (21,8 per cent). See the budget bill for 2018, prop. 2017/18:1 p. 659. Compare Forssén 2011 (1), p. 99.

[3] See art. 113 Treaty on the Functioning of the EU (TFEU).

[4] See the Council's decision 2000/597/EC, which is mentioned in the eighth para. in the preamble to the EU's VAT Directive (2006/112/EC) [previously the second para. in the preamble to the EC's sixth VAT directive (77/388/EEC), the Sixth Directive], and prop. 1994/95:19 (*Sveriges medlemskap i Europeiska unionen*) Part 1 p. 139 and prop. 1994/95:57 (*Mervärdesskatten och EG*) p. 93. That the EU's activity partly shall be financed by the VAT was decided already on the 21st of April 1970. See also Alhager 2001, p. 42 and Sonnerby 2010, p. 56. The VAT Directive's complete title: COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax. The VAT Directive replaced on the 1st of January 2007 the EC's first VAT directive (67/227/EEC), the First Directive, and the Sixth Directive. The Sixth Directive replaced in its turn in 1977 the EC's second VAT directive (67/228/EEC).

[5] See the SCB's website www.scb.se.

[6] See Nial & Hemström 2008, p. 36, where it is stated that according to the SCB's enterprise register there were 6,601 active *enkla bolag* in the end of 2005. By the way cannot an *enkelt bolag* register a company name in the Swedish Companies Registration Office's (*Bolagsverket*) Register of Partnerships (*handelsregister*) [see sec. 2 first para. 5 and third para. 1 *handelsregisterlagen (1974:157)* and also Mattsson 1994, p. 31]. A partner (*bolagsman*) in an *enkelt bolag* can although himself be liable to register in the Register of Partnerships, namely if he is carrying out business activity to the extent that he is liable to prepare annual accounts [see sec. 2 first para. 5, second and

an *enkelt bolag* exist in practice without even the partners (*bolagsmännen*) discovering it at the start of the company's activity.[7] The problems with determining the tax liability to VAT for *bolagsmän* (partners) in *enkla bolag* and *partrederier* concern both the rules on civil law about such legal figures and the rules on tax liability in the ML. That the *enkla bolagen* according to the SCB's enterprise register are not uninteresting to their numbers and that there is an undiscovered number is one of the reasons for me to do research on these problems.

According to civil law an *enkelt bolag* means two or more having made an agreement to exercise activity (*verksamhet*) in company without a partnership (*handelsbolag*) existing.[8] According to civil law a *partrederi* (shipping partnership) exists if several have agreed to jointly carry out under shared responsibility shipping with an own ship.[9] Opposite to a *handelsbolag* an *enkelt bolag* is not a legal entity which can acquire rights and make obligations and represent itself before courts and other authorities.[10] An *enkelt bolag* is a co-operation form.[11] A *partrederi* is neither any legal entity,[12] and *partrederi* is sometimes said to constitute a sort of *enkelt bolag*.[13] If not otherwise expressly stated what is mentioned in this presentation about *enkla bolagen* also applies to *partrederierna*.

Partrederierna have their given use, i.e. they are used by several persons to jointly carry out shipping with an own ship. A *partrederi* comprises only one single ship, which constitutes a particular activity col-

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third para. of *handelsregisterlagen* and also Nial & Hemström 2008, pp. 36, 355, 366 and 367].

[7] See Nial & Hemström 2008, p. 36, where it is also stated that the SCB's number regarding *enkla bolag* is not telling the real number of active *enkla bolag*. See also Forssén & Kellgren 2010, p. 33.

[8] See Ch. 1 sec. 3 *lag (1980:1102) om handelsbolag och enkla bolag (BL)*, i.e. the Partnership and Non-registered Partnership Act.

[9] See Ch. 5 sec. 1 first pat. first sen. *sjölagen (1994:1009)*, i.e. the Sea Act.

[10] See Ch. 1 sec. 4 BL and also Mattsson 1974, p. 18, Nial & Hemström 2008, p. 347, Lindskog 2010, p. 109, Dotevall 2009, pp. 122 and 124, Sandström 2010, p. 36, Barenfeld 2005, p. 70 and prop. 2010/11:165 (*Skatteförfarandet*) Part 2 p. 710, where it is also stated with reference to Ch. 1 sec. 4 BL and Ch. 5 sec. 1 *sjölagen* that an *enkelt bolag* or *partrederi* is not any legal entity.

[11] See Lindskog 2010, p. 26. See also Kellgren 2008, p. 697, where co-operation forms used regarding *enkla bolag* and stated that they are often named something else than *enkelt bolag*, e.g. joint venture, consortium or – within business – strategic alliance.

[12] See Ch. 5 sec. 1 second para. first sen. *sjölagen*.

[13] See Lodin et al. 2011, p. 514. See also prop. 1998/99:130 (*Ny bokföringslag m.m.*) Part 1 p. 231, where it is stated that the activity form (*verksamhetsformen*) *partrederi* is similar to an *enkelt bolag*, and Rinman 1985, p. 121, where it is stated that *partrederiet* is close to an *enkelt bolag*. Sometimes it is also said that partrederiet has features of an *enkelt bolag* as well as of a partnership (*handelsbolag*), but like *enkla bolaget* the *partrederiet* is not a legal person. See Sandström 2010, p. 39 and also Dotevall 2009, p. 158 and Lindskog 2010, p. 54.

lective.[14] The fields of use for *enkla bolagen* is however more extensive, and they exist both within and outside the business life. The *enkla bolagen*'s field of use comprises in the latter sense such activities as tipping and lottery companies etc.[15] Within the business life *enkla bolagen* constitute an enterprise form of great practical and economical importance within e.g. the building industry, where a consortium or a joint venture is formed.[16] Then it is a matter of two or more contractors making a co-operation agreement on jointly conducting construction work or installations etc. They make an agreement with the person ordering the work either one by one (shared contracting) or so that one of them makes the agreement with that person (general contracting).[17]

An *enkelt bolag* (consortium) does however not exist if it is a matter of a total contracting, where the person ordering the work makes an agreement with one contractor who in his turn hire the others as subcontractors.[18] The contractor is in such a case a legal entity, a natural person who is carrying out activity under sole proprietorship (*enskild firma*) or a legal person such as a limited company (*aktiebolag*) or a partnership (*handelsbolag*). That person makes an agreement with on the one hand a legal entity which is the ordering party and on the other hand with another legal entity which is a subcontractor, which in its turn maybe makes agreement with yet another subcontractor. Any non-legal entity in form of an *enkelt bolag* does not exist in such a chain of contractors.

When it is instead a matter of an *enkelt bolag* (or *partrederi*) the cooperating entrepreneurs may handle the tax liability by all partners in *bolaget* (or *rederiet*) jointly applying by the tax authority, *Skatteverket (SKV)*, to appoint one of them as representative. He will thereby become accounting and payment liable for all VAT in *bolaget*'s (or *rederiet*'s) activity (*verksamhet*).[19] It is voluntary and does not mean that *enkla*

[14] See the expression *ett eget fartyg* (a ship of your own) in Ch. 5 sec. 1 first para. first sen. *sjölagen* and Rinman 1985, p. 121.
[15] See Nial & Hemström 2008, p. 36 and Dotevall 2009, p. 123.
[16] See the SKV's *Handledning för mervärdesskatt 2012* Part 1 p. 202, the SKV's *Handledning för skatteförfarandet*, Ch. 5, p. 3 (www.skatteverket.se) and Dotevall 2009, pp. 123, 148 and 149. See also the SKV's statement of 2012-03-22 (dnr 131 186274-12/111), where the SKV states that when fishing is carried out jointly by fishers and ship owners in a so called fishing team an *enkelt bolag* exists. By the way it is stated in Dotevall 2009 (pp. 148 and 149) that *joint venture* is not any equal to *enkla bolaget*, even if a *joint venture* commonly is regarded as an *enkelt bolag* in Swedish law. There is stated that the background to the concept is unclear and that it emanates from Scottish law.
[17] See regarding shared contracting and general contracting, *Byggentreprenörerna 1998*, p. 16.
[18] See regarding total contracting, *Byggentreprenörerna 1998*, pp. 16 and 17.
[19] See Ch. 6 sec. 2 second sen. ML with reference to Ch. 5 sec. 2 *skatteförfarandelagen (2011:1244)*, SFL, prop. 2010/11:165 Part 2 p. 710 and the SKV's *Handledning för skatteförfarandet*, Ch. 5, pp. 3 and 4 and Ch. 7, pp. 3, 10, 18 and 20

bolaget (or *partrederiet*) becomes tax liable (*skattskyldigt*) to VAT, but only that the representative sees to it that accounting and payment to the SKV of VAT in *bolaget*'s (or *rederiet*'s) activity – i.e. the collection – is done. According to a mandatory rule the tax liability (*skattskyldigheten*) to VAT remains by the partners themselves.[20] If the SKV after application register the representative, he will be registered as representative for the partners as tax liable (*skattskyldiga*).[21] The difference is thus that if an application on appointing a representative is not filed to the SKV, the partners in an *enkelt bolag* or *partrederi* shall each on his own make sure that the collection of the VAT in *bolaget*'s or *rederiet*'s activity works.

However the possibility according to Chapter 6 section 2 second sentence ML and Chapter 5 section 2 SFL to appoint a partner as representative for the collection of the other partners' VAT in the activity of an *enkelt bolag* does not have any direct equivalent in the EU's VAT Directive (2006/112/EC).[22] For a so called VAT group the SKV appoints a head of the group to handle the accounting of VAT for the activity carried out by the VAT group.[23] That is supported by the VAT Directive (2006/112).[24] Otherwise it is only a foreign taxable person's possibility according to Chapter 6 sections 2 and 3 SFL to appoint a representative which is supported by the VAT Directive (2006/112). According to article 204 the Member States may allow a taxable person who is not established in the Member State where VAT shall be paid to appoint a tax representative as payment liable.[25]

(www.skatteverket.se) and also, the SKV's *Handledning för mervärdesskatt 2012* Part 1 pp. 202 and 203 and *Byggentreprenörerna 1998*, p. 73.

[20] See Ch. 6 sec. 2 first sen. ML and also the SKV's *Handledning för skatteförfarandet*, Ch. 5, p. 4 (www.skatteverket.se). See also the SKV's *Handledning för mervärdesskatt 2012* Part 1 p. 201 and Dahlqvist & Holmquist 2004, p. 31.

[21] See Ch. 7 sec. 1 second para. SFL. If a representative application is filed to the SKV for an *enkelt bolag* or *partrederi*, the form SKV 5711 shall be signed by all partners. Then the representative shall also sign and file a registration form to the SKV regarding the activity that *bolaget* or *rederiet* carries out and which shall be registered according to Ch. 7 sec. 1 SFL. See the SKV's *Handledning för skatteförfarandet*, Ch. 5, p. 4 and Ch. 7, p. 18 (www.skatteverket.se).

[22] That also applied regarding the Sixth Directive. See also SOU 2002:74 (*Mervärdesskatt i ett EG-rättsligt perspektiv*) Part 1 p. 135, where it regarding the rules in Ch. 6 ML is stated that the directive lacks at large equivalent rules. See also Forssén & Kellgren 2010, p. 47.

[23] See Ch. 6 a sec:s 1 and 4 ML.

[24] Se the facultative art. 11 of the VAT Directive (2006/112).

[25] See art. 204(1) first para. – and also art. 193, 213(1) first para. and 250(1) – of the VAT Directive (2006/112) and directive 2000/65/EC. See also Terra & Kajus 2012, pp. 1177 and 1178, Westberg 2009, pp. 592 and 607, prop. 2005/06:31 (*Deklarationsombud m.m.*) p. 17 and prop. 2001/02:28 (*Utländska företagares mervärdesskatt i Sverige*) p. 42.

Enkla bolagen and *partrederierna* are, as mentioned, legal figures that are not legal entities. Thereby they neither constitute tax subjects according to the general rules in the ML.[26] If it is a matter of legal entities, natural or legal persons, the enterprise form does not matter for the emergence of the tax liability.[27] *Enkla bolagen* and *partrederierna* constitute on the other hand neither legal entities nor tax subjects in the present meaning, but for the partners in such legal figures is, as mentioned, a mandatory tax liability stated in a particular rule. That tax liability is decided by who is a partner in an *enkelt bolag* or *partrederi* in the civil law meaning. However, it is clear that according to the ML as well as the BL and *sjölagen* can both natural and legal persons be partners in *enkla bolag* and *partrederier*.

Another important matter of interpretation is whether an ordinary private person can have the character tax liable (*skattskyldig*) just in his capacity of partner in an *enkelt bolag* or *partrederi*. It would not be in compliance with the main rule for the determination of taxable person according to the VAT Directive (2006/112).[28] The tax subject for VAT purposes is ordinarily a person who is named entrepreneur, whereas the consumer, who shall carry the tax (the tax carrier), usually is a private person.[29] The VAT is namely a consumer tax and the consumer the carrier of the VAT included in the price of most of the supplied goods and services from enterprises.[30] The entrepreneurs producing the product or the service have deducted and levied the VAT link by link up to the end costumer (the consumer). Regardless whether the partners in *bolaget* or *rederiet* apply by the SKV to appoint a representative, the question

[26] See the main rule on who is tax liable (*skattskyldig*), Ch. 1 sec. 2 first para. no. 1 ML: It is he who is (*den som*) comprised by the prerequisites for the emergence of the tax liability in the main rule Ch. 1 sec. 1 first para. no. 1 ML who is tax liable. The expression *den som* may be deemed concerning a legal entity – a natural or legal person – and an *enkelt bolag* or a *partrederi* does not constitute a legal entity. See also Westberg 1997, p. 35, Madsen 2011 pp. 24 and 92 and Egholm Elgaard 2016 p. 53.

[27] See Westberg 1997, p. 35, where reference is made inter alia also to pp. 188–189 in the preparatory work to the ML, prop. 1993/94:99 (*Ny mervärdesskattelag*).

[28] See art. 9(1) first para. of the VAT Directive (2006/112) [previously art. 4(1) of the Sixth Directive], where the criteria for taxable person are: any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

[29] See Alhager 2001, p. 30. There it is stated that the term enterprise (*företag*) is sued in that work regarding subjects which can carry out business activity (*näringsverksamhet*), i.e. *näringsidkare* (businessmen) and that the term enterprise should mainly correspond with the term's meaning in common language. There it is also referred to Westberg 1994, p. 38, where enterprise is used in the same meaning as taxable person according to art. 4 of the Sixth Directive, i.e. taxable person according to art. 9(1) first para. of the VAT Directive (2006/112).

[30] See Terra & Kajus 2012, p. 280. There it is stated that consumer taxes – e.g. VAT – aims to taxation of expenses by private persons, but that it shall not be understood literally. In short it is stated that most consumer taxes comprise all non-entrepreneurs.

whether a partner can be tax liable might never be tried by the courts. That may be the case despite that he perhaps only has the character of an ordinary private person.[31] The SKV's handbooks are not so extensive concerning issues on application and practice regarding *enkla bolagen* and *partrederierna* and the VAT is limited.[32] Thus, there are both interpretation and application problems concerning *enkla bolagen* and *partrederierna* and the VAT. That is the second reason for me to do research about the tax and payment liability for VAT in *enkla bolag* and *partrederier*.

Other fields within the business life than the building industry where *enkla bolagen* may exist are e.g. the fields of finance and insurance and in connection with film making and similar. There may be practical obstacles to carry out larger business activities by the use of an *enkelt bolag*. The credit possibilities can namely be limited due to *bolagsmännen* (the partners) lacking mutual responsibility if not several have taken part in the agreement with a third party.[33] However there is not any such formal limitations regarding what is meant by an *enkelt bolag*.[34] Thus, my investigation concerns *enkla bolag* and *partrederier* with activities of minor as well as major scope and – if not otherwise expressly stated – independent of sector. There is neither any limitation with regard of who can be a partner in an *enkelt bolag* or *partrederi* concerning whether that person is a Swedish or foreign legal entity.[35] This presentation is firstly problem orientated. Despite this are two rules on VAT concerning *enkla bolagen* and *partrederierna* completely central for the presentation. I mention them together or separately the representative rule (*representantregeln*) and they are stated here.[36]

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[31] Besides will *enkla bolag* carrying out business activity be comprised by the statistics at the SCB only if they register a representative by the SKV for accounting of VAT or employees salaries (se Nial & Hemström 2008, p. 36).

[32] I have also asked Staffan Renström by *Sveriges Byggindustrier* (Sweden's building industries) regarding whether a sequel is planned to *Byggentreprenörerna 1998*, and received by e-mail a negative answer on the 1st of August 2011. Staffan Renström was the tax lawyer by the *Byggentreprenörerna*, the predecessor to *Sveriges Byggindustrier*, who produced *Byggentreprenörerna 1998*. That handbook did not contain more than a remark on p. 73 that there is a possibility for partners in *enkla bolag* to appoint a representative for the accounting and payment of the VAT in *bolaget's* activity.

[33] See Ch. 4 sec. 5 BL and also SOU 1989:34 (*Utredningen om reformerad företagsbeskattning*) Part I p. 336.

[34] See Ch. 1 sec. 3 BL.

[35] See Ch. 1 sec. 3 BL and Ch. 5 sec. 1 first para. first sen. *sjölagen*.

[36] See the word *representant* (representative) in these rules and in the SKV's *Handledning för skatteförfarandet*, Ch. 5, pp. 1-5 and Ch. 7, pp. 3, 10, 18 and 20 (www.skatteverket.se). See also Ch. 5 p. 4 in that handbook and the SKV's *Handledning för mervärdesskatt 2012* Part 1 pp. 201 and 630, where the SKV uses the expressions representative accounting (*representantredovisning*) and, for the partner which shall answer for the accounting and payment, representative (*representant*).

Chapter 6 section 2 ML reads (in translation):

> A partner in an *enkelt bolag* or a *partrederi* is tax liable (*skattskyldig*) in relation to his share (*andel*) of *bolaget* or *rederiet*. In Chapter 5 section 2 § *skatteförfarandelagen (2011:1244)*, SFL, there are rules on when the SKV may decide that one of the partners shall be representative (*representant*).[37]

Chapter 5 section 2 SFL reads (in translation):

> If an activity (*verksamhet*) is carried out by an *enkelt bolag* or a *partrederi*, may the SKV after application by all partners decide that one of the partners that they suggest shall be representative (*representant*). The representative shall account and pay employee withholding taxes, employer's contribution (for national social security purposes), VAT and excise duties for the activity (*verksamheten*) and otherwise represent *bolaget* or *partrederiet* on issues concerning such taxes and fees.
>
> Documentation for control of the accounting shall be available by the representative.
>
> The decision does not mean that the other partners are releaved from their obligations if the representative does not fulfil his obligations.[38]

1.1.2 Purpose and formulation of problem

The purpose of this work is to analyze the representative rule for *enkla bolag* and *partrederier* based on the VAT's most central purposes, namely a cohesive VAT system, neutrality, EU conformity, efficiency of collection and legal certainty including legality. To identify the VAT's most central purposes is of importance for the analysis of the problems brought up in this work. Within the frame of the purpose with this work I mention inter alia the following problem fields:

> 1) A question of interpretation is whether the mandatory rule Chapter 6 section 2 first sentence ML alone can entail tax liability for a partner in an *enkelt bolag* or *partrederi* due to the character of partner itself, so that also an ordinary private person in that capacity can be

[37] Ch. 6 sec. 2 ML got this wording on the 1st of January 2012, by SFS 2011:1253.

[38] On the 1st of January 2012 the SFL replaced inter alia *skattebetalningslagen (1997:483)*, SBL, where Ch. 23 sec. 3 SBL was the equal to Ch. 5 sec. 2 SFL. By the SFL has a common act been made for at large the entire taxation procedure, and in it has inter alia the three big acts on the taxation procedure been put together, i.e. the SBL, *lag (2001:1227) om självdeklarationer och kontrolluppgifter* and *taxeringslagen (1990:324)*. See also e.g. Forssén 2011 (2), p. 15.

tax liable. The question on the interpretation of the concept tax liable according to Chapter 6 section 2 first sentence ML is decided by what is meant by *enkla bolag* and *partrederier* according to Chapter 6 section 2 ML. The question is also whether the answer is affected by the wording of the voluntary rule, i.e. Chapter 6 section 2 second sentence ML and Chapter 5 section 2 SFL. I investigate also how the tax liability is divided and should be divided between the partners of *bolaget* or *rederiet*.

2) Another question is also whether *enkla bolag* and *partrederier*, despite they are not legal entities, can constitute taxable persons according to article 9(1) first paragraph of the VAT Directive (2006/112). According to the main rule a taxable person is any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. It is in the first place such a person who constitutes a tax subject for VAT purposes opposite to a consumer. If the enterprise forms *enkla bolag* and *partrederier* could be deemed taxable persons, they would constitute tax subjects for VAT purposes instead of – as according to the representative rule – the partners. This question includes thus to judge whether a non-legal entity can constitute taxable person.

3) A third problem field concerns whether the representative rule needs precision by an amendment in Chapter 6 section 2 ML or Chapter 5 section 2 SFL, to simplify the collection (application issues). Then will both the subject side and the object side concerning the concept tax liability be mentioned. Both issues on taxable person and transaction, and the relations between *bolagsmännen* or *delägarna* of *enkla bolagen* or *partrederierna* and their respective relations to suppliers and customers are mentioned. I mention not only the material rules on tax liability and right of deduction, but also whether the representative rule entails a need to complete the formal presuppositions for right of deduction of input tax concerning the demands on content of invoice etc. in Chapter 11 ML. If Chapter 11 should be completed so that the invoicing liability also shall comprise the representative rule, the question is also whether there is a special need of amendment concerning the demands on content of invoice, to make the tax control function satisfactory concerning the representative rule. The main thread question in connection with the application issues is whether it will be proved to exist such vast need of amendments in the representative rule and in Chapter 11 ML that the rule will be too complex. That would in that case lead to a legal uncertainty for *bolagsmännen* or *delägarna*. That concerns whether accounting of output tax has been left out in the VAT return, *mervärdesskattedeklarationen* (MVD), or whether a too low output tax or a too high or incorrect input tax has been accounted there.

4) In connection with problem 1 regarding whether the representative rule can entail that an ordinary private person becomes tax liable I will also mention the following questions. Besides at a taxable person's taxable transaction within the country of goods or services according to the main rule in no. 1 of Chapter 1 section 1 first sentence ML tax liability emerges at intra-Union acquisitions[39] of goods and imports of goods. Regarding these other two instances of tax liability in Chapter 1 section 1 first sentence ML, no. 2 concerning intra-Union acquisitions of goods and no. 3 concerning imports of goods, the following may be mentioned. The tax liable can in the latter case be an ordinary private person or a taxable person,[40] whereas by tax liable for intra-Union acquisitions is normally meant a taxable person.[41] A private person may however be tax liable for intra-Union acquisitions of new means of transport.[42] Regarding who is tax liable for intra-Union acquisitions and imports the ML is in these respects complying with the VAT Directive (2006/112).[43] The question is whether a *bolagsman* or *delägare* who is an ordinary private person should be tax liable when he is making an import or an intra-Union acquisition of goods for *enkla bolaget* or *partrederiet*. Thereby will also the concept taxable person according to Chapter 5 section 4 ML be mentioned concerning the determination of country of supply for services. The representative rule and intra-Union acquisitions will also be mentioned with respect of control in connection with the application issues, i.e. problem 3. In connection with problem 1 concerning whether the representative rule can entail that an ordinary private person becomes tax liable I will by the way also mention another question. It concerns what scope the representative rule has at voluntary tax liability for letting of business premises etc. according to Chapter 9 ML.

5) I will also investigate whether there is any rule on the tax object in the ML whose application, independent of the existence of the representative rule, is influenced by the enterprise form *enkelt bolag*.

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[39] Intra-Community acquisition, *gemenskapsinternt förvärv* (GIF), is nowadays named intra-Union acquisition, *unionsinternt förvärv*, in the ML. By SFS 2011:283 terms in the ML have been updated in relationship to the Lisbon Treaty. See prop. 2010/11:52 (*Följdändringar inom skatte- och tullområdet med anledning av Lissabonfördraget*) p. 1 and 11etc.

[40] See Ch. 1 sec. 2 first para. no. 6 ML.

[41] See Ch. 1 sec. 2 first para. no. 5 and Ch. 2 a sec. 3 first para. no. 3 and second para. ML.

[42] See Ch. 1 sec. 2 first para. no. 5 and Ch. 2 a sec. 3 first para. no. 1 ML.

[43] See art. 2(1)(b)(i) and (ii) or (d) of the VAT Directive (2006/112). Art. 2(1)(b)(i) is the main rule regarding taxation of intra-Union acquisitions and art. 2(1)(b)(ii) concerns taxation of intra-Union acquisitions of new means of transport. Art. 2(1)(d) concerns taxation of imports.

1.1.3 More about the topic

Since Sweden's accession to the European Union (EU) on the 1st of January 1995 the EU law in the field of VAT is part of current law when interpreting the rules in the ML.[44] In the field of VAT the EU has issued directives and regulations.[45] The VAT acts in the various Member States shall be harmonised with each other.[46] The most important EU legislation to accomplish that is the VAT Directive (2006/112). The rules in the VAT Directive (2006/112) shall, with respect of the intended result,[47] regarding contents be implemented in the ML, as well as in the national VAT acts of the other Member States. The national authorities may only determine form and methods for the implementation.[48] Nowadays there is also an implementation regulation from the EU on establishment of certain application rules for the VAT Directive (2006/112).[49]

The main rule on who is tax liable according to the ML means that taxable supply of goods or services are made (within the country) of a taxable person in this capacity.[50] The necessary prerequisites for someone to become tax liable are inter alia economic activity and transaction. Thus, the concept tax liability has a subjective side (taxable person) and an objective side (transaction). The determination of who is tax liable has a systematic correspondence with the main rule on who is payment liable according to the VAT Directive (2006/112).[51] The prerequisites for taxable person according to the main rule article 9(1) first paragraph of the directive, inter alia independence and economic activity, have, by SFS 2013:368, been implemented in Chapter 4 section 1 ML. Taxable transactions (*beskattningsbara transaktioner*) in the directive equals

[44] On behalf of Sweden the Swedish Parliament then conferred competence in the field of VAT to the EU's institutions by virtue of the Swedish Constitution, *regeringsformen (1974:152)*, RF. See Ch. 10 sec. 6 first para. first sen. RF, which reads (in translation): Within the frame of the co-operation in the European Union the Parliament can confer rights of decision which will not affect the principles of the forms of government. By SFS 2010:1408 transferred from Ch. 10 sec. 5 first para. first sen. RF. See also Eka et al. 2012, pp. 15, 16 and 397 and Holmberg et al. 2012, p. 31

[45] Those are examples of legislation from the EU which according to art. 288 second and third para:s TFEU is binding for Sweden as a Member State.

[46] See art. 113 TFEU.

[47] See art. 288 third para. TFEU. See also e.g. Ståhl 1996, p. 63

[48] See art. 288 third para. TFEU.

[49] See the Council's implementation regulation (EU) no. 282/2011 of the 15th of March 2011 – came into force on the 1st of July 2011.

[50] See Ch.1 sec. 2 first para. no. 1 with reference to sec. 1 first para. no. 1 ML. That a person is tax liable according to Ch. 1 sec. 1 first para. ML entails that he is liable to account output tax at supply (the main rule in no. 1), intra-Union acquisition (no. 2) or import (no. 3). See Ch. 1 sec. 8 first para. ML with reference to Ch. 1 sec. 1 ML and prop. 1993/94:99 p. 106.

[51] See art. 2(1)(a) and (c) and 193 of the VAT Directive (2006/112).

taxable supply (*skattepliktiga omsättningar*).[52] Payment liable is a taxable person which shall make taxable transactions of goods or services (within Swedish territory). The representative rule constitutes in pursuance of Chapter 1 section 2 last paragraph of one of the special rules in the ML on who is tax liable.[53] Opposite to Chapter 4 section 1 ML the representative rule does not contain any expressed demand on that the activity in the *enkla bolaget* or *partrederiet* shall be carried out by a taxable person. That the otherwise for the emergence of tax liability necessary prerequisite taxable person is lacking in the representative rule raises an interpretation question in this work. The issue is what importance this has for the determination of whether a partner in an *enkelt bolag* or *partrederi* can be deemed tax liable. The question is whether the partner can be deemed tax liable according to the representative rule due to his character of partner in *bolaget* or *rederiet* itself. If *bolaget*'s or *rederiet*'s activity fulfil the criterion economic activity, the question is whether the partner can be deemed tax liable regardless whether he is otherwise fulfilling inter alia the prerequisite taxable person for tax liability according to the general rules in the ML.

The interpretation question is thus whether an ordinary private person can get the character tax liable just in his capacity of partner in an *enkelt bolag* or *partrederi*.[54] The second mentioned necessary prerequisite for tax liability according to the main rule – the transaction criterion – is neither expressed in the representative rule. However, it is the subject side and the conception taxable person which in the first place is of interest for the interpretation of the representative rule. Both taxable person and transaction are however mentioned with regard of the application issues for the rule.

On the subject side the question raises whether the representative rule expands the determination of who is comprised by the concept tax liability in the ML in relation to the main rule. The first of these two rules which constitute the representative rule, Chapter 6 section 2 ML, consists of two sentences. The first sentence means that if an *enkelt bolag* or *partrederi* exists it is the partners which are tax liable and not the legal figures *enkla bolag* and *partrederier*. That is a mandatory rule. The second sentence compared to Chapter 5 section 2 first paragraph SFL means that the partners under the same circumstances *may* apply by the SKV about one of them being appointed by the SKV to account for the VAT as a representative for the activity. It is thus a voluntary

[52] See art:s 14-30 of the VAT Directive (2006/112) and Ch. 2 ML.
[53] See Ch. 1 sec. 2 last para. ML, where it is stated that there are special rules on who that in certain cases is tax liable in Ch. 6, Ch. 9 and Ch. 9 c ML. Such a special rule is Ch. 6 sec. 2, where the mandatory rule in the first sen. states tax liability for a partner in an *enkelt bolag* or a *partrederi* in correspondence to his share of *bolaget* or *rederiet*.
[54] See sec. 1.1.2.

rule.[55] A question is whether the answer to the question whether an ordinary private person can be tax liable according to the mandatory rule Chapter 6 section 2 first sentence ML is influenced by the voluntary rule, i.e. Chapter 6 section 2 second sentence ML and Chapter 5 section 2 SFL.

The main rule for the determination of who is a taxable person,[56] contains the prerequisites independence and economic activity. The independence criterion distinguishes the taxable person from persons which are comprised by employment conditions.[57] The person shall be independent in an organizational meaning.[58] Of the CJEU's case law follows that the person self shall stand the economic risk, an entrepreneurial risk for the activity, for the independence criterion to be considered fulfilled.[59]

Economic activity is a totally objective concept, and therefore the activity is judged by itself.[60] The criterion economic activity means according to CJEU case law that a regularity demand – duration criterion – can be read out by comparison of the main rule on taxable person, article 9(1) first paragraph of the VAT Directive (2006/112), with the facultative rule on taxable person in article 12.[61] By article 12 of the VAT Directive (2006/112) follows that that rule above all is meant for temporary transactions concerning new production within the building sector.[62] The duration criterion for economic activity in the main rule on

[55] See sec. 1.1.1.
[56] See art. 9(1) first para. of the VAT Directive (2006/112).
[57] See art. 10 of the VAT Directive (2006/112).
[58] Se art. 10 of the VAT Directive (2006/112).
[59] See para. 13 in *Ayuntamiento de Sevilla* (C-202/90), where the CJEU writes about "*le risque économique de leur activité*" (Fr.) regarding taxable persons and Terra & Kajus 2012, p. 389, where they refer to that case and "*economic risk*" etc. as indicators on independence. See also Westberg 2009, p. 98.
[60] See Westberg 2009, p. 88 and also pp. 94 and 95, Terra & Kajus 2012, p. 370, Ds 2009:58 (*Mervärdesskatt för den ideella sektorn, m.m.*) p. 64 and Ståhl et al. 2011, p. 208.
[61] See para. 18 in *Götz* (C-408/06), where the CJEU states, regarding art. 4(2) of the Sixth Directive [nowadays art. 9(1) second para. of the VAT Directive (2006/112)], that "[A]n activity is thus, generally, categorised as economic where it is permanent" etc. The CJEU referred thereby to para:s 9 and 15 in *Commission v. the Netherlands* (235/85). See van Doesum 2009, p. 155. There is art. 9(1) first para. compared contrary to, whereby it is stated that there is a great measure of consensus in the literature that there is a regularity demand for economic activity (Nl., "*economische activiteit*"). There it is also stated that the CJEU in *Götz* has established that for economic activity a durable activity is demanded. See also Terra & Kajus 2012, p. 409. There it is also referred to *Götz*, whereby it is stated that the CJEU leaves it to the national court to decide "whether the activity at issue is permanent" etc. See also Ramsdahl Jensen 2003, p. 276.
[62] Art. 12(1) of the VAT Directive reads "Member States may regard as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the

taxable person, article 9(1) first paragraph, means that a taxable person cannot be an ordinary private person according to that rule.

The independence criterion in conjunction with the criterion economic activity shall distinguish a person as taxable person from the consumers according to the main rule. The main rule on taxable person cannot be considered comprising for example such hobby activities as private persons exercise. Economic activities in the present meaning are namely constituted either by activities performed within certain business sectors or categories of professions or exploitation of property for the purpose of obtaining income therefrom on a continued basis.[63] A hobby activity is an activity which is only performed within the private sphere, the hobby sphere.[64] A hobby activity is in the first place exercised in a personal and non-business like interest.[65] By the CJEU's case law follows that an economic activity according to the main rule on taxable person is considered existing first if the person devotes an investment which he is making more administrative efforts than what a private investor would have done.[66]

Of the VAT Directive's complete title follows that a common system of VAT shall exist within the EU. The CJEU has also established in the VAT field that the EU law concepts on VAT shall be independent in

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activities referred to in the second subparagraph of Article 9(1) and in particular one of the following transactions: (a) the supply, before first occupation, of a building or parts of a building and of the land on which the building stands; (b) the supply of building land."

[63] See art. 9(1) second para. Of the VAT Directive (2006/112).

[64] See van Doesum 2009, pp. 156, 172, 173 and 184, where it is stated (in translation) that activities *within the hobby sphere* are distinguished from the concept economic activity.

[65] See Stensgaard 2004, p. 125, where it in the context also is referred to Melz 2001, p. 165 and 171.

[66] See para. 12 in *Sofitam* (C-333/91) and para. 28 in *Floridienne* (C-142/99). See also Terra & Kajus 2012, p. 370. There it is referred to *Floridienne* and argued for a holding company making capital available for subsidiaries, by that activity in itself to continuously gain interest, being deemed having economic activity, but provided that the activity is not performed only temporarily or is limited to administrate an investment portfolio in the same manner as a private investor. It is invoked there that it shall especially be "a concern to maximise returns on capital investment". See also, as mentioned in this section, Ramsdahl Jensen 2003, p. 276. Regarding para. 28 in *Floridienne* it is by the way also stated on p. 279 in Ramsdahl Jensen 2003 that economic activity (Da., *økonomisk virksomhed*) characterized by a certain regularity (Da., *regelmæssighed*), and that it is in that sense the activities purpose or results (Da., *formål og resultat*) can be given a certain relevance at the judgement whether the activity constitutes economic activity. See also the CJEU cases *Polysar* (C-60/90), para. 13, *Wellcome Trust* (C-155/94), para:s 37 and 39, *Enkler* (C-230/94), para:s 22 and 27–30, *Harnas & Helm* (C-80/95), para. 18, and *Heerma* (C-23/98), para:s 14 and 19.

relation to the national civil law.[67] In pursuance of article 177 of the treaty[68] it is a matter for the national court to apply the EU law rules in the case at hand.[69] However, it shall be done with respect of the principle that the EU law concepts are independent in relation to the civil law. An interpretation of the representative rule with respect of what follows by the BL regarding the concepts *bolagsman* (partner) and *enkelt bolag* gives thus a non-EU conform interpretation result, if it is in violation the concept taxable person in the VAT Directive (2006/112). An ordinary private person which for example carries out a hobby activity can according to the CJEU's case law – *Götz* (Case C-408/06) and *Commission v. the Netherlands* (Case 235/85) – not be comprised by the main rule on taxable person in the VAT Directive (2006/112). An interpretation of the representative rule with regard of the BL gives a non-EU conform interpretation result, if such a consumer – an ordinary private person – would be considered as tax liable only in his capacity of partner in an *enkelt bolag* or *partrederi* according to the concept tax liability in Chapter 6 section 2 first sentence ML.

Thus, an expansion of taxable person to comprise for example an ordinary private person must concern an application of article 12. Since article 12 of the VAT Directive (2006/112) states that anyone can be given the character of taxable person, it applies also to private persons. However, the main rule on taxable person, article 9(1) first paragraph, is implemented in the ML by Chapter 4 section 1 ML, where the main rule for who is a taxable person according to the ML is stated.[70] The rule concerning *yrkesmässighet* in Chapter 4 which before the 1st of July 2013, and the reform by SFS 2013:368 of inter alia Chapter 4, nearest corresponded with article 12 of the directive was section 3. That rule expanded the concept *yrkesmässighet* in relation to section 1 in the following situations. The expansion regarded certain temporary transactions concerning felling rights and sales of products from private dwelling real estate or real estate by private dwelling enterprises and voluntary tax liability for letting of such real estate. For so to say be able to drop the duration criterion in the main rule on taxable person, article 9(1) first paragraph, and by support of the VAT Directive (2006/112) being able to make an ordinary private person tax liable, must support

[67] See para:s 8 and 9 in *Safe* (320/88), which concerned the interpretation of art. 5(1) of the Sixth Directive [nowadays art. 14(1) of the VAT Directive (2006/112)] regarding the concept supply of goods. See also RÅ 2002 not. 108 (2 Jul. 2002), advanced ruling on VAT, where it is referred to *Safe*, and Ståhl et al. 2011, p. 211. See by the way also Persson Österman 1998, p. 588, where it is stated that the EU law concepts and terms have a generally autonomous meaning, whereby as an example a reference is made to *Hoekstra* (75/63) which concerned social security issues.
[68] Nowadays art. 267 TFEU.
[69] See para:s 11 and 13 in *Safe* and also Ståhl et al. 2011, p. 212.
[70] See also Forssén 2011 (1), pp. 22 och 27.

be sought for in article 12 of the directive. The necessary prerequisite in the older main rule for who is tax liable according to the ML demanded support by Chapter 4 section 3 ML, for an ordinary private person being considered tax liable without that meaning a transgression of the directive's main rule on taxable person. The main rule for *yrkesmässighet* was a rule with a general scope concerning who could be considered a tax subject. The VAT Directive (2006/112) gave only support for such a determination of the tax subject, by its main rule on taxable person.

If an interpretation of the representative rule, Chapter 6 section 2 ML, can give the result that an ordinary private person is deemed tax liable due to the fact itself that he is partner in an *enkelt bolag* or *partrederi*, the ML is not complying with the VAT directive (2006/112). The basic idea about distinguishing the tax subjects from the consumers, in pursuance with what is recently said about the duration criterion in the main rule on taxable person in the VAT Directive (2006/112), is in that case not upheld by the representative rule. Taxable person according to Chapter 4 section 1 ML shall equal taxable person according to the main rule article 9(1) first paragraph of the VAT Directive (2006/112). A determination of the tax subject with support of Chapter 6 section 2 ML must also respect that, so that the representative rule does not open for partners in the legal figures *enkla bolag* and *partrederier* in general could be given the character of tax liable. An ordinary private person which is partner in another company form, e.g. limited company (*aktiebolag*) or partnership (*handelsbolag)*, does not become tax liable according to the main rule in the ML only because of the character of partner in *bolaget*, regardless of whether *bolaget* is considered carrying out economic activity. A shareholder of a limited company must beside the shares have an independently carried out economic activity of his own, to be able to be considered himself as tax liable according to the general rules of the ML. The same applies to a partner in a partnership [or in a limited partnership (*kommanditbolag*)].[71] A taxable person is according to article 9(1) first paragraph of the VAT Directive (2006/112), and the current Chapter 4 section 1 ML, *any person who*

[71] A *handelsbolag* (partnership) is a legal entity (and according to Ch. 1 sec. 2 BL is a *kommanditbolag* – limited partnership – also *handelsbolag*). Ch. 6 sec. 1 first sen. ML states that a *handelsbolag* is a tax subject. It was only a necessary law technical solution as long as taxation of *handelsbolag* was at partner level in *inkomstskattelagen (1999:1229)*, IL, i.e. the Income Tax Act 1999, and the main rule for *yrkesmässig verksamhet* in the ML referred thereto, whereas *handelsbolag* constitute tax subjects for VAT purposes. Despite SFS 2013:368 abolishing that connection to the IL, Ch. 6 sec. 1 ML remains unchanged. By the way it was expressly stated in the predecessor, i.e. sec. 3 second para. first sen. *lag (1968:430) om mervärdeskatt* (GML) that the rule also comprised *kommanditbolag*. See also Forssén & Kellgren 2010, p. 16.

independently carries out any economic activity.[72] The tax subject is thus the legal entity itself, i.e. a natural or legal person. There is no support in the directive or the ML for a person being able to have the character of taxable person only in his capacity as a partner. Thus, the representative rule has neither concerning Chapter 6 section 2 first sentence ML any direct equivalent in the directive (or the ML).[73]

Since the VAT Directive (2006/112) lacks a direct equivalent to Chapter 6 section 2 ML, the question arises whether an eventual conclusion that an ordinary private person can be tax liable due to his capacity as partner in an *enkelt bolag* or *partrederi* also entails that Sweden is guilty of a breach of EU law.[74] The representative rule would in that case entail the existence of a rule competition between the ML and the main rules in the VAT Directive (2006/112) about taxable person and payment liable.[75] The rule competition means that the choice of tax subjects becomes too vast if the representative rule would be considered having such a general scope that ordinary private persons would be given the character of tax liable – besides such cases which previously were comprised by *yrkesmässighet* according to Chapter 4 section 3 ML (which was supported by article 12). By the way neither article 9(1) first paragraph nor article 12 contains any amount limit for the determination of taxable person. Therefore it was quite right that the SEK 30,000-limit of annual turnover for *yrkesmässighet* regarding businesslike activity or certain transactions in inter alia activity in *enkelt bolag* according to Chapter 4 section 4 with reference to Chapter 4 sections 1 no. 2, 2 and 3 ML was abolished along with inter alia these rules, by SFS 2013:368.[76]

There are certain special rules according to which ordinary private persons by the character of partner itself can be given the character of tax liable. That is concerning voluntary tax liability for certain letting of real estate according to Chapter 9 ML, e.g. letting of business premises etc.[77] In these cases the tax subject is the owner of real estate, a tenant, a tenant-owner, a bankruptcy estate or a head of a VAT group in a regis-

[72] See also art. 193 of the VAT Directive (2006/112), i.e. the main rule on who is payment liable, where it is stated that VAT shall be payable by *any taxable person* carrying out a taxable supply of goods or services.
[73] Compare, regarding Ch. 6 sec. 2 second sen. ML and Ch. 5 sec. 2 SFL, sec. 1.1.1.
[74] A breach of EU law does not have to concern secondary EU law, such as the VAT Directive (2006/112), but may also concern primary EU law, e.g. the TFEU. See Alhager 2001, p. 101.
[75] See regarding rule competition Aldén 1998, pp. 33, 42 and 43, Sonnerby 2010, p. 60, Alhager 2001, pp. 103–107 and Tjernberg 1999, p. 48.
[76] See also Forssén 2011 (1), p. 253, where I argued for the SEK 30,000-limit in the previous supplementary rule on businesslike activity (Ch. 4 sec. 1 no. 2 ML) being abolished, since the limit lacked support by art. 9(1) first para. of the VAT Directive (2006/112).
[77] See sec. 1.1.2.

tered VAT group.[78] It does not exist any demand concerning the person's status otherwise. Also an owner of real estate who is an ordinary private person may apply for and receive the SKV's decision on voluntary tax liability for the letting of business premises to a businessperson. By the way the procedure was simplified on the 1st of January 2014, by SFS 2013:954: In the main case of such tax liability an application is no longer required, but it is sufficient to note VAT in the invoice to the businessperson. In the VAT Directive (2006/112), the facultative rule article 137(1)(d), the freedom of choice is however limited concerning transactions constituting leasing out and letting out of immovable property to apply to taxable persons.[79]

Another question in this work is, as mentioned above, whether *enkla bolag* and *partrederier*, despite they are not legal entities, can constitute taxable persons so that both the enterprise forms in that case can constitute tax subjects for VAT purposes.[80] If *enkla bolag* and *partrederier* can constitute taxable persons according to the main rule article 9(1) first paragraph of the VAT Directive (2006/112), the responsibility for the VAT in their activities should apply to *bolaget* or *rederiet* itself in accordance with the directive. That rules in that case instead of the tax liability – like with the mandatory rule Chapter 6 section 2 first paragraph ML – lying by the partners themselves. That would mean that the recently mentioned rule should be abolished from the ML due to it being in conflict with the EU law. Then the partners could be imposed a payment responsibility for the case that the in that case tax subject for VAT purposes, i.e. the *enkla bolaget* or *partrederiet*, does not fulfil the liability to account for and pay the VAT to the SKV. That responsibility could be made by *delägarna* (the partners) being imposed a joint payment responsibility – not tax liability – for the VAT with the *enkla bolaget* or *partrederiet*.

In the latter respect it is of interest that there is a facultative rule, article 205 of the VAT Directive (2006/112),[81] saying that the Member States may provide that a person other than the person liable for payment of VAT shall be held jointly and severally liable for payment of VAT. Such a joint responsibility presupposes thus that the tax liability first has been imposed to another person.[82] Article 205 may, concerning VAT, be considered implemented in Chapter 59 sections 13 and 14 SFL, where it is stated that a representative can be payment liable for a legal

[78] See Ch. 9 sec. 1 § first para. ML.
[79] Previously art. 13(C)(a) of the Sixth Directive.
[80] See sec. 1.1.2.
[81] Previously art. 28(g)(3) of the Sixth Directive.
[82] In para. in the preamble to the VAT Directive (2006/112) it is also stated that joint responsibility presupposes that there is a person who is payment liable. See also Forssén & Kellgren 2010, p. 47

person's tax debt.[83] A joint responsibility for partners (*delägare*) in *enkla bolag* and *partrederier* which would be considered tax subjects for VAT purposes could be regulated by an expansion of Chapter 59 sections 13 and 14 SFL, so that the representative responsibility also comprised such cases. By the way it would under the present circumstances neither be any reason to retain the voluntary rule Chapter 6 section 2 second sentence ML. Any particular rule on a representative being responsible for the collection of the VAT in *bolaget* or *rederiet* would not be necessary, if the legal figures *enkla bolag* and *partrederier* would constitute tax subjects for VAT purposes.

A neutrality aspect on VAT according to the EU law is that the mentioned harmonisation demand on the VAT legislations by the Member States shall work against competition distortion depending on the tax.[84] Sometimes a distinction is made between internal and external neutrality concerning the VAT. With internal neutrality is then meant neutrality between various transactions and taxable persons in the same country,[85] whereas external neutrality means neutrality at border transgressing transactions within the EU.[86] Since I also mention intra-Union acquisitions, both internal and external neutrality are regarded concerning the tax liability issue.

1.2 METHOD, MATERIAL AND INTERPRETATION

1.2.1 Method

In this thesis it is analyzed whether the representative rule is in compliance in the first place with the VAT Directive's main rule on taxable person in article 9(1) first paragraph. The method is law scientific. In section 1.1.2 the problems are mentioned which inter alia will be analyzed. By the expression the representative rule I mean the rules Chapter 6 section 2 ML and Chapter 5 section 2 SFL (insofar as that rule concerns VAT) jointly or each by itself.[87] In this book I regard rules coming

[83] In RÅ 2009 ref. 72 (28 Sep. 2009) the Supreme Administrative Court considered that Ch. 12 sec. 6 SBL was in compliance with the EU law and art. 21(3) of the Sixth Directive [nowadays art. 205 of the VAT directive (2006/112)]. See also Forssén 2011 (3), p. 24. Ch. 12 sec. 6 SBL has been replaced by Ch. 59 sec:s 12 and 13 SFL and Ch. 12 sec. 6 a SBL has been replaced by Ch. 59 sec. 14 SFL – see prop. 2010/11:165 Part 2 pp. 1005 and 1006.

[84] That follows by art. 113 TFEU as well as by the fourth para. in the preamble to the VAT Directive (2006/112).

[85] See the main rule Ch. 1 sec. 1 first para. no. 1 ML, where (taxable) supply within the country is a necessary prerequisite for tax liability and also Bjerregaard Eskildsen 2012, p. 44.

[86] See Ch. 1 sec.1 first para. no. 2 ML regarding the tax liability for intra-Union acquisitions of goods and Bjerregaard Eskildsen 2012, p. 45, Sonnerby 2010, p. 19, Alhager 2001, p. 60, Terra & Kajus 2012, pp. 290 and 292 and Hultqvist 1998, p. 43.

[87] See also sec. 1.1.1.

into force at the latest on the 1st of January 2015. I describe here the method – the way of conduct – used for the mentioned investigation.

The EU aw in the field of VAT is a part of current law at the interpretation of the rules in the ML.[88] That means that the tax subject *de lege lata*[89] is determined in two sets of legislation: the ML and the VAT Directive (2006/112). Since the content of the rules in the VAT Directive (2006/112) shall, with regard of the result that shall be achieved by the directive, be implemented in the ML,[90] the question is whether the representative rule is in compliance with the main rule on taxable person concerning the determination of the tax subject. This conformity test is an investigation of whether there exist a rule competition between the representative rule and article 9(1) first paragraph of the VAT Directive (2006/112). If the test shows that the representative rule does not comply with the directive rule concerning the choice of tax subject, I investigate how Swedish law may best be *de lege ferenda*[91] corrected to become in compliance with the EU law. I thereby also make suggestions for a change of the EU law *de lege ferenda*.

Sometimes it is claimed that the main task of law dogmatic is to interpret and systematize current law,[92] and that the law dogmatic is considered the true law science.[93] My method in this work means that I systematize and interpret the representative rule and other rules mentioned. The method also includes the choice of certain law political aims for the Swedish VAT system. These aims I have chosen to include in the analysis of the representative rule mainly because of the EU law in the field of VAT, and regarding both primary and secondary EU law. The primary EU law raises principles on harmonisation of the VAT legislations within the EU and about that competition distortion should be avoided.[94] The choice of the aims has also been made by respect of funda-

[88] See sec. 1.1.3.
[89] De lege lata ”On the given law”, i.e. current law. See Melin 2010, p. 94 and Bergström et al. 1997, p. 35.
[90] See sec. 1.1.3.
[91] De lege ferenda ”On the law that should be given”. A statement *de lege ferenda* expresses a wish about how future law rules should be on a certain aspect. See Melin 2010, p. 94 and Bergström et al. 1997, p. 35. See also Westberg 1994, p. 70 and Alhager 2001, p. 23. Compare also regarding shall rule (”*skola-regel*”) and should rule (”*böra-regel*”) e.g. Strömholm 1996, pp. 244 and 245, or, regarding the German *Sein und Sollen*, Lyles 2011, p. 173.
[92] See Peczenik 1995, p. 312 and Sandgren 2009, p. 118 and also Gunnarsson & Svensson 2009, pp. 92 and 93.
[93] See Hellner 2001, p. 23.
[94] See sec:s 1.1.1 and 1.1.3. I treat the VAT according to the EU law, but there are VAT legislations in countries outside the EU too. According to the OECD there re totally more than 150 countries which have VAT or so called Goods and Services Tax (GST), which equals three quarters of the world’s approximately 200 countries – see www.oecd.org. The OECD has a committee regarding tax issues (Committee on Fiscal

mental principles for the VAT which are mentioned in the preamble to the VAT Directive (2006/112) and in the directive rules. Furthermore has the choice of the aims been made by respect of what can perceived as fundamental principles and aims for the VAT system in inter alia preparatory works and case law and by the EU Commissions statements in a so called green paper about the future of the VAT system within the EU.[95]

The law political aims that I have identified and chosen emanate inter alia from the fundamental principles for the VAT which can be read out in the EU sources mentioned. Therefore it is only such aims – along with legal certainty including legality – which are regarded at the investigation. The law political aims I have thus chosen for the Swedish VAT system are

- a cohesive VAT system,
- neutrality,
- EU conformity,
- efficiency of collection and
- legal certainty including legality.

These aims are presented and discussed thoroughly in Chapter 2. After a review of the aims I am ending that chapter by a summary and overview of how I have indentified and chosen the aims for the Swedish VAT system. I explain also how I have reasoned for judging the relevance of the aims at the analysis in Chapter 6 of the representative rule.

The investigation of the representative rule can be simplified and in general be said meaning the following:

- By EU conform interpretation[96] I break down the representative rule (analysis).

- If the interpretation result from that analysis shows that the rule cannot be considered being in compliance with the main rule on taxable person,[97] I try to put together (synthesis) by suggestions *de lege ferenda*, so that it thereby – if possible – is made in compliance with article 9(1) first paragraph of the VAT Directive (2006/112).

Affairs), which develops so called guidelines, the OECD International VAT/GST Guidelines. See What are the OECD International VAT/GST Guidelines? December 2010. See also Rendahl 2009, pp. 59etc. and Kogels 2012, pp. 230–232.

[95] See COM(2010) 695 final of the 1st of December 2010 (green paper) and the follow-up by COM(2011) 851 final of the 6th of December 2011.

[96] See regarding EU conform (directive conform) interpretation: sec. 1.2.3.

[97] Art. 9(1) first para. Of the VAT Directive (2006/112).

I analyze thus whether a rule competition exists between the representative rule and the main rule on who is a taxable person, article 9(1) first paragraph of the VAT Directive (2006/112), so that the choice of the tax subject in the described manner becomes too extensive according to Chapter 6 section 2 ML.[98] The law political aims are regarded at the analysis of the problems mentioned in section 1.1.2, and at the synthesis, i.e. when I by suggestions *de lege ferenda* try to put together what should rule to make the representative rule in compliance with the directive rule. I also make reasons *de sententia ferenda*[99] regarding the interpretation of the representative rule.

To give an overview, a simple picture of the problems on both the subject side and the object side by the concept tax liable in the representative rule I use a tool which I call the ABCSTUXY-model. It will be described after the review of the mentioned law political aims for the analysis. In my model I put the persons A, B, C, S, T, U, X and Y. The point with the model is strictly pedagogical insofar as it simplifies to keep tabs on which person has been given what role in the model, by remembering them by support of the acronym:

- A, B and C are the imagined *bolagsmännen* or *delägarna* in *enkla bolaget* or *partrederiet* in the hypothetic case studies made in this work regarding the representative rule.

- S and T are supplier and customer respectively in relation to a *bolagsman* or a *delägare* when he represents *enkla bolaget*'s or *partrederiet*'s activity.

- X and Y are supplier and customer respectively in relation to a *bolagsman* or a *delägare* when he is not representing *bolaget* or *rederiet* but acting in his own activity.

- U is a person with an indirect relation to a *bolagsman* or a *delägare* when he is representing *bolaget*'s or *rederiet*'s activity.

I use the ABCSTUXY-model as a tool to keep in connection with the application issues focus on the concept tax liability in the mandatory rule Chapter 6 section 2 first sentence ML.

[98] See sec:s 1.1.2 and 1.1.3.
[99] De sententia ferenda "On the verdict that should be made", i.e. statements about the law such as one wishes it to be formed in case law in the future. See Bergström et al. 1997, p. 35.

The model is not meant to be a hypothesis model which taken by itself shall verify or falsify the representative rule with regard of its compliance with the main rule on taxable person according to article 9(1) first paragraph og the VAT Directive (2006/112).[100] Instead the model has its heuristic advantage for the application issues, i.e. to create various such questions whereby I by the hypothetic case studies test the representative rule. Thus, I use the model for that reason and for the mentioned pedagogic reasons in connection with the application issues regarding the concepts tax liability (concerning taxable supply of goods or services) and acquisitions (of goods or services) respectively. These concepts are fundamental for at all talking about a liability to account for output tax and a right to deduction of input tax respectively.[101]

The application issues concerning the rule regarding the subject side and the object side of the concept tax liability and regarding the right of deduction are tested by support of the ABCSTUXY-model. I am thereby trying the need for precision by amendments in the representative rule at such a level that a far too high degree of complexity risking to lead to legal uncertainty shall appear already regarding the basic concepts tax liability and acquisition. A far too high degree of complexity concerning the application of the representative rule entails that *bolagsmännen* or *delägarna* in *enkla bolaget* or *partrederiet* and the representative respectively will have a hard time foreseeing a taxation decision. That means legal uncertainty for them concerning the mentioned basic concepts, and thereby regarding whether a too low output tax or a too high or incorrect input tax has been accounted for in the MVD.[102]

I have in an advanced study which I have made not found any rule in the other VAT legislations within the EU that equals the representative rule.[103] That does not have to mean that the problems are unique for the ML. It is not unique for *enkla bolagen* and *partrederierna* that they are not legal entities. Therefore I have made an international outlook,[104] where I above all have regarded which countries within the EU that have legal figures similar to in the first place *enkla bolagen*. I have found that Finnish VAT law is of a certain comparative interest for the analysis of the representative rule. Finnish so called *sammanslutningar* and *partrederier* also constitute enterprise forms which are not legal entities. Finland is like Sweden an EU Member State, and the Finnish VAT Act,[105] FML, is comprised by the same demand on harmonisation

[100] See Alhager 1999, p. 39.
[101] See the main rules for tax liability and right of deduction respectively: Ch.1 sec. 1 first para. no. 1 ML and Ch. 8 sec. 3 first para. ML. Compare also Alhager 1999, p. 41.
[102] See sec. 1.1.2.
[103] See Forssén & Kellgren 2010.
[104] See Ch. 4.
[105] See *mervärdesskattelag 30.12.1993/1501*.

as the ML. To investigate the real similarities and differences between the content in various legal systems shall a comparative analysis of them concern their functions, not titles and other superficial similarities.[106] The sets of legislation shall correspond to each other functionally, so that they resolve the same problems insofar that the compared law systems regulate the same actual situations in reality.[107]

In the FML *sammanslutningar* and *partrederier* are treated as tax subjects for VAT purposes. It is another solution than with the representative rule: The possibility to voluntary appoint a representative for the collection of the VAT in activities by *enkla bolag* and *partrederier*, whereas the mandatory tax liability remains by the partners of *bolaget* or *rederiet*. I have made an advanced study concerning the FML, and above all concluded that section 13 FML stipulates tax liability under certain presuppositions for *sammanslutningar*, and that section 188 second paragraph second sentence FML stipulates joint responsibility for the tax for partners of *sammanslutningar*. The parts of section 188 FML which concern *sammanslutningar* and section 13 FML regarding *sammanslutningar* do not make any equivalent to Chapter 6 section 2 ML. However the mentioned rules in the FML display such similarities with the representative rule that also a certain comparative analysis is relevant as a complement in my method. By comparison the foreign law may have a ruling or serving mission in relationship to the Swedish law.[108] In this work I use, for a certain comparative analysis, sections 13 and 188 FML and certain Finnish material regarding these rules for a comparison with a serving purpose at the analysis of the representative rule. Thereby the comparative analysis has a certain meaning in the first place synthetically for the investigation. The FML is taken by itself also written in the Swedish language, but the mentioned advanced study has been possible by the contacts existing between Örebro University and Helsinki University, which I have visited and where I received help with the material in the Finnish language.[109]

In Chapter 5 an overview is made regarding *enkla bolag* and *partrederier* based on the civil law perspective. In connection with the analysis of the representative rule I also give a historical background to the rule, which form a simple review meant to give a background to how the

[106] See Bogdan 2003, p. 58.
[107] See Bogdan 2003, pp. 58 and 59.
[108] See Strömholm 1972, p. 462 and Kristoffersson 2010 (1), p. 279.
[109] Resourceful help from Helsinki University was provided by the doctoral candidate Kenneth Hellsten. That concerned finding Finnish literature on the topic, decisions by the Finnish Supreme Administrative Court and preparatory works to relevant rules in the FML and to translate from Finnish above all Saukko 2005. I have read the Finnish FML in the official Swedish language version.

representative rule has been written over the years.[110] It was namely from the beginning kept in one single rule and has later on come to be expressed in two rules. These two rules are today the mentioned Chapter 6 section 2 ML and Chapter 5 section 2 SFL.[111] At the analysis in Chapter 6 is to a certain extent regarded the mentioned comparison with the Finnish VAT law and also the overview regarding *enkla bolag* and *partrederier* from a civil law perspective.

1.2.2 Material

Sometimes it is said that the law source doctrine describes, explains, justifies and criticize the law sources.[112] The law sources vary from field of law to field of law, but the most central in the most fields, e.g. the field of taxation, are considered the law text, preparatory works, case law and doctrine.[113] Various law sources' position in legal argumentation is decided by certain law source norms.[114] Peczenik describes this as the most important law source norms stating which law sources that shall, should or may be followed as authoritative reasons.[115] This division in three of the formal law sources is however just an ideal image, to make it easier to understand the legal argumentation.[116] The classification can be completed with complex divisions of the law source norms.[117] I have however used material in this work based on what is comprised by the division into law sources which *shall*, *should* and *may* be invoked as authoritative reasons. Thus, I have regarded

- acts, which are examples of law sources that *shall* be invoked;[118]
- precedents and preparatory work to acts, which are examples of law sources that *should* be invoked;[119] and
- doctrine, i.e. law dogmatic literature which systematize and interpret current law,[120] other legal literature such as handbooks,[121]

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[110] See Lyles 2007, p. 74, where it is stated that the law historical task is to shed light on a development process, a stage during which the observed object changes and, if you will, develops.
[111] The representative rule has its origin in the general goods tax (*allmänna varuskatten*) of 1959, which had come into force in 1960 by *Kungl. Maj:ts förordning (1959:507) om allmän varuskatt*.
[112] See Peczenik 1995, p. 212.
[113] See Kristoffersson 2011, p. 836, where reference is also made to Peczenik 1995, pp. 212–218. See also e.g. Påhlsson 2011, pp. 114 and 115.
[114] See Peczenik 1995, p. 214.
[115] See Peczenik 1995, pp. 213 and 214.
[116] See Peczenik 1995, p. 222.
[117] See Peczenik 1995, p. 222.
[118] See Peczenik 1995, p. 214.
[119] See Peczenik 1995, pp. 215, 232, 239, 242 and 252.
[120] See Peczenik 1995, pp. 216 and 260.
[121] See Peczenik 1995, pp. 260 och 262.

> and the SKV's writs etc.,[122] which constitute examples of law sources that *may* be invoked.[123] *May* becomes however must in my role as researcher. My ambition has been to find in principle all of the important literature at least within the main field of this work. Foreign law may also be invoked as authoritative reasons, if it is not in conflict with Swedish *ordre public*.[124]

In the work with this book I have in accordance with what is recently said regarding the law source doctrine used customary law sources. The material I have used are EU law sources such as the VAT Directive (2006/112), CJEU case law, TFEU and the Treaty on European Union (TEU). Concerning Swedish law sources I have used law texts, preparatory works, precedents, doctrine and other legal literature, and, concerning foreign law, law text, doctrine and other legal literature.[125]

With regard of law source hierarchy problems can exist due to the VAT law having both EU law and national sources. The VAT Directive (2006/112) is a binding legislation.[126] Sweden shall, in pursuance of the so called solidarity principle (or loyalty principle),[127] make all necessary legislative measures to implement the VAT Directive (2006/112) in the ML.[128] Sweden may only determine form and methods for the implementation.[129] Swedish courts and authorities are obliged to interpret and apply the ML with respect of the VAT Directive (2006/112) and the result intended by it.[130] Concerning EU regulations rules that they are directly applicable in every Member State.[131] Any implementation is not even demanded for the regulations to be applicable. However, the CJEU has yet considered it relevant to establish that it is forbidden for the Member States to introduce such legislation in a national code of statutes that the EU law origin will be concealed.[132] The demand for implementation of direc-

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[122] See Peczenik 1995, p. 215, where the exemplification comprised inter alia recommendations from the time by the RSV (predecessor to the SKV).
[123] See Peczenik 1995, pp. 216 and 260.
[124] See Peczenik 1995, p. 216. Ordre public, the fundamentals for the legal system in a country. See Melin 2010, p. 293 and Bergström et al. 1997, p. 123.
[125] See Alhager 2001, pp. 25 and 28, Sonnerby 2010, p. 24 and Bernitz 2010 (1), pp. 29 and 30.
[126] See sec. 1.1.3.
[127] See art. 4(3) TEU and art. 291(1) TFEU.
[128] See Prechal 2005, p. 180, Hiort af Ornäs & Kristoffersson 2012, p. 21, Alhager 2001, p. 94, Sonnerby 2010, p. 63, Rendahl 2009, p. 39, Bernitz 2010 (2), p. 67 and Stensgaard 2004, p. 25.
[129] See sec. 1.1.3.
[130] See art. 288 third para. TFEU. See also e.g. Prechal 2005 p. 317.
[131] See art. 288 second para. TFEU.
[132] See *Fratelli Variola Spa* (34/73), which concerned issues on customs and Italian legislation in relationship to regulations in the agricultural field, and where the CJEU

tives in national law and for regulations to be expressed in national legislation so that their Union law origin is shown, supports a viewpoint meaning that EU law rules would be higher in the law source hierarchy than e.g. Swedish preparatory works.[133]

By article 267 TFEU follows that the CJEU in its role as the highest interpreter of the EU law assists the national courts with preliminary rulings regarding the interpretation of the EU law.[134] The CJEU has stated that a national court when interpreting national law is obliged to so far as it is possible to interpret the national law with respect of the directive's wording and purpose so that the result intended by the directive is achieved and thereby act in correspondence with article 288 third paragraph TFEU. According to the CJEU that applies even if there is information of the opposite meaning about how the law shall be interpreted in the preparatory work to the national rule.[135] It is Swedish courts that can judge whether Swedish national interpretation principles allow a EU conform interpretation of the ML.[136] Furthermore is the loyalty to the preparatory works so heavily anchored in Swedish law source doctrine that it is a national interpretation principle that they are such a law source which *should* be regarded, if not strong contrary reasons – firstly the law rule's wording – speaks for another interpretation.[137] However, the CJEU's judgement entails that it is possible to make an EU conform interpretation of Swedish law text in conflict with the preparatory works.[138] A general opinion is however that an EU conform interpretation does not mean a liability for the Member States to interpret the national law in conflict with its wording (*contra legem*).[139] That is also the CJEU's opinion.[140] The national procedural law and the constitutional law with the therein stated principle of legality for taxation measures can thus limit the EU conform interpretation of e.g. the representative rule.[141] I mention more about the principle of legality for taxation measures in section 2.7.[142]

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in para. 11 states that "no procedure is permissible whereby the community nature of a legal rule is concealed from those subject to it". See also Ståhl 1996, p. 63.

[133] See also Hiort af Ornäs & Kristoffersson 2012, p. 24.

[134] See Hiort af Ornäs & Kristoffersson 2012, p. 22 and prop. 1994/95:19 Part 1 p. 475 and Holmberg et al. 2012, p. 30.

[135] See para. 13 in *Björnekulla Fruktindustrier* (C-371/02), where the CJEU also refers to inter alia para. 8 in *Marleasing* (C-106/89). See also Ståhl 2005 p. 69, Hettne et al. 2011, pp. 189–192 and Prechal 2005, p. 186.

[136] See Ståhl et al. 2011, p. 37 and Ståhl 2005, p. 70.

[137] See Hiort af Ornäs & Kristoffersson 2012, p. 24, Sonnerby 2010, p. 66 and Kellgren 1997, p. 101.

[138] See Sonnerby 2010, p. 66.

[139] See Ståhl 2005, pp. 71 and 75 and Sonnerby 2010, p. 66.

[140] See para. 110 in *Adeneler et al.* (C-212/04). See also Sonnerby 2010, p. 66.

[141] The national legal certainty principles for taxation measures are above all expressed by the prohibition against retroactive tax legislation according to Ch. 2 sec. 10 second para. RF and the principle of legality which applies for taxation measures according to

The material to the present work has firstly been obtained from tax law and civil law acts, preparatory works and case law and from doctrine on the topic such as theses, hand- and textbooks and articles in periodicals. Important sources – but above all doors to other sources – for this work have the SKV's handbooks for VAT, taxation procedure, income tax and the connection between accounting and taxation been.[143] On the SKV's website[144] are inter alia these handbooks to be found, which sometimes have led me to inter alia precedents and the CJEU's verdicts.

Above all when law sources of such law source dignity as precedents and CJEU case law have been invoked in doctrine as secondary source I have obtained what is in the primary source. By thus getting principles which are of importance for the topic properly confirmed I have received support to judge whether there has been any need to move on in the same manner from secondary source to primary source also between material on a lower law source level. Also in such cases I have tried to avoid missing anything in e.g. a thesis invoked as primary material in a text- or handbook as secondary material. My ambition has thus been to avoid the risk of not discovering that the transference of information from the secondary source to the primary source has been incomplete or erroneous.[145]

There is a lot of foreign doctrine that is relevant for the VAT field,[146] and which is to be found in e.g. the international periodical EC Tax Review.[147] The choice of doctrine for this work can thus never be exhaustive. Instead it has been a matter of me in the research environment to which I have belonged seeking my way forward during the time I have worked with my licentiate's dissertation and this book (i.e. my doctor's thesis). That has inter alia meant that I have searched for material by using data bases such as Libris, Dawnsonera, ebrary and ECLAS, and to which Örebro University's website is connected.[148]

Ch. 8 sec. 2 first para. no. 2 RF [*nullum tributumj sine lege* (no tax without law)]. Ch. 8 sec. 3 was changed to Ch. 8 sec. 2 first para. no. 2 RF by SFS 2010:1408. See also Eka et al. 2012, p. 278 and Holmberg et al. 2012, p. 356. Alterations in Ch. 2 sec. 10 RF by SFS 2010:1408 were only linguistic. See Eka et al. 2012, p. 95.

[142] See also sec:s 1.2.3 and 1.3.

[143] See the SKV's *handledningar för mervärdesskatt 2011* and *2012*, *Handledning för skatteförfarandet*, *Handledning för mervärdesskatteförfarandet (2007)*, *Handledning för beskattning av inkomst vid 2012 års taxering* Part 3 and *Handledning för sambandet mellan redovisning och beskattning 2012*.

[144] See www.skatteverket.se.

[145] See Seipel 2010, p. 216.

[146] See Hiort af Ornäs & Kristoffersson 2012, p. 25.

[147] Articles in that periodical can be ordered via Internet on www.kluwerlawonline.se. See also Hiort af Ornäs & Kristoffersson 2012, p. 25.

[148] See www.oru.se (*under* Universitetsbiblioteket).

The analysis of the representative rule concerns in the first place those parts in the VAT Directive (2006/112) comprised by the harmonisation demand for the VAT legislations in the various EU Member States.[149] I mention foremost the concept taxable person and do not mention the tax rate issues, which is the most important area that remains to be harmonised.[150] At the interpretation of the rules in the ML the EU law is part of current law.[151] Above all the VAT Directive (2006/112) constitutes thus the legal ground concerning the contents of the rules in the ML and other EU Member States' legislations in the field. However, the representative rule does not have any equivalent in the VAT Directive (2006/112). Therefore are also foreign legislations of interest for the analysis of the representative rule. The EU law in the VAT field is part of current law at the interpretation of the rules in the ML. However, it is the EU law that shall be regarded at the interpretation of the rules in the ML. Thus, foreign law has only a serving purpose in relationship to the Swedish law at the analysis of the representative rule.[152] I am looking in the first place at the EU law when investigating the representative rule, but examine also if other countries – in the first place within the EU – can be chosen as objects for comparison concerning the analysis of the rule. I regard in that case foreign VAT legislations if they contain equivalents to the representative rule. Even if the highest interpreter of the EU law is the CJEU, I also regard verdicts in the highest instance in such a country if they can be of guidance for the analysis of the representative rule.

The CJEU verdicts are reported in ECR, i.e. European Court Report (from the CJEU, the General Court and the Civil Service Tribunal).[153] However, since June 2004 are not all verdicts published, but they are to be found in authentic language versions on the CJEU's website.[154] The EU's website[155] and webportal[156] have also been sources for finding CJEU verdicts.[157] Other input to find CJEU verdicts have also been inter alia the books *Mervärdesskattedirektivet – en kommentar*,[158] *Moms i*

[149] See art. 113 TFEU and also sec. 1.1.1.
[150] See para. 7 in the preamble to the VAT Directive (2006/112), where it is expressed that the rules in the directive is not fully harmonised.
[151] See sec. 1.1.3.
[152] Compare sec. 1.2.1.
[153] Mentioned before the Lisbon treaty the European Court of Justice (ECJ), the First Instance Court and the Civil Service Tribunal.
[154] See www.curia.europa.eu and Mulders 2010, p. 47 and Bernitz 2010 (2), pp. 82, 85 and 86.
[155] See www.europa.eu.
[156] See www.eur-lex.europa.eu.
[157] See Bernitz 2010 (2), pp. 82 and 85.
[158] Cit. Westberg 2009.

praktisk tillämpning EU-domstolens och Högsta förvaltningsdomstolens domar,[159] and *Mervärdesskatt i teori och praktik*.[160]

Swedish verdicts on EU law and VAT etc. are listed under a special headline in the register of *Högsta förvaltningsdomstolens* (HFD), i.e. the Supreme Administrative Court's, yearbooks, previously RÅ and nowadays HFD.[161] Besides that has inter alia the SKV's *Handledning för mervärdesskatt* been one road to find cases and advanced rulings on the topic. For advanced rulings from the time before 2007 *Skatterättsnämnden* (SRN), i.e. the Board of Advance Tax Rulings, refer on its website[162] to the SKV's case law protocol, i.e. to the predecessor *Riksskatteverket*'s (RSV) case law protocol and the SKV's *rättsfallssammanställning* – which are to be found on the SKV's website after inter alia writs and statements on the topic from the SKV or older writs on the topic from the RSV.

1.2.3 More about the primacy of the EU law, direct effect and EU conform interpretation

The EU is a legal person founded on a number of treaties, inter alia the Rome treaty from 1957 – nowadays the TFEU – and the TEU from 1993, and has also capacity to act under international law (so called tractate competence).[163] The EU law differs from the public international law, since it is a legal system of its own (*sui generis*) based on the fundamental treaties and independent but integrated with the EU Member States' national legal systems.[164] That is stated in the first paragraph of paragraph 3 in the summary of *Costa* (Case 6-64), which reads: "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply."

In pursuance of Costa the principle of the EU law's primacy before national law is considered fundamental for the EU law's impact in the

[159] Cit. Hiort af Ornäs och Kristoffersson 2012.
[160] Cit. Kleerup et al. 2012.
[161] The HFD was previously named *Regeringsrätten*.
[162] See www.skatterattsnamnden.se.
[163] See art. 47 TEU, art. 335 TFEU, art. 3(2) TFEU, art. 21(1) TEU, art. 2 first para. second indent TEU from 1993 and sec. 3 *lagen (1994:1500) med anledning av Sveriges anslutning till Europeiska unionen* (the so called accession act or the EU act), its wording according to SFS 2008:1095 (which came into force on the 1st of December 2009 according to SFS 2009:1110), and prop. 1994/95:19 Part 1 pp. 33, 78 and 113 and also Ståhl 1996, p. 54 and Bernitz 2010 (2), p. 60.
[164] See Ståhl 1996, p. 59, Prechal & van Roermund 2010, p. 6, prop. 1994/95:19 Part 1 pp. 111 and 475, Fritz et al. 2001, pp. 13 and 14, Ståhl et al. 2011, p. 21 and Pelin 1997, p. 209.

Member States.[165] The EU is on the one hand an international intra-state organization, but has on the other hand also to a large extent a supranational character.

The latter means that the Member States have conferred decision competence to the EU in pursuance of the principle on transferred competences (the principle of legality) according to articles 4(1) and 5(2) TEU.[166] On inter alia the VAT field the Swedish parliament transferred competence to the EU by virtue of the RF at Sweden's EU-accession in 1995.[167] The EU has however not any right of taxation of its own, why Sweden – like the other Member States – thus retains its tax sovereignty in e.g. the VAT field. However, the EU law influences the tax law in the Member States, e.g. by the VAT field being affected above all of the VAT Directive (2006/112). The EU Commission has actually made suggestions for the introduction of some form of EU-tax and urged the Council to work on the issue, but so far the EU lacks such a taxation right of its own.[168]

The EU law distinguishes between primary law and secondary law by above all the treaties and the legislation such as regulations and directives. The EU's institutions[169] issue the legislation by virtue of article 288 TFEU. By virtue of the same rule the EU's institutions creates the secondary EU law. The secondary EU law is therefore sometimes also called derived law.[170] The primary EU law has primacy before the secondary EU law.[171] The EU's secondary law legislation consists of the mentioned regulations and directives and of decisions, recommendations and opinions. Regulations, directives and decisions are, apart from recommendations and opinions, of binding character for the Member States.[172] Problems may arise with regard of the relationship between primary law and secondary law.

Sometimes I make comparisons at the analysis of the representative rule with the rules on VAT groups in Chapter 6 a ML. Therefore the

[165] See Ståhl 1996, p. 66, Prechal 2005, p. 94, Nergelius 2009, p. 58 and Sonnerby 2010, p. 60.
[166] See prop. 1994/95:19 Part 1 pp. 111, 470, 471 and 507 and Holmberg et al. 2012, p. 32, Bernitz 2010 (2), pp. 60 and 67 and Hettne et al. 2011, p. 77.
[167] See sec. 1.1.3.
[168] See the weekly letter from the EU-representation in Brussels week 30 year 2004, www.regeringen.se. See also Forssén 2011 (1), pp. 269 and 328.
[169] The EU's institutions shall according to art. 13(1) TEU be the following: the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors.
[170] See Ståhl 1996, p. 60 and Bernitz 2010 (2), p. 65.
[171] See Ståhl 1996, p. 60 and Sonnerby 2010, p. 38.
[172] See art. 288 TFEU.

following may be mentioned about that. The idea by that comparison is to show to what extent the rules on VAT groups may constitute alternatives to the representative rule or be of guidance at the analysis of that rule. The rules on VAT groups are based on a facultative directive rule.[173] By the rules on VAT groups can several enterprises in conjunction apply to register a VAT group and be considered as one single taxable person.[174] This means that such enterprises which are members of a registered VAT group do not become tax liable for taxable transactions between each other. Thereby the group members without right to deduct input tax avoid to suffering VAT as cost on group internal acquisitions.[175] However applies in pursuance of article 11 of the VAT Directive (2006/112) the possibility to register a VAT group only for members established within the country.[176] In the doctrine it has been claimed that that condition is in conflict with the principle of freedom for the citizens in a Member State to establish enterprise in another Member State's territory according to article 49 TFEU.[177] This conflict between primary EU law and secondary EU law are regarded in the situations where I make the mentioned comparisons at the analysis of the representative rule with the rules on VAT groups in Chapter 6 a ML. The rules on VAT groups do in other words not constitute any functioning alternative to the representative rule when all co-operating enterprises are not established in Sweden. In this context may be mentioned that the EU Commission opened a case on breach of the EU law against Sweden, and invoked that Chapter 6 a section 2 ML in practice limits the possibilities for group registration to apply to enterprises within the finance and insurance sectors, in conflict with article 11 of the VAT Directive (2006/112). However, the CJEU ruled in favour of Sweden and considered that the EU Commission had failed to show convincingly that, in the light of the need to combat tax evasion and avoidance, that

[173] See art. 11 of the VAT Directive (2006/112) [previously art. 4(4) second and third para:s of the Sixth Directive]. See also sec. 1.1.1.

[174] See Ch. 6 a sec. 1 first para. ML, where it (in translation) is stated that two or more taxable persons may be considered as one single taxable person (VAT group) at the application of the rules in the ML under the presuppositions which are stated in Ch. 6 a, whereby the activity carried out by the VAT group is considered one single activity. See also Bjerregaard Eskildsen 2011, p. 120.

[175] See prop. 1997/98:148 (*Gruppregistrering i mervärdesskattesystemet, m.m.*) pp. 1, 32, 33 and 61. See also Bjerregaard Eskildsen 2012, p. 91, Bjerregaard Eskildsen 2011, p. 114, Vyncke 2009, p. 302, RÅ 1989 ref. 86 (18 Oct. 1989) and Forssén & Kellgren 2010, p. 44.

[176] That has been expressed in the ML in Ch. 6 a sec. 2 second para., so that it is therein stated that only a taxable person's fixed establishment in Sweden may be contained in a VAT group.

[177] See Bjerregaard Eskildsen 2012, pp. 93 and 113 and Bjerregaard Eskildsen 2011, p. 114. The principle on freedom of establishment for the EU's citizens within the Member States is to be found in art. 49 TFEU, and according to art. 54 TFEU shall companies according to the civil- or business law be equal to natural persons who are citizens in the Member States.

measure is not well founded.[178] However, the problem with the described conflict between primary EU law and secondary EU law at the interpretation and application of the rules on VAT groups remains, and if that question will be tried by the HFD the HFD should obtain preliminary ruling from the CJEU.

In pursuance of article 288 third paragraph TFEU is, as mentioned above, directives binding legislation for the EU Member States to implement into their national legal systems, and the national authorities may only determine form and methods for the implementation.[179] An exact meaning with *form and methods* in article 288 third paragraph TFEU has not been concluded.[180] The purpose and consequence of this rest competence being left to the Member States' authorities only give them only possibilities to choose within the frames for the national constitutional and procedural law to make measures to implement a directive.[181]

If a directive rule has so called direct effect, the individual can invoke it in pursuance of the mentioned principle of the EU law's primacy before national law. The conditions for a directive rule – in pursuance of *van Gend en Loos* (Case 26/62) – having direct effect is that it is clear, precise and unconditional and the time for implementation have run out.[182] It can be hard to decide whether the interpretation of a directive rule gives a result to the individual's advantage or disadvantage. However, the important point with direct effect is that the individual is entitled to invoke a directive rule with such an effect to protect his interests. Sometimes it is said that direct effect classified as a right at the most means a right to invoke the EU law, and thereby a kind of procedural right with a corresponding obligation for the national courts and authorities – the national legal system – to respect that right.[183] The main rule on who is a taxable person, article 9(1) first paragraph of the VAT Directive

[178] See para. 39 in *Commission v. Sweden* (C-480/10).
[179] See sec:s 1.1.3 and 1.2.2.
[180] See Prechal 2005, p. 73.
[181] See Prechal 2005, pp. 74 and also p. 68.
[182] See Ståhl 1996, p. 68, Terra & Kajus 2012, p. 151, Bernitz 2010 (2), p. 74 and Sonnerby 2010, p. 63. See also prop. 1994/95:19 Part 1 p. 486, where it is (in translation) stated with reference to *van Gend en Loos* (26/62) that it is required for direct effect that the rule is *unconditional*, *precise and complete*, Moëll 1996, p. 197, where it is (in translation) with reference to *van Gend an Loos* stated that the CJEU has *concluded that a legal rule must be clear, precise and unconditional and intended to be directed to individuals to be able to have direct effect so that individuals can rely upon it and derive rights thereof*, and Nergelius 2009, p. 11, Habermas 2011, p. 58 and Alhager 2001, p. 94.
[183] See Prechal 2005, pp. 99, 100 and 105. See also van Dam & van Eijsden 2009, p. 28, where it is stated national (tax)courts in practice should apply the EU law *ex officio*, i.e. on their own initiative, to avoid that they otherwise risk to be questioned before the CJEU.

(2006/112), has direct effect.[184] The main rules on the right of deduction's emergence and scope, articles 167 and 168(a) of the VAT Directive (2006/112),[185] also have direct effect.[186]

Sometimes it is said that an EU conform interpretation is the regular method of interpretation concerning VAT, since the VAT field is so totally influenced by the EU law.[187] An obligation exists for the Member States' courts to make a directive conform (EU conform) interpretation of the ML ", as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter". That is stated by the CJEU in paragraph 8 in *Marleasing* (Case C-106/89), whereby the court also refers to *von Colson & Kamann* (Case 14/83).[188] The principle of EU conform interpretation was established in *von Colson & Kamann* and thus repeated in *Marleasing*.[189] By the expression *as far as possible* in paragraph 8 in *Marleasing* the CJEU actually considers that an EU conform (directive conform) interpretation is a requirement upon the national court, or authority, but with a certain reservation. In pursuance of paragraph 13 in *Björnekulla Fruktindustrier* (Case C-371/02) the reservation means: If the national law's interpretation principles allows an EU conform interpretation of the existing national law.[190] If the purpose of a directive is achieved by *a reasonable interpretation of a Swedish legal rule*, that interpretation shall be cho-

[184] See RÅ 2010 ref. 54 (20 Apr. 2010), the SKV's statement of 2004-12-14 (dnr 130 645783-04/111), Kristoffersson 2010 (2), p. 790, Hiort af Ornäs & Kristoffersson 2012, p. 56, Westberg 2009, p. 30.
[185] Previously art:s 17(1) and 17(2)(a) of the Sixth Directive. Art. 168(a) shall not be confused with art. 168a, which was inserted in 2011 into the VAT Directive (2006/112) according to the directive 2009/162/EU. That does not affect the main rule, since it by para. in the preamble to that directive follows that art. 168a secures that taxable persons are treated in the same way as according to the main rule for expenses related to supply of immovable property. The main rule art. 168(a) is nearest corresponded by Ch. 8 sec. 3 first para., whereas art. 168a is corresponded by Ch. 8 sec. 4 a which was introduced into the ML by SFS 2010:1892.
[186] See para. 36 in *BP Soupergaz* (C-62/93), where it is inter alia stated that "article 17(1) and (2) of the Sixth Directive" – nowadays art:s 167 and 168 of the VAT Directive (2006/112) – "confer rights on individuals on which they may rely before a national court". See also para. 23 in *Rompelman* (268/83) and para. 35 in *Stockholm Lindöpark* (C-150/99) and para:s 8 and 10 in *Kühne* (50/88), para:s 8, 9, 15, 17, 18 and 19 in *Mohsche* (C-193/91), para:s 46 and 47 and also para:s 27, 33, 38 and 40 in *Marks & Spencer* (C-62/00) and para. 29 in *Feuerbestattungsverein* (C-430/04).
[187] See Ståhl 2005, p. 74 and also Hultqvist 1998, p. 55.
[188] See also Westberg 2009, pp. 31 and 32, Rendahl 2009, p. 44, Olsson 2001, p. 133 and 134, Terra & Kajus 2012, p. 164, Kellgren 1997, p. 52, Nilsson 2009, p. 67.
[189] In Prechal 2005, pp. 183 and 184 it is furthermore stated that even before *von Colson & Kamann* (14/83) was implied that national courts had to apply consistent interpretation of national methods of implementation and of national law in general.
[190] In para. 13 in *Björnekulla Fruktindustrier* are also, as mentioned in sec. 1.2.2, referred to inter alia para. 8 in *Marleasing*.

sen, even if it may exist other reasonable interpretation alternatives.[191] Sometimes it is stated that the presupposition for an EU conform interpretation is considered to be that it according to the national law source doctrine exists a frame within which that conform interpretation fit.[192] EU conform interpretation could in principle be possible to motivate interpretations to the individual's disadvantage within certain frames.[193]

My analysis of the representative rule by direct conform interpretation is made like this. I make the directive conform interpretation in two steps,[194] where the interpretation of the national rule – the representative rule – based on national interpretation principles is made first in step 2. Step 1 means an interpretation of directive rules based on EU law interpretation principles, i.e. the interpretation principles which the CJEU uses. The CJEU uses above all the following four interpretation methods: textual interpretation, contextual interpretation, historical interpretation and teleological interpretation.[195] The reasonable interpretation result regarding the Swedish legal rule will be chosen, which best corresponds with intended material result of rules in the VAT Directive (2006/112) – step 2. The interpretation in step 1 is in that way steering the interpretation in step 2. In step 1 I make e.g. an analysis of the question whether a non-legal entity can constitute taxable person according to the main rule article 9(1) first paragraph of the VAT Directive (2006/112). The judgement of that question will steer the continued analysis in step 2. The room for an EU conform (directive conform) interpretation of the representative rule can be limited by the principle of legality for taxation measures. In section 2.7 I mention the principle of legality for taxation measures further.[196]

There are, as mentioned, a possibility and for highest instance in certain cases an obligation to obtain preliminary rulings from the CJEU according to article 267 TFEU. The HFD or the *Högsta domstolen* (HD), i.e. the Supreme Court, lacks reason to obtain preliminary ruling from the CJEU if the CJEU already has decided the question at hand (*acte éclairé*), but is otherwise obliged to do so according to article 267 third paragraph TFEU if the interpretation is not so obvious that there is no

[191] See Ståhl et al. 2011, p. 37, where this judgement is made based on *von Colson & Kamann* and *Marleasing*. See also Sonnerby 2010, pp. 63 and 64 and Stensgaard 2004, p. 31.
[192] See Kellgren 1997, p. 52 and Prechal 2005, pp. 201-203.
[193] See Kellgren 1997, pp. 52 and 53 and Prechal 2005, p. 203. In Prechal 2005 (p. 119) is by the way stated that certain directives as a whole protects the public good more than other directives.
[194] See Ståhl 2005, p. 68 and Sonnerby 2010, pp. 23, 24, 63 and 64 regarding EU conform (directive conform) interpretation as a two step interpretation operation.
[195] See Sonnerby 2010, p. 25 and Rendahl 2009, p. 55.
[196] See also sec:s 1.2.2 and 1.3.

room for doubt (*acte clair*).[197] Previously has been concluded that the CJEU's case law – *Götz* (Case C-408/06) and *Commission v. the Netherlands* (Case 235/85) – means that an ordinary private person cannot be considered having the character of taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112). That question is thus *acte éclairé*. In pursuance of *Safe* (Case 320/88) it is established in the CJEU's case law that the EU law concepts in the VAT field are independent in relationship to the national civil law. That means in the present context that an interpretation of the representative rule with regard also to the BL gives a non-EU conform interpretation result, if an ordinary private person would be deemed as tax liable only by his character of partner in an *enkelt bolag* or a *partrederi* according to the concept tax liability in Chapter 6 section 2 first sentence ML.[198]

At the interpretation of CJEU verdicts the Swedish language version of a CJEU verdict is authentic by virtue of the Swedish language being one of the EU's official languages. By paragraph 18 in *CILFIT* (Case 283/81) follows that the EU law's rules are written in several languages and that the various language versions are equally valid. An interpretation of an EU law rule demands according to the CJEU a comparison of the different language versions. To find out if there is at unclear issues about used terms an intended difference in meaning from the CJEU's side in a verdict the following is sometimes recommended. A comparison is made of the own language version – in my case the Swedish – of the verdict with the French so called original version and with the language of the case in the CJEU verdict at hand.[199] It is also recommended that the Swedish language version of an EU verdict should be compared with the English and/or the French version, but that for precision the French version should be regarded.[200] If the interpretation of a certain EU verdict seems unclear, I judge it in Swedish,[201] but also in the French version and in the language of the case in the case at hand.[202]

1.3 DELIMITATIONS

The representative rule is, as mentioned above, one of the special rules in the ML on who in certain cases is tax liable.[203] Such rules exist, as also mentioned above, besides in Chapter 6 where section 2 is to be

[197] See Hiort af Ornäs & Kristoffersson 2012, p. 22 and also Terra & Kajus 2012, pp. 248, 250 and 256, van Doesum 2009, p. 20, Prechal 2005, pp. 32 and 33 and Ramsdahl Jensen 2003, p. 16.
[198] See sec. 1.1.3.
[199] See Mulders 2010, p. 58.
[200] Se Bernitz 2010 (2), pp. 78 och 84.
[201] Provided that a Swedish translation exists on the CJEU's website (www.curia.europa.eu).
[202] Provided that the language of the case is Swedish, Danish, English, German, Netherlands or French.
[203] See sec. 1.1.3.

found, in Chapters 9 and 9 c ML.[204] The two latter mentioned Chapters concern the issue on tax liability regarding certain transactions, namely concerning voluntary tax liability for certain letting of real estate and exemption from taxation for supply of goods placed in certain warehouses (Customs warehouse etc.). I have chosen to analyze one of the special rules on tax liability concerning the subject issue, namely Chapter 6 section 2 ML. In the previously mentioned pre study the special cases of tax liability in Chapter 6 have been mentioned by an overview.[205] That has led to my choice to investigate the issue existing with Chapter 6 section 2 ML and, to the extent that rule concerns the VAT, Chapter 5 section 2 SFL,[206] namely that tax liability and collection are regulated in connection with a legal figure which is not a legal entity. Thus, I do not treat employee withholding taxes, employer's contribution (for national social security purposes) and excise duty. I mention also Chapter 9, namely regarding to what extent Chapter 6 section 2 ML should comprise voluntary tax liability for letting of business premises etc. according to Chapter 9 ML, since the subject issue regarding the representative rule is of interest in that context. Regarding Chapter 9 c, it is not of interest, since it concerns special rules on the determination of the tax object without any particular interest for the representative rule.

The other rules in Chapter 6 do not contain the described problem with taxation in connection with an enterprise form which is not natural or legal person from a civil law point of view like with *enkla bolag* and *partrederier* in section 2. Partnership (*handelsbolag*) which is mentioned in Chapter 6 section 1 is in pursuance of Chapter 1 section 4 BL an enterprise form which constitutes legal person.[207] Concerning the rule on bankruptcy estates in Chapter 6 section 3 ML the legal capacity issue does not get the same importance as regarding the representative rule, since Chapter 6 section 3 ML only means that the bankruptcy estate becomes tax liable for taxable transactions under the termination of the activity by a debtor which was tax liable.[208] The representative rule concerns instead an activity carried out in the enterprise form *enkelt bolag* or *partrederi* and which can carry on indefinitely.[209] Estates of deceased persons which are mentioned in Chapter 6 section 4 ML con-

[204] See Ch. 1 sec. 2 last para. ML.
[205] See regarding Ch. 6 sec. 2 ML: Forssén & Kellgren 2010, pp. 20–22 (sec. 2.2) and 31–57 (Ch. 4).
[206] Ch. 5 sec. 2 SFL comprises not only VAT, but also employee withholding taxes, employer's contribution (for national social security purposes) and excise duty, but Ch. 5 sec. 2 SFL will only be mentioned to the extent the rule concerns VAT.
[207] See also Forssén & Kellgren 2010, pp. 18–20, 29 and 30.
[208] See Forssén & Kellgren 2010, pp. 22, 23, 24 and 58–66.
[209] See also Forssén & Kellgren 2010, p. 60. The bankruptcy estate's tax liability according to Ch. 6 sec. 3 ML has by the way been treated in Öberg 2001, pp. 115etc.

stitute legal persons, but an estate of a deceased person is like a bankruptcy estate not an enterprise form, but only tax liable according to Chapter 6 section 4 ML if transactions occur in a deceased tax liable person's activity after the person's death.[210] The state constitutes a legal person, and the special rule on tax liability in Chapter 6 section 6 has only the meaning that if activity is carried out by the state through a public enterprise the enterprise itself shall be tax liable for its transactions.[211] In Chapter 6 there is no section 5, and by the way the remaining rules in Chapter 6, sections 7 and 8, concern tax liability in connection with certain intermediation of goods or services, which regards questions on the determination of the tax object and lacks a particular interest for the representative rule.[212] I mention thus not any of the other cases of special tax liability beside section 2 in Chapter 6 in this work. By the special rules on tax liability mentioned in Chapter 1 section 2 last paragraph ML – i.e. Chapter 6, Chapter 9 and Chapter 9 c – it is thereby only Chapter 6 section 2 which is investigated in this work and also to what extent Chapter 6 section 2 ML should comprise voluntary tax liability for letting of business premises etc. according to Chapter 9 ML.

The investigation of whether the concept tax liability and the collection according to Chapter 6 section 2 ML are complying with the main rules on who is a taxable person, the right of deduction and payment liability according to the VAT Directive (2006/112) is limited according to the following concerning the main rules for tax liability and right of deduction according to the ML.

Concerning the older main rule on *yrkesmässig verksamhet* according to the ML there was a problem regarding the compliance with taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112). That rule in the ML, Chapter 4 section 1 no. 1, referred to *näringsverksamhet* (business activity) according to Chapter 13 IL for the determination of *yrkesmässig verksamhet*.[213] The question whether that integration in the ML of the non-harmonised income tax law was complying with the EU law in the VAT field is left out in this work. In a memorandum from the Ministry of Finance of the 23rd of November 2012 (*Begreppet beskattningsbar person – en teknisk anpassning av mervärdesskattelagen*) it was suggested that the reference would be abolished from Chapter 4 section 1 ML. That was also later done on the 1st of July 2013, by SFS 2013:368.[214] The memo and the reform men-

[210] See also Forssén & Kellgren 2010, pp. 24, 67 and 68.
[211] See also Forssén & Kellgren 2010, pp. 24, 25 and 69.
[212] See also Forssén & Kellgren 2010, pp. 25–28 and 70–79.
[213] See also Forssén 2011 (1), pp. 22 and 27.
[214] The Treasury suggested also in the memo inter alia that Ch. 4 sec. 1 ML should be altered so that *beskattningsbar person* (taxable person) would be used instead of

tioned however not at all the representative rule.[215] The Ministry of Finance did neither suggest any alteration of the main rule on who is tax liable, Chapter 1 section 2 first paragraph number 1, nor for Chapter 1 section 2 last paragraph, which states that special rules on who is in certain cases tax liable are to be found in Chapter 6, Chapter 9 and Chapter 9 c, i.e. inter alia in Chapter 6 section 2 ML. The concept tax liable is corresponded by the VAT Directive's payment liable and not by the directive's taxable person.[216] Even if the Ministry of Finance's suggestion for a replacement of inter alia *yrkesmässig verksamhet* with *beskattningsbar person* (taxable person) was made, remains thus still the question whether the concept tax liable and the accounting and payment liability according to the representative rule are complying with taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112).

Concerning the main rule on deduction of input tax according to the general rules in the[217] there is a problem regarding the compliance with the emergence of the right of deduction according to articles 167 and 168(a) of the VAT Directive (2006/112). The ML can in that respect mean that the right of deduction does not emerge until taxable transactions have occurred in the activity and thus tax liability has emerged.[218] That would in accordance to the CJEU's case law not comply with the principle of the VAT's neutrality, but the right of deduction's emergence is decided by the intention to create taxable transactions in the economy activity.[219] It is the latter circumstances that decide the scope of the right of deduction, i.e. that the intention is to create taxable transactions of goods or services with the investments. Concerning the object side of the concept tax liability such circumstances shall be created in the activity, for the right of deduction of input tax to be able to exist regarding the acquisitions in the activity. There is also a so called right of reimbursement of input tax if the intention is to create from taxation exempted transactions.[220] It is only if the intention is to create from tax-

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yrkesmässig verksamhet (see p. 16 in the memo, www.regeringen.se). That was also achieved by SFS 2013:368.

[215] Compare: regarding Ch. 6 kap. sec. 2 ML, SFS 2013:368; and regarding Ch. 5 sec. 2 SFL, SFS 2013:369.

[216] See sec. 1.1.3.

[217] Ch. 8 sec. 3 first para.

[218] See Forssén 2011 (1), pp. 22, 23, 38, 39, 40 and 41 .

[219] See para. 23 in *Rompelman* (268/83) and the following CJEU cases: *INZO* (C-110/94), para:s 16 and 25; *Gabalfrisa et al.* (C-110/98-C-147/98), para. 45; *Breitsohl* (C-400/98), para:s 33-35 and 37; and *Faxworld* (C-137/02), para:s 28 and 41. See also Stensgaard 2004, pp. 98, 133 and 134. See by the way also para. 47 in *X* (C-84/09), where it is stated that the purchaser's intention at the acquisition moment also is of importance in connection with questions about determination of country of supply.

[220] See Ch. 10 sec. 11 first and second para:s ML and art. 169(c) of the VAT Directive (2006/112).

ation unqualified exempted transactions of goods or services that the investments do not entitle to right of deduction or reimbursement and the input tax on the acquisitions in the activity becomes costs.[221] I therefore do not mention the question on the emergence of the right of deduction or reimbursement.[222] The investigation of the concept tax liability in the representative rule concerns instead the following regarding acquisitions. I mention inter alia whether the scope of the right of deduction (or reimbursement), like what applies in that respect regarding the main rule Chapter 8 section 3 first paragraph ML, is complying with the corresponding main rule in the directive's article 168(a).

An uncertainty regarding the meaning of the basic concepts tax liability and acquisition entails an uncertainty concerning whether accounting of output tax should have been made or whether a too low or incorrect input tax has been accounted for in the MVD.[223] Such an erroneous accounting can lead to sanctions in form of tax surcharge (*skattetillägg*) or criminal charges. In that context may be mentioned that beside the principle of legality for taxation measures[224] there is also a crime law principle of legality, which is expressed *nulla poena sine lege* (no punishment without support in law) and *nullum crimen sine lege* (no crime without support in law).[225] A legal certainty aspect with the principle is the demand for support in law, the so called *lex scripta*-demand.[226] The *lex scripta*-demand is codified in Chapter 1 section 1 *brottsbalken* (1962:700), i.e. the Penal Code 1962.[227] The demand is also codified in article 7(1) of the European Convention of Human Rights. According to the Lisbon Treaty shall the EU make accession to the European Convention,[228] but the fundamental rights in the European Convention are already included in the EU law as general principles.[229] The European Convention has also been introduced as Swedish law according to SFS 1994:1219.[230] The *lex scripta*-demand for crime shall be read together

[221] Furthermore there are also so called deduction prohibitions for input tax regarding: acquisitions which can be referred to permanent dwelling, expenses for entertainment and similar, certain acquisitions of goods from ships, costs in a certain case of withdrawal taxation, acquisitions or hiring of passenger cars or motorcycles and in connection with so called margin taxation. See Ch. 8 sec:s 9, 15 and 16 and Ch. 9 a sec. 13 and Ch. 9 b sec. 3 ML. I disregard these special cases of deduction prohibitions, if not otherwise stated.
[222] The question was side issue D in Forssén 2011 (1). It was however not mentioned in the Ministry of Finance's memorandum of the 23rd of November 2012 nor later on in SFS 2013:368.
[223] See sec:s 1.1.2 and 1.2.1.
[224] See sec:s 1.2.2 and 1.2.3.
[225] See Alhager 1999, p. 75 and also Nordlöf 2005, p. 28.
[226] See Simon Almendal 2005, pp. 62 and 63 and also sec:s 1.2.2 and 1.2.3.
[227] See also Simon Almendal 2005, pp. 63 and 64.
[228] See art. 6(2) TEU.
[229] See art. 6(3) TEU.
[230] See also Simon Almendal 2005, p. 63 and Nergelius 2012, p. 22.

with the prohibition of retroactive punishment or other retroactive reactions to crime according to Chapter 2 section 10 first paragraph RF.[231] The principle of legality for taxation measures follows foremost by Chapter 8 section 2 first paragraph number 2 RF, and applies inter alia to the interpretation of the representative rule.[232] When I mention the principle of legality for taxation measures I stay regarding that principle at the question whether the representative rule entails legal uncertainty regarding the judgement of the basic concepts tax liability and acquisition and of the accounting and payment liability.[233] I leave out questions on tax surcharge and criminal law aspects.

Before the 1st of July 2013 the concept *näringsidkare* also existed in the ML, e.g. concerning the determination of the country of supply of services in Chapter 5 section 4 and concerning the invoicing rules in Chapter 11 and in Chapter 6 a regarding VAT groups.[234] For the determination of who was *näringsidkare* there was not any connection to the concept *näringsverksamhet* (business activity) in the IL, apart from, as mentioned above, regarding the older main rule on *yrkesmässig verksamhet* in Chapter 4 section 1 number 1 ML. It is only regarding Chapter 6 section 2 ML and the relationship to abroad for *enkla bolag* that Chapter 5 section 4 ML will be mentioned. For such a relationship will also the concept taxable person regarding the purchaser at intra-Union acquisitions of goods according to the main rule in Chapter 2 a section 3 first paragraph number 3 and second paragraph ML and of goods comprised by excise duty in the first paragraph number 2 of the same rule be mentioned. Apart from in the recently mentioned rules is in Chapter 6 section 2 first sentence ML the word *skattskyldig* (tax liable) regarding a partner in an *enkelt bolag* or *partrederi*. That problem is however not by itself affected by the concept *skattskyldig* being used in Chapter 2 a section 3 first paragraph number 3 ML regarding the vendor in the other involved EU Member State, why it is not mentioned in this work.[235] The rules on VAT groups are of interest for comparisons to the representative rule. Although these rules are limited to comprise the finance and insurance sectors and demands exist on all co-operating

[231] See also Simon Almendal 2005, p. 64 and Warnling-Nerep 1987, pp. 86 and 87.
[232] See also sec:s 1.2.2 and 1.2.3.
[233] See sec:s 1.1.2 and 1.2.1.
[234] By SFS 2013:368, which became the result of the mentioned memo of the 23rd of November 2012 from the Ministry of Finance, was also inter alia *näringsidkare* in Ch. 2 a, Ch. 5 sec. 4, Ch. 6 a and Ch. 11 ML altered into *beskattningsbar person*, i.e. taxable person (see the memorandum pp. 12-14, 20, 21, 26-29 and 38-40).
[235] Compare Forssén 2011 (1), p. 80. By SFS 2013:368 was tax liable (*skattskyldig*) in Ch. 2 a sec. 3 first para. no. 3 ML altered into *beskattningsbar person* (taxable person) on the 1st of July 2013, but otherwise was not any change made concerning the use of the concept tax liable in the ML.

enterprises being established in Sweden, they are an alternative to the representative rule.[236]

The invoicing rules in Chapter 11 ML were altered in 2004[237] insofar as the invoicing liability was connected to the concept *näringsidkare* instead of the concept *skattskyldig* (tax liable).[238] This change was caused by the so called invoicing directive (2001/115/EC).[239] The invoicing liability according to Chapter 11 section 1 ML is nowadays connected to the concepts *beskattningsbar person* (taxable person) and supply instead of to the concept *skattskyldig* (tax liable), which is used in the representative rule.[240] From an interpretation perspective I limit the investigation of the invoicing rules for the context to concern the question whether Chapter 11 should be completed by the invoicing liability according to the ML also comprising the representative rule. Otherwise the invoicing rules in the ML are mentioned in connection with the application issues at the hypothetic case studies regarding Chapter 6 section 2 ML.[241] Since 2008 there is furthermore a concept payment liable (*betalningsskyldig*) in the ML which concern liability to pay to the SKV an erroneously charged VAT, even if the amount does not constitute VAT according to the ML.[242] That is not a matter of tax liability (*skattskyldighet*), but only of a payment liability which has been introduced into the ML by virtue of article 203 of the VAT Directive (2006/112) for the situations where an amount erroneously has been noted as VAT in an invoice or similar document.[243] Since the amount does not lead to tax liability for the person from whom the goods or services have been acquired, that does not lead to right of deduction in the purchaser's activity due to it not constituting input tax.[244] Thus, it is a matter of a pure payment liability regarding erroneously charged VAT, and it is not mentioned more in this work.

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[236] See sec. 1.2.3.
[237] See SFS 2003:1134 – *lag om ändring i mervärdesskattelagen*.
[238] See also prop. 2003/04:26 (*Nya faktureringsregler när det gäller mervärdesskatt*).
[239] See the invoicing rules in art:s 217–240 of the VAT Directive (2006/112).
[240] See sec. 1.2.1.
[241] The invoicing liability according to Ch. 11 sec. 1 first para. ML and art. 220(1) of the VAT directive (2006/112) is based on the concept supply (*omsättning*). Sweden can in pursuance of art. 221(2) of the directive only issue legislation in a limiting direction regarding that liability and provided that it is a matter of supplies here, i.e. supplies placed within the SKV's control area. See also Forssén 2010, pp. 32, 34 and 35.
[242] See Ch. 1 sec. 1 third para. and 2 e ML, inserted by SFS 2007:1376, and prop. 2007/08:25 (*Förlängd redovisningsperiod och vissa andra mervärdesskattefrågor*) pp. 89 and 245. See also Forssén 2010, pp. 27etc.
[243] See prop. 2007/08:25 pp. 90 and 245. See also Forssén 2010, p. 28.
[244] See Ch. 8 sec. 2 first para. and sec. 3 first para. ML and prop. 2007/08:25 p. 86. See also Forssén 2010, p. 100.

When I write about accounting it is in the first place regarding the relationship between on the one hand the material rules on tax liability and right of deduction and on the other hand the invoicing rule sin the ML. I do not mention especially e.g. the connection between the rules in Chapter 13 ML regarding in which accounting period output tax and input tax respectively shall be accounted for and should be booked and the civil law concept *god redovisningssed* (Generally Accepted Accounting Principles, GAAP). In connection with issues on the meaning of GAAP it is sometimes expressed that *accounting recommendations and similar issuing of norms are a central law source in the tax law*.[245] However, I limit the accounting questions in this work to the mentioned material rules and the particular invoicing rules that the ML raises, which apply as independent special rules in the VAT field in addition to the general civil law accounting rules in *bokföringslagen* (BFL),[246] i.e. the Book-keeping Act.

The invoicing rules of Chapter 11 ML are for the control needs that the VAT raises in addition to the BFL's demands on the accounting of output tax and input tax in an enterprise's activity. A document including VAT containing all the formal demands on content according to Chapter 11 section 8 ML is according to Chapter 8 section 5 ML a presupposition for the tax liable being able to exercise right of deduction for a in the document – the invoice – charged input tax.[247] The CJEU has expressed that the condition on possession of a correct invoice, for exercising the right of deduction, accommodates "one of the aims of the Sixth Directive, that of ensuring that VAT is levied and collected, under the supervision of the tax authorities".[248]

The so called connected area (*kopplade området*) between the taxation and the civil accounting law is suggested to be revoked concerning the VAT as well as the income tax, according to SOU 2002:74 and SOU 2008:80 (*Beskattningstidpunkten för näringsverksamhet*) respectively.[249] Regardless whether these suggestion are realized or not, shall however the accounting in an MVD of the VAT when tax liability exist. Thus, in this work is only Chapter 4 section 5 BFL mentioned concerning the particular possibility for the partners in an *enkelt bolag* or *par-*

[245] See Bjuvberg 2006, p. 123.
[246] *Bokföringslagen (1999:1078)*, BFL.
[247] See art:s 178(a) and 226 of the VAT Directive (2006/112) and also prop. 1993/94:99 pp. 210, 211 and 217, prop. 1994/95:57 p. 136, prop. 2003/04:26 pp. 30, 31, 69 and 70. See also Forssén 2010, p. 59.
[248] See para. 37 in *Terra Baubedarf-Handel* (C-152/02), where reference is also made to para. 24 in *Reisdorf* (C-85/95) and to para. 17 in *Langhorst* (C-141/96), and also Forssén 2010, p. 60.
[249] See SOU 2002:74 Part 1 p. 20 and SOU 2008:80 Part 1 p. 19. Non of the two investigations has led to suggestions of legislation yet. See also the SKV's *Handledning för sambandet mellan redovisning och beskattning 2012* p. 37.

trederi to have a common book-keeping.[250] Otherwise the rules in the BFL will not be mentioned.

1.4 CENTRAL RESEARCH IN THE FIELD

There has not been any equal study of the representative rule before this work. In *Mervärdesbeskattning vid obestånd*[251] has one of the special rules on tax liability in Chapter 6 ML been treated, namely section 3 concerning bankruptcy estates, but that is not of any interest for the analysis of the representative rule.[252] Works close to the topic is my licentiate's dissertation, *Skattskyldighet för mervärdesskatt – en analys av 4 kap. 1 § mervärdesskattelagen*,[253] and the mentioned pre study to this work, *Momsskyldighet i särskilda fall: handelsbolag, enkla bolag, konkursbon, dödsbon och förmedlare m.fl.*[254]

Concerning taxable person and right of deduction respectively has *Merværdiafgiftspligten – en analyse af den afgiftspligtige transaktion*[255] and *Fradragsret for merværdiafgift*[256] respectively been research of a central interest for the investigation of the representative rule. *Contractuele samenwerkingsverbanden in de btw*[257] has also been research of such an interest for the investigation. There are VAT issues mentioned about inter alia so called *poolovereenkomsten*, which are not legal entities and thereby not comprised of the expression *any person who* in article 9(1) first paragraph of the VAT Directive (2006/112).[258] Also *Arvonlisäveroryhmät*[259] has been of interest for the investigation of the representative rule. Therein are *skattskyldighetsgrupper* (VAT groups) according to section 13 a FML treated,[260] whereby also to a certain extent tax liability for Finnish *sammanslutningar* according to section 13 FML, and joint responsibility for partners in a *sammanslutning* according to section 188 FML, are treated.[261] *Sammanslutningar* are similar to *enkla bolag* and do not constitute legal entities, but they are tax subjects according to section 13 FML.

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[250] See also prop. 1998/99:130 Del 1 p. 231.
[251] Cit. Öberg 2001.
[252] See sec. 1.3.
[253] Cit. Forssén 2011 (1).
[254] Cit. Forssén och Kellgren 2010.
[255] Cit. Ramsdahl Jensen 2003.
[256] Cit. Stensgaard 2004.
[257] Cit. van Doesum 2009.
[258] "*Een pool is dus geen entiteit en kan niet worden aangemerkt als 'eenieder' in de zin van art. 9 Btw-richtlijn*". See van Doesum 2009, p. 297.
[259] Translation: *Skattskyldighetsgrupper* (VAT groups). Cit. Saukko 2005.
[260] See sec. 1.2.2.
[261] See Saukko 2005, pp. 134–162.

Other central research in the field are *Strukturneutralitet i momssystemet*[262] and *Neutral uttagsbeskattning på mervärdesskatteområdet*[263] regarding the neutrality aspects on the VAT.[264] Concerning questions on the EU law and interpretation within the field of taxation have also the following two research projects been of interest for this work: *Aktiebeskattning och fria kapitalrörelser En studie av beskattningen av den löpande avkastningen av aktieinvesteringar på bolags- och ägarnivå mot bakgrund av EG:s fria kapitalmarknad*[265] and *Mål och metoder vid tolkning av skattelag – med särskild inriktning på användning av förarbeten*.[266] *Bolagskonstruktioner och beskattningseffekter En inkomstskatterättslig studie av handelsbolag och enkla bolag*[267] mentioned first and foremost the income tax, but has also been of interest for this work. That is also the case regarding *Personbolag i beskattningen Inkomstbeskattningen av öppna bolag och kommanditbolag i spänningsfältet mellan beskattningen av enskilda näringsidkare och aktiebolag*[268] and *Taxation of Cross-Border Partnerships Double Tax Relief in Hybrid and Reverse Hybrid Situations*.[269]

1.5 LANGUAGE ISSUES

The Lisbon Treaty of 2007 contains the TEU and the TFEU, which have the same legal value and are mentioned the treaties.[270] By the Lisbon Treaty it is stated that the EU's Charter of Fundamental Rights shall have the same legal value as the treaties.[271] The Lisbon Treaty was incorporated in Sweden on the 1st of December 2009 by SFS 2008:1095 and 2009:1110. The EC Treaty (the Rome treaty) from 1957 changed name to the TFEU, but the TEU from 1993 remains with certain alterations. In the TEU and TFEU the EU is called the Union. According to article 1 TEU has the Union replaced and succeeded the European community (EC). Therefore I use the EU instead of the EC and EU law (Union law), EU conform and the CJEU. At references to inter alia case law from the time before the Lisbon Treaty may the EC etc. be used.

Sometimes I use the expression the general rules in the ML. I mean thereby in the first place the basic concepts for the tax liability's emergence according to the main rule in Chapter 1 section 1 first paragraph number 1 ML, i.e. the concept supply (*omsättning*) and the concept tax-

[262] Cit. Bjerregaard Eskildsen 2012.
[263] Cit. Sonnerby 2010.
[264] Of interest was also a research project at Karl-Franzens-Universität Graz, *Gesellschaft und Gesellschafter in der Umsatzsteuer*, by Caroline Heber.
[265] Cit. Ståhl 1996.
[266] Cit. Kellgren 1997.
[267] Cit. Mattsson 1974.
[268] Cit. Rehbinder 1995.
[269] Cit. Barenfeld 2005.
[270] See art. 1 third para. TEU and art. 1(2) TFEU.
[271] See art. 6(1) first para. TEU.

able person (*beskattningsbar person*), and the to supply corresponding concept acquisition (*förvärv*) in the main rule on the right of deduction's emergence in Chapter 8 section 3 first paragraph ML. *Högsta förvaltningsdomstolen* (HFD), i.e. the Supreme Administrative Court, was previously named *Regeringsrätten*.

Sometimes I use the expression an ordinary private person. I thereby mean such a consumer for VAT purposes who is not comprised by the main rule on taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112). For instance I mean by an ordinary private person a natural person who is only conducting a hobby activity and not constituting an entrepreneur. If not otherwise stated, I also mean by an ordinary private person a natural person who is working as an employee. Another example of an ordinary private person is a natural person who is an ordinary private lender, and who is not carrying out finance activity.

1.6 OUTLINE

In *Chapter 2* I review the law political aims which I have chosen for the Swedish VAT system, and which are regarded at the analysis of the representative rule. In *Chapter 3* I describe the mentioned model, ABCSTUXY, which I use in connection with the application issues concerning the representative rule. In *Chapter 4* I make an international outlook, which is meant to make possible a certain comparative analysis. In *Chapter 5* I give an overview regarding *enkla bolag* and *partrederier* from a civil law perspective.

In *Chapter 6* I investigate the representative rule. I regard thereby the law political aims, in accordance with the meaning and relevance for the investigation which follows by Chapter 2. At the investigation in Chapter 6 is also regarded to a certain extent Finnish VAT law in accordance with the international outlook in Chapter 4 and also the overview regarding *enkla bolag* and *partrederier* from a civil law perspective in Chapter 5. I divide the investigation in Chapter 6 as follows. I begin with the interpretation issues and the question whether a non-legal entity can constitute taxable person, which will be steering for the continuation of the interpretation of the representative rule. I continue with the application issues, where I test certain hypothetical cases based on the tool in form of the ABCSTUXY-model which I have drawn up in Chapter 3.[272] Amongst the interpretation issues is also included the question whether there is any rule in the ML concerning the tax object whose application, independently of the existence of the representative rule, is affected by the enterprise form *enkelt bolag*.

[272] See sec. 1.2.3.

Each chapter 2–6 – except Chapter 5 – begins with questions which are treated in the respective chapter and the chapters are ended with a summary and conclusions. In Chapter 6 I furthermore continuously make conclusions in connection with the treatment of each respective question mentioned in the beginning of that chapter. In *Chapter 7* I then make a total summary and leave concluding viewpoints.

2. CERTAIN LAW POLITICAL AIMS FOR THE SWEDISH VAT SYSTEM

2.1 INTRODUCTION

In this chapter I review the law political aims for the Swedish VAT system which I have identified and chosen to include in the investigation of the representative rule. These aims are:

- a cohesive VAT system,
- neutrality,
- EU conformity,
- efficiency of collection and
- legal certainty including legality.

The aims above mentioned are regarded at the investigation in Chapter 6 of the problems stated in section 1.1.2. The aims are assumed also giving support to decide at the work with the investigation the importance of what I mention in Chapters 3-5 for the trial of the questions. In the next section, section 2.2, the identification and choice of these aims is treated. Thereafter are the aims reviewed in the above mentioned order. The chapter is ended with a discussion about the aims and with an explanation to how the aims are used in the continued analysis.

2.2 LISTING OF CERTAIN LAW POLITICAL AIMS

According to the OECD there are totally over 150 countries which have VAT or Goods and Services Tax (GST).[273] The OECD develops policies, guidelines and other material concerning inter alia questions on VAT and GST.[274] The GST does not have to comprise all parts of the vale added tax principle according to the EU law,[275] and countries outside the EU which have VAT legislations do not always either follow theses basic principles.[276] I mention the VAT according to the EU law,[277] and therefore I list and choose law political aims for the Swedish VAT system with respect of the EU sources on VAT.

The primary EU law harmonisation demand according to article 113 TFEU on the various Member States' VAT legislations means partly that it is necessary to ensure the establishment and functioning of the internal market, which applies according to the TEU since 1993, partly

[273] See sec. 1.2.1.
[274] See sec. 1.2.1, where I refer inter alia to *What are the OECD International VAT/GST Guidelines? December 2010* (www.oecd.org) and Rendahl 2009, pp. 59etc and Kogels 2012, pp. 230–232.
[275] These are mentioned in sec. 2.4.1.2.
[276] See Forssén 2011 (1), pp. 279etc.
[277] See sec. 1.2.1.

that distortion of competition shall be avoided.[278] The primary EU law has primacy before the secondary EU law, where the VAT Directive (2006/112) is one of the legislations.[279] In pursuance of the solidarity principle according to article 4(3) TEU and article 291(1) TFEU Sweden shall as an EU Member State take all necessary legislative measures to implement/incorporate the secondary EU law VAT Directive (2006/112) into the ML. Sweden may according to the primary EU law's article 288 third paragraph TFEU only decide the form and methods for the implementation, whereas Swedish courts and authorities are obliged to interpret and apply the ML with respect of the VAT Directive (2006/112) and the result intended with the directive.[280] It is basic for the VAT that the EU Member States shall have *one* VAT system in their legal systems. The VAT Directive's complete title is: COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax.[281] Thus, it follows already from the VAT Directive's title that the Swedish VAT system by the EU law shall be cohesive with the VAT systems in the other Member States, so that they form *one* common VAT system. The harmonisation demand on the EU Member States' VAT legislations shall ensure the establishment and functioning of the internal market, and also entail competition neutrality.

Already by the primary EU law in the VAT field and with regard of the VAT Directive's title the aim of *a cohesive VAT system* is identified. I choose to put it as the top law political aim for the Swedish VAT system. I get back to it in the next following section, and mention also above all that the secondary EU law by the VAT Directive (2006/112) – in line with its title – confirms that aim is overall meaning. Concerning the other mentioned aims may before that the following be mentioned.

That the VAT shall be competition and consumption neutral follows the primary EU law harmonisation demand meaning that distortion of competition shall be avoided. A distorted competition between the Member States is in conflict with that the harmonisation demand according to article 113 TFEU shall lead to that the establishment and functioning of the internal market is ensured. By secondary EU law the principle of a neutral VAT is also expressed in the preamble to the VAT Directive (2006/112).[282] *Neutrality* concerning the VAT constitutes thus also a relevant law political aim for the Swedish VAT system.

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[278] See sec:s 1.1.3, 1.2.1 and 1.2.3 and also Bernaerts & Nathoeni 2011, p. 293 and prop. 1994/95:19 Part 1 p. 139.
[279] See sec. 1.2.3.
[280] See also sec:s 1.1.3, 1.2.2 and 1.2.3.
[281] See sec. 1.1.1.
[282] See inter alia fourth para. in the preamble to the VAT Directive (2006/112) and fifth and seventh para:s in the preamble to the VAT Directive (2006/112). See also Bernaerts & Nathoeni 2011, p. 293.

According to article 288 third paragraph TFEU Sweden has as a Member State still the competence to give the Swedish VAT system its form and to determine the methods thereby. By the ML is thus a Swedish VAT decided. However follows also by the primary EU law rule that Swedish courts and authorities are obliged to interpret and apply the ML with respect of the VAT Directive (2006/112) and intended result by it. The rules in the ML shall thereby be in compliance (conform) with the directive rules. Deviations from the VAT Directive's rules at the Swedish application of law regarding the ML may affect the consumers on the internal market in the following way: Such differences may taken by themselves lead to that they choose or refrain from Swedish suppliers of goods or services in competition with suppliers from other Member States or from third countries (places outside the EU). An undesired competition distortion will be the consequence on the internal market. *EU conformity* is thus yet another law political aim which is relevant for the Swedish VAT system.

By the Lisbon Treaty and article 113 TFEU it has been clarified that the primary EU law demand on harmonisation of the Member States' VAT legislations also means that competition distortion shall be avoided. This means that with regard of primary EU law there is a demand on *a level playing field* for the indirect taxes to be harmonised.[283] Thereby should the formal law source value of the neutrality principle in the VAT field be set equally as high as the equally primary EU law founded demand on EU conformity in pursuance of inter alia article 288 third paragraph TFEU. The latter rule means that Swedish courts and authorities are obliged to interpret and apply the ML with respect of the VAT Directive (2006/112) and the result intended by it.[284]

In the preamble to the VAT Directive (2006/112) it is stated that taxable persons' obligations as far as possible should be harmonised, so as to ensure the necessary safeguards for the collection of VAT in a uniform manner in all the Member States.[285] The CJEU has expressed that the condition on possession of a correct invoice, to exercise the right of deduction, accommodates the directive's purpose to ensure the collection of VAT (and the tax authority's control).[286] In the preparatory

[283] See Terra & Kajus 2012, p. 6.
[284] See also Bjerregaard Eskildsen 2012, p. 47, where it is stated that "*[n]eutralitetsprincippet kan […] ikke tillægges forfatningsmæssig status, og princippet kan derfor* ikke *føre til fortolkningsresultater, der strider mod ordlyden af momsdirektiverne samt momssystemets indretning og opbygning*" (Da.). Formally should however in my opinion the neutrality principle and EU conformity be equally as high nowadays, due to the mentioned clarification according to art. 113 TFEU.
[285] See para. 45 in the preamble to the VAT Directive (2006/112).
[286] See para. 37 in EU-målet *Terra Baubedarf-Handel* (C-152/02) and also sec. 1.3.

works the state's interest of efficiency of collection of VAT has been expressed as the tax liable in principle functioning as the state's collector.[287] The importance of collection is also shown by the EU Commission's green paper, On the future of VAT : Towards a simpler, more robust and efficient VAT system.[288] In the follow-up to the green paper the Commission states the following for the future. By modern methods of collection and control shall the national tax authorities focus on risk behaviour, address fraud and act collectively as a European VAT authority and make the actual VAT collection more effective.[289]

The differences regarding the efficiency concerning the collection of VAT in the various Member States may also lead to an undesired competition distortion of the internal market. On the one hand may e.g. less serious suppliers of goods or services choose not to establish in Sweden, if the collection of VAT is more efficient here than in other Member States. On the other hand may for the same reason serious entrepreneurs choose to establish in Sweden rather than in other Member States, because they can count on getting back their VAT expenses from the state within reasonable time. In both cases the overall aim that the Member States shall form a common VAT system is prevented. An *efficiency of collection* is thus also a relevant law political aim for the Swedish VAT system. By the way is the EU directive 2010/24/EU *concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures* lead to a more efficient and swifter such assistance than the previous directive 2008/55/EC.[290]

That Sweden still has the competence to determine form and methods for the implementation of the VAT Directive (2006/112) means that the frame for the EU conform interpretation is set by the national interpretation principles. Thereby can the room for an EU conform interpretation of the representative rule be limited by the Swedish constitutional principle of legality for taxation measures, which follows by the CJEU's case law.[291] I mention also *legal certainty including legality* according to the EU law, and judge its relevance as aim for the Swedish VAT system in relationship to the other aims. That the tax law has an apparent invasive character can be reason for thereby giving the aim legal cer-

[287] See prop. 1989/90:111 (*Reformerad mervärdeskatt m.m.*) p. 294.
[288] See COM(2010) 695 final of the 1st of December 2010. See also Šemeta 2011, p. 3, where it is also noted that the green paper mentions whether the collection of VAT can be improved.
[289] See COM(2011) 851 final p. 6. See also Sandberg Nilsson 2012, pp. 265 and 266.
[290] See Spies 2012, pp. 527f. The directive 2010/24/EU has been implemented into *lag (2011:1537) om bistånd med indrivning av skatter och avgifter inom Europeiska unionen*, which on the 1st of January 2012 replaced *lagen (1969:200) om uttagande av utländsk tull, annan skatt, avgift eller pålaga*.
[291] See sec:s 1.2.2 and 1.2.3.

tainty including legality a particularly great importance at the investigation of the representative rule.[292]

The described aims are the most important. There are also other aims of importance, e.g. state finance reasons taken by themselves. However, they have not equally as strong anchoring in the VAT system as a cohesive VAT system, neutrality, EU conformity, efficiency of collection and legal certainty including legality. They have been identified and chosen in this work with respect of the EU law in the VAT field, and I have therefore chosen to consider these aims satisfactory.

2.3 A COHESIVE VAT SYSTEM

Concerning secondary EU law follows already by the VAT Directive's complete title that the Member States shall have *one* common VAT system: COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax.[293] By the first paragraph in the preamble to the Sixth Directive follows also that all Member State have introduced a VAT system. Furthermore follows by the eighth paragraph in the preamble to the First Directive from 1967 that the idea of all Member States having a common VAT system was that the gross taxes which lead to so called cumulative effects (tax-on-tax), by them lacking the VAT's in principle general right of deduction, would be replaced by the VAT.[294] In the preparatory work to the GML was also expressed the right of deduction as characteristic for the VAT as a multiple-stage tax: By the right of deduction for input tax the VAT distinguishes from multiple-stage taxes of so called cascade type. In a cascade tax system each transaction leads to an actual tax burden.[295] Concerning secondary EU law follows also by the fourth paragraph in the preamble to the VAT Directive (2006/112) inter alia that the VAT legislations in the Member States – as a presupposition for realizing the internal market – must not obstruct the free movement of goods and services.

Thus, it is confirmed that the various EU Member States through the EU law shall have *one* common VAT system in their legal systems not only by the title of the VAT Directive (2006/112), but also by the preamble to the VAT Directive (2006/112). The review shows that the preamble to the VAT Directive (2006/112) also means a confirmation of what is stipulated by primary EU law concerning free movement and establishment on the internal market: TFEU states inter alia the so called four

[292] Compare Kellgren 2002, p. 530.
[293] See sec. 2.2.
[294] See Ståhl et al. 2011, pp. 200 and 201 and Stensgaard 2004, p. 46.
[295] See prop. 1968:100 (*Kungl. Maj:ts proposition till riksdagen med förslag till förordning om mervärdeskatt, m.m.*) p. 36. The GML replaced the general goods tax. The GML's introduction was influenced by the EC law (nowadays the EU law) in the field – see prop. 1968:100 pp. 1, 25, 31 and 51.

freedoms for movement between EU Member States of goods, service, persons and capital and, which often is spoken of as a fifth freedom, the principle of freedom of establishment for EU citizens and enterprises within the Member States.[296] By the way follows by article 395 of the VAT Directive (2006/112) that a Member State must have a permit from the EU to make rules diverging from the rules in the VAT Directive (2006/112). A presupposition for permission is in that case that the intention is to simplify the collection of tax or to prevent certain sorts of tax avoidance or tax evasion. Sweden has only in a small number of cases been given such a permit from the EU.[297] That permission is demanded for divergence from the VAT Directive's rules also supports that the reasons for the directive following by the preamble to the directive should be law political aims for the Swedish VAT system,[298] for working by the EU law for a common VAT system within the EU. The same applies about the fact that certain special rules otherwise in the ML only exist by virtue of the accession treaty with the EU in pursuance of article 380 of the VAT Directive (2006/112).[299]

My conclusion is that a cohesive VAT system can be drawn up as the overall law political aim for the Swedish VAT system. The ambition from a Swedish horizon must in the end be, like what applies to the other Member States, to work for through the EU law a cohesive VAT system. The reasons for the VAT Directive (2006/112) following by its preamble confirm in accordance of the review in this section concerning secondary EU law what I invoke in section 2.2 with regard of the primary EU law: Article 113 TFEU states that the different Member States' VAT legislations shall be harmonised with each other so that it is inter alia ensured that EU's internal market is established and functioning. Since the EU lacks taxation right of its own, have Sweden and other Member States actually still tax sovereignty in e.g. the VAT field.[300] However, that shall not lead to a question on law selection by entrepre-

[296] The four freedoms are to be found in art. 28 TFEU, goods, art. 56 TFEU, services, art. 45 TFEU, persons, and art. 63 TFEU, capital. The principle on the EU citizens' right of free establishment in the Union is to be found in art. 49 TFEU. See also Bernitz 2010 (2) p. 59.

[297] For the building sector was inserted into the ML on the 1st of July 2007, by SFS 2006:1031 and 2006:1293, with permit from the EU according to art. 27 of the Sixth Directive – nowadays art. 395 of the VAT Directive (2006/112) – rules on so called reverse tax liability at supply of building services, which diverge from the directive. The motive was to come to terms with tax avoidance within the building sector. See prop. 2005/06:130 (*Omvänd skattskyldighet för mervärdesskatt inom byggsektorn*) pp. 28-31. See also regarding *Öresundskonsortiet* in sec. 2.6.

[298] The para:s in the preamble to the directive are also called *recitals* (i.e. listed reasons) for the directive. That follows e.g. by para:s 3 and 19 in *ADV Allround* (C-218/10) and by para:s 3 and 27 in *BLM* (C-436/10).

[299] See also prop. 1994/95:19 Part 1 pp. 142 and 143.

[300] See sec. 1.2.3.

neurs or consumers choosing or refraining from Sweden as part of the internal market depending on divergences in the ML in relationship to the VAT Directive (2006/112). That would be contrary to the harmonisation demand according to article 113 TFEU which shall mean that competition distortion is avoided. The both primary and secondary EU law fundamental aim of a cohesive VAT system should in my opinion undoubtedly be listed as the overall law political aim for the Swedish VAT system at the investigation in this work.

2.4 NEUTRALITY

2.4.1 Neutral VAT and the parts of the value added tax principle according to the EU law

2.4.1.1 In general

Sometimes it is stated that it is not self-evident that the tax rules shall work neutrally in all respects.[301] Distribution and enterprise political purposes are considered motivating a so called interventionistic, i.e. non-neutral, creation of certain rules.[302] The enterprise political motivated intervening rules are assumed to give sociological-economical efficiency winnings. The tax rules in the industrialized countries have evolved from intervening toward neutrality, inter alia in Sweden.[303]

The neutrality principle is, according to the CJEU's conception, a fundamental principle for the VAT.[304] However, the neutrality principle has several dimensions, and thus not only one meaning.[305] Sometimes it is said that the neutrality principle in the VAT field has a subject side, i.e. that neutrality between the tax subjects is provided, and an object side, i.e. that neutrality is provided between transactions.[306] That meaning or dimension regarding the neutrality in the value added taxation which is mentioned in this work concerns the subject and object sides of the concept tax liability and its use in Chapter 6 section 2 ML. That neutrality is an expressed part of current law at the interpretation and application of the ML follows directly of article 113 TFEU. There is the harmonisation demand on the different Member States' VAT legislations stated and that it inter alia means that competition distortion shall be avoided. The demand on a neutral VAT is also expressed in the preamble to the VAT Directive (2006/112). That the VAT shall be neutral is confirmed

[301] See Melz 1990, p. 67.
[302] See Melz 1990, p. 67 and SOU 1989:34 Part I p. 464.
[303] See Melz 1990, p. 67.
[304] See para. 59 in *Schmeink & Cofreth & Strobel* (C-454/98) and para. 25 in *Ampliscientifica & Amplifin* (C-162/07). See also Bjerregaard Eskildsen 2012, p. 42.
[305] See van Doesum 2009, p. 31, where it, with reference to *Schmeink & Cofreth & Strobel* (C-454/98) and *Ampliscientifica & Amplifin* (C-162/07), is (in translation) stated that *according to the CJEU's conception is the neutrality principle a fundamental principle for the VAT*, but that *the neutrality principle has however several dimensions*. See also Sonnerby 2010, pp. 18, 22 and 35.
[306] See Alhager 2001, p. 70.

both in primary and secondary EU law. If the competition becomes distorted because of the VAT not being neutral, it is in conflict with the harmonisation demand meaning that it shall be ensured that the internal market is established and functioning.[307] A striving to minimize sociological-economical efficiency losses is considered entailing a striving for neutral tax rules.[308]

2.4.1.2 Article 1(2) of the VAT Directive and its importance for the neutrality

The neutrality principle concerning taxation is considered aiming to avoid that equal economical actions before tax shall become unequal after tax and thereby affecting the individuals' economic planning.[309] Divergences from the VAT Directive's rules at the Swedish application of law concerning the ML can, as above mentioned, affect the consumer's choice of Swedish suppliers of goods or services in relation to competitors in other Member States or third countries. That is in conflict with the aim of a neutral Swedish VAT system as well as the aim that the Swedish VAT system shall be EU conform. Article 1(2) of the VAT Directive (2006/112) shows how VAT according to the EU law shall function in a market, for the competition to be neutral. By each link in the production and distribution chain up to the consumer (the ennobling chain) in principle being taxed according to article 1(2) of the VAT Directive (2006/112) it shall not make any difference how the production and distribution is organized. The VAT shall thereby be neutral.[310] The analysis of the representative rule is thus made inter alia of whether the enterprise forms mentioned in that rule, *enkla bolag* and *partrederier*, affects the consumer's choice and thereby the neutrality aspect regarding the VAT because of they existing in some link of the ennobling chain. A problem which shall be dealt with in Chapter 6, and which connects to this, is whether *enkla bolag* and *partrederier*, despite they not being legal entities, can constitute taxable persons according to article 9(1) first paragraph of the VAT Directive (2006/112). In that case could both the enterprise forms constitute tax subjects for VAT purposes, instead of – as according to the representative rule – the partners. The problem included to judge whether a non-legal entity can constitute taxable person.[311]

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[307] See sec. 2.2.
[308] See Melz 1990, p. 67 and SOU 1989:35 (*Reformerad mervärdeskatt m.m.*) Part I p. 143.
[309] See Bjerregaard Eskildsen 2012, p. 43, Melz 1990, p. 67 and SOU 1989:34 Part I p. 464.
[310] See Bjerregaard Eskildsen 2012, p. 42 and Ds 1992:6 (*Skatteförmåner och andra särregler i inkomst- och mervärdeskatten Rapport till expertgruppen för studier i offentlig ekonomi Av Nils Mattsson*) p. 75.
[311] See problem 2 in sec. 1.1.2.

Concerning secondary EU law the principle of a neutral VAT is expressed inter alia of the fourth paragraph in the preamble to the VAT Directive (2006/112) and the fifth and seventh paragraphs in the preamble to the VAT Directive (2006/112).[312]The neutrality principle in the VAT field is also considered deriving from article 2 of the First Directive.[313] Certain basic principles can, as parts of the VAT principle according to the EU law, be read out of article 1(2) as follows:

- *The first paragraph of article 1(2) reads*: ”The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.” The first paragraph can in my opinion – together with the second paragraph – be said to express the principle of passing on the tax burden.[314]

- *The second paragraph of article 1(2) reads*: ”On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.” The second paragraph expresses – together with the first paragraph – in my opinion the principle of a general right of deduction, the reciprocity principle and the principle of passing on the tax burden.[315]

- *The third paragraph of article 1(2) reads*: ”The common system of VAT shall be applied up to and including the retail trade stage.” The third paragraph determines – together with the first paragraph – in my opinion the scope of the VAT, by including all producers and distributors of the product or the service up to and including the retailer. Thus, in the end the consumer pays, as a consequence of the passing on of the tax burden link by link (or stage by stage) in the chain of enterprise (the ennobling chain), a price including output tax on the total ennobling value

[312] See sec. 2.2.
[313] See Sonnerby 2010, p. 285. Art. 2 of the First Directive has by the way been replaced by art. 1(2) of the VAT Directive (2006/112).
[314] See also Forssén 2011 (1), p. 272.
[315] See para. 23 in *Commission v. France* (50/87), where it is stated that the principle on the right of deduction is established in art. 2 of the First Directive [nowadays art. 1(2) of the VAT Directive (2006/112)]. The reciprocal is expressed also temporal in art. 167 [previously art. 17(1) of the Sixth Directive] of the VAT Directive (2006/112). There it is stated that ”[a] right of deduction shall arise at the time the deductible tax becomes chargeable”, i.e. when the state can claim the VAT from the counterparty. See also Forssén 2011 (1), p. 272.

of the product or the service.[316] The principle of a general right of deduction, the reciprocity principle and principle of passing on the tax burden forms the VAT principle. By maintaining these basic principles the VAT becomes neutral insofar as it does not affect the competition due to differences in the value added taxation concerning the enterprises or goods or services included in the chain. Thus, the VAT principle means that what is taxed is, opposite to what applies to other multiple-stage taxes, only the sum of the value added which have been created within the respective enterprise (economic activity). The consumer is thus affected as tax carrier by the VAT on the total value added on the in the ennobling chain produced product or service.[317]

2.4.1.3 A neutral VAT – an example

I illustrate the recently mentioned basic principles for the VAT according to the EU law by the following example, where the ennobling of a product up to the consumer is made in a chain of entrepreneurs consisting of a manufacturer, a wholesaler and a retailer:

1. *The manufacturer* which is producing the product sets a price on it of SEK 80 and that shall cover costs and give a profit. I assume that the general VAT rate 25 per cent according to Chapter 7 section 1 first paragraph ML is applicable. The manufacturer charge output tax SEK 20 in the invoice to the wholesaler (price SEK 80 + output tax SEK 20=SEK 100 including VAT) accounts in an MVD to the SKV,
    - Output tax, SEK 20.

2. *The wholesaler* makes, at the sale of the product to the retailer, a mark-up of 40 per cent to cover costs above the purchase cost and profit. The price will be SEK 112 excluding VAT (1,4 x 80), and the output tax SEK 28 in the invoice to the retailer and accounts in an MVD to the SKV,
    - Output tax SEK 28 and
    - Input tax SEK 20 and
    - Tax to pay SEK 8.

3. *The retailer* makes, at his sale of the product to the consumer (the end customer), a mark-up of 75 per cent to cover costs above the purchase cost and profit. The price is SEK 196 excluding VAT (1,75 x 112), and the output tax SEK 49 (0,25 x 196). The retailer charge output tax SEK 49 in the invoice to the end customer (the consumer) and accounts in an MVD to the SKV,

[316] See also Forssén 2011 (1), p. 272.
[317] See also Forssén 2011 (1), pp. 36, 37 and 272.

- Output tax SEK 49 kr and
- Input tax SEK 28 and
- Tax to pay SEK 21.

4. *The consumer* (the end customer) stands outside the VAT system and lacks right of deduction for VAT, and is thereby burdened as tax carrier of the VAT on the whole ennobling value, SEK 49. The has received the same amount totally, by the enterprises in the ennobling chain up to the consumer having paid to the SKV SEK 20 (the manufacturer) + SEK 8 (the wholesaler) + SEK 21 (the retailer)=SEK 49.

An amount of SEK 49 is thus the VAT which totally seen is finally passed on to the consumer in, by a right of deduction by one enterprise corresponds to a tax liability by another in the ennobling chain (reciprocity). By the right of deduction for involved enterprises is not limited in my example, but the principle of a general such right is assumed to apply to all involved enterprises, no cumulative effect arises, i.e. no tax-on-tax effect. The VAT principle function thereby ideally through the principles of right of deduction, reciprocity and passing on of the tax burden according to article 1(2) of the VAT directive (2006/112) working as general as possible for those involved. The VAT becomes neutral if various manufacturers, wholesalers and retailers apply the tax in the same manner as in the example. It is the same if some participant in the ennobling chain makes supplies of goods or services which are comprised by exemption from taxation according to someone of the rules in Chapter 3 ML[318] or by one of the two reduced VAT rates in Chapter 7 section 1 second or third paragraphs ML. [319] A neutral tax is achieved if the competitors to such a participant are comprised by the same exemption or reduced VAT rate in their activities. The VAT on the price to end customer (the consumer) will be higher or lower only because of

[318] By Ch. 3 sec. 1 first para. ML on general taxation of supply of goods and service and that certain exemptions from taxation are stated in other rules of Ch. 3 ML corresponds on the object side the concept tax liability in Ch. 1 sec. 2 first para. no. 1 ML structurally with the rules on payment liability in art:s 2(1)(a) and (c), 14–19, 24–29, 131–153 and 193 of the VAT Directive (2006/112). The main rules on supply of goods and services in Ch. 2 sec:s 1 and 5 ML correspond to the main rules on delivery of goods and the supply of services in art:s 14(1) and 24(1) of the VAT Directive (2006/112).

[319] In Ch. 7 sec. 1 first para. ML is stated that the general tax rate is 25 per cent. In Ch. 7 sec. 1 second and third para:s ML is stated cases where reduced VAT rates of 12 and 6 per cent may be applied. That is conform with the rules in the VAT Directive (2006/112) on that the Member States shall apply a normal tax rate and may apply one or two reduced VAT rates, which follows by art:s 96 and 98(1) of the VAT Directive (2006/112). Sweden has furthermore by virtue of the accession act (the EU act) permission to apply so called zero rating in certain cases. See art. 380 of the VAT Directive (2006/112) and also prop. 1994/95:19 Part 1 p. 143.

differences between the mentioned participants regarding their costs or mark-ups. Thus, the consumer chooses not a supplier before the others depending on differences of the taxation situation between various suppliers of the product, which proves that the VAT is neutral .

2.4.1.4 The principle of neutrality in the CJEU's case law

The CJEU notes that the principle of the common system for VAT is stated in article 2 of the First Directive, and that tax liable persons, according to article 17(2) of the Sixth Directive,[320] have right to deduct the VAT already levied in a previous stage of the production and distribution process from the VAT they themselves shall account for and pay to the state.[321] The CJEU has also expressed that article 33 of the Sixth Directive[322] shall prevent that the function for the common system of VAT is jeopardized by a Member State levying taxes or fees on goods and services in the same way as VAT.[323] The principles in article 1(2) are thus decisive according to the CJEU also about whether a tax is a competing VAT similar tax. The latter is not allowed according to article 401 of the VAT Directive (2006/112),[324] since it jeopardizes the common VAT system.[325] That would in other words jeopardize the overall aim of a cohesive VAT system. The CJEU has in the grand chamber case *Banca populare di Cremona* (Case C-475/03)[326] established the following four criteria of what constitutes VAT according to the EU law:

1) The tax applies generally to transactions relation to goods or services.

2) The tax is proportional to the price charged by the taxable person in return for the goods and services which he has supplied.

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[320] Nowadays art. 168 of the VAT Directive (2006/112).

[321] See para. 15 in *Wilmot* (295/84). See also Ståhl et al. 2011, pp. 205 and 206. Note: in the Swedish translation of the Sixth Directive existed *skattskyldig person* and *beskattningsbar person*. In Swedish language version of the VAT Directive (2006/112) is only *beskattningsbar person* used.

[322] See art. 33(1) of the Sixth Directive, where it is inter alia stated that the directive must not prevent a Member State from retaining or introducing certain there stated taxes and, more generally, all taxes, customs or fees which cannot be characterized as turnover taxes etc. By the double negation is determined that there must not exist VAT similar taxes beside the VAT. Art. 33(1) of the Sixth Directive corresponds today of art. 401 of the VAT Directive (2006/112).

[323] See para. 16 in *Wilmot*.

[324] Previously art. 33(1) of the Sixth Directive.

[325] See also Terra & Kajus 2012, pp. 1321 and 1325.

[326] See para. 28 in *Banca populare di Cremona*. See also Bjerregaard Eskildsen 2012, p. 45 and Cnossen 2006, p. 4.

3) The tax is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place.

4) The amounts paid during the preceding stages of the process are deducted from the tax payable by a taxable person, with the result that the tax applies, at any given stage, only to the value added at that stage and the final burden of the tax rests on the consumer.

These criteria of VAT according to the EU law can in my opinion be read out of article 1(2) of the VAT Directive (2006/112). The principles in article 1(2) of the VAT Directive (2006/112) are characteristic for the VAT and shall lead to VAT being taken out in a neutral way.[327] The CJEU has *a purist approach* in relationship to the basic principles in article 2 of the First Directive.[328] The ideal with the VAT principle according to the EU law is that a taxable person (entrepreneur) may deduct *input tax* on in principle all acquisitions in the activity and that in principle all supply of goods or services in the activity shall be taxable and entail accounting and payment of *output tax*.[329] This ideal is also confirmed by the rules in articles 131-137 of the VAT Directive (2006/112) on exemption from taxation regarding certain transactions shall be interpreted restrictively.[330] It follows also by the fifth paragraph in the preamble to the VAT Directive (2006/112) that if the VAT on goods and services is taken out as generally as possible the VAT system becomes the most simple and neutral. *The VAT's construction accommodates the demand on competition neutrality as long as the tax is passed on to the final consumer.*[331] Furthermore the CJEU confirms in its case law the VAT's basic principles according to article 1(2) of the

[327] See van Doesum 2009, p. 28 and also Henkow 2008, pp. 63 and 64.
[328] See Conlon 1998, p. 569 regarding use of *a purist approach* and that therein is noted from *BLP Group* (C-4/94) that the CJEU at the interpretation of the scope of the right of deduction according to art. 17 of the Sixth Directive "relied on Article 2 of the First Directive". Art. 2 of the First Directive is referred to in para:s 7, 11, 20, 21 and 28 in *BLP Group* and also in e.g. *Midland Bank* (C-98/98), para. 29, *Abbey National* (C-408/98), para. 27, and *Cibo* (C-16/00), para. 30. By the way is art. 17 of the Sixth Directive nowadays corresponded by art:s 167–177 of the VAT Directive (2006/112) – see Terra & Kajus 2012, p. 366.
[329] See Westberg 1994, p. 82 and Alhager 2001 p. 69.
[330] See e.g. *Commission v. the Netherlands* (235/85), para. 7; *SUFA* (348/87), para:s 10 and 13; *W. M. van Tiem* (C-186/89), para. 17;*SDC* (C-2/95), para. 20; *Commission v. Ireland* (C-358/97), para. 52; *Stockholm Lindöpark* (C-150/99); para. 25; *Seeling* (C-269/00), para. 44; and *Sinclair Collins* (C-275/01), para. 23. See also prop. 1989/90:111 p. 86, regarding that the GML on the 1st of January 1991 was EC adjusted by SFS 1990:576 in the present respect insofar as the taxation was made in principle general for all supplies of goods or services with exemptions stated expressly in the act from that general taxation.
[331] See Gunnarsson 1998, p. 553 and also Bjerregaard Eskildsen 2012, p. 45.

VAT Directive (2006/112), e.g. by *Schul* (Case 15/81) and *Rompelman* (Case 268/83):

- The CJEU invokes article 2 of the First Directive and article 17(2) of the Sixth Directive,[332] when it describes the VAT's basic principles meaning that it shall be a matter of a general tax which is passed on by deduction and charge link by link in the ennobling chain up to the consumer.[333]

- The CJEU concluded that "a basic element of the VAT system is that VAT is chargeable on each transaction only after deduction of the amount of the VAT borne directly by the cost of the various components of the price of the goods and services and that the deduction procedure is so designed that only taxable persons may deduct the VAT already charged on the goods and services from the VAT for which they are liable."[334] With reference to the quoted text the CJEU concludes furthermore "[a]article 4(1) of the directive must be considered against that general background" which "defines a taxable person as 'any person who independently carries out in any place economic activity specified in paragraph (2), whatever the purpose or results of that activity'".[335]

- The CJEU regarded the reciprocity principle in article 2 of the First Directive, by referring to article 17(1) of the Sixth Directive[336] and invoke that "the right to deduct shall arise at the time when the deductible tax becomes chargeable".[337]

- The CJEU can by the way be said emphasizing the principles of passing on the tax burden and reciprocity and the neutrality aspect, when the CJEU invokes the following: "From the provi-

[332] Nowadays art:s 1(2) and 168 of the VAT Directive (2006/112).
[333] See para. 10 in *Schul* (15/81) and also para. 16 in *Rompelman* (268/83), where the CJEU refers to *Schul*, and para:s 17, 18 and 19 in *Rompelman*.
[334] See para. 16 in *Rompelman* (268/83), where the CJEU refers to *Schul* (15/81), where para. 10 has an approximately corresponding wording.
[335] See first and second sen:s in para. 17 in *Rompelman* (268/83). By the way has *skattskyldig person* in the Swedish translation of art. 4(1) of the Sixth Directive been replaced with *beskattningsbar person* in art. 9(1) first para. of the Swedish version of the VAT Directive (2006/112).
[336] Nowadays art. 167 of the VAT Directive (2006/112).
[337] See para. 18 in *Rompelman* (268/83). See also SOU 1964:25 p. 382. Thereof follows that right of deduction for input tax presupposes that tax liability has emerged by the counterparty, but not that he has fulfilled his accounting and payment liability to the state. That is in compliance with the reciprocity principle in the VAT Directive (2006/112). See also Stensgaard 2004, p. 49 and Forssén 2001, pp. 74–76. See also Norberg 1993, p. 448 and, regarding the reciprocity principle at the income taxation, Pelin & Elwing 2003, p. 94 and Kellgren 2005, pp. 169etc.

> sions set forth above it may be concluded that the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of value-added tax therefore ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way".[338]

The CJEU may be considered giving a particular expression of the right of deduction's strong position as one of the VAT's basic principles, when the CJEU in the joint cases *Ampafrance et al.* (Cases C-177/99 and C-181/99) concludes the following: Although a Member State can have certain so called deduction prohibitions in its VAT legislation by virtue of article 176 second paragraph of the VAT Directive (2006/112)[339] may such a prohibition not be applied so that in the actual case at hand cannot be proven that it is a matter of expenses which have emerged in the business activity.[340] According to paragraphs 57, 62 and 63 in *Ampafrance et al.* The CJEU considered namely that national French legislation was not EU conform, despite that therein was inserted exemptions from the general right of deduction in article 17 of the Sixth Directive[341] for the tax liable's acquisitions of goods and services for entertainment by virtue of article 27 of the Sixth Directive,[342] to avoid tax avoidance and tax evasion. According to the CJEU could not divergences from the rules of the Sixth Directive be accepted, if they meant that a limitation of the right of deduction was based on the objective character of an acquisition without regard to whether it in the actual case at hand could be proved that the expenses had emerged in the business activity. At the application of the deduction limiting rule in the French legislation the individual was obliged to prove that it was not a matter of tax evasion or tax avoidance, to be able to exercise the right of deduction, even if such evidence was not possible. The CJEU expressed that then that rule did not constitute "as Community law now stands" a means which according to the so called proportionality principle in article 5 of the EC Treaty is proportional to the aim to prevent tax evasion or tax avoidance. The CJEU considered that the rule affected the Sixth Directive's purpose and principles in a too large extent.[343]

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[338] See para. 19 in *Rompelman* (268/83).
[339] Previously art. 17(6) second para. of the Sixth Directive.
[340] Already in the preparatory work to the GML the right of deduction was emphasized as characteristic for the VAT as a multiple-stage tax (see sec. 2.3).
[341] Nowadays art:s 167–177 of the VAT Directive (2006/112).
[342] Nowadays art. 395 of the VAT Directive (2006/112).
[343] See also Forssén 2011 (1), p. 277, where it is by the way also concluded that art. 5 of the EC Treaty has been replaced by art. 5 TEU, by the Lisbon Treaty.

2.4.2 The subject and the scope of the activity and neutral VAT

The investigation in Chapter 6 of the representative rule's compliance with the main rule on taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112) concerns inter alia that the rule regards tax liability and collection in connection with legal figures – *enkla bolag* and *partrederier* – which are not legal entities.[344] Beside the general review of the neutrality aspect on the VAT in the nearest previous section I mention in the present section the neutrality aspect for questions on the tax subject's legal form and the scope of the tax subject's activity.

The CJEU has established that the VAT shall be neutral concerning under which legal form the tax liable carries out his activity.[345] The neutrality principle and the principle of equal treatment is not one and the same principle.[346] However, it is sometimes said that a consequence of the neutrality principle as a particular form of the principle of equal treatment is considered to be legal form neutrality on subject level within the VAT.[347] By the following statement the CJEU may also be deemed to point out the importance of the state's collection interest in connection with the neutrality principle: The tax law neutrality principle prevents namely in particular that economical players which make the same supplies are treated differently regarding the collection of VAT.[348]

I have compared this statement by the CJEU according to the French language version of *Gregg* (Case C-216/97) with the Swedish language version and with the version of the actual language of the case, English. A difference can be concluded insofar as the CJEU in the language of the case talks about "the levying of VAT", whereas the CJEU in French and Swedish talks about "*perception de la TVA*" (collection of the VAT) and "*mervärdesskattehänseende*" (VAT respect). The Swedish and French language versions are thus closer to each other than to the English. In English would *perception de la TVA* have been written *collection of the VAT*.

Thus, I conclude that the CJEU, by deviating in the described way from the language of the case at the formulation of the first sentence of paragraph 20 in *Gregg*, states a more general determination of the neutrality principle. A neutral VAT shall not only mean neutrality concerning charge of the tax, but also regarding the collection of it. By the CJEU

[344] See problem 2 in sec. 1.1.2 and sec. 2.4.1.2.
[345] See second sen. in para. 20 in *Gregg* (C-216/97) and also Alhager 2001, p. 58.
[346] See Bjerregaard Eskildsen 2012, p. 47.
[347] See van Doesum 2009, p. 32.
[348] My translation of the French language version of first sen. of para. 20 in *Gregg*. See also e.g. *ADV Allround* (C-218/10), para:s 30 and 43.

making this general determination of the VAT's neutrality with respect of the question about the legal form's meaning I conclude the following. The neutrality principle comprises both the form isste taken by iytself and that the competition shall be neutral for VAT prurposes regardless the scope of the activity shich various subjects carry out.[349] By the way the CJEU has in *BLM* (Case C-436/10) stated that the character as *skattskyldig person* (taxable person) according to the Sixth Directive[350] is connected to the transactions which are carried out by the economical player and not to the legal form in which that subject is carrying out its activity.[351] However, the CJEU states at the same time that the question on who is a taxable person is determined by article 4(1) of the Sixth Directive,[352] whereby is meant "*varje person*" who independently somewhere carries out economic activity.[353] Compare the expression "*den som*" in article 9(1) first paragraph of the VAT Directive (2006/112) – no changes in the English language versions though (compare "any person who").[354]

A question which will be judged in this work is thus whether a non-legal entity can constitute taxable person according to the main rule article 9(1) first paragraph of the VAT Directive (2006/112).[355] With respect of article 1(2) of the VAT Directive (2006/112) should an entrepreneur in an ennobling chain up to the consumer be able to be an entity which does not constitute a legal entity, such as an *enkelt bolag* or *partrederi*. The principles in article 1(2) characterize the VAT according to the EU law and shall lead to the VAT being taken out in a neutral way.[356] To exclude a certain enterprise form, such as an *enkelt bolag* or *partrederi*, is in conflict with the neutrality in that respect. The question is however whether article 9(1) first paragraph of the VAT Directive (2006/112) can be given the interpretation that an entity, enterprise form which does not constitute a legal entity is comprised by the directive rule.

An EU law rule must be placed in its context and interpreted in the light of the EU law as a whole.[357] The CJEU sometime talks about interpretation by guidance of *the aims and broad logic* of the VAT system.[358] The

[349] See also Forssén 2011 (1), pp. 93 and 94.
[350] *Beskattningsbar person* (taxable person) according to the VAT Directive (2006/112).
[351] See para. 27 in *BLM* (C-436/10).
[352] Nowadays article 9(1) first para. of the VAT Directive (2006/112).
[353] See para. 27 in *BLM* (C-436/10).
[354] See sec. 1.1.3.
[355] See sec. 1.1.2.
[356] See sec. 2.4.1.2.
[357] See Prechal 2005, pp. 32 and 33. See also van Doesum 2009, p. 20.
[358] See para. 35 in *Securenta* (C-437/06), where reference also is made to para. 28 in *Wollny* (C-72/05), regarding that the CJEU at the interpretation of the Sixth Directive

CJEU's case law means thereby that the Member States may interpret with respect of "the principles underlying the common system of VAT", when the actual directive rule itself is not giving sufficient enough guidance.[359] Thus may the interpretation of the expression "any person who" in article 9(1) first paragraph of the VAT Directive (2006/112) be made in the first place with respect of the directive's article 1(2): There can the basic principles be read out which forms the VAT principle according to the EU law and which the CJEU falls back on at a necessary filling out of interpretation.

2.5 EU CONFORMITY

Sweden may in pursuance of article 288 third paragraph TFEU determine the Swedish VAT system's form and methods for the implementation of the rules in the VAT Directive (2006/112) into the ML. However, the VAT Directive (2006/112) is binding for the Swedish courts and authorities insofar as the interpretation and the application of the rules in the ML must not mean transgression of the intended result of the VAT Directive (2006/112).[360] A breach of the EU law by Sweden by a rule in the VAT Directive (2006/112) not being implemented or correct incorporated in the ML can lead to claims on idemnification from individuals against the state. By the joint cases *Francovich och Bonifaci* (Cases 6 and 9/90) follow namely that breach of the EU law may incur the state indemnification liability.[361] In that case it shall be a matter of e.g. a directive giving the individuals rights, that the rights can be read out of the directive's rules and that causality exists between the Member State's transgression and the individual's damage.[362] If Sweden incur liability for breach of the EU law, follows by the preparatory work to the accession act (the EU act) that Sweden joins the CJEU's conception that Sweden as Member State is obliged to take necessary steps to make the law breach situation cease to exist.[363]

The rules in the ML shall thus be in compliance (conform) with the directive rules. An EU conform interpretation means that the national law source doctrine gives a frame within which the conform interpretation fits and that that interpretation will be chosen at the law application. The question is whether the representative rule and the concept tax liability in the rule together with the rule's function as collection rule fits within the VAT principle according to the EU law and the on the EU law based

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can fall back on *the aims and broad logic of the Directive*, when a rule is applied on a situation which it does not expressly comprise.

[359] See para. 34 in *Securenta* (C-437/06)

[360] See sec. 2.2.

[361] See para:s 37–41 in joint cases *Francovich & Bonifaci* (6 and 9/90).

[362] See Terra & Kajus 2012, pp. 164 and 180, Rendahl 2009, pp. 44 and 45 and prop. 1994/95:19 Part 1 p. 488.

[363] See prop. 1994/95:19 Part 1 pp. 482, 487 and 488.

law political aims for the Swedish VAT system drawn up in this chapter.[364] The formal law source value of the demand on an EU conform ML should be set as high as the neutrality principle in the VAT field, since both principles follow by the primary EU law.

Since the basic problem with the representative rule is that it contains two enterprise forms – *enkla bolag* and *partrederier* – which are not legal entities, the investigation in Chapter 6 concerns in the first place the tax subject question.[365] Between certain sectors there are differences in the value added taxation for enterprises, but they shall foremost regard concerning the object side of the VAT rules and not which enterprises shall be included in an ennobling chain up to the consumer so that legal form would have a meaning thereby.[366] For instance are thus care-, education- and finance- and insurance activities comprised by exemption from taxation for supply of their goods and services, whereas e.g. a consultant's services are comprised by the general taxation of supply of goods or services. Furthermore the VAT rules mean differences between various sectors regarding applicable tax rates, i.e. regarding whether the general tax rate or anyone of the reduced tax rates shall be applied. If such rules in the ML concerning the tax object deviates from corresponding rules in the VAT Directive (2006/112),[367] it is decisive for the neutrality aspect to judge whether it means a competition distortion to apply the deviating rule at comparison between various sectors. Assume e.g. that the deviation concerns the insurance sector insofar that the rule on exemption from taxation for supply of insurance services according to Chapter 3 section 10 ML would have a far too big scope compared to article 135(1)(a) of the VAT Directive (2006/112). If the rule by such a deviation would mean that supply of ordinary consultant services in an insurance activity would be comprised by the exemption from taxation, a distortion of the competition arises in relation to consultant enterprises. That is in conflict with the CJEU's case law meaning that the rules in article 131-137 of the VAT Directive (2006/112) if exemption from taxation shall be interpreted restrictively.[368]

That *enkelt bolag* or *partrederi* as enterprise form is to be found in a rule on tax liability in special cases, Chapter 6 section 2 ML, is thus of interest regarding *neutrality* and *EU conformity* as law political aims for the Swedish VAT system. Neither concerning the subject side or the object side of the representative rule exists any limitations concerning

[364] See sec. 1.2.3.
[365] See problem 2 in sec. 1.1.2 and sec:s 2.4.1.1 and 2.4.2.
[366] See sec:s 2.4.1.2, 2.4.1.3 and 2.4.2.
[367] See sec. 2.4.1.3, where reference is made in two notes to the rules in the ML and in the VAT Directive (2006/112) regarding the tax object (exemption from taxation and tax rates etc.).
[368] See sec. 2.4.1.4.

the concept tax liable or the accounting and payment liability. Of interest in the present respect is that Chapter 6 section 2 ML and Chapter 5 section 2 SFL does not mean any limitations to a certain sort of activity regarding *enkla bolagen*. Such a limitation exists however where *partrederierna* are concerned, but they resemble *enkla bolagen* and I consider them in that manner as a subsection to *enkla bolagen* at the analysis of the representative rule.[369] The main rule on who is tax liable, Chapter 1 section 2 first paragraph number 1 ML, has a systematic correspondence with the main rule on who is payment liable according to articles 2(1)(a) and (c) and 193 of the VAT Directive (2006/112). I examine whether the concept tax liable and the accounting and payment liability of the representative rule are complying with the main rule on taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112), and thereby with the main rules on payment liable and right of deduction in article 168(a) of the VAT Directive (2006/112). If Chapter 6 section 2 is not complying with the main rules in the ML regarding tax liability, Chapter 1 section 2 first paragraph number 1 ML, and right of deduction for acquisitions, Chapter 8 section 3 first paragraph, is the rule neither complying with the corresponding main rule sin the directive. Since the enterprise form *enkelt bolag* does not have any limitation to a certain sort of activity or sector, the competition is distorted between those using the enterprise form and enterprises carried out in other forms. Then it is not relevant to go further and try the representative rule in relationship to other hypothetical cases on the theme EU conformity.

2.6 EFFICIENCY OF COLLECTION

The fiscal purpose, i.e. that taxes shall finance public activities, is sometimes mentioned as a so called ultimate purpose for both the VAT and the income tax.[370] The state's interest of an effective VAT collection means that the tax liable functions in principles as tax collector for the state.[371] The EU's attitude law politically in collection respect has gone from as many as possible making taxable transactions ought to be comprised by the VAT system to the EU Commission sending out a message of exercising restraint in that respect and of prioritizing registration control and otherwise questions on collection of VAT.[372] The SKV has also noted that the VAT system is exposed to such grave fraud that it has been pointed out from EU level the importance of the Member States exercising efficiency of collection of those *given entrance into*

[369] See sec. 1.1.1: *Partrederi* is sometimes said to constitute a form of *enkelt bolag*.
[370] See Melz 1990, p. 64 and also e.g. SOU 1989:35 pp. 140 and 142.
[371] See sec. 2.2 and also Virgo 1998, p. 591, where it is stated that "the taxpayer" can be seen as "agent for the Commissioners" (Inland Revenue Commissioners).
[372] See sec. 5.4.1, Reviewing the way VAT is collected, in the EU Commission's green paper COM(2010) 695 final and the EU Commission's follow-up to the green paper, COM(2011) 851 final p. 6.

the system.[373] The CJEU also mention the state's collection interest in connection with the neutrality principle.[374] That efficiency of collection is central for the VAT in the EU law's meaning follows also of the preamble to the VAT Directive (2006/112) stating that taxable persons' liabilities as far as possible should be harmonised, to ensure that tax collection is made in a uniform way in all Member States.[375] That the VAT shall be harmonised within the EU has by the way not only importance for the state finances in the Member States, but also for the EU as legal person. The taxation base for VAT forms also base for the Member States' financing of the EU's institutions.[376]

Thus, I identify and choose also *efficiency of collection* as a law political aim for the Swedish VAT system. However, I consider that that aim must not come into conflict with neutrality as law political aim for the Swedish VAT system. That follows of that article 395-permits from the EU for deviations from the VAT Directive (2006/112) to simplify the tax collection[377] only to an insignificant extent may affect the Member States total tax revenues at the final consumption stage.[378] The possibility to such permissions for deviations from the VAT Directive (2006/112) are thereby limited above all by the principle of passing on the tax burden in article 1(2) of the VAT Directive (2006/112), and thus by the neutrality principle.[379] With that limitation of article 395-permits in mind I make an overview of the for VAT purposes particular solution that *Öresundskonsortiet* has received by virtue of such a permission. It confirms that an effective collection still is considered a significant aim for the VAT system from Swedish side as well as from the EU's side.

Besides the special rules on tax liability in Chapter 6, Chapter 9 and Chapter 9 c ML there is a reference to special rules on VAT of interest in this work, namely in Chapter 1 section 2 c, which was introduced in the ML by SFS 2000:143. Therein it is stated that there are special rules on VAT in *lagen (2000:142) om avtal med Danmark om mervärdesskatt för den fasta vägförbindelsen över Öresund*. The special rule Chapter 1 section 2 c is considered necessary in the ML to accomplish that value added taxation of the consortium (*enkla bolaget*) regarding the permanent road-connection between Sweden and Denmark over *Öresund* (*Öresundskonsortiet*).

[373] See prop. 2010/11:165 Part 1 p. 320.
[374] See sec. 2.4.2.
[375] See para. 45 in the preamble to the VAT Directive (2006/112) and also sec. 2.2.
[376] See sec. 1.1.1.
[377] See sec. 2.3.
[378] See art. 395(1) second para. of the VAT Directive (2006/112).
[379] See sec. 2.4.1.2.

The motive to introduce the special rule concerning *Öresundskonsortiet* has been to resolve the question on efficiency of collection of VAT for the consortium. The special rule concerns one single *enkelt bolag*, *Öresundskonsortiet*, i.e. the agreement between Sweden and Denmark on the permanent road-connection over *Öresund*.[380] The agreement on building the *Öresundsförbindelsen* was made between Sweden and Denmark in 1991.[381] By SFS 1993:642 was introduced in the GML a possibility to make deduction in the project for input tax on acquisitions made from the 1st of October 1992. A deduction right was created by tax liability for certain reasons being introduced in section 2 fifth paragraph GML.[382]

In connection with *Öresundsförbindelsen* being taken into use in 2000 it was noted that the value added taxation would be divided according to article 9(2)(a) of the Sixth Directive[383] between Sweden and Denmark, since it stretches between the two countries.[384] Therefore Sweden and Denmark applied by the EU Commission and received permission for exemption from the EU's rules by virtue of article 27 of the Sixth Directive.[385] The exemption made it possible to introduce a simplified administration of the charge of tax for *Öresundsförbindelsen*.[386] The simplification means that the taxation base is divided so that letting of the road-connection is considered supplied to 50 per cent in Sweden and to 50 per cent in Denmark.[387] The simplified rules also mean that Swedish and Danish entrepreneurs may make deduction for VAT paid on the bridge-fee directly in the tax return of the own country.[388] For foreign entrepreneurs which are not VAT registered in either Sweden or Denmark the simplified rules mean they have to turn to the SKV in Sweden for VAT return of Danish as well as Swedish VAT. It was deemed natural that they address the SKV because the pay station is situated in Sweden.[389] According to the statute commentary means Chapter 1 section 2 c ML only that information is given about the existence of special rules on VAT, which are connected to the taxation of

[380] The road-connection is owned and driven by *Öresundskonsortiet*, which was formed by the state owned Swedish company *Svedab AB* and of the by the Danish state owned company *A/S Öresundsförbindelsen*. See prop. 1999/2000:58 (*Mervärdesskattefrågor med anledning av Öresundsförbindelsen*) p. 16.
[381] See prop. 1999/2000:58 p. 14.
[382] See prop. 1992/93:190 (*om mervärdeskatt på väg- och broavgifter, m.m.*) p. 13.
[383] Nowadays art. 47 of the VAT Directive (2006/112).
[384] See prop. 1999/2000:58 p. 17.
[385] Nowadays art. 395 of the VAT Directive (2006/112). See also sec. 2.3.
[386] See prop. 1999/2000:58 p. 15.
[387] See prop. 1999/2000:58 p. 19.
[388] See prop. 1999/2000:58 pp. 20 and 21.
[389] See prop. 1999/2000:58 p. 21.

fees for the passage over the *Öresund*-bridge.[390] Although the rule means a special solution for *Öresundskonsortiet* and nothing else in the ML, it is of interest in the present context of the following reason. It shows that the question of an effective collection of VAT is important both for Sweden as an EU Member State and for the EU, which gave the permission for exemption from the EU's rules for the consortium.

2.7 LEGAL CERTAINTY INCLUDING LEGALITY

The concept legal certainty has a formal as well as a material aspect. The formal legal certainty demand means that decisions which mean administration of justice or exercise of authority should be as foreseeable as possible according to the law. That would be adequate in an ideal society, whereas it in the real society have to suffice with the material legal certainty norm meaning that the mentioned decisions should be reasonably foreseeable etc.[391] Material legal certainty can be considered forming the legal method's overall aim. It is deemed demanding that decisions which mean administration of justice or exercise of authority are to large extent foreseeable due to the legal norms, i.e. formally, and at the same time to a large extent ethical acceptable.[392] At the investigation of the representative rule I try to regard the material legal certainty concept in the mentioned meaning, and in this section I mean to inter alia describe the CJEU's view on the legal certainty principle and its position in the VAT field.

In *Kolpinghuis* (Case 80/86) the CJEU concludes that at an EU conform interpretation shall also the principles on legal certainty and non-retroactivity be regarded.[393] *Kolpinghuis* is one of several cases where the CJEU has denied the Member States to claim that directives could be given so called reverse vertical direct effect and be invoked by the state against the individual, when a directive has not been implemented or implemented correctly by a Member State. According to *Marshall* (Case 152/84) the CJEU considers that "a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person".[394] In *Wells* (Case C-201/02) the CJEU concludes that the legal certainty principle raise an obstacle for the directives to be able to entail liabilities for individuals. In relationship to the indivuduals can according to the CJEU rules in a

[390] See prop. 1999/2000:58 p. 27. There is by the way noted that the Council on Legislation refrained from commenting the rule.
[391] See Peczenik 1995, p. 98. See also Kellgren 2011, p. 742, where reference is also made to Peczenik 1995, pp. 98 and 99.
[392] See Peczenik 1995, pp. 94, 99 and 100.
[393] See para. 13 in *Kolpinghuis* (80/86). See also Kellgren 1997, p. 53 and Ståhl 2005, p. 71.
[394] See para. 48 in *Marshall* (152/84).

directive only lead to rights.[395] It is sometimes said that the quintessence of the CJEU's case law regarding direct effect means an *estoppel*-like conception.[396] This means that a Member State shall not be able to benefit from its own lack of implementation of a directive.[397] That can in my opinion also be considered following by paragraph 49 in *Marshall*, where it is stated that the state is *prevented from* taking advantage of its own failure to comply with the community law (the EU law). Reverse vertical direct effect of directives can thus be excluded for the Member States to invoke against the individuals already by *the principle of estoppel*.[398] That a Member State fails to adapt acts and administrative practice to the EU law shall burden the authorities and not the individuals.[399]

The legal certainty principle in the VAT field may also be deemed expressed in e.g. *BP Soupergaz* (Case C-62/93), *Stockholm Lindöpark* (Case C-150/99), *Mohsche* (Case C-193/91), *Kühne* (Case 50/88), *Becker* (Case 8/81), *Marks & Spencer* (Case C-62/00) and *Feuerbestattungsverein* (Case C-430/04):

- In *BP Soupergaz* it is stated inter alia that "Article 17(1) and (2) of the Sixth Directive" – nowadays articles 167 and 168 of the VAT Directive (2006/112) – "confer rights on individuals on which they may rely before a national court".[400] According to the CJEU it would work against the VAT's neutrality principle if denied right of deduction was allowed leading to double taxation.[401]

- The CJEU establishes further in *Marks & Spencer* that if national law meant that the reimbursement right according to the Sixth Directive[402] could be denied a taxable person retroactively, that

[395] See para. 56 in *Wells* (C-201/02), where reference also is made to para. 48 in *Marshall* (152/84). See also Westberg 2009, p. 32, where para. 56 in *Wells* also is mentioned, and Persson Österman 2006, p. 208, where it (in translation) is stated that if a right is identifiable in a legislation from the EU and it concerns tax, it is *so to speak a right to not have to pay tax*.
[396] See Prechal 2005, pp. 219 and 223.
[397] See Prechal 2005, p. 219.
[398] See Prechal 2005, p. 261.
[399] See Alhager 2001, pp. 95 and 96 and Olsson 2001, p. 134.
[400] See para. 36 in *BP Soupergaz* (C-62/93) and also para:s 18, 32 and 34 in the same case and para. 35 in *Stockholm Lindöpark* (C-150/99).
[401] See *Mohsche* (C-193/91), para:s 8, 9, 15, 17, 18 and 19, and para:s 8 and 10 in *Kühne* (50/88), to which para:s reference is made in *Mohsche* para:s 8 and 9. In para. 17 in *Mohsche* it is furthermore referred to *Becker* (8/81).
[402] Nowadays the VAT Directive (2006/112).

would be in conflict with the efficiency principle and the legal certainty demand on foreseeable decisions.[403]

The legal certainty principle has thus a strong position in the VAT field, according to the EU law. That is important to regard at the analysis of the representative rule. If the individual's legal certainty is set aside, that should in itself be considered meaning that Chapter 6 section 2 ML should be revoked, and Chapter 5 section 2 SFL in consequence being altered so that that rule no longer comprises VAT. It can e.g. be a matter of the demand on foreseeable decisions being set aside if it is required that so vast amendments for precision would be made in the representative rule, for the collection by the representative functioning, that the rule becomes far too complex to apply. Then it is better that the role of collector for the state regarding the VAT is fulfilled by the partners themselves and each on his own in pursuance of the general rules in the ML.[404] The collection interest may in my opinion stand back for the individual's legal certainty demand for simple and foreseeable rules at the application of them concerning questions on tax liability and right of deduction.

The national legal certainty principles for taxation measures are above all expressed by the prohibition of retroactive tax legislation according to Chapter 2 section 10 second paragraph RF and the legality principle for taxation measures according to Chapter 8 section 2 first paragraph number 2 RF.[405] The legality principle means for the representative rule that what is stipulated in it about tax liability and accounting and payment liability cannot not be imposed against the individual, if it demands an interpretation in excess of the wording of the rule.[406] An EU conform interpretation can neither be imposed on the individual, if it exceeds the wording of the rule. That follows by paragraph 110 in *Adeneler et al.* (Case C-212/04).[407] There the CJEU, particularly with respect of the principles on legal certainty and prohibition of retroactive legislation, concluded cannot be made *contra legem* (legality). Thus, it is a general conception that an EU conform interpretation does not mean

[403] See para:s 46 and 47 and also para:s 27, 33, 38 and 40 in *Marks & Spencer* (C-62/00) and also para. 29 in *Feuerbestattungsverein* (C-430/04), where reference is made to para. 27 in *Marks & Spencer*.
[404] See also Diehl 2010, p. 229, where it is stated that solutions on VAT problems leading to a far too complex administration are not desired.
[405] See Holmberg et al. 2012, p. 356 and Eka et al. 2012, pp. 95 and 278 and Bergström 1978, p. 66, Hultqvist 1995, pp. 5, 126 and 127 and Alhager 1999, pp. 75 and 84. See also sec:s 1.2.2 and 1.3.
[406] See Alhager 2001, pp. 100 and 101, Ståhl et al. 2011, pp. 38 and 39, Sonnerby 2010, pp. 25 and 66, Olsson 2001, p. 133, Hultqvist 1995, pp. 5–7, 127 and 185, Påhlsson 1995, p. 132 and Bergström 1978, p. 64. See also Simon Almendal 2005, pp. 65 and 66.
[407] See sec. 1.2.2.

a liability for the Member States to interpret the national law in conflict with its wording.[408] The legality principle raises in that manner in my opinion a demand for expressed support in law for taxation measures, which applies inter alia for the interpretation of the representative rule.[409] The legality principle together with that directives are not comprised by reverse vertical direct effect give thus the legal certainty principle a strong position in the VAT field. Thus, I have identified and chosen *legal certainty including legality* according to the EU law as a law political aim for the Swedish VAT system.

At the interpretation of the representative rule I thus regard the legality principle for taxation measures in a restrictive and formal meaning, whereby I mean an interpretation limited to the wording of the rule as opposed to analogical deductions. Concerning the concept tax liable in the rule the legality principle for taxation measures according to Chapter 8 section 2 first paragraph number 2 RF also means that the state cannot refuse the individual right of deduction for input tax in the following cases: If the analysis shows that the partners in an *enkelt bolag* or *partrederi* gets a more comprehensive right of deduction by virtue of Chapter 6 section 2 ML than with respect of the main rule in Chapter 8 section 3 first paragraph compared to the main rule on tax liability in Chapter 1 section 1 first paragraph number 1 ML, they cannot be denied such right. However, the SKV can e.g. disqualify a deduction for input tax which would otherwise be formally acceptable, if it can be proven that it is a matter of fraud or so called abusive practice which gives advantages contrary to the purpose of the rules in the ML and the VAT Directive (2006/112).[410] By paragraph 86 in *Halifax et al.* (Case C-255/02) follows that it demands to establish abusive practice that a tax advantage is achieved which is contrary to the purpose of relevant rules in the Sixth Directive and in national legislation. It shall furthermore appear by the objective circumstances that the main purpose with the present transactions is to achieve a tax advantage. The CJEU has by the way shortly before that also established that the right of deduction cannot be denied someone for acquisitions made with the intention to make taxable transactions, just because somebody else before or after in the delivery chain has made a with regard of VAT fraudulent transaction of which he did not knew or could knew.[411]

The by the CJEU in *Halifax et al.* established principle on prohibition of abusive practice is however an EU law principle. It comprises abusive practice regarding the rules in the VAT Directive (2006/112). The ques-

[408] See also sec. 1.2.2 and reference there to Ståhl 2005, pp. 71 and 75 and Sonnerby 2010, p. 66.
[409] See sec:s 1.2.2, 1.2.3, 1.3 and 2.2.
[410] See para. 86 in *Halifax et al.* (C-255/02). See also Ridsdale 2005, p. 82.
[411] See para. 55 in the joint cases *Optigen et al.* (C-354/03, C-355/03 & C-484/03).

tion is whether the principle also comprises the rules in the ML, and which interpretation result that would entail that a rule, which formally gives the individual a right, *de sententia ferenda* should lead to a re-definition of legal facts so that the legal consequence which the right means will not arise.

In the context may be mentioned that *lagen (1995:575) mot skatteflykt*, The act against tax evasion 1995, does not comprise VAT but the EU law principle on prohibition of abusive practice in the VAT field perhaps could be brought up instead. The SKV expresses that the principle on prohibition of abusive practice is applied when the purpose of the VAT system is set out of order.[412] Sometimes the principle on prohibition of abusive practice is also expressed as a deviation from the legality principle.[413] It has also been stated that *Halifax et al.* has altered current law in Sweden and led to that the principle on prohibition of abusive practice, i.e. a clause of the same character as in The act against tax evasion 1995, can be applied concerning the ML.[414] Other conceptions have however also existed in the debate. It has then been claimed that the principle on prohibition of abusive practice, with respect of the tax law's legality principle, could not be applied in Sweden without it being incorporated into Swedish legislation by expressed rules.[415] Yet others have characterized the question whether the principle of prohibition of legal abuse – abusive practice – must be anchored into Swedish law to

[412] See the SKV's statement of 2006-11-17 (dnr 131 500981-06/111). See also the SKV's *Handledning för mervärdesskatt 2012* Part 1 p. 65. See also Norberg & Pettersén 2008, p. 9, where it is stated that the CJEU by *Halifax et al.* (C-255/02) and the principle on prohibition of abusive practice has given the Member States a tool in the VAT field to protect the system. The Göteborg administrative court of appeal considered however in a verdict, Case 622-05 (10 May 2007), that the principle on prohibition of abusive practice cannot be applied without expressed support in the ML. The verdict was not appealed and has become legally binding. The verdict gave rise to a debate and I mention in this section other contributions to that debate which were mentioned in Norberg & Pettersén 2008, p. 2.

[413] See Alhager 2007, p. 127, where that is stated with reference to *Halifax et al.* (C-255/02), and Bjerregaard Eskildsen 2012, p. 46. See by the way also e.g. *Kofoed* (C-321/05), para. 38, where reference is made inter alia to *Halifax et al.* in connection with that the principle on prohibition of abusive practice is also stated for the income tax field – regarding the EC's Merger Directive (90/434/EEC) [replaced by the Merger Directive (2009/133/EC)].

[414] See von Bahr 2007, p. 649. See also Alhager 2006, p. 269, where it is stated that by *Halifax et al.* (C-255/02) current law means that there is a sort of uncodified tax evasion clause and since it is a general interpretation principle it does not need to be implemented in Swedish law.

[415] See Karlsson & Öberg 2007, pp. 362 and 364. See however criticism in von Bahr 2007, p. 649, where it is stated that the reasoning in Karlsson & Öberg 2007 contains the same mistake as the Göteborg administrative court of appeal's verdict in Case 622-05 (10 May 2007) means, namely that the argumentation is based on the principle on prohibition of abusive practice being equalized with a material rule in an EC directive, why the primary EU law would lack importance.

be able to apply as unclear.[416] Furthermore it has sometimes been stated that the CJEU's attitude to aggressive VAT planning is risking to transfer the burden as gaps in the VAT system means from the legislator to the tax subject, so that the Member States refrain from taking action.[417]

In my opinion should the legality principle in a restrictive and formal meaning stand back for the principle on prohibition of abusive practice, if the interpretation result becomes so extreme that the fundamentals for the VAT system as it is determined by the EU law is set aside. Such an interpretation result concerning a rule in the ML would in my opinion exist if an ordinary private person would be given right of VAT deduction on his expenses, e.g. for purchases in the grocery store. The VAT is a consumer tax and the tax shall be carried by the consumer, who is usually a private person.[418] He shall opposite to the tax subjects not get deduction for input tax for purchases of groceries. He who e.g. has a restaurant is carrying out economic activity. He has as tax subject right of deduction for purchases of inter alia groceries and charges VAT in the bill to the restaurant guest, which in the capacity of consumer does not get any claim against the state equal to the VAT in the bill. If the consumer could make a claim against the state, that would be a matter of some sort of a subsidy from the state. It would not be a matter of an input tax like with a tax subject's claim against the state.

The described interpretation result would not be in compliance with that the result which shall be achieved by the VAT Directive (2006/112) is that taxation shall be made of consumption. However, it exists in my opinion no conflict between the Swedish constitutional law and the EU law in the VAT field in the described situation. Since it is rather a question of some sort of subsidy situation, it is not comprised by any such for a person who is comprised by the Swedish tax sovereignty protection worthy interest according to the legality principle for taxation measures in the RF. If Sweden had not made its accession to the EU, a trial of the present situation would probably have led to the same judgement in the HFD as the CJEU made in *Halifax et al.* To nowadays – when Sweden is member of the EU – invoke the by the CJEU established principle on prohibition of abusive practice also at the described extreme interpretation result regarding a rule in the ML entails therefore in my opinion not any conflict between the RF and the EU law. In my opinion it would not lead to a matter of the principle on conferred competence according to articles 4(1) and 5(2) TEU being transgressed.[419] The rule competition it means between the ML and the VAT Directive

[416] See Ståhl 2007, p. 579.
[417] See de la Feria 2006, pp. 34 and 35.
[418] See sec. 1.1.1.
[419] See also sec. 1.2.3.

(2006/112) could in my opinion be adjusted by a *de sententia ferenda* reduced interpretation of the rule in the ML, so that the result becomes in compliance with the result which shall be achieved by the VAT Directive (2006/112): Taxation shall be made of consumption. Thus I consider that an application of the EU law principle on prohibition of abusive practice in the present situation and regarding the ML does not mean that the EU is given any such *implied powers* or *Kompetenz-Kompetenz* (Ger.) which has been subject of discussions concerning article 352 TFEU and the predecessor article 308 of the EC Treaty.[420]

If Chapter 6 section 2 ML could be interpreted so that an agreement on *enkelt bolag* or *partrederi* would formally give the partners the character of tax liable themselves and thereby entitled to VAT deductions on their private consumption, is the interpretation result so extreme that it loosens the fundamentals of the VAT system according to the EU law. That would mean that the main rule to distinguish the tax subjects from the consumers, article 9(1) first paragraph of the VAT Directive (2006/112), will not be upheld. In my opinion should in that case the principle on prohibition of abusive practice be considered meaning that right of deduction for input tax on acquisitions for private consumption – like what applies normally – is not possible. Then should *de sententia ferenda* an agreement on *enkelt bolag* or *partrederi* be redefined, so that it in VAT respect will not be given the character of an agreement on *enkelt bolag* or *partrederi*. Thereby the described extreme interpretation result concerning the representative rule would neither entail that the person would be given the possibility to exercise right of deduction, despite he would formally be comprised by the concept tax liable in Chapter 6 section 2 first sentence ML. Thus, I share the judgement that the CJEU by *Halifax et al.* And the principle on prohibition of abusive practice has given the Member States a tool in the VAT field for the protection of the VAT system.

2.8 THE AIMS AND THEIR USE IN THE CONTINUED ANALYSIS – SUMMARIZING DISCUSSION

I have identified and chosen five law political aims for the Swedish VAT system: a cohesive VAT system, neutrality, EU conformity, efficiency of collection and legal certainty including legality. However, it shall not be perceived as any exhaustive listing of such aims, but only the aims which I consider necessary at the analysis of whether the representative rule is complying with the main rules on the tax subject and

[420] See Nergelius 2009, pp. 52 and 53, Nergelius 2012, pp. 51 and 52, Bernitz 2012, p. 179, Habermas 2011, p. 71 and also pp. 61, 63 and 69 and Hettne et al. 2011, pp. 78-80. See also e.g. Ståhl et al. 2011, pp. 308 and 309, Pelin 2004, pp. 503-511, Pelin 1997, p. 221, Pelin 1995, pp. 26 and 27, Tjernberg 2003, pp. 230 and 231, Mutén 2002, pp. 561-573, Alhager 2001, p. 86, Fritz et al. 2001, p. 237 and Allgårdh et al. 1993, p. 84 and prop. 1994/95:19 Part 1 p. 471.

the right of deduction in the VAT Directive (2006/112). I have identified the chosen law political aims and motives for them in the EU law on the VAT field.[421] The primary EU law has primacy before the secondary EU law.[422] However, the formal law source value of the principles which I have chosen to draw up as law political aims for the Swedish VAT system do not automatically give the aims their relevance for the analysis of the representative rule. They get different relevance depending on in which respect the representative rule is investigated.

I first explain in an *overview about the aims' general relevance for the investigation of the representative rule* (see below under In general about the aims). By sticking to the main rules on the determination of the tax subject and the right of deduction at the investigation of the representative rule, the relevance of the aims for the analysis of the rule coincides in my opinion in general with the relevance of the identified and chosen aims for the Swedish VAT system. Thereafter I explain how I have reasoned to judge *the relevance I give the various aims for the investigation in Chapter 6 of the material questions regarding the representative rule* (see below under The relevance of the aims). I evaluate the relevance of the aims in relationship to various thinkable results of the analysis without trying to resolve in this chapter the problems from section 1.1.2. Finally I mention some *other questions* of importance in the context.

In general about the aims

That the overall maim for the Swedish VAT system should be *a cohesive VAT system* follows in my opinion both by the primary and the secondary EU law in the field: The harmonisation demand on the EU Member States' VAT legislations in article 113 TFEU shall ensure the establishment and functioning of the internal market and it follows from the VAT Directive's complete title that the Member States shall have *one* common VAT system. The harmonisation demand can be said constituting a reflection of article 4(3) TEU and article 291(1) TFEU and of article 288 third paragraph TFEU, which are expressing *EU conformity* as an important law political aim for the Swedish VAT system, in my opinion. Sweden shall as a Member State in the EU make all necessary legislation measures to implement the VAT Directive (2006/112) into the ML, which follows by the solidarity principle in article 4(3) TEU and article 291(1) TFEU. Sweden may according to article 288 third paragraph TFEU only determine form and methods for the implementation. Swedish courts and authorities are obliged to interpret and apply the ML with respect of the VAT Directive (2006/112) and the result

[421] See sec:s 2.1 and 2.2.
[422] See sec. 1.2.3.

which is intended by the directive. By the Lisbon Treaty and article 113 TFEU it has been clarified that the primary EU law demand on harmonisation of the Member States' VAT legislations also means that competition distortion shall be avoided. *Neutrality* is thus also in my opinion a law political aim for the Swedish VAT system.[423]

The state has an interest of the collection of tax revenues functioning. According to the EU Commission shall collection issues be prioritized. That follows by the Commission's green paper COM(2010) 695 final and the Commission's follow-up to the green paper, COM(2011) 851 final. That is in line with the preamble to the VAT Directive (2006/112), and the CJEU mention in *Gregg* (Case C-216/97) also the state's collection interest in connection with the neutrality principle. The importance of collection issues is also expressed in the Swedish preparatory works, by it is stated there that the tax liable in principle function as the state's collector in the VAT field. *Efficiency of collection* is thus also in my opinion an important law political aim for the Swedish VAT system.[424]

According to the EU law the legal certainty principle has a strong position in the VAT field.[425] The scope for the EU conform interpretation of the representative rule can therefore be limited by the principle on prohibition of retroactive taxation and the legality principle for taxation measures according to Chapter 8 section 2 first paragraph number 2 RF.[426] The CJEU's case law means that the principles on legal certainty and non-retroactivity shall be regarded at an EU conform interpretation. The CJEU has denied the Member States to claim that directives would give a reverse direct effect so that they would be able to invoke by the state against the individual, when the state has not implemented a directive or not implemented a directive correctly in its legislation.[427] An EU conform interpretation cannot be enforced against the individual, if it goes beyond the wording of the rule.[428] *Legal certainty including legality* according to the EU law is thus an important law political aim for the Swedish VAT system.[429]

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[423] See sec:s 2.2, 2.3, 2.4.1.1, 2.4.2 and 2.5.
[424] See sec:s 2.2, 2.4.2 and 2.6.
[425] The principle is expressed in e.g. *BP Soupergaz* (C-62/93), *Stockholm Lindöpark* (C-150/99), *Mohsche* (C-193/91), *Kühne* (50/88), *Becker* (8/81), *Marks & Spencer* (C-62/00) and *Feuerbestattungsverein* (C-430/04). See sec. 2.7.
[426] See sec. 2.7.
[427] See *Marshall* (152/84), *Kolpinghuis* (80/86) and *Wells* (C-201/02), which are mentioned in sec. 2.7.
[428] See para. 110 in *Adeneler et al.* (C-212/04), which is mentioned in sec. 2.7.
[429] See sec. 2.7.

The relevance of the aims

I illustrate in Figure 1 and Figure 2 below in overview the relevance I deem that the identified and chosen law political aims for the Swedish VAT system has for the analysis of the representative rule. Thereafter I give first a *background* concerning the EU conform interpretation which shall be made in Chapter of the representative rule. It is followed by a review of Figure 1, which concerns the relevance of the aims for the analysis which shall be made in Chapter 6 of the rule's function for *the collection* of the VAT in an activity by an *enkelt bolag* or *partrederi*. That is about the voluntary rule in the rule, i.e. Chapter 6 section 2 second sentence ML and, to the extent the rule concerns VAT, Chapter 5 section 2 SFL. Thereafter I present Figure 2, which shall illustrate the relevance I give the aims particularly for the trial that shall be made in Chapter 6 of the concept *tax liable* (*skattskyldig*) in the representative rule. That trial is about whether the wording of the mandatory rule Chapter 6 section 2 first sentence ML means that a partner in *bolaget* or *rederiet* due to that character in itself can be considered tax liable, so that the concept also would comprise an ordinary private person in that capacity. The question is also whether the answer is affected by the wording of the voluntary rule, i.e. Chapter 6 section 2 second sentence ML with reference to Chapter 5 section 2 SFL.[430]

Figure 1

Test	**Result**	**Result**	**Relevance of the aims for the Swedish VAT system**
	Rule complying with {art. 1(2) dir.; 1:1 first para. 1 and 8:3 first para. ML; art. 2(1)(a) and (c), 193 [incl. art. 9(1) first para.] and 168(a) dir.}.		- A cohesive VAT system - Neutrality/EU conformity - Efficiency of collection [of the VAT in *enkelt bolag/ partrederi* by the voluntary rule (*The collection*)]
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Specifying amendments in the representative rule →	→	Give control possibility, but far too complex rule	- Legal certainty incl. legality according to the EU law

[430] See problem 1 in sec. 1.1.2.

Figure 2

Test	**Result**	**Relevance of aims for trial of the concept *tax liable* in the representative rule**
Tax liable in the rule complying with art, 9(1) first para. of the VAT Dir.?	Expanding {rule competition; also between the rule and 1:1 first para. 1 ML and art:s 2(1)(a) and (c) and 193 of the VAT Dir.}	EU conformity and legal certainty incl. legality according to the EU law are not relevant: The rule has no equivalent in the VAT Dir. _____ **Note** If *tax liable* in the rule is not made compatible with art. 9(1) first para. of the VAT Dir., procedural solutions are necessary: - The individual may invoke that art. 9(1) first para. has direct effect {extreme interpretation result that a private person (consumer) would be comprised by tax liable; in conflict with the basic principles in art. 1(2) of the VAT Dir.} - The state may invoke the principle of prohibition of abusive practice in accordance with Halifax et al. (Case C-255/02). _____ **Note.** COM or another Member State might go to the CJEU claiming breach of treaty, if tax liable distorts the competition on the internal market, according to art. 113 TFEU, which also would be in conflict with the neutrality principle according to the preamble to the VAT Dir. and art. 1(2) of the VAT Dir. and with the aim of a cohesive VAT system (COUNCIL DIRECTIVE 2006/112/EC […] on the common system of VAT).

Background

A question to judge in Chapter 6 is whether a non-legal entity, such as an *enkelt bolag* or *partrederi*, can constitute taxable person according to the main rule for taxable person, article 9(1) first paragraph of the VAT Directive (2006/112). The representative rule does not have any equal in the VAT Directive (2006/112).[431] There is nothing in the directive about determination of a partner in a legal person, e.g. in a partnership (*handelsbolag*) or limited company (*aktiebolag*), as a taxable person. There is no such rule in the directive that the Member State Sweden would be obligated to implement, incorporate into the ML in pursuance of EU conformity as an aim for the Swedish VAT system. If a non-legal entity can constitute taxable person according to the directive rule, motive is lacking to treat the enterprise forms *enkla bolag* and *partrederier* different than e.g. partnerships or limited companies. For these company

[431] See sec. 1.1.1.

forms the tax liability is determined on company level, and not on partner level as regarding partners in *enkla bolag* and *partrederier* according to the representative rule.[432] In accordance with article 1(2) of the VAT Directive (2006/112) could an entrepreneur in an ennobling chain up to the consumer be an entity which does not constitute a legal entity, such as an *enkelt bolag* or *partrederi*. The principles in article 1(2) characterize the VAT according to the EU law. They shall lead to that VAT is taken out in a neutral way. To exclude a certain enterprise form, such as an *enkelt bolag* or *partrederi*, from the chain would be in conflict with the neutrality principle such as it is expressed in article 1(2) by the basic principles for the VAT according to the EU law that can be read out therein: general right of deduction, reciprocity and passing on the tax burden. However, the question is firstly if article 9(1) first paragraph of the VAT Directive (2006/112) can be given the interpretation that an entity, enterprise form which does not constitute a legal entity is comprised by the directive rule.[433]

In step 1 of the EU conform (directive conform) interpretation of the representative in Chapter 6 I judge whether a non-legal entity can constitute taxable person according to the directive rule,[434] which will be steering for the continuing analysis in step 2.[435] The CJEU's case law means that the EU Member States may interpret with respect of "the principles underlying the common system of VAT", when the actual directive rule itself is not giving sufficient enough guidance.[436] Thus, the interpretation of whether a non-legal entity is comprised by article 9(1) first paragraph of the VAT Directive (2006/112) means that the basic principles for VAT according to the EU law in article 1(2) of the directive are regarded. An interpretation result meaning that non-legal entities can be considered constituting taxable persons according to article 9(1) first paragraph of the VAT Directive (2006/112) gives me reason to *de lege ferenda* suggest that Chapter 6 section 2 ML will be reformulated: The enterprise forms *enkla bolag* and *partrederier* should in that case be made to tax subjects, despite they are not constituting legal entities. There is also a solution in the Finnish VAT legislation which means that non-legal entities, namely *sammanslutningar* and *partrederier*, are made to tax subjects for VAT purposes. That gives rise to

[432] See sec. 1.1.3.
[433] See sec:s 2.4.1.2 and 2.4.2 regarding *Gregg* (C-216/97) and *BLM* (C-436/10) etc.
[434] See problem 2 in sec. 1.1.2.
[435] See sec. 1.2.3 regarding EU conform interpretation and *von Colson & Kamann* (14/83), *Marleasing* (C-106/89) and *Björnekulla Fruktindustrier* (C-371/02), etc.
[436] See para:s 34 and 35 in *Securenta* (C-437/06) and para. 28 in *Wollny* (C-72/05), which are mentioned in sec. 2.4.2. See also e.g.: *BLP Group* (C-4/94), para:s 7, 11, 20, 21 and 28; *Midland Bank* (C-98/98), para. 29; *Abbey National* (C-408/98), para. 27; and *Cibo* (C-16/00), para. 30 regarding that the CJEU has *a purist approach* in relationship to the basic principles in art. 1(2) of the VAT Directive (2006/112), which is mentioned in sec. 2.4.1.4.

my method for the analysis in Chapter 6 being completed with a certain comparative analysis, and I get back to that in the international outlook in Chapter 4.[437]

An interpretation result in step 1 meaning that non-legal entities cannot be considered constituting taxable persons does not change that there is an obligation for the Member States' courts to make an EU conform interpretation of the ML. It shall be made as far as it is possible to interpret the national law with respect of the directive's wording and purpose so that the result intended by the directive is achieved.[438] That means that the *test* of the representative rule in step 2 concerns the rule's *compliance* with the neutrality principle according to the principles in article 1(2) of the VAT Directive (2006/112). That test concerns whether the rule, by the possibility to appoint a representative, gives a *collection* of the VAT in *enkla bolaget*'s or *partrederiet*'s activity which is complying with the principles on a general right of deduction, reciprocity and passing on the tax burden. In step 2 is also tested whether the concept *tax liable* regarding a partner in an *enkelt bolag* or in a *partrederi* is complying with taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112).

The collection

Concerning the application issues regarding the representative rule I limit the investigation in Chapter 6 to a trial of the rule in relationship to the main rules on tax liability and right of deduction for acquisitions in the ML. The main rule on who is tax liable, Chapter 1 section 2 first paragraph number 1 ML, has a systematic correspondence with the main rule on who is payment liable according to articles 2(1)(a) and (c) and 193 of the VAT Directive (2006/112). By taxable person being a necessary prerequisite for payment liable includes the trial of the correspondence of the main rule regarding tax liable with the main rule on payment liable article 9(1) first paragraph of the VAT Directive (2006/112). Concerning the main rule in Chapter 8 section 3 first paragraph ML I mention the scope of the right of deduction, and whether the rule is complying with the corresponding main rule in article 168(a) of the VAT Directive (2006/112).[439] By in that way trying the representative rule in relation to the main rules in the directive which shall be implemented into the ML it is relevant to regard EU conformity as an aim for the rule in that respect, i.e. like for the Swedish VAT system in general (compare the headline to the column farthest to the right in Figure 1).

[437] See sec. 1.2.1.
[438] Se avsnitt 1.2.3.
[439] See sec. 1.3.

The mentioned main rules in the ML and in the directive are decisive for the aim *neutrality* to be fulfilled concerning the VAT according to the EU law. The neutrality principle can be read out of article 113 TFEU and the preamble to the VAT Directive (2006/112). It is also considered following by article 1(2) of the VAT Directive (2006/112). There can the basic principles for VAT according to the EU law be read out. They reflect the functionality for *efficiency of collection* of the VAT, and that the VAT thereby shall be neutral in an ennobling chain of enterprises up to the consumer: general right of deduction, reciprocity and passing on the tax burden.[440] I am trying the application issues regarding the representative rule in relation to *neutrality* such as the concept is expressed by the basic principles for the VAT according to the EU law in article 1(2). The trial is made based on that that aspect on neutrality means that motives are lacking to exclude *enkla bolag* and *partrederier* as entities, enterprise forms from the ennobling chain on behalf of legal form.[441] At the application issues I therefore mention the possibility to for the collection of the VAT in *enkla bolaget* or *partrederiet* appoint one of the partners as representative according to Chapter 6 section 2 second sentence ML and, to the extent the rule concerns VAT, Chapter 5 section 2 SFL. I am trying in that respect the representative rule in relation to the main rules on tax liability and right of deduction in the ML: The trial concerns whether the concept tax liable and the accounting and payment liability in the representative rule are in compliance with these main rules. If Chapter 6 section 2 is not complying with the main rule on tax liable, Chapter 1 section 2 first paragraph number 1, or the main rule on right of deduction, Chapter 8 section 3 first paragraph, in the ML, the rule is neither in compliance with the corresponding main rules in the directive. In that case the competition will be distorted between those who use the enterprise form *enkelt bolag* and enterprises carried in other forms, since *enkelt bolag* as enterprise form is not limited to apply to a certain sort of activity or sector.[442]

Concerning the representative rule and the application issues the investigation concerns in the first place *the collection*, and whether the possibility to appoint one of the partners in an *enkelt bolag* or *partrederi* as a representative gives an *effective collection* and makes the SKV's control activity easier. The question is whether the representative rule needs to be specified by amendments in Chapter 6 section 2 ML, to make collection and control easier when the partners in an *enkelt bolag* or *partrederi* has used that possibility.

[440] See sec. 2.4.1.2.
[441] See sec:s 2.4.1.3 and 2.4.2.
[442] See sec. 2.5.

Figure 1 above can from left to right be read: specifying amendments in the representative rule have as relevant aim for the Swedish VAT system efficiency of collection (see the column farthest to the right in the figure). The amendments can lead to different results concerning the interpretation of the rule, where the following two results would be incompatible with respect of the relevance I give the identified and chosen aims (see the arrows in the figure):

- One is that the rule by the amendments becomes complying with article 1(2) of the VAT Directive (2006/112) etc.

- The other is that amendments give control possibilities, but the rule becomes far too complex.

For these two results – which can exist simultaneously[443] – I divide the column farthest to the right in Figure 1 in an upper and a lower part, where I give the aims the following relevance:

- The upper part of the column illustrates that at the result compliance with article 1(2) etc. the fulfilment of the aim *efficiency of collection* also leads to the fulfilment of the aims *neutrality* and *EU conformity*, which in their turn also entail the fulfilment of the overall aim of *a cohesive VAT system*. The relevance of the aims for the analysis of the representative rule is stated in an increasing order. Efficiency of collection is placed lowest, since that aim must not come into conflict with neutrality as law political aim for the Swedish VAT system. That follows by article 395-permits from the EU to deviate from the VAT Directive (2006/112) to simplify the tax collection are only allowed to affect to a minor extent the Member States' total tax revenues at the final consumption stage.[444]

- The lower part of the column shows that if it at the same time also emerges a result which in a rule technical manner means that the amendments give a far too complex representative rule the aim *legal certainty including legality* according to the EU law will not be fulfilled. In my opinion that aim takes in that case over, and I do not mention any of the other of the five aims thereunder in the lower part of the column. By the way would in my opinion a far too complex rule in practice be hard to combine with the aim efficiency of collection.

[443] Compare the broken vertical line between the two result columns.
[444] See art. 395(1) second para. of the VAT Directive (2006/112), which is mentioned in sec. 2.6.

In connection with the application issues I mention both the subject side and the object side concerning the concept tax liability and the right of deduction. Both questions on taxable person and transaction, and relations between the partners in *enkla bolagen* and *partrederierna* and their relations to suppliers and customers are mentioned. At the investigation of the application issues regarding the representative rule I use the tool which I call the ABCSTUXY-model, and develop in Chapter 3.[445] Then is not only the material rules on tax liability and right of deduction mentioned. I also mention whether the representative rule entails a need to complete the formal presuppositions for right of deduction for input tax regarding the demands on invoice content etc. in Chapter 11 ML. The question is whether Chapter 11 should be completed with that the invoicing liability also should comprise the representative rule. The question is also whether there is a particular need of amendments concerning the demands on invoice content, to make the tax control function satisfactory regarding the representative rule. The throughout question in connection with the application issues is whether it will prove to exist such a vast need of amendments in the representative rule and Chapter 11 ML respectively that the rule will become far too complex. That leads in that case to legal uncertainty for the partners, although the SKV's control possibilities are improved.[446]

A VAT carrying document with all formal demands on content according to the main rule Chapter 11 section 8 ML is the request for the tax liable to be able to exercise right of deduction for charged input tax regarding an acquisition. That follows by Chapter 8 section 5 ML, which is corresponded by article 178(a) of the VAT Directive (2006/112). In pursuance of the CJEU's case law accommodates the demand on possession of a correct invoice, to exercise the right of deduction, one of the purposes which is aimed at by the VAT Directive (2006/112). That purpose is to ensure the collection of VAT and the SKV's control thereof.[447] The demands on content regarding an invoice according to the ML are stated in the main rule Chapter 11 section 8 ML. The corresponding rule in the VAT Directive (2006/112) is article 226.

Tax liable

Since the representative rule lacks an equal in the VAT Directive (2006/112), the question on the trial of the concept tax liable in the rule not whether an EU law rule has been implemented, introduced correctly into the ML. At the trial of the concept is thus not the aim EU conformi-

[445] See sec. 2.6.
[446] See problem 3 in sec. 1.1.2.
[447] See para. 37 in *Terra Baubedarf-Handel* (C-152/02), which is mentioned in sec. 1.3.

ty relevant, and thereby neither the aim legal certainty including legality according to the EU law. The trial of the concept tax liable in the representative rule concerns instead whether it is *in compliance* with article 9(1) first paragraph of the VAT Directive (2006/112). That is illustrated in Figure 2 above.

Since it is stated in Chapter 1 section 2 last paragraph ML that there are special rules on who is in certain cases tax liable in inter alia Chapter 6, and section 2 lacks the criterion taxable person, the question arises on the subject side whether the representative rule is *expanding* the determination of who is comprised by the concept tax liability in the ML in relation to the main rule.[448] An interpretation question is therefore whether a partner in an *enkelt bolag* or *partrederi* can be considered tax liable according to the wording of the representative rule because of the character of partner in itself, so that also an ordinary private person can be tax liable in that capacity. That is in that case in conflict with the main rule on taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112). That an ordinary private person cannot have the character of taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112) is established by in the CJEU‘s case law – cases *Götz* (Case C-408/06) and *Commission v. the Netherlands* (Case 235/85). That question is *acte éclairé*.[449] The interpretation of the concept tax liable in the representative rule is decided by what is meant with *enkla bolag* and *partrederier* according to the wording of Chapter 6 section 2 ML,[450] which does not contain any limitation regarding that concept. Concerning *enkla bolagen* there are no limitations to a certain sort of activities for the civil law determination of what is constituting an *enkelt bolag*. According to Chapter 1 section 3 BL rules namely the broader prerequisite *verksamhet* (activity) which contains inter alia business activity.[451] That causes an overall description of *enkla bolag* and *partrederier* from a civil law perspective in Chapter 5, before the interpretation is made of the concept tax liable in the representative rule in Chapter 6. For the question of what is relevant if the trial of *tax liable* (*skattskyldig*) proves that the concept is not *complying* with the main rule on taxable person in article 9(1) first paragraph of the VAT Directive (2006/112) I reason as follows.

If the choice of tax subjects becomes far too vast by the wording of the representative rule meaning that ordinary private persons in their capacities of partners in an *enkelt bolag* or *partrederi* are given the character of tax liables, the interpretation result becomes extreme: The basics

[448] See sec. 2.5.
[449] See sec:s 1.1.3 and 1.2.3.
[450] See problem 1 in sec. 1.1.2.
[451] See prop. 1998/99:130 Part 1 p. 231 and the SKV’s *Handledning för mervärdesskatt 2012* Part 1 p. 201. See also Forssén & Kellgren 2010, p. 32 and sec. 1.1.1.

for the VAT system are loosened. By the ML shall in the first place the tax subjects be distinguished from the consumers.[452] The CJEU's case law actually means that the EU Member States cannot claim that directives shall be given reverse vertical direct effect and be invoked by the state against the individual, e.g. when a rule in the VAT Directive (2006/112) has been implemented correctly into the ML. However, it is not a matter of some directive rule which would have been implemented in an incorrect way into the representative rule in the described situation. The EU conformity and legal certainty including legality according to the EU law lacks thereby relevance as aim for the Swedish VAT system concerning the trial of the concept tax liable in the rule. Instead it is in my opinion more of a *procedural solution* which will be at hand for the individual as well as for the state:

- An ordinary private person who is not comprised by the Swedish VAT system in the described situation, can in a tax case invoke that article 9(1) first paragraph of the VAT Directive has direct effect: The main rule for who can be considered having the character of taxable person does not comprise consumers. Alternatively can the SKV *ex officio* refrain from enforcing taxation measures against the individual in the present situation.[453]

- If it is instead so that an ordinary private person in the capacity of partner in an *enkelt bolag* or *partrederi*, by virtue of the legality principle, wants to exercise right of deduction, is the state through the SKV referred to invoke the principle on prohibition of abusive practice. That is an EU law principle which the CJEU established in *Halifax et al.* (Case C-255/02). Although the principle follows by EU law, I consider that the legality principle should stand back in the described situation: The interpretation result becomes so extreme that I deem it not being comprised of any protection worthy interest according to the legality principle for taxation measures in the RF. If an ordinary private person in the capacity of partner in an *enkelt bolag* or *partrederi* register for VAT and files an MVD, to be reimbursed input tax on e.g. purchase of foodstuffs for private consumption, it is in my opinion a matter of abusive practice. It is not a taxation situation. It is in such a case more of a matter of trying via the VAT system to get something similar to a subsidy. The administration courts should in such a case *de sententia ferenda* redefine the legal facts so that the legal consequence which the right means does

[452] See sec. 1.1.3.
[453] See sec. 1.2.3.

not emerge, i.e. the partner should for VAT purposes not be considered as anything else than a consumer.[454]

Although the EU conformity lacks relevance, *can* an *expanding* interpretation result in the present respect eventually cause that the EU Commission or another EU Member State sues Sweden for breach of the EU law according to articles 258 and 259 TFEU. That it by the Lisbon Treaty and article 113 TFEU has been clarified that the harmonisation demand on the VAT legislations within the EU also means that competition distortion shall be avoided on the internal market, is considered meaning a primary EU law on *a level playing field*.[455] The enterprise form *enkelt bolag* has a general scope with regard of sort of activity or sector.[456] Therefore would in my opinion an interpretation result with the described rule competition typically not be in compliance with the neutrality demand which rests with the Member States according to article 113 TFEU concerning VAT (and other indirect taxes). In that case there is a rule competition between the representative rule and the main rules on taxable person according to article 9(1) first paragraph, on payment liable according to articles 2(1)(a) and (c) and 193 and on right of deduction according to article 168(a) of the VAT Directive (2006/112). Since the neutrality principle follows also by the preamble to the VAT Directive (2006/112) and is considered following by article 1(2) of the directive,[457] would a competition distortion due to the rule competition in that case in my opinion be considered constituting a breach of the EU law according to the primary EU law or the secondary EU law.[458] By secondary EU law follows furthermore by the completed title of the VAT Directive (2006/112) that the Member States under the EU law shall have one common VAT system: COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax.[459]

Such an extreme, expanding interpretation result concerning the concept tax liable regarding partner in *enkelt bolag* or *partrederi* means in my opinion that an amendment should be made in the representative rule: *De lege ferenda* I suggest in that case that the rule should refer to the general rules in the ML on tax liable. Thereby I mean the main rule on who is tax liable, i.e. Chapter 1 section 2 first paragraph number 1, where reference is made to section 1 first paragraph number 1 ML with

[454] See sec. 2.7.
[455] See sec. 2.2.
[456] See sec. 2.5.
[457] See sec. 2.4.1.2.
[458] See sec. 1.1.3
[459] See sec:s 2.2 and 2.3.

inter alia the prerequisite taxable person.[460] The concept tax liability in the main rule corresponds with the main rule on who is payment liable according to articles 2(1)(a) and (c) and 193 of the VAT Directive (2006/112). Such a solution exists concerning the VAT groups: In Chapter 6 a section 1 second paragraph ML it is stated that it follows by the general rules in Chapter 1 section 2 first paragraph number 1 whether the VAT group's activity shall be considered leading to tax liability.[461]

Other questions

In connection with the question whether the representative rule can lead to an ordinary private person becoming tax liable I mention also the other two cases of tax liability in Chapter 1 section 1 first paragraph, number 2 (intra-Union acquisitions of goods) and number 3 (imports of goods), and voluntary tax liability according to Chapter 9 ML.[462] Opposite to the main rule for tax liability are in these cases the concept tax liable not connected to the concept taxable person. Also private persons can be considered tax liable. That rules in general for voluntary tax liability[463] and for imports of goods[464] and at intra-Union acquisitions of new means of transport.[465]

Concerning the mentioned cases of intra-Union acquisitions and imports that are supported by article 2(1)(b)(ii) and article 2(1)(d) of the VAT Directive (2006/112). That a partner in an *enkelt bolag* or *partrederi* can become tax liable for imports or in the mentioned case of intra-Union acquisition also if the person is an ordinary private person is thus in compliance with the directive. At the investigation of the possibility for a private person to apply for voluntary tax liability for letting of business premises etc. according to Chapter 9 ML will however the question on rule competition between the ML and the directive be mentioned.

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[460] According to SFS 2013:368 is since the 1st of July 2013 *beskattningsbar person* (taxable person) used in the ML instead of *yrkesmässig verksamhet*, but *skattskyldig* (tax liable) has not been changed in the present respects. The Ministry Finance's suggestion in the memorandum of 2012-11-23 came thus not to affect the problem I mention (see sec. 1.3).

[461] See sec:s 1.1.3 and 1.2.3.

[462] See problem 4 in sec. 1.1.2.

[463] The Ministry of Finance's suggestion in the memorandum of 2012-11-23 did neither affect what I mention concerning Chapter 9 section 1 ML. By SFS 2013:368 was *näringsidkare* changed into *beskattningsbar person* (taxable person) when VAT groups are mentioned in the second para. in the rule, but neither then nor on the 1st of January 2014 in connection with SFS 2013:954 and SFS 2013:1108 has any measure been taken regarding that the expressions real estate owner, tenants or tenant-owners in the first para. of the rule can comprise a private person.

[464] See Ch. 1 sec. 2 first para. no. 6 ML.

[465] See Ch. 1 sec. 2 first para. no. 5 and Ch. 2 a sec. 3 first para. no. 1 ML.

For the question whether a partner in an *enkelt bolag* or *partrederi* can be an ordinary private person and comprised of that possibility there is a directive rule to regard, and thus is the aim EU conformity relevant thereby. That is the facultative article 137(1)(d) of the VAT Directive (2006/112): There is the freedom of choice limited, for as taxable transactions considering leasing out of and letting of immovable property, to apply to taxable persons.[466]

By the way I have investigated whether there is any rule concerning the tax object in the ML whose application, independent of the existence of the representative rule, is affected by the enterprise form *enkelt bolag*.[467] I have found one such case. It concerns one of the rules on reduced tax rate in Chapter 7 section 1 third paragraph ML, namely number 8 regarding letting or transfer of rights to literary and artistic works. The question concerns inter alia those *enkla bolag* that may exist as enterprise form e.g. in connection with filmmaking and similar,[468] and is thus not insignificant. I mention what joint copyright and use of the enterprise form *enkelt bolag* may mean to the determination of the tax object and the question whether the general or reduced tax rate shall apply. The aim should be neutrality, since there is no support in the VAT Directive (2006/112) for legal form causing differences concerning the tax rate issue within the same sector in the present case.[469] The question concerns a specific situation where the determination of the tax object is affected by whether the enterprise form *enkelt bolag* is used, and is not affected in itself by the existence of the representative rule in the ML. Thus, it is a somewhat peripheral question in the present respects, but it deserves to be mentioned in the context of this work. This particular question about the tax rated is mentioned separately in section 6.5.

[466] See sec. 1.1.3.
[467] See problem 5 in sec. 1.1.2.
[468] See sec. 1.1.1.
[469] See sec:s 2.4.1.2, 2.4.1.3, 2.4.2 and 2.5.

3. A MODEL FOR HYPOTHETIC CASE STUDIES

3.1 INTRODUCTION

In this chapter I make a closer description of the ABCSTUXY-model which I use as a pedagogy tool in connection with the application issues concerning the representative rule and the review of a number of hypothetic case studies.[470] I end the chapter with a summary and conclusions regarding the mentioned tool and the roles which the persons A, B, C, S, T, U, X and Y are given in the case studies. Thereby I also draw up a couple of basic examples for the case studies.

3.2 THE ABCSTUXY-MODEL

The review in the nearest previous chapter shows that the functionality with a neutral VAT and the VAT principle according to the EU law is a question which should be judged in more than one stage. To merely judging the situation between the consumer and his counterparty is sometimes insufficient to establish whether the competition is distorted by an enterprise in the ennobling chain up to the end costumer (consumer) erroneously standing outside the VAT system and causing undesired cumulative effects. At the problemizing of the subject side and the object side by the concept tax liability and the question on the right of deduction in connection with the representative rule I therefore use the tool which I call the ABCSTUXY-model in connection with a number of hypothetic case studies regarding the rule.[471] The point is, as above mentioned, only pedagogical insofar that the acronym A-B-C-STUXY makes it easier to remember which person has been given what role in the model, by memorizing them by support of the acronym A-B-C-STUXY.[472] I develop here further the idea with the model for the mentioned purpose:

- A, B are C the imagined *bolagsmännen* in an *enkelt bolag* or *delägarna* in a *partrederi* in my problemizing of the representative rule by hypothetic case studies. If not otherwise stated A and B are assumed, in the hypothetical case studies, to have economic activities of their own beside the activity in *enkla bolaget* or *partrederiet*.

- I use A and B to illustrate that an *enkelt bolag* or *partrederi* exists in the case studies, and they are assumed applying together for the SKV to appoint A to handle *enkla bolaget*'s or *partrederiet*'s accounting of VAT according to Chapter 6 section 2

[470] See sec. 1.2.1.
[471] See sec. 1.2.1.
[472] See sec. 1.2.1.

ML. The person C may thereafter join as *bolagsman* in *bolaget* or as *delägare* in partrederiet or C may alternatively be a non-*bolagsman* or non-delägare, e.g. someone of the persons S, T, U, X or Y.

- S, may stand for supplier, and is a supplier in relation to a *bolagsman* or *delägare* when they represent *enkla bolaget*'s or *partrederiet*'s activity.

- T, may stand for taking in the meaning receiving, and is a customer in relation to a *bolagsman* or *partner* when they represent *enkla bolaget*'s or *partrederiet*'s activity.

- X and Y are supplier and customer respectively in relation to a *bolagsman* or *delägare* when they are not representing *enkla bolaget* or *partrederiet* but acts in their own activities.

- U is a person with an indirect relation to a *bolagsman* or *delägare* when they represent *enkla bolaget*'s or *partrederiet*'s activity.

In connection with the application issues and the hypothetic case studies I treat both the subject side and the object side of the concept tax liability. This means that I treat issues on taxable person and transaction. The questions which thus are mentioned concern relations between the partners (*bolagsmän*/*delägare*) in *enkla bolag* and *partrederier* and their relations to suppliers and customers.[473] I base my review in connection with the application issues on a supply comprised by the main rules on general taxation and tax rate for supplies of goods or services, if not otherwise is stated. That the internal relations between *bolagsmännen* or *delägarna* in *bolaget* or *rederiet* also is of interest for the investigation in this work may be said being a consequence of group accounting of VAT is not accepted either in the ML or the VAT Directive (2006/112). It is in principle only in the previously described situation with transactions between members of a registered VAT group according to Chapter 6 a ML that taxable transactions are not value added taxed between various persons comprised of the VAT.[474] If two or more taxable persons fulfil the presuppositions to apply for registration as VAT group and do so with a resulting decision by the SKV, they are considered as one single taxable person (VAT group) and the VAT group's activity as one single activity.[475] Whether the VAT group's activity shall be deemed

[473] See sec. 1.1.2.
[474] See sec. 1.2.3.
[475] See Ch. 6 a sec. 1 first para. and sec. 4 first para. first sen. ML (according to SFS 2013:368).

leading to tax liability follows by the general rules on who is tax liable according to Chapter 1 section 2 first paragraph number 1 ML.[476] There is by the way a mandatory rule on exemption from taxation for supply of services within an independent association of natural or legal persons in Chapter 3 section 23 a ML. It was introduced along with Chapter 6 a kap. ML, but I refrain from Chapter 3 section 23 a ML, since that rule applies to subjects which are not tax liable according to the ML and is according to the preparatory work meant to be applied within the care *on a very small number of services*.[477] The general principle is that VAT is not group accounted. Each subject is judged on its own. That follows by the word *den* (it) being used regarding tax liable and payment liable respectively in the main rules Chapter 1 section 2 first paragraph number 1 ML and article 193 (compare "any taxable person") of the VAT directive (2006/112) respectively and by the word *denne* (he/she) being used concerning taxable person in article 2(1)(a) and (c) of the VAT Directive (2006/112).[478]

The main rule on who is tax liable according to the ML has a systematic correspondence with the main rule on who is payment liable according to the VAT Directive (2006/112).[479] The tax liability's emergence according to the main rule is (in translation) described as follows: *VAT shall be paid to the state according to this act at such supply within the country of goods or services which are taxable and made by a taxable person in that capacity*.[480]

The main rule for the determination of the scope of the right of deduction for input tax according to the ML[481] is complying with the corresponding main rule in the VAT Directive (2006/112).[482] According to the ML as well as the VAT Directive (2006/112) there is also a so called right of reimbursement of input tax if the intention is to create from taxation qualified exempted transactions.[483] It is only concerning acquisitions made by intention to create from taxation unqualified exempted transactions and concerning acquisitions comprised by prohibition of deduction that the investments neither entitles to right of deduction nor

[476] See Ch. 6 a sec. 1 second para. ML.
[477] See prop. 1997/98:148 pp. 63 and 64. See also Forssén & Kellgren 2010, p. 44.
[478] There is an exemption from this general principle in the ML besides Ch. 6 a, namely Ch. 8 sec. 4 first para. no. 5 and second para. ML. There it is stipulated that under certain circumstances may input tax on acquisitions in a group enterprise without right of deduction be transferred to an enterprise in the same group which has right of deduction according to the main rule in Ch. 8 sec. 3 first para. ML.
[479] See sec. 1.1.3.
[480] See Ch. 1 sec. 1 first para. no. 1 ML, its wording according to SFS 2013:368.
[481] Ch. 8 sec. 3 first para.
[482] Art. 168(a). See also sec. 1.3.
[483] See sec. 1.3 regarding Ch. 10 sec. 11 first and second para:s ML and art. 169(c) of the VAT Directive (2006/112).

right of reimbursement and the input tax on the acquisitions in the activity becomes costs.[484] Figure 3 below shall give an overview regarding the basic concepts in the ML and how they connect.

Figure 3[485]

<table>
<tr><td colspan="4">Persons</td></tr>
<tr><td colspan="3">(1) Taxable person
(carries out independently an economic activity)</td><td>Others are consumers/tax carriers</td></tr>
<tr><td colspan="3">Supply of goods or services</td><td>Not right of deduction/ reimbursement of input tax</td></tr>
<tr><td>(2) Taxable</td><td>From taxation qualified exempted</td><td>From taxation unqualified exempted</td><td></td></tr>
<tr><td>(3)
Right of deduction of input tax</td><td>Right of reimbursement of input tax</td><td>Not right of deduction/reimbursement of input tax</td><td></td></tr>
<tr><td colspan="2">Purchase which is comprised by prohibition of deduction: Not right of deduction/reimbursement of input tax</td><td></td><td></td></tr>
</table>

3.3 SUMMARY AND CONCLUSIONS

Figure 4 below summarizes the tool, the ABCSTUXY-model, which I have mentioned in the introduction chapter and described closer in this chapter.[486] It describes the roles which I give the persons A, B, C, S, T, U, X and Y in the hypothetic case studies in connection with the application issues concerning the representative rule.

[484] See sec. 1.3.
[485] See also Forssén 2011 (1), p. 21 and Forssén 2011 (4), p. II.
[486] See sec:s 1.2.1 and 3.2.

Figure 4

<table>
<tr><td colspan="2">Enkelt bolag/partrederi</td></tr>
<tr><td rowspan="2">A –partner/representative
B – partner
A and B apply by the SKV for A to account for VAT in enkla bolaget or partrederiet</td><td>S – supplier to A or B in their capacities of partners in enkla bolaget/partrederiet</td></tr>
<tr><td>T – customer to A or B in their capacities of partners in enkla bolaget/partrederiet</td></tr>
<tr><td rowspan="3">C
Eventual additional partner in enkla bolaget or partrederiet. Alternatively may C be a non-partner, e.g. someone of S, T, U, X or Y</td><td>U – person with an indirect relation to A or B in their capacities of partners in enkla bolaget</td></tr>
<tr><td>X – supplier to A or B regarding their other activities</td></tr>
<tr><td>Y – customer to A or B regarding their other activities</td></tr>
</table>

From Figure 3 in the nearest previous section and Figure 4 according to above in this chapter I draw up two basic examples below. In these I assume that the partners A and B have their own economic activities beside the activity in *enkla bolaget* or *partrederiet*. At the hypothetic case studies in connection with the application issues in sections 6.4.1–6.4.7 concerning the representative rule I use the two basic examples and vary the presuppositions in them.

Example 1. The ennobling chain X – A – Y [see Figure 4]:
A carries out, beside the *enkla bolaget* with B, independently an economic activity [see (1) in Figure 3]. In it A makes a taxable supply of a product or a service [see (2) in Figure 3] to the customer Y. I assume that it is a matter of a product. For the sale of the product to Y is A tax liable and shall charge output tax (25 per cent) and account in his MVD. A has acquired the god from the equally tax liable supplier X, who has charged output tax (25 per cent) in invoice to A. Since A is tax liable, he has right to make deduction [see (3) in Figure 3] in his MVD for input tax charged by X.

Example 2. The ennobling chain S – A – T [see Figure 4]:
The presuppositions from example 1 are altered so that A acts for *enkla bolaget*'s or *partrederiet*'s activity instead of regarding his own activity. The supplier of the product and the customer respectively in relation to A I now call S and T respectively. S is, like X, liable to pay output tax, but the question is what in the present case applies regarding the right to deduct input tax and the liability to charge output tax on the further sale to T respectively.

Examples 1 and 2 shows that I in the hypothetic case studies in the first place is sticking to the general rules in the ML. I have therefore in Figure 3 numbered the prerequisites for tax liability and right of deduction respectively regarding the main rules in Chapter 1 section 1 first paragraph number 1 and Chapter 8 section 3 first paragraph respectively in the ML. Thereby I can in Example 1 use that numbering to illustrate that I at the trial of Chapter 6 section 2 ML in the first place am sticking to the mentioned main rules.[487]

[487] See sec. 2.8.

4. INTERNATIONAL OUTLOOK

4.1 INTRODUCTION

Equals to the representative rule in the ML is lacking in other VAT legislations within the EU.[488] However, that does not mean that the problems with companies lacking legal capacity is unique for the ML and *enkla bolagen* and *partrederierna*.[489] Of interest at an international outlook is therefore if guidance exists in foreign law as object for comparison of the investigation of the representative rule.[490]

The EU law work with the company law has concerned the limited company law. That has entailed that there are a couple of hundred so called *societas europea*, which constitute legal entities constituted in form of limited companies.[491] Concerning the Nordic company law has the law making co-operation within the limited company law been important and led to that rather uniform limited company acts exist in Denmark, Finland, Norway and Sweden since the 1970's. However, it has otherwise not existed any substantial Nordic law making co-operation in the field of company law.[492]

In the EU Member State Denmark there is *selskabsloven* regarding *aktie- og anpartsselskaber*,[493] but otherwise is on the whole company law legislation lacking.[494] Regarding so called *interessentskab* (equal to *handelsbolag*, i.e. partnerships) it is stated in *lov om visse erhvervsdrivende virksomheder* that all partners are joint responsible and without limitation for the activities debts.[495] Otherwise there is however a significant company law freedom of making agreements and flexibility, and any major need of a division into different types of companies has not existed.[496] *Interessentskabet* was furthermore for a long time considered lacking legal capacity, and any real equal to *enkla bolaget* has not been developed in Denmark.[497]

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[488] See sec:s 1.1.2, 1.1.3 and 1.2.1.
[489] See sec. 1.2.1.
[490] See sec. 1.2.2.
[491] See The council's regulation (EC) no. 2157/2001, para. 13 in the preamble to the regulation and para. 3 in the regulation, and *lag (2004:575) om europabolag* and Bernitz 2012 pp. 46, 47, 171 and 172.
[492] See Lindskog 2010, p. 29.
[493] See *lov nr. 470 af. 12. juni 2009 om aktie- og anpartsselkaber* (*selskabsloven*) [Da.], which replaced *aktieselskabsloven* and *anpartsselskabsloven*. *Anpart* corresponds to *andel* (share) in Swedish.
[494] See Lindskog 2010, pp. 30 and 32.
[495] See sec. 2 first para. in *lov om visse erhvervsdrivende virksomheder* (Da.), its wording according to *lov nr. 516 af 12. juni 2009*. See also Lindskog 2010, p. 32.
[496] See Lindskog 2010, p. 33.
[497] See Lindskog 2010, pp. 32 and 33 and Dotevall 2009, p. 16. Like what applies for *handelsbolag* (partnerships) in Swedish tax law constitutes by the way an *inter-*

In the Icelandic VAT act, *Lög um virðisaukaskatt*, it is stated in art. 3 who is tax liable, *Skattskyldir*.[498] The main rule on tax liability in article 3(1) equals in principle the Danish.[499] By the English translation of the Icelandic VAT act I read out, by the use in article 3(1) of the words *those who* [(Ice.), *Þeim sem*] that it is a matter of natural as well as legal persons.[500] Otherwise is paragraph 2 in article 3 of interest in the present context, by it is therein also stated that *co-operative societies as well as other societies and institutions* [(Ice.), *samvinnufélögum, svo og öðrum félögum og stofnunum*] can be tax liable. The regulation on VAT accounting comprises inter alia associations, limited companies and partnerships. The Icelandic VAT rules concern however not any equal to *enkla bolagen*.[501]

In the Norwegian *Selskapsloven* there is an equal to *handelsbolag* (partnerships), namely so called *ansvarlig selskap*.[502] A so called *indre selskap* is an equal to *enkla bolag*, and such a *selskap* is distinguished from *ansvarlige selskaper* by *selskapet* not acting before third party.[503] The partners in an *indre selskap* are thus appearing separately in relation

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essentskab a tax subject according to Danish value added tax law, but not for income tax purposes. See Ramsdahl Jensen 2003, p. 262 and also Stensgaard 2004, pp. 326 and 327.

[498] The main rule art. 3(1) reads: *Those who sell or deliver goods or valuables on a professional or independent basis or perform taxable labour or service*. The English translation of the Icelandic VAT act is to be found on the Icelandic Ministry of Finance and Economy's website – http://eng.fjarmalaraduneyti.is.

[499] See sec. 1 first sen. in the Danish *momsloven*, *lov om merværdiafgift*, which reads: *Erhvervsmæssig levering af varer og ydelser med leveringssted i Danmark er afgiftspligtig efter denne lov*. See also Westberg 1994, p. 175.

[500] The prerequisites *yrkesmässig* (*professional*) or independent (*independent*) also make that art. 3(1) of the Icelandic VAT act lies close to the Danish specification of who is comprised by the tax liability. See sec. 3 first para. of *momsloven*, which reads: *Afgiftspligtige personer er juridiske eller fysiske personer, der driver selvstændig økonomisk virksomhed*. See also Westberg 1994, pp. 158 and 159. See also Ramsdahl Jensen 2003, p. 262 and Stensgaard 2004, p. 106, which recapitulate the Danish wording of art. 4(1) of the Sixth Directive, i.e. the predecessor to art. 9(1) first para. of the VAT Directive (2006/112).

[501] See *Lög um virðisaukaskatt 1988 nr. 50* and translation into English of the act and *Regulation No. 667/1995, on Reporting and Remitting VAT*, on the Icelandic Ministry of Finance and Economy's website – http://eng.fjarmalaraduneyti.is. See also Gunnarsdóttir 2012, p. 421, where it is stated that inter alia *partnerships* constitute *taxable persons* and that all *taxable persons* shall be VAT registered.

[502] See sec. 1-2 1 b of *LOV 1985-06-21 nr 83 LOV om ansvarlige selskaper og kommandittselskaper* (*Selskapsloven*) [Norw.], where it is stated that an *ansvarlig selskap* constitutes a *selskap hvor deltakerne har et ubegrenset, personligt ansvar for selskapets samlede forpliktelser og som optrer som sådant overfor tredjemann*.

[503] See sec. 1-2 1 c of *Selskapsloven*, where it is stated that an *indre selskap* is a *selskap som ikke optrer som sådant overfor tredjemann*.

to a third party.[504] However, there is neither in Norwegian VAT law any equal to the representative rule. *Indre selskaper* are not VAT registered as such in any way.[505] Previously was *lottfiskere* which take boat-, tool- and person-share considered exercising common activity, but the tax authorities have begun to consider *lottlaget* – i.e. the team – as an *indre selskap* which shall not be registered jointly (*fellesregistreres*). It is the one in the team (*reder*, *høvedsmann* or *fisker*) who delivers the fish to the buyer or receives payment who shall be VAT registered.[506] In Sweden the SKV considers, according to its statement of 2012-03-22, that when fishing is carried out jointly by fishers and shipowners in a so called *fiskelag* – fishing-team – an *enkelt bolag* exists.[507] Contrary to in Norway can the participants in the fishing-team, according to the representative rule, apply by the SKV for one of them to be appointed as representative to take the common responsibility of accounting and payment liability regarding VAT in *enkla bolaget*'s activity.

Of interest to this work is thus instead that the legal similarity from Swedish point of view is largest on the company field within the North in relation to Finland.[508] *Enkla bolaget* is acknowledged in Finnish law although rules on the company form is lacking there.[509] Since 1988 there is a legislation on *öppna bolag* (partnerships) and *kommanditbolag* (limited partnerships)[510] The act concerns however only *öppna bolag* and *kommanditbolag*.[511] They are legal persons and registered in The register of partnerships.[512] *Öppet bolag* or *kommanditbolag* exists if two or more by virtue of an agreement together exercise business activity, to achieve a common economic purpose.[513] *Öppna bolag* equals thus *handelsbolag* (partnerships).[514] The rules in the Finnish act are in most cases similar to the rules in the BL,[515] but do not regard *enkla bolag* (which

[504] See also Nial & Hemström 2008, p. 71, Dotevall 2009, pp. 16 and 123 and Lindskog 2010, p. 32.
[505] See Gjems-Onstad & Kildal 2011, p. 116.
[506] See sec:s 2-5 in *merverdiavgiftsloven 19 juni 2009 nr 58* and Gjems-Onstad & Kildal 2011, pp. 116 and 136.
[507] See also the SKV's *Handledning för skatteförfarandet*, Ch. 5, p. 3 (www.skatteverket.se) and sec. 1.1.1.
[508] See Lindskog 2010, pp. 30, 31 and 893.
[509] See Rehbinder 1995, p. 1, Dotevall 2009, p. 123 and Lindskog 2010, p. 31.
[510] See *lag om öppna bolag och kommanditbolag 29.4.1988/389*.
[511] See sec. 1 *lag om öppna bolag och kommanditbolag*. See also Rehbinder 1995, pp. 1 and 2, Dotevall 2009, p. 123 and Lindskog 2010, p. 31.
[512] See sec:s 2 and 3 *lag om öppna bolag och kommanditbolag*.
[513] See sec. 1 first para. first sen. *lag om öppna bolag och kommanditbolag*.
[514] See also Lindskog 2010, p. 31, Dotevall 2009, p. 123 and Nial & Hemström 2008, p. 71 regarding that *öppna bolag* equals *handelsbolag*. In Dotevall 2009 (p. 123) is by the way stated that the model for the Finnish *öppet bolag* is taken from German law.
[515] See Lindskog 2010, p. 31 and also Dotevall 2009, p. 123.

in that case would be named *civilbolag* or *vanligt bolag*).[516] In the Finnish VAT act, FML,[517] is thus also rules on *enkla bolag* lacking. On the other hand contains the FML inter alia rules on what are named *sammanslutningar*. They are not regulated in *lag om öppna bolag och kommanditbolag*. *Sammanslutningar* and *partrederier* are considered – like regarding *enkla bolag* and *partrederier* – not constituting legal entities.[518] Finland is an EU Member State, and the FML comprised by the same harmonisation demand as the ML. Therefore it is of interest in this work inter alia that *sammanslutningarna* – opposite to the ML concerning *enkla bolagen* – are determined as tax liable, i.e. tax subjects, in section 13 FML.[519]

Both within and outside the EU there are other examples on company forms which show similes to *handelsbolagen* (partnerships) and *enkla bolagen*. The equal to *handelsbolag* is in English law called partnership.[520] Any equal to *enkla bolag* does however not exist in English law (and neither in US law).[521] In Switzerland (outside the EU) constitutes so called *Kollektivgesellschaft* the equal to *handelsbolag*.[522] There are also so called *einfache Gesellschaften.*[523] The Swiss *einfache Gesellschaften* resemble in VAT respect the Finnish *sammanslutningarna* since they can constitute tax subjects, but they are distinguished by demands on that they – similar to *handelsbolag* – must act external in their own name.[524] Any such demand does not exist in section 13 FML concerning *sammanslutningarna* or in Chapter 6 section 2 ML concerning *enkla bolag* and *partrederier*. On the other hand there are equals to *handelsbolag* and *enkla bolag* in Germany and France: In Germany there are *Offene Handelsgesellschaft* and *Gesellschaften des bürgerlichen Rechts* – abbreviated GbR and also called *BGB-Gesellschaft* – and in France there are *société en nom collectif* and *sociétés civiles*.[525] A

[516] See Dotevall 2009, p. 123, where it is stated that synonymous to *enkelt bolag* is in Finland the terms *civilbolag* or *vanligt bolag* used.
[517] See *mervärdesskattelag 30.12.1993/1501*.
[518] Regarding this information I have consulted Kenneth Hellsten at Helsinki University.
[519] See sec. 1.2.1.
[520] In English law are the equals to *handelsbolag* and *kommanditbolag*, i.e. partnership and limited partnership, regulated in two acts from 1890 and 1907. See Dotevall 2009, pp. 17 and 122, Nial & Hemström 2008, p. 71 and Barenfeld 2005, pp. 72, 75 and 76.
[521] See Dotevall 2009, p. 122.
[522] See Nial & Hemström 2008, p. 71.
[523] See Nial & Hemström 2008, p. 348 and also Dotevall 2009, p. 122, which by the way also state that the expression *enkelt bolag* is taken from the Swiss expression *einfache Gesellschaften*.
[524] See art. 10 in *Bundesgesetz über die Mehrwertsteuer vom 12. juni 2009*, art. 530 i *Schweizerischen Obligationenrechts* and ESTV 2010 p. 7.
[525] See sec. 105(1) in *Handelsgesetzbuch* and sec:s 705-740 in *Bürgerliches Gesetzbuch* (BGB), Germany, and art. R221-1 to R221-10 and art. R743-81 to R743-89

GbR is founded on an agreement of mutual obligation for the partners on contributing to in accordance with the agreement to achieve a common aim.[526] Austria has furthermore equals to both the German company forms, and they are named *Offene Gesellschaften* and *Gesellschaft nach bürgerlichem Recht* (GesnbR).[527]

By the French *Code général des impôts* follows that *taxe sur la valeur ajoutée* (TVA, i.e. VAT) shall be paid by an *assujetti* (taxable person) who against payment supplies goods and services. In article 256 A is stated that with *assujetties* is meant persons who independently carry out economic activity, and that that judgement is independent in relation to the status otherwise of these persons and in relation to other taxes and their influence. Furthermore it is stated that with independent are inter alia not meant employees and others working by an employer and that with economic activities is meant in the first place all activity with sales of goods and services by a producer.[528] In article 256 B is mentioned when public law legal persons (*les personnes morales de droit public*) are considered constituting taxable persons. In article 257 is stated when inter alia co-operative associations and trade unions are comprised by TVA. *Sociétés civiles* are however not comprised, and any equal to the representative rule does not exist in *Code général des impôts*.[529]

In the German VAT act, *Umsatzsteuergesetz* (UStG), is the main rule on *Unternehmer* (taxable person) to be found in section 2. Thereby follows that any person who independently exercise an industrial or professional activity is considered having the character of *Unternehmer*.[530] Any equal to the representative rule does neither exist in the UStG concerning GbR and that is either the case concerning Austrian GesnbR.[531] Of interest to this work is however section 1 number 1 a in the German UStG which states that transfer of an activity, where the purchaser steps into the trader's place, is not value added taxed. A sort of GbR, so called *Vorgründungsgesellschaft*, has thereby not been considered having the character of taxable person according to the German tax authority. The motivation was that the legal figure makes acquisitions and invokes VAT deduction for these, but the acquisitions are used to create

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in *Code de commerce* (Version consolidée au 1 janvier 2013), France. See also Dotevall 2009, p. 122 and Nial & Hemström 2008, pp. 71 and 348.

[526] See sec. 705 in BGB. See also Barenfeld 2005 p. 65.

[527] See sec. 105 *Unternehmensgesetzbuch* and sec:s 1175-1216 in *Allgemeines Bürgerliches Gesetzbuch*.

[528] See also Forssén 2011 (1), pp. 293 and 294.

[529] See commentary of art. 256 A, 256 B and 257 in *Code général des impôts*, Zaquin 2009, pp. 948-964.

[530] See sec. 2 first para. first sen. in UStG: *Unternehmer ist, wer eine gewerbliche oder berufliche Tätigkeit selbständig ausübt*.

[531] In the Austrian UStG is the definition of *Unternehmer* in sec. 2 first para. first sen. identical to the corresponding rule in the German UStG.

taxable transactions by another person, namely the limited company taking over the activity. The question led to the *Bundesfinanzhof* applying for a preliminary ruling by the CJEU. In *Faxworld* (Case C-137/02) the CJEU considered that such a *Vorgründungsgesellschaft* had the capacity of taxable person.[532] Therefore I have deemed it to be of interest to mention German *Vorgründungsgesellschaft* and *Faxworld* in the continuing international outlook in this chapter.

By the way may the following be mentioned regarding another German and Austrian legal figure in connection with *handelsbolag*, namely so called tacit companies.[533] Tacit companies are considered an in between-form of partial loan and company according to the BL.[534] Thus a line is drawn between companies according to the BL and tacit companies.[535] Sometimes it is stated that tacit companies nowadays would not be considered a particular legal figure, and then it is mentioned that the circumstances must be such as the company prerequisites according to the BL being fulfilled for an *enkelt bolag* existing. Otherwise applies general rules on loans.[536] Tacit companies are also accepted in Danish law, where they are called *stille selskaber*.[537] However, there is no room for tacit companies to exist in Swedish law since the demand on registration was introduced for *handelsbolag* into the BL in 1995 by SFS 1993:760,[538] and support is lacking in case law for the existence of tacit companies (*tysta bolag*).[539]

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[532] See Bunjes et al. 2005, pp. 55, 97, 108 and 109

[533] The German or Austrian name is *stille Gesellschaft*: see sec:s 230-236 in the German *Handelsgesetzbuch* and sec. 179 in the Austrian *Unternehmensgesetzbuch* and Bunjes et al. 2005 p. 95. See also Nial & Hemström, 2008 p. 416 and Dotevall 2009, p. 16.

[534] See Mattsson 1974, p. 74 and also Lindskog 2010, p. 59. By *partiarisk försträckning* (partial loan) is by the way meant that a person add money or other property to another person's business activity without participating in the activity, but the condition is that he shall take part in the result of the activity. See Lindskog 2010, p. 58.

[535] See Nial & Hemström 2008, p. 417.

[536] See Lindskog 2010, p. 59.

[537] See Lindskog 2010, p. 33 and Dotevall 2009, p. 16.

[538] See Dotevall 2009, p. 16.

[539] See Sandström 2010, p. 26 and Lindskog 2010, p. 33, where it – in translation – is stated that *the tacit company is from Swedish legal point of view a company form whose historical existence can be questioned and contemporary existence should be ruled out*. Compare also RÅ 1968 ref. 20 (27 Feb. 1968) – advanced ruling on income tax). The question was there whether going together into tacit company has led to emergence of *handelsbolag* (partnership) or not. The HFD considered that handelsbolag was not at hand, and the two appliers would be taxed each on his own for income of business activity. *Enkelt bolag* according to the then current *lagen (1895:64 s. 1) om handelsbolag och enkla bolag* was never mentioned by either the majority or one dissident. The advanced ruling is mentioned also in Mattsson 1974, p. 48, Melz 1981, p. 372 and Nial & Hemström 2008, p. 421.

I have found as central research in the field not only Saukko 2005, which to a certain extent concerns *sammanslutningarna* according to section 13 FML, but also van Doesum 2009, which sets focus on inter alia Netherlands *contractuele samenwerkingsverbanden*.[540] They resemble *enkla bolag* insofar as they constitute agreements on mutual cooperation between two persons or entities.[541] Therefore I mention also the Netherlands in this chapter. In the continuing international outlook in this chapter I begin with Germany, followed by the Netherlands and ending with Finland.

4.2 GERMANY

Faxworld (Case C-137/02) concerned a so called *Vorgründungsgesellschaft*, Faxworld Vorgründungsgesellschaft Peter Hünninghausen und Wolfgang Klein GbR, which thus constituted a GbR.[542] According to the Swedish language version of the verdict it was regarding civil law considered an *enkelt bolag*.[543] Sometimes is also said that *Vorgründungsgesellschaft* is closest equal in Sweden to an *enkelt bolag*.[544] In *Faxworld* the two persons formed the *Vorgründungsgesellschaft* with a single company aim to prepare the forming of a limited company (Ger., *Aktiengesellschaft*).[545] The establishment of the capacity taxable person according to the VAT Directive (2006/112) has been debated in German law where the founding stage is concerned regarding legal persons.[546] A *Vorgründungsgesellschaft* exists before the company agreement and registration of the legal person formed by that agreement.[547] The question to CJEU from *Bundesfinanzhof* was in *Faxworld* whether a *Vorgründungsgesellschaft* had right to deduct input tax on acquisitions made therein but on account of the limited company, despite its only transaction consisting of transfer of acquired assets to the limited company.[548]

In the German UStG was in 1993 introduced in section 1 number 1 a, in pursuance of the facultative articles 5(8) and 6(5) of the Sixth Directive,[549] the determination of that the transfer of the activity is ex-

[540] See sec. 1.4.
[541] See van Doesum 2009, p. 45: ”*overeenkomst tussen twee personen of instanties de onderlinge samenwerking*”.
[542] See para:s 2 and 3 in *Faxworld* (C-137/02). See also sec. 4.1 regarding that a GbR is considered equal to an *enkelt bolag*. See commentary of *Faxworld* also in Terra & Kajus 2012, pp. 483–488 and in Kleerup et al. 2012, p. 216.
[543] See para. 11 in *Faxworld* (C-137/02).
[544] See Kleerup et al. 2012 p. 216.
[545] Se para. 11 in *Faxworld* (C-137/02).
[546] See Bunjes et al. 2005, p. 108.
[547] See Bunjes et al. 2005, pp. 109 and 667.
[548] See para:s 13 and 14 in *Faxworld* (C-137/02).
[549] Nowadays art:s 19 and 29 in the VAT Directive (2006/112).

empted from value added taxation.[550] In *Faxworld* the German government considered that a *Vorgründungsgesellschaft* did not have right to deduct input tax because it could not be considered carrying out an economic activity or that the transfer of assets to the limited company was not taxable.[551] The CJEU considered that none of the two arguments could be accepted.[552] The present *Vorgründungsgesellschaft* constituted according to the CJEU a taxable person in pursuance of article 4 of the Sixth Directive.[553] An individual person who is acquiring assets in connection with an economic activity in the meaning of the directive rule is according to the CJEU to be considered tax liable without respect of to which enterprise the economic activity can be referred.[554] According to the CJEU that is not altered by the possibility in article 5(8) of the Sixth Directive to introduce exemption from taxation being used in the UStG. The scope of application for article 4 of the Sixth Directive is not affected by that circumstance. Although the only previous transaction by the present *Vorgründungsgesellschaft* consisted of the transfer of the activity to the legal person – the limited company – and was exempted from taxation the *Vorgründungsgesellschaft* constituted taxable person according to the CJEU.[555]

The CJEU concluded furthermore that the deduction system in the common VAT system guarantees the neutrality concerning the tax burden for all economic activity, regardless which purposes and results are aimed for by the activity, provided that it in itself in principle is submitted to VAT.[556] With respect of the right of deduction's general character the CJEU concluded that exemptions are only allowed in the cases which expressly are stated in the Sixth Directive. The CJEU considered that the VAT which the taxable person – the present *Vorgründungsgesellschaft* – wanted to deduct were related to acquisitions for transactions carried out in purpose of making possible taxable transactions. That was not altered by the transactions only being constituted by the limited company's planned transactions and that *enkla bolaget* itself had no intention to make taxable transactions.[557] With regard of precise-

[550] Compare Ch. 3 sec. 25 ML, which has been investigated in Alhager 2001, i.e. before *Faxworld* (C-137/02).
[551] See para. 26 in *Faxworld* (C-137/02).
[552] See para. 27 in *Faxworld* (C-137/02).
[553] See para. 30 in *Faxworld* (C-137/02). Compare previous note: In the Swedish translation of the Sixth Directive existed *skattskyldig person* and *beskattningsbar person*. In the Swedish language version of the VAT Directive (2006/112) is only *beskattningsbar person* used. Article 4 of the Sixth Directive is corresponded by articles 9-13 of the VAT Directive (2006/112).
[554] See para. 28 in *Faxworld* (C-137/02).
[555] See para. 29 in *Faxworld* (C-137/02).
[556] See para. 37 in *Faxworld* (C-137/02), where the CJEU also referred inter alia to *Rompelman* (268/83), para. 19.
[557] See para. 41 in *Faxworld* (C-137/02) and also Terra & Kajus 2012, p. 487.

ly these circumstances (Ger., *Unter diesen spezifischen Umständen*), and for the purpose of being able to guarantee the tax burden's neutrality, the CJEU concluded that it shall be possible to take into consideration the taxable transactions which shall made by the limited company at the trial of the right of deduction by the present *Vorgründungsgesellschaft*.[558] The question from *Bundesfinanzhof* on the right of deduction was answered by the CJEU so that a *Vorgründungsgesellschaft* formed for the only purpose to form a capital association has right to make deduction for input tax.[559] The CJEU has also in another preliminary ruling considered that right of deduction for input tax can emerge for a taxable person whose only activity aim is to prepare the economic activity for another taxable person which can make taxable transactions.[560]

Although the CJEU is reasoning about *Vorgründungsgesellschaft* as a *skattskyldig person* (taxable person),[561] it is in my opinion not possible to make the conclusion that non-legal entities can constitute taxable persons according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112). A *Vorgründungsgesellschaft* is indeed as a GbR to be compared with an *enkelt bolag* insofar as it does not constitute a legal entity. However, it is so that a *Vorgründungsgesellschaft* is formed only for the purpose of forming a legal person. The economic activity in a *Vorgründungsgesellschaft* shall prepare the economic activity for another taxable person which shall create the taxable transactions with the acquisitions for which *Vorgründungsgesellschaft* has right to make deduction for input tax. *Faxworld* can in my opinion not be given such a far going interpretation that the CJEU by the case would be considered having established that a non-legal entity like an *enkelt bolag* would constitute a taxable person according to the main rule in the directive. The activity in an *enkelt bolag* is not limited to have the function of a legal person being formed to which the activity is transferred. Also *Polski Trawertyn* (Case C-280/10) concerns a situation where right of deduction for acquisitions are allowed – the partners – because the intention is that taxable transactions shall be created by a legal entity (the finally formed company).

4.3 THE NETHERLANDS

[558] See para. 42 in *Faxworld* (C-137/02). See also Bunjes et al. 2005, p. 110, where it is by the way stated in connection with that para. 42 in the case that the CJEU would have increased the acceptance of the verdict if the CJEU had made more comprehensive reflections for its decision.
[559] See para. 43 in *Faxworld* (C-137/02).
[560] See para. 33 in *Polski Trawertyn* (C-280/10), where the mentioned conclusion is made with reference to para:s 41 and 42 in Faxworld (C-137/02). *Polski Trawertyn* concerned right of deduction for input tax on costs which the partners in the company Polski Trawertyn had had – before the forming and registration of the company– for the company's economic activity and with intention to carry out that activity.
[561] Nowadays *beskattningsbar person* (taxable person).

The Netherlands VAT act, *Wet op de omzetbelasting 1968* (Wet OB), does neither contain any equal to the representative rule. However, it is of a certain interest for this work what is said in van Doesum 2009 concerning *contractuele samenwerkingsverbanden in de btw* – i.e. contractual co-operation agreements and VAT.[562] *Samenwerking* – co-operation or joint activity – is the noun form of the verb *samenwerken* – co-operate, work together or co-work.[563] A *samenwerkingsverband* – co-operation agreement – is an *agreement between two persons or entities concerning mutual co-operation*.[564] In that way they resemble *enkla bolag*.[565]

Van Doesum investigates a choice of contractual co-operation agreements, since such are in practice uncountable.[566] The choice is based on only the sort of contractual co-operation which is acknowledge either in Netherlands civil law or in Netherlands VAT law.[567] Van Doesum examines various transactions in a model with eight different kind of contractual co-operation agreements divided into three levels of co-operation. The model contains also a level zero, where business activities are not co-operating at all.[568] On the third level – which is also called the integrated level – there are only contractual co-operations which mean that a new unit is created. On the first two levels of co-operation can transactions exist between the co-operating parties and between them and a third party.[569] It is first on the third level that transactions can exist between on the one hand the parties and on the other hand the contractual co-operation arrangement as a unit. If a VAT group has been formed, the parties disappear for VAT purposes by them being brought together as one single unit, whereby it cannot exist any transactions at all between the parties.[570] Such units on the third level where transactions can exist between the parties and the unit are according to van Doesum represented by *personenvennootschappen* and *feitelijke samenwerkingsverbanden.*[571] These are by van Doesum named in English *partnerships* and *de facto partnerships*.[572] To the mentioned third level van Doesum refers also European Economic Interest Grouping

[562] See sec. 4.1.
[563] See van Doesum 2009, p. 44.
[564] See van Doesum 2009, p. 45: "*overeenkomst tussen twee personen of instanties de onderlinge samenwerking*".
[565] See sec. 4.1.
[566] See van Doesum 2009, p. 688.
[567] See van Doesum 2009, p. 688.
[568] See van Doesum 2009, pp. 671, 687, 688 and 689.
[569] See van Doesum 2009, p. 687.
[570] See van Doesum 2009, p. 688.
[571] See van Doesum 2009, p. 671 and 677. *Personenvennootschappen* translates partnerships. *Feitelijke samenwerkingsverbanden* translates de facto partnerships.
[572] See van Doesum 2009, p. 696.

(EEIG).[573] When van Doesum wrote his thesis in 2009 there were suggestions for alterations in the Netherlands civil legislation on *partnerships*, so that only certain of them would be accepted and that they would have a freedom of choice to become legal persons.[574] The civil law judgement of the status as legal entity would however be irrelevant for the VAT judgement of whether a *partnership* has the status of taxable person. However, it was noted that that principle was not always applied in Netherlands VAT law.[575]

Partnerships resemble closest *handelsbolag* in Swedish, and those are like EEIG's tax subjects according to Chapter 6 section 1 ML.[576] Wet OB does not contain any equal to Chapter 6 section 2 ML regarding *enkla bolag* and *partrederier* and VAT. Thus, it is not possible to draw any conclusions – concerning the representative rule and the question whether *enkla bolag* and *partrederier* can constitute taxable persons – from the conception in van Doesum 2009 on *partnerships*. For the question whether a non-legal entity can constitute taxable person may however the following be mentioned from van Doesum 2009. The VAT system as an EU-system is considered based on a uniform concept taxable person (Nl., *belastingplichtige*). That is mentioned by van Doesum in connection while recapitulating the content in the main rule regarding taxable person, article 9(1) first paragraph of the VAT Directive (2006/112).[577] After reasoning about the concept taxable person and its position as a community concept van Doesum states that the interpretation of the concept is not depending on what is determined in the civil law by a Member State.[578] This is considered meaning *that each natural person, legal person and co-operation agreement, whether it is a legal entity or not, on its own must be regarded as a tax subject (taxable person) for collection of VAT*.[579] It is thus stated in van Doesum 2009 that *also subjects which are not qualifying as civil law subjects can function as tax subjects for collection of VAT*.[580]

Van Doesum 2009 implies only that a non-legal entity can constitute taxable person. When it is stated in van Doesum 2009 that this could be the case it is said with regard of the collection of VAT, not tax liability.

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[573] See van Doesum 2009, p. 679.
[574] See van Doesum 2009, p. 696.
[575] See van Doesum 2009, p. 697.
[576] *Partnership* is the English equal to *handelsbolag*. See sec. 4.1.
[577] See van Doesum 2009, p. 77.
[578] See van Doesum 2009, p. 77.
[579] See van Doesum 2009, p. 77: "*dat van iedere natuurlijk persoon, rechtspersoon en van ieder samenwerkingsverband, of dit nu civielrechtelijk een rechtssubject is of niet, op zichzelf bezien moet worden of het een belastingsubject (belastingplichtige) is voor heffing van btw.*"
[580] See van Doesum 2009, p. 77: "*Ook civielrechtelijk niet gekwalificeerde subjecten kunnen voor de heffing van btw als belastingsubject fungeren.*"

In article 7(1) Wet OB is stated that *ondernemer* (taxable person) are *all exercising activity independently* (”*ieder die een bedrijf zelfstandig uitoefent*”). That determination corresponds well with article 9(1) first paragraph of the VAT Directive (2006/112). *Poolovereenkomsten* – which are not constituting legal entities – are not considered constituting tax subjects according to article 9(1) first paragraph of the VAT Directive (2006/112): ”*Een pool is dus geen entiteit en kan niet worden aangemerkt als 'eenieder' in de zin van art. 9 Btw-richtlijn*”.[581] *Eenieder* – each and every one – is corresponded in the Swedish language version of article 9(1) first paragraph of the VAT Directive (2006/112) by *den som* (compare “any person who”). The quoted sentence reads approximately: En *pool*[582] is thus no unit (or entity) and cannot be described as any person who in the meaning of article 9 of the VAT Directive (2006/112). The question whether there would exist non-legal entities which still would constitute taxable persons was never fully tried by van Doesum, but it was only implied by the mentioned statement in collection respect. Regarding the subject side of the questions on *contractuele samenwerkingsverbanden* van Doesum makes instead assumptions whether they shall be considered forming a particular unit for VAT purposes, and then investigates them from a transaction perspective.

Thereby what is said in van Doesum 2009 does not give any decisive support for the judgement of the question whether *enkla bolag* and *partrederier* can constitute taxable persons according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112). Van Doesum mention from a transaction perspective inter alia *Heerma* (Case C-23/98) and *EDM* (Case C-77/01), which can be considered comprising VAT problems close to those concerning *enkla bolagen* and *partrederierna*. However, van Doesum 2009 gives no guidance for the subject question regarding the representative rule. On the other hand can what van Doesum states regarding the two EU cases be of a certain interest from precisely a transaction perspective for this work. Below in this section I judge whether *Heerma* and *EDM* can be considered given any support for a non-legal entity constituting taxable person. Thereby I mention what I deem may be of interest to regard for the judgement of the object side by the representative rule, where the transaction perspective on *Heerma* and *EDM* in van Doesum 2009 is concerned.

In *Heerma* (Case C-23/98) had a married couple formed a private company (Nl., *maatschap*) – in the into English translated version of the verdict called partnership (governed by Netherlands law) – which according to Netherlands law is not a legal entity and in the case was

[581] See van Doesum 2009, p. 297.
[582] *Pool* translates cartels or trusts.

called the private company Heerma.[583] One of the spouses had as only activity to let a barn building to the company, i.e. hiring out to the company in which the spouse was a partner.[584] The CJEU found that the partner and the company could not be considered as one single tax liable, despite that they – according to the Netherlands government – constituted a closed circle and had coinciding interests.[585] The circumstances were such according to the CJEU that any employment relationship could not be considered existing between the partner and the company according to article 4(4) first paragraph of the Sixth Directive,[586] but the partner was considered fulfilling the independence criterion.[587] It was thus a matter of a private company, a *maatschap* – which in van Doesum 2009 was called *open partnership* in English.[588] Others have also called Heerma a *partnership*.[589] In Swedish has Heerma sometimes been called an *enkelt bolag*,[590] but also – in accordance with the Swedish language version of the verdict – *enskilt bolag* (private company).[591] In my opinion it is not possible to make a direct comparison of the private company – i.e. partnership according to Netherlands law – with an *enkelt bolag*, just because neither of the two legal figures constitute a legal entity. Of interest in the present context is however that *Heerma* is not giving any support for a non-legal entity constituting taxable person.The CJEU has only made a statement that the partner is independent and can hire out immovable property to the private company.[592] The CJEU has not made any statement regarding whether the private company Heerma has the status of taxable person or consumer. It can only be read out from the verdict that the partner is independent in relationship to the private company and able to make a supply to it.

Under the assumption of a co-operation agreement considered forming a particular unit for VAT purposes or if so is assumed not becoming the case, the following is stated in van Doesum 2009 from the transaction perspective regarding *Heerma* (Case C-23/98) and *EDM* (Case C-77/01):

- With reference to *Heerma* is stated that the parties (the partners) can make taxable transactions to their own common unit and

[583] See para:s 7 and 8 in *Heerma* (C-23/98).
[584] See para:s 9 and 19 in *Heerma* (C-23/98).
[585] See para:s 15 and 16 in *Heerma* (C-23/98). See also Terra & Kajus 2012 pp. 394 and 395.
[586] Nowadays article 10 of the VAT Directive (2006/112).
[587] See para. 19 in *Heerma* (C-23/98).
[588] See van Doesum 2009, p. 696.
[589] See Terra & Kajus 2012, p. 394.
[590] See Westberg 2009, p. 87.
[591] See Kleerup et al. 2012, p. 209.
[592] See para. 22 in *Heerma* (C-23/98).

vice versa.[593] Then is thus assumed that a co-operation agreement exists on the third level according to the model used in van Doesum 2009, i.e. that the co-operation agreement forms a unit of its own.

- When the co-operation agreement is not assumed founding a particular unit for VAT purposes, it can instead be a matter of the co-operation agreement constituting a so called *pot-* or *poolovereenkomsten*.[594] Thereby is meant only agreements that cannot be considered as any of the other seven forms of contractual co-operation described for the analysis in van Doesum 2009.[595] Of interest from a transaction perspective is that the following is stated in van Doesum 2009 about *EDM* in connection with the review of *poolovereenkomsten* and internal actions between the participants within the frame of the co-operation agreement.[596] The CJEU is considered having made in *EDM* the interpretation that if a participant in a *pool* receives business activity resources (*bedrijfsmiddelen*) from another participant *occur in principle deliveries and services as contributions which thus are taxable*.[597] The *Pool is then no different from the market place, where the transactions occur between the two*.[598]

EDM constituted – according to Portuguese law – a holding company within the mining sector which after having been a public owned enterprise transferred into a private law legal person in the form of a limited company.[599] EDM took part in three consortiums whose only aim was to track and judge the profitability in mining findings in three different areas in Portugal.[600] One of the questions in *EDM* was about EDM granting a loan to a subsidiary and received interest. The question was whether that relationship, due to the rules on mixed activity in article 17(5) of the Sixth Directive,[601] would limit the right of deduction of

[593] See van Doesum 2009, pp. 697 and 698.
[594] *Pot* translates in the context approx. money pot.
[595] See van Doesum 2009, pp. 688, 689 and 691.
[596] See van Doesum 2009, p. 302, where the headline of sec. 19.4.3 has that wording: "*Handelingen van de participanten onderling in het kader van het samenwerkingsverband*".
[597] See van Doesum 2009, p. 303: "*deze leveringen en diensten in beginsel onder bezwarende titel plaatsvinden en dus belastbaar zijn*".
[598] See van Doesum 2009, p. 303: "*De pool is dan niets anders dan de marktplaats, waar de transacties tussen beiden plaatsvinden*".
[599] See para. 13 in EDM (C-77/01).
[600] See para. 17 in EDM (C-77/01).
[601] Nowadays art. 173(1) of the VAT Directive (2006/112). Mixed enterprise is an activity with both transactions that are taxable or qualified exempted from taxation and transactions that are unqualified exempted from taxation. To the part the activity means that the latter transactions will be created it entitles neither to right of deduction

input tax by the EDM, by such income interest being regarded at the calculation of deductible part of the activity according to article 19(1) of the Sixth Directive.[602] The CJEU explained to that part that it came upon the referring national court to establish whether the mentioned circumstances in the case by the national court only comprised a very limited use of goods or services for which VAT shall be paid. In that case would, in pursuance of article 19(2) of the Sixth Directive,[603] the national court exclude interests generated at these transactions from the denominator of the fraction used at calculation of the deductible part.[604]

I have not found any rule in the other VAT legislations within the EU which equals the representative rule. However, it does not have to mean that the VAT problems for *enkla bolag* are unique for the ML.[605] Of *EDM* follows however that the definition of a consortium according to Portuguese law resembles more the one for *handelsbolag* (partnerships) than for *enkla bolag*, by the demand that business activity shall be carried out.[606] Concerning the Portuguese VAT system I have not found either any equal to the representative rule or support for non-legal entities constituting tax subjects.[607] That *EDM* concerned a Portuguese legal figure is no reason for mentioning Portugal in the headline of this section. Of interest in this work is instead *EDM* in itself and regarding the second question in the case, which concerns whether internal transactions in a consortium are taxable. *EDM* is in my opinion of interest in a transaction perspective, and that concerns the concept of supply and cooperation forms in all EU Member States.

In this work is the following conclusion by the CJEU of interest for the application issues in the mentioned transaction perspective: Work conducted by the members of a consortium was considered not constituting either delivery of goods or rendering of services made for contribution

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nor right of reimbursement regarding input tax on acquisitions or imports in the activity.

[602] Nowadays art. 174(1) of the VAT Directive (2006/112).

[603] Nowadays art. 174(2) of the VAT Directive (2006/112).

[604] See para:s 78 and 79 in *EDM* (C-77/01)

[605] See sec:s 1.2.1 and 4.1.

[606] See para. 12 in *EDM* (C-77/01), where the following is stated: ”In Portuguese law, ’consortium’ means a ’contract by which two or more natural or legal persons, who carry on an economic activity, agree with each other to carry on, in a concerted manner, a certain activity or to make a certain contribution’ with a view to attaining one of the objectives set out, among which is prospecting or exploring for natural resources”. The CJEU refers thereby to art:s 1 and 2 of *decreto-lei* (legal decree) no. 231/81 of the 28th of July 1981, *Diário da República I*, serie A, no. 171, of the 28th of July 1981.

[607] See e.g. the EU Commission’s information on the Portuguese VAT system: TAXUD/1032/07-EN Part 7. The Commission states that the information from the Portuguese Ministry of Finance’s website (http://www.dgci.min-financas.pr) includes the Portuguese VAT act [”*the Portuguese VAT Code* (*adopted by Decree-Law No 394-B/84 of 31 December 1984 and its subsequent amendments*)”].

in the meaning of article 2(1) of the Sixth Directive,[608] if deliveries or rendering are made in pursuance of the rules in the consortium agreement and correspond to the agreed part that each and everyone in the consortium have been allocated.[609] According to the CJEU there is thereby neither any taxable transaction, and it does not matter if the work has been carried out by the member of the consortium leading it. According to the CJEU it exists on the other hand a delivery of goods or a rendering of services against contribution, i.e. supply, when a member of the consortium to another member render more than the work lying with him according to the consortium agreement, and leads to payment for that extra work. According to the CJEU constitutes this extra work delivery of goods or a rendering of services against contribution from the other members of the consortium, i.e. an internal supply and corresponding acquisition between two partners. *EDM* gives thereby in my opinion not any guidance to the question whether a non-legal entity can constitute taxable person. *EDM* only means that if a consortium agreement is followed arises no supplies for VAT purposes between the members of the consortium. That concerns thus the question whether the concept supply is fulfilled regarding the amount exchanged between the members of the consortium, and in that respect has EDM thus reflection on consortium agreements in any EU Member State at all. *EDM* gives support for no supply arising concerning the division between the partners of costs or incomes in accordance with an agreement on *enkelt bolag*. Supply arises between the partners first if an amount from one partner to another corresponds to an extra work – consideration – in excess to the agreement. *EDM* states however not anything about whether a non-legal entity – such as an *enkelt bolag* – can constitute a taxable person.

4.4 FINLAND

In the act on *öppna bolag* and *kommanditbolag* rules are lacking about *sammanslutningar*. *Sammanslutningarna* are however mentioned in the FML. Like *enkla bolag* and *partrederier* constitute *sammanslutningar* and *partrederier* not legal entities.[610] The parts of section 188 FML concerning *sammanslutningar* do not make any direct equivalents to the representative rule regarding *enkla bolag* and *partrederier*. However, display the mentioned rules in the FML such similarities with the representative rule that certain similarities and differences between it and these rules are of a comparative interest to the analysis of Chapter 6 section 2 ML and, to the extent the rule concerns VAT, Chapter 5 section 2 SFL.[611]

[608] Nowadays art:s 2(1)(a) and (c) of the VAT Directive (2006/112.
[609] See para. 91 in *EDM* (C-77/01).
[610] See sec. 4.1.
[611] See sec. 1.2.1.

The main rule on who is tax liable according to the FML is constructed in the same way as Chapter 1 section 2 first paragraph number 1 ML. Tax liable is according to section 2 first paragraph FML, for such sales mentioned in section 1 – where number 1 stipulates tax liability for business activity-like sales of goods and services in Finland – *den* (he/she) who has sold the goods or the services. Structurally corresponds thus the main rule on who is tax liable according to the FML with the main rule on who is payment liable according to articles 2(1)(a) and (c) and 193 of the VAT Directive (2006/112). In that manner are the ML and the FML alike. Furthermore there are special rules on tax liability also in the FML. There are sections 13 and 13 a FML of interest to this work. In the FML has in the same way as concerning VAT groups in Chapter 6 a ML rules been introduced on *skattskyldighetsgrupper* (Fi., *arvonlisäveroryhmät*), i.e. VAT groups, in section 13 a,[612] by virtue of article 4(4) second and third paragraphs of the Sixth Directive.[613] In the FML are *sammanslutningar* (Fi., *yhtymä*) treated in section 13, which – in translation – reads:

> *If two or more parties for the purpose of carrying out business activity have formed such a sammanslutning which is meant to be active for the benefit of the partners jointly, is* sammanslutningen *tax liable for the activity*.

In the FML are inter alia *sammanslutningar* also treated in section 188, which – in translation – reads:

> *Tax shall be levied the tax liable and those for the tax responsible persons with a joint responsibility*.
>
> *The partners of an* öppet bolag *and the personally responsible partners* (bolagsmännen) *in a limited partnership* (kommanditbolag) *are jointly responsible for* öppna bolaget*'s, and* kommanditbolaget*'s tax. The same responsibility for an in section 13 meant* sammanslutning*'s and a* partrederi*'s tax has a partner* (delägare) *of* sammanslutningen *or* partrederiet.

[612] Sec:s 13 a–13 c FML concern taxation of groups, where sec:s 13 a and 13 b treat *skattskyldighetsgrupper* and sec. 13 c treats *renbeteslagsgrupper* (approx. reindeer pasture teams).

[613] Art. 4(4) second and third para:s of the Sixth Directive has been replaced by art. 11 of the VAT Directive (2006/112). In the Danish *merværdiafgiftsloven* has by virtue of art. 4(4) of the Sixth Directive rules been introduced on *fællesregistrering* and also rules in the Norwegian *merverdiavgiftsloven* on *fellesregistrering* are corresponded closest in the EU law by art. 11 of the VAT Directive (2006/112). See Stensgaard 2004, p. 441 and Gjems-Onstad & Kildal 2011, p. 108.

All business persons belonging to the group are jointly responsible for an in section 13 a meant skattskyldighetsgrupp*'s (VAT group's) tax. (27.5.1994/377)*

An in item 2 meant delägare*'s and* bolagsman*'s and an in item 3 meant business person's responsibility emerges at the beginning of the month when he joins the company,* sammanslutningen *or* skattskyldighetsgruppen *and cease at the end of the month when he leaves the company,* sammanslutningen *or* skattskyldighetsgruppen*. (27.5.1994/377)*

The persons responsible for the tax shall be noted in the tax authority's (Skatteförvaltningen's) *decision. Has a person or business person meant in items 2 or 3 and who is liable for the tax not been noted in the decision, shall the tax authority after having heard the person or business person determine that he shall be liable for the payment of the tax jointly with the tax liable. (11.6.2010/529).*

The most important difference between Chapter 6 section 2 ML and section 13 FML is that *sammanslutningarna*, opposite to *enkla bolagen*, constitute tax subjects for VAT purposes – despite they are neither constituting legal entities. In that manner are *sammanslutningarna* for VAT purposes treated the same way as *öppna bolag* and *kommanditbolag*, which are legal entities and thus comprised by the main rule on who is tax liable, section 2 first paragraph FML. Like what rules for Swedish *handelsbolag* and *kommanditbolag* constitute by the way *öppna bolag* and *kommanditbolag* not tax subjects at the income taxation.[614]

The FML replaced on the 1st of June 1994 the Finnish *omsättningsskattelagen 22.3.1991 559/1991* (Fi., *liikevaihtoverolaki*).[615] In section 104 second paragraph *omsättningsskattelagen* was stated that partners in an *sammanslutning* was comprised by the same joint responsibility as applied to *bolagsmän* (partners) in *öppna bolag*[616] and *kommanditbolag*. That rule has been replaced with section 188 second paragraph in the FML, and by section 13 FML.[617] A difference in the present respect is by the way that *omsättningsskattelagen* regarded *sammanslutningar* of natural persons, whereas the FML does not contain any such limitation

[614] See Rehbinder 1995, p. 4.
[615] The FML was by the way reformed thoroughly on the 1st of January 1995 by *lag 1218/1994 och 1486/1994 i samband med att Finland blev EU-medlem*. Another greater reform of the FML has thereafter been made on the 1st of January 1996 by *lag 1767/1995*.
[616] See sec. 4.1.
[617] See Saukko 2005, p. 136.

concerning who can be partners of *sammanslutningar*.[618] The rules on *sammanslutningar* and VAT in the FML has thus a similar historical background as Chapter 6 section 2 ML; which has its origin in the Swedish *omsättningsskattelag* which was replaced by the GML.[619]

The Finnish *partrederierna* are, opposite to the Swedish, tax liable for VAT according to the main rule section 2 first paragraph FML, despite they are neither legal entities.[620] The word *den* i (he/she) in the rule implies otherwise that it is a matter of a certain person, a natural or legal person – in other words a legal entity. The rule in section 13 FML is however not applied on *partrederierna*.

With *enkelt bolag* is according to Chapter 1 section 3 BL meant that two or more have agreed to exercise activity in a company (without the existence of *handelsbolag* – partnership).[621] That resembles *sammanslutningarna* which are meant to be active for the common benefit of the partners. *Sammanslutningarna* and *enkla bolagen* resemble each other insofar as they – opposite to *partrederier* – are not limited to a certain sort of activity. I regard therefore certain differences between section 13 FML, regarding *sammanslutningarna*, and Chapter 6 section 2 ML, regarding *enkla bolag* and *partrederier*.The differences are the following between section 13 FML and Chapter 6 section 2 ML and, to the extent the rule concerns VAT, Chapter 5 section 2 SFL:

- The difference in relation to Chapter 6 section 2 first sentence ML is not only that the tax liability lies with *sammanslutningen* as such in section 13 FML, opposite to in the mentioned rule in the ML where the partners in *enkla bolaget* or *partrederiet* are tax liable. Another difference is that section 13 FML is a mandatory rule, whereas the partners in *enkla bolag* and *partrederier* have a possibility to register a representative according to the thus voluntary rule in Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL). In the preparatory work to section 13 FML is by the way stated that it for the sake of clarity was inserted an expressly statement on the tax liability lying with the association, i.e. *sammanslutningen*.[622]

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[618] Compare sec. 12 first para., sec:s 102 and 104 second para. *omsättningsskattelagen* with sec:s 13, 71 no. 8, 162 a fourth para., 166 second para. and 188 second para. FML.
[619] See sec. 1.2.1.
[620] Regarding this information I have consulted Kenneth Hellsten at Helsinki University by e-mail.
[621] See sec. 1.1.1.
[622] See *Regeringens proposition till riksdagen med förslag till mervärdesskattelag RP 88/1993 rd.* – the motivation to sec. 13 FML.

- Another difference is that section 13 FML states that *sammanslutningen* shall carry out business activity to become tax liable, whereas Chapter 5 section 2 SFL states that the representative shall account VAT for the activity (*verksamheten*).

If the question whether non-legal entities can constitute taxable persons according to article 9(1) first paragraph of the VAT Directive (2006/112) is answered with a yes, would the following be possible. *Enkla bolagen* and *partrederierna* could be made into tax subjects for VAT purposes, instead of the tax liability lying with *bolagsmännen* or *delägarna* themselves in *bolaget* or *rederiet*. That would in that case resemble the regulation of the VAT for *sammanslutningarna* according to section 13 FML. In that case could *bolagsmännen* or *delägarna* be made joint responsible with *bolaget* or *rederiet* in pursuance of article 205 of the VAT Directive (2006/112). That is also in my opinion what is stipulated in section 188 item 2 FML, whereof follows that partners in a *sammanslutning* (or *partrederi*) has a personal and joint responsibility for *sammanslutningen*'s tax. Such rules on *bolagsmännen*'s or *delägarna*'s joint responsibility with *bolaget* or *rederiet* for its VAT would in that case suitably be introduced into the SFL. An expansion of Chapter 59 sections 13 and 14 could be made, so that representative responsibility also could lie with *bolagsmän* or *delägare* in an *enkelt bolag* or a *partrederi* constituting tax subject for VAT purposes.[623]

Saukko mentions VAT groups according to section 13 a FML, but also to a certain extent *sammanslutningarna* according to section 13 FML and the joint responsibility according to section 188 FML for partners in a *sammanslutning*.[624] Of interest is inter alia that according to what is said in Saukko 2005 have traditionally four legal figures been treated as *sammanslutningar* in connection with section 13 FML. Those are

- unregistered limited companies (Fi., *rekisteröimättömät osakeyhtiöt*),
- estate of a deceased person (Fi., *kuolinpesät*),
- unregistered non-profit associations (Fi., *rekisteröimättömät aatteelliset yhdistykset*) and
- building consortiums (Fi., *rakennustyöyhteenliitymät*).[625]

In the latter respect there is the similarity with Swedish rules that building consortiums also could be considered constituting *enkla bolag* and comprised by Chapter 6 section 2 ML.[626] The importance of the prereq-

[623] See sec. 1.1.3.
[624] See Saukko 2005, pp. 134–162 and also sec:s 1.4 and 4.1.
[625] See Saukko 2005, p. 134.
[626] See the SKV's *Handledning för mervärdesskatt 2012* Part 1 p. 202 and the SKV's *Handledning för skatteförfarandet*, Ch. 5, p. 3 (www.skatteverket.se).

uisite that a matter according to section 13 FML shall concern a *sammanslutning* which is meant to be active for the common benefit of the partners, for the *sammanslutningen* to be considered tax liable, is proved by a decision of the Finnish HFD, *Korkein hallinto-oikeus* (Supreme Administrative Court), KHO. In KHO 16.7.1998 *taltio*[627] 1311 was a development project run for fourandahalf years by a number of dairies not considered constituting a *sammanslutning* comprised by section 13 FML.[628] The project was financed by public funding and the dairies also put in money in it. However considered the KHO that the community demand in section in section 13 FML was a central question, and since the project was not for the joint benefit of the partners (the dairies) it was not considered a *sammanslutning* comprised by section 13 FML. Saukko states indeed that the decision might as well have been the opposite,[629] but the case shows in any case on the importance of the mentioned community demand in section 13 FML. Saukko does not mention *sammanslutningarna* on the depth, but considers that the rules in section 13 FML only should be compulsory in certain cases. An example of this is mentioned, namely unregistered limited companies. Instead of the rules in section 13 FML being compulsory today when they are applicable, Saukko means that they only should be compulsory in certain cases and voluntary in certain specific situations such as concerning section 13 a FML regarding VAT groups. Since the tax liability is a central concept in the FML, Saukko considers that the legal certainty (Fi., *oikeusturva*) demands a legal alteration concerning section 13 FML.[630] Questions mentioned in Saukko 2005 are that transactions within *sammanslutningar* are not treated like within VAT groups, since partners in *sammanslutningar* can act by themselves and it is thus hard to decide when *sammanslutningen* or the partners has made an acquisition etc.[631]

I note that the tax liability according to section 2 first paragraph and section 13 FML for *partrederier* and *sammanslutningar* provides that non-legal entities in form of *partrederier* and *sammanslutningar* can constitute taxable persons. The representative rule on the other hand does not mean any such assumption, since the tax subject is the partner in *enkla bolaget* or *partrederiet*. The rule only makes it possible for the collection of the VAT in *bolaget*'s or *rederiet*'s activity to be handled by a representative. *Enkla bolagen* and *partrederierna* according to the BL and *sjölagen* (the Sea Act) resemble *sammanslutningarna* and *par-*

[627] Sw., *liggare* (ledger).
[628] I discussed the case with Kenneth Hellsten when visiting Helsinki University 2012-02-06. See also Saukko 2005, p. 143.
[629] See Saukko 2005, p. 143: "*Käsittääkseni ratkaisu olisi hyvinkin voinut olla myös päinvastainen*", which Kenneth Hellsten translated into approx.: *In my opinion could the decision very well have been the opposite*.
[630] See Saukko 2005, p. 162.
[631] See Saukko 2005, p. 147.

trederierna from Finnish law. By the comparison made with section 2 first paragraph, section 13 and section 188 FML can thereby a certain support be obtained for *enkla bolag* and *partrederier* being considered constituting taxable persons according to article 9(1) first paragraph of the VAT Directive (2006/112). The Finnish *sammanslutningarna* display certain similarities with *enkla bolag* concerning the scope, insofar that building consortiums are a common category and concerning the tax rules' history. Section 13 FML as well as Chapter 6 section 2 ML have their origins in a general goods tax. These similarities speak for the possibility of *enkla bolag* and *partrederier* being considered constituting taxable persons. However it is stated in Saukko 2005 (where *sammanslutningarna* were not the main issue), that it from legal certainty reasons exists a need for legal alterations concerning what is stated in the FML about *sammanslutningarna*.

Any decisive conclusion is not possible to make from the FML for the interpretation of the representative rule. I consider however that Finnish VAT law partly gives a certain support for non-legal entities constituting taxable persons, partly gives a certain support for *enkla bolag* and *partrederier* thereby constituting taxable persons according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112).

4.5 SUMMARY AND CONCLUSIONS

The international outlook in this chapter concerning the foreign VAT rules began in the introduction section with a limitation so that the following sections would concern if and how Germany, the Netherlands or Finland could form a base for comparison with the representative rule. Concerning German or Austrian UStG I have concluded that they do not give any comparative support for the investigation of the representative rule. These legislations namely do not contain any equal to the representative rule regarding the equals to *enkla bolag*, i.e. regarding the GbR and the GesnbR.[632] Concerning Germany has a sort of GbR – *Vorgründungsgesellschaft* – been treated by the CJEU in *Faxworld* (Case C-137/02). The review of that case, whereby also *Polski Trawertyn* (Case C-280/10) has been mentioned, gives however not support for a non-legal entity such as an *enkelt bolag* being considered constituting taxable person according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112). Although the CJEU in *Faxworld* is reasoning about a *Vorgründungsgesellschaft* as a *skattskyldig person* (taxable person),[633] is it only formed for the purpose of forming a legal person. The economic activity therein shall only prepare the economic activity in a legal person which shall be formed and become transferred there. The activity in an *enkelt bolag* is however not limited

[632] See sec. 4.1.
[633] Nowadays *beskattningsbar person* (taxable person).

to have the function of that a legal person shall become formed whereto the activity is transferred.[634]

Concerning Wet OB it does not either give any comparative support for the analysis of the representative rule, but van Doesum 2009 has inspired to a continuing regard of *Heerma* (Case C-23/98) and *EDM* (Case C-77/01) at the investigation of the representative rule. Thereby is *EDM* of a particular interest in connection with the transaction perspective on the application issues.[635]

What I have found being of a certain comparative interest for the analysis of the representative rule are sections 13 and 188 FML concerning *sammanslutningarna*. These are treated as tax subjects, despite they like *enkla bolagen* do not constitute legal entities. Thereby the FML gives a certain support for non-legal entities constituting taxable persons, and thus for *enkla bolag* and *partrederier* constituting taxable persons according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112).[636]

[634] See sec. 4.2.
[635] See sec. 4.3.
[636] See sec. 4.4.

5. OVERVIEW ON *ENKLA BOLAG* AND *PARTREDERIER* FROM A CIVIL LAW PERSPECTIVE

5.1 INTRODUCTION

In this chapter I make an overview regarding *enkla bolag* and *partrederier* from a civil law perspective. I am mentioning some characteristics concerning these two legal figures. Some of them have already been mentioned in section 1.1.1. Since the tax liability according to the mandatory rule Chapter 6 section 2 first sentence ML is determined based on who is a partner in an *enkelt bolag* or *partrederi*, the purpose with this chapter is to make the mentioned overview, before I analyze the representative rule inter alia in that respect in Chapter 6.[637]

This chapter is outlined as follows. First is the legal entity question and form demands for and aims with *enkla bolag* and *partrederier* discussed. Thereafter follows a review of the concepts *näringsverksamhet* (business activity), *verksamhet* (activity), *bolagsman* (partner) and share for the context. After that is *enkelt bolag* in relation to co-ownership or employment discussed. The chapter is ended with questions on *bolagsmännen*s' (the partners') relation to a third party and the internal relations between *bolagsmännen* and whether someone is financer in relation to *bolaget* or *bolagsman*.

5.2 THE LEGAL ENTITY ISSUE, FORM DEMANDS AND OBJECTIVE

The concept *bolag* (company) itself is not defined in *lagen (1980:1102) om handelsbolag och enkla bolag*, BL, but it has been considered a task for the doctrine and case law.[638] However, it is stated in the BL what is meant with *enkelt bolag* and *handelsbolag* (partnership) respectively [and the particular version of handelsbolag called *kommanditbolag* (limited partnership)].[639] In *sjölagen* (the Sea Act) is stated what is meant by *partrederi* (shipping partnership). With an *enkelt bolag* is meant, as mentioned above, according to Chapter 1 section 3 BL that two or more have agreed to exercise *verksamhet* (activity) in a *bolag* (company) without *handelsbolag* (partnership) emerging. Furthermore I have mentioned that a *partrederi* exists according to Chapter 5 section 1 first paragraph first sentence *sjölagen*, if several have agreed on that under divided responsibility carry out shipping with a ship of their own. In the BL is stated in Chapter 1 section 4 that an *enkelt bolag* – opposite to a *handelsbolag* – is not a legal entity which can acquire rights and make

[637] See sec:s 1.1.1, 1.1.3, 1.2.1, 1.2.3, 1.6 and 2.8.
[638] See Nial & Hemström 2008, p. 41, Dotevall 2009, p. 19 and Barenfeld 2005, p. 65.
[639] See Ch. 1 sec. 1 first para., sec:s 2 and 3 BL.

obligations and appear before courts and other authorities. An *enkelt bolag* is instead a form for co-operation. A *partrederi* can also be characterized as a form of *enkelt bolag* and constitutes, in pursuance of Chapter 5 section 1 second paragraph first sentence *sjölagen*, neither any legal entity.[640]

There is no form demand for an agreement on *enkelt bolag*. Such an agreement is comprised by general agreement law rules and may be oral or in writing.[641] A *partrederi* agreement shall be in writing to be able to be registered by *Sjöfartsverket*.[642]

An *enkelt bolag* may be formed for any objective at all, as long as it is legal.[643] A *partrederi* can however only be formed for the shipowners to carry out shipping with a ship of their own.[644] A procedural difference exists between the two enterprise forms, insofar as the HD has established *that a partrederi* can appear as party before the court, despite it is like an *enkelt bolag* not a legal person.[645]

5.3 THE CONCEPTS *NÄRINGSVERKSAMHET* AND *VERKSAMHET*

By alteration in the BL by SFS 1993:760 applies since 1995 once again that *näringsverksamhet* (business activity) can be carried out by *enkla bolag*.[646] The first fourteen years that the current BL from 1980 was in force was in principle agriculture (including forestry) the only *näringsverksamhet* (business activity) that could be carried out as *enkelt bolag*.[647] If two or more have agreed to jointly exercise *näringsverksamhet* in *bolag* (company) and *bolaget* (the company) is registered in *handelsregistret* (the Register of Partnerships) by *Bolagsverket* (the Companies Registration Office), a handelsbolag (partnership) exists.[648] It is left to *bolagsmännen* (the partners) to determine whether a *näringsverksamhet* shall be exercised in *handelsbolag* or *enkelt bolag*, by the unregistered *handelsbolag* being referred – in accordance with Chapter 1 section 3 BL – to *enkla bolagen*.[649] By the delimitation between *enkla bolag* and *handelsbolag* thereby has become more

[640] See sec:s 1.1.1 and 2.5.
[641] See Dotevall 2009, p. 122.
[642] See Ch. 5 sec. 1 first para. second sen. *sjölagen* and Dotevall 2009, p. 158.
[643] See Dotevall 2009, p. 122.
[644] See Ch. 5 sec. 1 first para. first sen. *sjölagen* and Dotevall 2009, p. 158.
[645] See NJA 1992 p. 110 (20 Feb. 1992) and also Dotevall 2009, p. 158 and Boman 1996, p. 32.
[646] See prop. 1992/93:137 (*om gränsdragningen mellan handelsbolag och enkla bolag*) p. 7 and also Nial & Hemström 2008, p. 36 and Dotevall 2009, p. 133.
[647] See Nial & Hemström 2008, p. 345. By the BL coming into force on the 1st of July 1981 was by the way *lagen (1895:64 s. 1) om handelsbolag och enkla bolag* revoked.
[648] See Ch. 1 sec. 1 first para. BL.
[649] See prop. 1992/93:137 p. 7.

simple there are no more any unregistered *handelsbolag* – so called de facto-*handelsbolag* (de facto partnerships).[650] Before registration exits an *enkelt bolag* and by registration it is transformed to a *handelsbolag* (partnership).[651] By the way may a *partrederi* agreement be registered in the ship register by *Sjöfartsverket*, according to Chapter 5 section 1 first paragraph second sentence *sjölagen*.[652]

An *enkelt bolag* does however not need to be carrying out business activity. The prerequisite in Chapter 1 section 3 BL is the broader *verksamhet* (activity) which contains inter alia *näringsverksamhet* (business activity). Also other activities than business activities can be carried out by agreement on co-operation in an *enkelt bolag*.[653] In connection with the reformation in 1995 of the BL it was assumed that *enkla bolaget* also in the future would be used more as an exemption for the sake of carrying on business.[654] In November 2012 there were however 7,000 active *enkla bolag* according to the SCB's enterprise register. The number has been increasing during the last years, and besides there can actually exist *enkla bolag* without *bolagsmännen* (the partners) even being aware of it at the beginning of *bolaget*'s (the company's) activity.[655] If business activity is carried out in an *enkelt bolag*, may however not he who is comprised by trading prohibition (*näringsförbud*) according to *lag (1986:436) om näringsförbud* be *bolagsman* (partner).[656] In section 1.1.1 I have given some examples on fields for the use of *enkla bolag*, e.g. tipping and lottery companies and consortiums within the building industry. Many *enkla bolag* are however lacking common property, and what is at hand is then instead only a joint activity.[657]

5.4 THE CONCEPTS *BOLAGSMAN* AND PART

Bolagsmän (partners) in *handelsbolag* (partnerships) or in *enkla bolag* can be natural or legal persons. However, there are thereby limitations for natural persons with regard of what is stated in *föräldrabalken*

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[650] See prop. 1992/93:137 pp. 1, 6, 7, 11 and 12 and also SOU 1989:34 Part I p. 337 and Forssén 1994, p. 295. At the alteration of the BL in 1995 the then existing *de facto-handelsbolag* (de facto partnerships) had a year thereafter to register. The companies that had not registered within the time limit were considered dissolved. Thereby was the desire achieved that unregistered older *handelsbolag* would not remain as particular legal entities under any longer period of time after the law alteration beside registered *handelsbolag*. See prop. 1992/93:137 p. 12.

[651] See Sandström 2010, p. 32 and prop. 1992/93:137 pp. 7 and 14.

[652] See also Dotevall 2009, p. 158.

[653] See prop. 1998/99:130 Part 1 p. 231 and the SKV's *Handledning för mervärdesskatt 2012* Part 1 p. 201, Dotevall 2009, p. 122 and also Forssén & Kellgren 2010, p. 32. See also sec. 2.5.

[654] See prop. 1992/93:137 p. 14.

[655] See sec. 1.1.1.

[656] See Dotevall 2009, p. 132.

[657] See Mattsson 1974, pp. 123 and 124 and also Forssén & Kellgren 2010, p. 19.

(1949:381) – i.e. the Parental Code – regarding under-aged and demand of consent from a guardian.[658] An *enkelt bolag* cannot have any assets, since it is not a legal person. The property used in *bolaget*'s activity thus belongs to *bolagsmannen* (the partner) individually or to *bolagsmännen* (the partners) jointly with co-owner right. If *bolaget* carries out business activity (*näringsverksamhet*), it can also be so that the partner has an *andel* (share) in a net wealth (property community or net wealth community).[659] In all these cases are the assets used in *enkla bolaget*'s activity tied up insofar as a *bolagsman* (partner) cannot – without consent by the others – on his own account dispose over a particular asset or part thereof. Such a consent can however not be granted generally in the company agreement or for a special case.[660] If a partner sells property included in the activity (*verksamheten*) in an *enkelt bolag* without the consent of the other partners, the partner risks incurring indemnification liability to the others and that can also lead to notice of cancellation of the *bolag*.[661]

A partner in a *handelsbolag* (partnership) has according to Chapter 2 section 21 first paragraph BL a transferable *andelsrätt* (share) in the legal subject, and it cannot be excluded by any rule in the agreement on the *bolag*.[662] There is not any reference for *enkla bolagen* in Chapter 4 BL to the rules on transfer of shares concerning *handelsbolag*.[663] That question shall however be distinguished from that a *bolagsman* (partner) in an *enkelt bolag* carrying out *näringsverksamhet* (business activity) transferring his *andel* (share) in one in a net wealth community included company assets.[664] Such an *andelsrätt* (share) constitutes a right which the partner has in the fluctuating total net wealth.[665] *Bolagsmannen* (the partner) does not have any from the beginning fixed and unchangeable share in the property community. Instead varies the partner's share of the company assets by changes through the partners' various contributions or withdrawals and is also affected by whether the partner fulfils work lying with him according to the company agreement.[666]

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[658] See Dotevall 2009, pp. 31 and 131 and Nial & Hemström 2008, p. 349.
[659] See Dotevall 2009, pp. 141 and 142 and Nial & Hemström 2008, pp. 366, 377 and 379.
[660] See Dotevall 2009, pp. 142 and 143 and Nial & Hemström 2008, p. 377.
[661] See Dotevall 2009, p. 144. Regarding *bolagsman*'s in *enkelt bolag* indemnification liability to another *bolagsman* in *bolaget*: see Ch. 4 sec. 2 which refers to Ch. 2 sec. 14 BL. See also Dotevall 2009, p. 137.
[662] See Nial & Hemström 2008, p. 365.
[663] See Nial & Hemström 2008, p. 365, where various viewpoints are mentioned.
[664] See Nial & Hemström 2008, p. 366, Dotevall 2009, pp.142 and 143 and also Mattsson 1974, pp. 123 and 124.
[665] See Nial & Hemström 2008, p. 377 and Dotevall 2009, p. 142.
[666] See Nial & Hemström 2008, pp. 366, 393 and 394 and Dotevall 2009, p. 142.

According to the HD is it at a liquidation of an *enkelt bolag* not a matter of liquidation of a legal person but only of a particular co-operation form between the partners (*bolagsmännen*).[667] The HD established that as a consequence of that *enkla bolaget* does not constitute a legal person shall the property division regarding *enkla bolag* at a partner's bankruptcy be made after a gross principle.[668] The partner's share of *enkla bolaget* shall not be calculated net with regard of debts, opposite to what applies concerning *handelsbolagen* (which are legal persons).[669] The HD states that it would entail consequences which cannot not be overviewed if a partner in an *enkelt bolag*, by the reference in Chapter 4 section 7 BL for liquidation and dissolution of such a company to the rules in Chapter 2 section 30 BL concerning *handelsbolag*, would be treated in the same way as a partner in a *handelsbolag*. Then would the creditors only have right to the net amounting to the partner in bankruptcy's share of *enkla bolaget*. If not the creditors would have right to the partner's share in *enkla bolaget* calculated gross, would it according to the HD in a fundamental respect alter the character of *enkla bolag* with unforeseeable consequences to follow.[670] In Chapter 4 BL is the term *bolagsman* (partner) used, to signify *bolagsmännen* (the partners) in an *enkelt bolag*, and that designation functions with regard of the recently mentioned well in relation to the concept *verksamhet* (activity) concerning *enkla bolag*. In Chapter 5 *sjölagen* is the term shipowner (*redare*) used regarding those owning shares in the ship.

5.5 *ENKELT BOLAG* IN RELATION TO CO-OWNERSHIP OR EMPLOYMENT

If an *enkelt bolag* consists of common property, owns in principle each partner part of the various assets in the same proportion as the own contribution corresponds to the total.[671] Eventually can the partners own the assets under co-ownership according to *lag (1904:48 s. 1) om samäganderätt*.[672] A co-ownership within the frame of an *enkelt bolag* is however not submitted to the recently mentioned act, but in such a case applies the BL's decision rules for *enkelt bolag* also to assets comprised by such a co-ownership.[673] If property is included in an *enkelt bolag*, can it thus indeed be co-owned but the *lag om samäganderätt* will not be applicable.[674] Co-ownership relations have certain similarities with *bolag*

[667] See NJA 1997 p. 211 (4 Apr. 1997).
[668] See NJA 1997 p. 211 (4 Apr. 1997) and also Dotevall 2009, p. 144.
[669] See NJA 1997 p. 211 (4 Apr. 1997) and also Dotevall 2009, p. 145.
[670] See also Lindskog 2010 p. 877, Dotevall 2009, p. 145 and Sandström 2010, p. 59.
[671] See the SKV's *Handledning för beskattning av inkomst vid 2012 års taxering* Part 3, p. 1210 and Dotevall 2009, pp. 142 and 143.
[672] See Lodin et al. 2011, p. 513. See also Forssén & Kellgren 2010, p. 31.
[673] See Lindskog 2010, p. 122 and also the SKV's *Handledning för skatteförfarandet*, Ch. 5, p. 3 (www.skatteverket.se).
[674] See Dotevall 2009, p. 127.

(companies) according to the BL, and it can in practice be hard to judge whether a legal relationship constitutes *bolag* or co-ownership.[675] Within family law has a principle on so called hidden co-ownership foremost been developed between spouses and cohabitants.[676] Concerning property purchased for common use can these principles also be applicable between the partners (*bolagsmännen*) in an *enkelt bolag* and in relation to their creditors. If the partners in an *enkelt bolag* are legal persons, has the HD established that hidden co-ownership cannot emerge. The HD considers namely in NJA 2002 p. 142 (20 Mar. 2002) that in the business life are demands raised on making important agreements expressly. Hidden co-ownership based on understood desires and presumed desires have according to the HD hardly any place there.[677]

To decide what constitutes an *enkelt bolag* and inter alia judge whether a legal relationship constitutes *bolag* (company) or co-ownership is the existence of demand on consent from other partners a significant circumstance. An important delimitation of what constitutes an *enkelt bolag* consists of that *bolag* according to the BL is based on agreement between two or more legal entities. At co-ownership can one party, opposite to what applies concerning e.g. *enkelt bolag*, set another in his place without consent from other partners.[678] The demand on such consent as a necessary circumstance for the company agreement's emergence means in my opinion that such an agreement must have been expressed orally or in writing or by implicit actions.[679]

For the concept *bolag* (company) according to the BL as well as to *aktiebolagslagen (2005:551)*, ABL, i.e. the Companies Act, apply furthermore that one of the prerequisites is a common objective. However can, although if neither the activity object nor the objective are of economic nature, a company (*bolag*) exist, e.g. if some persons agree to jointly finance a researchers work.[680] An agreement is however invalid to the extent it revokes or restricts employees' rights according to the

[675] See Dotevall 2009, p. 128 and Sandström 2010, p. 18.
[676] See NJA 2008 p. 826 (18 Jul. 2008), whereof inter alia follows that the presuppositions for hidden co-ownership between spouses and cohabitants were developed by the HD in a series of decisions in the beginning of the 1980's: NJA 1980 p. 705 (17 Dec. 1980), NJA 1981 p. 693 (10 Jun. 1981) and NJA 1982 p. 589 (7 Oct. 1982).
[677] See Dotevall 2009, pp. 142 and 143, Nial & Hemström 2008, pp. 385 and 386 and Lindskog 2010, pp. 38, 39 and 125 and also Sandström 2010, p. 20.
[678] See Nial & Hemström 2008, pp. 41, 42, 57 and 377 and Dotevall 2009, p. 142 and also sec. 5.4.
[679] Regarding that agreements on *enkelt bolag* can emerge by implicit actions (*konkludenta handlingar*): see Nial & Hemström 2008, pp. 351 and 352, Lindskog 2010, pp. 40, 179 and 181 and Dotevall 2009, pp. 22, 60 and 139.
[680] See Nial & Hemström 2008, p. 44.

labour law legislation.[681] That the labour law legislation is compulsory to the benefit of the employee means thus that an agreement is invalid if it means a circumventing of an employment relationship.[682] Thereby can the employer e.g. neither make an agreement on that he and the employee instead shall be active in an *enkelt bolag*, if the employee continues to be dependent of the employer. The delimitation between company (*bolag*) and employment agreement means thus that an agreement on *enkelt bolag* must not be used to circumvent an employment relationship.[683] The Labour Court (*Arbetsdomstolen*) considers by the way that it is doubtful whether the rule introduced in 2009 into Chapter 13 section 1 second paragraph IL,[684] for the judgement of whether a contractor's activity is carried out independently, affects the labour law employee concept.[685]

5.6 *BOLAGSMÄNNEN*S' RELATION TO A THIRD PARTY AND THE INTERNAL RELATIONS

Enkla bolaget is not a legal person. Therefore acts *enkla bolaget* legally not as a legal unit against third party, but by each and everyone of *bolagsmännen* (the partners) according to Chapter 4 section 5 first paragraph BL.[686] According to that rule is each partner in *enkla bolaget* responsible himself for his agreements with third party. If several partners have taken part in such an agreement, they answer according to Chapter 4 section 5 second paragraph first sentence BL jointly against third party with whom the agreement has been made, if not otherwise determined in the agreement.[687]

The internal rights and obligations between the partners under *enkla bolaget*'s existence are in principle determined by the agreement.[688] Freedom of agreement applies for the partners in an *enkelt bolag*, but not so far that they could determine that the agreed legal relationship shall have another legal status than to constitute an *enkelt bolag*.[689] Any

[681] See sec. 2 second para. *lag (1982:80) om anställningsskydd* and also Glavå 2011 p. 115.
[682] See – regarding delimitation between employee and entrepreneur relation – e.g. AD 1994:130 (so called franchising), AD 1983:89 (person who has sold coconut buns to *handelsbolag*) and AD 1981:121 (chauffeurs who have purchased the cars from the ex-employer). See also Glavå 2011, pp. 110-114 and Öman 2012, pp. 48, 49, 50, 52, 59, 60 and 61.
[683] See also Dotevall 2009, p. 131 and Sandström 2010, p. 24.
[684] See SFS 2008:1316.
[685] See *Arbetsdomstolen*'s (the Labour Court's) referral reply on the investigation (SOU 2008:76) which led to the new rule in the IL, and which is to be found on p. 23 in prop. 2008/09:62 (*F-skatt åt fler*). See also Glavå 2011, p. 114 and Forssén 2011 (1), p. 141.
[686] See Dotevall 2009, p. 124.
[687] See Ch. 4 sec. 5 second para. second sen. BL.
[688] See Ch. 4 sec. 1 first para. BL.
[689] See Dotevall 2009, p. 132.

registration demand does not exist and consequently it is the basic company prerequisites that forms an *enkelt bolag*. This means that two or more persons must have entered into an agreement on co-operation for a common objective and be obliged to act for that common objective.[690] A German GbR, which equals *enkla bolag*, is also founded on an agreement of a mutual obligation for the partners on contributing to in pursuance of the agreement achieving a common objective.[691] The demand on consent from the other partners for exchange of a partner and the prerequisite common objective for *bolag* (company) mean that an agreement between the partners of on these premises exercise *verksamhet* (activity) in bolag (without *handelsbolag* existing) constitutes an agreement on *enkelt bolag* according to Chapter 1 section 3 BL.

An *enkelt bolag* is a particular co-operation form between partners, which share costs and incomes in accordance with the company agreement. The freedom of agreement is thus limited for *enkla bolaget* concerning the internal relation between the partners insofar as they cannot act legally between themselves so that it would no longer be a matter of an *enkelt bolag*. On the other hand can two partners make an agreement beside or in excess to the agreement on *enkla bolaget*. Since *enkla bolag* and *partrederier* are not legal entities, will the ML's concept supply be mentioned partly concerning a partner's legal acting for *bolaget* or *rederiet* in relation to third party, partly concerning the internal relations between the partners in *bolaget* or *rederiet*. In the latter respect gives *EDM* (Case C-77/01) support for any supply not emerging for VAT purposes regarding division between partners of costs or incomes in accordance with an agreement on *enkelt bolag*. In accordance with that case emerges such a supply between the partners first if an amount from one partner to another is corresponded by an extra work – consideration – in excess to the agreement on *enkelt bolag*.[692]

5.7 FINANCER OR *BOLAGSMAN*

Since *enkla bolag* do not constitute legal persons can such exist actually without being discovered at the beginning of its activity.[693] With *bolag* (company) is meant an association comprised by the BL independently of whether it has legal capacity or not, and an *enkelt bolag* is according to Chapter 1 section 4 BL an association which – opposite to *handelsbolaget* (the partnership) – does not constitute a legal entity.[694] Since the demand on registration was introduced for *handelsbolag* (partnerships) into the BL in 1995 by SFS 1993:760 no room is considered existing in

[690] See Agrell & Ericsson 2009, p. 800.
[691] See sec. 705 in BGB and sec. 4.1.
[692] See sec. 4.3.
[693] See sec. 1.1.1.
[694] See sec. 1.1.1 and also Lindskog 2010, p. 680.

Swedish law for tacit companies.[695] An unregistered *handelsbolag* constitutes an *enkelt bolag*. However must the company prerequisites according to the BL be fulfilled for an *enkelt bolag* to be considered existing. Although the concept *bolag* (company) is not defined in the BL, it is the same company concept that applies for *handelsbolag* and *enkla bolag*. The difference is nowadays only the registration demand for *handelsbolag*.[696] With *enkelt bolag* is meant that two or more have agreed to exercise activity in company (without *handelsbolag* existing).[697]

A partner in a *handelsbolag* can by civil law leave an ordinary loan to *bolaget* beside his contributed capital, but a *bolagsman* in an *enkelt bolag* can in principle not loan any capital to *enkla bolaget*.[698] An important delimitation question is thus if a person is only a lender, financer or similar or a *bolagsman* (partner) in an *enkelt bolag*.[699] Since a tacit company is not accepted as company according to Swedish law, is the alternative to *enkelt bolag* that general rules on loans apply.[700] A delimitation problem is that a person can be *bolagsman* according to the internal relationship without appearing as such externally. The opposite can also be the problem, i.e. that he who is externally appearing as *bolagsman* really is only a partial lender, financer according to the internal agreement relationship. Where responsibility is concerned according to the BL becomes however only the one acting legally obligated.[701] If an *enkelt bolag* exists, becomes the active *bolagsman* (partner) obligated against the creditors. The state is also a creditor where the VAT is concerned according to the representative rule, but there is a partner in an *enkelt bolag* or in a *partrederi* tax liable in relation to his share in *bolaget* or *rederiet*.[702] An *enkelt bolag* can actually exist without even the partners themselves discovering it at the beginning of *bolaget*'s activity. Of interest for the analysis of the representative rule is therefore inter alia that it sometimes is said that agreement on *enkelt bolag* does not have to be made expressly in writing or orally, but may have emerged

[695] See sec. 4.1.
[696] See Lindskog 2010, p. 39.
[697] See Ch. 1 sec. 3 BL and also sec:s 1.1.1 and 4.4.
[698] See Melz 1981, p. 375 and Sandström 2010, pp. 24-26 and also Andersson 1983, p. 134.
[699] See Sandström 2010, p. 26.
[700] See sec. 4.1.
[701] See Ch. 4 sec. 5 first para. BL, where it, regarding *bolagsmännen*s' relation to a third party, is stated that it is only the *bolagsman* who has participated in the agreement that becomes entitled or obligated in relation to joint party. In Lindskog 2010 (p. 61) it is stated that for responsibility according to that rule it is of no importance whether he who is acting legally is *bolagsman* or not. That does not correspond with the legal text.
[702] See Ch. 6 sec. 2 first sen. ML and also sec. 1.1.1.

by implicit actions. Alterations in the company agreement can also be added by implicit acts.[703]

A dominating conception is considered to be that a company in principle is a closed association.[704] However it is only demanded a common activity of some sort for an *enkelt bolag* to be considered emerged. Only a statement of that an *enkelt bolag* exists is however not sufficient. Are the prerequisites for *enkelt bolag* not fulfilled, does neither any *enkelt bolag* exist. All partners do however not need to be active in the activity, but a partner can make a contribution at the establishment of *bolaget* and then be passive. Such a partner's contribution to establish *bolaget* can e.g. consist only by the partner making a contribution to *bolaget* in the form of money or e.g. stock. Provided that the other partners consent can thereafter the number of partners be changed e.g. so that a new partner is added, and in practice that becomes a matter of a company agreement between the joining person and the partners.[705] That a new partner thus is joining into *enkla bolaget* does however not mean that a new company is formed. *Enkla bolaget* remains with the same identity also if a new partner is added. That is considered following by the demand on consent by all partners applying in the same way as for alterations of the circle of partners in *handelsbolag*, by Chapter 4 section 2 BL referring to inter alia Chapter 2 section 2 BL where that demand is stated regarding *handelsbolag*.[706] At the analysis of the representative rule I mention inter alia the delimitation problems between that it is a matter of financing of an acquisition for *enkla bolaget* or a matter of the financer instead is to be considered as a new partner.

[703] See Nial & Hemström 2008, pp. 351 and 352, Lindskog 2010, pp. 40, 179 and 181 and Dotevall 2009, pp. 22, 60 and 139 and sec. 5.5.
[704] See Dotevall 2009, p. 130 and Nial & Hemström 2008, p. 63.
[705] See Nial & Hemström 2008, pp. 64, 215 and 363.
[706] See Nial & Hemström 2008, p. 363.

6. THE REPRESENTATIVE RULE

6.1 INTRODUCTION

In this chapter is the representative rule analyzed by my review of a number of interpretation questions concerning the rule and review of application issues concerning it. I treat the following question in the following order:

- The question in sections 6.2.1.1–6.2.1.4 is whether *enkla bolag* and *partrederier*, despite they are not legal entities, can constitute taxable persons according to the main rule article 9(1) first paragraph of the VAT Directive (2006/112).[707] In such a case could the two enterprise forms constitute tax subject for VAT purposes, instead – as according to the representative rule – the partners. This question is preceded by the question whether a non-legal entity can constitute taxable person.[708] The latter question begins the interpretation questions in this chapter and constitutes step 1 in the EU conform interpretation. That is governing for the continuing analysis of the representative rule in step 2.[709] I have concluded that sections 13 and 188 in the FML[710] concerning *sammanslutningar* is of a certain comparative interest to the investigation of the representative rule. *Sammanslutningarna* are namely treated as tax subject, despite they like *enkla bolagen* are not legal entities. That gives for the continuing investigation of the representative rule a certain support for non-legal entities constituting taxable persons, at least according to the Finnish conception. Thereby it also gives a certain support for *enkla bolag* and *partrederier* constituting taxable persons according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112).[711]

- Independent of the answer to the questions in the preceding paragraph is the question in sections 6.2.2.1–6.2.2.4 whether a partner in an *enkelt bolag* or *partrederi* can be considered tax liable according to the mandatory rule in the representative rule, Chapter 6 section 2 first sentence ML, due to the capacity of partner itself. The question is thereby raised whether also an ordinary private person can be tax liable in the capacity of partner.[712] In that case is it, as already concluded, not in compliance with tax-

[707] See problem 2 in sec. 1.1.2.
[708] See problem 2 in sec. 1.1.2.
[709] See sec:s 1.2.3 and 2.8.
[710] *Mervärdesskattelag 30.12.1993/1501*.
[711] See sec. 4.5.
[712] See problem 1 in sec. 1.1.2.

able person according to the main rule article 9(1) first paragraph of the VAT Directive (2006/112).[713] The interpretation question concerning the concept tax liable according to Chapter 6 section 2 first sentence ML is decided in the first place of what is meant with *enkla bolag* and *partrederier* according to Chapter 6 section 2 ML.[714] The question is also whether the answer is affected by the wording of the voluntary rule, i.e. Chapter 6 section 2 second sentence ML and Chapter 5 section 2 SFL.[715] The analysis also concerns the question how the tax liability should be divided between the partners in *enkla bolaget* or *partrederiet*.[716]

- By the way is also mentioned in section 6.2.2.4, in connection with the question whether the representative rule can entail that aan ordinary private person becomes tax liable, the scope of Chapter 6 section 2 ML at voluntary tax liability for letting of business premises etc. according to Chapter 9 ML.[717] In connection with that question is also treated in section 6.2.2.4 the representative rule in relation to the two cases of tax liability beside the main rule in number 1 of Chapter 1 section 1 first paragraph ML. The two cases are taxable intra-Union acquisitions of goods according to number 2 and import of goods which is taxable according to number 3.[718] In the latter context is also mentioned the concept taxable person according to Chapter 5 section 4 ML regarding the determination of country of supply for services.[719]

- After the interpretation questions about the representative rule and the recently mentioned particular question on the tax object the chapter continues with a question in sections 6.3.1–6.3.4 regarding the invoicing liability according to the ML and *enkla bolag* and *partrederier*. The question is whether Chapter 11 should be completed with that the invoicing liability according to the ML shall also comprise the representative rule.[720] That question is judged in a legal certainty-, control- and collection perspective on the current representative rule and on the assumption that *enkla bolag* and *partrederier* would constitute tax subjects for VAT purposes. The question whether there are particular needs of amendments in Chapter 11 ML regarding the demands on in-

[713] See sec. 1.1.1.
[714] See problem 1 in sec. 1.1.2.
[715] See problem 1 in sec. 1.1.2.
[716] See problem 1 in sec. 1.1.2.
[717] See problem 4 in sec. 1.1.2. See also sec. 1.1.3.
[718] See problem 4 in sec. 1.1.2.
[719] See problem 4 in sec. 1.1.2. See also sec. 1.3.
[720] See problem 3 in sec. 1.1.2.

voice content, for the tax control to function satisfactory regarding the representative rule, is also treated.[721] That question is mentioned in connection with application problems brought up at hypothetic case studies of the representative rule.

- In sections 6.4.1–6.4.7 is a review made of the application questions regarding the representative rule, which, as recently mentioned, consists of certain hypothetic case studies. Theses concern the subject side and the object side of the concept tax liability and carried out with the help of the tool which I call the ABCSTUXY-model.[722] Thereby are conditions judged between the partners of *enkla bolagen* or *partrederierna* and their relations to suppliers and customers. From the previous review are two basic examples for the investigation of the application questions used and on which the hypothetic case studies are built out.[723] For the situations where the judgement is that specification by amendments in the representative rule should be introduced, to make the collection easier, I consider – if not otherwise expressly stated – that it can be made in Chapter 6 section 2 ML or in Chapter 5 section 2 SFL. The throughout question in connection with these questions is instead whether there is such a vast need of amendments in the representative rule and in Chapter 11 ML that the rule becomes so complex that it leads to legal uncertainty.[724] From a control respect is also treated the representative rule and intra-Union acquisitions in connection with the present application issues in section 6.4.6.[725]

- I have investigated whether there is any rule concerning the tax object in the ML whose application, regardless of that there is a representative rule in the ML, is affected by the enterprise form *enkelt bolag*.[726] I have found one such rule. That is Chapter 7 section 1 third paragraph number 8 ML, which concerns reduced tax rate for letting or transfer of rights to literary and artistic works. The rule regards inter alia *enkla bolag* that can occur as enterprise form e.g. in connection with filmmaking and similar. The question is thus not insignificant, and I mention what importance joint copyright can have for the determination of the tax object and the question whether the general or reduced tax rate shall apply. The question concerns thus a specific situation where the determination of the tax object is affected of whether

[721] See problem 3 in sec. 1.1.2.
[722] See problem 3 in sec. 1.1.2. See also sec:s 1.2.1 and 3.2.
[723] See sec. 3.3.
[724] See problem 3 in sec. 1.1.2.
[725] See problem 4 in sec. 1.1.2.
[726] See problem 5 in sec. 1.1.2.

the enterprise form *enkelt bolag* is used. Therefore is this particular question on the tax rate treated especially in section 6.5.[727]

At the investigation in this chapter are the law political aims for the Swedish VAT system regarded which have been identified and chosen according to Chapter 2. These aims are: a cohesive VAT system, neutrality, EU conformity, efficiency of collection and legal certainty including legality. At the investigation of the representative rule I regard the relevance I have judged in section 2.8 that the aims have for the trial. The aims also give support for at the investigation decide the importance for it of what I have treated in Chapters 3-5, i.e. the ABCSTUXY-model (Chapter 3), that the FML is of a certain comparative interest (Chapter 4) and the review of *enkla bolag* and *partrederier* from a civil law perspective (Chapter 5).[728] The chapter is ended with summary and conclusions in section 6.6.

6.2 TAX LIABILITY IN CONNECTION WITH *ENKLA BOLAG* AND *PARTREDERIER*

6.2.1 The question whether *enkla bolag* and *partrederier* can be taxable persons

6.2.1.1 Interpretation of the main rule on taxable person

To judge whether *enkla bolag* and *partrederier* can constitute taxable persons according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112) I begin with judging whether a non-legal entities can constitute taxable persons according to the directive rule.[729] If it is possible, the question arises whether *enkla bolag* and *partrederier*, which are not constituting non-legal entities, still could be deemed constituting taxable persons according to article 9(1) first paragraph of the VAT Directive (2006/112). Article 9(1) first and second paragraphs and article 10 of the VAT Directive (2006/112) read:

> "'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity."[730]

> "Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."[731]

[727] See sec:s 1.1.1 and 2.5.
[728] See sec. 2.8.
[729] See sec. 6.1.
[730] Art. 9(1) first para. of the VAT Directive (2006/112).
[731] Art. 9(1) second para. of the VAT Directive (2006/112).

> ”The condition in Article 9(1) that the economic activity be conducted ’independently’ shall exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer’s liability.”[732]

The expression *den som* in article 9(1) first paragraph of the VAT Directive (2006/112) – compare “any person who” – means that even if an *enkelt bolag* or *partrederi* can be considered having economic activity) and carrying out such activity independently it is requested that it shall be a matter of a legal entity, a natural or legal person. An *enkelt bolag* or *partrederi* does not constitute a legal entity.[733] If *den som* in article 9(1) first paragraph of the VAT Directive (2006/112) can regard a non-legal entity, the question arises whether *enkla bolag* and *partrederier* still are excluded from the circle of taxable persons. The so called *sammanslutningarna* are treated as tax subjects in section 13 FML, despite that they like *enkla bolagen* are not constituting legal entities. That gives a certain support for non-legal entities constituting taxable persons and for *enkla bolag* and *partrederier* constituting taxable persons according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112).[734] According to van Doesum 2009 can non-legal entities function as tax subjects for the purpose of collection of VAT.[735] Van Doesum 2009 has also inspired to a continuing regard of *Heerma* (Case C-23/98) and *EDM* (Case C-77/01) at the investigation of the representative rule, where *EDM* is of a particular interest for the transaction perspective on the application questions.[736] Since the present subject question however is unclear, continues next the judgement of it.[737]

The CJEU sometime talks about interpretation by guidance of *the aims and broad logic* of the VAT system.[738] The CJEU’s case law means thereby that the Member States may interpret with respect of ”the principles underlying the common system of VAT”, when the actual directive rule itself is not giving sufficient enough guidance.[739] Thus may the interpretation of the expression *den som* in article 9(1) first paragraph of the VAT Directive (2006/112) be made in the first place based

[732] Art. 10 of the VAT Directive (2006/112).
[733] See sec:s 1.1.1 and 5.2.
[734] See sec:s 4.4 and 4.5.
[735] See sec. 4.3.
[736] See sec. 4.5.
[737] See sec:s 4.5 and 6.1.
[738] See para. 35 in *Securenta* (C-437/06) and para. 28 in *Wollny* (C-72/05). See also sec. 2.4.2.
[739] See para. 34 in *Securenta* (C-437/06). See also sec. 2.4.2.

on the basic principles for VAT according to the EU law in article 1(2) of the VAT Directive (2006/112): The first paragraph of article 1(2) is expressing the principle of passing on the tax burden for the VAT according to the EU law insofar as the tax shall be applied on goods or services regarding consumption and is taken out regardless of the number of transactions in the production and distribution process. The second paragraph of article 1(2) is expressing the principle of passing on the tax burden and the reciprocity principle. There is namely stated that deduction of the VAT amount carried by various cost components to put a price on the product or the service which the transaction regards is allowed, before the VAT on the transaction can be claimed. The third paragraph in article 1(2) states that the common VAT system shall be applied up to and including the retail trade stage.[740]

The review of the various paragraphs in article 1(2) of the VAT Directive (2006/112) displays that the value added tax principle is transaction orientated, and that it is not stated anything about the character of the tax subject more than it shall be a matter of enterprises in an ennobling chain regarding goods or services. In that way it is neither possible to draw any conclusion from article 9(1) second paragraph of the VAT Directive (2006/112) regarding the subject question. There it is stated in the first sentence that an economic activity is constituted by any activity carried out by producers etc. and activities within free and thereby equal professions. In the second sentence is stated the exploitation of assets in a certain way shall in particular be considered as economic activity. By article 10 of the VAT Directive (2006/112) follows only indirectly that it shall be a matter of a person, by the independence criterion is expressed meaning that the economic activity shall not be carried out by persons comprised by an employment relationship. Any limitation of persons to only concern civil law one's are however not possible to read out. An entrepreneur in an ennobling chain up to the consumer could thus be a unit which does not constitute a legal entity. The expression *den som* in article 9(1) first paragraph of the VAT Directive (2006/112) could be considered regarding also a legal figure which constitutes a non-legal entity. However, a systematic interpretation gives also the opposite interpretation result. It is namely only according to the facultative rule about VAT groups in article 11 of the VAT Directive (2006/112) that a Member State may consider as one single taxable person such persons who are legally independent.[741]

If the expression *den som* in article 9(1) first paragraph would be considered comprising also legal figures which are not legal entities, exist

[740] See sec:s 2.4.1.2, 2.4.2 and 2.8.
[741] The presupposition is by the way that the members of the VAT group are closely linked to each other by financial, economical or organizational ties.

in such cases tax subjects for VAT purposes. On the other hand applies also for the present sort of legal figures, precisely like concerning natural and legal persons, that they shall fulfil the prerequisites independence and economic activity to be comprised by the VAT according to article 9(1) first paragraph of the VAT Directive (2006/112). This means that also in the case non-legal entities could be considered constituting taxe subjects for VAT purposes, can such legal figures not be considered constituting taxable persons according to the mentioned main rule if they are comparable with ordinary private persons. Then they can only be comprised by the conception taxable person by virtue of the facultative rule of article 12 of the VAT Directive (2006/112), which above all is meant to regard temporary transactions regarding new production within the building sector.[742]

The other rules on taxable person in articles 9–13 are article 9(2) and article 13, but they do not give any support for the present literal interpretation and systematic interpretation of the subject question and the expression *den som* in article 9(1) first paragraph of the VAT Directive (2006/112). Article 9(2) of the VAT Directive (2006/112) is a particular rule on taxable person which concerns persons that temporarily are making a supply of a new means of transport and thereby are considered having the character of taxable person for such a transaction. Thereby emerges a corresponding intra-Union acquisition in another EU Member State for the purchaser. Article 9(2) has however not been implemented into Chapter 4 ML on taxable person. Instead was by SFS 2007:1376 a rule inserted into Chapter 9 a ML on margin taxation which shall have the same function.[743] Article 13 of the VAT Directive (2006/112) is a particular rule which determines the scope of taxable person for public law legal entities, by stating that public law bodies can have the character of taxable person for activities which are not included in the exercise of authority.[744] Article 13 is in the ML equalled by Chapter 4 sections 6 and 7, where economic activity in certain public activity – the state, public enterprise or municipality – is treated.

6.2.1.2 The CJEU's case law

In connection with the review of the law political aim with a neutral VAT I have also brought up how the question on neutrality regarding legal form has been judged by the CJEU in *Gregg* (Case C-216/97) and *BLM* (Case C-436/10).[745] The CJEU mention in *Gregg* also the state's collection interest, i.e. yet another law political aim for the Swedish

[742] See sec. 1.1.3.
[743] See Ch. 9 a sec. 1 second para. ML.
[744] The presupposition is by the way that the activities will not entail significant distortion of the competition.
[745] See sec:s 2.4.2 and 2.8.

VAT system, in connection with the neutrality principle.[746] My judgement based on that case is that a neutral VAT shall not only mean neutrality regarding charge of the tax, but also concern collection of it.[747] *Faxworld* (Case C-137/02), *Polski Trawertyn* (Case C-280/10) and *Heerma* (Case C-23/98) give however not any support for a non-legal entity constituting a taxable person according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112), and which itself would handle the collection of the VAT.[748] Above all shows *Heerma* however that if different parties can be considered having formed a particular unit can they make taxable transactions to their own common unit and vice versa. *EDM* (Case C-77/01) proves that the members in a consortium – which can be compared with an *enkelt bolag* – are not value added taxed for amounts exchanged between them in accordance with the consortium agreement on division of costs and incomes. In such cases emerges a supply which can be taxed first when a member of the consortium is rendering to another member more that the work lying with him according to the consortium agreement (and it causes payment for that extra work).[749]

The CJEU's case law contains thus not expressly any support for *den som* in article 9(1) first paragraph of the VAT Directive (2006/112) comprising a legal figure which constitutes a non-legal entity. The neutrality aspect on the question about legal form means that if a particular unit which is comprised by the prerequisite economic activity can be considered established should it be able to constitute taxable person according to the directive rule – provided that the particular unit functions independently. The legal situation is however in my opinion unclear, and it is first at a comparison with the FML that a certain – but not decisive – support is given for *enkla bolag* and *partrederier* being considered constituting taxable persons according to the directive rule.[750]

6.2.1.3 The Council on Legislation's and the Supreme Administrative Court's advanced rulings

Of interest are inter alia two advanced rulings on VAT: RÅ 2006 not. 90 (5 Jun. 2006) and RÅ 2009 not. 172 (18 Nov. 2009). RÅ 2006 not. 90 (5 Jun. 2006) concerned a co-operation agreement between a car dealing limited company and a limited company carrying out a property insurance activity. Via its resellers the car dealing company offered its cus-

[746] See sec:s 2.4.2, 2.6 and 2.8.
[747] See sec:s 2.4.2 and 2.8.
[748] See sec:s 4.2 and 4.3.
[749] See sec. 4.3.
[750] See sec:s 4.4 and 4.5.

tomers a brand insurance with the property insurance company as insurer. The right to take part in profit that the car dealing company had according to the agreement considered the SRN and the HFD constituting consideration for a service which that company provided the property insurance company. RÅ 2009 not. 172 (18 Nov. 2009) concerned a limited company which sold and distributed inter alia petrol, diesel and fuel oil and that had entered a co-operation agreement with a limited company which would issue and administrate a payment and credit card that could be used by buyers of petrol etc. The SRN and the HFD considered that the co-operation agreement was nearest of the corresponding sort to the agreement judged in RÅ 2006 not. 90 (5 Jun. 2006). The agreement was not considered constituting such a mutually obligating agreement of the sort that the CJEU had to judge in *EDM* (Case C-77/01). The SRN and the HFD have interpreted *Heerma* (Case C-23/98) and *EDM* as follows:

- In the advanced ruling RÅ 2009 not. 172 (18 Nov. 2009) the HFD interpreted *EDM* so that the parties shall carry out *a particular economic activity which is distinguished from the activities that the parties otherwise are carrying out*, for *an agreement to be in VAT respect treated as an agreement on* enkelt bolag. In the advanced ruling RÅ 2006 not. 90 (5 Jun. 2006), whereto reference as mentioned is made in RÅ 2009 not. 172 (18 Nov. 2009), a similar interpretation is made of *EDM*.[751]

- In both the advanced rulings the SRN and the HFD talk about the concept supply, and the applicants companies were not considered to have been able to agree on carrying out a separate economic activity beside there other activities. In both cases it was deemed that one of the companies supplied the other services for consideration. In both cases the SRN and the HFD considered that *right to take part in profit* according to co-operation agreement regarding cost and income division really constituted consideration for rendering of service (supply) between the partners of present *enkelt bolag*. Any such mutually obligating agreement of the sort that the CJEU had to judge in *EDM* was not considered existing.

- The SRN and the HFD had by the way, with reference to *Heerma*, made judgements in similar ways as later concerning the interpretations of *EDM* in RÅ 2006 not. 90 (5 Jun. 2006) and RÅ 2009 not. 172 (18 Nov. 2009). They mean part in profit being

[751] See also Agrell & Ericsson 2009, pp. 799-806, where the advanced ruling of 2009 was commented before it was decided in the HFD by RÅ 2009 not 172.

opposed to supply in form of consideration for rendering of goods or services.[752]

The HFD's and the SRN's advanced rulings are thus not saying more than the CJEU's case law. The advanced rulings are saying that if a civil law agreement on *enkelt bolag* exists that means in VAT respect that any supply is not emerging between the partners as long as they divide profit or loss between themselves in accordance with the agreement on carrying out activity in an *enkelt bolag*. Swedish case law is thus as little as the CJEU's case law saying anything about the present subject question, i.e. the question whether a non-legal entity can be considered constituting taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112).

6.2.1.4 Conclusions

In my opinion should a clarification be inserted into the VAT Directive (2006/112) meaning that an economic activity which is carried out independently by a legal figure which constitutes a non-legal entity may give that figure the character of taxable person according to the main rule article 9(1) first paragraph of the VAT Directive (2006/112). The basic principles in article 1(2) of the VAT Directive (2006/112) for what shall be understood with VAT according to the EU law are the provision for an efficient collection and a neutral VAT. Neutrality is one of the law political aims that I have drawn up for the Swedish VAT system.[753] The principle of efficiency of collection is another of these aims, and it is mentioned by the CJEU inter alia in *Gregg* (Case C-216/97) regarding the neutrality aspect on the VAT.[754]

The principles on neutrality and efficiency of collection constitute in my opinion strong reasons to introduce them mentioned clarification as a mandatory rule in article 9(1) first paragraph of the VAT Directive (2006/112). The Member States would then become bound to implement such a rule in their VAT legislations. That demand on EU conformity applies by the way already according to current law concerning the mandatory rule article 9(1) first paragraph of the VAT Directive (2006/112). By the way are the Finnish *partrederierna* and *sam-*

[752] See references to *Heerma* (C-23/98) in the SRN's advanced ruling on VAT, SRN 23 Jun. 2005, and in the HFD's advanced rulings on VAT RÅ 2007 ref. 6 (19 Feb. 2007), RÅ 2008 not. 19 (30 Jan. 2008) and RÅ 2009 ref. 56 (22 Sep. 2009). In the advanced ruling SRN 16 May 2005 it was also considered that a supply could not exist, since the applicant as partner in an *enkelt bolag* only received share in profit from *enkla bolaget*'s activity, which consisted of VAT free lottery activity. The SKV also refers to the advanced ruling, but emphasizes only the activity's character as exempted from VAT. See the SKV's *Handledning för mervärdesskatt 2012* Part 1 p. 202.

[753] See sec:s 2.2, 2.4.1.1, 2.4.1.2 and 2.8.

[754] See sec:s 2.4.2 and 2.6.

manslutningarna, which do not constitute legal entities, tax subjects for VAT purposes according to the mandatory rules section 2 first paragraph and section 13 FML.[755]

A literal interpretation and systematic interpretation of article 9(1) first and second paragraphs, article 10 and article 1(2) of the VAT Directive (2006/112) do not give any clear answer to the question whether a non-legal entity can constitute taxable person according to the main rule. That does not either the CJEU's case law or Swedish case law. The investigation can indeed not be considered having given any clear answer to the question whether a non-legal entity can be considered constituting taxable person according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112). However is an *enkelt bolag* or a *partrederi* a legal figure which should be comprised by the expression *den som* (compare "any person who") in the main rule article 9(1) first paragraph regarding who is constituting taxable person. Also such legal figures should thus constitute tax subjects for VAT purposes. By a clarification should it in my opinion be stipulated in the VAT Directive (2006/112) that the expression *den som* in article 9(1) first paragraph comprises also legal figures which do not constitute legal entities. The provision for them being considered constituting taxable persons would be that they fulfil the criteria independence and economic activity for taxable person according to the directive rule. By such a rule according to my suggestion would be mandatory, would an *enkelt bolag* or *partrederi* whose activity means that a particular unit which is comprised by the prerequisite economic activity can be considered established constitute a taxable person.[756] The delimitation between company (*bolag*) and employment agreement would in my opinion entail that an *enkelt bolag* or *partrederi* is fulfilling the independence criterion in the directive rule.[757]

For the collection to function in the ennobling chain of enterprises where non-legal entities are included should my suggestions be combined with a demand on acting in one's own name. Such a demand on an *enkelt bolag* or *partrederi* for it being considered having the character of taxable person would make the application easier of the formal VAT rules on demand on content in invoices. The situation would more resemble what applies to *handelsbolag* (partnership), where each and everyone of the partners are representing the company if not otherwise has been agreed (or the company has been liquidated).[758] The partners could each by himself represent *enkla bolaget* or *partrederiet* under

[755] See sec. 4.4.
[756] See sec. 6.2.1.2.
[757] See sec. 5.5.
[758] See Ch. 2 sec. 17 first para. BL.

bolaget's or *rederiet*'s own name. In such a case there is no need for a possibility to appoint a representative to handle the collection of the VAT in *bolaget*'s or *rederiet*'s activity. A supplier to e.g. an *enkelt bolag* that would constitute taxable person has, by *bolaget* acting in its own name, an addressee to note in his invoice to *bolaget*. The demand would also mean that the customers to such an *enkelt bolag* receive a VAT carrying documentation in the same manner as when they make purchases from a legal entity. *Enkla bolaget*'s VAT registration number and other demands on invoice content according to the main rule article 226 of the VAT Directive (2006/112) would be noted in the same way as when legal entities are issuing invoices. A customer with right of deduction in his activity could thereby exercise the right of deduction according to article 178(a) of the directive in the same way as when he is making purchases from legal entities.

My opinion is thus that *enkla bolagen* and *partrederierna* belong to an ennobling chain of enterprises up to the consumer according to article 1(2) of the VAT Directive (2006/112). Business activity (*näringsverksamhet*) can since 1995 once again be carried out in *enkla bolag* as an alternative enterprise form to *handelsbolag*, also in other cases than regarding agriculture or forestry.[759] My conclusion is that it is in conflict with the neutrality principle which inter alia is considered following by article 1(2) to exclude *enkla bolag* and *partrederier* from that ennobling chain. The overall aim of a cohesive VAT system should be benefitted by the competition and consumption neutrality not being distorted by exclusion of the enterprise form *enkelt bolag* or *partrederi* from the main rule on who is a taxable person.[760] My suggestions for alterations of article 9(1) first paragraph of the VAT Directive (2006/112) should mean such simplification reasons that also entails foreseeable decisions and benefits the law political aim of a legally certain VAT.[761]

Under the assumption of that a non-legal entity can be considered constituting taxable person, or of that it should be made possible by my suggestions for clarification in article 9(1) first paragraph of the VAT Directive (2006/112), should in my opinion the following be done concerning the representative rule. In such a case should in my opinion Chapter 6 section 2 first and second sections be abolished from the ML. Instead can Chapter 6 section 2 ML be reformulated so that it in a clarifying respect is clearly stated in the ML that *enkla bolag* and *partrederier* constitute tax subjects for VAT purposes, whereby Chapter 6 section 2 should state that they are comprised by the general rules in the

[759] See sec. 5.3.
[760] See sec:s 2.2 and 2.3.
[761] See sec. 2.7.

ML on tax liability. For such clearness could the same technique be used as concerning VAT groups, by that a reference to the general rules in the ML would be stated in a particular paragraph in Chapter 6 section 2. In Chapter 6 a section 1 second paragraph ML it is stated that it follows by the general rules in Chapter 1 section 2 first paragraph number 1 whether the VAT group's activity shall be considered entailing tax liability.[762] If a non-legal entity can constitute taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112), are motives lacking to treat the enterprise forms *enkla bolag* and *partrederier* different than e.g. *handelsbolag* or limited companies. For such companies are the tax liability determined on company level, and not on partner level like regarding partners in *enkla bolag* and *partrederier* according to the representative rule.[763]

By that *enkla bolag* and *partrederier* could constitute tax subjects for VAT purposes, provided that they fulfil the prerequisites in the main rule on who is tax liable,[764] could the partners instead be imposed a joint responsibility fro the VAT in these *bolag* and *rederier*. Such a responsibility could there by be imposed them instead of they being described as tax liable. That could in that case be done by virtue of article 205 of the VAT Directive (2006/112), by the representative responsibility according to Chapter 59 sections 13 and 14 SFL being expanded to comprise also such cases. To continue the comparison with the FML, is it also what in my opinion is stipulated in section 188 item 2 FML, whereof inter alia follows that partners in a *sammanslutning* have a personal and joint responsibility for *sammanslutningen*'s tax.[765]

Although the question whether a non-legal entity could constitute tax subject for VAT purposes has not had any clear answer and my suggestions are not carried out, I conclude that the order applying to the VAT groups could resolve the actual problems concerning the status on the activity in an *enkelt bolag* or *partrederi*. A particular paragraph in Chapter 6 section 2 could – like Chapter 6 a section 1 second paragraph – have been referring to general rules on tax liability in the ML, like recently stated. Thereby would *enkla bolag* and *partrederier* with non-economic activities consequently not be comprised by the VAT in general. The rules on VAT groups in Chapter 6 a ML are based on the facultative article 11 of the VAT Directive (2006/112).[766] When Chapter 6 a was introduced into the ML by SFS 1998:346 was however not the

[762] See sec. 2.5.
[763] See sec. 2.8.
[764] See Ch. 1 sec. 2 first para. no. 1 ML with reference to sec. 1 first para. no. 1.
[765] See sec. 4.4.
[766] See sec. 1.2.3.

then already existing representative rule mentioned.[767] The described order for the VAT groups would have resolved the problems regarding the VAT status on partners in *enkla bolag* and *partrederier*. That problem is treated in the nearest following sections (6.2.2.1–6.2.2.4).

6.2.2 The question whether the representative rule can lead to an ordinary private person becoming tax liable

6.2.2.1 The problem

By Chapter 1 section 2 last paragraph ML expanding the concept tax liable in relation to the main rule according to the first paragraph number 1 of the rule, and states that there are special rules on who is tax liable in inter alia Chapter 6, the question arises how it is affecting Chapter 6 section 2 ML. The question is whether an interpretation of the wording of the representative rule can give the result that the rule expands the determination of who is comprised by the concept tax liability in the ML in relation to the main rule in Chapter 1 section 1 first paragraph number 1. In such a case could a private person be considered tax liable according to Chapter 6 section 2 first sentence ML. Thereby would Chapter 6 section 2 not be in compliance with the VAT Directive (2006/112) in that part, since an ordinary private person cannot be considered constituting taxable person according to the main rule article 9(1) first paragraph of the VAT Directive (2006/112).[768]

6.2.2.2 General historical review of the representative rule

The judgement of the question whether a private person can be considered tax liable at the application of the representative rule begins with history. That is meant to give a background to how the representative rule has been written during the years.[769]

The representative rule has its origin in the general goods tax (*allmänna varuskatten*) from 1959.[770] That is one of the similarities between Chapter 6 section 2 ML and section 13 FML on *sammanslutningar*, which also has its origin in a general goods tax, namely section 104 of the Finnish *omsättningsskattelagen*, which was replaced by the FML.[771] The introduction of the Swedish VAT system and the GML in 1969 was made under the influence of the EU law in the field of the time.[772] In the GML there was a rule on accounting of VAT by a representative in an *enkelt bolag* (and mining companies or *partrederier*), which mainly

[767] See prop. 1997/98:134 (*Kontrolluppgiftsskyldighet vid options- och terminsaffärer, m.m.*) and prop. 1997/98:148.
[768] See sec. 1.1.3.
[769] See sec. 1.2.1.
[770] See sec. 1.2.1.
[771] See sec. 4.4.
[772] See sec. 2.3.

corresponded to today's Chapter 6 section 2 ML.[773] In section 12 item 2 *Kungl. Maj:ts förordning (1959:507) om allmän varuskatt* was stated that partners in *handelsbolag* (partnerships), *kommanditbolag* (limited partnerships) and *enkla bolag* and in section 53 item 2 *kommunalskattelagen (1928:370)*, KL, meant shipping company and mining company would be tax liable in relationship to his share in the enterprise.[774] Thereby has Chapter 6 section 2 ML a historical connection to the income tax law. When the ML replaced the GML on the 1st of July 1994 the rule was changed only insofar that Chapter 6 section 2 ML notes *enkelt bolag* or *partrederi*. Mining company was abolished from the rule, since it – like what applied for income tax purposes – was no longer any reason to have a particular rule about them. Mining companies were not considered constituting any special company form, and concerning mining becomes according to the preparatory work those tax rules applicable that apply for the company form which the partners have chosen for their co-operation.[775] Neither Chapter 6 section 2 nor any of the other rules on tax liability in special cases in Chapter 6 ML were mentioned in connection with the alterations in the ML by SFS 1994:1798 at Sweden's accession to the EU in 1995.[776] When the IL replaced inter alia the KL in 2000 it was considered redundant to retain an equal to section 53 item 2 KL. That the partners in an *enkelt bolag* (or *partrederi*) shall account incomes was not considered necessary to regulate in particular, but was considered following by the general rules on tax liability in the IL.[777] The representative rule has thus had a certain common history with the income tax law.

When the tax account system and the was introduced on the 1st of November 1997 was Chapter 6 section 2 ML split so that one part of the rule was transferred to Chapter 23 section 3 SBL, and is today to be found in Chapter 5 section 2 SFL – whereto reference is made in Chapter 6 section 2 second sentence ML. The expression *tills vidare* (until further notice) was transferred to Chapter 23 section 3 SBL, but was abolished when Chapter 5 section 2 SFL replaced that rule. On the 1st of November 1997 was also the expression that the decision on representative would apply to *bolaget*'s *hela skattepliktiga omsättning* (the whole taxable supply) abolished from Chapter 6 section 2 ML.[778] That expression is today not to be found in either Chapter 6 section 2 ML or in Chapter 5 section 2 SFL. The reason that the expression "*hela skattepliktiga omsättning*" was abolished was that the partners in *enkla bolaget*

[773] See sec. 3 first para. first and second sen:s GML and prop. 1968:100 p. 115. See also Forssén och Kellgren 2010, p. 22.
[774] See also Åqvist et al. 1959, p. 99.
[775] See prop. 1993/94:99 pp. 188 and 189. See also Forssén & Kellgren 2010, p. 22.
[776] See prop. 1994/95:57. See also Forssén & Kellgren 2010, p. 22.
[777] See prop. 1999/2000:2 (*Inkomstskattelagen*) Part 2 p. 67.
[778] See also Mattsson 1974, p. 137 and Forssén & Kellgren 2010, p. 22.

thereby are considered having all the time an individual responsibility, materially, for the VAT, and that the responsibility thus not only lies with the appointed representative. By the preparatory work to the SBL follows – in translation – that the purpose with the representative rule is to *simplify the accounting and payment of the VAT that can be referred to such activity which can be carried out via an* enkelt bolag *or* partrederi.[779] The meaning is still considered to be that the partner which is appointed as representative shall have the possibility to *on his own inter alia handle the accounting and payment of taxes and fees*.[780] If the representative does not fulfil the responsibilities concerning accounting and payment of inter alia the VAT, i.e. the collection, is neither today the decision on appointment of representative for an *enkelt bolag* or *partrederi* affecting the other partners' responsibility.[781] By the alteration of Chapter 6 section 2 second sentence ML and the introduction of Chapter 5 section 2 SFL on the 1st of January 2012 has by the way the by the SKV used concept *representanten* (the representative) been codified for the context.[782]

The possibility of accounting tax for *enkla bolag* and *partrederier* via representative was expanded in 2012 by Chapter 5 section 2 SFL to also comprise excise duty. In the predecessor Chapter 23 section 3 SBL was only noted employee withholding taxes, employer's contribution (for national social security purposes) and VAT.

6.2.2.3 Determination of enkla bolag *and* partrederier *according to the representative rule*

Regarding what is meant with *enkelt bolag* or *partrederi* according to Chapter 6 section 2 ML a definition is lacking for these concepts in the ML.[783] There is by the way neither any definition of them in the IL.[784] With respect of the representative rule having a certain common history with the income tax law it could not be ruled out that it could have been the case.[785] Since any tax law definition of *enkelt bolag* or *partrederi* does not exist, remains thus to regard the civil law at establishing the meaning of the mentioned concepts in the representative rule. In the preparatory work to the SFL on the alterations in Chapter 6 section 2 ML by SFS 2011:1253 is stated with reference to Chapter 1 section 4

[779] See prop. 1996/97:100 (*Ett nytt system för skattebetalningar, m.m.*) Part 1 p. 639. See also Forssén & Kellgren 2010, p. 22.
[780] See prop. 2010/11:165 Part 2 p. 710.
[781] See prop. 2010/11:165 Part 2 pp. 710 and 711.
[782] See prop. 2010/11:165 Part 2 p. 1232 and also sec. 1.1.1.
[783] Compare Ch. 1 sec:s 6–19 §§ ML, where the meaning of certain expressions in the ML are noted.
[784] Compare Chapter 2 IL, where it is stated where and regarding what definitions exist in the IL.
[785] See sec. 6.2.2.2.

BL and Chapter 5 section 1 *sjölagen* that neither an *enkelt bolag* nor a *partrederi* is any independent legal entity.[786] Also the SKV is referring in connection with Chapter 6 section 2 ML to the civil law's determinations of *enkla bolag* and *partrederier*, namely to Chapter 1 section 3 BL and Chapter 5 section 1 *sjölagen*.[787] It is also desirable that the tax legislation is built on terms and concepts from the civil law.[788] In general applies that the civil law meaning of a term shall apply also in the tax law normally.[789] Based on the preparatory work to the representative rule is my conclusion thus that what is meant with *enkla bolag* and *partrederier* according to the representative rule is determined by what is meant with these legal figures according to the civil law, i.e. according to Chapter 1 section 3 BL and Chapter 5 section 1 *sjölagen*. The civil law definitions of *enkla bolag* and *partrederier* mean, as above mentioned, the following

- With *enkelt bolag* is meant that two or more have agreed to exercise activity in a company without the existence of *handelsbolag* – partnership.

- A *partrederi* (shipping partnership) exists if several have agreed to jointly carry out under shared responsibility shipping with an own ship.[790]

Since 1995 applies once again that business activity (*näringsverksamhet*) can be carried out in *enkla bolag*. An *enkelt bolag* does however not need to be carrying out business activity. The broader prerequisite *verksamhet* (activity) in Chapter 1 section 3 BL includes inter alia business activity. Also another activity than business activity can thus be carried out by agreement on co-operation in an *enkelt bolag*.[791] In the representative rule is it also the broader concept *verksamhet* (activity) that is used concerning *enkla bolagen* and *partrederierna*. By Chapter 5 section 2 first paragraph second sentence SFL follows that the representative shall account and pay inter alia VAT *för verksamheten* (for the activity) and otherwise represent *enkla bolaget* or *partrederiet* in matters concerning taxes and fees which are comprised.[792]

In Chapter 6 section 2 first sentence ML and Chapter 5 section 2 SFL is the term *delägare* (partner) used. According to Chapter 1 section 4 BL is an *enkelt bolag* – opposite to a *handelsbolag* (partnership) – not a

[786] See prop. 2010/11:165 Part 2 p. 710 and also sec:s 1.1.1 and 5.2.
[787] See the SKV's *Handledning för mervärdesskatt 2012* Part 1 p. 201.
[788] See Bergström 1978, p. 14.
[789] See Bergström 1978, p. 57.
[790] See sec:s 1.1.1 and 5.2.
[791] See sec. 5.3.
[792] See sec. 1.1.1.

legal entity.[793] According to the HD's case law – NJA 1997 p. 211 (4 Apr. 1997) – shall at a partner's bankruptcy his share in an *enkelt bolag* be calculated after a gross principle, so that *enkla bolagen* will not be given the same character as *handelsbolagen* (the partnerships), which are legal persons. *Enkla bolagen* are a particular co-operation form between the partners, and many *enkla bolag* are lacking common property, whereby it is only a matter of a common activity. In the civil law legislation – Chapter 4 BL – is the term *bolagsman* (partner) used to name the partners (*bolagsmännen*) in an *enkelt bolag*, instead of *delägare* (partner), whereas the term *redare* (shipowner) is used in Chapter 5 *sjölagen* regarding those owning shares in the ship.[794] Since shares are owned in a ship with which shipping shall be carried out jointly, functions the representative rule's *delägare* typically regarding *partrederier*.

Of Chapter 6 section 2 first sentence ML follows that a partner in an *enkelt bolag* or in a *partrederi* is tax liable in relationship to his *andel* (share) in *bolaget* or *rederiet*.[795] Thereby the representative rule deviates concerning the treatment of *enkla bolag* not only by terminology from the civil laws concept *bolagsman* by the use of the concept *delägare*. The rule deviates also in material respect by it assuming that *delägarna* – the partners – are imposed a tax liability for shares in an activity by *bolaget*. From a civil law perspective is instead each *bolagsman* – partner – in *enkla bolaget* responsible for his agreements with a third party, according to Chapter 4 section 5 first paragraph BL.[796] If several *bolagsmän* – partners – have participated in such an agreement, they answer however according to Chapter 4 section 5 second paragraph BL jointly against a third party with which the agreement has been made, if not otherwise determined in the agreement.[797] Furthermore it has also been stated that the civil law meaning of a term normally shall apply also in the tax law.[798] Concerning *partrederier* apply by the way however that each shipowner answer only in relationship to his share in the ship for ship's obligations emerged after the *partrederi* agreement has been registered at Sjöfartsverket (if he has not undertaken greater responsibility).[799] It is indeed in line with the use of the concept *andel* (share) in the representative rule. Since a *partrederi* can be deemed con-

[793] See sec:s 1.1.1 and 5.2.
[794] See sec. 5.4.
[795] See sec. 1.1.1.
[796] See sec. 5.6.
[797] See Ch. 4 sec. 5 second para. second sen. BL and also sec. 5.6.
[798] See sec:s 3.3–3.5 in Bergström 1978.
[799] See Ch. 5 sec. 1 second para. first sen. *sjölagen*. For the shipping company's obligations which have emerged before the registration of the shipping partnership agreement are the shipowners joint responsible according to Ch. 5 sec. 1 second para. second sen. *sjölagen*. See also Lindskog 2010, p. 55 and Rinman 1985, p. 121.

stituting a form of *enkelt bolag*, applies however what I write about *enkla bolag* also for *partrederier*, if not otherwise noted.[800]

For the concept *bolag* (company) according to the BL as well as the ABL applies that one of the prerequisites is a common objective. However can, even if neither the activity object nor the objective are of economic nature, a company exist, e.g. if some persons agree to jointly finance a researcher's work. A co-ownership within the frame of an *enkelt bolag* is not submitted to *lagen (1904:48 s. 1) om samäganderätt*. An important delimitation of the concept *bolag* against such co-ownership relationships consists of that *bolag* according to the BL – e.g. *enkla bolag* – is based on agreements between two or more legal entities. At the mentioned sort of co-ownership can one party however put another in his place without consent of the other partners.[801] However must not the demand on consent, for an *enkelt bolag* to be considered existing, have been made expressly.

Since *enkla bolag* do not constitute legal persons can they exist actually without being discovered at the beginning of their activities.[802] An agreement on *enkelt bolag* does not, as mentioned above, need to have been made expressly in writing or orally, but can have been emerged or altered by implicit actions. If the prerequisites for *enkelt bolag* are not fulfilled, does however neither any *enkelt bolag* exist.[803] That applies according to the HFD's case law also concerning the question whether agreement on *enkelt bolag* in VAT respect exists.[804] The HFD notes with reference to Chapter 1 section 3 BL the prerequisite that the activity shall be carried out jointly, for an agreement on *enkelt bolag* being considered existing in VAT respect. The HFD's case law confirms thus my conclusion based on the preparatory work to the representative rule, namely that what is meant with *enkla bolag* and *partrederier* according to the representative rule is determined by what is meant with these legal figures according to the civil law. By the way will according to the SKV the relationship *bolag* not only be expressed in the agreement, but by the parties in various contexts also acting as a common *bolag*, e.g. in responsibility and marketing issues.[805]

Regardless whether an *enkelt bolag* exists expressly by agreement or actually by implicit actions, is what is an *enkelt bolag* – or *partrederi* – according to Chapter 6 section 2 ML determined, as mentioned above,

[800] See sec:s 1.1.1, 2.5 and 5.2.
[801] See sec. 5.5.
[802] See sec:s 1.1.1 and 5.7.
[803] See sec. 5.7.
[804] See RÅ 2009 not. 172 (18 Nov. 2009). See also sec. 6.2.1.3 and Forssén & Kellgren 2010, pp. 31 and 32.
[805] See the SKV's *Handledning för mervärdesskatt 2012* Part 1 pp. 111 and 202.

based on the civil law. That applies regardless whether the partners use or not use the voluntary rule in Chapter 6 section 2 second sentence ML and apply for one of them to be appointed as representative according to Chapter 5 section 2 SFL. In both cases applies according to the mandatory rule Chapter 6 section 2 first sentence ML that the partners are tax liable from the beginning of an *enkelt bolag*'s or *partrederi*'s activity. The difference is only that if a representative is appointed by the SKV after such an application it is he who will administrate the collection of the VAT in *bolaget*'s or *rederiet*'s *verksamhet* (activity) for all partners, whereby the partners – i.e. the tax subjects – are sought by the SKV first when the representative is not fulfilling the collection. According to the SKV does not the fact that the appointed representative already has tax arrears on the representative's tax account prevent that the other partners are sought.[806] IT-technical reasons can however according to the SKV make it hard practically/technically to accomplish a double charge.[807] The legal figures *enkla bolag* and *partrederier* are in any case never tax subjects according to Chapter 6 section 2 ML. The purpose with the representative rule is only to simplify the accounting and payment of the VAT that can be referred to such an activity carried out by an *enkelt bolag* or *partrederi*.[808]

6.2.2.4 Conclusions

The SKV presupposes *that the activity which* enkla bolaget *is carrying out is comprised by tax liability according to the ML*, for registration of a representative for an *enkelt bolag* being possible to make according to the representative rule.[809] I agree that the general rules in the ML should be fulfilled, before an *enkelt bolag* or *partrederi* can be considered having an activity comprised by the ML. That the representative rule constitutes a rule on tax liability in special cases should, at a systematic interpretation, not be considered meaning a tax liability which would not be based on the necessary prerequisites for tax liability according to the main rule of Chapter 1 section 1 first paragraph number 1 ML. The prerequisites for tax liability according to the main rule mean that it shall be a matter of taxable supply within the country in an independently carried out economic activity. The historical review of the representative rule's wording does not show that the purpose with the rule would

[806] See the SKV's statement of 2007-09-28 and the SKV's *Handledning för skatteförfarandet*, Ch. 5, pp. 4 and 5 (www.skatteverket.se) and also sec. 1.1.1.
[807] See the SKV's statement of 2007-09-28 and also the SKV's *Handledning för skatteförfarandet*, Ch. 7, p. 20 (www.skatteverket.se), where the SKV – in translation –states that *the other partners are not issuing any MVD as long as the representative is fulfilling his obligations*, and the SKV's *Handledning för mervärdesskatteförfarandet* (2007) p. 455, where the SKV stated that *the partners are accounting and payment liable if the representative is not fulfilling his undertakings*. See also Forssén & Kellgren 2010, p. 49.
[808] See sec. 6.2.2.2.
[809] See the SKV's *Handledning för mervärdesskatt 2011* Part 1 p. 201.

have been anything else than to comprise certain company forms for industrial co-operation, e.g. mining which before the ML replaced the GML was expressly noted in the rule.[810] That speaks for a demand on economic activity being included of the representative rule. However, Chapter 6 section 2 ML is lacking an expressed prerequisite taxable person. Indeed there was a rule meaning that the limitations of *yrkesmässigheten* (the professionality) in the then existing Chapter 4 section 1 number 2 and sections 2 and 3 ML were supposed to apply also to activity in inter alia an *enkelt bolag*.[811] However, that limitation did not rule out that the representative rule expanded the concept tax liability in relation to the main rule's demand on *yrkesmässighet* (professionality). I have interpreted the question whether the tax liability according to Chapter 6 section 2 first sentence ML can comprise a partner – *bolagsman* in an *enkelt bolag* or shipowner in a partrederi – who is an ordinary private person as follows.

Regardless whether the mandatory rule in the first sentence or the voluntary rule in the second sentence of Chapter 6 section 2 of the ML is concerned, is what is meant by *enkelt bolag* – or *partrederi* – determined based on the civil law, since the ML is lacking a definition of its own of these concepts. This means that *enkelt bolag* according to the representative rule can exist by expressed written or oral agreement or implicit actions. The answer to the present question is affected also by the voluntary rule, i.e. Chapter 6 section 2 second sentence ML and Chapter 5 section 2 SFL, insofar that the expression *för verksamheten* (for the activity) in Chapter 5 section 2 first paragraph second sentence SFL shows that *bolaget*'s or *rederiet*'s activity is not limited to constitute an economic one.[812] Above all concerning *enkla bolag*, which can exist without request of their activities constituting business activity (*näringsverksamhet*), can partners who are ordinary private persons be considered tax liable according to Chapter 6 section 2 first sentence ML merely by their role as partner in *enkla bolaget*. That role may mean that the partner has only made a contribution of money to *bolaget* and thereafter remains passive concerning the activity. Although neither the activity object nor the objective are of economic nature can a *bolag* (company) exist, if only the objective is common.[813] If the activity object is of an economic nature, an *enkelt bolag* or a *partrederi* exists from a civil law respect. It can e.g. be a matter of carrying out jointly business

[810] See sec. 6.2.2.2.
[811] See Ch. 4 sec. 4 ML (which expired on the 1st of July 2013 by SFS 2013:368) and sec. 1.1.3. The Ministry of Finance's suggestion in the memorandum of 2012-11-23 to replace inter alia *yrkesmässig verksamhet* with *beskattningsbar person* (taxable person) [see sec. 1.3] also meant that inter alia sec. 4 in Ch. 4 would be abolished from the ML (see p. 3 in the memo), which was done.
[812] See sec. 6.2.2.3.
[813] See sec:s 5.2, 5.5 and 5.6.

activity without the existence of *handelsbolag* – partnership – or to jointly carrying out shipping with an own ship. Nothing prevents that the partners themselves are ordinary private persons. Any such limitation is neither to be found in Chapter 6 section 2 ML. Therefore can the partners be tax liable merely due to their roles as such from the beginning of *enkla bolaget*'s or *partrederiet*'s activity, according to the mandatory rule Chapter 6 section 2 first sentence ML. That applies regardless whether the possibility to appoint a representative according to the voluntary rule Chapter 6 section 2 second sentence ML is used.

I consider thus that the wording of the representative rule expands the determination of who is comprised by the concept tax liability in the ML in relation to what follows by the main rule of Chapter 1 section 1 first sentence number 1. That is not in compliance with the VAT Directive (2006/112), since it opens for an ordinary private person being tax liable generally without being taxable person according to Chapter 4 section 1 ML.[814] That concept shall equal taxable person according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112), and a private person is not comprised by this main rule.[815]

My interpretation of the representative rule is thus that there is a need to clarify it so that an ordinary private person cannot be given the character tax liable according to the ML *via* Chapter 6 section 2 first sentence ML being applicable. The representative rule should in my opinion be specified so that Chapter 6 section 2 first sentence ML is expressed concerning *enkla bolag* and *partrederier* with economic activity according to Chapter 4 section 1 ML *and* so that it is also noted that the partners themselves in such *bolag* and *rederier* shall have the character taxable person. The previously mentioned specification can be made by stating that Chapter 6 section 2 first sentence ML presupposes that *enkla bolaget*'s or *partrederiet*'s activity would have been comprised by the general rules in the ML, *if enkla bolag* and *partrederier* would have been constituting tax liables according to the main rule of Chapter 1 section 2 first paragraph number 1 ML. Therein is referred to the main rule for tax liability, Chapter 1 section 1 first paragraph number 1, where one of the necessary prerequisites for tax liability is taxable person. The latter specification, meaning that it also should be noted in Chapter 6 section 2 first sentence ML that the partners themselves shall have the character taxable person, is in my opinion necessary to avoid that an ordinary private person enters as passive partner into *bolaget* or *rederiet*, and in that capacity is comprised by the VAT. The person has perhaps only made a contribution of money to *bolaget* and does nothing more, but is partner in *enkla bolaget* or *partrederiet* because of the con-

[814] See sec. 1.1.1.
[815] See sec. 1.1.3.

tribution. That he would be comprised by the VAT merely due to his role as partner in someone of these two legal figures is not neutral in relationship to e.g. what applies concerning shareholders and partners respectively in limited companies (*aktiebolag*) and partnerships (*handelsbolag*) respectively. That a limited company or partnership carries out an economic activity according to the ML does not give the shareholders or partners in the association form the same status, since shareholder/partner and company/partnership are separate subjects in that respect and judged for themselves regarding whether they are comprised by the VAT.

Concerning the resulting question how the tax liability should be divided between the partners in *enkla bolaget* or *partrederiet*[816] shows the review in sections 5.4, 5.6 and 6.2.2.3 that the alternative to the present order according to the representative rule is that the divison follows the rules in the BL. The question arises thus whether the tax liability should be imposed on the partners in relation to their shares in *bolaget* or *rederiet*. That is what applies according to the present wording of Chapter 6 section 2 first sentence ML. The question is whether their tax liability instead should be determined in accordance with the regulation in Chapter 4 section 5 BL of *bolagsmännen*s' (the partners') relationship to third party.

An *enkelt bolag* does not need opposed to a partrederi consist of certain common property, but can also merely consist of exercising a common activity.[817] Therefore should in my opinion *delägare* – partner – in Chapter 6 section 2 ML be reserved for *partrederierna* and the BL's concept *bolagsman* – partner – instead be used regarding *enkla bolagen* in the rule. However should, in my opinion, *andel* (share) be abolished from the representative rule. Instead should it be noted in Chapter 6 section 2 first sentence ML that a *bolagsman* in an *enkelt bolag* or a *delägare* in a *partrederi* shall be tax liable for *bolaget*'s or *rederiet*'s economic activity in accordance with the rules in Chapter 4 section 5 BL. The presupposition is however that the partner has the character of taxable person. Since *enkla bolaget* does not constitute a tax subject, the tax liability is according to Chapter 6 section 2 first sentence ML lying with *bolagsmännen* and *delägarna* themselves in *enkla bolaget* or *partrederiet*.[818] Each *bolagsman* or *delägare* for himself constitutes a tax subject. The specification that I suggest is that it should be noted that Chapter 6 section 2 first sentence ML presupposes that *enkla bolaget*'s or *partrederiet*'s activity is comprised by the general rules in the ML. Thereby should in my opinion the criterion supply be connected to the

[816] See problem 1 in sec. 1.1.2.
[817] See sec:s 5.3, 5.4, 5.5 and 6.2.2.3.
[818] See sec:s 1.1.1 and 6.2.2.3.

bolagsman or *delägare* acting for *bolaget* or *rederiet*. That can be done by an *bolagsman*'s or *delägare*'s tax liability for *bolaget*'s or *rederiet*'s economic activity being determined with reference only to Chapter 4 section 5 first paragraph BL.[819] If several *bolagsmän* or *delägare* have taken part in an agreement with a third party, should in my opinion the tax liability not be imposed them jointly in accordance with Chapter 4 section 5 second paragraph first sentence BL. Each *bolagsman* or *delägare* is tax subject and makes his supply of a product or a service for which his tax liability shall be judged according to Chapter 6 section 2 first sentence ML. Thereby becomes the present particular cases of tax liability complying with the general rules in the ML. That Chapter 4 section 5 second paragraph second sentence BL states that the agreement concerns above all joint responsibility, when several *bolagsmän* or *delägare* participates in an agreement with third party, alters by the way not what should apply according to the basic VAT principles. On the contrary is the agreement with third party an interpretative datum for determining which of *bolagsmännen* or *delägarna* who has made which supply.

Concerning the relationship that all or some of *bolagsmännen* or *delägarna* in an *enkelt bolag* or *partrederi* would be foreign I make the following judgement of which clarifications should be made in the representative rule.

When Sweden became EU member in 1995 was Chapter 4 section 5 ML altered by SFS 1994:1798, so that *yrkesmässigheten* (the professionality) of a foreign entrepreneur's activity was determined by if it corresponded to *yrkesmässig verksamhet* according to Chapter 4 section 1 ML. That was the only adjustment at the EU accession of the ML to the EU law on VAT of the concept *yrkesmässig verksamhet*.[820] In consequence hereby was also the expression *which is carried out here in the country* ("*som bedrivs här i landet*") abolished from the main rule of the tax liability's emergence, Chapter 1 section 1 first paragraph number 1 ML.[821] By that alteration emerged tax liability according to the main rule in the ML *independently of whether the* yrkesmässiga verksamheten *is carried out here in the country or abroad* ("*oberoende av om den yrkesmässiga verksamheten bedrivs här i landet eller utom landet*"), which is in accordance with the neutrality aspect on the VAT.[822] Also a temporary, single supply in Sweden was considered made in an *yrkesmässig verksamhet*, independently of whether the activity is carried out in Sweden or in another country.[823] *Bolag* (company) is consid-

[819] See sec:s 5.6 and 6.2.2.3.
[820] See prop. 1994/95:57 p. 175. By SFS 2013:368 was Ch. 4 sec. 5 ML revoked.
[821] See prop. 1994/95:57 pp. 154, 155 and 175.
[822] See prop. 1994/95:57 p. 175.
[823] See prop. 1994/95:57 pp. 155 and 175.

ered constituting a closed association form,[824] but there is no limitation in the BL of who can be *bolagsman* in an *enkelt bolag* with respect of whether the person is a Swedish or foreign legal entity.[825] By the way can foreign enterprises (*utländska företag*) carry out business activity (*näringsverksamhet*) by a branch in Sweden.[826] According to paragraph 39 in *Centros* (Case C-212/97) the principle of freedom of establishment for the EU's citizens within the Union prevents a Member State to refuse to register a branch of a company formed according to the legislation in another Member State.[827]However, it must not be a matter of inappropriate avoidance of national legislation, abuse or fraud.[828] In my opinion should it thus be clarified in the representative rule that it also comprises *enkla bolag* or *partrederier* where *bolagsmännen* or *delägarna* are foreign taxable persons, provided that *bolaget* or *rederiet* carries out economic activity. The belonging to the Swedish VAT system becomes then decisive of whether taxable or from taxation qualified exempted supplies of goods or services are made within the country (Sweden). I make the following judgement in case the foreign persons either are not making an application for the appointment of one of them as representative or make such an application according to the voluntary rule Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL):

- If the foreign persons in the capacity of *bolagsmän* or *delägare* are not applying for one of them being appointed as representative for accounting and payment of the VAT in *enkla bolaget* or *partrederiet*, they are judged each for himself according to the general rules in the ML.

- If the foreign persons on the other hand file an application on the SKV appointing one of them as representative, should in my opinion the activity by *enkla bolaget* or *partrederiet* be treated as for a foreign entrepreneur. In line with the mentioned alterations in the ML in 1995 should the clarification that I am suggesting in the representative rule also state the following. An application on appointment of representative according to Chapter 6 section 2 second sentence ML (with reference to Chapter 5

[824] See sec. 5.7.
[825] See sec. 1.1.1.
[826] See sec. 1 *lag (1992:160) om utländska filialer m.m.* and also Nial & Hemström 2008, pp. 39 and 40.
[827] The principle on the EU citizens' right to free establishment within the Union is to be found in art. 49 TFEU (see also sec. 2.3). According to art. 54 TFEU shall what is meant with *bolag* according to civil and business law be equal to natural persons who are citizens within the EU. See also Nial & Hemström 2008, p. 40.
[828] See *Centros* (C-212/97), para. 24, and also e.g. *Cadbury Schweppes* (C-196/04)), para. 35, and *Marks & Spencer* (C-446/03), para:s 43 and 49.

section 2 SFL) should be possible also for the case *bolaget* or *rederiet* has been formed only by foreign persons. The presupposition is however that taxable or from taxation qualified exempted transactions of goods or services in *bolaget*'s or *rederiet*'s activity are made within the country. The question should however be resolved in connection with another problem. That is about that the ML, opposite to the VAT Directive (2006/112), determines in Chapter 1 section 15 who is a foreign taxable person and lets it decide whether the purchaser of certain goods or service is tax liable instead of the one making the transaction within the country.[829] I stay at the following conclusion concerning the clarification in this part. Opposite of a representative for accounting of VAT for a foreign entrepreneur which is making supplies in Sweden[830] is the representative not only accounting liable. He is also payment liable for the VAT.[831] The possibility to register a representative for accounting of VAT in *enkla bolaget*'s or *partrederiet*'s activity should thus be determined by whether transactions are made – in the activity – in Sweden according to what is said recently. Thereby should that determination be made independent of the question on registration of branch for foreign enterprises within the country. Furthermore it is of interest that Chapter 5 section 4,[832] which corresponds to article 43 of the VAT Directive (2006/112), was introduced in 2009 into the ML. That rule concerns application of the rules on placement of the supply of a service in certain cases. The rule was introduced to expand the concept *näringsidkare* (business person) to also comprise inter alia business persons which would not be *yrkesmässiga* (professional) according to Chapter 4 section 1 ML.[833] In my opinion should it also be clari-

[829] See Ch. 1 sec. 2 first para. no. 1 compared to first para. no:s 2, 3, 4 c and third para. ML and prop. 2001/02:28 p. 62. The question was not mentioned in the Minsitry of Finance's memorandum of 2012-11-23 which is mentioned in sec. 1.3. There it is suggested inter alia that Ch. 4 sec. 5 regarding *yrkesmässig verksamhet* carried out by foreign entrepreneurs should be abolished from the ML, and that the determination of foreign entrepreneur (*utländsk företagare*) in Ch. 1 sec. 15 ML would be altered into determination of foreign taxable person (*utländsk beskattningsbar person*) [see pp. 3 and 8 in the memo). These alterations were made on the 1st of July 2013 by SFS 2013:368, but the representative rule was not mentioned at all and neither the question on possibility to register representative for *enkla bolag* or *partrederier* formed solely by foreign persons.

[830] See Ch. 6 sec:s 2 and 3 SFL [previously Ch. 23 sec. 4 SBL].

[831] See Ch. 5 sec. 2 first para. second sen. SFL and sec. 1.1.1 and, regarding that a representative for a foreign entrepreneur is not payment liable, prop. 2010/11:165 Part 2 p. 712.

[832] See sec. 1.3.

[833] See SFS 2009:1333, the directive on the place of supply of services (2008/8/EC), prop. 2009/10:15 (*Nya mervärdesskatteregler om omsättningsland för tjänster, återbe-*

fied in the representative rule that Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL) also comprises the concept taxable person according to Chapter 5 section 4 ML.

My suggestion for a demand that *bolagsmän* in *enkla bolag* or *delägare* in *partrederier* shall be taxable persons by themselves should also apply to voluntary tax liability for certain letting of real estate according to Chapter 9 ML, e.g. letting of business premises etc. According to Chapter 9 section 1 first paragraph is the tax subject in these cases: owners of real estate, tenants, tenant-owners, bankruptcy estates and VAT groups.[834] There is not any demand concerning the person's status otherwise. Also e.g. an ordinary private person who is an owner of real estate can apply for and receive the SKV's decision on voluntary tax liability for letting of business premises to a business person. According to the preparatory works is the intention with this voluntary VAT to be able to rectify the lack of neutrality which would exist between tax liables carrying out activity in premises of their own and thereby has right of deduction on acquisitions to premises and tax liables which carry out activity in rented premises.[835]

An ordinary private person in the capacity of partner in an *enkelt bolag* or *partrederi* should not be considered being tax liable according to Chapter 6 section 2 for voluntary tax liability for letting of business premises etc. according to Chapter 9 ML. According to the facultative article 137(1)(d) of the VAT Directive (2006/112) is namely the freedom of choice for taxation of transactions which consists of leasing out and letting of immovable property limited to apply to taxable persons. There was indeed an expansion of the concept *yrkesmässig* (professional) for certain transactions in the field of real estate, inter alia Chapter 9 section 1, namely in the nowadays revoked Chapter 4 section 3 ML. I do not go into whether that rule was complying with the facultative article 12 of the VAT Directive (2006/112), which means that an ordinary private person could be considered a taxable person. Of interest for the present question is instead that it cannot be deemed clearly expressed in article 12 that the rule comprises leasing out and letting of immovable property. There is stated that the determination especially regards supplies of buildings and land. The determination of the tax subject in article 12 can thereby in my opinion not clearly be considered taking over

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talning till utländska företagare och periodisk sammanställning) p. 213 and Forssén 2011 (1) p. 152.

[834] See sec. 1.1.3.

[835] See prop. 1978/79:141 (*om redovisning av mervärdeskatt, m.m.*) p. 68.

the limitation concerning the tax object in article 137(1)(d).[836] Since there is a directive rule to implement into the ML, article 137(1)(d), is the aim EU conformity of relevance.[837] Therefore should my suggestion for a demand of that *bolagsmän* in *enkla bolag* or *delägare* in *partrederier* shall be taxable persons themselves, to be comprised by the concept tax liable in Chapter 6 section 2 first sentence ML, apply also to voluntary tax liability according to Chapter 9 ML. If two or more own a real estate which is hired out to a tax liable business person, should they by the way – precisely like what is the case today – be able to apply for one of them being appointed by the SKV according to Chapter 6 section 2 § second sentence ML (with reference to Chapter 5 section 2 SFL) as representative for the collection of the VAT in the hiring out activity.[838]

Concerning the two other cases of tax liability in Chapter 1 section 1 first paragraph, i.e. taxable intra-Union acquisition of goods according to number 2 and imports of goods which are taxable according to number 3, I make the following judgement regarding the representative rule. The case of import is mentioned first and then intra-Union acquisition.

The EU is a customs union,[839] and also an ordinary private person who makes an import becomes subject of value added taxation according to Chapter 1 section 2 first paragraph number 6 and section 1 first paragraph number 3 ML. Both entrepreneurs and private persons can be tax liable for imports according to the ML.[840] A clarification should thus, in my opinion, be introduced into Chapter 6 section 2 first sentence ML, with reference to Chapter 1 section 1 first paragraph number 3 ML. It should mean that also a *bolagsman* or *delägare* who is an ordinary private person is considered as tax liable for imports of goods for an *enkelt bolag* or *partrederi*, regardless whether he is a taxable person or *bolaget* or *rederiet* carries out economic activity.

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[836] See sec:s 1.1.3 and 2.8. Regarding the abolishment of Ch. 4 sec. 3 ML the Government mention by the way art. 12, but not art. 137(1)(d) – see prop. 2012/13:124 pp. 76-78.

[837] See sec. 2.8.

[838] See also the SKV's *Handledning för mervärdesskatt 2012* Part 2 p. 898.

[839] With a customs union is meant the EU has a common customs rate against third country (place outside the EU), whereas customs om imports and exports between the Member States shall be prohibited. See art. 28 TFEU and art. 30 TFEU.

[840] *Den* (he/she) who takes the goods into Sweden shall make a report to the Customs (Tullverket) and is tax liable for VAT on the imports. See regarding this and customs procedure (*förtullning*), so called transition into free supply (of goods within the EU's internal market: Ch. 3 sec:s 3 and 4 and Ch. 5 sec:s 1 and 2 *tullagen (2000:1281)* and Ch. 1 sec. 2 first para. no. 6 and fourth para. and Ch. 1 sec. 1 first para. no. 3 ML. *Tullagen* (the customs act) shall equal the EU's customs codex – Council's regulation (EEC) no. 2913/92. See also Moëll 1996, p. 160, regarding that the EU's customs codex assembled the EU's customs law rules. From the year 2015 is VAT on imports taken out in accordance with the SFL for VAT registered – see SFS 2014:51.

Regarding intra-Union acquisitions of goods, where tax liable and tax liability are stated in Chapter 1 section 2 first sentence number 5 and section 1 first paragraph number 2 ML and the determination of such an acquisition is stated in Chapter 2 a ML, should on the other hand the demand for taxable person apply according to my general suggestion concerning Chapter 6 section 2 first sentence ML. The clarification that should be introduced into Chapter 6 section 2 first sentence ML in that respect is instead that taxable person in Chapter 4 section 1 ML comprises the same concept according to Chapter 2 a ML. Then becomes a partner in an *enkelt bolag* or *partrederi* tax liable according to Chapter 6 section 2 first sentence ML for intra-Union acquisitions of goods on account of *bolaget* or *rederiet* in such cases. That applies to intra-Union acquisitions according to the main rule in Chapter 2 a section 3 first paragraph number 3 and second paragraph ML and to such acquisitions regarding goods comprised by excise duty in the first paragraph number 2 of the same rule. Partners who are not taxable persons according to Chapter 4 section 1 ML become tax liable for intra-Union acquisitions on account of *bolaget* or *rederiet* only regarding new means of transport according to Chapter 2 a section 3 first paragraph number 1 ML.

6.3 THE ISSUE ON INVOICING LIABILITY ACCORDING TO THE VALUE ADDED TAX ACT AND *ENKLA BOLAG* AND *PARTREDERIER*

6.3.1 The problem

In this section is something mentioned about the invoicing rules in Chapter 11 ML.[841] This section is meant to give a background to the application issues and the hypothetic case studies. It is therefore an overview. The particular control needs beyond the BFL's demands on verification and accounting that the VAT entails concerning the accounting of output and input tax have caused the invoicing rules in Chapter 11 ML.[842] If invoicing liability exists according to the ML, Chapter 11 raises demands on content on an invoice in excess to the demands raised by the BFL on content of an invoice as verification of a business transaction.[843] A VAT carrying documentation with all the formal demands on content according to the main rule Chapter 11 section 8 ML is according to Chapter 8 section 5 ML the demand that the tax liable shall be able to exercise right of deduction for charged input tax.[844] The CJEU has in *Terra Baubedarf-Handel* (Case C-152/02) expressed that the demand on possession of a correct invoice, to exercise the right of deduction, accommodates on of the purposes aimed for with the Sixth Directive. That purpose is to ensure the collection of VAT and

[841] See sec:s 1.2.1 and 1.3.
[842] See sec. 1.3.
[843] See Ch. 5 sec. 7 BFL and also Forssén 2010, p. 53.
[844] See art:s 178(a) and 226 of the VAT Directive (2006/112) and also sec:s 1.3 and 2.8.

the SKV's need of control thereby.[845] The invoicing liability according to Chapter 11 section 1 ML was in 2004 connected to the concepts *näringsidkare* (business person) and supply, instead of to the concept tax liable (*skattskyldig*). By SFS 2013:368 was on the 1st of July 2013 the prerequisite *näringdsidkare* altered into *beskattningsbar person* (taxable person) in the rule. Since tax liable is used in the representative rule, I mention whether Chapter 11 should be completed so that the invoicing liability according to the ML also shall comprise the representative rule too.[846] I raise the question from a legal certainty, control and collection perspective partly with regard of the present representative rule, partly under the assumption that *enkla bolag* and *partrederier* in a future could constitute tax subjects for VAT purposes.

A new invoicing directive on VAT was adopted by the EU's council on the 13th of July 2010.[847] It has entailed certain alterations of Chapter 11 ML regarding content of invoice which was enforced on the 1st of January 2013.[848] I mention however the main rule on the invoicing liability in Chapter 11 section 1 first paragraph, if not otherwise stated.[849] The main rule has only been affected of the alterations insofar as that it has come to comprise also so called installation deliveries to other EU Member States.[850] In this work are not such cases mentioned, and when the main rule for the invoicing liability in Chapter 11 section 1 first paragraph ML is mentioned it concerns the rule's wording according to SFS 2013:368.[851]

6.3.2 The invoicing liability and the current representative rule

That the liability to issue invoice according to Chapter 11 section 1 ML has been connected, by SFS 2013:368, to the concepts *beskattningsbar person* (taxable person) and supply, instead of to the concept tax liable, is simplifying the control of whether output and input tax have been accounted for correctly in an entrepreneur's MVD. The concept tax liability governs instead when output and input tax shall be accounted. By the main rules in Chapter 13 section 6 number 1 and section 16 number 1 ML follow that the accounting shall be made in an MVD for the ac-

[845] See sec. 1.3 and also Forssén 2010, p. 60.
[846] See sec:s 1.2.1 and 1.3.
[847] See Council's directive 2010/45/EU.
[848] See SFS 2012:342 – *lag om ändring i mervärdesskattelagen*.
[849] See sec. 1.2.1.
[850] See SFS 2012:342 and prop. 2011/12:94 (*Nya faktureringsregler för mervärdesskatt m.m.*) pp. 9, 90 and 91. The alterations did not otherwise concern the main rule on the invoicing liability, but the second para. of Ch. 11 sec. 1 was changed so that invoicing liability was introduced in 2013 for so called distance sales from another Member State to a purchaser in Sweden.
[851] In this book are regarded, as mentioned in sec. 1.2.1, rules coming into force at the latest on the 1st of January 2015.

counting period under which the supply and the acquisition have been booked or should have been booked according to the BFL's concept GAAP. In the investigation SOU 2002:74 it was suggested that the so called connected area between the value added taxation and the civil law accounting law should be abolished.[852] Any legislation has however not followed from the suggestion. That does not change that the accounting in an MVD shall function when tax liability and right of deduction exist materially and the documentation for control are the invoices. By the main rule on the right of deduction for input tax, Chapter 8 section 3 first paragraph ML, follows indeed that an acquisition of a product or a service or an import of a product into an activity entailing tax liability gives such a right materially. However follows by Chapter 8 section 5 ML the formal demand that that right can be exercised first if it can be proven by invoice from someone who is tax liable for the supply corresponding to the acquisition (or if the purchaser is comprised by so called reverse tax liability), i.e. from a taxable person.[853]

A VAT carrying documentation with all formal demands on content according to the main rule Chapter 11 section 8 ML is according to Chapter 8 section 5 ML – which has its correspondence in article 178(a) of the VAT Directive (2006/112) – the demand of the tax liable being able to exercise right of deduction for charged input tax. According to the CJEU's case law the demand on possession of a correct invoice to exercise the right of deduction means that one of the purposes aimed for with the VAT Directive (2006/112) is accommodated. That purpose is that the collection of VAT and the SKV's control thereof is ensured.[854] The demands on content regarding an invoice are noted in the main rule Chapter 11 section 8 ML, which has its correspondence in article 226 of the VAT Directive (2006/112).[855]

The main rule in the BFL is that each person required to main accounting records is responsible for his own book-keeping.[856] However may *bolagsmännen* or *delägarna* in an *enkelt bolag* or *partrederi* use their particular possibility according to Chapter 4 section 5 BFL of having a common book-keeping.[857] The output and input tax shall however be possible to control against invoices fulfilling the ML's demands on con-

[852] See sec. 1.3.
[853] See sec:s 1.3 and 6.3.1 and prop. 2003/04:26 p. 42, prop. 1994/95:57 p. 136, prop. 1998/99:130 Part 1 p. 250 and also Forssén 2010, pp. 54 and 55.
[854] See para. 37 in *Terra Baubedarf-Handel* (C-152/02), which is mentioned in sec:s 1.3, 2.8 and 6.3.1.
[855] By the mentioned new invoicing directive 2010/45/EU inter alia art. 226 of the VAT Directive (2006/112) undergoes a certain change in 2013, but it is not mentioned due to it only being peripheral to the questions in this work.
[856] See Ch. 2 sec. 1 and sec. 6 first para. and Ch. 4 sec. 1 BFL. See also the SKV's *Handledning för mervärdesskatt 2012* Part 1 p. 629.
[857] See prop. 1998/99:130 Part 1 p. 231 and also sec:s 1.3 and 6.2.2.4.

tent regarding such documentation. By the preparatory work to Chapter 5 section 2 SFL is noted that if the possibility to appoint a representative for accounting and payment of VAT in the activity by an *enkelt bolag* or *partrederi* is used, the representative gets a particular registration number and tax account for *bolaget* or *rederiet*.[858] If *bolagsmännen* or *delägarna* in *enkla bolaget* or *partrederiet* have applied jointly by the SKV for one of them being representative for accounting and payment of the VAT in *bolaget* or *rederiet*, and the SKV decides in accordance therewith, the following happens. For administration of the actual representation the SKV attributes the representative a special accounting number connected to the organization number given *enkla bolaget* or *partrederiet*. The special accounting number is a number in the series 662 – 662-no. – to which a special tax account is connected. It is that special accounting number which is used for registration of the representative in his capacity as such in the VAT register.[859] By the second paragraph of Chapter 5 section 2 SFL follows that documentation for control of the accounting shall be available by the representative.[860] It concerns invoices fulfilling the ML's content demands on such documentation. The SKV describes the representative's liabilities as nearest administrative.[861] The SKV does not consider that the representative is tax liable according to the ML for *enkla bolaget* or *partrederiet*. The SKV considers that he shall account for and pay the VAT in its activity, i.e. in accordance with Chapter 6 section 2 second sentence ML administrate the collection of the VAT in *bolaget*'s or *rederiet*'s activity.[862]

The concept taxable person applies regardless whether the VAT in an *enkelt bolag*'s or *partrederi*'s activity is accounted for by an appointed representative amongst *bolagsmännen* or *delägarna*[863] or whether they are accounting the VAT themselves in their capacities as tax liables.[864] I suggest that it should be specified that Chapter 6 section 2 first sentence ML provides that *enkla bolaget*'s or *partrederiet*'s activity is comprised by the general rules in the ML, *if enkla bolag* and *partrederier* would have been tax liable according to the main rule of Chapter 1 section 2 first paragraph number 1 ML. In the latter rule is referred to the main

[858] See prop. 2010/11:165 Part 2 p. 710.
[859] See the SKV's *Handledning för skatteförfarandet*, sec. 61.1, p. 2 and Ch. 7, p. 20 (www.skatteverket.se) and sec. 1 no. 4 RSFS 2002:13 regarding special registration and accounting number. See also the SKV's statement of 2007-09-28, the SKV's *Handledning för mervärdesskatt 2011* Part 1 p. 201 and the SKV's *Handledning för mervärdesskatteförfarandet* (2007) pp. 75, 196 and 454.
[860] See also prop. 2010/11:165 Part 2 p. 710 and sec. 1.1.1.
[861] See the SKV's *Handledning för mervärdesskatt 2011* Part 1 p. 201.
[862] See the SKV's *Handledning för skatteförfarandet*, Ch. 5, pp. 3 and 4 and sec. 26.7.2, p. 60 (www.skatteverket.se). See also sec. 1.1.1 and the SKV's *Handledning för mervärdesskatt 2012* Part 1 p. 201.
[863] According to the voluntary rule Ch. 6 sec. 2 second sen. ML.
[864] According to the mandatory rule Ch. 6 sec. 2 first sen. ML.

rule for tax liability, Chapter 1 section 1 first paragraph number 1, where the necessary prerequisites for tax liability are inter alia *beskattningsbar person* (taxable person) and supply.[865]

The invoicing liability's emergence according to Chapter 11 section 1 ML is indeed founded on the concepts *beskattningsbar person* (taxable person) and supply. However is not a *delägare* in an *enkelt bolag* or *partrederi* which is tax liable regarding *bolaget*'s or *rederiet*'s activity according to the mandatory rule Chapter 6 section 2 first sentence ML comprised by invoicing liability according to Chapter 11 section 1 ML, when he is making a supply in the mentioned capacity regarding *bolaget*'s or *rederiet*'s activity. The law political aim of a materially legal certain VAT requires that decisions meaning administration of justice or exercise of authority are highly foreseeable due to the legal norms and at the same time highly ethical acceptable.[866] In the present context this means, in accordance with the law political aim of neutrality concerning legal form,[867] that the same supply should lead to tax liability as well as liability to issue an invoice according to the ML and to the SKV being able to control such a supply. That applies regardless whether the supply is made by a *bolagsman* (partner) or *delägare* (partner) regarding the activity in an *enkelt bolag* or *partrederi* or by that partner in the partner's own activity beside *bolaget* or *rederiet*. Furthermore is the SKV's possibility of control of the supply also when it is made by a *bolagsman* or *delägare* in an *enkelt bolag* or *partrederi* meaningful for the aim of an efficient collection of VAT.[868] Thus should in my opinion the liability to issue an invoice for a supply of a product or a service according to Chapter 11 section 1 ML be expanded to comprise partners which are tax liable according to Chapter 6 section 2 first sentence ML.

The purpose with the representative rule is to simplify the accounting and payment of the VAT that can be referred to activity carried out through an *enkelt bolag* or *partrederi*.[869] *Bolagsmännen* or *delägarna* in an *enkelt bolag* or *partrederi* answer themselves for the liability to issue invoices according to the ML, despite that a representative has been appointed for the accounting and payment of the VAT in *enkla bolaget* or *partrederiet*. That should in my opinion from the viewpoint of control typically be considered a worse alternative for the law political aim of efficiency of collection.[870] If a representative is appointed is the control possibility for the SKV upheld which according to Chapter 5 section 2 second section SFL is provided for such cases, by that rule impos-

[865] See sec. 6.2.2.4.
[866] See sec. 2.7.
[867] See sec. 2.4.2.
[868] See sec. 2.6.
[869] See sec. 6.2.2.2.
[870] See sec. 2.6.

ing the representative liability to keep available by him documentation for such control.[871] For the situation where representative has been appointed for the collection of the VAT in an *enkelt bolag* or *partrederi* should it therefore in my opinion be noted in Chapter 11 section 1 ML that also a representative according to Chapter 6 section 2 second sentence ML is comprised by the invoicing liability according to the ML.

6.3.3 The invoicing liability if *enkla bolag* and *partrederier* would constitute tax subjects for VAT purposes

If a non-legal entity could be considered constituting taxable person according to the main rule article 9(1) first paragraph of the VAT Directive (2006/112), or if that is made possible by clarification in the directive rule, could *enkla bolag* and *partrederier* be constituting taxable persons. Then should in my opinion Chapter 6 section 2 first and second sentences be abolished from the ML. I suggest in that case that Chapter 6 section 2 ML would be reformulated so that it in a clarifying respect would be clearly noted in the ML that *enkla bolag* and *partrederier* constitute tax subjects for VAT purposes, and that they are comprised by the general rules in the ML on tax liability.[872]

Under the recently mentioned presuppositions could the same technique be used for determining the tax liability for *enkla bolagen* and *partrederierna* as regarding the VAT groups in Chapter 6 a section 1 second paragraph ML.[873] In Chapter 6 a section 1 second paragraph ML is stated that it follows by the general rules in Chapter 1 section 2 first paragraph number 1 whether the VAT group's activity shall be deemed entailing tax liability. For VAT groups is the concept taxable person (*beskattningsbar person*) used according to Chapter 6 a section 1 first paragraph ML,[874] which makes their supplies comprised by the invoicing liability according to Chapter 11 section 1 ML, where the same concept is used.[875] If it in the present case would be noted in Chapter 6 section 2 that *enkla bolag* and *partrederier* are comprised by the main rule on who is tax liable according to the ML, would they be comprised by inter alia the prerequisites *beskattningsbar person* (taxable person) and supply in the main rule on the emergence of tax liability. It is also the prerequisites *beskattningsbar person* (taxable person) and supply which are founding the invoicing liability according to Chapter 11 section 1 ML. However should it in my opinion in the present cases be especially noted in Chapter 11 section 1 ML that the invoicing liability comprises supplies made by *enkla bolag* and *partrederier* which would constitute

[871] See the SKV's *Handledning för skatteförfarandet*, Ch. 5, p. 5 (www.skatteverket.se) and also sec. 1.1.1.
[872] See sec. 6.2.1.4.
[873] See sec. 6.2.1.4.
[874] See sec. 1.3.
[875] See sec. 6.3.2.

tax subjects for VAT purposes. Legal certainty demands on foreseeable decisions should also regarding activities by those two legal figures mean that the same supply leads to tax liability as well as invoicing liability according to the ML. The SKV's possibility to control should also here be benefitted by such a correspondence between the ML's material and formal rules.[876]

6.3.4 Conclusions

I have from legal certainty, control and collection perspectives treated the question whether Chapter 11 should be completed with the invoicing liability according to the ML comprising also the representative rule. That has been done partly with respect of the current representative rule, partly based on my suggestion that *enkla bolag* and *partrederier* would constitute tax subjects for VAT purposes under the provision that they fulfil the other prerequisites causing tax liability, such as supply of a product or a service within the country.

The emergence of the invoicing liability according to Chapter 11 section 1 ML is based on the concepts *beskattningsbar person* (taxable person) and supply. However is not a partner of an *enkelt bolag* or *partrederi* which is tax liable regarding *bolaget*'s or *rederiet*'s activity according to the present mandatory rule Chapter 6 section 2 first sentence ML comprised by the invoicing liability according to Chapter 11 section 1 ML. That is so even if my suggested specification would be enforced so that Chapter 6 section 2 first sentence states that the partner's tax liability provides that *bolaget*'s or *rederiet*'s activity would have been comprised by the general rules in the ML. Legal certainty demands on foreseeable decisions mean in my opinion that the same supply should lead to tax liability as well as liability to issue invoice according to the ML. Therefore it is requested that the SKV can control the supply in both respects. That demand should apply regardless whether the supply is made by a *bolagsman* or *delägare* regarding the activity in an *enkelt bolag* or *partrederi* or by anyone of them in the own activity beside *bolaget* or *rederiet*. The SKV's possibility to control also a supply made by a *bolagsman* or *delägare* in the activity in an *enkelt bolag* or *partrederi* is meaningful for the law political aim of an effective collection of VAT. My conclusion is thus that the invoicing liability according to Chapter 11 section 1 ML should be expanded to comprise partners who are tax liable according to Chapter 6 section 2 first sentence ML.[877]

The purpose with the representative rule is to simplify the collection of VAT which can be referred to an activity carried out through an *enkelt bolag* or *partrederi*. By the current voluntary rule Chapter 6 section 2

[876] Compare sec. 6.3.2.
[877] See sec. 6.3.2.

second sentence ML (with reference to Chapter 5 section 2 SFL) may *bolagsmännen* or *delägarna* in *bolaget* or *rederiet* appoint a representative and thereby not only administrate the collection of VAT in the activity more efficient by him. The representative is also upholding the SKV's possibility to control by being imposed according to Chapter 5 section 2 second paragraph SFL to keep available by him documentation for control of the accounting. From a control perspective should it typically be considered as a worse alternative for the law political aim of efficiency of collection that *bolagsmännen* or *delägarna* in *bolaget* or *rederiet* themselves would answer for the invoicing liability. Therefore should it in my opinion be noted in Chapter 11 section 1 ML that also a representative according to Chapter 6 section 2 second sentence ML would be comprised by the invoicing liability according to the ML.[878]

If non-legal entities could be considered constituting taxable persons according to the main rule article 9(1) first paragraph of the VAT Directive (2006/112), and *enkla bolag* and *partrederier* constituting taxable persons, should in my opinion Chapter 6 section 2 first and second sentences be abolished from the ML. In such a situation should Chapter 6 section 2 ML be reformulated so that it in a clarifying respect is clearly stated in the ML that *enkla bolag* and *partrederier* constitute tax subjects for VAT purposes, and are comprised by the general rules in the ML on tax liability. This means that the same technique would be used as regarding the VAT groups in Chapter 6 a section 1 second paragraph ML, by stating in Chapter 6 section 2 that it follows by the general rules in Chapter 1 section 2 first paragraph number 1 whether *enkla bolaget* or *partrederiet* shall be considered tax liable for its activity. In the same way as regarding the tax liability's emergence it is the prerequisites *beskattningsbar person* (taxable person) and supply which are founding the invoicing liability according to Chapter 11 section 1 ML. However should it be especially noted in Chapter 11 section 1 ML that the invoicing liability comprises supplies made by *enkla bolag* and *partrederier* which would constitute tax subjects for VAT purposes. Also concerning activities by the legal figures *enkla bolag* and *partrederier* should legal certainty demands on foreseeable decisions mean that the same supply leads to tax liability as well as invoicing liability according to the ML. That correspondence between material and formal rules in the ML should also in this case benefit the SKV's possibility of control.[879]

6.4 APPLICATION ISSUES

6.4.1 The problem

In this section continues the investigation by the treatment of the application issues, to find arguments for and against that the representative

[878] See sec. 6.3.2.
[879] See sec. 6.3.3.

rule – completely or partly – should be abolished, since the analysis of the subject question regarding the representative rule did not give any clear answer to this question.[880] The question is whether the possibility for *bolagsmännen* (partners) and *delägarna* (partners) in *enkla bolag* and *partrederier* to appoint according to the voluntary rule Chapter 6 section 2 second sentence ML one of them as representative can be expected leading to a functioning collection of the VAT. They are still themselves tax liable according to Chapter 6 section 2 first sentence ML regarding the VAT in *bolaget*'s or *rederiet*'s activity, but one of them shall as representative answer for accounting and payment of that VAT. I use the two basic examples that I drew up in section 3.3. In these I assume that the partners A and B each by himself have the character of taxable person beside the activity in *enkla bolaget* or *partrederiet*. Then I add thereto with more hypothetical cases, to test how the representative rule functions in relation to the main rules on tax liability and right of deduction according to the ML. These have a systematic correspondence with the main rules on who is payment liable and the scope of the right of deduction according to the VAT Directive (2006/112).[881]

By the hypothetical cases and the tool which I call the ABCSTUXY-model I make above all a balanced judgement between the state's collection and control interest and the individual's legal certainty demand on foreseeable decisions. That judgement I make thus regarding the law political aims which I in Chapter 2 have chosen for the Swedish VAT system for the investigation of the representative rule in this work. If the judgement turns out to be that there are, to make the collection by the representative working, a demand for so vast specifying amendments in the representative rule and amendments in Chapter 11 ML that the representative rule becomes far too complex to apply, should the following measures be made.[882] In that case should, in my opinion, the voluntary rule Chapter 6 section 2 second sentence ML be abolished and Chapter 5 section 2 SFL in consequence be limited to concern only employee withholding taxes, employer's contribution (for national social security purposes) and excise duty – not VAT.

At the problemizing by the hypothetic case studies I use the imagined persons from Figure 4 in section 3.3 (see below). This means that A, B, C, S, T, U, X and Y are put into different situations concerning the questions on tax liability and right to deduction of VAT. That regards partly relationships between *enkla bolaget* or *partrederiet* and its customers and suppliers, partly internal relationships between the partners.

[880] See sec. 6.2.1.4.
[881] See sec:s 1.1.3, 1.3 and 3.2.
[882] See sec. 2.8.

Figure 4

<table>
<tr><td>Enkelt bolag/partrederi</td><td></td></tr>
<tr><td rowspan="3">A –partner/representative
B – partner
A and B apply by the SKV for A to account for VAT in enkla bolaget or partrederiet</td><td>S – supplier to A or B in their capacities of partners in enkla bolaget/partrederiet</td></tr>
<tr><td>T – customer to A or B in their capacities of partners in enkla bolaget/partrederiet</td></tr>
<tr><td>U – person with an indirect relation to A or B in their capacities of partners in enkla bolaget</td></tr>
<tr><td rowspan="2">C
Eventual additional partner in enkla bolaget or partrederiet. Alternatively may C be a non-partner, e.g. someone of S, T, U, X or Y</td><td>X – supplier to A or B regarding their other activities</td></tr>
<tr><td>Y – customer to A or B regarding their other activities</td></tr>
</table>

If it is proven that there is a demand for far too vast amendments in the representative rule and in Chapter 11 ML, to make the collection of the VAT working, should Chapter 6 section 2 second sentence ML be abolished and Chapter 5 section 2 SFL limited according to what is recently said. In that case it is better that the role as collector for the state regarding the VAT instead is fulfilled by the partners themselves, i.e. by those who are tax liable according to the mandatory rule Chapter 6 section 2 first sentence ML. Although the collection interest would be treated unfairly by such a measure, it will have to stand back in such a case for the partners' legal certainty demand on foreseeable decisions at the application of the rules on VAT concerning *enkla bolag* and *partrederier*.[883] In the hypothetical cases I assume if not otherwise stated that by taxable person is meant an entrepreneur, i.e. a person who is comprised by the concept taxable person (*beskattningsbar person*) in Chapter 4 section 1 ML – corresponds to the main rule on who is a taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112). This person is also comprised by the concept taxable person (*beskattningsbar person*) concerning the invoicing rules in Chapter 11. With consumer I mean a person who normally is an ordinary private person, and which thus is not comprised by Chapter 4 section 1 ML and article 9(1) first paragraph of the VAT Directive (2006/112).

If the partners have applied for the appointment of one of them to be registered as representative to administrate the accounting and payment of the VAT in the activity by an *enkelt bolag* or *partrederi*, applies according to the SKV its decision on such registration accounting and payment of *all* VAT for the activity that *bolaget* or *rederiet* is carrying

[883] See sec:s 2.7 and 2.8.

out.[884] This means that concerning external acquisitions and sales are the input and output tax treated in practice as if *enkla bolaget* would be a tax subject of its own. I begin the application issues with the two mentioned basic examples, where partners are acting in activities of their own and for *enkla bolaget*'s or *partrederiet*'s activity respectively. Thereafter I examine the need of amendments in the representative rule and in Chapter 11 ML concerning the internal transactions between the partners in *enkla bolaget* or *partrederiet*. Other issues that I mention in connection with the hypothetical questions about the representative's accounting concern: whether a subsidy constitutes a part of the consideration for a supply; whether it is a matter of financing an acquisition for *enkla bolaget* or *partrederiet* or whether a new partner is entering; and regarding the representative rule and the relationship abroad. If not otherwise stated, I assume in connection with the application issues that the present transaction is comprised by the main rules on general taxation and tax rate for supplies of goods and services.[885]

6.4.2 Hypothetical cases where a partner acts in his own activity and respectively for the activity of *enkla bolaget* or *partrederiet*

In *example 1* in section 3.3 I assume that A and B have formed an *enkelt bolag*, and that A has an economic activity of his own. B is also supposed to have an economic activity of his own. A is supposed to sell a product to the customer Y, and A purchased the product from the supplier X who is also assumed to be an entrepreneur. If X, A and Y are placed into an ennobling chain like the one I am illustrating in section 2.4.1.3, the VAT is treated as follows:

- The supplier X is supposed to put a price on the product of SEK 80 and shall, according to the general VAT rate (which is supposed to apply), charge output tax of SEK 20 in the invoice issued to A, and X accounts output tax in his MVD to the SKV,

    - Output tax, SEK 20.

- A makes, at his sale of the product to the customer Y, a mark-up of 40 per cent to cover costs exceeding the purchase cost plus profit. The price will be SEK 112 excluding VAT (1,4 x 80), and the output tax SEK 28 (0,25 x 112). A charges output tax SEK

[884] See the SKV's *Handledning för skatteförfarandet*, Ch. 5, p. 4 (www.skatteverket.se) and also sec. 1.1.1. Previously the SKV expressed by the way the same by stating that the representative shall answer for the accounting and payment of inter alia VAT for an *enkelt bolag*'s whole activity (*hela verksamhet*). See the SKV's *Handledning för mervärdesskatteförfarandet* (2007) p. 453.
[885] See sec. 1.3.

28 in the invoice to the customer Y, and A accounts in his MVD to the SKV,

- Output tax SEK 28 and
- Input tax SEK 20 and
- Tax to pay SEK 8.

- The customer Y, who is supposed to be a consumer in this case, will carry the VAT cost on the total value added of the ennobling of the product, i.e. SEK 28 which is included in the total price that Y is paying to A on SEK 140. The state has received the same amount, SEK 28, partly from X (SEK 20), partly from A (SEK 8). Collection of VAT shall normally function this way.

In *example 2* in section 3.3 I change the presuppositions from example 1 so that A is acting for the activity in *enkla bolag* or *partrederi* run by A and B, instead of for his own activity. The supplier of the product and the customer respectively in relation to A I now call S and T respectively. The question is what applies in this case concerning the right to deduct input tax and the liability to charge output tax. If my suggestions in section 6.2.2.4 are carried out, Chapter 6 section 2 first sentence ML has been specified as follows. The rule states in that case that *enkla bolaget*'s or *partrederiet*'s activity is comprised by the general rules in the ML, *if enkla bolag* and *partrederier* would have been tax subjects for VAT purposes and constituted tax liables according to the main rule in Chapter 1 section 2 first paragraph number 1 ML. Furthermore states in that case Chapter 6 section 2 first sentence ML that the partners shall be taxable persons themselves, and that the tax liability for them is determined with reference to Chapter 4 section 5 first paragraph BL so that the transaction criterion is connected to the partner acting for *bolaget* or *rederiet* – whereby the concept *andel* (share) is abolished from Chapter 6 section 2 first sentence ML. With these specifications of Chapter 6 section 2 first sentence ML applies the following regarding the right to deduct input tax on the acquisition from S and the liability to charge output tax on the sale to T, if A on *enkla bolaget*'s account alone makes the agreements with S and T. A is in that case solely deduction entitled according to Chapter 8 section 3 first paragraph ML concerning the acquisition from S om *enkla bolaget*'s account, and solely tax liable concerning the sale on *enkla bolaget*'s account of the product to T. The situation is the same for VAT purposes as in example 1.

If my suggestion in section 6.2.2.4 to abolish the concept *andel* from Chapter 6 section 2 first sentence ML is not made, and the tax liability neither is connected by the transaction (supply) concept to the partner in *enkla bolaget* or *partrederiet* acting for *bolaget* or *rederiet*, it leads to the following.

The liability of S to account and pay output tax of SEK 20 on the price of the product (SEK 80) is not affected. S shall thus account output tax in his MVD to the SKV: Output tax, SEK 20.

S is charging the VAT of SEK 20 in an invoice to A, and can do so according to Chapter 11 section 1 first paragraph ML because A is another taxable person. A is however according to the present wording of Chapter 6 section 2 first sentence ML *tax liable in relation to his share in* bolaget *or* rederiet. A's share (*andel*) is 50 per cent and B's share is 50 per cent. This means that A and B respectively have a right, materially according to the main rule Chapter 8 section 3 first paragraph ML, to deduct 50 per cent each of the VAT amount SEK 20. A is tax liable according to Chapter 6 section 2 first sentence ML in his capacity of partner in *bolaget*, and deduction entitled materially according to the main rule Chapter 8 section 3 first paragraph ML. The same applies to the partner B. The two partners are tax liable and deduction entitled in relationship to their shares (*andelar*) in *bolaget*, i.e. for 50 per cent each regarding the VAT amount SEK 20. In a formal respect falls however SEK 10 outside the two partners' respective MVD. A can according to Chapter 8 section 5 ML prove his right of deduction for the SEK 10, which he materially has the right to deduct by virtue of a VAT carrying documentation according to Chapter 11 ML received from S. On the other hand has B no such documentation, and cannot prove formally his material right to deduct his 50 per cent, i.e. SEK 10. A's cost becomes in this case SEK 90 (100 – 10). At the sale to T sets A – under the assumption of the same mark-up as in example 1 (40 per cent) – a price on the product of SEK 126 excluding VAT (1,4 x 90). The output tax is SEK 31 and 50 *öre* (pence) [0,25 x 126], which is rounded into SEK 32 kr.[886] A charges in the invoice to T SEK 32 output tax (on the price SEK 126). A shall account in his MVD output tax equal to his share (50 per cent), i.e. SEK 16, and B shall account output tax equal to his share (50 per cent), i.e. SEK 16. In this case account A and B in their respective MVD to the SKV according to the following:

A's MVD,
- Output tax SEK 16 and
- Input tax SEK 10 and
- Tax to pay SEK 6;

B's MVD,

[886] See the SKV's *Handledning för mervärdesskatt 2012* Part 1 p. 615, where it is stated that if rounding to whole SEK is applied at invoicing may that be made on the tax amount under the provision that *öretal* (pence) equal to 50 ore more are raised to the nearest higher SEK and *öretal* below 50 are decreased to nearest lower SEK.

- Output tax SEK 16 and
- Input tax SEK 0 and
- Tax to pay SEK 16.

The customer T, which still is assumed being a consumer, pays to A a price of SEK 158 (126 + 32), i.e. SEK 18 more than in example 1. The price will be higher for the consumer depending on cumulative effects caused by a formal limitation of a materially equal situation compared to example 1. If *enkla bolaget* or *partrederiet* had been a tax subject for VAT purposes, would deduction have been possible to make in *bolaget*'s or *rederiet*'s MVD in the same way as concerning A, when he is acting for his own activity in example 1. Now is the competition distorted if T disregard A as supplier, depending on the raise of the rice caused only by A and B sharing the tax liability and the right of deduction with an accompanying formal limitation of the right of deduction. That limitation of SEK 10 leads thus to a raise of the price of SEK 18 with respect of the assumed mark-up of 40 per cent by A.[887]

To avoid the described cumulative effect and the emergence of the distortion of competition must in my opinion in the present case the following be stated by an amendment in the representative rule and in Chapter 8 section 5 ML and Chapter 11 ML. A partner who is tax liable formally may exercise right of deduction which materially exists by him, but which otherwise would be lost formally. Such a loss of right of deduction on formal grounds is caused by the present partner not being the partner who has received the VAT carrying documentation from the supplier of the product or the service to *enkla bolaget* or *partrederiet*. If the mentioned amendments are not made, will the effect furthermore be that the state collects VAT of SEK 42 (20 + 6 + 16), instead of SEK 28 as in example 1, despite that the material provisions for VAT purposes are the same in the two examples concerning the ennobling of the product. It is only the formal presuppositions which are different in example 2. Therefore should they under the present provisions be completed by such an amendment that I suggest. The problem is however also that it is A who receives the amount equal to the whole output tax on the sale to T and that it is A who is paying the whole charged input tax amount to S. B shall share the tax liability and the right of deduction with A. Since the cash flows in relation to the supplier S and the customer T respectively goes via the cash register etc. by A, must A transfer SEK 14 (50 per cent of SEK 28) to B, so that B can pay his part of the output tax to the state. B must also transfer to A the part of the input tax that B receives from the state, i.e. SEK 10 (50 per cent of 20), so that A receives an amount equal to the whole of the by S charged input tax that A has paid. The big problem is in my opinion to accomplish amend-

[887] 10 x 1,4=14; 0,25 x 14=3,5; 14 + 3,5 + (rounding to whole SEK) 0,5=18.

ments in the representative rule and in Chapter 11 ML for the drawing up of documentation between the partners so that these transfers are also regarded. That becomes above all hard if the number of partners in *enkla bolaget* or *partrederiet* is high. By the way there is a so called lockage rule regarding the input tax within real groups.[888] However is that order not to any guidance in the present case. It concerns namely the relationship that a tax free transaction is made within such a group, whereby that group company's VAT expenses under certain circumstances may be deducted according to the lockage rule by a tax liable company within the group.

The present example gives in my opinion additional support for the abolishment of *andel* (share) from Chapter 6 section 2 first sentence ML. The tax liability – and thereby the right of deduction – should not be divided in that way between the partners of an *enkelt bolag* or *partrederi*. They should instead – in the manner that I am suggesting in section 6.2.2.4 – be imposed the tax liability in accordance with Chapter 4 section 5 first sentence BL concerning their respective transactions – supplies – in relationship to suppliers and purchases from customers on *bolaget*'s or *rederiet*'s account. It is a better solution than introducing such an amendment into the representative rule and into Chapter 8 section 5 and Chapter 11 ML as recently mentioned. Amendments lead namely probably not to an effective collection or to a simplified control, if the number of partners in *bolaget* or *rederiet* is high. By the tax liability for partners in *enkla bolag* and *partrederier* according to Chapter 6 section 2 first sentence ML being determined by a reference to Chapter 4 section 5 first paragraph BL is the concept supply and the tax liability connected to the partner who is acting on account of *bolaget* or *rederiet*. Thereby it will be unnecessary to make the mentioned completion of the formal rules in Chapter 8 section 5 and Chapter 11 ML.

6.4.3 Hypothetical cases where internal transactions may exist between the partners in *enkla bolaget* or *partrederiet*

EDM (Case C-77/01) means that any supply will not arise for division between the partners in accordance with the agreement on the present *enkla bolaget*. A supply between two partners occur first if an amount from one partner to another corresponds to an extra work – consideration – in excess to the agreement.[889] The SKV notes also with reference to *EDM* that work made in accordance with a consortium agreement does not constitute any transaction of goods or services for consideration (supply). Instead it is requested for supply that a member does more

[888] See Ch. 8 sec. 4 first para. no. 5 and second para. ML and the SKV's *Handledning för mervärdesskatt 2012* Part 1 pp. 497 and 498 and the SKV's *Handledning för mervärdesskatt 2012* Part 2 p. 899.
[889] See sec. 4.3.

than the work lying with him according to the agreement.[890] By the way is an agreement between the partners in *enkla bolaget* on profit sharing also considered having validity for income tax purposes. *Enkla bolaget* is not taxed for income, but the income is instead taxed by the partners in relation to their parts of the activity.[891] If the partners in an *enkelt bolag* or *partrederi* only divide costs and incomes, profit and loss, between each other in accordance with the company agreement, emerge thus not any taxation consequences neither for VAT nor income tax purposes.

I assume that A and B have one economic activity each and that they are active as engineers. I also assume that they co-operate in an *enkelt bolag* by making measuring technical services. I assume that they both are working as consultants and that it is not a matter of providing such building services which would cause so called reverse tax liability by the customer.[892] This means that taxable supplies of the services are assumed causing tax liability for the supplier, i.e. that he will become liable to account output tax. The agreement is assumed meaning that A and B shall co-operate in an *enkelt bolag* by jointly carrying out economic activity consisting of the performance of measuring technical services. Thereby means the co-operation agreement a mutual cost and income division between A and B concerning *enkla bolaget*'s activity. Thereby A and B have a common economic activity. A and B apply jointly by the SKV for A to be representative for accounting and payment of the VAT in *enkla bolaget*'s activity. The SKV stipulates the following for such an application: The partners shall jointly sign the application (form SKV 5711) on one of them administrating the accounting and payment of the VAT in *enkla bolaget* (or *partrederiet*) and the representative shall – in addition to the application – file a tax and fee notice to the SKV regarding the activity that *bolaget* (or *rederiet*) is carrying out.[893]

Enkla bolaget does not constitute a legal entity, but A and B are carrying out jointly a particular economic activity which is distinguished from their other activities, and an agreement on *enkelt bolag* in VAT respect exists according to the HFD's interpretation of *EDM* in RÅ

[890] See the SKV's *Handledning för mervärdesskatt 2012* Part 1 p. 203.
[891] See the SKV's *Handledning för beskattning av inkomst vid 2012 års taxering* Part 3 p. 1210 and SOU 2002:35 (*Ny handelsbolagsbeskattning*) p. 150. SOU 2002:35 treated suggestions on a changed income taxation of *handelsbolag* (partnerships), where the choice stood between treating them as *enkla bolag* or tax subjects, and the investigation proposed the latter but any law bill has never been made. See SOU 2002:35 pp. 150 and 151. See also Mattsson 1974, p. 18, Lodin et al. 2011, p. 514 and Kellgren 2008, p. 698.
[892] See Ch. 1 sec. 2 first para. no. 4 b and second para. ML.
[893] See the SKV's *Handledning för mervärdesskatt 2011* Part 1 p. 201.

2006 not. 90 (5 Jun. 2006) and RÅ 2009 not. 172 (18 Nov. 2009).[894] From a transaction perspective means according to *EDM* transfers of utilities between the partners in excess to the company agreement that transactions (supplies) are made between them as on any market place at all.[895]

Concerning the partners' external supplies and acquisitions I assume the following. A has purchased a product – e.g. a measuring instrument – from the supplier S for SEK 10,000 including VAT of SEK 2,000, and lends it to B for use in *enkla bolaget*'s activity in accordance with the company agreement. I also assume that B is getting an income of SEK 20,000 including VAT of SEK 4,000 for taxable transaction in the form of measuring services to *enkla bolaget*'s customer T. I assume for simplicity that the mentioned acquisition of a product and supply of a service[896] in the form of hiring out of a product are made in the same accounting period. I also assume that A on account of *enkla bolaget* has rendered the customer T consultant services of SEK 15,000 including VAT of SEK 3,000 under the same accounting period. Then shall A in an MVD (with 662-no.) on account of *enkla bolaget*'s activity account taxable supply of SEK 28,000 (16 000 + 12 000) and output and input tax and tax to pay as follows:

- Output tax SEK 7,000 kr and
- Input tax SEK 2,000 kr and
- Tax to pay SEK 5,000.

Concerning the question on internal transactions between A and B I assume the following. B is using the measuring instrument also in his own activity, but does not leave any consideration to A and the cost for that usage is assumed to be SEK 1,000 for A. A makes then a supply in form of hiring out of a product to B. That transfer of utility – the supply – constitutes an extra work in excess to the co-operation agreement and is not comprised by the agreement on *enkelt bolag* in VAT respect. The supply's character is taxable, since the hiring out of a measuring instrument (a product) constitutes a supply of a service which is not comprised by any of the exemptions from taxation in Chapter 3 ML and an in principle general taxation applies to supply of goods or services.[897] A supply in form of withdrawal exists according to the main rule on withdrawal of services.[898] In case of supply in form of withdrawal taxation is

[894] See sec. 6.2.1.3.
[895] See also sec. 4.3, where it is also noted that such an interpretation of *EDM* (C-77/01) is stated in van Doesum 2009, p. 303.
[896] See Ch. 2 sec. 1 third para. no. 1 ML.
[897] See Ch. 3 sec. 1 first para. ML.
[898] See Ch. 2 sec. 1 third para. no. 2 and sec. 5 first para. no. 1 ML.

brought up I disregard cases regarding gift of goods of lesser value or test samples and use of services of insignificant value.[899]

After a verdict in the CJEU[900] were the general withdrawal rules in the ML altered,[901] so that withdrawal according to the ML normally is constituted of such a supply for which a product or a service is required without consideration being left for the utility, i.e. a rendering free of charge. Due to the withdrawal shall A in his own MVD account output tax (according to Chapter 7 section 2 first paragraph and section 3 no. 2 b ML) of SEK 250 (SEK 1,000 x 25 per cent), which equals VAT according to general tax rate of 25 per cent in Chapter 7 section 1 first paragraph ML. A shall thus

- due to the purchase and due to the on account of *enkla bolaget* made measuring and consultant services still account in an MVD (with 662-no.) for *enkla bolaget*'s activity, tax to pay of SEK 5,000, and

- furthermore in his own MVD due to withdrawal account output tax of SEK 250.

I also assume that the presuppositions are altered insofar as B is partly leaving a contribution of SEK 500 to A for his purchase of the measuring instrument for *enkla bolaget*'s activity, partly leaving a consideration for the hiring of the measuring instrument in B's own activity. In the previous respect it is a matter of cost sharing in accordance with the co-operation agreement regarding *enkla bolaget* and any taxation consequences will not arise. In the latter respect it is instead a matter of A receiving a consideration for the extra work in form of hiring out of the measuring instrument to B for use in his own activity. A shall account output tax of SEK 125 (SEK 500 x 25 per cent) in his own MVD as for an ordinary taxable supply of service, i.e. in the same way as for such a supply to his own customer Y. Although that supply is made for an under price in relationship to the cost to make the service, arises not any withdrawal situation for VAT purposes. Withdrawal taxation is no longer made for supplies of goods or services to under pricing. *Hotel Scandic Gåsabäck* (Case C-412/03) namely means that it is sufficient with the subjective value of an actual amount being paid for a product or a service, for withdrawal taxation not being brought up according to the ML. To not being considered a rendering free of charge and withdrawal it is according to the CJEU sufficient that the consideration can be ca-

[899] Such cases do not lead to withdrawal according to Ch. 2 sec. 2 second para. and sec. 5 second para. ML.
[900] *Hotel Scandic Gåsabäck* (C-412/03).
[901] See SFS 2007:1376.

pable of *being expressed in money*. The CJEU considers that the risk of actual but merely symbolic considerations being applied may be resolved by Sweden in that case asking in accordance with article 27 of the Sixth Directive for permission to introduce rules for the purpose of preventing tax evasion or tax avoidance.[902] A shall under these circumstances thus

- still for *enkla bolaget* account in an MVD (with 662-no.), tax to pay of SEK 5,000, but

- in his own MVD due to the hiring out only account output tax of SEK 125.

In this situation may B deduct the VAT amount SEK 125 as input tax in his own MVD, if B receives a VAT carrying documentation from A, which normally shall fulfil the content demands for invoice in Chapter 11 section 8 ML. Such an invoice functions as documentation for the accounting of output tax in A's own MVD and as documentation for the accounting of input tax in B's own MVD. For B the VAT situation will be the same as if B would have hired the measuring instrument directly from S. A and B shall thus openly account output tax of SEK 125 and input tax of SEK 125 respectively regarding the extra work which constitutes taxable supply. That shall be done even if it becomes a zero-sum game against the state to do the open accounting of the supply and the acquisition within *enkla bolaget*.

In the situation with under pricing of the hiring out of the measuring instrument from A to B's own activity can instead of withdrawal so called revaluation (*omvärdering*) be brought up regarding the consideration,[903] i.e. regarding the taxation base.[904] That provides however

- that the consideration is lower than a market value determined in accordance with Chapter 1 section 9 ML,

- that A and B are considered allied to each other,

- that the purchaser B has not full deduction or reimbursement right for input tax in his activity and

- that A cannot make it plausible that the consideration is market conditioned.

[902] See para:s 21, 25 and 26 in *Hotel Scandic Gåsabäck* (C-412/03). Art. 27 of the Sixth Directive has been replaced by art. 395 of the VAT Directive (2006/112).
[903] See prop. 2007/08:25 pp. 117 and 122, where the expression revaluation (*omvärdering*) is used for the context.
[904] See Ch. 7 sec. 3 a ML.

The rules on revaluation of consideration between allied parties at under or over pricing were introduced into the ML[905] by virtue of article 80 of the VAT Directive (2006/112).[906] The taxation base is determined by the consideration *at another supply than withdrawal* (*vid annan omsättning än uttag*).[907] The revaluation rules in the ML are independent and do not present an alternative to the withdrawal rules. The purpose of the revaluation rules is to work against tax avoidance where a taxable transaction is made between allied parties to a *low value*, where the purchaser is lacking right to full deduction of the VAT. At *ordinary supply* shall the taxation base under certain circumstances be revaluated to market value instead of the consideration that the vendor has received or shall receive for the supplied product or service.[908] A rendering free of charge constitutes thus a withdrawal situation and an under pricing at SEK 0. To be able to be a matter of a revaluation situation – and not withdrawal – must A receive at least a symbolic amount for the extra work to B. I assume that B has full deduction right for input tax, and therefore revaluation will not be applicable in the described under pricing situation. Under such circumstances will not revaluation be brought up, despite that A and B may be considered allied with each other – if not otherwise so due to the legal bound existing between them in form of the company agreement. If B on the other hand would make from taxation exempted transactions of goods or services, i.e. supplies which neither entail deduction nor reimbursement right for input tax, would the following have applied. A would have been forced to make it probable that the low consideration (SEK 500) was market conditioned, to avoid revaluation of the consideration.

I consider that it in the described situation exist control and evidence problems concerning the extra work that A makes to B, by either letting B use the measuring instrument in his own activity for free (the withdrawal situation) or against a price which under certain circumstances leads to revaluation at a market price. By lumping together taxable transactions with what is constituting profit sharing without taxation consequences between the partners arises a risk for them not being discovered. To reduce the risk that the application of the representative rule leads to taxable transactions thus disappearing in a control and evidence respect should the following legislative measures be made in the ML:

- A particular amendment should be inserted into the representative rule, where it is noted that representative for an *enkelt bolag*

[905] See Ch. 7 sec:s 3 a–3 d ML according to SFS 2007:1376.
[906] See prop. 2007/08:25 pp. 120 and 124.
[907] See Ch. 7 sec. 3 a with reference to inter alia sec. 3 no. 1 ML.
[908] See prop. 2007/08:25 p. 253.

or *partrederi* answer for making the other partners aware of the situation that – as in the present case study – an internal taxable transaction has occurred by them. This means that the representative is responsible for alerting about certain amounts not fully constituting profit sharing but taxation consequences between the partners.

- Such an amendment in the representative rule should be completed with a particular being introduced into Chapter 11 ML on drawing up transaction notes etc. between the partners in an *enkelt bolag* or *partrederi* which are comprised by Chapter 6 section 2 ML. Therein should be stipulated that the partners shall specify in such notes internal cash flow regarding its parts. That would mean stating in such notes how big part of such an internal amount that constitutes profit sharing and how big part is constituting internal supply in *enkla bolaget* or *partrederiet* and the VAT character of such a supply.

- In the completion of Chapter 11 ML should also be stated that it is lying with the partners to send copies of the recently mentioned documentation to the representative of *enkla bolaget*. With such a procedural solution will probably the possibility to apply the representative rule not be used by an indeed serious but large constellation of partners. Otherwise they might not be aware of the increased complexity a large number of partners mean for a correct application of the rule.

- The control which the SKV may exercise in accordance with paragraph 24 in *Rompelman* (Case 268/83) is also simplified by suggestions for amendments in the representative rule and completion of Chapter 11 ML. The risk is otherwise apparent in my opinion that the partners A and B see the consideration regarding the hiring out of the measuring instrument from A to B as a so called zero-sum game. This means that they, due to both being fully tax liable and deduction entitled in their own activities, regards it as an unnecessary procedure that A shall account output tax of SEK 125 in his own MVD and B deducting the equal amount as input tax in his own MVD. By the open accounting of the supply is A also avoiding to suffer from the relationship at control being erroneously perceived as a withdrawal situation, where he instead would account output tax of SEK 250.

- The partners A and B are liable according to Chapter 11 section 1 first paragraph M to issue invoices for the described internal supplies. However should a particular rule in Chapter 11 ML on transaction note etc. according to what I suggest mean an en-

hanced attention by the partners in the following respect. It is not possible to determine a lump sum, name it profit sharing and thereby disregard whether a part of such an amount equals an internal supply between them.

6.4.4 Subsidy or part of the contribution for the supply

I now assume that A or B as partner in *enkla bolaget* has an indirect relation to a person U. By that I mean that A or B are neither making a direct acquisition from nor a direct supply to U. Instead is U assumed to have such a direct relation to S or T. It could for example be a matter of B on account of *enkla bolaget* supplying the measuring services to the customer T, and that T co-operates with U or U in his turn is a customer to T. In both of the latter cases U has an interest of the measuring services being done. U can e.g. be a housing company, which hires T for measuring of areas in the accommodations for the purpose of updating contracts in that respect.

I assume that B on account of *enkla bolaget* charge T for a consideration of SEK 10,000 plus output tax SEK 2,500 to make a measuring service. However, it turns out that the measuring instrument must be completed with an application fro SEK 1,250 (price SEK 1,000 plus VAT SEK 250), for making the service possible. I assume that U sends a subsidy of SEK 1,250 to B, who on account of *enkla bolaget* purchases the application from S (who issues an invoice to B). This leads to the taxation base for *enkla bolaget* becoming SEK 11,000, since SEK 1,000 is also included into the consideration for the supply of the measuring service.[909] By consideration is namely meant all that the vendor has received or shall receive from the purchaser or from a third party, including such subsidies which are directly connected to the price of the product or the service.[910] B receives in the example such a subsidy from U. Thus shall A in the capacity of representative for *enkla bolaget* in an MVD (with 662-no.) account a taxation base of SEK 11,000 (10 000 + 1 000), for the supply of the measuring service to T, and output tax thereon and input tax, for the purchase of the application from S, and tax to pay as follows:

- Output tax SEK 2,750[911] and
- Input tax SEK 250 and
- Tax to pay SEK 2,500.

[909] See Ch. 7 sec. 3 c first para. ML.
[910] That the consideration also shall include what the vendor has received from third party was determined by alteration of Ch. 7 sec. 3 a ML on the 1st of January 2003, by SFS 2002:1004. By SFS 2007:1376 the previous Ch. 7 sec. 3 a ML got on the 1st of January 2008 instead the designation Ch. 7 sec. 3 c ML.
[911] 11 000 x 25 per cent=2 750.

If A is not regarding the subsidy from U as a part of the consideration for the measuring service to T and thus only would account output tax on the part of the consideration received from the customer T, i.e. SEK 2,500, would the state lose output tax of SEK 250 (2 750 – 2 500). In the stage S to B it will be SEK 0 to the state, i.e. S accounts output tax of SEK 250 and A deducts input tax of SEK 250 for *enkla bolaget*. In the stage B to T shall not SEK 250 in output tax disappear by T only paying SEK 2,500 in VAT, whereas an amount corresponding to SEK 250 in VAT is left by U to B as a part of U's subsidy to B. By VAT regarding the subsidy from U also being regarded at the determination of the taxation base, the situation will be the same as if B on account of *enkla bolaget* would have received a so called depending subsidy from the customer T. A depending subsidy is left for something in return and constitutes thus supply for VAT purposes. An independent subsidy – and thus not any supply – exists for VAT purposes according to the SKV if the giver is not going to have anything in return from the subsidy receiver.[912]

With respect of the present case study where the person U can be designated as external regarding the supply itself, but yet, by subsidy etc., indirectly affecting the taxation base, I suggest that an amendment should be inserted into the representative rule also in the present respect. Also in this case is the specification of the representative rule motivated by decreasing the risk of the application of the rule leading to taxable transactions disappearing in control and evidence respect. That risk may arise by the representative not receiving information from the other partners about the amounts they are receiving and which have to do with the activity of *enkla bolaget*. I suggest that the following specifying amendments should be made in the representative rule:

- The representative should be imposed to review the agreement relationships between another partner and customers and suppliers to *enkla bolaget*'s or *partrederiet*'s activity.

- In such an amendment should also be noted that it is lying with the partners in *bolaget* or *rederiet* to inform the representative about the existence of all agreements which – directly or indirectly - concern *bolaget*'s or *rederiet*'s activity.

6.4.5 Financer of purchase or new partner

I now assume that the partner B still is interested of on account of *enkla bolaget* acquiring the application to the measuring instrument which the supplier S has for sale for SEK 1,250 including VAT. B gets an offer from the person C to either borrow SEK 1,250 for purchase of the appli-

[912] See the SKV's *Handledning för mervärdesskatt 2012* Part 1 p. 142.

cation from S or let C be included in the common activity with A and B insofar as C contributes with SEK 1,250 to *enkla bolaget*. B makes on account of *enkla bolaget* the purchase of the application from S or I assume that C has a similar application and adds it as input goods into *enkla bolaget*.

A has in capacity of representative for *enkla bolaget* to determine whether C is a new partner in *bolaget*, i.e. whether the partners consist of A, B and C or whether C is only a lender and ordinary financer in relation to *enkla bolaget*, which in that case only has the partners A and B. A company according to the BL can exist even if neither the activity object nor the objective is economic.[913] Although the representative rule would be completed, as I mention above, with it regarding *enkelt bolag* which has economic activity and that each partner has the character taxable person,[914] can the number of partners have been expanded. It might have been done by A and B having agreed to C joining the co-operation and take part in profit or loss in the activity.[915] Such an expansion of the company agreement does not need to have been made expressly. It can have emerged by A's and B's implicit acting.[916] A must in such a case judge whether C is a new partner in *enkla bolaget* or an ordinary financer – lender – in relationship to *bolaget*.[917]

If C, with expressed or implicit acceptance from A and B, contributes with money, SEK 1,250, or as input goods adds the application as *enkla bolaget* needs for the measuring instrument, is C a new partner in *enkla bolaget* along with the original, A and B. If C is an ordinary private person, should in that case A report to the SKV that the representative rule shall be revoked, provided that my suggestion for a demand on each partner himself having the character of taxable person is carried out. With regard of civil law has *enkla bolaget* been expanded with one partner,[918] but he is a private person and should not *via* the representative rule be comprised by the VAT. It is namely not neutral in relationship to e.g. what is applying concerning shareholders and partners in limited companies and partnerships.[919] If C is a taxable person, should A report to the SKV that *enkla bolaget* has been expanded with one partner, C. If C on the other hand is only a lender in relation to B, who with a money loan on SEK 1,250 from C purchases the application to

[913] See sec. 6.2.2.3
[914] See sec. 6.2.2.4.
[915] See Mattsson 1974, p. 76.
[916] See sec. 6.2.2.3.
[917] See sec. 5.7.
[918] See Nial & Hemström 2008, pp. 405 and 406.
[919] See sec. 6.2.2.4.

the measuring instrument from S, it will not affect the representative registration.[920]

The representative A must thus have insight in the agreement relation between B and C, to be able to judge whether C on the one hand leaves a money contribution or input goods to *enkla bolaget* or on the other hand instead is leaving a money loan. A must thus get information from B concerning the agreement which he has entered into on account of *enkla bolaget* with C, to be able to judge whether a report shall be left to the SKV on the change of circumstances compared to what applied when A was appointed representative for *enkla bolaget* consisting of the partners A and B. I suggest therefore that the amendment, which I according to the nearest previous section suggest should be inserted into the representative rule, also should contain the following. The partners in an *enkelt bolag* or *partrederi* which are listed in an original application on applying the representative rule should be imposed to inform the representative about written or oral agreements with external persons. That should apply if such agreements concern the question whether the company agreement remains or if a new agreement on *enkelt bolag* exists, where the number of partners has been changed.

By the suggested amendment in the representative rule should thus the representative have a reasonable possibility to fulfil the demands on reporting altered circumstances to the SKV.[921] Furthermore would it also simplify for the SKV to seek the right number of partners for *enkla bolaget*'s VAT if the representative would not fulfil the accounting.

6.4.6 The representative rule and the relations to abroad

I suggest according to the above mentioned certain clarifications in Chapter 6 section 2 first sentence ML with regard of the acquisitions of goods from abroad. They mean in the first place that an ordinary private person also in the capacity of partner in an *enkelt bolag* or *partrederi* should be tax liable when he is making an import of goods for *bolaget* or *rederiet*. The clarifications should also mean that partner becomes tax liable for intra-Union acquisitions of goods on account of *bolaget* or *rederiet* in the cases where the concept taxable person is used for the purchaser regarding what is according to Chapter 2 a ML constituting such acquisitions. I suggest therefore that it should be clarified in Chapter 6 section 2 first sentence ML that taxable person according to Chapter 4 section 1 ML, which corresponds to the main rule for taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112), comprises also taxable person in Chapter 2 a ML.[922]

[920] See Nial & Hemström 2008, p. 416.
[921] See Ch. 7 sec. 4 SFL.
[922] See sec. 6.2.2.4.

In the latter respect should also Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL) be completed, so that intra-Union acquisitions of goods in cases with an appointed representative for the VAT accounting in the activity by an *enkelt bolag* or *partrederi* can be easily controlled. For control reasons should it thus in my opinion be stated by an amendment in the representative rule that the representative shall make intra-Union acquisitions of goods for *bolaget* or *rederiet* by invoking the given 662-number. That should simplify for the vendor in the other involved EU country to judge if he shall charge his country's VAT on the supply. He can turn to his own country's tax authority, to get information from the so called VIES system whether the VAT registration number – VAT-number – which the Swedish purchaser is invoking is correct.[923] The vendor of a product in the other involved EU country notes the purchaser's Swedish VAT-number and does not have to charge his country's VAT, since intra-Union acquisition is considered taking place in Sweden.[924] If the vendor supplies services, he needs however only to prove that the purchaser constitutes a taxable person, for it being decided whether the place of supply of services is placed in the Member State where the supplier is established or in the Member State where the purchaser has established his business activity.[925] That problem should be from evidence and control respect satisfactory resolved in the present respect, if my suggestions for specifications of the representative rule according to section 6.2.2.4 are carried out. These suggestions would inter alia mean that the representative, like other partners in *enkla bolaget* or *partrederiet*, by himself shall have the character taxable person. By the way it has been stated that a certain over-confidence has existed in the efficiency with control of the EU trade by the VIES system,[926] which also motivates improvements in control respect.

The recently suggested amendment in the representative rule should also state – together with a corresponding amendment in Chapter 11 ML – that the representative shall issue invoices in connection with supply

[923] See the SKV's *Handledning för skatteförfarandet*, Ch. 7, p. 19 (www.skatteverket.se) and the SKV's *Handledning för mervärdesskatteförfarandet* (2007) pp. 66 and 138. VAT stands for *value added tax*, and the Swedish abbreviation of *mervärdesskatt* is *moms*. VIES, *VAT Information Exchange System*, is the computer based system for exchange of VAT information between tax authorities in the EU's Member States. The VAT number, which the system is using, is identical with the complete registration number for VAT, and in Sweden it is the personal or organization number with the land code SE in the beginning and ended with the additional number 01. If an *enkelt bolag* or *partrederi* has been given the organization number 662123-1234, the VAT no. will be: SE662123123401.
[924] See art. 41 first para. of the VAT Directive (2006/112).
[925] See para. 31 in *Kollektivavtalsstiftelsen TRR Trygghetsrådet* (C-291/07).
[926] See Aujean 2011, p. 213.

of goods to another EU Member State which is made in *enkla bolaget*'s or *partrederiet*'s activity. Since the representative is registered in the VAT register, is he also liable to submit to the SKV a recapitulative statement over deliveries of goods to other EU countries.[927] The rules on recapitulative statements are to be found in articles 262–271 of the VAT Directive (2006/112), and they were incorporated into the Swedish tax legislation at Sweden's EU accession to make possible the control of VAT at the trade of goods with other EU countries.[928] By my suggestion will the representative not only be liable to due to his VAT registration on account of *enkla bolaget* or *partrederiet* leaving MVD (with 662-no.) and recapitulative statement when deliveries of goods are made for *bolaget* or *rederiet* to other EU countries. He will also be imposed to issue the invoices for *bolaget* or *rederiet*. It should simplify control with assistance of the VIES system by purchasers in other EU countries which are dealing with *enkla bolaget* or *partrederiet*, and shall judge whether they are tax liable for so called reverse tax liability there because of the purchase of goods from Sweden. It is also of interest that the control of *enkla bolagen*s' and *partrederierna*s' trade with the EU countries functions due to the existence of a connection between the information in the MVD and the system Intrastat in that respect.[929]

6.4.7 Conclusions

According to Chapter 6 section 2 first sentence ML is the tax liability divided between the partners of an *enkelt bolag* or *partrederi* after their respective *andel* (share) in *bolaget* or *rederiet*. Thereby leads the formal demands in Chapter 8 section 5 and Chapter 11 ML for exercise of the deduction right to emergence of cumulative effects to the pricing of *bolaget*'s or *rederiet*'s supplies. They arise due to this right only lies with the partner which on account of *bolaget* or *rederiet* has received a VAT carrying documentation from a supplier of a product or a service. A solution of the problem by amendment in the representative rule and in Chapter 8 section 5 and Chapter 11 ML will be hard to apply if the number of partners is high. It gives probably not an efficient collection or a simplified control.[930] Instead I consider that the situation gives my further support for the conception that *andel* should be abolished from Chapter 6 section 2 first sentence ML. The concept should be replaced with the tax liability being imposed each partner by connecting the prerequisite supply to the partner which is acting for *bolaget* or *rederiet*. Therefore I suggest that the partner's respective tax liability shall be determined by reference to Chapter 4 section 5 first paragraph BL.[931]

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[927] See Ch. 35 sec. 2 first para. no. 1 SFL.
[928] See the SKV's *Handledning för skatteförfarandet*, sec. 35.1, p. 1 (www.skatteverket.se).
[929] See the SKV's *Handledning för mervärdesskatt 2012* Part 1 p. 31.
[930] See sec. 6.4.2.
[931] See sec:s 6.2.2.4 and 6.4.2.

Taxable transactions are risking to disappear in control and evidence respect at the application of Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL) in the following situation. That is when internal supplies emerge between partners in an *enkelt bolag* or *partrederi* due to that consideration for extra work in excess to the company agreement has been received.[932] That constitutes a supply according to *EDM* (Case C-77/01),[933] but it may be lumped together with what is according to the company agreement constituting profit sharing without taxation consequences between the partners.[934] To decrease that risk should in my opinion the following measures be taken in the ML. A particular amendment should be inserted into the representative rule on the representative making the other partners aware of the described situation. Thereby shall the risk decrease for a taxable supply emerged by them being considered profit sharing without taxation consequences internally between the partners. The amendment should be completed with a particular rule in Chapter 11 ML about transaction notes etc. being issued between the partners on cash flows within *enkla bolaget* or *partrederiet*. The completion should also impose the partners to leave copies of such documentation to the representative.[935]

For control and evidence reasons should an amendment also be inserted into the representative rule meaning that the representative shall review the agreement circumstances between another partner and customers and suppliers to the activity of *enkla bolaget* or *partrederiet*. That should be combined with a mutual liability for the partners to inform the representative. Such an amendment is in my opinion necessary, since it may exist subsidies etc. from external persons affecting the taxation base concerning output tax which the representative shall account for *bolaget* or *rederiet*. Without the amendment there is a risk that such amounts will left beside the taxation base.[936] The representative shall decide if a new partner is joining *bolaget* or *rederiet* or whether it is only a matter of financing an acquisition for *bolaget or rederiet*. Therefore should the amendment also impose the partners to inform the representative of written or oral agreements with external persons, if they concern such issues. Thereby should the representative have a reasonable possibility to report altered circumstances to the SKV. It is also a provision for the SKV being able to seek the right number of partners for *enkla bolaget*'s VAT if the representative would not fulfil the accounting.[937]

[932] See sec. 6.4.3.
[933] See sec:s 4.3 and 6.4.3.
[934] See sec. 6.4.3.
[935] See sec. 6.4.3.
[936] See sec. 6.4.4.
[937] See sec. 6.4.5.

The need of specifying amendments is also relevant regarding Chapter 6 section 2 second paragraph ML (with reference to Chapter 5 section 2 SFL), where it concerns the relationship to abroad and more precisely to other EU countries. To simplify control of accounting regarding *enkla bolaget*'s or *partrederiet*'s trade of goods with other EU countries, should an amendment of the representative rule state that the representative shall make intra-Union acquisitions of goods for *bolaget* or *rederiet* by invoking the given 662-number. That should simplify for the vendor in the other involved EU country to judge whether he shall charge his country's VAT on the supply, by turning to his country's tax authority to control that the VAT registration number – VAT-number – invoked by the Swedish purchaser is correct. A purchaser in another EU country shall have the opportunity to control – via the VIES system – whether he is comprised by reverse tax liability because of the purchase of goods from Sweden. Therefore should it in the amendment also be noted – together with a corresponding amendment in Chapter 11 ML – that it is the representative who shall issue invoices in connection with supplies of goods to another EU country made in the activity of *enkla bolaget* or *partrederiet*.[938]

The review in sections 6.4.1–6.4.6 displays a vast need of completing Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL). The information that should be available by the representative for the SKV's control that he is taking care of the accounting and payment of VAT for *enkla bolaget* or *partrederiet* is thereby vast. The vast need of amendments for the application of the representative rule leads in its turn to the following needs. There will also be necessary to introduce an amendment that it should be mandatory in cases where representative is appointed according to Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL) that he is also answering for a common book-keeping for the partners according to Chapter 4 section 5 BFL. The representative is in that case not only responsible to keep documentation for VAT control available by him according to Chapter 5 section 2 second paragraph SFL.

The scope of the need of amendments in the representative rule, to accomplish an efficient collection of the VAT in *enkla bolag* and *partrederier* by Chapter 6 section 2 second paragraph ML, shows in my opinion that such specifying amendments indeed are benefitting that this will be achieved, but at the expense of the individual's legal certainty. The individual's demand on foreseeable decisions regarding the material taxation rule is not benefitted by such vast amendments in the representative rule. Instead I consider that the principle of legality in the field

[938] See sec. 6.4.6.

of taxation, and the thereof following demand for an expressed support in law for taxation measures, means that Chapter 6 section 2 second sentence should be abolished from ML.[939] A consequence of this is that Chapter 5 section 2 SFL should be limited to only regard employee withholding taxes, employer's contribution (for national social security purposes) and excise duty, not VAT. Although it would be a matter of *bolag* or *rederier* with few partners, the representative rule with the suggested amendments in the rule becomes far too complex for an in that respect legally certain judgement of the taxation situation. Therefore should the aim to accomplish efficiency of collection stand back for the legal certainty aspects,[940] and the collection be administrated by the tax liables themselves, i.e. by the partners according to Chapter 6 section 2 first sentence ML.

An alternative would be to follow the Finnish solution concerning *partrederier* and *sammanslutningar*, which are not legal entities but – as described in section 4.4 – treated as tax subjects for VAT purposes according to section 2 first paragraph and section 13 FML. This would mean that both first and second sentences would be abolished from Chapter 6 section 2 ML. Instead may in such case Chapter 6 section 2 ML state in a clarifying respect that *enkla bolag* and *partrederier* as tax subjects in for VAT purposes are comprised by the general rules in the ML on tax liability.[941] It would also mean that the partners in such *bolag* or *rederier* no longer would be tax liable in that capacity. Instead it would be possible to make them joint responsible for the payment of the VAT in such a particular tax subject for VAT purposes. Such a joint responsibility for the partners could be introduced by an expansion in that sense of Chapter 59 sections 14 and 14 SFL by virtue of article 205 of the VAT Directive (2006/112).[942] Above all the regulation of the VAT for *sammanslutningar* according to sections 13 and 188 FML could thus be of a comparative guidance for a solution where *enkla bolag* and *partrederier* could be tax subjects for VAT purposes.[943]However should a legislative measure in the ML in pursuance of the FML's solution be made first when it is clarified on EU level whether a non-legal entity can be considered constituting taxable person according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112). I make that judgement with respect of not having come to any definitive conclusion in the matter.[944]

[939] See sec:s 2.7 and 2.8 and also sec:s 1.2.2, 1.2.3, 1.3 and 2.2.
[940] See sec. 2.8.
[941] See sec. 6.2.1.4.
[942] See sec:s 1.1.3 and 6.2.1.4.
[943] See sec:s 4.4 and 4.5.
[944] See sec. 6.2.1.4.

6.5 ESPECIALLY ABOUT THE TAX OBJECT

The general tax rate for taxable transactions of goods or services is 25 per cent, according to Chapter 7 section 1 first paragraph ML. According to Chapter 7 section 1 second and third paragraphs ML may in certain cases reduced VAT rates of 12 and 6 per cent be used. The Swedish rules are in accordance with the rules in the VAT Directive (2006/112) on that the EU Member States shall apply a normal tax rate and may apply one or two reduced VAT rates, according to articles 96 and 98(1) of the VAT Directive (2006/112).[945] I have found one rule in the ML which independent of the existence of the representative rule means that the enterprise form *enkelt bolag* can affect the determination of the tax object and thereby the tax rate issue.[946] That is Chapter 7 section 1 third paragraph number 8 ML, which – in translation – reads:

> *The tax shall be charged with 6 per cent of the taxation base for letting or transfer of rights comprised by sections 1, 4 or 5* lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk, URL *[i.e. the Copyright Act], however not regarding photographs, advertising products, system and programs for automatic data processing or film, videodisc or other similar recording which regards information*.

The problem is that the rule only notes sections 1, 4 and 5 URL. If two or more originators have co-operated to create a work so that the individual contributions are not unique and thereby not independent works according to section 1 URL, they have joint copyright regarding the finished work according to section 6 URL.[947] Examples of such joint works are film, television programmes and jointly written textbooks or a musical work emerged in a jam session.[948] I have previously mentioned film making and similar as examples on activities where *enkla bolagen* can exist as enterprise form.[949] They can also occur in e.g. the recently mentioned contexts. The URL has been subject of comprehensive alterations and amendments in connection to the EU law.[950] However, I do not treat the present rule in the URL otherwise than regarding its functionality in Chapter 7 section 1 third paragraph number 8 ML and whether it is complying with the aim of the VAT being neutral. There is not any explanation in the preparatory work to the ML regarding why section 6 URL is not comprised by Chapter 7 section 1 third paragraph

[945] See sec. 2.4.1.3.
[946] See sec:s 2.5 and 6.1.
[947] See Bernitz et al. 2017, pp. 57 and 71.
[948] See Bernitz et al. 2017, p. 71.
[949] See sec. 1.1.1.
[950] E.g. in accordance with the so called Infosoc-directive (2001/29/EC). See Bernitz et al. 2017, pp. 21 and 32.

number 8.[951] The following is an example of it leading to lacking neutrality.

If e.g. a stage designer works with the set for a film and thereby creates an independent stage design work according to section 1 URL, is that service comprised by the reduced tax rate of 6 per cent according to Chapter 7 section 1 third paragraph number 8 ML.[952] If on the other hand an artistic work exists first when the film work is finished, the stage designer has copyright to the work (the film) jointly with several which have participated at the production of the joint work (the film). The stage designer's supply of his services is in that case comprised by the general tax rate 25 per cent according to Chapter 7 section 1 first paragraph ML.[953] Anyone who wants to use the film work must negotiate with all who has participated in creating it, and these – provided they are taxable persons – shall charge VAT for their supplies and with the tax rate applying for the supplies.[954] This means that if the one who shall use the film work is lacking right of deduction for input tax in his activity, emerges a non-competition neutral situation. It consists of the present constellation of film makers being disregarded by him due to the stage designer having to apply the general tax rate 25 per cent on the supply of his part of the film work. There is a risk of that if the film makers are addressing the state financed television, which is exempted from taxation in its production and broadcasting activity according to Chapter 3 section 20 ML.[955] If the stage designer and the others, instead of co-operating in the enterprise form *enkelt bolag*, forms a limited company or a partnership, they can let or transfer the rights to the film to the reduced tax rate 6 per cent. The limited company or the partnership is a legal person and the person which in such a case has created the film work, and the film company is comprised by section 1 URL.[956]

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[951] On the 1st of January 1997 was the changed made by SFS 1996:1327 meaning that copyrights are taxable in general, instead of as previously exempted from taxation. Any explanation was however not given to why sec. 6 URL was not noted in no. 4 – nowadays no. 8 – in the third para. of Ch. 7 sec. 1. It was only stated that the rule was transferred unchanged from the exemption in Ch. 3 sec. 11 no. 1 and that the transactions for which reduced tax rate was meant to be applied corresponded to those previously exempted from taxation [see prop. 1996/97:10 (*Mervärdesskatt inom kultur-, utbildnings- och idrottsområdet*) p. 56]. Neither in connection with the alterations in the GML in 1991 by SFS 1990:576, i.e. when – as mentioned in sec. 2.4.1.4 – the services were made taxable in general to be EU conform, was any explanation given to why sec:s 1, 4 and 5 URL, but not sec. 6 URL, were noted as copyrights comprised by exemption from taxation according to no. 7 in the instructions to sec. 8 GML (see prop. 1989/90:111 pp. 113 114 and 194).

[952] See Forssén 2001, pp. 224 and 225 and also Forssén 1998, p. 188.

[953] See Forssén 2001, p. 225 and also Forssén 1998, p. 188.

[954] See Forssén 2001, p. 225 and also Forssén 1998, pp. 188 and 189.

[955] Corresponds to art. 132(1)(q) of the VAT Directive (2006/112).

[956] See Forssén 2001, p. 225 and Forssén 1998, p. 189. Compare also the SKV's *Handledning för mervärdesskatt 2012* Part 2 p. 1036. There the SKV states that when artists

Of interest to this work is that if the stage designer and the other film makers in my example are using the co-operation form *enkelt bolag*, it is a case where the described non-neutral effect emerges. This depends on the one of the film makers who by his individual effort is not creating an independent work having to apply the general tax rate. The competitors in the sector, who on their part are co-operating with film making in a similar way, use the limited company or partnership form and thereby apply the reduced tax rate. The aim should be neutrality. There is lacking support in the VAT Directive (2006/112) for legal form leading to differences concerning the tax rate issue within the same sector in the present case.[957]

The present question regarding the tax object and the tax rate question in connection with joint works exists regardless that *enkla bolag* are treated in the representative rule, and therefore I treat it separately in this section. The review of the present particular question about the determination of the tax object and thereby of applicable tax rate shows that that determination is affected by whether the enterprise *form enkelt* bolag is used. However, the problem is not lying in the existence of the representative rule. Therefore will not the described lack of neutrality of the taxation be remedied in the present particular respect by Chapter 6 section 2 ML being reformulated, so that *enkla bolag* would constitute tax subjects as regarding the Finnish VAT law and the treatment of *sammanslutningarna*.[958] Instead the solution lies in that Chapter 7 section 1 third paragraph number 8 ML should be altered, so that the rule also comprises section 6 URL and joint works, if such a work would be created under the enterprise form *enkelt bolag* and in another company form would have been an independent work.

6.6 SUMMARY AND CONCLUSIONS

Concerning the question whether a non-legal entity can constitute taxable person according to the main rule article 9(1) first paragraph of the VAT Directive (2006/112) a literal and systematic interpretation of article 9(1) first and second paragraphs, article 10 and article 1(2) of the VAT Directive (2006/112) do not give any clear answer. That does neither the CJEU's case law or Swedish case law. The basic principles of article 1(2) of the VAT Directive (2006/112) for what is meant by VAT according to the EU law constitute however the presuppositions for an effective collection, and that principle is mentioned by the CJEU in *Gregg* (Case C-216/97) concerning the neutrality aspect on the VAT.

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have *set themselves on company*, e.g. when an orchestra carries out its activity in a limited company owned by the members, such companies use to be designated as artist companies.

[957] See sec. 2.8.

[958] See sec. 6.2.1.4.

There are in my opinion strong reasons to introduce a clarification in the VAT Directive (2006/112) on that an economic activity which is carried out independently by a legal figure which is constituting a non-legal entity shall be able to give that figure the character of taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112). An *enkelt bolag* is a legal figure which thereby could be comprised by the expression *den som* (compare "any person who") in the main rule article 9(1) first paragraph regarding who is constituting taxable person.[959]

It is in my opinion in conflict with the neutrality principle which inter alia is considered following by article 1(2) of the VAT Directive (2006/112) to exclude *enkla bolag* and *partrederier* from an ennobling chain of enterprises up to the consumer. That the CJEU in connection with the neutrality principle is mentioning the principle of efficiency of collection makes therefore in my opinion reason to make the *enkla bolagen* and *partrederierna* to tax subjects for VAT purposes. This provides that it is clarified in article 9(1) first paragraph of the VAT Directive (2006/112) that non-legal entities can constitute taxable persons. The latter provision is necessary for a reformulated Chapter 6 section 2 ML, which states that *enkla bolagen* and *partrederierna* can constitute tax subjects, being in compliance with the directive rule. That the neutrality thereby no longer would be distorted by the enterprise form *enkelt bolag* or *partrederi* being excluded from the main rule on who is a taxable person should benefit the for the Swedish VAT system overall aim with a cohesive VAT system. The alterations I am thus suggesting in the VAT Directive (2006/112) and the ML should mean such simplifying reasons which also entail foreseeable decisions and benefitting the law political aim with legally certain VAT.[960]

The aims neutrality and efficiency of collection constitute in my opinion strong reasons to introduce the clarification into article 9(1) first paragraph as a mandatory rule in the VAT Directive (2006/112). With regard of the formal demands on content of invoice according to the main rule article 226 of the VAT Directive (2006/112) should the suggestion be combined with a demand that a non-legal entity which constitutes taxable person should act in his own name.[961]

By *enkla bolag* and *partrederier* could be considered constituting tax subjects for VAT purposes, could the partners – instead of them being described as tax liable – be imposed a joint responsibility for the VAT in these *bolag* and *rederier*, by an expansion of such meaning of the

[959] See sec. 6.2.1.4.
[960] See sec:s 2.8 and 6.2.1.4.
[961] See sec. 6.2.1.4.

representative responsibility according to Chapter 59 sections 13 and 14 SFL. That could be done by virtue of article 205 of the VAT Directive (2006/112). The treatment of *enkla bolagen* and *partrederierna* in the ML according to my suggestions would constitute a correspondence to the treatment of *sammanslutningar* and *partrederier* in the FML.[962]

If the representative rule is retained, should the tax liability according to Chapter 6 section 2 first sentence ML be divided between the partners in an *enkelt bolag* or *partrederi*, by the prerequisite supply being connected to the partner acting for *bolaget* or *rederiet*. I suggest that the partners' respective tax liability according to Chapter 6 section 2 first sentence ML is determined with reference to Chapter 4 section 5 first paragraph BL, instead of to their respective *andel* (share) in *bolaget* or *rederiet*.[963]

That the division of the tax liability would continue to be connected to the partners shares' of *bolaget* or *rederiet* means the following for the right of deduction. The formal demands in Chapter 8 section 5 and Chapter 11 ML to exercise the right of deduction for input tax entails that from a neutrality respect undesired cumulative effects emerges in the pricing of *bolaget*'s or *rederiet*'s supplies.[964] That depends on that such right only lies with the partner which on account of *bolaget* or *rederiet* has received a VAT carrying documentation from a supplier of a product or a service. To resolve the problem by specifying amendments in the representative rule and in Chapter 8 section 5 and Chapter 11 ML becomes hard to apply if the number of partners is high, and leads probably not to an effective collection or simplified control.[965] Furthermore sho*uld delägare* (partner) in Chapter 6 section 2 first sentence ML be reserved for *partrederierna* and BL's concept *bolagsman* (partner) be used regarding *enkla bolagen*, since an *enkelt bolag*, opposite to a *partrederi*, does not have to consist of certain common property, but only of carrying out common activity. Concerning cases where the partners are foreign taxable persons (*utländska beskattningsbara personer*), should it also be clarified in the representative rule that it applies, provided that *bolaget*'s or *rederiet*'s activity is an economic activity. Thereby would it also in these cases be decisive for the question on belonging to the Swedish VAT system whether taxable or from taxation qualified exempted supplies of goods or services are made within the country (Sweden).[966]

[962] See sec. 6.2.1.4.
[963] See sec. 6.4.3.
[964] See sec:s 6.2.2.4, 6.4.3 and 6.4.7.
[965] See sec. 6.4.3.
[966] See sec. 6.2.2.4.

It is lacking an expressed demand in Chapter 6 section 2 ML on that the activity in an *enkelt bolag* or *partrederi* shall constitute an economic activity. The use of the expression *för verksamheten* (for the activity) in Chapter 5 section 2 first paragraph second sentence SFL shows also that *bolaget*'s or *rederiet*'s activity is not limited to an economic activity. The ML is also lacking a definition of its own of the concepts *enkla bolag* and *partrederier*. Thus is the civil law determining what is meant with the two legal figures also according to the representative rule. Above all regarding *enkla bolag*, which can exist without demand of activity constituting business being carried out, can thereby partners which are ordinary private persons be considered tax liable according to Chapter 6 section 2 first sentence ML due to that character itself. I consider thus that the wording of the representative rule is expanding the determination of who is comprised by the concept tax liability in the ML compared to what follows by the main rule of Chapter 1 section 1 first paragraph number 1. That is not in compliance with the VAT Directive (2006/112), since a private person is not comprised by the duration criterion for economic activity and thus not by the main rule of who is a taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112). Thus, it exists in my opinion a need to clarify the representative rule so that an ordinary private person cannot be given the character of tax liable according to the ML *via* Chapter 6 section 2 first sentence ML. It should be done by it being specified that Chapter 6 section 2 first sentence ML is regarding *enkla bolag* and *partrederier* with economic activity according to Chapter 4 section 1 ML *and* by it also being noted that the partners of such *bolag* and *rederier* shall themselves have the character taxable person.[967]

The invoicing liability's emergence according to Chapter 11 ML is indeed founded on the concepts *beskattningsbar person* (taxable person) and supply. However is not a partner in an *enkelt bolag* or *partrederi* who is tax liable for *bolaget*'s or *rederiet*'s activity according to the current mandatory rule in Chapter 6 section 2 first sentence ML comprised by the invoicing liability. The legal certainty demand on foreseeable decisions and control reasons mean that the same supply should lead to tax liability as well as liability to issue invoice according to the ML, regardless whether the supply is made by a partner regarding the activity of *enkla bolaget* or *partrederiet* or by anyone of them in the own activity beside *bolaget* or *rederiet*. Thus should the invoicing liability according to Chapter 11 section 1 ML be expanded to comprise partners which are tax liable according to Chapter 6 section 2 first sentence ML.[968]

[967] See sec. 6.2.2.4.
[968] See sec. 6.3.4.

At the application of Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL) are taxable supplies risking to disappear in control and evidence respect, when internal supplies emerge between partners in an *enkelt bolag* or *partrederi* due to consideration being received for extra work exceeding the company agreement. The latter constitutes a supply according to *EDM* (Case C-77/01), but it can in practice become lumped together with what is according to the company agreement constituting profit sharing without taxation consequences between the partners. Therefore should a particular amendment be inserted into the representative rule on the representative making the other partners aware of such a relationship. The amendment should furthermore be completed with a particular rule in Chapter 11 ML about that transaction notes etc. should be drawn up between the partners of cash flows within *enkla bolaget* or *partrederiet*. The partners should be imposed to leave copies of such documentation to the representative. The need of specifying amendments is also appearing in more contexts fro the representative rule, inter alia where the relationship to abroad and more precisely to other EU countries is concerned. I have mentioned a vast need of amendments in the representative rule, to accomplish an effective collection of the VAT in *enkla bolag* and *partrederier*. This means that although such amendments indeed benefit the control, it will be at the expense of the individual's legal certainty. Legal certainty demands on foreseeable decisions concerning the material taxation rule are not benefitted by such vast amendments of the representative rule. Thus demands the legal certainty including the legality principle in the field of taxation that Chapter 6 section 2 second sentence should be abolished from the ML and – as a consequence thereof – that Chapter 5 section 2 SFL is limited to apply only to employee withholding taxes, employer's contribution (for national social security purposes) and excise duty, not VAT. The representative rule with the concluded need of specifying amendments becomes, although it would in practice be a matter of *bolag* and *rederier* with few partners, far too complex for a legally certain taxation judgement. Thus should the aim of accomplishing efficiency of collection stand back for the legal certainty aspects, and the collection instead be administrated by the tax liables themselves, i.e. by the partners according to Chapter 6 section 2 first sentence ML.[969]

If the voluntary rule Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL) is retained, is my suggestion of a clarification concerning demand on economic activity not sufficient. With respect of *enkla bolaget* or *partrederiet* might have been formed only by foreign taxable persons (*utländska beskattningsbara personer*), should it also be noted in the rule that it is provided that taxable or from

[969] See sec:s 2.8 and 6.4.3.

taxation qualified exempted transactions of goods or services in the activity of *bolaget* or *rederiet* are made within the country. I consider however that the question shall be resolved in connection with another problem. That is about that the ML, opposite to the VAT Directive (2006/112), determines in Chapter 1 section 15 who is a foreign taxable person (*utländsk beskattningsbar person*) and lets it decide whether the purchaser of certain goods or services is tax liable instead of the one making the supply within the country.[970] In this part I rest by the clarification should mean that the possibility to register a representative for accounting of VAT in the activity of *enkla bolaget* or *partrederiet* is determined by whether supplies are made in Sweden. It should also be clarified in the representative rule that Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL) also comprises the concept taxable person (*beskattningsbar person*) in Chapter 5 section 4 ML regarding application of rules on placement of the supply of a service in certain cases.[971]

The present voluntary rule Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL) shall, in accordance with the purpose of the representative rule, simplify the collection of the VAT. It is supposed to be the case by the representative accounting the VAT, instead of it being accounted by each partner himself in *enkla bolagen* and *partrederierna*. The representative is also expected to uphold the SKV's possibility of control, since the representative is imposed according to Chapter 5 section 2 second paragraph SFL to keep available by him documentation for control of the accounting. That the representative is administrating the VAT accounting in *bolaget* or *rederiet* should typically from a control point of view be considered benefitting the aim of efficiency of collection. From a control point of view should in my opinion furthermore be noted in Chapter 11 section 1 ML that also a representative according to Chapter 6 section 2 second sentence ML is comprised by the invoicing liability according to the ML.[972]

The alternative to let the partners themselves handle the collection of the VAT in the activity of *enkla bolaget* or *partrederiet* is to follow the Finnish solution concerning *partrederier* and *sammanslutningar*. These

[970] The Ministry of Finance suggested in the memorandum of 2012-11-23 inter alia that the determination of foreign entrepreneur (*utländsk företagare*) in Ch. 1 sec. 15 ML would be altered into determination of foreign taxable person (*utländsk beskattningsbar person*), which was made by SFS 2013:368, but the question about the possibility to register a representative according to Ch. 6 sec. 2 second sen. ML for *enkla bolag* or *partrederier* formed by only foreign persons was not mentioned. The representative rule was not mentioned at all neither then nor later (see sec:s 1.3 and 6.2.2.4).
[971] See sec. 6.2.2.4.
[972] See sec. 6.3.4.

are not legal entities, but are treated as tax subjects for VAT purposes according to section 2 first paragraph and section 13 FML. The Finnish solution would mean that both first and second sentences in Chapter 6 section 2 would be abolished from the ML. Instead would *enkla bolagen* and *partrederierna* be made into tax subjects for VAT purposes. That would in that case be done by noting in Chapter 6 section 2 ML that *enkla bolag* and *partrederier* are comprised by the general rules in the ML on tax liability. It would also mean that partners in such *bolag* or *rederier* no longer would be tax liable in that capacity. Instead would they be made joint responsible for the payment of the VAT in such tax subjects for VAT purposes. The partners could – like what applies according to section 188 FML – be imposed a joint responsibility for the VAT in *enkla bolagen* and *partrederierna*, by an expansion of such meaning of the representative responsibility according to Chapter 59 sections 13 and 14 SFL. The latter would be made by virtue of article 205 of the VAT Directive (2006/112). However I have, as mentioned in the beginning of this section, not been able to draw any definitive conclusion regarding the question whether a non-legal entity can be considered constituting taxable person according to the main rule of article 9(1) of the VAT Directive (2006/112). Therefore should a legislative measure in the ML meaning that *enkla bolagen* and *partrederierna* are made into tax subjects for VAT purposes, like what already applies according to the FML regarding *sammanslutningar* and *partrederier*, be made first after that question has been clarified on EU level.[973]

If the main rule concerning taxable person, article 9(1) first paragraph of the VAT Directive (2006/112), by such a clarification that I am suggesting, is stated comprising also non-legal entities which fulfil the prerequisites independence and economic activity, should Chapter 6 section 2 ML be reformulated. Thereby should in that case the rule state that *enkla bolag* and *partrederier* constitute tax subjects fro VAT purposes. That could be done by therein note that both the legal figures are comprised by the tax liability with the same technique used concerning the VAT groups in Chapter 6 a section 1 second paragraph ML. In that case could it be noted in Chapter 6 section 2 that it follows by the general rules in Chapter 1 section 2 first paragraph number 1 whether *enkla bolaget* or *partrederiet* shall be considered tax liable for its activity. Concerning the invoicing liability it is nowadays determined according to Chapter 11 section 1 ML by the fulfilment of the prerequisites *beskattningsbar person* (taxable person) and supply. Although these prerequisites also apply for the tax liability, should it, in my opinion, also be especially noted in Chapter 11 section 1 ML that the invoicing liability comprises supplies made by an *enkelt bolag* or *partrederi* fulfilling the prerequisites for taxable person according to Chapter 4 section 1 ML.

[973] See sec. 6.4.3.

Legal certainty demands on foreseeable decisions should benefit from the same supply thus leading to tax liability as well as invoicing liability according to the ML, and it should also benefit the SKV's possibility to control.[974]

Regarding the other two cases of tax liability in Chapter 1 section 1 first paragraph, i.e. taxable intra-Union acquisitions of goods according to number 2 and imports of goods according to number 3, I suggest the following concerning the representative rule. The demand on taxable person according to my general suggestion regarding Chapter 6 section 2 first sentence ML should also apply to intra-Union acquisitions of goods, where tax liable and tax liability is stated in Chapter 1 section 2 first paragraph number 5 and section 1 first paragraph number 2 ML and the determination of such acquisition is stated in Chapter 2 a ML. In this respect should however be clarified in Chapter 6 section 2 first sentence ML that taxable person (beskattningsbar person) according to Chapter 4 section 1 ML also comprises the same concept according to Chapter 2 a ML. Concerning intra-Union acquisitions of goods according to the main rule in Chapter 2 a section 3 first paragraph number 3 and second paragraph ML and of goods comprised by excise duty according to the first paragraph number 2 of the same rule is the concept taxable person used for the purchaser. By noting in Chapter 6 section 2 first sentence ML that the demand on taxable person also comprises such acquisitions, becomes a partner in an *enkelt bolag* or *partrederi* tax liable for intra-Union acquisitions of goods on account of *bolaget* or *rederiet* in these cases. The following should also be clarified in Chapter 6 section 2 first sentence ML with reference to Chapter 1 section 1 first sentence number 3 ML: Also a partner who is an ordinary private person shall be considered tax liable for imports of goods for an *enkelt bolag* or *partrederi*, regardless whether he is a taxable person or whether *bolaget* or *rederiet* has economic activity. Both entrepreneurs and private persons can namely be tax liable for imports according to the ML.[975]

On the other hand should an ordinary private person in the capacity of partner in an *enkelt bolag* or *partrederi* not be able to be considered tax liable according to Chapter 6 section 2 for voluntary tax liability for letting of business premises etc. according to Chapter 9 ML. According to the facultative article 137(1)(d) of the VAT Directive (2006/112) is the freedom of choice limited for taxation of transactions constituting leasing out and letting of immovable property to apply to taxable persons. The facultative article 12 of the VAT Directive (2006/112) states that taxable person comprises certain temporary transactions regarding supplies of buildings and land. In my opinion it is not clearly expressed

[974] See sec. 6.3.4.
[975] See sec. 6.2.2.4.

in article 12 that the rule would comprise leasing out and letting of immovable property. Thereby can it neither be considered clearly expressed that the determination of the tax subject in article 12 is taking over the limitation concerning the tax object in article 137(1)(d).[976] There is a directive rule to implement into the ML, article 137(1)(d), why the aim EU conformity is relevant.[977] Therefore applies my suggestion on demand that the partners themselves in *enkla bolag* or *partrederier* shall have the character taxable person, to be comprised by the concept tax liable in Chapter 6 section 2 first sentence ML, also to voluntary tax liability according to Chapter 9 ML. By the way should two or more owning a real estate which is let out to a tax liable business person – like today – be able to apply for one of them being appointed by the SKV according to Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL) as representative for the collection of the VAT in the activity consisting of the letting.[978]

If Chapter 6 section 2 ML would be reformulated so that it would be clearly stated in the ML that *enkla bolag* (and *partrederier*) constitute tax subjects for VAT purposes and that they are comprised by the general rules in the ML on tax liability, it does not solve the particular problem that I am mentioning about the determination of the tax object. It concerns copyright to literary and artistic works. Joint works created e.g. by an *enkelt bolag* are namely comprised by the general tax rate 25 per cent, whereas a corresponding work is considered independent by for instance a limited company or a partnership and the reduced tax rate 6 per cent is instead applied. The question is however independent of the existence of the representative rule. Therefore is the lack of neutrality in taxation in the present particular respect not remedied by Chapter 6 section 2 ML being reformulated, so that *enkla bolag* would constitute tax subjects like regarding the Finnish VAT law and the treatment of *sammanslutningarna*.[979] The solution lies instead with Chapter 7 section 1 third paragraph number 8 ML being altered, so that the rule would not only comprise independent works. The reference in that rule to sections 1, 4 or 5 URL should for neutrality reasons be expanded to also comprise section 6 URL, if a joint work created under the enterprise form *enkelt bolag* in another company form would have been an independent work.[980]

[976] See sec:s 1.1.3 and 2.8.
[977] See sec:s 2.8 and 6.2.2.4.
[978] See sec. 6.2.2.4.
[979] See sec. 6.2.1.4.
[980] See sec. 6.5.

7. SUMMARY AND CONCLUDING VIEW-POINTS

7.1 SUMMARY

7.1.1 Questions in and the purpose of this work

This work concerns in the first place one of the rules on tax liability in special cases in Chapter 6 ML, namely section 2 regarding partners in *enkla bolag* and *partrederier*.[981] The rule Chapter 6 section 2 ML consists of two sentences. The first sentence means that if an *enkelt bolag* or *partrederi* exists it is the partners which are tax liable and not the legal figures *enkla bolag* and *partrederier*.[982] That is a mandatory rule.[983] The second sentence compared with Chapter 5 section 2 first paragraph SFL means that under the same provisions *may* the partners apply by the SKV for one of them being appointed by the SKV to be payment liable as representative, and thereby liable to account the VAT in the activity.[984] The second sentence in Chapter 6 section 2 ML is thus a voluntary rule.[985] When Chapter 6 section 2 ML is mentioned, I regard – if not otherwise stated – also Chapter 5 section 2 SFL (in the part the rule concerns VAT). I mean thereby with the expression the representative rule the rules Chapter 6 section 2 ML and Chapter 5 section 2 SFL together or each by itself.[986] The representative rule has no direct equivalent in the VAT Directive (2006/112). There is nothing in the directive on determination of a partner in a legal person, e.g. in a partnership or limited company, as taxable person. In these cases is the tax liability determined on company level, and not on partner level as concerning partners in *enkla bolag* and *partrederier* according to the representative rule.[987]

The problem is basically that Chapter 1 section 2 last paragraph ML so to speak builds out the concept tax liable in relation to the main rule according to the first paragraph number 1 in the rule, by noting that there are special rules on who is tax liable in inter alia Chapter 6.[988] The main rule on who is tax liable according to the ML is determined in Chapter 1 section 2 first paragraph number 1 by reference to section 1 first paragraph number 1.[989] This determination has a systematic correspondence with the main rule on who is tax liable according to articles 2(1)(a) and (c) and 193 of the VAT Directive (2006/112). Payment li-

[981] See sec:s 1.1.1, 1.1.2 and 1.1.3.
[982] See sec. 1.1.1.
[983] See sec:s 1.1.1 and 1.1.3.
[984] See sec. 1.1.1.
[985] See sec:s 1.1.1 and 1.1.3.
[986] See sec:s 1.1.1 and 1.2.1.
[987] See sec:s 1.1.1, 1.1.3 and 2.8.
[988] See sec:s 1.1.3 and 6.2.2.1.
[989] See sec:s 1.1.1 and 1.1.3.

able is a taxable person which shall make taxable transactions of goods or service (within Swedish territory). Taxable person and taxable transactions are corresponded in the ML by who is *beskattningsbar person* (taxable person) and whether *skattepliktig omsättning* (taxable supply) is made (of goods or services within the country).[990] They are some of the necessary prerequisites for tax liability according to the main rule Chapter 1 section 1 first paragraph number 1 ML, since *yrkesmässig verksamhet* was replaced in the ML on the 1st of July 2013 by *beskattningsbar person* – taxable person – by SFS 2013:368.[991] Sometimes I use the expression the general rules in the ML, and regard in the first place the basic concepts for the tax liability's emergence according to the main rule in Chapter 1 section 1 first paragraph number 1 ML. These are inter alia the concepts *omsättning* (supply) and *beskattningsbar person* (taxable person). The against the concept supply corresponding concept in the main rule for the right of deduction's emergence in Chapter 8 section 3 first paragraph ML is *förvärv* (acquisition).[992] In section 3.2 I have in Figure 3 made this overview of the rules on tax liability and right of deduction or reimbursement in the ML.

Figure 3

<table>
<tr><td colspan="4">Persons</td></tr>
<tr><td colspan="3">(1) Taxable person
(carries out independently an economic activity)</td><td>Others are consumers/tax carriers</td></tr>
<tr><td colspan="3">Supply of goods or services</td><td>Not right of deduction/ reimbursement of input tax</td></tr>
<tr><td>(2) Taxable</td><td>From taxation qualified exempted</td><td>From taxation unqualified exempted</td><td></td></tr>
<tr><td>(3)
Right of deduction of input tax</td><td>Right of reimbursement of input tax</td><td>Not right of deduction/reimbursement of input tax</td><td></td></tr>
<tr><td colspan="2">Purchase which is comprised by prohibition of deduction: Not right of deduction/reimbursement of input tax</td><td></td><td></td></tr>
</table>

The problem is above all that the representative rule does not contain any expressed demand that the activity in *enkla bolaget* or *partrederiet*

[990] See sec. 1.1.3.
[991] See sec. 1.1.3 and also sec. 3.2.
[992] See sec. 1.5.

shall be an economic activity according to the ML. The question is whether the representative rule can give an interpretation result meaning that an ordinary private person could be deemed tax liable according to the wording of the mandatory rule Chapter 6 section 2 first sentence ML.[993] The question is also whether the answer is affected by the wording of the voluntary rule, i.e. Chapter 6 section 2 second sentence ML and Chapter 5 section 2 SFL.[994] If an interpretation of Chapter 6 section 2 ML can give the result that a private person is considered tax liable, is not the ML in compliance with the VAT Directive (2006/112). The basic idea with the VAT is to distinguish the tax subjects from the consumers, according to the main rules on taxable person and payment liable respectively in the VAT Directive (2006/112). Taxable person (*beskattningsbar person*) according to Chapter 4 section 1 ML corresponds with taxable person (*beskattningsbar person*) according to the main rule article 9(1) first paragraph of the VAT directive (2006/112).[995] The tax subject is usually a person which is named entrepreneur, whereas the consumer usually is a private person. The VAT is a consumption tax and the consumer is the carrier of the VAT included in the price of most goods and services supplied by enterprises.[996] The main rule of taxable person, article 9(1) first paragraph of the VAT Directive (2006/112), contains the prerequisites independence and economic activity. Concerning the criterion economic activity means *Götz* (Case C-408/06) that a regularity demand – duration criterion – can be read out by comparison of that directive rule with the facultative rule on taxable person in article 12. Article 12 is above all meant for temporary transaction concerning new production in the building sector, and it is with that rule private persons can be given the character of taxable person. An expansion of the concept taxable person to comprise ordinary private persons is on the other hand not possible by virtue of the mandatory rule article 9(1) first paragraph of the VAT Directive (2006/112).[997] Such an expansion in relation to taxable person according to Chapter 4 section 1 ML, by interpretation of Chapter 6 section 2 ML, means a conclusion of a rule competition *de lege lata* in relation to the directive rule.[998] Rule competition exists in that case between the representative rule and the main rules on taxable person according to article 9(1) first paragraph, on payment liable according to articles 2(1)(a) and (c) and 193 and on right of deduction according to article 168(a) of the VAT Directive (2006/112). That relationship could mean that Sweden is guilty of a breach of the EU law.[999]

[993] See sec:s 1.1.1, 1.1.2, 1.1.3 and 6.2.2.1.
[994] See sec. 1.1.2.
[995] See sec. 1.1.3.
[996] See sec. 1.1.1.
[997] See sec. 1.1.3.
[998] See sec:s 1.1.2 and 1.1.3.
[999] See sec:s 1.1.3 and 2.8.

The purpose of this work is to analyze the representative rule for *enkla bolag* and *partrederier* from the VAT's most central purposes, which are a cohesive VAT system, neutrality, EU conformity, efficiency of collection and legal certainty including legality. I treat certain problems within the frame of this purpose.[1000] The investigation concerns in the first place whether the representative rule for *enkla bolag* and *partrederier* is in compliance with the main rule on taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112).[1001] The question is whether alterations or amendments should be made in the representative rule *de lege ferenda*, to make it comply with above all the main rule on taxable person of article 9(1) first paragraph, and thereby also with the main rules on payment liability in articles 2(1)(a) and (c) and 193 and on the scope of the right of deduction in article 168(a) of the VAT Directive (2006/112).[1002]

7.1.2 The conduction of the investigation

I have mentioned a number of problems for the question on the compliance of the representative rule with article 9(1) first paragraph of the VAT Directive (2006/112).[1003] An important interpretation question in this book is whether *enkla bolag* and *partrederier*, despite they are not legal entities, can constitute taxable persons according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112).[1004] That question includes to judge whether a non-legal entity can constitute such a taxable person.[1005] If *enkla bolag* and *partrederier* can constitute taxable persons according to the directive rule, should the representative rule be abolished and the responsibility be imposed on *bolaget* or *rederiet* itself. Then would the tax liability be imposed on *bolaget* or *rederiet* instead of it – in accordance with what is stated in Chapter 6 section 2 first sentence ML – being imposed on the partners themselves in *bolaget* or *rederiet*.[1006]

With a scientific method I have by the use of customary law sources analyzed the representative rule Chapter 6 section 2 ML and the concept tax liability in the rule together with the rule's function as a collection rule. I have in connection with the investigation also used, for a serving purpose, a certain comparative analysis. The VAT Directive (2006/112) lacks an equal to the representative rule.[1007] I have neither found any

[1000] See sec. 1.1.2.
[1001] See sec. 1.2.1.
[1002] See sec:s 1.1.2 and 2.8.
[1003] See sec. 1.1.2.
[1004] See sec:s 1.1.2 and 1.1.3.
[1005] See sec. 1.1.2.
[1006] See sec. 1.1.3.
[1007] See sec:s 1.1.1, 1.1.3, 1.2.1 and 2.8.

direct equivalent in foreign VAT legislations, whereby I above all have regarded such within the EU.[1008] I have nevertheless made an international outlook concerning the German UStG and so called *Vorgründungsgesellschaft*,[1009] Netherlands Wet OB and *contractuele samenwerkingsverbanden*,[1010] and the Finnish FML and – above all – *sammanslutningar*.[1011] *Sammanslutningar* do not constitute legal entities, and sections 13 and 188 FML display – although the rules are not direct equivalents to Chapter 6 section 2 ML – such similarities with the representative rule that I at the investigation of the representative rule has made a certain comparison with Finnish VAT law.[1012]

I have also, based on the EU law and the primary and secondary EU law sources in the field and the basic principles for the VAT which can be read out of these, drawn up and chosen to include in the investigation of the representative rule certain law political aims for the Swedish VAT system.[1013] These aims are: a cohesive VAT system, neutrality, EU conformity, efficiency of collection and legal certainty including legality. In Chapter 2 I have, after a review of the aims, summarized by an overview how I have identified and chosen these. Thereby I have also explained how I have reasoned to judge their relevance at the trial in Chapter 6 of the representative rule, and illustrated it in Figure 1 and Figure 2.[1014]

Figure 1

Test	**Result**	**Result**	**Relevance of the aims for the Swedish VAT system**
	Rule complying with {art. 1(2) dir.; 1:1 first para. 1 and 8:3 first para. ML; art. 2(1)(a) and (c), 193 [incl. art. 9(1) first para.] and 168(a) dir.}.		- A cohesive VAT system - Neutrality/EU conformity - Efficiency of collection [of the VAT in *enkelt bolag/partrederi* by the voluntary rule (*The collection*)]
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Specifying amendments in the representative rule		Give control possibility, but far too complex rule	- Legal certainty incl. legality according to the EU law

[1008] See sec. 4.1.
[1009] See sec. 4.2.
[1010] See sec. 4.3.
[1011] See sec. 4.4.
[1012] See sec:s 4.4 and 4.5.
[1013] See sec:s 1.2.1 and 2.2.
[1014] See sec. 2.8.

Figure 2

Test	**Result**	**Relevance of aims for trial of the concept *tax liable* in the representative rule**
Tax liable in the rule complying with art, 9(1) first para. of the VAT Dir.?	Expanding {rule competition; also between the rule and 1:1 first para. 1 ML and art:s 2(1)(a) and (c) and 193 of the VAT Dir.}	EU conformity and legal certainty incl. legality according to the EU law are not relevant: The rule has no equivalent in the VAT Dir. _____ **Note** If *tax liable* in the rule is not made compatible with art. 9(1) first para. of the VAT Dir., procedural solutions are necessary: - The individual may invoke that art. 9(1) first para. has direct effect {extreme interpretation result that a private person (consumer) would be comprised by tax liable; in conflict with the basic principles in art. 1(2) of the VAT Dir.} - The state may invoke the principle of prohibition of abusive practice in accordance with Halifax et al. (Case C-255/02). _____ **Note.** COM or another Member State might go to the CJEU claiming breach of treaty, if tax liable distorts the competition on the internal market, according to art. 113 TFEU, which also would be in conflict with the neutrality principle according to the preamble to the VAT Dir. and art. 1(2) of the VAT Dir. and with the aim of a cohesive VAT system (COUNCIL DIRECTIVE 2006/112/EC […] on the common system of VAT).

At the analysis of the representative rule I have regarded the aims. The trial of the rule has however also been made with regard of the review of *enkla bolag* and *partrederier* from a civil law perspective (Chapter 5) and that the FML has been concluded being of a certain comparative interest (Chapter 4). Respect of the aims has also been affected by the use of the ABCSTUXY-model according to my description below.[1015]

The investigation of the representative rule in Chapter 6 has also been made through a division partly into interpretation questions, partly into application issues.[1016] I have also given a historical background regarding the wording of the representative rule.[1017] At the investigation in Chapter 6 I have by hypothetic case studies judged the need of specifying amendments in the representative rule and in Chapter 8 section 5

[1015] See sec:s 2.8 and 6.1.
[1016] See sec:s 1.6 and 6.1.
[1017] See sec:s 1.2.1 and 6.2.2.2.

and Chapter 11 ML. Above all it has been done with respect of the collection of VAT functioning effectively concerning activities in *enkla bolag* and *partrederier*, and that control difficulties will not arise for the SKV regarding the representative's VAT accounting.

In connection with the application issues I have made the mentioned hypothetic case studies. Thereby I have, for judgement of the subject side and the object side by the concept tax liable in accordance with the representative rule, used a tool which I have constructed and am calling the ABCSTUXY-model.[1018] In section 3.3 I have in Figure 4 given this illustration of the model.

Figure 4

<table>
<tr><td>Enkelt bolag/partrederi</td><td></td></tr>
<tr><td rowspan="3">A –partner/representative
B – partner
A and B apply by the SKV for A to account for VAT in enkla bolaget or partrederiet</td><td>S – supplier to A or B in their capacities of partners in enkla bolaget/partrederiet</td></tr>
<tr><td>T – customer to A or B in their capacities of partners in enkla bolaget/partrederiet</td></tr>
<tr><td>U – person with an indirect relation to A or B in their capacities of partners in enkla bolaget</td></tr>
<tr><td rowspan="3">C
Eventual additional partner in enkla bolaget or partrederiet. Alternatively may C be a non-partner, e.g. someone of S, T, U, X or Y</td><td>X – supplier to A or B regarding their other activities</td></tr>
<tr><td>Y – customer to A or B regarding their other activities</td></tr>
</table>

My model has only had the pedagogical point that I by using the persons A, B, C, S, T, U, X and Y in the case studies have created an acronym, A-B-C-STUXY, to simplify memorizing in which role the different persons are put in the case studies in Chapter 6.[1019] In connection with Figure 4 in section 3.3 I have given two examples for the hypothetic case studies which thereafter have been conducted in Chapter 6, and on which further case studies have been developed there.[1020] The two examples show that I in the hypothetic case studies in the first place have stuck to the general rules in the ML. Therefore I have in Figure 3, which also is shown in the nearest previous section, numbered the prerequisites for tax liability and right of deduction regarding the main

[1018] See sec:s 1.2.1 and 3.2.
[1019] See sec:s 1.2.1 and 6.4.1–6.4.6.
[1020] See sec:s 6.4.1–6.4.6.

rules in Chapter 1 section 1 first paragraph number 1 and Chapter 8 section 3 first paragraph ML.[1021]

I have concluded that the main rule on who is a taxable person, article 9(1) first paragraph of the VAT Directive (2006/112, has direct effect and that it is also the case regarding the main rules on the emergence and scope of the right of deduction, articles 167 and 168(a) of the VAT Directive (2006/112).[1022] The question is whether alterations or amendments in the representative rule should be made *de lege ferenda*, to make it conform with above all the main rule on taxable person of article 9(1) first paragraph and the main rule on payment liability in article 2(1)(a) and (c) and 193 of the VAT Directive (2006/112).[1023] Concerning the right of deduction the investigation has been limited to regard the rule's compliance with the right of deduction's scope according to article 168(a) of the directive.[1024] The investigation of the representative rule has meant that I by EU conform (directive conform) interpretation have broken down the rule (analysis). If the interpretation result from that analysis has proved that the representative rule cannot be in compliance with article 9(1) first paragraph of the VAT Directive (2006/112), I have tried to put together the rule (synthesis) by suggestions *de lege ferenda*, so that it thereby is made in compliance with the directive rule.[1025]

Each Chapter 2–6 – except Chapter 5 – has begun with questions which have been treated in respective chapter and the chapters have been ended with summary and conclusions. Chapter 5 contains only an overview regarding *enkla bolag* and *partrederier* form a civil law perspective. In Chapter 6 I have also continuously made conclusions in connection with the treatment of the respective question stated in the beginning of the chapter. A particular question on the tax object, namely the determination of applicable tax rate regarding letting or transfer of copyright to literary and artistic works, concerns *enkla bolag*. However exists that question regardless of the existence of the representative rule in the ML. It has therefore been treated by itself in section 6.5.[1026] In the present chapter is a summary made and I also leave concluding viewpoints, where I inter alia am reasoning *de sententia ferenda* regarding the interpretation of the representative rule.[1027]

[1021] See sec. 3.2
[1022] See sec. 1.2.3.
[1023] See sec:s 1.1.2 and 7.1.1.
[1024] See sec:s 1.3 and 2.8.
[1025] See sec. 1.2.1.
[1026] See sec. 6.1.
[1027] See sec:s 1.2.1 and 2.8.

7.1.3 Conclusions at the analysis of the representative rule

7.1.3.1 The structuring of the questions for the investigation and of the conclusions

The investigation of the representative rule in Chapter 6 has been made by a division into interpretation questions and application issues.[1028] The interpretation questions have been treated in sections 6.2–6.3.4 and the application issues have been treated in sections 6.4.1–6.4.3. Furthermore has the particular question on the tax object (tax rate) has been treated by itself in section 6.5. The review of the conclusions is made in sections 7.1.3.2–7.1.3.6 in the same order as at the review of the questions. This means that the conclusions concern in the following order:

- the question whether *enkla bolag* and *partrederier* can constitute taxable persons;[1029]
- the question whether the representative rule can lead to an ordinary private person becoming tax liable[1030]
- the question on invoicing liability according to the Value Added Tax Act 1994 and *enkla bolag* and *partrederier*;[1031]
- the application issues;[1032] and
- the question on the tax object, i.e. the question on the determination of applicable tax rate concerning letting or transfer of copyright to literary and artistic works and *enkla bolag*.[1033]

7.1.3.2 The question whether enkla bolag *and* partrederier *can be taxable persons*

I have made a literal interpretation and systematic interpretation of article 9(1) first and second paragraphs, article 10 and article 1(2) of the VAT Directive (2006/112),[1034] and investigated the CJEU's case law and Swedish case law concerning the question whether a non-legal entity can constitute taxable person according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112).[1035] I have not come to any definitive conclusion which would prove that a non-legal entity could constitute taxable person according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112).[1036] The partners in an *enkelt bolag* can jointly carry out a particular economic activity distinguished from their other activities. In that case exists according to the HFD's interpretation of *EDM* (Case C-77/01) in RÅ 2006 not.

[1028] See sec:s 1.6, 6.1 and 7.1.2.
[1029] See sec:s 6.2.1.1–6.2.1.4. See also sec. 6.1 and problem 2 in sec. 1.1.2.
[1030] See sec:s 6.2.2.1–6.2.2.4. See also sec. 6.1 and problem 1 in sec. 1.1.2.
[1031] See sec:s 6.3.1–6.3.4. See also sec. 6.1 and problem 3 in sec. 1.1.2.
[1032] See sec:s 6.4.1–6.4.3. See also sec. 6.1 and problems 3 and 4 in sec. 1.1.2.
[1033] See sec. 6.5. See also sec. 6.1 and problem 5 in sec. 1.1.2.
[1034] See sec. 6.2.1.1.
[1035] See sec:s 6.2.1.2 and 6.2.1.3.
[1036] See sec:s 6.2.1.4 and 6.6.

90 (5 Jun. 2006) and RÅ 2009 not. 172 (18 Nov. 2009) an agreement on *enkelt bolag* in VAT respect. However, it does not mean that a non-legal entity for civil law purposes – as an *enkelt bolag* or a *partrederi* – can constitute a taxable person according to the main rule article 9(1) first paragraph of the VAT Directive (2006/112).[1037] If non-legal entities could constitute taxable persons, or if it is made possible by clarification in the VAT Directive (2006/112), the following applies. *Enkla bolag* and *partrederier* could thereby constitute taxable persons according to the main rule article 9(1) first paragraph of the VAT Directive (2006/112). In that case should in my opinion Chapter 6 section 2 ML be totally reformulated, so that the rule states that *enkla bolagen* and *partrederierna* themselves are tax liable, if they fulfil the general rules according to the main rule on such liability in the ML, i.e. Chapter 1 section 1 first paragraph number 1.[1038]

Although it is not possible to draw any definitive conclusion in the subject question according to what is recently said, my opinion is that a clarification should be introduced into the VAT Directive (2006/112). It should mean that an economic activity which is carried out independently by a legal figure which constitutes a non-legal entity shall be able to give also that legal figure the character of taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112). That could be done by stipulating in the directive rule that the expression *den som* (compare "any person who") also comprises legal figures which are not legal entities, if they fulfil the criteria independence and economic activity for taxable person according to the rule. Such a clarification in article 9(1) first paragraph would open for Chapter 6 section 2 ML stating that *enkla bolag* and *partrederier* could constitute such taxable persons and tax liables. I base my viewpoint above all on that the overall aim with a cohesive VAT system should benefit from competition and consumption neutrality not being distorted by the enterprise form *enkelt bolag* or *partrederi* being excluded from the main rule on who is a taxable person. That the aim with efficiency of collection is mentioned by the CJEU in *Gregg* (Case C-216/97) concerning the neutrality aspect on the VAT, contributes also in my opinion to that the mentioned clarification in the VAT Directive (2006/112) should be introduced. I consider that the aims neutrality and efficiency of collection make strong reasons for the clarification in article 9(1) first paragraph of the VAT Directive (2006/112) ought to be made a mandatory rule like what applies concerning that directive rule according to current law. The formal demands on invoice content according to the main rule article 226 of the VAT Directive (2006/112) leads in my opinion to that the suggestion should be combined with a demand on a non-legal entity which consti-

[1037] See sec:s 6.2.1.2 and 6.2.1.3.
[1038] See sec. 6.2.1.4.

tutes taxable person acting in its own name. My suggestions for alterations in article 9(1) first paragraph of the VAT Directive (2006/112) should bee considered meaning such simplification reasons that entails foreseeable decisions and benefit the aim with a legally certain VAT. I consider thus that *enkla bolagen* and *partrederierna* belong in an ennobling chain of entrepreneurs up to the consumer according to article 1(2) of the VAT Directive (2006/112).[1039]

In sections 4.4 and 4.5 I concluded that the FML gives a certain support for a non-legal entity constituting taxable person, since *sammanslutningar* and *partrederier* – which are not legal entities according to Finnish civil law – are considered tax liable according to the particular rule section 13 FML and the main rule section 2 first paragraph FML. If Chapter 6 section 2 ML was reformulated so that *enkla bolagen* and *partrederierna* – and not the partners – could be tax liable, could the partners instead, by virtue of article 205 of the VAT Directive (2006/112), be imposed a joint responsibility for the VAT in these *bolag* and *rederier*. That could be made by an expansion of such meaning of the representative responsibility according to Chapter 69 sections 13 and 14 SFL.[1040] It would be a solution to the one concerning partners in *sammanslutningar* and *partrederier* in section 188 item 2 FML. The alterations would also mean that Chapter 5 section 2 FML in consequence would be changed so that that rule no longer applies to VAT, but only to employee withholding taxes, employer's contribution (for national social security purposes) and excise duty. The aim with EU conformity provides however that a reformulation according to my suggestion of Chapter 6 section 2 ML can be supported of it being stated in article 9(1) first paragraph of the VAT Directive (2006/112) that non-legal entities can constitute taxable persons. First thereby can it with respect of the mentioned aim be noted in Chapter 6 section 2 ML that *enkla bolag* and *partrederier* can constitute tax subjects.[1041]

The question whether *enkla bolag* and *partrederier* could constitute tax subjects for VAT purposes has thus not received any clear answer. The order applying for VAT groups could have resolved the problem itself concerning the status of the activity in an *enkelt bolag* or *partrederi*. In the same way as in Chapter 6 a section 1 second paragraph could a par-

[1039] See sec:s 6.2.1.4 and 6.6.
[1040] It would not work in my opinion to expand Chapter 59 section 11 SFL, which means that the SKV can decide on responsibility regarding inter alia VAT for partners in a Swedish partnership (*handelsbolag*) according to Chapter 2 section 20 BL, to apply also to partners in *enkla bolag*. It would provide that a partner in an *enkelt bolag* could be treated in the same way as a partner in a partnership. According to the HD [NJA 1997 p. 211 (4 Apr. 1997)] would in such a case the character of *enkla bolag* be changed fundamentally with unforeseeable consequences following (see sec. 5.4).
[1041] See sec:s 2.8, 6.2.1.4 and 6.6.

ticular paragraph in Chapter 6 section 2 have been referring to general rules on tax liability in the ML. *Enkla bolag* and *partrederier* with non-economic activities would thereby in consequence not be comprised by the VAT in general. However, the described order for the VAT groups would not have resolved the problem concerning the VAT status of partners in *enkla bolag* and *partrederier*, which is treated in the next section.[1042]

7.1.3.3 The question whether the representative rule can lead to an ordinary private person becoming tax liable

If Chapter 6 section 2 ML is not reformulated according to my suggestion in the nearest previous section, my interpretation of the wording of the representative rule still means that its wording should be altered. My analysis of Chapter 6 section 2 ML and Chapter 5 section 2 SFL means namely that the tax liability according to Chapter 6 section 2 first sentence ML can comprise a partner – bolagsman in an *enkelt bolag* or shipowner in a *partrederi* – who is an ordinary private person.[1043] I base that interpretation on the historical review, which shows that the purpose with the representative rule is that the tax liability is provided to lie with the partners from the beginning.[1044] The interpretation is also based on that the determination of *enkla bolag* and *partrederier* according to the representative rule above all shows that there is no limitation in Chapter 6 section 2 first sentence ML regarding who can be considered constituting such a partner.[1045] The interpretation means that an ordinary private person can become tax liable to VAT personally for his share (*andel*) of *enkla bolaget* or *partrederiet* merely based on him being a partner in *bolaget* or *rederiet*. I describe the interpretation as follows.[1046]

Regardless whether the mandatory rule in the first sentence or the voluntary rule in the second sentence of Chapter 6 section 2 ML is concerned, the determination of what is meant with an *enkelt bolag* or *partrederi* falls back on the civil law, since the ML is lacking a definition of what is meant with such *bolag* and *rederier*.[1047] *Enkla bolag* can exist according to Chapter 1 section 3 BL without demand of their activities constituting business activity (*näringsverksamhet*).[1048] Although neither the activity object nor the objective is of an economic nature can a company (*bolag*) exist, provided the objective is common.[1049] If the activity object is of an economic nature, e.g. it is a matter of carrying out joint

[1042] See sec. 6.2.1.4.
[1043] See sec:s 6.2.2.4 and 6.6.
[1044] See sec. 6.2.2.2.
[1045] See sec:s 6.2.2.3, 6.2.2.4 and 6.6.
[1046] See sec:s 6.2.2.4 and 6.6.
[1047] See sec:s 6.2.2.4 and 6.6.
[1048] See sec:s 6.2.2.3 and 6.6.
[1049] See sec:s 6.2.2.3 and 6.2.2.4.

business activity without the existence of a partnership or the joint carrying out of shipping with an own ship, exists in a civil law respect an *enkelt bolag* according to Chapter 1 section 3 BL and a *partrederi* according to Chapter 5 section 1 first paragraph first sentence *sjölagen* (the Sea Act)[1050] Nothing prevents that the partners themselves are ordinary private persons. Regardless whether the possibility to appoint a representative according to the voluntary rule Chapter 6 section 2 second sentence ML is used, can therefore a partner be tax liable merely because of the role as partner itself according to the mandatory rule Chapter 6 section 2 first sentence ML. Thus is my interpretation of the wording of the representative rule that also an ordinary private person can become tax liable for his share of an *enkelt bolag* or *partrederi* merely because of him being partner in *bolaget* or *rederiet*. In that way I consider that the representative rule means an expansion of the determination of who is comprised by the concept tax liability in the ML in relation the main rule in Chapter 1 section 1 first paragraph number 1. That is not in compliance with the VAT Directive (2006/112). An ordinary private person is namely not comprised by the main rule on who is a taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112). That is depending on that an ordinary private person is not comprised by the duration criterion for the concept economic activity in the directive rule.[1051]

In my opinion there is thus a need to clarify the representative rule so that an ordinary private person cannot be given the character of tax liable according to the ML *via* Chapter 6 section 2 first sentence ML being applicable. The representative rule should in my opinion be specified so that it is noted that Chapter 6 section 2 first sentence ML is regarding *enkla bolag* and *partrederier* with economic activity according to Chapter 4 section 1 ML *and* that it is also noted that the partners in such *bolag* and *rederier* themselves shall have the character of a taxable person. The first specification can be made by the introduction of a demand meaning that *enkla bolaget*'s or *partrederiet*'s activity would have been comprised by the general rules in the ML, *if enkla bolag* and *partrederier* would have been constituting tax liables according to the main rule of Chapter 1 section 2 first paragraph number 1 ML. Therein is referred to the main rule on the emergence of the tax liability, Chapter 1 section 1 first paragraph number 1, where on of the necessary prerequisites for tax liability is taxable person (which includes the prerequisites independence and economic activity). The other specification, concerning that the partners themselves shall be taxable persons, is in my opinion necessary to avoid that an ordinary private person enters as passive partner into *bolaget* or *rederiet*, and in that capacity is comprised by the VAT.

[1050] See sec:s 6.2.2.3 and 6.6.
[1051] See sec:s 6.2.2.4 and 6.6.

The latter situation is not neutral in relation to e.g. what applies regarding shareholders and partners respectively in limited companies (*aktiebolag*) and partnerships (*handelsbolag*) respectively. A limited company's or a partnership's status as taxable person according to the ML does not give the shareholders or partners in the association form the same status, since shareholder/partner and company/partnership are separate subjects in such cases and judged for themselves regarding whether they are comprised by the VAT.[1052] By the way was it right that the limit SEK 30,000 for *yrkesmässighet* (professionality) regarding businesslike activity or certain transactions in inter alia activity in *enkelt bolag* according to Chapter 4 section 4 with reference to Chapter 4 sections 1 no. 2, 2 and 3 ML was abolished along with inter alia these rules, by SFS 2013:368, since neither article 9(1) first paragraph nor article 12 of the VAT Directive (2006/112) contain any amount limit for the determination of taxable person.[1053]

Concerning the resulting question whether tax liability according to Chapter 6 section 2 first sentence ML should continue to be imposed the partners in relation to their shares (*andelar*) in *enkla bolaget* or *partrederiet* or whether their tax liability should be determined in accordance with the regulation in Chapter 4 section 5 BL by the partners' relationship to third party are my conclusions the following:

- *Delägare* (partner) in Chapter 6 section 2 first sentence ML should be reserved for *partrederierna* and the BL's concept *bolagsman* – partner – instead be used regarding *enkla bolagen* in the rule. *Partrederierna* are presupposed by *sjölagen* to have joint property in form of a ship. An *enkelt bolag* does not have to consist of a certain joint property, but can consist of a joint activity being carried out.[1054]

- On the other hand should in both the mentioned respect *andel* (share) be abolished, so that instead is noted in Chapter 6 section 2 first sentence ML that a partner in an *enkelt bolag* or *partrederi* shall be tax liable for *bolaget*'s or *rederiet*'s economic activity in accordance with the rules in Chapter 4 section 5 BL (provided that the partner is a taxable person himself). The partner does not have a from the beginning fixed and unchangeable share of the property community. Instead varies the partner's share of the company assets by changes through the partners' various contributions or withdrawals and is also affected by whether the partner fulfils work lying with him according to the

[1052] See sec:s 1.1.3, 2.8, 6.2.2.4 and 6.6.
[1053] See sec. 1.1.3.
[1054] See sec:s 6.2.2.4 and 6.6.

> company agreement. Since *enkla bolaget* is not constituting a tax subject, the tax liability is lying according to Chapter 6 section 2 first sentence ML with the partners in *enkla bolaget* or *partrederiet* themselves.[1055]

I suggest that it should be noted that Chapter 6 section 2 first sentence ML presupposes that *enkla bolaget*'s or *partrederiet*'s activity is comprised by the general rules in the ML, i.e. inter alia the criteria *beskattningsbar person* (taxable person) and *omsättning* (supply). Thereby should the concept supply be connected to the partner acting for *bolaget* or *rederiet* in relation to a third party. It can be done by a partner's tax liability for the economic activity of *bolaget* or *rederiet* being determined by reference only to Chapter 4 section 5 first paragraph BL and that tax liability thus is not imposed on them jointly in accordance with Chapter 4 section 5 second paragraph first sentence BL. Each partner is a tax subject and makes his supply of a product or a service for which his tax liability shall be judged according to Chapter 6 section 2 first sentence ML, for the present special case of tax liability being in compliance with the general rules in the ML. Although *delägare* is working as a concept for *partrederier*, should the same principles for division of responsibility concerning the VAT apply for both the legal figures comprised by the representative rule.[1056] In this work applies what I write about *enkla bolag* also to *partrederier* – as a sort of *enkla bolag* – if not otherwise stated.[1057]

Especially about enkla bolag *and* partrederier *where all or some of the partners are foreign*

In my opinion it should be clarified in the representative rule that it comprises also economic activities in *enkla bolag* or *partrederier*, where all or some of the partners are foreign. I assume that it is now a matter of a non-legal entity, an *enkelt bolag* or *partrederi*, would be formed by foreign persons. If not these in the capacity of partners apply for one of them being appointed as representative for the accounting of the VAT in *bolaget* or *rederiet*, they will be judged by themselves according to the general rules in the ML. If they on the other make such an application according to Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL), should in my opinion the economic activity by *bolaget* or *rederiet* be treated as for *one* foreign entrepreneur. The clarification that I am suggesting in the present respect in the representative rule should state that an application on appointment of representative according to Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL) is possible also in case *bo-*

[1055] See sec:s 6.2.2.4 and 6.6.
[1056] See sec:s 6.2.2.4 and 6.6.
[1057] See sec:s 1.1.1, 2.5, 5.2 and 6.2.2.3.

laget or *rederiet* has been formed only by foreign taxable persons (*utländska beskattningsbara personer*). This provides however that taxable or from taxation qualified exempted supplies of goods or services in *bolaget*'s or *rederiet*'s activity are made within the country. The resolution of that question should however be handled in connection with another problem. That concerns that the ML, opposite to the VAT Directive (2006/112), determines in Chapter 1 section 15 who is foreign taxable person and lets it decide whether the purchaser of certain goods or services is tax liable instead of the person making the supply within the country.[1058] I do not go further than invoking that the recently mentioned clarification should mean that the possibility to registration of a representative for the accounting of the VAT in *enkla bolaget*'s or *partrederiet*'s activity is determined of whether supplies are made in Sweden in its activity. The possibility to such registration should thereby be noted as being independent of e.g. questions on whether registration of branch for foreign enterprises shall be made or not. By the way should it in my opinion also be clarified in the representative rule that Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL) also comprises the concept taxable person (*beskattningsbar person*) according to Chapter 5 section 4 ML regarding the determination on whether supply of services are made within the country.[1059]

Especially about imports and intra-Union acquisitions

Both entrepreneurs and private persons can be tax liable for imports according to the ML. Therefore should it be clarified in Chapter 6 section 2 first sentence ML that the rule imposes a person who is making an import of goods to an *enkelt bolag* or *partrederi* tax liability according to Chapter 1 section 1 first paragraph number 3 ML, regardless whether he is a taxable person or whether *bolaget* or *rederiet* has an economic activity. Concerning intra-Union acquisitions of goods, where the tax liability is stated in Chapter 1 section 1 first paragraph number 2 Ml and the determination of such acquisitions is stated in Chapter 2 a ML, should on the other hand the demand on taxable person apply according to my general suggestion regarding Chapter 6 section 2 first sentence ML. In this respect should it however be inserted into Chapter 6 section 2 first sentence ML a clarification on taxable person according to Chapter 4 section 1 ML also comprising the same concept according

[1058] The Ministry of Finance suggested in its memorandum of 2012-11-23 inter alia that the determination of *utländsk företagare* (foreign entrepreneur) in Chapter 1 section 15 ML would be changed to determination of *utländsk beskattningsbar person* (foreign taxable person), which was made by SFS 2013:368. However is not the question on possibility to register a representative according to Chapter 6 section 2 second sentence ML for *enkla bolag* or *partrederier* formed only by foreign persons mentioned. The representative rule is not mentioned at all in the memorandum (see sections 1.3, 6.2.2.4 and 6.6).

[1059] See sections 6.2.2.4 and 6.6.

to Chapter 2 a ML. Thereby becomes a partner in an *enkelt bolag* or *partrederi* tax liable according to Chapter 6 section 2 first sentence ML for intra-Union acquisitions of goods on account of *bolaget* or *rederiet* in the cases where the concept taxable person applies to the purchaser, i.e. according to the main rule in Chapter 2 a section 3 first paragraph number 3 ML and regarding goods comprised by excise duty in the first paragraph number 2 of the same rule.[1060]

Especially about voluntary tax liability

I do not make any exception from my suggestion to introduce a demand into Chapter 6 section 2 ML on the partners in *enkla bolag* and *partrederier* being taxable persons themselves regarding voluntary tax liability for certain letting of real estate according to Chapter 9 ML, e.g. hiring out of business premises etc. The facultative article 137(1)(d) of the VAT Directive (2006/112) gives a freedom of choice for taxation of transactions which constitute leasing out or letting out of immovable property, but it is limited to apply to taxable persons. In the facultative article 12 of the VAT Directive (2006/112) is stated that taxable person comprises certain temporary transactions regarding supplies of buildings and land. In my opinion it is not clearly expressed in article 12 that the rule would comprise leasing out and letting out of immovable property. In that case can it neither be considered clearly expressed that the determination of the tax subject in article 12 is taking over the limitation regarding the tax object in article 137(1)(d).[1061] Since a directive rule, article 137(1)(d), shall be implemented into the ML, is the aim EU conformity relevant.[1062] My suggestion on a demand that partners in *enkla bolag* or *partrederier* shall be taxable persons themselves, to be comprised by the concept tax liable in Chapter 6 section 2 first sentence ML, therefore applies to voluntary tax liability according to Chapter 9 ML. By the way should two or more owning a real estate which is let out to a tax liable business person – like today – be able to apply for one of them being appointed by the SKV according to Chapter 6 section 2 second sentence ML and Chapter 5 section 2 SFL as representative for the collection of the VAT in the letting out activity.[1063]

7.1.3.4 The issue on invoicing liability according to the Value Added Tax Act and enkla bolag *and* partrederier

The invoicing liability according to Chapter 11 section 1 ML has, by SFS 2013:368, been connected to the concepts *beskattningsbar person* (taxable person) and *omsättning* (supply), instead of to the concept tax liability. Therefore the question arises whether Chapter 11 should be

[1060] See sec:s 6.2.2.4 and 6.6.
[1061] See sec:s 1.1.3 and 2.8.
[1062] See sec:s 2.8, 6.2.2.4 and 6.6.
[1063] See sec:s 6.2.2.4 and 6.6.

completed with the invoicing liability also comprising *enkla bolag* and *partrederier*.[1064] I have answered the question with a yes concerning the mandatory rule Chapter 6 section 2 first sentence ML as well as the voluntary rule Chapter 6 section 2 second sentence ML, according to the following.

Regardless whether *enkla bolag* and *partrederier* can or cannot be considered taxable persons, I have suggested the following.[1065] In case the mandatory rule Chapter 6 section 2 first sentence ML remains, should it state that partners in *enkla bolag* and *partrederier* shall be taxable persons themselves. It should be noted that the rule provides that the activity of *bolaget* or *rederiet* would have been comprised by the general rules in the ML, *if enkla bolag* and *partrederier* would have been tax liable according to the main rule of Chapter 1 section 2 first paragraph number 1 ML.[1066] The partner in an *enkelt bolag* or *partrederi* is indeed tax liable for the activity of *bolaget* or *rederiet* according to Chapter 6 section 2 first sentence ML, but it is not he who is comprised by the invoicing liability. Legal certainty demands on foreseeable decisions and control reasons mean however that the same supply should lead to tax liability as well as liability to issue invoice according to the ML, regardless whether the supply is made by a partner regarding the activity of *enkla bolaget* or *partrederiet* or by anyone of them in the partner's own activity beside *bolaget* or *rederiet*. Therefore should the invoicing liability according to Chapter 11 section 1 ML be expanded to comprise partners which are tax liable according to Chapter 6 section 2 first sentence ML. It should benefit the mentioned legal certainty demand and control regarding the partner's accounting in his MVD of VAT in the own activity and of VAT which he shall also account for in his capacity as partner and tax liable according to Chapter 6 section 2 first sentence ML.[1067]

If a representative has been appointed for collection of the VAT in an *enkelt bolag* or *partrederi*, he shall file an MVD with 662-number for *bolaget* or *rederiet*. For such cases it is in my opinion suitable that it is noted in Chapter 11 section 1 ML that a representative according to Chapter 6 section 2 second sentence ML is comprised by the invoicing liability according to the ML. Thereby is the control possibility upheld which according to Chapter 5 section 2 second paragraph SFL is provided for such cases, by the rule imposing the representative liability to keep available by himself documentation for control of the accounting. My suggestion should typically give better possibilities to maintain an

[1064] See sec:s 6.3.1, 6.3.2 and 6.6.
[1065] See sec:s 6.6 and 7.1.3.2.
[1066] See sec:s 6.3.4, 6.6 and 7.1.3.3.
[1067] See sec:s 6.3.4 and 6.6.

effective collection than the partners also in such cases themselves answering for the liability to issue invoices according to the ML. The latter would neither from a control point of view be consequent in relation to the representative's liability to keep documentation for control available.[1068]

7.1.3.5 Application issues

The application issues have above all concerned whether the possibility for the partners in *enkla bolag* and *partrederier* to appoint according to Chapter 6 section 2 second sentence ML one of them as representative to answer for accounting and payment of VAT can be expected leading to a functioning collection of the VAT. The question has concerned whether specifying amendments should be inserted into the representative rule and into Chapter 8 section 5 and Chapter 11 ML.[1069] That trial has meant a balance between on the one hand the individual's legal certainty interest and on the other hand the SKV's need of being able to conduct control of the collection working through the representative.[1070]

In my opinion should the legal certainty demand on foreseeable decisions have precedence over the aim of efficiency of collection, if the need for amendments in the representative rule and in Chapter 8 section 5 and Chapter 11 ML becomes vast and entails that the representative rule is given a far too high degree of complexity.[1071] If the individual's legal certainty is set aside, it should in my opinion in itself be considered meaning the abolishment of Chapter 6 section 2 second sentence from the ML and that the collection will be administrated by the partners themselves without the possibility of appointing a representative for the collection of the VAT in *enkla bolaget* or *partrederiet*.[1072] The investigation of the application issues has therefore been made with regard of that Chapter 6 section 2 second sentence should be abolished from the ML and Chapter 5 section 2 SFL consequently limited to only regarding employee withholding taxes, employer's contribution (for national social security purposes) and excise duty, not VAT, if the need of amendments in the representative rule and in Chapter 8 section 5 and Chapter 11 ML thus would be far too vast.[1073] I have in the present respects drawn the following conclusions concerning Chapter 6 section 2 first sentence ML and Chapter 6 section 2 second sentence ML respectively:

[1068] See sec:s 6.3.4 and 6.6.
[1069] See sec:s 6.4.1 and 6.6.
[1070] See sec:s 6.4.7 and 6.6.
[1071] See sec. 2.8.
[1072] See sec:s 2.8 and 6.6.
[1073] See sec:s 6.4.1 and 6.6.

- Concerning the mandatory rule Chapter 6 section 2 first sentence ML I consider that any specifying amendment should not be introduced. There is an application problem with the use in the rule of the concept *andel* (share). It depends on the formal demands in Chapter 8 section 5 and Chapter 11 ML for exercising the right of deduction for input tax leading to cumulative effects arising on the pricing of *bolaget*'s or *rederiet*'s supplies. That right is namely only given to the partner who on account of *bolaget* or *rederiet* has received a VAT carrying documentation from a supplier of goods or services. A solution of the problem by amendments to Chapter 6 section 2 first sentence becomes hard to apply if the number of partners is high, and gives thereby probably not an effective collection or simplified control.[1074] Instead the application problem gives me further support for my conception meaning that *andel* should be abolished from Chapter 6 section 2 first sentence ML, to be replaced with the tax liability – and thereby the right of deduction – being imposed on the respective partner only in accordance with Chapter 4 section 5 first paragraph BL.[1075] That suggestion solves the present application problem insofar that each partner will be judged according to Chapter 6 section 2 first sentence ML regarding the tax liability and deduction question for his supply and his acquisition respectively on account of *bolaget* or *rederiet*.[1076]

- At the application of the voluntary rule Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL) taxable transactions are risking to disappear in control and evidence respect in the following situation.[1077] That is when internal supplies emerge between the partners in an *enkelt bolag* or *partrederi* due to consideration for extra work exceeding the company agreement being received.[1078] It constitutes a supply according to *EDM* (Case C-77/01) whereto reference also is made in RÅ 2006 not. 90 (5 Jun. 2006) and RÅ 2009 not. 172 (18 Nov. 2009),[1079] but may be lumped together with what is constituting profit sharing without taxation consequences between the partners according to the company agreement. To reduce that risk should the following measures be made. A particular amendment should be inserted into the representative rule on the representative making the other partners aware of the situation. A particular rule should be introduced into Chapter 11 ML on

[1074] See sec:s 6.4.7 and 6.6.
[1075] See sec:s 6.2.2.4, 6.4.2, 6.4.7, 6.6 and 7.1.3.3.
[1076] See sec:s 6.2.2.4, 6.4.2 and 6.4.7.
[1077] See sec.s 6.4.3 and 6.4.7.
[1078] See sec:s 6.4.7 and 6.6.
[1079] See sec:s 4.3, 6.2.1.3, 6.4.3, 6.4.7 and 6.6.

> that transaction notes etc. should be drawn up between the partners regarding the cash flows within *bolaget* or *rederiet*. The latter completion of the rules in Chapter 11 ML should also impose on the partners to leave copies of such documents to the representative.[1080]

For control and evidence reasons should concerning Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL) further amendments be inserted into the representative rule. The representative should be imposed to review agreement circumstances between another partner and customers and suppliers to the activity of *enkla bolaget* or *partrederiet* – with a mutual liability for the partners to inform the representative of those. Such specifying amendments in the representative rule are in my opinion necessary to avoid that subsidies etc. from external persons which are affecting the taxation base concerning output tax will be left out in the representative's MVD (with 662-number).[1081] They are also necessary for the representative to be able to decide whether a new partner is entering *bolaget* or *rederiet* – whereby the representative shall report the changed circumstances to the SKV – or if it is only a matter of financing of an acquisition to *bolaget* or *rederiet*.[1082]

That altered circumstances compared to what applied at the representative registration are reported, is also a provision for the SKV being able to seek the right number of partners for *enkla bolaget*'s VAT if the representative would not fulfil the accounting.[1083] The need of specifying amendments is also a reality concerning the relationship to abroad and more so regarding other EU countries. An amendment should be inserted into the representative rule to simplify control – via the VIES system – of the accounting regarding *enkla bolaget*'s or *partrederiet*'s trade of goods with other EU countries. It should be noted that the representative shall make intra-Union acquisitions of goods for *bolaget* or *rederiet* by invoking the given 662-number. The amendment should further state (together with a corresponding amendment in Chapter 11 ML) that it is the representative – and not another partner – who shall issue invoices in connection with supplies of goods to another EU country which are made in the activity of *enkla bolaget* or *partrederiet*.[1084] The comprehensive need of specifying amendments in the representative rule entails that it for legal certainty reasons also exists a need to introduce an amendment into the rule meaning that it should be mandatory that the representative also shall answer for a common book-keeping for the partners according to Chapter 4 section 5 BFL. The representative

[1080] See sec:s 6.4.3, 6.4.7 and 6.6.
[1081] See sec:s 6.4.4, 6.4.7 and 6.6.
[1082] See sec:s 6.4.5 and 6.4.7.
[1083] See sec:s 6.4.5 and 6.4.7.
[1084] See sec:s 6.4.6, 6.4.7 and 6.6.

should in my opinion thus not only answer for a documentation for VAT control being available by him according to Chapter 5 section 2 second paragraph SFL.[1085]

A vast need of specifying amendments in the representative rule and in Chapter 8 section 5 and Chapter 11 ML has thus been established, for an effective collection being accomplished of the VAT in *enkla bolag* and *partrederier* by Chapter 6 section 2 second sentence ML. Although such amendments would benefit the control of the collection, it is at the expense of the individual's legal certainty. The individual's legal certainty demand on foreseeable decisions regarding the material taxation rule is not benefitted by vast such amendments.

Although it is a matter of *bolag* or *rederier* with few partners, the representative rule becomes with the need of specification that I have found concerning Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL) far too complex for a legally certain judgement of the taxation situation. The legal certainty aspects should be considered having precedence over the aim with efficiency of collection, if the need of amendments in the representative rule and in Chapter 8 section 5 and Chapter 11 ML becomes far too vast. Thus should in my opinion the collection be administrated by the tax liables themselves, i.e. by the partners according to Chapter 6 section 2 first sentence ML. The possibility to appoint a representative amongst the partners according to Chapter 6 section 2 second sentence ML (with reference to Chapter 5 section 2 SFL) is lacking an equivalent in the VAT Directive (2006/112). The mentioned legal certainty aspects mean that it is not suitable to by vast amendments in that part try to make the representative rule in compliance with the general rules in the ML and taxable person and payment liable respectively according to article 9(1) first paragraph and articles 2(1)(a) and (c) and 193 respectively in the VAT Directive (2006/112). Thus I consider that Chapter 6 section 2 second sentence should be abolished from the ML and – as a consequence thereof – Chapter 5 section 2 SFL limited to only regard employee withholding taxes, employer's contribution (for national social security purposes) and excise duty, not VAT.[1086]

An alternative would be to follow the Finnish solution concerning *partrederier* and *sammanslutningar*, which are not legal entities but are treated as tax subjects for VAT purposes according to section 2 first paragraph and section 13 FML.[1087] That would mean that both the first and second sentences would be abolished from Chapter 6 section 2

[1085] See sec. 6.4.7.
[1086] See sec:s 6.4.7 and 6.6.
[1087] See sec:s 4.4, 6.4.7 and 6.6.

ML.[1088] In such a case can Chapter 6 section 2 ML instead state in a clarifying respect that *enkla bolag* and *partrederier* as tax subjects for VAT purposes are comprised by the general rules in the ML on tax liability.[1089] That would also mean that partners in such *bolag* or *rederier* would no longer be tax liable in that capacity. They could instead be made jointly responsible for the payment of the VAT in such a tax subject in VAT respect.[1090] Such a joint responsibility for the partners could be introduced by an expansion of such meaning of Chapter 59 sections 13 and 14 SFL by virtue of article 205 of the VAT Directive (2006/112).[1091] Above all the regulation of the VAT for *sammanslutningar* according to sections 13 and 188 FML could give comparative guidance for a solution where *enkla bolag* and *partrederier* could be tax subjects for VAT purposes.[1092] With respect of that I have not come to any definitive conclusion in my analysis regarding the question whether a non-legal entity can be considered constituting taxable person according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112), should however a legislative measure in the ML in accordance with the FML's solution be made first after that question has been clarified on EU level.[1093] The aim with EU conformity provides namely that a reformulation of Chapter 6 section 2 ML according to my suggestion, i.e. meaning that *enkla bolag* and *partrederier* could be constituting tax subjects, can be supported of that article 9(1) first paragraph of the VAT Directive (2006/112) is altered so that the directive rule states that also non-legal entities can constitute taxable persons.[1094]

7.1.3.6 Especially about the tax object

If Chapter 6 section 2 ML is reformulated according to my suggestion in section 7.1.3.2, it would mean that it is clearly noted in Chapter 6 section 2 ML that *enkla bolag* (and *partrederier*) constitute tax subjects for VAT purposes and that they are comprised by the general rules in the ML on tax liability. However, it would not resolve the particular problem that I am mentioning concerning the determination of the tax object, i.e. the tax rate question regarding copyright to literary and artistic works. The problem is that joint works created e.g. by an *enkelt bolag* are comprised by the general VAT rate 25 per cent, whereas a similar work is considered as independent by for instance a limited company (*aktiebolag*) or a partnership (*handelsbolag*) and the reduced tax rate 6 per cent is applied instead. That question is however independent of the existence of the representative rule. The with respect of the VAT Di-

[1088] See sec:s 6.4.7 and 6.6.
[1089] See sec:s 6.4.7, 6.6 and 7.1.3.2.
[1090] See sec:s 6.4.7 and 6.6.
[1091] See sec:s 1.1.3, 6.4.7 and 6.6.
[1092] See sec:s 4.4, 6.4.7 and 6.6.
[1093] See sec.s 6.2.1.4, 6.4.7, 6.6 and 7.1.3.2.
[1094] See sec:s 6.2.1.4 and 7.1.3.2.

rective (2006/112) unmotivated lack of neutrality in the taxation in the present particular respect is therefore not remedied by a reformulation of Chapter 6 section 2 ML. Instead would the solution be lying in that Chapter 7 section 1 third paragraph number 8 ML would be altered, so that the rule would not only comprise independent works, but also joint works. The reference in that rule to sections 1, 4 or 5 URL should in my opinion from neutrality reasons be expanded to comprise also section 6 URL, if a joint work is created under the enterprise form *enkelt bolag* and in another company form would have been an independent work.[1095]

7.2 CONCLUDING VIEWPOINTS

Now I have tried the representative rule and drawn the conclusion that the ML in that part is not fulfilling the five law political aims for the Swedish VAT system which I have identified and chosen from the EU law in the field. The representative rule has no equivalent in the VAT Directive (2006/112). I have interpreted the rule so that it allows also an ordinary private person to become tax liable to VAT personally for his share in *enkla bolaget* or *partrederiet* merely on basis of him being a partner in *bolaget or rederiet*.[1096] That is not in compliance with the main rule on who is a taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112). I have not been able to draw any definitive conclusion concerning whether a non-legal entity can be considered having the character of taxable person according to the EU law. However, I have concluded that *enkla bolagen* and *partrederierna* belong in an ennobling chain of entrepreneurs up to the consumer according to article 1(2) of the VAT Directive (2006/112). Therefore should in my opinion a clarification be introduced into the VAT Directive (2006/112) on also a non-legal entity being comprised by the concept taxable person. First thereby could with respect of the aim *EU conformity* a reformulation be made of Chapter 6 section 2 ML, so that *enkla bolag* and *partrederier* would constitute tax subjects.[1097] That would make it possible for the ML also in the present respect to fulfil the primary EU law based harmonisation demand on the VAT legislations in the EU Member States, so that the aims *a cohesive VAT system* and a *neutral* VAT are upheld also for the enterprise forms *enkla bolag* and *partrederier*.

If the measures I am suggesting are not made in the VAT Directive (2006/112) and in Chapter 6 section 2 ML, I have drawn the conclusion that the possibility to appoint a representative for the accounting of the VAT in an *enkelt bolag* or *partrederi* should be abolished. In that case it

[1095] See sec:s 2.8, 6.5 and 6.6.
[1096] See sec. 7.1.3.3.
[1097] See sec. 7.1.3.2.

is better that the partners in *bolaget* or *rederiet* are administrating the collection of the VAT themselves. I base this conception on my conclusion that it exists a vast need of specifying amendments in the representative rule and in Chapter 8 section 5 and Chapter 11 ML, for an effective collection being accomplished by the possibility to appoint a representative amongst the partners. Although such amendments would benefit the SKV's control of the collection, it will be at the expense of the individual's legal certainty. The representative rule is thus neither fulfilling the other two law political aims: *efficiency of collection* and *legal certainty including legality*.[1098] I leave the following further viewpoints based on my conclusions and state in connection thereby an order for the carrying out of the measures I am suggesting concerning the representative rule.

By the conclusion that the representative rule can be interpreted so that an ordinary private person can be considered tax liable merely due to his role as partner in an *enkelt bolag* or *partrederi*, loosens in my opinion the fundamentals of the VAT system according to the EU law. The main rule for the distinction between the tax subject and the consumer by the determination of taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112) is not upheld in that respect. I designate such an interpretation result as extreme in relation to the result which shall be achieved by the VAT Directive (2006/112). It opens namely for so called arrangements, where it cannot be ruled out that VAT deduction could be invoked successfully by virtue of the ML regarding private consumption, by application of the representative rule for *enkla bolag* and *partrederier* according to the rule's present wording. The national interpretation principles can lead to the described interpretation result regarding the representative rule. However, in my opinion should the EU law principle on prohibition of abusive practice mean that an ordinary private person who is a partner in an *enkelt bolag* or *partrederi* cannot exercise such a right to VAT deduction. That principle should in my opinion thus also mean that the right of deduction cannot be exercised, despite that it formally would be valid in accordance with the concept tax liable in Chapter 6 section 2 first sentence ML.[1099]

The CJEU has by *Halifax et al.* (Case C-255/02) and the principle on prohibition of abusive practice given the Member States a tool in the field of VAT to protect the system. That principle should apply at such an extreme interpretation result as the described concerning a rule in the ML. It should in my opinion not mean any conflict between the RF and the EU law: An application of the EU law principle should not be con-

[1098] See sec. 7.1.3.5.
[1099] See sec. 2.8.

sidered meaning that the principle on conferred competence according to articles 4(1) and 5(2) TEU is transgressed.[1100] If an agreement on *enkelt bolag* has been made and means that VAT deduction would be possible for private consumption, it should thus be able to be *de sententia ferenda* redefined so that it will not be treated – as the HFD expressed it in RÅ 2009 not. 172 (18 Nov. 2009) – in VAT respect as an agreement on *enkelt bolag*.[1101] However, I suggest – in the first place – the following measures concerning the representative rule:

- The representative rule should be specified so that Chapter 6 section 2 first sentence ML is noted to regard *enkla bolag* and *partrederier* with economic activity according to Chapter 4 section 1 ML *and* that it would also be noted that the partners in such *bolag* and *rederier* shall have the character taxable person (*beskattningsbar person*) themselves.

- The measures should be combined with the concept supply (*omsättning*) being connected to the respective partner in *bolaget* or *rederiet*. That could be done by *andel* (share) being abolished from Chapter 6 section 2 first sentence ML and replaced with the partner's tax liability being determined with reference to Chapter 4 section 5 first paragraph BL and thus based on the partner's relationship to third party.[1102] Regardless whether that measure is made, *EDM* (Case C-77/01) entails that the tax liability lies with a partner who is a taxable person already according to the general rules in the ML for extra work to another partner in excess to the company agreement. Consideration for such extra work in excess to the mutual cost and income division following by the agreement constitutes an internal supply within *bolaget* or *rederiet*.[1103] Possibly could if for avoidance of misunderstanding be suitable that it is stated that the suggested reference to Chapter 4 section 5 first paragraph BL does not mean any limitation of the tax liability for a partner in an *enkelt bolag* or *partrederi*, where such liability follows by the general rules in the ML.

- In connection with the measures concerning Chapter 6 section 2 first sentence ML being carried out should also the possibility to appoint a representative amongst the partners for the accounting of the VAT in an *enkelt bolag* or *partrederi* be abolished. It would mean that the second sentence would be removed from

[1100] See sec:s 2.7 and 2.8.
[1101] See sec:s 6.2.1.3 and 2.8.
[1102] See sec. 7.1.3.3.
[1103] See sec:s 7.1.3.2 and 7.1.3.5.

Chapter 6 section 2 ML and that Chapter 5 section 2 SFL would be limited so that that rule would not comprise VAT. Then are by the way the suggestions not relevant on noting in Chapter 11 section 1 that the representative should be comprised by the invoicing liability according to the ML or on that it should be mandatory that the representative also shall answer for a common book-keeping for the partners according to Chapter 4 section 5 BFL. In such a case is neither my suggestion relevant on that the representative rule should state that the representative shall make intra-Union acquisitions of goods for *bolaget* or *rederiet* by invoking the given 662-number.[1104] Further are not either my suggestions relevant on the clarification that it should be possible to appoint a representative also where *bolaget* or *rederiet* is formed only by foreign taxable persons (*utländska beskattningsbara personer*) and that Chapter 6 section 2 second sentence ML also should comprise the concept taxable person (*beskattningsbar person*) according to Chapter 5 section 4 ML regarding the determination of whether a supply of services is made within the country.[1105]

- Concerning the rules in Chapter 1 section 1 first paragraph numbers 2 and 3 on tax liability at intra-Union acquisitions and imports I suggest the following. A clarification should be inserted into Chapter 6 section 2 first sentence ML on that taxable person (*beskattningsbar person*) according to Chapter 4 section 1 ML also comprises the same concept according to Chapter 2 a ML. Taxable person applies namely for the determination of intra-Union acquisitions according to the main rule of Chapter 2 a section 3 first paragraph number 3 and regarding goods comprised by excise duty in number 2 of that rule. Thereby can a partner in an *enkelt bolag* or *partrederi* become tax liable according to Chapter 6 section 2 first sentence ML for intra-Union acquisitions of goods on account of *bolaget* or *rederiet*. It should also be clarified in Chapter 6 section 2 first sentence ML that the rule also imposes tax liability on a person importing goods to an *enkelt bolag* or *partrederi*, regardless whether the person is a taxable person or whether *bolaget* or *rederiet* has an economic activity. The reason is that also an ordinary private person can become tax liable for imports, and that should also apply in connection with *enkla bolag* and *partrederier*.[1106]

[1104] See sec:s 7.1.3.4 and 7.1.3.5.
[1105] See sec. 7.1.3.3.
[1106] See sec. 7.1.3.3.

Where my suggestion that Chapter 6 section 2 ML should be reformulated, so that *enkla bolag* and *partrederier* could constitute tax subjects for VAT purposes, is concerned, should that have to come second, since it would probably not let itself be made without a more thorough legislative work on EU level. Such a work will in my opinion not only concern the rules in the VAT Directive (2006/112). It also concerns the EU's regulation no. 904/2010 on administrative cooperation and combating fraud in the field of VAT (together with the EU's regulation no. 79/2012 with certain application provisions to it). The aim with EU conformity provides that the mentioned reformulation of Chapter 6 section 2 ML can be supported by that article 9(1) first paragraph of the VAT Directive (2006/112) is altered so that the directive rule states that also non-legal entities can constitute taxable persons.[1107] My suggestion is that such a work begins by a co-operation between Sweden and Finland, where *sammanslutningarna* and *partrederierna* already are treated as tax subjects for VAT purposes but current law cannot be designated as clear.

I have mentioned that Saukko inter alia considers that the compulsory rules on tax liability for *sammanslutningar* according to section 13 FML should be so only in certain cases and voluntary in certain specific situations like concerning section 13 a FML regarding VAT groups (*skattskyldighetsgrupper*). Since the tax liability is a central concept in the FML, Saukko considers that the legal certainty (Fi., *oikeusturva*) demands a law alteration regarding section 13 FML. Saukko mentions that transactions within *sammanslutningar* are not treated as within VAT groups, since partner*s in sammanslutningar* can act for themselves and it is thus difficult to decide when *sammanslutningen* or the partners have made an acquisition etc.[1108]

Skattskyldighetsgrupperna (VAT groups) are corresponded in Sweden by *mervärdesskattegrupper* (VAT groups), which are treated in Chapter 6 a ML. According to the ML as well as the VAT Directive (2006/112) applies the general rule that VAT cannot be group accounted.[1109] It is in principle only between members of a registered VAT group according to Chapter 6 a ML that taxable supplies cannot be value added taxed between different persons comprised by the VAT.[1110] In that way the rules on VAT groups in Chapter 6 a ML constitute an alternative to the rules on *enkla bolag* and *partrederier* in Chapter 6 section 2 ML, where the problem with internal supplies and acquisitions between the partners in *bolaget* or *rederiet* is concerned.[1111] However, there is a problem with

[1107] See sec. 7.1.3.5.
[1108] See sec. 4.4.
[1109] See sec:s 1.2.3 and 3.2.
[1110] See sec. 3.2.
[1111] See sec:s 1.2.3 and 1.3.

the rules on VAT groups insofar as article 11 of the VAT Directive (2006/112) limits the possibility for registration of a VT group to apply only for members established within the country. In the doctrine it has been claimed that it is in conflict with the primary EU law principle on the EU citizens' right of free establishment within the Union. The EU Commission started proceedings against Sweden on breach of EU law and claimed that Chapter 6 a section 2 ML in practice is limiting the possibilities to group registration to apply to enterprises within the finance and insurance sectors, in conflict with article 11 of the VAT Directive (2006/112). Regarding that issue the CJEU went in its verdict on the 25th of April 2013 on Sweden's line and considered that the EU Commission had failed to show convincingly that the limitation was not well founded, in the light of its purpose being to combat tax avoidance and tax evasion.[1112] Although that question thereby may be considered clarified, remains that the rules on VAT groups do not constitute any functioning alternatives to the representative rule where all co-operating enterprises are not established in Sweden. That question can be treated in connection with the question whether *enkla bolagen* and *partrederierna* shall be made into VAT subjects for VAT purposes. Then can be mentioned whether alterations of the rules on VAT groups can make Chapter 6 a into an alternative to at all having a particular regulation regarding *enkla bolagen* and *partrederierna* in the ML. The clarifications should be made on EU level and approaches thereto probably most suitable made by Sweden in consultation with Finland.

By the way would such a reformulation which I am suggesting, having to come second, concerning the representative rule not solve the particular problem with the question on applicable tax rate at joint copyright to literary and artistic works. That problem arises namely for *enkla bolag* independent of the existence of the representative rule. A solution of the problem would instead be lying in that Chapter 7 section 1 third paragraph number 8 ML would be altered, so that the rule would not only comprise independent works, but also joint works.[1113]

[1112] See para. 39 in *Commission v. Sweden* (C-480/10) and sec. 1.2.3.
[1113] See sec. 7.1.3.6.

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CASE LAW

CJEU

The land codes for the present cases are: BE, Belgium; DE, Germany; DK, Denmark; EL, Greece; ES, Spain; FR, France; GB, Great Britain; IE, Ireland; IT, Italy; NL, the Nederlands; PL, Poland; PT, Portugal; and SE, Sweden. [M] marks that the case concerns *moms* (i.e. VAT).

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– The main rule, *enkla bolag* and *partrederier*

ABBREVIATIONS

art., article
BFL, *bokföringslagen (1999:1078)* [the Book-keeping Act]
BL, *bolagslagen*, *lag (1980:1102) om handelsbolag och enkla bolag* (the Partnership and Non-registered Partnership Act)
Btw, *belasting op de toegevoegde waarde* (VAT in Netherlands)
C, *curia* (court – about the CJEU)
Ch., chapter
cit., citation
Ds, department series
EC, European Community
e.g., exempli gratia, for example
Et al., and others
etc., et cetera
EU, the European Union (or the Union)
FML, *mervärdesskattelag 30.12.1993/1501* (the Finnish VAT act)
GAAP, Generally Accepted Accounting Principles
HFD, the Supreme Administrative Court
i.e., id est, that is
IL, *inkomstskattelagen (1999:1229)*
SEK, Swedish kronor
m.fl., *med flera* (and others – et al.)
ML, *mervärdesskattelagen (1994:200)*
Moms, abbreviation of *mervärdesskatt* (VAT)
MVD, *mervärdeskattedeklaration* (VAT return)
no., number
p., page; pp., pages
para., paragraph
Prop., *Regeringens proposition* (Government bill)
ref., reference case
RÅ, *Regeringsrättens årsbok* (from 2011 the HFD's yearbook)
SBL, *skattebetalningslagen (1997:483)* [the Tax Payment Act – replaced by the SFL]
sen., sentence
SFL, *skatteförfarandelagen (2011:1244)* [the Taxation Procedure Act]
SFS, *svensk författningssamling*, Swedish Code of Statutes
SKV, *Skatteverket* (the tax authority)
SOU, *statens offentliga utredningar* (the Government's official reports/investigations)
Sw., Swedish
v., versus
VAT, value added tax
VIES, VAT Information Exchange System

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1. INTRODUCTION

1.1 Background

This paper ends a combined thesis, where the first part consists of the licentiate's dissertation *Skattskyldighet för mervärdesskatt – en analys av 4 kap. 1 § mervärdesskattelagen* (Tax liability to value added tax – an analysis of Chapter 4 section 1 Value Added Tax Act)[1114] and the second part consists of *Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier* [Tax and payment liability to VAT in (approx.) joint ventures and shipping partnerships].[1115] I summarize in this finalizing paper the conclusions from the mentioned books. Before I account for these conclusions and some of the concluding viewpoints in Chapters 2-4 in this paper, I mention in this introduction chapter background, topic, purpose, method, delimitations and research in the filed for both the investigations.

For the VAT which is a consumption tax it is fundamental that the rules shall distinguish the tax subjects from the consumers. In part 1 focus was set on the main rule to accomplish precisely that. The question was whether *mervärdesskattelagen (1994:200)*, ML (the Value Added Tax Act 1994), is in compliance with the EU law in this respect, and above all with the main rule on who is a taxable person according to the EU's VAT Directive (2006/112/EC). Since part 1 was published has, by SFS 2013:368, Chapter 4 section 1 ML been altered and *beskattningsbar person* (taxable person) introduced into the ML. Thereby shall the main rule in the ML on who shall belong to the VAT system, account for and pay VAT be in compliance with the directive's main rule, but much remains to be done in my opinion, e.g. concerning the emergence of the right of deduction.

In part 2 is also the determination of the tax subject investigated, but concerning one of the special rules in the ML. I call that rule the representative rule. The representative rule treats partly *skattskyldigheten* (the tax liability) for partners in *enkla bolag* and *partrederier*, partly a possibility for the partners to let one of the partners as a representative answer for the accounting and payment liability regarding the VAT in *bolaget* (approx. joint ventures) or *rederiet* (shipping partnerships). By its character of a special rule on tax and payment liability is the representative rule not of the same economical importance as the main rule to determine the tax subject. The representative rule is however of a significant economical interest, since there are more than 7,000 active enkla bolag according to the SCB's enterprise register. Furthermore there are

[1114] Cit. part 1.
[1115] Cit. part 2.

hidden statistics concerning undetected *enkla bolag*. The legislator has not at all mentioned problems with the representative rule.

A particular scientific interest with the representative rule is that it concerns a more classic law scientific problem. The representative rule concerns namely taxation and collection in connection with legal figures – *enkla bolag* and *partrederier* – which are not legal entities. The representative rule shall furthermore also entail a tax liability which is complying with the main rule on who is a taxable person according to the VAT Directive (2006/112). That a partner in an *enkelt bolag* or a *partrederi* is named as *skattskyldig* (tax liable) in the representative rule lacks equivalent in the VAT Directive (2006/112). There is nothing in the directive on determination of a partner in a legal person, e.g. in a partnership (*handelsbolag*) or a limited company (*aktiebolag*), as a taxable person. In these cases is the tax liability determined on company level, and not on partner level like with partners in *enkla bolag* and *partrederier* according to the representative rule. The representative rule has thus no direct equivalent in the VAT Directive (2006/112).[1116]

The problem is basically that the representative rule as a special rule on the tax subject so to speak builds out the concept tax liable in relation to the main rule on who is tax liable according to the ML. The problem is above all that the representative rule, opposite to the main rule, is lacking an expressed demand on that the activity (*verksamheten*) in *enkla bolaget* or *partrederiet* shall be an economic activity. An important question is therefore whether the interpretation of the wording of the representative rule means that it is expanding the determination of who is tax liable according to the ML in relation to the main rule on tax liability, so that an ordinary private person can be considered tax liable. In that case is the representative rule insofar not complying with the VAT Directive (2006/112). The CJEU's case law – *Götz* (Case C-408/06) and *Commission v. the Netherlands* (Case 235/85) – means namely that an ordinary private person cannot be considered constituting a taxable person according to the main rule in the VAT Directive (2006/112).[1117]

1.2 Topic and purpose

Part 1 and part 2 are independent books, but the topic lies in both cases within the VAT law, whereby I treat the concept tax liability from two perspectives.[1118] In part 1 I treated the main rule in the ML to determine the tax subject, namely the concept *yrkesmässighet* (professionality) in the then applying wording of Chapter 4 section 1 ML.[1119] In part 2 I am

[1116] See sec:s 1.1.1, 1.1.3, 2.8 and 7.1.1 in part 2.
[1117] See sec:s 1.1.1, 1.1.2, 1.1.3, 1.2.3, 2.8, 6.2.2.1 and 7.1.1 in part 2.
[1118] See sec. 1.1.
[1119] See p. 24 in part 1.

treating the special case of tax liability which is determined in Chapter 6 section 2 ML, where reference also is mentioned in the second sentence to Chapter 5 section 2 *skatteförfarandelagen (2011:1244)*, SFL. I call them jointly or each rule by itself for the representative rule.[1120] In this paper I am not making a complete summary of the conclusions from the two books. I review common problems and differences regarding both these perspectives on the concept tax liability in the ML. Above all I treat whether the concept is in compliance with the main rule on who is a taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112).

The investigation of the concept tax liability treats in the first place whether the choice of tax subjects is complying with the main rule on who is a taxable person according to the recently mentioned directive rule. It stipulates inter alia that with taxable person is meant any person who independently is carrying out an economic activity.[1121] It is fundamental for the VAT to distinguish the tax subject from the consumer.[1122] The tax subject is normally a person who is usually named entrepreneur and the consumer is normally an ordinary private person.[1123] The tax subjects are comprised by the VAT and the VAT system and are normally charging output tax on the price of his goods and services.[1124] The consumer is not comprised by the VAT and is lacking right of deduction for thus charged input tax on acquired goods and services, why the consumer also is called *the tax carrier*.[1125] A law political aim with the VAT according to the EU law is neutrality, i.e. that the tax shall be competition and consumption neutral.[1126] A neutral VAT shall not entail that the consumer chooses between various suppliers of goods or services depending on differences between them regarding the VAT.[1127] That the choice of the tax subjects based on the concept tax liability in the ML in that manner shall be neutral and complying with the VAT Directive (2006/112) is a basic and common theme for the investigation of the determination of the concept tax liability. The investigation in part 1 was made based on the concept *yrkesmässighet* according to the then applying wording of Chapter 4 section 1 ML and in part 2 based on Chapter 6 section 2 first sentence ML on tax liability for partners in an *enkelt bolag* or *partrederi*. In both cases was the concept tax liability according to the main rule in the ML compared[1128] with the main rule

[1120] See sec. 1.1.1 in part 2.
[1121] See p. 24 in part 1 and sec:s 1.1.1 and 1.1.2 in part 2.
[1122] See p. 26 in part 1 and sec. 1.1.3 in part 2.
[1123] See pp. 24 and 29 in part 1 and sec. 1.1.1 in part 2.
[1124] See pp. 21 and 22 in part 1 and sec:s 1.1.1, 1.1.2, 1.1.3 and 1.2.1 in part 2.
[1125] See pp. 21 and 22 in part 1 and sec. 1.1.1 in part 2.
[1126] See p. 37 in part 1 and sec:s 1.2.1, 2.2, 2.4.1, 2.4.2 and 2.8 in part 2.
[1127] See p. 91 in part 1 and sec. 2.4.1 in part 2.
[1128] See Ch. 1 sec. 2 first para. no. 1 with reference to sec. 1 first para. no. 1 ML.

on who is payment liable according to the VAT Directive (2006/112).[1129]

The main rule on who is tax liable according to the ML means nowadays that the tax subject is making taxable supplies of goods or services (within the country) in his economic activity.[1130] The concept tax liability has thus a subject side (taxable person) and an object side (supply).[1131] The main rule on the concept tax liability has a systematic correspondence with the main rule on who is payment liable according to the VAT Directive (2006/112).[1132] Payment liable is according to the main rule a taxable person which shall carry out taxable supplies of goods or services (within Swedish territory).[1133] The directive's *beskattningsbar person* (taxable person) was previously nearest corresponded by *yrkesmässig verksamhet*, and nowadays is *beskattningsbar person* implemented into the ML. Taxable transactions in the directive is corresponded by taxable supplies (*omsättningar*).[1134] *Beskattningsbar person* (taxable person) in the main rule Chapter 4 section 1 is nowadays determining the prerequisite *beskattningsbar person* (taxable person) in the main rule regarding the concept tax liability.[1135] The representative rule constitutes in accordance with Chapter 1 section 2 last paragraph one of the special rules in the ML on who is tax liable (*skattskyldig*).[1136] The representative rule contains – opposite to the main rule – not any expressed demand on that the activity in *enkla bolaget* or *partrederiet* shall be an economic activity.[1137]

In part 1 was in the first place treated whether the choice of tax subject by application of the concept tax liability is complying with taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112). The question was whether this was the case despite that the income tax law concept business activity (*näringsverksamhet*) at the time was integrated into the ML, by the main rule for the determination of *yrkesmässig verksamhet*, Chapter 4 section 1 number 1 ML, connect-

[1129] See art:s 2(1)(a) and (c) and 193 of the VAT Directive (2006/112).
[1130] See Ch. 1 sec. 1 first para. no. 1 ML and pp. 21, 22 and 25 in part 1 and sec.s 1.1.2, 1.1.3 and 3.3 in part 2.
[1131] See pp. 21 and 22 in part 1 and sec:s 1.1.2 and 1.1.3 in part 2.
[1132] See p. 25 in part 1 and sec. 1.1.3 in part 2.
[1133] See art:s 2(1)(a) and (c) and 193 of the VAT Directive (2006/112) and pp. 25 and 35 in part 1 and sec:s 1.1.3, 2.4.1 and 3.2 in part 2.
[1134] See pp. 26 and 35 in part 1 and sec. 1.1.3 in part 2.
[1135] See p. 24 in part 1.
[1136] In Ch. 1 sec. 2 last para. ML is noted that there are special rules on who is in certain cases tax liable in Ch. 6, Ch. 9 and Ch. 9 c ML. The representative rule Ch. 6 sec. 2 is such a rule special rule, where the first sen. stipulates tax liability for a partner in an *enkelt bolag* or a *partrederi* in correspondence to his share in *bolaget* or *rederiet*. See sec. 1.1.3 in part 2.
[1137] See sec. 1.1.3 in part 2.

ing to that concept according to Chapter 13 *inkomstskattelagen (1999:1229)*, IL (the Income Tax Act 1999).[1138] The basic problem with that connection was that it consisted in the primary EU law by article 113 TFEU raising a general harmonisation demand on the VAT legislations in the EU countries. The income tax law is on the other hand non-harmonised and comprised in some cases by secondary EU law legislation such as the Merger Directive (2009/133/EC).[1139] In part 2 is also treated in the first place whether the choice of tax subjects is complying with taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112). The question is if this is the case despite that the tax liability in the mandatory rule Chapter 6 section 2 first sentence ML is imposed on a partner in connection with certain legal figures – *enkla bolag* and *partrederier* – and not on the legal figures themselves. Furthermore they constitute co-operation forms which are not legal entities of their own.[1140] The tax liability remains by the partners also if they choose to apply the voluntary rule in Chapter 6 section 2 second sentence ML with reference to Chapter 5 section 2 SFL, and apply by the tax authority – *Skatteverket* (SKV) – for one of them to be appointed as representative to administrate the collection of the VAT in the activity by *enkla bolaget* or *partrederiet*.[1141]

The main purpose in part 1 was to investigate whether the determination of the then applying *yrkesmässig verksamhet* according to Chapter 4 section 1 ML was complying with taxable person according to the main rule article 9(1) first paragraph of the VAT directive (2006/112) or could be made complying with the directive rule by suggestions for alterations.[1142] That work had as a side purpose to put the concept *yrkesmässig verksamhet* into a broader context than regarding the material liabilities in the VAT system. I mentioned thereby that the ML's main rule on right of deduction for input tax, Chapter 8 section 3 first paragraph, used – like today – the concept tax liable to determine that right, and that tax liable (*skattskyldig*) corresponds to the VAT Directive's payment liable (*betalningsskyldig*), whereas the directive uses taxable person in the main rule on the right of deduction, article 168(a).[1143] Furthermore it was included in the side purpose to mention that in the corresponding way was – then like now – tax liability used in connection with the determination in the Swedish legislation of the lia-

[1138] See pp. 22, 25 and 26 in part 1. Since part 1 was published has, by SFS 2013:368, the connection to Ch. 13 IL been abolished from Ch. 4 sec. 1 ML on the 1st of July 2013 – see sec. 1.3 in part 2.
[1139] See p. 44 in part 1.
[1140] See sec:s 1.1.1–1.1.3 in part 2.
[1141] See sec. 1.1.1 in part 2.
[1142] See pp. 24 and 32 in part 1.
[1143] See p. 38 in part 1.

bility to register for VAT purposes.[1144] In that context is taxable person used in articles 213–216 of the VAT Directive (2006/112).[1145]

The purpose with part 2 is to analyze the representative rule for *enkla bolag* and *partrederier* based on the VAT's most central purposes, namely a cohesive VAT system, neutrality, EU conformity, efficiency of collection and legal certainty including legality. Since Chapter 6 section 2 ML does not have any direct equivalent in the VAT Directive (2006/112), the question is inter alia whether alterations or amendments should be made, to make the rule in compliance with the EU's VAT Directive (2006/112).[1146]

To accomplish an overview of common problems and differences concerning the questions in the two books I am leaving this overview regarding the questions (A–E) which I mentioned within the purpose of part 1 and the problems (1–5) which inter alia were mentioned within the purpose of part 2:

A) The main question in part 1 concerned whether the concept *yrkesmässig verksamhet* in the then applying wording of Chapter 4 section 1 ML was in compliance with taxable person according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112), despite that Chapter 4 section 1 number 1 ML at the time connected to the concept *näringsverksamhet* (business activity) in Chapter 13 IL.[1147]

B) Sub questions to A were if the concept *verksamhet* (activity) in *yrkesmässig verksamhet* according to Chapter 4 section 1 numbers 1 and 2 ML was in compliance with the prerequisite economic activity in article 9(1) first paragraph of the VAT Directive (2006/112) and the question whether the concept *verksamhet* should be abolished at all from the ML.[1148]

C) Another sub question to A was the question whether the determination of the tax object eventually affected the determination of the tax subject.[1149]

[1144] See Ch. 3 kap. *skattebetalningslagen (1997:483)*, SBL, and the now applying Ch. 7 SFL.
[1145] See p. 38 in part 1.
[1146] See sec. 1.1.2 in part 2 and sec. 1.1.
[1147] See pp. 25–33 in part 1.
[1148] See p. 34 in part 1.
[1149] See pp. 34–36 in part 1.

D) One of the side issues concerned whether the tax liability's emergence has an importance for the emergence of the right of deduction.[1150]

E) Another side issue was whether a control problem exists with that the concept tax liable, which corresponds to the VAT Directive's payment liable, was used – then like today – for the liability to VAT register. In that respect is taxable person used in articles 213–216 of the directive. Furthermore is the Swedish tax system using for the registration the general tax register or the VAT register, depending on whether the tax subjects' transactions are taxable or not for VAT purposes. This side issue was the only taxation procedure question in part 1.[1151]

1) An interpretation question in part 2 is whether the mandatory rule Chapter 6 section 2 first sentence ML alone can entail tax liability for a partner in an *enkelt bolag* or *partrederi* due to the capacity of partner itself, so that also an ordinary private person in that capacity can be tax liable. The question on the interpretation of the concept tax liable according to Chapter 6 section 2 first sentence ML is decided by what is meant with *enkla bolag* and *partrederier* according to Chapter 6 section 2 ML. The question is also if the answer is affected by the wording of the voluntary rule, i.e. Chapter 6 section 2 second sentence ML and Chapter 5 section 2 SFL. I also investigate how the tax liability is divided and should be divided between the partners in *bolaget* or *rederiet*.[1152]

2) Another question is also whether *enkla bolag* and *partrederier*, despite they are not legal entities, can constitute taxable persons according to the main rule article 9(1) first paragraph of the VAT Directive (2006/112). According to the main rule is a taxable person any person who, independently, carries out an economic activity. It is in the first place such a person which constitutes a tax subject for VAT purposes opposite to a consumer. If the enterprise forms *enkla bolag* and *partrederier* could be considered constituting taxable persons, they would constitute tax subjects for VAT purposes instead of – as according to the representative rule – the partners. This problem also contains to judge whether a non-legal entity can constitute taxable person.[1153]

[1150] See pp. 38–41 in part 1.
[1151] See p. 41 in part 1.
[1152] See sec. 1.1.2 in part 2.
[1153] See sec. 1.1.2 in part 2.

3) A third problem concerns whether the representative rule needs to be specified by amendments in Chapter 6 section 2 ML or Chapter 5 section 2 SFL, to simplify the collection (application issues). Then are both the subject side and the object side mentioned concerning the concept tax liability. Both questions on taxable person and supply, and relationships between the partners in *enkla bolagen* or *partrederierna* and their respective relations to suppliers and customers are mentioned. I do not just mention the material rules on tax liability and right of deduction, but also whether the representative rule entails a need to complete the formal provisions for right of deduction for input tax regarding the demands on invoice content etc. in Chapter 11 ML. If Chapter 11 should be completed with the invoicing liability also comprising the representative rule, is the question also whether there exists a particular need of amendments concerning the demands on invoice content, to make the tax control working satisfactory regarding the representative rule. The throughout question in connection with the application issues is whether it will prove to exist such a vast need of amendments in the representative rule and Chapter 11 ML respectively that the rule will become far too complex. That entails in that case legal uncertainty for the partners. It concerns whether accounting of output tax has been left out in the VAT return, *mervärdesskattedeklarationen* (MVD), or whether a too low output tax or a too high or incorrect input tax has been accounted there.[1154]

4) In connection with problem 1 regarding whether the representative rule can entail that an ordinary private person becomes tax liable I will also mention the following questions. Besides at taxable transaction within the country of goods or services (in economic activity) according to the main rule in no. 1 of Chapter 1 section 1 first sentence ML tax liability emerges at intra-Union acquisitions of goods and imports of goods. Regarding these other two instances of tax liability in Chapter 1 section 1 first sentence ML, no. 2 concerning intra-Union acquisitions of goods and no. 3 concerning imports of goods, the following may be mentioned. The tax liable can in the latter case be an ordinary private person or a taxable person,[1155] whereas by tax liable for intra-Union acquisitions is normally meant a taxable person.[1156] A private person may however be tax liable for intra-Union acquisitions of new means of transport.[1157] Regarding who is tax liable for intra-Union acquisitions and imports the ML is in these

[1154] See sec. 1.1.2 in part 2.
[1155] See Ch. 1 sec. 2 fisrt para. no. 6 ML.
[1156] See Ch. 1 sec. 2 first para. no. 5 and Ch. 2 a sec. 3 first para. no. 3 and second para. ML.
[1157] See Ch. 1 sec. 2 first para. no. 5 and Ch. 2 a sec. 3 first para. no. 1 ML.

respects complying with the VAT Directive (2006/112).[1158] The question is whether a partner who is an ordinary private person should be tax liable when he is making an import or an intra-Union acquisition of goods for *enkla bolaget* or *partrederiet*. Thereby will also the concept taxable person according to Chapter 5 section 4 ML be mentioned concerning the determination of country of supply for services. The representative rule and intra-Union acquisitions will also be mentioned with respect of control in connection with the application issues, i.e. problem 3. In connection with problem 1 concerning whether the representative rule can entail that an ordinary private person becomes tax liable I will by the way also mention another question. It concerns what scope the representative rule has at voluntary tax liability for letting of business premises etc. according to Chapter 9 ML.[1159]

5) I will also investigate whether there is any rule on the tax object in the ML whose application, independent of the existence of the representative rule, is influenced by the enterprise form *enkelt bolag*.[1160]

1.3 Method

1.3.1 The conduction of the investigation in part 1

The investigation of the main question A was made by a scientific study and concerned the judgement of whether the determination of the tax subject according to Chapter 4 section 1 ML was complying with the main rule on taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112) The analysis of *the content* in the national rules in the ML and IL was made based on Swedish traditional law sources such as preparatory work statements and case law and doctrine.[1161] Any comparative method was not relevant, since the Swedish law technical solution with a connection to the income tax law for the determination of the tax subject for VAT purposes according to the main rule in the ML had proven to be uniquely Swedish.[1162] At the trial of the main question A the VAT principle's parts according to article 1(2) of the VAT Directive (2006/112) – i.e. the principles on general deduction right, reciprocity and passing on of the tax burden – had a great importance for the trial of whether the then applying wording of

[1158] See art. 2(1)(b)(i) and (ii) or (d) of the VAT Directive (2006/112). Art. 2(1)(b)(i) is the main rule regarding taxation of intra-Union acquisitions and art. 2(1)(b)(ii) concerns taxation of intra-Union acquistions of new means of transport. Art. 2(1)(d) concerns taxation of imports.
[1159] See sec. 1.1.2 in part 2.
[1160] See sec. 1.1.2 in part 2.
[1161] See sec. 8.1.2 and also sec. 1.3 in part 1.
[1162] See sec. 8.1.2 and also sec. 1.3 and Appendix 2 in part 1.

Chapter 4 section 1 ML was complying with the directive rule, article 9(1) first paragraph. [1163]

Concerning question B and the question whether the concept *verksamhet* (activity) should have been abolished from the ML and the question whether the same subject can have more than one *verksamhet*, has the directive rule's [article 9(1) first paragraph] prerequisite economic activity been judged first. Thereafter has the national law, where the preparatory work to the ML is referring to older income tax law for the determination of the concept *verksamhet*, been tried against the first mentioned judgement.[1164]

Concerning question C it follows by the VAT Directive's main rule of article 2(1)(a) and (c) regarding who is payment liable that the subject side and the object side are independent to each other, why an affection from a rule of the tax object on the determination of the tax subject would not be complying with article 9(1) first paragraph of the VAT Directive (2006/112). The investigation has concerned whether such an influence still exists in Swedish case law in cases regarding a certain rule on the tax object, namely taxable letting of parking places in a *parkeringsverksamhet* (parking business) according to Chapter 3 section 3 first paragraph number 5 ML. There exists a historical connection in the preparatory work to the ML to older income tax law and the concept *parkeringsrörelse* (parking business activity).[1165]

Concerning the side issue D on the right of deduction's emergence has been concluded that the CJEU has concluded[1166] that it is in conflict with the principle of neutrality if a rule raises a demand meaning that the emergence of the right of deduction in an economic activity, where the intention is to create taxable transactions, would be depending of such transactions first actually having occurred in the activity. The investigation has therefore concerned whether the use of the concept tax liability in the main rule on right of deduction for input tax of Chapter 8 section 3 first paragraph ML can be interpreted as the ML raising such a demand. [1167]

Concerning the side issue E has the investigation consisted of laying application aspects in control respect on that Chapter 3 SBL for the liability to VAT register used the ML's concept tax liable.[1168] In articles 213–216 of the VAT Directive (2006/112) were on the other hand taxa-

[1163] See sec. 8.1.2 and also sec. 1.3 and sec. 1.1.4 and Appendix 1 in part 1.
[1164] See sec. 8.1.2 and also sec. 1.3 in part 1.
[1165] See sec. 8.1.2 and also sec. 1.3 and sec. 1.1.3.3 in part 1.
[1166] Para. 23 in *Rompelman* (268/83). See pp. 39 and 40 in part 1.
[1167] See sec. 8.1.2 and also sec. 1.3 and sec. 1.1.5.2 in part 1.
[1168] The same problem exists with now applying Ch. 7 SFL.

ble person used and not the to tax liable (*skattskyldig*) corresponding payment liable (*betalningsskyldig*). The questions on control concerns in the first place that the Swedish tax system for the registration uses the general tax register or the VAT register, depending on whether the tax subject's transactions are taxable or not for VAT purposes.[1169]

1.3.2 The conduction of the investigation in part 2

The overall matter with the problems concerning the representative rule is whether alterations or amendments in Chapter 6 section 2 ML should be made, to make the rule complying with the main rule on taxable person of article 9(1) first paragraph of the VAT Directive (2006/112). That question is caused in the first place of that Chapter 1 section 2 last paragraph ML is building out the concept *skattskyldig* (tax liable) in relation to the main rule of Chapter 1 section 2 first paragraph number 1 with reference to section 1 first paragraph number 1 ML. That is due to that Chapter 1 section 2 last paragraph states that there are special rules on who is tax liable in inter alia Chapter 6, where section 2 is to be found.[1170] Therefore I have drawn up the problems concerning the representative rule which are to be found in section 1.2 above.[1171] An important interpretation question for the analysis of the representative rule is whether *enkla bolag* and *partrederier*, despite that they are not legal entities, can constitute taxable persons according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112).[1172] The particular question on the tax object according to problem 5 in section 1.2 above concerns the determination of applicable tax rate according to Chapter 7 section 1 third paragraph number 8 ML. The question concerns thereby letting or transfer of copyright to literary and artistic works, and regards *enkla bolag* but exists regardless of the existence of the representative rule in the ML. It has therefore been treated by itself.[1173]

I have with a law scientific method and by using customary law sources investigated the representative rule Chapter 6 section 2 ML and the concept tax liability in the mandatory rule in the first sentence, with reference to Chapter 5 section 2 SFL, and the representative rule's function as a collection rule. That the EU law in the VAT field is a part of current law at the interpretation of the rules in the ML means that the tax subject *de lege lata* is determined in two legislations: the ML and the VAT Directive (2006/112). The content of the rules in the VAT Directive (2006/112) shall, with regard of the result which shall be achieved by the directive, be implemented into the ML. Therefore the

[1169] See sec. 8.1.2 and also sec. 1.3 and sec. 1.1.5.3 in part 1.
[1170] See sec. 7.1.1 and also sec. 1.1.3 in part 2.
[1171] See sec. 7.1.2 and also sec. 1.1.2 in part 2.
[1172] See sec. 7.1.2 and also sec:s 1.1.2 and 1.1.3 in part 2.
[1173] See sec. 7.1.2 and also sec:s 6.1 and 6.5 in part 2.

question is whether the representative rule is complying with the main rule on taxable person regarding the determination of the tax subject. At the investigation of the representative rule I have by EU conform (directive conform) interpretation broken down the rule (analysis). If the interpretation result from that analysis has proved that the rule cannot be considered being in compliance with article 9(1) first paragraph of the VAT directive (2006/112), I have tried to put it together (synthesis) by suggestions *de lege ferenda*, so that it thereby – if possible – is made in compliance with the directive rule.[1174] I have also reasoned *de sententia ferenda* concerning the interpretation of the representative rule.[1175] In connection with the investigation I have also to a certain extent used, in a serving purpose, a comparative analysis.[1176] By an international outlook I have found that above all the rules in the Finnish VAT act (FML)[1177] on so called *sammanslutningar* – which are not constituting legal entities but are treated as tax subjects – show such similarities with the representative rule that I at the investigation have made a certain comparison with Finnish VAT law.[1178]

Based on the EU law, and the primary and secondary EU law sources in the field and the fundamental principles for the VAT that can be read out of these, I have identified and chosen to include in the analysis of the representative rule certain law political aims for the Swedish VAT system.[1179] These aims are: a cohesive VAT system, neutrality, EU conformity, efficiency of collection and legal certainty including legality. After a review of each aim I have summarized by an overview how I have identified and chosen the aims. Thereby I have also explained how I have judged their relevance at the trial of the representative rule, and illustrated it in Figure 1 and Figure 2.[1180]

[1174] See sec. 7.1.2 and also sec. 1.2.1 in part 2.
[1175] See sec. 7.1.2 and also sec:s 1.2.1 and 2.8 in part 2.
[1176] See sec. 7.1.2 and also sec. 1.2.1 in part 2.
[1177] *Mervärdesskattelag 30.12.1993/1501*.
[1178] See sec. 7.1.2 and also sec:s 4.4 and 4.5 in part 2.
[1179] See sec:s 1.2.1, 2.2 and 7.1.2 in part 2.
[1180] See sec:s 2.8 and 7.1.2 in part 2.

Figure 1

Test	**Result**	**Result**	**Relevance of the aims for the Swedish VAT system**
	Rule complying with {art. 1(2) dir.; 1:1 first para. 1 and 8:3 first para. ML; art. 2(1)(a) and (c), 193 [incl. art. 9(1) first para.] and 168(a) dir.}.		- A cohesive VAT system - Neutrality/EU conformity - Efficiency of collection [of the VAT in *enkelt bolag/ partrederi* by the voluntary rule (*The collection*)]
Specifying amendments in the repre-sentative rule	----------	----------	----------
		Give control possibility, but far too complex rule	- Legal certainty incl. legality according to the EU law

Figure 2

Test	**Result**	**Relevance of aims for trial of the concept *tax liable* in the representative rule**
Tax liable in the rule complying with art, 9(1) first para. of the VAT Dir.?	Expanding {rule competition; also between the rule and 1:1 first para. 1 ML and art:s 2(1)(a) and (c) and 193 of the VAT Dir.}	EU conformity and legal certainty incl. legality according to the EU law are not relevant: The rule has no equivalent in the VAT Dir. _____ **Note** If *tax liable* in the rule is not made compatible with art. 9(1) first para. of the VAT Dir., procedural solutions are necessary: - The individual may invoke that art. 9(1) first para. has direct effect {extreme interpretation result that a private person (consumer) would be comprised by tax liable; in conflict with the basic principles in art. 1(2) of the VAT Dir.} - The state may invoke the principle of prohibition of abusive practice in accordance with Halifax et al. (Case C-255/02). _____ **Note.** COM or another Member State might go to the CJEU claiming breach of treaty, if tax liable distorts the competition on the internal market, according to art. 113 TFEU, which also would be in conflict with the neutrality principle according to the preamble to the VAT Dir. and art. 1(2) of the VAT Dir. and with the aim of a cohesive VAT system (COUNCIL DIRECTIVE 2006/112/EC […] on the common system of VAT).

At the analysis of the representative rule I have regarded the aims. The trial of the rule has however also been made with regard of the review of *enkla bolag* and *partrederier* from a civil law perspective and that the FML has been concluded being of a certain comparative interest. Respect of the aims has also been affected by the use of the ABCSTUXY-model according to my description below.[1181]

The investigation of the representative rule has been made by a division partly into interpretation questions, partly into application issues.[1182] Previously I have made an overview regarding *enkla bolag* and *partrederier* from a civil law perspective.[1183] A historical background has been given regarding the formulation of the representative rule in connection with the investigation of it.[1184] In connection with the application issues I have judged the need of specifying amendments in the representative rule. Thereby have hypothetic case studies been made, whereby, for judgement of the subject side and the object side by the concept tax liable according to the representative rule, a tool has been used which I have constructed and calls the ABCSTUXY-model.[1185] I have given this illustration of the model.[1186]

Figure 4

<table>
<tr><td>Enkelt bolag/partrederi</td><td></td></tr>
<tr><td rowspan="3">A –partner/representative
B – partner
A and B apply by the SKV for A to account for VAT in enkla bolaget or partrederiet</td><td>S – supplier to A or B in their capacities of partners in enkla bolaget/partrederiet</td></tr>
<tr><td>T – customer to A or B in their capacities of partners in enkla bolaget/partrederiet</td></tr>
<tr><td>U – person with an indirect relation to A or B in their capacities of partners in enkla bolaget</td></tr>
<tr><td rowspan="2">C
Eventual additional partner in enkla bolaget or partrederiet. Alternatively may C be a non-partner, e.g. someone of S, T, U, X or Y</td><td>X – supplier to A or B regarding their other activities</td></tr>
<tr><td>Y – customer to A or B regarding their other activities</td></tr>
</table>

By using the persons A, B, C, S, T, U, X and Y in the case studies an acronym has been created, A-B-C-STUXY, to simplify memorizing in

[1181] See sec:s 2.8, 6.1 and 7.1.2.
[1182] See sec:s 1.6 and 6.1 in part 2.
[1183] See Ch. 5 in part 2.
[1184] See sec:s 1.2.1 and 6.2.2.2 in part 2.
[1185] See sec. 7.1.2 and also sec:s 1.2.1 and 3.2 in part 2.
[1186] See sec. 7.1.2 and also sec. 3.3 in part 2.

which role the different persons are put in connection with the application issues.[1187] In connection with Figure 4 I have given two examples for the hypothetic case studies which thereafter have been conducted and on which further case studies have been developed.[1188] In the hypothetic case studies I have in the first place stuck to the general rules in the ML.[1189] Thereby I mean the basic concepts for the emergence of the tax liability according to the main rule of Chapter 1 section 1 first paragraph number 1 ML, i.e. the concept *omsättning* (supply) and the concept *beskattningsbar person* (taxable person), and the to the concept *omsättning* responding concept *förvärv* (acquisition) in the main rule for the emergence of the right of deduction of Chapter 8 section 3 first paragraph ML.[1190]

The investigation has also concerned the question whether Chapter 11 ML, which contains the VAT's rules on invoicing, should be completed with the invoicing liability also comprising the representative rule. The invoicing rules according to the ML are treated also in connection with the application issues and the mentioned hypothetic case studies regarding Chapter 6 section 2 ML. For the tax control working satisfactory it is a matter of finding a balance between on the one hand the individual's legal certainty interest and the rules' degree of complexity and on the other hand the SKV's need to be able to control that the collection is working by the representative rule. I have intended to keep the trial of the need of specification by amendments in the representative rule at such a level that a far too high degree of complexity risking to lead to legal uncertainty shall be proven already concerning the basic concepts tax liability and acquisition.[1191]

1.4 Delimitations

In my studies on tax liability to VAT I have chosen to focus partly on the main rule, partly on the rules on tax liability for partners in *enkla bolag* and *partrederier*. This means that a number of rules on tax liability have been left out in my analysis. These were concerning part 1 the rules on: *yrkesmässig verksamhet* concerning certain temporary transactions, Chapter 4 section 3 ML; *yrkesmässighet* in certain personnel restaurants, Chapter 4 section 2 ML; *yrkesmässighet* in certain public activity, Chapter 4 sections 6 and 7 ML; and the limitation of *yrkesmässigheten* for non-profit associations (*allmännyttiga ideella föreningar*) and registered religious communities, Chapter 4 section 8

[1187] See sec. 7.1.2 and also sec:s 1.2.1 and 6.4.1–6.4.6 in part 2.
[1188] See sec. 7.1.2 and also sec:s 6.4.1–6.4.6 in part 2.
[1189] See sec. 7.1.2 in part 2.
[1190] See sec. 1.5 in part 2.
[1191] See sec. 1.2.1 in part 2.

ML.[1192] I have chosen to investigate the determination of the tax subject in the ML in relation to the main rule on who is a taxable person, article 9(1) first paragraph of the VAT Directive (2006/112).[1193] The rule in Chapter 4 ML on the determination of who has *yrkesmässig verksamhet* which shall mean an implementation of the directive rule is section 1, which at the time had the main rule in number 1 and a supplementary rule in number 2.[1194] Therefore I have chosen in part 1 to investigate Chapter 4 section 1 ML in relation to the directive rule, and not the other rules in Chapter 4 ML.[1195]

A pre study I have made[1196] has contributed to the choice of the representative rule, Chapter 6 section 2, amongst the special rules on who is tax liable in certain cases in the ML for the investigation of the subject question in part 2. I have left out Chapter 6 sections 1, 3, 4, 6, 7 and 8 and Chapter 9 and Chapter 9 c ML. It is namely only Chapter 6 section 2 ML that contains the described complication with a regulation of tax liability and collection in connection with a legal figure which is not constituting a legal entity, in the present respect an *enkelt bolag* or *partrederi*. In Chapter 6 section 1 is *handelsbolag* (partnership) treated, i.e. an enterprise form which constitutes legal person. In Chapter 6 sections 3 and 4 ML, regarding bankrupt's estate and estate of a deceased person, are cases treated on tax liability in these two forms concerning supply in an activity under liquidation for which another person has been tax liable, i.e. the debtor and the deceased person. It is not of interest for the legal capacity question like concerning the representative rule. The particular rule on tax liability in Chapter 6 section 6 has only the meaning that if activity is carried out by the state through a public enterprise the enterprise itself shall be tax liable for its transactions. The remaining rules in Chapter 6, sections 7 and 8, concern tax liability in connection with certain intermediation of goods or services. That regards questions on the determination of the tax object which lacks a particular interest for the representative rule. The same apply to Chapter 9 and Chapter 9 c ML. Both the chapters are treating the question on tax liability concerning certain transactions, namely regarding voluntary tax liability for certain letting of real estate and exemption from taxation for supply of goods placed in certain warehouses.[1197] Opposite from part 1 are in part

[1192] See p. 79 in part 1. Since part 1 was published has, by SFS 2013:368, inter alia Ch. 4 sec:s 2 and 3 ML been abolished from the ML, and *yrkesmässig verksamhet* has in general been replaced with *beskattningsbar person* (taxable person) in the ML – see sec:s 1.1.3 and 1.3 in part 2.
[1193] See p. 24 in part 1.
[1194] See p. 27 in part 1. Also the supplementary rule was abolished from the ML by SFS 2013:368 – see sec. 1.1.3 in part 2.
[1195] See pp. 78 and 79 in part 1.
[1196] See sec:s 1.2.1 and 1.3 in part 2 regarding Forssén & Kellgren 2010.
[1197] See sec. 1.3 in part 2.

2 also mentioned intra-Union acquisitions of goods and the invoicing rules in the ML and Chapter 5 section 4 ML regarding the determination of country of supply for services.[1198] Thereby is the concept *beskattningsbar person* (taxable person) used instead of *skattskyldig* (tax liable) regarding the tax subject. These rules are however only mentioned in connection with the questions on Chapter 6 section 2 ML. Also Chapter 9 is mentioned to a certain extent regarding to what extent Chapter 6 section 2 ML should comprise voluntary tax liability for letting of business premises etc. according to Chapter 9 ML.[1199]

By part 1 in the first place treating the then existing connection to the concept *näringsverksamhet* (business activity) in the IL for the determination of *yrkesmässig verksamhet* in the main rule Chapter 4 section 1 number 1 ML, together with the supplementary rule Chapter 4 section 1 number 2 ML, in relation to the main rule on taxable person (*beskattningsbar person*) of article 9(1) first paragraph of the VAT Directive (2006/112), I delimited away also some other questions on the tax subject. In that book was not the concept *näringsidkare* (business person) treated when it at the time was used in the ML inter alia in connection with the rules in Chapter 5 ML on placing of the supply of services within or outside the country and the rules on so called intra-Union acquisitions of goods in Chapter 2 a ML and the rules on invoicing in Chapter 11 ML. *Näringsidkare* was namely independent in relation to the IL.[1200]

In part 2 the investigation was limited to whether the concept tax liability and the collection according to Chapter 6 section 2 ML is in compliance with the main rules on who is a taxable person, the right of deduction and the payment liability according to the VAT Directive (2006/112) to apply to the main rules on tax liability and right of deduction according to the ML. In the investigations SOU 2002:74 (*Mervärdesskatt i ett EG-rättsligt perspektiv*) and Ds 2009:58 (*Mervärdesskatt för den ideella sektorn, m.m.*) and in the Ministry of Finance's memorandum of 2012-11-23 (*Begreppet beskattningsbar person – en teknisk anpassning av mervärdesskattelagen*) it was suggested that the connection to the IL would be abolished from Chapter 4 section 1 number 1 ML. It was later as mentioned also done on the 1st of July 2013, by SFS 2013:368,[1201] but the question remains whether the concept tax liability

[1198] See sec:s 1.2 and 1.3.2.
[1199] See sec. 1.3 in part 2.
[1200] See p. 78 in part 1.
[1201] The Ministry of Finance suggested also in its memorandum that Ch. 4 sec. 1 ML should be altered so that *beskattningsbar person* (taxable person) is used instead of *yrkesmässig verksamhet*. It was further also suggested in the Ministry of Finance's memo inter alia that *näringsidkare* (business person) in Ch. 2 a, Ch. 5 sec. 4, Ch. 6 a and Ch. 11 and *skattskyldig* (tax liable) should be altered into *beskattningsbar person*

in the representative rule is in compliance with taxable person according to the main rule of article 9(1) first paragraph of the VAT Directive (2006/112). Like the two investigations the memorandum did not at all mention the representative rule. Therefore can Chapter 6 section 2 ML and Chapter 5 section 2 SFL be expected to remain for a foreseeable time. The Ministry of Finance suggested that the concepts *yrkesmässig verksamhet*, *företagare* (entrepreneur) and *näringsidkare* would be replaced by *beskattningsbar person* (taxable person), which was done. However remains the problems according to section 1.2 concerning the concept *skattskyldig* (tax liable) and accounting and payment liability according to the representative rule. It depends on the following. The concept tax liability is corresponded by the VAT Directive's payment liable (*betalningsskyldig*) and not by the directive's taxable person. The Ministry of Finance did not suggest any alteration of the ML either regarding the main rule on who is tax liable, Chapter 1 section 2 first paragraph number 1, or regarding Chapter 1 section 2 last paragraph, which states that special rules on who is in certain cases tax liable are to be found in Chapter 6, Chapter 9 and Chapter 9 c. In Chapter 6 ML is section 2 to be found, i.e. the representative rule.

By the way I do not mention in part 2 the question on the right of deduction's or the right of reimbursement's emergence, i.e. side issue D in part 1.[1202] If the right of deduction in Chapter 8 section 3 first paragraph ML, in accordance with my suggestion in part 1,[1203] would be connected to *beskattningsbar person* (taxable person) instead of the concept tax liability (*skattskyldighet*), should it consequently apply also regarding the representative rule.[1204] The analysis of the concept tax liability in the representative rule regards concerning acquisitions (*förvärv*) instead inter alia whether the right of deduction's (or the right of reimbursement's) scope, like what applies regarding the main rule Chapter 8 section 3 first paragraph ML, is in compliance with the main rule of article 168(a) of the VAT Directive (2006/112).

Legal uncertainty concerning the basic concepts tax liability (*skattskyldighet*) and acquisitions (*förvärv*) means such an uncertainty regarding whether accounting of output tax should have been made or whether a too low output tax or a too high or incorrect input tax has been accounted in an MVD. Incorrect accounting in the mentioned respects can furthermore lead to sanctions in form of tax surcharge (*skattetillägg*) and criminal charges. Concerning questions on legal certainty I stay

(taxable person). All the mentioned suggestions were also carried out on the 1st of July 2013, by SFS 2013:368. See sec. 1.3 in part 2 and also Ch. 3.

[1202] See sec. 1.3 in part 2.

[1203] See p. 262 in part 1.

[1204] Any suggestion in the present respect was by the way not left by the Ministry of Finance in its memorandum of 2012-11-23 regarding Ch. 8 sec. 3 first para. ML.

however in part 2 at the question whether the representative rule entails legal uncertainty regarding the judgement of the basic concepts tax liability and acquisitions and of accounting and payment liability.[1205]

Concerning accounting questions are not in anyone of the two books mentioned the connection in the rules in Chapter 13 ML regarding in which accounting period output and input tax shall be accounted and should be accounted to the civil law concept Generally Accepted Accounting Principles (GAAP).[1206] When I write about accounting in part 2 it concerns in the first place the relationship between on the one hand the material rules on tax liability and right of deduction and on the other hand the invoicing rules in Chapter 11 ML. In that work is only mentioned the rule in *bokföringslagen (1999:1078)*, BFL (i.e. the Book-keeping Act), which makes it possible for the partners in an *enkelt bolag* or *partrederi* to have a common book-keeping, namely Chapter 4 section 5 BFL.[1207] I do not mention any other rules in the BFL. In part 1 was mentioned accounting questions only in relation to the question whether the evidence is affecting the determination of the tax subject.[1208] In control respect is in part 2 focus set on the representative rule and the accounting of output and input tax in an MVD in relation to the invoicing liability.[1209]

Concerning the procedural side issue E in part 1 regarding the concept tax liability as *préjudiciel* to the registration liability I suggest for control reasons that all taxable persons should be comprised by the same control system from the beginning, regardless of the character of the transactions they are intending to make. I suggested thus that Chapter 3 section 1 first paragraph numbers 2 and 4 SBL[1210] should be altered, so that therein would be stipulated that notice to the SKV shall be made in VAT respect when *yrkesmässig verksamhet* according to the ML starts, changes or ends.[1211] Indeed has – after the publishing of part 1 – the possibility given according to Chapter 10 section 31 SBL for enterprises with a low turnover to account the VAT in the income tax return been abolished, when the SFL replaced the SBL on the 1st of January 2012. However, it is still so that the liability to VAT register is connected to the tax liability according to the ML (or that it is a matter of an activity

[1205] See sec. 1.3 in part 2.
[1206] See pp. 33, 79 and 80 in part 1 and sec. 1.3 in part 2.
[1207] See sec. 1.3 in part 2.
[1208] See pp. 33, 79, 80, 81 and 176–181 in part 1.
[1209] See sec. 1.3 in part 2.
[1210] Nowadays Ch. 7 sec. 1 first para. no. 3 and no. 4 SFL.
[1211] See pp. 263 and 264 in part 1.

in which from taxation qualified exempted transactions are made).[1212] Thus remains the control problems which I mentioned in part 1 with taxable persons being referred to the VAT register and the general tax register depending on the following. The distinction is determined by whether the persons intend to make taxable or from taxation qualified exempted supplies of goods or services or to make from taxation unqualified exempted supplies of goods or services.[1213] My suggestions in connection with side issue E in part 1 are thus not affecting the investigation of the representative rule in part 2. There is instead treated inter alia the particular procedural possibility to account the VAT in the activity of an *enkelt bolag* or *partrederi* by one of the partners in *bolaget* or *rederiet* being appointed as representative according to the voluntary rule Chapter 6 section 2 second sentence ML with reference to Chapter 5 section 2 SFL.

1.5 Central research in the field

There has not been any equal study of the representative rule before this work. In *Mervärdesbeskattning vid obestånd*[1214] has one of the special rules on tax liability in Chapter 6 ML been treated, namely section 3 concerning bankruptcy estates. That is however not of any interest for the analysis of the representative rule.[1215] Works close to the topic is my licentiate's dissertation, *Skattskyldighet för mervärdesskatt – en analys av 4 kap. 1 § mervärdesskattelagen*,[1216] and the mentioned pre study to this work, *Momsskyldighet i särskilda fall: handelsbolag, enkla bolag, konkursbon, dödsbon och förmedlare m.fl.*[1217]

Concerning taxable person and right of deduction respectively has *Merværdiafgiftspligten – en analyse af den afgiftspligtige transaktion*[1218] and *Fradragsret for merværdiafgift*[1219] respectively been research of a central interest for the investigation of the representative rule. Also *Contractuele samenwerkingsverbanden in de btw*[1220] and *Arvonlisäveroryhmät*[1221] have been research of such interest for the investigation of the representative rule.

[1212] See Ch. 7 sec. 1 first para. no. 3 and no. 4 SFL, which has replaced Ch. 3 sec. 1 first para. no. 2 and no. 4 SBL, and prop. 2010/11:165 (*Skatteförfarandet*) Part 1 p. 320.
[1213] See p. 263 in part 1.
[1214] Cit. Öberg 2001.
[1215] See sec. 1.3 in part 2.
[1216] Cit. Forssén 2011 (1).
[1217] Cit. Forssén & Kellgren 2010.
[1218] Cit. Ramsdahl Jensen 2003.
[1219] Cit. Stensgaard 2004.
[1220] Cit. van Doesum 2009.
[1221] Translates into Swedish: *Skattskyldighetsgrupper* (i.e. VAT groups). Cit. Saukko 2005.

Concerning the neutrality aspects on the VAT are other central research in the field *Strukturneutralitet i momssystemet*[1222] and *Neutral uttagsbeskattning på mervärdesskatteområdet*.[1223] Regarding questions on the EU law and interpretation within the field of taxation have also the following two research projects been of interest for this work: *Aktiebeskattning och fria kapitalrörelser En studie av beskattningen av den löpande avkastningen av aktieinvesteringar på bolags- och ägarnivå mot bakgrund av EG:s fria kapitalmarknad*[1224] and *Mål och metoder vid tolkning av skattelag – med särskild inriktning på användning av förarbeten*.[1225] *Bolagskonstruktioner och beskattningseffekter En inkomstskatterättslig studie av handelsbolag och enkla bolag*[1226] mentioned first and foremost the income tax. However has that work also been of interest for this work. That applies also regarding *Personbolag i beskattningen Inkomstbeskattningen av öppna bolag och kommanditbolag i spänningsfältet mellan beskattningen av enskilda näringsidkare och aktiebolag*[1227] and *Taxation of Cross-Border Partnerships Double Tax Relief in Hybrid and Reverse Hybrid Situations*.[1228]

[1222] Cit. Bjerregaard Eskildsen 2012.
[1223] Cit. Sonnerby 2010.
[1224] Cit. Ståhl 1996.
[1225] Cit. Kellgren 1997.
[1226] Cit. Mattsson 1974.
[1227] Cit. Rehbinder 1995.
[1228] Cit. Barenfeld 2005.

2. OVERVIEW – CONCLUSIONS IN PART 1

2.1 Conclusions concerning the main question A – the main rule on *yrkesmässig verksamhet*

According to the CJEU's case law – *Götz* (Case C-408/06) and *Commission v. the Netherlands* (Case 235/85) – an ordinary private person cannot be deemed having the character of taxable person according to the main rule in Article 9(1) first paragraph of the VAT Directive (2006/112). That is due to the prerequisite economic activity meaning that a duration criterion must be fulfilled for a person to be considered having that character. That is only possible when it is a matter of applying the facultative rule of taxable person according to article 12 of the VAT Directive (2006/112), which above all is meant for temporary transactions concerning new production in the building area. [1229] That economic activity means that a duration criterion is raised has been a central issue for the trial of whether *yrkesmässig verksamhet* (professional activity) according to Chapter 4 section 1 number 1 ML, with the previous connection to the concept *näringsverksamhet* (business activity) in Chapter 13 IL, was complying with taxable person according to the main rule of the Directive. Furthermore can an ordinary private person not be deemed having the character of taxable person according to the main rule.

I have concluded that the only rule on *näringsverksamhet* in Chapter 13 IL which had a general scope in the same way as article 9(1) first paragraph of the VAT Directive (2006/112) was the rule on real *näringsverksamhet* of Chapter 13 section 1 first paragraph second sentence IL.[1230] It is similar to article 9(1) first paragraph of the VAT Directive (2006/112), which inter alia stipulates that taxable person means any person who, independently, carries out an economic activity.[1231] With *näringsverksamhet* according to Chapter 13 section 1 first paragraph second sentence IL is meant that an activity for obtaining income (*förvärvsverksamhet*) is carried out professionally and independently.[1232] The CJEU's case law and Swedish case law proved to mean that the content of the independence prerequisite in Chapter 13 section 1 first paragraph second sentence IL could be considered complying with the independence prerequisite in article 9(1) first paragraph of the VAT Directive (2006/112). It is determined excluding relationships of employment and contains the demand that the person in question is taking an entrepreneur's risk (business risk) of his own.[1233] The concept

[1229] See pp. 30, 247 and 303 of part 1 and sections 1.1.3 and 1.2.3 of part 2 and section 1.1.
[1230] See pp. 248 and 305 of part 1.
[1231] See pp. 27, 248 and 305 of part 1.
[1232] See pp. 248 and 305 of part 1.
[1233] See pp. 255 and 312 of part 1.

förvärvsverksamhet in Chapter 13 section 1 first paragraph second sentence 2 IL can be deemed in itself containing a duration prerequisite. The CJEU's case law and Swedish case law showed a common delimitation of economic activity and *näringsverksamhet* with respect of duration insofar as it is requested in both cases that the person in question must commit to his investments more measures of administration than what could be expected from a private investor.[1234]

The conclusions concerning the main question A meant that the connection in the main rule for *yrkesmässig verksamhet*, Chapter 4 section 1 number 1 ML, to the concept *näringsverksamhet* should have been limited to only refer to Chapter 13 section 1 first paragraph second sentence IL. It was not in compliance with taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112) that the connection referred to the concept *näringsverksamhet* according to the whole of Chapter 13 IL. It meant namely that the legal persons, by the connection to Chapter 13 section 2 IL, were professional (*yrkesmässiga*) according to Chapter 4 section 1 number 1 ML already by virtue of their character of legal persons. The request of inter alia an economic activity existing according to article 9(1) first paragraph of the VAT Directive (2006/112) applies regardless of the legal form in which the activity is carried out. The same requests apply for who is considered having the character of taxable person according to the directive rule for natural persons as well as for legal persons.[1235]

Although the connection in question was limited as recently stated, Swedish case law caused a need for the main rule to continuously being completed by the supplementary rule for *yrkesmässig verksamhet* under forms similar to *näringsverksamhet* (*näringsverksamhetsliknande former*), Chapter 4 section 1 number 2 ML, so that Chapter 4 section 1 could have been totally in compliance with the directive rule in question.[1236] Swedish case law excludes an activity which is totally criminal from the concept *näringsverksamhet*,[1237] whereas the CJEU considers that the principle of neutrality prevents a difference between legal an illegal transactions for the determination of economic activity.[1238] Furthermore can according to the preparatory work certain single payments fall beside the income tax schedules in the IL and as well beside the income tax schedule *näringsverksamhet*.[1239] This meant a limitation of the determination of who was professional (*yrkesmässig*) and thus on the subject side – which was not in compliance with article 9(1) first

[1234] See pp. 256, 313 and 314 of part 1.
[1235] See pp. 248, 251, 252 and 304 of part 1.
[1236] See pp. 253 and 310 of part 1.
[1237] See pp. 185, 253 and 310 of part 1.
[1238] See p. 167 of part 1.
[1239] See pp. 175, 253 and 310 of part 1.

paragraph of the VAT Directive (2006/112). Thus, the supplementary rule was necessary to make Chapter 4 section 1 ML totally in compliance with the directive rule.[1240] Swedish case law did however not anymore raise a profit prerequisite for *näringsverksamhet* that would have caused a need for the supplementary rule, since that prerequisite was diluted in the case law and had – then like now – its importance above all by delimiting *näringsverksamhet* from the income tax schedule earned income concerning hobby activities.[1241] In article 9(1) first paragraph of the VAT Directive (2006/112) it is stipulated that a taxable person has that character concerning his economic activity, whatever the purpose or results of that activity.[1242]

In addition to the limitation of the connection in Chapter 4 section 1 number 1 to the IL and the continuous need of the supplementary rule in Chapter 4 section 1 number 2, should the yearly turnover limit SEK 30,000 have been abolished, so that the concept *yrkesmässig* according to Chapter 4 section 1 ML totally would have been in compliance with the main rule of taxable person, Article 9(1) first paragraph of the VAT Directive (2006/112).[1243] Concerning the second paragraph introduced in 2009 into Chapter 13 section 1 IL for the judgement of whether a mandator's activity is carried out independently, it would have been necessary to follow up the development of the case law. The question was whether the second paragraph affected the meaning of the independence prerequisite, despite that it according to the Council on Legislation (*lagrådet*) opinion only would mean a codification of the then current case law concerning the concept.[1244]

2.2 Conclusions concerning question B – the concept *verksamhet*

A clarification should have been inserted into chapter 4 § 1 ML meaning that *verksamhet* (activity) in the expression *yrkesmässig verksamhet* (professional activity) in the rule no longer is determined by the income tax concept *verksamhet* from the time before 1994. The reference that was made in the preparatory work to the ML to that concept *verksamhet* in older Swedish income tax law, meant that the same subject could have more than one *verksamhet* if different activities lack natural connection to each other. It was not in compliance with the CJEU's case law meaning that the same person has one single economic activity according to article 9(1) first paragraph of the VAT Directive (2006/112),

[1240] See pp. 253 and 310 of part 1.
[1241] See pp. 254 and 311 of part 1.
[1242] See pp. 113, 128, 129, 132, 254 and 311 of part 1.
[1243] See pp. 253 and 310 of part 1. The amount limit 30 000 was by the way abolished completely from the ML, since inter alia Ch. 4 sec. 1 no. 2 and sec:s 2-4 were revoked by SFS 2013:368 – see section 1.1.3 of part 2.
[1244] See pp. 255 and 312 of part 1.

regardless of the number of activities.[1245] The conclusion in question also concerned the side issue E insofar as Chapter 3 section 2 second paragraph SBL – nowadays Chapter 7 section 2 second paragraph SFL should have been altered, so that the same person is registered for one *verksamhet*, although new activities will occur thereafter.[1246] By the way, the examination in this part has shown that the CJEU's case law and Swedish case law mean that a transaction thinking (*transaktionstänkande*) cannot in general replace an activity thinking (*verksamhetstänkande*) in the ML in the way the investigation SOU 2002:74 was suggesting, why a concept *verksamhet* should remain in the ML. That question was resolved by the implementation of the concept *ekonomisk verksamhet* (economic activity) in the ML, by SFS 2013:368.[1247]

2.3 Conclusions concerning question C – *parkeringsverksamhet*

A review of two advanced rulings, RÅ 2003 ref. 80 and RÅ 2007 ref. 13, that treat Chapter 3 section 3 first paragraph number 5 ML concerning taxation of letting of parking places in a *parkeringsverksamhet* (parking business), showed that that determination of the tax object could affect the determination of the tax subject according to the previous main rule on *yrkesmässig verksamhet*, Chapter 4 section 1 number 1 ML.[1248] That depends on that Chapter 3 section 3 first paragraph number 5 ML could be considered containing a historical connection in the preparatory work to the older income tax concept *parkeringsrörelse* (parking business activity).[1249] That the determination of the tax object would influence the determination of the tax subject – or vice versa – is not in compliance with the ML or the VAT Directive. The rules on the tax subject and on the tax object respectively are judged separately. That such an influence has been concluded in one case is in my opinion sufficient for a clarification to be made in the ML that if there are historical connections in the preparatory works to the ML to the concepts *näringsverksamhet* or *rörelse* (business activity) of the income tax law, for the determination of taxable or from taxation exempted transaction of goods or services in Chapter 3 ML, they are to be considered obsolete.[1250] The CJEU has taken by itself established that a national court at interpretation of national law is obliged if possible to interpret the national law on the basis of the wording and purpose of a directive so that

[1245] See p. 260 of part 1.
[1246] See pp. 260 and 317 of part 1. By the way the need of this alteration seems to remain, since also the replacement Ch. 7 sec. 2 para. 2 SFL still stipulates "*en anmälan för varje verksamhet*" (an application for each activity).
[1247] See pp. 259 and 317 of part 1 and section 1.1.3 of part 2.
[1248] See pp. 261 and 318 of part 1.
[1249] See pp. 205, 261 and 318 of part 1 and section 1.3.1.
[1250] Se pp. 261, 318 and 319 of part 1.

its intended result will be achieved, although the preparatory works to the national rule are of an opposite meaning. However, problems may arise in the situation described due to the loyalty to the preparatory works being so heavily established in the Swedish law source doctrine that it is a national principle of interpretation.[1251] *Yrkesmässig verksamhet* (professional activity) has, by SFS 2013:368, expressly been replaced by *beskattningsbar person* (taxable person) in the ML, but without any commentary concerning the determination of the tax object. Therefore the need of the mentioned alteration remains.

2.4 Conclusions concerning the side issues D and E – certain questions about the concept *skattskyldighet*

Concerning the side issue D I have concluded that the right of deduction in chapter 8 § 3 first paragraph ML should be connected to the concept *yrkesmässighet* (professionalism) instead of the concept *skattskyldighet* (tax liability).[1252] The main rule on the right of deduction, chapter 8 § 3 first paragraph ML, where the concept *skattskyldighet* is a necessary prerequisite for the emergence of the right of deduction, and Chapter 10 section 9 ML, stipulates special reasons for right of reimbursement before taxable transactions have occurred in the activity. That could be interpreted so that there is a demand for taxable transactions to have occurred in the activity, before the right of deduction emerges for input tax on acquisitions or imports in the activity.[1253] That is not in compliance with the CJEU's case law, of which it follows that it would be in conflict with the principle of the VAT's neutrality to demand that the right of deduction would emerge first when taxable transaction has occurred in the activity.[1254] The intention to create such transactions is instead decisive for the emergence of the right of deduction according to the main rule article 168 a) of the VAT Directive (2006/112).[1255] By the way should Chapter 10 section 9 ML be abolished from the ML, since – with regard of the recently described practice by the CJEU – that rule taken by itself is obsolete.[1256] That problem remains yet. The Ministry of Finance did not even mention in its memorandum of the 23rd of November 2012 Chapter 8 section 3 or Chapter 10 section 9, and that was neither the case later on in SFS 2013:368.

Concerning side issue E it has been concluded that the CJEU's case law cannot be deemed expressing clearly that also taxable persons which only have the intention to make from taxation unqualified exempted transactions shall be VAT registered according to articles 213–216 of

[1251] Se section 1.2.2 of part 2.
[1252] See pp. 262 and 319 of part 1 and section 1.4.
[1253] See pp. 218, 219, 262 and 320 of part 1.
[1254] See para. 23 in *Rompelman* (268/83). See pp. 39, 215, 216, 262 and 320 of part 1.
[1255] See p. 40 of part 1.
[1256] See pp. 263 and 320 of part 1.

the VAT Directive (2006/112).[1257] Due to the control problems concerning control of altered circumstances compared to those at the filing of the application for registration, all taxable persons should from the beginning be comprised by the same control system for VAT purposes.[1258] Taxable persons who only intend to make from taxation unqualified exempted transactions are today comprised by the general tax register and should instead from the beginning belong to the VAT register, like those which from the beginning have the intention to make taxable or from taxation qualified exempted transactions of goods or services. That would benefit both the SKV's control and the entrepreneur's planning in advance if he moves on to make taxable – or from taxation qualified exempted – transactions.[1259] Thus should no longer the liability to register to VAT be connected to the concept *skattskyldighet*. Instead should Chapter 7 section 1 third and fourth paragraphs SFL[1260] be altered so that it is stipulated therein that the application to the SKV shall be made for VAT purposes when *yrkesmässig verksamhet* according to the ML is started, altered or revoked.[1261] Then it should also be clearly expressed that the concept *näringsverksamhet* in Chapter 7 section 2 first paragraph SFL[1262] is used for other measures of registration than concerning the VAT.[1263] By the way should also Chapter 7 section 2 second paragraph SFL[1264] be altered as a consequence of the conclusion that the same person has only one economic activity regardless of the number of activities, so that the same person is registered for one *verksamhet* regardless if new activities will occur thereafter.[1265]

[1257] See pp. 263 and 320 of part 1.
[1258] See pp. 263 and 321 of part 1.
[1259] See p. 263 of part 1.
[1260] Previously Ch. 3 sec. 1 para:s 2 and 4 SBL.
[1261] See pp. 263 and 264 of part 1 and section 1.4.
[1262] Previously Ch. 3 sec. 2 para. 1 SBL.
[1263] See p. 264 of part 1.
[1264] Previously Ch. 3 sec. 2 para. 2 SBL.
[1265] See pp. 260 and 264 of part 1 and section 2.2.

3. OVERVIEW – CONCLUSIONS IN PART 2

An important establishment from part 1, and which I have come back to in part 2, is that an ordinary private person cannot be considered having the character of taxable person according to the main rule article 9(1) first paragraph of the VAT Directive (2006/112).[1266] I have construed the wording of the representative rule, Chapter 6 section 2 ML, so that an ordinary private person can be deemed tax liable (*skattskyldig*) merely because of his role as partner in an *enkelt bolag* or a *partrederi* (shipping partnership), which thus is not in compliance with the main rule on who is a taxable person. My interpretation has been decided by the question of what is the meaning of *enkla bolag* and *partrederier* according to Chapter 6 section 2 ML, whereby it has been concluded that regardless whether the mandatory rule in the first sentence or the voluntary rule in the second sentence is in question what is thereby meant with *enkelt bolag* or *partrederi* is decided by the civil law. In the Swedish civil law, Chapter 1 section 3 of *lag (1980:1102) om handelsbolag och enkla bolag, BL* (i.e. the Partnership and Non-registered Partnership Act), an *enkelt bolag* is defined as two or more having agreed to carry on activity in a company without establishing a partnership (*handelsbolag*). A Swedish shipping partnership (*partrederi*) is similar to an *enkelt bolag*. A *bolag* can exist even if neither the activity object nor the purpose is of an economic nature, if only the purpose is common. An *enkelt bolag* may thus exist without a demand that the activity constitutes business activity (*näringsverksamhet*). A partner who is an ordinary private person can be deemed as tax liable for his share (*andel*) of the *enkla bolaget* (or the *partrederiet*) merely because of the role as partner, according to Chapter 6 section 2 first sentence ML.[1267]

That the expression *för verksamheten* (for the activity) is used in Chapter 5 section 2 SFL, whereto the voluntary rule Chapter 6 section 2 second sentence ML refers, shows that the *verksamhet* (activity) of the *enkla bolaget* or the *partrederiet* does not have to be *en ekonomisk verksamhet* (an economic activity).[1268] The voluntary rule thereby affects the judgement that an ordinary private person can become tax liable merely because of his role as partner in an *enkelt bolag* or a *partrederi*. Thus, there is a need to clarify the representative rule so that an ordinary private person cannot be deemed having the character of tax liable according the ML by Chapter 6 section 2 first sentence ML being applicable. The representative rule should in my opinion be specified so that Chapter 6 section 2 first sentence ML complies to *enkla bolag* and *partrederier* with *ekonomisk verksamhet* (economic activity) according

[1266] See section 2.1.
[1267] See section 7.1.3.3 of part 2.
[1268] See sections 6.2.2.3 and 6.2.2.4 of part 2.

to Chapter 4 section 1 ML *and* so that it also stipulates that the partners of *enkla bolag* and *partrederier* shall be *beskattningsbara personer* (taxable persons) by themselves. If the representative rule is retained, the resulting question is whether the tax liability according to Chapter 6 section 2 first sentence ML still should apply to the partners in relation to their shares in the *enkla bolaget* or the *partrederiet*. I have concluded that the distribution of the tax liability in that case instead should work so that the transaction criterion is connected to the partner acting for the *enkla bolaget* or the *partrederiet*. That should be made by a partner's tax liability for the *enkla bolagets* or the *partrederiets ekonomiska verksamhet* (economic activity) being determined with reference only to Chapter 4 section 5 first paragraph BL. Furthermore, it should be specified in the representative rule that an application to appoint a representative according to Chapter 6 section 2 second sentence 2 ML is possible also in the case that the *enkla bolaget* or the *partrederiet* is established solely by *utländska beskattningsbara personer* (foreign taxable persons). However, that question should be resolved in connection with a review of the special problem that the ML, opposite to the VAT Directive, lets the determination of who is a foreign taxable person decide whether the purchaser of certain goods or services is tax liable instead of he who is making the supply within the country.[1269] Therefore, I only suggest – for now – that the specification mentioned should mean that the possibility of registration of a representative for the purpose of accounting of VAT in the *enkla bolagets* or the *partrederiets* activity is determined of whether supplies are made in Sweden in its activity, regardless of e.g. questions of whether or not registration of an establishment for a foreign enterprise shall be made. It should also be clarified in the representative rule that Chapter 6 section 2 second sentence ML also comprises the concept *beskattningsbar person* (taxable person) according to Chapter 5 section 4 ML concerning the determination of whether supply of services takes place within the country.[1270]

The alternative to retain the representative rule with the suggested clarifying amendments or to abolish it is to totally change its wording. I have not been able to conclude from the CJEU's case law in the field with any certainty whether a non-legal entity can be deemed taxable person according to the main rule in article 9(1) first paragraph of the VAT

[1269] In the Ministry of Finance's memorandum of 23.11.2012 it was suggested inter alia that the determination of foreign entrepreneur (Sw., *utländsk företagare*) in Ch. 1 sec. 15 ML should be altered to a determination of foreign taxable person (Sw., *utländsk beskattningsbar person*), which was made by SFS 2013:368. However, the question of a possibility to register a representative according to Ch. 6 sec. 2 second sen. ML for *enkla bolag* or *partrederier* formed solely by foreign persons was not mentioned. The representative rule was not mentioned at all in the memorandum. See section 7.1.3.3 of part 2 and section 1.4.

[1270] See section 7.1.3.3 of part 2.

Directive (2006/112). It is clear without any doubt that the determination within the EU harmonised VAT is not dependent of national civil law classifications, but the question is yet whether a person who is not a legal entity can be sufficiently independent to be a tax subject for VAT purposes. However, I suggest that a clarification should be inserted into the VAT Directive meaning that it shall be possible for non legal entities to be taxable persons. Then could also the wording of Chapter 6 section 2 ML be changed so that the *enkla bolagen* and the *partrederierna* too would be tax liable, if they fulfil the main rule according to the general rules on tax liability in the ML, i.e. Chapter 1 section 1 first paragraph number 1.[1271] Such a measure would make it possible for the ML to fulfil also concerning *enkla bolag* and *partrederier* the law political aims that I based on the EU law in the field suggest for the Swedish VAT system: A cohesive VAT system, neutrality, EU conformity, efficiency of collection and the legal rights of the individual.[1272] Such a measure of legislation in the ML should however be delayed until it has been clarified on the EU level that a non-legal entity can be deemed taxable person according to article 9(1) first paragraph of the VAT Directive (2006/112).[1273] A rewritten Chapter 6 section 2 ML according to my suggestion so that *enkla bolag* (and *partrederier*) would constitute tax subjects for VAT purposes, would by the way, for those using the co-operation form *enkelt bolag* to make a joint work of literature or art, not resolve the special problem with the issue on applicable tax rate for joint copyright. That problem occurs for *enkla bolag* with such activities regardless of the existence of the representative rule. Instead would that question be resolved by Chapter 7 section 1 third paragraph number 8 ML being changed so that that rule would not only comprise independent works of literature or art but also joint copyright.[1274]

The emergence of the liability to issue an invoice according to Chapter 11 section 1 ML is nowadays based upon the concepts *beskattningsbar person* (taxable person) and supply. For the same supply leading to tax liability as well as liability to issue an invoice according to the ML I suggest that the invoicing liability will be expanded to comprise partners who are *skattskyldiga* (tax liable) according to Chapter 6 section 2 first sentence ML. That should for the purpose of the legal rights of the individual benefit demands on foreseeable decisions and control possibilities concerning the partners accounting for VAT. If a representative has been appointed to answer for the collection of VAT in an *enkelt bolag* or a *partrederi*, it is in my opinion for the sake of efficiency of collection and control reasons also appropriate that it would be stated in

[1271] See section 7.1.3.2 of part 2.
[1272] See sections 7.1.3.2 and 7.1.3.5 of part 2.
[1273] See section 7.1.3.5 of part 2.
[1274] See section 7.1.3.6 of part 2.

Chapter 11 section 1 ML that a representative according to Chapter 6 section 2 second sentence ML is comprised by the invoicing liability according to the ML.[1275] A vast need for precision by amendment of the representative rule means also that it should be stated in the rule that it shall be mandatory for he who is appointed as representative to answer for a common book-keeping for the partners according to Chapter 4 section 5 BFL. In that case the representative should not only be obligated to keep documentation for the purpose of VAT control according to Chapter 5 section 2 second sentence SFL.[1276]

Concerning the questions on application I do not suggest any amendment for the sake of precision in the mandatory rule, Chapter 6 section 2 first sentence ML. There is a problem with a limited right of deduction and cumulative effects concerning distribution of tax liability between the partners of the *enkla bolagen* or the *partrederierna* due to formal limitations of the right of deduction. That problem should however be resolved by the suggestion above in this chapter on replacing share (*andel*) in Chapter 6 section 2 first sentence ML with the tax liability – and thereby the right of deduction – being applied to the respective partner with reference only to Chapter 4 section 5 first paragraph BL.[1277]

A vast need for precision by amendment of the rule has been concluded concerning Chapter 6 section 2 second sentence ML with its reference to Chapter 5 section 2 SFL, for an efficiency of collection being able to accomplish of the VAT in *enkla bolag* and *partrederier* by the representative rule. Although such amendments would benefit the control of the collection, it would be at the expense of the legal rights of the individual. Vast amendments for the sake of precision will not benefit the legal rights of the individual and their demand on foreseeable decisions concerning the material rule of taxation. Considering that I place the legal rights of the individual before the aim of efficiency of collection and that amendments for the sake of precision in the representative rule will be too vast and complex, I conclude that the collection should be handled by the tax liable themselves, i.e. by the partners according to Chapter 6 section 2 first sentence ML. Thus, I consider that Chapter 6 section 2 second sentence should be abolished from the ML and – as a consequence thereof – Chapter 5 section 2 SFL limited to only concern tax deducted at source, employer's contribution and excise duty, not VAT. That is my suggestion if it will not be clarified that a non-legal entity can be deemed *beskattningsbar person* (taxable person), so that *enkla bolag* and partrederier could be deemed tax subjects for VAT purposes. For this case will, by the way, my suggestion to make the rep-

[1275] See section 7.1.3.4 of part 2.
[1276] See section 7.1.3.5 of part 2.
[1277] See section 7.1.3.5 of part 2.

resentative liable to issue invoices according to the ML become irrelevant.[1278]

Concerning the other two cases of tax liability in Chapter 1 section 1 first paragraph ML beside the main rule in number 1, i.e. number 2 and number 3, I have concluded the following. In the latter respect it should be clarified in Chapter 6 section 2 first sentence ML that the rule impose on a person making import of goods to an *enkelt bolag* or a *partrederi* tax liability according to Chapter 1 section 1 first paragraph number 3 ML, regardless of whether he is *beskattningsbar person* (taxable person) or the *enkla bolaget* or the *partrederiet* carries out *ekonomisk verksamhet* (economic activity) or not. It is due to that also a private person can be tax liable for imports. Where tax liability for intra-union acquisitions of goods and Chapter 1 section1 first paragraph number 2 ML is concerned should, in addition to my suggestion of a demand of *beskattningsbar person* (taxable person) concerning Chapter 6 section 2 first sentence ML, a clarification be inserted into the rule that *beskattningsbar person* according to Chapter 4 section 1 ML also comprises the same concept according to Chapter 2 a ML. That is required for a partner in an *enkelt bolag* or a *partrederi* becoming tax liable according to Chapter 6 section 2 first sentence ML for intra-union acquisitions of goods on behalf of the *enkla bolaget* or the *partrederiet*. The concept *beskattningsbar person* applies namely to the purchaser according to the main rule in Chapter 2 a section 3 first paragraph number 3 ML and concerning goods subject to excise duties in number 2 of the same rule.[1279] To make the control easier concerning the *enkla bolagen*s' and the *partrederiernas*' trade of goods with other EU Member States – via the VIES system – should by the way an amendment in the representative rule stipulate the following. It should stipulate that the representative shall make intra-union acquisitions of goods for the *enkla bolaget* or the *partrederiet* by invoking the 662-number given to him. It should also stipulate that it is the representative – and no other partner – that shall issue the invoices for supply of goods to another EU Member State made in the activity of the *enkla bolaget* or the *partrederiet*.[1280] If Chapter 6 section 2 second sentence would be abolished from the ML, both the latter suggestions concerning the representative would become irrelevant.

[1278] See section 7.1.3.5 of part 2.
[1279] See section 7.1.3.3 of part 2.
[1280] See section 7.1.3.5 of part 2.

4. CONCLUDING VIEWPOINTS

Common for the two books in question has above all been to judge whether the concept tax liability in the ML may cause dissolution of the fundamental function of the VAT system concerning the distinction of the tax subjects from the consumers. Otherwise the risk is above all that the selection of tax subjects according to the ML opens for private consumption not being taxed e.g. by an legal person formed for the purpose of deducting input tax on acquisition of goods or services which are actually used privately. If nothing will be done about the problem mentioned along with the main question A of part 1, i.e. that the connection in Chapter 4 section 1 number 1 ML refers to the whole of Chapter 13 IL, can legal persons be used for obtaining such benefits for VAT purposes. In that case the SKV must show that it is a question of fraud or invoke the principle of prohibition of abusive practice concluded by the CJEU, to be able to disqualify a deduction of input tax which would otherwise be formally accepted.[1281] It is the same way with one of the important questions of interpretation in part 2, namely the conclusion that the representative rule can be interpreted so that an ordinary private person may be considered tax liable merely because of his role as partner in an *enkelt bolag* or a *partrederi*. That leads in my opinion to a dissolution of the basis of the VAT system according to the EU law, by the distinction between the tax subject and the consumer by the determination of taxable person according to the main rule article 9(1) first paragraph of the VAT Directive (2006/112) not being upheld in that respect.

It cannot be ruled out that VAT deduction could be invoked successfully with the support of the ML regarding private consumption, by the application of the representative rule for *enkla bolag* and *partrederier* according to its present wording. I name this an extreme interpretation result in relation to the intended result with the VAT Directive, i.e. that the VAT shall function as a tax on consumption (consumption tax). Therefore should in my opinion the principle of prohibition of abusive practice mean that an ordinary private person who is a partner in an *enkelt bolag* or a *partrederi* cannot exercise a right of VAT deduction – despite that it formally would be valid in accordance with the concept *skattskyldig* (tax liable) in Chapter 6 section 2 first sentence ML.[1282]

I share the viewpoint that the CJEU by *Halifax et al.* (Case C-255/02) and the principle recently mentioned has given the Member States a tool in the field of VAT to protect the system.[1283] I consider that redefinition should *de sententia ferenda* be possible so that an agreement on *enkelt*

[1281] See pp. 266 and 324 of part 1 and section 2.1.
[1282] See sections 2.8 and 7.2 of part 2.
[1283] See sections 2.7, 2.8 and 7.2 of part 2.

bolag that has been established to make it possible to deduct VAT on private consumption will become disqualified for VAT purposes.[1284] However, the described situation means that the following suggestion in part 2 should be carried out firstly. If the representative rule will be retained, should Chapter 6 section 2 first sentence ML be specified, as described in chapter 3 above, so that the rule applies to *enkla bolag* and *partrederier* with *ekonomisk verksamhet* (economic activity) according to Chapter 4 section 1 ML *and* that it also states that *delägarna* (the partners) in such *enkla bolag* and *partrederier* shall be *beskattningsbara personer* (taxable persons) by themselves.

Otherwise I have inter alia noted that even if the connection in Chapter 4 section 1 ML to the concept *näringsverksamhet* (business activity) in the IL has been revoked by SFS 2013:368, the reason for the EU Commission to start in 2008 the procedure against Sweden on breach of EU law remains, since the question on the use of the concept *skattskyldighet* (tax liability) for the determination of the emergence of the right of deduction in Chapter 8 section 3 first paragraph ML has not been treated yet by the legislator regarding the question on breach of article 9(1) first paragraph of the VAT Directive (2006/112).[1285] For the future it could furthermore be examined whether it is possible with a – compared to what applied earlier – reversed order, where the ML is governing the IL concerning who is an entrepreneur for tax purposes.[1286] Concerning the issue about the representative rule and whether a non-legal entity can be deemed taxable person and *enkla bolag* and *partrederier* thereby being able to be considered tax subjects for VAT purposes should clarifications be made on the EU level. Thereby I argue – with regard of a certain comparison which has been possible to make to the FML as described in section 1.3.2 above – for proposals thereof probably most apt to be made by Sweden in conjunction with Finland. In that context could also questions concerning so called VAT groups be treated.[1287]

[1284] See sections 6.2.1.3 and 7.2 of part 2.
[1285] See sections 1.4 and 2.4.
[1286] See pp. 267 and 325 of part 1.
[1287] See section 7.2 of part 2.