Ne bis in idem

A comparative study of the interpretation of the principle in Sweden and Norway concerning tax surcharge and tax fraud

Bachelor’s thesis within Commercial and Tax Law

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Abstract

The Ne bis in idem-principle was founded in 1984 and is found in article 4 of the seventh additional protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms. The interpretation of the principle has been uncertain, which resulted in a harmonization of all previous case law on the subject in the Zolotukhin case. The case concerns a Russian citizen who brought his girlfriend onto a Russian military base while being drunk. This action resulted in an administrative proceeding and a criminal proceeding.

The Swedish and Norwegian tax systems concerning tax surcharge and tax fraud are very alike and both countries adapt a dual court system. The differences concerning the interpretation are found in four cases from 2009 and 2010, two from the Norwegian Supreme Court, one from the Swedish Supreme Administrative Court and one from the Swedish Supreme Court. Even though there are similarities in the argumentations in the cases there are also different approaches concerning how to interpret the principle. The Norwegian Supreme Court bases its judgements, especially in the second one after the Zolotukhin case, on the prerequisites established by the European Court of Human Rights and the purpose of the principle. The Swedish Supreme Court and the Swedish Supreme Administrative Court bases the judgements on previous case law and refers to the uncertain judicial area and affirms that there is room for interpretation for the national courts. Even though the argumentation in the judgements differ the national Supreme Courts reach the same answer to the question whether the tax systems are a breach of the Ne bis in idem-principle. None of the courts finds that the national tax systems are an infringement of the Ne bis in idem-principle.
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I Introduction

I.1 Background

The Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) was first founded in November 1950 and came into force for ten contracting states in 1953.\(^1\) Because the Convention is a closed convention, only states in the Council of Europe can accede,\(^2\) which includes forty-seven contracting states as of 2011\(^3\). The *ne bis in idem*-principle was established in article 4 of the seventh additional protocol. The Principle states that no one shall be tried twice for the same offence under the jurisdiction of the same state.

The European Court of Human Rights (the ECHR) has, over the years, had the opportunity to interpret the *ne bis in idem*-principle, and did so with varying degrees of consistency\(^4\). The different interpretations by the ECHR have created confusion regarding the case law and what specifically constitutes the same offence. This has created judicial uncertainty for national courts in their interpretation of the *ne bis in idem*-principle.\(^5\)

On the 10\(^{\text{th}}\) of February 2009, the ECHR in Grand Chamber presented a decision in the Zolotukhin case\(^6\), which addressed, as one of the issues, the different interpretations surrounding the *ne bis in idem*-principle. The case involved a Russian citizen who brought his girlfriend onto a Russian military base while being drunk. This offence resulted in two separate proceedings against the citizen, one administrative proceeding and one criminal proceeding. In the decision, the ECHR referred to earlier case law on the *ne bis in idem*-principle and how the different interpretations of the principle have resulted in difficulties for national courts. To eliminate the judicial uncertainty for the national courts, the ECHR harmonized the earlier case law. The ECHR stated that for a situation to be included in the *ne bis in idem*-principle there should be a trial or a prosecution concerning a second offence,

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\(^2\) H Danelius, pp. 17-21.


\(^4\) Se for example no. 73661/01, the 13\(^{\text{th}}\) of December 2005, no. 60619/00, the 14\(^{\text{th}}\) of September 2004 and no. 59892/00, the 21\(^{\text{st}}\) of September 2006.


\(^6\) No 14939/03, 10\(^{\text{th}}\) of February 2009.
where that offence is based on the same or essentially on the same substantial grounds and facts as the first offence. For the *ne bis in idem*-principle to be applicable, the offences must be connected in time as well as place and involve the same person.\(^7\)

The focus of this thesis is the Norwegian and Swedish tax systems, the Supreme Courts have before the Zolotukhin case, answered the question differently regarding whether the Norwegian and Swedish tax systems are breaches of the *ne bis in idem*-principle.\(^8\) This is interesting because the systems are similar with administrative sanctions, tax surcharges, and criminal laws concerning tax fraud. Furthermore, both countries have cases in the Supreme Courts concerning the tax systems. It is therefore of relevance to study if the Supreme Courts in either country having changed their positions as a result of the harmonization in the Zolotukhin case.

### 1.2 Purpose and delimitation

The purpose of this thesis is to answer the question how Norway and Sweden have interpreted the *ne bis in idem*-principle, and if the interpretations differ from each other, after the ECHR’s harmonization of the principle in the Zolotukhin case, concerning tax surcharge and tax fraud.

Case law decided before 2009 will not be analyzed because such cases have lost their relevance for the purpose of this thesis. Even though article 4 in the seventh additional protocol and article 6 of the convention usually are discussed together article 6 will be excluded from this thesis for the purpose of having a strong focus on article 4.

### 1.3 Method and material

The Convention and the associated protocols of relevance will be studied together with case law from ECHR and literature in the area. Further, to be able to describe the legal systems in Sweden and Norway the national laws, case law and literature will be studied. The propositions linked to the relevant laws will not have any relevance for the purpose but will be studied synoptically to get an understanding of the subject.

To reach a legally secure result, the sources used will be prioritized based on a legal hierarchy with an emphasis on primary legal sources. This thesis will begin with a presentation of

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\(^7\) No 14939/03 para 25-39, 10\(^{th}\) of February 2009.

\(^8\) See for example RT. 2002 p. 557 and RÅ 2002 ref 79.
the Convention and case-law from the ECHR. Next, the thesis continues with a presentation of relevant laws in the relevant countries because of their position in the legal hierarchy. In an informative purpose the propositions connected to some of the relevant laws will, also, be studied. Finally, case law from the national courts will be presented and analyzed to see how the national courts implement the *ne bis in idem*-principle with additional literature to gain a deeper understanding of the subject.

The purpose of the second chapter of the thesis is to give the reader a picture of the *ne bis in idem*- principle and the tax systems in Sweden and Norway. The chapter will contain a presentation of the principle, relevant cases and legislation in the states concerned in the order explained above. This part of the thesis will be based on the traditional doctrinal method.  

The third and fourth chapter of the thesis has the purpose of investigate and affirm the similarities and differences between the tax systems and the interpretation of the principle. In chapter five, to fulfill that purpose, a comparative method will be used.  

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9 McConville Mike & Hong Chui Wing (red), Research methods for law, Edingburgh University, Press Edin-burgh, 2007, p. 4.  

2 Ne bis in idem

2.1 Article 4 in the seventh additional protocol of the Convention

The seventh additional protocol is one of the later additions to the Convention that was prepared by the Steering Committee for Human Rights, and was granted by the member states in the European Council the 22nd of November 1984.11 The purpose of the seventh additional protocol is to “take further steps to ensure a collective enforcement of certain rights and freedoms by means of the Convention for the Protection of Human Rights and Fundamental Freedoms”12. In article 4 of the protocol the ne bis in idem-principle is established. The principle have two main functions, firstly to guarantee certain rights for the individuals in relation to the states and secondly to be a guarantee for legal certainty by upholding the finality of judicial decisions.13

“Article 4 – Right not to be tried or punished twice

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.”14

The ne bis in idem-principle states that no one shall be tried or punished twice under the same jurisdiction for the same offence, irrespective of whether the person was acquitted or convicted in the first procedure.15 The article implies a primary and basic protection against double prosecution in criminal proceedings with the limitation that it only concerns prosecutions within the same state, which means that it can not be applied at two trials in differ-

11 Van Bockel, Bas, The Ne Bis In Idem principle in EU law, Great Britain 2010, p. 15.
12 Protocol No. 7 to the Convention.
13 B. Van Bockel, p. 25.
14 Art 4 of Protocol No. 7 to the Convention.
15 Art. 4.1, Seventh Additional protocol of the Convention.
ent states. The previous mentioned limitation means that a judgement from state A will not be an obstacle for a new proceeding in state B. A situation of that sort is regulated in other conventions, for example the European Convention on the International Validity of Criminal Judgements. Additionally, it requires that the judgement, to be an obstacle for a new prosecution is final and legally binding.\textsuperscript{16}

An exemption from the first paragraph concern cases where new evidences or new facts are detected, and that facts or evidences would have had a fundamental impact on the outcome of the trial.\textsuperscript{17} This gives the parties of a finished and legally binding procedure the possibility to get a new trial and to vacate a jurisdiction due to grave procedural error if that is allowed by the national law in the state concerned.\textsuperscript{18} In the case Nikitin v. Russia\textsuperscript{19} the office of the public prosecutor demands that the presidium of the Supreme Court shall review a final and legally binding judgement from the Supreme Court within its authority. The ECHR in this case states that this is not a new trial in the meaning of article 4.\textsuperscript{20} The convention aims to protect the citizens within the contracting states which implicates that a procedure that only can result in a more favourable judgement for the defendant will not be a breach of article 4, even though there is a previous final and legally binding judgement.\textsuperscript{21} Article 4 does not eliminate the possibility for a disciplinary proceeding concerning the same offence that has been up for a criminal trial.\textsuperscript{22}

One of the issues relating to the \textit{ne bis in idem}-principle for the national courts is how to determine what is to be seen as the same offence for the purpose of the Convention and that there are no common denominator on the international level.\textsuperscript{23} There have been many cases in the ECHR concerning the interpretation of the \textit{ne bis in idem}-principle. In the cases the ECHR administered different interpretations of the \textit{ne bis in idem}-principle, which resulted in an unwanted judicial uncertainty. To establish an unequivocal interpretation, the

\begin{itemize}
\item \textsuperscript{16} H.Danelius, p. 516.
\item \textsuperscript{17} Art 4.2, Seventh Additional protocol of the Convention.
\item \textsuperscript{18} H.Danelius, p. 516.
\item \textsuperscript{19} No. 50178/99, the 24\textsuperscript{th} of July 2004.
\item \textsuperscript{20} No. 50178/99, the 24\textsuperscript{th} of July 2004.
\item \textsuperscript{21} Explanatory report, point 31.
\item \textsuperscript{22} Explanatory report, point 32.
\item \textsuperscript{23} B. Van Bockel, p. 25.
\end{itemize}

2.2 Case law from the ECHR

2.2.1 Zolotukhin v. Russia

The case Zolotukhin v. Russia is important for the subject even though the case itself does not concern taxes. The importance of this case relates to the harmonization of the *ne bis in idem*-principle.

The circumstances in the case concern a Russian citizen who brought his girlfriend onto a Russian military base while being drunk. While getting arrested, the defendant was rude and threatened the officer who arrested him. The behavior of Zolotukhin resulted in an administrative proceeding the same day, where he was found guilty. Later on, after the legally binding administrative judgement, Zolotukhin was prosecuted in a criminal trial. The national court referred the question to the ECHR questioning what is considered to be “the same offence” according to article 4 of the seventh additional protocol of the Convention.

The ECHR starts with straightening out how “the same offence” is defined in other international legal frameworks. While doing this the Court determines that there are several different interpretations and wordings. In some frameworks “the same offence” is referred to as “the same act”, which in most cases aims at the same thing but might create confusion for the national courts while administering the frameworks.

While determining whether the procedures against Zolotukhin is a breach of article 4, the ECHR starts out by investigating if the administrative procedure is criminal in its nature. Based on the three Engel-criteria’s the Court affirms that the procedure is a procedure of criminal nature, which results in article 4 being applicable. What the Court, referring to the Engel criteria’s, is studying is the legal assessment of the crime / crimes under national legislation, the type of the crime and the severity of the sentence the accused could be sentenced to. After the ECHR determines that article 4 is applicable, it continues with an investigation concerning whether the two proceedings against Zolotukhin are based on the same offence. In the same way the concept of “the same offence” is interpreted differently

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24 No 14939/03, the 10th of February 2009.

25 No. 14939/03, the 10th of February 2009.

26 See Engel and others v. the Netherlands (5100/71) [1976] ECHR 4.
in different international legal frameworks, the Court realises that different interpretation methods have also been administered in different cases\textsuperscript{27}. Because of this, the different interpretations result in a juridical uncertainty for the concerned parties and the national courts. The ECHR decides to harmonize the interpretation of “the same offence” through the decision in the Zolotukhin case. The ECHR affirms that the concept “the same offence” is to be interpreted as a prohibition against a second trial or prosecution that is based on facts which are the same or essentially the same as in the first proceeding. The relevant facts are concrete facts that derive from the same person and are linked by time and place.

In the Zolotukhin case, the ECHR concludes that the two proceedings are based on essentially the same facts, and therefore should be seen as concerning the same offence under the meaning of the convention. The two proceedings are a breach of article 4 of the seventh additional protocol.

\subsection*{2.2.2 Routsalainen v. Finland}

As a reinforcement of the interpretation of “the same offence” in the Zolotukhin case, the ECHR applies the same interpretation in the case Routsalainen v. Finland\textsuperscript{28}. Routsalainen had to pay tax surcharge after the police discovered that his car was driven on a fuel that was being subjected to a lower tax than the diesel the vehicle allegedly should be refuelled with. In connection with this, the defendant was sentenced for tax fraud and had to pay fines. Later on in a separate proceeding he was also declared liable to pay a fee to the central of vehicle management because he had changed fuel without notifying the authority concerned.

Because of the above presented facts, Routsalainen considers himself being punished twice for the same offense in the meaning of article 4 of the seventh additional protocol of the Convention. The national court referred the issue to the ECHR.

As in the Zolotukhin case, the ECHR starts with determining whether the proceedings have the character of being criminal due to the Engel-criteria’s\textsuperscript{29}. The Court determines in this case that the proceeding fulfils the criteria’s. The next step is to investigate whether

\textsuperscript{27} See for example No. 60619/00, the 14\textsuperscript{th} of September 2004, No. 73661/01, the 13\textsuperscript{th} of December 2005 and No. 41087/98, the 12\textsuperscript{th} of December 2001.

\textsuperscript{28} No. 13079/03, the 16\textsuperscript{th} of June 2009.

\textsuperscript{29} Engel and others v. the Netherlands (5100/71) [1976] ECHR 4.
the two proceedings are based on the same facts. Due to the interpretation in the Zolotukhin case, the ECHR rules that the two proceedings in this case are based on the same facts. The Court considers it to be irrelevant that the prior proceeding was based on intent. Routsalainen's rights under the *ne bis in idem*-principle are violated and therefore the proceedings are to be considered a breach of article 4.

### 2.2.3 Other case law from 2009 and 2010 concerning the principle

After the Zolotukhin case and the Routsalainen case, there have been two cases in the ECHR concerning the principle. In both cases, one case from June 2009 and one case from January 2010, the ECHR has adapted the same interpretation of the *ne bis in idem*-principle.

The cases Maresti v. Croatia[^30] and Tsonév v. Bulgaria[^31] are two cases that concerns assault where the defendants had been up for two proceedings. In both cases the ECHR considered that the two proceedings where based at the same facts and therefore a breach of article 4 of the seventh additional protocol of the Convention.

[^30]: No. 55759/07, the 15th of June 2009.
[^31]: No. 2376/03, the 10th of January 2010.
3 Sweden

3.1 Tax legislation

In the Swedish tax system, matters concerning tax fraud and tax surcharge are regulated in separate laws. The tax surcharge is mainly regulated in the Swedish Law of Taxation\textsuperscript{32} (TL) supported by the Swedish Law on Tax Returns and Verification\textsuperscript{33}. The legislation concerning tax fraud, offences that is to be seen as coarser than what is required to get tax surcharge, is regulated in the Swedish Law on Tax Fraud\textsuperscript{34} (SKBRL).

3.1.1 Legislation concerning tax surcharge

The tax surcharge system is an administrative system that was introduced on the 1\textsuperscript{st} of January 1972. The main purpose is that those who had not fulfilled their liability to do their taxes should be sanctioned and that people in this way would be inspired to declare their taxes correctly.\textsuperscript{35} The tax surcharge system is as an administrative system and procedure because the legislator finds that there is a relevance of utilizing the knowledge that exists in the tax area within for example the Swedish Tax Authorities. It is an effective way to move parts of the workload from the prosecutors and courts, which results in a more effective and faster process.\textsuperscript{36}

3.1.2 Grounds for tax surcharge

The tax surcharge is understood as a fee charged when a person, in a different way than orally, leaves incorrect information that constitutes a basis for the taxation. The surcharge can also be adjudicated to a person who issues information in the context of an assessment that is not accepted in the probation.\textsuperscript{37} For the purpose of the legislation, information is to be considered as incorrect if it is clear that the information is incorrect or it appears that relevant information is omitted.\textsuperscript{38} The regulation includes all types of inaccurate information that is of relevance for the determination of tax and other charges, questionable in-

\begin{itemize}
\item \textsuperscript{32} Taxeringslag (1990:324).
\item \textsuperscript{33} Lag (2001:1227) om självdéklarationen och kontrolluppgifter.
\item \textsuperscript{34} Skattebrottslag(1971:69).
\item \textsuperscript{35} Prop 2002/03 p. 50.
\item \textsuperscript{36} Prop. 1971:10 p. 199–201.
\item \textsuperscript{37} 5\textsuperscript{th} chapter 1\textsuperscript{st} section, TL.
\item \textsuperscript{38} 5\textsuperscript{th} chapter 1\textsuperscript{st} 2\textsuperscript{nd} section, TL.
\end{itemize}
information should be declared openly and clearly.\textsuperscript{39} An exception to what is to be considered as incorrect information is inaccurate valuations and claims based on the subjective perception of an individual.\textsuperscript{40} In cases with inaccurate information is easier for the Swedish Tax Authorities to detect than cases where the tributary person exempts relevant information in the declaration of tax. Furthermore, it is difficult for the authorities to determine whether the exemption of information is enough for it to be considered as a breach of the obligation to inform and therefore incorrect information in the meaning of the legislation.\textsuperscript{41}

What is to be included in the declaration of tax for it to be correct is to be found in a separate law\textsuperscript{42} focusing only on the declaration and the statement of earnings and tax deductions.

Exemptions concerning the obligation to pay a tax surcharge are cases where the individual misspelled or miscalculated information in the declaration of tax or other written communication to the authorities.\textsuperscript{43} The incorrect information is also exempted from tax surcharge in cases where it would have been corrected by a statement of earnings and deductions, that is handed in and available to the Tax Authorities in the end of November during the year of assessment.\textsuperscript{44} Tax surcharge will not be adjudicated in cases where the deviation concerns a claim and not the substance of the information, if the incorrect information has been adjusted voluntary or if the effect of the inaccuracy is insignificant.\textsuperscript{45} The regulation concerning inaccurate claims is applied in situations where the individual has provided all the necessary facts, but then based the claims on a miscalculation. This based on the principle that none shall be sentenced to pay tax surcharge because of a miscalculation.\textsuperscript{46}

Regarding the burden of proof, it is up to the tax debtor to prove his claims of income and deductions.\textsuperscript{47} Because there is a stringent requirement regarding disclosure and declaration,
there are strong reasons for the taxpayers to keep records as evidence in case of a closer inspection. For a normal worker, it may involve for example pay slips from the employer. In the preparation-, decision- and process procedures the burden of proof is placed upon the Swedish Tax Authorities. It is of importance that the authorities justifies why the information is considered as incorrect, by presenting the grounds for the proceeding.

3.1.3 Riddance from tax surcharge

There are possibilities to get riddance from the tax surcharge; the possibilities are divided into cases that are excusable and cases where it is to be considered to be unfair to impose the full amount. The taxpayer may get riddance with parts of the amount, in those cases the amount shall be reduced to a half or a quarter.

Information that is to be considered as incorrect is excusable in cases where the incorrectness might be based on age, health or similar circumstances. Incorrectness is included in the exemption both in cases of high and low age, errors due to the low age are excluded as they may be based on ignorance or inexperience. The exception is justified as these persons may have less opportunity to manage their financial affairs than a person who age-wise is between the two extremes. The prerequisite “health” aims at situations where the tributary person’s disease is likely to have impact on the person’s ability to declare correctly, it should, for the context, be stressed that the provision includes both somatic and psychic diseases. Furthermore, there is an opportunity to get riddance if the incorrectness is based on a misunderstanding of the tax provision or the significance of the facts by the tributary person. While determining whether an error is to be excluded, the knowledge and experience of the tributary person is to be taken into consideration, together with the nature of the information. A third possibility to get riddance on bases of excusableness concerns cases where the incorrectness is based on a statement of earnings and tax deductions that is

49 B. Leidhammar, p. 73.
50 5:14 1st para, TL.
51 5:14 2nd section, 1st point, TL.
54 5:14 2nd para 2nd point, TL.
incorrect or misleading. Exceptions due to the provision presuppose that the tributary person has verified the information. Further emphasizes that the rule should be applied strictly.

There are cases where it is considered unreasonable to impose the full fee, this concerns cases where the fee can not be considered to be in proportion to the incorrectness or negligence. Also, cases where the time factor is such as to be considered unfair when charging the whole amount because the extended process does not depend on the taxpayer. A third case that is included in the riddance’s because it is considered to be unreasonable to impose the full amount. It concerns cases when the tributary person is sentenced under the Swedish law on tax fraud or regarded as a subject of confiscation of proceeds of criminal activity.

3.1.4 Legislation concerning tax fraud

The Swedish Law on Tax Fraud is applicable on Swedish taxes and fees where there is a direct reference to the law. The law contains regulations concerning the prerequisites and the punishment of the crime. It is of importance to stress that the law does not apply to tax surcharges.

Tax fraud is defined as a crime where a person in another way than orally intentionally submits incorrect information to the Swedish Tax Authority. Furthermore, a crime is to be considered to be a tax fraud if a person omits to declare tax, statement of earnings and tax dedications or other provision, which might lead to tax being exempted from the state or in some other way accrue himself or other. Swedish legislation classifies the degree of the crime by the amount of money concerned. If the suspect has been using false documents or misleading accounting, or if the crime is a part of a systematically conducted crime in a greater extent than the crime concerned in the current proceeding, or in some other way

56 5:14 2nd para 3rd point, TL.
58 5:14 3rd para, TL.
59 2§ and 4§, SKBRL.
60 1§ 1st para, SKBRL.
61 2§, SKBRL.
considered to be of an exceedingly serious kind.\textsuperscript{62} Incorrect information regarding tax fraud is defined in the same way as concerning tax surcharge.\textsuperscript{63}

In the previous law a person who planned a crime but failed to complete it was punished less severely than a person who could carry the offense. This was considered to be disproportional by the legislator who introduced what in Swedish legislation is called a farerekvisit\textsuperscript{64} in the current law. By introducing the farerekvisit, the Swedish government develops its capacity to punish those who have not been able to commit a planned crime if it is considered to be specific risk that the crime will be carried out. That kind of risk is not considered to exist in cases where the crime most certainly would be detected, if the information is questionable and therefore should have been investigated closely by the Swedish Tax Authorities or in cases where the incorrect information should be detected in a regular control. Incorrectness that is based on ignorance or other similar circumstances is not respected by the legislator.\textsuperscript{65}

\section*{3.2 Case law from the Swedish Supreme Administrative Court}

\subsection*{3.2.1 RÅ 2009 ref. 94}

In this case, a Swedish citizen omitted information in his declaration of tax that was related to some work he had done during the year. Because of this he was sentenced for a petty tax offence and had to pay day-fines. The citizen was also declared liable to pay tax surcharge based on the same omitted information. The Administrative Court and the Administrative Court of Appeal found that the amount of the tax surcharge should be reduced to the half of the original surcharge which was appealed to the Swedish Supreme Administrative Court by the Swedish Tax Authorities.

The Swedish Supreme Administrative Court affirms that the double proceedings are not to be seen as an infringement of Swedish national law. Furthermore, the court noticed that none of the parties in their arguments called attention to the prohibition against double punishment, the \textit{ne bis in idem}-principle under the Convention. With reference to the new

\begin{footnotes}
\item[62] $4^\text{§}$, SKBRL.
\item[64] The Farerekvisit implicates that a planned crime is equivalent to a executed one.
\item[65] Prop 1995/96:170 p. 95.
\end{footnotes}
interpretation of the principle in the Zolotukhin case and the following cases, the Court considers that it is relevant to the outcome of the case to include the new interpretation in the assessment and refers to the government survey\textsuperscript{66} from 2009 that states that the legal situation in the area is to be considered as judicially uncertain.

The Supreme Administrative Court considers that an assessment of whether the Swedish tax system is contrary to the \textit{ne bis in idem}-principle must take into account that Sweden has a dual court system with administrative courts and criminal courts and that this system has been taken advantage of when designing the Swedish tax system. The Court considers the new interpretation to be extremely narrow and therefore difficult to apply for the national courts. The court also considers it to be of relevance that the ECHR previously has accepted the Swedish tax system\textsuperscript{67} and that the Swedish Supreme Administrative Court as well as the Swedish Supreme Court previously have found that the system is not an infringement of the principle. The Supreme Administrative Court considers the Swedish tax system not to be affected by the new interpretation, because of its special structure. The grounds that have been stated above leads to that the Supreme Administrative Court does not consider the Swedish tax system to be an infringement of the Convention.

3.2.2 \textbf{RÅ 2010 ref. 117}

This case does not contribute anything new for the purpose of this thesis, but refers to the other Swedish cases concerning the principle that are presented in this thesis.

A person omitted information in his declaration of tax to the Swedish Tax Authorities in 2005 and 2006, concerning a larger amount of money that derived from profits he had made on shares. He was sentenced for tax fraud and he also had to pay tax surcharge. The person appealed and claimed that he should be freed from the obligation to pay tax surcharge because of the judgement where he was sentenced for tax fraud.

In this case the Supreme Court of Appeal refers to NJA 2010 p 168 I and II and RÅ 2009 ref. 94, and states that the Swedish tax system is not a breach of the \textit{ne bis in idem}-principle. Furthermore, the Court addresses the issue concerning if the person in this case should be freed from the obligation to pay tax surcharge, that part of the judgement is not of relevance for this thesis.

\textsuperscript{66} SOU 2009:58.

\textsuperscript{67} See case No. 60619/00, the 14\textsuperscript{th} of September 2004.
3.3  Case law from the Swedish Supreme Court

3.3.1  NJA 2010 p. 168 I and II

In March of 2010, the Swedish Supreme Court announced a judgement in two joined cases concerning tax fraud and tax surcharge. The case is the first case concerning the interpretation of the *ne bis in idem*-principle founded in the Zolotukhin case in relation to the tax system.

The judgement in this case started a debate in Sweden concerning the Swedish tax system and the district court of Haparanda referred five questions to the ECHR. The issues concerned the judgement and whether the Swedish tax system is an infringement of article 4 of the seventh additional protocol of the Convention.\(^{68}\)

3.3.1.1  Circumstances

The circumstances of the first case in the judgement is that a person in his declaration of income regarding 2004 submitted incorrect information which resulted in the fact that a larger sum of money was excluded in the declaration through an improper tax deduction for a capital loss on shares. Such a deduction would lead to a detriment of significant amounts of tax revenue for the Swedish government. Due to Swedish law this is to be considered a felony because of the large amount of money. The defendant verifies the circumstances but do not consider the action to be intentional or grossly negligent, he was found guilty in the district court. In the Court of Appeal the defendant claims that the case should be rejected because of a judgement from the Administrative Court of Appeal where he was adjudicated tax surcharge for the same offence. The Court of Appeal rejected the case with reference to article 4 of the seventh additional protocol of the Convention.\(^{69}\)

The defendant in the other case indicated to Swedish authorities that he lived in Great Britain during the time period of 2000 to 2004. However, during this time he was civil registered in Sweden and had his family and home in Sweden in addition to a permanent residence and main income from Sweden. According to the Swedish Tax Authorities, the defendant was fully taxable in Sweden for the incomes relating to those years. The district court considered the tax fraud as intentional and gross; therefore the court sentenced him for gross tax fraud, which was later affirmed by the Court of Appeal. The judgement was

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\(^{68}\) Case C-617/10.

\(^{69}\) NJA 2010 p 168 I, B 5498-09.
appealed to the Supreme Court because of a judgement from the Administrative Court of Appeal where he was sentenced with tax surcharge.\textsuperscript{70}

\textbf{3.3.1.2 The judgement of the Swedish Supreme Court}

The Swedish Supreme Court investigates whether the two defendants' convictions for tax fraud and tax surcharge liability under the Swedish tax system is in conflict with article 4 of the seventh additional protocol of the Convention. After a review of the ambiguous case law from the ECHR, the Swedish Supreme Court finds that the judgement shall be based on the interpretation of the \textit{ne bis in idem}-principle given in the Zolotukhin case and several subsequent cases\textsuperscript{71}. The interpretation from the Zolotukhin case implies that the \textit{ne bis in idem}-principle should be understood as a prohibition against two proceedings based on the same, or essentially the same facts.\textsuperscript{72}

The Swedish Supreme Court affirms that, in both cases, the proceedings are based on the same facts, the only difference between the regulations concerning tax fraud and tax surcharge is the prerequisite for intention or gross negligence concerning tax fraud. As such, the Swedish system is considered to be an infringement of the \textit{ne bis in idem}-principle in article 4 of the seventh additional protocol of the Convention. However, the Swedish Supreme Court considers, by referencing to the proposition\textsuperscript{73} and the case Rosenqvist v. Sweden\textsuperscript{74}, it to be possible that the different requisites can be a factor that leads to the result that the proceedings will be considered concerning two different offences. The Supreme Court considers that the new practices fully exclude the possibility of that interpretation. To support this interpretation, the Court refers to RA 2000 ref. 65, which later resulted in the case Nilsson v. Sweden\textsuperscript{75}, where a person (Nilsson) was sentenced for unlawful driving and drunk-driving. Later on Nilsson got his license revoked by the Court of Administration. The ECHR in the case finds that there is a relation between the judgements that is close enough for it not to be an infringement of article 4 of the seventh addi-

\textsuperscript{70} NJA 2010 p 168 II, B 2509-09.

\textsuperscript{71} See No 2376/03, No 55759/07 and No 13078/03 presented above in section 3.2 and 3.3.

\textsuperscript{72} Se section 3.1 for a presentation of the case.

\textsuperscript{73} Prop. 2002/03:106.

\textsuperscript{74} No. 60619/00, the 14\textsuperscript{th} of September 2004.

\textsuperscript{75} No. 73661/01, the 13\textsuperscript{th} of December 2005.
tional protocol, the time between the judgements is considered as not of relevance for the outcome.\textsuperscript{76}

The Swedish Supreme Court determines, after a review of earlier case law from the ECHR, mainly Nilsson v. Sweden\textsuperscript{77}, but also Malge v. France\textsuperscript{78}, R.T. v. Switzerland\textsuperscript{79}, Philips v. Great Brittan\textsuperscript{80} and Maszni v. Rumania\textsuperscript{81} that the legal area concerning penalties handed down by various authorities for the same offense is not comprehend enough to be considered as an area without room for interpretation. The Supreme Court states that a new procedure may be initiated if the second proceeding is predictable, and there is an objective and temporal relation between the proceedings. This implies that new sanctions could be added to those that have been previously imposed in a judgement and become legally binding.

The Swedish Supreme Court stress that the legislator through the founding of the relevant legislation allowed for the same incorrect information to be entered in various courts, depending on which sanction these proceedings concern. Furthermore, the Court stress that it is first and foremost for the legislator to implement the interpretations of different principles from the ECHR and the ECJ in the legislation. The Supreme Court continues by stating that it requires clear support in the Convention or the case law from the ECHR or the ECJ for the Court to be able to deviate from Swedish law. The Swedish Supreme Court does not find that the support to deviate from the Swedish law is clear enough and therefore the Court can not reject the system with double proceedings.

\textbf{3.3.1.3 Divergent opinions and amendments from the Justices}

In the judgement from the Swedish Supreme Court, two of the Justices of the Supreme Court have divergent opinions. However, the Justices also consider that the same offense in some cases might lead to two or more sanctions. In those cases the dissenting Justices interprets the case law in such way that the subsequent process will be complementary to the first one and not a whole new one. Because of the fact that the Swedish system requires

\begin{itemize}
\item \textsuperscript{76} No. 73661/01, the 13\textsuperscript{th} of December 2005.
\item \textsuperscript{77} No. 73661/01, the 13\textsuperscript{th} of December 2005.
\item \textsuperscript{78} No. 68/1997/852/1059, the 23\textsuperscript{rd} of December 1998.
\item \textsuperscript{79} No. 31982/96, the 30\textsuperscript{th} of May 2000.
\item \textsuperscript{80} No. 41087/98, the 12\textsuperscript{th} of December 2001.
\item \textsuperscript{81} No. 59892/00, the 21\textsuperscript{st} of September 2006.
\end{itemize}
that the proceedings concerning tax fraud and tax surcharge is to be held in different courts, the proceedings can not be considered to be complementary to the other one. The *ne bis in idem*-principle is therefore an obstacle for a new proceeding in cases like the current one.

One of the divergent Justices adds that the legislator as soon as possible should coordinate the proceedings and penalties to prevent the system from being rejected by the ECHR.\textsuperscript{82} Furthermore, one of the Justices that was not by a divergent opinion, ads for himself that a problem for the Swedish system in relation to the principle is the aspect of time, the justices considers that the two proceedings are that close connected that the system should be accepted by the ECHR.\textsuperscript{83} One of the Justices has a divergent opinion concerning the motivation of the judgement and argue that the ECHR in the Zolotukhin case does not refer to systems which are assimilated with the Swedish tax system and that the previous case law is unclear and that the result of a review of the system can not be predicted, based on that the Swedish system can not be rejected by the ECHR.\textsuperscript{84}

### 3.3.2 Effects of the judgement from the Supreme Court

The fact that the Justices of the Supreme Court have different opinions in the case has resulted in that the authority of the Supreme Court is considered to be weakened by legally qualified people within Sweden. It is also considered that the case law does not get the same prejudicial effect when Justices of the Supreme Court can not reach a unanimous decision, particularly where, as in the case from 2010\textsuperscript{85}, the Justices had their own, individual opinions related the case and compatibleness of the Swedish tax system in relation to article 4 of the seventh additional protocol of the Convention.\textsuperscript{86}

The doubted authority of the Swedish Supreme Court is confirmed not least by the decision by Haparanda district court to refer the matter to the ECHR.\textsuperscript{87} The judgement has not received the desired prejudicial effect is also confirmed by the fact that series of inferior

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\textsuperscript{82} Justices of the Supreme Court Lindskog, Stefan in his amendment.

\textsuperscript{83} Justices of the Supreme Court Lamberts, Göran in his amendment.

\textsuperscript{84} Justices of the Supreme Court Blomstrand, Severin in his divergent opinion concerning the motivation.

\textsuperscript{85} NJA 2010 p. 168 I and II.

\textsuperscript{86} Bylander Eric, Högsta domstolens dubbelbestraffningsbeslut som bidrag till rättstillämpningen. JT, 2010-11, nr 1, p. 114 ff.

\textsuperscript{87} Case C-617/10.
courts have chosen to stay the proceedings concerning tax fraud in cases where the defendant already have been sentenced to pay tax surcharges, and in some cases even gone against the case law of the Supreme Court.  

88 See for example B 15051-08, District Court of Stockholm 11th of January 2011.

89 See for example B 2432-09, Court of Appeal for Western Sweden 23rd of June 2010, and B 8288-09, District Court of Solna 14th of April 2010.
4 Norway

4.1 Tax legislation concerning Income tax

The Norwegian tax system is much alike the Swedish model with a separate set of rules concerning tax fraud and a separate set of rules concerning tax surcharge. In Norwegian legislation the tax surcharge and the tax fraud is regulated in different chapters of the Norwegian Law of Tax Administration\(^90\) (Ligningsloven). Concerning tax fraud, both the prerequisites and punishment for tax fraud is found in Ligningsloven.\(^91\)

4.1.1 Legislation concerning tax surcharge

The tax surcharge is regulated in the tenth chapter of Ligningsloven. A person who declares incorrect or incomplete information is sentenced to pay tax surcharge.\(^92\) The surcharge is 30\% of the amount of money that risks to be exempted from taxation.\(^93\) Furthermore, a person who has not declared on time or not at all or otherwise done something improper that might, or has resulted, in tax incentives can also be sentenced to pay tax surcharge.\(^94\) For a person to be sentenced to pay a tax surcharge the Norwegian Tax Authorities have to prove that it is likely that the inaccuracy has or might result in a tax relief for the accused person. The requirement of likelihood also regards the evidence that the taxpayer failed the obligation of disclosure and the size of the potential tax advantage.\(^95\) A person that fails in the first stage to submit the declaration and in the second stage provides false information shall only be prosecuted for failure to submit the declaration and not for the latter offence.\(^96\)

A person will not be sentenced to pay tax surcharge in cases where the submitting of incorrect information is attributable to the high age of the tributary person. Additional factors

\(^91\) 12th chapter I§ 2nd para, Ligningsloven.
\(^92\) 10th chapter 2§ 1st para, Ligningsloven.
\(^93\) 10th chapter 5§ 1st para, Ligningsloven.
\(^94\) 10th chapter 2§ 1st para, Ligningsloven.
\(^95\) Ot.prp. nr. 82 (2008-2009) section 8.9.3.
such as sickness, inexperience or other similar circumstances are taken into account. Incorrect information that obviously is caused by typing errors and miscalculations or are oppressed in the declaration will be exempted from tax surcharge. For a typing error or miscalculation to be considered to be obvious, it should be so distinct that the Tax Authorities can not miss it in a review of the declaration. An inaccuracy is not considered to be obvious if there is a possible explanation for the miscalculation or typing error that might make it correct.

Inaccuracies, which occurred even though the declaration is properly completed, will also be exempted from an obligation to pay tax surcharge. If the tributary person corrects the information voluntarily and it is possible for the Tax Authorities to calculate the tax correctly, the person will not be sentenced to pay tax surcharge. It is of importance that the correction is made voluntarily and not because of an inspection by authorities. It is not of relevance for the possibility of exemption if the correction occurs at ordinary tax proceeding or at a later date. In cases where the surcharge will be below 600 NOK or the tributary person has died there will not be any tax surcharge. It must be added that a tax surcharge that was imposed before a person's death does not fall away because of the death due to the exemption.

A person who by gross negligence or intentionally report incorrect information or omits to declare may be sentenced to pay stricter tax surcharge. For a person to be liable to pay the stricter tax surcharge, it requires that the person could be sentenced to surcharge due to Norwegian law. The chief value in assessing how much the extra surcharge should be is whether the person submitted the false information with gross negligence or intent.

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97 10th chapter 3 § 1st para, Ligningsloven.
98 10th chapter 3 § 2nd para letter a and b, Ligningsloven.
100 10th chapter 3 § 2nd para letter c, Ligningsloven.
102 10th chapter 3 § 2nd para letter d and e, Ligningsloven.
104 10th chapter 5 § 1st para, Ligningsloven.
105 10th chapter 2 §, Ligningsloven, presented above.
4.1.2 Legislation concerning tax fraud

For a person to get sentenced for tax fraud due to Norwegian legislation the person shall intentionally or with gross negligence in some unlawful way obtain tax benefits. One example is if the person submits incorrect or incomplete information and understands or should understand that it can result in tax or charge advantages. Another example is if the person issues a document that he understands or should understand is used to get a tax advantage, or in some other way infringes the Norwegian tax legislation.\(^{107}\) The last includes all major threat of violation of the relevant legislation, there is no requirement of a criminal act that will or may result in a tax advantage.\(^{108}\) The provision includes situations in which the person acted actively or passively, resulting in a tax advantage.\(^{109}\)

The prerequisite for gross negligence stems from the fact that it in many cases can be difficult to determine the intent of the accused person. Also, it can be complicated to prove that the accused person knew that the information submitted was incorrect or incomplete. Such a prerequisite can also be administered in situations where the person has not cared to gain proper knowledge of the system. However, a person can never be considered grossly negligent in the process of declaring if the person is taking advice from the Tax Authorities or from a person who is an expert in the area.\(^{110}\)

If the crime is considered to be gross, the accused person can be sentenced for aggravated tax fraud. While determining if the crime is to be considered to be gross, preference is given to whether the executed action may result in a circumvention of a very significant fee or tax amount. Consideration is also given to whether the executed action is done in such a way that it is particularly difficult to detect the incorrectness or if it is done through misuse of a trust or the exercise of economic activity.\(^{111}\) To determine if a tax fraud is to be considered a gross offence, the crime has to be studied and seen in its context. Ignorance can result in a person being convicted for gross tax fraud if the consequences of the ignorance

\(^{107}\) 12th chapter 1§ 1st para, Ligningsloven.


\(^{110}\) E.Harboe p. 544 f.

\(^{111}\) 12th chapter 2§ 2nd para, Ligningsloven.
satisfy the factors. Not having more knowledge in the area concerned can be considered gross negligence.\textsuperscript{112}

\section*{4.2 Case law from the Norwegian Supreme Court}

\subsection*{4.2.1 RT 2010 page 72}

The case is about X, who is a cab driver who runs his business as a sole proprietorship. In 2007 he was ordered to pay additional income tax of 60\% after having submitted false and incomplete information to the Norwegian Tax Authorities, including missing accounts for the years 2000 and 2001, later accounts included several legal defects and the reported wage payments were incomplete. The following year X was prosecuted for tax fraud and accounting fraud which he was partly convicted and partly acquitted for in the inferior courts. X appealed to the Norwegian Supreme Court and argued that the fact that he first had to pay tax surcharge and then got sentenced for tax and accounting fraud, is to be considered to be contrary to the \textit{ne bis in idem}-principle in article 4 of the seventh additional protocol of the Convention, and the harmonization of the principle in the Zolotukhin case.

The Norwegian Supreme Court affirms that the ECHR through the harmonization in the Zolotukhin case reckon that the facts in that particular case is to be the basis for determining whether one or more processes are to be regarded as an infringement of the \textit{ne bis in idem}-principle. The Norwegian Supreme Court stresses that the harmonized implementation from the ECHR is to be used by Norwegian courts. It is therefore of importance to determine whether it in this case are the same or essentially the same facts on which the proceedings against X are based on, further the Norwegian Supreme Court has to determine whether the facts are connected in time and space.

The Norwegian Supreme Court begin the argumentation regarding the current case by pointing out that the fact that X was acquitted on parts of the prosecution in the inferior courts is not of relevance to the assessment of whether the procedure is to be regarded as an infringement of the principle. The Supreme Court considers that it is clear that the incorrect and incomplete accounts were an important condition in the result that X was found liable to pay extra taxes and fees, but the Court also points out that the accounting rules are not only to be seen as a part in the process of payment of taxes. Because of this the proceedings shall not be considered to be a case of double procedures in the meaning

\textsuperscript{112} 12\textsuperscript{th} chapter 2\textsuperscript{nd} 3\textsuperscript{rd} and 4\textsuperscript{th} para, Ligningsloven.
of the new implementation of principle. The same applies to the false documentation that the false accounting is based on.

Concerning the incorrect reports of the wage to the employees, the Norwegian Supreme Court emphasizes that it is not the same or essentially the same measures that are the basis for the procedure. The indictment does not regard X’s own tax but his participation and empowerment of others to commit tax fraud. X has therefore violated his duty as an employer to report the correct wages for the employees which are the basis of their taxes. Because of this the proceedings concerning the incorrect reports of the wages is not to be considered as an infringement of the principle.

4.2.2 RT 2010 page 1121

In the year 2001 B sold shares of company A, partly owned by himself and partly owned through his wholly owned company C that was registered in Gibraltar. The profit in company C was then transferred to company D, registered in Gibraltar, which B also wholly owned. The capital gain he made by selling company C’s shares in company A was never declared and because of that B managed to escape from his obligation to pay tax on that profit.

![Diagram]

Figure 1 – Explanation of the circumstances in RT 2010 page 1121

In 2005 Bs’ hidden assets was detected in a tax field audit of company D, this resulted in that the profit that was hidden in company D was added to Bs’ incomes for year 2002, and that sum of money was therefore taxed with by property tax for the years between 2003 and 2007. In addition, B had to pay tax surcharge of 30% of the income. The decision was not appealed within the term of appeal of three weeks. In 2008 B was charged because he intentionally or through gross negligence had provided incorrect or incomplete information to Norwegian Tax Authorities. B is sentenced by the inferior courts, where the issue of ar-
article 4 of the seventh additional protocol of the Convention is brought into the Court of Appeal, but the Court holds that the *ne bis in idem*-principle has not been violated by the Norwegian tax system. B appeals to the Norwegian Supreme Court and stress that the procedure he has been exposed to is to be regarded as a violation of his rights under Article 4 of the seventh additional protocol.

The Norwegian Supreme Court starts with a study of the significance of the principle and how the ECHR implemented it in the Zolotukhin case. The Supreme Court determines that there is a series of cumulative requirements to be fulfilled for a proceeding to be considered to be an infringement of article 4. The cumulative requirements implies that all the relevant proceedings must have had the nature of being criminal to fall under article 4, the proceedings must be under the jurisdiction of the same state, and the first judgement must be final to be an obstacle for a second proceeding. The Supreme Court refers to the grounds of an earlier case that is presented above concerning a cab driver and determines that it is the interpretation from the Zolotukhin case that is to be applied in the current case.

The Norwegian Supreme Court affirms that there is no doubt that the two proceedings against B are based on essentially the same facts; both cases are based on the fact that B failed to declare for the hidden income in company D. Through studies of earlier case law the Supreme Courts determines that tax surcharge is to be considered as a punishment that is comprehended in article 4 of the seventh additional protocol of the Convention.

Because of the fact that B did not appeal the decision that he had to pay tax surcharge makes the decision final. When determining whether the decision is finally made based on the six-month time limit for appeal set out in Ligningsloven, the decision was not final when the next process began. The Supreme Court affirms that due to Norwegian legislation the decision is to be considered to be final when the regular time for appeal has passed, in this case three weeks, an opinion that is supported by the government.115

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113 RT 2010 p. 72, presented above in section 5.2.1.
114 RT 2006 p. 1409.
115 NOU 2003: 15 section 5.7.16.3.
Next step for the court is to determine whether the proceedings against B is to be considered as duplicate or parallel, the determination is of importance because duplicated proceedings are forbidden due to article 4, but there are cases where parallel proceedings have been granted by the ECHR. For example in the case R.T v Switzerland\textsuperscript{116} where a person who drove his car drunk lost his drivers license and was in a separate proceeding sentenced to prison and fines, the ECHR found that the parallel proceedings can not be considered to be repeating proceedings contrary to article 4. The same outcome had Nilsson v Sweden\textsuperscript{117} where the ECHR found that the proceedings are parallel and that the proceeding had a close connection and was therefore not a breach of article 4. The Supreme Court stress that criminal proceedings and administrative proceedings are handled parallel in the Norwegian court system.

In the current case the Norwegian Supreme Court finds that there is a close connection between the proceedings and although the prison and fines are handled in another proceeding than the tax surcharge the proceedings are considered to be a special degree of interwoven. With regard to the purpose of \textit{ne bis in idem}-principle, to free the citizens from the burden of being prosecuted twice, the Supreme Court does not find that the procedures against B is to be regarded as a breach of the principle, also based on the fact that B could not have expected that there would be only one procedure. In view of what has been stated above the Norwegian tax system can not be considered to be an infringement of the \textit{ne bis in idem}-principle.

\textsuperscript{116} No. 31982/96, the 30\textsuperscript{th} of May 2000.

\textsuperscript{117} No. 73661/01, the 13\textsuperscript{th} of December 2005, see section 4.2.1.
5 Analysis

5.1 The legal systems

Chapter 3 and 4 concludes the Norwegian and Swedish tax systems concerning tax fraud and tax surcharge are very alike. Both countries have an administrative proceeding where the accused person can be liable to pay an administrative fee, the tax surcharge, and a criminal proceeding that might result in that the accused person gets sentenced for tax fraud.

Even though the tax systems are very alike there are differences between the systems, which will be identified in the following analysis, as well as the similarities. The analysis of the tax systems is divided into three major parts, the first one concerns the tax surcharge, the second one concerns the regulations concerning tax fraud and the third part consists a short summary and conclusion.

The legislation concerning tax surcharge in both Norway and Sweden focuses on situations where incorrect or incomplete information have been submitted to the national Tax Authorities. One difference in the grounds for tax surcharge is that Sweden clearly excludes situations where the incorrect information has been submitted orally. Concerning exemptions, the legislators in both countries consider that mistakes that are based on age, sickness, inexperience or other similar circumstances should be excluded from the grounds of liability to pay tax surcharge. Mistakes that obviously are based on misspellings or miscalculations are also excluded. Due to Norwegian legislation a miscalculation or misspelling is not obvious if there is a possible explanation that might result in that the suspected error is correct information.

For a person to be sentenced for tax fraud due to Swedish legislation the person shall intentionally or by gross negligence, in another way then orally, submit incorrect information to the Swedish Tax Authorities. Due to Norwegian legislation the person shall submit incorrect information intentionally or by gross negligence to be sentenced for tax fraud. The prerequisite for gross negligence was interpreted because of the difficulties with proving the intention of a person. In both countries omitting of information and declarations is considered to be enough to be sentenced for tax fraud. Both countries also apply legislation with two different levels of tax fraud, where the assessment of the degree is based on the size of the amount of money that could be exempted from the state by the offense. One difference is that there in Swedish legislation exists a farerekvisit that makes it possible for
the courts in Sweden to sentence a person that have planed a crime, but not yet performed it in cases where there is a great risk that the crime will be performed.

To sum, the systems are very much alike, and the differences that are identified through the study and analysis of the legal systems have no impact on how the systems relate to the *ne bis in idem*-principle. This is based on the fact that the differences between the systems do not concern the proceedings but only the prerequisites for the crime and administrative fee, and the fact that it is the proceedings that are affected by the principle and not the sanctions.

### 5.2 The interpretation of the Supreme Courts

This subchapter has been divided into two parts. The first part contains an analysis of how the Swedish Supreme Courts have interpreted the principle and the second part an analysis of how the Norwegian Supreme Court has done the interpretation. The final comparison and analysis of the similarities and differences between the interpretations will be done in a separate subchapter.

The Swedish Supreme Court, the Swedish Supreme Administrative Court and the Norwegian Supreme Court have reached the same answer on how the national tax systems concerning tax surcharge and tax fraud is a breach of the *ne bis in idem*-principle. Therefore, the focus will be on the grounds, which constitutes the basis for the judgements of the Supreme Courts.

#### 5.2.1 The Swedish Supreme Courts

The Swedish Supreme Administrative Court, in a case from 2009\(^{118}\), does not consider the Swedish tax system to be a breach of the *ne bis in idem*-principle. This conclusion the Court bases on a quite brief argumentation. The main arguments that the Court base the judgement on is that the ECHR and the Swedish Supreme Court and the Swedish Supreme Administrative Court previous the Zolotukhin have accepted the Swedish tax system. The Court also stress that the Swedish system with a dual court system makes the process more effective and that the special structure of the system results in that the new interpretation in the Zolotukhin case does not affect the validity of the Swedish Tax System.

\(^{118}\) RÅ 2009 ref. 94, presented above in section 3.2.1.
The Swedish Supreme Court, in the case from 2010\textsuperscript{119}, comes to the same conclusion as the Swedish Supreme Administrative Court but bases its judgement on a more well-founded argumentation. The Supreme Court affirms that the new interpretation in the Zolotukhin case shall be applied on the issue. Then the Court affirms that both the procedures against the defendants in the case are based on the same facts, which should result in that the tax system should be considered to be a breach of the \textit{ne bis in idem}-principle. The Court continues by stating that it is possible that the different prerequisites for tax fraud and tax surcharge will result in that the offence will be considered as two separate offences, and therefore not a breach of the \textit{ne bis in idem}-principle.

The Swedish Supreme Court refers to Nilsson v Sweden\textsuperscript{120}, and stress that two proceedings concerning the same offence might be declared to be valid by the ECHR if they are close connected. Furthermore, the Court, by referring to previous case law from the ECHR, affirms that the ECHR have used different interpretations and that the area can not be considered an area without room for interpretation for the national courts. Because of the fact that the Swedish tax system is predictable and that there is an objective and temporal relation between the proceedings the Supreme Court stress that the system might be declared valid, and that it would result in the fact that a second sanction can be added to a previous one. Finally the Supreme Court stress that it first and foremost is for the legislator to interpret the supranational principles and that it requires clear support in the Convention or the case law from the ECHR or the ECJ for the Court to be able to derive from Swedish law. That kind of clear support, the Swedish Supreme Court does not consider existing because of the judicial uncertainty.

\textbf{5.2.2 The Norwegian Supreme Court}

In a case from 2010\textsuperscript{121}, the Norwegian Supreme Court comes to the conclusion that the Norwegian tax system is not a breach of the \textit{ne bis in idem}-principle in article 4 of the seventh additional protocol of the Convention. The Supreme Court affirms that it is the new interpretation of the principle in the Zolotukhin case that shall be the basis for the judgement, it is therefore of importance to investigate whether the two proceedings are based on the same or essentially the same facts. The Court argues that this is the same offense, but

\begin{itemize}
  \item \textsuperscript{119} NJA 2010 p. 168 I and II, presented above in section 3.3.1.
  \item \textsuperscript{120} No 73661/01, the 13\textsuperscript{th} of December 2005.
  \item \textsuperscript{121} RT 2010 p. 72, presented above in section 4.2.1.
\end{itemize}
that the legislation that the action was a breach of has several purposes and that the offence, therefore, can not be considered to be the same offense in the meaning of the principle. The Court continues the argumentation with explaining that the fact that the criminal act of the person in this case results in that the employees pays less tax then if their wages would have been reported correctly. The person is therefore also liable for participating in the tax frauds committed by the employees. The proceedings concerning the incorrect reports of the wages can not be considered to be a breach of the principle.

In another case from 2010\cite{122} the Norwegian Supreme Court comes to the same conclusion as in the first case but argues in differently. As in the first case the Supreme Court establishes that it is the new interpretation from the Zolotukhin case that shall be applied on the judgement. The court also takes note of the constituent elements that the ECHR sets out in the case, the requirement for a criminal proceeding, the jurisdiction of the same state and that the first judgement must be final. The Court affirms that there in this case is no doubt concerning whether the proceedings are based on the same or essentially the same facts, both proceedings are based on the fact that the accused person hid income from the state.

Through studies of earlier Norwegian case law the Supreme Court determines that the tax surcharge is considered to be criminal in the meaning of the principle. The Court investigates when the first judgement should be considered to be final, and reach the decision that it is final when the period of appeal ends, in this case after three weeks. The Court continues the argumentation with an investigation concerning if the proceedings are to be considered as duplicate or parallel and comes to the conclusion that the proceedings are parallel and therefore not a breach of that prerequisite of the *ne bis in idem*-principle.

Finally the Norwegian Supreme Court affirms that the purpose of the principle is to free the citizens from the burden of being prosecuted twice and that the proceedings in this case is closely connected and that the accused person in this case could not have expected that there would be only one procedure. This argumentation results in that the Norwegian Supreme Court comes to the conclusion that the Norwegian tax system is not an infringement of the *ne bis in idem*-principle.

\cite{122} RT 2010 p. 1121, presented above in section 4.2.2.
5.3 Analysis of the argumentation of the Supreme Courts

As stated above, the national Supreme Courts in all cases come to the same conclusion but the argumentations in all four cases are different. One similarity is that in both countries the argumentations in the first cases are brief and the courts do not go very deep into the subject. The Swedish Supreme Court and the Norwegian Supreme Court, in the second case, do a more reliable and deeper investigation of the principle and the compatibleness of the national tax systems in relation to the principle.

In all four cases the Supreme Courts confirm that it is the interpretation in the Zolotukhin case that is do be applied on the issue and that the proceedings in each case have been based on the same or essentially the same facts. The Norwegian Supreme Court, the Swedish Supreme Court and the Swedish Supreme Administrative Court all consider that the national tax and court systems have a special character because of the dual court systems. The courts also stress that the systems are predictable for the citizens. Therefore, the courts consider that the tax systems can not be considered to be an infringement of the principle because of the special character and the predictability. The Supreme Courts also affirm that the two proceedings are close connected and that they should be considered as complementary. Further, the argumentations in the cases start to differ.

The Swedish Supreme Court and the Swedish Supreme Administrative Court adds weight to previous case law from the ECHR where the Swedish tax system has been declared valid. The courts also adds relevance to the different prerequisites for the tax surcharge and tax fraud, and stress that the different prerequisites might result in that the tax system is declared valid by the ECHR. Even though the interpretation in the Zolotukhin case is considered to be a harmonization of previous case law, the Swedish Supreme Court refers to previous case law from the ECHR and states that the area has room for interpretation for the national courts. The Norwegian Supreme Court on the other hand builds its argumentation on the fact that the broken national laws have several purposes and focuses of the prerequisites of the new interpretation and the purpose of the principle. The Court also investigates whether the proceedings in the tax system are to be considered to be dual or parallel.

It should be noticed that the Justices of the Norwegian Supreme Court where united in the judgements and the Justices of the Swedish Supreme Court all had divergent opinions or amendments to the judgement. Furthermore, the debate in Sweden that was caused by the
judgement from the Swedish Supreme Court indicates that the issue is not solved yet, similar debate has not occurred in Norway. This might have the base in the fact that the judgements from Norwegian Supreme Court, especially the second one, can be perceived as a more clear and complete investigation of the prerequisites in the new harmonized interpretation of the principle that was founded in the Zolotukhin case instead of focusing on previous case law and the prerequisites for the national legislation like the Swedish Supreme Courts.
6 Conclusion

The purpose of this thesis is to analyze how Sweden and Norway have interpreted the *ne bis in idem* principle, and if the interpretations differ from each other, concerning tax surcharge and tax fraud after the harmonization of the principle in the Zolotukhin case.

The Norwegian Supreme Court, the Swedish Supreme Administrative Court and the Swedish Supreme Court come to the same conclusion concerning the question whether the tax systems are infringements of the principle. The unanimous answer to the question is that the national tax systems is not an infringement of the *ne bis in idem*-principle in article 4 of the seventh additional protocol of the Convention.

The differences concerning the interpretations of the principle in Sweden and Norway are found in the case law from the Supreme courts. The courts have different ways of motivating the interpretations of the principle, the Norwegian Supreme Court focuses on the purpose and prerequisites of the principle while the Swedish Supreme Court and the Swedish Supreme Administrative Court focuses on the judicial uncertainty related to the previous case law from the ECHR, the prerequisites of the national law and the lack of clear support to deviate from the Swedish legislation.
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