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The Swedish Electricity Certificates Act and its compatibility with the European Convention on Human Rights

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Abstract
The Swedish government encourages the development of electricity produced from renewable sources using an electricity certificates system. The system is regulated in the Swedish Electricity Certificates Act (lag (2003:113) om elcertifikat). The regulation imposes a penalty fee on producers for those that have received certificates grounded on incorrect or misleading information. Once the penalty fee has been charged, the legislation does not allow any adjustments, even in the case of an unjustified penalty. This article addresses the question whether this scheme is compatible with art. 6 of the European Convention on Human Rights (the Convention). It is concluded that the penalty fee how it is regulated in the Electricity Certificates Act is not in conformity with the Convention and therefore does not comply with EU law. Regulatory changes are needed in the sense that the Electricity Certificates Act has to take into account any reasons for reducing a penalty fee.

I. Introduction

The Directive 2009/28/EC establishes a common framework for the energy use from renewable resources in the European Union (EU) with the purpose of limiting greenhouse gas emissions and promoting cleaner transports. It determines that 20 percent of all the energy used in the EU shall be provided from renewable energy sources by the year of 2020. To this end, every Member State has been given its own binding target percentage of renewable sources in its gross final consumption.[1]

In attaining Sweden's target percentage an important measure for the country is the already in 2003 implemented electricity certificates system. Electricity certificates (hereafter certificates) are given as government contributions to the owners of electricity production plants for every mega-watt hour electricity they produce from renewable sources, on the condition that they fulfill certain standards. The certificates can subsequently be sold to get an extra income meant to cover the higher costs that often comes with production from renewable sources. The price on the certificates is not decided from extra costs but between every buyer and seller, hence it is decided by supply and demand. The demand is secured from the quota obligation which means that producers of electricity must own a certain amount of certificates.

To avoid fraudulent behavior and wrongly issued certificates appearing on the market, the Swedish Electricity Certificates Act[2] contains a penalty fee for those who receive certificates because they have given incorrect or misleading information. The penalty fee is calculated as 150 percent of the mean price during the year prior to the decision of the penalty fee. It shall be noted that the producer must keep the certificates and can save or sell them which means that the penalty is in "reality" 50 percent of the mean price.[3] The Swedish government has an interest in that certificates are not issued for the wrong reasons since every certificate issued on wrong grounds represents one megawatt-hour of "unclean" electricity entering the market. In the long run this can result in that the target percentage in Dir. 2009/28/EC from calculations seems to be reached when it is in reality not. If a member state has not reached its target percentage by the year of 2020 the European Commission (EC) can commence infringement proceedings against that member state on the grounds for failure to fulfill an obligation under the Treaties.[4]

The Electricity Certificates Act contains no rules of reducing or removing the penalty fee, nor is the penalty fee subject to any evidentiary issues when the decision of it is appealed to a court. This implies that the rules are in breach of general principles of law such as the principle of proportionality and the principle of legal certainty. There is reason to compare this scheme with the Swedish tax surcharge system, as the rules for the latter have been changed to comply with the European Convention on Human Rights[5] (hereafter the Convention).[6] The penalty fee could be in breach of art. 6 of the Convention and the Convention as such. The presumption of innocence in art. 6 of the Convention could require the existence of some kind of evidentiary issues. Further on, the fact that there

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[1] Dir. 2009/28/EC, p. 46.
[2] *Lag (2003:113) om elcertifikat.*
[3] Electricity Certificates Act, chapter 6, art. 7 and chapter 5, art. 1, s. 2.
[4] Treaty on the Functioning of the European Union, art. 258 and 288.
[5] Convention for the Protection of Human Rights and Fundamental Freedoms, of 4 November 1950, ETS No. 5.
[6] *Västberga Taxi Aktiebolag and Vulic v. Sweden*, Judgment of 23 July 2002, application number: 36985/97 s. 82, and *Janosevic v. Sweden*, Judgment of 23 July 2002, application number: 34619/97 s. 71.

are no possibilities of reduction or remission could conflict with the principle of proportionality of the Convention. Also, because the penalty fee is decided as a percentage of the mean price during a twelve month period, it is possible that the exact amount of the penalty fee cannot be foreseen in advance due to fluctuation in price, which then also becomes an aspect of legal certainty. All these legal aspects constitute rights that must be ensured to a party accused of a criminal charge that falls under art. 6 of the Convention. Two cases from the administrative courts in Sweden which concern the penalty fee set the grounds for the discussion. The first case is from the Administrative Court in Södermanlands län, case number 1528-05 (hereafter case *Umeå Energi* first instance), the judgment was appealed to the Administrative Court of Appeal in Stockholm, case number 3957-06 (hereafter case *Umeå Energi*). Case *Umeå Energi* was denied a right of appeal in 2006,[7] and was thereby finalised. The second case is from the Administrative Court in Linköping, case number 1257-10 (hereafter case *Tekniska Verken*).

The purpose of this article is to analyse if the regulations on the penalty fee in the Electricity Certificates Act are in conformity with the legal certainty aspects in art. 6 of the Convention. Chapter 2 starts off with the history and legal value of the convention along with its interpretation in Swedish national law. Chapter 3 describes the Swedish tax surcharge system connecting back to the Convention and discusses to what extent the rules on tax surcharge can be used to compare with the penalty fee, whereas the latter one is analysed in chapter 4. Chapter 5 discusses what a party whose rights under the Convention has been violated can do to get compensation. Finally, chapter 6 concludes that the regulations on the penalty fee in the Electricity Certificates Act are not in conformity with the legal certainty aspects in art. 6 of the Convention, therefore rules are required allowing adjustment in cases when charging the penalty fee would be unreasonable.

II. History and Legal Value of the European Convention on Human Rights

2.1 The Convention in the European Union and Sweden

The Convention is a multilateral treaty that was created and is maintained by the Council of Europe,[8] which is separate from the EU but all members of the EU are today also members of the Council of Europe. Sweden ratified the Convention in 1953 and was thereby bound to it.[9] When joining the EU, the Convention was incorporated into Swedish national law through an incorporation law[10] in force since 1 January 1995.

After the Lisbon Treaty had entered into force 1 December 2009, Sweden, as a member state of the EU, was also bound to the Charter of Fundamental Rights of the European Union[11] (hereafter the Charter) which acknowledges and confirms, among other things, the Convention,[12] and the judgments of the European Court of Human Rights (ECtHR).[13] The rights in the Convention are protected in art. 53 of the Charter giving that nothing in the Charter shall be interpreted in a way that is restricting human rights as it is set out in the Convention.

The Charter is not part of the Treaty on European Union[14] but art. 6 of the Treaty on European Union expressly refers to the Convention. Art. 6, paragraph 1 of the Treaty on European Union gives that the Charter has the same legal value as the Treaties. From this it has to be concluded that the Convention and the judgments of the ECtHR is a part of EU law.

Art. 1 in the Convention binds the contracting states to ensure the rights and freedoms set forth in section I (which includes art. 6 of the Convention) to everyone within their jurisdiction. The Convention was originally made to protect the fundamental rights of individuals but it also protects the rights of private companies. The ECtHR supervises the compliance of the Convention of the contracting states and the entities that have the right to complain to the ECtHR which are set out in art. 34 of the Convention: private organisations, individuals or a group of individuals. This right to complain shows that companies also shall be ensured the rights under the Convention.

The judgments of the ECtHR are binding only on the respondent state,[15] but are indicative to how the Convention shall be interpreted. Unlike for example the Court of Justice of the European Union, the ECtHR cannot rely on national courts to implement its case law.[16]

[7] Case number 7849-06.
[8] Cameron, Iain, *An introduction to the European Convention on Human Rights*, (5 ed., 2006) p. 31.
[9] Danelius, Hans, *Mänskliga rättigheter i Europeisk praxis, En kommentar till Europakonventionen om de mänskliga rättigheterna,* (3 ed., 2007) p. 34.
[10] *Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och grundläggande friheterna.*
[11] Charter of Fundamental Rights of The European Union (2010/C 83/02). Proclaimed on the 12 of December 2007 by the European Parliament, the Council and the Commission see OJ C 303, 14.12.2007, p. 1.
[12] The Charter, art. 53.
[13] The Charter, preamble, paragraph 5.
[14] 2007/C 306/01 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.
[15] The Convention, art. 46.
[16] Tomuschat, Christian, *Human Rights Between Idealism and Realism,* (2 ed., 2008) p. 245.

2.2 Interpretation of the Convention in Swedish national law

The legislators in Sweden have given much priority to how the ECtHR has interpreted the Convention and to the Convention as such in case of a conflict between the Convention and a national law. In the preparatory work to the incorporation of the Convention into Swedish legislation, the possibility of a conflict between national laws and the Convention was foreseen.[17] The government described the principles that shall be used in such case. First it shall be noted that there is a general principle of interpretation in Swedish legislation which means that the regulations shall be interpreted in the light of the international law (in this case the Convention), because the regulations are compatible with the international law, or at least are supposed to be.[18]

If the national rule is clear in a way that leaves no room for an interpretation that corresponds to the conditions set out in the Convention, there is a real conflict and a choice must be made of what rule to give precedence. Two generally recognised principles shall be used in such situation: the principles of *lex posterior* and *lex specialis*.[19]

- *Lex posterior:* If the national rule has been amended in time before the law incorporating the Convention, this principle can be used; laws amended later in time have precedence over older laws. The law in question (Electricity Certificates Act) was amended in 2003 and the Convention was incorporated in 1995 so this principle shall according to Government Bill 1993/94:117 not be used.
- *Lex specialis:* Simultaneously this principle must be respected; a special rule has precedence over a more general rule, regardless of the age of the laws.[20]

The result of a "real" conflict between the Electricity Certificates Act and the Convention where a choice must be made of what rule to give precedence to, the assessment given in Government Bill 1993/94:117 would result in that the principle of *lex specialis* must be used. It shall be noted that rules on human rights has been said to have a special nature and be given a special significance in a conflict with a national rule.[21]

It shall also be noted that there is the possibility for a court, which has concluded that there is a conflict between a national law and the Convention, to use the provision in chapter 2, art. 23 of The Instrument of Government which gives that laws or regulations shall not conflict with the Convention. Chapter 11, art. 14 of The Instrument of Government gives that a court or authority that finds that a regulation is in conflict with a decision in the Constitution (chapter 2, art. 23 of the Instrument of Government in this case) or other regulations of higher hierarchical value, can judge that the regulation may not be used in that case.

The aim of the Swedish legislators seems to be that the Convention shall be given much preference. Solving a conflict of rules in favor of the Convention is probably also preferable because if the case is brought to the ECtHR, they will have their own ways of dealing with the issue.

2.3 Article 6 of the Convention

Art. 6 of the Convention concerns the right to a fair trial.

Article 6 of the Convention

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The ECtHR has in its case law[22] set out the criteria for determining whether a proceeding is criminal or administrative with the most important factor being the nature and degree of severity of the penalty.[23] Concerning the penalty fee in this article the courts in case *Umeå Energi* and *Tekniska Verken* has given that the penalty fee falls under art. 6 of the Convention.

Art. 6, paragraph 1 of the Convention gives that anyone accused of a crime has the right to a fair trial within reasonable time in an independent and impartial court established by law. This part of the article applies to all proceedings which concern the determination of civil rights and obligations, not only criminal charges and these rights are not restricted to only concern the rights in the Convention.[24] Art. 6, paragraph 1 of the Convention also ensures the right to appeal to a court. In general art. 6, paragraph 1 shall protect fundamental rights of legal certainty, infringements to rights in the Convention may be justified but it is difficult to see how these specific

[17] Government Bill 1993/94:117, *Inkorporering av Europakonventionen och andra fri- och rättighetsfrågor,* p. 37-38.
[18] *Op.cit.*, p. 37.
[19] *Op. cit.,* p. 37-38.
[20] *Ibid.*
[21] Government Bill 1993/94:117, p. 37-38.
[22] In particular case *Bendenoun v. France*, Judgment of 24 February 1994, Series A no. 284.
[23] Case *Bendenoun*, paragraph 45.
[24] Engel and Others v. the Netherlands, Judgment of 8 June 1976, Series A no. 22, p. 36.

rights could be subject to infringements that could be justified in any way because they are fundamental rights.

Art. 6, paragraph 2 of the Convention ensures a party accused of a criminal charge to be seen as innocent until proven guilty. The burden of proving that the accused is guilty must be put on the prosecutor to make sure the principle of the presumption of innocence is fulfilled.[25] This right demands that the presumptions of that an accused party is guilty, is held within reasonable limits.[26]

2.4 Legal certainty

Art. 7 of the Convention is meant to guarantee a minimum level of legal certainty. It establishes that a person committing a crime shall not be subject to a heavier punishment than what was described in the laws at the time for the offence. The ECtHR has given that if the national laws are "formulated with sufficient precision reasonably to allow the applicants to foresee the consequences of their actions" it is enough to ensure legal certainty.[27] It can also be said that it is enough if the maximum punishment can be foreseen.

In case *Umeå Energi* the Administrative Court of Appeal gave legal certainty an even broader interpretation and concluded that in order to respect the principle of legal certainty it is required that the penalty fee can be removed if it is unreasonable that it is charged in a specific case. An example of when it would be unreasonable would, according to the Administrative Court of Appeal be, when no negligence can be attributed to the producer. Establishing what is unreasonable is closely linked to the principle of proportionality which shall ensure that no unreasonable measures are taken.

2.5 The principle of proportionality and margin of appreciation

The proportionality concept is not mentioned in the Convention or its additional protocols.[28] However, the principle of proportionality is a principle that permeates the entire Convention.[29] This comes from the ECtHR case *Västberga Taxi* in which the ECtHR referred to several of its earlier cases[30] and thereby pointed out that the principle of proportionality is a well established principle.[31]

Many measures that seems to comply with the Convention can only do so if they are also proportionate.[32] Also a restriction of a right can be allowed if it is justifiable and proportionate. This means a balance of interests has to be made between the right being restricted and the purpose of the restriction.[33] If balance can be achieved in a less restrictive way, the measure is not proportionate.[34] A right under the Convention can be restricted without being a violation of the Convention; this is the case if the state is able to give adequate reasons for the restriction and if it is proportionate to the public interest it is aimed to serve.[35] The rights can be subject to restrictions for certain objectives as national security, public order, public morality or the rights of others if necessary in a democratic society.[36] What is necessary in a democratic society can be very subjective and the ECtHR assumes in some cases that it cannot make a better assessment of what is the best policy in difficult social and technical spheres of the contracting states.[37] The contracting states are then given a freedom to decide upon the necessity of measures restricting human rights called a "margin of appreciation".[38] The ECtHR presumes that those closer to the decision might be better suited to judge upon the specific requirements of a case.[39]

The ECtHR will normally answer that it is not competent to try questions that concerns for example too harsh punishment of crime. The penalty fee is a punishment for a crime in the sense of the Convention. The courts of the contracting states are more competent on such matters and the result of their judgment shall be accepted unless there are special reasons not to.[40] Special reasons have in previous cases concerned: the purpose of the measure that interferes with the fundamental rights. On the area of taxation the close connection to social politics often gives the court of the contracting states a margin of appreciation.[41] The national legislation should also enjoy a wide margin of appreciation if the case concerns other general policies with the aim to achieve goals that the general public will benefit of, for example environmental questions.[42]

[25] Danelius, p. 270.
[26] *Salabiaku v. France*, Judgment of 7 October 1988, Series A.141-A, paragraph 28.
[27] *Steel and Others v. the United Kingdom*, Judgment of 23 September 1998, Reports 1998-VII, paragraph 75.
[28] McBride, Jeremy, 'Proportionality and the European Convention on Human Rights', in: Ellis, Evelyn, The principle of proportionality in the laws of Europe, p. 23.
[29] Danelius p. 49.
[30] *Deweer v. Belgium*, Judgment of 27 February 1980, Series A no. 35, p. 24-25, paragraphs 48-49, and the case Aït-Mouhoub v. France, Judgment of 28 October 1998, Reports 1998-VIII, p. 3227, paragraph 52.
[31] Case *Västberga Taxi Aktiebolag and Vulic v. Sweden*, paragraph 92.
[32] RÅ 2007 ref. 65.
[33] See McBride, p. 26.
[34] See McBride, p. 26.
[35] Cameron, p. 108.
[36] McBride, p. 24.
[37] See *Powell and Rayner v. The United Kingdom*, Judgment of 21 February 1990, Series A no. 172, paragraph 44.
[38] Cameron, p. 108 see also case *Powell and Rayner v. The United Kingdom*, paragraph 44 and Danelius p. 48.
[39] McBride, p. 29.
[40] Danelius, p. 48.
[41] Moëll, Christina, *Proportionalitetsprincipen i Skatterätten*, (2003) p. 62.
[42] Moëll, p. 62.

The ECtHR has described its role in these cases as it shall review the decisions the courts of the contracting states has made pursuant to their power of appreciation and determine if the restriction was proportionate to the legitimate aim sought to achieve.[43] What is proportionate depends on circumstances in each case. The ECtHR takes into account the nature of the measure taken, if other measures could be taken instead or if they could be implemented in a less strict way. Also the ECtHR takes into account if there are regulations protecting the party whose rights has been intervened which can compensate for the infringements of the rights.[44]

If the courts of Sweden are not given a margin of appreciation in the case of the penalty fee, the ECtHR will judge according to their own knowledge. However if the courts of Sweden would be given a margin of appreciation then it is these courts that would have to make sure the measure is proportionate, otherwise the ECtHR will not accept the infringement. In either case the measures will have to be proportionate. If it is the courts of Sweden that will make sure the principle of proportionality is met the national principle of proportionality will most likely be used,[45] in case it differs from the principle under the Convention. However there should be nothing that prevents the courts of Sweden to use the principle as it is established by the ECtHR.

The principle of proportionality is stated in Swedish law,[46] and is a general principle of law.[47] In administrative procedures when authorities, as the Energy Agency, exercise their power there has to be a balance between the goal that is desired to achieve and the measures used to achieve it. The consequences for an individual must be reasonable in relation to the benefit for the general public that the measure is aimed at.[48]

If the national courts fail to make sure that the principle of proportionality is respected, there might be a breach of the Convention. If an applicant brings the case to the ECtHR then it is the principle of proportionality as it is established by the ECtHR that will be used. Therefore the principle as it is under the Convention is of importance.

The ECtHR has given a lot of general statements of how a punishment is proportionate in cases concerning the Swedish tax surcharge, for example in case *Västberga Taxi*. Therefore the principle of proportionality as it is established by the ECtHR concerning tax surcharge will be used. To justify such interpretation it is necessary to present the tax surcharge and the rules on it since they are considered not in breach of the Convention and proportionate.

III. Swedish Tax Surcharge

3.1 In general

It is the person or company owning an approved electricity production that receives the certificates and it is also this owner that is liable to pay a possible penalty fee. In many cases where the decision to charge the penalty fee has been appealed the penalty fee has been argued by the companies, to resemble the tax surcharge.[49] The tax surcharge is an administrative fee and a quite severe economic punishment for withholding tax from the Swedish Tax Agency (hereafter Tax Agency).

The purpose of the system with administrative penalties on the taxation area is to encourage taxpayers to leave correct information in time.[50] The taxpayer is responsible for the information and that it is correct.[51] A tax surcharge is charged if a taxpayer has given incorrect information and this information forms the grounds for or affects the calculation of the tax that taxpayer is liable for.[52] The information must have been given by an authorised representative when it concerns the taxation of companies,[53] in writing or electronically.[54] A tax surcharge can be charged regardless of the intentions of the taxpayer when giving incorrect information.[55] Incorrect claims, opinions or estimations are not incorrect information.[56]

The calculation of the tax surcharge is done in different ways depending on the kind of tax it concerns. Concerning most taxes a tax surcharge of 40 percent of the withheld tax is charged.[57] For value added tax which is reported monthly or every third month the tax surcharge is 20 percent.[58]

When a tax surcharge is appealed to an administrative court it is the Tax Agency that has to prove that there are grounds for charging the tax surcharge.

[43] *Observer and Guardian v. United Kingdom*, Judgment of 26 November 1991, Series A 216, paragraph 59.
[44] Cameron, p. 108.
[45] Moëll, p. 235. Moëll makes the conclusion that it is the Swedish national principle of proportionality that shall be used in those situations.
[46] Code of Judicial Procedure, Ds 1998:65, chapter 24, art. 1, paragraph 3.
[47] Government Bill 1993/94:117, p. 39-40.
[48] Strömberg, Håkan and Lundell, Bengt, *Allmän förvaltningsrätt*, (24 ed., 2008) p. 68.
[49] The Administrative Court case number 1528-05, P- 3 and the Administrative Court case number 1257-10, p. 3.
[50] Government Bill 1991/92:43, *om vissa ändringar i bestämmelserna om skattetillägg, preliminär B-skatt m.m.*, p. 62.
[51] *Lag (2001:1227) om självdeklarationer och kontrolluppgifter*, chapter 1, art. 1.
[52] Taxation Act, chapter 5, art. 1.
[53] Lag (2001:1227) om självdeklarationer och kontrolluppgifter, chapter 4, art. 3 and chapter 19 art. 1.
[54] Taxation Act, chapter 5, art. 1 and Government Bill 2002/03:106, p. 50-51.
[55] Government Bill 2002/03:106, p. 97.
[56] *Op cit*, p. 116 referring to Government Bill 1977/78:136, *om ändrade regler för skattetillägg m.m.*, p. 144.
[57] Taxation Act, chapter 1, art. 1, sections 1-5.
[58] *Op. cit.*, chapter 5, art. 4.

The Swedish Electricity Certificates Act

If this is done the taxpayer has to prove the opposite or that the tax surcharge is unreasonably high, to avoid or reduce it.[59] It can be noted that higher standard of proof is required regarding incorrect information than in other cases of taxation.[60] In certain situations the tax surcharge shall be reduced, that is if the incorrect information has been corrected or could have been corrected from information that the Tax Agency had access to, for example former declarations of taxation from the taxpayer. In that case the tax surcharge is 20 percent.[61]

A tax surcharge shall not be charged when the information given is unreasonable in relation to for example other information the taxable person has given.[62] When this situation occurs the Tax Agency is obligated to investigate the information further before submitting a tax surcharge.[63] A tax surcharge is not charged if the taxpayer has corrected incorrect information voluntarily.[64] Voluntary correction can be done as long as the Tax Agency has not taken action on grounds of the incorrect information. If the authority has asked for further information about something that has a connection to the incorrect information there is no longer a possibility of voluntary correction.[65]

There are situations when the tax surcharge shall be removed or reduced because the failure is excusable, and this shall be regarded irrespective of whether or not the taxable person has claimed this right.[66] The tax surcharge shall be removed or reduced if the reason for giving incorrect information has to do with the taxpayer's age, an illness, lack of experience or similar circumstances that appears excusable. It shall also be reduced or removed if it is the result of the taxpayer misjudging a tax rule or the significance of circumstances. If the tax surcharge is reduced it is set down to half or one fourth (20 or 10 percent).[67]

Tax surcharge shall not be charged if doing so would be unreasonable.[68] This is the relief of last resort if none of the grounds above can be used for removing the tax surcharge but it is still unreasonable in relation to the offence it is connected to.[69]

Tax surcharge is charged on objective grounds and in case RÅ 2007 ref. 65 the Supreme Administrative Court concluded that the fact that an error was accidental does not give grounds for reduction of the tax surcharge. However the Supreme Administrative Court said that it is a factor that can be of importance in an assessment of the principle of proportionality.

3.2 Tax surcharge and the Convention

The tax surcharge has been subject for a discussion of the principle of proportionality that culminated in a proposition[70] from the Swedish government, two cases[71] from the Supreme Administrative Court and two judgments[72] from the ECtHR. The reason for this was that lower courts had opposed decisions of higher courts and reduced and removed tax surcharges referring to the principle of proportionality and rules on punishments under art. 6 of the Convention.[73]

In the Supreme Administrative Court case RÅ 2000 ref. 66, the conclusion was made that the tax surcharge is a punishment under art. 6 of the Convention and also that the rights under it were respected in using the rules applicable to it. The rules on tax surcharge make it possible to take into consideration the fact that an offence could be excusable and if it would be "manifestly unreasonable" to charge a tax surcharge it can be removed. The preparatory documents gives that the expression "manifestly unreasonable" refers to the situation when charging a tax surcharge would be disproportionate to the offence committed by the taxpayer or it would be unacceptable for other reasons.[74]

In the case *Janosevic* the ECtHR referred to the case *Salabiaku v. France* and gave that the Swedish system on tax surcharge fulfills the requirements of presumption of innocence. The reason for this was that when presuming that the accused is guilty and that the tax surcharge is not unreasonably high, these presumptions are held within reasonable limits. Also, the ECtHR gave that the system contains several subjective measures of remission.[75]

In the case *Västberga Taxi* the ECtHR also concluded that there was no violation of the presumption of innocence concerning the tax surcharge. A major reason for this decision was that the burden of proving that the taxpayers have given incorrect information lies on the Tax Agency,[76] which has to prove that incorrect information has been given.[77]

The penalty fee has not been subject for discussion in the ECtHR. However it is possible that it may be in the future and if it is considered to be as similar to the tax surcharge as the complaining party in case *Umeå Energi* and case *Tekniska Verken* claim, the ECtHR will most likely use similar argumentation on art. 6.

[59] SOU 2001:25, p. 90.
[60] Government Bill 2002/03:106, p. 233 and Taxation Act, chapter 5, art. 1, second paragraph.
[61] Taxation Act, chapter 5, art. 1, sections 3 and 4.
[62] *Op cit.*, chapter 5, art.1, second paragraph.
[63] *Op cit.*, chapter 3, art. 1.
[64] *Op cit.*, chapter 5, art. 8, section 4.
[65] Government Bill 1971:10, p. 269-270.
[66] Taxation Act, chapter 5, art. 15.
[67] Taxation Act, chapter 5, art. 14.
[68] *op. cit.*, chapter 5, art. 14, third paragraph, section 1.
[69] Government Bill 1991/92:43, p. 88.
[70] Government Bill 2002/03:106.
[71] RÅ 2000 ref. 66 I and II.
[72] Case *Janosevic v. Sweden* and case *Västberga Taxi Aktiebolag and Vulic v. Sweden.*
[73] Moëll, p. 225.
[74] Government Bill 1991/92:43, p. 88.
[75] Case *Janosevic v. Sweden*, paragraph 100.
[76] Case *Västberga Taxi Aktiebolag and Vulic v. Sweden*, paragraph 86.
[77] SOU 2001:25, *Skattetillägg m.m.*, p. 90.

IV. The Penalty Fee

4.1 A punishment under article 6 of the Convention

The Administrative Court investigated in case *Umeå Energi* first instance if the penalty fee is a punishment under art. 6 of the Convention.[78] The Administrative Court referred to the Supreme Administrative Court case RÅ 2000 ref. 66 (I) in which the interpretation of art. 6 of the Convention has been set out. Since the penalty fee is decided to a higher value than what the producer would normally be able to sell the certificates for, the penalty fee is to be seen as an appreciable penalty. Also the purpose of the penalty fee is mainly deterring from violations of the rules. From these circumstances the Administrative Court in case *Umeå Energi* first instance concluded that the penalty fee falls under art. 6 of the Convention. Both the Administrative Court of Appeal in case *Umeå Energi* and the Administrative Court in case *Tekniska Verken* agreed with the Administrative Court in case *Umeå Energi* on that the penalty fee is a punishment under art. 6 of the Convention.[79] There is no reason to question or further analyse this conclusion.

All the rights in art. 6 of the Convention must be ensured to a party charged with the penalty fee. However the rights ensured can be limited when it is necessary in a democratic society.[80]

In case *Umeå Energi* the Administrative Court of Appeal concluded that in order to respect the principle of legal certainty it is required that the penalty fee can be removed if it is unreasonable that it is charged in a specific case. This way of ensuring the principle of legal certainty was collected a ECtHR judgment[81] on the Swedish tax surcharge. The Administrative Court of Appeal gave as an example that it would be unreasonable to charge the penalty fee if no negligence can be attributed to the producer. In this case the Administrative Court of Appeal used the argumentation on tax surcharge to determine if the penalty fee was respecting the principle of legal certainty.

Using the rules on tax surcharge for guidance on art. 6 has already been done by the Administrative Court of Appeal in case *Umeå Energi*. The question is if it is possible to go even further and apply the rules on tax surcharge directly on the penalty fee. Such method of interpretation is named analogous procedure.[82] Analogous interpretation of laws means that one goes beyond the wording of the law but keeps to its purpose.[83] It is a way of using existing solutions on a problem that is unregulated.[84] A prerequisite for making an analogous interpretation is that no other rule is applicable and the situation is therefore unregulated.[85]

The penalty fee has been said to be a punishment like that of a crime and art. 7 of the Convention includes a prohibition of analogy in criminal law.[86] There is also a prohibition for analogous interpretation on criminal law in Swedish law.[87] However the penalty fee is not seen as a punishment for a crime under Swedish national laws and there is no prohibition for analogy within administrative law,[88] at least not when the result will be positive for the defendant.[89] An analogous interpretation in this case would most probably result in a reduction of the penalty fee and lead to a positive result for the defendant.

Nonetheless, there are existing rules that specifically concern the penalty fee hence the area is not unregulated. This would imply that there cannot be a question of analogous interpretation on the rules of tax surcharge.

As the Administrative Court noted in the case *Tekniska Verken* there are no rights that can reduce the penalty fee. The situation as such, not to be able to take different circumstances in each case into consideration, is unregulated when it comes to the penalty fee. However, this area is unregulated given that it should have been regulated. If the purpose of the rules is that the penalty fee shall hit with no regard taken to unreasonableness and excusable behavior, then there is no justification for an analogous interpretation. The Administrative Court of Appeal in case *Umeå Energi* gave that it would be unreasonable to charge the penalty fee if no negligence can be attributed to the producer. This implies that there should be rules of reducing the fee and of evidentiary issues which there are not today, and the author agrees with the Administrative Court of Appeal on this point.

It is not necessary to go as far as to make an analogous interpretation of the rules on the tax surcharge and such interpretation cannot be justified. But there are certainly grounds for it concerning evidentiary issues and rules reducing the fee. The Administrative Court of Appeal in case *Umeå Energi* has already started to use a judgment[90] from the

[78] Case *Umeå Energi*, first instance, p. 10.
[79] Case *Umeå Energi*, p. 4 and case *Tekniska Verken*, p. 8.
[80] McBride, p. 24.
[81] Case *Västberga Taxi*.
[82] Strömholm, p. 457. Strömholm even claims that it is the most common used procedure in interpretation.
[83] Lodin, Sven-Olof, Lindencrona, Gustaf, Melz, Peter, Silfverberg, Christer, *Inkomstskatt en läro- och handbok i skatterätt*, (12 ed., 2009) p. 681.
[84] Strömholm, p. 457.
[85] *Ibid.*
[86] *Kokkinakis v. Greece*, Judgment of 25 May 1993, Series A260-A, paragraph 52.
[87] Swedish Penal Code, *(Brottsbalk (1962:700))* chapter 1, art. 1.
[88] See Bohlin, Alf and Warnling-Nerep, Wiweka, *Förvaltningsrättens grunder*, (2 ed., 2007) p. 66 and case RÅ 1996 ref 11 in which an analogy interpretation was discussed, however it was finally not allowed in that case.
[89] Legal certainty aspects made the Supreme Administrative Court in case RÅ 1999 ref 49 not allow an analogous interpretation that would result in negative effects for the individual.
[90] Case *Västberga Taxi*.

The Swedish Electricity Certificates Act

ECtHR in which the tax surcharge and art. 6 of the Convention was up for discussion. A continuation of this assessment can certainly be used to compare with the rules on the penalty fee to evaluate if they are complying with art. 6 of the Convention.

4.2 The rights in article 6 of the Convention

The Administrative Court of Appeal in case *Umeå Energi* gave that the accused party shall have a right to appeal to a court that can ensure that all the rights of legal certainty and efficiency is met as it is laid down in art. 6 of the Convention. The Administrative Court of Appeal concluded that all these rights were met.

The right of appeal for a producer charged with the penalty fee is ensured in the Electricity Certificates Act.[91] However, it can be questioned how much jurisdiction is given to the courts when the penalty fee is appealed and how effective an appeal really is since a court cannot do much about for example the penalty fee being unreasonable.

When the penalty fee is appealed to a court of law the court cannot take different circumstances in each case into consideration, the only thing a court can do is to make sure that incorrect information has been given in the way the Energy Agency claims. If incorrect information has been given the party is guilty. A court can of course disagree with the Energy Agency and change their decision if the information given is correct. In deciding if incorrect or misleading information has been given no objective measures are used. The Energy Agency is something of an expert on the information needed to receive certificates. It would logically be impossible for a court to make a better and more correct investigation of the information being correct or not, than what the Energy Agency has already done. What can a court in reality do about a decision of a penalty fee? It can alter the decision of the Energy Agency but that chance is probably small.

Up until 2006 no court had altered a decision from the Energy Agency on a penalty fee.[92] In November 2008 there is one example of when a decision from the Energy Agency on the penalty fee was changed by the Administrative Court in Södermanland in case number 1298-07 (concerning *Härjeåns Kraft AB* where the Administrative Court found that the company had not given incorrect information).[93] However this judgment was changed back (altered), in June 2009 by the Administrative Court of Appeal in Stockholm in case 8959-08 which reset the decision of the Energy Agency to charge the penalty fee. There may be other examples of cases when a decision of a penalty fee has been changed by a court but a majority of decisions from authorities are not altered.[94] However, the fact that a majority of decisions from authorities are not altered does not deprive the value of the trial.[95]

Apart from changing the decision of the Energy Agency, a court can, and has, tried the rules on penalty fee against the rights in art. 6 of the Convention, which means that courts are not totally deprived of their power. The Administrative Court in case *Umeå Energi* investigated a possible breach of the right to a fair trial in art. 6 of the Convention. The question was if circumstances in each situation could be taken into consideration before making the decision. The Administrative Court concluded that such possibility existed and that the accused party in this case even had an obligation to do so, and since the party did not, the mistake was not excusable. The incorrect information in a monthly report, which this case concerns, is sent electronically to *Svenska Kraftnät*.[96] A possibility, not stated in any Act, document or regulation, would be to send a letter to the Energy Agency explaining the report further. This seems to be the way the Administrative Court meant that the producers should do. This process would have to be more formalised for a producer to trust and use.

If the producer is obligated to send further information this should be stated in the rules to enhance legal certainty. Further on, *Svenska Kraftnät* issues the certificates according to what the report from the producer says without delay.[97] This implies that there is no time for sending in additional information after the report has been registered. It is not likely that there is a chance to affect the process, which is electronic without delay, with a normal mail that takes a day or more to reach its destination. Consequently, how to send extra information required to have any chance of being excused of a mistake, has to be regulated otherwise unreasonable responsibility is put on the producer to find out what is required to avoid an unreasonable penalty fee.

The rules clearly give that wrong information equals a penalty fee and there are no rights under the law to reduce or remove it. Therefore, even if a mail with additional information would be at the Energy Agency's disposal at the time when the decision of a penalty fee is made, the certificates have already been issued and the damage is done. It is possible that the Energy Agency would take the additional information into consideration and adjust the penalty fee, and this is what the Administrative Court in case *Umeå Energi* insinuated. However it shall be noted that the Energy Agency also has to follow the Electricity Certificates Act, which contains no rules of reduction. If the Energy Agency has other rules that can be used which allows adjustment of the

[91] Electricity Certificates Act, chapter 8, art. 1, section 8.
[92] *Nyhetsbrev* number 2 2006, p. 4.
[93] Administrative Court in Södermanland in case number 1298-07, p. 7.
[94] Bohlin and Warnling-Nerep, p. 313.
[95] *Ibid.*
[96] STEMFS 2009:3, chapter 3, art. 4, first paragraph.
[97] Electricity Certificates Act, chapter 3, art. 4, second paragraph.

penalty fee, these rules should be available for the producers, at least for the purpose of legal certainty.

Cases *Umeå Energi* and *Tekniska Verken* concerns production from biofuels and the courts have in both cases noted that such production is special when it comes to the right to receive certificates. The reason for this is that the producer hands in a monthly report on the fuels used and certificates are given based on that report and are not subject to any control before certificates are issued. Hence the producer is responsible for that correct information has been given in the reports.

For the definition of biofuels there is an enactment to the Electricity Certificates Act.[98] The list of sources for biofuels is to be seen as exhaustive.[99] When using liquid biofuels criteria for sustainability must also be respected to have the right to receive certificates.[100] Added to this complexity is the fact that the work of defining biofuels must be an ongoing process to ensure that new environmentally sustainable technologies are not facing a disadvantage which would hinder development.[101] It can also be added that a production can use both biofuels that do and do not meet the standards set up to receive certificates. There are consequently many points at which a mistake can be made in the monthly reports because the rules are so detailed and technical. A simplification is most likely welcomed by the producers and this would also be in favor for reasons of legal certainty.

The courts have in both cases *Umeå Energi* and *Tekniska Verken* come to the conclusion that the penalty fee is not excusable because the producer has a responsibility of handing in additional information and that they should have known that this was needed. The possibility to foresee this conclusion can be questioned especially since these requirements are not specified in any regulation. Warnling-Nerep believes that this way of reasoning used by the Administrative Court of Appeal in case *Umeå Energi* was unintelligible, especially because of transparency requirements that Warnling-Nerep suggests should exist in all cases when there is a threat of punishments.[102]

The exact consequence and punishment when handing in incorrect information is also difficult so foresee. The ECtHR has given that if the national law is "formulated with sufficient precision reasonably to allow the applicants to foresee the consequences of their actions" it is enough to ensure the legal certainty.[103] The size of the penalty fee depends on the mean price during the twelve month period prior to a decision on a penalty fee from the Energy Agency. However the size also depends on when the decision is made, because this in turn decides what twelve month period is used for deciding the mean price. The Energy Agency has a maximum of two years to decide upon a penalty fee and the price can fluctuate severely in two years time.[104] For these reasons the exact punishment cannot be foreseen and there is therefore a conflict with legal certainty which shall be ensured according to art. 6 of the Convention.

4.3 Presumption of innocence in article 6, paragraph 2 of the Convention

The Administrative Court of Appeal in case *Umeå Energi* used the ECtHR's judgment on tax surcharge in case *Västberga Taxi*, therefore also other judgments on the tax surcharge from the ECtHR's can be used for the application of for example the presumption of innocence in art. 6, paragraph 2 of the Convention. The presumption of innocence in relation to the principle of proportionality has been judged on by the ECtHR in case *Janosevic*. From *Janosevic* it is concluded that when presuming that a punishment (under art. 6 of the Convention) is charged and it is presumed that the punishment is not unreasonably hard, this presumption must be proportionate. When a tax surcharge is charged it is presumed not to be unreasonably high and after the Tax Agency has proven that there are grounds for charging a tax surcharge, the accused party has to prove that it is unreasonable, to avoid or reduce it.[105] The penalty fee on the other hand would, since no evidentiary rules exist for it, consequently also be presumed not to be unreasonably high when it is charged, however the difference lies in that there are no rights or possibilities for the accused party to prove that it is unreasonable.

The Swedish system on tax surcharge fulfills the requirements of presumption of innocence because the presumptions of that the accused is guilty and of that the tax surcharge is not unreasonably high, are held within reasonable limits. The rules on tax surcharge are not disproportionate and not in breach of the principle of presumption of innocence partly because it is the Tax Agency that has the burden of proving that the taxpayer has given incorrect information, whilst at

[98] *Förordning (2003:120) om elcertifkat,* (Ordinance on electricity certificates) art. 4. See Appendix 1.

[99] Decision from the Energy Agency number 06-2007-05616, based on mainly Government Bill 2005/06:154, p. 34, and the judgment of the Administrative Court of Stockholm in case number 20171-05, where the court gave that the list in art. 4 shall be seen as exhaustive.

[100] Electricity Certificates Act, chapter 2, art. 1, third paragraph.

[101] Government Bill 2009/10:1, *Budgetpropositionen för 2010, Förslag till statsbudget för 2010, finansplan och skattefrågor m.m.,* p. 178.

[102] Warnling-Nerep, Wiweka, *Sanktionsavgifter särskilt i näringsverksamhet,* (2010) p. 274.

[103] Case of *Steel and Others v. the United Kingdom*, paragraph 75.

[104] A penalty fee cannot concern certificates that have been issued more than two years prior to the decision of the penalty fee, See Electricity Certificates Act chapter 6, art. 7, last sentence.

[105] ER 2010:30, paragraph 73.

the same time the Tax Agency must consider reasons of remission.[106]

It is here evident that exactly the rules that the penalty fee lack are the rules that makes the tax surcharge not in breach of the presumption of innocence and the principle of proportionality (in relation to an infringement of the presumption of innocence) in the Convention. For the sake of the principle of proportionality, evidentiary issues should be regulated for the penalty fee. The presumptions of that the accused is guilty must be considered unreasonable and not held within reasonable limits for the penalty fee.

The Administrative Court in case *Umeå Energi* concluded that the penalty fee was not unreasonable on the grounds claimed; consequently it is possible that there might be other grounds on which the penalty fee can be unreasonable. The Administrative Court of Appeal in case *Umeå Energi* on the other hand mentioned as an example that it would be unreasonable to charge the penalty fee if no negligence can be held from the person giving information. In a way the Administrative Court of Appeal in case *Umeå Energi* here answered "yes" to both the question of a possible breach of the presumption of innocence and if the rules are disproportionate. Since there are no set rules on the evidentiary issues for negligence or intent at all concerning the penalty fee it is impossible to give count to good intentions of the producer and this would be unreasonable, to use the conclusion of the Administrative Court of Appeal in case *Umeå Energi*.

4.4 The Energy Agency's response to evidentiary issues

Another problem with the penalty fee being charged regardless of intentions, raised by *Avfall Sverige*[107] in a comment on the proposal of changes in the Electricity Certificates Act from the Energy Agency, is how the party shall act while a process of appealing the penalty fee is ongoing. If it continues to report as it did in the report that led to a penalty fee, the producer risks another or several other penalty fees. If the report is changed to be in line what the Energy Agency suggests, the producer might lose a lot of income from not receiving certificates if the result of the appeal is in favor of the producer.[108] The Energy Agency answers that this problem is "for the most part" solved through the new suggested rule of reduction in the allocation of certificates. Apart from this, evidentiary issues and the need of such is not discussed in the proposal. If the problem that the penalty fee is charged regardless of intentions is only solved "for the most part", this is not enough to ensure the right of presumption of innocence.

4.5 Purpose of the penalty fee

Intervening with rights set out in the Convention can be allowed when it is necessary in a democratic society to ensure certain interests.[109] An intervention in the rights can be justified if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[110] This is a balance of interests that has to be done and if balance can be achieved in a less restrictive way the measure is not proportionate.[111]

The main purpose of the penalty fee concerns the fact that the system needs supervision to make sure that it works in the way it is intended. The Swedish government has an interest in that the system works because it is an important part in fulfilling the target set out in Dir. 2009/28/EC. Every single certificate issued on wrong grounds represents one megawatt-hour of "unclean" electricity entering the market. If a mistake, a certificate issued on wrong grounds, is revealed the order can be established in a way that the true result can be calculated. If the mistake is not revealed certificates issued for "unclean" electricity will result in that the target percentage of used renewable sources will seem as it is met before it really is. If directives are not achieved, the member state (Sweden in this case) can be prosecuted for failure to fulfill an obligation under the Treaties.[112]

The government also has an interest in that the certificates gives an income of taxes since they are seen as inventories for the holder of them,[113] and are subject to tax when they are sold. However this amount is not of significance to the total tax incomes of the Swedish government.[114]

Society's necessary interest is difficult to find for the penalty fee and how it must be charged. Of course it is of the interest of every person that the environment does not collapse and leaves a world that is not suitable to live in, and the penalty fee ultimately helps in encouraging the usage of renewable energy which in turn leads to a better environment, which is the long-term purpose of Dir. 2009/28/EC and certainly necessary in a democratic society. However this is

[106] Case *Västberga Taxi Aktiebolag and Vulic v. Sweden*, paragraph 86.
[107] Swedish interest- and industry association of waste management and recycling.
[108] ER 2010:30, p. 92.
[109] McBride, p. 24.
[110] Danelius, p. 49.
[111] See McBride, p. 26.
[112] Treaty on the Functioning of the European Union, art. 258 and 288.
[113] Income Tax Act, chapter 17, art. 22a.
[114] The total turnover for electricity certificates was in 2009 approximately 4,6 billion (Statistics on electricity certificates: *https://elcertifikat.svk.se/cmcall.asp*, → "Marknadsstatistik" → "Utfärdade" period January 2009 to December 2009. Available 10/11/2010) The total income of taxes in 2009 was approximately SEK 1,444 billion (*Rapport Statsbudgetens utfall* 2009, ESV-nr: 2010:9, Date: 2010-03-15, reference number: 49-229/2010, Annex 1, p. 4).

too far-reaching and not directly connected to the penalty fee being necessary in a democratic society.

Another interest of the society is a well functioning legal system. The producer charged with a penalty fee submits a monthly report in order to receive financial aid. It is in the interest of the entire society that there shall be a punishment for those who will not comply with rules and tries to make a profit committing fraud. However there must be regulations protecting the party whose rights have been intervened, which can compensate for the infringements, and there are no such rights. Also there could be less drastic ways of achieving the same result, for example controlling the reports before handing out certificates.

It is questionable whether the interests have come through in the preparatory documents to the Electricity Certificates Act. The Administrative Court in case *Umeå Energi* has interpreted the purpose of the penalty fee from Government Bill 2002/03:40.

4.6 Intentions of legislators, strict responsibility

The Administrative Court in the case of *Umeå Energi* (first instance) pointed out that in Government Bill 2002/03:40 p. 123-124 it is given that the producer is responsible for the plant continuously fulfilling the requirements for it to be approved. If the producer has given incorrect or misleading information in the monthly report certificates can be given on wrong grounds. Incentives to provide incorrect or misleading information in the reports should be limited by issuing a penalty.[115] From this the Administrative Court concluded that it is the responsibility of the producer that correct information has been provided.[116] In the wording of the court this responsibility seems to be strict. Both the Administrative Court of Appeal in case *Umeå Energi* and the Administrative Court in case *Tekniska Verken* agreed with this conclusion.

From the wording of the Government Bill 2002/03:40 p. 123-124 it cannot be taken for certain that there should be a strict responsibility on the producer for the correctness of the information in the monthly report. The way the Administrative Court interpreted Government Bill 2002/03:40 may be the intention of the legislator but it does not come from the wording.

On the other hand the Electricity Certificates Act could not be more clear that there shall be no regard taken to the penalty fee being unreasonable or excusable, since no such rules exist. This clearly shows that the penalty fee was not meant to be the subject of a discussion of it being unreasonable.

Not much has been written about the penalty fee in the Electricity Certificates Act but Warnling-Nerep mentions in her book about sanction fees that the system of the penalties in the Electricity Certificates Act seems to not be very well thought through.[117] Since the Electricity Certificate Act seems to be subject to major changes[118] in the near future,[119] the statement of Warnling-Nerep is certainly not unfounded. Warnling-Nerep has also concluded that rules for reduction or similar is needed to take different circumstances into consideration in a system of strict responsibility.[120] As the Administrative Court in case *Umeå Energi* first instance has given, the responsibility is strict, a statement which has not been challenged by other courts after that; rules for reduction are needed to take different circumstances into consideration.

Maybe the way of reasoning used by the courts in the case *Umeå Energi* and *Tekniska Verken,* on a strict responsibility of the producer, could be reasonable if the intent of the producer was established to be dishonest. As concluded above intentions are not considered before charging the penalty fee and that makes it not proportionate. If evidentiary issues would have to be established first or if there was a possibility to reduce the penalty fee it would be charged in a way that is proportionate.

4.7 Obligation to investigate

The Administrative Court Procedure Act[121] gives that the court shall make sure that a case is thoroughly investigated as to what is necessary.[122] This means that the court has a responsibility for the investigation and shall lead it and obtain the material needed.[123] The possible deficiencies in the obligation to investigate is a parenthesis, however it is important since the overall credibility of the judgments in the cases of *Umeå Energi* and *Tekniska Verken* is questioned.

Tekniska Verken brought up a question about the principle of proportionality in their appeal to the Administrative Court which it did not comment on in its judgment. The Administrative Court gave that the penalty fee was not unreasonable on the grounds claimed, consequently it is possible that there might be other grounds on which it can be unreasonable. Possible other grounds where not mentioned in the judgment.

[115] Case *Umeå Energi*, first instance, p. 9.
[116] *Op cit*. p. 14
[117] Warnling-Nerep, p. 94.
[118] See ER 2010:30.
[119] A new rule is proposed that will increase legal certainty for the producers that send in monthly reports. The producers will be able to do this according to their own knowledge of the Electricity Certificates Act without taking the risk of being charged with the penalty fee, given that it is openly claimed that the producer has reported according to its own knowledge. Or similar open claim; how it will work practically is not totally clear from the proposal. See ER 2010:30, p. 72-73.
[120] Warnling-Nerep, p. 268.
[121] *Förvaltningsprocesslag* (1971:291).
[122] Administrative Court Procedure Act, art. 8.
[123] See Government Bill 1971:30 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om allmänna förvaltningsdomstolar, m.m.,* part 2, p. 529530.

The Swedish Electricity Certificates Act

4.8 The Energy Agency's considerations on proportionality

The Energy Agency has in its proposal of changes raised the issue of the fact that the penalty fee cannot be reduced or removed. The Energy Agency even pointed out that there is a reason to introduce a possibility for adjustment of the penalty fee when it hits a producer unreasonably hard. According to the Energy Agency it is too early to tell whether the new rules on sustainability will affect the parties receiving certificates when using biofuels in their production (the rules on sustainability requirements came into force on the 1 August 2010[124]). The Energy Agency is of the opinion that relatively few parties have been charged with a penalty fee and that it is unclear whether the number of decisions on penalty fees will increase due to the sustainability criteria for liquid biofuels.[125]

The Energy Agency is of the opinion that there have only been a few producers charged with the penalty fee as it is today, therefore it will not propose a change. Consequently, an increase of the number of parties subject to the penalty fee might make a change on this point.

V. Means for Parties Charged with a Penalty Fee

The Convention is part of Swedish law and if a lower instance court fails to regard the Convention there are grounds for appeal. If the administrative judgment is *res judicata* (has binding effect), it is possible to re-open the judgment because of particular circumstances.[126]

Damages for the promulgation of rules that does not comply with the Convention can be difficult to get in Sweden because it is prohibited to bring claims against the government for failure to enact a rule in an Act.[127] A court may refuse to apply a rule that it finds to be not complying with the Convention,[128] but it may not be able to award damages under the Tort Liability Act as it is today. However the Supreme Court has established that damage claim for loss due to violation of the Convention can be awarded using art. 13 of the Convention directly.[129] Art. 13 of the Convention concerns effective remedy for everyone whose rights and freedoms as set forth in the Convention are violated:

Article 13 of the Convention

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

It shall also be noted that an investigation[130] from the government on the responsibility of the government for damage claims due to the Convention and art. 13 was recently presented (07/12/2010). The purpose of the investigation was to propose how the recent development in case law[131] shall be established in law. The investigation suggested that there is a need for a new regulation which allows remedies and damages to a party that has been victim to an infringement of the Convention. The investigation proposed that a new rule is inserted in the Tort Liability Act which will ensure that individual natural persons and companies can claim damages from the government when an infringement of a right in the Convention has been made. The new regulation shall ensure the demands on a contracting states set out in art. 13.

It is also said in the investigation that courts must be aware of issues regarding the Convention to be able deal with an infringement directly within the national judicial procedure. Therefore, a positive effect for parties which have suffered from violation of the Convention will also be that when efficient national remedies are introduced this should reduce complaints to the ECtHR which in turn will reduce the workload of the ECtHR and enhance the possibility for it to be more efficient.

Before the rules in the Electricity Certificates Act on the penalty fee are changed and if the rules are not changed, a producer charged with the penalty fee shall have a better chance than before to get compensations for infringements of the rights ensured in the Convention in a national court if the new rules as suggested in SOU 2010:87 are implemented. However there is also a possibility to bring the matter directly to the ECtHR which is done by sending a letter or an application form to the ECtHR.[132]

VI. Conclusion

This study concludes that Sweden as a state today does not fulfill its undertakings under the Convention. Thus

[124] *Lag (2010:598) om hållbarhetskriterier för biodrivmedel och flytande biobränslen.*
[125] ER 2010:30, p. 83.
[126] Administrative Court Procedure Act, art. 37b and Cameron, p. 187-188.
[127] Tort Liability Act (Skadeståndslagen (1972:207)), chapter 3, art. 7 and Cameron, p. 189.
[128] The Instrument of Government, chapter 11, art. 14.
[129] Supreme Court, case NJA 2005 s. 462 where it was also established that the rules in the Swedish Tort Liability Act does not provide a fulfilment of the undertakings Sweden has due to the Convention. See also Cameron, p. 189.
[130] SOU 2010:87, *Skadestånd och Europakonventionen.*
[131] Among others NJA 2005 s. 462.
[132] European Court of Human Rights: Questions and answers, Registry of the Court. Available 07/12/2010 at *http://www.echr.coe.int/echr/en/header/applicants/information+for+applicants/frequently+asked+questions/.*

the country does not comply with EU law. Art. 6 of the Treaty on European Union expressly refers to the Convention and art. 6, paragraph 1 of the Treaty on European Union gives that the Charter has the same legal value as the Treaties. The Charter in turn acknowledges and confirms the Convention, and the judgments of the ECtHR.

The discussion in this article has shown that the way in which the penalty fee in chapter 6, art. 7 of the Electricity Certificates Act is regulated is not in conformity with the Convention. Art. 6 of the Convention requires that there must be rules allowing adjustment in cases when charging a penalty fee would be unreasonable because of legal certainty and otherwise the very right to a court is affected in an unjustified way.

Regulatory changes are needed in the sense that the Energy Agency and courts can take into account any reasons for reducing a penalty fee. When new rules for the penalty fee are implemented it is suggested that the rules on tax surcharge are used as an example. These rules have been subject for discussions in the ECtHR. The penalty fee and the tax surcharge are similar to the extent that it is not necessary to go over the process that the tax surcharge has been through, once again with the penalty fee. It is likely that the ECtHR will find that the two penalties are similar and refer to its earlier solutions in the judgments on the tax surcharge.