

COOPERATIVE COMPLIANCE IN SWEDEN: A QUESTION OF LEGALITY

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Abstract

The purpose of this paper is to emphasise the importance of recognising the legal framework within which a cooperative compliance programme is to operate. This is done through the example of the Swedish cooperative compliance model, *fördjupad dialog* (“in-depth dialogue”), which has been described as somewhat of a failure by representatives from both academia and business. In this paper, the author points to certain legal issues that may explain why the Swedish cooperative compliance programme has not been a success. The focus is the principle of legality, laid down in Swedish constitutional law, which requires a legal basis in the law for public agency activities. The lack of legal basis has been a central part of the criticism concerning *fördjupad dialog*. The Swedish Tax Agency argues that there is a legal basis for *fördjupad dialog*, through the so-called service obligation provision in Section 6 of the Administrative Procedure Act of 2017. The author argues that, on the contrary, *fördjupad dialog* does not constitute a form of service under this Act. This conclusion is based on, *inter alia*, an analysis of the scope of the term “service”. Therefore, *fördjupad dialog* lacks legal basis. Since it has not been possible to find another provision laid down in the law that may constitute such a legal basis, it is the author’s conclusion that the constitutional principle of legality has not been met. Thus, the criticism concerning the fact that *fördjupad dialog* lacks legal basis still stands.

Keywords: *fördjupad dialog*, cooperative compliance, constitutional law, principle of legality, service obligation, administrative law, tax confidentiality

INTRODUCTION

From an overall perspective, this paper addresses the significance of recognising the legal framework within which a cooperative compliance model is to operate. Light is shed on this topic through the example of the Swedish cooperative compliance model, *fördjupad dialog* (“in-depth dialogue”). By taking part in the research project *Cooperative Compliance – Breaking the Barriers*² and sharing Swedish experiences of cooperative compliance within this project, it has become clear that Sweden, and its *fördjupad dialog*, serves as a vivid example of what happens when a country’s legal framework is not adequately observed when implementing a cooperative compliance programme and the impact this has on the functions of the programme.

Fördjupad dialog, or rather, as it was initially termed, *fördjupad samverkan* (“in-depth collaboration”), was introduced in Sweden in 2011, but actual cooperation began in early 2012 (Skatteverket, 2011). The initiative stemmed from the work of the Organisation for Economic

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² *Cooperative Compliance – Breaking the Barriers* is a project headed by the WU Global Tax Policy Centre, run in cooperation with the African Tax Institute at the University of Pretoria’s Faculty of Economic and Management Sciences and the Commonwealth Association of Tax Administration. For more information, visit <https://www.wu.ac.at/en/taxlaw/institute/gtpc/current-projects/co-operative-compliance/>.

Co-operation and Development (OECD) and the International Fiscal Association (IFA) on the “Enhanced Relationship”.³ The Swedish Tax Agency's initial report states that the purpose of *fördjupad samverkan* was to reduce the tax risks of corporations, increase the exchange of information and transparency between corporations and the Tax Agency, enhance trust between corporations and the Tax Agency, and reduce tax evasion and aggressive tax planning (Skatteverket, 2011). It is clear from the report that *fördjupad samverkan* was part of the Tax Agency's focus on more preventive measures to ensure that taxes and fees are correctly established as early as possible in the taxation process. The report states that *fördjupad samverkan* was one of several steps taken to enhance preventive measures (Skatteverket, 2011).

Early on, the initiative was heavily criticised, both by academia and by business and the Confederation of Swedish Enterprises (Sw. Svenskt Näringsliv). The criticism was mainly of a legal character, concerning conflicts with Swedish constitutional and administrative law, such as equal treatment before the law and the issue of confidentiality (Andersson, Fritsch, & Rydin, 2012; Pålsson, 2012a; Pålsson, 2013; Sallander, 2013; Svenskt Näringsliv, 2012-10-23).

As a consequence of the criticism, the Tax Agency reviewed *fördjupad samverkan* in 2014. Following this, the programme's name was changed to *fördjupad dialog* and guidelines (*Riktlinje för fördjupad dialog*, hereinafter referred to as “the Guidelines”⁴) for its procedures were drafted.

The purpose of *fördjupad dialog*, as worded in the Guidelines, Item 1, is to help companies report taxes and fees correctly from the outset through the Tax Agency's provision of support and information. The Tax Agency's view is that when this form of cooperation is appropriate, it facilitates the work of taxation activities and entails efficiency gains in corporate tax treatment (Guidelines, Item 1).

The Guidelines show that both companies and the Tax Agency can initiate cooperation under *fördjupad dialog* (Guidelines, Item 3). The decision to engage in cooperation is, however, taken solely by the Tax Agency, albeit in consultation with the company (Guidelines, Item 4).

Once *fördjupad dialog* has been initiated, an officer at the Tax Agency is appointed as a contact to whom the company addresses its questions (Guidelines, Item 5 and Comments on Item 5). The contact at the Tax Agency is only the company's communication channel into the Agency. The contact may not manage the company's affairs, but the company's questions are referred within the Agency's operations, more precisely, to its legal department (Guidelines, Item 7; Skatteverket, 2013; Skatteverket, 2015).

According to the Guidelines, there are three different types of activities that the Tax Agency may engage in under *fördjupad dialog*. The Tax Agency may, within the framework of the *fördjupad dialog*: (1) report its assessment of risks in terms of a company's ability to fulfil its obligations under tax law; (2) support a company in its internal work to ensure that systems

³ The “Enhanced Relationship” was introduced by the Forum on Tax Administration (FTA, created by the Committee on Fiscal Affairs in July 2002) in 2008, in the “Study into the Role of Tax Intermediaries”, which addressed the topic of aggressive tax planning and the relationship between revenue bodies, taxpayers and tax intermediaries. The study pointed to large taxpayers and revenue bodies engaging in a collaborative, trust-based relationship as a means of influencing aggressive tax planning (OECD, 2008; OECD, 2013).

⁴ The first Guidelines were introduced in March 2014 (Skatteverkets riktlinjer, Riktlinje för fördjupad dialog, 2014-03-10, dnr. 131 409414-13/111), but the current Guidelines date back to June 2016, when the last changes were made (Skatteverkets skrivelser, Ändrade riktlinjer för fördjupad dialog 2016-06-23, dnr. 131-285072-16/111).

and procedures are in place so that proper data can be provided to the Swedish Tax Agency; and (3) help a company to reduce the uncertainty about liable taxes and fees by providing clear and prompt answers (Guidelines, Item 8).

Despite the fact that there are three activities in Item 8 of the Guidelines, *fördjupad dialog* could be said to consist of two parts. The first part entails a company continually submitting questions on substantial tax issues to the Swedish Tax Agency in order to receive a statement of the Agency's position. This forms, in my view, the central part of the programme. The second part consists of a company involving the Tax Agency in its internal work with tax management by being transparent about its tax management, upon which the Agency may provide a risk assessment.

Despite efforts to renew the cooperative compliance programme and the drafting of these Guidelines, criticism has continued. One example is the report written by Bernitz and Reichel (2015), in which the authors question the legality of *fördjupad dialog*.

To put it mildly, *fördjupad dialog* has not been a huge success. Not only has the programme received harsh criticism from academia, businesses have shown resistance towards it. For instance, in June 2011, during the launch of *fördjupad samverkan*, 25 of Sweden's largest companies signed a letter in which they rejected the Tax Agency's invitation to participate in the programme (Svenskt Näringsliv, 2011). The lack of success can also be illustrated by the fact that even today only a handful of companies are participating in the programme.⁵

Bearing in mind that Sweden, from a general point of view, has a well-functioning tax administration that has been ranked in the top five in Sifo's annual citizen survey on public administration reputation for several years (Kantar Sifo surveys "Myndigheternas anseende") and that the Tax Agency has several different channels for direct communication with taxpayers, such as telephone panels and answering written questions, that all appear to function well, you might ask yourself why this activity – *fördjupad dialog* – is not a success in Sweden.

As has been held above, when describing the criticism directed towards *fördjupad samverkan/fördjupad dialog*, there are several issues that are problematic from a legal perspective, which could be said to be part of, albeit not the sole reason, why *fördjupad dialog* has not prospered.⁶ What is addressed in this paper is, first and foremost, the question of legality. More precisely, the paper concerns the Swedish cooperative compliance model and how it fits – or perhaps rather does *not* fit – within the Swedish constitutional and administrative legal framework.

This approach demands a presentation of the Swedish model of administration describing the role of public agencies in Sweden and their relation to the Government, but perhaps more importantly, a description of the principle of legality that is laid down in constitutional law and how it introduces obstacles concerning a cooperative compliance model such as the one discussed in this paper. Furthermore, when discussing legality in the context of the Swedish

⁵ In 2015, five agreements on *fördjupad dialog* were concluded, though only one of the companies participated actively (Björklund Larsen, 2015). Björklund Larsen notes that none of the agreements relate to (the time) after the programme shifted from *fördjupad samverkan* to *fördjupad dialog* (Björklund Larsen, 2015).

⁶ Björklund Larsen, Ph.D. research fellow at Linköping University, Sweden, has written a report on the Swedish cooperative compliance model from a social anthropological perspective (Björklund Larsen, 2015), not primarily from a legal perspective, although legal issues are identified as problematic.

cooperative compliance model, *fördjupad dialog*, there is reason to address a special feature of Swedish administrative law called “the service obligation”.⁷

Criticism directed at *fördjupad dialog* has, as previously stated, to a large extent concerned legality. However, writing a paper on *fördjupad dialog* and its failure without mentioning the topic of confidentiality would to omit one important and much debated issue. Therefore, the issue of confidentiality is also briefly touched upon.

Before embarking on the study of *fördjupad dialog*, something needs to be said concerning methodology. The traditional method of legal research in Sweden adheres to what could be called *legal dogmatics*, involving the interpretation and systematisation of the law as it stands (Peczenik, 1983). The sources that are used in such a study are legislation, preparatory works, case law and legal scholarship, here listed in the order of precedence according to the Swedish doctrine of the hierarchy of legal sources.⁸

The starting point of this study is the law – or the legislative text – as the primary source of law. Since the content of the legislative text is not clear as regards the topic of this paper, the emphasis is rather on the preparatory works. Preparatory works are seen as complementing the dominant legal source, the legislative text, in that they are used to interpret legislation, since details not included in the statutory text are often supplied in the preparatory works (Strömholm, 1996). A Government Bill (in this paper referred to as a “Bill”) contains the government’s proposal for new legislation and is the part of the preparatory works that is closest to the actual legislation. A Bill is often preceded by the appointment of a Committee of Inquiry, which publishes an Official Report of the Swedish Government – SOU (Sw. *Statens Offentliga Utredningar*) – in which an in-depth study of the matter is conducted.

Regarding case law, several of the provisions studied in this paper are of so-called “goal-oriented” character, which is why case law is scarce. Reference to legal scholarship is, on the other hand, made frequently, since in this case such sources facilitate the interpretation of the unclear legislation.

THE SWEDISH MODEL OF ADMINISTRATION

From a European perspective, the Swedish model of administration may appear slightly odd. Sweden is characterised by independent administrative agencies, forming a model of dualism – a separation of organisation and responsibility between the government and the administrative agencies. This dualism can be traced back to the 18th century (Bernitz & Reichel, 2014; Wennergren, 1998).

The independence of public agencies is laid down in constitutional law in the Instrument of Government from 1974, a general fundamental law which lays down the rules on how the country is to be governed. Chapter 12, Article 2 states that no public agency, including the Riksdag (the Swedish Parliament), may decide how an administrative agency settles matters regarding the exercise of public agency or regarding the application of the law. This independence is held to be the foundation and focal trait of the Swedish model of administration (Lind & Reichel, 2014; Wennergren, 1998).

⁷ A more in-depth analysis of these issues, among others, is provided in Hambre (2018).

⁸ This is the traditional order of precedence, although there are differences of opinion regarding the ranking (see, for instance, Strömholm, 1996; Nergelius, 2011; Peczenik, 1995).

This, however, does not imply that the government has no influence over the work of public agencies. Based on the annual state budget decided by the Riksdag, the government issues appropriation directives for the government agencies (Chapter 9 of the Instrument of Government). The appropriation directives set out the objectives of the agencies' activities and their budgets. This provides the government with substantial scope for directing a public agency's activities. However, as held above, the government has no power to interfere with agency activities involving the exercise of power or the application of the law in individual matters. Thus, the Tax Agency has rather a free rein regarding its operations within the framework of the appropriation directives (Svernlöv & Persson Österman, 2016).

This model of administration prevents individual ministers from making their own decisions about the subordinate agencies and their decisions in individual matters, which, like the independence of public agencies, is held to be a key feature of the Swedish model (Bernitz & Reichel, 2014; Lind & Reichel, 2014). What is often referred to as "the prohibition of ministerial rule" is stipulated in the provisions of the Instrument of Government (Chapter 7, Article 3 and Chapter 12, Article 1). As concerns the Tax Agency, the prohibition of ministerial rule implicates that the Minister of Finance may not interfere with the Agency's dealings in individual cases.

Hence, as regards the exercise of public authority and the application of the law, there is a clearly defined line between the government and the administrative agencies. The intention is to create an inherent slowness in the system that counteracts political whims and contributes to predictability (Bernitz & Reichel, 2014; Bill 1973:90; Wennergren, 2008). Lind and Reichel (2014) characterise the Swedish model of administration as governed by law rather than policy. The continued adherence to this distinction is also expressed in preparatory works. In Bill 2009/10:175 on public administration for democracy, participation and growth, it is held that the line between politics and administration must be clear.

The Swedish administrative system is not only characterised by the dividing lines between politics and administration but also by its long tradition of transparency in public administration through the principle of public access to information, including the far-reaching right of public access to public administration documents. This right is enshrined in Swedish constitutional law – Chapter 2, Article 1 of the Freedom of the Press Act – and has been so since 1766. When restrictions on this right are created, in other words, when provisions on confidentiality are being designed, a great deal of emphasis is placed on the right of access to public administration documents. Transparency is held to be the starting point of confidentiality legislation in Sweden (Bill 1979/80:2, part A; Bill 1975/76:160).

The field of taxation, however, is regarded as an area where information that is particularly sensitive for an individual is maintained, which is why Swedish confidentiality legislation offers a very high level of confidentiality in tax administration, protecting, for instance, information in taxpayers' tax returns from public access (Chapter 27, Section 1 of the Public Access and Secrecy Act). There are certain exceptions as regards this high level of confidentiality. Most Tax Agency decisions are, for instance, not protected by confidentiality but considered to be public information (Chapter 27, Section 6 of the Public Access and Secrecy Act), which means, for instance, that information on taxable income is public information in Sweden. Another exception from confidentiality is the Tax Agency's consulting activities (Bill 1979/80:2, part A).

How the Tax Agency's new activity, *fördjupad dialog*, fits in with the tax confidentiality legislation briefly presented above⁹ has not been particularly clear. The Tax Agency's position regarding *fördjupad dialog* and confidentiality has fluctuated considerably over the relatively few years the *fördjupad dialog* programme has been running. Initially, the Tax Agency's position was that the programme did not enjoy confidentiality protection (Påhlsson, 2012a). This position changed later, whereby *fördjupad dialog* was considered to be embraced by the scope of confidentiality under Chapter 27, Section 1 of the Public Access and Secrecy Act (Hansson, Askersjö, & Landén, 2012; Skatteverket, SKV decision dnr 480 713075-12/263). The Tax Agency again changed its position following a case in the Supreme Administrative Court in 2013, where the Court concluded that *fördjupad dialog* constitutes a consulting activity and, since such activities are not protected by confidentiality according to Bill 1979/80:2, part A, the information part of *fördjupad dialog* is to be considered to be public information (HFD 2013 ref. 48). The position that the information part of *fördjupad dialog* is public information is now explicitly stated in the current Guidelines (Item 13 and Comments on Item 13).

THE PRINCIPLE OF LEGALITY

The dualistic model of administration makes Swedish public agencies independent and strong. Their independence is, however, limited by the principle of legality, which is also laid down in constitutional law in the opening Article of the Instrument of Government, which states that “public power is exercised under the law”.

This implicates that an obligation imposed on a citizen by a public agency must always be based on the law. An interpretation of the wording of this provision gives the impression that it only concerns provisions laid down in actual acts of law. However, the term “law” has a wider scope than such an interpretation reveals. The term “law” does not only embrace acts of law but also ordinances and other types of provisions and practice (Bill 1973:90; KU 1973:26; Bill 2016/17:180). The phrase “public power is exercised under the law” thus holds that public agency action must be supported by an act of law or other enactment.

The meaning of the principle of legality differs slightly according to the legal field and relating to the term “law”. In certain legal fields, the principle requires statutory law as a basis for agency activities, while in others, provisions in a government ordinance may be enough to meet the principle of legality.

The field of taxation is one which requires an actual act of law. It follows from Chapter 8, Articles 2 and 3 of the Instrument of Government that provisions on taxes shall be laid down in the law and that the power to approve provisions regarding taxes may not be delegated. Since delegation is not possible and the Riksdag is the sole legislator (Chapter 8, Article 1 of the Instrument of Government; Bill 1973:90), tax provisions need to be decided by the Riksdag.¹⁰

The principle of legality within the field of taxation is often referred to as “*nullum tributum sine lege*” – “no taxation without prior legislation” – a sort of pun related to how the principle is expressed in criminal law – “*nullum crimen sine lege, nulla poene sine lege*” (“no crime without prior legislation, no punishment without prior legislation”). The implication of the principle of legality in the field of taxation is an individual's right not to pay more tax than is

⁹ For more on the Swedish tax confidentiality legislation, see Hambre (2015).

¹⁰ Note the exception mentioned below.

stipulated in tax law (Hultqvist, 1995). In addition to this right, Pålsson (1995) has pointed to another feature of the principle, the obligation to pay tax in that the tax prescribed by law must also be collected. The principle of legality is a factor of legal certainty for the protection of citizens against state abuse of taxation (Alhager, 1999).

There is one exception to the requirement of a legal basis and the Riksdag being the body issuing provisions on taxes, through which the Riksdag is able to delegate legislative powers directly to local agencies concerning charges and taxes intended to regulate traffic (Chapter 8, Article 9 of the Instrument of Government). This exception makes it possible for local agencies to impose parking fees and congestion charges.

Apart from this exception, the Tax Agency has restricted possibilities regarding the drafting of binding provisions. The Tax Agency may, sub-delegated by the government under Chapter 8, Articles 7 and 11 of the Instrument of Government, draft what is called *verkställighetsföreskrifter*, which is, in short, a set of rules that mainly consists of administrative provisions relating to the implementation of laws. Although such provisions may, to a certain – limited – extent, “fill out” an act of law, the main presumption is that *verkställighetsföreskrifter* may not add anything substantial to the law. It may not entail new responsibilities for individuals or new interferences as to the personal or financial circumstances of individuals (Bill 1973:90).

Hence, there are only two means by which binding provisions on taxes may be issued: a law or *verkställighetsföreskrifter*, the latter having substantial restrictions as to their contents. Apart from this, the Tax Agency has the mandate to issue non-binding provisions in the form of *allmänna råd* (general advice) and other statements. General advice falls outside the normative powers of government, which is why they are not binding either for public agencies or individuals (Pålsson, 1995). This means that the Tax Agency, in principle, is not obliged to follow its own general advice, even in situations where higher legal sources do not provide any guidance on the matter (Lodin, Lindencrona, Melz, Silfverberg, & Simon-Almendal, 2017).

As can be seen above, the principle of legality not only stipulates a requirement for a basis in law or other enactment for public agency activity but also includes conditions as to which body may adopt which kind of provision. It has been stated that, regarding taxes, the principle implicates that provisions shall be laid down in law and that the Tax Agency has strictly limited opportunities to adopt binding provisions.

If the principle of legality requires a legal basis for public agency activity within the field of taxation, the requirement is less strict concerning administrative regulation. Previously, there was no further demarcation of a principle of legality in administrative law apart from Chapter 1, Article 1 of the Instrument of Government. However, as of 1 July 2018, a new Administrative Procedure Act has come into force, stating in its Section 5 that an agency may only take measures that have a legal basis in the legal system. The wording “the legal system” corresponds with the meaning of the term “law” in Chapter 1, Article 1 of the Instrument of Government, which is why the principle of legality in Section 5 of the Administrative Procedure Act does not require an act of law as a legal basis for agency action; instead an ordinance suffices, or binding agency regulation or even practice (Bill 2016/17:180; *c.f.* Bill 1973:90; KU 1973:26). Thus, although there is a principle of legality specifically for the field of administrative law, there is no decisive difference between this provision and what is stated in the Instrument of Government (Bill 2016/17:180).

The difference in contents of the principle of legality in different fields of law is relevant with regard to *fördjupad dialog*, in that the scope of the principle in the field of taxation has consequences in terms of how the activity must be governed. If the principle embraces only substantive tax provisions or if it also includes administrative rules that the Tax Agency has to apply in its activities, there are different requirements concerning the basis for the activity. If regulating *fördjupad dialog* falls under the tax principle of legality, a legal basis in an act of law is required, while if *fördjupad dialog* is considered to fall under the administrative principle of legality, the requirement is less strict.

The scope of the principle of legality in the field of taxation is often discussed in contexts concerning substantive tax provisions, which is why the impression may be that the requirement for a legal basis in an act of law only applies to such rules (Hultqvist, 1995, 2005, 2016; Lodin et al., 2017; Pålsson, 2014). However, statements in preparatory works and, to some extent, case law, indicate that the interpretation should be made wider, that is, that the principle of legality with its requirement concerning legal basis in an act of law for Tax Agency activity not only includes substantive tax provisions but also administrative rules (Bill 1973:90; SOU 1972:15; RÅ 1987 ref. 21).

As for the implication of the above with regard to *fördjupad dialog*, it may be held that *fördjupad dialog* does not concern the Tax Agency's traditional activities relating to taxation. The rules on *fördjupad dialog* do not include any substantive tax provisions and no tax is levied through *fördjupad dialog*, only through a tax decision notified ex-post the completion of the transaction. The activities within *fördjupad dialog* are, however, carried out in close connection to taxation activities and the Tax Agency statements provided in *fördjupad dialog* affect a company's future taxation to a certain extent, even though the statement does not provide any direct basis for taxation since the statements are non-binding (Guidelines, Comments on Item 8). Considering this close connection to taxation and the fact that the principle of legality not only concerns substantive tax law but also administrative rules, regulating an activity such as *fördjupad dialog* should fall under the requirement of having legal basis in an act of law.

What creates legal concerns in this context of *fördjupad dialog* is that the Tax Agency has engaged in this activity on its own; it has not come into Swedish administration on the basis of an initiative from the Riksdag or the government. It is not governed by law but by the non-binding Guidelines drawn up by Tax Agency.

A consequence of the fact that the programme has been designed by, and the instructions (the Guidelines) for the procedures of the programme are drawn up by, the Tax Agency is that the Guidelines may be changed from one day to the next, without prior notification or legal inquiry, creating issues as regards predictability. This is not only a theoretical possibility but has, as described above, actually happened on several occasions regarding the issue of confidentiality.

More importantly regarding the topic of this subsection, the Guidelines themselves do not fulfil the requirement set by the principle of legality in the field of taxation, which is why you may argue that legislation is necessary. The Tax Agency, however, argues that *fördjupad dialog* does not need to be stipulated in a legislative act, because it already has a legal basis through the so-called "service obligation" that includes answering questions and guiding companies, and is regulated in the Administrative Procedure Act from 2017 which applies to all public agencies, including the Tax Agency (Kristoffersson, 2014; Guidelines, Comment on Item 1).

If the line of reasoning of the Tax Agency is correct and *fördjupad dialog* could be said to have a legal basis in the service obligation under the Administrative Procedure Act, it could be said that the issue of legality may be resolved. However, there is no given interpretation for this legal issue and this is not easily established, which will be further elaborated below.

FÖRDJUPAD DIALOG AND THE SERVICE OBLIGATION

The Administrative Procedure Act and the Service Obligation

The purpose of the Administrative Procedure Act is to guarantee a high level of legal certainty in public administration and in its dealings with citizens (Bill 1985/86:80). This Act includes provisions that apply to the way in which public agencies handle cases. It contains rules not only on the service duties of the agencies but also on the right to have an interpreter, on the filing of documents, on disqualification, on the right for citizens to submit information orally to the public agency, on the obligation for agencies to record information of importance regarding the outcome of a case, on the rights of parties to access data in a case, on a requirement that the agency involved in a decision needs to state the reasons for the outcome, on how a decision shall be notified, and other provisions. These are all meant to reinforce the legal certainty for individuals in their interactions with public agencies (Bill 1985/86:80).

As has been held above, a central aspect of the criticism concerning *fördjupad dialog* is that it lacks legal basis and therefore does not fulfil the principle of legality. To counteract this criticism, the Tax Agency argues that *fördjupad dialog* is a form of service falling under the service obligation. Since the service obligation is laid down in law, categorising *fördjupad dialog* as a service has the benefit of creating a legal basis for this activity.¹¹

The part of the provision on the service obligation that is relevant reads as follows:

The agency shall provide the individual with such assistance that he or she may defend his or her interests. Assistance shall be provided to the extent appropriate given the nature of the issue at hand, the individual's need for assistance and the agency's activities (Section 6, para. 2 of the Administrative Procedure Act, author's translation).

According to the second sentence, the Agency itself has, to a certain extent, the possibility of setting the limits of this service obligation. The Agency may, for instance, if it considers a question submitted by an individual to be too complicated, refuse to answer it (Bill 1985/86:80; Hellners & Malmqvist, 2010). Thus, the Agency is able to limit the extent of the service. It could be argued that the Agency also has the possibility to *extend* the service. If so, what the Tax Agency argues when holding that *fördjupad dialog* is part of the service obligation could be correct and then there is no issue with the principle of legality holding that provisions in the field of taxation shall be laid down in law.

There is, however, reason to investigate more closely what the service obligation entails in order to conclude whether *fördjupad dialog* could be said to constitute a form of service under this Act. Literature on the scope of the service obligation is scarce, not only from a tax

¹¹ The Tax Agency's claim concerning *fördjupad dialog* and the service obligation has not, to my knowledge, been a subject for discussion or debate, that is, it has not been confirmed or rejected by either academia or business. It would, however, in my view, be very important to investigate this claim further, due to its implications for the principle of legality.

perspective but also from a general administrative law perspective, and hence there is a research gap to be filled.

In the pursuit of answering the question of whether *fördjupad dialog* falls under the service obligation or not, the first task would be to demarcate the scope of the term “service” in the meaning of the Act. When the scope has been established, an analysis of whether *fördjupad dialog* fits within its boundaries can be made.

In order to demarcate the term “service”, it is, however, necessary to initially address the different categories of agency activities. This is because categorising *fördjupad dialog* under these types of activities facilitates the demarcation of the term “service” and thus also helps to answer the question of whether *fördjupad dialog* constitutes a service or not. In other words, such a categorisation creates a basis for conclusions on whether *fördjupad dialog* has legal basis in the sense argued by the Tax Agency or if the criticism concerning the issue of legality still stands.

Categorising *Fördjupad Dialog* under the Administrative Procedure Act

The different categories of agency activity are:

- The exercise of public authority (Sw. *myndighetsutövning*).
- Case management (Sw. *ärendehandläggning*)
- Actual administration (Sw. *faktiskt handlande*).

There are no clearly defined lines between these categories, although what constitutes the exercise of public authority generally generates little discussion. The **exercise of public authority** is an expression of the power relationship between the state and an individual, where a public agency exercises its power by making a decision concerning a benefit, right, obligation, disciplinary punishment or other comparable circumstances in relation to an individual (Bill 1971:30). A public agency’s “power to decide” in Bill 1971:30 is presumed to mean binding decisions. However, it is stipulated at the same time that the central feature is that the cases are determined unilaterally by the public agency. This concerns decisions or other measures that express the power of public authorities in relation to the citizens, illustrating an individual's dependence on the agencies, a characteristic of the exercise of authority (Bill 1971:30; Hellners & Malmqvist, 2010).

The other two categories – **case management** and **actual administration** – are, in a simplified sense, rather easy to distinguish. Actual administration embraces non-compulsory actions for an individual (SOU 2003:59; Strömberg & Lundell, 2014). Case management is, in turn, related to the agency’s decision-making activities (Hellners & Malmqvist, 2010).

Common examples given to make a distinction between actual administration and case management are the university teacher giving a lecture (actual administration) and grading an exam (case management), and the physician performing surgery (actual administration) and subsequently charging the patient a patient fee (case management) (see, for instance, Bohlin & Warnling-Nerep, 2007). Driving a bus, directing traffic and extinguishing fires are other examples of actual administration (Bill 1985/86:80).

The fundamental difference between actual administration and case management is, in preparatory works, held to be that the former is characterised by the fact that the agency takes

a certain actual measure while the latter is terminated by a decision of some kind (Bill 2016/17:180). However, it does not necessarily need to be a *binding* decision; a decision of *some kind* suffices (Hellners & Malmqvist, 2010; Ragnemalm, 2014; Strömberg & Lundell, 2014). The distinction is, however, not as easily made as the above examples may suggest (Bill 1971:30; Bohlin & Warnling-Nerep, 2007).

A certain form of agency activity that provides difficulties concerning its categorisation is a consulting activity. It is held in the Government Official Report SOU 2003:59 that actual administration embraces consulting activities, while it can be concluded from SOU 2001:47 and SOU 2010:29 that consulting activities may constitute case management.

Thus, a field of tension can be identified, where an activity involving public agency consultation cannot easily be categorised as case management or actual administration. The central part of the activities within *fördjupad dialog* – answering corporate tax questions – places itself in this area of tension, which is why it would be interesting to investigate this aspect further.

As held above, case management is characterised by entailing a decision of *some kind*, albeit not necessarily a binding decision. Thus, the term “decision” is of importance when drawing the line between the two categories of case management and actual administration. This requires a demarcation of the term “decision”.

There is no explicit definition of the term “decision”, but guidance as to its scope can be found in both preparatory works and literature, holding that a decision regularly includes a statement from an agency that is intended to have certain effects for the person to whom the decision is addressed, or, expressed slightly differently, the idea is that the person concerned is influenced by the decision (Bill 2016/17:180; SOU 2010:29). While binding decisions, as mentioned previously, are to be regarded as falling under the category of the exercise of authority, activities leading to other forms of decision – for instance, non-binding statements – constitute case management.

There are certain statements in preparatory works that support the view that consulting activities may constitute case management. SOU 2001:47 on the procedures at the Social Insurance Agency speaks of consulting *cases (ärenden)* leading to non-binding statements (p. 460) and that contact between the Social Insurance Agency and an insured individual may constitute case management even when the contact solely pertains to advice or other services (p. 110). Thus, it is not entirely outlandish to speak of case management concerning activities entailing non-binding decisions, such as consulting activities.

A similar line of reasoning can be found in the literature. For example, according to Hellners and Malmqvist (2010), activities that include advice, information and other non-binding statements may constitute case management.

There are, however, statements that speak against such a view. It is, for instance, emphasised in SOU 2010:29 that the Administrative Procedure Act is based on the assumption that the agencies may provide advice and information as actual administration without the result constituting a decision, making the activity fall under the category of case management. More importantly, the Bill preceding the new Administrative Procedure Act states that when an agency provides information and advice under the provision on the service obligation, this does not constitute a decision under administrative law, even if the information may affect the

recipient's actions. The reason given for this view is that this includes information that the addressee does not necessarily have to comply with (Bill 2016/17:180).

Thus, the Bill appears to limit the term "decision" to only include binding decisions, excluding from its scope non-binding statements that may affect the recipient's actions. This is a deviation from the view that the term "decision" includes binding as well as non-binding statements. Such a view could be considered to lead to there not being any possibility of arguing that consulting activities, under certain circumstances, may constitute case management, since case management has been described as activities entailing decisions of some kind, but the advice provided under the service obligation according to the Bill does not constitute a decision.

However, on closer examination, the wording of the Bill gives, in my opinion, some room for considering consulting activities as *either* actual administration or case management. The reason for this is that the Bill explicitly states that advice provided *under the service obligation*, when the agency engages in actual administration, does not constitute a decision, that is, it is not held that *all* advice provided by an agency is to be viewed in this way (Bill 2016/17:180 pp. 24-25).¹²

Similarly, the statement in SOU 2010:29 that the Administrative Procedure Act is based on the assumption that the agencies may provide advice and information as actual administration without the result including a decision, making the activity a part of case management, explicitly states that agencies *may* provide advice and information as actual administration, not that all such activity necessarily constitutes actual administration.

But when is consultation actual administration and when is it case management? A distinction may be made between consulting activities as actual administration and consulting activities as case management, the difference being whether the consultation includes some form of legal opinion from the public agency. In other words, if the agency presents to the individual the different options that are available to him or her, i.e. what the individual *may* do, that would constitute consultation in the sense of actual administration, while advice containing the agencies' opinion of what an individual *should* do, in other words, with more of a normative function, would constitute consultation as case management (Påhlsson, 1995). A distinction may thus be made between consulting activities involving some form of legal position taken by the agency (consultation involving case management) and advice that does not include such action (consultation in the sense of actual administration).

The Tax Agency's answers to corporate tax questions in *fördjupad dialog* are, as mentioned previously in this paper, non-binding. Nonetheless, they contain the Agency's opinion – a legal position – on how the particular issue should be resolved. In that sense, the central part of

¹² Additionally, the statement in the Bill is, in my view, most likely not intended to establish a new scope regarding the term "decision", but is rather a way of stating that advice provided in the form of actual administration does not constitute a decision. If a "decision" was to be delimited by the binding or non-binding character of the Agency's statement, this would, according to my interpretation, lead to there being only two categories of public agency activity: the exercise of authority, on the one hand, and actual administration, on the other. In other words, if a decision is a decision only when it is binding, you automatically end up in the "exercise of authority" category when there is a decision at hand, since this category is characterised, *inter alia*, by binding decisions, and in the "actual administration" category when there is not a decision at hand. This leads to use of the "case management" category ceasing. There are other statements in the Bill, relating to a difference between the exercise of authority and case management, which, in my opinion, speak in favour of the interpretation that the intention in the Bill was probably not to establish a new scope for the term "decision" (Bill 2016/17:180).

fördjupad dialog may be held to fall under the consulting category involving case management rather than actual administration.¹³

“Service”

As held previously in this paper, the categorisation of *fördjupad dialog* under the Administrative Procedure Act facilitates the analysis of the question of whether *fördjupad dialog* falls under the service obligation or not. The latter includes an analysis aiming at a demarcation of the scope of the term “service” in the meaning of Section 6 paragraph 2 of the Administrative Procedure Act.

Examples provided in the Bill preceding the Administrative Procedure Act¹⁴ with regard to what is included in the service obligation are instructions on how to write an application or fill out a form, and advice on which documents should be attached. It is further stated that the agency shall assist an individual with advice on necessary supplementary matters, initiate further investigation, ensure that the investigation is limited to what is necessary, and make the individual aware of the fact that there is another way to achieve what he or she is seeking to accomplish (Bill 1985/86:80). Case law shows that the service obligation includes a service in cases where an application is not clear and where the agency has to make sure what the purpose of the application is by contacting the individual (NJA 1994 s. 150).

Legal scholarship suggests that a service may encompass not only such pure service actions as mentioned above but also actions with traits of “case management” (Hellners & Malmqvist, 2010). Hellners and Malmqvist (2010) illustrate the complexity of deciding what is and what is not a service by holding that assistance consisting of, for example, filling out a form can at one point in time be considered actual administration but at another (point in time) be considered case management. If an individual contacts a public agency when wanting to initiate a matter and needs assistance with what must be attached to the application, such assistance constitutes actual administration. If, on the other hand, a case has already been initiated and the agency is assisting the individual with advice on what needs to be added to the case in terms of attachments, this is considered to be case management, not actual administration.

Since *fördjupad dialog*, in its core activity of consultation concerning tax matters, following the analysis in the foregoing subsection, may be considered to be case management, it is of interest to address the question of where to draw the line between: (1) actions that have such case management *traits* and are therefore to be considered to be a service; and (2) actions that are too close to pure case management to be considered a service.

¹³ The focus of this paper is the core function of the programme, that is, the part of the programme in which the Tax Agency answers participating companies’ tax questions. Another part of *fördjupad dialog* is the starting and ending of a *fördjupad dialog*. This serves as an example of the category of the exercise of authority, since the decision to start and the decision to end a *fördjupad dialog* is made solely by the Tax Agency (although the initiative to start and to end may come from the company as well as the Tax Agency). The part of the programme consisting of the Tax Agency’s risk management and support regarding the company’s systems and routines to ensure that the correct information is supplied serves as an example of the “actual administration” category. This activity relates to administrative action rather than to substantial legal issues and should seldom lead to legal statements with an opinion on how a particular tax issue is to be solved. (Hambre, 2018)

¹⁴ Reference is made primarily to the Bill preceding the Administrative Procedure Act of 1986. The reason for this is that although the wording of the service obligation has changed in the new Act, the contents of it is basically the same as in the Act from 1986 (Bill 2016/17:180; SOU 2010:29).

The effort to draw this line is based on certain criteria retrieved from case law and preparatory works. Case law directly related to Section 6 of the Administrative Procedure Act is severely limited, which has been explained by the fact that the provision on the service obligation is a so-called “goal-oriented” provision that is rarely brought before the court (Bill 2016/17:180). Instead, the criteria are retrieved from tort law, namely Chapter 3, Sections 2 and 3 of the Liability Act (Sw. *skadeståndslagen*) as well as the preparatory works and case law related to these provisions. These provisions determine government agency liability for personal injury, property damage or pure financial loss caused by error or negligence when exercising public authority (Chapter 3, Section 2) and for pure financial loss caused by error or negligence when an agency provides false information or advice (Chapter 3, Section 2).

Liability under Chapter 3, Sections 2 and 3 of the Liability Act requires certain “special reasons” to be at hand. What these “special reasons” consist of is further elaborated in the preparatory works preceding these tort law provisions¹⁵ and case law on issues related to the provisions, forming certain criteria that, I would argue, could help to set the boundaries for when actions constitute a service and when actions fall outside the scope of a service.

The preparatory works relating to these tort law provisions state that advice and information and other forms of service to the public are basically excluded from the scope of the provision by not being attributable to the exercise of authority (Bill 1972:5). In case law (NJA 2013 s. 1210), in which the court had to review damages under Chapter 3, Section 2 of the Liability Act, the court made an explicit link between this provision and the service obligation in Section 4 (now Section 6) of the Administrative Procedure Act. This reinforces the view that the preparatory works and case law regarding these provisions in the Liability Act are interesting to study in terms of understanding the scope of the term “service” under administrative law.

The first demarcation of the scope of service, however, relates not to these criteria, but to actions falling under the category of the exercise of authority. As mentioned, the preparatory works (Bill 1972:5) and case law (NJA 2013 s. 1210) hold that a service action does not comprise the exercise of authority. This is supported by statements in Bill 1971:30 preceding the Administrative Procedure Act, holding that the provisions in the Administrative Procedure Act designed to be applied in matters involving the exercise of authority do not apply in matters that exclusively entail advice and guidance – i.e. pure advice and guidance is not considered as falling under the “exercise of authority” category. If a service is not the exercise of authority, it could be held that an action involving the exercise of public authority cannot be considered a service. Therefore, actions involving the exercise of authority fall outside the scope of the term “service”.

Since the core activities of *fördjupad dialog* have been categorised as falling under the category “case management”, the issue of *fördjupad dialog* in relation to service and the exercise of authority does not need to be further explored. If, however, you were to argue that *fördjupad dialog* constitutes the exercise of authority, the conclusion would be – based on the aforementioned statements – that *fördjupad dialog* falls outside the scope of the service obligation.

¹⁵ To clarify, all references to preparatory works in this subsection refer to preparatory works preceding these tort law provisions unless explicitly stated otherwise.

Since, in this paper, *fördjupad dialog* is considered to be “case management”, it is of interest to turn to the criteria that may help set the boundary between: (1) actions with *traits* of case management (service); and (2) actions too close to pure case management (not service).¹⁶

The first criterion that helps to set the scope of the term “service” relates to **the proximity to a closed, ongoing or future case**. Following the case law (NJA 1985 s. 696 I and II; NJA 2013 s. 1210) and preparatory works (Bill 1997/98:105), this criterion may serve as a demarcation of the service obligation in such a way that the provision of advice, guidance and information which is closely connected to a closed, ongoing or future case falls outside the scope of the service obligation. If such a connection does *not* exist, the provision of information falls within the remit of the service obligation.

The second criterion concerns **the manner in which the information is provided**. This criterion is retrieved from the preparatory works (Bill 1997/98:105) and holds that it is of importance whether the information is provided in written or oral form. Information provided in written form is, according to the Bill, more likely to fall outside the term “service”, while advice provided orally is, to a greater extent, considered as a service. Written guidance often gives the officer more time for reflection with regard to both the content and wording. However, the first criterion, that is, the proximity to a current or future case, appears to carry more weight, as both NJA 1985 s. 696 I and II and NJA 2013 s. 1210 concerned information provided by telephone, but the proximity to a specific case and the exercise of authority was decisive for the liability issue.

The third criterion regards **the nature of the information**. Concrete and precise information about the contents of a regulation, clear information on the agency’s prospective assessment, and specific calls to the individual to act in a certain way are more likely to be considered as not being guidance of a service character (Bill 1997/98:105; SOU 1993:55; NJA 2013 s. 1210).

The fourth criterion identified is **the expression of power and authority**. Guidance and information that relates to the agency’s special field of operations and has a substantial impact on the individual’s choice of actions tends to be considered as involving the exercise of authority, thus not falling under the term “service” (Bill 1997/98:105; NJA 1985 s. 696 I).

The fifth criterion relates to **the person providing the information**. The preparatory works imply that information provided by specialised or experienced officers carries more weight than information from those with less knowledge and experience (Bill 1997/98:105).

To summarise, the conclusion of this paper is that the service obligation under the Administrative Procedure Act does not include actions that are considered as the exercise of authority. The characteristics of the exercise of authority are that it concerns the public agencies’ unilateral management of cases, decisions or other measures that express public authority in relation to the citizens, which illustrates the individual’s dependence on the public agency.

It can, furthermore, be concluded that the service obligation includes advice on how to fill out a form, but also advice where the agency provides more general information about the applicable rules in the field and information on applied practices. Such advice can result in

¹⁶ For the purpose of this article, the author considers that a slightly condensed presentation of the criteria suffices. The criteria are further elaborated on in Hambre (2018).

advice on how an individual *may* act, i.e. situations in which the agency provides the individual with information about different options. This is different from situations in which the agency, in writing, takes a position as to how someone *should* act, or when the agency, in writing about reported facts, announces the legal consequence that, in the agency's opinion, should occur if certain action is taken. Both of the latter types of advice include the agency taking some form of legal position.

In my view, in situations such as the latter, there is, firstly, a certain level of the exercise of authority and, secondly, concrete and precise information about the content of regulations or specific requests to individuals to act in a certain way. It may also be assumed that the advice is very important with regard to an individual's future actions. If these circumstances apply, there is reason to consider the advice as a measure possessing such strong traits of case management that it is so close to pure case management that the action falls outside the scope of the service obligation.

Based on this, I argue that the *fördjupad dialog* activity consisting of the Tax Agency's answers to participating companies' substantial tax questions is not a service in the meaning of Section 6 of the Administrative Procedure Act. There is a certain proximity to a future case; it is most often provided in written form; the information is presumably concrete and precise, and concerns the Tax Agency's prospective assessment; it is most certainly an expression of power and authority; and it is provided by experts at the Tax Agency.

Hence, I do not agree with the Tax Agency arguing that there is a legal basis for *fördjupad dialog* in the service obligation in the Administrative Procedure Act. Therefore, the principle of legality cannot be said to be fulfilled through Section 6 of the Administrative Procedure Act. At the time of writing, no other kind of legal basis has been identified. The crucial point of criticism concerning *fördjupad dialog* therefore remains – the Swedish cooperative compliance model lacks legal basis, a basis that is required under the principle of legality laid down in constitutional law.

SUMMARY AND FINAL REMARKS

This paper sheds light on the importance of recognising the legal framework within which the cooperative compliance model is to operate. If a cooperative compliance model is to function properly and successfully, recognition of such issues is required. In Sweden, overlooking the importance of the legal framework – or neglecting its eminence – has had unfortunate consequences for the programme.¹⁷ The question is whether the initial management introducing the model and the efforts to overcome the subsequent criticism has caused permanent harm to such initiatives or whether the damage may be restored, making cooperative compliance possible in Sweden.

In Sweden, the model of administration must be taken into account – separating politics from administration, thereby providing independent and strong public agencies. As stated above, the independence of public agencies is limited by the principle of legality, stating that public power is exercised under the law. As regards the field of taxation, the principle of legality requires a

¹⁷ As mentioned earlier in this paper, I do not claim that legal issues alone explain the failure of *fördjupad dialog*. However, criticism regarding the legal aspect has repeatedly been directed at the programme from academics as well as businesses (see, for instance, Björklund Larsen's report from 2015 containing several interviews with different stakeholders pointing out legal issues and also Andersson, Fritsch, & Rydin, 2012), which is why legal issues, in my opinion, may be assumed to have played a substantial role in the failure of the programme.

legal basis for Tax Agency activities, which are held to include activities such as *fördjupad dialog*.

The Tax Agency argues that there is a legal basis for *fördjupad dialog* in the service obligation laid down in Section 6 of the Administrative Procedure Act. In this paper, I argue that this is not the case and that *fördjupad dialog* lacks legal basis, by which the principle of legality is not fulfilled. This is based, firstly, on a categorisation of *fördjupad dialog* under the three categories of public agency activity of the Administrative Procedure Act, placing the core activity, *fördjupad dialog*, within the category of “case management”, and secondly, on an analysis of the scope of the term “service” under the Act which reveals five criteria that facilitate the setting of the scope. This leads to the conclusion that *fördjupad dialog* not only possesses traits of actions falling under the “case management” category but shows characteristics that instead place the key activity of providing answers to companies’ substantive tax questions outside the scope of the service obligation. It is the author’s view that *fördjupad dialog* must be subject to the in-depth, legal investigation that tax issues normally undergo prior to legislation.

Another issue touched upon in this paper is that of the confidentiality of the data submitted and produced within the framework of *fördjupad dialog*, which has been a hotly debated topic. The different positions taken by the Tax Agency in respect of this matter have been presented, showing that they have ranged from that of transparency, to confidentiality and then back to transparency again. Not only does this fluctuation of positions create problems as regards predictability, it also pinpoints another problem, which is based on the fact that *fördjupad dialog* is a product of the Tax Agency; that is, the Tax Agency itself has shaped this activity and designed the Guidelines governing the programme, creating obstacles when it comes to carrying out its own functions, in that companies may hesitate to participate (Björklund Larsen, 2015; Sallander, 2013; Kristoffersson, 2014).

To conclude, operations such as cooperative compliance programmes cannot simply be dismissed as being trendy, political whims. They are a far too advanced means of meeting social and international demands on tax administration efficiency, building trust, and combatting tax avoidance and tax evasion. It is probable that measures like cooperative compliance programmes will, considering the spread of cooperative compliance programmes around the world in recent years, gain more recognition as they develop and are reinforced in different tax systems. With this in mind, I believe that Sweden has to find a way to relate to such activities, to take adequate measures in order to enable cooperative compliance and similar programmes to be implemented in the Swedish system and ensure that they operate in a way that means they fulfil their purpose, instead of creating obstacles and mistrust.

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