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The VAT research in Sweden – method questions

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1 Introduction

Value-added tax (VAT) is a tax for which two sets of legislation shall be interpreted and applied within the various EU Member States. In for instance Sweden and Finland *mervärdesskattelagen (1994:200*, here abbreviated ML), i.e. the Swedish VAT Act, and *mervärdesskattelagen (1501/1993*, here abbreviated FML), i.e. the Finnish VAT Act, apply. The content of the ML and the FML is determined by rules in the legislations from the European Union (EU) in the field, that is by the EU law in the field of VAT. When Sweden and Finland accessed to the EU on 1 January, 1995 the two countries namely transferred competence in for instance the field of indirect taxes, which in the first place consists of VAT, excise duties and customs, to the EU's institutions.[1] The so-called principle of legality for such transfer of competence follows by articles 4(1) and 5(2) TEU, and, where Sweden is concerned also by virtue of the Swedish constitution, namely by Ch. 10 sec. 6 first paragraph first sentence of *regeringsformen (1974:152*, here abbreviated RF).[2]

In this article I treat how the research is done in Sweden regarding the problemizing of the rule competition emerging if one or more rules in the EU's VAT Directive (2006/112/EC) can be given another interpretation and application than what follows by the corresponding rule or rules in the national VAT legislation, the ML. In this respect I treat the use of methods for analysing in the VAT research the implementation into the ML the directive rules, where I reason about the aptitude of a law dogmatic method or comparative method for such a jurisprudential study. The following is meant by law dogmatics and comparative law:

- Law dogmatics is the part of jurisprudence occupied with the legal norm system and the interpretation of the norms (Sw., "Rättsdogmatik är "den del av rättsvetenskapen som sysslar med det rättsliga normsystemet och normernas tolkning").[3]

- Comparative law – comparing law – means the comparing of the law of different countries.[4]

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[1] The EU's institutions shall according to article 13(1) of the Treaty of European Union (TEU) be the following: the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors.

[2] At Sweden's EU-accession the rule was to be found in Ch. 10 sec. 5 of the RF.

[3] See Sture Bergström – Torgny Håstad – Per Henrik Lindblom – Staffan Rylander, *Juridikens termer* (Eng., Terms of law), eighth edition, Almqvist & Wiksell Förlag/Liber AB 1997, p. 145 (Bergström et al. 1997).

[4] See Bergström et al. 1997, p. 90.

I illuminate the method question with theses where the approach for the study in the field of VAT has been carried out only by a law dogmatic method, with such a method in combination with a comparative method and only with a comparative method respectively.

I put the Swedish theses on the subject of VAT law in relation to inter alia article 113 of the Treaty on the Functioning of the European Union (hereinafter the Functional Treaty), and reason about pros and cons with them for the maintaining of the two principles in the treaty article. This meaning that it, to the extent that it is necessary to secure the internal market within the EU being established and functioning, is a demand for harmonisation on the national legislation of the indirect taxes in the EU Member States and that a competition distortion shall be avoided. Article 113 of the Functional Treaty has the following wording:

> ”The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.”

That it is binding for Sweden to implement the rules of the VAT Directive into the ML follows by article 288 third paragraph of the Functional Treaty, which has the following wording:

> ”A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”

At the review of pros and cons with the law dogmatic method and the comparative method in the research in the subject VAT law in Sweden I disregard from Sweden in the accession treaty with the EU getting by negotiation an exemption from implementing certain rules of the EU’s First VAT Directive (67/227/EEC) and the EU’s Sixth VAT Directive (77/388/EEC), which have been replaced by the VAT Directive,[5] and I also disregard from the so-called rest competence that is expressed in the subordinate clause on *form and methods* for the implementation of the VAT Directive. Any exact meaning by the expression *form and methods* in article 288 third paragraph of the Functional Treaty has not been established.[6] The purpose with and consequences of this rest competence being left to the Member States and their authorities regarding implementation of directives are only to give them opportunities of

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[5] See *lagen (1994:1500) med anledning av Sveriges anslutning till Europeiska unionen* (Eng., the Act concerning Sweden’s accession to the European Union in 1995), the so-called Accession Act or the EU-Act; prop. 1994/95:19 (*Sveriges medlemskap i Europeiska unionen* – Eng., Sweden’s membership of the European Union) Part 1, pp. 142 and 143 (prop., abbreviation of *regeringens proposition* – Eng., government bill). See also article 380 and items 1, 2, 9 and 10 of Part B of Annex X of the VAT Directive. See also 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 (licentiate’s dissertation), p. 53 (Forssén 2011). Forssén 2011 is available in full text in the database DiVA (www.diva-portal.org) and on www.forssen.com.

[6] See Sacha Prechal, Directives in EC Law (Second, Completely Revised Edition), Oxford University Press, Oxford 2005 [a book in the series Oxford EC Law Library], p. 73 (Prechal 2005). See also Forssén 2011, p. 63 and Björn Forssén, *Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier* [Eng., Tax and payment liability to VAT in (approximately) joint ventures and shipping partnerships], Örebro Studies in Law 4/2013 (doktor’s thesis), p. 43 (Forssén 2013). Forssén 2013 is available in full text in the database DiVA (www.diva-portal.org) and on www.forssen.com. The fifth edition of my doctor’s thesis (self-published 2019) and my translation of it into English (2019), Tax and payment liability to VAT in joint ventures and shipping partnerships, Fifth edition, are available in full text on www.forssen.com and in printed versions at Kungliga biblioteket i Stockholm (the National Library of Sweden) and at the Lund University Library.

choice within the frames of the national law and law of procedure to take measures in that respect.[7]

Thus, in this article I mention in the first place the principal clause of article 288 third paragraph of the Functional Treaty, that is that it is in principle binding for Sweden to implement the rules of the VAT Directive into the ML, together with the harmonisation demand on the ML and the principle of a neutral VAT according to article 113 of the Functional Treaty, when I reason about the research in VAT in Sweden and pros and cons with using the law dogatic method and the comparative method as approach for problemizing the implementation of the rules of the VAT Directive into the ML. By that review I am aiming to illuminate the importance of the choice of method, so that the research result can be expected to be useful for the legislators in the various EU Member States, for the courts and tax authorities within the EU and for other appliers of law concerning the implementation question.

2 The importance of the principles of a general right of deduction and of free movement and establishment for the method question

2.1 A generak right of deduction is decisive for what is meant by VAT according to the EU law

The VAT is a tax on consumption. The fundamental purpose with the tax is to separate the entrepreneurs, the taxable person, from the consumers, who often are ordinary private persons or employees by an enterprise. By item 2 of the portal article, article 1, of the VAT Directive follows that the VAT according to the EU law comprises production and distribution of goods and services, whereby the tax on the general consumption of such achievements shall be exactly proportional to the price of them. The primary law demand of harmonisation regarding the Member States' national legislations about indirect taxes according to article 113 of the Functional Treaty shall regarding the VAT be carried out by implementation of the secondary law VAT Directive according to article 288 third paragraph of the Functional Treaty. It follows by the directive's complete title that a common VAT system shall exist within the EU.[8] Concerning the relationship between primary and second law may for the further presentation be mentioned, that the secondary law within the EU is created by the EU's institutions and that the secondary law is therefore sometimes called derived law, which means that the primary law has primacy before the secondary law.[9]

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[7] See Prechal 2005, p. 74 and also p. 68. See also Forssén 2011, p. 63 and Forssén 2013, p. 43 in Björn Forssén.

[8] 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.

[9] See Kristina Ståhl, *Aktiebeskattning och fria kapitalrörelser En studie av beskattningen av den löpande avkastningen av aktieinvesteringar på bolags- och ägarnivå mot bakgrund av EG:s fria kapitalmarknad* (Eng., Taxation of stock and free capital movements A Study of the taxation of the current proceeds on investments in stock on the company and owner level with respect of the EC's free capital market), Iustus förlag 1996, p. 60 (Ståhl 1996); Ulf Bernitz, *Kapitlet EUROPARÄTTEN*, Eng., the Chapter European Law, (pp. 59–89), p. 65 in *Finna rätt Juristens källmaterial och arbetsmetoder* (*elfte upplagan*), Eng., Finding law The lawyer's source material and work methods (eleventh edition), by Ulf Bernitz – Lars Heuman – Madeleine Leijonhufvud – Peter Seipel – Wiweka Warnling-Nerep – Hans-Heinrich Vogel, Norstedts Juridik 2010 (Bernitz 2010); and Mikaela Sonnerby, *Neutral uttagsbeskattning på mervärdesskatteområdet* (Eng., Neutral withdrawal taxation in the field of VAT), Norstedts Juridik 2010, p. 38 (Sonnerby 2010). See also Forssén 2011, p. 43 and Forssén 2013, p. 42.

The enterprises have obligations and rights according to the VAT system and by the mentioned article 1(2) of the VAT Directive also follows that enterprises liable to pay VAT to the State on the production and distribution of goods or services have a right of deduction for its expenditure regarding VAT that has been charged in previous links of the ennobling chain regarding present goods or services, and that this applies up to the the retail trade. The consumer finally purchasing the goods or services in question does not have any obligations or rights concerning the VAT system, but is affected as the so-called tax carrier by the VAT on the total value-added on the production and distribution of the goods or services, by him or her paying the price including VAT on the goods or services.

According to recital 5 of the preamble to the VAT Directive a VAT system becomes the most simple and neutral when the VAT is taken out as generally as possible and comprising all links of production and distribution and supply of services. The ideal with the VAT principle according to the EU law is that the consumer, who in the end shall carry the VAT on the goods produced or service rendered by the enterprises involved in such an ennobling chain, will not pay tax on the tax, that is so-called cumulative effects should be avoided for the VAT being neutral with respect of competition as well as consumption.[10]

Value-added is a concept not defined in the EU's legislation in the field of VAT. Therefore it is, regardless of the method applied for analyses of questions on the subject VAT, necessary to do the surveys with respect of the VAT principle according to article 1(2) of the VAT Directive. That is what decides what is meant with VAT according to the EU law. By the second paragraph of article 1(2) follows that the VAT principle consists of the following principles:

- the principle of a general right of deduction,
- the reciprocity principle, and
- the principle of passing on the tax burden.

These principles shall, as parts of the VAT principle, jointly entail that the tax is passed on through the whole production and distribution chain up to the consumer, so that he or she as tax carrier will be burdened by the VAT on the total value-added of the goods or services in the ennobling chain.

By recital 8 of the preamble to the First VAT Directive (67/227/EEC), which has been replaced by the VAT Directive, it follows that the idea with all EC Member States having a common VAT system was to replace the gross taxes that lead to so-called cumulative effects, that is tax-on-tax, since they are lacking the general right of deduction that rules in principle for the VAT.[11] Although a Member State can have certain so-called deduction prohibitions in their VAT legislations by virtue of article 176 second paragraph of the VAT Directive, it is the general right of deduction that gives the VAT according to the EU law its character of a a multiple-stage tax. If the principle of a general right of deduction of input tax on acquisitions made by en enterprise, a taxable person, is not upheld, undesired cumulative effects emerge

[10] See Forssén 2011, sections 2.2.1, 2.2.2 and 2.2.3 and Forssén 2013, sections 2.4.1.2, 2.4.1.3 and 2.4.1.4.

[11] See Kristina Ståhl – Roger Persson Österman – Maria Hilling – Jesper Öberg, *EU-skatterätt*, *Tredje upplagan* (Eng., EU tax law, Third edition), Iustus förlag 2011, pp. 200 and 201 (Ståhl et al. 2011), and Henrik Stensgaard, *Fradragsret for merværdiafgift* (Eng., Right of deduction of VAT), Jurist- og Økonomforfundets Forlag 2004, p. 46 (Stensgaard 2004). See also Forssén 2011, p. 273.

due to the output tax on its sale of goods or services being calculated on a taxation amount that contains a latent VAT cost. If the consumer can choose between a deliverer that takes part in such an ennobling chain and one who takes part in a chain where the ideal meaning that such effects will not emerge is upheld, the consumer will, everything else equal, choose the later deliverer. Then the principle in article 113 of the Functional Treaty meaning that competition distortion shall be avoided will be set aside. That principle follows by recital 4 of the preamble to the VAT Directive. Thus, it is with respect of primary law an dsecondary law established that the principle of a neutral VAT is necesary to realize the aim to create a functioning internal market within the EU.

I descibe the VAT principle according to the EU law by the following example, where I assume that it is a question of sales within Sweden of goods, and that the ennobling chain up to the consumer, the buyer B, consists of the following taxable persons, entreprises, namely: the producer, P; the wholesaler, W; and the retailer, D.

The tax rate for the goods is the general of 25 per cent according to Ch. 7 sec. 1 first paragraph of the ML. All enterprises in the ennobling chain up to K. are tax liable for the of the goods.

Assume that P is selling the goods for SEK 100 excluding VAT to W., who sells the goods for SEK 140 to R. Since all the enterprises involved have a full right of deduction of input tax in their activities, B is, as tax carrier, burdened by VAT in the price – consideration – that R finally charges for the goods to consumers, in this case to B for the goods to consumer. If R's price for the goods is SEK 200 excluding VAT, the price including VAT is SEK 250 (200 x 25 % = 50; 200 + 50 = 250). Thus, B is as tax carrier burdened by a VAT expenditure of SEK 50, i.e. of the VAT included in the price SEK 250. I describe this link by link as follows:

Link 1 (P – W)
P invoices W:
100 + output tax 20 = 125 (100 x 25 % = 25; 100 + 25 = 25).
W deducts charged VAT, SEK 25.

Link 2 (W – R)
W invoices R:
140 + output tax 35 = 175 (140 x 25 % = 35; 140 + 35 = 175).
R deducts charged VAT, 35.

Link 3 (R – B)
R invoices (or gives receipt to) B:
200 + output tax 50 = 250 (200 x 25% = 50; 200 + 50 = 250).

This means that P, W and R account VAT to the State as follows:

P,
Output tax: SEK 20
[I disregard deduction by P, and illustrate only the passing on of the VAT link by link in the ennobling chain regarding the goods in question.]
P pays to the State, SEK 20.

W,
Output tax, SEK 35
Input tax, SEK 20
W pays to the State, SEK 15 (35 – 20).

R,
Output tax, SEK 50
Input tax, SEK 35
R pays to the State, SEK 15 (50 – 35).

Totally, P, W and R are paying SEK 50 in VAT to the State (20 + 15 + 15 = 50).

The example illustrates that P, W and R together are paying net to the State the same VAT amount, SEK 50, that B is paying in the price for the goods to D.

By all involved enterprises in the ennobling chain of the goods, which the consumer B purchases from D, are tax liable, and fully entitled to deduct input tax on acquisitions and imports in their activities, the consumer is in the end not burdened by a tax on the tax, i.e. a cumulative effect. Thereby, the ideal idea is upheld with the VAT according to the EU law, which is expressed by the VAT principle in article 1(2) of the VAT Directive.

Assume that W for some reason would not have a right of deduction of input tax on its acquisition of the goods from P. Then emerges a latent VAT cost of SEK 20 in the ennobling chain, and the following effect arises:

- For W not burdening its result W. increases the taxation amount when selling the goods to R. Thereby W charges an output tax of SEK 40 instead of SEK 35 in its invoice to R.

- R deducts an input tax of SEK 40, but the cost has increased by SEK 20 also for R compared to when W had a right of deduction for its purchase from P. Thus, R charges an output tax of SEK 55 in its invoice to the consumer, B.

- Thus, a cumulative effect emerges for B who pays a tax on the tax of Sek 5, because W in the link before R in the ennobling chain was burdened with a VAT cost of SEK 20 due to W not having a right of deduction of SEK 20 in the invoice from P. The consumer, B, thereby pays a SEK 5 higher price for the goods compared to if the principle of a general right of deduction is upheld in the ennobling chain regarding the goods.

2.2 The principles of free movement and establishment are decisive for the EU's internal market

A neutral VAT is necessary to realize the aim to create a functioning internal market within the EU. On the internal market shall goods and services produced in one EU country or goods imported thereto from a third country, that is from a country outside the EU, move freely between the Member States. According to article 28(1) of the Functional Treaty the EU is in that way a customs union, and also goods brought into an EU Member State and reported to the Customs are gone into transition of free supply and can be delivered to other Member States without being subject to customs again, why neither Customs VAT is taken out thereby. The EU's internal market is based on the so-called four freedoms for movement between EU Member States of goods, services, persons and capital and on the principle of freedom of establishment for EU citizens within the Member States.[12]

[12] The four freedoms are to be found in the following articles of the Functional Treaty: article 28, regarding goods; article 56, regarding services; article 45, regarding persons; and article 63, regarding capital. The principle on the EU citizens' right of free establishment in the Union is to be found in article 49 of the Functional

If a person makes a taxable transaction of a product or a service within for example the EU country Sweden, the question arises whether he or she is a taxable person according to article 9(1) first paragraph of the VAT Directive. The directive rule is the main rule for who is deemed to have the character of taxable person, and means that that is the case regarding ”any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity”. This means in practice that a person who is an entrepreneur is tax liable for the supply in Sweden, and thus liable to account for and pay output tax to the Swedish state on the transaction (if not rules on reverse charge of the customer arise).[13] This applies regardless of where in the world the person has established the activity giving him the character of taxable person.[14] Value-added taxation can comprise all taxable transactions of goods or services made within the geographical area belonging to the EU according to article 52 of the TEU and article 355 of the Functional Treaty.[15] EU-ländernas territorier utgör i princip EU:s skatteområde beträffande moms (mervärdesskatteområde), genom hänvisning i artiklarna 5.1 och 5.2 i mervärdesskattedirektivet till de båda nyss nämnda artiklarna i Fördraget om EU och funktionsfördraget.[16]

Although the supply within for instance the EU country Sweden is only temporary, solitary becomes thus also a foreign entrepreneur (taxable person) tax liable and shall account for and pay output tax to the Swedish state.[17] The EU’s VAT system can in that way be considered imperialistic in relation to the third countries, but on the other hand shall, in pursuance of the main rule on the scope of the right of deduction in article 168 a) of the VAT Directive, also an entrepreneur from a third country be entitled to deduct input tax on the goods and services that he in that case acquires in Sweden to make his transactions of taxable goods or services there or to make his deliveries or supplies from Sweden to another EU country or to a third country. Besides, an entrepreneur from a third country gets a refund of the input tax he is paying when visiting an EU country without he himself making transactions of goods or

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Treaty. What is meant by company according to the civil or trade legislation shall be equalized with natural persons who are citizens in the Member States, which follows by article 54 of the Functional Treaty. See also Forssén 2011, p. 45.

[13] See ch. 1 sec. 2 first paragraph no. 1 of the ML with reference to sec. 1 first paragraph no. 1 and Ch. 1 sec. 8 with reference to sec. 1. See also Forssén 2011, p. 96.

[14] See Ben J.M. Terra and Julie Kajus, A Guide to the European VAT Directive, Volume 1, Introduction to the European VAT 2010, IBFD 2010, p. 331 (Terra and Kajus 2010). There it is stated that a silk dealer in Djakarta (Indonesia) is a taxable person as well as a store in Amsterdam. However, they note that the silk dealer must supply his goods within the territory of Netherlands, to act so that he ”acts within the Dutch VAT”. See also Forssén 2011, p. 96.

[15] See articles 2(1) a and c and articles 5(1) and 5(2) of the VAT Directive. See also Ståhl et al. 2011, p. 207 and Forssén 2011, p. 96.

[16] However, note that the articles 6 and 7 of the VAT Directive mean that certain deviations frommthe principle that the EU Member States territories also forms part of the EU’s VAT area. Therein it is stated that for example Åland does not belong to the EU VAT area, despite that Åland – like the rest of Finland – forms part of the EU’s customs area, and that for instance Monaco shall not be treated with respect of the VAT Directive as a third country by the Member States regarding transactions to and from that area, but as if the transactions originated from or were meant for France. See also Forssén 2011, p. 96.

[17] See also Forssén 2011, p. 97.

services there, according to the Thirteenth Directive on repayment of VAT to entrepreneurs established outside the EU.[18] An entrepreneur from for example Japan or the USA visits perhaps an industry fair in Sweden and stays at a hotel, entertains at restaurants and goes by taxi during the visit, but does not make any transactions within Sweden. The foreign entrepreneur is not liable to register for VAT in Sweden under these premises and cannot deduct the VAT expenditures in a VAT rerurn in Sweden, but shall by application to the Swedish tax authority (*Skatteverket*) be restituted these expenditures, so that the loss side of his profit and loss statement will not be burdened with Swedish VAT as a cost.

2.3 The meaning of a general right of deduction and of the freedoms on the EU's internal market for the method question

The principle of a general right of deduction of input tax comprise all entrepreneurs carrying out trade in the EU's internal market or that come visiting from third countries and having VAT expenditures there. By the competition neutrality thus being upheld on the internal market for the transaction of goods and services should the principle of a general deduction together with above all the principles on free movement for goods and services be decisive for the choice of method at studies of VAT according to the EU law. Thereby can the research result of jurisprudential studies of questions on the subject of VAT be expected to be useful for the legislators within the various EU Member States, for courts and tax authorities within the EU and for other appliers of law.

Thus, I am reviewing the questions on the choice of a law dogmatic method, of a law dogmatic method completed with a comparative method or of a solely comparative method for jurisprudential studies in the subejct VAT from the following two viewpoints:

- the importance of a general right of deduction for what is meant by VAT according to the EU law, and
- the importance of the principles of free movement for goods and services on the EU's internal market.

Before that, I go through some law political aims for the EU's common VAT system, which should be considered at the choice of method for the analysis of the questions that the study is supposed to illuminate.

3 The importance of law political aims with the common VAT system for the methods

3.1 Examples of law political aims

In Forssén 2013 I identified and put forward, for the analysis of the question on the enterprise form *enkelt bolag (och partrederi)* – Eng., joint venture (and shipping partnership) – in Ch. 6 sec. 2 of the ML (and Ch. 5 sec. 2 of *skatteförfarandelagen (2011:1244*, here abbreviated SFL) – Eng., the Swedish Taxation Procedure Act – in relation to the VAT Directive and above all the main rule therein on who is a taxable person, article 9(1) first paragraph, the following law political aims for the VAT system based on the EU's legislation in the field: a

[18] Complete title of the Thirteenth Directive: Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonization of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in Community territory.

cohesive VAT system, neutrality, EU conformity, legal certainty including legality and efficiency of collection.[19]

3.2 A cohesive VAT system

That a cohesive VAT system, a uniform VAT is a law political aim with the VAT according to the EU law follows already by the VAT Directive's complete title, that is that it is a directive *on a common system of value added tax*.

3.3 Neutrality

That neutrality is a law political aim with the VAT according to the EU law follows by the principle of a neutral VAT following of primary law according to article 113 of the Functional Treaty and of secondary law according to the recitals 4, 5 and 7 of the preamble to the VAT Directive and article 1(2) of the VAT Directive.[20]

3.4 EU conformity and legal certainty including legality

That EU conformity is a law political aim follows already by that it is binding by primary law according to article 288 third paragraph of the Functional Treaty for the Member States to implement the VAT Directive into their national VAT legislations.

Moreover, it follows by the grounds for the judgment in the EU-case 6-64 (Costa)[21] that "the precedence of Community law" before national law is confirmed by article 189 of the Rome Treaty – nowadays article 288 of the Functional Treaty. The principle of the EU laws precedence before national law has been constantly established after the "Costa"-case, and applies by both primary and secondary law,[22] why it is considered fundamental for the EU law's impact in the Member States.[23] Based on this principle the Court of Justice of the EU has developed the principles on direct effect of the directive rules and that the national authorities and courts shall give those an EU conform (directive conform) interpretation.[24] Based on the EU-case 26/62 (van Gend en Loos)[25] and the "Costa"-case from 1963 and 1964 the Court of Justice of the EU has developed that concept that the directives can have a so-

[19] See Forssén 2013, Chapter 2.

[20] See above regarding recitals 4 and 5 of the preamble to the VAT Directive and article 1(2) of the VAT Directive. In recital 7 of the preamble to the VAT Directive it is stated that the tax rates and exemptions from taxation are not fully harmonised, but that the principle of a neutral VAT still applies so that similar goods and services bear the same tax burden within the territory of each Member State.

[21] See the EU-case 6-64 (Costa), ECLI:EU:C:1964:66.

[22] See Prechal 2005, p. 94, where she notes this concerning "the supremacy of Community law over national law". See also Forssén 2011, p. 55.

[23] See Prechal 2005, p. 94; Ståhl 1996, p. 66; Joakim Nergelius, The Constitutional Dilemma of the European Union, Europa Law Publishing, Groningen 2009, p. 58 (Nergelius 2009); and Sonnerby 2010, p. 60. See also Forssén 2013, p. 41.

[24] See Sonnerby 2010, p. 61. See also Forssén 2011, p. 55.

[25] The EU-case 26/62 (van Gend en Loos), ECLI:EU:C:1963:1.

called direct effect.[26] If a directive rule has direct effect, the individual can invoke it in pursuance of the EU law's primacy before national law. The terms for a directive rule having direct effect is that it is clear, precise and unconditional and that the time for implementation has run out.[27]

Thus, the rules in for example the ML and the FML shall be compatible (conform) with the directive rules. Thus, in Forssén 2013 I identify from article 288 third paragraph of the Functional Treaty and the case law of the Court of Justice of the EU also *EU conformity* as a law political aim with the common VAT system.[28] However, an EU conform (directive conform) interpretation of for example the ML or the FML can be limited insofar that if a literal interpretation of the rule in the national legislation means that it according to its wording does not support a measure of taxation against the individual an EU conform interpretation cannot be driven through against him or her.

Thus, an EU conform interpretation cannot constitute an obligation for the Member States to interpret the national law contrary to its wording (*contra legem*).[29] That is also the conception of the Court of Justice of the EU, which follows by item 110 of the EU-verdict C-212/04 (Adeneler et al.).[30] Thus, I identify also as a law political aim *legal certainty including legality*, whereby I furthermore refer in Forssén 2013 to the principal of legality according to articles 4(1) and 5(2) of the TEU and to the principle of legality for taxation meaures according to Ch. 8 sec. 2 first paragraph no. 2 of the RF.[31] Thus, the national law of procedure and the constitutional law with all the above-mentioned principle of legality for taxation measures can the EU conform interpretation of a rule in the VAT Directive.[32]

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[26] See Prechal 2005, pp. 92, 93 and 218 and also p. 16, where ske concludes this from the EU-cases 26/62 (van Gend en Loos) and 6-64 (Costa). See also Terra and Kajus 2010, p. 129. See also Forssén 2011, p. 56.

[27] See Ståhl 1996, p. 68; Terra and Kajus 2010, p. 129; Ben J.M. Terra and Julie Kajus, A Guide to the European VAT Directive, Volume 1, Introduction to the European VAT 2012, IBFD 2012, p. 151 (Terra and Kajus 2012); Bernitz 2010, p. 74; and Sonnerby 2010, p. 63. See also prop. 1994/95:19 Part 1, p. 486, where it is (in translation) stated with reference to van Gend en Loos (26/62) that it is required for direct effect that the rule is *unconditional, precise and complete*; Christina Moëll, *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), Juristförlaget in Lund 1996, p. 197 (Moëll 1996), where it is (in translation) with reference to the case "van Gend an Loos" stated that the Court of Justice of the EU has concluded that *a legal rule must be clear, precise and unconditional and intended to be directed to individuals to be able to have direct effect so that individuals can rely upon it and derive rights thereof*; and Nergelius 2009, p. 11; Jürgen Habermas, *Om Europas författning – en essä* (Eng., On the constitution of Europe – an essay), Translation (from German into Swedish) Jim Jakobsson, Ersatz 2011, p. 58 (Habermas 2011); and Eleonor Alhager (nowadays Kristoffersson), *Mervärdesskatt vid omstruktureringar* (Eng., Value-added tax at reconstructions), Iustus förlag 2001, p. 94 (Alhager 2001). See also Forssén 2011, p. 55 and Forssén 2013, pp. 43 and 44.

[28] See Forssén 2013, sections 2.1, 2.2 and 2.5.

[29] See pp. 71 and 75 in Kristina Ståhl, *Fusionsdirektivet Svensk beskattning i EG-rättslig belysning* (Eng., the Merger Directive Swedish taxation in the light of EC law), Iustus Förlag AB, Uppsala 2005 (Ståhl 2005) and Sonnerby 2010, p. 66. See also Forssén 2013, p. 38.

[30] The EU-case C-212/04 (Adeneler et al.), ECLI:EU:C:2006:443. See also Sonnerby 2010, p. 66. See also Forssén 2013, p. 38.

[31] See Forssén 2013, sections 2.1, 2.2 and 2.7.

[32] See Forssén 2013, p. 38.

3.5 Efficiency of collection

Another law political aim with the VAT system according to the EU law is the aim of an effifiency of collection of the tax in the common VAT system. In Forssén 2013, I state that the fiscal purpose, that is that taxes shall finance public activities, is sometimes mentioned as a so-called ultimate purpose for both the VAT and the income tax.[33] I mention in this respect also inter alia that the State's interest of an effective VAT collection means that the tax liable functions in principle as tax collector for the State.[34]

I furthermore mentioned in Forssén 2013 that the EU's attitude law politically in collection respect has gone from as many as possible making taxable transactions ought to be comprised by the VAT system to the EU Commission sending out a message of exercising restraint in that respect and of prioritizing registration control and otherwise questions on collection of VAT.[35] I mentioned also that *Skatteverket* already in connection with the introduction of the SFL on 1 January, 2012 noted that the VAT system is exposed to such grave fraud that it has been pointed out from EU level the importance of the Member States exercising effective control of those *given entrance into* the system.[36] That efficiency of collection is central for the VAT in the EU law's meaning follows also by recital 45 of the preamble to the VAT Directive stating that taxable persons' liabilities as far as possible should be harmonised, to ensure that tax collection is made in a uniform way in all Member States.[37] That the VAT shall be harmonised within the EU has by the way not only importance for the state finances in the Member States, but also for the EU as legal person. The taxation base for VAT forms also base for the Member States' financing of the EU's institutions.[38]

The Court of Justice of the EU also mention the State's interest of collection in connection with the principle on neutrality. That follows of the EU-case C-216/97 (Gregg), which I comment in Forssén 2011 and Forssén 2013. I conclude that this is the case, by comparing item 20 in the verdict of the case in Swedish, in the language of the case, which is English,

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[33] See Peter Melz, *Mervärdeskatten Rättsliga grunder och problem* (Eng., The VAT Legal foundations and problems), Juristförlaget 1990, p. 64 (Melz 1990) and also e.g. SOU 1989:35, *Reformerad mervärdeskatt m.m.* (Eng., Reformed VAT etc.), Part 1, pp. 140 and 142 (SOU, *statens offentliga utredningar* – Eng., the Government's official reports). See also Forssén 2013, p. 76.

[34] See prop. 1989/90:111 (*Reformerad mervärdeskatt m.m.* – Eng., Reformed VAT etc.), p. 294 and also Graham Virgo, Restitution of Overpaid VAT, British Tax Review 1998 pp. 582–591, where it on p. 591 is stated that "*the taxpayer*" can be seen as an "*agent for the Commissioners*" (*Inland Revenue Commissioners*). See also Forssén 2013, pp. 59 and 76.

[35] See section 5.4.1, *Översyn av uppbörden av mervärdesskatt* (Eng. Overview of the collection of VAT), in the EU Commission's green paper *KOM(2010) 695 slutlig* (Eng., COM(2010) 695 final) and the EU Commission's follow-up to the green paper, COM(2011) 851 final p. 6. See also Forssén 2013, p. 76.

[36] See prop. 2010/11:165 (*Skatteförfarandet* – Eng., the Taxation Procedure) Part 1, p. 320. See Forssén 2013, p. 76.

[37] See also Forssén 2013, p. 76.

[38] See the Council's decision 2000/597/EG, which is mentioned in recital 8 of the preamble to the VAT Directive [previously recital 2 of the preamble to the EC's Sixth VAT Directive (77/388/EEC)] and prop. 1994/95:19 Part 1, p. 139 and prop. 1994/95:57 (*Mervärdesskatten och EG* – Eng., The VAT and the EC) p. 93. See also Alhager 2001, p. 42 and Sonnerby 2010, p. 56 and Forssén 2013, pp. 14 and 76.

and in French, which traditionally is the Court of Justice of the EU's common language for its deliberations. In Swedish it is stated in the first sentence of the item that the principle on neutrality presents inter alia an obstacle for various players providing goods and services being treated differently "i mervärdesskattehänseende" (Eng., for VAT purposes). In English "as far as the levying of VAT is concerned" is used,[39] which is more specific than the quotation in Swedish, that is in the language version in English of the verdict the charge of the VAT is alluded to, whereas the Swedish translation states generally *for VAT purposes*. Clearness of what the Court of Justice of the EU is aiming at can be obtained first when reading item 20 of the verdict in French, where the quotation reads "perception de la TVA" (Eng., collection of the VAT). That is closer to the language version in Swedish than to the one in English, since the specific question on levying of VAT is not brought up in French, but the more general on "perception de la TVA", which in English would read *collection of the VAT*. Thus, I consider that item 20 of the EU-verdict C-216/97 (Gregg) shows that efficiency of collection as a law political aim with the common VAT system also can be identified from the case law of the Court of Justice of the EU.[40]

At the treatment in this article of the method question in the Swedish theses in the field of VAT the above-mentioned examples of law political aims are taken into consideration concerning my viewpoints on what is a suitable method. Finally, I bring up the importance of the law political aim of an effective collection especially regarding the formal rules in the field.

4 Review of the question on suitable choices of method for the VAT research in Sweden

4.1 Circumstances to which the question choice of method should be related

In sections 2 and 3 I have for the review of whether the theses show pros or cons with the choice of method for the research result being expected to become useful for the legislators within the various EU Member States, for courts and tax authorities and for other appliers of law, which I stipulate in section 1 as the purpose with this article, put forward certain circumstances for the trial of whether the method chosen works in the respect mentioned to analyse the implementation of the rules in the VAT Directive into the ML. I am going through the theses regarding whether the approach in them for the study in the field of VAT has been carried out only with a law dogmatic method, with such a method completed with a comparative method or with only a comparative method. The question is, with respect of what I state in sections 2 and 3, how the method chosen function in relation to

- the importance of a general right of deduction for what is meant by VAT according to the EU law, and
- the importance of the principles of free movement for goods and services on the EU's internal market.

I make the review in two main tracks, where one track consists of the application of only a comparative method or of a law dogmatic method completed with a comparative method as support, whereas the other track consists of only a law dogmatic method being applied for the

[39] VAT, value-added tax, abbreviation in English corresponding to *moms*, the abbreviation of *mervärdesskatt*.

[40] See Forssén 2011, pp. 92 and 93 and Forssén 2013, p. 72.

jurisprudential study in the subject VAT law. Before I make the review, I describe partly in the next section what the implementation of EU's legislation in the field of VAT into the ML concerns, that is the tax subject and the tax object, partly in the section following thereafter that I at the work with Forssén 2011 and Forssén 2013 used a law dogmatic method, and completed in Forssén 2013 with a comparative method.

4.2 The implementation question concerns the tax subject and the tax object

The material rules on obligations and rights for VAT purposes correspond structurally when comparing the ML with the VAT Directive. I use to illustrate the relationship between the obligations and the rights with the following figure.[41]

<table>
<tr><td colspan="4">Ia Persons</td></tr>
<tr><td colspan="3">Taxable persons [the ML and the VAT Directive]</td><td>Others are: consumers/tax carriers</td></tr>
<tr><td colspan="3">Ib Supply of goods or services (the ML)/
Deliveries of goods or supplies of services
(the VAT Directive)</td><td rowspan="4"></td></tr>
<tr><td>Taxable</td><td>From taxation
qualified exempted</td><td>From taxation
unqualified exempted</td></tr>
<tr><td>II Deduction right
for input tax</td><td>II Reimbursement right
for input tax</td><td rowspan="2">No deduction or reimbursement right for input tax
(on acquisitions made by non-taxable persons
or by a taxable person that supplies from
taxation unqualified exempted goods or services).</td></tr>
<tr><td colspan="2">Certain acquisitions comprised by prohibition of deduction: no deduction or reimbursement right for input tax</td></tr>
</table>

The main rule in the ML for who is liable to pay VAT (tax liable) is to be found, as mentioned, in Ch. 1 sec. 2 first paragraph no. 1, with reference to sec. 1 first paragraph no. 1, whereof follows that "den som" (Eng., any person) who is taxable person and in that capacity makes a taxable transaction of goods or services within the country (i.e. Sweden) is tax liable. Thus, the prerequisites for who is liable to pay VAT according to the main rule in Ch. 1 sec. 2 first paragraph no. 1 of the ML and according to the main rules in the articles 2(1) a and c of the VAT Directive correspond with each other. The only difference is that the ML for that liability is using the concept *skattskyldig* (Eng., tax liable), whereas the VAT Directive is using the concept *betalningsskyldig* (Eng., liability for payment) for a person liable to pay VAT to the State.[42]

Thus, the figure above reflects that *any person* who is a taxable person is tax liable or liable for payment according to the ML and the VAT Directive respectively

[41] See 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 11 100 000 (Forssén 2019a). Forssén 2019 a 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. See also Forssén 2011, section 1.1.1 and Forssén 2013, section 3.2.

[42] See articles 194, 197.2, 199, 199a, 199b.1, 201, 204.1 and 205 of the VAT Directive.

– if the person in the capacity of taxable person,[43]
– within the country, for consideration makes a taxable transaction of goods or services and delivers goods or supply services respectively.[44]

What the legislator in Sweden, *Skatteverket*, the courts and other appliers of law need as support from the researchers is to deal with situations where a rule competition exists between a rule in the VAT Directive and a rule in the ML. According to the figure of above such situations concern the determination of the tax subject (taxable person) and of the tax object, that is delivery of goods or services in relation to taxable transaction of goods or services.

The Swedish doctor's theses and one licentiate's dissertation on the subject VAT law is so far the following:

- Björn Westberg, *Nordisk mervärdesskatterätt – behandlingen av utländska företag, varor eller tjänster inom ramen för nationella lagar* (Eng., Nordic VAT law – the treatment of foreign entrepreneurs, goods or services within the frame of national laws), Juristförlaget JF AB 1994. (Westberg 1994).

- Jesper Öberg, *Mervärdesbeskattning vid obestånd Andra upplagan* (Eng., Value-added taxation at insolvency Second edition), Norstedts Juridik AB 2001. (Öberg 2001).[45]

- Eleonor Alhager (nowadays Kristoffersson), *Mervärdesskatt vid omstruktureringar* (Eng., Value-added tax at reconstructions), Iustus förlag 2001. (Alhager 2001).

- Oskar Henkow, 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).[46]

- Pernilla Rendahl, Cross-Border Consumption Taxation of Digital Supplies, IBFD 2009. (Rendahl 2009).[47]

- Mikaela Sonnerby, *Neutral uttagsbeskattning på mervärdesskatteområdet* (Eng., Neutral withdrawal taxation in the field of VAT), Norstedts Juridik AB 2010. (Sonnerby 2010).

- 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 (licentiate's dissertation). (Forssén 2011).

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

[44] See Ch. 2 sec. 1 first paragraph no. 1 and third paragraph no. 1 and the articles 2(1) a and c of the VAT Directive respectively.

[45] The thesis is from 2000. In this article I refer to the published book: Öberg 2001.

[46] The thesis s from 2007. In this article I refer to the published book: Henkow 2008.

[47] The thesis is from 2008. In this article I refer to the published book: Rendahl 2009.

- Björn Forssén, *Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier* [Eng., Tax and payment liability to VAT in (approximately) joint ventures and shipping partnerships], Örebro Studies in Law 4/2013. (Forssén 2013).

- Marta Papis-Almansa, Insurance in European VAT On the Current and Preferred Treatment in the Light of the New Zealand and Australian GST Systems, Lund University 2016. (Papis-Almansa 2016).

- Mikael Ek, *Leveranser och unionsinterna förvärv i mervärdesskatterätten* (Eng., Deliveries and intra-Union acquisitions in the VAT law), Iustus Förlag AB 2019. (Ek 2019).

- Giacomo Lindgren Zucchini, Composite Supplies in the Common System of VAT, Örebro Studies in Law 14/2020. (Lindgren Zucchini 2020).[48]

In this article I treat, as mentioned, based on the two main tracks regarding the method chosen in each thesis, how the research result with respect of the implementation question an be expected to be useful for the legislators in the various EU Member States, for courts and tax authorities within the EU and for other appliers of law. I begin, as mentioned, the further review by commenting my own theses, which concern in the first hand the tax subject. At the review I mark in notes in each section if something that I write refers to the tax subject (Ia) or the tax object (Ib). In actual cases I mark in the same way also if the right of deduction is not treated in a thesis (II), which in itself leads to a decreasing probability of a research result becoming expected to be useful regarding the question of an EU conform implementation of the rules in the VAT Directive into the ML.

In the latter respect, I remind, in pursuance of what is stated above in that respect, of the principle of a general right of deduction being a decisive circumstance to determine what is VAT according to the EU law, and that the right of deduction thereby has a decisive importance for whether a VAT system in a third country is appropriate as material for comparison when applying a comparative method for the analysis of questions on the VAT law in the theses that I bring up at the review of whether the choice of method can be expected to give a useful research result for the implementation question. By the figure above, I illustrate that an economic activity wherein a taxable person produces taxable transactions of goods and services cause a right of deduction for input tax on acquisitions or imports in the activity, whereas a right of reimbursement of input tax exists if from taxation qualified exempted goods or services are produced in the activity. In the further presentation I mean by right of deduction both situations (II). It is only when the taxable person produces from taxation unqualified exempted goods or services that he or she is lacking right of deduction or reimbursement for input tax or imports in the activity or if a certain acquisition of goods or services is comprised by prohibition of deduction for input tax.

I continue, as mentioned, the review of suitable choice of method for the implementation question with my own theses, before I, as also mentioned, divide the review into two main tracks: application of only a comparative method or of a law dogmatic method completed with a comparative method as support and application of only a law dogmatic method

[48] Lindgren Zucchini 2020 is available in full text in the database DiVA (www.diva-portal.org).

respectively. Before that I treat, after having gone through the method at the work with Forssén 2011 and Forssén 2013, especially the first two theses on the subject VAT law in Sweden: Westberg 1994 and Öberg 2001.

4.3 Forssén 2011 and Forssén 2013 – law dogmatics completed with a comparative method

In Forssén 2011 and Forssén 2013 I treated in the first place the question on the determination of the tax subject in the ML,[49] and whether it was compatible (conform) with the main rule on who is taxable person according to article 9(1) first paragraph of the VAT Directive. In the work with those theses, I applied a law dogmatic method. In Forssén 2013, I completed with a comparative method as a support to the interpretation and systematization of current law that was the law dogmatic method. In an article by associate professor Katia Cejie it is stated that I in Forssén 2013 is using foreign law, but without claiming that I use a comparative method.[50] That is wrong: I express that I complete the law dogmatic method with a certain comparative analysis of the FML and Finnish material.[51] What is not mentioned in Cejie 2020 is that Forssén 2013 was the second and final step in my mentioned previous research work within the VAT law, which began in a first step with Forssén 2011, where I reason about the relevance in that step of completing with a comparartive method. Forssén 2011 is not mentioned in Cejie 2020. There is only Forssén 2013 mentioned. Thus, Forssén 2011 was the first step in the mentioned research project in the field of VAT. There I made an international outlook to judge which third countries that could be of interest to, in addition to comparisons of the ML with VAT legislations in other EU countries, include in a comparative analysis to support the law dogmatic analysis of the ML in relation to the EU's legislation.[52]

In Forssén 2011 the research result meant regarding the main question that I suggested that the concept *yrkesmässig verksamhet* (Eng., professional activity) concerning the determination of the tax subject in the main rule Ch. 4 sec. 1 no. 1 of the ML should be adapted to the concept *beskattningsbar person* (Eng., taxable person) according to the main rule in article 9(1) first paragraph of the VAT Directive. This was also done by SFS 2013:368 on 1 July, 2013 (SFS: abbreviation of svensk författningssamling – Eng., Swedish Code of Statutes), so that the determination of the tax subject according to the ML no longer connects to the non-harmonised income tax law.[53]

In the second step of my research work, thus consisting of my work with Forssén 2013, the main question concerned the enterprise form *enkelt bolag (och partrederi)* – Eng., (approximately) joint venture (and shipping partnership). There I suggest that Sweden should bring up on EU level that the principle of a neutral VAT demands a clarification that also such

[49] See Ia in the figure in section 4.2.

[50] See Katia Cejie, Comparative Method(s) and Tax Law Research, *Svensk Skattetidning* 3/2020, pp. 145–159, 155. (Cejie 2020).

[51] See Forssén 2013, p. 35.

[52] See Forssén 2011, pp. 71, 72, 279–297 (*Bilaga 2 – Internationell utblick* – Eng., Appendix 2 – International outlook) and, re. My foreign country inquiry for the main question, 349.

[53] See article 115 of the Functional Treaty, whereof follows that for instance income tax is not comprised by a harmonisation demand, but the Member States' national legislations in the field shall be approximated to each other by directives from the EU.

legal figures, that is non-legal entities, are comprised by the determination of who is taxable person according to the main rule of article 9(1) first paragraph of the VAT Directive.

In Forssén 2013 I did as support to the law dogmatic method a comparative analysis by a comparison of the ML with the FML, where *sammanslutningar och partrederier* (Eng., joint ventures and shipping partnerships) that neither are legal entities are treated as tax subjects, unlike the ML and the SFL, where *enkla bolag (och partrederier)* – Eng., joint ventures and shipping partnerships – are not treated as tax subjects. According to Ch. 6 sec. 2 second sentence of the ML (and Ch. 5 sec. 2 of the SFL) it is instead voluntary to apply by *Skatteverket* for a partner to be appointed representative to account for and pay the VAT in the activity of *enkla bolaget* (or *partrederiet*). Otherwise the tax liability lies upon each partner of *enkla bolaget* (or *partrederiet*) according to Ch. 6 sec. 2 first sentence of the ML.

Since non-legal entities are treated differently in Sweden and Finland concerning the determination of who is a tax subject for VAT purposes, I suggested in Forssén 2013 that Sweden should bring up the question on EU level in consultation with Finland,[54] and I have iterated the problem and my suggestion in an article in the JFT during 2019 and in a commentary to a proposition of legislation in JFT 2020.[55]

4.4 Westberg 1994 and Öberg 2001 respectively – comparative and law dogmatic method respectively

Westberg 1994 is the first Swedish thesis on VAT law. There was the current law illuminated in the field of VAT in all Nordic countries, whereby also EC law rules were considered. The method applied for the study was the comparative, and it was emphasized that with that method the essential with the study will be the placement of the rules in their legal context.[56] This is meaningful not least for the researcher's suggestions *de lege ferenda*,[57] that is concerning suggestions by the researcher to the legislator about changing a certain rule or rules in the ML,[58] like what I did in Forssén 2011 and Forssén 2013.

However, Westberg 1994 is from April 1994, that is from short before the current ML came into force on 1 July, 1994, which replaced *lagen (1968:430) om mervärdeskatt* (here abbreviated GML), and thus from the time before Sweden's EU-accession on 1 January,

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

[55] 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, 69 and 70, (Forssén 2019b) 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 to a new VAT Act in Sweden – SOU 2020:31), JFT 3/2020, pp. 388–399, 392 and 393 (Forssén 2020a). Both Forssén 2019b and Forssén 2020a are available in full text on www.forssen.com.

[56] See Westberg 1994, pp. 75 and 76.

[57] See Westberg 1994, p. 75.

[58] 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), by Stefan Melin, Iustus förlag 2010, p. 94 (Melin 2010); and Bergström et al. 1997, p. 35. See also Forssén 2013, p. 31.

1995, and thus are in Westberg 1994 not the questions on rule competition in relation to the EU law treated thar I brought up in Forssén 2011 and Forssén 2013 concerning the EU conformity with the determination of the tax subject acording to the ML. The current ML was mentioned in Westberg 1994 regarding that the GML would be replaced by the ML, which also was done on 1 July, 1994. In Westberg 1994 it was also stated that the VAT at the time had been treated exceptionally sparsely in the jurisprudential literature, whereby it was mentioned that Melz 1990 – although it was not thesis – was the first jurisprudential work concerning the Swedish VAT law.[59] That Melz 1990 and Westberg 1994 are jurisprudential works that should be part of the material for a jurisprudential study of the subject VAT, despite they are from the time before Sweden's EU accession in 1995, follows in my opinion of that already the GML, which was the first Swedish VAT legislation (and that came into force on 1 January, 1969), was introduced under influence of the EC law in the field.[60]

Björn Westberg went also on in 1997 with *Mervärdesskatt – en kommentar* (Eng., VAT – a commentary), where an EU law perspective was joined with a Swedish one concerning the VAT law.[61] Another important work for the research in VAT law in Sweden from Björn Westberg is *Mervärdesskattedirektivet – en kommentar* (Eng., the VAT Directive – a commentary) from 2009 with inter alia a comprehensive review of the Court of Justice of the EU's case law on the field of VAT.[62]

I had use of studying Westberg 1994, Westberg 1997 and Westberg 2009, when I worked with the questions on the tax subject in the field of VAT in Forssén 2011 and Forssén 2013. I applied, as mentioned, a law dogmatic method completed with a comparative method in Forssén 2013 and in Forssén 2011, that is in the first step of research projects in the field of VAT, I did, as also is mentioned, an international outlook to judge which third countries that could be of interest to, in addition to comparisons of the ML with VAT legislations in other EU countries, include in a comparative analysis to support the law dogmatic analysis of the ML in relation to the EU's legislation.[63]

There is a Swedish thesis besides my own that concerns the tax subject question,[64] and that is *Mervärdesbeskattning vid obestånd* (Eng., Value-added taxation at insolvency) by Jesper Öberg, where an in principal interesting question was stated regarding how a delimitation shall be made between a bankrupt's and a bankrupt's estate's tax liability for different transactions.[65] The method for the analysis in Öberg 2001 is described as "sedvanligt

[59] See Westberg 1994, p. 27.

[60] See prop. 1968:100 (Kungl. Maj:ts proposition till riksdagen med förslag till förordning om mervärdeskatt, m.m. – Eng., the Government's bill to the Parliament with proposal for a regulation on VAT, etc.) pp. 1, 25, 31 and 51. See also Forssén 2011, p. 274 and Forssén 2013, p. 61.

[61] See Björn Westberg, *Mervärdesskatt – en kommentar* (Eng., VAT – a commentary), Nerenius & Santérus förlag 1997, p. 17 (Westberg 1997)

[62] See Björn Westberg, *Mervärdesskattedirektivet – en kommentar* (Eng., the VAT Directive – a commentary), Thomson Reuters 2009, pp. 841–878 (Westberg 2009).

[63] See Forssén 2011, pp. 279–297, *Bilaga 2 – Internationell utblick* (Eng., Appendix 2 – International outlook).

[64] See Ia in the figure in section 4.2.

[65] See Öberg 2001, p. 15.

rättsdogmatisk" (Eng., customary law dogmatic),[66] and I mention Öberg 2001 in Forssén 2011 and Forssén 2013, but Öberg 2001 has not been of any important influence for my research projects, since the EU law is treated sparsely in Öberg 2001 with the motivation that *the EC's legislation only gives the frames and must be filled out with national rules* (Eng., "EG:s regelverk endast ger ramarna och måste fyllas ut med nationella regler".[67]

Westberg 1994 should be regarded as a basis for other Swedish research efforts in the field of VAT to be expected to give useful research results on the theme EU conformity for the legislator concerning the question on implementation of the rules in the VAT Directive into the ML or regarding the use of expressions in the ML that is not used or defined in the VAT Directive. However is Öberg 2001 of less importance in these respects, since the analysis therein is limited concerning the EU law.

4.5 Main track 1 – application of a comparative method or a law dogmatic method completed with a comparative method

4.5.1 Rendahl 2009 – application of only a comparative method

In Rendahl 2009 are border crossing digital supplies from enterprises to consumers treated by application of a comparative method.[68] The motive is that it shall give an external perspective on the EU law in the field of VAT. The EU's legislation is compared with so-called Goods and Services Tax (GST) in Australia and Canada.[69]

Thus, since Rendahl 2009 is not aiming at what applies internally considering the implementation, it is in my opinion something that decreases the probability that the research result will be possible to use by the legislator to judge the necessity to adapt the rules in the ML in relation to the rules in the VAT Directive. However, in my opinion it is not wrong in itself to compare the EU's legislation with corresponding systems in third countries. However, such comparisons should be made in a way so that they are not the only material for comparison. Instead should the comparison have been made with respect of the national VAT legislation in one or more EU Member States, like Sweden, and with respect of such legislation in one or more third countries respectively. Thus, to apply a comparative method without including any EU Member State in the survey tends to make the research result less useful for the legsilators in the various EU Member States, for courts and tax authorities within the EU and for other appliers of law. Thus, the legislation work and the application of law may show whether my conception is right.

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[66] See Öberg 2001, p. 17.

[67] See Öberg 2001, p. 19. There it is for that standpoint referred to Westberg 1997, p. 26. However should not what is stated in Westberg 1997 (p. 26) have been taken as support for limiting the use of EU law in Öberg 2001. Already Westberg 1994, which also is mentioned in Öberg 2001, should have inspired to more EU law in Öberg 2001 and among the Swedish theses existed already at the time Ståhl 1996 with vast aspects on the EU law. Although the thesis Ståhl 1996 concerns income tax, I had for my research projects great use of inter alia that work for the studies of the VAT questions on the tax subject. However is Ståhl 1996 not mentioned in Öberg 2001.

[68] See Ib in the figure in section 4.2.

[69] See Rendahl 2009, p. 13.

What I in the present context want to emphasize as something very important from Rendahl 2009 is that it is stated therein that risks exist with comparisons with third countries due to fundamentally constitutional differences, whereby it is emphasized that it is only within the EU that freedom of movement exists.[70] However, I stated in Forssén 2011 that if a comparative method is used and includes one or more third countries as material for comparison it should be carefully investigated whether the third country in question has VAT according to what is meant by VAT according to the EU law. I am especially warning for information from the OECD on which countries outside the EU that should be weighted in this respect,[71] so that it will not be taken for granted that information saying that a third country has rules on VAT (value-added tax) or GST means that is a matter of VAT according to what is meant by VAT according to the EU law. In Forssén 2011 I warned of the OECD's information meaning that almost 150 of the world's about 200 countries, that is three quarters of the world's countries, have VAT gave a non-weighted material for comparison concerning what is comparative with what is meant by VAT according to the EU law, where a general right of deduction is one of the principles of the VAT principle according to article 1(2) second paragraph of the VAT Directive that is decisive in that respect.[72] If a third country is lacking a general right of deduction in the system described as a VAT system (II), it is not a question of VAT in the EU law's meaning, but of a gross tax. Thus should such a third country typically not be an appropriate material for comparison in theses on the subject VAT, if they are supposed to concern the EU's legislation in the field with or without regard of the implementation question.

4.5.2 Alhager 2001, Sonnerby 2010 and Papis-Almansa 2016 – application of a law dogmatic method completed with a comparative method

In Sonnerby 2010 it is stated that the method for the analysis of the question on a neutral withdrawal taxation in the field of VAT is made by application of a law dogmatic method based on EU law.[73] There it is also mentioned that an EU law method is used.[74] There is no such thing. The EU does not have any special method for carrying out jurisprudential studies of VAT, and that may be considered a case of abuse of terminology, since what is meant is which interpretation methods that the Court of Justice of the EU is using in cases in the field of VAT.[75]

What I want to emphasize in the present context as something very important from Sonnerby 2010 is that it is also stated therein that a comparative method is used to get an additional perspective on the ML and the implementation of the VAT Directive therein. It is stated that *a comparative method is conducive to the understanding of the own legal system and to see new*

[70] See Rendahl 2009, pp. 50 and 51, where it is stated that "free movement provisions only exist in EC VAT". See also p. 282 in Forssén 2011, where I inter alia mention this.

[71] OECD: Organization for Economic Co-operation and Development.

[72] See Forssén 2011, p. 279–287.

[73] See Sonnerby 2010, p. 23. See Ib in the figure in section 4.2.

[74] See Sonnerby 2010, p. 24.

[75] See Sonnerby 2010, p. 25.

possibilities (Sw., ”en komparativ metod bidrar till att förstå det egna rättssystemet bättre och se nya möjligheter”).[76]

By completing the law dogmatic method with a comparative method the probability typically increases in my opinion the interpretation and systematization of current law in the form of the ML giving a research result with respect of the implementation question that can be expected to be useful for the Swedish legislator, for courts and tax authorities and for other appliers of law.

I mention in this section in the first place Sonnerby 2010, since the focus in that thesis is set on the principle of a neutral VAT, which, as mentioned, is basic from primary as well as secondary law as law political aim for the common VAT system within the EU together wit the law policial aim on a cohesive system, which, as also is mentioned, follows by the complete title of the VAT Directive: Council directive 2006/112/EC of 28 November 2006 on the common system of value added tax. However, I may, in addition to my theses, mention that Alhager 2001 and Papis-Almansa 2016 respectively, which concern the tax object on reconstructions and insurance services respectively,[77]also are examples of application of a law dogmatic method completed with a comparative method at jurisprudential studies within the VAT law.[78]

Concerning the choice of countries to compare with I may mention the following differences between Alhager 2001 and Papis-Almansa 2016 concerning the expected usefullness of the research result.

In Alhager 2001 a comparison is made between Swedish law and German law regarding the implemenation question.[79] Such an internal perspective on that question increases in my opinion the probability for the research result to become useful for the Swedish legislator, for courts and tax authorities and for other appliers of law concerning the implementation question, since the thesis is aiming at trying precisely how the implementation of the VAT Directive’s rules on reconstruction has been made in the national VAT legislations in question.

In Papis-Almansa 2016 the comparison is made only of the EU law VAT system in relation to the GST systems of New Zealand and Australia. In the nearest previous section I state, regarding Rendahl 2009, where an external perspective on the EU law in the field of VAT

[76] See Sonnerby 2010, p. 30.

[77] See Ib in the figure in section 4.2. Regarding Alhager 2001 may be mentioned that exemption from taxation for transfer of going concerns according to Ch. 3 sec. 25 of the ML, which is mentioned therein on p. 356, was replaced on 1 January, 2016, by SFS 2015:888, by Ch. 2 sec. 1 b, which stipulates exemption from supply of activity. The alteration is supposed to give a better correspondence with articles 19 and 29 of the VAT Directive. Regarding Papis-Almansa 2016 may be mentioned that exemption from taxation for insurance services is stipulated in article 135(1) a of the VAT Directive, which is mentioned therin inter alia on pp. 19, 28 and 29. Ch. 3 sec. 10 of the ML stipulates the same, and corresponds nearest by that directive rule, but is not mentioned in the thesis, since it has an external perspective on the EU law in the field of VAT.

[78] See Alhager 2001, pp. 25 and 26 and Papis-Almansa 2016, sections 1.6.1 and 1.6.2 respectively, which have the headlines *Legal dogmatics* and *Comparative legal study*, that is law dogmatics and comparative judicial studies.

[79] See Alhager 2001, pp. 26 and 27.

also is applied by the comparison of the EU's VAT system with the GST systems of Australia and Canada, that such a perspective in opposition to an internal one is typically not giving a research result that will be likely to be useful concerning the implementation question. What still means that Papis-Almansa 2016 should be held before Rendahl 2009 in that respect is in my opinion that New Zealand is an interesting material for comparison among the third countries in relation to the EU's VAT system, since, which I state in Forssén 2011, there is a simple, principle true VAT without any differentiation of the tax rates in New Zealand.[80] In that respect, I referred to an article by professor Leif Mutén,[81] where he states precisely this about New Zealand.

Besides, I may, as support of New Zealand as a suitable third country to be included in the material for comparison regarding the EU's VAT system, mention that it is stated in Alhager 2001, that a comparative method should complete the law dogmatic one inter alia because the tax rates is the essential field that remains to be harmonised,[82] which, as mentioned, is what inter alia follows by recital 7 of the preamble to the VAT Directive.

4.6 Main track 2 – application of only a law dogmatic method

4.6.1 Henkow 2008 and Lindgren Zucchini 2020 – application of a purely law dogmatic method

In Henkow 2008 a purely law dogmatic method is applied for the analysis of financial activities in relation to the EU's common VAT system,[83] where it may be mentioned that unqualified exemptions from taxation occur according to articles 135(1) b–g of the VAT Directive.[84] In Henkow 2008 was *rättsdogmatisk metod* (which I express as a *law dogmatic method*) translated into "a traditional method of jurisprudence", and there it was stated, as a notorius fact,[85] that VAT systems have been adopted all over the world that are similar to each other, which means that a purely technical comparison would be especially suitable for VAT.[86] Therefore, I denote the method in Henkow 2008 as a purely law dogmatic method. By that expression I mean to avoid the word fundamentalism to signify the type of law dogmatic method.

In Lindgren Zucchini 2020 is also only a law dogmatic method used for the analysis of composite transactions for VAT purposes, which therein is translated into *legal dogmatics*.[87]

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[80] See Forssén 2011, p. 282.

[81] See Leif Mutén, *Export av skattesystem. Skattepolitiska transformations processer i tredje världen* (Eng., Export of tax systems. Tax political transformation processes in the Third World). Skattenytt 2006 pp. 487–497, 494. (Mutén 2006). See also my references to Mutén 2006 in Forssén 2011, pp. 271 and 282.

[82] See Alhager 2001, p. 26.

[83] See Henkow 2008, p. 13.

[84] See Ib in the figure in section 4.2.

[85] See Melin 2010, p. 278: Notorious circumstances *Circumstances that are a matter of common knowledge*. For such circumstances there is no need to produce evidence in the case (Sw., "Notoriska omständigheter *Omständigheter som är allmänt kända*. För sådana omständigheter behöver ingen bevisning företes i målet").

[86] See Henkow 2008, p. 13.

[87] See Lindgren Zucchini 2020, section 2.2 with the headline *Legal dogmatics*.

No such motive as in Henkow 2008 is not presented for the choice of the law dogmatic method, but neither in Lindgren Zucchini 2020 is a comparative method used as support for the law dogmatic one. Since the choice of the law dogmatic method is made unreservedly in Lindgren Zucchini 2020, it may also there be denoted as purely law dogmatic.

In Lindgren Zucchini 2020 it should in my opinion have been noted that already Rendahl 2009 may be considered to have dismissed the motive in Henkow 2008 to choose a purely law dogmatic method. What is stated thereby in Henkow 2008 is actually not correct, that is that the VAT systems adopted all over the world would be so similar to each other that a purely technical comparison would be especially suitable for VAT. I remind of what I am mentioning above from Rendahl 2009, namely that it concerning third countries exist fundamentally constitutional differences, namely insofar that it is only within the EU that freedom of movement exists. The freedom of movement regarding inter alia goods and services is, as I mention above, fundamental for a neutral VAT to function on the EU's internal market and secure that the internal market is established and functioning, why the differences constitutionally, that is with respect of competition distortion being avoided on the internal market according to article 113 of the Functional Treaty, may in my opinion not be neglected for methodological purposes. Rendahl 2009 should have been a strong incentive to complete the law dogmatic method with a comparative method in Lindgren Zucchini 2020. If a comparative method would have completed the law dogmatic one in Lindgren Zucchini 2020, should, in pursuance of what I state above from Alhager 2001, the material for comparison have been internal as well as external considering the implementation question regarding the EU's VAT system, whereby a comparison with a third country should have regarded New Zealand. This with respect of that it, as mentioned, is stated in Alhager 2001 that a comparative method should complete the law dogmatic inter alia because the tax rates is the essential field that remains to harmonise,[88] whereby, as also is mentioned, should be regarded that this is pecisely what inter alia follows by recital 7 of the preamble to the VAT Directive. These aspects should have been deemed central for the choice of method in a thesis like Lindgren Zucchini 2020, where the subject is composite transactions for VAT purposes, whereby achievements of various tax character or tax rates are examples on situations that should be problemized for the analysis of that subject.[89]

Moreover, it is stated in Lindgren Zucchini 2020 that the focus for the analysis of composite transactions for VAT purposes is set on output tax, whereby the right of deduction for input tax is left to future research on the subject.[90] This despite that it is at the same time expressed an awareness of the connection between the right of deduction of input tax on the acquisitions that a taxable person makes and the taxable transactions that the person is making, and for which the person shall account for and pay output tax, that is for which the person in question is tax liable.[91] That considering the right of deduction in the thesis should also have been deemed as central regardless of the choice of method, since the principle of a general right of deduction is, as inferred of above, one of the parts of the VAT principle according to article

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[88] See Alhager 2001, p. 26.

[89] By the way, recital 7 of the preamble to the VAT Directive is not mentioned in Lindgren Zucchini 2020.

[90] See II in the figure in section 4.2.

[91] See Lindgren Zucchini 2020, section 8.5 with the headline *Future Research Opportunities*, and also section 1.3 with the headline *Delimitations*.

1(2), and the right of deduction thus is central for at all being able to make deeper reasoning on VAT according to the EU law. This should have been considered as especially important, since the thesis furthermore concerns an expression, *composite supplies* (Sw., *sammansatta transaktioner*), which neither is defined in nor used in the VAT Directive, and nor is defined in the so-called implementing regulation (EU) No 282/2011, where implementing measures for certain rules in the VAT Directive are established,[92] nor in a primary law rule.

By not completing the law dogmatic method with a comparative method in Henkow 2008 and Lindgren Zucchini 2020 respectively decreases in my opinion typically the probability for a research result in the two theses can be expected to be useful for the legislators within the various EU Member States for courts and tax authorities within the EU and for other appliers of law. Thus, also in those cases may the legislation work and the application of law in the field of VAT show whether my conception is correct. However, I may, with respect of the right of deduction's decisive importance for what is meant by VAT according to the EU law, emphasize as especially problematic for precisely the mentioned theme on usefulness, that Lindgren Zucchini 2020 for the study of composite supplies for VAT purposes is not regarding the right of deduction, whereby therein, as mentioned, is stated that the right of deduction instead is left to future research on that subject.

4.6.2 Ek 2019 – application of a law dogmatic method which is not purely law dogmatic

In Ek 2019, which concerns deliveries and intra-Union acquisitions within the VAT law,[93] a law dogmatic method is also used.[94] However, it is not stated as the only suitable method, like in Henkow 2008 and Lindgren Zucchini 2020, where, as mentioned, the motive for applying a purely law dogmatic method according to above all Henkow 2008 should be questioned, since that is based on that it would be a notorious fact that VAT systems have been adopted all over the world that are similar to each other, and that a purely technical comparison therefore would be especially suitable for VAT, which, as mentioned, is contradicted already by Rendahl 2009.

In Ek 2019 can an awareness of that the law dogmatic method is not the only suitable for jurisprudential studies in VAT law be read out, by the law dogmatic method therein being described as *traditional* (Sw., ”traditionell”) only *in the sense that a law dogmatic method or basis is not unusual in VAT law theses* (Sw., ”i den bemärkelsen att en rättsdogmatisk metod eller utgångspunkt inte är ovanlig i mervärdesskatterättsliga avhandlingar”).[95] I note that thereby exemplification is made with the following Swedish theses in VAT law: Westberg 1994, Alhager 2001, Henkow 2008 and Papis-Almansa 2016.[96] I may therefore point out that the method in Westberg 1994 was comparative and that in Alhager 2001 and Papis-Almansa 2016 a law dogmatic method completed with a comparative method were applied, whereas

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[92] The implementing regulation's complete title is: Council implementing regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax.

[93] See Ib in the figure in section 4.2.

[94] See Ek 2019, p. 33.

[95] See Ek 2019, p. 33.

[96] See Ek 2019, p. 33.

the method was only law dogmatic in Henkow 2008 – which I denote as purely law dogmatic. However, Ek 2019 separates itself, as mentioned, from Henkow 2008 and from the later arising Lindgren Zucchini 2020, by it in Ek 2019 not being stated that the law dogmatic method would be especially suitable for studies in VAT law.

Besides, Ek 2019 separates itself from above all Lindgren Zucchini 2020 also insofar that the method questions are not connected only to the interpretation of the EU law, but also to the use of and choice of judicial material subject to the study in VAT law.[97] In the latter respect are also regarded in Ek 2019 – if only to a smaller extent – Swedish sources like preparatory work to the ML and the tax authority's (Sw., *Skatteverkets*) writs and standpoints that concern the VAT, in opposition to Lindgren Zucchini 2020, where neither Swedish nor foreign public printing is regarded. In Henkow 2008 is in itself also material consisting of Swedish and foreign public printing regarded, but also there to a smaller extent.[98] In Ek 2019 is also regarded certain material from IFRS (International Financial Reporting Standards), which is a set of rules regarding for example annual reports.[99] That shows an awareness of the importance of the civil law accounting law and concepts like Generally Accepted Accounting Principles to make the collection of inter alia VAT functioning. Such material is lacking in Henkow 2008 and Lindgren Zucchini 2020.[100]

Concerning the material question I also consider that Ek 2019, Henkow 2008 and Lindgren Zucchini 2020 are far too limited on references to national verdicts from the Member States. It is not only EU-verdicts, but also national precedential verdicts that are serving as guidance for national authorities and the lower instances of the court system. National precedential verdicts in for instance the EU country Sweden can be deemed being *acte clair*, that is the interpretation of a question is in that case so obvious that there is no room for doubt about it and there is no need to make it *acte éclairé* by the Supreme Administrative Court of Sweden (Sw., *Högsta förvaltningsdomstolen*) obtaining a preliminary ruling from the Court of Justice of the EU in accordance with article 267 third paragraph of the Functional Treaty.[101] Such a verdict by the Supreme Administrative Court is also serving as guidance for example for *Skatteverket* and for the lower administrative courts (Sw., *förvaltningsrätterna* and *kammarrätterna*). In Ek 2019 it is referred to five verdicts by the Supreme Administrative Court of Sweden.[102] In Henkow 2008 it is referred to two verdicts by the VAT Tribunal in the then Member State the United Kingdom and to two verdicts by the Supreme Administrative

[97] See Ek 2019, p. 35.

[98] See Ek 2019, pp. 302 and 322, Lindgren Zucchini 2020, pp. 259–278 and Henkow 2008, pp. 380 and 381.

[99] See Ek 2019, p. 321.

[100] See Henkow 2008, pp. 361–394 and Lindgren Zucchini 2020, pp. 259–278.

[101] See Eleonor Alhager and Lena Hiort af Ornäs, *Rättsfallssamling i EG-moms* (upplaga 2:1), Eng. Case collection in EC VAT (edition 2:1), Norstedts Juridik 2009, pp. 17 and 18 (Alhager och Hiort af Ornäs); and also Terra and Kajus 2010, pp. 216, 218 and 223; A.J. van Doesum, *Contractuele samenwerkingsverbanden in de btw* (Eng., approx., Joint ventures in the VAT), Universiteit Tilburg, the Netherlands 2009, p. 20 (van Doesum 2009); Prechal 2005, pp. 32 and 33; and Dennis Ramsdahl Jensen, *Merværdiafgiftspligten – en analyse af den afgiftspligtige transaktion* (Eng., VAT liability – an analysis of the taxable transaction), Juridisk Institut Handelshøjskolen, Århus, juli 2003, p. 16 (Ramsdahl Jensen 2003). See also Forssén 2011, p. 65.

[102] See Ek 2019, p. 321.

Court of Sweden.[103] In Lindgren Zucchini 2020 it is not referred to any verdict from the Supreme Administrative Court of Sweden, but to two verdicts from the United Kingdom, where by the way one of them meant obtaining of a preliminary ruling from the Court of Justice of the EU.[104] The awareness of that also national precedential verdicts from the Member States are meaningful for the interpretation and application of the EU law in the field of VAT is weak in my opinion in all of the three theses recently mentioned, but Ek 2019 although distinguish itself from Henkow 2008 and Lindgren Zucchini 2020 partly by not stating that the law dogmatic method is the only suitable method for the analysis of the VAT law, partly by referring to a broader material for interpetation and systematization of current law according to the EU law in the field of VAT.

Thus, I do not denote, unlike concerning Henkow 2008 and Lindgren Zucchini 2020, the law dogmatic method used in Ek 2019 as purely law dogmatic.

5 Conclusions and final viewpoints

5.1 Introduction

In section 5.2 I concluded what the review in Chapter 4 concerning the question on suitable choices of method for the VAT research in Sweden can be deemed showing in that respect. I give my conclusions by place in order choice of method according to the two main tracks that I have used as basis for the review of Swedish theses on VAT law, that is I place in order the following choices of method:

- application of a comparative method or a law dogmatic method completed with a comparative method (Main track 1) and
- application of only a law dogmatic method (Main track 2) respectively.

The placing in order is made with respect of the probability of the choice of method, with the modifications of the main tracks that the review shows exists, being expected to give a research result that is useful for the legislators in the various EU Member States, for courts and tax authorities within the EU and for other appliers of law, when it is a matter of judging how well the implementation of the rules in the VAT Directive have been done or can be expected to become in the VAT legislations of the EU Member States, for example in the ML or in the FML. I am reminding of that I am not claiming hat my conclutions are the ideal solutions to get a functioning contact between the research in the field and above all the legislation work, but what I present is my own opinion of what are positive or negative tendencies regarding the mentioned theme usefulness. Therefore, I mark ”Negative tendency” and ”Positive tendency” respectively for *the implemantation question* (Sw., ”implementeringsfrågan”) regarding *the expected research result* (Sw., ”förväntat forskningsresultat”) regarding each choice of method according to the main tracks.

In sections 5.3.1 and 5.3.2 I give final viewpoints partly on how the VAT research in Sweden is considering the question on collection of VAT, partly on how the research in Sweden regarding other indirect taxes and fees, excise duties and customs, relate to the VAT research in Sweden so far.

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[103] See Henkow 2008, p. 380. Note that the United Kingdom left the EU on 31 January, 2020.

[104] See Lindgren Zucchini 2020, p. 278.

5.2 The importance of the choice of method for a research result that will be useful for the legislators and the appliers of law within the EU

Main track 1, the alternative application of a comparative method with only an external perspective on the EU law in the field of VAT: Negative tendency for the implementation question regarding expected research result.

Commentary:

The review in section 4.5.1 shows that if only a comparative method is used should the material for comparison not be only external, that is only concern third countries whose VAT systems or GST systems are compared with the EU's VAT system. Besides should on the whole the use of third countries as material for comparison be made with caution, since it in such cases exist constitutional differences in relation to the EU and its internal market with free movement inter alia for goods and services and a third country may express that it has VAT or GST, but at a closer look it turns out that it is not a matter of VAT in the meaning of the EU law, for example due to the third country in question not applying an in principle general right of deduction, which is one of the parts of the VAT principle according to article 1(2) second paragraph of the VAT Directive. In the latter case a comparative method is pointless where the implementation question is concerned, since it concerns the implementaion of VAT according to the EU law, that is according to the VAT Directive, into the national VAT legislations of the EU Member States. Then you cannot add pears to a material for comparison that shall consist of apples, that is mix third countries that do not have a legislation on VAT or GST where the VAT or GST is similar to VAT according to the EU law with third countries that have such a legislation on VAT or GST. Such a material for comparison is not of interest although the subject would not concern the implementation question, but only a comparison of the EU's legislation in the field of VAT with VAT systems or GST systems in third countries, since those in such a case do not concern what is meant by VAT according to the EU law. In Forssén 2011 I question in that respect that Rendahl 2009 includes Canada in the material for comparison, since Canada, unlike Australia, is way apart from the EU law as a third country lacking a uniform VAT.[105]

Main track 1, the alternative application of a comparative method with an internal perspective on the EU law in the field of VAT: Positive tendency for the implementation question regarding expected research result.

Commentary:

It is nothing wrong in itself to compare the EU's legislation in the field of VAT with corresponding systems in third countries. However, the review in section 4.5.1 shows that such an external perspective on the EU law in the field of VAT should not be used in the research on the VAT law without that it in the comparative method also is included at least some EU Member State's VAT legislation. Such an internal perspective on the EU law in the field of VAT is precisely what the implemenation question is about, that is the implementation of VAT according to the EU law into the national VAT legislations of the Member States.

[105] See Forssén 2011, pp. 281 and 282.

Main track 1, the alternative application of a law dogmatic method completed with a comparative method: Positive tendency for the implementation question regarding expected research result.

Commentary:

The review in section 4.5.2 shows that if a law dogmatic method, meaning interpretation and systematization of current law in the field of VAT, is completed with a comparative method it is conducive to a better understanding of the EU's VAT system and the national VAT legislations into which the VAT Directive's rules shall be implemented, that is the perspective on the implementation question benefits by such a methodological combination, where the usefulness is concerned for that question regarding expected research result. The comparison with oter VAT legislations than the ML should although be made with the VAT legislations of other EU Member States, for example with the FML, and not only with VAT systems or GST systems in third countries. If one or more third countries at all shall be included in the material for comparison, should, as mentioned above, such a country's VAT system or GST system be weighted regarding how relevant it is in relation to the principles on free movement inter alia for goods and services on the EU's internal market and in relation to what is meant by VAT according to the EU law.

Main track 2, application of only a law dogmatic method that is or is not purely law dogmatic: Negative tendency for the implementation question regarding expected research result.

Commentary:

The review in sections 4.6.1 and 4.6.2 shows that application of only a law dogmatic method concerning the EU's VAT system gives a far too limited perspective and understanding for the scope of the necessity of problemizing the VAT question that the jurisprudential study shall concern.

If what I describe as a purely law dogmatic method, with an analysis which on the whole is only based on a casuistic review of EU-verdicts and references to various authors, becomes a track for further application and influence of the VAT research, the risk is obvious that this entails a development of the research that in the end means that the VAT law no longer will be treated as a jurisprudential subject. Instead will such a development lead to the reserach in the field of VAT becoming more like research within natural science – as if the VAT Directive contains something similar to a physical object that shall be discovered and analysed. Then it is no longer a matter of jurisprudential studies being carried out within the VAT law in Sweden.

I have recently brought up the mentioned risk of applying a purely law dogmatic method, where the method is not completed with neither a comparative method nor empiric surveys in form of inquiries that can seize what is not to be found in the literature in the field of VAT etc., in an article about what I name the trap of mathematics in the VAT research.[106] Therefore, I may for the context also mention the following regarding how the law dogmatic

[106] See Björn Forssén, *Matematikfällan i forskningen – avseende mervärdesskatterätten* (Eng., The Trap of Mathematics in the Research – regarding the VAT law), *Tidningen Balans fördjupningsbilaga* (Eng., The Periodical Balans Annex with advanced articles) 2/2020, pp. 17–27 (Forssén 2020b). The e-version is available in full text on www.tidningenbalans.se and on www.forssen.com.

method in itself should be developed, regardless whether it is combined with a comparative method or empiric surveys.

From Forssén 2013 I have carried on with a side question therein, inter alia in the JFT.[107] The problem concerns both the tax subject and the tax object, and regarded – and still regards – that a lack of neutrality exists between the enterprise form *enkelt bolag* (approx. joint venture) and other enterprise forms, when authors and artists create a joint work and co-operate in an *enkelt bolag*, if every partner does not fulfill the civil law criterion independent work for his or her effort as author or artist, but an independent work emerges according to sec. 1, 4 or 5 of *upphovsrättslagen (1960:729)*, Eng., the Swedish Copyright Act, first in form of a finished work. For example it is a matter of a stage play, a film or a musical work performed at a concert. Since the rule on reduced tx rate in the ML only refers to these rules in the Swedish Copyright Act and not to the rule in sec. 6 on joint works, the artists must form an *aktiebolag* (Eng., a limited company), so that all rights are contained in such a company, which, in opposition to an *enkelt bolag*, is a legal entity. Otherwise applies in the described situation the general tax rate for each partner.[108] I have commented this problem not only in Forssén 2013 and thereafter in Forssén 2018a and Forssén 2018b, but also already in my VAT books from 1998 and 2001.[109] In the JFT I pointed out that the example does not only show the necessity of clarifying whether non-legal entities, like *enkla bolag och partrederier* (Eng., approx. joint ventures and shipping partnerships) in Sweden and *sammanslutningar och partrederier* (Eng., approx. joint ventures and shipping partnerships) in Finland respectively, are comprised by the main rule in article 9(1) first paragraph of the VAT Directive on who is a taxable person,[110] but also *the importance of completing a law dogmatic study of composite supplies in the field of VAT with an analysis based on legal semiotics* (Sw., ”på vikten av att komplettera en rättsdogmatisk studie av sammansatta transaktioner på momsområdet med en analys baserad på juridisk semiotik”).[111]

In Forssén 2018a I use a doll’s house as an idea figure to find connotations, which make it easier to do judgments of the various elements at the creation of a joint work, like a stage play, a film or a musical work performed at a concert, when it is a question of which tax rates apply for the various participants in such a project, if it is carried out in the enterprise form

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[107] See 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 (Forssén 2018a). See also Björn Forssén, *Kulturproduktion i enkla bolag och tillämpliga momssatser samt momssituationen för bolag som producerar artistframträdanden* [Eng., Cultural production in *enkla bolag* (joint ventures) and applicable VAT rates and the VAT situation for companies producing artistic performances], *Svensk Skattetidning* 2018, pp. 646–658 (Forssén 2018b). Both articles are available in full text on www.forssen.com.

[108] See Forssén 2013, sections 2.8, 6.5, 6.6, 7.1.3.2 and 7.1.3.6.

[109] See Björn Forssén, *Momshandboken Enligt 1998 års regler* (Eng., The VAT Handbook According to the rules of 1998), Norstedts Juridik 1998, pp. 188 and 189; and Björn Forssén, *Momshandboken Enligt 2001 års regler* (The VAT Handbook According to the rules of 2001) and Björn Forssén, Norstedts Juridik 2001, pp. 224 and 225. The latter book is avaliable in full text on www.forssen.com (the book is there different from its printed version only by the layout).

[110] See Forssén 2013, sections 7.1.3.2 and 7.1.3.6, Forssén 2019b, pp. 69 and 70 and Forssén 2020a, pp. 392 and 393.

[111] See Forssén 2018a, p. 320.

enkelt bolag, that is by a non-legal entity.[112] The connotations that are created by the idea figure of giving the various authors and artists a room of their own (or step) in the doll's house, which is an illustration of the process of creating the joint work, shall give a model – a tool – that gives support for the analysis carried out with a law dogmatic method concerning the composite supply that the creative process constitutes in relation to the theatres showing the play, for the cinemas showing the film or the arrangers of concerts where the musical work is performed.[113]

If a tool – model – is used to support for instance the law dogmatic method for the analysis of questions within the VAT law, may however in my opinion the tool – the model – not be made to the method in itself for the study. Such an approach for a jurisprudential study is only a matter of deduction, and thus no induction developing the knowledge on the subject. That would merely be a matter of calculating with law rules, if mathematics and logic are made to the method in itslef, and not only used in the study as a supporting tool at the application of a law dogmatic method. Then the researcher ens up in what I, as mentioned, am calling the trap of mathematics in the VAT research.[114]

5.3 Final viewpoints

5.3.1 The question on how the VAT research in Sweden regards the question on the collection of VAT

I have emphasized above the importance of an effective collection of VAT as an important law political aim for the common VAT system within the EU, whereby I have 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. The collection of VAT is, as mentioned, not only important for the public treasury in the respective Member State, but also for the financing of the EU's institutions.

For the law political aim with an effective collection to be favoured 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 aim at the formal VAT questions, which inter alia concern whether the SFL is conform in relation to the rules on VAT registration in articles 213–216 of the VAT Directive. In Forssén 2011 side question E concerned questions on VAT registration.[115] However, I cannot find that that question has been mentioned in any other theses on VAT in Sweden. In that way cannot the legislator get any conception of the range of how many that due to inefficient control of those *given entrance into* the system are causing the State tax evasion or tax losses, which, as mentioned,[116] has been pointed out on EU level as a problem for the VAT collection.

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[112] See Forssén 2018a, section 3.1 with the headline *Ett enkelt bolag samt ett litterärt eller konstnärligt verk* (Eng., A joint venture and a literary or artistic work), pp. 317–320.

[113] See Forssén 2018a, p. 320.

[114] See Forssén 2020b.

[115] 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.

[116] See section 3.5.

Thus, I suggest that the VAT research in Sweden also will aim at formal questions such as the question on the collection of VAT, and not only on the material questions of taxation. In that context I also suggest that the law of procedure will be brought up in inter alia the research in the field of VAT. That is important as long as the principle of the EU law's primacy before national law is not codified, which I bring up in an article on norm hierarchy that regards national law in the broader perspective that also includes the European Convention.[117]

5.3.2 The question on how the research in Sweden regarding other indirect taxes and fees, excise duties and customs, relate to the VAT research in Sweden so far

Concerning the research regarding excise duties there is only one Swedish thesis, Olsson 2001.[118] It does not regard that the same problem as 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 into the rule of non-harmonised income tax rules, existed concerning the Swedish legislation in the field of excise duties. I mentioned this in Forssén 2011, so that the legislator would be able to look also on the excise duties in the same respect.[119]

The problem with the mentioned connection for the excise duties affects the VAT, by the excise duties being included in the taxation amount for VAT.[120] If the excise duties are treated in a wrong way, it affects thus the determination of the taxation amount for VAT.[121] By the VAT reform on 1 July, 2013 (SFS 2013:368) ended, as mentioned, the connection to the income tax legislation for the determination of the concept taxable person in Ch. 4 sec. 1 first paragraph first sentence of the ML, so that its wording literally corresponds with the main rule in article 9(1) first paragraph of the VAT Directive, but that reform has never got any equivalent in the field of excise duties. This means the following:

- For energy tax applies according to Ch. 1 sec. 4 *lagen (1994:1776) om skatt på energi* (Eng., the Swedish Energy Tax Act) still that the tax subject is determined by a definition of *yrkesmässig verksamhet* (Eng., professional activity) consisting of a main rule referring to the concept *näringsverksamhet* (Eng., business activity) according to Ch. 13 of *inkomstskattelagen (1999:1229*, here accreviated IL), i.e. the Swedish

[117] See Björn Forssén, *Europatrappan – en normhierarkisk bild vid regelkonkurrens mellan svenska nationella och europarättsliga regler med skatterättsexempel* (Eng., The European stepladder (staircase) – a norm hierarchic figure at rule competition between Swedish national and European law rules with tax law examples), *Tidningen Balans fördjupningsbilaga* (Eng., The Periodical Balans Annex with advanced articles) 4/2017, pp. 15–19 (Forssén 2017). The e-version is available in full text on www.tidningenbalans.se and on www.forssen.com. The European Convention complete title is: European Convention for the Protection of Human Rights and Fundamental Freedoms Rome 4 November 1950.

[118] See Stefan Olsson, *Punktskatter – rättslig reglering i svenskt och europeiskt perspektiv* (Eng., Excise duties – legal regulation in a Swedish and European perspective), Iustus förlag, Uppsala 2001. (Olsson 2001).

[119] See Forssén 2011, pp. 54 and 76.

[120] See Ch. 7 sec. 2 first paragraph second sentence of the ML and article 78 first paragraph a) of the VAT Directive.

[121] See Forssén 2019a, section 12 201 024.

Income Tax Act, together with a supplementary rule meaning that an activity is professional also if it is carried out in businesslike forms.

- For the advertising tax the main rule is also that the tax subject is determined by what is deemed to constitute *yrkesmässig verksamhet* (Eng., professional activity) with reference to the concept *näringsverksamhet* (Eng., business activity) according to Ch. 13 of the IL.[122]

- On the other hand applies concerning e.g. tax on alcohol that with *yrkesmässighet* (Eng., professionality) is meant – without any connection to the IL – that an *upplagshavares* (Eng., a warehousekeeper's) activity forms part of exercising industry.[123]

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, but so far has nobody taken an interest in the same problem existing in the filed of excise duties regarding certain taxes there. 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 one.[124] I expected that the research or the legislator would bring up the question on conformity with the mentioned connection to the IL with the EU law in the field of excise duties, but this has not happened.

I pointed out already when I wrote Forssén 2011 that no analysis had been done in the jurisprudential literature of whether the Swedish national legislation on excise duties is conform with *näringsidkare* (Eng., a trader) in article 7(2) of the then so-called *cirkulationsdirektivet*, Eng., movement directive, (92/12/EEC) and the concept *självständig verksamhet* (Eng., independent activity), when the concept *yrkesmässig* (Eng., professional) is concerned.[125] Thus, in Forssén 2011 I raised once again that question based on the so-called *punktskattedirektivet*, Eng., the excise duty directive, (2008/118/EG), which on 1 April, 2010 replaced the movement directive.[126]

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[122] See first paragraph of the instructions to sec. 9 of *lag (1972:266) om skatt på annonser och reklam* (Eng., the Swedish Act on Advertising Tax).

[123] The definition of what is *yrkesmässig* (Eng., professional) is not evident by the rules on *skattskyldiga* (Eng., the tax liable) and *upplagshavare* (Eng., warehousekeepers), sections 8 and 9 *lag (1994:1564) om alkoholskatt* (Eng., the Swedish Act on Alcohol Tax), but of the preparatory work, prop. 1994/95:56 (*Nya lagar om tobaksskatt och alkoholskatt, m.m.* – New acts on tobacco tax and alcohol tax, etc.), p. 85.

[124] See Forssén 2011, section 1.2.4, where a reference 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) pp. 81 and 82, whereof follows that the motive to, with the ML serving as a model, connect the concept professional in the Energy Tax Act to the IL's concept business activity was to retain the mentioned tradition. See also Forssén 2019a, section 12 201 024.

[125] 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), where Olsson 2001 is also mentioned in the present respect. Forssén 2007 is available in full text on www.forssen.com.

[126] See Forssén 2011, sections 1.2.2.6 and 1.2.4. See also Forssén 2019a, section 12 201 024.

I suggest once more that the research or the legislator brings up the question on the determination of the tax subject in the Swedish legislation on excise duties, since an incorrect treatment of the excise duty question affects the determination of the taxation amount for VAT in accordance with the above-mentioned. Besides, I may mention the following in that respect. Since connections still exist, for the determination of the tax subject regarding certain excise duties, to the concept *näringsverksamhet* (Eng., business activity) according to Ch. 13 of the IL, it is, in my opinion, rather obvious that it gives a selection of tax subjects in the field of excise duties that is to extensive in relation to the excise duty directive. Thereof follows by recitals 16 and 22 of the preamble that the tax liable still shall be *näringsidkare* (eng, traders). Thereby can for instance an *aktiebolag* (Eng., a limited company) that is merely carrying out a hobby activity constitute a tax subject according to the Swedish legislation on energy tax and on advertising tax, by the concept *yrkesmässig* (Eng., professional) there being determined by the connection to the concept *näringsverksamhet* (Eng., business activity) in the whole of Ch. 13 of the IL.

Concerning the research within *tullrätt* (Eng., customs law) there is also only one Swedish thesis, Moëll 1996, which treats customs tariffs. I note that the then equivalent to article 113 of the Functional Treaty, that is article 99 of the Rome Treaty, is not mentioned therein. Article 99 of the Rome Treaty was first replaced by article 93 of the EC Treaty, which, by the Lisbon Treaty, was replaced on 1 December, 2009 by article 113 of the Functional Treaty. Thereby has a principle of neutrality come to be clearly expressed by the primary law for the indirect taxes, that is for VAT, excise duties and customs. That means that the principle of neutrality not only follows by the secondary law in the field of VAT, but also by primary law,[127] but it thus also means that the principle of neutrality, compared to what was the case in article 99 of the Rome Treaty, is expressed en clair for customs too by primary law.

I Moëll 1996 it is stated that *varubegreppet* (Eng., the concept goods) by the ML – which replaced the GML on 1 July, 1994 – has got *the same construction as within the EU* (Sw., ”samma konstruktion som inom EU”).[128] Customs are charged on imports of goods from third countries. The concepts goods and services respectively are not defined in the EU’s legislation on VAT, neither in the then Sixth VAT Directive nor in the present VAT Directive. However should the research notice that there is a primary law definition of the concept *tjänst* (Eng., service) in article 57 of the Functional Treaty, which thus applies also in other fields than taxation, if the EU’s institutions have been transferred competence in the field in question.[129] According to Moëll 1996 limited efforts have been made to create a uniform concept goods within a few fields of law, and it is signified as otherwise uncertain of the concept goods.[130] I Moëll 1996 it was stated that *it would hardly be possible or even meaningful to establish a uniform concept goods for all fields of law. You should instead continue to determine the meaning of the concept field by field based on the present legislation* (Sw., ”det torde […] knappast vara möjligt eller ens meningsfullt att fastställa ett för alla rättsområden enhetligt varubegrepp. Man bör i stället fortsätta med att bestämma begreppets innebörd områdesvis utifrån den aktuella rättsakten”).[131] That attitude by researchers will typically not favour the

[127] See Forssén 2011, p. 46.

[128] See Moëll 1996, p. 38. See also Forssén 2019a, section 12 201 010.

[129] See also Forssén 2019a, section 12 201 010.

[130] See Moëll 1996, p. 40. Se also Forssén 2019a, section 12 201 010.

[131] See Moëll 1996, p. 41. See also Forssén 2019a, section 12 201 010.

EU project. Besides, the work regarding a future introduction of the free trade agreement between the USA and the EU, i.e. the TTIP-agreement,[132] will probably be resumed.

Since a comprehensive work can be expected regarding the TTIP-agreement, it should, in my opinion, be joined with efforts meaning that it at least within the field of indirect taxes will be simplifications, for example by a uniform concept goods being prepared in that field within the EU.[133] Thereby it can be an interesting question for the research to illuminate what meaning it may have in that context that it nowadays is clearly expressed by primary law that a principle of neutrality applies to all indirect taxes.

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

[133] See also Forssén 2019a, section 12 201 010.