

Soft Law in the Swedish Accounting Law System – Effects on other Areas

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1 Introduction

1.1 *The Swedish Accounting Law System – an Introduction*

In this section I will briefly introduce to the Swedish accounting law system. The description of the system is then developed below in the paper, especially regarding the use of Soft Law.¹ To start with, accounting is regulated in law, e.g. the Annual Accounts Act (1995:1554, hereinafter AAA)² and the Bookkeeping Act (1999:1078, hereinafter BA)³, and the law is of course the starting point when analyzing accounting issues. However, the legislation in the field of accounting consists of framework laws that are depending on a legal standard, “sound business practice” or Swedish Generally Accepted Accounting Practice (hereinafter referred to as SE GAAP)⁴, to fill the frames with content. The normative content is received by obtaining what is normally described as “non legal material”. This “non legal material” is probably the most important source in the accounting law system. Actually, it is this “non legal material”, that is the central part of this paper.

The term “non legal material” is in my opinion not entirely adequate, at least not in the accounting law system. There are at least two reasons for that. First, the material is according to my opinion legal to some extent by the reference in chapt. 2 sec. 2 AAA and chapt. 4 sec. 2 BA to SE GAAP. Secondly, the legislator has recognized the “non legal material” in e.g. chapt. 8 sec. 1 AAA, where it is stated that the Swedish Accounting Standards Board⁵ (hereinafter referred to as SASB) and the Swedish Financial Supervisory Authority⁶ (hereinafter referred to as SFSA) are given the mandate to develop SE GAAP, and in the preparatory works.⁷ In short, the mandate is fulfilled by issuing what could be defined as formally non-binding standards and/or recommendations. Other authoritative subjects within the accounting law area are the Swedish Financial Reports Council⁸ and the professional institute for authorized public accountants, approved public accountants and other highly qualified professionals in the accountancy sector in Sweden, FAR. These two subjects also issues standards and recommendations within the field of accounting. It should be mentioned that the two last mentioned are private law subjects acting without mandate in law. It is however not questioned that their standards and recommendations are granted a similar position as the ones

1 For a more in-depth review, see Bjuvberg, Jan, *Redovisningens betydelse för beskattningen*, Mercurius förlag 2006 p. 43-115 (academic dissertation, hereinafter quoted Bjuvberg).

2 *Årsredovisningslagen*.

3 *Bokföringslagen*.

4 *God redovisningssed*.

5 *Bokföringsnämnden* “www.bfn.se”.

6 *Finansinspektionen* “www.fi.se”.

7 See e.g. prop. 1998/99:130 p. 185.

8 *Rådet för finansiell rapportering*.

issued by SASB and SFSA.⁹ Hereinafter, the “non legal material” will be referred to as standards and recommendations.

1.2 Purpose, Method and Limitations

The scope of this paper is to describe, analyze and criticise how soft law affects the Swedish accounting law system. In order to fulfil the abovementioned scope I will use a traditional legal or jurisprudential method. This means that I will use the traditional sources of law, i.e. the law itself, rulings from the Supreme Court and the Administrative Supreme Court, preparatory works and legal doctrine when determining the meaning of the law. In section 1.1 above, it is stated that standards and recommendations are of major importance when interpreting and applying accounting law. These sources are normally not considered as traditional sources of law. The main question in this paper is to discuss the legal status of the standards and recommendations within the accounting law system.

I have limited the paper to a discussion about Soft Law and AAA. The reason for this is mainly related to time constrains. This means that I will not treat the Annual Accounts Act for Finance and Securities Companies (1995:1559, AAFA)¹⁰ and the Annual Accounts Act for Insurance Companies (1995:1560, AAIA).¹¹ There is however one exception, and that is the fact that the SFSA has been approved a right to enact formally binding regulations on the field of accounting, see e.g. chapt. 1 sec. 5 in AAFA, chapt. 1 sec. 4 in the AAIA and chapt. 23 sec. 15 p. 3 in the Securities Market Act (2007:528, SMA).¹² Neither is the BA treated. However, the discussion in the paper is relevant also for the relation between standards and recommendations and AAFA, AAIA and BA.

Another limitation is that I do not discuss consolidated accounting. There are two reasons for that. First, a consolidated group of companies do not form a legal subject according to Swedish law. Secondly, hard law governs the preparing of consolidated accounts for listed companies within the European Union (EU), namely regulations from the EU.¹³ The background for this is that the EU has delegated the standard setting on this area to a private organisation, subject of almost no form of institutional control by the EU, International Accounting Standards Board (IASB). The EU has adopted almost all of the Standards enacted by IASB as regulations. The consequence of that is therefore

9 See e.g. Thorell, Per, i *utlåtande till BFN (SASB) av den 5 juli 2006* “www.bfn.se/skrivelser/ovrigt/perthorell.pdf”, visited 11 March 2013.

10 *Lag om årsredovisning i kreditinstitut och värdepappersbolag.*

11 *Lag om årsredovisning i försäkringsföretag.*

12 *Lag (2007:528) om värdepappersmarknaden*, see also Securities Market Regulation (2007:572, *förordning om värdepappersmarknaden*) chapt. 6 sec. 1 p. 63.

13 Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards. Regarding the regulation, see Bjuvberg in *Skattenytt* (Swedish tax law journal) p. 26 ff.

that all listed companies in the member states have to apply these Standards when preparing their consolidated accounts. This delegation is an example of the hardening of soft law, a subject discussed in the field of international law.¹⁴ The issue is of course interesting, but not within the scope of this paper.¹⁵

1.3 *The Concept of Soft Law*

The concept of soft law originates from international law. There is no consensus over a definition of the concept.¹⁶ One factor that all soft law has in common is that it is not binding in the same way as hard law¹⁷ in a traditional legal dogmatic perspective. This implies that a breach of soft law is not a breach of a legal obligation.¹⁸ Besides that, there are a number of common denominators highlighted by several authors. One of these is that soft law often is shaped in the same way as hard law, regarding both design and creation.¹⁹ Soft law in the accounting system is an example of that. When International Accounting Standards Board (IASB) issues standards it is normally preceded by a proposal that is remitted to interested parties, e.g. stakeholders, other standard setting bodies and governments. Before launching the final standard, IASB considers the criticism from these parties. The provisions in the standards are normative in the same way as a law provision. SASB uses a similar approach when issuing standards. Another common denominator is that soft law often is *considered to bind* or at least in general is followed by its addressees, even though the fact that soft law is not formally binding, see above.²⁰

Regarding the Swedish accounting system, in my opinion there is a strong presumption that soft law, i.e. accounting standards and recommendations from authoritative issuers largely expresses SE GAAP and that the addressees follow

14 See e.g. Karmel, Roberta S and Claire R Kelly, *The hardening of Soft Law in Securities Regulation* in 34 Brook Journal of International Law 2008/2009 p 883-951 and Schelkle, Waltraud, *EU fiscal governance: hard law in the shadow of soft law* in Columbia Journal of European Law p. 705-731, especially p. 712 where an example of the opposite way, the softening of hard law, is discussed.

15 The fact that EU has delegated the standard setting in the field of consolidated accounts has been discussed by Chiapello, Eve and Medjad, Karim in *Critical Perspectives on Accounting* 2009 p. 448-468.

16 See e.g. Gold, Joseph, *Strengthening the soft international law on exchange arrangements*, 77 American Journal of International Law 1983 p. 443.

17 The term Hard Law is a reference to formally binding provision, from a Swedish perspective provisions enacted in accordance with chapt. 8 in the Swedish Constitution.

18 See e.g. van der Sluijs, Jessika in *Soft law-regleringen av försäkringsrätten*, *Juridisk Tidskrift* 2010/11 p. 297 (peer reviewed article, hereinafter quoted van der Sluijs) and Gold, Joseph in *Strengthening the soft international law of exchange arrangements*, 77 American Journal of international Law p. 443 (Gold).

19 van der Sluijs p. 298.

20 See eg. Gold p. 443.

them largely.²¹ This is supported by the fact that the supreme administrative court regularly follows opinions from SASB, an authoritative issuer of accounting standards, in business tax cases regarding allocation of income and expenditures to a particular tax year.²²

As mentioned above, the concept of soft law originates from international law. The concept also exists within national law, e.g. within the area of corporate law and insurance law.²³ In the area of accounting law, the abovementioned standards and recommendations sometimes are referred to as Soft Law. One important question is whether if the definition of Soft Law in international law can be directly translated into national law, in this case accounting law. Regarding insurance law, van der Sluijs view is that the characteristics, advantages and problems that are highlighted in the international law doctrine regarding soft law also can be applied in a national context.²⁴

When it comes to accounting law it is clear that formally non-binding standards and recommendations are of major importance when determining the content of SE GAAP, see above in section 1.1. In the literature it has been argued that there is a presumption that recommendations and standards from authoritative subjects reflect SE GAAP.²⁵ This is supported by the provision in chapt. 2 sec. 3 para. 2 AAA where it is stated that a company that deviates from a recommendation or standard has to disclose that in its financial report. An additional argument for this standpoint is the fact that courts and other addressees normally apply and follow standards and recommendations from e.g. SASB, see above. It is also clear that the standards and recommendations are construed in a way similar to law, regarding the creation, its content and structure.

As mentioned above, there is no consensus over a definition of soft law, but factors that soft law normally have in common are identified. The characteristics of the standards and recommendations in the Swedish accounting law system discussed in this paper indicate in my opinion that the concept of soft law in the international law environment also fits in the Swedish national accounting law system, i.e. the concept and characteristics of soft law in international law can be applied also in the field of national accounting law.

21 See Bjuvberg p. 131-132. Thorell has expressed that there is a weak presumption, see Thorell, Per, ÅRL, *Årsredovisningslagen Lagkommentar, Iustus*, 1996 p. 66 (textbook). Rundfelt has, however, argued that soft law on the area of accounting area is weak in Rundfelt, Rolf, *Tendenser i börsbolagens årsredovisningsar* 1996, Stockholms fondbörs skriftserie nr 16, p. 26, hereinafter quoted Rundfelt.

22 See e.g. RÅ 1999 ref. 32, RÅ 2002 ref. 84, RÅ 2006 ref. 63 and RÅ 2007 ref. 19 I and II (case law from the Supreme Administrative Court). See also Knutsson, Margit, Norberg, Claes och Thorell, Per, *Skattefrågor i redovisningspraxis*, 3rd edition, Iustus förlag 2012.

23 See Stattin, Daniel I *Nordisk tidskrift for selskabsret* 2006 p. 107-118. and van der Sluijs.

24 van der Sluijs p. 305.

25 See note 21 above.

The above-described model for defining soft law starts from the effects of the application of soft law, e.g. to what extent is soft law binding for and followed by the addressees. From another standpoint, the legalization perspective, it can be argued that there are three main characteristics of legalization. Abbot *et al* points out obligation, precision and delegation as these three main characteristics.²⁶ In the model, the starting point is the rules and their characteristics, not the effects of them.²⁷

By obligation Abbot *et al* mean “that states or other actors are bound by a rule or commitment or by a set of rules or commitments”, by precision they mean “that rules unambiguously define the conduct they require, authorize or proscribe” and by delegation they mean “that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules”.

Furthermore, they point out that each of the characteristics “is a matter of degree and gradation, not a rigid dichotomy, and each can vary independently”.²⁸ Both hard and soft law fits in their description. Soft law can give rise to a binding effect (obligation), even if it is not binding in the same formal way as hard law, see above. Soft law is often designed in the same way as hard law, i.e. in a normative way. Therefore it has to point out or define the behaviour it will prescribe, prohibit or allow. As a reason of this, soft law is often more precise and detailed in its wording (precision) than hard law, at least in the field of accounting.²⁹ Regarding the last characteristic, delegation, it is stated in chapt. 8 sec. 1 BA that the SASB and SFSA is responsible for the development of SE GAAP and SFSA. The provision does not express a possibility for SASB or SFSA to enact mandatory provisions in the sense dealt with in chapt. 8 in the Swedish constitution but rather authorizes SASB and SFSA to enact formally non-binding standards in the area of accounting.³⁰ When Abbot *et al* discuss delegation, they precise the meaning of it as “the extent to which states and other actors delegate authority to designated third parties – including courts, arbitrators, and administrative organizations – to implement agreements”³¹ and exemplifies delegation of rule-making and implementation with the possibility for e.g. the International Labour Organization “to promulgate a variety of nonbinding rules, some for use by private actors”.³² In summary, this implies that the provision in chapt. 8 sec. 1

26 Abbot, Kenneth W, Keohane, Robert O, Moravcsic, Andrew, Slaughter, Anne-Marie and Sindal, Duncan, *The Concept of Legalization in International Organization* 2000 p. 401 (hereinafter Abbot *et al*).

27 Abbot *et al* p. 402

28 Abbot *et al* p. 401.

29 In the accounting law area framework laws are used to a large extent. The provisions in these framework laws are normally supplemented by soft law, *see* section 1.1 above.

30 A possibility to enact formally binding regulations has been delegated to SFSC, *see* section 1.2 above and section 3.1.2 below.

31 Abbot *et al* p. 415.

32 Abbot *et al* p. 417.

BKA means that authority is delegated to SASB and SFSA as described by Abbot *et al.* In my opinion this approach is therefore also possible to translate from international law to national accounting law.

2 Regulatory Powers

2.1 Introduction to the Division of Regulatory Powers

The concept of regulatory powers includes the right according to chapt. 8 in the Swedish Constitution to issue binding provisions.³³ The starting point for the dividing of regulatory power is that the Parliament issues and enacts law, decides about tax to the state and decides how the means of the state shall be used, see chapt. 1 section 4 in the Swedish Constitution.³⁴

According to chapt. 8 sec. 1 in the Constitution a provision should be enacted by the Parliament through law or by the Government through regulations. In addition to that, public bodies under the parliament or Government, if they are empowered to do so by the parliament or government also may enact regulations. Such authority has to be enacted in law or regulation. From this it follows that binding provision as a main principle is enacted by the Parliament as law or the Government as regulation and that this right can be delegated to public bodies under the parliament or government.

The possibility to delegate regulatory powers is however limited. According to chapt. 8 sec. 2 para. 1 in the Constitution a provision *shall* be enacted as law if it concerns, among other things, the legal position of private subjects and their personal and economic relations between them. Furthermore, there is no possibility to delegate regulatory powers when it comes to the relationship between private subjects and the state, given that the provisions regards duties for private subjects or interferences in private subjects private or economic affairs, see chapt. 8 sec. 2 para. 2 in the Constitution.

This is to some extent modified by chapt. 8 sec. 3 in the Constitution, where it is stated that the parliament may delegate the right to enact regulations according to chapt. 8 sec. 2 para. 2-3 to the Government. This possibility is however also limited. The regulation must not regard 1. other effects of committed crime than fines, 2. taxes, except for toll, import of goods or 3. Bankruptcy or enforcement. The fact that the provision only refers to para. 2-3 in chapt 8 sec. 2 in the Swedish constitution also makes it clear that it is not possible to delegate regulatory powers in the private law area.

The consequence of this is that it is not possible to delegate regulatory powers in the area of private law. However, as indicated above the

33 Besides the provisions in chapt. 8 of the Constitution, it exists provisions on regulatory power in other parts of the constitution in the fundamental law on freedom of expression and also in the freedom of the press act, *see prop. 2009/10:80 p. 216*. The provisions in chapt. 8 of the Constitution does only treat regulations enacted by Swedish subjects. Therefore, norms enacted within the EC are not covered by chapt. 8 of the Constitution, *see ibid.*

34 *Regeringsformen.*

Government has its own regulatory powers, see chapt. 8 sec. 7 in the Constitution. According to it, the government may issue binding provisions (regulations) under certain conditions. For the purpose of this paper, the government's possibility to issue regulations on execution of law³⁵ is the interesting part. Within the scope of the regulatory powers of the Government, delegation from the Parliament is not needed and the provision gives the government a right but not a duty to issue or delegate the right to enact regulations to public authorities on execution of law.³⁶ A regulation on execution of law is normally an administrative regulation or a regulation that fills out a provision in law with material content.³⁷ The possibility to issue regulations of execution was discussed in the preparatory works. Several interesting statements were made. Maybe the most important statement was that a regulation on execution of law could fill out a law provision even if it was enacted within the Parliament's obligatory law-area, which is the area where only the parliament is allowed to enact provisions, e.g. regarding private law.³⁸ From that statement it is clear that the idea with regulations on execution of laws is intended to be able to contribute materially to a law-provision. The aim with regulations of execution of laws is therefore that they may add something new to an existing law provision. If this possibility would not exist, the use of regulations of execution of laws should be limited only to describe the content of the law provision.

Another interesting statement in the preparatory works regards the demands on the underlying law provision, which is the law provision that the regulation of execution of laws aims at. It was stated that such a provision have to be detailed to an extent that makes it possible to safeguard that nothing substantially new is added to the provision.³⁹ The statement is related to the fact that only the government may enact provisions within e.g. the private law area. To uphold that demand the regulation of execution of laws have to be in line with the aim of the underlying law provision. Regarding this, Strömberg has stated that a framework law can be combined with a delegation to the government, combined with an injunction to a public body to enact more precise provisions on how the law should be applied within the area where delegation is possible but not elsewhere.⁴⁰ Hultqvist has summarized the possibilities to use regulations on execution of laws with the following statement: "norms in regulations on execution of laws should be able to use to contribute to the content of law but nothing significantly new may be added

35 *Verkställighetsföreskrift*.

36 Hultqvist p. 139 f.

37 Prop. 1973:90 p. 211 and Hultqvist p. 129 and 137.

38 Prop. 1973:90 p. 211. In the preparatory works it was stated that a regulation of execution of law can be of solely administrative character, *see ibid*. That kind of regulation of execution of law will not be treated in the paper.

39 Prop. 1973:90 p. 211.

40 Strömberg, *Normgivningsmakten enligt 1974 års regeringsform*, Juristförlaget i Lund, 1999 p. 130 (Strömberg, textbook on constitutional law).

[my translation]”.⁴¹ I agree with Strömberg and Hultqvist. A conclusion on this is that the possibility to add something new by the use of a regulation on execution of law must be considered severely more limited in comparison with a delegation of regulatory powers.

To summarise, in the Swedish system regarding the dividing of regulatory powers according to chapt. 8 of the Swedish constitution, it is clear that the main principle is that regulatory powers belong to the Parliament. In some areas, like private law and tax law the Parliament has an exclusive right to regulate. In other areas of law, the Parliament may delegate regulatory powers to the Government or to a public authority. An example of that is that the Parliament can delegate regulatory powers in the field of business since that it is within the field of public law, see below in section 2.2.⁴² Within the framework of such a delegation, the addressee may enact binding regulations. Besides this, the Government have its own regulating power. For this paper, the possibility to issue regulations on execution of laws is the interesting part of the Government’s own regulatory power. Such provisions may add content to an underlying law provision. However, the possibilities to do that is limited.

2.2 *Regulatory Powers in the Field of Accounting Law*

In this section I will treat the demands according to chapt. 8 in the Swedish constitution applied on norms in the field of accounting. As stated above in section 2.1 the parliament has an exclusive right, not possible to delegate, to enact binding regulations within the private law area. In the area of business, however, there is a possibility for the parliament to delegate regulatory powers to the Government or to a public authority,⁴³ since it is considered to belong to the public law area.⁴⁴ The most important question is therefore how accounting law is classified, as private law or public law. The crucial point regarding that classification is primarily the meaning of “private subject”⁴⁵ and “the state”⁴⁶

41 Hultqvist p. 166 f.

42 *Näringsverksamhet*.

43 Before 2011, this was specifically regulated in chapt. 8 sec. 7 in the Swedish constitution. This was criticized in the preparatory works to the amended Constitution, since the old provision pointed out the areas where it was possible to delegate regulatory powers. As a consequence of this, it was stated that the provision were interpreted extensively. Regardless of that, it has been argued that the possibilities to delegate has been too narrow, see prop. 2009/10:80 p. 221-223. Chapt. 8 sec. 3 in the Swedish constitution which corresponds to the old chapt. 8 sec. 7, points out the areas where it is not possible to delegate regulatory powers instead of the opposite. It is therefore my opinion that the area where it is possible to delegate at least has not been decreased. See also Holmberg, Erik, Stjernquist, Nils, Isberg, Magnus, Eliasson, Marianne, Regner, Göran, *Grundlagarna*, Norstedts Juridik, the commentary on chapt. 8 sec. 3 in the Constitution (hereinafter referred to as “the commentary”).

44 Prop. 1973:90 p. 311 and Norberg, Claes, *Reglering och beskattning av banker*, Iustus 1991, p. 124-125 (doctoral dissertation, hereinafter quoted “Norberg”).

45 “enskilda”.

46 “det allmänna”.

and “private subjects personal situation and regarding their personal and economic circumstances” in chapt. 8 sec. 2 para. 1 and 2 in the Constitution.

The term private subject refers both to natural and legal persons.⁴⁷ A public authority may also be classified as a private subject, if it e.g. enters into agreements with private law character, similar to those that a private subject enters into. In such a case it ought to be seen and treated as a private subject in the meaning of chapt. 8 sec. 2 in the Constitution.⁴⁸ However, normally, it is natural and legal persons other than public authorities that are pointed out as private subjects. The fact that the state owns shares, e.g. in a limited liability company does not affect the classification of the limited liability company as a private subject in the meaning of chapt. 8 sec. 2 in the constitution.

The provisions in chapt. 8 sec. 2 and 3 are built upon a diversion between regulations regarding private subjects’ personal situation and mutual interrelation and regulations aiming at the interrelation between private subjects and the state. Regulations concerning private subjects’ personal situation are e.g. those that regulate their legal capacity and those that regulate formation and dissolution of legal entities. Provisions that regulate the relation between private subjects are rules that can be quoted in disputes between them.⁴⁹ A provision that directly aims on e.g. the relation between a company and its customers is attributable to that category.

In the preparatory works, it is stated that the meaning of the provisions in chapt. 8 in the constitution is that delegation of legislative powers only is possible within the public law area and that provisions regulating business ought to be part of the public law area.⁵⁰ Regarding what is considered to be public law provisions regulating business it was only stated that sales law⁵¹ cannot be considered to belong to the public law area.⁵² It is not possible to draw any far-reaching conclusions from that statement. However, according to Strömberg, a provision that can be invoked by a private subject against another private subject is within the private law area and a provision that only may be invoked against or by the public sector is within the public law sector.⁵³ This is relevant for the part of private law that regulates private subjects’ interrelations. Regarding private subjects personal position, it was, among other things, expressly mentioned in the earlier wording of chapt. 8 sec. 2 para. 3 that provisions regarding companies should be enacted by the government in the form of law. In connection to this, it was mentioned in the earlier version of chapt. 8 sec. 7 para. 7, among other things, that it was possible to delegate legislative powers regarding business, and accounting could be seen as a part of that area of law. The fact that the reference to

47 See e.g. SOU 1996:157 p. 137.

48 See Strömberg p. 69 och 174.

49 Strömberg p. 71.

50 Prop. 1973:90 p. 311. See also Norberg p. 124-125.

51 ”Köprätt”.

52 Prop. 1973:90 p. 311.

53 Strömberg p. 71 and 174.

“business” in the pre amendment version of chapt. 8 in the Constitution was discarded in the amended version does not necessary lead to the conclusion that the possibility to delegate normative powers within the area of business is abolished. The reason for that is that in the amended version of chapt. 8, the legislator uses a method that lists the areas of law in which it is not allowed to delegate normative powers, while the opposite method was used in the earlier version. In the preparatory works it was stated that the change of method may lead to an *increased* possibility to delegate legislative powers.⁵⁴ On this basis, it is natural to conclude that the possibility to delegate normative powers within the field of business law still exists. It is however not possible to draw the conclusion that accounting law is a part of the business law area in the meaning the term had in the pre amendment version of chapt. 8 in the constitution.

Regarding the question whether if accounting legislation should be classified as public law (business law) or private law, Norberg has expressed that it is associated with difficulties. The reason for that, Norberg states, is the difficulty to determine if a certain provision in the accounting legislation can be invoked by a private entity in a legal dispute with another such entity.⁵⁵

One way to classify legislation is to analyze the underlying purpose with it. In short, the primary aims of accounting law used to be creditor protection, overview and control possibilities for the owner of the company, information to the capital markets, information to employees and the need of a satisfactory basis for the calculation of taxable income.⁵⁶ Another purpose is that the accounting law and the accounting material, e.g. bookkeeping materials and financial reports, function as control tools for the tax authorities. From this description it is clear that the purposes do not give a clear indication to the current classification issue. The reason for that is that the purposes and aims are a mix between what could be defined as both public and private law orientated purposes. Norberg summarises that the mixed aims of the accounting law means that accounting law cannot be classified as private or public law as a whole and that the central part of accounting law *may* be classified as private law and that this ought to affect the classification of the accounting law in general.⁵⁷ I agree with Norberg that it is hard to classify accounting law in relation to chapt. 8 in the Constitution. There is no direct guidance in the preparatory works related to the constitution regarding the question. In fact, the issue of accounting law is not mentioned at all. A qualified guess is that the government did not think about accounting law as an issue in the legislative process at all. Since the question about classification is weather a provision may be invoked by a private subject against another private subject, a formal approach, it is my opinion that most parts of the accounting legislation should be classified as private law, without possibilities

54 Prop. 2009/10:80 p. 271.

55 Norberg p. 139.

56 Norberg p. 133. *See also* prop. 1995/96:10 p. 174 and following pages.

57 Norberg p. 140.

to delegate legislative powers from the parliament.⁵⁸ As pointed out by Norberg, however, the accounting legislation is different from the model pointed out in the Constitution. Foremost, the fact that accounting legislation is a framework law and dependent on a legal standard and non-binding standards, makes it difficult to fit it into that model.

My conclusion is therefore that it is to some extent unclear whether if the accounting law entirely should be classified as private or public law. Most of the provisions in AAA, especially those regarding valuation in chapt. 4 and consolidation in chapt. 7 should, according to my opinion, be considered as private law. Regarding BA however, some provisions has several characteristics which indicate that they could be classified as public law, e.g. the provisions regarding archiving in chapt. 7 and the provisions in chapt. 3 regarding the definition of “financial year”. The conclusion from the abovementioned is – according to my opinion – that it has to be determined in a case-by-case way whether if a certain provision in the accounting legislation should be classified as private or public law.

As mentioned above, the content of SE GAAP, the legal standard in BA and AAA, is mainly derived from accounting standards and recommendations – Soft Law – from authoritative bodies even though the starting point for it is the wording of the law.⁵⁹ The accounting standards are not formally binding for the addressees, but are normally followed by them. This could be questioned from a constitutional perspective. Another constitutionally doubtful issue is the fact that the accounting standards are issued not only by public entities but also by private subjects, both national and international. Yet another issue that may give rise to constitutional questions is the fact that there are several different sets of rules for different categories of companies. This could be in conflict with the principle of equality. These questions are all interesting from a constitutional perspective. However, the space in a paper like this is limited, and I have therefore decided to analyze two, according to me, even more interesting constitutional questions that arises from the above mentioned, namely 1) whether the strong legal status granted to standards and recommendations in the area of accounting law circumvents the prohibition to delegate regulative powers within the private law-sector and 2) whether it is consistent with the Constitution to delegate regulatory powers to SFSA in the area of accounting law.

3 Soft Law in the Accounting Law System – Possibilities and Conclusions

The system with framework laws combined with a legal standard complemented with soft law in the form of standards and recommendations has been a reality in Swedish accounting law over several decades. SASB was founded in 1976 and started to publish accounting standards and

58 Norberg p. 140.

59 Prop. 1998/99:130 p. 185.

recommendation. Before that several other private bodies published accounting standards and recommendations. At that time the aim with the standards was to codify accounting practice. Later on the focus on accounting practice turned towards a more law-like product, i.e. new methods for accounting was first published by e.g. SASB and thereafter it became accounting practice.⁶⁰ In principle, the system has been accepted by the stakeholders in the field of accounting from the start. This does not, however, mean that the system is in line with the Swedish Constitution.

From a constitutional perspective, there are several open questions when it comes to soft law in the accounting system, see above. Out of them I have chosen to treat the two mentioned above in section 56.

3.1 *Circumventing the Prohibition to Delegate Regulatory Powers*

As mentioned above, the Swedish accounting law system is built upon framework laws, complemented by standards and recommendations, i.e. soft law, without formal binding character.⁶¹ Despite the non-binding character, the standards and recommendations do have a strong legal status. The distinguishing between binding and non-binding standards is a legal construction. In a general linguistic meaning, it is not necessary that a standard has been adopted in accordance with Chapter 8 in the Constitution to be perceived as binding. Another issue related to this is that a body that issues e.g. standards and recommendations expect them to be followed by the addressees. Such an expectation is not the same as that the norm in question is formally binding. Another observation that has relevance to this is that there is a reason to believe that the starting point for the standard-setting bodies, such as SASB or SFSA, is to relate to higher ranked norms, i.e. provisions in AAA, in a correct manner.

When it comes to the field of accounting, the standards and recommendations, not formally binding, to a large extent are considered as binding by the addressees. Norberg has stated that a change or clarification of the content of SE GAAP is given a similar effect as a change of law.⁶² Added to this, standards and recommendations, together with statements from SASB, are given a strong legal status by the courts in their judicial capacity.⁶³ Thorell has stated that the courts cannot deviate from an opinion from SASB in a tax law case regarding the content of SE GAAP, given that it expresses SE GAAP.⁶⁴ Thorell has also stated that SASB is allowed to increase or restrict the application of non-mandatory law provisions in its standards and

⁶⁰ Ibid.

⁶¹ One exception from the formal non binding character is treated below.

⁶² Norberg in *Skattenytt* 1999 p. 696.

⁶³ Bjuvberg p. 121-133.

⁶⁴ Thorell i *Skattenytt* 1999 p. 585.

recommendations.⁶⁵ This should be viewed in light of that the legislator, at no time has expressed that the use of non-binding provision in the accounting system has aimed at providing the companies a possibility to choose between different accounting methods. Rather, the aim has been to state that the designated method is allowed, but that it is e.g. SASB that is responsible for the substance of the rule.⁶⁶ Together with the fact that SASB and SFSA is appointed as responsible for the development of SE GAAP, see chapt. 8 sec. 1 BA, this leads to the conclusion that standards and recommendations from authoritative bodies do have a strong legal status on the field of accounting.

This gives rise to the question that is implied in the title of this section, namely if the strong position of standards and recommendations in the accounting law system circumvents the prohibition to delegate regulatory power within the private law area. The question has not been raised in the preparatory works. From what has been discussed above, it is clear that SASB and other governmental and private entities are recognized as standard setters in the accounting system.⁶⁷ Their standards and recommendations are entitled a strong status within the accounting law system. Hultqvist has stated that today's system is close to circumventing the constitution regarding the possibility to delegate legislative powers.⁶⁸ He also states that standards and recommendations are not binding and therefore possible to deviate from, even if that might not have been the view of the legislator and SASB.⁶⁹ From that he draws the conclusion that the system with framework laws, a legal standard complemented by standards and recommendations is in line with the constitution. In this context, it is interesting to note that in chapt. 2 sec. 3 para 2 AAA it is stated that if a company deviates from standards or recommendations they have to disclose it and the reasons for the deviation in a note in the financial report (e.g. the annual account). The provision should be seen in the light of the structure of the standards and recommendations that currently are applicable in the Swedish accounting system. One common denominator is that in principle all standards and recommendations state that they should be applied in its entirety, see e.g. BFNAR 2012:1⁷⁰ chapt. 1 sec. 4.⁷¹ The newly mentioned provision in the AAA makes it possible to deviate

65 "www.bfn.se/skrivelser/ovrigt/perthorell.pdf" p. 7 and following [downloaded march 11, 2013].

66 See e.g. prop. 1995/96:10 part 2 p. 52, where it regarding intangibles is stated that it should be forwarded to accounting practice, i.e. SE GAAP, to, based on the legislation, specify the details of how to account for different types of intangibles.

67 See also Hultqvist, Anders in *Svensk Skattetidning* 2009 p. 261. It should be stated that the starting point for Hultqvist is whether if the connection between tax and accounting is in line with the constitution.

68 Hultqvist, Anders in *Svensk Skattetidning* 2009 p. 265. See also Pålsson in *SOU* 2008:80 p. 631 and 635.

69 Hultqvist, Anders in *Svensk Skattetidning* 2009 p. 265.

70 The main set of standards for limited liability companies.

71 The Swedish system is built upon four different formally non-binding comprehensive set of standards.

from a standard or recommendation, despite the existence of a requirement in them that they shall be applied in its entirety. This assumes, however, that it is consistent with the principle of true and fair view and SE GAAP. A problem related to this is that – as mentioned above in section 1.3 – there is at least a presumption saying that standards and recommendations expresses SE GAAP. A consequence of that presumption is that a company that wants to deviate from e.g. BFNAR 2012:1 may encounter problems to prove that the deviation is consistent with SE GAAP in e.g. a dispute with the Tax Authorities. In my opinion the extent of this problem depends on the nature of the relevant standard or recommendation, if it is a rule based or a principle based one. The problem arises normally not if the standard or recommendation is principle based, since this means that it is more vague and open compared with a rule based, that is more detailed. A more vague principle based standard or recommendation leaves more options and it is more probable that the need to use different methods is covered by it. Therefore, it is my opinion that governmental bodies and courts have to take that into account when addressing a company that deviates from a rule based standard or recommendation. However, I agree with Hultqvist, the system is in line with the Constitution, but the provisions in chapt. 8 could be clearer on this point.

3.2 *SFSB:s Right to Issue Binding Provisions on the Field of Accounting Law*

As mentioned above in Section 1.2 has SFSB been granted regulatory power in the accounting field by delegation from the Parliament in its role as legislator in e.g. AAFA. To start with, SFSB is the only body, governmental or private, that has a right to issue binding provisions in the area of accounting. The background and reason for this is not mentioned in modern preparatory works. In both prop. 1995/96:10 (part 1, p. 192-194) and prop. 1986/87:12 p. (section 3.7) it is only stated that such a right already existed in earlier legislation. Probably the main reason for granting SFSB a right to issue binding provisions is the fact that the business that companies on the financial conduct to a large extent of dealing with external persons fortune, i.e. the main reason is that there is a special protective interest in their activities, and that norms regulating accounting in the financial sector was considered to be of public law-character.

To start with, in paragraph 6 of the transitional provisions⁷² of the Constitution in its wording from 1974 it is stated that older statutes or regulations remain valid notwithstanding that it has not been conducted in the order that is prescribed in e.g. chapt. 8 of the Constitution. When it comes to the mandate given to SFSA in e.g. AAFA or AAIA it is clear that they are more recent than the transitional provision mentioned above. Therefore, the mandates have to be in line with chapt. 8 in the Constitution. To the extent that the mandate covers public law, i.e. the business law area it is my opinion that it is in line with the Constitution. To the extent it covers private law issues, it is

72 *Övergångsbestämmelser.*

in my opinion a clear violation of the wording of chapt. 8 of the Constitution. This is supported by the Law Council⁷³ in a statement from 1992 saying that at least a part of the accounting legislation is private law.⁷⁴ Though, in a later statement from 1998 the Law Council expressed that the question of the legal status of SFSA's binding norms is difficult to assess. The Council stated that such mandates had been given by Parliament on several occasions before and that this indicated that they are not unconstitutional. The Council also referred to an earlier statement in prop. 1977/78:75 s. 144 ff., where it expressed that the requirement of a constitutional application in strict accordance with the wording of the Constitution hardly appeared with the same strength in all situations, e.g. regarding fundamental rights and freedoms compared with the Parliaments possibilities to delegate legislative powers to the Government.⁷⁵ The reference to the fact that Parliament on several occasions has delegated normative powers to SFSA is linked to what is known as Constitutional Practice in the meaning that the Parliament has over time accepted that certain norms, e.g. within the private law or tax law area, does not fall within the absolute law area.⁷⁶ Such Constitutional Practice can in some sense be said to weaken the Parliament's position in relation to what was intended in the Constitution.⁷⁷ To summarize, the view of the Law Council could lead to the conclusion that the mandate to SFSA is in line with the Constitution.

Another starting point that probably would lead to the opposite conclusion is to high lighten the wording of the Constitution and interpret it in a more strict, material way. A consequence of this ought to be that the parliament's position will be stronger. It will also lead to a greater demand for parliamentary involvement regarding the issuing of norms within the accounting law area. The strongest argument for this view is of course that the wording of the Constitution clearly shows that an aim with it is that the Parliament should have a strong position regarding the power to issue and enact binding provisions.

However, practical reasons speaks otherwise, namely for an acceptance of the existing order since it is well accepted by the stakeholders and seems to work in a positive way.⁷⁸ From my point of view, I would like to stress that the wording of the constitution does not allow any delegation of regulatory powers in the private law area. Therefore it is rather clear that the mandate given to SFSA is in conflict with the Constitution to the extent it covers private law.

73 *Lagrådet*.

74 Prop. 1991/92:113 p. 470.

75 Prop. 1998/99:130 p. 255.

76 Bull, Thomas in SOU 2008:80 p. 650. It should be stated that the starting point for Bull is whether if the connection between tax and accounting is in line with the constitution.

77 Bull, Thomas in SOU 2008:80 e.g. pp. 644, 652-653. *See also*, Strömberg, Håkan 1999 p. 201 ff.

78 Pålsson, Robert in SOU 2008:80 p. 626-627. Pålsson also discusses the question whether the connection between tax and accounting is in line with the constitution.

The mandate to SFSB in e.g. chapt. 1 sec. 5 in AAFA⁷⁹ does not differentiate between private and public law.⁸⁰ On the contrary, the wording gives the impression that that it includes both private law- and public law-provisions, e.g. provisions regarding bookkeeping (at least partly public law) and financial reports (at least mainly private law, e.g. provisions regarding valuation of assets). To the extent that the mandate covers private law it is, according to my point of view, not in line with the Constitution. However, the mandate has been used by SFSB in its (at least partly binding) regulations, see e.g. FFFS 2008:26⁸¹. Chapt. 4 in FFFS 2008:26 regulates valuation and at least some of the binding provisions therein ought to be classified as private law, see e.g. sec. 4 that regulates acquisition cost, a question regarding valuation, regarding certain assets. To the extent that and other provisions in FFFS 2008:26 ought to be classified as private law, they are unlawful and should not be treated binding provisions but as Soft law. From my point of view this is rather clear and the fact that the Parliament earlier has accepted such mandates should not affect this conclusion.

De lege ferenda, a question arises, namely whether this (unlawful) way of regulating the area of accounting for the companies on the financial market is appropriate, and therefore should be kept. Of course, this is – according to my point of view – not possible since it is not in line with the Constitution as of today. In my opinion the protective interest when it comes to the financial market may very well motivate “special arrangements”, e.g. a possibility for an authoritative government body to issue binding provisions in the field of accounting. Another argument for this standpoint is that today’s system seems to be accepted by the stakeholders and also well functioning. To make it possible, however, it requires that the Constitution is amended in a way that allows it.

79 See also Annual Accounts Regulation for Finance Companies, Securities Companies and Insurance companies (1995:1600).

80 The same applies to the mandates in ch 1 sec. 5 in the AAFA and 23 sec. 15 p. 3 in SMA. For this reason, the conclusions regarding the mandate in AAIA is also relevant for these.

81 SFSBs Regulations and Recommendations regarding Annual Accounts in Insurance Companies (*Finansinspektionens föreskrifter och allmänna råd om årsredovisning i försäkringsföretag*).

