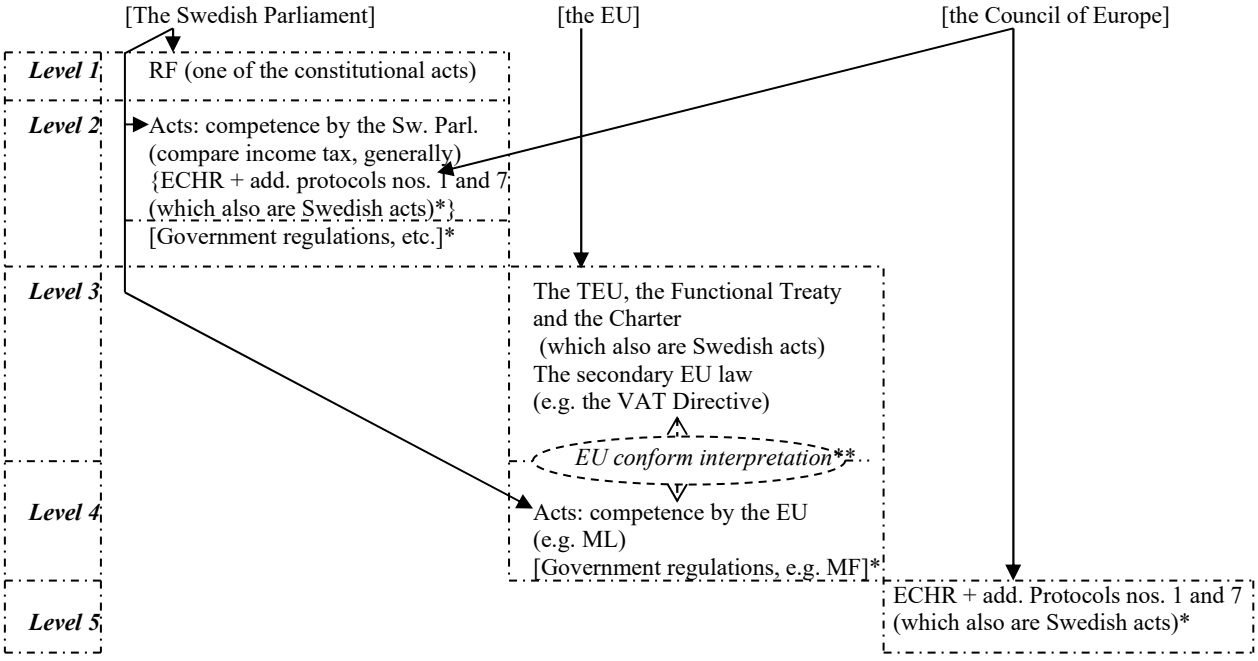
The European stepladder – a norm hierarchy image at rule competitions between Swedish national and European law rules with taxation examples

[Translation of the article *Europatrappan – En normhierarkisk bild vid regelkonkurrens mellan svenska nationella och europarättsliga regler med skatterättsexempel*, by Björn Forssén, published in original in *Tidningen Balans fördjupningsbilaga* (The Periodical Balans Annex with advanced articles) 4/2017, pp. 15–19. Translation into English by the author of this article, Björn Forssén.]

At a rule competition between rules comprised by the competence of the Swedish Parliament, the European Union (EU) or the Council of Europe a norm hierarchy emerges. The principle of the formal power of law, which can be considered – for norm hierarchy purposes – forming a ladder does not give a sufficient picture. In this article, Björn Forssén suggests a norm hierarchy image where the internal ranking of the legislations is made in the form of a stepladder (the European stepladder). Since the EU does not have a constitution of its own, the author considers that the law of procedure should also be regarded to describe the relationship between rules for which the competence lies with the Swedish Parliament, the EU's institutions or the Council of Europe.

In this article, I am giving a proposal of hoe the norm hierarchy can be described in a European law perspective concerning the rule competition between legislations for which the competence lies with the Swedish Parliament, the EU or the Council of Europe. In other situations, I have presented the image below which I name the European stepladder (or staircase) and use in this article:

"The European stepladder (staircase) – Sw., *Europatrappan*"



In Ch. 8 of the 1974 Instrument of Government), *regeringsformen (1974:152)*, abbreviated RF, the order concerning acts and other legislations in Sweden is stipulated. There, it is stated

that those are issued by the Parliament through acts and by the Government through regulations. By appointment from the Parliament or the Government can instructions also be issued of other authorities than the Government and by municipalities. The principle of the formal power of law is fundamental for the stability of the legal system.[1] The principle means that constitutional acts can be altered only by constitutional acts, that general acts only can be altered by at least general acts and so on. Inter alia, this means that the Government cannot introduce a regulation which is in conflict with a current act. The principle of the formal power of law shall resolve a collision between a constitutional act, like the RF, and each instruction of lower value, between general acts and each instruction of lower value and so on. If a rule to its wording is not compatible with another rule it must at least be on the same level to be given preference. If the wording of an instruction is in conflict with an already current instruction it must in other words at least be of the same constitutional value as it to be applied. Thereby, the principle of the formal power of law is of great practical importance if there are real or illusory conflicts between various norms.[2] The maxim of the principle of the formal power of law can thereby be said constituting directives for the authorities and the courts concerning their application to judge a conflict between norms of different constitutional value.[3] Thus, the courts' and the authorities' trial of law in cases of norm conflicts are to be resolved by the principle of the formal power of law.[4] The principle of the formal power of law can be described as a ladder, where the following order of ranking applies:

- *the constitutional acts* e.g. the RF, have the highest constitutional value and are issued by the Parliament and thereafter follows in the following order;
- *general acts*, which also are issued by the Parliament;
- *regulations, which are issued by the Government*; and
- *instructions by others than the Parliament and the Government*, e.g. by municipalities or administrative authorities, have the lowest constitutional value.

By Sweden's EU-accession in 1995, competence was conferred in certain fields from the Swedish Parliament to the EU's institutions (organs) in accordance with Ch. 10 sec. 5 of the RF – nowadays Ch. 10 sec. 6 of the RF. This means that Sweden as a Member State of the EU is bound by certain legal acts from the EU's institutions, namely regulations, directives and decisions, whereas recommendations and opinions are not binding – according to article 288 of the Treaty on the Functioning of the European Union (TFEU). The European law consists of rules from the EU, the Council of Europe and the EFTA (European Free Trade Association). Sweden left the EFTA due to the accession to the EU in 1995. This does not mean that EFTA-rules would be in conflict with Swedish *ordre public*, that is with the fundamentals for the Swedish legal system, but they can be invoked comparatively in legal argumentation, above all regarding questions comprised by the EEA-co-operation between the Member States of the EU and the EFTA-countries Iceland, Liechtenstein and Norway. However, the overall question in this article, that is the question on how the norm hierarchy can be described concerning norm collisions between Swedish national rules and rules

[1] See p. 418 in *Grundlagarna REGERINGSFORMEN SUCCESSIONSORDNINGEN RIKSDAGSORDNINGEN Tredje upplagan* (The 1974 Instrument of Government The Act of Succession The Riksdag ACT Third edition), by Holmberg, Erik, Stjernquist, Nils, Isberg, Magnus, Eliason, Marianne and Regner, Göran. Norstedts Juridik AB. Stockholm 2012 (below Holmberg et al. 2012) and also pp. 341 and 342 in *Regeringsformen – med kommentarer* (The 1974 Instrument of Government – with comments), by Eka, Anders, Hirschfeldt, Johan, Jermsten, Henrik and Svahn Starrsjö, Kristina. Karnov Group. Stockholm 2012 (below Eka et al. 2012).
[2] See Eka et al. 2012 p. 342.
[3] See Holmberg et al. 2012 p. 419.
[4] See Ch. 11 sec. 14 and Ch. 12 sec. 10 of the RF and Holmberg at al. 2012 p. 419.

comprised by the competence of European organs, the problems on competition between rules decided by the Swedish Parliament, the EU and its organs or the Council of Europe. That follows by the EU's treaties, i.e. the Treaty of European Union (TEU) and the TFEU, the EU Charter of Fundamental Rights (EUCFR) and the European Convention of Human Rights of 4 November 1950 (ECHR), that is the European Convention from the Council of Europe, all apply as Swedish (general) law since 1995. Thus, concerning the EU law rules the problem in question comprises the primary law and the secondary law legal acts which are binding for Sweden as an EU Member State. With respect of the European law, the principle of the formal power of law is not possible to describe as a norm hierarchy in the form of a ladder, since a norm can be expressed by a rule in more than one legislation at the time, that is in a rule written by a Swedish organ – the Parliament, the Government etcetera – and by the EU's organs (institutions) or by the Council of Europe respectively. Instead, I suggest that that collision – rule competition – to be described in a norm hierarchy stepladder, the European stepladder (staircase).

In the following sections, I describe how the legislations decided by the Swedish Parliament, the EU and the Council of Europe can be assigned to the five levels of the European stepladder (where level 1 is the highest and level 5 is the lowest) and how they relate to each other, whether rule competition exists between them. The asterisks in the illustration above of the European stepladder recur with comments at that review. In section 2, I give a constitutional and procedural background to the review of the five levels in the European stepladder and then makes the actual review in sections 3.1–3.3.

2 Constitutional and procedural background to the five levels of the European stepladder

All power is derived from the people. It is exercised under the laws, which are decided by the Swedish Parliament (Ch. 1 sec:s 1 and 4 of the RF). The Swedish Parliament does not decide the rules of the European law: the EU law and the Convention law, respectively, constitute legal systems of their own (*sui generis*). This means a limitation of the principle of the formal power of law, since Sweden in certain fields has conferred constitutional competence to the EU's institutions according to Ch. 10 sec. 6 of the RF and it is stated in Ch. 2 sec. 19 of the RF that acts or other instructions must not be issued in conflict with Sweden's commitments according to the ECHR. The limitation of the principle of the formal power of law by conferment of competence to the EU's institutions may however not mean that such conferment would cause that fundamental principles of our constitutional system cease to be valid, which above all regards the rules on the fundamentals of Sweden's form of government (constitution), whereby the committee of constitution especially emphasized the freedom of opinion's great importance for our constitution.[5]

The TEU, the TFEU and the EUCFR and the ECHR with its additional protocols nos. 1 and 7 are incorporated in Sweden, but as ordinary acts – not constitutional acts. A draft of a Constitutional Treaty of the EU (a Constitution for Europe) was adopted on the summit in Brussels 17–18 June, 2004 and signed on 29 October, 2004 but was not ratified by all Member States.. Instead, a reform treaty was later accomplished, that is the Lisbon Treaty. The Lisbon Treaty meant that the EC Treaty (i.e. the Rome Treaty from 1957) was replaced by the TFEU and the TEU (i.e. the Maastricht Treaty of 1992) was reformed and that the EUCFR (the Charter) was equalized with the treaties, that is with the TEU and the TFEU. The

[5] See Holmberg et al. 2012 pp. 418, 489 and 490 and Eka et al. 2012 pp. 403 and 404.

Lisbon Treaty was decided and signed respectively in Lisbon on 19 October, 2007 and 13 December, 2007 respectively and had been ratified by all the then EU27-countries on 3 November, 2009. A constitutional treaty has although never entered into force, but the Lisbon Treaty with the TEU, the TFEU and the EUCFR was introduced as ordinary acts into the Swedish legislation on 1 December, 2009, by SFS 2009:1110. Despite that the EU does not have a constitution of its own the Court of Justice of the EU (CJEU) in Luxemburg considers that the EU law has primacy over national law, including the Member States' constitutions. The CJEU considered in the case Costa (6-64) that the EC Treaty was different from ordinary international treaties, by it meaning the EU introducing "its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply". There has also been discussed whether the EU can be considered having an understood authority – so-called *implied powers* or *Kompetenz-Kompetenz*. My perception is that the EU in its capacity as an international organ only can be considered having the character of a legal person, which like for instance a non-profit organization creates its own legal system. The EU is not a supranational organization and the principle of conferment of competence is a principle of legality which only can deprive the peoples of the EU Member States and their own parliaments the right of decision as far as it like in Sweden is covered by Ch. 10 sec. 6 of the RF and the EU's treaties.

According to article 288 second and third paras of the TFEU the EU's regulations are directly applicable in the Member States, whereas directives must be implemented. Something speaking for the EU law not having primacy before national law and the constitutions of the EU Member States is that the CJEU considers according to item 110 of the case C-212/04 (Adeneler et al.) that although the EU Member States' authorities and courts are bound to make an EU conform (directive conform) interpretation of national legal texts, by which a directive from the EU shall be considered been implemented, an EU conform interpretation does not mean an obligation for the Member States to interpret the national law in conflict with its wording (*contra legem*). Moreover, it may in my opinion be deemed unclear whether national authorities and courts are obliged to *ex officio* (by their own initiative) apply an EU rule before a national rule, even if it is a matter of a directive rule deemed to have direct effect. The main point with the principle of direct effect is that the individual has the right to invoke a directive rule with such effect to protect his or her interests. Sometimes, it is said that direct effect at the most can be classified as the right to invoke the EU law and thereby a sort of procedure (procedural) right with a corresponding obligation for the national courts and authorities – the national legal system – to regard that right.[6] To further confirm my perception, meaning that the EU law does not have an absolute primacy over national law so that it would even be set before the RF regardless of whether a question concerns a legal field (or part of a legal field) where the competence is conferred to the EU's organs by the Swedish Parliament, it may be mentioned that in article I-10(1) of the draft of the EU constitution, which was adopted in 2004 but never ratified by all EU Member States, it was proposed that the principle of the EU law's primacy over national law would be codified. However, this was not done in the reform treaty that was introduced instead, that is the Lisbon Treaty with the TEU, the TFEU and the EUCFR, which – as mentioned – only had the constitutional status of ordinary law in Sweden.

[6] See pp. 99, 100 and 105 in *Directives in EC Law (Second, Completely Revised Edition)*, by Sacha Prechal, Oxford University Press, Oxford 2005 [included in the series Oxford EC Law Library].

3 The review of the five levels of the European stepladder

3.1 The European stepladder's five levels are divided into three steps

The European stepladder which I express in section 1 has five levels of legislations (where level 1 is the highest and level 5 is the lowest), which are divided into three steps. The three steps regard legislations decided by the Swedish Parliament, the EU (that is the EU's institutions) and the Council of Europe:

- step 1 regards bodies of rules decided by the Swedish Parliament , and comprises levels 1 and 2;
- step 2 regards bodies of rules decide by the EU, and comprises levels 3 and 4; and
- step 3 regards bodies of rules decided by the Council of Europe and comprises level 5.

I have made the division of the five levels in the three steps so that the European stepladder thereby illustrates how the legislations within the different levels relate to each other set out from an order of ranking in a constitutional sense, if a competition of rules (collisions) exists between them. In sections 3.2 and 3.3, I make a review of how the three steps should be ranked in relation to each other and how the order of ranking should the occasion arise should be made of bodies of rules on different levels within each step. Then, I also mention how collisions between rules belonging to different steps should be resolved in terms of order of ranking or if a procedural solution is demanded.

Concerning fields where different bodies of rules remain within the competence of the Swedish Parliament or – by conferment – belongs to the competence of the EU, I have chosen to exemplify with the field of taxation, where competence has been conferred to the EU's institutions in general on the field of indirect taxation, which comprises e.g. value-added tax, whereas the competence remains in general by the Swedish Parliament in the field of direct taxation, which above all comprises income tax.

> Concerning VAT applies with regard of primary law for the sake of the internal market a general demand on harmonisation of the legislations in the EU Member States (article 113 of the TFEU), whereas it regarding the field of income tax is only a question of approximation of the legislations (article 115 of the TFEU). In the field of VAT, Sweden is as an EU Member State above all bound by the EU's VAT Directive (2006/112/EC), the VAT Directive. Such a general secondary law legal act is lacking in the field of income tax. There only the following EU-directives exist: the Merger Directive (2009/133/EC), the mother/daughter company directive (2011/96/EU), the savings directive (2003/48/EC) and the interest/royalty directive (2003/49/EC).

With respect of what I state in section 2 about directives and direct effect, must, as long as national authorities and courts are not made liable to *ex officio* apply the EU law, a description of the norm hierarchy in such a field as the field of taxation contain the procedural implication that this relationship means.

3.2 The levels 1, 2 and 5 – bodies of rules decided by the Swedish Parliament and the Council of Europe respectively

The top step of the European stepladder can be said containing the formal power of law. Thereto, I assign bodies of rules within fields of law where competence has not been conferred in general to the EU's institutions, like in the field of income tax and therefore that principle is intact in such cases, i.e. it is not limited by the middle step in the European stepladder to which fields of law (or pars of fields of law) for which competence has been

conferred to the EU by the Swedish Parliament belong. Therefore, on level 1 of the top step I express the RF as one of the Swedish constitutional acts, which all belong to that level and I rank under there on level 2 ordinary acts and other instructions, where the acts apply before other instructions, like the Government's regulations etc. The formal power of law resolves, as mentioned, a collision between the RF and instructions of lower value, between ordinary law and each instruction of lower value and so on.

*The ECHR and inter alia its additional protocols nos. 1 and 7, which lie within the field of competence of the Council of Europe belongs to level 5 (i.e. to the lowest step in the European stepladder). These bodies of rules are, as mentioned, also incorporated as ordinary law in Sweden since 1995. Therefore, they also belong to level 2. A rule decided by the Council of Europe which also has been incorporated as ordinary law in Sweden, like a rule in the ECHR, I rank below level 1 and in level 2 over other instructions than ordinary laws, like the Government's regulations etc.

However, it is more problematic to generally resolve a collision between a rule in the ECHR and a rule in another ordinary act within level 2 by only making a ranking of the bodies of rules. Sometimes it has been stated that *at a conflict between acts there is a weak presumption that the ECHR is preceding other acts*.[7] In my opinion, it is supported by Ch. 2 sec. 19 of the RF stipulating that acts or other instructions may not be issued in conflict with Sweden's commitments according to the ECHR, i.e. if it is a matter of a law conflict constituting a rule conflict. If on the other hand it is a matter of another sort of competition of rules, I consider that the solution of the question should be procedural instead. Sometimes it is stated that a conflict of rules always constitutes a form of competition of rules, namely that different law rules whose fields of application coincide completely or partly are impossible to apply at the same time and sets the applier of law in a situation of making a choice of rule, whereas a competition of rules also can mean a rule conflict in a more limited meaning, i.e. a collision between different rules exists that cannot be denoted as a rule conflict but the legal consequences of it can still in some way be incompatible.[8] Thus, in the recently mentioned cases of competition of rules, I consider that the solution of the collision should be procedural: a national court may in the individual case make a hypothetical trial of how the European Court of Human Rights (ECtHR), in Strasbourg, would judge, i.e. a hypothetical trial of how the competition of rules would be finally resolved if the question would be pursued by the individual to the ECtHR after the Swedish national remedies are exhausted.

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[7] See p. 34 in *De europeiska domstolarna och det svenska äganderättsskyddet* (The European courts and the Swedish protection of the peaceful enjoyment of property), by Joakim Nergelius, Norstedts Juridik AB, Stockholm 2012 (below Nergelius 2012). By the way, therein is the abbreviation EMRK used regarding the European Convention, whereas EKMR is used here.

[8] Se s. 31, 32, 33, 42 och 43 i *Om regelkonkurrens inom inkomstskatterätten – med särskild inriktning på förhållandet mellan olika grunder för beskattning av dolda vinstöverföringar till utlandet* (On competition of rules within the income tax law – with special focus on the relationship between various bases for taxation of hidden transfer of profit abroad), by Stefan Aldén, Nerenius & Santérus Förlag, Stockholm 1998. See also *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation* (What is right? On democracy, legal certainty, ethics and legal argumentation), by Aleksander Peczenik, Norstedts Juridik, Stockholm 1995, where it inter alia is stated (in my translation) on p. 274 that *incompatibility between rules – logical, empirical or in terms of value – can be more or less complete, depending on whether their fields of application completely or partly coincide*.

3.3 The levels 3, 4 and 5 – bodies of rules decided by the EU and the Council of Europe respectively

In fields of law (or parts of fields of law) where the competence has been conferred to the EU's institutions by the Swedish Parliament the principle of the formal power of law is, as mentioned, limited, if it does not cause that fundamental principles in our constitutional system cease to be valid. Although the Swedish Parliament has conferred the EU's institutions competence in a certain field, I set the RF (level 1) higher than the EU's primary law (the TEU, the TFEU and the EUCFR) on level 3 in the European stepladder, since an EU constitution, which also is mentioned, never has been introduced. The primary law has primacy before the secondary law,[9] why I within level 3, which concerns bodies of rules decided by the EU, set the primary law bodies of rules over the secondary law rules, e.g. the VAT Directive. Ordinary acts and regulations decided by the Swedish Parliament has here a lower value (level 4), since Sweden in this case is bound by the EU law in the field in question.

Sometimes it has been stated that (in my translation) *the ECHR is known to form part of the EU law*.[10] According to the Lisbon Treaty *shall*, taken by itself, the EU access to the ECHR, but since article 6(2) of the TEU, stating this, has not been ratified yet, the human rights and fundamental freedoms of the ECHR are only contained in the EU law as general principles, according to article 6(3) of the TEU. The CJEU considers the following according to the first para. of item 2 of the decision in the EU-case C-617/10 (Åkerberg Fransson): " European Union law does not govern the relations between the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law." Therefore, I set the convention law on the lowest step of the European stepladder, which forms level 5: if it is a matter of a field of law where the competence has been conferred to the EU, ordinary acts and regulations decided by the Swedish Parliament and the Government (level 4) have precedence before rules in the ECHR. *In that respect, for example the VAT regulation, *mervärdesskatteförordningen (1994:223)*, abbreviated MF, has precedence before the ECHR and for example its additional protocol nos. 1 and 7, despite that these rules have the status of (ordinary) acts in Sweden, whereas regulations have a lower value: if it had concerned a field where competence has been conferred to the EU, the reverse order would have applied, since the principle of the formal power of law then would have been intact.

> Thereby, structure of the European stepladder in three steps has been reviewed: the top step, the levels 1 and 2 with rules belonging to the competence of the Swedish Parliament; the middle step, the levels 3 and 4 with rules belonging to the competence of the EU; and the lowest step, level 5 with rules belonging to the competence of the Council of Europe.

**Especially concerning the present sort of rules belonging to the middle step in the European stepladder, i.e. rules for which the Swedish Parliament has conferred competence to the EU's

[9] See p. 60 in *Aktiebeskattning och fria kapitalrörelser En studie av beskattningen av den löpande avkastningen av aktieinvesteringar på bolags- och ägarnivå mot bakgrund av EG:s fria kapitalmarknad* (Taxation of shares and free movements of capital A study of the taxation of the continuous proceeds of investments in shares on a company or owner level with regard of the EC's free capital market), by Kristina Ståhl, Iustus förlag, Uppsala 1996 and p. 38 in *Neutral uttagsbeskattning på mervärdesskatteområdet* (Neutral withdrawal taxation in the field of value-added tax), by Mikaela Sonnerby, Norstedts Juridik, Stockholm 2010.
[10] See Nergelius 2012 p. 35.

institutions, applies typically that the appliers have to regard two bodies of rules, namely partly the Swedish national rules, like the VAT act, *mervärdesskattelagen (1994:200)*, abbreviated ML, and the MF, partly the corresponding EU law rules, like in the present case above all the VAT Directive. A collision between for instance a rule in the ML and a rule in the VAT Directive shall be resolved by *EU conform (directive conform) interpretation*.

> By article 267 of the TFEU follows that the CJEU in its role as the highest interpreter of the EU law assists the national courts with preliminary rulings regarding the interpretation of the EU law.[11] The CJEU has also expressed that a national court at interpretation of national law is obliged, as far as it is possible to interpret the national law in the light of the wording of the directive and its purpose so that the result meant by the directive is achieved, to thereby act in correspondence with article 288 third para. of the TFEU. According to what the CJEU states in item 13 of the EU case C-371/02 (Björnekulla Fruktindustrier), this applies also if the preparatory works to the national contains opposite information on how the act shall be interpreted. However, the CJEU considers, as mentioned, according to the case C-212/04 (Adeneler et al.) that an EU conform interpretation does not mean an obligation for the EU Member States to interpret the national act in conflict with its wording (*contra legem*). See also the RF and the demand on legality stipulated in Ch. 8 sec. 2 first para. no. 2 for intervention in the individual's personal or economical relationships of the public, e.g. for taxation.

Thus, the solution might be achieved first by a proceeding, by the individual invoking the EU law, since it, as mentioned, is unclear whether national authorities and courts are obliged to apply a directive rule *ex officio*, even it has direct effect. Therefore, I have set the principle of EU conform interpretation as a procedural element in the European stepladder between level 3 and level 4.[12]

BJÖRN FORSSÉN *Doctor of Laws and lawyer in his own law firm in Stockholm. In the capacity of an external resource, member of Research Team, Tax law at Örebro University (JPS) and lecturer at Södertörn University, the institution of social science (public law).*

[11] See p. 22 in *Moms i praktisk tillämpning EU-domstolens och Högsta förvaltningsdomstolens domar* (VAT in practice The EU-court's and the Supreme Adminstrative Court's verdicts), by Lena Hiort af Ornäs and Eleonor Kristoffersson, Liber AB, Malmö 2012 and prop. 1994/95:19 Part 1 p. 475 and Holmberg et al. 2012 p. 30.

[12] See more about different interpretation alternatives concerning EU conform interpretation and the European stepladder in section 5.2.8.1 of *Ord och kontext i EU-skatterätten*: *En analys av svensk moms i ett law and language-perspektiv Andra upplagan* (Words and context in the EU tax law: An analysis of Swedish VAT in a law and language-perspective Second edition), by Björn Forssén, Melker Förlag, Laholm 2017; section 10.4 in *Skatteförfarandepraktikan – med straff- och europarättsliga aspekter* (The taxation procedure handbook – with criminal and European law aspects), by Björn Forssén, Melker Förlag, Laholm 2015; and section 3.8.1 in The Entrepreneur and the Making of Tax Laws – A Swedish Experience of the EU law Third edition, by Björn Forssén, Melker Förlag, Laholm 2017.