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THE SWEDISH NE BIS IN IDEM SAGA – PAINTING A MULTI-LAYERED PICTURE

Angelica Ericsson*

1. INTRODUCTION

During the past couple of years, legal debate has reached a peak on the topic of whether the Swedish system of parallel sanctions concerning tax offences is compatible with the principle of *ne bis in idem* (or 'double jeopardy'). In general terms, this principle entails that a party cannot be prosecuted, tried and convicted twice for the same activity.[1] The Swedish system, allowing for both a tax surcharge and a criminal sanction as cumulative penalties for the submission of wrongful information to the tax authorities, has been questioned on multiple occasions in Swedish doctrine, as well as before national courts and the European Court of Human Rights (ECtHR).[2] Until last year, the system had been

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1 J.A.E. Vervaele, "The Application of the EU Charter of Fundamental Rights (CFR) and its *Ne Bis In Idem* Principle in the Member States of the EU", 6 (2013) REALaw. 113, at p. 114. According to Vervaele, "[t]he *ne bis in idem* principle is a general principle of (criminal) law in many national legal orders, sometimes even codified as a constitutional right, such as in article 103 of the German Constitution. Historically the *ne bis in idem* principle only applies nationally and is limited to criminal justice, this means precluding application to punitive administrative enforcement. There is also no general rule of international law that imposes an obligation to comply with *ne bis in idem*".

2 See references to the discussion in Swedish legal doctrine in A.S. Lind, *Ett par kommentarer rörande mål C-617/10 Åklagaren mot Åkerberg Fransson, dom av den 26 februari 2013*, ERT 2013, p. 387.

upheld by the supreme courts of the Swedish judiciary. Firstly, insecurities prevailed concerning what the *ne bis in idem* rule applicable to the Swedish system actually entailed and, secondly, there was no small amount of hesitance towards setting aside a whole system of legal sanctions.

However, after the judgment of the 26 February 2013, issued by the Court of Justice of the European Union (ECJ) in *Åkerberg*,[3] the Swedish courts were prompted to revise their position. Consequently, during the summer of 2013, *Högsta domstolen* (the Supreme Civil Court of Sweden) issued two important judgments concerning the (non-)compatibility of the Swedish system with the principle of *ne bis in idem*. During the fall of that same year, *Högsta förvaltningsdomstolen* (the Supreme Administrative Court of Sweden) followed suit in a judgment of its own.

The primary aim of this article is to examine the sum of these three Swedish judgments of 2013 against the backdrop of the legal developments preceding them, with a particular attention to how different layers of law are perceived and given effect.

In more general terms, the Swedish *ne bis in idem* saga is just an example (albeit an excellent one) of the potential effects of adhering to a legal system which consists of various layers. The overriding question being: What are the effects of having different layers of laws in Europe on the enforcement of a certain right? The recent example of the Swedish *ne bis in idem* saga is certainly a very telling example in this regard. It is obviously bound to national specificities, but this example clearly shows that where there are differences between the various layers of laws, the very multiplicity of layers can result in a higher enforceable rights protection than what any one of the layers would have envisaged.

To aid the analysis of the abovementioned Swedish judgments of 2013, and better visualize the interaction between the layers of laws in Europe, this article will start off in a theoretical section. In this initial section (2.), it will be argued that a connection can be made between the function of old-fashioned overhead sheets and the function of the three layers of European law – these layers being the national one, the European Union (EU) one, and the one comprising the European Convention on human rights (ECHR). After these theoretical developments, a recap of the Swedish *ne bis in idem* saga, up to the point of the domestic Supreme Court judgments of 2013, will be provided (3.). These recent judgments will be the prime focus of the analysis in the subsequent section (4.), which is then followed by a concluding discussion (5.).

[3] Case C-617/10 *Åkerberg* [2013] nyr.

2. CAN OVERHEAD SHEETS HAVE ANYTHING TO DO WITH LAW?

Overhead sheets, do you remember those? Once frequently used in classrooms and for conference presentations (that is, before the arrival of digital projectors and power point presentations). Nowadays, these transparent plastic sheets seem to have become obsolete and their function might have been forgotten. One or several of them could be put on the bright surface of an overhead projector and the resulting picture would be displayed on the wall for the intended audience. If, for example, three overhead sheets each had a letter on them (respectively; C, D and O) and they were all put on top of each other on the projector, the resulting picture being projected on the wall would be that of the combined shapes (and would look like an O with a vertical line going through it). If the shapes on the different sheets were identical, they would overlap and, hence, the image would stay the same, no matter how many of these sheets were to be put on top of each other. Consequently, it is only the shapes that differ between the sheets that can bring about a departure from the original images – and the creation of new ones.

Now, imagine if you could draw an abstract picture of law. Every line, dot or curve would have a legal significance. Imagine you could draw a legal system (or, at the very least, a certain right in that legal system) on an overhead sheet. It would be an image with all the intricacies and particularities of that individual system. Consider, then, that you would put the images of different legal systems on top of each other on an overhead projector. What you would see projected on the wall is no longer the particularities of each one of the different legal systems, but rather a new image, composed of the shapes and forms of its various layers. Substance on one sheet would fill a void on the other ones.

But who would be the intended audience for our multi-layered image of law, thus projected? In the European context, it has become customary to identify three layers of law that reign in the so-called *common constitutional space* of the EU.[4] Without going into a discussion of whether and in what circumstances any of the layers of law should have precedence over another, it suffices (for the purpose of this metaphor) to emphasize that it is only the national judge who effectively will have to take into account all three layers of law. This judge might not have any influence on the images drawn on the overhead sheets depicting the specific EU and ECHR legal orders. She might even need some help inter-

[4] For a further discussion on this 'common constitutional space', see X. Groussot, *General Principles of Community Law* (European Law Publishing, 2006), at p. 421, as well as K. Lenaerts and J. A. Gutiérrez-Fons, "The Place of the Charter in the EU Constitutional Edifice", in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, forthcoming, spring 2014).

preting the contours of these images. Nevertheless, she will be the only one with the benefit and responsibility of seeing the whole picture.

In the upcoming sections of this article, I will try to explain what the multi-layered picture of the rule of *ne bis in idem* would have looked like to the national judge who was faced with applying it to the Swedish system of parallel sanctions concerning tax offences.

3. RECAP OF THE SWEDISH NE BIS IN IDEM SAGA

To better understand the situation of the Swedish judge assessing the compatibility of the national system of parallel sanctions against the principle of *ne bis in idem*, a historical overlook may prove useful. This recap of relevant legal development aims to elucidate how the different layers of law, and the different conceptions of the *ne bis in idem* principle, have been perceived in Sweden over the past decade.

Concerning the position of the principle of *ne bis in idem* in the national legal order, this principle is reflected in Chapter 30, paragraph 9 of the Swedish Procedural code (*Rättegångsbalken*). Moreover, Sweden has – unlike several other EU Member States – signed and ratified Protocol 7 to the ECHR, Article 4 of which contains the *ne bis in idem* rule. Sweden did so unconditionally and has therefore committed itself to respect the ECHR conception of *ne bis in idem*. Besides Sweden being bound by the ECHR as an international convention, it should be noted that this convention, and consequently Article 4 of its seventh protocol, has been applicable as law in Sweden since the middle of the 1990's.[5] However, neither the text of the convention, nor any other Swedish statute concerning *ne bis in idem*, has been given a constitutional status within the national legal order. Therefore, any conflicts between the domestic expression of *ne bis in idem* and Swedish laws will not necessarily result in such conflicting laws being set aside.

As for the ECHR conception of the *ne bis in idem* principle, it has been through somewhat of a jurisprudential overhaul in recent years. The most pertinent judgments of the ECtHR, directly concerning this principle and the Swedish system of tax sanctions, are *Janosevic*[6] and *Rosenquist*.[7] In *Janosevic*, the ECtHR declared the Swedish tax surcharge to be criminal in nature, due to its

[5] Law 1994:1219 on the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[6] Application no. 34619/97, *Janosevic v. Sweden*, Judgment of the ECtHR delivered on 23 July 2002.

[7] Application no. 69619/00, *Rosenquist v. Sweden*, Judgment of the ECtHR delivered on 14 September 2004.

purpose and general nature. Hence, both of the sanctions liable to be imposed for the submission of wrongful tax information should – contrary to what the Swedish legislator had initially predicted[8] – be regarded as criminal in nature. However, in *Rosenquist*, the ECtHR subsequently concluded that the Swedish system was still compatible with Article 4 of Protocol 7 to the ECHR, since the two sanctions did not concern the same offence. The reasoning of this judgment was based on the circumstance that the two offences (i.e. the administrative offence and the criminal offence) did not share the same "essential elements", since they had different objectives and requirements concerning intent. Had the Strasbourg case-law on the conception of what is to be considered an offence not been overhauled after *Rosenquist*, it would have remained clear that the Swedish system was indeed compatible with the rule on *ne bis in idem* in the ECHR.

Although not directly dealing with the Swedish tax sanctions, the *Zolothukin* judgment[9] of 2009 did, however, undeniably change the approach to be used when determining 'the same offence', within the meaning of the ECHR conception of *ne bis in idem*. This seminal judgment consequently cast a shadow of serious doubt as to whether the *Rosenquist*-blessing of the Swedish system would still stand. Would the two sanctions still be considered as connected to two different offences under the new approach? Such doubts intensified with the judgment in *Ruotsalainen*,[10] where the ECtHR ruled that a system with multiple sanctions, similar to the Swedish one, concerned the same offence. Shortly after the introduction of the ECtHR's new approach, both of the highest courts in Sweden were faced with the question of whether the Swedish system could still be considered as compatible with the ECHR. In its judgment of September 2009 (the '2009 judgment'),[11] *Högsta förvaltningsdomstolen* played down the importance of the *Zolothukin* judgment and considered that the two Swedish sanctions were still to be considered as compatible with the ECHR due to their specific characteristics, ensuring a fair and proportionate sanctioning of the offence at hand. Although eventually reaching the same conclusion of compatibility, *Högsta domstolen* proved to be more hesitant on this point than its administrative counterpart.

To enable a better understanding of how the newly changed ECHR conception of *ne bis in idem* was perceived by the Swedish judiciary at this time, it is useful to take a closer look at the judgment which *Högsta domstolen* handed

8 SOU:1996/96 (an Official Report of the Swedish Government, part of the preparatory works for the legislative acts concerning the tax surcharge).

9 Application no. 14939/03, *Zolothukhin v. Russia*, Judgement of the ECtHR delivered on 10 February 2009.

10 Application no. 13079/03, *Routsalainen v. Finland*, Judgment of the ECtHR of 16 June 2009.

11 Judgment of 17 September 2009 in case RÅ ref. 94.

down the 31 March 2010 ('the 2010 judgment').[12] The court concluded that after the shift in approach concerning what is to be considered the same offence, the two Swedish sanctions could no longer be considered as connected to different offences.[13] However, *Högsta domstolen* considered that it could not be excluded that the Swedish system may be deemed compatible with the ECHR as combined sanctions connected to the same offence – a construction that could be compatible with the principle of *ne bis in idem*, provided that there is a sufficiently close connection between the sanctions, in substance and in time, and that the sanctions are predictable.[14] Hence, despite considering that the Swedish system at hand constituted two sanctions of criminal nature concerning the same offence, *Högsta domstolen* concluded that there was still a possibility that this system would be deemed to be compatible with the ECHR, noting that the jurisprudence of the ECtHR concerning permissible coordinated sanctions was meager and open to different interpretations.[15] After having recalled that Swedish law can only be set aside on the basis of an incompatibility with the ECHR if there is 'clear support' in either the text of the ECHR or the jurisprudence of the ECtHR, *Högsta domstolen* concluded that no such clear support could be found, given the abovementioned vague jurisprudence concerning combined sanctions.[16]

In this regard, it is interesting to note that *Högsta domstolen* did not actually take a positive stand on whether the Swedish system should be deemed compatible with the ECHR or whether the ECHR case-law on combined sanctions for the same offence was effectively applicable to the Swedish system. It merely asserted that it could not be excluded that the system would classify as permissible combined sanctions and would, thereby, be compatible with the ECHR. According to the majority, there was consequently not the required 'clear support' to generally disqualify the Swedish system.[17] The two authors of the dissenting opinion in the case, however, did look into the question of whether the national sanctions could be classified as a permissible combined sanction and

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[12] NJA 2010 p. 168. (This particular judgment acutely reflects the tensions surrounding the issue of the Swedish system's compatibility with the principle of *ne bis in idem*. Of the five judges deciding the case, only three supported the final outcome: upholding the validity of the Swedish system of tax sanctions, and one of these three judges even presented a separate opinion justifying this outcome.)

[13] *Ibid.* points 18 and 19.

[14] *Ibid.* points 20 to 24. The reasoning of *Högsta domstolen* in this regard is largely based on an admittedly meager jurisprudence about combined sanctions for traffic offences, concerning the combination of a criminal law sanction and the administrative sanction of the driver's license being revoked.

[15] *Ibid.*, point 24.

[16] *Ibid.*, points 32 and 33.

[17] *Ibid.*, point 38.

concluded that they could in fact not.[18] These judges, hence, advocated that there was clear support of the incompatibility of the Swedish system with the Article 4 of Protocol 7 to the ECHR.[19]

Another national judgment worth mentioning is the one *Högsta domstolen* handed down on 29 June 2011 ('the 2011 judgment'),[20] in which this court confirmed its stance on the validity of the Swedish system with regard to the ECHR and – more importantly – concluded that this system did in no way constitute implementation of EU law. *Högsta domstolen* asserted that the EU directives on VAT did not prescribe any administrative or criminal sanctions, nor were the national rules shaped in line with any solution designated through EU law.[21] With regard to these circumstances, *Högsta domstolen* concluded that a case involving the Swedish system of tax sanctions could not trigger the application of the EU *ne bis in idem* rule,[22] and there was consequently no need to refer a question for preliminary ruling to the ECJ.

Again, speaking in terms of overhead sheets capable of carrying legally significant images, the Swedish judges seem to have taken a very cautious and restrictive interpretation of the picture developing before their eyes. Firstly, the image of the *ne bis in idem* rule on the domestic sheet did not enable a judicial review of the Swedish system of parallel sanctions. Secondly, the EU sheet was simply thrown out the window; disregarded altogether on grounds of irrelevance. Thirdly, the recently altered image on the ECHR sheet puzzled the Swedish judges in *Högsta domstolen*. Since they were not completely sure that the new shapes would imply that the Swedish system ran counter to the ECHR *ne bis in idem* rule, they were not willing to enter into a guessing game that could have grave consequences for a statutory system of sanctions.

It should be noted that not all Swedish judges believed that the ECHR *ne bis in idem* rule could possibly allow for the system of paralell tax sanctions, and some suspected that EU law could also be of relevance. Hence, the rather controversial and less than unanimous stance of *Högsta domstolen* sparked a minor rebellion among lower courts.[23] One appeal court openly defied the 2010 judgment, shortly after it had been pronounced, and considered the Swedish system incompatible with the ECHR. Moreover, in what has now become part of EU

[18] The dissenting opinion of Marianne Lundius and Stefan Lindskog in the 2010 judgment, points 35 to 42. Their main argument was that the two Swedish sanctions clearly constituted two separate proceedings with separate assessments of responsibility, something that would not be permissible if the sanctions were to qualify as combined sanctions for the same offence.

[19] *Ibid.*, point 51.

[20] NJA 2011 p. 444.

[21] *Ibid.*, points 13 and 14.

[22] Enshrined in Article 50 of the EU Charter of Fundamental Rights.

[23] See A.S. Lind, *Ett par kommentarer rörande mål C-617/10 Åklagaren mot Åkerberg Fransson, dom av den 26 februari 2013*, ERT 2013, p. 389.

law legend, a first instance court in the far north jurisdiction of Haparanda disregarded the statements made concerning the applicability of EU law in the 2011 judgment and made a reference to the ECJ concerning the compatibility of the Swedish combination of sanctions with the principle of *ne bis in idem*, as enshrined in Article 50 of the EU Charter of fundamental rights. The beginning of the end of the Swedish *ne bis in idem* saga was marked by the ECJ's judgment in the ensuing *Åkerberg* case.

4. THE MULTI-LAYERED ENDING TO THIS SAGA

It can be argued that the ECJ's ruling in *Åkerberg* did not really bring much new to the table with regard to the substantive issue of whether the Swedish system is compatible with the principle of *ne bis in idem*. However, there is no doubt that the mere 'activation' of the layer of EU law infused the composed picture of *ne bis in idem* with a persuasiveness which the national judges could not ignore. This section will focus on how the supreme courts of Sweden reacted to the new multi-layered picture, resulting from the ECJ's response in *Åkerberg*.

The ECJ established that the Swedish regulation involving parallel sanctions did in fact, as far as it concerned sanctioning infringements connected to the levying of VAT, imply an implementation of EU law within the meaning of Article 51(1) of the Charter.[24] As to the substantive interpretation of the Charter rule on *ne bis in idem* and its consequences for the Swedish regulation, the ECJ held that Article 50 of the Charter precluded a criminal proceeding in relation to acts of non-compliance with declaration obligations if it followed a sanction of criminal nature in respects of the same acts and that sanction had become final. It should be noted that the ECJ in no way discussed the possibility under EU law to maintain combined criminal sanctions for the same offence. This latter issue was, in fact, raised in the order for reference but never included in the concrete questions referred by the national court.

Before *Haparanda tingsrätt* even got the chance to apply the response given by the ECJ in the *Åkerberg* case, *Högsta domstolen* granted leave to appeal in another national dispute concerning the Swedish system of parallel sanctions. It was clear that the judgment from Luxembourg had the potency for overturning the earlier jurisprudence of *Högsta domstolen* and this court most likely

[24] For further discussion about the implications connected to this interpretation of the meaning of the term 'implementing', see K. Lenaerts and J. A. Gutiérrez-Fons, "The Place of the Charter in the EU Constitutional Edifice", in S Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart Publishing, Forthcoming, autumn 2013), and V. Skouris, "Développements récents de la protection des droits fondamentaux dans l'Union européenne: les arrêts *Melloni* et *Åkerberg Fransson*", Il Diritto dell'Unione Europea, 2/13, pp. 233 to 235.

wanted to regain control of how *ne bis in idem* was to be interpreted in relation to the applicability of the national sanctions, to avoid diverging interpretations by various lower courts. Consequently, *Högsta domstolen* hurriedly retried the question of the compatibility of the Swedish system with *ne bis in idem*. It did so in its plenary formation, handing down a unanimous judgment the 11 June 2013 ('the first 2013 judgment').[25] First of all, *Högsta domstolen* had to concede that, in light of the *Åkerberg* judgment, the assertions made in the 2011 judgment needed to be reconsidered.[26] Without much further ado, this court thereby accepted that it had to apply EU law and the Charter when it assessed the validity of parallel sanctions concerning incorrect information submitted with regards to VAT. It also emphasized that the rights enshrined in the Charter had to be given full effect and that it was not permissible for Swedish courts to require a 'clear support' in this regard. Although the ECJ did not itself refer to the ECtHR's judgement in the *Engel*[27] or *Zolothukin* cases when it set out the criteria for assessing whether certain sanctions violate the EU rule on *ne bis in idem*, *Högsta domstolen* took for granted that these cases were relevant and applicable to the assessment that was to be carried out on the national level.[28] When carrying out this assessment, it comes as no surprise that *Högsta domstolen* found the tax penalty to have a criminal nature.[29] As previously mentioned, this was already acknowledged in the 2010 judgment. In this regard, *Högsta domstolen* promotes unity in the European human rights law by expressly stating that the conclusion about the criminal nature of a sanction has to be the same, whether the assessment is made in the light of the ECHR or the EU Charter.[30] The Swedish court concluded that it follows from what has been held by the ECJ that a person who has already been subjected to a tax penalty concerning VAT could not be tried in criminal proceedings in respect of the same acts.[31] Moreover, *Högsta domstolen* extended the protection against double jeopardy in so far as it stated that the mere initiation of a proceeding of criminal nature would suffice to block another proceeding, without requiring that the person concerned be convicted and that conviction have become final.[32] This extension of the protection stemmed from the national rule of *lis pendens*.

Furthermore, the Swedish system with two different sanctions for tax offences was a general one and did not only apply to infringements concerning

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[25] Case nr B 4946-12.
[26] *Ibid.*, point 25.
[27] Application no. 5100/71, *Engel and Others* v. *the Netherlands*, Judgment of the ECtHR delivered on 8 June 1976.
[28] Case nr B 4946-12, points 28 and 29.
[29] *Ibid.*, point 34.
[30] *Ibid.*, points 36 and 37.
[31] *Ibid.*, point 48.
[32] *Ibid.*, points 69 and 70.

VAT. *Högsta domstolen* therefore proceeded to examine whether it should change its holding in the 2010 judgment also with regard to infringements concerning income tax, employers' contributions and similar levies (the sanctioning of which escapes the scope of EU law). In doing so, *Högsta domstolen* elaborated on the degree of prudence that had to be adopted when assessing the validity of national legislation in the light of the ECHR. It stated that the use of the requirement of 'clear support' in the 2010 judgment was justified at the time of that judgment, bearing in mind that the game-changing *Zolothukin* judgment was still very fresh and that the practical consequences of disqualifying the Swedish system would have been great. At that time, it was preferable to give the Swedish legislator time to react to the new approach outlined in the *Zolothukin* judgment.[33] However, *Högsta domstolen* then asserted that the situation had changed significantly since the 2010 judgment. By referring to the fact that the "damage had already been done" to the Swedish system, in so far as it had been put out of play with regard to VAT-infringements, and that fundamental principles of foreseeability and equal treatment militated for a uniform application of *ne bis in idem*, *Högsta domstolen* concluded that there was now 'sufficient support' to disqualify the system of parallel sanctions as a whole, due to its incompatibility with both EU and ECHR law.[34]

Shortly after the first 2013 judgment, *Högsta domstolen* announced its intention to clarify whether and in what circumstances earlier convictions for tax offences, that had become final, would be subject to revision. Indeed, on the 16th of July that same year, *Högsta domstolen* handed down a judgment determining the retroactive consequences of the first 2013 judgment ('the second 2013 judgment').[35] After establishing that the case at hand could not be subject to revision on the basis of the restricted possibilities to grant such extraordinary judicial remedy under established Swedish law,[36] *Högsta domstolen* set out to assess whether revision could be granted on the basis of ECHR law.[37] On the basis of an analysis covering both the provisions of the ECHR and the jurisprudence of the ECtHR, the Swedish court then concluded that a revision was indeed merited – considering that *ne bis in idem* is a fundamental rule connected to the rule of law, that a revision would provide a remedy that would be

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33 *Ibid.*, point 57.
34 *Ibid.*, point 60.
35 Case Ö 1526-13.
36 *Ibid.*, points 13 to 15.
37 *Ibid.*, point 17, which states that: 'The assessment should primarily be carried out in accordance with the ECHR. The judicial application of the ECJ, in this regard, only targets VAT, while [Protocol 7 to the ECHR] has a wider scope of application as regards double jeopardy concerning tax infringements. The assessment shall be based upon the circumstance that it is contrary to the protocol to prosecute and convict a person for a tax offence if he or she has already been ordered to pay a tax surcharge, as a consequence to the same false information that is concerned by the criminal prosecution' [my own translation].

more appropriate than other alternative remedies, and that the Swedish system of parallel sanctions had been set aside as a whole by the first 2013 judgment.[38] An interesting last point to note about the second 2013 judgment is that *Högsta domstolen* determined the date from which convictions that had become final can be revised to be the 10th of February 2009, the date of the ECtHR's *Zolothukin* judgment. The Swedish court expressly stated that the ECJ's judgment in *Åkerberg* did not entail a change of ECHR law, even if this judgment changed the view of the content of the ECHR law.[39] One might of course ponder on whether the latter does not effectively imply the former. In any case, this reasoning concerning the period from which revision is warranted does imply that *Högsta domstolen* acted incorrectly in the 2010 judgment, the soundness of which the plenary chamber of this court was so careful to defend in the first 2013 judgment.

As for the stance taken by *Högsta förvaltningsdomstolen*, having been even more protective of the Swedish system in 2009, the *Åkerberg* judgment did not spark any immediate reaction. However, after the firm stance taken by *Högsta domstolen* in the two abovementioned judgments, its administrative counterpart eventually followed suit. On the 29th of October 2013, *Högsta förvaltningsdomstolen* handed down a clear (even if sparsely reasoned) judgment,[40] reiterating the same conclusions reached by *Högsta domstolen*.

5. CONCLUSION

Returning to the idea of the different European layers of law being represented as images on transparent overhead sheets, we can see that a major extension of a certain right can be achieved by the mere fact of having several layers – if these layers are different. It should be noted that it's not necessarily the image of the particular right at hand that has to be different to produce such an effect. Every layer of law also contains particular functional or procedural traits which may have an expansive impact on the image of the right at hand, making the picture perceived by the national judge both fuller and more complex. The case of the Swedish *ne bis in idem* saga certainly illustrates that the differences between the legal orders as such can extend a particular right, even when the conceptions of this right are not dramatically different between the legal orders.

It should be recalled that an important difference between the EU and ECHR legal orders is their way of being absorbed into the national legal order; EU law imposing itself on its own merits, and ECHR law taking a more sub-

[38] *Ibid.*, point 25.
[39] *Ibid.*, point 32.
[40] Case nr 658–660-13.

sidiary role, being dependent on the particular status afforded to it by the constitutional idiosyncracies of each individual Contracting Party. As regards the status of the ECHR in Sweden, the key can be found in the reasoning of *Högsta domstolen* in point 53 in the first 2013 judgment, where this court re-elaborates on the requirement of clear support. It should be noted that this requirement does not concern the application of the ECHR, as incorporated into Swedish national law, in individual cases.[41] The requirement of clear support has only become relevant when a question arises about the validity of a provision of Swedish law and the judiciary would be disqualifying an act of national parliament on the basis of the ECHR as an international convention. This is something it has proved very unwilling to do, and maybe understandably so.

When taking a closer look at the interplay between the different layers of EU and ECHR human rights law, as exemplified by the Swedish legal developments surrounding the *Åkerberg* case, the metamorphosis of the requirement for 'clear support' is particularly interesting. In point 60 of the first 2013 judgment, *Högsta domstolen* seemed to abandon the requirement of 'clear support' hitherto applied in the Swedish constitutional review of the national rules in relation to the ECHR. Instead, the use of the considerably more flexible requirement of 'sufficient support' was justified by a time element and the effects of EU law. However, none of these factors has anything to do with the clarity of support for the constitutional review. From this, we can draw the conclusion that the *Åkerberg* judgment did not only influence how the content of ECHR law is perceived substantially, but also how easily it can penetrate the national legal order and be used as a basis for constitutional review. In other words, not only did the Swedish court equate the meaning of *ne bis in idem* in the ECHR with that of the Charter, but the new test developed for the non VAT-sanctions' compatibility with the ECHR is also affected by the consequences of EU law and the Charter.

The aftermath of the *Åkerberg* judgment does indeed provide a good example of when the interplay between the EU and ECHR legal orders results in a raised level of human rights protection, not envisioned or attainable without the input of each strand of standards. Of course, *Högsta domstolen* was correct when it said that the ECJ's interpretation of Article 50 of the Charter does not change the meaning of Protocol 7 to the ECHR. *Per se*, it does not. But since the national court does not want to risk falling below any of the minimum standards set up by the EU and the ECHR, and thereby chooses to use a homogenous standard across the board, the protection given by the ECHR principle of *ne bis in idem* in Sweden will, in practical terms, have increased. Moreover, due to this EU-induced increase in ECHR protection, the ECJ's

[41] See e.g. Case RH 2006:79, where Article 4 of Protocol 7 to the ECHR was interpreted and applied without any considerations in regards to a clear support.

interpretation of *ne bis in idem* will now spill over and affect purely internal situations of direct taxation. In fact, since tax surcharges for wrongful information concerning VAT are most frequently imposed on companies ("which, unlike their executives, are not capable of being criminally liable"), the *Åkerberg* judgment will most likely have more effects on purely internal situations involving direct taxation than situations covered by EU law.

To sum up, one can conclude that adding a different type of law, another layer to the picture of the *ne bis in idem* that should be applicable in Sweden, made the crucial difference in how judicial review could be conducted on the basis of this rule. It should be recalled that the Swedish layer and the ECHR one stayed constant between the 2010 judgment and the three judgments handed down by the Swedish supreme courts in 2013. The only factor capable of changing the picture of *ne bis in idem* was the *Åkerberg* judgment and the activation of the EU layer. The image on the EU law layer is actually limited, as it only applies in relation to the VAT-part of the Swedish system. But, as has been shown throughout this article, the strong basis for judicial review provided by the EU layer spilled over and affected how the Swedish judiciary perceived the image on the ECHR layer. The EU layer affected both how the substantive ECHR right was perceived and how easily it could penetrate the national system and be used as the basis for judicial review. In addition, the particular national rule of *lis pendens* came into play and reinforced the Swedish *ne bis in idem* rule even further.