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Corporate Social Responsibility and Corporate Taxation



Contents

Foreword	2
Summary	3
1 Introduction	5
1.1 The topic	5
1.2 What is CSR?	6
1.3 Is paying taxes encompassed by CSR?	8
2 The constitutional mandate that taxation requires legal grounds – a background exploration	10
3 Tax morale	14
3.1 Why are taxes paid – the significance of “tax morale”?	14
3.2 How can tax morale be influenced?	19
4 On the current official Swedish view on governance and on the role of government agencies	24
4.1 Introduction	24
4.2 The Swedish Tax Agency’s operational approach and value-shaping activities	26
5 A company law perspective	32
5.1 Introduction	32
5.2 The tasks of the board of directors	32
5.3 Objective of the company and profit motive	34
5.4 Value transfers	38
5.5 Sanctions	40
5.6 Tax planning and Corporate Social Responsibility – a company law perspective	42
6 Conclusions	46
Bibliography	49
Legal case registry	55

Foreword

On October 14 of last year, we had the pleasure of participating in a seminar at Stockholm University that was organized by the research department on tax law at the Stockholm Centre for Commercial Law, SCCL. The seminar addressed the matter of whether taxes are a sustainability issue, that is, if the issue of tax planning as a phenomenon is compatible with Corporate Social Responsibility (CSR). Participating in the seminar were Carl Svernlöv, a lawyer with Baker & McKenzie Advokatbyrå KB, adjunct professor of company law at Uppsala University and Roger Persson Österman, a professor of financial law at Stockholm University. The seminar was moderated by Teresa Simon-Almendal, a professor of financial law at Stockholm University, who presided over an exciting and interesting discussion with participants including academics, advisors and the Swedish Tax Agency.

CSR is a hot topic today in many areas, including taxation. Ministers talk about grey zones that are inappropriate for companies to venture into, and so forth. Is being involved in activities related to forming opinions on taxes part of the Swedish Tax Agency's task? Should companies pay more tax than required by law, and if so, who is meant to determine what the right amount of tax to pay is?

We believe that CSR in the area of taxation is a pertinent social matter to discuss, and that it is important for it to be analyzed from a broad perspective whereby the legal rules are clarified. In continuing the discussion from the seminar, we have therefore commissioned Carl Svernlöv and Roger Persson Österman to author a report that is based on the lecture they held at Stockholm University. During the presentation of the report, which is scheduled to take place on May 17, 2016 at the Confederation of Swedish Enterprise, a panel of knowledgeable debaters have been invited to take part in discussing these matters, with Teresa Simon-Almendal moderating the discussion.

Stockholm, April 2016

Kerstin Nyquist Richard Hellenius
The Confederation of Swedish Enterprise

Summary

CSR – Corporate Social Responsibility – is a familiar concept in the current public discourse. At the same time, the meaning of the term is not entirely clear. CSR involves, among other things, firms doing more than what is required of them by law. In this report, the issue discussed is: Can CSR require a firm to abstain from a legal opportunity to reduce its tax burden?

It is reasonable to assume that the personal values of the executives of a firm will have an impact on the decisions they make in respect of the firm's operations. Thus, the tax morale of the individual executive may have an impact on the firm's decisions related to legal tax planning. On the other hand, any executive is subject to restrictions, limiting his or her ability to make decisions based on personal morals. An executive is bound by his or her employment contract as well as by formal rules and regulations. Furthermore, an executive is bound by soft social standards, such as the expectations of superiors, of shareholders, but also of employees and other stakeholders. It is somewhere here that CSR enters the arena. However, the values of an executive may also be colored by the values that the Swedish Companies Act gives expression to – namely the purpose of profit-making.

It is therefore likely that it is less a matter of the executive's own personal values and more a matter of whether the executive believes that a particular decision will improve the firm's financial position. Strictly speaking, most stakeholders are positive to a firm that is doing well.

It is likely that CSR could impact the tax planning of different firms, provided that tax planning in practice may be significant to a firm's financial success. If a firm's reputation in respect of willingness to pay taxes may have an impact on the market on which it operates, CSR may even play a significant role. If on the other hand, the firm's reputation in relation to taxes is of less importance, the significance of CSR in this respect may be questioned. Thus, it is the expectations of stakeholders in general that may be of importance. Any person having an interest in improving CSR in the taxation context must therefore work with actions aimed at influencing the general public.

It can be discussed whether it is appropriate for regulated authorities to engage in public relations – the Swedish legislator has adopted a clearly restrictive approach in this respect. For good reasons, there should thus be a little room for the Swedish Tax Agency to advocate the inclusion of taxes, and what this means, in the CSR sphere.

Furthermore, it is important to adopt a realistic and nuanced approach to including taxes in CSR. Empirical studies show that firms are most likely to determine their tax policy based on a strict cost/benefit analysis, and it will therefore be difficult for any Tax Agency to influence firms through the forms of cooperation available to it and that are compatible with the rule of law. There are plenty of indications that a firm which does not perceive any reputation risk in legal tax planning will make full use of it, and it is difficult to change this fact by trying to change attitudes. It would likely be more effective if the Swedish Tax Agency, taking into account the rule of law, would spend its resources on conventional audit activities and, where applicable in case of grey zones, use its opportunity to litigate in a constructive manner (e.g., by allowing

the specific body within the Swedish Tax Agency the so called the “ombudsman” to apply for advance tax rulings), rather than trying to “persuade” taxpayers to pay more tax than actually required by law. The Swedish Tax Agency should of course share with the legislator its observations in relation to the legal tax planning activities of firms, but to think that firms would be willing to pay more tax than required by law is a naïve – and possibly dangerous – way of securing the tax base.

The Swedish Tax Agency’s efforts in terms of so called cooperative compliance, the Agency’s issuing of private letter rulings/clearances and other forms of networking activities could nevertheless have positive effects, and may be highly appreciated by firms. It is however uncertain whether such activities will strengthen the willingness of firms to refrain from legal tax planning or executing transactions in grey areas. A firm may of course refrain from an intended transaction if it knows that the Tax Agency will not accept the transaction – however, a firm’s decision will most likely be based on a rational economic analysis, which may include litigation costs. Any Tax Agency should however avoid intentionally threatening litigation. There is a fine line between a constructive discussion, in which the Tax Agency and the firm may take opposite positions as regards the interpretation of current law, and unilateral repression. General threats from an authority should never be seen as an acceptable tool for the purposes of trying to control behaviors. Threats might even have a detrimental effect on the authority’s legitimacy, and therefore in the longer run, counterproductive effects.

When it comes to company law aspects of treating tax matters as CSR, we show that the Swedish Companies Act imposes limitations on the ability of board of directors to refrain from availing themselves of a legal opportunity resulting in lower taxation. While it is difficult in practice to show that the board of directors has violated the Swedish Companies Act by making a decision in a tax related matter, as most decisions can be justified on commercial grounds, legally, the provisions on the purpose of profit-making and value transfers limit the board of directors’ discretion. Ultimately, a violation of these restrictions is sanctioned by personal liability for the directors.

If it is accepted that legal rules have an effect on our actions, and possibly a “moral-forming” effect, such that the contents of the rules of law influence social values and attitudes, the question arises as to what impact the basic rules of the Swedish Companies Act have on the attitude of firm representatives? Or to put it differently – does a board of directors comply with the requirement to operate for profit A) because it is mandatory under the Companies Act and under the threat of legal sanctions/litigation, or B), because the board of directors finds it is right and appropriate to follow the instructions implicitly expressed by the Companies Act?

In light of the social science studies referred to in our report, it is in our opinion not an unreasonable assumption that B is the right answer. It is also our belief that as long as the Swedish Companies Act is based on the underlying purpose of profit, it will be very difficult to change the attitudes of boards of directors’, and this would also be in conflict with legislative intent.

In our opinion, this constitutes a good illustration as to why social governance is hard to achieve based on social values, as it is not rare that the two conflict with each other. Where legal rules are followed, a certain stability in social life will be achieved, along with increased foreseeability with regard to operators’ behavior and legal certainty. For example, under the well established assumption that firms operate for purposes of profit, we can adapt to that assumption and act accordingly.

Roger Persson Österman
Carl Svernlöv

1 Introduction

“Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible. This is a fundamentally subversive doctrine.”¹

1.1 The topic

The discourse on corporate social responsibility (“CSR”) is highly topical in Sweden – it may involve the significance of CSR in general, or the significance of CSR in more specific matters, such as activities with an environmental impact, employee-related issues or tax matters. This report addresses CSR and corporate taxation. In brief, the principal question is: Can companies be deemed to bear a social responsibility to pay the taxes required by the public domain, and could this responsibility be of a different nature than its legal responsibility? In other words, could a company have a responsibility to refrain from a legal option that yields a lower tax burden?

This report thus aims to discuss what CSR could entail in exercising taxation authority, and to discuss the leeway that public bodies (government agencies) could be presumed to have in terms of value-shaping efforts. The report addresses the following underlying assumptions and issues.

- From a constitutional perspective, taxation authority must be exercised in accordance with the law. Taxpayers must comply with tax legislation.
- Based on social-science research findings regarding taxpayer behavior, one could say that there are two main views: A) taxpayers comply with tax regulations because of the laws forcing them to do so, which are backed by legal sanctions; B) taxpayers comply with the tax code because of an inner conviction that complying with said code is the right and proper course of action (“tax morale”).
- The significance of CSR in taxation should depend on the degree to which B) exists – the social responsibility that CSR can be deemed to entail should be correlated with taxpayers’ values or their tax morale.
- One of the underlying assumptions in this report is that values can be influenced. According to regulatory research, the administrative approach, operational practices and decision-making methods play a substantial role in how values are established and influenced. In other words, it is a matter of weighing the rewards against the penalties, or the significance of maintaining a confrontational or collaborative approach. An interesting question is to what extent changes in administrative practices can influence attitudes to go beyond the requirements of the law – meaning CSR.
- In recent decades, public administrative operational practices have been subjected to pressure to make efficiency enhancements. The work of government agencies has been influenced by business-economic views on the efficient use of resources and efficiency targets. Organizational theory offers thoughts on new structures for administrative operational practices, which are based on collaboration and on network governance. Sweden’s tax administration has been subject to a development that, it could be argued, runs counter to a more collaborative and

¹ Friedman, M, *Capitalism and Freedom*, University of Chicago Press, 1962, pp. 133, 134; also see Friedman, M, *The Social Responsibility of Business Is to Increase Its Profits*, *New York Times Magazine* in Hoffman, W.M, and Frederick, R, eds. *Business Ethics: Readings and Cases in Corporate Morality*, 3d ed., McGraw-Hill, 1995, 138.

confidence-instilling approach. The underlying objective of this development should be to enhance the efficiency of tax collection, and that the approach is presumed to strengthen taxpayers' willingness to comply with the tax code (the will "to do the right thing").

- There are also indications that the Swedish tax administration also foresees a need to strengthen taxpayers' willingness to do more than just comply with the tax code – it is predominantly about a desire to influence attitudes toward introducing transactions that may yield a lower tax burden. A key question is whether the tax administration's change in operational practices allows the Swedish Tax Agency to influence attitudes on legal tax planning and to what extent there may be limitations concerning such operational practices. Good governance practices meet rigorous demands on procedural justice, and can be deemed to be of considerable significance in terms of taxpayers' trust in the administration. Under procedural justice, there are vital key factors such as objectivity, equal treatment, predictability and access to independent reviews of government agency decisions. Provided that the trust of taxpayers can be maintained, there should not be any decisive obstacles to the Swedish Tax Agency operating with new operational methods.
- As was initially pointed out, taxpayers must comply with the tax code. However, tax legislation only constitutes a minor element of the regulatory framework with which taxpayers must comply, and for corporations, there are a vast number of rules governing commercial law that have a bearing on business. For limited liability companies, the key commercial law regulation is the Swedish Companies Act (2005:551, ABL).
- According to the Swedish Companies Act, the responsibility for a limited liability company's organization and administration rests with its board of directors, which in turn enjoys a broad capacity for decision-making. However, this capacity is circumscribed by a number of restrictions, including the equality principle and the general clause, and by the rules governing the delegation of functions within the limited liability company, the objective of the company, the profit motive and governing value transfers. The last three in particular pose legal restrictions for the board's ability to make decisions on refraining from a legal option to achieve a lower tax burden.

1.2 What is CSR?

The first question that must be addressed in this report is how the term CSR is defined. After all, it is not an entirely obvious term and observers can add a variety of content to the term, or focus on different factors in the term.

The Confederation of Swedish Enterprise maintains that:

"There is increasing pressure on companies to respect human rights, fundamental labor law principles and basic environmental standards, regardless of where in the world they operate. It is said that companies bear a social responsibility, known as corporate social responsibility, CSR".²

² CSR – corporate social responsibility, Confederation of Swedish Enterprise (31/3 2016), www.svensktnaringsliv.se/fragor/csr

The organization CSR Sweden (a network comprising a number of Swedish companies), maintains:

"[...] that companies actively engage in the development of society. Proactive CSR efforts strengthen the company's relationships with its employees, customers and owners – as well as growth and profitability".³

The EU maintains that:

"Corporate social responsibility refers to companies voluntarily going beyond what the law requires to achieve social and environmental objectives during the course of their daily business activities".⁴

It can be noted that these statements are not entirely consistent with one another. Some research claims that CSR can be regarded as an ambiguous term and that it can be questioned for many reasons.⁵ At its core, the term involves companies taking on social responsibility. Most observers agree that it is not about complying with the laws and other binding legislation that can be deemed applicable for the company, but is instead a matter of something greater.

The Finnish professor Knuutinen (Åbo University) maintains that:

"The concept of CSR refers to the operations or actions of companies that are above or independent of the limits or minimum requirements set by legislation. Society expects companies to act in socially responsible ways. In other words, society sets expectations for businesses to reflect its ethical norms".⁶

Knuutinen further maintains that there are a number of common denominators in terms of various CSR definitions: the social responsibility that the company exercises must be *voluntary*, the commitments are *broad* and must encompass stakeholders beyond just the "traditional stakeholders", for example, the responsibility must include customers, suppliers and employees, the responsibility encompasses an *openness* and *transparency* regarding the company's activities and, finally, the responsibility must be exercised as part of its day-to-day operating activities and *permeate all of the companies actions*.⁷

Researchers Ulfvebrand and Dovers maintain that CSR is fundamentally based on the perception that the company is subject to a vast number of different and occasionally contradictory interests (economic, cultural, environmental, social) since the company both influences and is influenced by such interests.⁸ CSR means that, for its own sake, the company must be able to understand and manage these relationships.

³ See CSR Sweden's website *CSR Sweden*, (31/3 2016), www.csrsweden.se

⁴ *Corporate social responsibility (CSR)*, European Commission, (31 March 2016), <http://ec.europa.eu/social/main.jsp?catId=331&clangId=en>

⁵ Ulfvebrand, N, and Dovers, P "Corporate social responsibility: CSR as a cover for capitalist exploitation" in *Business economics and society* (Hasselblad and Holmqvist Eds, Studentlitteratur 2013) p. 234.

⁶ Knuutinen, R, *Corporate Social Responsibility, Taxation and Aggressive Tax Planning*, Nordic Tax Journal 2014:1 p. 38.

⁷ Knuutinen, R, *Corporate Social Responsibility, Taxation and Aggressive Tax Planning*, Nordic Tax Journal 2014:1. p. 38 f.

⁸ Ulfvebrand, N, and Dovers, P, *Corporate social responsibility: CSR as a cover for capitalist exploitation* in Hasselblad, H, and Holmqvist, M, (eds.), *Business economics and society*, Studentlitteratur, 2013, p. 234.

In our assessment, it is fundamentally a matter of the company as an organism surviving in a complex environment and being able to adapt to shifting demands and circumstances. Accordingly, in the long run, it is a matter of ensuring a company's ability to generate a profit.⁹ If CSR is important for the company's survival in the market, then the company must un sentimentally "deal with it". On the other hand – if the company is less dependent on social responsibility in a certain area for its survival, this may influence the company's actions in terms of CSR. It could also be argued that a company's ability to generate a profit is a necessary condition (*condicio sine qua non*) for the company to have the ability to take social responsibility. Knuutinen maintains that "it is clear that a company needs economic success in order to take care of any kind of responsibilities".¹⁰

Accordingly, CSR has a commercial connotation – CSR can be regarded as lacking a content-related link with ethics. This condition is probably also what makes the concept of CSR subject to criticism – it can become a matter of image or marketing – not of "moral fortitude" in a philosophical-ethical sense.¹¹ This may perhaps bother the idealist – on the other hand, it should be evident that a company, as an assembled organism, can hardly be regarded as possessing "morals" or even a "soul".¹²

Consequently, CSR as a concept is not a magic wand that means a company will voluntarily comply under various circumstances with more rigorous or higher standards than dictated by law. CSR is largely based on a cost/benefit analysis – what will the company earn in a particular case by complying with a higher CSR standard? A matter that also lacks any basis under the CSR concept as such is how the company, regarding different areas, should act. After all, CSR does not define which standard should be followed – CSR is not a legislative act per se. That standard must be sought elsewhere.

1.3 Is paying taxes encompassed by CSR?

Academics have advocated including the paying of taxes in CSR. We will mention two researchers here. The American professor Avi-Yonah adamantly maintains that companies bear a social responsibility that includes loyally paying taxes. He also argues in favor of companies refraining from business transactions whose sole objective is to minimize taxes.¹³ Corporate representatives who are advised on tax-minimizing transactions should "just say no" to such transactions. However, Avi-Yonah is uncertain of the effectiveness of the concept of CSR. He maintains that "the only real solution" is to change the attitude of corporate executives to transactions that are tax-driven.

Knuutinen's conclusion regarding CSR and paying taxes is more cautious. He maintains that "whether or not taxes belong to the CSR agenda has been somewhat ambiguous".¹⁴ According to him, this is mainly due to the fact that he interprets company law as clearly stipulating which stakeholders the company or the company's

⁹ Grankvist, P, *Corporate Social Responsibility in practice – How companies can work with sustainability to generate earnings*, Liber, 2009.

¹⁰ Knuutinen, R, *Corporate Social Responsibility, Taxation and Aggressive Tax Planning*, Nordic Tax Journal 2014:1. p. 71.

¹¹ Brytting and Westelius *Gärna förtroende men först ett rejält ansvar* [Trust as well, but first significant responsibility], *Organisation & Samhälle, Svensk Företagsekonomisk Tidskrift 1* [Organisation & Society, Swedish Business Economics Periodical] (2014) p. 30 ff.

¹² See also Norberg, P, *Good deeds and misdeeds – corporate ethics in the public discourse*, in Hasselblad, H, and Holmqvist, M, (ed.), *Business economics and society*, Studentlitteratur, 2013, p. 199 ff.

¹³ Avi-Yonah, R, *Just Say No: Corporate Taxation and CSR*, Public Law and Legal Theory Paper series no. 402 University of Michigan, 2014, p. 34. It can be noted that it is not clear that the conditions as in the US apply in Sweden, due to differences in company law, see chapter 5.

¹⁴ Knuutinen, R, *Corporate Social Responsibility, Taxation and Aggressive Tax Planning*, Nordic Tax Journal 2014:1 p. 71.

representatives have an economic responsibility to – and these stakeholders do not include the public as tax creditors. However, Knuutinen finds indications that CSR may encompass taxes “regardless of what companies themselves think about the fact”.¹⁵ He cites stakeholders’ expectations, public opinion, media monitoring and the actions of legislators.

In the public discourse, the director-general of the Swedish Tax Agency, Ingemar Hansson, has maintained that the Swedish Tax Agency wants to encourage companies and asset managers to include tax matters to a greater extent in their sustainability efforts – meaning that tax matters would become a part of their CSR.¹⁶ Hansson clearly states that the Swedish Tax Agency’s understanding is that taxation is to be based on the prevailing tax legislation, and yet he still indicates a concern that tax planning “may erode companies’ and the citizenry’s desire to do the right thing and thus impair the Swedish Tax Agency’s ability to fulfil its task as set forth by the government”. Hansson points out that it is a matter of contributing to “a society in which everyone wants to do the right thing”. The desire to do the right thing is the central tenet. According to Hansson, this desire is, in turn, influenced by social norms, perceptions of what is right, and perceptions of what other taxpayers are doing. Ingemar Hansson thus appears to be cautiously allowing for the possibility of the agency being able to influence the willingness to pay taxes, by addressing the substance of the social norms and that this might also be able to encompass attitudes to tax planning.

In summary, we can conclude that in the public discourse, paying taxes has become included in the term CSR.¹⁷ What exactly this is meant to entail is less clear.

¹⁵ Knuutinen *ibid* p. 71.

¹⁶ Hansson, I, Op-Ed: Taxes are a matter for the board of directors, *Dagens Industri* Sept 15, 2015.

¹⁷ The fact that taxes *per se* fall within the realm of CSR also appears not to be questioned by the voices that have treated the implications of this as a problem; see e.g. Nilsson “Tax and sustainability”, *Svensk Skattetidning* (Swedish Tax Journal) 2015 pp. 711 ff.

2 The constitutional mandate that taxation requires legal grounds – a background exploration

We can conclude that the term CSR, as relates to taxation, can be regarded as meaning that a company bears a social responsibility that may end up going beyond the stipulations of the tax code. Could a company have a responsibility to refrain from a legal option that yields a lower tax burden? This may, for example, involve refraining from legal, advanced tax planning.¹⁸ Fundamentally, this is a matter of the existence and normative significance of social norms or social values: “moral beliefs”. What could be considered the right thing to do? Could doing more than what is required by law be considered the right thing to do?

It can be noted that the Swedish Constitution states that taxation requires legal grounds; refer to chapter 8, section 3 of the 1974 Instrument of Government. Taxes belong to the area of law in which legislation is mandatory. Another way of expressing this is that the *legality principle* applies to the area of taxation. Naturally, this specifically means that the public (the Swedish Tax Agency) cannot collect more tax than that which is dictated by law, yet it also means that the tax prescribed by law is also to be collected.¹⁹ As such, there is a duty for citizens, based on the circumstances in each particular case, to pay a certain amount of tax – yet there is also a protection against paying more than is mandated by law. In conclusion, the latter protection is generally included in the term *legal certainty*.

Based on the objective of this report, there is reason to provide a brief and elementary background on the inclusion of taxation regulations in the Swedish legal system. The inclusion of taxation regulations in the Swedish legal system is not a coincidence, and their inclusion can be presumed to indicate certain fundamental social values and thus serve as an expression of the fundamental social attitudes to the authority to tax.

There are a number of very powerful and well-known arguments in favor of taxation being governed by law. These arguments deal with the core of what could be described as the citizenry’s acceptance of taxation and of the fundamental legitimacy of tax regulations as part of society.

The first argument is the *democracy and the will of the people* argument – the publicly elected assembly must be the one enacting laws. All other public entities (government agencies and courts) must simply respect the law. Traditionally, constitutional legal protection is regarded as encompassing the notion of the hierarchical structure of the law – no body under a publicly elected assembly has the right, without specific legal grounds, to expand the meaning of the law. It would undermine the notion of a government by the people if a body whose officials are not politically replaceable were to have the authority to expand the areas of application of laws. Accordingly, the Swedish Tax Agency’s mandate to expand the meaning of tax laws is sharply curtailed. The aim of the Swedish Tax Agency’s important and often popular infor-

¹⁸ In this context, legal tax planning is defined as a transaction (or a structure) whose implementation reduces a tax burden and that, based on the formulation of the tax regulations as initially or ultimately understood by the agents of the legal system, achieve said tax-reducing effects.

¹⁹ Pålsson calls the obligation to pay taxes the “other side” of the principle of legality, “*The Recommendations of the Swedish Tax Agency – general recommendations and other statements on taxes*” Iustus 1995 p. 136.

mation-disseminating activities includes ensuring equal treatment – yet the tax courts are tasked with reviewing and, where appropriate, rejecting or complementing the legal content found in e.g. public legal recommendations/guidelines. A matter for discussion is whether it wouldn't be more effect to delegate more authority to the Swedish Tax Agency and allow it to have some form of binding interpretative prerogative (refer to the US doctrine on “deference” for comparison) – however, no such proposal has ever even been put forth in Sweden.²⁰ In terms of drafting its general legal positions, the Swedish Tax Agency has clearly stated that these must be able to be retried by a court using the interpretation principles employed by courts.²¹

The other argument deals with the citizenry's demands for (at least in terms of anything that can be perceived as negative) not being treated worse than anyone else – consequently there are strong demands for equal treatment. It seems obvious that equal treatment presupposes a legal standard (a legal provision) that meets some form of clarity – or at least by way of the standard's positioning in the legal system can become clear and thus enable subsequent equal treatment. Within the framework of the legality principle's demands on clear legal provisions, the surrounding legal system is also of vast significance for legal certainty. The tax law system is actually a highly refined system in which the independent courts play a major role in producing legal clarity – the Supreme Administrative Court's (SAC) task is to produce precedents that are to increase the clarity of legal standards and ensure the equal treatment of taxpayers. A unique phenomenon is also found in the tax law system – advance rulings that are issued by the Council for Advance Tax Rulings and that can be retried by the SAC. It can, for instance, be mentioned that the vast majority of leading precedents from the SAC concerning the application of the Swedish Tax Evasion Act comprise appeals of advance rulings. Consequently, without the SAC's precedent-creating activities legal certainty would have been far weaker in the area of taxes.²² International commitments add further complexity to the matter. The EU court in Luxembourg and the Human Rights Court in Strasbourg possess the legal capacity to retry Swedish tax law within certain boundaries.

The third argument deals with *ensuring the absence of arbitrariness and ensuring objective treatment*. Arbitrariness and a lack of objectivity undermine the citizenry's faith in the administration and the presence of this may spawn corruption. Ensuring the aforementioned requires legal standards that embody a certain level of clarity that enables the decision-maker to make the decision without the decision having to involve their private, subjective perceptions.

The fourth argument deals with *dispute resolution and independent reviews of the administration*. The legal system possesses an advanced apparatus in the form of independent courts to allow individuals the ability to be able retry decisions that government agencies have made. The courts have been given a mandate, using interpretation doctrines developed within the legal system, to interpret and apply legislation to the individual case. In the interest of faith in the functions of society, it is likely of the utmost importance that a citizen can have their matter tried by an objective and independent body.

²⁰ See SCOTUS *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Doctrines on deference must naturally be viewed in light of the US system of government.

²¹ See e.g. Leif Krafft's statement that efforts to draft command signals must be based on the courts' approach to solving legal matters, Krafft, L, Expert groups and command signals, SvSkT 2005:1 p. 63.

²² In drafting legislation, the advance ruling proceedings have even be cited as a foundation for maintaining legal certainty in terms of the Tax Evasion Act, see Persson Österman, R, *Advance rulings on tax matters*, Iustus, 2013, p. 66.

A weakness regarding reviews of administrative decisions is that reviews are generally limited to an individual protesting a negative decision. This means that an individual able to enjoy a benefit that others are not able to enjoy is hardly likely to protest. The fact that unmotivated advantages do not arise for individuals is first and foremost limited by the fact that the rules that are applied are so clear that deviations generally do not occur. Secondly, *transparency* is presumed to be an important motivating factor. Transparency is generally not presumed to be a component of the legality principle, yet it will have to be presumed to be assigned a high value in a society governed by law.

Accordingly, one can conclude that there are strong arguments in favor of taxation being based on law, and that the legality principle is to apply to taxes. The democratic requirement, the requirement for equal treatment, the requirement for objectivity and the absence of arbitrariness, as well as the requirement for independent judicial reviews can hardly be met without the existence of a legality principle. This may seem apparent, yet it is nonetheless worth highlighting. After all, it is not a matter of a meaningless abstraction. In summary, the legality principle can be described in concrete functional terms – it serves a key function in safeguarding a number of highly fundamental requirements that will have to be regarded as deeply rooted in social values.

In other words, CSR deals with the fact that a company may be subjected to requirements greater than those dictated by formal legislation. A clear and indisputable weakness in this train of thought is that what can be regarded as constituting good social responsibility generally isn't established in a formalized manner within the framework of a democratic system. It may be difficult to establish what can be perceived as being socially responsible for a company. It is a matter of social values; "morals". In terms of social values or what constitutes good morals, there can be many different and probably contradictory perceptions (*de gustibus non est disputandum*). There are no generally formalized systems for interpreting and applying norms for good behavior. There are evident risks that a company could be treated differently and that there may be cases of arbitrariness. Also missing is a generally established system that offers independent dispute resolution or review.

It can be noted that within certain areas of social responsibility or areas of "sustainability", organizations have come to take on a role as "quasi-legislators" and norm-setters in order to solve some of the problems facing CSR. Well-known examples of this include the "Swan" label, the "KRAV" label, "UTZ" certification, the "Fairtrade" label, and so forth. This is essentially exclusively a matter of companies voluntarily subjecting themselves to private norm-setting, without the involvement of public bodies or government agencies.

A very interesting question in this context is what mandate public bodies have in terms of setting social norms. A jurist faced with the question of whether the power of society should be exercised through the setting of social norms would probably adopt a highly skeptical position. Within the paradigm of legal sciences, it should essentially be evident that the governance of society and society's intervening norms should be expressed in the form of legal provisions. In a more collective, "holistic" paradigm, the jurist would, however, naturally acknowledge that social norms can be just as powerful as legal norms, and that in all likelihood, the citizenry doesn't always reflect on why they act in a certain way. Naturally, working with moral teachings isn't foreign to jurists either – on the contrary, jurists can often perceive formal rules and regulations as giving expression to powerful social norms (e.g. rules of law concerning human rights). Another example is naturally the notion that tax laws entail

an obligation to pay certain taxes (the “other side” of the legality principle) – the obligation of the rule naturally expresses a social value that the tax burden is to be distributed among the citizenry based on a predetermined regulatory system.

Accordingly, there are also solid grounds within the legal paradigm for acknowledging the significance of social norms on the citizenry’s course of action, and predominantly for acknowledging that legal norms can become more effective by increasing and harnessing the understanding of the setting of social norms. In terms of CSR and taxes, gaining a better understanding of the attitudes that can be presumed to govern the behavior of taxpayers is naturally of considerable interest. In the next section, we will present social-science research that takes aim at the behavior of taxpayers. What factors explain the behavior of taxpayers? Is there such a thing as “tax morale”, and if so, can it be influenced, and if so, what methods could be effective in an administrative context?

3 Tax morale

3.1 Why are taxes paid – the significance of “tax morale”?

A hypothesis that many jurists probably hold is that the actual paying of taxes, as dictated by tax laws, is predominantly a product of the existence of strict sanctions and the fact that there are reviews or other systems in place to detect inadequate regulatory compliance. The Swedish Tax Procedure Act (SFL) imposes very strict requirements on taxpayers to submit all of the information required by the Swedish Tax Agency “to be able to make proper decisions” (chap. 31, par. 3 SFL). Those who fail to submit all of this information are routinely subjected to tax surcharges (chap. 49, SFL). Tax surcharges are a harsh sanction that under European law are regarded as a penal sanction.²³ Penalties are the ultimate consequence of improper behavior. In the words of Karl Olivecrona, a Swedish lawyer, it is a matter of the taxpayer internalizing a norm due to fear: namely the obligation to pay tax.²⁴ It is a matter of compulsion and power.

Neoclassical macroeconomic research has seemingly affirmed this intuitive thesis. An often cited, by now classic study by Allingham and Sandmo is entitled *Income Tax Evasion: A Theoretical Analysis* from 1972.²⁵ The so-called AS model demonstrates (in a simplified way) that the paying of taxes is a function of sanctions and the risk of getting caught. In later studies, Sandmo has upheld his position.²⁶

The degree to which the AS model holds true bears evident consequences for CSR. CSR involves adhering to a setting of norms other than legal ones, and it involves voluntarily adhering to the setting of “moral” norms. It seems intuitive that the relevance of CSR in taxation would be limited if the decision to comply with tax rules predominantly involved assessing the risk of sanctions in the form of tax surcharges or other punitive sanctions being imposed. The legal force is exercised strictly on the basis of the legal rules’ area of application. Based on the model’s prediction on taxpayer behavior, legal advanced tax planning that reduces a company’s tax burden will probably be implemented. The company says “yes”. Provided that the contemplated tax planning cannot be regarded as having any other effects on the company’s ability to generate a profit, it does not matter for the company that society’s tax revenues are declining.

The story doesn’t end here, however. Other respected social-science research (predominantly what can be termed behavioral science) has demonstrated and argued that the “AS model” is marred by shortcomings: namely that the model forecasts a substantially higher degree of tax evasion than what actually appears to be occurring. This research is regarded as showing that taxpayers don’t act in the economically rational way predicted by the AS model. Taxpayers simply pay more tax than the model predicts. Torgler calls this phenomenon “the puzzle of tax compliance”.²⁷

²³ See e.g. the EU Court’s judgment in case C-617/10 Åkerberg Fransson.

²⁴ For Olivecrona’s assessment, see the comprehensive study by Spaak in Spaak, T, *A Critical Appraisal of Karl Olivecrona’s Legal Philosophy*, Springer International Publishing, 2014.

²⁵ Allingham, M, and Sandmo, A, *Income Tax Evasion: A Theoretical Analysis*, *Journal of Public Economics* 1972:1, p. 323–338.

²⁶ Sandmo, A, *The theory of tax evasion: a retrospective view*, *National Tax Journal* 2005:58, pp. 643–63.

²⁷ Torgler, B, *Introduction to the Special Issue on Tax Compliance and Tax Policy*, *Economic Analysis & Policy*, 2008, vol. 38 no. 1 p. 32.

There may thus be other motives than a strictly economically rational approach governing taxpayers: the term “tax morale” has come into use as a collective way of describing the foundation for these motives. Taxpayers may “voluntarily” tend to comply with what is termed a *social norm* instead of a *legal norm*.²⁸ Accordingly, the message is that taxpayers to a greater extent pay more tax than predicted by the AS model, and that social values and attitudes in the taxpayer’s everyday environment and community context are of considerable significance. The social-science research that argues in favor of it being a matter of social attitudes rather than economic rationality is particularly extensive.²⁹

Ultimately, this implies that the ability to influence taxpayers’ attitudes may be relatively substantial and that there may well be room to work with CSR or other morale-shaping discourses with the aim of influencing taxpayer attitudes, beyond the use of force and threats of sanction. It will not be a matter of “if” but rather of “how”.

However, according to the research, what does influence tax morale is a highly complex matter – it involves a vast number of elusive factors. It involves the composition of the population group, in terms of age, gender, education, political views, political culture and attitudes to what society spends tax dollars on. The complexity of the tax system is also an influencing factor – complicated rules have a negative effect. Corruption, faith in government agencies, faith in officials at said agencies and faith in the legal system in general are also key factors. Knowledge of an agency’s actions spread quickly among taxpayers. Taxpayers are influenced to a considerable extent by how they perceive the actions of others: thus making it a matter of “herd mentality”. If others are perceived as cheating or engaging in tax planning and “getting away with it”, then the individual’s inclination to follow suit increases. If numerous companies use “transfer pricing manipulation”, this significantly increases the likelihood of more companies opting for such structures. Tax planning spreads. A taxpayer is rarely inclined to pay more taxes than anyone else if the other party is perceived as being in a similar situation. On the other hand, we can be inclined to pay taxes as long as “everyone else” does. The effect at the individual level isn’t necessarily affected by reality, but is rather a matter of the prevailing perceptions: paradoxically, this may entail that actions that are taken due to extensive fraud in an industry end up deteriorating tax morale if the public is made aware of said actions (by spreading an impression of the existence of extensive tax fraud).³⁰

²⁸ A social norm can be defined as: “rules and standards that are understood by members of a group, and that guide and/or constrain social behavior without the force of law”, Bobek, D, Roberts, R, and Sweeney, J, *The Social Norms of Tax Compliance: Evidence from Australia, Singapore, and the United States*, Journal of Business Ethics, 2007:74 p. 49 ff.

²⁹ See e.g. Alm, J, *Tax Compliance and Administration i Handbook on Taxation*, ed. Hildreth, B and Richardson, J, Marcel Dekker, 1999, pp. 741 ff; Posner, E, *Law and Social Norms: The Case of Tax Compliance*, Virginia Law Review, 2000, 86:8, pp. 1784; Lago-Peñas, I, and Lago-Peñas, S, *The determinants of tax morale in comparative perspective: Evidence from European countries*, European Journal of Political Economy 26, 2010, pp. 443 ff; Sheffrin, S, and Triest, R, *Can Brute Deterrence Backfire? Perceptions and Attitudes in Taxpayer Compliance*, i *Why People Pay Taxes*, ed. Slemrod, J, Ann Arbor, University of Michigan Press, 1992, pp. 136–159; Scholz, J, and Pinney, N, *Duty, Fear, and Tax Compliance: The Heuristic Basis of Citizenship Behavior*, American Journal of Political Science, 1995, 39:2, pp. 490–512; Trivedi, V, Shehata, M, and Trivedi, B, *Impact of Personal and Situational Factors on Taxpayer Compliance*, Journal of Business Ethics, 2003, pp. 175–197; Frey, B, and Torgler, B, *Tax Morale and Conditional Cooperation*, Journal of Comparative Economics, 2007, p. 35; Ruii, G and Lisi, G, *Tax Morale, Slippery-Slope Framework and Tax Compliance: A Cross-section Analysis*, Dipartimento di Scienze Economiche, Università di Cassino, 5/2011; Prinz, A, Muehlbacher, S, and Kirchler, E, *The slippery slope framework on tax compliance: An attempt to formalization*, Journal of Economic Psychology, 2014:40, pp. 20–34. A recently published Swedish doctoral dissertation in jurisprudence that presents and utilizes research findings in the area by Hambre, *Tax Confidentiality A Comparative Study and Impact Assessment of Global Interest*, Örebro Studies in law 6, 2015. For an inventory of the research landscape, also see the European Commission’s *Taxation papers – working paper no 41 “Behavioral Economics and Taxation” (2014)*

³⁰ It should be noted that there are methodological issues concerning the studies on the significance of social norms as a cause of paying taxes – the studies are based on empirical evidence, yet may also include laboratory experiments, surveys and similar research methods that may have faulty sources. Our background in jurisprudence prevents us from scientifically being able to assess other social-science research. However, it would be unusual if we were unable to use such research in our own work.

The summary conclusion of the social-science research that argues against the AS model is that paying taxes is not influenced all that much by the risk of getting caught or legal sanctions. It is a matter of the social norms held by the individual taxpayer – which in turn indicate that the actual implications of legal tax norms play a smaller role in the paying of taxes than what one would intuitively believe.

The significance of social norms in this behavior leads to the insight that individuals can come to act in unexpected ways. One phenomenon is termed “over-compliance” in this literature, or “extra-role behavior”.³¹ The fact that “over-compliance” can occur is of course not unusual given the research observation that individuals appear to voluntarily comply with norms without reflecting on the underlying legal requirement. If you are voluntarily engaging in an action, you can clearly also voluntarily refrain from an action that could reduce the tax burden or abstain from reporting such a tax-reducing action to the tax authorities. The individual who voluntarily complies with tax laws has no reason to thoroughly contemplate the strict boundary between what is legally possible and what isn’t legally possible, in terms of e.g. tax-reducing transactions. Thus, CSR constitutes a form of “over-compliance”.

However, the discussion within social-science research is by no means over. A recent study attempting to address the problem of the AS model’s noted shortcomings was conducted by Kleven, Knudsen, Thustrup Kreiner, Soren Pedersen and Saez and was entitled *Unwilling or Unable to Cheat? Evidence from a Tax Audit Experiment in Denmark*.³² The conclusion reached by the authors deserves to be cited at length:

“While we do not deny the importance of psychological and cultural aspects in the decision to evade taxes, the evidence presented in this paper points to a more classic information story. In particular, we show that the key distinction in the taxpayer’s reporting decision is whether income is subject to third-party reporting or if it is solely self-reported.

For self-reported income, our empirical results fit remarkably well with the basic AS model: tax evasion is substantial and responds negatively to an increase in the perceived probability of detection coming from either a prior audit or a threat-of-audit letter. Interestingly, evidence from bunching at kink points shows that the elasticity of tax evasion with respect to the marginal tax rate is very low, which suggests that rigorous tax enforcement is a much more effective tool to combat evasion than cutting marginal tax rates.

For third-party reported income, tax evasion is extremely modest and does not respond to the perceived probability of detection, because this probability is already very high. This shows that third-party reporting is a very effective enforcement device. Given that audits are very costly and eliminate only a part of tax evasion, enforcement resources may be better spent on expanding third party reporting than on audits of self-reported income.”

The fact that economic conditions can play a pivotal has also been found in behavioral studies in other regulatory areas. An interesting observation can be found in an American study analyzing environmental regulations. The study covered environmental compliance in the trucking industry in California. The study showed that social pressures

³¹ See e.g. Tyler, T, *Why people cooperate – The Role of Social Motivations*, Princeton University Press, 2011, p. 23.

³² Jacobsen Kleven, H, Knudsen, M, Pedersen, S, and Saez E and Thustrup Kreiner, C, *Unwilling or unable to cheat? Evidence from a tax audit experiment in Denmark*, *Econometrica*, 2011:3, vol. 79, pp. 651 – 692. It may be of some interest to know that the structure of the Danish business community has a certain emphasis on small and mid-sized companies.

and social norms played a minimal role in terms of smaller companies operating in highly competitive market. Instead, it was question of strictly economic considerations.³³ The results of the study can cautiously be presumed to also have bearing in terms of paying taxes – circumstances may cause strictly economic considerations to play a decisive role in taxpaying behavior. The results may also indicate the significance that factors like the size of the company have on behavior.

Finally, it should be stressed that a substantial share of the research on the significance of values in determining taxpayer behavior focuses on individuals. This is natural, since the individual is the social animal that is in focus when addressing the significance of values and the relevance of social context. The question that takes center stage in this report is how these observations should be understood in relation to businesses and limited liability companies. A legal phenomenon like a limited liability company does not have a soul. However, this does not necessarily mean that the legal persons are independent of social context, since it isn't the legal person's soul that is involved in the decisions that the legal person is taking, but rather the company's executives who are taking the decision. These executives are humans and thus social animals.

Social pressures and social norms can be presumed to affect influential owners, corporate executives and key employees when reaching the decisions that are taken in the name of the company.³⁴ In a study from 2012, Alm and McClellan contend that companies have a tax morale: "A main lesson of our work is that tax morale considerations apply to both individuals and firms".³⁵

One assumption, which holds that a company's actions cannot solely be assessed on the basis of economic rationality, has been tested and found to be accurate by a number of observers. Meanwhile, it should be highly likely that corporate executives are bound by various types of restrictions – when making decisions, it is unlikely that they can follow their private moral convictions, but should instead be bound by various legal and social contracts (company law and labor law regulations, loyalty clauses to the owners, and so forth). A reasonable assumption is that factors such as the size of the company and whether or not it is listed are of considerable significance.³⁶

The ethical standards of advisors may also be of significance in a company's decisions. Regarding measures to minimize taxes, under "Measures which bear uncertainty concerning the law" in items 2.5 and 2.6 of the Swedish divisions of FARS's ethics recommendations EtikR Tax Services, it is stated that an advisor can recommend such measures if the advisor concludes that it is more probable than not that such measures will yield a "lawful" tax outcome.³⁷ Accordingly, FAR's ethics rules accept legal tax planning.³⁸

³³ Thornton, D, Kagan, R, and Gunningham, N, *When Social Norms and Pressures Are Not Enough: Environmental Performance in the Trucking Industry*, Law & Society Review, 2009, p. 431.

³⁴ Thornton, D, Kagan, R, and Gunningham, N, *When Social Norms and Pressures Are Not Enough: Environmental Performance in the Trucking Industry*, Law & Society Review, 2009, p. 407 f.

³⁵ Alm, J, and McClellan, C, *Tax Morale and Tax Compliance from the Firm's Perspective*, *Kyklos*, 2012, 65:1, p. 1–17.

³⁶ The topic of how the large business sector behaves in terms of legal tax planning has not been subject to very many economic studies; see the European Commission's Taxation papers – working paper no 41 "Behavioral Economics and Taxation" (2014) p. 31.

³⁷ Version December 2015.

³⁸ Of some interest in this context is the fact that the Swedish Tax Agency has a partnership agreement with FAR, which, among other things, is presumed to be based on FAR conducting quality assurance, see www.skatteverket.se/omoss/press/pressmeddelanden/fragorochsvaromsamarbetetmellanskatteverketochfarsrf.4.2b543913a42158acf80004732.html

A number of highly interesting surveys conducted at the Oxford University Centre for Business Taxation (OUCBT) in the UK focus on topics including the attitudes held by tax officers in major British companies.³⁹

In brief and simplified terms, the following was concluded by the first of these studies:⁴⁰ Most executives believed that openness and transparency concerning tax policy could be motivated. However, many emphasized that tax planning must be regarded as constituting a right and that decisions concerning tax planning must be taken pursuant to a strict “cost/benefit” analysis. Several executives held that they could often question the tax authority’s interpretation of the meaning of the prevailing tax law concerning tax planning and that they reserved the right to be able to observe their own legal interpretation. The boards of most major companies maintain a tax policy. However, these were most often of a general and vague nature. It was stated that a consequence of tax-planning decisions being elevated to board-level work could be that such tax planning would be launched due to proposals from external board members with knowledge of the tax planning practices of other companies. No executives believed that the company should pay more tax than was legally required. However, they realized that there are circumstances in which achieving the greatest possible shareholder value over time may require taking into account the perceptions of stakeholders rather than the owners. The executives believed that tax matters in general were of limited value to shareholders (of publicly listed companies) or analysts. However, what is termed “reputational risk” was outlined as being a reality that should be taken into consideration when it comes to tax planning as well. However, the determining factor was whether a bad reputation in terms of tax planning could lead to lower sales or otherwise yield a lower profit. Most felt that any such causal correlation was missing. However, companies in certain markets and companies with public contracts could clearly see such a correlation.

In summary, the OUCBT study indicates that tax matters in the corporate sector are primarily determined on the basis of an economic perspective, and that social values play a minor or non-existent role. There is reason to believe that the attitudes identified by the study can probably be found among executives in the largest Swedish companies. The largest Swedish companies often operate in the international market and executives in these major Swedish companies can, in a cultural sense, be regarded as belonging to an international group with overlapping attitudes.⁴¹

In conclusion, the following can be said: The most important lesson the social-science research provides should be that the willingness to pay taxes is a function of complicated processes and that there is no single explanation as to why an individual or a company chooses to pay their taxes. While social norms are significant, there is reasonable reason to assume that economic considerations play a major role and that the force that the legal rules express are of considerable significance. A key insight is also that research findings concerning taxpayer behavior can be difficult to transfer directly to the corporate sector. The reason for this is that, while corporate executives can be governed by values and by attitudes, their ability to make decisions can be limited by a substantial number of restrictions. They are, in a manner of speaking, not

³⁹ Vella, J, Freedman J, and Loomer, G, *Corporate Tax Risk and Tax Avoidance: New Approaches*, British Tax Review, 2009:74, and the subsequent Freedman, J, Ng, F, and Vella, J, *HMRC’s relationship with business*, draft report OUCBT, 19 June 2014.

⁴⁰ The second survey, which is admittedly of considerable interest, focuses on the British companies’ understanding about the tax agency’s cooperation with the large business sector.

⁴¹ As an example, Astra Zeneca’s tax head of tax has participated in the survey efforts conducted by the OUCBT. Brimicombe is naturally influential in the Swedish arm of Astra Zeneca, which belongs to the Swedish Tax Agency’s so-called large business sector.

as “free” regarding the decision to pay taxes as is the individual. This observation naturally also implies that publicly listed companies can hold a logic that is independent of the one held by owner-managed businesses.

3.2 How can tax morale be influenced?

Social-science research shows that tax morale is a complex phenomenon, yet one that can also be of significance in the willingness to pay taxes. In this report, the focus is on the function of public bodies, not on the media or the significance of public opinion. Accordingly, apart from maintaining a system that controls and sanctions taxpayer behavior (and thus influences tax morale), there may be room for an administrative operational approach that involves influencing social values with the aim of achieving a greater voluntary “non-economic” desire to pay taxes. Such an approach could also be regarded as having the advantage of being able to influence taxpayer attitudes to legal tax planning or to using what are termed “tax schemes”.

The term “tax schemes” is hardly accurate. In *Skattenytt*, a Swedish periodical on tax law, Director General of the Swedish Tax Agency, Ingemar Hansson, stated that “a tax scheme is a measure that lies in a grey zone, meaning a measure whose compatibility with tax law is unclear and will ultimately be determined by the Supreme Administrative Court”.⁴² Hence, it can be presumed to be a matter of a company concluding that the tax laws provide a legal tax planning opportunity, yet that the company may perceive the presence of what is known as a procedural risk. An alternative is for the company to submit an application for an advance ruling to the Council for Advance Tax Rulings. Another alternative is to launch the tax planning process and, using what is known as an “open petition”, present the matter for trial by the Swedish Tax Agency.

It is hardly a controversial fact that the public domain (the state and its bodies) has a negative view of loopholes being used or tax schemes being launched.⁴³ The government states e.g. in its 2016 Budget Proposal that “aggressive tax planning” must be counteracted since such actions may undermine tax morale.⁴⁴

Tax morale is, as demonstrated above, a complex phenomenon. Numerous factors should be beyond the control of an administrative authority (e.g. the prevailing understanding of a society’s use of funds). However, we can conclude that research also demonstrates that the administrative operational approaches and decision-making processes may be of considerable significance in the behavior among the administrative authorities’ addressees. The interesting question then naturally becomes what concrete measures (beyond reviews) the government’s authorities could imagine launching to influence tax morale in such a way as to increase the voluntary willingness to pay taxes.

From the perspective of this framing of the question, the public international research known as regulatory research becomes highly significant. The research emphasizes the importance of the authority’s approach and the authority’s way of approaching each individual/company. According to this view, the authority should be proactive and try to include the individual in the processes. This is presumed to influence the individual’s desire to comply with the established regulations – meaning what can be termed voluntary regulatory compliance.

⁴² Alm, A, Melbi, I, and Persson Österman, R, A new meeting with the head of the Swedish Tax Agency, Director-General Ingemar Hansson, SN 2012 p. 754.

⁴³ According to the Swedish Tax Agency’s operational plan 2015–2017 p. 15, tax schemes are to be counteracted.

⁴⁴ Bill 2015/16:1 *Budget bill for 2016*, Expenditure area 3 p. 20.

The regulatory research came about (as seen in the description) within regulated sectors like environmentally hazardous operations, healthcare and financial (banking) operations.⁴⁵ However, the findings of the research have come to be regarded as having a reach beyond these markets – e.g. the area of taxation.⁴⁶

A model for administrative decision-making that has gained a great deal of attention is the model on responsive regulation. It is a model for administrative operational approaches and for administrative decision-making processes that was designed by professor Braithwaite.⁴⁷ The model calls for the use of a highly sophisticated system for public management. According to professor Gunningham, the model can be described as an effective compromise between the two extreme positions in terms of getting individuals to comply with regulations: A) force, or B) compliance based on voluntary action.⁴⁸ The model is based on the key underlying assumption that individuals and companies hold different attitudes toward regulations. As described above, this presumption is backed by research conducted on taxpayer behavior, for example. The model is also based on the fact that actions of a governing nature and the imposition of sanctions are to be taken in a measured, incremental succession (the so-called “pyramid” or “steps”).

Braithwaite has formulated nine principles for his model. In summary, these principles can be said to entail the following:

First and foremost, it is a matter of trying to get the operators (companies) subject to the regulations to voluntarily comply with the regulations in question. Values and attitudes are to be transferred from the authority to the company, and the company is to be included in the efforts related to its own regulatory compliance. Backed by the authority, the company is to build up internal structures to manage said compliance. This initial phase is hallmarked by collaboration. The authority is to listen to the company and maintain a dialogue that includes an understanding for the company’s situation and issues. The companies that willingly collaborate with the authority are to be supported and encouraged. The companies that are skeptical to collaboration are not to be treated worse because of this skepticism. Their skepticism is to be taken in earnest, and their motives are to be seen as an opportunity for the authority to further improve regulations/governance. Without being threatening, the authority is also to clarify that there will (naturally) be a host of sanctions that can be employed on an escalating scale if need be. Finally, there must be the option of deciding upon highly strict sanctions. However, in principle the most stringent sanctions should never be taken as the first course of action.

Accordingly, the model largely involves engaging in close cooperation with the operators in various way to ensure that these operators take strong, independent responsibility for their regulatory compliance. The operators must be stimulated to independently want to “do the right thing” and the point is not to, first and foremost, involve the use force or to play on the fear of sanctions in the event of improper behavior.⁴⁹ It is, however, a matter of combining “carrots” and “sticks”, with the carrots always being assigned priority. It could be argued that the model can be regarded as being based on a delib

⁴⁵ Baldwin, R, Cave, M, and Lodge, M, *Introduction: Regulation – the Field and the Developing Agenda*, The Oxford Handbook of Regulation, OUP 2010 p. 3 ff.

⁴⁶ Freedman, J, *Responsive Regulation, Risk, and Rules: Applying the Theory to Tax Practice*, U.B.C. Law Rev. 2011:44 p. 627.

⁴⁷ Braithwaite, J, *The essence of responsive regulation*, UBC Law Rev. 2011:44 p. 476.

⁴⁸ Gunningham, N, *Enforcement and Compliance Strategies*, The Oxford Handbook of Regulation 2010 p. 125 ff.

⁴⁹ Power, M, *The Audit Society*, Oxford Univ. Press, 1999, p. 144.

erate and strategic “difference in treatment” – the model is based on the fact that individuals and companies are different, and that different measures may need to be employed at different junctures.

Professor Freedman believes that the model has been highly significant for “methods of tax administration”.⁵⁰ She is also essentially positively disposed to the model’s applicability in the area of tax administration.⁵¹

However, Freedman emphasizes that its application within taxation should be based on “the rule of law”, which, in this context, she defines as requiring public governance with the use of known legal rules and that the laws applied must meet certain requirements on clarity.⁵² She acknowledges that tax law isn’t always entirely straightforward, yet that it must at least be “ascertainable within an equitable system”.⁵³ The latter must be understood as her regarding the need for a system with independent bodies that can review the authority’s decisions through the interpretation and application of the law and thus set precedents (meaning courts). Grey zones will be fleshed out by the courts (unless legislators take action).

Freedman must be regarded as being clear in that it is the methods designed by a society governed by rule of law that are to be used in terms of actually discerning what the tax norms actually entail. This plays a significant role in e.g. determining who will decide how the legal rules are to be interpreted. Freedman advocates a traditional view that the courts are ultimately in charge of deciding on interpretation doctrines. It is not uninteresting that proposals have been put forth positing that it is the values of the legal operators that are to change – meaning that advisors’, legislators’ and judges’ values on how the law should be interpreted should be changed.⁵⁴ These are controversial thoughts that many legal scholars should distance themselves from. Naturally, critical debates should be held on interpretation doctrines, yet the overwhelming majority of legal scholars should adopt the view that interpretation doctrines are an indistinguishable element of law as such. Legal interpretation doctrines are a product of hundreds, and sometimes thousands, of years of jurisprudential dynamics and not something that can easily be changed.

In its efforts to improve tax administration, the OECD (which can be said to represent legislators) has said that tax authorities must not be allowed to create a form of “soft law” that supersedes or replaces the laws adopted by the legislative assembly, or that supersedes or replaces the case laws that are designed by the courts.⁵⁵

The contradictory relation between legislators and law enforcing courts is not to be exaggerated. In Sweden, jurists who work with legislation generally possess judicial training and thus have a clear understanding of how interpretations are made. The judges of the supreme administrative court are largely former officials in charge of legislating, which is why legislators and the judiciary can be said to live in a legal symbiosis.

⁵⁰ Freedman, J, *Responsive Regulation, Risk, and Rules: Applying the Theory to Tax Practice*, U.B.C. Law Rev. 2011:44 p. 627.

⁵¹ Freedman, J, *Responsive Regulation, Risk, and Rules: Applying the Theory to Tax Practice*, U.B.C. Law Rev. 2011:44 p. 627.

⁵² Freedman, *ibid* p. 629.

⁵³ Freedman *ibid* p. 630.

⁵⁴ Braithwaite, V, *Defiance in Taxation and Governance*, Edward Elgar, 2009 p. 91 ff.

⁵⁵ *Co-Operative Compliance: A framework – from enhanced relationship to co-operative compliance*, OECD 2013, p. 49.

A clearly inherent problem with responsive regulation based on a jurisprudence perspective is that it can be seen as being in something of a tense position in relation to the key legal principle of equal treatment. Above, it is argued that equal treatment is a key component of the legality principle, and that it can ultimately be derived from the citizenry's social values. It is a matter of basic functional requirements on the regulatory framework in order to secure the legitimacy of governance. From a jurisprudence perspective, it must be regarded as uncontroversial that the model, which ultimately aims to create a more effective administration, must maintain legal ideals and is thus subject to certain limitations concerning its application.

Another powerful doctrine that has gained considerable attention in both jurisprudential and regulatory contexts is the doctrine of procedural justice as an explanatory model for regulatory compliance. Tyler is the author of this doctrine. His most famous study in the area is *Why people obey the law*.⁵⁶ A later sequel to the study is the book *Why people cooperate – The Role of Social Motivations*.⁵⁷ Tyler believes that the individual's motivation for complying with legal rules and decisions based on legal rules is based on the existence of social relations and the ethical positions taken by the individual. This motivation is not primarily based on the desire to avoid punishment or on the desire to gain an advantage. Tyler believes that the crux is the formation of the actual decision-making process – legitimacy is directly correlated with the degree of what he terms procedural justice. Tyler (who is a psychologist, but works as a law professor at Yale Law School) primarily bases his research on empirical evidence.

Procedural justice takes aim at the methods of the legal decision making process. The key phrase is, above all, the renowned legal adage “no one shall be condemned unheard”: It is of significant import that an individual who is subject to a legal decision-making process be given the opportunity to present their case and that said individual feels free to be able to actively participate in the decision-making process. It is also important that the individual feels that the legal decision maker is paying attention to the case being presented. It is important that the individual feels that the decision maker is treating the individual with dignity and respecting and acknowledging their rights. There must also be a convincing sense of objectivity within the framework of the decision-making process. If the system for making legal decisions is hallmarked by these factors, the chance of an individual accepting a legal decision that is negative for them increases. Consequently, according to Tyler, the most important explanatory model for the individual opting to comply with norms and decisions is based on the norm that the requirement of procedural justice is observed. The methods are more important than the content. In later studies (2011), Tyler has not contested the value of cooperation as a suitable method for governing behavior.⁵⁸ He is not opposed to responsive regulation as a phenomenon (which he designates the “the command-and-control approach”), though he believes that that starting point should always be to employ “procedurally fair policies and practices”.⁵⁹

⁵⁶ First edition Yale University Press, 1990, reprinted with a new afterword, Princeton University Press, 2006.

⁵⁷ Tyler, T, *Why people cooperate – The Role of Social Motivations*, Princeton University Press, 2011.

⁵⁸ Tyler 2011 *ibid* p. 17, p. 127 and p. 167 f.

⁵⁹ Tyler 2011 *ibid* p. 157.

It is not exactly clear how to translate the term “procedural justice” into Swedish. In our opinion, the most obvious choice would be the Swedish term “den formella rättssäkerheten” – essentially, it is a matter of how authorities or other bodies that make decisions that affect individuals should structure their decision-making process.⁶⁰

We can conclude that the Swedish term “god förvaltningsed” (good governance), comports with the term procedural justice to a very high degree. In light of the historical background of Swedish administration, the traditional structure behind Swedish administrative law and the Swedish Administrative Procedure Act are strikingly similar to the ideals that Tyler presents.⁶¹ Accordingly, there is reason to believe that traditional Swedish administrative law and the traditional Swedish administrative operational approach hold excellent potential to instill confidence in the work of the authorities and by extension the citizenry’s trust in society.⁶²

⁶⁰ Stridh and Wittberg term this procedural justice in Stridh, A, and Wittberg, L, *From dreaded tax bailiff to popular service agency*, The Swedish Tax Agency, 2015, p. 77. This is a literal translation from English to Swedish, which does not provide an exact understanding of what the term substantively represents. Justice can be translated as justice, yet it can also have other significances in Swedish in terms of substance.

⁶¹ Hambre, *Tax Confidentiality A Comparative Study and Impact Assessment of Global Interest*, Örebro Studies in law 6, 2015, p. 90 refers to e.g. the highly renowned Swedish political scientist Rothstein, who has called attention to the importance of good governance.

⁶² See Hambre, *Tax Confidentiality A Comparative Study and Impact Assessment of Global Interest*, Örebro Studies in law 6, 2015, p. 87 ff. Hambre also points out the considerable significance of equal treatment, p. 90.

4 On the current official Swedish view on governance and on the role of government agencies

4.1 Introduction

In recent decades, the Swedish government agency sector has seen an interesting evolution from a classic government-agency perspective to what has been called more of a “customer-oriented” perspective. It can be said that this evolution took place as a result of a significant societal change. It is a matter of making markets free in a broad sense. There have been countless attempts to privatize or create quasi-markets in the public sector. It has also been a matter of open-choice reforms, under which public services have been adapted to the various preferences of the citizenry.

A reform movement that has also had a strong impact on the Swedish public sector is new public management (NPM). Under NPM, the aim is for the public sector to adopt the private sector’s approach to governing its operations.⁶³ A *market approach* is to be applied to the public sector. A target and results-based approach to governance has emerged as the overall governance model, in the area of public administration as well.

However, NPM has been subject to criticism. Among other concerns, the approach is regarded as possibly leading to a simplified way of viewing what defines efficient. “The NPM is problematic because it puts itself as doctrine beyond question”.⁶⁴ It risks becoming solely a question of overseeing agencies’ work by way of reviews/audits. “The mood of the NPM is such that audits tends to dominate evaluation and that performance tends to be measured in terms of auditable outputs”.⁶⁵ Aspects that are difficult to measure precisely simply risk being left out of the NPM concept. Quality, for example, can be difficult to measure.

A later conceptual model (or governing paradigm) in organizational theory is new public governance (NPG).⁶⁶ The idea behind NPG is, simply, that citizens (operators) are to be regarded as neither subordinates nor anonymous consumers, but rather as a kind of “team mate”. Citizens are to be made active by way of collaboration. Under NPG, the efficiency of public operations should be viewed on the basis of how satisfied the citizenry is with the public sector, unlike NPM, which emphasizes the quantifiable output of the administration.

The important aspect is to underscore that NPG is an advancement on NPM and that it is grounded in the same fundamental basis. The organizational researchers Wiesel and Modell give particular emphasis to the fact that the NPM mind-set – whereby the citizen is a customer or user – remains alive in NPG, alongside the new mind-set of making citizens/companies “participants”.⁶⁷ What NPG represents has swiftly come to dominate the discourse in the public or semi-public sector and can predominantly be discerned in the rapidly growing trend toward network governance and collaborative-networks.⁶⁸

⁶³ Hasselblad, H, and Holmqvist, M, (ed.), *Business economics and society*, Studentlitteratur, 2013, p. 110, Power, M, *The Audit Society*, Oxford Univ. Press, 1999, p. 43 f.

⁶⁴ Power, M, *The Audit Society*, Oxford Univ. Press, 1999, p. 93.

⁶⁵ Power, M, *The Audit Society*, Oxford Univ. Press, 1999, p. 120.

⁶⁶ Wiesel, F, and Modell, S, *From New Public Management to New Public Governance*, Financial Accountability & Management, 2014, p. 175 ff.

⁶⁷ See e.g. The Swedish Tax Agency’s *Intelligence Report 2012* which discusses the operation’s “customer focus”.

⁶⁸ Wiesel and Modell *ibid* p. 178.

It is naturally interesting to note that the thoughts expressed in organizational theory go hand-in-hand with Braithwaite's regulatory model on "responsive regulation" as well as Tyler's later discussion on collaborative governance. It ultimately involves a major change in the fundamental perspective on the public administration's approach to how decisions that are geared toward citizens and companies are to be prepared and taken.

The Swedish government's understanding in terms of the administration's operational approach is naturally interesting in this perspective and is illustrated by its statements in its "Public administration for democracy, participation and growth" bill.⁶⁹ It is clear that public benefit is central to the government, and the participation of the citizenry is an objective.⁷⁰

The participatory perspective is found in e.g. the context that the administration/agencies are, to a certain degree, to be able to influence the citizenry's knowledge, attitudes and behaviors. Naturally, a collaboration does not have to rest on some form of common frame of reference. To ensure collaboration, the administration/agency may thus have to work on measures that, from a historical perspective, have been somewhat foreign to agencies. The government maintains that: "It is not sufficient for agencies to act impartially, considerately and in an otherwise correct manner in a formal sense".⁷¹ The government points out that agencies are to be able to provide "swift, straightforward and clear decisions" to citizens, and help citizens and companies fulfil their obligations.⁷² The government emphasizes that user surveys concerning citizens' needs for and views on the administration's services are a key tool and should therefore be used.

Meanwhile, the government also points out that confidence in the agency is achieved by way of objectivity, impartiality and a high level of integrity.⁷³ The government does not believe that agencies should engage in forming public opinion.⁷⁴ An agency can, however, use information as a resource in influencing knowledge, attitudes and behaviors, provided that the information is objective and impartial. However, the design of such informational initiatives, with the express intention of influencing attitudes and behaviors, must be thoroughly examined by the agency.⁷⁵ According to the government, the agencies' information is to be hallmarked by good governance practices, meaning e.g. that a precautionary principle should be observed when selecting the method for opinion-making activities.

What can be referred to as the new perspective on the role and approach of the administration, has not escaped criticism from jurisprudential sectors.⁷⁶ Often mentioned is the concern that an outsized emphasis on efficiency can be risky from a more traditional law-based approach to administration. Professionalism, objectivity and legality are key major concepts that can be negatively influenced by public power being exercised

⁶⁹ Bill 2009/10:175 *Public administration for democracy, participation and growth*, The center-right Alliance administration was the one who drafted the bill and, naturally, one cannot preclude that subsequent administrations may have different understandings based on principles. We have not been able to identify any relevant dissenting statements that were published (what was parliament doing?).

⁷⁰ Bill 2009/10:175 *Public administration for democracy, participation and growth*, p. 23 f.

⁷¹ Bill 2009/10:175 *Public administration for democracy, participation and growth*, p. 31.

⁷² Bill 2009/10:175 *Public administration for democracy, participation and growth*, p. 29 ff.

⁷³ Bill 2009/10:175 *Public administration for democracy, participation and growth*, p. 38.

⁷⁴ Bill 2009/10:175 *Public administration for democracy, participation and growth*, p. 30.

⁷⁵ Bill 2009/10:175 *Public administration for democracy, participation and growth*, p. 40.

⁷⁶ A brief compilation, including references, is presented in Bernitz, U, and Reichel, J, *Efficiency or legality – an assessment of the Swedish Tax Agency's new collaborative methods*, Report by the Confederation of Swedish Enterprise, 2015, p. 10 f.

in highly complex ways. The agency must act in a legally secure, predictable and impartial manner. Demands placed on responsibility and supervision require a sufficient level of clarity, which in turn requires a legal approach.⁷⁷

The criticism is based on a perception that there is a contradiction between a desire to A) modernize the administration, to enhance its potential as a governing function, to exercise governance through collaboration and a networking mind-set, and B) the demands of a legal state. Above, we already broached the contradiction that can be found between these two mind-sets.

In conclusion, it should be stressed that no changes to the Swedish Administrative Procedure Act (FL) or the Swedish Administrative Court Procedure Act (FPL) were made due to the new trains of thought. Administrative decisions in Sweden are managed in the same way as before. What is immediately at issue is whether new working methods or new approaches are phenomena that could be presumed to fall outside the formal and regulated administrative area. The manifestations of these phenomena would thus risk being difficult to access with the traditional administrative rules. The risk that arises is that short-term efficiency would be compromised in the long term as a result of less legitimacy if the administration's operational approach deviates from the characteristic matter of procedural justice inherent to good governance practices.

4.2 The Swedish Tax Agency's operational approach and value-shaping activities

The Swedish Tax agency has long be subject to an inner change process that would have to be described as being of a pervasive nature. The change process has been described by a large number of individuals familiar with the situation. Particularly important works that shed light on the agency and its shifting approach are its anniversary publication (anthology) Centenary Declaration (RVS 2003), and its recently published work *From dreaded tax bailiff to popular service agency* (Stridh and Wittberg, Swedish Tax Agency 2015). There are also a number of articles that address the topic in various way.⁷⁸

Within the limited framework of this study, there is no ability to give anything other than a very brief description of the significant changes being made. Roughly speaking, it can be said that the Swedish Tax Agency is a reflection of the aforementioned discourse – for some time, the Swedish Tax Agency has invested considerable resources in cooperative compliance, collaborations and network building.⁷⁹ The Swedish Tax Agency has also worked with media channels to influence taxpayers' attitudes.⁸⁰ The Swedish Tax Agency also provides other information aimed at influencing taxpayer behavior – for instance, “schemes” are presented on the Swedish Tax Agency's website.

⁷⁷ See e.g. Lodge, M, and Stirton, L, *Accountability in the Regulatory State*, The Oxford Handbook of Regulation, 2010, p. 349 ff.

⁷⁸ Thärnström, B, *Tax administration in transition*, SN 1993, Jansson, S, *The Swedish Tax Agency – the new tax agency*, SvSkT 2003, Krafft, L, *Expert groups and command signals*, SvSkT 2005, p. 57, Svanberg, J, *The public representative with the Swedish Tax Agency – what, who and why?*, SvSkT p. 2006 p. 235. The organizational theory study that includes The Swedish Tax Agency, Model, S, *The interplay between internal and external efficiency – a comparative study in Efficiency and governance in government agencies*, eds. Modell, S, and Grönlund, A, Studentlitteratur, 2006, is also very interesting. The magazine *Skattenytt* has also published a number of interviews with the Director-General Ingemar Hansson, as well as former Head Counsel Inga-Lill Askersjö – these interviews provide an interesting look into the perceptions and thoughts of the senior officials, 2010 p. 257 [Hansson], 2012 p. 754 [Hansson], 2013 p. 232 [Askersjö] and 2015 p. 503 [Askersjö].

⁷⁹ As an example, the so-called dialogues offered by the Swedish Tax Agency's large business sector services were launched in 2006.

⁸⁰ An entertaining example is a short film by The Swedish Tax Agency called the *Sausage Vendor*, Receipt – Online video with captioning, The Swedish Tax Agency (March 31, 2016), <http://www.skatteverket.se/privat/skatter/arbeteinkomst/kvitto/webbfilmtextadversion.4.5fc8c94513259a4ba1d800031830.html>.

A factor contributing to new operational approaches being seen as necessary can be explained by budgetary restrictions – tax agencies must conserve and use resources as efficiently as possible. Reviews can be very costly.⁸¹ If other operational methods can reduce the need for reviews or make reviews more accurate, this will naturally be very positive.⁸² Wittberg states the following:

“Many errors are made due to ignorance or the Swedish Tax Agency failing to be clear about how something is to be done. Massive resources are expended in identifying and rectifying these errors. These resources are instead to be used for the third element, namely in-depth investigations into serious fraud. The Swedish Tax Agency must possess the capacity to handle highly advanced forms of tax evasion, which also influences faith in the tax system and the will to do what is right. *In brief, this is the strategy for how the Swedish Tax Agency is to be able to achieve more with dwindling resources*.”⁸³

We believe that it is evident that the objective of the Swedish Tax Agency’s efforts related to the so-called cooperative compliance services, and the partnership agreement with FAR/SRF is to strengthen companies’ willingness to do what is right – meaning to appropriately comply with the tax rules.⁸⁴ In other words, these efforts are not a matter of focusing on reviews and sanctions as norm-setting activities, but rather a matter of getting companies to do what is right based on the social value that doing what is right is a value in and of itself. Nor is it a question of disseminating information, but a question of far more advanced information. The ensuing cooperative compliance and the trust that is generated from this is presumed to reduce the need for formal reviews. After all, the Swedish Tax Agency receives information from companies in advance when companies request the cooperative compliance services. It must be done properly from the very beginning. Trust is the key word. This means that e.g. responses given under said cooperative compliance services must be of a high quality and that the Swedish Tax Agency must stand by what it has said.⁸⁵

It must be stressed that the new operational methods may be popular among companies. The cooperative compliance services provided by the Swedish Tax Agency’s large business sector division in particular are highly popular have grown increasingly in demand among companies. The companies appreciate obtaining swift decisions on the Swedish Tax Agency’s understanding of complicated matters. The Swedish Tax Agency even offers to answer questions about the application of the Tax Evasion Act. The in-depth cooperative compliance services are more controversial.⁸⁶ It should also be stated that the Swedish Tax Agency appears to be influenced predominantly by Tyler’s model in terms of the design of its important review efforts.⁸⁷

⁸¹ For a policy description of how the Swedish Tax Agency views work in the future, see Wittberg, L, *The Reviews of the Future*, Swedish Tax Agency, 11 Nov. 2015.

⁸² As a note of caution, efforts related to the dialogues and the in-depth dialogues may require major resources from highly qualified staff in order to work well – for instance, the Swedish Tax Agency’s internal policy documents for the dialogues and for the written replies reveal that the legal department must often be engaged for quality assurance purposes (see Decision on procedures for responding to written enquiries, June 24, 2013, case no. 129 621087-08/1211 and *Guidelines – The administration of written replies to external tax enquiries, including dialogue replies*, March 2, 2015 (case no. N/A). According to verbal information from parties operational in the legal department, efforts related to the written replies have occasionally been perceived as a new and demanding task that competes with other work.

⁸³ Wittberg, L, *A Tax agency on the offensive*, SN 2012, p. 197. Italics added.

⁸⁴ Norberg and Norberg, however, have contended that the dialogues are an extension of the Swedish Tax Agency’s service obligation, though we perceive this as a somewhat simplified view, Norberg, C, and Norberg, K, *Advance rulings – for whom and why?* SN 2014, p. 328.

⁸⁵ The fact that the Swedish Tax Agency must stand by what it has said is not without exception. For example, an individual who poses a dialogue enquiry must provide accurate information. In reality, the Swedish Tax Agency is subject to the same challenges as the Council for Advance Tax Rulings in terms of fact checking.

⁸⁶ At the moment, there appear to be rather few large businesses that have opted to be part of the in-depth dialogues.

⁸⁷ Wittberg, L, *The reviews of the future*, The Swedish Tax Agency, Nov. 11, 2015.

The concrete measures that the Swedish Tax Agency takes should thus be able to be regarded as constituting an extension of the theories posited above with regard to the significance of tax morale and the scientific models on how tax morale can be influenced. It is worth noting that the Swedish Tax Agency is not alone in setting out on this path – in recent years, several tax agencies worldwide have adopted a similar operational approach.⁸⁸ In that sense, the Swedish Tax Agency can be said to work with CSR in taxation. The in-depth cooperative compliance services and the cooperative compliance services address the large business sector, and the partnership agreements with FAR/SRS address smaller and often owner-managed companies.

It is interesting that the Swedish Tax Agency's shift in its operational approach cannot be regarded as being a shift that was initiated from the top – but rather is a matter of change from within (or, as has been claimed, a lateral change – from agencies in other legal cultures). As far as we know, the government has not issued any formal directives to the Swedish Tax Agency concerning their concrete operational approach in terms of collaboration or trust-instilling activities. Work on the in-depth cooperative compliance services and the cooperative compliance services is exclusively governed by internally drafted guidelines. Naturally, since the guidelines do not enjoy the status of being constitutional texts, their normative meaning has not been clarified. Recently, the guidelines have also been subject to a number of comprehensive revisions.

First and foremost, the Swedish government governs by way of the so-called appropriation directions. The appropriation directions concerning the Swedish Tax Agency are relatively general.⁸⁹ Research has also stressed that the Swedish Tax Agency enjoys a great deal of confidence with the Ministry of Finance, and that this may explain why the agency is governed by the use of relatively open formulations of objectives.⁹⁰ Professor Modell, however, regarded this as being a “relatively unique” relation in the central government. However, Modell was able to discern a trend that greater requirements on quantifiable reporting from the Swedish Tax Agency was in demand.⁹¹ Modell's observations were later confirmed by the Swedish National Audit Office's audit of the Swedish Tax Agency's review operations – the governance of the Swedish Tax Agency could be classified as “informal.”⁹² This informal governance is hardly aggravated by the fact that the Director-General of the Swedish Tax Agency is a former high-ranking official of the Ministry of Finance, or by the fact that the current Finance Minister was formerly Hansson's closest second official at the Swedish Tax Agency (Deputy Director-General).

In its audit, the Swedish National Audit Office was critical of the Swedish Tax Agency's so-called “pre-emptive efforts”, to which the collaborative efforts could probably be linked.⁹³ The Swedish National Audit Office deemed that the Swedish Tax Agency lacked follow-up options for its pre-emptive efforts and that no examination of the effect of its pre-emptive efforts had been conducted. The Swedish National Audit

⁸⁸ See a few examples: UK (see Freedman, J, Ng, F, and Vella, J, *HMRC's relationship with business*, draft report OUCBT, June 19, 2014), US (compliance assurance process, see Compliance Assurance Process, IRS (March 31, 2016), www.irs.gov/Businesses/Corporations/Compliance-Assurance-Process, France (relation de confiance, see Reibel European Taxation 2015 p. 2012), and, naturally, the pioneering country, the Netherlands (Påhlsson, R, *In-depth collaborations/horizontal monitoring in the Swedish public law arena*, Confederation of Swedish Enterprise, 2012).

⁸⁹ Government decision Fi2015/05629/S3, 17 December 2015.

⁹⁰ *The interplay between internal and external efficiency – a comparative study in Efficiency and governance in government agencies*, eds. Modell, S, and Grönlund, A, Studentlitteratur, 2006, p. 89.

⁹¹ *Ibid* p. 113.

⁹² *The Swedish Tax Agency's review of companies – selection, volume development and follow-up*, Swedish National Audit Office, RIR 2012:13 p. 23. The Swedish National Audit Office did not seem entirely convinced of the advantages of such informal governance, *ibid* p. 87.

⁹³ *Ibid* p. 85.

Office deemed that an examination would be particularly motivated if the pre-emptive efforts could be considered a factor contributing to the decline in review volumes.⁹⁴

It would be interesting to find out the government's, or rather the legislators', understanding of the Swedish Tax Agency's new focus. It can be noted that the government's statements in its last budget bill emphasize the importance of reviews and the significance of sanctions in the due payment of taxes.⁹⁵ The government notes that review resources have declined.⁹⁶ The government points out that it is important that the review levels be maintained. Without mentioning the AS model, the government appears to be basing its statements on the presumptions on which the model is based.

Meanwhile, the government also stresses that the Swedish Tax Agency conducts positive and long-term efforts in strengthening trust in the agency among citizens and companies.⁹⁷ However, the government points out that this trust requires taxes to be collected in a uniform manner consistent with the rule of law.⁹⁸ The government maintains that:

"The trust of citizens and companies in the Swedish Tax Agency influences the willingness to do what is right and compliance with tax regulations in a positive way. Accordingly, it is important that case management, reviews and the application of the law are carried out in a proper and uniform manner, ensuring equal treatment for all".⁹⁹

The government is thus most closely associating itself with Tyler's procedural justice doctrines. In our opinion, it can be concluded that the Swedish National Audit Office's underlying assumptions in its audit of the Swedish Tax Agency, as well as the government's statements in its latest budget bill, appear to be influenced by a relatively traditional view on the task of Swedish Tax Agency. The statements in the budget bill can be regarded as being comfortably in line with the statements in the aforementioned bill *Public administration for democracy, participation and growth*.¹⁰⁰ In that bill, the government maintains that agencies are to operate on the basis of objectivity, impartiality, a high level of integrity, and to observe the equality of everyone under the law.¹⁰¹ The government also states that the line between politics and administration is to be clear.¹⁰²

In summary, we can conclude that the Swedish Tax Agency will have to be regarded as being evidently influenced by the contemporary discourse in terms of tax morale and the operational approaches that, in a positive sense, can be presumed to affect tax morale. Specifically, this is reflected in the Swedish Tax Agency's operational approach, which has changed over time "from dreaded tax bailiff to popular service agency". Concerning corporate taxation, the most important examples of the Swedish Tax Agency's new operational approach is the cooperative compliance services, the in-depth

⁹⁴ In 2013 in the US, similar criticism was levelled against the IRS for its efforts at in-depth dialogues (termed "compliance assurance process" or CAP), see Final Report, Treasury Inspector General for Tax Administration, ref. no. 2013-30-021, 2013.

⁹⁵ Bill 2015/16:1 *Budget bill for 2016*, Expenditure area 3 p. 20.

⁹⁶ Bill 2015/16:1 *Budget bill for 2016*, Expenditure area 3 p. 19.

⁹⁷ Bill 2015/16:1 *Budget bill for 2016*, Expenditure area 3 p. 19 f.

⁹⁸ Bill 2015/16:1 *Budget bill for 2016*, Expenditure area 3 p. 20.

⁹⁹ Bill 2015/16:1 *Budget bill for 2016*, Expenditure area 3 p. 18.

¹⁰⁰ Bill 2009/10:175 *Public administration for democracy, participation and growth*.

¹⁰¹ Bill 2009/10:175 *Public administration for democracy, participation and growth*, p. 38 ff.

¹⁰² Bill 2009/10:175 *Public administration for democracy, participation and growth*, p. 39.

cooperative compliance services and the partnership agreements with FAR/SRF. It can be concluded that the Swedish Tax Agency's operational approach that has changed over time and has done so from the inside. It can also be concluded that the Swedish Tax Agency, as a government agency, enjoys a great deal of confidence within the central government. The Swedish Tax Agency is governed by the open formulation of objectives, as well as through informal governance. Meanwhile, it can be concluded that the government, in a variety of ways, expresses a relatively traditional view on the task of the Swedish Tax Agency – the government emphasizes the significance of reviews and sanctions and thereby associates itself with the mind-set that can be said to be expressed in the aforementioned AS model. Furthermore, the government emphasizes, in various contexts, the relatively traditional view on what constitutes good governance practices, meaning objectivity, impartiality and the equality of all under the law. It could be contended that the government essentially adopts a stance similar to Tyler's: the agency's trust and the citizenry's faith in the agency are a direct consequence of procedural justice. Its legitimacy is based on the methods used in administrative decision-making. Engaging in the shaping of morale in addition to the aforementioned operational approach does not appear to have clear support when reading the government's statements in official legal documentation.

It is also interesting to conclude that the regulatory procedural framework governing taxes that the Swedish Tax Agency must use when taking essentially all tax decisions (the Swedish Tax Procedure Act, STPA) can hardly be regarded as being influenced by the responsive regulation model designed by Braithwaite. One of the most important elements of the model is the incremental approach – known as the pyramid. The STPA does not leave a great deal of room for working in accordance with the pyramid. Rather, the STPA will have to be regarded as being based on the more traditional administrative law approach.¹⁰³

An illustrative example of this is the systematics concerning “incorrect information” and the legal consequences of submitting incorrect information. Under the current example, the submission of incorrect information generally leads to both a different tax ruling and a tax surcharge over the course of an extended time frame. According to the pyramid approach, it ought to be significantly easier to change a tax ruling than to levy a tax surcharge, since the latter consequence will have to be regarded as a sanction. Accordingly, there are arguments in favor of the fundamental requirement not being the same for two different legal consequences.¹⁰⁴

This example demonstrates that the government (or parliament) has hardly given clear directives to the Swedish Tax Agency, which, in its core operations, is to adapt its approach in accordance with current models for more efficient administrative governance.

Accordingly, the Swedish Tax Agency has essentially developed new operational methods on its own accord that were not initiated by legislators. However, the Swedish Tax Agency has considered itself compelled to adapt its operational methods in accord-

¹⁰³ In its evaluation efforts, the Swedish Tax Agency has itself observed that the new operational methods (the practice of submitting written replies/dialogue replies), in key respects, differ from the approach instructed by legislators. In regard to issuing written responses, the Swedish Tax Agency maintains that the operation “lacks the ‘review stations’ – in the form of appeal options, the status of the party, the fact that the notifications are public, and other provisions – that are available in the proceedings governed by law”. (Report on Replying to written enquiries, case no. 131-604625-11/111, Swedish Tax Agency, 14/5 2012, p. 19). The Swedish Tax Agency's observation implies that its new operational methods can be regarded as being characterized by a weaker procedural justice relative to the established decision-making methods.

¹⁰⁴ The so-called grounds for exemption can result in inaccurately submitted information yielding tax surcharges – however, the application of grounds for exemption is not generous. Accordingly, in practice, inaccurately submitted information generally results in both tax adjustments and tax surcharges.

ance with critical views that have come not from legislators, but from society at large. Illustrative of this is the development related to the in-depth cooperative compliance services. The Swedish Tax Agency's initial project was designated "in-depth collaboration". The description of the in-depth collaboration in the "In-depth collaboration between the Swedish Tax Agency and Sweden's largest conglomerates" report is very interesting.¹⁰⁵ It may be regarded as being a question of the lawful implementation of Braithwaite's responsive regulation model. Among other aims, the in-depth collaboration was to lead to participating companies maintaining a higher ethical standard (a social norm, a higher tax morale).¹⁰⁶

The in-depth collaboration was subject to sharp criticism, after which the Swedish Tax Agency re-assessed the entire project and re-named it an "in-depth cooperative compliance service". In the context, it is interesting to note that the OECD also underwent a form of re-assessment, transitioning from the notion of an "enhanced relationship" to "co-op compliance". The UK, for example, also re-named its procedure.¹⁰⁷ However, the ambition should essentially be the same – although the Swedish Tax Agency was evidently influenced by the traditional legally based criticism whose arguments included that there may be problems regarding such aspects as the equal treatment principle.¹⁰⁸

Another problem that has plagued the new operational methods is the matter of confidentiality – in its guidelines, the Swedish Tax Agency stated that participation in the in-depth cooperative compliance service and in the cooperative compliance service (responses by letter), should, according to the Agency's assessment, be subject to absolute tax secrecy. However, in somewhat simplified terms, the SAC and later the Administrative Court of Appeals found that, since this was a matter of a task distinct from that of making tax decisions, there could not be any so-called absolute secrecy.¹⁰⁹ The fact that it is completely open to the public could be regarded as being an obstacle to the entire operation. In hindsight, it naturally seems regrettable that the Swedish Tax Agency didn't seek legislative support right from the very beginning when they started drafting more detailed guidelines for its new operational approach.

In summary, the conclusion that we should be able to draw from this is that the Swedish Tax Agency, provided that it traditionally engages in reviews, and, when necessary, sanctions, should be able to develop its operational methods to further bolster its trust. This is an important development and it will have to be presumed to be carried out with the support of legislators. However, its confidence-instilling efforts should be hallmarked by "good governance practices" and it will have to be regarded as important to maintain a strict line between politics and administration. The new operational methods must also be hallmarked by a high degree of procedural justice in order to ensure legitimacy, and by extension confidence in the agency. The secrecy matter must probably also be resolved – though in a manner that fulfils the desire for democratic transparency and review of the Swedish Tax Agency's decision-making methods. Equality in the eyes of the law cannot be compromised.

¹⁰⁵ Case no 480-698289-101211, 31/3 2011, Swedish Tax Agency.

¹⁰⁶ See reproduced debate in Pålsson, R, *In-depth collaboration/horizontal monitoring in the Swedish public law arena, Confederation of Swedish Enterprise*, 2012, p. 12.

¹⁰⁷ Freedman, J, Ng, F, and Vella, J, *HMRC's relationship with business*, draft report OUCBT, June 19, 2014, p. 2.

¹⁰⁸ In the UK, the form of collaboration between the tax agency and the large business sector has been criticized as enabling inappropriate "sweetheart deals", see Freedman, J, Ng, F, and Vella, J, *HMRC's relationship with business*, draft report OUCBT, June 19, 2014.

¹⁰⁹ See Supreme administrative court 2013 ref 48 and the administrative court of appeals in Stockholm's decision of September 25, 2015 in case no. 6737-15, and <https://www4.skatteverket.se/rattsligvagledning/edition/2016.2/329101.html#h-Radgivning-samt-fragor-och-svar>.

5 A company law perspective

5.1 Introduction

In his ground-breaking 1937 article *The Nature of the Firm*, legal economist Ronald Coase contended that a firm emerges when the costs of doing something internally in a company are lower than the costs of performing the same task in an open market.¹¹⁰ In an employment relationship, the entrepreneur does not pay the employees for specific duties, but for the right to govern their work.¹¹¹ The primary advantage of organizing production in the form of a company is that this form of organization allows for a higher degree of specialization. Economies of scale and synergy effects boost productivity. At the same time, resources can be redistributed within a company to where they do the most good. A company can be organized in a number of different way, such as partnerships, joint stock companies, economic associations and limited liability companies. The most common form of association in Sweden today is the limited liability company, whose significance in terms of economic development and prosperity in society can hardly be exaggerated. The legal structure that allows one or several individuals to invest capital in the form of a company without risking more than what they have invested in the company has created the means for today's large business sector and for the vast number of smaller limited liability companies that are presently registered.

Within the company, the board of directors bears overall responsibility for the company's organization and for the administration of the company's affairs.¹¹² The board enjoys considerable freedoms in terms of organizing and governing the operations of a limited liability company, within the framework stipulated in the Swedish Companies Act and the company's articles of association. However, central limitations are imposed by the *equality principle* and the *general clause*, and by the rules governing the *delegation of functions*, *object of the company*, *profit motive* and *value transfers*. In this section, we will take a closer look at what impact these rules could have on a board's ability to refrain from a legal option to obtain a lower tax burden.

5.2 The tasks of the board of directors

The Swedish Companies Act only lists a general delegation of duties between the company's bodies. However, the board of directors bears overall responsibility for the company's organization and for the administration of the company's affairs. The board must thus regularly assess the company's and, if the company is the parent company in a group, the group's economic situation. The board must also ensure that the company is organized in such a way that its accounting, asset management and other economic relations are reviewed in an adequate manner.¹¹³ The board must ensure that its organization is consistent with its objective. This includes ensuring that the organization itself accommodates procedures and functions that assure quality. This involves securing permits, administrative routines, administrative guidelines and the manage-

¹¹⁰ Coase, R, *The Nature of the Firm*, 4 Econ. 386, 1937; see also Samuelsson, P, *On the Legal Economy's Emergence and Influence on Research Into Company Law*, SvJT 1997 p. 528.

¹¹¹ Posner, R, *Economic analysis of law*, Wolters Kluwer Law & Business, 2014, p. 427.

¹¹² Chapter 8, section 4 of the Swedish Companies Act.

¹¹³ Chapter 8, section 4 of the Swedish Companies Act.

ment of the company's assets, a strong selection of employees and regular communications between executives. The board also constitutes a forum for planning and evaluating the company's development.¹¹⁴ As part of the board's oversight of the company, and possibly the group, the board must impart instructions for when and how such information that is needed for the board to regularly evaluate the company's and group's economic situation is to be submitted and reported to the board.¹¹⁵

Apart from that, the law does not provide much guidance for the board and its tasks. It is clear, however, that the board is allowed to make decisions in all areas that are not expressly reserved for other company bodies. The very broad decision-making capacity that is conferred upon the board by law is limited in relation to the general meeting of shareholders, primarily by the *delegation of functions* within the limited liability company, meaning by the provisions that give the general meeting of shareholders the exclusive right to make decisions in certain matters. The exclusive capacity of the general meeting of shareholders includes the more significant matters of the company, such as amending its articles of association, share issues and other changes to share capital, the election of the board, dividends and bringing claims of damages on behalf of the company against board members, the CEO and auditors. The classification of the decisions stipulated in the Swedish Companies Act as being under the sole direction of the general meeting of shareholders is based on the general meeting of shareholders not reserving the right to delegate decisions to the board or other parties, unless such a right is expressly described in the law. The board can make decisions in essentially any area not expressly reserved for the general meeting of shareholders (or another body).¹¹⁶

The board's capacity is further limited by a number of specific rules that have been established to protect shareholders (and specifically a minority of them), as well as creditors. Among the most crucial general rules of protection for shareholders is the so-called *equality principle*, which is primarily expressed in chapter 4, section 1 of the Swedish Companies Act and that primarily entails that each share is to grant the same rights and protections, unless otherwise dictated by law or stipulated in the articles of association.¹¹⁷ The *general clause* in chapter 8, section 41 of the Swedish Companies Act – which stipulates that the board of directors or any other representative of the company may not perform legal acts or any other measures which are likely to provide an undue advantage to a shareholder or another person to the disadvantage of the company or any other shareholder – also constitutes a limitation of the boards freedom to act. Nor may a representative of the company comply with instructions

¹¹⁴ Bill 1997/98:99 *The organization of the limited liability company*, p. 205; AJS 8:4.2.

¹¹⁵ Chapter 8, section 5 of the Swedish Companies Act.

¹¹⁶ Nerep E, and Samuelsson, P, *The Swedish Companies Act: a legal commentary*, Thomson Reuters Professional, 2009, chapter 7, section 1, 1.5. In other words, the general meeting of shareholders is allowed to make decisions on nearly all matters that concern a company. In addition, certain legal scholars have presumed that there are certain decisions that are so drastic for shareholders that they must be decided on by the general meeting of shareholders despite nothing being stipulated about this in the legal code; this is known as an unwritten capacity of the general meeting of shareholders. However, this perception has not gone unchallenged, and it is unclear how far such a capacity would extend and what it actually means. See AJS 7:1.1 with references to Båvestam, U and Lindblad, A, *As to the question of whether the general meeting of shareholders holds an unwritten exclusive capacity – so too the question of whether the general meeting of shareholders reserves the exclusive right to decide on a delisting*, JT 2007–08 p. 224 ff., R, *Liability for damages for board members and the CEO*, Norstedt, 1989, p. 177, Krook, S, *The delisting of shares listed on a stock exchange or other marketplace – a matter for the general meeting of shareholders or the board of directors?*, JT 2006–07 p. 854 ff., and Åhman, O, *Authorization and Authority in Company Law*, Lustus, 1997, p. 534 ff.

¹¹⁷ In jurisprudential literature, there are differing opinions as to whether the equality principle focuses on the shares, the shareholders, or both. See e.g. Arvidsson, N, *Company law's equality and equal treatment principles: an analysis in light of NJA (a Swedish legal publication) 2013 p. 1250, JT 2014/15 p. 263*. Arvidsson believes that there are two different principles: the equality principle, which focuses on the internal structure of members' rights and not the actual content of member rights, as well as the equal treatment principle, which constitutes a conditional ban on special treatment. See also Dotevall, R, *Liability for damages for board members and the CEO*, Norstedt, 1989, p. 282; Skog, R, *Rodhes' Company Law*, Norstedts juridik, 2014, p. 246; Dotevall, R, *Company law*, Norstedts juridik, 2015, p. 299.

from the general meeting or any other company organ where such instruction is void as being in violation of this Act, the applicable annual reports legislation or the articles of association.¹¹⁸ The general clause can in part be regarded as expressing the equality principle, except that the equality principle takes aim at the relation between shares, meaning strictly mathematical justice, while the general clause takes aim at preventing undue actions.¹¹⁹

Two other minority protection rules that are of particular interest for this investigation are the rules governing the limited liability company's objective and profit motive. Within the creditor protection rules, the provisions on value transfers are of primary relevance. These will be addressed in further detail in the following two sections.

5.3 Objective of the company and profit motive

5.3.1 Objective of the company

Under chapter 3, section 1 of the Swedish Companies Act, the articles of association are to include information on e.g. the objective of the company, stated as the nature of the objective. In other words, the objective of the company simply describes what activities the company will engage in.

Since 1995, the objective of the company has not been relevant in assessing the company's obligation of legal actions toward third parties¹²⁰ yet a board member or CEO who acts outside the objective of the company and thus damages the company may be liable for compensation. Therefore, it is imperative that the description be clear, while the delimitation does not have to be so narrow that it impedes minor redirections of the company's operations, hence the law only requires the operation to be listed by its "nature".¹²¹ To successfully fault a resolution taken by a general meeting of an economic association or a limited liability company on the grounds that it violates the objective of the company as per the association's bylaws or the company's articles of association, it must be proven that the decision pertains to objectives that are *clearly* foreign to the objective of the association.¹²²

5.3.2 Profit motive

Another singular feature of a limited liability company is the *profit motive*. The Swedish Companies Act operates under the assumption that a limited liability company is operated with the aim of furnishing a profit for its shareholders. This is indirectly made clear by the requirement that if a company's operations are to, in full or in part, have a purpose other than providing a profit to be allocated among its shareholders, this must be stated in its articles of association. In these cases, it is also to be stated how the company's profits and retained assets are to be used in the event of the company's liquidation.¹²³ However, the ability to stipulate particular purposes for the company's operations may not be used to circumvent rules governing creditor protection under the law. In other words, it is not permitted to use such a stipulation to

¹¹⁸ Chapter 8, section 41 of the Swedish Companies Act.

¹¹⁹ Östberg, J, *The duty of loyalty among board members*, Jure, 2016, p. 234.

¹²⁰ See Chapter 8, section 42 of the Swedish Companies Act and section 5.6.2.

¹²¹ See chapter 3, section 3 and chapter 32 of the Swedish Companies Act.

¹²² See NJA 1967 p. 313; see also NJA 1987 p. 394; see also NJA 2000 p. 404.

¹²³ Chapter 3, section 3 of the Swedish Companies Act; Bill 2004/05:85 *New Swedish Companies Act*, p. 219.

This disregards the rarely utilized form of incorporation known as a limited liability company with profit allocation limitations; see chapter 32 of the Swedish Companies Act. Provisions in the articles of association on a company's operations holding a purpose other than generating a profit are very rare. This predominantly occurs in publicly – e.g. municipally – owned companies. See Skog, R, On the significance of the profit motive as per the Swedish Companies Act, SvJT 2015 pp. 11, 14.

distribute profit in a manner than contradicts these rules.¹²⁴ If there is no stipulation in the articles of association that deviates from the principal rule of a profit motive, no decision can be made entailing that the company's profit is to be used for any purpose other than allocation among its shareholders without the consent of all shareholders.¹²⁵ The only exception from a profit motive stipulated by the law is the ability to decide on a gift for the public good or other comparable cause. Such a gift is permitted if, in consideration of the nature of the objective, the company's position and other circumstances, it can be deemed reasonable and the gift does not infringe upon restricted equity or contravene the precautionary rule.¹²⁶ Decisions regarding such a gift must be made by the general meeting of shareholders or, if the matter is of minor significance in relation to the company's position, by the board of directors.

5.3.3 Interests of the company

The rules on profit motive are thus closely associated with the term the *interests of the company*. The term has been discussed and debated over the course of many years, yet the predominant understanding that the term interests of the company is synonymous with the mutual interest of the shareholders.¹²⁷ How to define this may not be entirely clear. In certain contexts, it has been claimed that the actual mutual interests of the shareholders is to be the governing factor.¹²⁸ However, the prevailing perception in jurisprudence literature appears to be that it is not the actual interests, but rather the shareholders' hypothetical mutual interests that are to be the governing factor for the board.¹²⁹ This mutual interest is subsequently, absent any provisions in the articles of association to the contrary, linked to the profit motive,¹³⁰ and the interests of the company thus become synonymous with the profit motive.

5.3.4 Profit motive an influential factor in actions

The profit motive thus becomes an influential factor for the company's bodies. This means for example that the board is normally not allowed to make decisions that result in the company deliberately disposing of assets in return for compensation that is incompatible with market rates, or undertakes duties that are not compatible with the profit motive.¹³¹ In an article from 1977 that was published in conjunction with the enactment of the Co-determination Act, Rodhe expanded on the profit motive as follows:

¹²⁴ Bill 2004/05:85 *New Swedish Companies Act*, p. 540.

¹²⁵ See AJS 17:5.01; Bill 2004/05:85 *New Swedish Companies Act*, p. 754 f.

¹²⁶ See Chapter 17, section 5 of the Swedish Companies Act; see also chapter 17, section 3 of the Swedish Companies Act; see also NJA 1962 p. 182 (prior law).

¹²⁷ See e.g. Nyström, G, and Sjöman, E, *Shareholders' Interests, Responsibility of the Target Company's Board of Directors* in Svernlöv (ed.), *Shareholder rights*, Iustus, 2009, pp. 11, 14; Stattin, D, *Corporate governance*, Uppsala University, 2008, p. 214; Skog, R, *Rodhes' Company Law*, Norstedts juridik, 2014, p. 246 f.; Skog, R, *On the significance of the profit motive as per the Swedish Companies Act*, SvJT 2015 p. 11. Consequently, Swedish law rejects a more pluralistic view of stakeholder value and the so-called stakeholder model – which provides parties other than stakeholders an interest in the company as well – in favor of a view that is commonly referred to as shareholder value in literature on economic law. See e.g. Bergström, C, and Samuelsson, P, *The fundamental problem with the Swedish Companies Act*, Norstedts juridik, 2015, p. 258 f.

¹²⁸ See e.g. the Swedish Commission on Business Confidence: "The fact that various groups of owners in a company with a diverse range of ownership can have conflicting interests in particular matters is not unusual. Hence, it should be a matter for the board to consider these different interest and merge them into a unified course of action, which, to a reasonable extent, meets all shareholders' interests". Swedish Government Official Report 2004:47 *The business community and confidence*, p. 206.

¹²⁹ See e.g. Stattin, D, *Corporate governance*, Uppsala University, 2008, p. 214 ff. including further references.

¹³⁰ Åhman, O, *Authorization and Authority in Company Law*, Iustus, 1997, p. 809 ff.; see also Skog, R, *On the significance of the profit motive as per the Swedish Companies Act*, SvJT 2015 p. 11 f. In this context it can be noted that as early as in the preparatory efforts ahead of the Swedish Companies Act of 1895, it was stated that the interest of the shareholders must reasonably be to gain the greatest possible return on their capital. See Bill 1895:6 p. 117.

¹³¹ Skog, R, *Rodhes' Company Law*, Norstedts juridik, 2014, p. 244 f.

“The underlying assumption in the Swedish Companies Act is that the objective of a company’s operations is to furnish its shareholders with a profit. Under the law, each shareholder holds a claim that the general meeting of shareholders is to respect this fundamental rule and that the company as a whole has the same claim against the board. It is now evident that the general meeting of shareholders and the company’s board must possess considerable freedom in terms of defining what is appropriate under the aforementioned principle. However, the line must be drawn somewhere. The board of the company is not entitled to knowingly squander the company’s assets on actions that cannot, even under a long-term assessment, be defended as being in the interests of the company, e.g. by allowing the company’s assets to vanish by continuing to operate loss-generating operating divisions, or by using the company’s assets for a new investment, that, while creating work, cannot be expected to generate a return”.¹³²

As was later observed by Ohlson, however, the discussion in the literature appears to have more of a focus on the negotiation leeway of the company’s bodies within the framework of the profit motive than on the matter of the right to deliberately deviate from the profit motive.¹³³ The Swedish Companies Act does not provide any detailed guidance on what transgressions of the profit motive can be attacked within the framework of bringing claims of damages against a board member who has partaken in a transgression. In the same way that a transgression of the objective of the company must clearly be foreign to the objective of the company to be criticized – to be banned, however, an action must clearly contravene the profit motive;¹³⁴ it is not sufficient for it to appear commercially inappropriate in hindsight.¹³⁵

The fact that the interests of the company are equated with the interests of all shareholders, which is linked to the profit motive, does not mean that the board is prevented from taking other interests into consideration either. For example, there are a vast number of mandatory laws and regulations, e.g. environmental, labor and competition legislation, which the company – and thus the board – must take into consideration. There is naturally also room for the board – within the framework of the profit motive/interest – to voluntarily take other interests into consideration to a greater extent than is stipulated by mandatory law when making decisions. Accordingly, if the law requires certain minimum standards to be met in term of e.g. environmental considerations, the board can make decisions that exceed these levels as long as it doesn’t run counter to the profit motive.

5.3.5 Risk management and CSR

In this context, we should mention the increased focus in recent years among market-listed and other major companies on risk and risk management. Under chapter 8, section 4 of the Swedish Companies Act, since the board is responsible for ensuring that the company’s organization is designed so that accounting, asset management and the company’s other economic situation can be reviewed in a reliable manner, the board thus has a duty to create an internal control and risk management system

¹³² Rodhe, K, *Pertinent questions. The Co-determination Act and the Swedish Companies Act*, SvJT 1977 p. 295 f.

¹³³ Ohlson, G, *Importance of profit*, Iustus, 2012, p. 101.

¹³⁴ See e.g. Stattin, D, *On Corporate Representatives’ Transgressions of Authority*, Uppsala University, 2007, p. 82.

¹³⁵ Skog, R, *Rodhes’ Company Law*, Norstedts juridik, 2014, p. 244 f.

within the company.¹³⁶ The board should thus design a framework for risk management and control in order to support the identification, evaluation, supervision, management and control of risks that are significant to the company's ability to achieve its operational objectives and to provide reliable financial information. The risks that this framework should encompass span across a broad range, from social and macroeconomic risks that affect all companies, to risks specific to the company's own market, like customer, supplier and market-driven risks, and purely internal risks like risks related to staff, including misconduct and capacity utilization, as well as risks attributable to tax matters and the fulfilment of tax obligations.¹³⁷ An area that has garnered particularly substantial interest in recent years is risks concerning CSR, like corruption and other unethical proceedings or improprieties in the supply chain, pertaining to e.g. environmental crimes or child labor. The latter risks are attributable to what is commonly referred to as "reputational risk", and which may have a negative impact on the company's reputation and thus sales to customers, and above all, consumers. The responsible and systematic management of these and other risks faced by limited liability companies is not just compatible with the profit motive, but can nowadays even be regarded as a precondition for not ultimately jeopardizing the profit motive. Accordingly, it is clear that decisions that are also geared toward sound CSR practices, for example, are not incompatible per se with the profit motive.

5.3.6 An operationalization of the profit motive

From the above, we can discern that a substantial number of decisions that are not characterized by an immediate profit maximization can very much still be compatible with the objective of generating a profit. The key factor is that the board does not side-line the profit motive to the advantage of other interests.¹³⁸

How should the board go about fulfilling the profit motive? There is no clear answer. In an attempt to operationalize the profit motive in the literature, Skog has stated the following:

"From a business economic perspective, it is difficult to envision this happening in any other way - that is meaningful to the company's bodies - than the board striving to maximize the value of the company through its actions. The practical implications of this are to make all investments that have a positive present value, meaning that are expected to generate greater discounted revenues than costs, and to not make any other investments".¹³⁹

¹³⁶ Accordingly, the board must ensure that documentation is available on which to make a decision on the structure and power of the internal control. Internal controls aim to prevent, eliminate or reduce risks that present a threat to the stated objectives of the operation. In other words, a company's internal control must be comprehensive. Specifically in terms of the responsibility for ensuring accurate financial reporting, measurement instruments are needed that show which activities in the processes related to accounting and financial statements are associated with the greatest risks or that handle the largest transaction volumes. Here, the company conducts risk analyses with the aim of identifying potential obstacles to achieving accurate financial reporting. The legal provisions in the Swedish Companies Act and the Swedish Annual Accounts Act on the audit committee and the corporate governance report are very strictly focused on financial reporting. The system for internal control and risk management that it is up to the board to create, as per chapter 8, section 4 of the Swedish Companies Act, must provide a reasonable level of security in terms of e.g. preventing or detecting in time non-approved purchases or unauthorized use of the company's assets that could have a significant impact on the company's financial reports.

¹³⁷ See e.g. the OECD's *Guidelines for multinational enterprises*, 2011, art XI.2: "Enterprises should treat tax governance and tax compliance as important elements of their oversight and broader risk management systems. In particular, corporate boards should adopt tax risk management strategies to ensure that the financial, regulatory and reputational risks associated with taxation are fully identified and evaluated".

¹³⁸ Skog, R, *On the significance of the profit motive as per the Swedish Companies Act*, SvJT 2015 p. 16.

¹³⁹ Skog, *On the significance of the profit motive as per the Swedish Companies Act*, SvJT 2015 p. 11, 15.

The principle is – at least theoretically – easily applied, though it is essentially limited to investment decisions. To provide the board with guidance within the framework of the vast number of decisions that are directly related to investment decisions, more general – and perhaps thus more difficult to apply – guidelines are needed. To begin with, there is the matter of what timeline the board should observe. In many operations, it should, for example, be possible to “exploit” the company to generate significantly higher profit during a brief period than in the long-term perspective. For instance, cutting down on marketing, new recruits, investments and other factors that only generate a return in the long term, leads to reduced costs and thus higher profit in the short term. However, due to e.g. the unlimited life of the limited liability company, the perception in the legal literature appears to be that the profit motive must be seen from more of a long-term perspective.¹⁴⁰ Against this background, in our opinion, it ultimately falls to the board, within the framework of its management expertise, to attempt to determine whether a certain action or a certain decision *creates value and thus – at least in the long term – contributes to achieving the profit motive.*

A transgression of the profit motive is sanctioned by liability in damages as per chapter 29 of the Swedish Companies Act; see section 5.5.1.

5.4 Value transfers

5.4.1 Introduction

The Swedish Companies Act is not limited to including provisions on the relation between shareholders and those in charge of the company’s administration on their behalf. A number of provisions in the law have been added for the protection of the company’s creditors. Capital protections in the Swedish Companies Act can be said to be based on three basic tenets, namely (i) contribution duty, (ii) limitations in the company’s right to allocate in excess of the contributed or earned capital, and (iii) the rules on forced liquidation. Of interest in this context is the second of these basic tenets, which is expressed by way of the law’s value transfer provisions. Share capital, revaluation reserve, statutory reserve and the equity method reserve comprise the company’s restricted equity. Its unrestricted equity comprises available funds, retained earnings or losses and the profit or loss for the financial year.¹⁴¹ Unrestricted equity also includes shareholder contributions. Assets not included in restricted equity can essentially not be allocated by the shareholder other than in conjunction with liquidation¹⁴² or under the specific circumstances that follow from the rules on the reduction of share capital or the statutory reserve. Unrestricted equity, on the other hand, can essentially be paid out to shareholders by way of so-called *value transfers*, though only under the conditions stipulated in chapter 17 of the Swedish Companies Act. The law thus differentiates between value transfers that are subject to formal conditions and those that are not. Value transfers that are subject to formal conditions include the distribution of profit, the purchase of own shares, and a reduction in share capital of the statutory reserve.¹⁴³ Gifts for the public good are also a value transfer that are permitted under certain circumstances. Value transfers that are not subject to formal conditions, or disguised value transfers, refer to a business event

¹⁴⁰ See e.g. Ohlson, G, *Importance of profit*, Iustus, 2012, p. 263; see also Samuelsson, P, *An Essay on Profit as Value* in Festschrift to Boel Flodgren, Juristförlaget, 2011, p. 361, 373; Östberg, J, *The duty of loyalty among board members*, Jure, 2016 p. 69. Skog’s operationalization of the profit motive, as stated above, supports this thesis.

¹⁴¹ Chapter 5, section 14 of the Swedish Companies Act.

¹⁴² Bill 1973:93 HRH’s bill including proposals on acts on convertible debentures, etc. p. 63.

¹⁴³ Since 1 February 2016, agreements on intra-group financial support that are approved under chapter 6 b, section 6 of the Swedish Banking and Financing Business Act, or chapter 8 b, section 6 of the Swedish Securities Market Act also constitute a value transfer that is subject to formal conditions; see chapter 17, section 5, item 5.

other than the value transfers that are subject to formal conditions that are listed in chapter 17 of the Swedish Companies Act, which entail a reduction in the company's assets and are not strictly of a commercial nature for the company.

5.4.2 Business event

According to the preparatory work, a business event is defined as all of the changes in the size and composition of the company's assets that influence the company's external economic relations, such as incoming and outgoing payments, the emergence of receivables or liabilities, as well as contributions to and withdrawals from the company of funds, goods or other items.¹⁴⁴ For a business event to be regarded as a disguised value transfer, it must in other words first and foremost result in a reduction of the company's assets. Whether the transaction results in a reduction in assets or not is determined by general principles, and its effects on the company's accounting are of no significant bearing.¹⁴⁵ The testing of whether a value transfer has occurred is essentially based on the market value of the performances of each party.¹⁴⁶ This means that the transfer of an asset from the company that is conducted at the carrying value is, from a value-transfer perspective, to be regarded as a value transfer to the extent that the market value exceeds the carrying value. Another matter is that the lawfulness of the act, as per the value cap, is assessed pursuant to the net method, meaning on the basis of the asset's carrying value.

5.4.3 Assessment of disguised value transfer

According to the preparatory work, particular significance will have to be attached to the difference between the parties' performances (the value discrepancy). The case in which the transaction comprises a "bad deal", meaning that it is disadvantageous for the company and advantageous for the counterparty, does not, however, automatically mean that it is to be regarded as a value transfer. Also of considerable significance is whether the transaction is compatible with the company's normal operations. In other words, a transaction that comprises a normal part of the operation will have to be regarded as being appropriate to business. In conducting the assessment, there may be reason to consider such factors as the legal form of the transaction (an acquisition, a pledge, a surety, a salary payment, etc.) and the recipient's relation to the company (what actual influence or formal position he or she holds in the company). In the event of transactions between a shareholder in a close corporation and the company, even a slight difference between the performances of the parties should indicate that the transaction is to be considered a value transfer, since in these cases it can generally be presumed that the purpose is to benefit the owner. A transaction that the same company conducts with an outside party, however, can entail major differences between the performances of the parties without being regarded as a value transfer. Accordingly, the evaluation must be made on the basis of the circumstances in the specific case.¹⁴⁷

Against the background laid forth above, the term disguised value transfer will refer to such activities as the company disposing of assets below cost, overpaying for assets, paying salaries or fees for services or work that is not at all, or only in part, equivalent to the payment, lending funds at an interest rate that is low relative to

¹⁴⁴ See also chapter 1, section 2, first paragraph, line 6 of the Swedish Book-keeping Act.

¹⁴⁵ Bill 2004/05:85 *New Swedish Companies Act*, p. 747.

¹⁴⁶ AJS 17:1.2 including further references.

¹⁴⁷ Bill 2004/05:85 *New Swedish Companies Act*, p. 748.

the market, or taking a loan at a rate that is high relative to the market, writing off receivables or allowing receivables to expire. It is irrelevant which designation the business event was assigned.¹⁴⁸ As worded, fiscal transfers could also be designated as a value transfers under the law.

5.4.4 Conditions under which a disguised value transfer would be legal

In the event of disguised value transfers, the law does not stipulate any particular decision-making procedure. However, for the value transfer to be legal, the shareholders must be in agreement, and the value transfer may not violate the creditor-protection rules under the Swedish Companies Act. The same applies in matters of value transfers to parties other than shareholders.¹⁴⁹ In the matter of a transaction that is decided on by the general meeting of shareholders or jointly by the shareholders, the matter will be tested to determine whether it constitutes a value transfer in consideration of the circumstances at the time of the decision. Otherwise, the date of the board's decision or, in the absence of said date, the date on which the company bound itself to the transaction takes on a decisive role. Subsequent changes in the value of the performances should not entail that a transaction that was flawless at the time of the decision or agreement should be regarded as being encompassed by the stipulation.¹⁵⁰

A transgression of the value-transfer rules of the Swedish Companies act will be subject to a restitution obligation and deficient coverage liability; see section 5.5.2.

5.5 Sanctions

5.5.1 Violation of the profit motive

Under chapter 29, section 1 in the first sentence of the first paragraph of the Swedish Companies Act, a founder, member of a board of directors or CEO who, in the performance of his or her duties, intentionally or negligently causes damage to the company shall compensate such damage. This liability in damages to the company is occasionally referred to as *internal liability*. Pursuant to chapter 29, section 1 in the second sentence of the first paragraph of the Swedish Companies Act, compensation liability for board members and the CEO can also materialize when damage is inflicted upon shareholders or other parties due to violations of the Swedish Companies Act, the applicable Annual Accounts Act,¹⁵¹ the company's articles of association or the EU's prospectus regulations. This liability – the *external liability* – thus does not only require damage to have been inflicted, but also for that damage to have been directly attributable to a violation of the aforementioned legislation (including the prospectus regulations), or the company's articles of association. External liability itself can be divided into two subcategories: liability for *direct damages* that immediately afflict shareholders and third parties, and *indirect or mediated damages*, whereby the direct damage is done to the company, and shareholders and third parties only indirectly suffer as a consequence thereof.

¹⁴⁸ Bill 2004/05:85 *New Swedish Companies Act*, p. 747.

¹⁴⁹ Bill 2004/05:85 *New Swedish Companies Act*, p. 394.

¹⁵⁰ Bill 2004/05:85 *New Swedish Companies Act*, p. 748.

¹⁵¹ Applicable laws regarding annual accounts refer to the Swedish Annual Account Act (1995:1554) (ÅRL) or, in the matter of a limited liability company that is, in full or in part, subject to the Swedish Annual Accounts for Credit Institutions and Investment Firms Act (1995:1559), to that law and its stated supporting provisions. In the matter of companies that prepare or will prepare consolidated financial accounts as per Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, as relates to their consolidated financial accounts, the accounting standards that have been adopted with the support of this regulation also apply. See chapter 1, section 12a of the Swedish Companies Act.

Although the board is a collective body, the liability provisions in chapter 29 of the Swedish Companies Act are of an individual nature. This individual responsibility may, for example, mean that certain board members, but not others, will be held liable for a particular damage.

Based on the liability rule in the first sentence of the first paragraph of chapter 29, section 1 of the Swedish Companies Act, one can derive four basic requirements for the company to be able to demand damage liabilities from a board member or the CEO:

1. damage must have occurred,
2. the damage must have been inflicted within the perpetrator's capacity for the company,
3. the perpetrator must have acted in a culpable manner and
4. there must be adequate causality.¹⁵²

If a party is liable for damages, the damages may be adjusted taking into consideration the nature of the act, the extent of the damages and the circumstances in general, as per chapter 29, section 5 of the Swedish Companies Act.

A violation of the profit motive should first and foremost bring about liability of damages against the company, as per the first sentence of the first paragraph of chapter 29, section 1 of the Swedish Companies Act. If the petitioner is able to demonstrate that, by way of a decision or other action, one or several board members significantly violated the profit motive, they should be able to demonstrate culpability. Provided that the other criteria have been met, liability can then be adjudicated. In strictly theoretical terms, external liability to shareholders could conceivably exist due to a violation of chapter 4, section 1 of the Swedish Companies Act (though hardly in relation to a creditor). In regard to liability to shareholders for what essentially constitutes indirect damage, however, certain complicated procedural matters arise that this theoretical proposition does not allow for a closer examination of.¹⁵³

5.5.2 Value transfers

The sanction for a value transfer in violation of the rules stipulated in chapters 17, 18 and 20 of the Swedish Companies Act, is, according to the first paragraph in chapter 17, section 6 of the Swedish Companies Act, that the recipient shall return what he or she has received. However, one prerequisite for such a restitution obligation, is that the company prove that the recipient knew or should have realized that the value transfer was in violation of this Act.

¹⁵² Dotevall, R, *Liability for damages for board members and the CEO*, Norstedt, 1989, p. 88 ff.; Dotevall, R, *Corporate management's liability for damages*, Norstedts Juridik 2008, p. 65 f.; Stattin, D, *Corporate governance*, Uppsala University, 2008, p. 329 ff.

¹⁵³ In conclusion, the right for a shareholder to seek compensation in the event of indirect damages – meaning damages that primarily affected the company and only indirectly affected the shareholder – is questioned in jurisprudential literature. The matter has not been tried by a court. According to our preparatory work/legislative history, an individual shareholder is only eligible for compensation for such damages if the damages that are inflicted on the company were directed against a particular or certain shareholders. Bill 1997/98:99 The organization of a limited liability company, p. 182, thereby states the following: “It may be claimed that an individual shareholder should have the right to demand compensation from the board, provided that the board, by way of negligent administration of the company, has reduced the value of the shareholder's shares. However, in such a case, it is fundamentally a matter of damages that have been inflicted upon the company. The damages have affected all shareholders equally. A minority of shareholders has the right, on behalf of the company, to take compensatory legal action against the members of the board of directors. In light of the above, it seems most natural to regard the damages as something related to the shareholder's participation in the company's business, and as such something that the shareholder must accept”.

Under chapter 17, section 7 of the Swedish Companies Act, the individuals who have colluded in the decision on a value transfer are accountable for any shortfalls that arise when making the return, as per chapter 17, section 6 of the Swedish Companies Act. Cited as an example in the preparatory work is a board member who has proposed to the meeting that it vote on an illegal value transfer, or a shareholder who has voted for such a decision.¹⁵⁴ Deficient coverage liability, however, can be imposed on an individual who has colluded in the execution of a decision, e.g. a board member or a CEO who has executed an outgoing payment or entered into an agreement that constitutes an illegal value transfer. This also applies to those who have colluded in the drafting or adoption of an incorrect balance sheet that has served as the basis for a decision on a value transfer. A board member or CEO who has signed an incorrect balance sheet, and an auditor who has verified it may be held liable on these grounds. None of these cases requires the colluding party to personally have received anything from that which was unlawfully transferred. However, for deficient coverage liability pertaining to board members, the CEO, auditors, general examiners and special examiners, intent and negligence must be established, and, pertaining to shareholders and other parties, intent and gross negligence must be established.

Restitution obligation, under chapter 17, section 6 of the Swedish Companies Act and deficient coverage liability under chapter 17, section 6 of the Swedish Companies Act are the only sanctions available under the law against companies for violations of the value transfer rules in chapter 17, section 3 of the Swedish Companies Act, meaning that the provisions governing damages in chapter 29, section 1 of the Swedish Companies Act are not applicable.¹⁵⁵ However, the fourth paragraph of chapter 17, section 7 of the Swedish Companies Act states that when enforcing the provisions in the third paragraph in chapter 17, section 7 of the Swedish Companies Act, sections 5–6 of chapter 29 of the Swedish Companies Act apply. Consequently, several parties bearing deficient coverage liability are liable jointly with one another and the deficient coverage liability can be adjusted. The party liable under the deficient coverage liability can seek recovery from the party who holds the restitution obligation for that which the party liable has laid out, as per chapter 17, section 6 of the Swedish Companies Act. Insofar as others are also liable under the deficient coverage liability, the party identified as being liable under the deficient coverage liability can seek recovery from each of the others the portion that they should ultimately bear of the compensation liability toward the company. The limitation period expires in accordance with the provisions governing the general period of limitations for receivables.¹⁵⁶

5.6 Tax planning and Corporate Social Responsibility – a company law perspective

In light of the above, the question then becomes if a company can and should include tax matters in its CSR efforts. Knuutinen's definition of CSR (see section 1.2) as "operations or actions of companies that are *above or independent of the limits or minimum requirements set by legislation*"¹⁵⁷ also begs the question of the extent to which a board of directors is allowed to decide that a limited liability company actually is to pay more in taxes than it is obligated to by law.

¹⁵⁴ Bill 2004/05:85 *New Swedish Companies Act*, p. 757.

¹⁵⁵ However, in the preparatory work ahead of the Swedish Companies Act of 1944, it was stated that an individual creditor should have the right to take legal action for damages against individual board members who were complicit in an illegal dividend, see Swedish Government Official Report 1941:9 Law-drafting board's proposal on a legislative act for limited liability companies, etc. p. 642. Nothing indicates that any changes have been made in the Swedish Companies Act of 1975 or the Swedish Companies Act; see Bill 2004/05:85 *New Swedish Companies Act*, p. 757 ff.

¹⁵⁶ Bill 2004/05:85 *New Swedish Companies Act*, p. 759.

¹⁵⁷ Italics added. Knuutinen, R, *Corporate Social Responsibility, Taxation and Aggressive Tax Planning*, Nordic Tax Journal, 2014 1 p. 38

The Swedish Tax Agency has stressed that companies should include taxes in their CSR efforts, e.g. by drafting guidelines for tax planning and tax schemes. These guidelines can also encompass considering the tax affairs of suppliers and other business partners when selecting such partners.¹⁵⁸ In our opinion, this recommendation – which has been perceived as being relatively controversial¹⁵⁹ – has nothing to do with CSR. Rather, it is part of the board's general risk management responsibility. Specific risks pertaining to the company's relations with its suppliers and other business partners or to its tax affairs or taxation in general are just a few of the many matters that a responsible board must take into consideration in its risk efforts.

Complying with the tax legislation in the country in which the company operates is no more unusual than complying with environmental legislation or other applicable legislation. General considerations, including the board's risk appetite, the market in which the company is active, the risks of reputational damage within the framework of the area of taxation, and other factors contribute to determining how proactive a company wants to be in its tax efforts and its tax planning. As emphasized above (see p. 18) in this report, companies probably generally determine their tax policies on the basis of a strict analysis of the costs and the benefits that they entail, and tax matters in general are regarded as being of limited value for shareholders (in publicly traded companies) or for analysts. As long as the company's tax policy is compatible with the law, it ought to be very difficult to contend that a board is acting carelessly even if the company engages in relatively advanced tax planning with the aim of minimizing the taxation of the company and the group. On the contrary, such a policy is directly and causally consistent with the profit motive.

However, the board of a limited liability company would be setting out on a slippery slope if it decided to pay *more tax than is required by law*.¹⁶⁰ It is difficult – even from a long-term perspective – to reconcile excessive tax payments with a profit motive.

To illustrate the differences between the questions that – in normal language usage – constitute the core of a company's CSR efforts and tax payments, we can take one example. The board of a publicly listed company that is active in the consumer market, has three specific proposals to decide on. The first pertains to eliminating in advance certain chemicals in its manufacturing process that will become illegal in 4–5 years under the EU environmental code. The second is a decision to invest in a new production line in which certain hazardous and filthy work processes that are currently being performed by employees will instead be performed by robots.

The proposal is motivated in its entirety by a work-environment perspective: the current production line be used for another 10–12 years without any major investments. The third proposal derives from a form of tax planning that the company has been utilizing in recent years and that draws advantage of writing off intra-group interest that has been questioned by the media. Therefore, the proposal is to change the tax structure, which will lead to the group and parent company's effective tax burden increasing. Each one of the proposals will lead to a negative net outcome for the company in the amount of SEK 10 million.

¹⁵⁸ Hansson, I, Op-Ed: Taxes are a matter for the board of directors, Dagens Industri Sept. 15, 2015.

¹⁵⁹ Andersson, K, Fritsch, A, and Rydin, U, *Should tax reviews be privatized?* Dagens Industri Sept. 24, 2015.

¹⁶⁰ In this context, it can be noted that while the OECD's Guidelines for multinational enterprises may appear relatively ambitious in that they on the one hand stipulate that "In particular, enterprises should comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate. Complying with the spirit of the law means discerning and following the intention of the legislature". However, on the other hand, it is expressly stated that "It does not require an enterprise to make payment in excess of the amount legally required pursuant to such an interpretation". See Art. XI.1.

With regard to the first two proposals, the assessment is that the net outcome itself cannot be “recouped”, meaning that in the event of an isolated application of Skog’s present value model for investments (see section 5.3.6), the investments themselves are not expected to generate greater discounted revenues than costs. Seen in terms of the goodwill that the board expects the investments to generate with customers and other consumers, it nonetheless believes that the long-term outcome will create so much value that it will ultimately have a cautiously positive impact on the company’s earnings.¹⁶¹ Both environmental matters and work-environment matters are topical and a company at the forefront of these areas captures market shares. The investments are thus consistent with the profit motive.

In terms of the third proposal, the link to the company’s market is not nearly as evident. The value of the reputational risk inherent to being associated with certain forms of – completely legal – “tax schemes” is not equivalent to the increased tax burden that the company will face. Accordingly, a decision to change its tax structure is not compatible with the profit motive.

Granted, in strictly theoretical terms, one could imagine that a company active in certain markets could have such a strong interest in being regarded as a good tax citizen that it could lead to another assessment. This mainly pertains to companies that have state and municipal customers. In such companies, one could imagine that refraining from advanced tax planning is compatible with the profit motive, if the company were otherwise to risk losing assignments to other companies that do not employ such tax planning. However, this situation is an exception and is hardly representative of most tax-paying companies.

Unlike investments in the environment or a supplier’s working conditions – conventional CSR areas – it is thus difficult, other than in exceptional cases, to see that excessive tax payments would create goodwill that in the long-term could lead to increased earnings. As described in the initial sections above, such decisions may – at least theoretically – deviate from both the profit motive and from the rules governing value transfers. Accordingly, such a decision would subject the board to the risk of both liability for damages and deficient coverage liability.¹⁶²

Admittedly, it should be stressed that, in practice, it would probably be very difficult to demonstrate that a board has violated the Swedish Companies Act in making a tax-related decision, since most decisions pertaining to taxes could probably be defended on commercial grounds.¹⁶³ In terms of violations of the profit motive in particular, Lindskog has stated the following:

¹⁶¹ Admittedly, it could therefore be contended that Skog’s present value model would thus ultimately be fulfilled.

¹⁶² Another theoretical question that could perhaps be left open is to what extent the state would be subject to a restitution obligation for taxes paid in excess, which in and of itself constitutes a value transfer; see also chapter 17, section 6 of the Swedish Companies Act: “If a value transfer that is referenced in section 1, 1 or 3, or section 5, has occurred in violation of the stipulations in this chapter..., the recipient must return what he or she has gained, if the company demonstrates that he or she realized or should have realized that the value transfer was in violation of this law. If a value transfer pursuant to section 1, 4, which does not pertain to a gift under section 5, has occurred in violation of this chapter, the recipient bears a restitution obligation if the company can demonstrate that he or she realized or should have realized that the transaction encompassed a value transfer from the company”.

¹⁶³ See Nilsson, M, *Taxes and sustainability*, SvSkT 2015:9 pp. 711, 721.

"A general presumption, however, appears to be that if a company body's decision to carry out a transaction can be defended on the basis of game theory, then neither claims of negligence nor a deviation from the profit directive could be made ... Otherwise, the lack of profit motive would have to be highly substantial for the profit directive to be regarded as being neglected."¹⁶⁴

Completely regardless of what sanctioning options are available, the notion that paying taxes should constitute a component of a company's CSR efforts is, both in theory and in practice, difficult to reconcile with the profit motive.

¹⁶⁴ Dotevall, R, *Liability for damages for board members and the CEO*, Norstedt, 1989, p. 417; see also Taxell, LE, *Responsibility and delegation of responsibility in limited liability companies*, Åbo akad., 1963, p. 75 f. (prior Finnish law).

6 Conclusions

CSR involves companies doing more than what the law requires. The question is: Can a company be obligated to refrain from a legal option of gaining a lower tax burden? The values that an executive at a company has is probably of significance in the decisions that are taken in terms of the company's business. The executive's tax morale may thus be of significance in the company's decisions on legal tax planning. On the other hand, an executive is subject to restrictions. The executive is not at liberty to make decisions that are based on his or her own private morals. The executive is bound by his or her employment contract and by the formal rules of law. The executive is also bound by soft social norms in the form of expectations by superiors and by owners, yet also by employees and other stakeholders. The executive's values may have been influenced by the values expressed in the Swedish Companies Act – namely the profit motive. It is somewhere in this realm that CSR enters the game – there are numerous interests that can be presumed to influence the executive.

It should thus to a lesser extent be a matter of the executive's own private values, and instead by a matter of an executive believing that the company's economic potential will be improved by the executive's decision. In a rough manner of speaking, one could say that most stakeholders are favorable to a company doing well.

CSR can probably be of significance for a company's tax management provided that the practical tax management could play a significant role in the company's financial success. If the market in which the company is active can be influenced by the company's reputation as a taxpayer, CSR, as is outlined in section 5.6, should play a fairly substantial role. If a company's reputation does not matter, the significance of CSR can be questioned. Accordingly, the expectations that are imposed on a company by the surrounding community are the ones that can be of significance. Those who want to strengthen CSR in the area of paying taxes must thus work on forming opinions.¹⁶⁵ As above, one could discuss whether it is appropriate for agencies governed by rules to engage in the forming of opinions – legislators have clearly adopted a restrictive view on this.¹⁶⁶ Room for the Swedish Tax Agency to propagate for the incorporation of taxes into CSR efforts and what that is to entail more specifically is thus, rightly, limited.

Furthermore, it is important to adopt a realistic and nuanced approach to including taxes in CSR. Empirical studies show that firms are most likely to determine their tax policy based on a strict cost/benefit analysis, and it will therefore be difficult for any Tax Agency to influence firms through the forms of cooperation available to it and that are compatible with the rule of law. There are plenty of indications that a firm which does not perceive any reputation risk in legal tax planning will make full use of it, and it is difficult to change this fact by trying to change attitudes. It would likely be more effective if the Swedish Tax Agency, taking into account the rule of law, would spend its resources on conventional audit activities and, where applicable in case of grey zones, use its opportunity to litigate in a constructive manner (e.g.,

¹⁶⁵ Customers' perceptions can surely be of significance; see <http://www.svd.se/walesiska-byn-gor-revolt-mot-skattesmitare>. [A town in Wales revolts against tax evaders]

¹⁶⁶ Bill 2009/10:175, *Public administration for democracy, participation and growth*, p. 39 f.

by allowing the specific body within the Swedish Tax Agency the so called the “ombudsman” to apply for advance tax rulings), rather than trying to “persuade” taxpayers to pay more tax than actually required by law. The Swedish Tax Agency should of course swiftly share with the legislator its observations in relation to the legal tax planning activities of firms, but to think that firms would be willing to pay more tax than required by law is a naïve – and possibly dangerous – way of securing the tax base.

The Swedish Tax Agency’s efforts in terms of so called cooperative compliance, the Agency’s issuing of private letter rulings/clearances and other forms of networking activities could nevertheless have positive effects, and may be highly appreciated by firms. It is however uncertain whether such activities will strengthen the willingness of firms to refrain from legal tax planning or executing transactions in grey areas. A firm may of course refrain from an intended transaction if it knows that the Tax Agency will not accept the transaction – however, a firm’s decision will most likely be based on a rational economic analysis, which may include litigation costs. Any Tax Agency should however avoid intentionally threatening litigation. There is a fine line between a constructive discussion, in which the Tax Agency and the firm may take opposite positions as regards the interpretation of current law, and unilateral repression. Threats should not constitute an acceptable tool in governing behavior. Threats also have an eroding effect on the legitimacy of the agency and thus, ultimately, have counterproductive effects. An example of what could be regarded as less successful communication is outlined in the Swedish Bar Association and FAR’s joint complaint filed with the Parliamentary Ombudsmen against the Swedish Tax Agency’s classification of a certain form of partnership structure as constituting a “tax scheme”.¹⁶⁷ Right or wrong – an action that causes major organizations to file a strongly worded complaint with the Parliamentary Ombudsmen cannot be regarded as being a successful way to build confidence. The dialogue broke down. A key insight for those who want to influence attitudes is that the audience enjoys the benefit of hindsight.

When it comes to company law aspects of treating tax matters as CSR, we showed in chapter 5 above that the Swedish Companies Act imposes limitations on the ability of board of directors to refrain from availing themselves of a legal opportunity resulting in lower taxation. Although it would admittedly be challenging to demonstrate that a board has violated the Swedish Companies Act in making a tax-related decision, since most tax-related decisions should be defensible on commercial grounds, in strictly legal terms, provisions on the profit motive and value transfers limit a board’s discretion in this regard. Ultimately, a violation of these restrictions is sanctioned by personal liability for the directors.

If it is accepted that legal rules have an effect on our actions, and possibly a “moral-forming” effect, such that the contents of the rules of law influence social values and attitudes, the question arises as to what impact the basic rules of the Swedish Companies Act have on the attitude of firm representatives? Or to put it differently – does a board of directors comply with the requirement to operate for profit A) because it is mandatory under the Companies Act and under the threat of legal sanctions/litigation, or B), because the board of directors finds it is right and appropriate to follow the instructions implicitly expressed by the Companies Act?

¹⁶⁷ *The Swedish Bar Association and FAR file joint complaint with the Parliamentary Ombudsmen against the Swedish Tax Agency, The Swedish Bar Association (31 March 2016), <https://www.advokatsamfundet.se/Nyhetsarkiv/2016/mars/Advokatsamfundet-och-FAR-JO-anmaler-Skatteverket/>*

In light of the social science studies referred to in our report, it is in our opinion not an unreasonable assumption that B is the right answer. It is also our belief that as long as the Swedish Companies Act is based on the underlying purpose of profit, it will be very difficult to change the attitudes of boards of directors, and this would also be in conflict with legislative intent.

In our opinion, this constitutes a good illustration as to why social governance is hard to achieve based on social values, as the two are often in conflict with each other. Where legal rules are followed, a certain social stability will be achieved, along with increased predictability with regard to operators' behavior and legal certainty. For example, under the well-established assumption that firms operate for the purpose of profit, we can adapt to that assumption and act accordingly. As researchers, we opt for realism over idealism.

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