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The research on excise duties in Sweden – the tax subject question

[Translation of the article *Punktskatteforskningen i Sverige – skattesubjektsfrågan*, by Björn Forssén, published in original in Swedish in Tidskrift utgiven av Juridiska Föreningen i Finland – Eng., The journal published by the Law Society of Finland (abbreviated JFT), JFT 3/2022 pp. 242–276.]

1 Introduction

In two articles from 2020 and 2021 I have written in the JFT about the value-added tax (VAT) research in Sweden partly concerning the method questions for that research,[1] partly concerning the question on the Swedish language position in theses regarding VAT.[2] In this article I bring up that some of the rules on excice duties in Sweden are not complying (conform) with the EU law[3] regarding the determination of the tax subject. At the review of that problem I mention my viewpoints regarding the treatment in the theses in Sweden in the field of VAT concerning the question of the determination of the tax subject. At this review by comparison of the tax subject question in the fields of excise duties and VAT I also mention to some extent Finnish law, to give a comparative analysis of the Swedish rules with the Finnish rules on the theme EU conformity. Thereby, I also aim at showing the importance of regarding in the research as well in practice how a discrepancy between a national set of rules on excise duties and the EU law can cause non-EU conform consequences for the VAT. Finally, I leave comments on the choice of method in the excise duty research and about that the right of deduction for input tax can be affected by an unclear determination of the tax subject for VAT purposes and a gap in the legislation on customs and suggestions on future research in the field of indirect taxes, which in the first place consists of VAT, excise duties and customs.

2 EU-demand for harmonisation of the rules on indirect taxes and approximation of the rules on direct taxes

By the EU's primary law follows that a demand of harmonisation of the Member States' legislations apply for the indirect taxes. Thus, it follows by article 113 of the Treaty on the Functioning of the European Union (the Functional Treaty) that the Member States' legislations on "turnover taxes, excise duties and other forms of indirect taxation" (Sw., "omsättningsskatter, punktskatter och andra indirekta skatter eller avgifter") shall be harmonised (the harmonisation demand). This to secure the internal market and avoiding competition distortion due to differences between the Member States with their national

[1] See Björn Forssén, *Momsforskningen i Sverige – metodfrågor* (Eng., The VAT research in Sweden – method questions), JFT 6/2020, pp. 716–757 (Forssén 2020a). Forssén 2020a is available in full text on my website, www.forssen.com.

[2] See Björn Forssén, *Momsforskningen i Sverige – svenska språkets ställning* (Eng., The VAT research in Sweden – the position of the Swedish language), JFT 6/2021, pp. 412–447 (Forssén 2021a). Forssén 2021a is available in full text on www.forssen.com.

[3] EU, the European Union (or the Union).

legislations in the field of indirect taxes. In article 288 of the Functional Treaty it is stated what applies concerning various secondary legislation. For this article I note what is stated regarding regulations and directives, namely the following. The EU's regulations are directly applicable in the Member States according to article 288 second paragraph of the Functional Treaty. This means that secondary legislation are not necessary to implement in the Member States' national legislations to become applicale. However, the EU's directives shall be implemented – carried through – into the Member States' national legislations. That follows by article 288 third paragraph of the Functional Treaty stipulating that a directive shall be binding upon each Member State within the EU as to the result to be achieved with the directive.

Regarding direct tax, like income tas, there is no harmonisation demand for the Member States' national legislations. Where hamonisation of the direct taxation (direct tax) for example income tax, follows by article 115 of the Functiona Treaty that harmonisation shall be done by approximation of the Member States' national legislations to each other. The wording of article 115 of the Functional Treaty is the following:

> ”Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.” (Sw., ”Utan att det påverkar tillämpningen av artikel 114 ska rådet enhälligt i enlighet med ett särskilt lagstiftningsförfarande och efter att ha hört Europaparlamentet och Ekonomiska och sociala kommittén utfärda direktiv om tillnärmning av sådana lagar och andra författningar i medlemsstaterna som direkt inverkar på den inre marknadens upprättande eller funktion.”)

Thus, regarding the rules on income tax there is no general demand on harmonisation like in article 113 of the Functional Treaty for the indirect taxes, but according to article 115 of the Functional Treaty are the EU's institutions, concerning te Member States' national rules on income tax, directed to use directives for the harmonisation of the legislations. The EU's Council has issued only a few directives regarding income tax, for instance the Merger Directive (2009/133/EC) and the Parent Companies and Subsidiaries Directive (2011/96/EU).[4] However, the EU-directives in the field of income tax do not regard the determination of the tax subject. Since I am treating the tax subject question in this article, I therefore use the expression *the non-harmonised income tax law* (Sw., den icke-harmoniserade inkomstskatterätten) when I am mentioning income tax rules in that respect.[5]

The most important EU legislations on the indirect taxes are

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[4] The complete titles of the two directives are: Council directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States; and Council directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

[5] See also the sections 1.2.2.1 and 1.2.2.2 in Björn Forssén, *Skattskyldighet för mervärdesskatt – en analys av 4 kap. 1 § mervärdesskattelagen* (Eng., Tax liability for VAT – an analysis of Ch. 4 sec. 1 of the ML), Jure Förlag AB 2011 (Forssén 2011). Forssén 2011, my licentiate's dissertation, is available in full text in the database DiVA (www.diva-portal.org) and on www.forssen.com.

- concerning VAT, the EU's VAT Directive 2006/112/EC,[6] which in this article is called the VAT Directive;

- concerning excise duties, Council directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty, which I call the Excise Duty Directive (EU) 2020/262; and

- concerning customs, Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, usually called the Union Customs Code.

Concerning the excise duties in relation to the EU law and the Excise Duty Directive (EU) 2020/262 may be mentioned that certain excise duties are mandatory for the Member States (harmonised excise duties). In article 1(1) of the directive it is stated that the directive lays down "general arrangements for excise duty which is levied directly or indirectly on the consumption of the following goods ('excise goods')" (Sw., " allmänna regler för punktskatt som direkt eller indirekt påförs på konsumtion av följande varor (nedan kallade *punktskattepliktiga varor*)":

(a) energy products and electricity covered by Directive 2003/96/EC;
(b) alcohol and alcoholic beverages covered by Directives 92/83/EEC and 92/84/EEC;
(c) manufactured tobacco covered by Directive 2011/64/EU.

According to article 1 of Directive 2003/96/EC shall energy products and electricity be taxed in the EU's Member States in accordance with that directive.[7] In this article I mention excise duty in the form of energy tax, carbon dioxide tax and sulphur tax in Sweden with regard of certain fuels according to Ch. 1 sec. 3 a of *lagen (1994:1776) om skatt på energi* (here abbreviated LSE), i.e. the Swedish Energy Tax Act. The problem I bring up concerning the compliance with the EU law in the field of excise duties where the determination of the tax subject is concerned is that it in Ch. 1 sec. 4 no. 1 of the LSE exists a reference to *the non-harmonised income tax law* regarding what constitutes an *yrkesmässig verksamhet* (Eng., professional activity). However, I do not mention the other two harmonised excise duties, which in Sweden are comprised by *lagen (1994:1564) om alkoholskatt* (i.e. the Swedish Alcohol Tax Act) and *lagen (1994:1563) om tobaksskatt* (i.e. the Swedish Tobacco Tax Act) respectively, since such a connection to *the non-harmonised income tax law* does not exist therein.[8]

There are also several non-harmonised excise duties in Sweden, that is indirect taxes on consumption of various goods and services for which harmonised EU rules on what shall be taxed – and taxation procedure rules from the EU – are lacking. According to the Swedish tax

[6] The complete title of the VAT Directive is: Council directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

[7] The complete title of directive 2003/96/EC is: Council directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.

[8] By the way, the same applies according to *lagen (2022:156) om alkoholskatt* (i.e. the new Swedish alcohol tax act) and *lagen (2022:155) om tobaksskatt* (i.e. the new Swedish tobacco tax act), which on 13 February, 2023 will replace the two acts from 1994.

authority's (*Skatteverkets*) website are non-harmonised excise duties applying according to the following Swedish acts:

- *lagen (1994:1776) om skatt på energi*, the LSE (i.e. the Energy Tax Act), except the excise duty on the fuels comprised by the stay procedure (according to Ch. 1 sec. 3 a of the LSE – *my remark*),
- *lagen (1984:410) om skatt på bekämpningsmedel* (i.e. the Act on Tax on Biocides),
- Sections *35–40 a of lagen (1994:1563) om tobaksskatt* (that is the excise duty on moist snuff, chewing-tobacco and other tobacco),[9]
- sec. 2 first paragraph no. 5 of *lagen (1990:661) om avkastningsskatt på pensionsmedel* (i.e. the Act on Tax on Return of Pension Means),
- *lagen (1990:1427) om särskild premieskatt för grupplivförsäkring, m.m.* (i.e. the Act on Special Premium Tax for Group Life Insurance, etc.),
- *lagen (1995:1667) om skatt på naturgrus* (i.e. the Act on Tax on Nature Gravel),
- *lagen (1999:673) om skatt på avfall* (i.e. the Act on Tax on Waste Products),
- *lagen (2007:460) om skatt på trafikförsäkringspremie m.m*. (i.e. the Act on Tax on Third Party Insurance Premium etc.),
- *lagen (2016:1067) om skatt på kemikalier i viss elektronik* (i.e. the Act on Tax on Chemicals in Certain Electronics),
- *lagen (2017:1200) om skatt på flygresor* (i.e. the Act on Tax on Air Trips),
- *lagen (2018:696) om skatt på vissa nikotinhaltiga produkter* (i.e. the Act on Tax on Certain Products with Nicotine Content),
- *lagen (2018:1139) om skatt på spel*, (i.e. the Act on Tax on Lotteries)
- *lagen (2019:1274) om skatt på avfall som förbränns* (i.e. the Act on Tax on Burn up Waste), and
- *lagen (2020:32) om skatt på plastbärkassar* (i.e. the Act on Tax on Plastic Carrier Bags).[10]

It is only in *lagen (1984:410) om skatt på bekämpningsmedel*, the Act on Tax on Biocides, that there exists such a connection to *the non-harmonised income tax law* regarding what is meant by the concept *yrkesmässig verksamhet* (professional activity) like in Ch. 1 sec. 4 of the LSE, namely in sec. 4 third paragraph whose wording corresponds completely with Ch. 1 sec. 4 of the LSE (which is expressed in section 3.2.1). I mention something about the Act on Tax on Biocides in connection with the LSE, whereas other non-harmonised excise duties of above will not be mentioned at all. However, I will mention something about another non-harmonised excise duty in Sweden, namely the recently abolished advertising tax.

3 The question on EU conformity regarding the determination of the tax subject according to certain rules on excise duties in Sweden in comparison with Finnish law

3.1 The secondary law in the field of excise duties and the determination of the tax subject

According to the EU's secondary law in the field of excise duties it is a matter of the tax subject being determined independently, and that the activities for which a person can become

[9] The rules in question has been replaced in *lagen (2022:155) om tobaksskatt* by Ch. 2 sections 9 and 10.

[10] See <https://www4.skatteverket.se/rattsligvagledning/edition/2022.1/382794.html?q> (visited 2022-10-17).

liable to pay excise duty typically is carried out by a person who in general is called an entrepreneur – not by an ordinary private person (a consumer). This follows by the current Excise Duty Directive (EU) 2020/262, which came into force on 18 March, 2020,[11] and which does not mean any alteration in relation to what applied concerning the determination of the tax subject according to the predecessors in the field. I state the following as support to my interpretation that current and previous EU-directives in the field of excise duties thus means that the determination of the tax subject in the field of excise duties should not be done by national rules in the field being connected to *the non-harmonised income tax law*.

When the Excise Duty Directive (EU) 2020/262 came into force on 18 March, 2020 the excise duty directive 2008/118/EC was rescinded. Previously, the excise duty directive 2008/118/EC had on 1 April, 2010 replaced the movement directive 92/12/EEC.[12]

In the excise duty directive 2008/118/EC and in its predecessor the movement directive 92/12/EEC respectively the tax subject was determined independently by the concept trader (Sw., *näringsidkare*). By article 7(2) of the movement directive and by recitals 16 and 22 of the preamble to the excise duty directive 2008/112/EC respectively it was evident that the tax liable shall be a trader, by the use of the expressions *a trader carrying out an economic activity independently* (Sw., *en näringsidkare som bedriver självständig verksamhet*) and *traders* (Sw., *näringsidkare*) respectively.[13] There is no connection to other legislations for the determination of the concept trader in the two directives, but the determination of the tax subject was made independently therein.

The concept trader is not used in the Excise Duty Directive (EU) 2020/262. Instead, it follows by article 7(1) of the Excise Duty Directive (EU) 2020/262 who the persons are that are liable to pay excise duty, whereby in the first place it is stated therein *authorised warehousekeeper, registered consignee or any other person releasing the excise goods or on whose behalf the excise goods are released from the duty suspension arrangement or, in the case of irregular departure from the tax warehouse, any other person involved in that departure* (Sw., *godkänd upplagshavare, registrerad mottagare eller någon annan person som frisläpper eller på vars vägnar de punktskattepliktiga varorna frisläpps från ett uppskovsförfarande eller, vid en otillåten avvikelse från skatteupplaget, varje annan person som är involverad i avvikelsen*). To save space, I do not express the complete article 7, but stay at esablishing that the Excise Duty Directive (EU) 2020/262, like the two predecessors, means that the tax subject is determined independently according to the EU law in the field of excise duties, and that the activities for which a person can become liable to pay excise duty according to article 7 is

[11] According to article 57 the Excise Duty Directive (EU) 2020/262 came into force on the twentieth day after that it had been published in the Official Journal of the European Union, which was done on 27 February, 2020 and thus the Excise Duty Directive (EU) 2020/262 came into force on 18 March, 2020. According to article 56 the alterations due to the Excise Duty Directive (EU) 2020/262 come into force on 13 February, 2023.

[12] The complete titles of the two directives are: Council directive 92/ 12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products; and Council directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC.

[13] See Björn Forssén, *EG-rättslig analys av hänvisningen till inkomstskattens näringsverksamhetsbegrepp för bestämning av begreppet yrkesmässig verksamhet i mervärdesskattelagen* (Eng., EC law analysis of the reference to the income tax law's concept business activity for the determination of the concept professional activity in the ML). VJS 2007, pp. 29 and 30 (Forssén 2007). Forssén 2007 is available in full text on www.forssen.com. See also Forssén 2020a, section 5.3.2.

typically not carried out by an ordinary private person (a consumer), but by a person who in general is called an entrepreneur.

Although the expression trader (Sw., *näringsidkare*) is not used in the Excise Duty Directive (EU) 2020/262, it is thus so that the tax subject is still determined independently according to the EU law in the field of excise duties, and the taxation regarding excise duties typically still comprises persons who in ordinary parlance, that is in common, usually are called entrepreneurs (Sw., *företagare*) or traders (Sw., *näringsidkare*) – not ordinary private persons (consumers). The tax subject can be a natural or a legal person, which follows already by the headline of article 7 of the Excise Duty Directive (EU) 2020/262 having the following wording: ”Person liable to pay excise duty” (Sw., ”Person som är skyldig att betala punktskatt”).

3.2 Excise duty rules in Sweden which are not or neither have been EU conform concerning the determination of the tax subject and comparison with previous rules on VAT

3.2.1 Energy tax, carbon dioxide tax and sulphur tax

Energy tax shall according to Ch. 1 sec. 1 of the LSE be paid to the State for fuels and electrical energy. On the theme EU conformity the problem with the determination in the LSE of the tax subject is in a certain respect the reference there to the concept *näringsverksamhet* (Eng., business activity) in Ch. 13 of *inkomstskattelagen (1999:1229*, here accreviated IL), i.e. the Swedish Income Tax Act, regarding which *activities* (Sw., *verksamheter*) that are considered *professional* (Sw., *yrkesmässiga*). Since 1 January, 2000 Ch. 1 sec. 4 of the LSE namely has the following wording:[14]

> *An activity is professional, if it*
> 1. *constitutes a business activity according to Ch. 13 of the IL, or*
> 2. *is carried out in forms comparable to such a business activity and the consideration for supplies in the activity during a calendar year exceeds SEK 30,000*
>
> (Sw., ”En verksamhet är yrkesmässig, om den
> 1. utgör näringsverksamhet enligt 13 kap. inkomstskattelagen (1999:1229), eller
> 2. bedrivs i former som är jämförliga med en till sådan näringsverksamhet hänförlig rörelse och ersättningen för omsättningen i verksamheten under ett kalenderår överstiger 30 000 kronor.”)

I do not make a complete review of who is tax liable according to Ch. 4 sec. 1 of the LSE, but note that according to Ch. 4 sec. 1 no. 1 of the LSE is a person tax liable for energy tax, carbon dioxide tax and sulphur tax when the person in the capacity of *authorised warehousekeeper* is handling certain fuels, namely fuels according to Ch. 1 sec. 3 a for which a procedure of stay is applied according to the LSE.

In section 3.2.5 I get back to that suggestions were presented in prop. 2021/22:61 (*Nytt punktskattedirektiv och vissa andra ändringar* – Eng., A new excise duty directive and certain other changes) regarding the Swedish excise duties for the purpose of implementing the Excise Duty Directive (EU) 2020/262 (prop., abbreviation of *regeringens proposition* – Eng.,

[14] See Ch. 1 sec. 4 of the LSE, its wording since 1 January, 2000 according to SFS 1999:1289. SFS: abbreviation of svensk författningssamling – Eng., Swedish Code of Statutes.

government bill). However, already here may be mentioned that it partly leads to the introduction of three new acts on excise duty in Sweden, the above-mentioned *lagen (2022:155) om tobaksskatt* (i.e. the new Swedish tobacco tax act) and *lagen (2022:156) om alkoholskatt* (i.e. the new Swedish alcohol tax act), which entail that the previous acts in those fields will become rescinded, and *lagen (2022:157) om Europeiska unionens punktskatteområde* (Eng., the Swedish Act on the European Union's excise duty area), partly to certain alterations being introduced into the LSE, by SFS 2022:166. Those alterations due to the Excise Duty Directive (EU) 2020/262 come into force on 13 February, 2023, that is when the alterations therein come into force according to article 56. Here I may mention that, although the LSE was mentioned in prop. 2021/22:61, the legislator did not mention the phenomenon with the connection in Ch. 1 sec. 4 no. 1 of the LSE to the concept *näringsverksamhet* (Eng., business activity) in Ch. 13 of the IL for the determination of the tax subject on the theme of EU conformity. This means that the alterations on 13 February, 2023 meaning that the determination of the tax subject regarding energy tax, carbon dioxide tax and sulphur tax is transferred from Ch. 4 to Ch. 5 of the LSE, but for that determination Ch. 1 sec. 4 no. 1 with its connection to *the non-harmonised income tax law* remains. I refer to the rules from the time before the alterations on 13 February, 2023, since they are current when this article is written.

Furthermore, concerning the fuels regarded they also follow by Ch. 1 sec. 3 a of the LSE, which has the following wording:

> *In accordance with what is especially stated in this act are certain procedure rules applicable for energy products according to the following KN-no.* (Sw., "I enlighet med vad som särskilt anges i denna lag tillämpas vissa förfaranderegler för energiprodukter enligt följande KN-nr")
> 1. KN-no. 1507–1518, when the products are intended to be used as fuel for heating or as motor fuel,
> 2. KN-no. 2707 10, 2707 20, 2707 30 and 2707 50,
> 3. KN-no. 2710 11–2710 19 69,
> 4. KN-no. 2711, however not KN-no. 2711 11, 2711 21 and 2711 29,
> 5. KN-no. 2901 10,
> 6. KN-no. 2902 20, 2902 30, 2902 41, 2902 42, 2902 43 and 2902 44,
> 7. KN-no. 2905 11 00, which is not of a synthetic origin, when the products are intended to be used as fuel for heating or as motor fuel,
> 8. KN-no. 3811 11 10, 3811 11 90, 3811 19 00 and 3811 90 00, and
> 9. KN-no. 3824 90 99, when the products are intended to be used as fuel for heating or as motor fuel.
>
> Regarding products according to KN-no. 2710 11 21, 2710 11 25 and 2710 19 29 what is stated in the previous paragraph only applies at *professional bulk transports* (Sw., *yrkesmässiga bulktransporter*).

That the fuels with the KN-numbers[15] according to the enumeration in Ch. 1 sec. 3 a of the LSE are comprised by excise duty that is harmonised follows by the articles 2 and 20(1) of the directive 2003/96/EC. All KN-numbers in Ch. 1 sec. 3 a except in first paragraph item 8 are corresponded by KN-numbers for which it is stated in article 20(1) that they constitute energy products which shall be comprised by the rules on monitoring and movement in the

[15] KN, the combined nomenclature (Sw., *kombinerade nomenklaturen*) for customs purposes.

movement directive 92/12/EEC, whereby the same conditions are made in the article as in the rule in question. From article 2(1) f of the directive 2003/96/EC it is evident that the term energy products (Sw., *energiprodukter*) is applied on products according to KN-no. 3811, why Ch. 1 sec. 3 a of the LSE as a whole, that is including first paragraph item 8, is complying with the nearest corresponding rules in the original version of directive 2003/96/EC.[16] Furthermore, I use the expression *certain fuels* (Sw., *vissa bränslen*) regarding fuels according to Ch. 1 sec. 3 a of the LSE, and the review of directive 2003/97/EC shows that these fuels are comprised by what is meant by harmonised excise duties.

On the theme EU conformity with the energy tax in Sweden and the determination of the tax subject it is of interest that it by Ch. 4 sec. 3 first paragraph of the LSE follows that the person who may be authorised as warehousekeeper is the person who in its professional activity in Sweden (Sw., ”yrkesmässig verksamhet i Sverige”) is aiming at: manufacturing or working on fuels; storing in airports aviation kerosine; or in a larger extent keep fuels in warehouse. The problem by this theme of the determination of who is tax liable is that the meaning of the determination of which activity (Sw., *verksamhet*) that is professional (Sw., *yrkesmässig*) is made by the reference (connection) to *the non-harmonised income tax law* in Ch. 1 sec. 4 no. 1 of the LSE.

The connection to Ch. 13 of the IL, and the concept *näringsverksamhet* (Eng., business activity) therein, concerning which activities that are professional means partly that the determination of the tax subject in Ch. 4 sec. 1 no. 1 of the LSE is in conflict with the tax subject supposed, according to the Excise Duty Directive (EU) 2020/262, to be determined independently in the legislations in the field of excise duties, partly that the selection of tax subjects will be far too vast in relation to the directive. To illustrate the latter consequence concerning the scope of the persons that can be considered tax liable for energy tax, carbon dioxide tax and sulphur tax regarding *certain fuels* due to Ch. 1 sec. 4 no. 1 of the LSE, I compare in the nearest following section about the same connection to Ch. 13 of the IL existing in that rule in the LSE existed in Ch. 4 sec. 1 no. 1 of *mervärdesskattelagen (1994:200*, here abbreviated ML), i.e. the Swedish VAT Act, during the period of 1 January, 2001 to 30 June, 2013.

3.2.2 The connection to the non-harmonised income tax law for the determination of the tax subject – a comparison with the VAT law during the period of 1 January, 2001–30 June, 2013

On 1 January, 2001 a reference was, by SFS 1999:1283, introduced in Ch. 4 sec. 1 no. 1 of the ML, to the concept *näringsverksamhet* (Eng., business activity) to *the whole of* Ch. 13 of the IL, that is for the determination of who is deemed having an *yrkesmässig verksamhet* (Eng., professional activity). Thereby the determination of who shall be deemed a tax subject was connected to *the non-harmonised income tax law*. In Forssén 2011 the main question concerned that that connection was not complying with the main rule on who is *beskattningsbar person* (Eng., taxable person) according to the EU law in the field of VAT,

[16] According to the EU’s website there is a consolidated version of directive 2003/96/EG of 15 September 2018. Thereof follows that only certain adjustments have been made on which KN-no. that are stated in article 20(1) and that concern items 1 c and 1 h. I note that article 20(1) also in the consolidated version refers to the rules in the movement directive 92/12/EEC, despite that it was replaced on 1 April, 2010 by the excise duty directive 2008/118/EC. By the way, I note that article 2(1) f is unchanged in the consolidated version. See <https://eur-lex.europa.eu/legal-content/SV/TXT/?uri=CELEX%3A32003L0096> (visited 2022-10-17). The LSE should be adjusted due to the alterations in article 20(1) c and h, concerning KN-numbers stated in Ch. 1 sec. 3 a, but it does not change anything in principle regarding the meaning of this article.

that is according to article 9(1) first paragraph of the VAT Directive. It meant above all that legal persons already due to the subject registration of for instance an *aktiebolag* (Eng., limited company), whereas a natural person was deemed as a tax subject for VAT purposes provided that he or she fulfilled the rule on who has a real *näringsverksamhet* (Eng., business activity), that is by the wording of Ch. 13 sec. 1 first paragraph second sentence of the IL follows that *with business activity is meant that an activity for obtaining income is carried out professionally and independently* (Sw., ”Med näringsverksamhet avses förvärvsverksamhet som bedrivs yrkesmässigt och självständigt.” The prerequisite *obtaining income* (Sw., ”förvärvsverksamhet”) means that the activity shall have a purpose of obtaining income, that is an activity demand (Sw, *varaktighetsrekvisit*) lies within the prerequisites of Ch. 13 sec. 1 first paragraph second sentence of the IL.[17] A hobby activity is an achievement by a person for a private purpose, and thus not for obtaining income that can be deemed a real business activity.[18]

Before the change of the rule the reference was made to a real business activity both for natural and legal persons, but from 1 January, 2001 the reference to the whole of Ch. 13 of the IL came to comprise also for instance sec. 2 of Ch. 13 of the IL by whose wording follows that *for legal persons are incomes and expenditures due to possession of assests and debts or in the form of capital wins or capital losses included in the income tax schedule business activity, although the incomes or expenditures are not contained in a business activity according to sec. 1* (Sw., ”För juridiska personer räknas inkomster och utgifter på grund av innehav av tillgångar och skulder eller i form av kapitalvinster och kapitalförluster till inkomstslaget näringsverksamhet, även om inkomsterna eller utgifterna inte ingår i en näringsverksamhet enligt 1 §.”) Thereof follows thus that a legal person, in opposition to a natural person, is deemed having a business activity regardless whether the prerequisites for a real business activity are fulfilled. Before the IL came into force Ch. 4 sec. 1 no. 1 of the IL referred to the concept business activity in sec. 21 of *kommunalskattelagen (1928:370*, here abbreviated KL), which corresponded to Ch. 13 sec. 1 first paragraph second sentence of the IL.[19]

By the determination of professional activity according to Ch. 4 sec. 1 no. 1 of the ML being altered on 1 January, 2001 to refer to the concept business activity according to the whole of Ch. 13 of the IL the scope of the tax subjects according to the ML was expanded without any motive. In Forssén 2011, I emphasized that it was not complying with the main rule for the determination of the tax subject in article 4(1) of the Sixth VAT Directive (77/388/EEC) and neither with article 9(1) of the VAT Directive (which has replaced inter alia the Sixth VAT Directive).[20]

I did not find any similar connection to the income tax law for the determination of the tax subject for VAT purposes in the legislations in the field of VAT in any other EU Member

[17] See Forssén 2011, pp. 132 and 149.

[18] See Forssén 2011, pp. 132 and 134.

[19] See prop. 1999/2000:2 (*Inkomstskattelagen* – Eng. the income tax act) Part 1, p. 422. See also Ch.1 sec. 1 of lagen (1999:1230) om ikraftträdande av inkomstskattelagen (1999:1229), i.e. the act on the coming into force of the IL, where it is stated that the IL came into force on 1 January, 2000 and was applied for the first time at the tax assessment of 2002.

[20] See also Forssén 2021a, section 2.5.1.2.

State. For example, I did not find any such connection to the income tax law in *mervärdesskattelagen (1501/1993*, here abbreviated FML), i.e. the Finnish VAT Act.[21] The legislator in Sweden seems almost affected by his ambition to use business activity as the common concept for the delimitation of Ch. 13 of the IL for natural persons as well as for legal persons,[22] not realizing that a reference to the whole of Ch. 13 of the IL for the determination of professional activity in Ch. 4 sec. 1 no. 1 of the ML was not EU conform. After I had submitted Forssén 2011 the legislator did also on 1 July, 2013 revoke, by SFS 2013:368, the connection in question to Ch. 13 of the IL, whereby article 9(1) first paragraph of the VAT Directive was implemented literally into Ch. 4 sec. 1 first paragraph first sentence of the ML. Then was also the concept professional activity (Sw., ”yrkesmässig verksamhet”) in that rule altered to taxable person (Sw., ”beskattningsbar person”), so that that concept nowadays also applies according to the ML for the determination of the tax subject for VAT purposes: *’Taxable person’ shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity*. (Sw., ”Med *beskattningsbar person* avses den som, oavsett på vilken plats, självständigt bedriver en ekonomisk verksamhet, oberoende av dess syfte eller resultat”.).[23]

In the same way as regarding the connection in Ch. 4 sec. 1 no. 1 to the income tax law being altrered on 1 January, 2001 had already on 1 January, 2000 the reference in Ch. 1 sec. 4 no. 1 of the LSE been altered from regarding business activity according to sec. 21 of the KL to apply to the concept business activity according to the whole of Ch. 13 of the IL.[24] Thus, for the energy tax applies according to Ch. 1 sec. 4 of the LSE that the tax subject is determined by a definition of professional activity which according to no. 1 of the rule consists of a main rule referring to the concept business activity in Ch. 13 of the IL, whereby furthermore applies, according to the supplementary rule in Ch. 1 sec. 4 no. 2 of the LSE, that an activity also is professional if it is carried out as a businesslike activity – provided that the annual turnover exceeds the amount limit in the supplementary rule. By the determination of professional activity according to Ch. 1 sec. 4 no. 1 of the LSE being determined since 1 January, 2000 by the connection to the concept business activity according to the whole of Ch. 13 of the IL the selection of tax subjects has been expanded in conflict with the then applying movement directive 92/12/EEC, which as well is in conflict with the now current Excise Duty Directive (EU) 2020/262. I do not find any motive for the alterations in question in the LSE, on 1 January, 2000, and in the ML, on 1 January, 2001, respectively in their common preparatory work.[25] The same applies concerning the alteration of sec. 4 third paragraph of *lagen (1984:410) om skatt på bekämpningsmedel*, Eng., the Act on Tax on Biocides. For the determination of professional activity the reference therein to sec. 21 of the KL was altered to regard the concept business activity according to the whole of Ch. 13 of the IL. That was also done on 1 January, 2000, by SFS 1999:1252, and as well without any motive in the preparatory work, which also consisted of prop. 1999/2000:2.[26]

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[21] See Forssén 2011, pp. 289 and 290 regarding my inquiry to tax authorites in inter alia Finland.

[22] See prop. 1999/2000:2 Part 1, p. 514.

[23] See article 9(1) first paragraph of the VAT Directive and Ch. 4 sec. 1 first paragraph first sentence of the ML.

[24] See prop. 1999/2000:2 Part 1, p. 432.

[25] See prop. 1999/2000:2 Part 1.

[26] See prop. 1999:2000:2 Part 1, p. 366.

3.2.3 Comparison with Finnish law

Thus, by the connection in Ch. 1 sec. 4 no. 1 of the LSE a breach of EU law by Sweden exists due to thar phenomenon meaning an incorrect implementation of the secondary law in the field of excise duties. A egal person is comprised by tax liability by the connection inter alia comprising sec. 2 in Ch. 13 of the IL, which means that business activity exists for such a person, although it is not a matter of a real business activity, but only a matter of placing a hobby activity into for example a limited company. This means that the selection in Sweden of tax subjects regarding energy tax, carbon dioxide tax and sulphur tax is typically larger than concerning energy tax in for instance Finland.

In the Finnish Excise Duty Act, *punktskattelagen (182/2010*, here abbreviated FPL), like in the FML, there is not any such connection to *the non-harmonised income tax law* for the determination of the tax subject as is existing in Ch. 1 sec. 4 no. 1 of the LSE. That follows above all of sec. 12 of the FPL which states who are tax liable regarding energy tax. According to sec. 12 item 1 no. 1 of the FPL is an authorised warehousekeeper, a registered consignee, a temporarily registered consignee or any other person releasing or on whose behalf the excise goods are released from a duty suspension arrangement liable to pay excise duty. According to the Finnish tax authotity's website there are nine different excise duties in Finland: alcohol and tobacco tax, tax on soft drinks, soft drinks packages, liquid fuels, electricity and certain fuels, tax on waste products and oil protection fee.[27] Concerning the mentioned connection to *the non-harmonised income tax law* I note that it is the energy taxation in Finland that is of interest for a comparison with the excise duties in Sweden, since there is not any tax on either biocides or advertising in Finland. Thus, it is of interest that it concerning the energy taxation is stated in the Finnish tax authority's detailed instructions that inter alia authorised warehousekeepers and registered consignees are tax liable, whereby a reference is made to sections 12 and 13 of the FPL.[28] There it does not exist any such connection to the income tax law for the determination of the tax subject like regarding the energy tax in Ch. 1 sec. 4 no. 1 of the LSE, which is conform with the EU law in the field of excise duties.

3.2.4 The advertising tax during the period of 1 January, 2000–1 January, 2022

A connection had also been introduced on 1 January, 2000, by SFS 1999:1241, in the first paragrah first sentence of the instructions to sec. 9 of *lagen (1972:266) om skatt på annonser och reklam* (here abbreviated RSL), i.e. the former Swedish Advertising Tax Act, to the concept business activity according to the whole of Ch. 13 of the IL for the determination of professional activity, and thereby of who was tax liable – a tax subject – regarding advertising tax according to sec. 9 of the nowadays rescinded RSL.[29] Thus, it was the same kind of alteration that was, according to the above-mentioned, introduced into the LSE on 1 January,

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[27] See <https://www.vero.fi/sv/foretag-och-samfund/skatter-och-avgifter/punktbeskattning/> (visited 2022-10-17).

[28] See the Finnish tax authority's detailed instructions regarding energy taxation 19 February, 2021, dnr VH/904/00.01.00/2021, section 1.4, <https://www.vero.fi/sv/Detaljerade_skatteanvisningar/anvisningar/56206/energibeskattning2/> (visited 2022-10-17).

[29] See also prop. 1999/2000:2 Part 1, p. 343.

2000 and into the ML on 1 January, 2001, and inte common preparatory work to the alterations in question there was neither any motive to the alteration in the RSL.[30]

In Forssén 2011 I also brought up that the legislator should look at the same circumstance with a connection to *the non-harmonised income tax law* for the determination of the tax subject on certain legislations in Sweden regarding excise duties like in the ML.[31] However, no such reform like what the legislator made in that respect regarding the ML has ever been done regarding either the LSE or the RSL, and the phenomenon has, as I mentioned in Forssén 2020a, not been treated otherwise in the research concerning indirect taxes in Sweden.[32] However, after that Forssén 2020a was published has the change occurred meaning that there is no longer any Swedish advertising tax, since it was abolished on 1 January, 2022, by SFS 2021:1166.[33] The phenomenon with a connection to the concept business activity in Ch. 13 of the IL for the determination of the tax subject is nowadays not to be found for advertising tax as a consequence of that that excise duty was abolished by the revoking of the RSL on 1 January, 2022.

3.2.5 The legislator and the research in Sweden do not treat the non-EU conform determination of the tax subject regarding the energy tax

With respect of the concept professional activity remaining in Ch. 1 sec. 4 no. 1 of the LSE I suggest once again that the research or the legislator brings up on the theme EU conformity with that determination being made by a connection to *the non-harmonised income tax law*, more precisely to the concept business activity in the whole of Ch. 13 of the IL. In consideration of my analysis in Forssén 2011 of the same phenomenon concerning the ML, it is, in my opinion, obvious that the connection in question in Ch. 1 sec. 4 no. 1 of the LSE to Ch. 13 of the IL still gives a selection of tax subjects also for the energy tax in the field of excise duties, which is far too comprehensive in relation to the Excise Duty Directive (EU) 2020/262.[34]

In prop. 2021/22:61 were, as mentioned, suggestions presented regarding the Swedish excise duties for the purpose of implementing the Excise Duty Directive (EU) 2020/262. Thus, the Excise Duty Directive (EU) 2020/262 leads to three new acts on excise duty being introduced in Sweden: *lagen (2022:155) om tobaksskatt*, i.e. the new Swedish tobacco tax act, and *lagen (2022:156) om alkoholskatt*, i.e. the new Swedish alcohol tax act, which, as mentioned, leads to the previous acts in those fields being rescinded; and *lagen (2022:157) om Europeiska unionens punktskatteområde*, i.e. the Swedish Act on the European Union's excise duty area. Furthermore are, as also mentioned, inter alia certain alterations introduced in the LSE, by SFS 2022:166. The alterations due to the Excise Duty Directive (EU) 2020/262 come into force on 13 February, 2023, that is when, as mentioned above, the alterations therein come

[30] See prop. 1999/2000:2 Part 1.

[31] See Forssén 2011, pp. 54 and 76.

[32] See also Forssén 2020a, section 5.3.2.

[33] See also prop. 2021/22:20 (*Avskaffad reklamskatt* – Eng., Abolished advertising tax), p. 1.

[34] Besides is that selection expanded further by the supplementary rule in Ch. 1 sec. 4 no. 2 of the LSE regarding persons that carries out activities in the field of energy under businesslike forms (provided that they have an annual turnover exceeding SEK 30,000).

into force according to article 56. Furthermore were in prop. 2021/22:61 certain alterations suggested in the ML and several excise duty legislations because of the Council's directive (EU) 2019/2235 of 16 December 2019 on alteration of the VAT Directive and the excise duty directive 2008/118/EC where common defense efforts within the EU are concerned. Those alterations came into force on 1 July, 2022.[35]

The LSE was in itself mentioned in prop. 2021/22:61, but the phenomenon with the connection in Ch. 1 sec. 4 no. 1 of the LSE to the concept business activity in Ch. 13 of the IL for the determination of the tax subject regarding the energy tax was, as mentioned, not brought up by the legislator on the theme EU conformity.[36]

Besides what I have mentioned in Forssén 2007, Forssén 2011 and Forssén 2020a about the connection in the LSE and in the nowadays rescinded RSL to the concept business activity in Ch. 13 of the IL for the determination of the tax subject,[37] there is nothing to be found in the research in Sweden regarding indirect taxes on the theme EU conformity about the phenomenon. Concerning excise duties (Sw., *punktskatter*) there is only one thesis in Sweden, namely professor Stefan Olsson's thesis, *Punktskatter – rättslig reglering i svenskt och europeiskt perspektiv* – Eng., Excise duties – legal regulation in a Swedish and European perspective.[38]

Within the VAT research in Sweden there is only in Forssén 2011 and in my doctor's thesis "*Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier*" [Eng., Tax and payment liability to VAT in (approximately) joint ventures and shipping partnerships][39] and in Jesper Öberg's thesis "*Mervärdesbeskattning vid obestånd*" (Eng., Value-added taxation at insolvency)[40] that the tax subject question is given a closer analysis.[41] In the research so far in Sweden on the field of excise duties, that is in Olsson 2001, questions about the tax subject are given a rather limited treatment. My criticism regarding Olsson 2001 is mainly about that circumstance.

Olsson 2001 is written in Swedish, which is in line with what I state in Forssén 2021a about the importance for the research in jurisprudential subjects that are influenced by the EU law to promote Swedish at such studies. With respect of methodology is Olsson 2001 also in line

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[35] See regarding: the ML, SFS 2022:160; *lagen (1994:1563) om tobaksskatt*, SFS 2022:163; *lagen (1994:1564) om alkoholskatt*, SFS 2022:164; and *lagen (1994:1776) om skatt på energi*, SFS 2022:165. See also prop. 2021/22:61, p. 1.

[36] See prop. 2021/22:61, pp. 109–154.

[37] See Forssén 2011, pp. 54 and 76 and Forssén 2020a, section 5.3.2.

[38] See Stefan Olsson, Punktskatter – rättslig reglering i svenskt och europeiskt perspektiv. Iustus förlag 2001 (Olsson 2001).

[39] Björn Forssén, *Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier*, Örebro Studies in Law 4/2013 (Forssén 2013). Forssén 2013, my doctor's thesis, is available in full text in the database DiVA (www.diva-portal.org) and on www.forssen.com.

[40] Jesper Öberg, *Mervärdesbeskattning vid obestånd Andra upplagan* (Eng., Value-added taxation at insolvency Second edition), Norstedts Juridik AB 2001 (Öberg 2001). The thesis is from 2000. Here is referred to the published book: Öberg 2001.

[41] See also Forssén 2020a, p. 738.

with what I state in Forssén 2020a. A traditional law dogmatic method is used in Olsson 2001, but with the statement that *various methods can of course complete each other* (Sw., ”olika metoder kan givetvis komplettera varandra”).[42] Thereby can Olsson 2001 not be considered to have been conducive to the development within the VAT research in Sweden that I am warning for by Forssén 2020a and Forssén 2021a, namely the risk that the jurisprudential studies will be made by application of what I call a purely law dogmatic method, whereby I in that respect refer to two theses on the subject VAT law.[43] My criticism regarding Olsson 2001 concerns instead the lack of analysis on the theme EU conformity of the determination of the tax subject in the national Swedish legislation in the field of excise duties.

In the introduction to the closer examination of the legal regulation of the excise duties are both the tax subject and the tax object mentioned in Olsson 2001.[44] Furthermore, it is noted therein that the tax liability is divided into two parts: the tax subject and the tax object.[45] It is in itself also stated that the concepts professional (Sw., *yrkesmässig*) and professionality (Sw., *yrkesmässighet*) are central concepts within the tax law,[46] but a rather limited analysis is made in a Swedish and EU law perspective of the tax subject question in the Swedish legislation on excise duties and in the then applying movement directive 92/12/EEC respectively.[47] Professor Stefan Olsson mentioned that the term tax liable (Sw., *skattskyldig*) is lacking in the movement directive 92/12/EEC, and that the Swedish legislator is under the impression to have the right to choose for himself how to implement the directive in that respect.[48] He pointed out in the conclusions regarding the concept tax liability that its meaning in Swedish tax law cause an unfortunate confusion of concepts.[49] After the introduction to the closer examination in Chapters 4 and 5 about tax liability were however in the remaining part of Olsson 2001 mostly treated facts of interest for the application of the time of the occurrence of the tax liability (Chapter 6), of what is a tax object (Chapter 7) and questions about deduction and reimbursement, that is how to account for excise duties (Chapter 8). However,

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[42] See Olsson 2001, pp. 23 and 24. In the tables on p. 443 in Forssén 2021a I account for both the methodological main tracks according to Forssén 2020a regarding the theses on the subject VAT in Sweden. Olsson 2001 is comparable with two of the theses in *Tabell – huvudspår 2* (Eng., Table – Main track 2), namely Öberg 2001 and Mikael Ek, *Leveranser och unionsinterna förvärv i mervärdesskatterätten* (Eng., Deliveries and intra-Union acquisitions in the VAT law). Iustus Förlag AB 2019 (Ek 2019). In Ek 2019 is the jurisprudential study made by application of a customary law dogmatic method and the thesis is written in Swedish, which thus is comparable with Olsson 2001, where a traditional – customary – law dogmatic method also is used and the thesis is written in Swedish as well. See also Forssén 2021a, section 2.5.3.1 and Forssén 2020a, pp. 738 and 745.

[43] The two theses are: Oskar Henkow (deceased), Financial Activities in European VAT A Theoretical and Legal Research of the European VAT System and the Actual and Preferred Treatment of Financial Activities. Kluwer Law International 2008 (Henkow 2008); and Giacomo Lindgren Zucchini, Composite Supplies in the Common System of VAT. Örebro Studies in Law 14/2020 (Lindgren Zucchini 2020). Henkow 2008 is from 2007. Here I refer to the published book: Henkow 2008. Lindgren Zucchini 2020 is available in full text in the database DiVA (www.diva-portal.org).

[44] See Olsson 2001, p. 143.

[45] See Olsson 2001, p. 159.

[46] See Olsson 2001, p. 168.

[47] See Olsson 2001, pp. 170–203.

[48] See Olsson 2001, p. 186.

[49] See Olsson 2001, p. 203.

finally in Olsson 2001 (Chapter 9) was not the suggestions *de lege ferenda* made that could be expected concerning the tax liability question.[50]

Thus, in Olsson 2001 was not regarded that the same problem that I brought up as the main question in Forssén 2011, that is that the determination of the tax subject in Ch. 4 sec. 1 no. 1 of the ML was made by an incorporation in that rule of *the non-harmonised income tax law*, existed also in the field of excise duties regarding the LSE and the RSL. Professor Stefan Olsson participated at the final seminar regarding Forssén 2011. He said he did not understand my comparison with Olsson 2001 concerning the precarious with connections from the indirect taxes to *the non-harmonised income tax law*, when it was a matter of the concept professional activity (Sw., *yrkesmässig*) and thereby the determination of the tax subject. I stated in Forssén 2011 that Olsson 2001 does not have a focus on the tax subject in the way I do in Forssén 2011. To stimulate further research in Sweden in the field of excise duties I noted the following as a considerable lack in Olsson:[51]

– On page 144 in Olsson 2001 it is stated that within income and value-added taxation it is *often enough to delimit the tax subject with far definitions like e.g.* 'professionality' (Sw., "oftast tillräckligt att avgränsa skattesubjektet med vida definitioner som t.ex. 'yrkesmässighet'"). However, he refers in a footnote to that statement to *Ch. 13 sec. 1 of the IL, Ch 1 sec. 1 no. 1 of the ML* (Sw., "13 kap. 1 § IL, 1 kap. 1 § 1 p. ML". Thus, I noted that it in Olsson 2001 is not regarded that the connection from Ch. 4 sec. 1 no. 1 of the ML from 2001 applied to the concept business activity (Sw., *näringsverksamhet*) in the whole of Ch. 13 of the IL.

I stated in Forssén 2011 that an explanation to professor Stefan Olsson not bringing up in Olsson 2001, concerning the mentioning therein of the determination of the concept professional (Sw., *yrkesmässig*) in the main rule in the ML, that the reference for that determination to Ch. 13 sec. 1 (first paragraph second sentence) of the IL was altered on 1 January, 2001 to apply to the concept business activity in the whole of Ch. 13 of the IL, could be that Olsson 2001 was issued during June 2001, that is after that alteration of the rule.[52] However, in the preface of Olsson 2001 it is stated that new material has been regarded until 31 December, 2000.[53] Thus, it is a considerable lack in Olsson 2001 that the connection in Ch. 1 sec. 4 no. 1 of the LSE and the instructions to sec. 9 of the RSL respectively to the concept business activity in the whole of Ch. 13 of the IL, for the determination of the tax subject regarding energy tax and advertising tax respectively, is not mentioend, since that phenomenon emerged, as mentioned above, already on 1 January, 2000, by SFS 1999:1289 and SFS 1999:1241 respectively and, concerning tax on biocides, also on 1 January, 2000, by SFS 1999:1252.

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[50] 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 in a certain aspect. See Stefan Melin. *Juridikens begrepp, 4:e upplagan* (Eng., Conceptions of the law, fourth edition). Iustus förlag 2010, p. 94 and Sture Bergström – Torgny Håstad – Per Henrik Lindblom – Staffan Rylander. *Juridikens termer. Åttonde upplagan* (Eng., Terms of the law, eighth edition). Almqvist & Wiksell Förlag/Liber AB 1997, p. 35. See also Forssén 2011, p. 33 and Forssén 2013, p. 31.

[51] See Forssén 2011, p. 76.

[52] See Forssén 2011, p. 76.

[53] See Olsson 2001, p. 6.

That I in Forssén 2011 treated above all the connection to the IL for the determination of the tax subject according to the ML may possibly have stimulated the legislator to the reform by SFS 2013:368 on 1 July, 2013. However, nobody has yet showed any interest for the same problem existing also in the field of excise duties regarding energy tax and advertising tax.[54] In Forssén 2011 I pointed out that it has been a Swedish tradition in the field of indirect taxes to connect that taxation to the direct taxation,[55] like according to what is mentioned above still is the case regarding Ch. 1 sec. 4 no. 1 of the LSE and sec. 4 third paragraph *lagen (1984:410) om skatt på bekämpningsmedel*, i.e. the Act on Tax on Biocides, by the connection in those rules to Ch. 13 of the IL for the determination of the concept professional activity (Sw., *yrkesmässig verksamhet*).

I expected that the research or the legislator would after Forssén 2011 take up the question on the compliance with the EU law concerning that the connection mentioned to the IL exists also in the field of excise duties, but this has not happened. A part of the problem in that field was resolved simply as a consequence of the abolishment of the advertising tax in Sweden on 1 January, 2022, whereby, as mentioned, the RSL was rescinded according to SFS 2021:1166. However, it remains, as also mentioned, concerning the determination of the tax subject regarding energy tax, carbon dioxide tax and sulphur on *certain fuels*, by who thereby is professional (Sw., *yrkesmässig*) still is determined by Ch. 1 sec. 4 no. 1 of the LSE referring to the concept business activity (Sw., *näringsverksamhet*) in the whole of Ch. 13 of the IL. Thus, this phenomenon is the basic problem on the theme of EU confirmity where the determination of the tax subject regarding those excise duties is concerned.

I use the term basic problem regarding that Ch. 1 sec. 4 no. 1 of the LSE cannot be deemed complying with the EU law in the field of excise duties due to the connection to Ch. 13 of the IL, since a question whether taxation occur according to the Excise Duty Directive (EU) 2020/262 is not decided concerning the tax object in itself in the form of an authorised warehousekeeper's handling of *certain fuels*, but for taxation is also requested that such a person is a tax subject according to what I state above, that is typically a – natural or legal – person who in general is called an entrepreneur (or trader). That a legal person by the connection in Ch. 1 sec. 4 no. 1 of the LSE to Ch. 13 of the IL, and thereby to inter alia sec. 2 in Ch. 13, constitutes a tax subject although it is only a matter of a hobby activity is not EU conform. By forming for instance a foundation (Sw., *stiftelse*), a limited company (Sw., *aktiebolag*) or another legal person, by which the handling of *certain fuels* is carried out as a hobby activity, may namely ordinary private persons with an activity carried out without the purpose of obtaining income, who typically constitute consumers, transform into tax subjects

[54] In the years of 2018 and 2019 I contacted professor Stefan Olsson via e-mail about that phenomenon should be addressed, but without any result. On 3 June, 2019 I informed him that I was aiming to write an article on the question, which thus is realized by this article.

[55] See Forssén 2011, section 1.2.4, where a refernce is made in the present respect to prop. 1994/95:54 (*Ny lag om skatt på energi, m.m.* – Eng., New act on tax on energy, etc.), pp. 81 and 82, whereof it is evident that the motive to, with the ML as model, connect the concept professional (Sw., *yrkesmässig*) in the act on tax on energy to the income tax and the concept business activity (Sw., *näringsverksamhet*) was to retain the tradition mentioned. See also Forssén 2020a, section 5.3.2 and Björn Forssén, *Momsrullan IV*: *En handbok för praktiker och forskare*, Eng., The VAT roll IV: A handbook for practicians and researchers (self-published 2019), section 12 201 024 (Forssén 2019a). Forssén 2019a is available in full text on www.forssen.com, and in a printed version at Kungliga biblioteket i Stockholm (the National Library of Sweden) and at the Lund University Library.

according to the wording of Ch. 1 sec. 4 no. 1 of the LSE that has applied since 1 January, 2000, by forming for example a foundation or a limited company for the activity.

Thus, the legislator should suggest that the connection in question from Ch. 1 sec. 4 no. 1 of the LSE to the concept business activity in the whole of Ch. 13 of the IL would be revoked, so that the determination of the tax subject will become conform with the Excise Duty Directive (EU) 2020/262. To increase the terminological clarity should the concept professional (Sw., *yrkesmässig*) be completely abolished from the LSE, since it is not used in the directive.

In the latter respect, I may also mention that private persons can be comprised by excise duty on electric power regarding self-produced electricity in sun-cell installations on the own house, the summer house or the garage. By Ch. 1 sec. 2 second paragraph of the LSE follows that rules on energy tax on electric power are to be found in Ch. 11. In Ch. 11 sec. 1 of the LSE is stated that electric power consumed in Sweden is taxable, if not anything else follows by sec. 2. According to Ch. 11 sec. 2 first paragraph no. 1 a and 1 b and second paragraph no. 2 of the LSE is electric power not taxable if it is produced in for example a sun-cell installation that has a total installed generator effect less than 500 kilowatts.[56] Thereby the tax is limited regarding such electricity production at private persons regarding the tax object. The alterations of Ch. 11 sec. 2 of the LSE that was made on 1 July, 2021 meant inter alia that the mentioned top-effect limit in second paragraph no. 2 of the rule was raised from 255 to 500 kilowatts. However, that expansion of the exemption from energy tax for self-produced electricity was according to the preparatory work not judged to affect the households, since self-use of electricity produced in the households' installations already normally was exempted from taxation of energy tax. In the Swedish Energy Agency's (Sw., *Energimyndighetens*) register over authorised installations in the electricity-certificate system there were only a few sun-cell installations with an installed effect between 255 and 500 kilowatts owned by private persons.[57] Thus, in practice there is no problem concerning the limitation of energy tax on electric power for privat persons.

Although the concept professional (Sw., *yrkesmässig*) in itself is not *préjudiciel* to the tax liabilty regarding electric power, may it yet cause interpretation and application problems concerning the determination of who is a tax subject regarding the taxation of electric power, when the production of electric power – the tax object – is not exempted from taxation. An example of such problems is proved by Ch. 6 a of the LSE, regarding tax exempted fields of use etc., in sec. 3 first paragraph first sentence stipulating that *at simultaneous production of heat and taxable electric power in one and the same process, when the heating emerging is used, shall the division of fuel used for the production of heat, taxable electric power and such electric power which is not taxable respectively be made by proportioning in relation to each energy production* (Sw., "vid samtidig produktion av värme och skattepliktig elektrisk kraft i en och samma process, när den värme som uppkommer nyttiggörs, ska fördelning av

[56] See Ch. 11 sec. 2 of the LSE, its wording from 1 July, 2021, according to SFS 2021:411. See also prop. 2020/21:113 (*Utökad befrielse från energiskatt för egenproducerad el* – Eng., Increased exemption from energy tax for self-produced electricity) pp. 1 and 25 and the tax authoriy's (Sw., *Skatteverkets*) standpoint of 2021-07-02, "Beskattningskonsekvenser för den som har en solcellsanläggning på sin villa eller fritidshus som är privatbostad" (Eng., Taxation consequences for those having sun-cell installations on the own house or summer house being private residences), dnr 8-1080745, section 2. It may also be mentioned that *Skatteverket* in the introduction of the standpoint is referring in a note to the recently mentioned SFS 2021:411 and prop. 2020/21:113.

[57] See prop. 2020/21:113 pp. 5 and 25.

bränslet som förbrukas för framställning av värme, skattepliktig elektrisk kraft respektive sådan elektrisk kraft som inte är skattepliktig ske genom proportionering i förhållande till respektive energiproduktion").[58] Thus, those circumstances also constitute reasons to refine the terminology in the LSE, by completely abolishing the concept *yrkesmässig* (Eng., professional) from the LSE.

3.3 A non-EU conform detrmination of the tax subject in the field of excise duties may cause non-EU conform consequences for the taxation amount for VAT

The excise duties are gross taxes. This means that the enterprises do not have such a general right to get back from the State paid excise duty on purchases, which instead is a fundamental characteristic of what is meant by VAT according to the EU law.[59]

Regardless whether it is a matter of harmonised excise duties or non-harmonised excise duties, such a connection to *the non-harmonised income tax law* for the determination of the tax subject that is made by the connection in Ch. 1 sec. 4 no. 1 of the LSE and in sec. 4 third paragraph *lagen (1984:410) om skatt på bekämpningsmedel* (Eng., the Act on Tax on Biocides) to the concept business activity in the whole of Ch. 13 of the IL cause a competition distortion regarding the VAT in conflict with the secondary law and recital 4 of the premable to the VAT Directive and article 1(2) of the VAT Directive as well as with the primary law and article 113 of the Functional Treaty.[60] That will be the consequence for the VAT of the selection of tax subjects becoming far too comprehensive for the two excise duties regarding the legal persons, whereby I state the following to confirm this.

If it in a chain of producers and distributors comes in a legal person that would not belong to he chain if it was not for the connection to Ch. 13 of the IL existing for the energy tax or the tax on biocides, the costs increase at real traders occurring in a later link of the ennobling chain, since they cannot deduct that – due to that in the present respect non-EU conform LSE or *lagen (1984:410) om skatt på bekämpningsmedel* (Eng., the Act on Tax on Biocides) – undesired excise duty (gross tax). Due to the enterprises in later links of the ennobling chain cannot deduct excise duty that normally would not occur on the acquisitions, the costs increase for the determination of the taxation amount for VAT on their taxable supplies of goods or services. Thus, that the selection of tax subjects is expanded regarding the legal persons in relation to article 7 of the Excise Duty Directive (EU) 2020/262, compared to what would apply if they like what applies for natural persons would have been considered tax subjects only regarding real business activity, cause a non-EU conform determination of the

[58] By Ch. 6 a sec. 3 first paragraph second sentence and second paragraph respectively of the LSE follow furthermore that the proportionate division of fuels which are used is further complicated if various fuels are used and if it besides the mentioned electricity production is simultaneously made condensation-power production from the same fuel respectively.

[59] See article 1(2) of the VAT Directive of which follows that the principles which form the VAT principle according to the EU law are the principles of a general right of deduction, reciprocity and passing on the tax burden. See also Forssén 2011, pp. 86, 87, 272 and 281.

[60] See Björn Forssén, *Om rättsliga figurer som inte utgör rättssubjekt – den finska och svenska mervärdesskattelagen i förhållande till EU-rätten* (Eng., On legal figures not constituting legal entities – the Finnish and Swedish VAT acts in relation to the EU law), JFT 1/2019, pp. 61–70, 65 and 66 (Forssén 2019b). Forssén 2019b is available in full text on www.forssen.com.

taxation amount for VAT according to the ML and the VAT Directive.[61] Under the mentioned circumstances will in the end the consumer, as tax carrier of the VAT, be burdened by a higher price including VAT on the purchase of goods or services compared to if the expansion of the selection of tax subjects would not occur concerning the legal persons regarding the energy tax and the tax on biocides.

By the reform on 1 July, 2013 ended, as mentioned, the connection to Ch. 13 of the IL for the determination of the tax subject in Ch. 4 sec. 1 no. 1 of the ML, so that the wording of Ch. 4 sec. 1 first paragraph first sentence of the ML corresponds literally with the main rule on who is a taxable person in article 9(1) first paragraph of the VAT Directive. However, that reform has, as mentioned, never had any correspondence in the field of excise duties. I consider that my review shows that the connection to Ch. 13 of the IL should be abolished concerning the harmonised energy tax as well as the non-harmonised tax on biocides. That the problem was resolved on 1 January, 2022 concerning the non-harmonised advertising tax may be signified as chance as a consequence of that tax being abolished.

4 An adjustment of the income tax law to the rules on VAT and excise duties for the determination of the tax subject should be investigated

I have previously mentioned in the JFT that it was a guiding-star in Forssén 2011 and Forssén 2013 to emphasize that it is decisive for analyses of VAT issues to observe both the tax subject question and the tax object question, so that the first mentioned will not be left aside to go directly to writing about the tax object.[62] I stated that academics writing on the subject VAT law should focus more on emphasizing that complicated issues demand that both the tax subject question and the tax object question are analysed, whereby I emphasized that there has been a far to big focus on the tax object question from Swedish writes on the subject.[63] The same phenomenon exists in the field of exise duties, which I have accounted for above at the review of Olsson 2001, that is of the only thesis in Sweden on the subject excise duties. The fundamental fault concerning the Swedish determination of the tax subject for VAT purposes was that it was made by the described connection to *the non-harmonised income tax law*, which the legislator took care of by revoking that connection on 1 July, 2013, whereby the phenomenon however still remains in the field of excise duties in Sweden regarding the tax subject for the energy tax and the tax on biocides. I do not comment this further, but may only mention that I in Forssén 2011 stated that current law at the time was like that such an adjustment of the income tax law in Sweden to the rules on VAT and excise duties for the determination of the tax subject was possible. I consider that the possibilities for such a reform should be investigated – as a suggestion in co-operation by Sweden and Finland – whereby I state the following to confirm this.

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[61] See Ch. 7 sec. 2 first paragraph of the ML and articles 73 and 78 of the VAT Directive. See also Forssén 2019a, section 12 201 024 and section 2.3 in Björn Forssén, *IMPAKT – Avtal och momsproblem: Tredje upplagan*, Eng., IMPAKT – Agreements and VAT problems: Third edition, self-published 2019 (Forssén 2019c). Forssén 2019c is available in full text on www.forssen.com, and in a printed version at Kungliga biblioteket i Stockholm (the National Library of Sweden) and at the Lund University Library.

[62] See Björn Forssén, *Moms och bemanning inom vård och omsorg – den finska och svenska mervärdesskattelagen i förhållande till EU-rätten* (Eng., VAT and staffing within care – the Finnish and Swedish VAT acts in relation to the EU law), JFT 4/2019, pp. 240–253 (Forssén 2019d). Forssén 2019d is available in full text on www.forssen.com.

[63] See Forssén 2019d, pp. 252 and 253.

– On 1 January, 2009 was, by SFS 2008:1316, a second paragraph introduced into Ch. 13 sec. 1 of the IL, whereby the independence prerequisite for what is meant by a real business activity in the first paragraph second sentence was clarified. That led to interpretation and application problems concerning VAT and staffing within care (Sw., *vård och omsorg*) that I bring up in Forssén 2019d, but which I do not comment here. Instead I go back to what I brought up in Forssén 2011 regarding the possibility to let the VAT guide for corporate taxation purposes the income tax concerning the tax subject question. In that respect, I mentioned that the investigation that led to the reform of Ch. 13 sec. 1 of the IL pondered upon *letting the VAT Directive be directly steering for the IL's rules* (Sw., "att låta mervärdesskattedirektivets regler vara direkt styrande för IL:s regelverk").[64] However, the preparatory work expressed that it would not be suitable to abolish the prerequisite of profit purpose (Sw., *vinstsyfte*) for the determination of business activity, by connecting that concept in the IL to the VAT Directive's concept economic activity, whereby I assumed that the legislator's standpoint was based on that it in the case-law still was made a profit prerequisite as a necessary prerequisite for real business activity. If so, it would be incompatible with article 9(1) first paragraph of the VAT Directive whereof follows that an economic activity can exist "whatever the purpose or results of that activity" (Sw., "oberoende av dess syfte eller resultat").[65]

– However, the analysis in Forssén 2011 proved that the profit prerequisite for real business activity that was considered obstructing a reverse scheme, where the VAT Directive's rules on taxable person would be directly steering for corporate taxation purposes who is considered having a business activity, no longer was upheld in the Swedish case-law.[66] The question whether it was possible to introduce a reverse scheme where the ML is guiding the IL concerning who is an entrepreneur I left open, for instead only suggesting that the connection in Ch. 4 sec. 1 no. 1 of the ML to Ch. 13 of the IL would be revoked, which as mentioned then also was made on 1 July, 2013, but I noted that advantages can be achieved with a common taxation frame by also introducing the mentioned reverse scheme, namely for evidence, procedure and proceedings purposes.[67]

– If the reverse scheme is introduced, can also the connection from Ch. 4 sec. 8 of the ML to the IL, for the limitation of the value-added taxation of incomes in non-profit associations and registered religious communities, be revoked.[68] In Ch. 4 sec. 8 of the ML is stated that an activity carried out by a non-profit association or a registered religious community is not considered an economic activity, if the incomes in the

[64] See reference to SOU 2008:76 (*F-skatt åt flera* – Eng., F-tax for more) in prop. 2008/09:62 (*F-skatt åt fler* – Eng., F-tax for more), p. 24, and my reference in Forssén 2011, p. 105 to these preparatory works to the reform of Ch. 13 sec. 1 of the IL on 1 January, 2009. The F in F-tax stands for *företagare* (Eng., entrepreneur) – see prop. 1991/92:112 (*F-skattebevis, m.m.* – Eng., F-tax certificate, etc.), p. 76. SOU, *statens offentliga utredningar* – Eng., the Government's official reports.

[65] See Forssén 2011, pp. 105 and 106.

[66] See Forssén 2011, p. 267.

[67] See Forssén 2011, pp. 267 and 268.

[68] See Forssén 2011, pp. 268 and 269.

> activity constitute income of business activity that do not cause tax liability for the association or the religious community according to Ch. 7 sec. 3 of the IL. According to Ch. 7 sec. 3 first paragraph of the IL are foundations which fulfil the so called purpose, activity and completion demands and non-profit associations and registered religious communities, which besides the demands mentioned also fulfil the so called openness demand – with exemption for capital wins and capital losses – tax liable only for income of business activity according to Ch. 13 sec. 1 of the IL. Thus, the limitation of the value-added taxation regarding incomes in non-profit associations and registered religious communities is made with respect of the tax subject. If the connection to the IL thereby is revoked, the question of a breach of EU law that the EU Commission brought up in the notification about Ch. 4 sec. 8 of the ML on 26 June, 2008 would get its solution.[69] Thereby would namely the limitation of the value-added taxation within the non-profit sector be made with respect of the tax object in someone of the exemption rules in Ch. 3 of the ML, instead of regarding the tax subject like in Ch 4 sec. 8 of the ML. The Swedish Government applied on 20 January, 2011 for a permit according to article 395 of the VAT Directive to introduce an annual turnover limit of SEK 1,000,000 for the application of Ch. 4 sec. 8 of the ML, which the EU Commission rejected, whereon the Government according to a press release on 31 March, 2011 expressed that it would continue working with the question.[70] However, nothing has happened since then, and such an amount limit with respect of the tax subject that the Government brought up with the EU Commission does not solve the problem that the limitation of the value-added taxation within the non-profit sector shall be made with respect of the tax object, like in articles 132–134 of the VAT Directive, and besides the Government's suggestion would lead to a non-EU conform competition distortion.[71]

Thus, I consider that an adjustment of the income tax law to the VAT Directive for the determination of the tax subject should be investigated. To achieve such advantages that I am mentioning with a common taxation frame for corporate taxation purposes should thereby also the Excise Duty Directive (EU) 2020/262 be considered. An investigation of an adjustment of the income tax law to the rules on VAT and excise duties for the determination of the tax subject could be made by Sweden and Finland in co-operation bringing up the question on the EU level. As a suggestion it could be done at the same time as Sweden and Finland possibly take up my proposal in Forssén 2013 of bringing up on the EU level the question whether enterprises ran by non-legal entities should be made tax subjects for VAT purposes, since such legal figures are treated differently in the two countries for VAT purposes, where *enkla bolag och partrederier* (Eng., approx., joint ventures and shipping partnerships) are not considered tax subjects according to the ML, whereas *sammanslutningar och partrederier* (Eng., approx., joint ventures and shipping partnerships) are considered tax subjects according to the FML.[72] I have iterated that proposal previously in the JFT during

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[69] See 2007/2311 K(2008) 2803 (*EU-kommissionens formella underrättelse den 26 juni 2008 om behandlingen av ideella föreningar och registrerade trossamfund i ML*), i.e. the EU Commission's formal notification on 26 June, 2008 about the treatment of non-profit associations and registered religious communities in the ML. See also Forssén 2011, p. 269.

[70] See Forssén 2011, p. 269.

[71] See Forssén 2011, p. 269.

[72] See Forssén 2013, pp. 225 and 226.

2019 and 2020,[73] and I do the same here. Besides, I also iterate – from Forssén 2011 – that the described reverse scheme for the determination of the tax subject for corporate taxation purposes should make it easier to introduce an EU-tax in the future.[74]

5 Final comments and suggestions on future research in the field of indirect taxes

5.1 Concerning the choice of method in the excise duty research

In section 2.5.4.1 in Forssén 2021a I state that I do not dismiss law dogmatics as a method for the research in the VAT law. However, I state there that that method should be completed with a comparative method, where at least one EU Member State is included in the material for comparison.[75] This to increase the probability for the research results to become useful regarding the implementation question. Thereby I mean the implementation of the VAT Directive into the ML or for that matter into the FML. Article 1(2) of the VAT Directive defines, as mentioned, the VAT principle according to the EU law. In Forssén 2020a I state that if a jurisprudential study concerns the implementation question regarding the VAT it is, at the choice of a third country as material for comparison for the use of a comparative method in itself or as a complement to the law dogmatic method, decisive that the country has a VAT system in accordance with what is meant by VAT according to the EU law, to judge whether it is suitable as material for comparison in that respect, so that the choice of method can be expected to give a useful research result for the implementation question.[76]

Since there is no specific definition of what is meant with excise duties according to the EU law in the Excise Duty Directive (EU) 2020/262, I consider that it is more open than regarding the VAT to use third countries as material for comparison at the use of a comparative method for jurisprudential studies regarding the implementation of the Excise Duty Directive (EU) 2020/262 into the national legislations regarding harmonised excise duties. What is important is in my opinion to, in the same way as concerning the implementation questions regarding VAT, consider both the tax subject question and the tax object question at a study of the implementation question in the field of excise duties. Regarding Olsson 2001 I note above that the method therein is not what I call a purely law dogmatic method, which I consider typically means that the choice of method can be expected to give a useful research result for the implementation question also in the field of excise duties. My criticism regarding Olsson 2001 concerns instead, as mentioned, the circumstance that questions about the tax subject are given a rather limit treatment therein, and above all, as also mentioned, that the phenomenon, with a connection for the determination of professional

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[73] See Forssén 2019b, pp. 69 and 70 and Björn Forssén, *Synpunkter på vissa regler i förslaget till en ny mervärdesskattelag i Sverige – SOU 2020:31* (Eng., Viewpoints on certain rules in the proposal of a new VAT act in Sweden – SOU 2020:31). JFT 3/2020, pp. 388–399, 394 (Forssén 2020b). Forssén 2020b is available in full text on www.forssen.com.

[74] See Forssén 2011, p. 269 (and 327). See also Forssén 2013, pp. 41 and 42.

[75] If a third country shall be part of a comparative analysis, I suggest that an EFTA-country is chosen, inter alia since those are examples of third countries which have VAT systems in the meaning of the EU law. See Forssén 2011, p. 283 and also Forssén 2021a, section 1. EFTA, European Free Trade Association (Sw., *Europeiska frihandelssammanslutningen*).

[76] See Forssén 2020a, p. 734.

activity in Ch. 1 sec. 4 no. 1 of the LSE and in sec. 4 third paragraph of *lagen (1984:410) om skatt på bekämpningsmedel*, Eng., the Act on Tax on Biocides, to the concept business activity in Ch. 13 of the IL, is not treated at all. However, Olsson 2001 serve as guidance for the future research regarding the excise duties insofar as the thesis confirms that neither such research in the field of indirect taxes shall be made by the aplication of a purely law dogmatic method.

By the way, concerning the law dogmatic method in itself I state in section 2.5.4.1 in Forssén 2021a that it can be developed by the addition of legal semiotics.[77] Besides, it promotes of course also a jurisprudential study of the implementation question in the field of excise duties if the law dogmatic method is completed with an empirical investigation of the application of the rules concerned by the study, which also can constitute a further complement at the use of a comparative method in itself or as a completion of the law dogmatic method. In Forssén 2020a I mention that I am when advising against the application of a purely law dogmatic method, where the method is not completed with neither a comparative method nor empirical investigations in the form of inquiries that can capture what is not to be found in the jurisprudential literature, warning in an article for what I call the trap of mathematics in the VAT research,[78] which I also do concerning the research in the field of excise duties. In Forssén 2020a I also state that tools – models – can be developed by the researcher to support for example the law dogmatic method at analyses of questions within the VAT law, whereby I exemplify with a tool that I had mentioned previously in Forssén 2018a.[79] I did that reference also in Forssén 2021a,[80] and mentioned then also a book wherein I describe how a tool (model) could be developed to serve as support for a method that is applied in the VAT research or for example in a tax case.[81] Anyone carrying out jurisprudential studies in the field

[77] See Forssén 2020a, p. 752 and reference there to Björn Forssén, *Juridisk semiotik och tecken på skattebrott i den artistiska miljön* (Eng., Legal semiotics and signs of tax fraud in the artistic environment). JFT 5/2018, pp. 307–328, *320* (Forssén 2018a). Forssén 2018a is available in full text on www.forssen.com. See the same reference to Forssén 2018a in Björn Forssén, *Momsforskningen i Sverige – vart är den på väg? Del 2* (the VAT research in Sweden – where is it going? Part 2), *Tidningen Balans fördjupningsbilaga* (Eng., The Periodical Balans Annex with advanced articles) 2/2021, pp. 29–36, *32* (Forssén 2021b). Forssén 2021b is available in full text on www.tidningenbalans.se and on www.forssen.com.

[78] See Forssén 2020a, pp. 750 and 751, where I – concerning the risk of falling into the trap of mathematics with your research – refer to Björn Forssén, *Matematikfällan i forskningen – avseende mervärdesskatterätten* (Eng., The Trap of Mathematics in the Research – regarding the VAT law), *Tidningen Balans fördjupningsbilaga* 2/2020, pp. 17–27 (Forssén 2020c). Forssén 2020c is available in full text on www.tidningenbalans.se and on www.forssen.com.

[79] See Forssén 2020a, p. 752 and the reference there to Forssén 2018a, p. 320 and the idea figure of a doll's house as the complete joint work, when several persons participate in creating for example a musical work to be performed at a concert, a stage play or a film. I refer to the same idea figure in Forssén 2018a, p. 320 and also in Björn Forssén, *Sammansatta transaktioner och semiotik beträffande moms* (Eng., Composite transactions and semiotics concerning VAT). *Svensk Skattetidning* 2020, pp. 160–172, 171 and 172 (Forssén 2020d). Forssén 2020d is available in full text on www.forssen.com.

[80] See Forssén 2021a, p. 441 and the reference there to Forssén 2020a, p. 752 with reference to Forssén 2018a, p. 320.

[81] See Forssén 2021a, p. 441 and the reference there to Björn Forssén, *Vara och tjänst vid sammansatta transaktioner – tolkning och tillämpning enligt mervärdesskattelagen och EU:s mervärdesskattedirektiv* (Eng., Goods and services at composite supplies – interpretation and application according to the VAT Act and the EU's VAT Directive), self-published 2020 (Forssén 2020e). In Forssén 2020e I create in Chapter 3 a tool for the case studies of composite transactions that I do in Chapter 4 therein. Forssén 2020e is available in full text on www.forssen.com, and in a printed version at Kungliga biblioteket i Stockholm (the National Library of

of excise duties should in my opinion also have a support by developing tools for this, for example to clearly structure when the problemizing of the implementation question concerns the tax subject and the tax object respectively.

5.2 About that the right of deduction for input tax can be affected by an unclear determination of the tax subject for VAT purposes and a gap in the legislation on customs

Concerning the third of the above-mentioned indirect taxes, that is customs, I come back here to me finally in section 5.3.2 in Forssén 2020a stating that it, like concerning the field of excise duties, only exists one thesis withing the research on customs law in Sweden, namely professor Christina Moëll's thesis, *Harmoniserade tulltaxor Införlivande, tolkning och tillämpning av internationella regler för varuklassificering* (Eng., Harmonised customs tariffs Incorporation, interpretation and application of international rules on classification of goods).[82] However, customs does not present any problem regarding the determination of the tax subject. According to the secondary law is in article 5(19) of the above-mentioned Union Customs Code a person who is liable to pay a customs debt, the debtor (Sw., *gäldenären*), defined as "any person liable for a customs debt" (Sw., "varje person som är skyldig att betala en tullskuld"). Thus, the use in the rule of the expression *any person* (Sw., *varje person*) means that the debtor can be an ordinary private person (consumer) as well as an entrepreneur. The Union Customs Code is an EU regulation and thereby directly applicable in the Member States, according to article 288 second paragraph of the Functional Treaty. Thus, there is no need to implement the Union Customs Code into the Member States' national legislations for it to apply, and by Ch. 1 sec. 1 first paragraph first indent of *tullagen (2016:253*, here abbreviated TuL), i.e. the Swedish Customs Act, follows that that act only completes (Sw., *kompletterar*) the Union Customs Code and the regulations issued by the EU by virtue of that regulation. In a corresponding way it is stated in Ch. 1 sec. 1 item 1 first sentence of the Finnish Customs Act, *tullagen (304/2016)*, that that act is applied on customs clearance, customs supervision and customs taxation in addition to (Sw., *utöver*) what is determined about this in the EU legislation.

For future research concerning indirect taxes, I may mention that an interpretation problem regarding the determination of the tax subject in the ML and a gap in the TuL can cause that the scope of the right of deduction for input tax becomes far too vast. I treated the interpretation problem thoroughly in an article 2018.[83] I state there that the gap in the TuL can open for an undesired arrangement meaning that for example holding companies, non-profit associations and registered religious communities can get deduction for import-VAT, despite imported goods will not be sold in their turn and leading to liability to account for outut tax but used purely for consumption. If the assumed gap in the TuL can be used in that way it is

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Sweden) and at the Lund University Library. By the way, I refer in Forssén 2020e inter alia to the following: Forssén 2011, Forssén 2013, Forssén 2018a, Forssén 2019a, Forssén 2019b, Forssén 2019d, Forssén 2020c and Forssén 2020d.

[82] See Christina Moëll, *Harmoniserade tulltaxor Införlivande, tolkning och tillämpning av internationella regler för varuklassificering*. Juristförlaget i Lund 1996 (Moëll 1996). See also Forssén 2020a, section 5.3.2.

[83] See Björn Forssén, *Lucka i tullagen öppnar för ej avsett momsavdrag på grund av två olika bestämningar av vem som är beskattningsbar person* (Eng., Gap in the customs act opening for unintended VAT deduction due to two different determinations of who is a taxable person). *Tidningen Balans fördjupningsbilaga* 3/2018, pp. 17–19 (Forssén 2018b). Forssén 2018b is available in full text on www.tidningenbalans.se and on www.forssen.com.

due to the ML since the mentioned reform on 1 July, 2013, by SFS 2013:368, has come to contain two determinations of the concept taxable person (Sw., *beskattningsbar person*), namely the general in Ch. 4 sec. 1 and a special in Ch. 5 sec. 4, which is used in connection with the application of the rules in Ch. 5 of the ML determining if a supply of a service is made within or outside the country.[84] I bring up this interpretation problem also in a book from 2019,[85] and as well in a commentary that I submitted in the JFT in the year 2020 regarding a proposal of a new VAT act in Sweden according to the Government's official report *En ny mervärdesskattelag (SOU 2020:31)*, Eng., A new VAT act, which was suggested to come into force on 1 January, 2022.[86] When this is written a proposal of 17 February, 2022 has been made to the Council on Legislation for consideration (Sw., *lagrådsremiss*), where the coming into force instead is suggested to be on 1 January, 2023 (which however thereafter has been altered to 1 July, 2023 – see prop. 2022/23:46, p. 1). Here I mention the interpretation problem in question as an example of the importance to observe that the determination of the tax subject regarding the VAT together with a gap in the TuL may cause undesired effects of for example the mentioned kind. I summarize the interpretaion problem in question according to the following.

The TuL replaced on 1 May, 2016 *tullagen (2000:1281*, here abbreviated GTuL). On 1 January, 2015 *Skatteverket* (i.e. the Swedish tax authority) took over the value-added taxation of certain kinds of import from the Swedish Customs (Sw., *Tullverket*). According to SFS 2014:50 and SFS 2014:51 was on 1 January, 2015 the scheme introduced meaning that *import-VAT* (Sw., *importmoms*) is taken out by *Skatteverket* in accordance with *skatteförfarandelagen (2011:1244*, here abbreviated SFL) – Eng., the Swedish Taxation Procedure Act – of those VAT-registered in Sweden, whereas the Customs still is the taxation authority for imports in other cases. In an e-mail of 12 December, 2014, I pointed out to the Swedish Treasury the existence of a risk for an undesired arrangement, if not Ch. 5 sec. 11 a first paragraph no. 1 and no. 2 of the GTuL were changed so that no. 2 referred to *beskattningsbar person* (En., taxable person) according to the ML *except in the special meaning the concept is given in Ch. 5 sec. 4 of the ML* (Sw., *utom i den särskilda betydelse begreppet ges i 5 kap. 4 § ML*). In Ch. 5 sec. 11 a first paragraph no. 2 of the GTuL, its wording according to SFS 2014:51, was stated as one of the conditions for *import-VAT* to be taken out according to the SFL, that the person making a tax return *acts in the capacity of taxable person according to the ML at the import* (Sw., "agerar i egenskap av beskattningsbar person enligt mervärdesskattelagen vid importen eller införseln"). The word *vid* (Eng., at) is

[84] The rule in Ch. 5 sec. 4 of the ML was introduced on 1 January, 2010, by SFS 2009:1333 (and the regulation SFS 2009:1034 on the coming into force of SFS 2009:1333), and then was the concept trader (Sw., *näringsidkare*) used – see also prop. 2009/10:15 (*Nya mervärdesskatteregler om omsättningsland för tjänster, återbetalning till utländska företagare och periodisk sammanställning* – Eng., New VAT rules on country of the placement of supply of services, refund to foreign entrepreneurs and periodical statements) p. 19. At the reform on 1 July, 2013, by SFS 2013:368, *näringsidkare* was replaced with *beskattningsbar person* (taxable person) in Ch. 5 sec. 4 of the ML, whereby the motive only was to thereby achieve an increased formal correspondence with the VAT Directive – see prop. 2012/13:124 (*Begreppet beskattningsbar person – en teknisk anpassning av mervärdesskattelagen* – Eng., The concept taxable person – a technical adjustment of the VAT act), pp. 1 and 25.

[85] See Björn Forssén, *Ord och kontext i EU-skatterätten: En analys av svensk moms i ett law and language-perspektiv Tredje upplagan*, Eng., Words and context in the EU tax law: An analysis of Swedish VAT in a law and language-perspective Third edition (self-published 2019), sections 3.7.1 and 3.7.2 (Forssén 2019e). Forssén 2019e is available in full text on www.forssen.com, and in a printed version at Kungliga biblioteket i Stockholm (the National Library of Sweden) and at the Lund University Library.

[86] See Forssén 2020b, section 3.4. I refer to Forssén 2018b also in Forssén 2020b, p. 396.

conducive to the interpretation problem in question, and the expression *i samband med* (Eng., in relation to) should have replaced it, but the problem with two determinations of the concept *beskattningsbar person* (Eng., taxable person) would have disappeared by a clarification that no. 2 with the reference to the concept *beskattningsbar person* did not regard its determination in Ch. 5 sec. 4 of the ML. The lack in Ch. 5 sec. 11 a first paragraph no. 2 of the GTuL of the expression *utom i den särskilda betydelse begreppet ges i 5 kap. 4 § ML* (Eng., *except in the special meaning the concept is given in Ch. 5 sec. 4 of the ML*) meant in my opinion there was a gap in the act, that is a gap in the GTuL. The gap could in my opinion give an unjustified right of deduction for input tax on imports according to the main rule on the right of deduction in Ch. 8 sec. 3 first paragraph of the ML. It existed in my opinion an obvious risk for the following undesired arrangement:

- For example a non-profit association or a holding company acquiring a service from abroad can already because of that be a taxable person according to Ch. 5 sec. 4 of the ML. If the non-profit association or the holding company combines that with import of goods for pure consumption, can right of deduction emerge according to Ch. 8 sec. 3 first paragraph of the ML for input tax corresponding to the import-VAT by those subjects, regardless of whether they in their activities supply taxable goods or services.

- Thus, the interpretation problem concerns the tax subject question and that there were two relevant determinations of the concept *beskattningsbar person* (Eng., taxable person) in the ML to which the rule in question in the GTuL could be deemed referring to, namley Ch. 4 sec 1 and Ch. 5 sec. 4. In Ch. 5 sec. 4 of the ML is by *beskattningsbar person* meant not only persons carrying out economic activity etc., but also for example holding companies and non-profit associations and registered religious communities that do not have an economic activity according to Ch. 4 sec. 1 of the ML.

- Thus, in the e-mail to the Treasury, I pointed out the presumed gap in the GTuL, and the Treasury answered on 16 December, 2014 (Dnr. Fi2014/4452). What is in my opinion precarious is that the Treasury referred to await the case-law rather than making my suggested alterations of the rule in the GTuL to reduce the risk of undesired arrangements regarding VAT due to the presumed gap in the act. The legislator had the opportunity to easily rectify the gap, when the TuL replaced the GTuL on 1 May, 2016, which however has not happened yet, but the word *vid* (Eng., at) is also used in Ch. 2 sec. 2 first paragraph of the TuL, which corresponds to the former Ch. 5 sec. 11 a of the GTuL.

Thus, I may suggest that the interpretation problem in question will be brought up in the research concerning indirect taxes in Sweden, so that the legislator gets another stimulus to rectify by altering the legislation the gap that I consider exists, rather than waiting for an undesired arrangement to be tried in case-law. I do not go into the customs law, but mention in the next section something more about customs partly regarding corporate taxation questions and whether they can be treated assembled for evidence, procedure and proceedings purposes, partly regarding the concept goods [Sw., *vara* (the singular)].

5.3 Suggestions on future research in the field of indirect taxes

In Forssén 2020a I mentioned finally in section 5.3.1 the question on how the VAT research in Sweden considers the collection of VAT. I came back to that I in the article emphasized the

importance of an effective collection of VAT as an important law political aim for the common VAT system within the EU, whereby I had referred to Forssén 2011 and Forssén 2013 concerning that support for that standpoint is to be found both by the EU Commission and the Court of Justice of the EU. I reiterate here that the collection of the VAT is not only important for the public treasury in each Member State, but also to finance the EU's institutions. For future research concerning the indirect taxes, that is not only regarding VAT but also regarding excise duties and customs, I also got back to me in Forssén 2020a, section 5.3.1 emphasizing that if the law political aim witn an effective collection shall be promoted by impulses from the VAT research it cannot continue to be focused in the first place on the material questions in the field, but it must also be aiming at the formal VAT questions, whereby I exemplified with the question whether the SFL is conform in relation to the rules on VAT registration in articles 213–216 of the VAT Directive. I mentioned that side question E in Forssén 2011 concerned the question on VAT registration,[87] but that I did not find it to have been mentioned in any other thesis on VAT in Sweden. In section 5.3.1 of Forssén 2020a I therefore got back to section 3.5 in the article, where I state that without research efforts with focus on the registration question cannot the legislator get any conception of the range of how many persons are due to inefficient control *given entrance into* the VAT system on faulty grounds, and causing the State tax evasion or tax losses, which I also mentioned has been pointed out on EU level as a problem for the VAT collection.

Thus, I suggested in section 5.3.1 in Forssén 2020a, that the VAT research in Sweden also would aim at formal questions such as the question on the collection of VAT, and not only on the material questions of taxation, whereby I suggested that also the law of procedure should be brought up in inter alia the research in the field of VAT. I reiterate my suggestions and may, in the light of what I state in this article about the advantages with a common taxation frame regarding VAT and income tax, also state that the VAT research in the future should focus also on the accounting questions, which also would be in line with what I have emphasized about that the law political aim with an effective collection should be promoted by impulses from the VAT research.

Olsson 2001 is a fine example of a theis that considerably regards not only the material taxation questions, by also especially treat, in Chapter 8, questions on deduction and reimbursement, that is how the excise duties are accounted for. I suggest that future VAT research follows that example and that the VAT and accounting questions even could be a subject in itself, where the research effort concerns the material VAT questions only to the extent that they need to be mentioned to give context to the accounting questions. What could be mentioned in the latter respect is in that case that the prerequisites for a person to be *required to maintain accounting records* (Sw., *bokföringsskyldig*) regarding natural persons, according to Ch. 2 sec. 6 of *bokföringslagen (1999:1078*, here abbreviated BFL), i.e. the Swedish Book-keeping Act), resemble the prerequisites in the main rule on who is a taxable person in article 9(1) of the VAT Directive. In the preparatory work to the BFL it is stated that the *requirement to maintain accounting records* for a natural person who is carrying out business activity occur according to Ch. 2 sec. 6 of the BFL when he or she is *professionally carrying out activity of economic sort* (Sw., "yrkesmässigt bedriver verksamhet av ekonomisk art").[88] Thus, the concept *bokföringsskyldig* (i.e. the concept person required to maintain

[87] At the time ruled *skattebetalningslagen (1997:483)* (Eng., the Swedish Tax Payment Act), which was one of the taxation procedure acts that were replaced on 1 January, 2012 by the SFL.

[88] See prop. 1998/99:130 (*Ny bokföringslag m.m.* – Eng., New book-keeping act) Part 1, p. 205. See also Forssén 2011, pp. 33 and 176.

accounting records) has a value for evidence purposes to determine who is a tax subject. The *requirement to maintain accounting records* (Sw., bokföringsskyldigheten) gives thereby a certain – however not decisive – guidance to that question, and thereby stability to the taxation procedure and proceedings. Thus, that the evidence influence from the accounting law in that way affects the procedure and the proceedings regarding the determination of the tax subject for VAT purposes promotes the legal rights of the individual.[89] Although a common taxation frame for corporate taxation purposes is not introduced insofar as the ML would be steering for the IL from a material perspective regarding who is an entrepreneur, which I, as mentioned above, left open in Forssén 2011, it would in my opinion be an advantage for evidence, procedure and proceedings purposes to keep the two taxes together in a common taxation frame.[90]

Since also excise duties are included for procedure purposes in the tax account system (Sw., *skattekontosystemet*) and comprised by the SFL, my suggestion in the respects mentioned also apply to those, that is if also excise duties are urgent for an enterprise it promotes the legal rights of the individual if such a common taxation frame as I recommend includes excise duties together with VAT and income tax. However, it provides, regarding the energy tax and the tax on biocides, that the material connection to the concept business activity (Sw., *näringsverksamhet*) in the whole of Ch. 13 of the IL made in Ch. 1 sec. 4 no. 1 of the LSE and sec. 4 third paragraph of *lagen (1984:410) om skatt på bekämpningsmedel* (the Act on Tax on Biocides), for the determination of the concept professional activity (Sw., *yrkesmässig verksamhet*), will be revoked. Thereby would, as mentioned, the tax subject regarding the Swedish excise duties be determined independently, like what is the case according to the FPL, which thus is EU conform in that respect, which also is mentioned above.

Concerning customs applies, as mentioned, since 1 January, 2015 the scheme that *import-VAT* (Sw., *importmoms*) is taken out by *Skatteverket* (the Swedish tax authority) in accordance with the SFL for those VAT-registered in Sweden, whereas the Customs still is the taxation authority for imports in other cases, where the taxation procedure follows by the TuL. Thus, for VAT-registered enterprises should it benefit them from a legal certainty point of view that the question on the determination of the tax subject is kept together for corporate taxation purposes in a common tax frame for evidence, procedure and proceedings purposes, where thus that determination would be made assembled thereby for customs and the other taxes in question. Regarding the customs questions I iterate what I state in section 5.3.2 in Forssén 2020a about the concept goods [Sw., *vara* (the singular)], namely that it at research in the field of indirect taxes should be made analyses of the opportunity to accomplish simplications for the determination of the tax object, by establishing *a uniform concept goods* for the taxes within the corporate taxation. I mentioned that in Moëll 1996 (p. 41) was stated that *it would hardly be possible or even meaningful to establish a uniform concept goods for all fields of law*, but that it therein was stated that the meaning of the concept should be determined *field by field based on the present legislation*. I consider that that attitude will typically not favour the EU project, and that the research instead should be conducive to an effective collection in the field of indirect taxes, by preparing for the introduction there of a uniform concept goods. Thereby I also iterate that the result of such a research result can be used in a work on the

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[89] See Forssén 2011, pp. 180 and 181.

[90] See Forssén 2011, p. 267.

introduction of the free trade agreement between the EU and the USA,[91] that is the TTIP-agreement,[92] if this will be resumed.

To the research regarding formal rules and accounting rules on VAT I can contribute in a decriptive respect by Forssén 2019a, where I treat such issues especially in the sections 30 000 000–33 000 000. Furthermore, I have made a SFS-register over taxation procedure and administration proceedings concerning the entire field of taxation from the 1950's until present times.[93] The acts are stated in Forssén 2019f with their numbers according to *svensk författningssamling (SFS)*, i.e. the Swedish Code of Statutes, whereby the preparatory work to each SFS-number are stated regarding *regeringens propositioner* (i.e. the Swedish Government's bills) and *riksdagsutskottens betänkanden* (i.e. the reports from the Swedish Parliament's committees) and, when so is current, the EU's legislations.[94] Concerning the Customs system the SFS-register in Forssén 2019f contains, like for the VAT, SFS-numbers both for procedure rules and material rules. The book gives a good historical *SFS-outline* (Sw., *SFS-överblick*) of the procedure rules of the entire Swedish field of taxes. It should serve as support for researchers who for example plan to write about the taxation procedure in the field of indirect taxes, as I am suggesting in this section. Since the Swedish procedure rules are hard to take in historically, I have put in a schematic, historical guide to the SFS-register under *ÖVERSIKT* (Eng., outline) in the book.[95] I may also emphasize that the list of abbreviations in the book gives a simple information on which existing or former committees of the Parliament that are meant by abbreviations regarding those in various law sources.[96]

[91] USA, United States of America (Sw., *Amerikas Förenta Stater*).

[92] TTIP or T-TIP is the abbreviation of The Transatlantic Trade and Investment Partnership.

[93] See Björn Forssén, *SFS-register över beskattningsförfarandet och förvaltningsprocess: Andra upplagan*, Eng., SFS-register over the taxation procedure and administration proceedings: Second edition, self-published 2019 (Forssén 2019f). Forssén 2019f is available in full text on www.forssen.com, and in a printed version at Kungliga biblioteket i Stockholm (the National Library of Sweden) and at the Lund University Library.

[94] The source to the information in Forssén 2019f is the law databases by the secretariat of the Swedish Government (www.regeringen.se).

[95] See Forssén 2019f, p. 12.

[96] See Forssén 2019f, p. 8.